Specimen coursework assignment

M05 – Insurance law

The following is a specimen coursework assignment including questions and indicative answers.

It provides guidance to the style and format of coursework questions that will be asked and indicates the length and breadth of answers sought by markers. The answers given are not intended to be the definitive answers; well-reasoned alternative answers will also gain marks.

Contents

M05 Specimen coursework assignment

Coursework submission rules and important notes

Before commencing work on, or submitting, your coursework assignment it is essential that you fully familiarise yourself with the content of *Mixed Assessment Candidate Guidelines*. This includes the following information:

- Answers to a coursework assignment should be between 6,000 and 12,000 words in total depending on your writing style.
- Arial font and size 11 to be used in your answers.
- Important rules relating to referencing all sources including the study text, regulations and citing statute and case law.
- Penalties for contravention of the rules relating to plagiarism and collaboration.
- Six month deadline from enrolment date for the submission of coursework answers.
- The total marks available are 200. You need to obtain 120 marks to pass this assignment.
- Do not include your name or CII PIN anywhere in your answers.

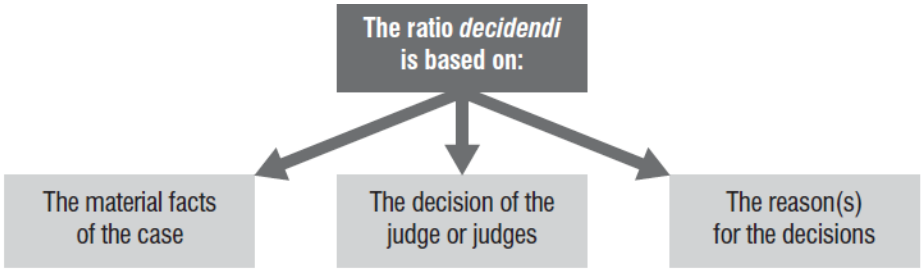
Top tips for answering coursework questions

- Read the Learning Outcome(s) and related study text for each question before answering it.
- Ensure your answer reflects the context of the question. Your answer must be based on the figures and/or information used in the question.
- Ensure you answer all questions.
- Address all the issues raised in each question.
- Do not group question parts together in your answer. If there are parts (a) and (b), answer them separately.
- Where a question requires you to address several items, the marks available for each item are equally weighted. For example, if 4 items are required and the question is worth 12 marks, each item is worth 3 marks.
- Ensure that the length and breadth of each answer matches the maximum marks available. For example, a 30 mark question requires more breadth than a 10 or 20 mark question.

Additional M05 coursework tips

It is recommended that you take the following four-step approach when planning an answer to an M05 question:

- **Step One:** Identify which area(s) of the law the question is testing and link it back to the correct Learning Outcome(s).
- **Step Two:** Explain how the relevant area(s) of the law, in outline, may relate to the context set out in the question. Identify relevant statute and case law. When quoting law, focus on the ratio *decidendi* rather than the general facts of the case.



For further information see chapter 1 of the M05 Study text.

- **Step Three:** Apply the relevant principles of the law, including statute and case law, to the question.
- **Step Four:** Include in your answer a conclusion which directly links back to the question and relevant area(s) of the law.

The coursework questions link to the Learning Outcomes shown on the M05 syllabus as follows:

Question	Learning Outcome(s)	Chapter(s) in the Study Text	Maximum marks per answer
1	Learning Outcome 3	Chapter 3	10 marks
2	Learning Outcome 4	Chapters 4 & 9	10 marks
3	Learning Outcome 5	Chapters 5 & 9	10 marks
4	Learning Outcome 6	Chapters 4, 6 & 7	30 marks
5	Learning Outcome 7	Chapter 8	20 marks
6	Learning Outcome 8	Chapters 4 & 10	20 marks
7	Learning Outcome 9	Chapter 11	20 marks
8	Learning Outcome 10	Chapter 12	20 marks
9	Across more than one Learning Outcome	Across more than one chapter	30 marks
10	Across more than one Learning Outcome	Across more than one chapter	30 marks

M05 specimen coursework questions and answers

Question 1 - Learning Outcome 3 (10 marks)

You are a claims handler. A serious road accident was caused by Arthur's negligent driving.

David's car was involved in this serious accident. The accident resulted in David being pulled from his car, just before the petrol tank exploded and he narrowly avoided death. David sues Arthur for damages in respect of post-traumatic stress disorder (PTSD) caused by nervous shock.

Fiona did not witness the accident. However, Fiona suffered nervous shock and developed PTSD after visiting her husband, David, in hospital. David was being treated for serious injuries received in the accident. Fiona sues Arthur for damages in respect of PTSD caused by nervous shock.

(a) Explain the legal position in respect of the legal liability of Arthur regarding the claim made by David. Refer to **one** relevant case in support of your explanation. (4)

(b) Explain the legal position in respect of the legal liability of Arthur regarding the claim made by Fiona. Refer to **two** relevant cases in support of your explanation. (6)

Answer to Question 1 (Learning Outcome 3)

The relevant areas of law to be considered here are types of victims.

(a) The question states that Arthur has been negligent so there is no need to consider the tort of negligence itself. The issue here is liability for subsequent loss or damage to property or to the person, the latter including either physical or psychological damage or both. According to Parsons (2016:3/17), the relevant law in this context is that relating to 'nervous shock' (also known as PTSD) a recognised psychiatric illness (and not 'mere' grief or sorrow). Nervous shock claimants fall into two categories: primary victims, who suffer shock as a result of fear for their own safety, and secondary victims, who suffer shock through fear for the safety of others. David is a 'primary' victim. In *Page v Smith* (1996) the House of Lords held that a primary victim need only prove that *some form* of personal injury was foreseeable: victims do not need to establish foreseeability of *psychiatric* injury. Given the scale of the accident some form of injury to him was clearly foreseeable and therefore applying *Page v Smith* (1996) it is likely that that David would succeed in his claim.

(b) According to Parsons (2016:3/17), a secondary victim is one who has suffered shock through witnessing the plight of others. In *Alcock v Chief Constable of South Yorkshire Police* (1992) the House of Lords held that secondary victims can succeed only when they were proximate in space and time to the accident, or its immediate aftermath, and also have a close tie of love and affection with a direct victim. Fiona is clearly a secondary victim who suffered shock through fear for the safety of others. While she did not witness the accident itself she witnessed its aftermath. Another relevant case is *McLoughlin v O'Brian* (1983)*, which decided that such victims may be able to claim if they witness the 'immediate' aftermath of such a situation. McLoughlin is likely to be distinguished on its facts if applied here, as Fiona is not witnessing the 'immediate' aftermath, therefore in applying McLoughlin Fiona is unlikely to succeed in her action.

***Note:** This case is not found in the study text. This is an example of where further reading can justify marks.*

Question 2 - Learning Outcome 4 (10 marks)

Julie pays to attend a concert. On the back of her ticket, bought at the entrance of the concert hall, there is the following statement:

'The owners of these premises do not accept responsibility for bodily injury to any visitor, or loss or damage to the property of any visitor, whether caused by the owners' negligence or not.'

While watching the concert, Julie's seat collapses. This causes Julie to injure her leg and spill a cup of coffee over the suit that she is wearing, ruining it completely. She claims compensation from the owners of the concert hall, however, they refuse to pay her anything referring to the exclusion clause on the back of her ticket.

Explain, with justification, Julie's legal rights against the owners of the concert hall. Refer to **one** statute and **two** relevant cases in support of your explanation. (10)

Answer to Question 2 (Learning Outcome 4)

The relevant areas of law to be considered here are:

- the incorporation of terms into contracts;
- the possible exclusion of those terms.

Julie's contract is governed by the general law of contract however the context of this question is the ability to 'contract out' of certain liabilities under that contract.

There appear to be no issues relating to the formation of the contract applying the general law of contract and therefore this would appear to be a valid contract.

The main issue here is the contract terms. Terms can be incorporated into a contract in a number of ways. As Parsons (2016: 4/17) notes, parties are generally free to negotiate their own contractual terms but in practice, terms may be set by one party, such as here, where the contractual terms appear on the back of the ticket. One of these terms appears to be an 'exclusion or exemption clause'.

Exclusion or exemption clauses are effective at common law only when they are incorporated in the contract. This means that the party who seeks the protection of the clause must establish that the document containing it was 'contractual', i.e. which could reasonably be expected to contain terms and that those terms had been sufficiently drawn to their attention, for example, in *Thompson v LMS Railway* (1930) a railway ticket was held to be a document which could be expected to contain contractual terms.

In *Olley v Marlborough Court Ltd* (1949) the question of such terms being sufficiently brought to the claimant's attention was considered. Applying both of these cases it is likely that this document will be considered contractual and the terms sufficiently notified to Julie.

However, even if the term has been incorporated in the contract it will be subject to the Unfair Contract Terms Act 1977, s2 of which states that: 'no one acting in the course of business can by means of contractual terms or any notice given or displayed, exclude his liability for death or bodily injury arising from negligence'.

This is relevant because a claim based on negligence is likely here. Therefore, applying the Act, the owners of the hall cannot rely on the clause of the ticket to deny Julie's claim for the personal injury.

Under section 2(2) of the Act, a person may exclude liability for other forms of loss caused by their negligence (e.g. property damage), but only if they can prove that the exclusion is reasonable. This is relevant to the damage to Julie's suit but it will be for a court to decide if this is reasonable.

Question 3 - Learning Outcome 5 (10 marks)

Karen is an agent for CDE plc (CDE), an insurer. CDE have given Karen authority to grant cover on all household insurance risks, other than houses of non-standard construction which must be referred to CDE for approval.

Without reference to CDE, Karen grants cover on a house of non-standard construction that is owned by David. One week later David's house is damaged in a fire, but CDE refuse to pay the claim, stating that the insurance is invalid because Karen had no authority to grant cover.

(a) Explain briefly, the legal rights and duties of CDE regarding cover and the claim. (6)

(b) Explain briefly, the legal rights and duties of Karen regarding cover and the claim. (4)

Answer to Question 3 (Learning Outcome 5)

The relevant area of law to be considered here is the relationship between principals and agents.

(a) In the law of agency, according to Parsons (2016:5/3), a principal, here CDE, is bound not only by the actual authority of their agent but also by the apparent (or ostensible) authority of the agent; that is, bound by the authority that the agent appears to have in the eyes of the third party. According to Parsons (2016:5/11), for this rule to apply the principal must have represented or 'held out' to the person in question as being their agent. CDE have clearly done this, as they have obviously given her some authority to act for them. Again, a principal will not be bound by the apparent authority of their agent if the third party knows that the agent has no actual authority to act.

Applying the principles of the law of agency the insurance contract with David appears to be valid. CDE are therefore obliged to meet David's claim, unless David knew that Karen had no authority to put CDE on risk.

If the breach here is regarded as a serious one, CDE may have the right to terminate the agency agreement and withdraw Karen's authority completely. Alternative remedies available to CDE might include the right to refuse to pay Karen commission and, possibly, to sue her for damages.

(b) In granting cover, Karen is acting as an agent of CDE and not an agent of her client, David. It is clear that Karen has been given authority to bind the insurers, but that authority is limited, as she is not allowed to give cover on houses of non-standard construction. In granting cover on such a house, Karen has therefore gone beyond her actual authority; that is the authority expressly conferred on her by CDE.

In stepping outside her authority and granting cover, Karen has certainly broken the duties of obedience and due care and skill that every agent owes to their principal. Karen will be liable for a breach of her duties as an agent and may be liable for the claim amount.

Question 4 - Learning Outcome 6 (30 marks)

You are a claims handler for ABC Insurance plc (ABC), an insurer.

In February 2015, you pay the owner of a factory £20,000 in settlement of a claim for storm damage to the factory.

In April 2015, the factory is damaged again in another storm. The factory owner claims £50,000 for repairs to the building and £50,000 for loss of stock.

Following the claim investigation the following facts are established:

- The factory owner is to appear in court on a fraud charge, which he was aware of when he took out the factory insurance cover in January 2015.
- The factory owner had answered 'no' to a question on the proposal form asking if he had ever been convicted of a criminal offence. There was no question on the proposal form relating to pending prosecutions.
- A loss adjuster's report states that the April 2015 building damage was £50,000, but that at the time of loss there was only £25,000 of stock.

You refused to pay the April 2015 claim and ABC send a letter to the factory owner declaring the policy *ab initio* on the basis of breach of good faith.

The factory owner writes back to you stating:

- He has just been acquitted of the fraud charge and did not declare it on the proposal form as he knew that he was innocent.
- All the questions on the proposal form were answered truthfully and, in any event, the fraud charge could have no relevance whatsoever to the claims for storm damage.
- The claim for stock was for £50,000 because he had been told that ABC always try to settle for less than the amount claimed. He assumed that he would not be paid the £25,000 unless he claimed for a greater sum.

(a) Discuss ABC's rights to avoid the policy *ab initio*. Refer to **two** statutes and **two** relevant cases in support of your discussion. (14)

(b) Discuss the factory owner's legal position with regard to the claim. Refer to **two** relevant cases in support of your discussion. (16)

Answer to Question 4 (Learning Outcome 6)

(a) This question involves a number of issues surrounding the duty of good faith that applies in insurance. The duty under the Insurance Act 2015 in business insurance (not 'consumer' insurance) is the duty to make fair presentation of the risk.

S.3(4)(a) of the Insurance Act 2015 provides that the insured is required to disclose every material circumstance which the insured knows or ought to know.

The materiality of a fact should be judged by reference to the position as it existed at the date of placing the risk. In *Brotherton v Aseguradora* (2003), it was held that the only issue was whether allegations that existed when the risk was placed were material. Therefore, the fact the factory owner has now been acquitted of the fraud charge is irrelevant and does not release him from his original duty to disclose it, assuming that it is material to the risk.

A material fact, is something 'which would influence the judgement of a prudent insurer in fixing the premium or determining whether he will take the risk.' (Marine Insurance Act 1906 s.18(2)). C*ontainer Transport International Inc. v Oceanus Mutual Underwriting Association (Bermuda) Ltd* (1984) held that the words 'influence the judgement' simply mean that the fact must be one which a typical, reasonable underwriter would have wanted to know about when forming his opinion of the risk. It need not necessarily be a decisive fact that would have caused such an underwriter to act differently had he known about it. Applying this case, it would seem that a pending prosecution is certainly something that a hypothetical 'prudent insurer' would at least want to know about in assessing the risk.

The argument that the factory owner puts forward, to the effect that a fraud prosecution is irrelevant to claims for storm damage, would appear not to be a valid one and would not prevent the insurers from claiming a breach of good faith. If a court accepted all these arguments, as the law stands, ABC may be entitled to avoid the insurance contract *ab initio,* i.e. cancel it retrospectively. Under the Insurance Act 2015 there are a range of alternative remedies for the breach of the duty of fair presentation, depending on whether the breach of duty by the proposer was deliberate, or reckless, or otherwise.

(b) It could be argued that the factory owner's pending prosecution did not, in fact, need to be disclosed because it was a matter that law outside the scope of the specific question about criminal conviction contained in the ABC proposal form. That is, in asking on the proposal form for details of actual convictions only, ABC implied that

there was no need to disclose potential convictions. This is an example of facts that do not need to be disclosed because the requirement to disclose them has been 'waived' by the insurers.

If this argument were to be accepted, ABC could not cancel the policy retrospectively and refute the current claims for failure to disclose the pending prosecution. Neither could they recover the £20,000 paid in respect of the earlier claim.

In this case, attention would then turn to the second claim for storm damage and, in particular, the factory owner's claiming for loss of stock to the value of £50,000 when property to the value of £25,000 only had been lost. A leading case on fraud in the claims process is the decision of the House of Lords in *Manifest Shipping Co v Uni-Polaris Shipping Co.* (2001) (*The Star Sea).* This case confirmed the existence of a general duty, on both parties to an insurance contract, to act in good faith throughout the currency of the insurance, including the claims process. *The Star Sea* also confirmed that a right on the part of insurers to repudiate, not only a claim, but also the contract itself will arise in the case of actual fraud in the course of making an insurance claim. For this right to arise, the falsehood in question must be substantial (i.e. not trivial), wilful (e.g. deliberate and not merely negligent) and also material in the sense that it had a decisive effect on the insurer's willingness to pay.

The factory owner says that he exaggerated his claim only because he thought that he would get less than that to which he was entitled, unless he asked for a greater amount, and some allowance must generally be made for negotiation between the insurer and the insured. However, he appears to be claiming for property that had not been lost at all, which is much more likely to be regarded as a deliberate attempt to deceive ABC, and therefore fraud. By way of example, in *Galloway v GRE* (1999), a case in which a burglary claim for £16,000 was genuine up to £14,000 but fraudulent for the balance of £2,000, the court held that the insurers were entitled to repudiate the claim as a whole. In this case, even though it seems quite probable that ABC could establish fraud, it is also likely that the insurers could terminate the contract only as regards the future and could not avoid it *ab initio* (i.e. retrospectively cancel the policy from inception). This means that ABC would not be able to recover money paid in respect of the first 'honest' storm claim.

Question 5 - Learning Outcome 7 (20 marks)

You are an errors and omissions (E&O) claims handler for WYZ plc (WYZ), an insurer. You are notified by Diane, a policyholder, of a claim for £50,000.

Diane is a sole trader insurance broker who recruited another insurance broker, Elaine, to join her as a business partner. Diane asked WYZ to add Elaine as a joint policyholder on her E&O insurance. This was confirmed once a supplementary proposal form was filled out by Elaine.

Six months after being added to the E&O policy, Elaine defrauded a client by diverting a £50,000 premium into her own private bank account. She withdrew the money and disappeared. The client is seeking reimbursement of the £50,000 from Diane.

Subsequently Diane found out that Elaine had been expelled from a professional association of insurance brokers two years ago, for defrauding another client. Elaine had withheld this information from Diane and WYZ, however Elaine's expulsion had been widely reported in the insurance press at the time.

(a) Explain, with justification, why WYZ may be entitled to cancel the policy. (12)

(b) Explain, with justification, why WYZ may be entitled to refuse to pay the claim, if their attempt to cancel the policy is unsuccessful. Refer to **one** relevant case in support of your explanation. (8)

Answer to Question 5 (Learning Outcome 7)

The relevant law here is that relating to the distinction between joint and composite policies and the effect of breaches on each.

(a) According to Parsons (2016:8/17), policies in joint names can be interpreted in two ways, either as 'joint' insurances or as 'composite' insurances. A joint insurance is regarded as a single and indivisible contract, which means that an individual act of either joint policyholder (such as a breach of warranty or breach of good faith) can affect the insurance as a whole and possibly invalidate it entirely. Under a composite insurance, the position is different. In this case the policy is divisible, as though the joint policyholders were insured separately. This means that the actions of one joint policyholder will not affect the cover granted to the other.

Elaine's failure to disclose her earlier fraud and expulsion from the professional association of insurance brokers when completing the supplementary proposal form, would probably be regarded as a failure to disclose a material fact and would therefore entitle WYZ to rescind i.e. cancel the E&O insurance as a whole. This would remove Diane's own cover. Furthermore, insurance policies do not, as a matter of public

policy, cover liability arising from deliberate criminal acts and they often explicitly exclude fraud by the insured (or policyholder). This means that the claim against Diane, arising from Elaine's fraud, would not be covered in any event if the policy was joint. Partners in a partnership, according to Parsons (2016:8/17), such as Diane and Elaine, are 'jointly and severally liable' for wrongs committed by their fellow partners (which is why Diane is being held responsible for Elaine's fraud against the claim) so it might be argued that their interests are the same and thus that the policy is joint rather than composite.

(b) Where there is doubt about the true basis of the insurance, the courts are likely to consider the policy wording as well as the nature of the parties' interests in order to determine whether the insurance is joint or composite. In *Arab Bank plc v Zurich Insurance Co.* (1999), it was held that the wording of the policy was crucial in confirming that an E&O policy was intended to be composite rather than joint. In that case the court was influenced by the intention to protect innocent directors while denying cover to guilty directors. This could mean that this case, if applied here, would depend on any intention which could be identified.

If the policy was held to be joint, Diane would have no cover at all. However, if the policy is composite Diane's cover will not be invalidated automatically by Elaine's failure to disclose her past fraud and expulsion, or by the fact that the current claim against Diane is based on the fraud. Instead, the focus will move to Diane's own duty of good faith and whether she should have known about Elaine's past history and informed WYZ about it.

WYZ might argue that Elaine's position is something that Diane, as an insurance broker, knew or ought to have known about. The nature of 'knowledge' as now defined would be relevant in this context (Parsons 2016:7/38). If a court accepted this argument, WYZ could avoid the whole policy for non-disclosure and refuse Diane's claim. However, Diane might argue, that Elaine's fraud and expulsion is something that WYZ themselves should have known about and, therefore, there was no need to disclose it. The fact that the expulsion had been widely reported in the insurance press supports both arguments. Both insurance brokers and E&O underwriters are likely to read the insurance press, so a court would have to take a view on whether Diane or WYZ were in the best position to know about Elaine's history.

Question 6 - Learning Outcome 8 (20 marks)

You are an insurance broker. One of your clients is the owner of a shop which is insured with YLX Insurance plc (YLX), an insurer, on a commercial combined policy.

A policy condition states that 'reasonable precautions to prevent loss, damage or liability' should be taken. A clause on the policy states: 'It is warranted that all external locks and window fixings must be activated and secured when the premises are unattended.'

The owner of the shop informs you of the circumstances of a claim:

- He briefly left the shop to carry a customer's shopping to their car parked on the other side of the road, leaving his ten year old daughter alone inside the shop. His daughter accidentally started a fire in the shop, while playing with a cigarette lighter.
- He saw the fire and returned quickly to rescue his daughter. However, the fire had already caused extensive damage.
- He sent the claim direct to YLX, however, they refused to pay as they stated that he had failed to take reasonable precautions. Additionally, YLX stated that he had breached the warranty by leaving the shop and not securing the door, whilst the shop was unattended.

(a) Explain, with justification, the validity of YLX's decision to refuse the claim due to the alleged breach of reasonable precautions. Refer to **one** relevant case in support of your explanation. (10)

(b) Explain, with justification, the validity of YLX's decision to refuse the claim due to the alleged breach of the warranty clause. Refer to **one** relevant case in support of your explanation. (10)

Answer to Question 6 (Learning Outcome 8)

This question is about the law relating to ambiguity in the interpretation of insurance policies and the burden of proof.

(a) The first question is whether the shop owner has broken the condition that required him to take 'reasonable precautions to prevent loss, damage or liability,' as YLX argue. According to Parsons (2016:10/9) 'the English courts have often been rather reluctant to enforce conditions of this sort……they have generally been enforced only in the case of reckless conduct by the insured…..'. Recklessness, as defined by Parsons (2016) applies where the insured is not merely careless but deliberately takes an obvious and unjustified risk. The burden of proof lies with the insurer.

In *Sofi v Prudential Assurance Company Ltd.* (1993) similar conditions required the insured to take 'reasonable care to avoid loss' in a personal all risks policy and a travel policy. The Court of Appeal decided that the insured was entitled to claim because, on the facts, his conduct although careless was not reckless.

Whether or not the shop owner has been reckless in this case is arguable. Leaving a young child alone in a shop where there are cigarette lighters and inflammable material might be unwise but the shop keeper's absence from the shop was 'brief' and in connection with his business. He saw the fire and returned quickly so he may not have been reckless, which means that there will have been no breach of the policy condition.

(b) Regarding the warranty, specific warranties are construed strictly under the common law so the insurers would probably be able to repudiate liability if the warranty applies even if locking the door might have actually made things worse rather than better.

The question of whether or not the warranty has been broken depends mainly on the construction of the word 'unattended'. Taken literally, the shop was not unattended, since a young child was present in it, but the insurers might argue that the only sensible construction of the word 'unattended' is 'not attended by any 'capable adult', since attendance only by a young child would not be appropriate. It may be argued that the word 'unattended' is ambiguous in this context and should be construed *contra proferentem*; that is, against the insurers who proposed the clause. This would give the shop keeper the benefit of the doubt and mean there was not breach of warranty.

The shopkeeper could suggest that, in any event, the warranty applied only to the theft section component of the insurance policy and not to the fire or material damage section which may provide cover for fire claims. A similar issue arose in *Printpak v AGF* (1999) in which the insured had broken a warranty that required the burglar alarm to be fully operational when the premises were closed. However, the policy divided into a number of sections. Section A covered fire and the alarm warranty was a 'section endorsement' in Section B, which dealt with theft. The insurers argued that the insured's breach of warranty ended the whole contract. However, the Court of Appeal held that although the policy was a single contract it was not necessarily 'seamless' and the burglar alarm warranty applied only to Section B, and not to A, so the fire claim succeeded. Effectively, the court in *Printpak* held that the insurance contract was, in effect composite (or divisible) and not joint (or indivisible). John might make a similar point, and argue that, even if there had been a breach of warranty the effect would be to invalidate the theft section component of the policy only, and not the fire or material damage cover.

The shopkeeper could also suggest that the warranty cannot apply in any case, claiming 'waiver by estoppel'. The argument here would be that, having initially raised only a defence based on the breach of the 'reasonable precautions' condition, the insurers had thereby waived (i.e. agreed to disregard) the breach of warranty by the shopkeeper.

In conclusion, YLX would have difficulty in enforcing either the 'reasonable precautions' clause, or the warranty, and are therefore probably liable to meet the claim.

Question 7 - Learning Outcome 9 (20 marks)

You are an insurance broker. One of your clients, Anthony, purchases a high quality car for £90,000. You arrange motor insurance with XYZ plc (XYZ), an insurer, at an annual premium of £5,000. The motor policy states that, in the event of a total loss, XYZ will pay the market value of the car.

A few days later the car is stolen. XYZ promptly pays Anthony £87,500, which is the market value less a policy deductible of £2,500.

Anthony buys a replacement car of the same make and model. He asks that the car is added to his motor insurance policy. XYZ decline to do so, saying that his old policy had expired when the car was stolen.

XYZ states that Anthony must purchase a new policy if he wants the replacement car to be covered. XYZ quotes an annual premium of £6,500, due to the large claim. Anthony says that the policy has not expired, therefore XYZ are obliged to add his new car as a replacement vehicle without additional premium.

Six months later, XYZ succeeds in recovering the stolen car. The car's market value has risen to £100,000. Anthony argues that XYZ have made a profit of £10,000 and they should pass it to him, or at least pay him the amount of the £2,500 deductible.

(a) Explain, with justification, whether XYZ are correct in their argument that the policy ceased when the car was stolen. Refer to **one** relevant case in support of your explanation. (12)

(b) Explain whether XYZ should return any, or part, of the £10,000 to Anthony. (8)

Answer to Question 7 (Learning Outcome 9)

The relevant areas of law here are principle of indemnity and the doctrine of salvage and abandonment.

(a) The central issue here is whether Anthony's motor insurance terminated when the car was stolen and XYZ paid for the loss.

Cover may cease automatically following a total loss because the subject matter that supports the insured's insurable interest may no longer exist. When the new vehicle needs to be insured, the old vehicle has not been recovered. With this in mind, the policy has been terminated as the subject matter no longer exists. If the subject matter does still exist (as here) the insured will have generally no rights in respect of it if the insurers have paid a total loss. This is so because, under the doctrine of salvage and abandonment, the property in the subject matter will pass to the insurers on payment of a total loss and the insured's ownership will cease.

The law draws a distinction between marine and non-marine insurance. In our example therefore, the principles of non-marine insurance apply. This principle states that you either have a total loss or a partial loss, there is no abandonment. For example, in *Holmes v Payne* (1930), the insurers paid a total loss on jewellery which was believed to have been destroyed in a fire but was later found undamaged. It was held that the insured stopped being the owner and therefore the policy ceased.

A review of the exact wording of the policy would be required to determine whether XYZ are justified in treating the contract as terminated. If, as it seems XYZ are so justified, then they are also entitled to invite Anthony to insure the replacement car under a new insurance and to pay a full (and higher) premium for it.

However if, in the light of the policy wording, the contract cannot be treated as terminated and Anthony is allowed to substitute his new car for his old one, it is very unlikely that XYZ can ask him to pay a full year's premium. XYZ might well be entitled to raise the premium for the new car (even if it is the same model) because there has been change or variation in the contract and not merely a continuation of the contract in its old form.

(b) Under the doctrine of salvage and abandonment, insurers that have paid a total loss are entitled to take over anything of the insured property that remains, so the car is now the property of the insurers. Therefore, it might seem that XYZ are entitled to benefit from the rise in the value of the car that has been abandoned, just as they would have had to suffer any detriment that would occur if the car had fallen in value.

The relevant question is can XYZ keep the whole of the salvage (or all the money that results from its sale) given that they have not paid Anthony the full market value of the car? This question has not been clearly settled under English law, but is possible that XYZ cannot do so.

In concluding it may be useful to note that the UK Financial Ombudsman has taken the view that the insured should at least be given the chance to repurchase the car in circumstances such as these, although it is not clear whether the (re)purchase price need necessarily be the same as the amount paid to the insured by the insurers.

Question 8 – Learning Outcome 10 (20 marks)

You are an insurance broker. One of your clients, George, owns and operates a factory, which is insured on an all risks basis for £5 million.

The factory sustains fire damage, at an estimated value of £1.5 million, caused by the negligence of a firm of building contracts, DCY Ltd (DCY), who were working on the factory. George claims under his all risks insurance policy and is paid £1 million as there is a £500,000 excess on the policy.

The insurer sues DCY in George's name and recovers £700,000 as DCY are insolvent. George demands to be paid £500,000 by his insurer, to recover the excess. The insurer declines to pay him anything as their recovery of £700,000 is less than their claim payment of £1 million.

(a) Explain with justification, whether George is entitled to the £500,000 from his insurer. Refer to **one** relevant case in support of your explanation. (10)

(b) Explain how the legal position would differ if George had sued DCY in his own name for £500,000 before George's insurer had settled the claim. (10)

Answer to Question 8 (Learning Outcome 10)

The relevant areas of law here are contribution and subrogation clauses in insurance contracts.

(a) George has requested that his insurer indemnify him for the full amount of his loss including the £500,000 excess he has paid. This would mean that there is no material gain and no material loss from the fire. In this case the recovery of £700,000 from the third party that caused the loss, DCY Ltd, is less than the £1.5 million loss and less than the insurers' own payment of £1 million. The key question is how the £700,000 recovery should be distributed, and who has priority over it, the insurers or George?

The answer can be found by applying *Napier v Hunter* (1993), where the House of Lords held that the money recovered by way of subrogation should first be allocated to any uninsured losses that the insured has suffered, then to the insurers for the losses that they have paid and, last, to the insured to cover any excess on the insurance policy. The insured's deductible is last in the chain of priorities because the insured, in taking an excess, has agreed to bear the first part of any loss, up to the amount of that excess.

Since there is no mention of any uninsured losses in our case, apart from the excess, it would appear that the insurers could keep the whole of the £700,000 recovered, as this is less than the amount of £1 million which they have paid. Therefore George is not entitled to the £500,000 from his insurer as they take precedence in the recovery. George agreed to the excess when he took the policy out.

(b) Regarding the legal position, if George had sued in his own name to recover the amount of his excess, he may well have broken one or more conditions of his insurance policy. It was held in *Napier v Hunter* (1993) that the doctrine of subrogation carries into an insurance policy a number implied terms, including a promise by the insured to act in good faith when proceeding against the third party. This means that an insured who proceeds against a third party would sue for the whole of the loss; £1.5 million in this case. If this occurs they cannot also seek compensation under their insurance policy, as any gains would be subject to a contributions clause. This is because only one action can be brought against the third party. If George had sued DCY for £500,000 only and settled for this amount, the insurers could not also sue DCY to make a further recovery. This would prejudice the insurer.

The legal concept of subrogation prevents 'unjust enrichment' where a person unfairly profits from their loss i.e., they do not benefit from a claim.

Claims conditions of this type generally take effect as conditions precedent to liability, which means that the insurers are likely to be entitled to refuse George's claim against them.

Question 9 - Across more than one Learning Outcome (30 marks)

You are an insurance broker. One of your clients, Chris, is a builder.

Chris had undertaken building work for one of his customers, Julie, at an agreed cost of £5,000. Julie was unable to pay Chris the agreed cost in a single payment. They had agreed that Julie should pay Chris in five monthly instalments of £1,000.

Subsequently Julie tells Chris that she will not be able to make any of the monthly payments. Chris then agreed to accept Julie's car, valued at £4,500 to pay the debt, together with Julie's car insurance policy, underwritten by QSR plc (QSR), an insurer.

Chris approaches you for advice and you establish the following:

- Whilst driving the car, Chris has hit a parked car owned by John.
- Chris believes that John's car was poorly parked and partially blocking the road.
- The repair bill, sent by John to Chris, for the damage to John's car, is £2,000.
- Chris had sent the repair bill to QSR under Julie's policy.
- QSR had replied stating that Chris is not insured under Julie's policy because it covers Julie and name drivers only, which does not include Chris.

Chris wishes to know whether QSR should pay the repair bill.

Chris says that, unless QSR pays the repair bill, he will demand the £5,000 from Julie. He states that the agreement to accept the car was never put in writing and the £4,500 value is less than the debt of £5,000, so the debt cannot be discharged. He also states that he believes that the damage to John's parked car was due to its poor parking.

(a) Explain, with justification, whether QSR are legally obliged to pay Chris' motor insurance claim. Refer to **one** relevant case in support of your explanation. (10)

(b) Explain whether there may be grounds upon which Chris might reduce his liability for damage to John's car. (8)

(c) Explain, with justification, whether Chris is still legally entitled to the amount of £5,000 that Julie owes him. Refer to **two** relevant cases in support of your explanation. (12)

Answer to Question 9 (Across more than one Learning Outcome)

The issues here relate to assignment of contracts of insurance, defences in negligence and consideration in relation to part payment of a debt.

(a) Motor insurance policies are 'personal' contracts. The terms of the cover granted and the amount of premium payable will depend not only on the vehicle to be insured, but also on many factors relating to people who may drive it, including their age, occupation, experience and general use of the vehicle. All these are likely to change if a car transferred as stated by Parsons (2016:4/52).

In *Peters v General Accident Fire and Life Assurance Corporation Ltd* (1938) the seller of a van handed over his insurance policy along with the vehicle to the buyer, who assumed that he was covered by it. The buyer subsequently caused an accident in which the claimant was injured. The claimant secured a judgement against the buyer but the court held that the insurers were not liable to satisfy it, because the policy could not be assigned without their consent and no consent had been given. Whilst the motor policy was given to Chris by Julie indicating that she intended to assign the policy to Chris, motor insurance policies cannot be freely assigned; that is cannot be assigned without the consent of the insurer.

There is no mention of QSR giving their consent in this case so they are not legally obliged to meet Chris' claim.

(b) It is possible that both parties were at fault, i.e. that Chris was negligent but that John was also partly to blame because he parked his car in such a way as to make the accident more likely to happen, or make the effects of the accident worse, or both. The concept here is contributory negligence which is a possible partial defence, (resulting in a reduction of liability) in relation to claims based on negligence or some other tort. If this defence was made out Chris would still have to pay compensation to John, but the amount of damages payable would be reduced by a percentage corresponding to John's share of the blame. For example, if a court took the view that John was 40% to blame, his damages would be reduced from £2,000 to £1,200.

(c) The question is whether Chris, having agreed to accept a car and a motor insurance policy to pay off the debt of £5,000, can change his mind and claim the full sum that was originally owed. Chris argues that the agreement to accept the car and insurance policy was never put in writing and also that their £4,500 value is much less than the debt of £5,000, so cannot discharge it.

Most agreements do not need to be in writing to be legally binding, and here evidence in writing is not necessary.

As a general rule, a money debt cannot be discharged by the payment of a smaller sum, so a person who is owed £5,000 and simply agrees to accept just £4,500 can change their mind afterwards and sue for the whole sum. The theory behind this rule is that the debtor in such a case has provided no consideration, i.e. nothing of value, in return for the creditor's promise to accept a smaller sum, so the promise is not binding and can be revoked. However, payment of a smaller sum can discharge a larger debt if there is a change in the time or mode of payment, or something extra is added. This was the ratio of *Pinnel's Case* (1602).

This principle was confirmed by the House of Lords in *Foakes v Beer* (1884) in which Beer had obtained judgment against Foakes for £2,090. Later, Foakes agreed to pay £500 down and half-yearly sums of £150 until the debt was repaid. When the whole sum had been repaid, Beer sued Foakes for interest on the debt and the court held that she was entitled to do so as Foakes had supplied no consideration for her agreeing to accept payment by instalments.

In Chris' case there is a change both in the mode of payment and the timing of it. Payment is now being made in the form of goods (the car) and intangible property (the insurance policy) instead of cash and, perhaps more importantly, payment is effectively being made earlier than originally agreed. This is so because payment of the £5,000 was originally to have been in instalments, spread out over five months. In applying Pinnel's Case Chris may not be entitled to the £5,000 that was owed originally if the requirements of that case are found to be satisfied here.

Question 10 - Across more than one Learning Outcome (30 marks)

You are an insurance broker. You are arranging the insurances for a new client who owns and operates a restaurant. You recommend that the insurance is placed with WSR plc (WSR), an insurer.

With the owner of the restaurant, you completed WSR's online application form and entered the answers given to you by the restaurant owner. The restaurant owner informed you of two recent claims for thefts from the restaurant. However, you did not include this claim information on the application form.

Although you asked the owner to check the completed online application form, he declined to do so. The form is submitted to WSR who issue the policy.

Two months later the restaurant is damaged by a lightning strike. A claim for damage is notified to WSR, however, they refuse to pay the claim when, during their claim investigations, they learn about the earlier theft claims. WSR decide not to cancel the policy.

(a) Explain, with justification, whether WSR are correct in their decision not to pay the claim resulting from the damage caused by the lightning strike. Refer to **one** relevant case in support of your explanation. (8)

(b) Explain, with justification, whether WSR are correct in their decision not to cancel the policy. (6)

(c) Explain the extent of your responsibility for the decision not to include the theft claims in the online application form. (8)

(d) Explain how the legal position would differ if WSR had asked you to visit the restaurant owner to help with completing the online application form. Refer to **one** relevant case in support of your explanation. (8)

Answer to Question 10 (Across more than one Learning Outcome)

The issues to be considered here are material facts, the duties of an agent and remedies on breach.

(a) In relation to many of their activities, insurance brokers act as agents of the insured, or the proposer for insurance, and this is generally the case when an insurance broker assists a client in completing a proposal form or similar documentation. As stated in Parsons (2016:5/6) an agent must exercise reasonable skill and care. Here, the broker is acting on behalf of the restaurant owner when the two completed the online application form together.

The broker's omission of the claims would be treated, in law, as though the restaurant owner himself had omitted the information, because he is the principal for whom the insurance broker was working and not WSR. The effect of this is that WSR are entitled to treat this failure as an actionable breach of good faith; previous theft claims are clearly material facts that a reasonable insurer would want to know about when a person applies for business insurance cover. The nature of material facts was recently considered in *Versloot Dredging BV and another (Appellants) v HDI Gerling Industrie Versicherung AG and others (Respondents)* (2016)*.

(b) The only remedy for a breach of good faith in the case of a non-consumer insurance is rescission (cancellation) of the insurance policy as a whole (in which case there is no obligation to pay any claim under it), unless the insurers choose to ignore the breach of good faith and affirm the contract, in which case they must pay any valid claim. Therefore, WSR must either cancel the policy and refuse the claim or let the policy stand, in which case they must pay.

The restaurant owner complains that the thefts were completely unrelated to the lightning strike, which would have happened in any event, but this does not affect the insurer's rights in any way. In order to prove that there has been an actionable breach of good faith and rescind the policy, insurers do not need to prove that there is a link between the information that was withheld or misrepresented and any loss; the only issue is whether the facts or information in question was material to the risk as a whole, which it seems it was in this case.

(c) The broker's decision not to include the theft claim in the online application form has implications. Insurance brokers, like other agents, have a duty to obey the instructions of their clients and to exercise due care and skill, and it is apparent that the broker has failed to do this, as any reasonably competent insurance broker would understand the importance of disclosing the full claims record of their client to the insurers. Should a loss occur, this might mean that the restaurant owner may be able to sue the broker for breach of their duties as an agent and claim damages. Damages would normally be based on the loss to the restaurant owner that resulted from the broker's negligence; this might be equivalent to the amount of the restaurant owner's uninsured loss from the lightning strike.

There is a complication in that the restaurant owner failed to check the application form when invited to do so by the broker, as it might be argued that, as well as the broker, the restaurant owner has been negligent to some degree. One way in which a court might deal with this problem is to make a reduction for contributory negligence in the damages payable by the broker to the restaurant owner. However, the restaurant owner has a reasonable argument when he says that he assumed that the broker had completed everything correctly, so any reduction in his damages are unlikely to be significant.

(d) If WSR had asked the broker to visit the restaurant owner and help him complete the online application form, the legal position might well be different. When an insurance intermediary is instructed by the insurers to ask questions and fill in the answers on an insurance proposal form he is likely then to be viewed as the insurers' agent rather than as an agent of the proposer, even when the proposal contains a declaration to the contrary.

A further effect would be that the broker would now be in breach of their duties as an agent to their principal, WSR, which could expose them to a claim for damages by WSR. It is unlikely that WSR could sue the broker for the full amount of the loss that the restaurant owner suffered as a result of the lightning strike because if they had known about the two thefts, they might well have been prepared to insure the restaurant owner anyway, though perhaps at a high premium. In this case the basis of damages might be the difference between the premium that the restaurant owner actually paid and the premium that they would have paid if WSR had they been given the full claims record.

***Note:** This case is not found in the study text. This is an example of where further reading can justify marks.*

References

http://www.financial-ombudsman.org.uk/publications/ombudsman-news/92/92-insurance-claims.html (accessed 25th November 2016)

https://www.supremecourt.uk/cases/docs/uksc-2014-0252-judgment.pdf (accessed 27th November 2016)

Parsons C (2016) Insurance Law. CII. London

How to plan an answer for a coursework question

The following three plans are based on 10, 20 and 30 mark questions respectively.

Question 1 - Learning Outcome 3 (10 marks)

You are a claims handler. A serious road accident was caused by Arthur's negligent driving.

David's car was involved in this serious accident. The accident resulted in David being pulled from his car, just before the petrol tank exploded and he narrowly avoided death. David sues Arthur for damages in respect of post-traumatic stress disorder (PTSD) caused by nervous shock.

Fiona did not witness the accident. However, Fiona suffered nervous shock and developed PTSD after visiting her husband, David, in hospital. David was being treated for serious injuries received in the accident. Fiona sues Arthur for damages in respect of PTSD caused by nervous shock.

(a) Explain the legal position in respect of the legal liability of Arthur regarding the claim made by David. Refer to **one** relevant case in support of your explanation. (4)

(b) Explain the legal position in respect of the legal liability of Arthur regarding the claim made by Fiona. Refer to **two** relevant cases in support of your explanation. (6)

Question deconstruction

- Review Learning Outcome 3 in the course material and the relevant information in the study text. As the facts disclose that Arthur has been negligent there is no need to consider negligence here so the focus lies elsewhere i.e. the type of victims, whether they can be compensated and if so, by whom.
- Highlight the instructions within the question (which are circled in red above).
- Consider the circumstances, in this case as to whether the victims here are primary or secondary victims and what effect that classification has.

Answer plan

- Before planning your answer refer to the four stages outlined in the M05 top tips in the answer M05 template.
- Look closely at the mark allocation awarded for each part of the question.

- The number of marks available indicates the relative length and breadth required for the answer to each part of the question.
- You should answer each part separately and in each case, refer to the relevant case law to support your discussion.
- As this is a 10 mark question, your answer should be less detailed than your answers to either 20 or 30 mark questions.

Question 5 - Learning Outcome 7 (20 marks)

You are an errors and omissions (E&O) claims handler for WYZ plc (WYZ), an insurer. You are notified by Diane, a policyholder, of a claim for £50,000.

Diane is a sole trader insurance broker who recruited another insurance broker, Elaine, to join her as a business partner. Diane asked WYZ to add Elaine as a joint policyholder on her E&O insurance. This was confirmed once a supplementary proposal form was filled out by Elaine.

Six months after being added to the E&O policy, Elaine defrauded a client by diverting a £50,000 premium into her own private bank account. She withdrew the money and disappeared. The client is seeking reimbursement of the £50,000 from Diane.

Subsequently Diane found out that Elaine had been expelled from a professional association of insurance brokers two years ago, for defrauding another client. Elaine had withheld this information from Diane and WYZ, however Elaine's expulsion had been widely reported in the insurance press at the time.

(a) Explain, with justification, why WYZ may be entitled to cancel the policy. (12)

(b) Explain, with justification, why WYZ may be entitled to refuse to pay the claim, if the attempt to cancel the policy is unsuccessful. Refer to **one** relevant case in support of your explanation. (8)

Question deconstruction

- Review Learning Outcome 7 in the course material.
- Highlight the instructions within the question (which are circled in red above).
- Consider the circumstances very carefully. There has been an act of fraud but the focus here is on the insurer's repudiation of the claim which is being disputed.

Answer plan

- Before planning your answer refer to the four stages outlined in the M05 top tips in the answer M05 template.
- You are required to explain with justification the entitlement of the insurer to cancel the policy. Identify the relevant area of law-what is the intended focus here? The facts state that Elaine is a joint policyholder so is this question about joint policies only rather than

joint and composite policies? Define both types in outline.

- Consider the relevant law. The *Arab Bank plc v Zurich Insurance Co.* (1999) case indicates policy wording may not be conclusive and that the court may decide the nature of the policy.
- Applying this case it would be necessary to consider both joint and composite policy situations in both parts with the focus on joint in (a) because of the nature of partnerships.
- The focus here is on the nature of the policy but in considering that other topics such as disclosure and knowledge need to be mentioned.
- Knowledge is likely to be a particular issue in (b).
- Conclude that despite the facts the nature of this policy is ultimately matter for the courts.
- As this is a 20 mark question, your answer should be more detailed than the answer to a 10 mark question but less detailed than the answer to a 30 mark question.

Question 9 - Across more than one Learning Outcome (30 marks)

You are an insurance broker. One of your clients, Chris, is a builder.

Chris had undertaken building work for one of his customers, Julie, at an agreed cost of £5,000. Julie was unable to pay Chris the agreed cost in a single payment. They had agreed that Julie should pay Chris in five monthly instalments of £1,000.

Subsequently Julie tells Chris that she will not be able to make any of the monthly payments. Chris then agreed to accept Julie's car, valued at £4,500 to pay the debt, together with Julie's car insurance policy, underwritten by QSR plc (QSR), an insurer.

Chris approaches you for advice and you establish the following:

- Whilst driving the car, Chris has hit a parked car owned by John.
- Chris believes that John's car was poorly parked and partially blocking the road.
- The repair bill, sent by John to Chris, for the damage to John's car, is £2,000.
- Chris had sent the repair bill to QSR under Julie's policy.
- QSR had replied stating that Chris is not insured under Julie's policy because it covers Julie and name drivers only, which does not include Chris.

Chris wishes to know whether QSR should pay the repair bill.

Chris says that, unless QSR pays the repair bill, he will demand the £5,000 from Julie. He states that the agreement to accept the car was never put in writing and the £4,500 value is less than the debt of £5,000, so the debt cannot be discharged. He also states that he believes that the damage to John's parked car was due to its poor parking.

(a) Explain, with justification, whether QSR are legally obliged to pay Chris' motor insurance claim. Refer to **one** relevant case in support of your explanation. (10)

(b) Explain whether there may be grounds upon which Chris might reduce his liability for damage to John's car. (8)

(c) Explain, with justification, whether Chris is still legally entitled to the amount of £5,000 that Julie owes him. Refer to **two** relevant cases in support of your explanation. (12)

Question deconstruction

- Review the relevant Learning Outcomes in the course material and the relevant information in the study text. Identify those areas which are in issue here and the relevant law.
- Highlight the instructions within the question (which are circled in red above).
- Consider the context which provides various clues to the different parts of the question.
- Apply the law as identified above appropriately in terms of detail and e.g. the number of cases required.

Answer plan

- Before planning your answer refer to the four stages outlined in the M05 top tips in the answer M05 template.
- There are three parts to this question. You are required to explain the legal obligations for each part and to explain the legal principles involved in each.
- Note the clues to the detail of each explanation provided by the mark allocation which is different between parts (a), (b) and (c).
- As this is a 30 mark question, your answer should be more detailed than the answers to 10 and 20 mark questions.

Glossary of key words

Analyse

Find the relevant facts and examine these in depth. Examine the relationship between various facts and make conclusions or recommendations.

Describe

Give an account in words of (someone or something) including all relevant, characteristics, qualities or events.

Discuss

To consider something in detail; examining the different ideas and opinions about something, for example to weigh up alternative views.

Explain

To make something clear and easy to understand with reasoning and/or justification.

Identify

Recognise and name.

Justify

Support an argument or conclusion. Prove or show grounds for a decision.

Recommend with reasons

Provide reasons in favour.

State

Express main points in brief, clear form.