Examiners’ report 2012

LA1040 Elements of the law of contract – Zone A

Introduction

This document sets out the Chief Examiner’s report for the examination paper in Elements of the Law of Contract – Zone A. It begins with general remarks pertaining to the examination scripts as a whole before considering each examination question in turn.

Many candidates answered the questions well. At times, however, some candidates struggled in the attempt to answer the problem set. Three common difficulties were exhibited. One was a very fundamental one: an inability to recognise that certain areas of law were involved in resolving the hypothetical 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 presented by those candidates who did not carefully consider 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, in absence of any attempt to apply this law towards the resolution of the problem given. A third, somewhat less fundamental difficulty, 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. It must be emphasised that a purpose of the Examiners’ report 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 Examiners’ report is 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. 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 dutifully recorded in the examination booklet. The reason for this is likely twofold: first, it is often hard for intermediate candidates to discern the relevant from the irrelevant and caution encourages a complete list of cases to ensure that none are omitted; secondly, it is tempting to produce a lengthy answer in the hope that the Examiner will be impressed by the breadth of knowledge acquired by the candidate. A successful answer identifies the issues and applies the relevant law to them. Such an answer displays not only knowledge, but also understanding of the subject being examined. The recitation and discussion of cases which are irrelevant to the question serve to highlight a candidate’s uncertainty as to which issues are involved in the question. In other instances, some answers appeared chaotic, as if the candidate had hurried into an issue 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. Among other things, it 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. Their attempts were often, and unfortunately, confined to the recitation of everything they knew about a particular subject. In so doing, such candidates often presented a great deal of material; this presentation was marred by an apparent 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 as asked. A part of this answer will, necessarily, involve legal analysis. In other instances, candidates were unable to answer the question asked in an essay question. They chose, instead, to adapt the question to a topic that they did know something about. Such an attempt is not, however, an answer to the question asked. It 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 balance of the paper.

It goes without saying that it is difficult to succeed where all of a candidate’s efforts are concentrated on two or three answers when the examination paper requires four questions to be answered. A number of candidates did not appear to have sufficient knowledge of contract law to attempt four questions. Lastly, the Examiners for Elements of the Law of Contract wish to emphasise the importance of writing the answers clearly. It is difficult, and sometimes impossible, to assess the illegible.

## Specific comments on questions

### Question 1

Norman, a model, has been losing his hair, a matter which concerns him greatly. He reads an advertisement in a men’s magazine which states:

‘Thinning hair? Receding hair? Worry no more for an easy lotion is now available: Dynamic Hair Growth – a new lotion made by the Dynamic Hair Growth Company. The use of the Dynamic Hair Growth lotion will not only halt hair loss, it will reverse this process and restore any hair already lost. Simply use Dynamic Hair Growth three times daily, in accordance with the instructions, for two months and see the results. A full head of hair or we will provide you with £1,000.’

The advertisement also states, in small print below the bold statement, ‘see our website for further information’. Norman does not check the website which provides a long list of medical conditions which will prevent the Dynamic lotion from properly working.

Norman purchases the Dynamic Hair Growth lotion from Easy Chemists, where the sales assistant informs him that the lotion has done wonders for her husband’s hair. Norman uses the lotion in accordance with the instructions for two months. At the end of the two months, Norman is
completely bald. When he contacts the Dynamic Hair Growth Company, their doctor examines him. Based on this examination, Dynamic inform him that the baldness is due to a rare medical condition. Norman, now no longer able to work as a model, becomes despondent.

Advise Norman.

To what extent, if any, would your advice differ if the Dynamic Hair Growth had been a gift to Norman from his girlfriend, Olive?

General remarks
This problem question asked candidates to determine whether or not Norman had formed a contract with Dynamic. To answer this question, candidates needed to consider those cases concerned with the offer of a unilateral contract. These cases include *Carlill v Carbolic Smoke Ball Co* (1893), *Bowerman v ABTA* (1995) and *Soulsbury v Soulsbury* (2007). If Norman does have a contract with Dynamic, is he able to claim damages beyond the reward offered of £1,000? To resolve this specific issue, candidates needed to consider the nature of the terms of Dynamic’s offer. In particular, what effect are those matters listed on Dynamic’s website and of Norman’s failure to consult the website? Is Norman’s rare medical condition one of those which are listed?

In addition to any possible contract with Dynamic, candidates needed to consider any potential contract with Easy Chemist. It seems likely that a contract was formed with Easy Chemist; would such a contract have allowed Norman to claim damages for the losses which arose? A good attempt at the answer would have differentiated the nature of any contract with Dynamic from that with Easy Chemist. In addition, the facts given appear to indicate that Norman’s baldness is due to a rare medical condition and not use of the hair lotion.

This question concluded with a variant to the principal issues presented above when candidates were asked to consider whether their advice would differ if the hair lotion had been a gift to Norman from his girlfriend Olive. In such a situation it seems unlikely that Norman would be aware of Dynamic’s offer of a reward. If he is not aware of the offer, it is probably the case that he cannot accept the offer although the law in relation to such an issue is not certain. Candidates could have considered the nature of the decisions in cases such as *Gibbons v Proctor* (1891) and *R v Clarke* (1927). If Norman is aware of the offer, has he met the conditions of the offer if Olive purchased the hair lotion? Has Norman provided consideration such that a contract has been formed?

A good answer to this question would...

Begin by considering the general nature of the area of law concerned – contractual formation – and then would proceed to identify the particular issues involved in resolving the question of the contract or contracts formed and the particular terms of these contracts.

A good answer would also set out the legal principles and reasoning in the relevant cases and apply these with clarity to the issues presented in these problems.

Poor answers to this question...

Varied from those instances where candidates were unable to establish that the question involved issues of contractual formation. In some cases, candidates were preoccupied with addressing matters that were not central to the resolution of the problem. An example of this occurred with considerations of misrepresentation – on the basis that the Easy Chemist sales assistant had informed Norman that the lotion
had done wonders for her husband’s hair. A further example occurred in those attempts to answer the variant to the question with considerations based solely on privity of contract. Such lengthy considerations were misplaced because there is nothing to indicate that such a statement was a misrepresentation, let alone an actionable misrepresentation.

**Student extracts**

**Extract 1**
The following is an extract from the introduction of one candidate’s attempt to answer this question.

‘OFFER: An expression of willingness to be bound on certain terms.

Acceptance: An unequivocal assent to all terms.

Generally Adverts are considered as ITT’s (Partridge v Crittenden) and the offer will be made by responding to the advert, by communicating with the advertiser.

But conditions are different for that of a unilateral contract. Unilateral contracts are often referred to as reward contracts. Where the offeror makes an offer to the world at large usually via an advert. A promise in return for an act. The offeree does not need to communicate acceptance directly to the offeror. Acceptance is usually made by carrying out an act or term listed in the advert. This will normally initiate a binding contract. Revocation of this kind of offer has to be made in exactly the same way as the offer to the world at large.’

There are a number of weaknesses presented in this extract in addition to the obvious grammatical errors and infelicities of style. It is far preferable to commence a discussion with the relevance of the statements to be made rather than plunging into the statements as to the nature of an offer and an acceptance. It is also the case that the statement as to the nature of an offer is not complete. Neither proposition is supported with reference to the relevant legal precedents. The answer then jumps, without further ado, to consider ‘Adverts’, stating that they are ‘ITT’s’. It would be preferable if the nature of an offer were considered more fully, with reference to the relevant cases before proceeding to consider whether or not an offer can be made in an advertisement. It is also advisable not to use acronyms or abbreviations (here ‘ITT’s’) without defining these or, at a minimum, indicating what this is an abbreviation for. The result is that this candidate has commenced their attempt to answer the question in a way which is confusing to read and does not indicate an understanding of the question which has been asked by the Examiners.

**Extract 2**
Another candidate began their attempt to answer the same question with the following statements.

‘Norman will want to be advised if he is able to claim the £1,000 from Dynamic Hair Growth Company and, if possibly, he is entitled to any further compensation as a result of his hair loss.

The ‘offer’
An offer is an expression of willingness to contract on certain terms with the intention to be bound upon acceptance – (Treitel). We must first look to see whether the advertisement that Norman (‘N’) saw in the men’s magazine was indeed an offer.

Historically, adverts in magazines are seen as invitations to treat rather than offers (Partridge v Crittenden) but there are exceptions to this rule when there is a unilateral offer. A unilateral offer is a promise in return for an act. The facts of the scenario strike a resemblance to that of the famous case of Carlill v Carbolic Smoke Ball Company where the court held that this was a unilateral offer. In this case an advertisement was placed offering a monetary reward should one purchase a ‘Carbolic Smoke Ball’, use it correctly, and still contract influenza. The claimant was entitled to the reward as the offer was deemed as ‘an offer to the world at large’ capable of acceptance by conduct (i.e. purchasing and using the carbolic smoke ball). Relating the facts of this case to the present situation will no doubt suggest that the magazine advertisement was a unilateral offer and capable of acceptance.’

In comparing these two attempts to answer the question, it can be seen that this second attempt has certain strengths over the first attempt. It clearly introduces the general point of the answer (‘Norman will want to be advised . . .’). The point could be stated more directly that Norman’s entitlement to damages lies in establishing that a contract exists with Dynamic and then proceeding to consider:

(a) the necessity of an offer to form a contract; and

(b) whether or not an offer capable of acceptance has been made in this case.

The second attempt to answer the question sets out the relevant legal precedents in attempting to resolve the issues presented. The second attempt could, however, be stronger. It might, for example, have considered what was necessary to constitute an offer before considering in what circumstances an advertisement could be an offer.

Question 2

Abby operates a taxi company and has entered into lucrative contracts with two law firms, City Slackers LLP and Fat Cats LLP. The following events occur:

a) Her contract with City Slackers involves the supply of ten taxis every night to take their employees and clients home from the firm’s offices. After a month, Abby realises that the rise in petrol prices has made it impossible for her to supply the taxis without operating at a loss. She contacts City Slackers and informs them that she will not be able to supply the full quota of ten taxis the following night. City Slackers are hoping to finalise a very profitable deal with important clients that week and have no time to find an alternative taxi firm. In addition, they think that Abby’s professional taxi service will give a good impression and may help to seal the deal. They therefore agree to pay Abby an extra £500 if she can continue to provide the taxis for the rest of the week. Abby agrees but when she invoices City Slackers they refuse to pay her the additional money.
b) Abby has an agreement with Fat Cats to supply five taxis every morning. Recently, however, she has had a number of staff problems and is unable to provide enough drivers for the five taxis. She contacts Fat Cats and asks whether it would be possible to provide only three taxis for two months whilst she expands her business through a new advertising and recruitment drive. Fat Cats agree. Abby spends a huge amount of money on advertising, buys new cars and employs new staff. However, after the two months, Fat Cats now seek compensation for the two taxis that were not provided.

c) One of Abby’s drivers picks up the managing director of Fat Cats, Sophie, every morning. Sophie tells the driver that she loves being driven the longer, scenic route to work since it relaxes her and improves her performance during the working day. The driver begins to take Sophie via the scenic route. After a month, Sophie tells the driver that the journey is greatly benefitting her work and that Fat Cats will pay for the extra petrol. That day, Abby invoices Fat Cats for the last month’s services, including an additional £100 for the extended route. Fat Cats refuse to pay the additional £100.

Advise Abby.

General remarks
This question was attempted by a large number of candidates. The problem presents three distinct issues concerned with consideration, promissory estoppel and the relationship between these two areas of law.

Part (a) required candidates to discuss the law applicable to the question of whether or not the performance of a pre-existing contractual obligation (owed to the same party and not to another party) can be good consideration. If it is good consideration, Abby should be able to enforce the promise to pay the additional £500 City Slackers agreed to pay to Abby under the renegotiated agreement. To determine whether or not there is good consideration present in this renegotiated agreement depends upon the application of Williams v Roffey Bros (1989). Candidates needed to consider whether or not the circumstances necessary for the application of this precedent; for example, an absence of duress, exist in these circumstances. A good answer considered the criteria necessary to establish a practical benefit as established in Williams v Roffey Bros (1989) and applied these criteria to the facts given in the problem. It could be argued that Abby should have been more aware of the rising petrol prices which would render contractual obligations impossible to perform profitably. A very good answer would consider the strength of Williams v Roffey Bros (1989) as a precedent in light of later decisions such as Re Selectmove (1993).

Poor attempts to answer this question consisted of formulaic discussions of the necessity for consideration without exploring the precise issues involved in the problem. Many candidates did not display an understanding of the circumstances in which Williams v Roffey Bros could be applied nor the criteria necessary for its application.

Part (b) of the question asks candidates to consider promissory estoppel and its relationship to consideration. Abby’s reliance on the promise, by spending money on advertisement and recruitment, is likely to assist her claim that a promissory estoppel has been made out. Candidates needed to consider and apply the criteria
necessary to establish a promissory estoppel. If, on these criteria, a promissory estoppel has been made out, can Fat Cats recover damages for the non-performance of the original agreement? While many candidates considered the nature of promissory estoppel, few considered whether such an estoppel would prevent the recovery of damages for the non-performance of the original agreement.

Finally, part (c) required candidates to consider whether or not Sophie’s promise to pay extra money is contractually enforceable. It would appear that the promise is not binding since the apparent consideration is past consideration. It is unlikely that the exceptions established by *Pao On v Lau Yiu Long* (1979) will apply in this scenario. A good attempt to answer the question would consider the decision in *Pao On v Lau Yiu Long*.

Weak attempts to answer this question were made by those candidates who did not realise that the problem was concerned with the rule against past consideration.

**Question 3**

‘Although the Misrepresentation Act 1967 was a much-needed piece of legislation it was extremely poorly drafted, leaving much for the courts to develop. On the whole, however, the courts have done a good job in their interpretation of the legislation, particularly where the “fiction of fraud” is concerned.’

Discuss.

**General remarks**

A significant number of candidates attempted to answer this question. Candidates were required to write an essay considering the Misrepresentation Act 1967 and how the legislation has been interpreted and applied by the courts since that time. A good answer to the question might also include an examination of the 1967 Act’s relationship with the common law torts of negligent misstatement and deceit and the relief available for an equitable misrepresentation.

A number of topics could be discussed in an essay considering the 1967 Act. One such topic could be the ‘fiction of fraud’ and how this has been interpreted in decisions such as *Royscott v Rogerson* (1991). An essay could also discuss how difficult courts have made it for a representor to prove his honesty and reasonableness under s.2 of the Act in making the statement as a result of the decision in *Howard Marine & Dredging Ltd v Ogden* (1977). Another interesting area of examination arises from the interpretation of s.2(2) of the Act. The Act provides little guidance as to the assessment of damages to be made under this sub-section. In addition, the authorities are divided as to whether or not the sub-section is applicable when the claimant has lost the right to rescind the contract (for example, *Zanzibar v British Aerospace Ltd* (2000), *Thomas Witter Ltd v TPB Industries Ltd* (1996)). A very good attempt at the question would explore a variety of these topics, providing a good synthesis of the judicial interpretations of the Act and an analysis of the difficulties presented by these interpretations.

Few candidates who attempted to answer this question addressed their answer to the question as set. An unfortunately large number of attempts discussed matters either entirely irrelevant to the question set (for example, those requirements
necessary to establish a misrepresentation) or produced discussions which were largely irrelevant (for example, a catalogue of different types of misrepresentation). The question is not answered by producing a general discussion on the nature of different forms of misrepresentation and the remedies generally available.

Question 4

Walter and Metallica Ltd contract to provide that Walter will sell to Metallica an island rich in coal. The agreement was entered into on April 13 and the island was to be conveyed to Metallica on May 1. The purchase price was £5,000,000. On April 1 Parliament passed the (fictitious) Prevention of Strip Mining Act. The Act came into force on April 10 and its effect was to prohibit all strip mining on the island.

Neither party was aware of the legislation at the time of the contract. Metallica paid to Walter a deposit of £500,000. Metallica subsequently discovered the planning restrictions before May 1. Metallica refused to complete the contract of sale. Walter sued for specific performance of the contract and Metallica counter-claimed for the return of its deposit. The island, so restricted, is worth £200,000.

Advice Metallica.

General remarks
A large number of candidates attempted to answer this question. The central issue presented is that of contractual mistake.

A good answer to this question would...

Need to consider whether there was a sufficiently fundamental mistake to vitiate the apparent contract of sale? The relevant mistake is as to a quality of the subject matter of the contract. Candidates needed to consider and apply the leading cases concerned with such a mistake. Relevant cases include Bell v Lever Bros (1931), Solle v Butcher (1949), and Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (2002). A number of particular issues needed to be addressed. Is the contract void for mistake? Is it possible for it to be voidable for mistake? A good attempt to answer the question would address the ambiguities left in this area of law following the Court of Appeal’s decision in Great Peace Shipping v Tsavliris Salvage (International) Ltd. Candidates could also have considered, if the contract is subsisting, whether or not the purchaser could resist an action for specific performance.

Poor answers to this question...

Occurred where candidates did not properly consider the issues arising from the facts presented. Although fictitious legislation is present in the facts given, it does not give rise to issues of illegality. Nor is the question concerned with frustration because there is no supervening event arising after contractual formation. Attempts to answer the question on either basis revealed a lack of understanding of contract law.
Question 5

Pat is the owner of an old and somewhat decrepit house in need of attention. Her family decide that, as a birthday gift to her, they will have the house renovated and refurbished. Her husband, Quentin, engages Sparke Ltd, a firm of electricians, to rewire the house and install recessed lighting throughout. The work is to be completed by the end of February. Pat’s mother, Ruby, arranges to have Floode Ltd install a new set of bathroom fixtures in the upstairs bathroom. This work is also to be completed by the end of February. After Ruby has placed her order, she and Floode agree that Floode will only be accountable to her. Not to be outdone in the project, Terence, Pat’s father, visits the Busted shop and arranges to have a complete home entertainment system delivered to Pat’s home.

Sparke work slowly and erratically and at the end of April have still not completed their work. Floode do not supply the bathroom fixtures ordered and what they do install is so poorly done that the entire work will need to be replaced. Pat and Ruby argue over this and Ruby insists that everything is fine and that there is nothing she will do about this. The home entertainment system from Busted is not as described and is unable to function continuously for more than half an hour. Pat and Quentin have had to live in a hotel for the past two months and found it difficult to function normally given the stress of the situation.

Advise Pat.

General remarks
This question was attempted by a reasonable number of candidates. The question is primarily concerned with privity of contract and the rights of third parties. Pat owns a house; Quentin, Ruby and Terence all enter into contracts in relation to this property. Pat is not a party to these other contracts; privity of contract should bar her from enforcing these contracts. Candidates should have considered and applied cases such as Dunlop Pneumatic Tyre v Selfridge & Co Ltd (1915) and Beswick v Beswick (1967) to establish such a proposition.

The issue to be considered, however, is whether Patricia is able to enforce all or any of these contracts as a third party, either under the Contracts (Rights of Third Parties) Act 1999 or under the various exceptions available at common law? Candidates should consider and apply the relevant provisions of the Act.

A good answer to this question would...
Examine the cases interpreting the provisions of the Act. A particular issue which arose in relation to Ruby is her attempt to vary the contract after it has been entered into; the Act, in general terms, prohibits such an attempt. Would the attempt have been effective here? Candidates could also have considered the relationship of the Act to the common law and consider whether or not, at common law, Patricia might have enforceable rights under some or all of these contracts.

A very good attempt to answer the question would note that aspects of the problem are close to that outlined in the obiter dicta of Lord Griffiths in the leading case of Linden Gardens v Lenesta Sludge (1993).
A minor issue at the end of the problem is, assuming that Patricia does have a right to enforce some or all of these contracts, what remedy is available to her? Can she, for example, recover damages for mental distress? A good attempt to answer the question would explore such a possibility.

**Poor answers to this question…**

Failed to appreciate that privity of contract was an issue presented by the facts given. The result was to produce an answer concerned with breach of contract and damages without any consideration that Pat’s central problem was whether or not she could, as third party, enforce the various contracts. Some poor attempts to answer this question recognised that privity was a problem but did not consider any means by which Pat, as a third party, could seek to enforce the various contracts.

**Question 6**

Hubert decides to improve his foreign language skills. He telephones SpeakRite, an online foreign language service, and enquires about their Polish language courses for beginners. Patek, one of SpeakRite’s salespersons, explains the content of the Polish language package to Hubert. Every month a password will be emailed to Hubert which will enable him to download the full content of that month’s lessons. In addition, SpeakRite undertake to provide Hubert with an hourly conversation class by telephone with one of the company’s native Polish teachers. The package costs £100 per month.

Hubert is impressed and decides to subscribe to the monthly package. He receives a contract by email which directs him to a website containing SpeakRite’s terms and conditions. When Hubert accesses the webpages and tries to read them, however, he is unable to understand anything as it is all written in Polish. He nevertheless sends SpeakRite the initial £100 to commence the course.

All goes well for the first two months. However, certain problems then arise. Hubert discovers that the native Polish teacher has resigned and there will no longer be any conversation classes available. In addition, when Hubert enters his password a virus within SpeakRite’s webpages deletes all of Hubert’s files on his computer. He immediately telephones SpeakRite who send one of their engineers, Marek, to investigate. Unfortunately, Marek cannot rescue the files. On leaving Hubert’s home, Marek reverses his van over Hubert’s foot causing him serious injury.

On complaining to SpeakRite, Hubert is given an English copy of the company’s terms and conditions:

i) SpeakRite reserve the right to alter the content of their service without prior notification.

ii) SpeakRite accept no responsibility whatsoever for damage to property, howsoever caused.

iii) SpeakRite accept no liability for personal injury caused to their clients by SpeakRite or their employees.
Advise Hubert.

**General remarks**

This question was attempted by a large number of candidates. The question is concerned 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. A good attempt to answer the question would have considered these various issues in turn.

The first issue presented is how the terms provided are incorporated into the contract. If they are incorporated, it is probably by reasonable notice. The problem is whether the fact that the terms are written in Polish prevents their incorporation. A good attempt to answer the question would notice that it is relevant that the terms regulate contracts for those learning the Polish language and therefore, by definition, not able to understand terms written in this language.

If incorporation can be established (on the facts given, this appears to be a difficult endeavour) candidates needed to establish whether the terms covered the breaches that arose. If they cover breaches, then the statutory controls (The Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999) over the use of terms must be examined and applied. Good attempts to answer the question considered and applied not only the relevant portions of the legislation but also those cases which have interpreted the legislation. A very good attempt to answer the question would consider the differing applications of the different pieces of regulatory legislation.

In relation to the resignation of the Polish teacher and subsequent lack of conversation classes, answers should have addressed whether the Unfair Terms in Consumer Contracts Regulations applied and, if so, whether terms would be considered unfair under Reg. 5 of the Unfair Terms in Consumer Contracts Regulations. Good attempts to answer the question would also have scrutinised this issue in relation to term 1(k) in the indicative and non-exhaustive list set out in Schedule 2 to the 1999 Regulations. A good answer would identify that terms which appear in the indicative list raise a presumption of unfairness.

In relation to the deletion of Hubert’s computer files through the computer virus, if it can be established that the term covers the breach then candidates could have considered whether Hubert can establish that exclusion of liability is unreasonable under the Unfair Contract Terms Act 1977 and/or unfair under Reg. 5 of the Unfair Terms in Consumer Contracts Regulations 1999. A good answer would also consider upon which party lay the burden of proof of establishing reasonability and unfairness.

In relation to personal injury, the exclusion of liability would probably be regulated by both s. 2(1) of the Unfair Contract Terms Act 1977 and Reg. 5 of the Unfair Terms in Consumer Contracts Regulations 1999 and term 1(a) of the indicative list in Schedule 2.

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

Consider and apply those cases interpreting the relevant legislative provisions.
Poor answers to this question…
Approached the problem as primarily one of the incorporation of terms into a contract. Attempts which were focused on exhaustive discussions of the nature and processes of incorporation failed to address the principal issues presented in this problem, that of the application and effect of the two regulatory regimes.

Question 7

‘English law’s restrictive approach to the equitable remedy of specific performance is difficult to justify. Since the only reason that parties enter contracts is to obtain performance, then the law should allow parties to enforce performance when breach occurs.’

Discuss.

General remarks
Only some candidates attempted to answer this essay question. This question calls for critical discussion of specific performance and the various ‘bars’ to its availability.

A good answer to this question would…
Consider and analyse the body of case law which illustrates those factors which weigh against the remedy, in particular, that of Co-Operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd (1997).

A good attempt to answer the question would also provide an indication of the candidate’s own views on whether the remedy should be extended and whether such an extension would better support the reason(s) that parties enter into contracts. The candidate’s opinion should be supported by reference to the case law.

Student extracts

Extract 3
The following represents a significant portion of one candidate’s attempt to answer this question:

‘Specific performance is a requirement placed by the courts to a party to complete the performance of the Act if it is in breach of the contract.

This is an equitable remedy and is provided to a party who seeks to rely on it if it abides by the equitable maxim that he who comes to equity must come with clean hands.

We can find that justification can be provided to the restrict approach of specific performance in Equity as equity seeks to look at reasoning, equality and fairness and thus it will not grant the order of specific performance if there is a contradiction to the rules of equity.

Equity can limit specific performance in many ways, if it finds that the party is unable to perform the contract specifically, e.g. where there is an unavailability of a
good. It may also, however, we can also find that specific performance may be granted when there is no substitute for the good. Thus, forcing parties to obtain a performance which is essentially the reason for entering into a contract as held in a case where the court ordered a company to provide the other party with machinery which was not available anywhere else.'

Comments
This is a weak attempt to answer the question set. The structure of the answer is poor and the information presented is disorganised and confusing. The account of specific performance is limited to a rambling, and at times inaccurate, discussion of equity in very general terms. No attempt is made, either in this extract or in the entirety of the answer provided, to examine and analyse the cases concerned with specific performance.

Extract 4
The following extract is derived from another candidate’s attempt to answer the same question. This candidate began with a clear introduction to their attempt to answer the question, followed by a discussion of the nature of specific performance and the various bars placed upon an award of specific performance. Relevant cases were used to support this discussion. The candidate then set out their thoughts on the matter:

‘From the above it can be seen that the courts really have adopted quite a restrictive approach to the remedy of specific performance . . . but all these restrictions are either flowing from the nature of this remedy which is equitable or they are based on pure logic and practical considerations. Why make a party do something it is incapable of doing? Why force someone to work for somebody else if that person is unwilling and later the courts might be involved in settling a dispute on the deliberate non-performance (or maybe non-deliberate, which would be extremely difficult to assess)?

Besides, damages can be awarded as a flexible element here to mitigate the fact that e.g. the subject matter of the contract has been used or consumed and it is physically impossible to comply to the order of specific performance if there is nothing to return.’

This candidate has attempted to provide their own commentary on the underlying reasons justifying English law’s restrictive approach to orders of specific performance. It is this commentary, following upon a detailed discussion and analysis of the relevant cases, which makes this a good attempt to answer the question. It is, importantly, an attempt to answer the question asked by the Examiners and not a general discussion on remedies.

Question 8

Smooth Sam is a disc jockey. He agreed to work last Saturday for the Nelson Arms pub. The Nelson Arms agreed to provide Sam with all the necessary equipment for his show including a selection of 200 records. The Nelson Arms also agreed to pay Sam £1,000 for his show on Saturday and to pay Dave, Sam’s friend, £150 to set up the equipment before Sam went on stage and to take it down afterwards. Dave was not a party to the contract between the Nelson Arms and Sam.
On Saturday, Dave arrived at the Nelson Arms early and set up the equipment for Sam. However, when Sam arrived he found that there was only a selection of 40 records available. He thereupon informed Tom, the manager of the Nelson Arms, that he would not perform and left.

Tom was furious. He told Dave to leave the equipment set up and began telephoning around to find another disc jockey for the evening. He eventually contacted a disc jockey called Rocking Rod who agreed to perform at the Nelson Arms that evening for £1,500. Tom agreed to pay for this fee but, when Rod arrived at the Nelson Arms, Tom found that Dave had taken down the disc jockey equipment and gone home. Tom was forced to pay two local youths £75 each to set up the equipment for Rod. Rod then performed that evening and was very successful.

Sam and Dave are demanding their fees of £1,000 and £150 from the Nelson Arms. Tom has refused to pay them and is threatening legal action by the Nelson Arms (which is a limited company) against Sam for breach of contract.

Discuss.

General remarks
Few candidates attempted this question. The question is concerned with what constitutes a breach of contract and the assessment of damages. Two contracts are presented: the contract between Sam and the Nelson; and the contract between Dave and the Nelson. A good attempt to answer the question considers in turn the issues posed by each of these contracts.

In the case of the contract between Sam and the Nelson, the Nelson has breached a term of the contract. Was this, however, a repudiatory breach? Was the term in question a condition, warranty or a sufficiently serious breach of an innominate term? If the Nelson has not committed an anticipatory breach, Sam has breached the contract. Candidates need to consider Sam’s liability for damages – an issue which requires the application of the remoteness test in Hadley v Baxendale (1854) (and the later cases interpreting and applying Hadley v Baxendale such as The Achilleas (2008)).

The contract between the Nelson and Dave also needed to be considered. Answers should have noted that since Dave was not a party to the contract between Sam and the Nelson that he can only derive a benefit from that contract if he comes within the Contracts (Rights of Third Parties) Act 1999. Dave probably does, however, have a form of contract with the Nelson – a contract he has likely breached by removing the equipment before the performance. Does his breach of contract dis-entitle him from claiming his fee from the Nelson? Candidates might also have considered the possible liability of Dave to the Nelson.