Examiners’ report 2014

LA1040 Elements of the law of contract – Zone B

Introduction

General examination advice is to ensure that you read the examination questions carefully and decide the topic which is being examined and which questions you want to tackle. The questions are set out to allow you to demonstrate your knowledge and understanding in relation to specific issues. Although there may be some overlap there are no two questions on the same topic. There are no trick questions, so ask yourself ‘why have the Examiners told me this, what legal issues are raised on these facts?’

There were some very good answers in this examination, which had a good grasp of the relevant case law and legislation. In problem questions good answers directly applied this knowledge to the facts presented. In essays they built critically on this knowledge and answered the actual question posed.

There are certain errors which occur in most examination sittings. One is a failure to identify the correct area of law; this may arise from a failure to actually read the rubric and identify who is being advised (see specific comments below). Also, some candidates answer two questions on the same topic. It is highly unlikely that this is being asked for, as explained above, so read the questions carefully to see the clues that there are in the question to help focus the answer. If the subject guide has been followed and the activities undertaken this should help you identify the facts which raise certain legal issues, and then the appropriate response.

Another problem is failure to use relevant authority to support arguments. There remain some answers which have no authority at all; these cannot gain credit for the required knowledge which needs to be evidenced in the answers. Some candidates who use no cases but say ‘there is a decided case’ will also gain little credit, in a common law system there will be cases on most issues covered so this is not showing knowledge of cases.

Additionally, there are candidates who write all they know on a particular area, whether relevant to the question or not, then ‘apply the law’ in a short paragraph. This is not the correct style. This style leads to repetition, which is time consuming and will mean there is time pressure to fully answer the question, and an inability to show understanding of the relevant law by applying it to the given facts. There were a large number of answers which had a long introduction setting out the issues to be discussed, which was little more than a repetition of the key facts, followed by a ‘statement of law’ which was either an essay or list of all the issues which are related to the subject, whether relevant or not, then ‘application to facts’ where the candidate concluded if there was an issue or not. This style does not allow you to show which part of the law you set out is relevant to your conclusion. You must apply the law to the facts supported by the relevant law. Remember you are asked to advise a person on the given facts. So being selective of the relevant law to their facts is essential.
A logical answer will also show that you have planned your answer based on the relevant facts and thought logically about the demands of the facts. In problem questions advise each party separately to help in keeping their answer logical (see specific advice). In essays remember to formulate an answer that actually addresses the question posed. There is still a tendency to write the answer to the question candidates wish they had been asked or a prepared answer to a question which has appeared in the past. This will gain little credit, if any, as the essay requires a critical approach to the issue based on the question posed.

There were also some candidates who did not plan their time, answering three questions well with a weak, or sometimes non-existent, fourth answer. This means that there are immediately 25 per cent of potential marks lost. In an age of electronic writing it may help you to practice writing timed answers in long hand. This will pay dividends in the final examinations.

Specific comments on questions

Question 1

On 1st May Aga decides to sell her collection of pots. She places an advert in the local paper, 'Beautiful Arden pot for Sale. £500 or nearest offer.' She includes her telephone number, email address and postal address on the advert. On 2nd May Beatrice emails Aga saying, 'I will buy the pot for £450.' Aga replies saying, 'I will take £475 but please let me know by 5pm today as another customer is calling to see the pot tomorrow.' Beatrice immediately emails back asking if Aga will accept payment by cheque. By 4.30pm she has not heard from Aga so sends a further email to say she will buy the pot for £475. Aga's internet connection is lost that afternoon and Aga does not get this email until it is reconnected on 5th May. On 3rd May Chad calls Aga and says he will buy the pot for £400 but Aga says she would not take less than £475. Chad says he will think about this. Later that day Chad writes to Aga saying he will pay £475 but the letter is misaddressed and never arrives. On 4th May Aga sells the pot to Didier for £500. Didier, a friend of Beatrice, meets her on 5th May and tells her of his luck in getting the pot. Beatrice is upset as the pot would complete her Arden Collection.

Advise Aga.

General remarks

This question was related to agreement: it would be useful for candidates to take each party and deal with their issues chronologically.

First, discuss the nature of the advert, offer or invitation to treat (ITT) with relevant case law to explain the principles. It is likely that this is an ITT. Some candidates also concluded that this was not an offer as it was a bi-lateral advertisement; the advertisement was not a bi-lateral situation as it was made to the world in general.

The next logical stage was to consider the nature of Beatrice’s (B) communication, as the advert is likely to be an ITT it is B who makes an offer. Some candidates concluded this was a counter offer, which is illogical as a counter offer requires an original offer to counter. It is Aga (A) who makes a counter offer, which should be explained with reference to relevant case law. This offer will end at 5pm that day, when it will lapse. Candidates may explain that there is no obligation to keep the offer open until this time, with reference to relevant case law.
B’s email following A’s offer could be a request for information, which appears most likely, so the offer is still open. If there is a counter offer, then this ends A’s offer which cannot be accepted by later email. This should be explained with reference to relevant case law. If the email was a request for information then B has later sent acceptance, but not communicated this until 5th May. There should have been discussion with the relevant law whether this communication was effective. If the communication was not effective, then when B meets Didier (D) who says he has purchased the pot, does this mean the offer is revoked? Is Didier reliable? Good answers noted that this was not necessary as the offer would have lapsed earlier so there was no need to revoke.

Chad’s (C’s) call would be an offer, which follows logically from the earlier conclusion that the advert was an ITT, then there is a counter offer by A. Then C sends a letter which seems to be an acceptance. This must be communicated, but it is misaddressed so is not communicated. There should be a discussion of the postal rule with relevant case law. The offer would remain open until it was revoked or lapsed on a reasonable passage of time.

**Law cases, reports and other references the Examiners would expect you to use**

This is an indication of cases which could be included and not an indication of all cases which are relevant.

*Smith v Hughes* (1871) LR 6 QB 597; *Partridge v Crittenden* [1968] 1 WLR 1204; *Hyde v Wrench* (1840) 3 Beav 334; *Entores v Miles Far East Corp* [1955] 2 QB 327; *Thomas v BPE Solicitors* [2010] EWHC 306; *Brinkibon v Stahag Stahl* [1983] 2 AC 34; *Adams v Lindsell* (1818) 1 B&Ald 681; *Korbetis v Transgrain Shipping* [2005] EWHC 1345 (QB); *Dickinson v Dodds* (1876) 2 Ch D 463; *Routeledge v Grant* (1828) 4 Bing 653.

**Common errors**

Considering the advert as an offer, which is unlikely on authority. Giving a long detailed discussion of the facts of cases that were irrelevant to the facts in the question. Failing to plan the answer to ensure that all the issues were considered fully. Very few candidates considered the offer to B as lapsing at 5pm.

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

Deal with the parties logically and consistently, using case law consistently to support their argument. The best answers dealt with the majority of the issues identified above and had a good range of cases to support their points.

**Poor answers to this question…**

Failed to discuss the issues logically and the relevant communication issues. For example, discussing the postal rules in relation to B and A when there was no issue of post in their communication. Failed to use case law or were overly descriptive of the cases in this area without applying the principles (ratio and obiter) to the relevant facts.

**Student extract**

Counter offer can be defined as an act to alter the terms of the offer put forward by the offeror by the offeree. This can be seen in the authority of *Hyde v Wrench* where and offeror proposed to sale his land for £1000 and the offeree priced £950 which the offeror rejected and the offeror later came back to agree to buy for the £1000 ad the offeror rejected. The court held that the first price of £950 by the offeree destroyed the origin offer and his price was then the new offer which the offeror can choose to accept or reject.
What is the effect of Beatrice e-mail to Aga on the 2\textsuperscript{nd} May? The e-mail send by Beatrice on 2\textsuperscript{nd} May is likely to be a statement of intention since the offer is not definite and give room for further negotiation.

**Comment on extract**

This part of an answer sets out clearly what a counter offer is, with relevant authority. The candidate then explains at length the details of the case, which is rarely necessary. Facts of cases are usually only needed if you are distinguishing the given facts (in the problem question) from the ones in the case. This is not the position here. The main problem here is that the next part of the answer has no issue of counter offer, so the authority is correct but is not relevant to the facts. At this stage of the chronology there is no offer to be countered. So while the candidate has some knowledge of the law it is not clearly understood as it has not been applied correctly.

**Student extract**

An offer is an expression of willingness to contract on specified terms made with the intention of becoming binding on acceptance; Treitel. As per Moran v University College Salford (#2) the courts take an objective approach to the matter and require sufficient certainty from an offer as per Storer v MCC. This was emphasized in Gibson v MCC although Lord Denning argued that a strict adherence to the offer-acceptance model may often be a hindrance.

A’s advert is likely to be an invitation to treat as per Partridge v Crittenden and hence incapable of acceptance: it seems to lack the requisite criteria under Carlill v Carbolic Smoke Ball to constitute a unilateral offer.

**Comment on extract**

This candidate has begun by clearly defining the meaning of an offer at law, with reference to academic authority and cases. You will see there is no detail of the facts of the case and although this is a case not commonly used it is correctly applied. Sometimes candidates think that only the cases in the subject guide or textbook can be used but look at updates or your own reading for other cases to support your arguments. The principle of an offer is clearly stated, the need for certainty and the cases of Gibson/Storer v MCC are both referenced without long details as to what actually happened but some argument which was raised in the case.

In the second paragraph the candidate immediately advises on the nature of the advert, with reference to relevant authority. Although there is no explanation of what criteria is missing from Carlill this is dealt with clearly. Perhaps a line saying that the certainty that existed in Carlill and the impossibility of running out of stock were possibly the relevant criteria.

**Question 2**

‘It is important to understand that the legal regulation of illegal contracts and contracts which are contrary to public policy is characterised by a tension between competing policies.’ (McKendrick, *Contract Law*)

Explain the situations when a contract will be tainted by illegality and the policy behind such rules.

**General remarks**

The question focused on the public policy behind contracts which are deemed illegal and the tension between the competing policies. The policy of freedom of contract and preventing this freedom becoming the basis of illegal agreements.
Law cases, reports and other references the Examiners would expect you to use
This is an indication of cases which could be included and not an indication of all cases or statutes which are relevant.


Common errors
Failing to put the question in context and merely listing the issues where contracts are illegal and the effect of illegality.

A good answer to this question would...
Look at the situations, with reference to cases, which are deemed illegal and perhaps, in relation to gaming, why there may be changes.

Poor answers to this question...
Failed to actually answer the question and look at the policy behind the rules on illegality.

Question 3
Brenda wishes to rent business premises in Eastfield Shopping Centre from which to run her cookware business. Norman, the owner of Eastfield Shopping Centre, informs Brenda that she should rent the premises opposite the busy supermarket chain, Price Cutters, since she would be assured of a large number of customers walking past. He also tells her that he will be launching a nationwide advertising campaign to ensure that Eastfield Shopping Centre is a success. Later that week, Norman discovers that Price Cutters has gone into receivership and is closing all of its stores. Brenda is looking to attract upmarket customers for her range of cookware and, on discovering that the premises Norman suggested are next door to an exclusive fashion shop, decides to rent the premises from Norman. The next day, Norman realises that he does not have enough money to launch his advertising campaign. Several months later, Brenda’s cookware business is in serious financial trouble. Shoppers have not heard of Eastfield Shopping Centre and it is rarely visited. Since the closure of Price Cutters the situation has become worse. Brenda’s bank demands that she repay her loan and she is forced to sell her family house.

Advise Brenda.

General remarks
This is an issue of misrepresentation. Candidates can validly but briefly consider why it is not a term of the contract, with reference to the relevant cases and tests. Candidates should then define a misrepresentation and use that definition to help identify if there is an actionable misrepresentation. At this stage candidates should not try to say if it is fraudulent or negligent just if there is a basis of action. Identify the pre-contractual statements, large number of customers, location of the store and the campaign launch. Large numbers may be ambiguous but the store location is clear as is the intention to launch a campaign. The issue which is always important is that the statements need to induce the contract, which should be considered in some detail as it seems that there may be other inducements to enter. All of these need to be supported by relevant case law.

If there is a misrepresentation then what type is it? Fraudulent, which can be compared with liability under the Misrepresentation Act? Where the burden of proof
lies can be discussed. To a lesser extent there could be a common law claim under
*Hedley Byrne*. In each situation explain the relevant measure of damages and
remedies. This is where candidates can show understanding of why the relevant
claims are important. If the losses appear to be remote then a claim under common
law is subject to foresight but under fraud and the Act this is not necessary.
Candidates should also consider rescission and the relevant bars. If relevant then
discuss in detail, if not relevant then briefly say why not.

It may be valid to say there is a contract term, which should then be discussed as to
the damages which are available.

**Law cases, reports and other references the Examiners would expect you to use**

This is an indication of cases which could be included and not an indication of all
cases which are relevant.

*Dimmock v Hallett (1866) LR 2 Ch App 21; Bisset v Wilkinson [1927] AC 177;*
*Esso v Marden [1976] QB 801; Edginton v Fitzmaurice (1885) 29 Ch D 459;*
*Museprime v Adhill (1991) 61 P&CR 111; Derry v Peek (1889) 14 App Cas 337;*
*Royscott v Rogerson [1991] 2 QB 297; Misrepresentation Act 1967 s.2(1); East v*

**Common errors**

Candidates failed to identify which statements could be actionable. Also some failed
to establish if all the elements of an actionable misrepresentation were present. A
failure to use the relevant case law to support the arguments and to explain which
remedies would follow. Some candidates confuse the claim under s.2(1) Misrepresentation Act 1967 and negligent misstatement under *Hedley Byrne v Heller.*

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

Take the answer logically, defining a misrepresentation and then using this
definition to explain, with relevant case law, if the statements made were actionable.
A key feature was the inducement as it was not clear that the shop or campaign
were the only inducement. Good answers would identify the best route by which to
make a claim and the relevant shift in the burden of proof. The remedies available
under each claim should be identified and applied to the facts.

**Poor answers to this question...**

Thought the whole question was about breach of contract. Alternatively did not
explain which statements were possibly actionable, failed to explain what elements
are essential for an actionable misrepresentation and then to apply it to the facts
with relevant case law. Weaker candidates failed to explain or understand the
different types of misrepresentation, especially the difference between an action
under s.2(1) Misrepresentation Act 1967 and a common law claim in negligence
under *Hedley Byrne v Heller*. Weaker candidates also failed to explain the shift in
the burden of proof between deceit and a claim under the Act.

**Question 4**

Simon is a famous record producer and talent show host. His nephew, Louis,
is desperate for the chance to enter the music business and begs Simon to
give him the opportunity to perform at a televised talent show that Simon is
organising. Simon tells Louis that, if he stops having his singing lessons at
Simon’s house, he will let him perform at the show. Louis cancels all his
singing lessons. Simon later regrets his decision and informs Louis that he
will not permit him to perform at the show.
Carmel, Simon’s girlfriend, wishes to do something special for Simon. Two weeks before the talent show she contacts Roses, a florist, and pays £1,000 for them to send a bouquet of flowers to Simon’s house every day until the day of the show. She tells them that the flowers are for a very famous person in the music industry. Roses stop sending the flowers after only two days. Simon is upset, and rings them to demand that they continue to send the flowers, in accordance with their contract.

Two days before the show is to start, one of the talent show judges, Diva, informs Simon that she has been offered her dream chance to perform in Los Angeles and no longer wishes to appear as a judge on his show. Simon is devastated since Diva is the most popular judge and attracts high viewing figures. He fears that the show will not be a success without her. He tells Diva that he will double her salary if she stays. Diva agrees. However, after the show has finished, Simon changes his mind and refuses to pay her the extra money.

Advise Simon.

General remarks
This was a combined question, with consideration, privity and intention to create legal relations. In the first situation with Louis two issues were relevant. First, whether there was an intention to create legal relations, reference to the presumptions in family situations and how to rebut the presumption. Second, to define consideration and its role in contract law. What was the consideration – did it have value in law? For some reason candidates considered past consideration as relevant here. This indicated a lack of preparation and understanding.

In relation to the roses Simon cannot enforce the contract as he is not party to the arrangement, so the relationship between consideration and privity can be discussed. Reference to cases and statute were relevant here. Again some candidates also considered past consideration here. This may be a failure to see the overlap with privity and consideration.

In the last situation with Simon and Diva the issue is performance of existing obligation. Candidates should explain the general rule and the exceptions. The principles of Stilk v Myrick and Williams v Roffey should be considered and clearly applied.

Some candidates applied estoppel to all parts of the answer, showing a failure to see that promissory estoppel is a shield and not a sword, so cannot be used to found a claim.

Law cases, reports and other references the Examiners would expect you to use
This is an indication of cases which could be included and not an indication of all cases which are relevant.


Common errors
Some candidates failed to identify all the areas covered in this mixed topic question. The topics covered here are commonly connected and should have been dealt with separately. Again there was a problem with some candidates failing to use the relevant cases to support the arguments.
A good answer to this question would...
Recognise all the issues. The two separate issues with the nephew: consideration and intention to create legal relations. Then the issue of privity and the enforcement of the agreement by Simon against Roses. The issue with Diva and the performance of an existing contractual obligation should then be considered. All of these should be explained with reference to relevant case law.

Poor answers to this question...
Failed to see all the different issues involved in the question and only dealt with consideration and not the additional points in the question. Failed to use relevant case law.

Question 5
On 3rd May Zalmi contracted with Bilal to headline at the 6th June concert in the park for a fee of £10,000. £1,000 was paid on 3rd May, with the remainder payable after the performance. Bilal spent £2,000 in preparing the necessary light show for his performance. Zalmi was delighted that Bilal had agreed as this would result in high profile coverage by TV. Bilal later got a better offer and informed Zalmi he would not be there. Zalmi said that he would expect him to arrive as promised on 6th June and Bilal had better uphold their agreement. Bilal said he would not.

Bilal later decided that it was unfair to let Zalmi down and on 30th May called Zalmi to say he would be there after all. However on 28th May there had been terrible floods in the area and Zalmi had cancelled the concert. Zalmi had leased the land for three months (May, June and July) for the concert and follow up events, with a monthly rent of £1,000 payable on 1st of each month. On 30th May Zalmi had told the landlord he would no longer need the field and the landlord asked for the balance of the rent.

Advise Zalmi on his rights and liabilities.

General remarks
This considers discharge of a contract which covers both breach and frustration which some candidates failed to see. Bilal (B) makes an anticipatory breach, which Zalmi (Z) can elect to accept or reject. Here Z has elected to reject the breach; can he be within the principles of White and Carter? There is a legitimate reason but this would need the co-operation of B. If B rejects his obligations also remain, which means that when he cannot perform then he would be in breach. Many candidates failed to see the issue of anticipatory breach which may be a failure to see the topic of discharge of a contract as a whole. This then leads to the next issue.

In relation to the floods Z will claim frustration – candidates should define frustration and consider if this situation fulfils the criteria. It may do, which would then lead to a discussion of the remedies at common law and statute. If the contract is not frustrated then there would be breach of contract and the measure of damages could be considered with reference to the criteria for frustration and the limiting factors and the relevant case law.

Z may try and make a claim frustration of lease, is this significant enough? This seems unlikely. Some candidates failed to address this issue.

Law cases, reports and other references the Examiners would expect you to use
This is an indication of cases which could be included and not an indication of all cases which are relevant.
Common errors
Some candidates failed to identify the issue of anticipatory breach and the effect that had on the later possible frustration of the contract. Where topics are combined and overlap both topics should be addressed. Some candidates failed to use relevant case law for breach, if considered, and frustration. Also some candidates could not explain the consequences of frustration.

A good answer to this question would...
Deal logically with the possible breach and the options for the innocent party when faced with anticipatory breach and its implications. Then consider the possibility of frustration and the consequences of frustration on the contracts.

Poor answers to this question...
Only considered breach or frustration and failed to use relevant case law to support their arguments.

Question 6
Paul wants to buy a present for his partner Gianni, who is a fan of sports memorabilia, although Paul hates all sports. In a London wine bar Paul meets Clovis who claims to be Nicole, a well-known female boxer and Olympic Gold medal winner. Paul remembers that there had been a female boxing gold medalist who looked like Clovis. Clovis says she has her winning gloves with her, and would sell them to Paul for £2,000, with her own message to Gianni. Paul does not have that money with him and so offers to pay £500 and give his gold watch as security for the payment. Clovis agrees, and hands over the gloves, signed ‘To Gianni, simply the best, love Nicole’ and an address for Paul to forward the money to. Paul thanks Clovis for her trust in him. Clovis leaves taking the money and the watch. When Paul hands the gloves to Gianni they discover they cannot be genuine as Nicole is currently in New Zealand and could not have been in a London Wine Bar. They try to find the address and discover that it does not exist. On their way back home they see Paul’s watch in Yazmine’s jewellery shop window. Yazmine explains she bought it earlier from a young lady for cash.

Gianni had also purchased a pair of gloves from Rocky’s. He believed the gloves belonged to Rocky Marciano as they were in the Marciano section of the shop. He was delighted as they were priced at only £50 when an original pair of gloves would normally cost over £500. When he got them home he found that they were in fact Rocky Graziani gloves and worth only the £50 he paid.

Advise Paul on any claims he can have for the return of the watch and if Gianni can return the gloves to Rocky’s.

General remarks
This is a question on mistake, although there is a fraud by Clovis she has disappeared and Paul wants to reclaim his watch. To do this he would need to claim that the sale by Clovis to Yazmine was invalid as Clovis did not own the watch. It is valid to briefly explain why a claim in fraud is not the best way to achieve his aims. As there is clearly a fraud it is not a contentious issue and should be dealt with briefly. Candidates should look at the result required: the return of Paul’s watch.
from Yazmine. This would be based on the contract for the gloves being void for mistake. The relevant cases on face to face transactions should be explained and applied. Some candidates spent time on contracts made at a distance, which was not relevant and indicates a lack of planning or understanding. Candidates show understanding by clear application of relevant law.

The next issue was the mistake made by Gianni, which appears to be a unilateral mistake. The question to be addressed is if the mistake was fundamental, with reference to relevant case law.

Law cases, reports and other references the Examiners would expect you to use
This is an indication of cases which could be included and not an indication of all cases which are relevant.


Common errors
Some candidates failed to answer both the mistakes which meant that the question was not fully answered. Also many candidates answered this as a misrepresentation question. The clue is that there is clearly a fraud and the person who committed the fraud has disappeared. So the best remedy would be to claim mistake. This may fail but this is the only way to gain the result which Paul wants. As Question 3 is about misrepresentation this logically cannot be on the same topic.

A good answer to this question would...
Explain why the claim in misrepresentation will not be made, and why, briefly. Then consider the test for making a contract void for mistake, explaining that this will enable Paul to reclaim the watch. Conclude on the likelihood of this claim. Then deal with the separate issue of Gianni and the gloves.

Poor answers to this question...
Some candidates considered this to be a question of misrepresentation despite the issues explained above. Some candidates merely listed the relevant cases on mistake without considering how they relate to the facts, for example long discussion of distance contracts when this was face to face. Poor answers failed to consider the issue of mistake for Gianni.

Question 7
‘The traditional approach in English contract law is to award damages for non-pecuniary losses very reluctantly. Recent case law, however, reveals a more generous attitude towards the recovery of this type of loss. It is difficult to justify this latter approach.’

Discuss.

General remarks
The question was very specific and there could have been a valid brief discussion of the general principles of damages, with reference to Robinson v Harman. The main body of the answer should have considered how the general reluctance to award damages for non-pecuniary losses in contract has been viewed by the courts. There should have been close reference to relevant case law and critical commentary on those cases.
Law cases, reports and other references the Examiners would expect you to use
This is an indication of cases and authority which could be included and not an indication of all cases which are relevant.


Common errors
Candidates failed to see this as a question specifically on non-pecuniary losses. This led to a discussion of the general principles of damages. While this may be valid briefly to put the essay in context the essay should have focused on non-pecuniary losses.

A good answer to this question would...
Explain the traditional approach to contract damages briefly and then explain why the courts were reluctant to award damages beyond the traditional measures and comment on cases where the courts had done this.

Poor answers to this question...
Merely explained the difference measures of damages traditionally awarded and did not address the question posed. Alternatively the cases of non-pecuniary awards were merely described and not commented on or analysed critically.

Student extract
As in Addis v Gramphone, English law is reluctant to award damages for non-pecuniary.

Recent case shows a more generous attitude, but it cannot be said it is unjustified in all case.

The tide starts to turn with Rostyh Electronics and construction v Forstley.

On some case, the contract is for employment and court infer an implied term that employer should be dealing honestly in their business as not to 'taint' employee future employment opportunities. Court award damages to employee in such case (Malik v BCCI, Mahmud v BCCI; Unisys).

Comment on extract
Here the candidate has begun with a strong case reference and a clear statement of the law. The grammar is weak but only if the grammar is so poor that it leads to confusion will this be reflected in the marks. The next single sentence paragraph refers to a change but with no case law there. In the next single sentence paragraph the case is incorrectly referenced but it is close enough that the Examiners can understand the case which is meant. However this is not a strong answer as this is a crucial case in this area so needs more analysis. Critical commentary on this case could form the basis of a good essay in this area.

Remember to be critical of the law and if you are going to write an answer to an essay question then you need to be able to comment critically on the cases and law to gain the higher marks.

Question 8
Terence wishes to hire a bicycle for the day from Rides Ltd, a bicycle hire company that supplies bicycles at various docking stations across London. He arrives at a docking station and carefully reads the instructions written on the docking station’s screen. He is asked to insert his credit card and on doing so the machine prints out a ticket. Terence is then asked to confirm the
hire charge of £20. Terence confirms this hire charge and the machine returns
the credit card. On one side of the ticket is a code which unlocks the bicycle
from the docking station. On the other side of the ticket is a term that states:
‘Rides Ltd limit liability for any damage whatsoever and howsoever caused
during the operation of their bikes to the daily hire charge of £20.’

Terence is enjoying his ride across London when suddenly the brakes on
the bicycle fail and he falls into a canal. Terence injures his right arm and needs
physiotherapy. He also ruins his £2,000 laptop that he was carrying at the
time of the accident.

Advise Terence.

General remarks
This question considered breach of contract and the attempts to limit liability for any
breaches. The starting position should have been to identify the breach of contract,
with reference to implied terms under the Supply of Goods and Services Act, and
the losses which flowed from those breaches. The next step in this type of answer
is to consider if the attempt to limit liability of Rides Ltd has been incorporated into
the contract. This requires close reference to case law, timing, nature of the
document and notice. After this there should have been a discussion of the
construction arguments, some students failed to do this despite the vague nature of
the limitation clause. After discussing the common law principles students should
then discuss the Unfair Contract Terms Act (UCTA) and Unfair Terms in Consumer
Contracts Regulations (UTCCR).

Law cases, reports and other references the Examiners would expect you to
use
This is an indication of cases and authority which could be included and not an
indication of all cases which are relevant.

Terms in Consumer Contract Regulations 1999; Thornton v Shoe Lane Parking
[1971] 2 QB 163; Parker v SER (1877) 2 CPD 416; Spurling v Bradshaw [1956] 1
WLR 461; Chapleton v Barry UDC [1940] 1 KB 532; Andrews v Singer Co [1934] 1
KB 17; Ailsa Craig v Malvern Fishing Co [1983] 1 WLR 964; Canada Steamship v R
[1952] AC 192; R&B Customs v UDT [1988] 1 WLR 321; George Mitchell v Finney
Lock Seeds [1983] 2 AC 803; Smith v Eric Bush [1990] 1 AC 831; OFT v Abbey

Common errors
Failing to identify the breach for which Rides are trying to limit liability. Failing to
fully consider the common law mechanisms of dealing with exclusion or limitation
clauses. Failing to consider the construction tests, when this term was very broad.
Not explaining how the principles of unreasonableness under UCTA were applied. It
is not a stand-alone requirement but needs to be established in tandem with other
sections of UCTA. Failing to consider the Regulations.

A good answer to this question would...
Deal logically with the answer, identify the breach and then apply the common law
principles of incorporation and construction to the facts. Then after fully discussing
this with reference to relevant case law, apply UCTA and UTCCR.

Poor answers to this question...
Failed to use the relevant cases to support the arguments on incorporation, some
failing to consider the common law rules at all. Some candidates failed to consider
any relevant construction arguments despite the vague nature of the limitation
clause. Some candidates also just applied the reasonableness test under UCTA
without explaining how they reached s.11. The test of reasonableness is not a stand-alone section, it is related to attempts to exclude liability under ss.2,3, etc.