

# Law of Contract

## Past-paper Questions and Answers

---

2014

### Q&A

Long questions from past examination papers (2013 to 2009) - and a few extras - answered.

# Direct questions

---

Discuss the impact of the Consumer Protection Act 68 of 2008 upon the law of contract with reference to its aims, objectives, scope, national regulatory institutions, and sanctions. [15]

The CPA is bound to have a huge impact on the conduct of businesses in South Africa, and the law of contract.

The primary purpose of the Act is to protect consumers from exploitation in the marketplace, and to promote their social and economic welfare. More specifically, it aims to:

- Establish a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, and responsible, for the benefit of consumers generally;
- Promote fair business practices;
- Protect consumers from unconscionable, unjust, or unreasonable business practices.

The scope of the Act is very wide. It applies to:

- Most transactions concluded in the ordinary course of business between suppliers and consumers within South Africa, as well as;
- The promotion of goods and services that could lead to such transactions, and;
- The goods and services themselves once the transaction has been concluded.

A supplier is any person (including a juristic person, trust, and organ of State) who markets any goods or services.

A consumer includes not only the end-consumer of goods and services but also:

- Franchisees
- Relatively small businesses in the supply chain (asset value or annual turnover below the threshold determined by the Minister)

The Act does not apply to any transaction in terms of which goods and services are promoted or supplied:

- To the State
- To a juristic person with an asset value or annual turnover above the threshold

- Employment contracts
- Credit agreements
- Transactions exempted by the Minister

These rights are protected and enforced not only through the courts, but the National Consumer Commission and the National Consumer Tribunal. Failure to comply with provisions of the Act might attract various sanctions, commencing with compliance notices and leading possibly to the imposition of fines and criminal penalties. Contractual provisions in contravention of the Act may be declared null and void to the extent of non-compliance.

**List and very briefly discuss the requirements for a valid offer and acceptance. [10]**

*OFFER:*

- Must be firm.  
(That is to say, with the intention that its acceptance will call into being a binding contract.)
- Must be complete.  
(It must contain all the material terms of the proposed agreement.)
- Must be clear and certain.  
(It should be enough for the addressee to answer merely “yes” for a contract to come into being.)
- Must meet the requirements of the Consumer Protection Act.

*ACCEPTANCE:*

- Must be unqualified.  
(It must be a complete and unequivocal assent to every element of the offer.)
- Must be by the person to whom the offer was made – *Bird v Summerville*.  
(E.g. the offer to sell farm A cannot be accepted by A and B jointly.)
- Must be a conscious response to the offer – *Bloom v American Swiss Watch Co*.  
(A person cannot accept an offer if he was not aware of it.)
- Must be in the form prescribed by the offeror, if any.

**State the ways an offer may be terminated.**

1. Rejection of the offer
2. Acceptance of the offer
3. Effluxion of the prescribed time, or of a reasonable time
4. Death of either party
5. Revocation of the offer
6. Loss of legal capacity to act

**Discuss and distinguish between an option and a right of pre-emption. [10]**

An option is a substantive offer, reinforced by an agreement in terms of which the offeror undertakes to keep his offer open to the offeree for a specified period.

A right of pre-emption is a type of right of preference. It is given by a prospective seller to a prospective purchaser, to give the purchaser preference if the prospective seller should decide to sell.

There are significant differences between the two:

In the case of an option to buy, the grantor has already made a firm offer to the grantee, and the power to conclude the sale lies exclusively in the hands of the grantee.

With a pre-emption agreement, however, there is as yet no firm offer “on the table” – merely an undertaking to make an offer to the grantee if the trigger event occurs (usually, if the grantee decides to sell the property). The grantor accordingly retains the power to decide whether or not to sell, and cannot be compelled to do so unless or until the trigger event has occurred.

Remedies for breach:

Remedies for the breach of an option contract are governed by the general principles of the law of contract. An attempted revocation of the substantive offer does not prevent the exercise of the option, and the option holder may enforce the contract specifically by means of an interdict against the grantor of the option. The option holder may also claim damages, if suffered, to place him or her in the position that he or she would have been if the option had been exercised.

Remedies for the breach of a pre-emption contract by the grantor are a bit less certain. The Appellate Division in *Owsianick* held that a right of pre-emption entails a restriction on alienation and that the holder was entitled to an interdict to prevent the grantor from alienating the thing to a third party. Furthermore, it

held that the only other remedy available to the holder was a claim for damages. In *Associated SA Bakeries* the court also doubted whether the holder could claim specific performance by means of an order directing the grantor to make him an offer, but granted a different approach, which was set out as follows:

- If a seller concludes a contract of sale with a third party contrary to a pre-emptive right, the purchaser can step into the shoes of the third party by a unilateral declaration of intent. A contract of sale will then be deemed to have been concluded between the seller and the holder of the pre-emptive right.
- Should delivery already have taken place, the holder of the right would not be able to pursue the *merx* in the hands of the third party with his or her personal right, unless the third party was aware of the existence of the pre-emptive right.

Formalities:

Option contract

In *Brandt v Spies*, the defendant orally granted an option to the plaintiff to purchase his farm. Disregarding the option, he sold the farm to a third party. The plaintiff who exercised the option in writing, then claimed damages for breach of contract, but an exception to his claim was upheld. The court stated that an undertaking to keep open an offer that is invalid can itself confer no right upon the grantee because there is nothing to keep open. It is submitted that this is correct in the case where the offer and the offer to keep the first offer open are made simultaneously and orally. However, where the offer to sell is made in writing on one occasion and is followed by an oral offer to keep the offer to sell open at a later stage, it is submitted that the oral acceptance of the option contract is valid.

Pre-emption contract

If the object of the envisaged sale is land, both the offer to buy (or sell) and the acceptance thereof must be in writing. The contract from which the right of pre-emption arises also has to be in writing (*Hirschowitz v Moolman*).

### State the requirements for duress and undue influence.

*DURESS* (improper pressure that amounts to intimidation):

1. Actual violence or reasonable fear
2. The fear must be caused by the threat of some considerable evil
3. It must be the threat of an imminent or inevitable evil
4. The threat or intimidation must be *contra bonos mores*
5. The moral pressure must have caused damage

*UNDUE INFLUENCE* (The party who seeks to set aside the contract must establish):

1. The other party obtained an influence over the party
2. This influence weakened his or her powers of resistance and rendered his will compliant
3. The other party used this influence in an unscrupulous manner to persuade him or her to agree to a transaction that
  - a. was prejudicial to him or her
  - b. he or she would not have concluded with normal freedom of will

**State the elements for commercial bribery as held in *Extel Industrial (Pty) Ltd v Crown Mills (Pty) Ltd*.**

1. A reward
2. paid or promised
3. by one party, the briber
4. to another, the agent (agent in true sense or merely a go-between)
5. who is able to exert influence over
6. a third party, the principal
7. without the principal's knowledge, and
8. for the direct or indirect benefit of the briber
9. to enter into or maintain or alter a contractual relationship
10. with the briber, his principal, associate, or subordinate.

**State the requirements for *restitutio in integrum*.**

1. Misrepresentation by the other party
2. Inducement
3. Intention to induce
4. Materiality

**State the elements of a fraudulent misrepresentation.**

1. A representation

2. which is, to the knowledge of the representor, false;
3. which the representor intended the representee to act upon;
4. which induced the representee to act; and
5. that the representee suffered damage as a result

### Define misrepresentation.

A misrepresentation is generally a false statement of past or present fact (not law or opinion) made by a contractual party to another prior to the conclusion of a contract and regarding some matter or circumstance relating to the contract.

### Define *dictum et promissum*.

A material statement made by the seller to the buyer during negotiations, bearing on the quality of the *res vendita* and going beyond mere praise and commendation.

### State the test to determine if a restraint of trade clause is enforceable (Basson test). [5]

1. Is there an interest of one party worthy of protection?
2. If so, is that interest threatened by the conduct of the other party?
3. If so, does such interest weigh up against the interest of the other party to be economically active and productive?
4. Is there another aspect of public policy that requires that the restraint should be maintained or rejected?

Discuss the factors taken into consideration in determining whether the legislator impliedly intended the contract to be void for statutory illegality.

1. What is the object of the statute and what mischief (harm) is the statute directed against? If the validity of the contract brings about the harm the statute is directed against, it is an indication that the legislator intended the contract to be void.
2. Does the enactment impose a criminal sanction? This is usually an indication that the legislator intended the contract to be void. However, this is not the case where the sanction provides adequate protection against the mischief that the statute is directed against.
3. Does the enactment merely serve to protect the revenue of the State? If the answer is in the affirmative, it is an indication that the legislator intended the contract to be valid.
4. Does the provision merely protect individuals or does it involve a public interest that requires protection by voiding the contract? If the provision is for the protection of the public, it would be an indication that the legislator intended the contract to be void.
5. What are the consequences of a particular interpretation of the contract? A balance-of-convenience test is employed that questions whether nullity of the contract would cause greater inconvenience and justice than allowing the illegal conduct to stand.

**Distinguish between initial impossibility of performance, supervening impossibility of performance, and prevention of performance. [10]**

If a performance is objectively impossible at the time of conclusion of a contract, no obligation arises. To render performance impossible, it is not sufficient that a particular party cannot perform, that is, subjective impossibility. The impossibility must be so serious that nobody can render the performance – that is, it must be objectively impossible. An example of impossible performance is where A agrees to sell his house to B, but unbeknown to them the house has already been destroyed by a fire. Initial impossibility of performance prevents a contract from arising at all.

If, after the conclusion of the contract, performance becomes objectively impossible without the fault of the debtor, as a result of an unavoidable and unforeseen event, this is known as supervening impossibility of performance, and the obligation to perform is also, as a general rule, extinguished. The requirements for supervening impossibility of performance are:

1. the performance must be objectively impossible; and
2. the impossibility must be unavoidable by a reasonable person.

If, after the conclusion of the contract, performance on either side becomes impossible owing to the fault of either the debtor or the creditor, the contract is



not terminated, but the party who rendered the performance impossible is guilty of a breach of contract known as prevention of performance. It is not necessary that the performance should be objectively impossible in order for the breach to arise; subjective impossibility will suffice.

**Distinguish between suspensive conditions, resolutive conditions, suspensive time clauses, and resolutive time clauses.**

*SUSPENSIVE CONDITION:*

Performance of an obligation (which is an uncertain future event which may or may not occur) is suspended, and enforceable only when that event has been fulfilled or has failed.

*RESOLUTIVE CONDITION:*

Performance of obligations should operate in full, but will come to an end if an uncertain future event does or does not happen.

*SUSPENSIVE TIME CLAUSE:*

Performance of obligations postponed/suspended until an event or time that is certain to arrive in the future.

*RESOLUTIVE TIME CLAUSE:*

Obligations terminate at a certain date or happening of a certain future event.

**Briefly discuss tacit terms. [5]**

A tacit term is one that the parties did not specifically agree upon, but which (without anything being said) both or all of them expected to form part of their (oral or written) agreement. It is a wordless understanding having the same legal effect as an express term.

In ascertaining whether a contract contains a tacit term, the courts often employ the officious bystander test:

The court supposes that an impartial bystander had been present when the parties concluded their agreement and had asked the parties what would happen in a situation they did not foresee and for which their express agreement did not provide. If they were to agree that the answer to the stranger's question was self-evident, they are taken to have meant to incorporate the term into their contract and to have tacitly agreed on it.

### What is the parol evidence rule?

The parol evidence rule declares that where the parties intended their agreement to be fully and finally embodied in writing, evidence to contradict, vary, add to, or subtract from the terms of the writing is inadmissible.

### State the different forms of breach of contract.

1. *Mora debitoris*
2. *Mora creditoris*
3. Positive malperformance
4. Repudiation
5. Prevention of performance

### Discuss *mora debitoris* and *mora creditoris* and distinguish between them. [10]

#### *MORA DEBITORIS:*

*Mora debitoris* is the unjustifiable failure of a debtor to make timeous performance of a positive obligation that is due and enforceable and still capable of performance in spite of such failure.

#### Requirements:

- The debt must be due and enforceable.
- The time for performance must have been fixed, either in the contract or by a subsequent demand for performance, and the debtor must have failed to perform timeously.
- Such failure to perform on time must be without legal justification.

*Mora ex re* occurs where the debtor fails to perform on or before the due date expressly or impliedly stipulated by the parties in their contract.

*Mora ex persona* occurs where no time for performance has been stipulated, and the creditor demands that the debtor perform on or before a definite date that is reasonable in the circumstances (by means of a letter of demand, or oral demand).

### *MORA CREDITORIS:*

*Mora creditoris* is a form of breach of contract by a creditor. It occurs in cases where a creditor is obliged to lend his or her cooperation, and culpably fails to do so timeously.

Requirements:

- The debtor must be under an obligation to make the performance to the creditor (the performance need not be enforceable or due, however).
- Cooperation of the creditor must be necessary for the performance by the debtor of his obligation.
- The debtor must tender performance to the creditor.
- The creditor must delay in accepting performance.
- The delay must be due to the fault of the creditor.

### Define repudiation.

Repudiation is the demonstration by a party, by words or conduct, and without lawful excuse, of an unequivocal intention no longer to be bound by the contract or by any obligation forming part of the contract.

### State the requirements than an innocent party must prove in order to succeed with a claim for damages. [5]

1. A breach of contract has been committed by the defendant.
2. The plaintiff has suffered financial or patrimonial loss.
3. There is a factual link between the breach and the loss.
4. As a matter of legal causation, the loss is not too remote a consequence of the breach.

### Write notes on the difference between general damages and special damages. [5]

General damages are those which flow naturally and generally from the breach in question, and the law presumes that the parties contemplated them as a

possible result of the breach. The guilty party is summarily held liable for general damages.

In contrast, special damages are those that do not flow naturally and generally from a specific form of breach. The guilty party is only liable for special damages in certain circumstances. The courts use two principles to determine the extent of liability in the case of special damages: the contemplation principle, and the convention principle.

In terms of the contemplation principle, liability is restricted to damages that the parties actually or reasonably must have contemplated as a probable consequence of the breach.

According to the convention principle, liability is limited to those damages that may be proved on the basis of the contract. The innocent party has to prove either an express or implied provision concerning the payment of damages.

**Discuss the *exceptio non adimpleti contractus* with regard to its definition, the principles of reciprocity, how reciprocity is to be determined, as well as when the defence can be raised. Refer to case law in your answer. [10]**

The *exceptio non adimpleti contractus* is a defence that can be raised in the case of a reciprocal contract. It is a remedy aimed at keeping the contract alive. It permits a party to withhold his or her own performance, and to ward off a claim for such performance until such time as the other party has either performed or tendered proper performance of his or her own obligations under the contract.

The *exceptio non adimpleti contractus* is available when two requirements are met:

1. the two performances must be reciprocal to one another
2. the other party must be obliged to perform first, or at least simultaneously with the party raising the *exceptio*. The *exceptio* may also be raised where a party has performed incompletely.

In *BK Toolings (Edms) Bpk v Scope Precision Engineering (Edms) Bpk*, the court stated that reciprocal obligations are obligations that have been created in exchange for each other.

In order to determine whether an obligation is reciprocal or not, the (express or tacit) intention of the parties must be determined by interpreting the agreement. The question to be asked is: did the parties intend to create obligations in exchange for each other?

**State the requirements for a valid cession.**

1. An entitlement by the cedent to dispose of the personal right
2. The capacity of the personal right to be ceded
3. A transfer agreement
4. Formalities
5. Legality
6. Absence of prejudice to the debtor

**State the ways in which obligations may be terminated.**

1. By performance
2. By agreement
  - a. Release and waiver
  - b. Novation
  - c. Compromise
  - d. Effluxion of time
  - e. Notice
3. By law
  - a. Set-off
  - b. Merger
  - c. Supervening impossibility of performance
  - d. Prescription
  - e. Insolvency
  - f. Death

**Write brief notes on release and waiver.**

A release is an express or tacit agreement that the debtor be freed from an obligation or obligations. It therefore has the effect that the debtor need not perform. The debtor may be released in whole or in part.

The term “waiver” is often used synonymously with the concept of a release agreement. However, sometimes waiver is used to denote a unilateral act of

abandoning a right or remedy that exists for the sole benefit of the party  
abandoning the right or remedy.

### **Write brief notes on novation.**

A novation is an agreement to extinguish or replace one or more existing obligations with a new obligation. Accessory obligations to the original debt, such as a pledge or suretyship, are extinguished by an agreement to novate the debt.

The parties may agree to replace the debtor with a third party, provided of course that the third party agrees to such novation. Replacement of a debtor by novation is called delegation.

If an original obligation is void, a novation of the obligation will also be void. But if the novation itself is void, the original obligation will continue to exist.

### **Write brief notes on compromise.**

Compromise is an agreement in terms of which parties settle a dispute or some uncertainty between themselves.

Compromise differs from true novation in that compromise does not require a valid old obligation to have existed.

The purpose of a compromise is to secure a final settlement of a dispute or uncertainty, sometimes as to whether there is a debt at all.

### **Write brief notes on set-off, and the requirements therefor.**

Where two parties have claims against each other, and the requirements for set-off are met, the debts can extinguish each other. If they are not for the same amount, the smaller debt is extinguished and the larger debt is reduced by the amount of the smaller debt.

The following four requirements must be met for set-off to operate:

1. The debts must exist between the same two persons in the same capacities
2. The debts must be of the same kind or nature
3. Both debts must be due and enforceable
4. Both debts must be liquidated

# Problem questions

---

Albert takes his motor vehicle to Dodgy Motors for a service. On his arrival, he is asked to sign a “job card” by the owner. Albert enquires why he is required to sign the “job card” and the owner explains to him that by signing he is authorising them to conduct the service on his car, which will cost R1000. He signs the “job card” without reading it. While servicing the car, the service manager finds faults on the car (unrelated to the service) and he proceeds to do these additional repairs for a further R2000. Albert refuses to pay for the additional repairs and argues that he did not authorise such repairs. The owner of Dodgy Motors argues that Albert is obliged to pay for the work done as the “job card” contains a contractual clause authorising Dodgy Motors to do any repairs on the motor vehicle which they deem necessary, without asking the client’s authorisation, and requiring the client to pay for such repairs. Advise Albert on whether he is liable on the contract to pay Dodgy Motors R2000 for the additional repairs. Refer to *George v Fairmead (Pty) Ltd, Sonap Petroleum (SA) Ltd (SA) (Pty) Ltd v Pappadogianis*, and other relevant case law in your answer. Do not apply the Consumer Protection Act to this question. [15]

The essence of this problem is the question whether Albert and the owner of Dodgy Motors have reached actual consensus or ostensible consensus. Albert will not be contractually bound to pay for the additional repairs if this requirement for a valid contract is absent.

At the outset, it must be determined whether agreement (*consensus ad idem*) as a contractual basis exists between the parties, as required in terms of the will theory. Consensus has three elements:

1. The parties must seriously intend to contract
2. The parties must be of one mind as to the material aspects of the proposed agreement (the terms and the identity of the parties to it)
3. The parties must be conscious of the fact that their minds have met

In the present case, the parties were not in agreement as to the consequences they wished to create; Albert thought that he was authorising Dodgy Motors to only service his car, while the owner of Dodgy Motors knew that the contract also allowed Dodgy Motors to conduct repairs which they deemed necessary and payable by Albert without any further authorisation from Albert. This is a mistake as to the obligations the parties wished to create and is thus a material mistake, which excludes consensus between the parties. This means that no contract could arise on the basis of the will theory.

This type of mistake can be illustrated with a number of cases:



In *George v Fairmead*, the appellant signed a hotel register without reading it. The register contained a term excluding the respondent from liability for certain acts. The appellant was unaware of this term and his mistake related to a term that he believed would not be in the contract and as such was material because it related to an aspect of performance.

In *Allen v Sixteen Stirling Investments*, the plaintiff believed he was purchasing the erf pointed out to him by the seller's agent, while the written contract that he signed indicated the correct erf, which was a completely different property. His mistake related to performance and was material.

However, the matter does not end here. A party may be held contractually liable on the basis of a supplementary ground for liability, namely the reliance theory. In this regard, the direct or indirect approach to the reliance theory may be considered.

#### DIRECT APPROACH:

With reference to the direct approach, contractual liability is based on the reasonable reliance that consensus has been reached, which the one contractant (the contract denier) creates in the mind of the other contractant (the contract enforcer).

According to the *Sonap* case, the direct reliance approach entails a threefold enquiry:

1. Was there a misrepresentation regarding one party's intention?
2. Who made the misrepresentation?
3. Was the other party misled by the misrepresentation, and if so, would a reasonable person have been misled?

In our question, firstly, Albert made a misrepresentation by signing the contract, that his intention is the same as that expressed in the contract.

Secondly, the owner of Dodgy Motors could actually have been misled by this misrepresentation, but a reasonable man would have taken steps to point out to Albert that the contract allows Dodgy Motors to unilaterally conduct repairs on the car, because Albert enquired about the purpose of the "job card" and the owner of Dodgy Motors misled him to believe that by signing the card he is merely authorising the service to be done. In *Sonap* the court found that the contract enforcer knew that the contract denier was acting under a mistake and was thus not misled.

In our case, Albert therefore did not create a reasonable reliance that he wished to be bound by the contract he signed.

#### INDIRECT APPROACH (IUSTUS ERROR DOCTRINE):

In terms of this approach, a party may escape liability to be bound to a contract if it can be established that the mistake is both:

1. Material, and
2. Reasonable

It has already been shown in the discussion above that Albert's mistake is material. It still has to be determined if his mistake was reasonable.

The contract denier's mistake will be reasonable in the following instances:

1. If caused by a misrepresentation on the part of the contract enforcer (an unlawful misrepresentation).
2. If the contract denier is not to blame for the mistake.
3. If the contract denier did not cause a reasonable belief in the contract asserter that the contract denier assented to the agreement.

Fault is not a requirement for the misrepresentation by the contract enforcer, but unlawfulness is. If the misrepresentation is a positive act it is unlawful in itself. If a legal duty to speak exists and the party has kept quiet when he ought to have spoken, an unlawful negative misrepresentation has occurred. A legal duty to speak exists in the following instances:

- Where the contract asserter knows or ought to know as a reasonable person that the other party is mistaken
- Where, prior to the conclusion of the agreement, the contract asserter created an impression directly conflicting with the provisions of the agreements, he must draw the contract denier's attention to the discrepancy (*Du Toit v Atkinson's Motors*).

In our problem, Albert enquired about the purpose of the "job card" and the owner of Dodgy Motors misled him by answering that by signing he was merely authorising the service. The owner's misrepresentation was a positive act, and was therefore unlawful. Albert's error was thus reasonable.

Applying the indirect approach to the reliance theory we do not have a valid contract. Applying the direct approach, we do not have a valid contract. Albert is not contractually liable to pay R2000 for the repairs.

X, an organiser of art exhibitions, contracted with Y for an exhibition to be held on 24 to 27 July. These dates were the only dates mentioned during negotiations. After having been pressurised by X, Y hurriedly signed a standard form contract without reading it. The contract contained a clause permitting X to change the dates of the exhibition unilaterally. Thereafter, X changed the dates. X had no reason to believe that Y would have signed the contract if he had known of the term. Y averred that the contract

was void. Will Y succeed in his attempt to have the contract set aside? Substantiate your answer and refer to relevant case law. Do not apply the Consumer Protection Act to this problem. [15]

The essence of this problem is whether X and Y have reached consensus. Y will not be contractually bound if this requirement for a valid contract is absent.

At the outset, it must be considered whether agreement (*consensus ad idem*) as a contractual basis exists between the parties, as required in terms of the will theory. Consensus has three elements:

1. The parties must seriously intend to contract
2. The parties must be of one mind as to the material aspects of the proposed agreement (the terms and the identities of the parties to it)
3. The parties must be conscious of the fact that their minds have met.

In the present case, the parties were not in agreement as to the consequences they wished to create: Y thought that the dates for the exhibition (X's performance) was fixed, while X knew that the contract allowed X to unilaterally change the dates. This is a mistake as to the obligations the parties wished to create and is thus a material mistake, which excludes consensus between the parties. This means that no contract could arise on the basis of the will theory.

This type of mistake can be illustrated with a number of cases:

In *George v Fairmead*, the appellant signed a hotel register without reading it. The register contained a clause excluding the respondent from liability for certain acts. The appellant was unaware of this term and his mistake related to a term that he believed would not be in the contract and as such was material because it related to an aspect of performance.

In *Allen v Sixteen Stirling Investments*, the plaintiff believed he was purchasing the erf pointed out to him by the seller's agent, while the written contract that he signed indicated the correct erf, which was a completely different property. His mistake related to performance and was material.

However, the matter does not end here. A party may be held contractually liable on the basis of a supplementary ground for liability, namely the reliance theory. In this regard, the direct or indirect approach to the reliance theory may be considered.

#### INDIRECT APPROACH (IUSTUS ERROR DOCTRINE):

In terms of this approach, a party may escape liability to be bound to a contract if it can be established that the party laboured under a mistake, which was both:

1. material and
2. reasonable.

It has already been shown that Y's mistake is material in the discussion above. It still has to be determined if Y's mistake was reasonable.

The contract denier's mistake will be reasonable in the following circumstances:

1. If caused by a misrepresentation on the part of the contract asserter (an unlawful misrepresentation)
2. If the contract denier is not to blame for the mistake
3. If the contract denier did not cause the contract asserter to have a reasonable belief that the contract denier assented to the contract.

If a legal duty to speak exists and a party has kept quiet when he ought to have spoken, that party has made an unlawful negative misrepresentation. A legal duty to speak will usually exist where:

- The asserter knows or ought to know as a reasonable person that the other party is mistaken
- Where, prior to the conclusion of the agreement the asserter created an impression directly conflicting with the provisions of the agreement, he must draw the contract denier's attention to this discrepancy (*Du Toit v Atkinson's Motors*).

Since X had no reason to believe that Y would have signed the contract had Y known of the term allowing X to change the dates of the exhibition unilaterally, X had a legal duty to point out this clause to Y. X's failure to do so renders Y's material mistake reasonable.

#### DIRECT APPROACH:

With reference to the direct approach, contractual liability is based on the reasonable reliance that consensus has been reached, which the one contractant (the contract denier) creates in the mind of the other contractant (the contract asserter).

According to the *Sonap* case, the direct reliance approach involves a threefold enquiry:

1. Was there a misrepresentation regarding one party's intention?
2. Who made this misrepresentation?
3. Was the other party actually misled by this misrepresentation, and if so, would a reasonable person have been misled?

By signing the contract, Y, a party to the contract, misrepresented her intention to be bound by the clause allowing X to unilaterally change the dates. X knew that the only dates mentioned during negotiations were 24 to 27 July, that Y hastily signed the contract, and that the contract had a clause allowing X to unilaterally change the dates. X was probably not actually misled by the misrepresentation by Y, and nor would a reasonable person be misled in any

event. There was therefore no reasonable reliance on consensus on the part of Y.

Y is not bound by the agreement because of lack of apparent and actual consensus.

X is a keen golfer who has played at many golf tournaments over the years as an amateur. She is very well informed about the rules pertaining to her amateur status as a golfer, and knows that amateurs can only claim a maximum of R1000 in prize money at golf tournaments. X participated in a recent golfing tournament wherein she achieved a hole-in-one at the 9<sup>th</sup> hole. At this hole was an advertising board, which read: "Hole-in-one prize sponsored by Speedy Motors to the value of R90 000". The prize was parked next to this board in the form of a new car. X claimed the prize from Speedy Motors but they rejected her claim on the basis that the prize could only be claimed by professional players and not amateur players. Advise X. Refer to *Steyn v LSA Motors* and other relevant case law. [15]

This problem deals with two questions: Was there a valid offer and acceptance? Was there consensus between the parties?

Offer and acceptance:

The general rule in our law is that an advert constitutes merely an invitation to do business (*Crawley v Rex*). However, following the reasoning in *Carlill v Carbolic Smoke Ball Co*, the court in *Bloom v American Swiss Watch Co* held that the advertising of a reward might be construed as an offer to the public.

An offer may only be accepted by a person or persons to whom it was directed (*Bird v Summerville*). Although Speedy Motors intended the offer to be open only to professional players, the expressed offer was apparently open to the public.

Mistake is thus also relevant.

Mistake:

At the outset, it must be determined whether agreement (*consensus ad idem*) as a contractual basis exists between the parties, as required in terms of the will theory. Consensus has three elements:

1. The parties must seriously intend to contract
2. The parties must be of one mind as to the material aspects of the proposed agreement (the terms and the identities of the parties to it)
3. The parties must be conscious of the fact that their minds have met

In our case, X and Speedy Motors were not in agreement as to the identity of the parties, and this is a material mistake, which excludes consensus based on the will theory.

However, the matter does not end here. A party may be held contractually liable on the basis of a supplementary ground for liability, namely the reliance theory. In this regard, the direct reliance approach or the indirect reliance approach may be considered. Because the facts in this case are similar to the case of *Steyn v LSA Motors* where it was held that the indirect approach couldn't be applied in instances where there is no objective appearance of agreement, only the direct approach will be considered.

#### DIRECT APPROACH:

With reference to the direct approach, contractual liability is based on the reasonable reliance that consensus has been reached, which the one contractant (the contract denier) creates in the mind of the other contractant (the contract enforcer). According to the *Sonap* case, the direct reliance approach entails a threefold enquiry:

1. Was there a misrepresentation regarding one party's intention?
2. Who made this misrepresentation?
3. Was the other party actually misled by the misrepresentation, and if so, would a reasonable person have been misled?

In our question, Speedy Motors made a misrepresentation regarding its intention that the offer is made only to professional players, by advertising the reward to the public. Although it may be argued that X was actually misled by the misrepresentation, it is certain that a reasonable person in X's position would not have been misled. X should know, as an experienced amateur golfer, that only certain prizes are open to amateurs. There was therefore no reasonable reliance on consensus on the part of X. X will not succeed in her claim for the prize.

S, who lives in Upington, sends P, who lives in Grahamstown, a letter by private courier in which she offers to sell him her (S's) motorcycle, a collector's piece, for R100 000. She states in her letter that her offer will expire on 1 February. P accepts S's offer by letter, which he posts on 31 January. S receives the letter on 7 February and only reads it on the next day. P tenders payment of R100 000 but S refuses to accept payment. Did a valid contract arise between S and P? Substantiate your answer. [15]

The question is whether P has accepted S's offer in time and thus whether S and P have reached consensus.

Where the offeror has prescribed a time limit for acceptance, the offer lapses automatically if it is not accepted within the prescribed period.

The general rule is that a contract comes into being only when the acceptance is communicated to the mind of the offeror. The information theory, which is the general rule in our law, states that the agreement is concluded when and where the offeror learns or is informed of the acceptance – in other words, when the offeror reads the letter of acceptance.

On the other hand, the expedition theory applies to postal contracts. In terms of this theory, introduced into our law in the *Cape Explosive Works* case, a contract comes into being when and where the offeree posts the letter of acceptance. By making an offer through the post, the offeror is deemed not only to have authorised acceptance by post, but also to have waived the requirement of notification of acceptance.

The question that then arises is which theory applies. In our law, the general rule is that the information theory applies, however the expedition theory will apply if the following four criteria are met:

1. the offer is made by post or telegram
2. the postal services are operating normally
3. the offeror has not indicated a contrary intention, expressly or tacitly, and
4. the contract is a commercial one.

If any of these criteria are not met, the information theory applies.

In this question, the offer was not made by post, instead it was sent by private courier, and therefore the expedition theory does not apply. It follows that the information theory must be applied. Because S only learnt of the acceptance by P after expiry of the offer (when S read the letter on 8 February), the offer had already lapsed and no valid contract arose between the parties.

X is on her way from work and sees a white bull terrier bitch hiding in a doorway. Being an animal lover, she takes the dog home with her. The next day, she sees the following advertisement in the newspaper:

*Lost in Johannesburg, on 27 May. Pedigree white bull terrier bitch with black patch over left eye. Answers to the name of Beauty. Reward of R1000 for information leading to safe return. Tel 011 555 5555.*



She realises that the dog she found matches the description given. She calls the advertiser who rushes over to be joyfully united with Beauty. In his joy, Beauty's owner, Y, seems to forget the reward and X wishes to claim it from him. Will she be successful? Substantiate your answer. Refer to *Bloom v American Swiss Watch Co* and other relevant case law in your answer. [10]

X will only be successful in her claim if a valid contract arose between X and Y, and this will be the case if there was a valid offer and acceptance.

The offer:

The offer was in the form of an advertisement. The general rule in our law is that an advertisement constitutes an invitation to do business (*Crawley v Rex*). However, in *Bloom v American Swiss* it was held that the advertising of a reward might be construed as an offer to the public. Offers to the public at large can be made (*Carlill v Carbolic Smoke Ball Co*).

In our case, the offer was firm, complete, clear, and certain. The offer can therefore be said to have been valid.

The providing of information by X was a valid acceptance of Y's offer:

- X's acceptance was unqualified
- X, as a member of the public to whom the offer was made, may accept (offer may only be accepted by offeree – *Bird v Summerville*)
- X's acceptance was a conscious response to the offer (he knew of the offer and could thus accept it – unlike the situation of *Bloom v American Swiss* where the plaintiff returned the item but was unaware there was a reward for doing so).

It can be concluded that a valid contract arose in this problem, because Y made a valid offer, which X validly accepted.

Y signs and delivers a written offer (including all the material terms) to Z on 1 July, for the purchase of Z's waterfront apartment. Y's offer is for R800 000 and one of the terms of the offer states "This offer lapses on 30 August". However, whilst Z is still considering Y's offer, Y delivers a letter to Z on 20 July, advising Z that his (Y's) offer is cancelled. Z insists that the offer is valid until 30 August, and on 25 July Z delivers a letter to Y, advising Y that he accepts Y's offer. Has a valid contract of sale been created between Y and Z? Discuss with reference to *Brandt v Spies* and other relevant case law. [10]



Contracting parties may enter into an agreement in terms of which the offeror undertakes not to revoke his or her offer. In such cases, it is said that one party grants the other an option.

For this question, an option does not exist because there is no agreement in place that binds Y to keep his offer open until 30 August. Y has unilaterally imposed this upon himself in the offer, but it was certainly not an agreement by both parties to hold Y to keep his offer open until this date. This means that no option contract was concluded.

Y validly revokes his offer to Z on 20 July and therefore there is no offer that Z can accept. The requirements for a valid offer and acceptance for a contract have not been met, and no valid contract has thus been created.

X has been leasing a commercial property from Z for the past three years. The lease will come to an end on 31 May 2010. On 5 March 2010, X phones Z and offers to renew the lease for a further three years, which offer Z accepts. During this phone call, the material terms of the renewal agreement are agreed upon and X and Z further agree that the said material terms must be reduced to writing and signed by both parties. Subsequently, on 5 April 2010, X is shocked to receive a letter from Z, advising X that there will be no renewal of the lease and that X should vacate the leased property on 31 May 2010. X and Z never reduced their oral agreement to writing. Advise X if a binding agreement with Z exists for the renewal of the lease for a further three years. Refer to *Goldblatt v Fremantle*. [15]

This question deals essentially with formalities stipulated by the parties for a valid creation of a contract. The main question is whether a formality was stipulated in the oral agreement for the renewal of lease between the parties, that for such agreement to be valid it should be reduced to writing.

Parties to an oral agreement will often agree that their agreement should be reduced to writing, and perhaps also signed. In doing so, they may have the following intentions:

1. To have a written record of their agreement to facilitate proof of its terms. If so, the agreement is binding even if it is never reduced to writing.
2. Alternatively, they may intend that their oral agreement will not be binding upon them until it is reduced to writing and signed by them. In *Goldblatt v Fremantle*, the Appellate Division held that no contract existed because the parties intended their agreement to be concluded in writing, which also involved signing by the parties.

In the absence of contrary evidence, the law presumes that the intention of the parties was merely to facilitate proof of the terms of the agreement. The party who alleges otherwise bears the onus of proof.

In our case no binding agreement exists because the parties agreed that the oral agreement must be reduced to writing and signed, and this indicates their intention that the agreement will not be binding if this formality is not complied with.

Y let premises to X. The lease contained a clause prohibiting X from sub-letting the premises without the written consent of Y. A further clause of the lease required that any variation of the terms of the lease had to be in writing and signed by both parties. Later Y told X that he (X) could sub-let a portion of the premises. After X had sub-let a portion of the premises to a third party, Y changed his mind and informed X that both X and the sub-lessee (third party) must vacate the premises because X had breached the contract. Discuss X's position with reference to *Sa Sentrale Ko-operatiewe Graanmaatskappy Bpk v Shifren*.

The facts correspond to a large extent with *Shifren*. The question is whether parties may orally deviate from a written agreement that contains a clause that determines that the contract may only be varied or terminated in a specific manner (non-variation clause). In such instances, the parties have actually set formalities for the amendment or termination of their contract.

In the *Shifren* case, the court decided in favour of the lessor even though the lessor apparently gave permission verbally for the amendment of a lease agreement, which contained such a provision. The lessor was entitled to cancel the contract as a result of the lessee's breach despite the oral variation. The same results would apply to the present case.

In the *Shifren* case the court's reasoning was as follows:

Where the parties insert a clause into their contract that provides that any amendment of the contract, including the specific clause, must be in writing, they cannot later orally amend that clause or any other provision. However, if the specific clause itself is not entrenched against oral variation, the particular provision may be varied orally, with the result that thereafter the other provisions of the contract may possibly also be varied orally.

X, the owner of Tex-Mex Fried Chicken in Town A, sells her business as a running business to Y for R100 000. The contract of sale provides that X may not conduct a similar business in Town A and Town B for a period of two years. Six months later, X opens a similar business in Town B. X uses the same recipe she used when preparing the chicken. Y seeks to enforce this clause in the contract with an interdict. It appears that, at the time of conclusion of the sale, the Tex-Mex Fried Chicken drew its customers only from Town A and that Tex-Mex chicken is not prepared according to a secret recipe. Will Y succeed? Discuss.

Y will only succeed if the agreement in restraint of trade is reasonable, but the onus of proving that it is unreasonable rests on X (the contract denier). In this regard, the Basson test should be applied to the facts of this problem.

The first question is whether Y has a protectable interest. Goodwill definitely exists as part of the running business. There is no right to a trade secret because although the recipe is useful and has economic value, it is not secret (it is public knowledge).

The second question is whether the goodwill will be threatened by the conduct of Y. The opening of a similar business in Town B directly infringes the restraint.

The third question involves a weighing up of the interests of X and Y. The business only drew its customers from Town A. This shows that the restraint goes further than necessary to protect the goodwill of the business.

The conclusion is thus that the restraint is not reasonable as between the parties. But the enquiry does not end here. The fourth question that should be asked is whether there is any other relevant aspect of public policy which indicates that the restraint should be enforced. In our problem, there is none.

Y will not be successful in enforcing the restraint against X.

Tony, a petrol attendant, sells dagga to Samuel for R1000. Tony delivers the dagga to Samuel but Samuel refuses to pay. Section 5 of the Drugs and Drug Trafficking Act provides that no person shall deal in dagga while section 4 prohibits possession of such substances. Section 13 makes the contravention of both sections 4 and 5 a crime. Dagga is a substance as defined in section 5. Advise Tony if he can sue Samuel for payment of R1000 or the

return of the dagga. Would your advice be different if Tony was an undercover policeman who sold dagga to Samuel during a police entrapment operation? Discuss with reference to *Jajbhay v Cassim* and other relevant case law. [15]

This question involves an illegal contract of sale, which is void due to statutory illegality. The fact that the legislator has enacted a criminal sanction for a contravention is a factor that would imply that the legislator intended the contract to be void.

An illegal contract creates no obligations and it cannot be enforced. The *ex turpi* rule applies: from an illegal cause no action arises. Neither party can institute an action on the contract or claim performance from the other party. So for instance if a party has suffered damage as a result of such a contract, he or she may not claim contractual damages from the other party. A court does not have the discretion to relax this rule and there are no exceptions to it.

A party who has performed in terms of an illegal contract may however reclaim his performance, in principle, with an enrichment action. However, such restitution will be prevented where the *par delictum* rule applies. According to the *par delictum* rule: where two parties are equally morally guilty, the one who is in possession is in the stronger position. If this is the case, restitution in terms of an enrichment action is prevented.

In our case, Tony is precluded from instituting any contractual claim for R1000 from Samuel because of the *ex turpi* rule, and also from an enrichment claim because of the *par delictum* rule.

The situation might differ if Tony was an undercover cop. In such a case, Tony would not be equally morally guilty (*Minister of Justice v Van Heerden*) and so the *par delictum* rule would not apply.

In *Jajbhay v Cassim*, the Appellate Division held that the *par delictum* rule may be relaxed in appropriate circumstances in order to justice “between man and man” if it would be in the interests of public policy.

X insures the contents of her house with Y Insurer. The insurance contract contains the following clause:

*If we reject liability for any claim made under this policy we will be released from liability unless summons is served within 60 days of repudiation.*

X's house is burgled and her TV and hi-fi are stolen. X notifies Y Insurer of the theft, but Y insurer rejects her claim. X only serves her summons 61 days after rejection of her claim. X was involved during this period in a serious car accident and, as a consequence, she was hospitalised for 30 days. Y Insurer raises the defence that Y Insurer has been released from liability based on the relevant clause. Discuss whether the court will uphold Y Insurer's defence.

The facts of this problem are based on the *Barkhuizen* case. However, the time period for the institution of the claim is far shorter, and the insured has a good reason for failing to be in time with the institution of her claim.

The first question is whether the clause gives X a fair opportunity to seek legal redress.

The period is only two-thirds of the period in the *Barkhuizen* case (60 days versus 90 days), and it can be validly argued that the short period in the clause amounts to a denial of the right to seek judicial redress (a public interest informed by the constitutional right in section 34 of the Constitution).

It may furthermore be argued that the enforcement of the clause against X is unfair in the circumstances, where X was in hospital for 30 days and only had 30 days to institute a claim against Y Insurer, as this could amount to a denial of the right to seek judicial redress. X will have to have to plead the illegality of the clause or the unfairness of enforcement. The onus will also rest on X to prove illegality and unfairness. X will have to lead evidence on how long it usually takes to institute a claim.

If we assume that the clause is illegal, a further question will arise: Can the clause be severed from the rest of the insurance contract, as X would like to enforce the rest of the contract against Y insurer. The guidelines that the courts use will have to be applied:

- Firstly, the clause is grammatically and notionally separate from the rest of the contract, as it forms a separate clause.
- Secondly, if the clause is severed from the rest of the contract, the contract still stays an insurance contract. The substantive character of the insurance contract remains intact.
- Thirdly, it could be argued that the insurer's hypothetical intention would still be to enter into the insurance contract, as no insurer can survive without business. Y Insurer would be faced with the possibility that all its insurance contracts with such a clause would be invalid. X would, of course, have entered into the insurance contract.

It can be concluded that the clause could be severed from the rest of the contract.

X hands in her shocking pink suede jacket at the dry-cleaner. Y hands her a receipt. On the back of the receipt is a clause excluding Y's liability in the event of negligent damage to or theft of any goods handed in for dry-cleaning. The same words appear on a big notice board in the shop, which is clearly visible. When X fetches her jacket, she is dismayed to discover that the dry-cleaning process has changed the jacket's colour. Is she bound by the exemption clause? Discuss briefly. [5]

With so-called ticket contracts, one of the parties issues a ticket on which certain contractual terms appear. The question is whether the other party may be held bound to such terms where that party has not signed the ticket in question. Our courts use a three-legged test:

1. Did the person know there was writing on the ticket?
2. Did he know that the writing referred to terms of the contract?

If both answered in the affirmative, the terms form part of the contract. If either answered negative, a further question follows:

3. Did the party who issued the ticket take reasonable steps to bring the reference to the terms to the attention of the other party?

In the present case, X will probably be held bound because of the notice board that also refers to the contractual terms.

Andy and Craig conclude a contract wherein Andy agrees to paint Craig's office block by 31 August, and Craig agrees to pay Andy R10 000 upon completion of the work. When 80% of the work is completed Andy suddenly falls ill and he is unable to complete the job by 31 August. Craig refuses to pay Andy any money for his (Andy's) services rendered, as Craig believes that Andy has breached the contract by not completing the work. Craig hires another contractor at an amount of R3000 to complete the job. Craig does not incur any other costs to complete the job, neither does his business make any losses. Advise Andy as to what amount (if any) he may recover from Craig for the services that he rendered, and on what basis. Discuss with reference to *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* and other relevant case law. [15]

This contract is reciprocal in nature. Andy has rendered defective performance and the issue is whether Craig has to compensate Andy for the work that has already been done.

This question deals with the *exceptio non adimpleti contractus*. The *exceptio* is a defence that can be raised in the case of a reciprocal contract, where the performances due on either side are promised in exchange for one another. It is a remedy that permits a party to withhold their performance and ward off a claim for such performance until such time as the other party has either performed or tendered performance of their obligations.

Where a party who has to perform first has only performed part of its obligations or has rendered defective performance, that party is in principle not entitled to claim counter-performance until such time as he has performed in full. In practice, the innocent party often accepts part-performance and starts using the performance. This sometimes leaves the breaching party in the unfair position that it may be impractical or impossible to make full performance, but any claim for counter-performance can be defended by the other party relying on the *exceptio*.

As a result, the courts have exercised a discretion to relax the principle of reciprocity and order the party making use of the defective or incomplete performance to pay a reduced amount to the party in breach.

In *BK Tooling*, the Appellate Division confirmed this, and held that the courts have an equitable discretion to award a reduced contract price, depending on the nature of the defect, and the cost of repair, replacement, or substitute performance. The onus to prove the amount of reduction is on the party in breach claiming the reduced price. The plaintiff must allege and prove:

- that the other party is using his performance
- the cost of remedying defects
- that it would be equitable to award some remuneration despite breach
- that the circumstances are such that the court should exercise its discretion

Based on the ruling in *BK Tooling*, Andy is entitled to be compensated by Craig because:

1. Craig is utilising the defective performance
2. It would be equitable as Andy has completed most of the work
3. The counter-performance ought to be reduced by R3000 (the amount it cost to complete the job)

In the circumstances, Andy is entitled to receive R7000 from Craig, which represents the difference between the contract price and the cost to complete the job.



On 1 June M and Q conclude a contract whereby M undertakes to manufacture and install kitchen cupboards in Q's home for R50 000. The parties agree that the price will be paid as soon as the kitchen cupboards are installed, but they do not determine a date for the completion of the work. M, however, informs Q during the negotiations that she has some other work to complete and that she will attend to the kitchen cupboards as soon as possible. Eight months has lapsed since the contract was concluded and Q has not heard from M. Q runs out of patience and hires W to manufacture and install the same kitchen cupboards for R60 000. After W has completed the job, M turns up to do the work. Q claims R10 000 damages from M, but M institutes a counterclaim for R30 000 from Q for her loss of profit. Who will succeed in this claim? Discuss.

This question deals with damages for breach of contract. In order to determine who will succeed in the claim for damages, we must ascertain which party committed the breach.

A plaintiff who wishes to claim damages for breach of contract must prove the following:

1. A breach of contract has been committed by the defendant
2. The plaintiff has suffered financial or patrimonial loss
3. There is a factual causal link between the breach and the loss
4. As a matter of legal causation, the loss is not too remote a consequence of the breach.

Did M or Q breach the contract?

M could possibly be in breach in the form of *mora debitoris*. *Mora debitoris* is the unjustifiable failure of a debtor to make timeous performance of a positive obligation that is due and enforceable, and still capable of performance in spite of such failure.

Because performance has become impossible, it is not capable of performance. Also, no date was stipulated for performance, nor did Q demand performance, so M could neither be in *mora ex re* nor *mora ex persona* respectively. M has not committed a breach of contract.

Q, by hiring W to manufacture the cupboards has committed two forms of breach: repudiation, and prevention of performance. A party commits the breach of repudiation when, by words or conduct, and without lawful excuse, he manifests an unequivocal intention no longer to be bound by the contract or any obligation forming a part thereof.



Prevention of performance is a breach whereby, after conclusion of the contract, one of the parties, owing to their fault, causes performance to become impossible.

M will therefore be able to claim damages from Q successfully, because he will be able to prove that Q committed a breach of contract. The aim of damages is to place the innocent party in their fulfilment position, that is, the position they would have been in had there been no breach. M's claim for loss of profit will probably be successful.

X contracts with Y for the latter (Y) to build and fit a security gate for the entrance of her (X's) home. Y builds the gate and fits it with an electric motor, which is activated with a remote control. X is satisfied with the work and pays Y the contractual amount agreed upon. A week later, the gate gets stuck while it is halfway open as a result of defective materials used to build the gate. When X attempts to physically move the gate to close it fully, she suffers such severe damage to her left knee that she has to have a knee operation. Her medical costs are R20 000. The costs of repairing the gate amount to R15 000. X wants to claim both medical costs as well as the cost of repairing the gate from Y. Advise X if she will be successful with her claim. Refer to *Shatz Investments (Pty) Ltd v Kalovymas; Holmdene Brickworks (Pty) Ltd v Roberts Construction Co*, and other relevant case law in your answer. [15]

This question deals with a claim for damages for breach of contract, and specifically, the element of legal causation regarding special damages and general damages.

A plaintiff who wishes to claim damages for breach of contract must prove:

1. A breach of contract has been committed by the defendant
2. The plaintiff has suffered financial or patrimonial loss
3. There is a factual causal link between the breach and the loss
4. The loss is not too remote a consequence of the breach (legal causation).

Y has committed a breach of contract in the form of positive malperformance (the defective materials used to build the gate).

In the law of contract, the approach to remoteness of consequences from breach (legal causation) has been traditionally based on a distinction between general and special damages. The distinction between general damages and special damages was stated in *Holmdene Brickworks*: general damages are those damages that flow naturally and generally from the kind of breach in

question and which the law presumes the parties contemplated as a probable result of the breach; special damages, on the other hand, are presumed to be too remote unless exceptional circumstances are present.

X may claim the cost of repairing the gate as general damages.

If X wants to succeed in the claim for medical costs as special damages, X must prove that:

1. The damages were actually foreseen or reasonably foreseeable at the time of entry into the contract (the contemplation principle); and
2. The parties can be taken to have agreed that there would be liability for damages arising from special circumstances (the convention principle).

Study smart.