**SUMMARY QUESTIONS**

**ESSAY QUESTIONS**

1. ‘The fiduciary and contractual duties implied into the contract of an agent are fair, albeit they are demanding.’

Discuss.

**Indicative content outline answer:**

* The duties were introduced to protect innocent third parties.
* The fiduciary duties are imposed due to the nature of the relationship between the agent and principal, and the authority the agent exercises for the principal.
* If a breach of the duty is discovered, the principal may seek to recover any secret profit made by the agent, and / or any bribe that has been paid. In such a situation the principal may seek damages for the fraud committed. The principal may have the option to refuse to pay the commission or salary of the agent. The agent’s contract with the principal may be terminated, and the agreement with the third party may be rescinded. The use of these options is determined by the courts depending on the actions of the parties and what is fair and reasonable in the circumstances.

#### *Duty not to take Bribes*

* One of the most important duties placed on an agent is to ensure that they do not take bribes in the exercise of the authority for the principal.
* Good faith requires that the agent acts in the best interest of the principal rather than the agent’s benefit.
* Accepting bribes is not confined to money, but could include free samples for the agent, the agent being invited to hospitality events or any other gift in kind.
* Where the principal discovers the bribe they may terminate the arrangement with the agent and recover any commission paid; recover the bribe provided; consider the bribe to be held by the agent on trust (*Attorney General for Hong Kong v Reid*); recover damages from the third party that provided the bribe for any losses attributable (rather than recovering the bribe); and they may rescind the contract between the principal and the third party.

#### *Secret Profits*

* The agent must ensure that the profits accrued from the agreement(s) with the third party are agreed between the agent and principal.
* The agent should not make a profit that has not been previously agreed (such as the agent’s commission / salary). This may be particularly so when the agent is asked to dispose of goods and they do so at a higher price than requested by the principal (and they retain the ‘extra’ amount), or the agent uses the principal’s property for their own purposes.
* These situations do not have to cause the principal any loss, but it is the abuse of the position of trust and authority that is at issue. Where an agent has made a secret profit but has not been dishonest the court will usually award the principal with the profit rather than impose more harsh penalties.

#### *Avoid a Conflict of Interest*

* The agent must also not allow their own interests to conflict with that of the principal. The agency agreement is predicated on the basis of the agent acting in the best interests of the principal, and this is the case even where an agent acts, but not with the intention to defraud or mislead the principal, and there is the appearance of a conflict.
* Where a conflict of interest may arise, the agent should offer a full disclosure to the principal so an informed choice may be made (*Armstrong v Jackson)*.

#### *Duty to Account*

* The agent must maintain adequate records of their dealings on behalf of the principal and to make these available for inspection when requested.
* As agents may work under the authority of several principals it is their duty to maintain records in a manner that allows for the separation of the principals’ accounts. This is the case where information is maintained in computer form (on a database for example) and the principal is entitled to view their own accounts. Where the agent cannot separate the principal’s accounts, the principal is entitled to see all of the accounts held by the agent (*Yasuda Ltd v Orion Underwriting Ltd*). This further has an impact on the agent’s duty of confidentiality, and the continuing nature of this obligation following the cessation of the agency agreement (*Bolkiah v KPMG*).
* The rights of the agent may be raised such of indemnity; payment; and lien.
* The agent also has rights and protection when the relationship is terminated at common law and through the 1993 Regulations.
* Therefore, the rights are largely fair, and have been subject to protection through judicial intervention and the actions of the EU.

2. ‘The creation of agency by operation of the rules of common law are dated but still are considered good law.’

Discuss the above in relation to necessity and cohabitation.

**Indicative content outline answer**

* Necessity – Where the agent acts in relation to necessity (for example, protecting property owned by the principal), then the courts may bind the principal in the actions of the agent even though they have no actual or apparent authority to act in the particular way.
* These cases have often occurred in emergencies at sea or where perishable goods are involved.
* The requirements to bind the principal in this way involve satisfying the following criteria:

1 The agent must have had responsibility for the control over the property belonging to the principal.

2 It was not possible for the agent to discuss the issue with the principal and gain their instructions as to the action to be taken.

3 The situation must be considered an emergency.

4 The agent must have acted in good faith.

* In Springer v Great Western Railway the agent was not permitted to sell tomatoes (when engaged to carry these). However, due to weather and transport problems the agent did sell the goods on behalf of the principal as the tomatoes were perishing in the heat. This had occurred on land and it was possible and reasonable for the carriers to contact the principal and obtain his instructions before taking the action. Therefore, it was held that such a situation did not amount to an emergency and was an unauthorized act.
* Identify and explain the nature of communication in this context.
* Agency through co-habitation is presumed where the man and woman are residing together in the household. This is the case where they are living as husband and wife – even where they are not. However, there are limits to where the presumption between the couple will exist (*Debenham v Mellon*).
* The presumption enables the woman (for example) to purchase necessities on the man’s credit. However, this remains a presumption. Like all presumptions, it may be superseded through an express instruction to the contrary or some other reasonable indication – e.g. where the order of goods on the man’s credit was excessive (*Miss Gray Ltd v Earl Cathcart*).
* Whilst these topics are still ‘good law’ their practical effects due to the movement of society and relationships is limited.

**PROBLEM QUESTIONS**

1. James operates a business, All Bright Consumables (ABC), which trades in DIY goods to electricians and traders. As James is expanding his business in other areas and has become too busy to manage ABC personally, he appoints Brenda to manage the operation. Brenda is engaged on a three-year fixed-term contract with payment by commission of 7 per cent of the sales the business makes. One stipulation James makes as part of the agreement with Brenda is that Brenda does not deal with ABC’s major rival business, XYZ.

At the beginning of the engagement, all parties are happy as business is good. However, soon afterward the economy begins to move into recession and business slows. The result is Brenda’s commission from sales is dramatically reduced and despite her pleas to James to increase her rate of commission, James refuses. Brenda is soon approached by XYZ who offer her a business opportunity. If she agrees to sell XYZ’s electric shower for them to ABC customers, they will deliver the showers to the customers directly from XYZ’s warehouse. As this will be ‘their little secret’, James need never know and XYZ will give Brenda 30 per cent of the profits from the sales.

Sometime later, James is at a trade event where he is approached by an acquaintance who expresses to James his disappointment at the quality of the showers they are now selling. Further, he informs James that due to this choice of poor quality components he has had to suggest to his customers that they do not purchase from ABC. When James enquires about his acquaintance’s concerns, he is shocked to discover that the showers are from XYZ. James immediately challenges Brenda about the truth of this situation, which she confirms. Brenda also says that she has had several customers return the showers as being of very poor quality and wanting a refund as they purchased them from the ABC store. Further, XYZ are refusing to accept any returns.

Explain the legal position of the parties using agency law.

**Indicative content outline answer:**

* The first element to consider in the answer is the issue of express / actual authority.
* Agency agreements are very easy to establish. They may be formed through a contract (although in most situations this is not necessary) or through verbal agreement. However, where an agent is appointed to execute a deed (and have a ‘power of attorney’), under common law, they must be appointed by deed. Further, an agency agreement can be established implicitly where the intentions of the parties provide guidance as to the true relationship. Finally, agency may be imposed on the parties by statute, through necessity, and through cohabitation.
* The authority for the agent to act on the principal’s behalf may be based on ‘actual’ authority provided (either expressly or through implication); it may be ‘apparent’ through a representation made to the third party; it may through the principal’s subsequent ‘ratification’ of the contract; or the authority may have derived through ‘necessity.’
* Note, the classic principle that to create obligations under agency required the representation of this relationship to have derived from the principal and not the agent has been weakened, especially through the concept of apparent authority. Where the agent has authority from the principal to contract, the third party may rely on this in his/her enforcement of a contract.

***Actual Authority***

* When expressed, there is an agreement between the principal and the agent as to the powers that the agent will have to bind the principal (for example the owner of a shop may inform the shop assistant that they have the right to sell the goods in the shop for the price identified on the ticket). As with other types of express agreements, this can be established in words or writing (through a contract and this may be preferable to clearly identify the extent of any authority).
* There also exist situations where the authority may have been provided through implication due to the relationship / conduct between the agent and principal (*Hely-Hutchinson v Brayhead Ltd).*
* Implied authority may also have the effect to broaden powers already provided (*Waugh v HB Clifford and Sons Ltd*).
* The contractual obligations applicable to the agent, such as instructions on how to act and the extent of their authority should be raised and discussed in the context of the breach (of authority).
* An obligation to obey lawful instructions: An agent may have agreed with the principal the parameters of the (actual) authority, and these may have been established in a contract. Where this is so, a failure on the side of the agent to follow the requirements of the contract will amount to a breach, even if this was performed in good faith. Therefore, even if, in not following instructions, the agent considered his/her actions to be the most appropriate course for the principal, a breach is still committed.
* Finally, the following issues - no profit / none competing duties – damages to principal / third party for breaches should be discussed in the context of the question.

2. ABC Ltd operates a business of selling specialist cars and difficult-to-source car spares to customers and at auctions. It manages this through engaging representatives for regions around the UK who source the goods on behalf of ABC Ltd. ABC Ltd appoint Billy as its representative for the North West of England, on contractual terms of a three-year irrevocable engagement, where he will receive a commission of 35 per cent of the profits made by ABC Ltd on the sale of the goods he acquires. An important aspect of the contract is that Billy is instructed not to obtain Ford cars or spare parts as these can prove difficult to sell. Billy is issued with a letter of introduction from ABC Ltd identifying him as the company’s ‘associate for the North West.’

Two months after his engagement began (on 5 July), Billy was approached by Stock-Cars who informed him that they had a mint-condition 1967 Ford Mustang, which was currently on display at the National Museum of American History until 2 November, which he could buy for £25,000. In the negotiations with Stock-Cars, Billy identified that he was acting on behalf of ‘a specialist car-buying company’ and that ‘his principal will wait until the conclusion of the exhibition before taking delivery of the vehicle’. Billy and Stock-Cars agree that payment in full will be made within 30 days of 2 November when the vehicle is available. Having concluded the deal, on 8 July Billy reaches an agreement to sell the vehicle to Jack Vegas, a specialist car enthusiast, for £40,000, with delivery being made on 5 November. Billy intends to keep the profit made as ‘a perk’ by not informing ABC Ltd of the deal.

Soon after the meeting on the 8 July, Jack Vegas spoke with Stock-Cars about another vehicle he was interested in, and mentioned the car he had agreed to buy from Billy. Stock-Cars thus realized that they had sold the Ford Mustang too cheaply, and having investigated Billy and found that the ‘specialist car-buying company’ he worked for was ABC Ltd, they informed ABC that they would not proceed with the sale. On 9 July, in an attempt to secure the profitable sale to Jack Vegas, ABC Ltd informed Stock-Cars that they refuse the repudiation of the contract made with Billy, and insist on delivery as agreed.

In relation to the agency principles applicable to the problem, identify the rights of the parties.

**Indicative content outline answer:**

* Define agency - The agent’srole is to act on the principal’s behalf, in establishing contracts, for example, and when the agent has the required authority to act in this way, the contract will not be considered to bind the agent and the third party, but rather will bind the principal and the third party.
* Billy as a special agent - Special agent: Denotes a similar form of agency agreement but the agent is only authorized to perform a particular act.
* Valid agency relationship established between the parties.
* Possible apparent authority. Apparent authority exists outside of the actual authority previously identified. Whereas express and implied authority derives from the agreement between the principal and agent, apparent authority is applicable where the principal (or someone acting for them) has represented to the third party that the agent has the authority to act on their behalf.
* The consequence is that where the third party has been given this impression of authority of the agent, an agreement that is subsequently concluded between the agent and third party may bind the principal, who is unable to deny the representation made.
* To establish apparent authority, the following criteria must be demonstrated:

1 There must have been a representation regarding the person as an agent.

2 The principal must have conveyed this representation (or someone acting on their behalf).

3 The third party must have acted based on this representation.

* Ratification of agent’s actions (*Bolton Partners v Lambert* [1889]).
* Ratification must be in reasonable time – *Metropolitan Asylum Board v Kingham* (1890) – 10 days was too late to ratify.
* Billy is unable to keep the profit – equitable principle that agents / trustees may not retain a profit made in the course of, or by means of their office – *Phipps v Boardman*.