Examiners’ report 2013

LA1040 Elements of the law of contract – Zone A

Introduction

Many candidates answered the questions well. At times, however, some candidates struggled. There were three common difficulties. The first was fundamental: an inability to recognise that certain areas of law were involved in resolving the problem. Candidates might, for example, fail to recognise that when asked to advise party C given a contract between A and B (for the possible benefit of C) that the primary issues involved were privity of contract and the rights of third parties.

A second difficulty was not carefully considering the facts presented in a problem question. The resulting legal reasoning was often not directed at the given issues. In some instances, a general discussion of a particular area of law was presented, but without any attempt to apply this law towards the resolution of the problem given. In other instances, candidates discussed, and attempted to apply, law which was irrelevant to the issues raised in the particular problem.

A third was an inability to recognise the particular and specific issues involved within a broad area of law which the candidate had recognised as relevant. At times, this problem seemed to arise because candidates appeared to be covering legal issues which had formed examination questions set in previous years. Some candidates, in other words, appeared to be reproducing answers to past examination questions. The purpose of the Examiners’ reports is to give an indication of a method by which particular questions can be answered and some indication of the law necessary to answer these questions. The reports are not intended to form a base of specific knowledge which is to be recited as the answers to future examination questions.

It is extremely important that candidates apply the law to the issues presented in a problem. Such an answer displays not only knowledge, but also understanding of the subject being examined. Candidates should consider the principles developed within the relevant cases and the reasons behind these particular principles. These must then be applied to the problem to resolve it. For many candidates, however, their answer to a problem question resembled a ‘shopping list’ of cases. The recitation and discussion of cases which are irrelevant to the question only highlights a candidate’s uncertainty as to which issues are involved in the question.

In other instances, answers appeared chaotic, as if the candidate had hurried into an answer without full consideration of the question as a whole. Candidates who prepare a careful plan of their answer before writing it in full will find that the time spent in making such a plan is repaid by the clarity of the final answer. Amongst other things, this approach allows candidates to see the interaction of issues before they have committed themselves to one course or another. It should also prevent candidates from omitting points they had intended to discuss. Many candidates struggled to answer essay questions thoroughly, often reciting everything they knew about a particular subject. This shows an inability to discern the relevant from the
irrelevant and a lack of analysis as to the underlying nature of the question. Candidates must consider whether or not they are addressing their answer to the question asked. A part of this answer will, necessarily, involve legal analysis.

In other instances, candidates were unable to answer the question asked and attempted to adapt the question to a topic that they did know something about. This results in low marks and also leaves the Examiners with the impression that the candidates are unable to answer four questions from the examination paper.

Finally, many candidates suffered from an inability to budget their time. In these instances two or three good answers would be followed by a weak (and in some cases non-existent) effort to answer the rest of the paper. A number of candidates did not appear to have sufficient knowledge of contract law to attempt four questions.

Lastly, the Examiners wish to emphasise the importance of using clear handwriting.

---

Specific comments on questions

Question 1

On the 2\textsuperscript{nd} of April, an announcement appears in the newspapers to the effect that shares in Digger, a gold exploration company, may be subscribed for £5 each.

Later that day Goldbug sees the announcement and fills in the application form in the newspaper requesting 1,000 shares. His application is received by Digger the following day and the Company Secretary promptly sends the share certificates to Goldbug by that morning's post. However, Goldbug changes his mind and on the same afternoon (the 3\textsuperscript{rd}) he posts a letter, withdrawing his application to Digger.

During the day a rich seam of gold is discovered by Digger in Cumbria and the Company Secretary telephones Goldbug informing him that they do not wish to accept his application and would like him to return the certificates when they arrive.

By the time he receives the Secretary’s request, Goldbug has heard of the gold discovery and wishes to buy the shares after all.

Advise Goldbug.

General remarks

This question is concerned with the formation of a contract and, in particular, the effect of the various communications between Goldbug and the Digger company. Has Goldbug a contract for the purchase of shares from Digger?

Candidates needed to ascertain the requirements necessary for an offer applying the criteria established in cases such as \textit{Storer v Manchester City Council} (1974), \textit{Gibson v Manchester City Council} (1979) and \textit{Centrovincial Estates v Merchant Investors Assurance Company} (1983). If an offer was made, at what point was it made? Candidates needed to apply the legal criteria to the facts provided to resolve this question. Digger’s advertisement is likely an invitation to treat but Goldbug’s completion of the form and payment is likely an offer. An offer, to be effective, must be actually communicated to the offeree (see, for example, \textit{R v Clarke} (1927)).

It is said that a contract requires an acceptance of a particular offer and the next issue which arises is whether or not Goldbug’s offer is accepted. In other words,
when the Company Secretary posts the share certificates to Goldbug in the morning post, is this an acceptance of Goldbug’s offer? An acceptance takes effect upon communication but there are exceptions to this rule. One of these exceptions is the postal acceptance rules and candidates needed to consider whether or not the Company Secretary’s posting of the share certificates is within this exception. The rules surrounding postal acceptance need to be analysed and applied to this situation to resolve this issue. While many candidates simply referred to the decision in Adams v Lindsell (1818), a detailed consideration of the decision in Household Fire Insurance v Grant (1879) repaid the effort expended given the factual similarities between that case and the facts provided. Many candidates considered and referred to the later decision in Holwell Securities v Hughes (1974) in order to develop a critical decision of the utility of the postal acceptance rules in an area of instantaneous, and near instantaneous, communications.

The next issue presented by these facts is Goldbug’s next action when he then purports to revoke his offer. Is this valid? If so, why is it valid? If the postal acceptance rules apply on the basis set out above, a valid contract is formed when the Company Secretary posts the share certificates with the result that Goldbug cannot now purport to revoke his offer because it has been accepted and a contract formed (see, for example, Byrne v van Tienhoven (1880) for such reasoning). This is not a case in which Goldbug attempts to use a quicker method of revoking his posted offer (and thus the reasoning in Dunmore v Alexander probably does not assist greatly in the resolution of this point).

In addition Digger has attempted to withdraw its acceptance after it was posted but before it is reached by Goldbug – is this attempt effective? In this instance the offeree’s change of mind is communicated to the offeror using a faster method of communication. There is an absence of English authority on this point although the decisions in Dunmore v Alexander (1830) (Scotland) and Wenkheim v Arndt (1873) (New Zealand) are of persuasive effect in England. These are not, however, binding decisions and candidates are best advised to consider this as a matter of principle. To this end, Treitel suggests that ‘the issue is whether the offeror would be unjustly prejudiced by allowing the offeree to rely on the subsequent revocation’.

In this question, it is particularly relevant that when the Company Secretary has telephoned Goldbug, Goldbug has already posted his own revocation. It seems unlikely, as a matter of policy, that a court would wish to allow him to revoke the revocation in light of the gold discovery.

**Common errors**
Reciting as many case names as possible without any attempt to analyse the cases and apply the criteria to the facts presented in the problem. This was particularly unfortunate where the cases recited were in no way relevant to answering the particular issues raised in these facts.

**A good answer to this question would…**
Take a critical view of the various rules presented by the cases concerned with offer and acceptance to reach a more principled result in this case.

**Poor answers to this question…**
Displayed an inability, or a reluctance, to identify and isolate the relevant issues presented by the facts given.

**Student extract 1**
This candidate began their answer by stating that the question was concerned with ‘whether there has been a contract formed between Goldbug and Digger’. The candidate then continued in the next paragraph to state that:
‘the first element which the court may consider is whether the advertisement which has been read by Goldbug amounts to an offer or an invitation to treat. An offer is an expression of willingness to contract on certain terms which [is] in turn accepted [and] must be acted upon by the offeror while an invitation to treat is when some kind of transaction involves a preliminary stage which one party invites the other to make a proposition. The answer then continued to explain and consider how these statements of law were established by the decisions in Storer v Manchester City Council and Gibson v Manchester City Council.

Comment on extract 1
This extract demonstrates a good introduction to answering the question set. The principal question to be addressed was set out in the first paragraph and the relevant issues correctly identified. The candidate then successfully identified that the first issue (or element) to be addressed was the effect of Digger’s announcement in the newspaper. The candidate set out the possible effects as either an offer or an invitation to treat and succinctly summarised what each was and how they were distinct from each other. The relevant cases establishing these propositions were then discussed and applied to the particular facts given, with the correct conclusion reached – namely, that the announcement could not be an offer.

Student extract 2
The candidate began by stating that the question involved issues concerned with contractual formation and then outlined Goldbug’s request for 1,000 shares. The answer then stated that:

this offer by Goldbug may be said to be not accepted as the facts show. When the secretary posted acceptance it may be said that the contract is made. The general postal rule states that the offer is accepted when the post is sent (Alder v George). However, if the court is persuaded to apply the permissive rule stated in Shuey v USA – which states that the post when received will constitute as an acceptance – then it may be established that the offer is not accepted by the Digger and thus, no contract is formed.

Goldbug withdrew his offer before receiving the Digger’s post. If the rule in Shuey v USA is applied then there is no breach of contract by Goldbug. However if the general postal rule – as mentioned above – is followed then Goldbug will be held liable for a breach of contract.

The situation gets even more confusing as Digger’s acceptance is not yet received by Goldbug and Digger withdraws its acceptance.

Comment on extract 2
In contrast to the first extract, there are a number of unfortunate difficulties apparent in the second extract. The candidate’s grammar is weak, a fact which mars the candidate’s answer as the attempt lacks clarity and precision. The candidate applies the postal acceptance rule without considering the circumstances in which this rule is applied or that the rule is actually an exception to the general rule that only a communicated acceptance creates a binding contract. An uncertain grasp of the law is then presented when the answer cites the wrong authorities and, in so doing, attributes propositions to them which these authorities do not support. The answer also displays certain confusion as to what is necessary to form a binding contract and when this contract would be formed. The same confusions were repeated throughout the answer and the candidate concluded with an erroneous statement, namely, that Goldbug would be entitled to succeed in a claim for the specific performance of the contract. Altogether, so little knowledge and understanding of the law surrounding contractual formation was displayed that this candidate received a fail mark.
Question 2

Robbie runs a fairground, Toppers, and hires a big dipper from Fred for £3,000 per annum. Times are tough, however, and the bad weather has affected business at the fairground. Robbie asks Fred whether he can have a reduction in rent until he gets on his feet again. He intends to use the money, thereby saved to advertise the fairground more widely. Fred agrees to reduce Robbie’s rent by £1,000 per annum until business improves. Delighted, Robbie immediately spends £1,000 on advertising, in the hope that it will attract more visitors. However, Fred now regrets his promise and demands that Robbie pay him the full amount of rent.

Spooks operates the ghost train at the fairground and receives a 50% share of the ticket sales. He wishes to buy his wife a new car and needs some extra cash. He telephones Robbie and asks him to increase his share of the ticket sales to 75% for a twelve-month period. Ghost train operators are specialists and extremely hard to find. However, although Robbie does not want to lose Spooks, he will find it a financial strain to fund the higher commission rate. Robbie asks Spooks if he can think about this request for a few days. Spooks agrees. The next day, however, Spooks gets an offer from another fairground, offering a 75% share of the ticket sales to run their ghost train. He goes to Robbie’s home and threatens to quit his job unless Robbie gives him the 75% share of the ticket sales. Robbie agrees. Three months later he tells Spooks that next month he will return to the 50% share of the ticket sales.

Robbie asks his cousin, Claude, who is a carpenter, to paint the big wheel. He has often asked Claude to do jobs around the fairground and always pays him. When Claude finishes, Robbie is delighted and says that he will pay him £350. However, following a family argument, Robbie now refuses to pay him.

Advise Robbie.

General remarks

This problem question contains three parts. Each part deals with issues of contractual formation, namely whether or not consideration is provided. In one instance it is also relevant as to whether or not a promise unsupported by consideration might be binding according to the principle in High Trees House.

The first part of the question asked candidates to address the law relating to consideration and promissory estoppel. Candidates needed to examine Fred’s promise to Robbie that he will reduce the hire fee of the big dipper from £3,000 to £2,000 per annum ‘until business improves’. The question requires a consideration and application of the criteria established in Central London Property Trust Ltd v High Trees House Ltd (1947) and subsequent decisions to the facts given. A good answer would also indicate that the effect of the decision in Re Selectmove (1995) likely means that there can be no consideration in the form of a practical benefit according to the reasoning in the decision of Williams v Roffey Bros & Nicholls (Contractors) Ltd (1991). The facts presented here (namely Fred’s demand that Robbie repay him) also indicate a further issue presented in relation to the principle in High Trees House – namely, whether the outstanding amounts are permanently extinguished or not. The decision of the Court of Appeal in Collier v P. & M.J. Wright (Holdings) Ltd (2007) is of assistance in considering this particular point.

The second part of the problem deals with the variation of a contract and whether consideration has been given for the modification such that the modification constitutes a binding contractual obligation. Candidates needed to discuss whether Robbie receives a ‘practical benefit’ that might constitute consideration in light of the decision of Williams v Roffey Bros & Nicholls (Contractors) Ltd (1991) and cases.
subsequent to this, notably Re Selectmove. A possible difficulty in the application of Williams v Roffey Bros & Nicholls (Contractors) Ltd (1991) is that Spook’s actions might constitute economic duress. Candidates needed to consider whether or not, according to the cases concerned with economic duress, that this was made out. If his actions constituted economic duress, it seems on balance that there is no practical benefit within the meaning of Williams v Roffey Bros & Nicholls (Contractors) Ltd (1991) although it could be argued, based on the reasoning and decision in Adam Opel GmbH, Renault S.A. v Mitras Automotive (UK) Limited (2007) that even in the presence of duress a practical benefit can exist.

Finally, the third part of the problem required candidates to consider whether or not there was an intention to create legal relations, given the relationship between Robbie and Claude (they are cousins). An additional difficulty here is that Robbie’s promise to pay Claude does not appear to be supported by consideration because the consideration is past. It is possible, though, that the promise fits within the exceptions to past consideration established by the criteria in the Privy Council’s decision in Pao On v Lau Yiu Long (1980). A good attempt to answer the question would consider the conceptual links between consideration and an intention to create legal relations and the practical ramifications of these contractual doctrines in this case.

**Common errors**
Reciting every major case concerned with consideration and promissory estoppel without an examination of how, or why, such a case would be relevant to the particular problem given. Such an error indicates a poor understanding of the relevant law and how to apply it to the given facts.

**A good answer to this question would...**
Isolate the relevant issues from the facts given and resolve these issues through an application of the criteria in the case law to resolve these issues. A very good attempt to answer these questions would examine the underlying conceptual links between the different contractual doctrines presented by these facts and discuss these links in relation to the facts given.

**Poor answers to this question...**
Displayed an inability, or a reluctance, to identify and isolate the relevant issues presented by the facts given.

**Question 3**
Honey is planning for her wedding in August and decides to visit Romantic Weddings, a local shop that advertises itself as providing ‘Stress Free Weddings or Your Money Back!’ Honey is particularly attracted by the shop’s photos of romantic castles and lakes and asks Amir, the manager of Romantic Weddings, for more information about a possible venue for her wedding reception. Amir informs Honey that he can find her the perfect setting for a romantic wedding, adding that ‘the sweet singing of the birds will be the only noise to disturb the tranquillity of the day’. He suggests a venue, Dagenham Manor, and advises that Honey visit it so that she can appreciate the true beauty of the place for herself. Dagenham Manor is in Romstown, a town near to where Honey lives. Honey knows Romstown well and is surprised to hear that it would offer a tranquil and romantic location for her wedding. However, she notices that she will get special rates if she books that day and decides to book the venue immediately. Before paying, she asks Amir how many guests Dagenham Manor will hold. Amir has never visited the venue and rings a friend, Wayne, who had his wedding there last year. Wayne tells Amir that it holds about one hundred people and Amir passes this news
on to Honey. On hearing this, Honey is thrilled. She is expecting 80 guests and realises Dagenham Manor will be perfect. She goes ahead with the booking.

The wedding day is a disaster. Dagenham Manor is located on the junction of a busy motorway and the noise of the passing vehicles reaches unbearable levels. In addition, the venue is very small and can only accommodate 40 people. As a result, half of Honey’s guests are turned away from the venue. Amongst those prevented from entering is Mr Bee, Honey’s boss. He is so angry that he does not give Honey the wedding gift of £10,000 that he had promised her.

Advise Honey.

General remarks
This question asked candidates to consider and apply the law relating to misrepresentation. The problem is best dealt with by considering each issue in turn.

The first issue raised is whether Amir’s statements were warranties or representations. Candidates needed to consider and apply the criteria in the relevant cases (such as Heilbut, Symons & Co v Buckleton (1913), Oscar Chess Ltd v Williams (1967) and Esso Petroleum Co Ltd v Mardon (1976)). In this instance, it seems most likely that the statements are not warranties but are instead representations or puff.

The next issue raised is the importance of determining, through an application of the case law to the facts given, whether the statements are actionable as misrepresentations. It is particularly important to consider a number of statements made by Amir. These include the statement concerned with the beauty and tranquility of the venue: is this mere puff or actionable as a misrepresentation? Is the statement regarding the capacity of the venue an opinion? Is it an opinion which can be actionable as a misrepresentation? Did either of these statements induce Honey to enter into the contract? Does it matter that Honey could have verified and examined the statements by visiting Dagenham Manor? Very good attempts to answer this question could consider the effect, if any, of Romantic Weddings’ advertisement of ‘Stress Free Weddings or Your Money Back!’.

In the event that the requirements of an actionable misrepresentation can be met, candidates would then need to consider the remedies available to Honey. This, in turn, would depend upon the type of misrepresentation made by Amir. A good answer would focus on the advantages for Honey in pursuing an action under s.2(1) of the Misrepresentation Act 1967. A claim brought under this section is particularly advantageous for Honey for two reasons. The first is the difficulty Amir will have in showing that he had reasonable belief that his statement was true. The interpretation of reasonable within s.2(1) by the court in Howard Marine & Dredging v Ogden indicates the difficulties faced by Amir in this regard. A good answer would compare the complexity of Honey proving a negligent mis-statement or fraud at common law to the action brought under s.2(1) of the 1967 Act.

The second advantage to Honey in bringing an action under s.2(1) of the 1967 Act is the calculation of damages, particularly the possibility of claiming damages for unforeseeable losses. Candidates needed to consider Honey’s possible losses, including the loss of Mr Bee’s wedding gift. Can damages for such a loss be recovered under the statute?
Common errors
Not considering whether the statements were actionable as misrepresentations and simply discussing various types of misrepresentation.

A good answer to this question would...
Isolate the relevant issues from the facts provided, address these issues in turn and recommend that Honey bring an action under s.2(1) of the 1967 Act.

Poor answers to this question...
Set out everything the candidate knew about misrepresentation with little attempt to apply the knowledge to resolve the issues which arose from this particular problem.

Question 4
‘Equity provides various forms of relief in cases of mistake but it will not provide relief where the common law renders a contract void for common mistake. This is not a desirable result.’

Discuss.

General remarks
This question required candidates to consider the doctrine of contractual mistake and the different means by which law and equity respond to mistake. Mistake at common law, if operative, renders a contract void but equitable relief is more flexible and takes various forms. In particular, candidates need to consider the nature of equitable relief and how, if at all, this has been affected by the Court of Appeal’s decision in *Great Peace Shipping v Tsavliris Salvage*. Candidates also needed, given the wording of the question, to consider whether or not rescission in equity for a common mistake is a remedy which should be retained in English law. Note that candidates should provide an answer directed to the particular title set and not a general discussion of mistake in English law.

Common errors
An apparent inability to ascertain what the question called upon candidates to consider. Also, an inability to structure the answer – many attempts resembled shopping lists of major mistake cases with no attempt made to analyse the cases in relation to the title set.

A good answer to this question would...
Consider the nature of relief available in law and equity and how and why it differs. A very good answer considered whether or not this distinction can be maintained and, if not, how the common law should respond to a contractual mistake.

Poor answers to this question...
Consisted of recitations of everything the candidate knew about mistake. In some cases the material provided was largely irrelevant to answering the question. Discussions focused entirely, for example, on mistake of identity were misplaced.

Student extract
This candidate began their answer to the question by establishing that while the common law could find an apparent contract void for mistake, equitable relief for mistake could take one of three forms. These forms were rectification, a refusal to grant specific performance or rescission. These concepts were, for several pages, knowledgeably discussed, with appropriate consideration and employment of multiple cases concerned with each form of relief. The candidate then analysed the effect of the House of Lords’ decision in *Bell v Lever Bros* and Lord Denning’s consideration of this case in *Solle v Butcher*. It is at this point that the extract below appeared:
The decision of *Solle v Butcher* has influenced a lot of later decisions subsequently leading to the decision in *Associated Japanese Bank v Credit du Nord*. The flexibility in this case created tension over the relationship between mistake of law and of equity. This rancor led to the decision in the leading case of *Great Peace Shipping Ltd v Tslaviris Salvage (International) 2002* generally referred to as the *Great Peace*. This case involved two ships. One of the ships suffered very severe damages and it was feared that it might sink. The defendant was recruited to salvage the sinking ship. To this end they contracted the services of the Great Peace to act as a standby for the purpose of salvaging lives. At the time the defendant engaged the claimant he mistakenly believed that the ships were only 35 miles apart. Immediately after the signing of the contract it was discovered that the ships were over 400 miles apart. When they contacted a closer substitute ship, the defendant refused to honour his part of the bargain. The defendant during the trial proceedings argued that the contract was void for mistake at law and voidable in equity by reason of mistake. The Court of Appeal in their judgment reviewed the cases of *Bell v Lever Bros* and *Solle v Butcher*. The concept of equity was extensively evaluated both before and after the case. The Court found it difficult to reconcile the two and therefore the appeal was squashed. The ramifications of this decision are yet to be fully determined. The bottom line is if equity by virtue of this decision lacks the flexibility and latitude to provide relief, it is difficult to envision circumstances in which any contract will be affected as to the quality of the subject matter. The doctrine of the *Great Peace* has been applied in more recent decisions and the conclusion derived in that there is effectively no threshold or ambit for the doctrine of mistake.

In summary, therefore, as a means of conclusion, it is clear that an equity court can be in a position to rectify an agreement. It can also order or refuse to order specific performance and can also rescind a contract. However since the decision in the *Great Peace* it is clear that the capacity of an equity court to rescind a contract remains terribly in doubt. This is definitely an undesirable situation as the law should be consistent to ensure equity and fair play.

**Comment on extract**

The strength of this answer can be seen in the manner in which the underlying issues are considered in the above extract. The candidate successfully identified the tensions between the common law position and the equitable position. The answer observes that while some forms of equitable relief are not effected by the decision in the *Great Peace*, the ability to rescind a contract for a common mistake appears to have been removed. The candidate is critical about the current direction that the law appears to have taken in the *Great Peace*, a case applied and followed in subsequent decisions. The essential problem presented by the decision in the *Great Peace* – that it appears unlikely that a case of mistake can ever arise if the case is to be followed – is correctly identified. Although the candidate’s attempt to answer the question would have been strengthened by a more detailed examination of Lord Phillips’ judgment in the *Great Peace*, the attempt was given a high upper second class mark.
Question 5

‘Although the doctrine of privity is simple in practice, attempts to circumvent it introduced unnecessary complications into English law. The Contracts (Rights of Third Parties) Act 1999 has done little to simplify English law in this area.’

Discuss.

General remarks
This question required candidates to consider the doctrine of privity and the means by which its effects can be avoided. Candidates need to consider both how privity (and, really, the related rules concerned with damages) could be circumvented at common law and the nature of the rights which can be conferred under the Contracts (Rights of Third Parties) Act 1999. There have been sufficient cases decided pursuant to the 1999 Act that it was desirable for candidates to knowledgeably discuss these cases.

Common errors
Attempting to answer the question by paraphrasing, or even copying out, the Contracts (Rights of Third Parties) Act 1999. Not only was this an inadequate attempt to answer the question set but it resulted in attempts which displayed so little originality and thought on the part of the candidate that little in the way of marks could be given for the result.

A good answer to this question would...
consider the nature of privity and discuss the various means by which parties can, at common law, circumvent the operation of privity of contract or the rules concerned with damages (e.g. the Dunlop v Lambert exception) and assess the efficacy of these circumventions. A good answer would also attempt to address the issue of whether the 1999 Act, as interpreted by the cases, rendered the law more or less complex than it had been at common law.

Poor answers to this question...
either copied out the Act (see above comment) or simply provided a general discussion of privity of contract in English law without attempting to address the particular question set.

Question 6

Milo wants to landscape the garden of his house and requires a new lawnmower. He notices that the local garden supply shop, Lawnz, has special offers on garden equipment. He enters the shop and immediately notices a top-of-the-range lawnmower on display. A sign above it states ‘Special Offer! Terms and Conditions apply – ask within’. Milo asks the shop assistant, Sebastian, for more information. Sebastian informs Milo that the lawnmower is being sold at £200 (half the recommended retail price) and that the shop’s website gives full information on the terms and conditions of all the shop’s sales. Fearful of missing out on such a great bargain, Milo decides to purchase the lawnmower immediately. As he is waiting at the cash desk, Sebastian gives Milo a number of papers and informs Milo that he will find the lawnmower’s operating instructions amongst them.

Milo wishes to use the lawnmower that afternoon and consults the operating instructions as soon as he gets home. Amongst the papers he also finds Lawnz’ terms and conditions of sale. These include the following two terms:

1. Lawnz is not responsible for any damage whatsoever or howsoever caused when using its products.
2. Lawnz reserves the right to replace faulty products with a substitute of their choice.

Despite several attempts at operating the lawnmower Milo cannot get it to work. He takes it back to Lawnz where Sebastian does some electrical work on it. Unfortunately, Sebastian has done the work incorrectly and when Milo attempts to use the lawnmower again it explodes, damaging an expensive sculpture in his garden. Milo returns to Lawnz and demands that it replaces the lawnmower and compensates him for the damage caused by the explosion. Lawnz refuse compensation but offer to give Milo a replacement lawnmower. The replacement lawnmower is a second-hand one and of far inferior quality than the one originally purchased by Milo.

Advise Milo.

General remarks
This was a popular question and asked candidates to discuss the law relating to contractual terms. The following particular issues arose: first, whether or not terms were implied into contract; second, whether or not Lawnz’s terms had been incorporated into the contract; third, whether or not the terms were applicable to the circumstances that have arisen; and, fourth, the statutory regulation of the terms.

The first issue required a consideration of whether or not the contract contained terms implied by the Sale of Goods Act 1979, particularly s.14, which requires that goods sold by a seller in the course of his business be of satisfactory quality. Is the lawnmower purchased by Milo of satisfactory quality?

The second issue was whether terms have been incorporated into the contract. This required a consideration of the rules and case law relating to incorporation by reasonable notice. Two issues are relevant in such a consideration: the information from Sebastian that terms can be consulted on the website and the fact that the terms are handed to Milo – before purchase, but within the pack of papers given to him by Sebastian. A good answer identified that it was not clear that there were contractual documents within the pack of papers. If there were not, what effect would this have?

If incorporation can be established, it then needed to be established if the terms, properly interpreted, covered the liability that has arisen. Good answers discussed the approach of English courts to exemption (in contrast to limitation) of liability clauses (clause 1) and the approach to clauses which attempt to exclude or limit liability for negligence.

Candidates should then examine and apply the statutory controls (the Unfair Contract Terms Act 1977 (UCTA) and the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR)) and the cases which have interpreted these two pieces of legislation. In relation to the damage to the garden sculpture (and any attempt by Lawnz to rely on term 1), discussion of UCTA s.2(2) and the test of reasonableness under s.11 and Schedule 2 is relevant, as is case law that interprets s.11 (e.g. Mitchell v Finney Lock Seeds). Good answers also mentioned that although Schedule 2 only applied to ss.6 and 7 UCTA, it has been applied as a general guide to reasonableness (e.g. Granville Oil v Davis Turner). It also needed to be considered whether the UTCCR applies and, if so, whether term 1 might be considered unfair under reg.5(1) UTCCR.

In relation to the replacement lawnmower, and any attempt to rely on term 2, candidates needed to discuss whether the UTCCR apply and, if so, whether the term would be considered unfair under reg.5(1). Good answers should also consider whether term 2 falls within the indicative list of Schedule 2 UTCCR.
Common errors
Addressing only the first of the issues set out above – namely, whether or not the terms were incorporated into the contract.

A good answer to this question would...
set out the issues with clarity and apply not only the relevant statutory provisions to the terms in question but also undertake this application with a consideration of the cases interpreting the legislation. Good answers to this question would also address the question of which party bore the burden or proof in establishing reasonableness and unfairness.

Poor answers to this question...
recited, or copied out, the statutory provisions the candidate believed could be applied to the particular terms in this contract.

Question 7

Arthur was a supplier of horsemeat who was registered as required by the (fictitious) Horsemeat Supply and Distribution Act 2003. Arthur supplied 150 kilos of horsemeat to Beatrice for the agreed price of £400. However he did not include the statutory invoice recording the sale, as required by the Act since Beatrice had told him that, as between friends, such formalities were unnecessary. Beatrice now refuses to pay Arthur for the horsemeat.

Arthur delivered to Charles 1,000 kilos of horsemeat. The meat was accompanied by the required statutory invoice. Charles processed the meat and sold it as ‘organic beef burgers’. This misleads consumers who would not otherwise eat horsemeat for ethical reasons. Charles now refuses to pay Arthur.

Arthur delivered to Davina 20 kilos of horsemeat to be fed to her dogs. The delivery was not accompanied by the relevant statutory invoice, the horsemeat was tainted with bacteria and caused one of Davina’s dogs to fall seriously ill. Davina is required to pay £200 to the veterinarian to care for the dog.

Advise Arthur.

To what extent, if any, would your advice differ if Arthur’s registration had expired before the above transactions were entered into, although Arthur was unaware of this?

General remarks
This question, attempted by a good number of candidates, was concerned with illegality. The question called for a determination of the extent to which courts will enforce a contract despite the taint of illegality. Here the illegality is created by statute. The initial starting point in such an answer is to consider the purpose behind the statutory requirements. Following St John Shipping v Rank, the issue to be considered in relation to Arthur’s dealings with Beatrice, Charles and Davina is the purpose behind the statute. Is the statute intended to penalise conduct or to prohibit contracts? The question also contained a variant which must be considered – namely, what was the effect upon these transactions if Arthur’s registration had expired?

Arthur supplied Beatrice with horsemeat and failed to provide the invoice required by the legislation. Beatrice refused to pay him. Is the contract illegal as formed or illegal as performed? Would the purpose of the statute be furthered by denying Arthur the remuneration due under the agreement with Beatrice? Arthur may be able to recover on a quantum valebat basis for the goods supplied (Mohammed v
Alaga) but not if public policy would prevent such a restitutionary recovery (Awwad v Geraghty & Co). However, if Arthur’s registration had expired, the contract is illegal as formed and thus unenforceable by either party (Re Mahmoud and Ispahani, 1921).

Arthur’s supply of horsemeat to Charles was accompanied by the invoice but Charles used the meat for an illegal purpose. Is such a contract against public policy and within Pearce v Brooks (1866)? Is Arthur able to recover payment for the meat?

With regard to Arthur’s sale to Davina, Arthur has again failed to provide the statutory invoice. Here, however, Davina will seek to sue upon the contract. The question is, therefore, whether she (as an apparently innocent party) can maintain the suit. Courts are generally much more sympathetic to a suit brought by an ‘innocent’ party. See, for example, Archbolds (Freightage) Ltd v Spangletts Ltd (1961). Again, however, if Arthur’s registration has expired, the contract is illegal as formed and thus unenforceable by either party (Re Mahmoud and Ispahani, 1921).

Common errors
An inability to discern that issues concerned with illegality were relevant to answering this question.

A good answer to this question would...
set out the issues and apply the law with clarity to resolve the particular issues. A very good answer would analyse the underlying practice of the courts in an attempt to posit a rational solution to the issues posed.

Poor answers to this question...
simply set out various cases concerned with illegality upon contractual formation without any consistent attempt to resolve the particular issues posed by the problem.

Question 8
Miles, a famous television presenter, has decided to treat himself to a special teeth-whitening procedure at his dentist’s surgery, Smiles Ltd. He discusses the options with Roman, the dentist. Roman advises him that the bleaching powders, known as Bleachit, are the most time consuming treatment, but provide the best result. The procedure requires ten separate visits and, after the final visit, Miles will have permanently whitened teeth. Roman warns Miles, however, that it is only on the final treatment that Miles’ teeth will turn white, and that during the course of treatment Miles’ teeth will be yellow. The cost for the treatment is £3,000. Miles agrees to this procedure and pays £2,000 immediately. The balance is due at the end of the ten treatments.

Miles undergoes the first five treatments. He finds that his teeth start to go a very bright yellow. The day before Miles arrives at his sixth appointment, the results of an enquiry into the cosmetic surgery industry are published. The report reveals that the company that manufacture Bleachit have not followed the relevant safety procedures for licensing. The UK government therefore announce that Bleachit is to be banned from public use. Roman is rather glad about this news as Bleachit had recently increased their prices so much that he was operating at a loss on his clients’ treatments. He telephones Miles and informs him that he will not be able to continue with his treatment. Miles is furious. Unable to work with yellow teeth he is sacked from his job. He demands a refund and compensation from Roman.

Advise Roman.
**General remarks**
This question was concerned with the non-performance of the contract between Roman and Miles and the doctrine of frustration. The first issue concerns the UK government ban and whether this is such to frustrate the contract. Candidates should examine the cases that are relevant to determining the scope of frustration (eg. *National Carriers Ltd v Panalpina* and *Davis v Fareham UDC*). Relevant to the resolution of this issue was whether other bleaching products were available to finish the treatment or whether Bleachit was the only possible product.

If the frustration doctrine does apply in these circumstances, then candidates needed to discuss and apply the Law Reform (Frustrated Contracts) Act 1943 s.1(2), and the relevant cases interpreting it. Section 1(3) would be applicable to whether Roman can claim anything for the 'valuable benefit' conferred on Miles. The question would be whether yellow teeth would be deemed a valuable benefit under this section. In this regard the decision in *BP Exploration (Libya) v Hunt* is relevant and should be considered and applied.

If frustration did not apply in these circumstances, candidates needed to discuss whether Roman would be liable for breach of contract and whether Miles would have a claim for damages.

**Common errors**
Common errors exhibited in attempting to answer this question was to disregard entirely the possibility that the contract might have been frustrated.

*A good answer to this question would*... address the limited scope of the doctrine of frustration and the reluctance of courts to allow parties to escape from poor bargains.

*Poor answers to this question*... copied out portions of the Law Reform (Frustrated Contracts) Act 1943.