Examiners’ reports 2015

LA1040 Elements of the law of contract – Zone A

Introduction

A key requirement in examinations is to read the question carefully and identify the relevant issue being examined. The questions are designed 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?’ Knowing the facts of the cases helps you to identify the areas of law, but remember you are not required to repeat the detailed facts of cases in your answer.

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 understand who is being advised (see specific comments below). Another is answering two questions on the same topic; it is highly unlikely that there will be two questions on the same topic, 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.

You must use relevant authority to support your arguments. If your answer contains no authority, you cannot gain credit for the required knowledge which needs to be evidenced in the answers. Using no specific cases but saying ‘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.

Avoid just writing all you know on a particular area, whether relevant to the question or not, then ‘applying the law’ in a short paragraph. This displays a lack of understanding of the relevant law. It can also lead to repetition, which will use up valuable time. You must apply the relevant law to the facts. Remember, you are asked to advise a person on the given facts. So using the relevant law is essential.

You should plan your answer based on the relevant facts and think logically about the demands of the facts. In problem questions, advise each party separately to help to keep the answer logical. In essays, remember to formulate an answer that actually addresses the question posed. Do not be tempted to write the answer to a question you wish 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.

Make sure you plan your time in the examination well to avoid having three good answers and a weak or non-existent fourth answer. 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.
Comments on specific questions

Question 1

‘We should emphasise that we do not wish our proposed legislation…to hamper the judicial development of third party rights.’ Law Commission Report 1996 (para 5.10)

Critically evaluate the success of the Law Commission’s aims in light of the above statement.

General remarks
This is a question in relation to the doctrine of privity. It asks you to critically consider the law in this area. It requires a knowledge of the attack on privity by the courts and how the legislation has impacted on this move, to the benefit or detriment of the position of third parties.

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

Common errors
Merely reciting the cases in relation to the privity of contract. Then listing the changes made by the Contract (Rights of Third Parties) Act 1999 with no commentary.

A good answer to this question would...
understand the increasing momentum for change to the doctrine of privity being led by the courts, with close reference to case law. Understand the Law Commission motivation for change and the response of the courts in the immediate wake of the Contract (Rights of Third Parties) Act.

Poor answers to this question...
merely outlined the cases that illustrated the application of the doctrine of privity and then listed the rights and limits of the Act.

Question 2

Alex, a builder, requires a crane for a building project. Alex negotiates with Mehmet, a supplier of building machinery, to hire all his building machinery including the crane. During the negotiations Mehmet states that he can supply all Alex’s crane needs for the project, including the DC100 crane which can carry a weight of up to three tonnes. Mehmet has checked the tonnage capacity of the DC100 both in the crane’s manual stored in his office and in the online register. Both confirm that the DC100 is suitable for Alex’s requirements. Alex’s surveyor has also quickly checked the manual and sees that it is suitable. A week before the contract is agreed Mehmet receives an email from the manufacturer with the subject heading ‘DC100 tonnage: error in manual’s tonnage capacity’. He does not bother to read the email. This email would have told Mehmet that the carrying capacity was only one tonne. Alex decides to hire his machinery from Mehmet; he is especially pleased that Mehmet offers him a 10% discount on the hire. Nothing in the written contract
refers to the weight capacity of the DC100. However, when using the DC100 to lift two tonne concrete blocks, the crane is unable to support the weight and drops one of the concrete blocks, which crashes into the roof of the building, a specially commissioned stained glass worth £1 million. Alex has to halt his building project whilst he waits for a new glass panel to be delivered. As a result, he is extremely late on completing the project and makes a loss of £1,200,000. His delay also means that the main contractor does not hire him for a subsequent project. This would have resulted in a £40,000 profit for Alex. Alex discovers that the DC100 only has a weight capacity of one tonne and wishes to sue Mehmet.

Advise Alex.

General remarks
This question concerns misrepresentation. You should discuss whether the statement about tonnage is a representation or a term. Facts suggest that it is more likely to be a representation as the question states that there was nothing in the contract in relation to this matter. The negotiations are for machinery generally, and there are other issues which seem to be part of the contract. You may conclude that it is a term, which means that you may address this. Some credit can be given but it is clear on the facts that the written contract does not include this statement. This is the central issue for examination. Also, as the damages may be too remote for contract damages it may be preferable to bring a claim in misrepresentation.

You should first establish that representation is an actionable misrepresentation before discussing the nature of that misrepresentation and the relevant remedies. It is a statement of fact, which is false. There should be discussion of inducement, as it may be the statements of Alex’s surveyor or the discount that acts as an inducement rather than the weight capacity. It need not be the sole inducement. There is no requirement for Alex to check the weight capacity but it seems that he did make some effort to do so, which should be considered as a central argument to suggest that it was not an inducement. You should then consider the type of misrepresentation that may have arisen: perhaps a fraud, but in that case the burden remains with Alex, so it is better to look at the Misrepresentation Act 1967. In looking at the cause of action under s.2(1) of the Misrepresentation Act, you should consider whether Mehmet had reasonable grounds to believe that the statement was true, and in doing so, consider the case of Howard Marine v Ogden and whether the facts here are distinguishable. Under the Act the burden has shifted to Mehmet, and it is a high burden. Regarding remedies under s.2(1), you should discuss the case of Royscott v Rogerson and the significance of this case as to the question of foreseeability.

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


Common errors
Focusing on the possibility of a term when careful attention to the question should indicate that a misrepresentation was the better option for a claim. Failure to fully consider if the statement was actionable before moving on to consider the type of misrepresentation that it could be. Failure to clearly consider the relevant remedies available.
A good answer to this question would…

take a logical approach to the issues, with close reference to relevant common law authority with clear application of the facts to the principles from those cases.

carefully consider the remedies available for the misrepresentation.

Poor answers to this question…

merely recited all the candidate’s knowledge in relation to contractual terms and misrepresentations without any attempt to apply this to the given facts. Failing to use cases to a sufficient level to develop a full argument.

Question 3

In November 2014, Lottie booked a holiday to do a bungee jump and sports activity based adventure in March 2015. The cost of the holiday was £1,100. Lottie paid £100 deposit with the remaining £1,000 to be paid in two instalments; £500 on 28 February, one month before the holiday, and £500 upon arrival. On 21 February, five weeks before the holiday, Lottie discovers that the bungee jump has been cancelled and so Lottie calls to cancel the holiday. The Adventure Centre tell Lottie that there are still all the other activities available and they will keep her place open and expect full payment. Lottie is very annoyed but, on reflection, she decides she will go. She makes the payment of £500 on 28 February.

On 26 March, two days before Lottie’s holiday is due to start, the Adventure Centre is hit by food poisoning and is closed for inspection. It is discovered that the poisoning is due to contaminated milk being sent from the manufacturer and used in the puddings.

Advise Lottie on any claims.

How would your answer be different if the food poisoning was caused by the chef storing the butter uncovered on the same plate as raw meat?

General remarks

This question involves issues of repudatory breach and frustration. Lottie has a contract, which she will try to say was frustrated when the Adventure Centre failed to provide a part of the contract which she particularly wanted to enjoy. This is unlikely to be frustration and you should point out the narrow nature of the doctrine with a clear definition of what amounts to frustration of a contract. You should explain that when Lottie tried to cancel it would be unlikely on this basis that she could claim frustration as she still had largely what she contracted for, with reference to relevant case law. So, in fact, she was possibly falling within the principle of anticipatory breach as she is saying she will not attend as expected, which the Adventure Centre have rejected; so the problem here is that the obligations remain on both sides. When the Adventure Centre later cancel due to the food poisoning they may be in breach. You should then consider if this is frustration. You should explain the impact of frustration; with reference to the total failure consideration compared to the Chandler v Webster principle and the Act.

The alternative scenario is self-induced so this would be a breach and the remedies would not be in frustration.

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

Common errors
Dealing with this only as a breach of contract or only seeing the possibility of frustration. This error is a problem that results from revising the law in parts, rather than as a whole, and not seeing where topics in the course can be connected.

A good answer to this question would...
deal with the issues logically in relation to the cancellation of part of the holiday and Lottie’s response to this. Then consider clearly that if there is no frustration the remedies for breach may be limited and that Lottie may be in breach herself. She could not get a refund if she did not attend. Then consider the liabilities remaining: the subsequent food poisoning being a frustrating event and the consequences. Then consider clearly the alternative scenario.

Poor answers to this question...
failed to see that this was a frustration question, despite the clues in the question, of unforeseen events and then an alternative situation which suggested the event was self-induced.

Question 4
Seema places an advert in her local shop window, ‘Five goblets for sale: each £10. Available only to the first five people who pay me this amount by Saturday 1st May’.

Ali sends Seema £10 in the post on Tuesday 27th April and says he will collect one goblet on Monday 3rd May. The letter gets lost in the post.

In the morning of Thursday 29th April Chet telephones Seema and asks if he can buy two goblets for £15. Seema says she needs time to think about this and Chet tells her to let him know by Saturday at 10am. On Thursday evening Seema calls Chet and leaves a message on his answering machine saying, ‘I agree you can have two goblets for £15.’ Chet does not hear the message until Saturday morning.

Being disappointed by the response to the advert, Seema decides to place the remaining three goblets in an auction on Friday 30th April. Seema places a note in her window stating that the goblets are no longer for sale and that they are going to auction.

Chet attends the auction and is delighted to see the goblets for sale. He makes a successful bid and buys the three for £15. He sees Eduord, Seema’s partner, at the auction and says ‘What a bargain I’ve got! I’m glad that Seema didn’t respond to my telephone call’. Eduord calls Seema immediately. She is furious as she was keeping two goblets for Chet. In anger she takes two goblets to a charity shop on Friday evening.

Having seen the advert Diego arrives at Seema’s house on Saturday morning with £10 and is very annoyed to see the note as he planned to give a goblet to his mother as a present. Ali arrives on Monday to collect his goblet.

Advise Seema.

General remarks
This is a question in relation to agreement. You should begin by establishing the nature of the advertisement, with close reference to relevant authority. Specifically, with the certainty issue being discussed and the comments by Parker CJ in Fisher v
Bell. Good answers would make reference to this being a unilateral offer with reference to Lefkowitz v Great Minneapolis Stores. If this is a unilateral offer then a revocation would need to follow the principles of Shuey v USA. This case should be read carefully, as the method was not exactly the same.

Seema v Ali – if the advert is a unilateral offer then this can be acceptance. You should explain the general rules in relation to acceptance and then the postal rules, with close reference to authority. These rules apply even if the post is lost, although it may be that Seema has required the communication to actually reach her by the use of the words ‘pay me’. In which case there is no contract with Ali.

If the advert is an invitation to treat then this is an offer which was not communicated, as postal rules only apply to acceptance and not offer.

Seema v Chet – if the advert is an offer then this communication is a counter offer, which Seema needs to accept. The original offer is ended. Seema now needs to communicate acceptance – which is not done until Chet actually receives the acceptance. Discuss the general rules of communication; if this were a commercial context could we argue that the communication is when Chet should have heard the acceptance? This is unlikely in this context. Chet then buys the three goblets at the auction, which was not contentious, and tells Eduord that he no longer wants the two goblets from Seema. Eduord serves to raise the issue of communication of revocation of offer: can it be by a third party and is Eduord able to communicate it? Reference should be made to Powell v Lee, Dickinson v Dodds.

If the advert is an invitation to treat then this is just a straightforward offer and the same applies to communication.

Seema v Diego – if the advert is an offer then Diego is trying to accept as prescribed. He arrives, sees the note, this is actual communication of revocation so there is no need to apply Shuey but credit would be given for explaining how it would operate. Can Seema revoke when Diego has begun to perform and is willing to perform? See Errington v Errington-Woods.

If the advert is an invitation to treat then he is making an offer which she can reject.

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

*Partridge v Crittenden* [1968] 1 WLR 1204; *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB; *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); *Henthorn v Fraser* [1892] 2 Ch 27; *Dickinson v Dodds* (1876) 2 Ch D 463; *Routeledge v Grant* (1828) 4 Bing 653; *Errington v Errington-Woods* [1952] 1 KB 290.

**Common errors**

Failure to use authority in answers. This cannot gain credit as you are required to refer to relevant cases. With this area you should always consider the alternative issue: what would be the results if the postal rule did apply and if it didn’t apply?

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

take the issues logically and clearly set out which parties were being advised. A good answer would deal with the facts clearly, such as noting that Seema’s words in the advert required the money to be paid to her, suggesting that the postal rules would not apply.
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Poor answers to this question…
failed to address the facts as given and dealt with the issues without reference to authority. Some candidates who knew the authority made no attempt to apply it to the facts.

Student extract
The first issue is if the advertisement posted by Seema is an offer. There is a general rule for the advertisement states that all advertisements should be treated as an invitation to treat as to protect the person who is placing the advertisement from incurring any liability in response to the ones who wish to purchase the goods from him. The leading case for this principle is Partridge v Crittenden, stating the general rule for advertisements indeed apply to this case. However, there is an exception which can be seen in the case of Carlil v Carbolic Smoke Ball Company as it identifies that the advertisement has constituted an offer to the company who places this advertisement as it is an unilateral contract and there is a definite intention to create a contract. Therefore based on the advertisement given the sentence that ‘available only to the first five people who pay me this amount by Saturday 1st May’ has given rise the definite intention to bind the contract with the first five persons paying £10 for each goblet.

Comment on extract
The candidate has begun with the facts of the problem, which is a good start and the rule is stated clearly. It would be useful if they had explained what an invitation to treat is, as this is a term of art. What is good in this response is that they have explained the reasoning for the general rule, then supported this with a case. They have then moved on to the exception, a unilateral offer. This point could be developed by explaining how this differs from an invitation to treat, and by giving a clear definition of an offer. What is particularly good here is the application of the facts, a direct reference to the sentence in the given facts which the candidate feels is evidence of the true intention of Seema. Although there is room for improvement in this opening paragraph there is a good deal to credit in the technical ability to explain the law.

Question 5

‘It would seem that the courts are intent on preserving to themselves a degree of remedial flexibility and the measure of recovery in any particular case may therefore be a matter of some uncertainty.’ (McKendrick, Contract Law)

Explain and critically evaluate how damages are assessed by the courts in light of the above statement.

General remarks
Here the focus is on the various measures of damages. There may be some descriptive element but you should critically consider the inclusion of restitution and consumer surplus in a discussion of the more general measures of expectation and reliance. You could usefully consider the equitable remedies.

Law cases, reports and other references the examiners would expect you to use
Common errors
Some candidates merely recited all they knew in relation to damages, or dealt with this as a misrepresentation question.

A good answer to this question would...
compare and contrast the cases in relation to the measure of damages and how the courts try to maintain consistency in their approach while dealing with the issue of true compensation. There is no set answer, some candidates used a discussion of equitable remedies to illustrate the exercise of judicial discretion. Other good answers focused on the introduction of restitutionary damages for contract.

Poor answers to this question...
merely recited cases in relation to damages with no effort to address the question. An essay requires you to consider how to formulate an argument to respond to the question.

Question 6

Roger has a food catering business and has agreed with Dawn, the manager at Nippers Nursery, to supply lunches for the nursery children for a period of one calendar year. He is to be paid £2,000 per month, a price that reflects providing a main course and dessert for each child daily. Unfortunately, due to increased electricity costs, Roger finds himself in financial difficulty. He says to Dawn: ‘Unless you increase my monthly fee to £2,500 I will not be supplying any desserts as part of the lunchtime meal for the children.’ Dawn is disappointed as Roger’s desserts are far healthier than the desserts of his competitors. She believes that a more healthy option will result in positive reviews of the nursery and thereby increase her funding from the government. She agrees to the price rise.

Roger buys his food supplies from Amy. However, his recent financial problems have made it difficult for him to pay Amy and he is £3,000 in debt. Amy is in love with Roger and says to him: ‘Don’t worry, just pay me £500 and we can forget about the rest.’ Roger pays the £500. He is delighted and he books tickets for him and his new girlfriend, Kate, to go away on holiday together.

Both Amy and Dawn hear about Roger’s impending holiday with Kate. Dawn refuses to pay him the extra monthly fee and Amy demands the full repayment of the debt.

Advise Roger.

General remarks
This is a question about consideration. It would be useful to give a very short definition of consideration, with reference to relevant case law, but this should not be a long essay on all the issues on consideration as this is not the best style of answering a problem question.

Roger v Nippers – you should first discuss, using relevant case law, whether there is consideration for the promise by Dawn to pay more. You could explain the general rule from Stilk v Myrick and perhaps compare to when there is anything extra given, as in Hartley v Ponsonby. Then consider if the principles of Williams v Roffey apply. This is a contract for services, and Roger is not going to perform the service which Nippers has agreed to pay more for. There may be some practical benefit, in getting positive reviews of the nursery. Would it be possible for Dawn to raise the issue of economic duress here? There is enough to suggest this.
Roger v Amy – this is a contract for debts, you may consider if Williams v Roffey applies to this type of contract but should reject this in light of the comments in Re Selectmove. Therefore, consider whether Amy’s promise to accept less money is enforceable or if there is lack of consideration for the promise (Foakes v Beer). You should also discuss the doctrine of promissory estoppel, including whether there was reliance on the promise to accept less. If so, then can Amy go back to her legal rights subject to reasonable notice?

Law cases, reports and other references the examiners would expect you to use Currie v Misa (1875) LR 10; Stilk v Myrick (1809) 2 Camp 317; Hartley v Ponsonby (1857) 7 E&B 872; Williams v Roffey Bros [1991] 1 QB 1; Foakes v Beer (1884) 9 App Cas 605; Pinnel’s Case (1602) 5 Co Rep 117a; Re McArdle [1951] Ch 669; Pao On v Lau Yiu Long [1980] AC 614; CLP v High Trees House [1947] KB 130.

Common errors
Failure to consider all the elements of Williams v Roffey and only considering either duress or practical benefit. Logically, if there were duress, which could set aside a contract, there would need to be a contract to set aside. So to focus on this was illogical. Failure to see the limit of Williams v Roffey in relation to Roger v Amy.

A good answer to this question would...
explain very briefly, with reference to relevant case law, what consideration is and then begin to give advice directly. Break down the relevant issues of the principles of the cases and reach a conclusion on those principles.

Poor answers to this question...
recited all the candidate knew in this area or failed to address the facts given in the question in relation to the relevant law.

Question 7
Agatha telephones Brian to order a ‘Betahouse’ food blender, the latest device for perfect baking. Brian mishears this and thinks she wants a ‘Bekahaas’, the standard blender. Brian tells Agatha that he has one for £200 and Agatha is delighted at this price as this is much less than the normal cost of a ‘Betahouse’ blender, which is £800. She tells Brian to put it aside for her and she will be in at 5pm that day to collect it.

Later Agatha, who runs a shop selling antiques, receives a telephone call from someone claiming to be Polly Petty, a famous antiques collector and television celebrity and the host of a television programme about antiques. ‘Polly Petty’ asks if Agatha’s wonderful Russian Blue clock is for sale as she would like to buy it to make an episode of her television show about it. Agatha is very flattered and delighted as ‘Polly Petty’ is willing to pay top price. In fact, ‘Polly Petty’ is a rogue called Hetty.

When ‘Polly Petty’ arrives Agatha is so star struck that she asks for publicity shots to be taken, which Polly happily agrees to. Agatha loads the clock into Polly’s car and then Polly produces her cheque book. Although Agatha is reluctant to take a cheque for such a large amount she does not want to miss the opportunity for such good publicity.

Agatha then arrives at Brian’s shop and discovers that a Bekahaas has been set aside for her and she refuses to accept it. Then later, at the bank she discovers that the cheque is a forgery. On the way home she sees her Russian Blue clock in Zayn’s second hand shop. She goes in and demands he return it to her.

Advise Agatha.
General remarks
The issue here is mistake. Briefly explain the consequence of mistake on a contract – making it void and not voidable.

Agatha v Brian – mistake which was mutual at cross purposes. It could be argued that she snatched at a bargain as the price was considerably lower, with reference to relevant case law. Generally, a discussion of the requirements of mistake here is relevant.

Agatha v Zayn – there is clearly a fraud by Polly but as she has disappeared this is of no use, so you should not focus on misrepresentation. This would only make the contract voidable and on the facts the property had been sold to Zayn before Agatha realised the deceit. Misrepresentation makes the contract voidable so Zayn obtained good title if there was a contract. To have a claim against Zayn then she must prove that he never obtained good title, as there was no contract between Agatha and Polly. Then unilateral mistake to identity: was it a fundamental mistake or just as to finances? This should include a discussion of distance or face to face contract.

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

Common errors
Only dealing with misrepresentation, which, on a clear understanding of the principles, would not have helped in a claim against Zayn. Also, there was no issue of the Sale of Goods Act, as Brian did not make any guarantees as to the blender. There was a misunderstanding.

A good answer to this question would...
understand the issues which were relevant and what Polly would need to do to avoid the contractual obligation to buy the blender and recover the property from Zayn.

Poor answers to this question...
failed to spot the issues in the question, only dealing with misrepresentation, which shows a lack of understanding as to the consequences of both misrepresentation and mistake.

Question 8
Simone has a dairy farm business and attends a meeting with Rita, the manager at Freshco, a large national supermarket to whom Simone wishes to sell her milk. Rita is impressed by Simone and wants to do business with her. Rita agrees to contract with Simone for a period of six months. She hands Simone the standard Frescoh order form which details the quantity of milk Simone is required to supply each week and the dates on which it is to be delivered to the supermarket. Simone is thrilled to have this business opportunity and signs the order form immediately. Unbeknown to her, on the back of the order form, in very small print, it reads:

Clause 1.1 ‘Freshco reserves the right to cancel the order at any time.’
Cause 1.2  ‘Freshco limits its liability for any damage whatsoever and howsoever caused in the performance of its contractual obligations to £100.’

After two weeks, Simone receives a telephone call from Polly telling her that Freshco wishes to cancel all future orders with immediate effect. Simone is extremely upset and slams the phone down. Rita decides to drive over to Simone’s farm to check that she is alright. As she arrives, however, her car slips in the mud and crashes into Simone’s barn, causing £5,000 worth of damage.

Advise Simone.

General remarks
This question deals with the incorporation of terms into a contract, whether the terms are applicable to the circumstances that have arisen and the statutory regulation of the terms. To begin, you could identify the issues facing Simone: the cancellation of the contract and the damage to her barn.

You should first discuss whether terms have been incorporated into the contract. Most relevant here is whether the document (order form) is one which could be expected to have contained contractual terms. As the form has been signed it may be difficult to deny incorporation but reference can be made to the onerous nature of the terms and if this requires further steps to be taken by Rita, on behalf of Freschco, to bring this to Simone’s notice. It could be useful to point out that as they are both business people this will be difficult for Simone to argue.

If incorporation can be established you would need to discuss whether the terms cover the breaches that arose – particularly relevant here is whether Rita was acting ‘in the performance of contractual duties’ when she damaged the barn, as clause 1.2 specifically refers to liability arising in those circumstances. This point was rarely noted by candidates, who instead focused on the wide nature of the terms, ‘whatsoever and howsoever’ as part of the construction argument. Statutory control over terms must then be examined. Since Simone is not a consumer only UCTA is relevant and candidates should be able to examine the applicability of s.3(2)(b)(i) and associated case law as well as s.2(2) and s.11 (in the event that circumstances of accident might be held to fall within exclusion clause). One key issue was that UCTA only covers attempts to exclude or limit liability for a breach and therefore does not directly cover clause 1.1.

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

Common errors
Failure to address the common law clearly and to move directly to the statutory provisions. In relation to the statutory provisions many candidates broadly applied UCTA to clause 1.1 when this is not an exclusion clause. Also, some candidates just considered s.11 UCTA on reasonableness rather than explaining how this section could be used. It is not a standalone section and you can only apply this via sections such as s.2 and s.3.
A good answer to this question would...
identify the issues facing Simone and clearly deal with the common law before moving to the relevant statutory provisions, perhaps with a line saying why UTCCR does not apply.

Poor answers to this question...
failed to deal with the issues logically or to deal with the common law. Although this may seem irrelevant in practice, as the legislation covers so much, it has limitations. For example, the limits of UCTA for clause 1.1 and how to use the common law in this area. Again, many candidates failed to refer to the wide range of relevant cases in this area.

Student extract
Clause 1.1 Freshco reserves the right to cancel order at any time.

The contract was made and Simone has been abiding to the contract. There appears to be no breeches [sic] by Simone. As such, it is unfair for Freshco to cancel the order without any valid reasons. The clauses inserted states the right to cancel order. This is however, not standing due to infringement of Unfair Contract Terms Act 1977. Freshco has no right to terminate the order.

It is an implied term that repudiating of contract can only occur when there is obvious breeches [sic] of contract. As such, Simone can sue on an Unfair Contract Terms Act 1977.

Comment on extract
The candidate began directly with the first clause, which is good to get to the facts but you should identify the key issue, reliance on contractual terms and their incorporation and then the parties. The candidate is right on what clause 1.1 covers and immediately asserts that this is unfair. There is no general requirement for contract terms to be fair, consider the principles of freedom of contract which are central to contract law, especially between businesses. The candidate then refers to UCTA, which does not directly cover this type of clause. The application of UCTA to all clauses is a common error, the Act only applies to attempts to exclude or limit liability for breach. The candidate then seems to suggest that there are implied terms as to when a contract can end, this is incorrect.

Although the candidate has a grasp of the basics, and uses language of contractual nature, there is no discussion of the common law rules of incorporation and construction which are the only method to use here to help Simone in any claim.