Examiners’ report 2013

LA1040 Elements of the law of contract – Zone B

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.

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**Specific comments on questions**

**Question 1**

On Wednesday Frederick advertised his Nikon D800E digital camera in the local newspaper for £2,000. George, on seeing the advertisement, called at Frederick’s house on the same day to see the camera. After discussion, Frederick offered to sell the camera to George for £1,500. George stated that he would need some time to think it over but that Frederick should assume if he heard nothing from George by Thursday evening, that George had bought it. Frederick replied that this arrangement was fine by him.

At 3pm Hari telephoned Frederick and offered to buy Frederick’s camera for £2,300. Frederick immediately accepted Hari’s offer and e-mailed George revoking his original offer. Unknown to Frederick and George, there was a problem with George’s internet service provider and the message to George was never directed to him. Although Frederick did not know this, he was worried about the matter and tried to telephone George again at 6pm. Frederick spoke to Isabel, George’s wife, and told her that the camera had been sold. Isabel said that she expected George home at 6.30pm and would pass the message on to him then. However, George had already decided to buy the camera and had faxed his acceptance to Frederick’s home at 5.15pm. Frederick did not read George’s acceptance until 6.30pm. George came home at 7.15pm and Isabel then gave him the message from Frederick.

Advise Frederick.

**General remarks**

The question is concerned with the formation of a contract and, in particular, which (if any) of the various communications between Frederick and George constitute an offer met by a binding acceptance. Candidates need to begin by considering at what point an offer is made. The criteria established in cases such as *Storer v Manchester City Council* (1974), *Gibson v Manchester City Council* (1979) and *Centrovincial Estates v Merchant Investors Assurance Company* (1983) are relevant to the resolution of this issue. Note that Frederick begins this process by an advertisement, which is likely not an offer based not only on the criteria of the above cases but also the decision and reasoning in *Partridge v Crittenden* (1968). Frederick, however, then clearly states that he will sell the camera to George at a particular price and this statement likely does satisfy the criteria set out in the cases.
mentioned above and constitutes an offer. The next issue which arises concerns the acceptance of this offer. Is George’s statement an acceptance? The cases establish that an acceptance must be unconditional and must ‘mirror’ the offer and George clearly does not do this. He does, however, state that if Frederick does not hear from him by Thursday that Frederick is to assume that George has bought the camera. The particular issue presented here, of course, is whether there is any communication of the acceptance. Is it possible to accept an offer through silence? What if the offeree waives the necessity for communication? Good answers to this question would assess the extent to which these questions are, or are not, answered by the legal authorities. It was clear in *Carll v Carbolic Smoke Ball Co* that the requirement of communication was waived but the authority can be seen to be distinguishable on the basis that it concerned the offer of a unilateral contract. What if the original offer was one of a bilateral contract? In such instances a consideration of the decision in *Felthouse v Bindley* is well placed.

Before the date set by George, Hari offers to buy the camera at a much higher price. Frederick accepts this, a contract is formed between the two and Frederick consequently purports to revoke his offer to George before an acceptance has been communicated to Frederick by George. Revocation must be communicated to be effective, following the criteria established in *Byrne v van Tienhoven* (1880). Simply selling the camera to Hari will not suffice to revoke the offer to George. When, if at all, has revocation been communicated? Two particular possibilities exist on the facts provided – first by Frederick’s email to George and secondly by his telephone call to George and Frederick’s message to Isabel. There is, in particular, no clear authority as to when a revocation has been communicated through the medium of an email. Is it reasonable for Frederick to attempt to communicate by email? Is it possible to apply the reasoning of *Dickinson v Dodds* (1876) to such a technological method? Frederick makes a further attempt to revoke the offer by speaking to Isabel – has she the authority to receive such a communication? If there has been an effective revocation, was George’s acceptance communicated before any revocation? Finally, George faxes the acceptance to Frederick – at what point is this acceptance effective? Good answers would consider the reasoning in cases such as *Entores v Miles Far East Corp* (1955) and *Brinkibon Ltd v Stahag Stahl* (1982).

**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…**

analyse the facts provided, isolate the relevant legal issues presented by these facts and then apply the relevant law to resolve these issues. Very good answers would take a critical view of the various rules presented by the cases concerned with offer and acceptance in order 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**

This extract is taken from a very good attempt at answering the question. The candidate began by indicating that the problem gave rise to issues concerned with contractual formation and whether or not Frederick had a contract with either George or Hari in the circumstances given. The candidate then proceeded to
consider each issue individually. As indicated above, one of the particular issues presented by the facts in this case is the legal effect of George’s discussion with Frederick. In response to Frederick’s offer to sell the camera to George for £1,500. ‘George stated that he would need some time to think it over but that Frederick should assume if he heard nothing from George by Thursday evening, that George had bought it.’ The legal issue which arises from this is whether or not an acceptance can be made by silence.

In considering the effect of the discussion, the candidate considered the matter in the following manner:

Frederick then offers to sell to George for £1,500. This counter-offer, or a change of offer to be more specific, kills the original offer of £2,000. It seems this is more like an offer than an invitation to treat as Frederick is intended [sic] to be bound upon George’s acceptance to sell the camera at £1,500 (Storer v Manchester CC).

In the conversation, George stated that Frederick should assume if he heard nothing from George by Thursday evening that George had bought it. George has suggested an acceptance method by silence which is accepted by Frederick. Nonetheless, the law seems not to have agreed that acceptance can be made by silence (Felthouse v Bindley). There are, nonetheless, some precedents in obiter, suggesting that if this acceptance method is agreed by both parties, silence can be a method of acceptance. (Re Selectmove). Rust v Abbey Life Assurance (1979) even suggests that acceptance by silence can be viewed as an acceptance by conduct if both parties agreed. Yet at the end of the day, it seems that Felthouse v Bindley is still the rule – acceptance by silence is not allowed. Up till this point, no contract is made.

Comment on extract
The precision of this extract exemplifies the reasons that the Examiners gave this answer as a whole a first. The answer is well structured and logical in its approach. In considering this particular issue – acceptance by silence – the candidate sets the issue in the context in which it has arisen. The candidate sets out the law both for and against allowing an acceptance by silence. An even stronger answer would consider why the law is adverse to allowing an acceptance by silence as a matter of principle. The law is applied to the facts given. A conclusion is then reached on the particular issue before the candidate proceeds to consider the next issue.

Question 2
Harold is planning a number of celebrations for the fortieth birthday of his partner, Percy. He intends to hold a firework party in the garden of their stately home on the eve of Percy’s birthday. Harold wants to prevent the fireworks from landing on the roof of their property, since it dates from the 14th century and would be difficult to repair if it got damaged. He therefore telephones his friend, Sam, the fire chief at the local fire station, and tells him that he will pay him £1,000 if he attends on the night of the party with three fire fighters. Sam agrees. It is a requirement under local regulations that at least two firefighters attend firework events.

Harold needs to redecorate the ten bedrooms of his house so that his guests can stay in comfort during the party period. He contacts his cousin, Gloucester, who is a painter and decorator, and asks him to undertake the work. Gloucester charges Harold £3,000. After completing only one bedroom, Gloucester is offered another job at a higher wage and informs Harold that he will not complete the job. Harold is desperate to get the painting finished in
time for the party and offers to pay Gloucester an additional £1,500 if he completes it. Gloucester agrees and completes the work.

Harold telephones Birthday Banquets to arrange the food for the party. Birthday Banquets agree to provide a hot buffet for 300 people on Percy’s birthday. Harold agrees to pay them £800. However, a week before the party, all the chefs at Birthday Banquets get sick. On learning of this, Harold tells Birthday Banquets that if they can find another reliable company to prepare the buffet that would be great. Birthday Banquets contact Fantastic Foods, who agree to provide the buffet instead.

After the party, Harold refuses to pay Sam the £1,000 and tells Gloucester he will only pay him the £3,000. On receiving an invoice from Fantastic Foods, he also refuses to pay them any money.

Advise Harold.

General remarks
The question is concerned with issues of contractual formation, primarily consideration but also with an intention to create legal relations.

The question is comprised of three parts. The first part asks candidates to discuss the law relating to consideration and whether consideration has been given for the promise to perform a pre-existing public duty. In this particular case though, Sam is providing more firefighters than the two firefighters required by the local regulations. Candidates needed to consider and apply the criteria in *Glasbrook Bros Ltd v Glamorgan CC* (1925) to establish whether or not there was consideration because Sam had gone beyond the public duty required as a result of the local regulations.

The second part of the question called for examination of the doctrine of intention to create legal relations. Harold and Gloucester are cousins – does this relationship mean that there is no intention to create legal relations? On balance, the better view is that an application of the relevant cases to these facts establishes that there is an intention to create legal relations. A related difficulty, though, is whether or not consideration has been given for the variation of the contract. Candidates needed to discuss whether Harold received a practical benefit that might constitute consideration within *Williams v Roffey Bros & Nicholls (Contractors) Ltd* (1991) and cases decided subsequent to this decision (notably *Re Selectmove* (1995) and *South Caribbean Trading Ltd ("SCT") v Trafigura Beeher BV* (2004)). A particular problem in considering whether or not such a practical benefit existed in this case is that the considerations may not apply because Gloucester’s actions constitute economic duress. The presence of economic duress makes it difficult, if not impossible, to establish a practical benefit, although a very good answer would consider and apply the decision in *Adam Opel GmbH, Renault S.A. v Mitras Automotive (UK) Limited* (2007).

The third part of this question is concerned with Harold’s potential liability to Fantastic Foods. Has Harold a separate contract with them? Could Fantastic Foods enforce the promise Harold made to Birthday Banquets under the Contacts (Rights of Third Parties) Act 1999? It may be difficult to argue that the contract ‘purports to confer a benefit’ under s.1(b) and that Fantastic Foods are ‘expressly identified’ in the contract with Birthday Banquets. Very good attempts to answer the question considered whether Fantastic Foods had an implied contract with Harold to provide the food or whether or not Birthday Banquets was able to enforce the contract on behalf of Fantastic Foods.

Common errors
Correctly identifying the issues presented in the first part of the problem but then coming to the conclusion that the second part of the problem, dealing with
Gloucester, was concerned with the application of the principle in *High Trees House*. Another error exhibited by some candidates was not to advise Fantastic Foods but to advise Birthday Banquets in relation to the third part of the question.

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 answer 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...

arose when some candidates were concerned to apply exclusively *Williams v Roffey Bros* (or sometimes *Stilk v Myrick*) to all three parts of this problem. Such an approach indicated a lack of understanding of the law in this area.

**Question 3**

Wendy is arranging a party for her daughter, Violet’s, 5th birthday. Wendy is anxious that Violet’s birthday party is a success. She is hoping to start her own business as a childrens’ party organiser and believes a successful party will attract business from many of the parents at her daughter’s party.

Wendy visits Pirate Playhouse, a local children’s play centre, in order to enquire if she can hire it as a venue for the party. She meets Kamil, an employee, who tells her that the play centre is the best in the neighbourhood with a wide range of facilities. He reassures her that the party will be a great success. He says, ‘The children will be talking about it for months!’ Kamil suggests that he show Wendy all the facilities available at the play centre, but Wendy refuses as she is late for a hairdressing appointment. Wendy notices that the play centre is offering a discount if she books that day. She therefore decides not to delay and books Pirate Playhouse for Violet’s party. As she is leaving, Wendy asks Kamil whether Pirate Playhouse can accommodate 100 children. Kamil has only just started working at the play centre and is not sure of its capacity. He consults his ‘Employee Handbook’ and reads: ‘the play centre should not allow entrance to more than 200 children.’ Kamil informs Wendy that there is more than enough room for 100 children.

On the day of the party, things do not go to plan. Pirate Playhouse is extremely basic with very few play facilities. The children get extremely bored and complain to their parents. In addition, unbeknown to Kamil, the Employee Handbook is out of date and since its publication Pirate Playhouse has sold off half of its estate, thereby reducing its capacity considerably. The Pirate Playhouse can now only hold 80 children and many of Violet’s friends are prevented from entering. The result is disastrous. As a result, Wendy believes that her chances of attracting potential customers for her new business have been ruined. It can only accommodate a maximum of 80 children and many of Violet’s friends are prevented from entering. Wendy believes that the disastrous party has ruined her chances of attracting potential customers for her new business.

Advise Wendy.

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 Kamil’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. Three particular statements of Kamil’s are at issue. The first is that the play centre is the best in the neighbourhood with a wide range of facilities. The second is that the children will talk about it for months. The third concerns the number of children the play facility can accommodate. Good attempts to answer this question noted the ambiguity of when this last statement was made in relation to whether it occurred before or after Wendy had placed her booking. Particular points to be considered are: whether or not the statements were a mere puff or opinion (and, if the latter, whether or not actionable); whether or not the statements induced Wendy to contract with Pirate Playhouse; and whether or not it matters that Wendy could have verified matters by looking around the Pirate Playhouse herself but declined to do so.

In the event that the requirements of an actionable misrepresentation can be met, candidates needed to then consider the remedies available to Wendy. This, in turn, required a consideration of the various types of misrepresentation and which could be successfully claimed by Wendy. Good answers would then focus on the advantages to her in pursuing an action under s.2(1) of the Misrepresentation Act 1967. In this respect, an action under s.2(1) is particularly advantageous to Wendy because of the difficulty Kamil would have in establishing that he had a reasonable belief his statement was true. This is particularly apparent when the interpretation of s.2(1) of the 1967 Act made by the court in Howard Marine & Dredging v Ogden is analysed and applied.

Candidates should also discuss damages under s.2(1) of the Act and whether or not the decision in Royscot v Rogerson would allow recovery of ‘loss of opportunity’ damages with regard to Wendy’s potential business as a children’s party organiser.

Common errors
Not considering whether the statements were actionable as misrepresentations and simply discussing various types of misrepresentation. Another error exhibited by some candidates was to conclude that an actionable misrepresentation had been made by Kamil but to then assess the damages payable on a contractual basis rather than a tortious basis.

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

Poor answers to this question…
Poor answers to this question took one of two general forms. The first was to wrongly identify the issues presented by the facts. This is not, for example, a question concerned with the Sale of Goods Act 1979 because no good is sold. The second were those in which the candidate set out everything they knew about misrepresentation with little attempt to apply the knowledge to resolve the issues which arose from this particular problem.
Question 4

‘If the law of contract is to be coherent and rescued from its present unsatisfactory and unprincipled state, the House has to make a choice: either to uphold the approach adopted in Cundy v Lindsay and overrule the decisions in Phillips v Brooks Ltd and Lewis v Averay, or to prefer these later decisions to Cundy v Lindsay.’ [Shogun Finance Ltd v Hudson (2003) per Lord Nicholls]

Discuss.

General remarks
This question required candidates to critically consider the law surrounding mistake of identity and the differing results and deliberations of this situation made by various courts since Cundy v Lindsay. Cundy v Lindsay itself makes no mention of a doctrine of mistake of identity and was said at the time to be based on the decision in Hardman v Booth. Later cases, however, seemed to find that a mistake as to identity renders the contract void, with the result that the innocent third party purchaser acquired no title to the good that they bought from a rogue. In some instances, however, this was not the case. In King’s Norton Metal v Edridge the contract was found to be voidable, as it was in Phillips v Brooks. It was suggested in relation to the latter case that because the contract was formed inter praesentes, or face to face, that the contract was voidable since a presumption arose that the owner intended to contract with the person before them, in contrast to the situation in Cundy v Lindsay, where the contract was formed by correspondence between parties dealing with each at a distance. The difficulties of these two approaches can be seen in the contrasting decisions in Lewis v Avery and Ingram v Little. The question allowed candidates to examine carefully the judgments in Shogun Finance v Hudson and discuss the ways in which the law is unsatisfactory (e.g. it is impossible to establish with certainty when the third party purchaser will own a good or when they will not) and unsatisfactory (e.g. why does the face to face presumption arise?). Note that candidates should attempt to answer the question set rather than to produce a general discussion on the law of mistake.

Common errors
Focusing upon one question concerned with mistake of identity to the exclusion of all others.

A good answer to this question would...
set Shogun Finance v Hudson in the development of the law of mistake of identity in English law. A very good answer would not only consider the ways in which this development was unsatisfactory and unprincipled but also make an attempt to recommend which course the law should follow in the future and why it should follow such a course.

Poor answers to this question...
tended to set out case after case by means of a factual description with little attempt to analyse what each case established, how it established what it did and the relationship between the cases.

Student extract
The extract set out here represents the beginning of the candidate’s attempt to answer the question:

In Shogun Finance v Hudson, the case was that a person pretending to be another, purchased a vehicle under hire purchase, and due to the terms of the hire purchase, they became the legal owner of the vehicle.
The approach in *Cundy v Lindsay* was that when a buyer takes a bona fide interest in the said goods without knowing that the seller of said goods did not have the good title to them, the title to these goods would pass to the innocent party.

In *Phillips v Brooks*, however, the case was approached differently, as the imposter appeared and produced a cheque of considerable value and wished to purchase jewelry with the money.

**Comment on extract**

This extract demonstrates many of the aspects which made this answer weak. There is no introduction to either the difficulties established by these cases or how the cases relate to each other beyond factual differences. The analysis of what each case establishes is, at best, weak and, at worse, erroneous. It is not true, for example, that the rogue in *Shogun Finance v Hudson* became the legal owner of the vehicle. Had he become the legal owner of the vehicle, Shogun Finance would have had no case because the rogue would clearly have had a title to pass to Hudson. The description of *Cundy v Lindsay* is incomplete for it does not explain why the third party could acquire title from a vendor who did not themselves have title. In any event, in *Cundy v Lindsay* itself the decision was that the third party could acquire no title since there had never been any form of contract with the rogue Blenkarn. The analysis of the decision in *Phillips v Brooks* is similarly flawed – the point of distinction taken in the case and by later commentators was that the parties dealt face to face – not that a cheque of considerable value was produced.

**Question 5**

‘The rule that a third party cannot acquire rights under a contract to which he is not a party is a controversial one and courts created numerous exceptions to this rule. The use of such exceptions, and the development of new exceptions, will diminish following the enactment of the Contracts (Rights of Third Parties) Act 1999.’

**Discuss.**

**General remarks**

This question required candidates to consider the doctrine of privity and the means by which its effects can be avoided. Candidates needed 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. The essential element of an attempt to answer this question was a consideration of whether or not the 1999 Act removed the impetus for the further development of the common law in relation to exceptions to privity of contract.

**Common errors**

Setting out everything candidates could remember about privity of contract without considering the title which had been set.

**A good answer to this question would…**

note that many of the common law exceptions were founded upon the intention of the parties. Now that these intentions can be realised through the employment of the 1999 Act what incentive will there be for further common law developments to occur?

**Poor answers to this question…**

merely provided a general discussion of the law of privity.
Question 6

Khan is the owner of a small flat. He has been posted abroad for two years and wants to rent out his flat. He visits Houzz, a local home rental agency, and discusses his situation with Miranda, the owner. Khan agrees with Miranda that she will find tenants for his flat and ensure that the property remains safe during the period of his absence. It is also agreed that any rent received from the property will be paid directly to the bank which holds the mortgage on the property, to satisfy Khan’s mortgage payments. Miranda asks Khan for a £200 cheque and informs him that this represents the first two months’ commission for Houzz’s services at £100 per month. Khan also supplies Miranda with his bank details so that they can arrange for monthly payments direct from his bank account to cover Houzz’s services. Miranda gives Khan a glossy brochure entitled ‘Welcome to Houzz’ and tells him that he will find everything he needs within.

Six months later, Khan notices that he has very little money in his bank account. He investigates and realises that Houzz have been increasing their monthly fees considerably. His latest monthly payment was £900. That same day, Khan receives an email from Miranda informing him that Peter, her cousin, was helping her out with the business last weekend. Unfortunately, when he visited Khan’s property he didn’t lock the door. As a result, a burglar entered and stole Khan’s audiovisual equipment worth £3,000.

Khan is furious and telephones Miranda. Miranda informs Khan that she will be terminating his contract in seven days and that he must consult the brochure she sent. Khan does so and finds the following terms and conditions:

1. The commission charges for managing your property are variable and may fluctuate depending on a number of factors including such things as the value of your home, the time period of rental, the Bank of England interest rate and average commission charges of competing home rental agencies in a 4.5 kilometre radius from Houzz.

2. Houzz are not liable for any loss or damage caused by the negligence of their employees.

3. Houzz reserve the right to terminate the contract with the provision of one week’s notice. Houzz’ clients must provide six month’s notice for termination of the contract.

Advise Khan.

General remarks

This question asked candidates to discuss the law relating to terms. Three general issues are presented: first, whether the terms have been incorporated into the contract; second, whether the terms are applicable to the circumstances that have arisen; and third, the statutory regulation of the terms.

The first issue is whether the terms have been incorporated. Candidates needed to discuss the rules and case law relating to incorporation by reasonable notice. Of particular relevance is whether it was clear that the brochure was a contractual document and, even if it was, whether it was given before or at the time of contractual formation.

Candidates then needed to discuss whether the terms – properly interpreted – cover the liability that has arisen.
If this can be established, then the statutory controls needed to be examined and applied. In relation to the increased commission taken from Khan's bank account, candidates should consider whether clause 1 falls within reg.6(2) of the Unfair Terms in Consumer Contracts Regulations (UTCCR). Is it in plain and intelligible English? If so, might it be considered a core term according to case law (e.g. OFT v Abbey; DG v First National Bank) and therefore outside the scope of the UTCCR?

In relation to loss of audiovisual equipment, if clause 2 does cover this liability (is Peter an employee; is this negligence?) then candidates needed to discuss whether this clause would be deemed reasonable under the Unfair Contract Terms Act 1977 (UCTA) or fair under the UTCCR.

In relation to Miranda’s notice of one week, candidates should discuss whether it would be deemed unfair under the UTCCR or reasonable under UCTA.

**Common errors**

**A good answer to this question would...**
consider the legislation carefully and apply it with reference to the cases which interpreted the relevant portions of the legislation.

**Poor answers to this question...**
focused solely upon the issue of whether or not the terms had been incorporated into the contract and ignored the regulation of the terms so incorporated.

**Question 7**

Adam was a supplier of fireworks who was registered as required by the (fictitious) Firework Supply and Distribution Act 2003. Adam supplied 150 boxes of fireworks to Bernadette, without the statutory invoice recording the sale, as required by the Act. However, he did not include the statutory invoice recording the sale, as required by the Act, since Bernadette told him that, as between friends, such formalities were unnecessary. Bernadette now refuses to pay Adam for the fireworks.

Adam delivered to Charlotte 100 boxes of fireworks. The boxes were accompanied by the required statutory invoice. Charlotte used the fireworks to celebrate events at her brothel. Charlotte now refuses to pay Adam for the fireworks.

Adam delivered to Dana 20 boxes of fireworks to be used at a private party at her house. Although the delivery was accompanied by the relevant statutory invoice, the fireworks were poorly assembled and caused damage to Dana’s house. Dana is required to pay £2,000 to fix the damage caused.

Advise Adam.

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

**General remarks**
This question is concerned with illegality. The question calls 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 Adam’s dealings with Bernadette,
Charlotte and Dana is the purpose behind the statute. Is the statute intended to penalise conduct or to prohibit contracts? The question also contains a variant which must be considered: what is the effect upon these transactions if Adam’s registration had expired?

Adam supplies Bernadette with fireworks and has failed to provide the invoice required by the legislation. Bernadette refuses to pay him. Is the contract illegal as formed or illegal as performed? Would the purpose of the statute be furthered by denying Adam the remuneration due under the agreement with Bernadette? Adam 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 Adam’s registration has expired, the contract is illegal as formed and thus unenforceable by either party (*Re Mahmoud and Ispahani*, 1921).

Adam’s delivery of fireworks to Charlotte is accompanied by the invoice but she uses the fireworks for an illegal purpose. Is such a contract against public policy and within *Pearce v Brooks* (1866)? Would *Pearce v Brooks* be followed by a modern court? Can Adam recover payment for the fireworks?

With regard to Adam’s sale to Dana, Dana will seek to sue upon the contract. The question is, therefore, whether she (as an apparently innocent party) can maintain the suit. Because the sale was accompanied by the relevant statutory invoice, the sale is a valid one and Adam’s supply of poorly assembled fireworks is a breach of contract. If, however, Adam’s registration has expired, the contract is illegal as formed and thus unenforceable by either party (*Re Mahmoud and Ispahani*, 1921).

**Common errors**
Failing to acknowledge that the relevant issue presented in all three instances was one of illegality.

**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**

Boris Buses are planning a new business venture in London. They want to operate a tourist bus service around the main tourist attractions of central London. In addition to the sightseeing experience, passengers will be able to dine at the gourmet restaurant that will be on every bus. Boris Buses are expecting to make most of their money from restaurant diners, rather than from the ticket sales for the tourist bus route.

Boris Buses contact Ken, a supplier of red double-decker buses, and arrange to buy 30 buses from him at a cost of £6,000,000. £4,000,000 is payable immediately and the balance is due on delivery of all the buses. Boris Buses also contract with Cameron, who will equip the buses with compact kitchens on their top decks. Boris Buses agree to pay £1,000,000, the total of which is payable immediately. Cameron orders the kitchen equipment in advance at a cost of £150,000 and starts building the kitchens.
One day after Boris Buses have received all of their buses from Ken, the Mayor of London introduces, with immediate effect, regulations on public transport emissions. Environmental regulation had been a key element of the Mayor’s recent election manifesto. All public transport that does not meet the required level of nitrogen oxide emissions is banned from entering the central London zone. The prohibition starts immediately. Boris Buses’ new buses do not meet the nitrogen oxide requirements as set out in the regulation. Boris Buses are therefore unable to follow their planned tourist route and are instead restricted to an outer London route that offers no tourist attractions.

Boris Buses are furious. They wish to cancel their contracts with Cameron and Ken. Both refuse and demand that Boris Buses pay them what they owe. Advise Boris Buses.

General remarks

The question is concerned with the non-performance of the contracts between Boris Buses and Ken, on the one hand, and Cameron, on the other, and how the particular contracts are discharged. Does discharge occur automatically by frustration or through breach?

Candidates needed to discuss whether the Mayor of London’s regulation over nitrogen oxide emissions is such to frustrate the contract between Boris and Ken. In this respect, candidates needed to examine the cases relevant to the determination of the scope of frustration (e.g. National Carriers Ltd v Panalpina, Davis v Farehama; and Herne Bay Steamship v Hutton). Relevant to this issue is whether the event is foreseeable or not (the regulation was within the Mayor’s recent election manifesto) and the fact that the buses could still follow an alternative route (albeit not within central London) and still offer the restaurant service. If the buses have been delivered and the contract complete when the Mayor introduces the new regulation, can the contract be frustrated? Is this situation analogous with that of the failed coronation procession in Krell v Henry? If the contract is not frustrated, has it been breached?

If frustration operates in this instance, then candidates needed to discuss and apply the Law Reform (Frustrated Contracts) Act 1943 and the cases which interpret it. Section 1(2) would apply to allow Boris to recover any sums paid and to retain the balance. However, the court would need to exercise its discretion under the same provision to determine whether or not to make an award.

Has the contract with Cameron been frustrated? It is not clear when the compact kitchens are to be installed on the top decks of the buses. In addition, the same issues arise in relation to the limited scope of frustration – does it apply to a changed route for the buses? Does Boris’s purpose for having the kitchens installed form the basis of the contract with Cameron? In the event that the contract has been frustrated, questions as to the restitutionary results arise. Particularly relevant is whether Cameron can offset any of his expenses from the £1,000,000 that Boris paid upfront. In this respect, s.1(2) and the case law that interprets it (e.g. Gamerco v ICM Fair Warning) is relevant. There may also be a claim under s.1(3) for valuable benefit (as interpreted by BP v Hunt) since Cameron has already constructed some of the kitchens.

Common errors

Disregarding entirely the possibility that the contract might have been frustrated.

A good answer to this question would...

A good answer to this question isolated the relevant issues and applied the case law and legislation to resolve these issues in an attempt to indicate the likely outcome a court would reach in this instance.
Poor answers to this question...
Poor attempts to answer this question focused on the question of whether or not the contract had been frustrated and, having decided that it had been, did not then consider the application of the Law Reform (Frustrated Contracts) Act 1943.