Notes on Thematic Questions on the 2024 Sample Exam
Caroline Bradley

1 Discuss (with examples) whether the contract law you have learned this semester rewards or penalizes opportunistic behavior.

The Merriam Webster dictionary defines opportuinism as follows: the art, policy, or practice of taking advantage of opportunities or circumstances often with little regard for principles or consequences.

This suggests the idea of using contract law in a way that benefits you, and taking advantage of the rules in ways that undermine the point of contract law. This raises the question about what the point of contract law is. Some options are economic efficiency; making people keep their promises (society works better if people keep their promises, because this encourages trust); legal certainty. Whatever the underlying reason the idea of pacta sunt servanda ((contractual) promises should be kept) is a fundamental principle of contract law.

You might distinguish contractual promises from the sort of promises that aren't contractual. So, for example, we read Marvin v Marvin and Tompkins v Jackson, two decisions that show a very different approach to the idea of promises within non-marital cohabiting relationships. We could argue that the women in these cases might be seen as acting opportunistically in the sense they are trying to enforce as contractual bargains promises that aren't really contractual at all. But the courts in California and New York saw these cases quite differently: the California court was willing to think in terms of contractual obligation, whereas the New York court was not, given that New York had abolished common law marriage.

A number of the restitution cases seem to me to involve opportunism: Baer v Chase (the prosecutor and the Sopranos); Apfel v Prudential Bache Securities (the firm trying to back out of the deal claiming the idea was not novel so there was no consideration, after had seemed to think it valuable for a while); Tasini v AOL (when Huffington Post turned out to be valuable bloggers tried to get a share of the proceeds). In these cases the claims were rebuffed, suggesting, perhaps, a dislike of opportunism. We also saw that volunteers/ officious intermeddlers don't get a restitutionary remedy, as in Brady v Alaska, although doctors are different, as in Cotnam v Wisdom.

If I were answering this question I would be inclined to think about situations where parties seem to be trying to get out of contracts because they have changed their minds about whether the deal was a good one for them. One example would be Fiege v Boehm. This case could suggest opportunism on both sides: the mother trying to get payments from a person who was not in fact the biological father, and the non-father who agreed to make the payments trying to get out of the contract on the basis he was not the father (the court holds that forbearance to assert an invalid claim, if there is an honest and reasonable belief in its validity, can be consideration).

In the remedies area, I think we saw a number of examples of ways in which the law constrains opportunism. Damages should be real and not speculative, and should be proved with reasonable certainty (e.g. Vanessa Redgrave, Mindgames). The breach of contract should be the cause of the damages claimed (Paris Hilton). Those claiming damages should be required to mitigate damages (Michael Jordan; Shirley Maclaine). These mitigation of damages cases could provide a nice contrast. In both cases the claimants try to argue that they should receive the full promised amount of money, and the results in the 2 cases are quite different (although the facts are also different).

Mostly I think the examples we have seen are of courts declining to allow people to behave opportunistically (we began the course with Lucy v Zehmer), rather than penalizing opportunism. But the Diasonics case looks like an example of penalization: the attempt to recover the deposit was met with a successful lost volume seller claim resulting in the need for Davis to pay more than $150,000 on addition to forfeiting its deposit.

2. Is contract law fair?

This question could be answered with much the same material you could use to answer the other question. To the extent that contract law allows people to behave opportunistically I would argue it is not fair. But the idea of fairness is also broader than this. We could ask what it would take to make contract law fair. I think predictability of the law and its application is a component of fairness: if people act believing that the law will apply to their circumstances in one way and the law produces a different result there is an argument that the law is not fair, or not being applied fairly.

So examples of situations where we can't really predict how the law will apply might

cause problems for fairness. Cases involving promissory estoppel claims raise this issue of uncertainty. Where there is a focus on providing remedies for particular situations in order to do justice there's a question whether it's fair to the party required to pay the remedy. The possibility of uncertain risks of liability has implications for how people organize their activities.

The cases on impossibility, frustration, and impracticability seem rather random to me, and an example of how contract law sometimes seems to be very fluid. This fluidity can seem like a good thing to provide remedies in a particular case, based on the particular facts of the case, but to the extent that certainty is a component of fairness there are some issues with this fluidity. An example of a complicated case for me is Kel Kim, where the court said that the need to get insurance was foreseeable, but where the reason for the difficulty in obtaining the insurance was an insurance crisis, which seems to me to be different from the normal sorts of issues about whether a person or firm can obtain insurance (which may relate to their own history/attributes).

You could think about the situations in which we particularly focus on fairness rather than on neutral issues like was there a contract, was there breach etc. The cases involving misrepresentation, mistake, duress, and undue influence are really about whether a person should be treated as having freely agreed to this contract. But there are other situations where we hold people to contractual terms they did not in fact really agree to (Carnival, ProCD).

The area of remedies involves both an attention to issues of fairness (e.g. foreseeability of damages, causation, no speculative damages) and situations where we might wonder whether fairness is really achieved (is specific performance subject to too many restrictions?). The approach to liquidated damages is a remedies-related example of the tension between ensuring that the damages provided for are not set at too high a level (one idea of fairness) and enforcing the contracts parties agree to (certainty).