A-LEVEL

LAW

7162/3A Paper 3A (Law of Contract)
Report on the Examination

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Introduction

Given the problems caused by the global pandemic, for most schools and colleges this was only the second sitting of this paper, following on from the exam series in June 2019.

Despite the difficulties arising from the events of the last two years, there were encouraging signs that students had coped well with the demands of the examination, even if the quality of responses across the range of questions was a little variable.

However, it would be helpful to take into account the following general comments on performance:

- when dealing with scenario-based questions, students should try to focus on the specific rules of law which must be explained, analysed and applied to suggest a credible solution or alternative solutions. For example, it is rarely necessary to canvass the whole range of rules on formation of contract, rather than some particular aspect of those rules. In some instances (Question 08, say), students went laboriously through this process, often to the detriment of an answer directed more clearly at the issues raised. This was evident even in some answers to the second part of Question 10, despite the fact that it could not be doubted that Paul had entered into a contract with Shirtails when he bought the slim-fit shirt

- where the instruction supplies the specific focus, as in Questions 07 and 08 for example, students should observe it and avoid using up valuable time in establishing what they have expressly been told to assume (for which no credit will be available) or what is clear by necessary implication

- a little more precision in use of terminology might help to avoid some confusion and error. For example, *rescission* is not a universal expression for termination of a contract by an innocent party who has been the victim of a breach of contract. It is an equitable remedy which may be awarded at the discretion of a judge where, say, there has been a misrepresentation. Its effect will be to treat the contract as void from the outset, so that it is as if the contract had never been made. By contrast, at common law the innocent victim of a 'fundamental' (or 'repudiatory') breach of contract will be able to *'treat the contract as at an end'* ('elect' to do so) and will also be able to sue for damages. The effect of that election by the innocent party will be that the contract terminates from the time of communication of the election. Until that time, all rights and obligations remain enforceable.

Question 01

The correct answer was option A:

"A false statement can be misrepresentation even if it is not the only factor which induces the claimant to make the contract."

This question proved difficult for students, many more of whom chose an incorrect option than the correct option. Option A was correct because, though the false statement must contribute to the claimant's decision to enter the contract, it need not be the sole contribution.

The incorrect option chosen most frequently was option B, "A fraudulent misrepresentation immediately brings the contract to an end." This is not true because the remedy of rescission to bring the contract to an end is an equitable remedy which lies within the discretion of a judge to

grant and may be lost for a variety of reasons: impossibility of returning the parties to the position that each was in before the contract was made; affirmation of the contract by the innocent party; lapse of too much time; acquisition of rights by a third party.

Question 02

The correct answer was option B:

“A party’s performance of a contract will be a breach only if it was negligent.”

Students were much more confident in dealing with this question. Over two-thirds chose the correct option, the incorrect choices being distributed fairly evenly between options A, C and D. Option A was correct as being a false statement because a contract usually, though not always, imposes strict liability. This means that a breach may be established without proof of negligence, though not in all cases.

Option A is a true statement because the breach may be non-fundamental where the term is a warranty, or an innominate term classified as a warranty because the actual breach is relatively minor. Option C is true because the parties can come to an enforceable agreement to modify obligations where mutual relinquishing of rights supplies the necessary consideration from each. Option D is true because, quite simply, there is no formal restriction on the number of parties who can enter into a contract, provided only that privity of contract requirements are observed.

Question 03

The correct answer was option C:

“Public officials should be given maximum freedom to make decisions affecting the legal rights of citizens.”

This answer was chosen by all but a small percentage of students, demonstrating that there was an almost universal understanding that giving wide discretionary powers to public officials would lead to arbitrariness in decision making; the rule of law requires that rights and liabilities be decided by the application of law, not the exercise of individual discretion.

Despite this, it is slightly disappointing that any students could believe that the rule of law would not be supported by the propositions that ‘as far as possible, the law should apply equally to all citizens’ (option A), that ‘citizens should be given as much access to the courts as is necessary’ (option B), and that ‘the law should be written in language which is clear and accurate’ (option D).

Question 04

The correct answer was option C:

“Judges in superior courts cannot easily be removed from office.”

Over three-fifths of students chose the correct option, the overwhelming majority of incorrect choices being distributed between options A and D. Option C was the correct answer because it is both true (they can only be removed on a Petition to the Monarch by both Houses of Parliament) and important in ensuring that they cannot easily be influenced by fears of removal on the whim of politicians.

Option A is false because if judges took advice from a government minister this would undermine judicial independence and the separation of powers. Option B is false because judicial immunity from suit only extends to the exercise of the judicial function. If judges commit crimes, for example, they can be prosecuted. D is false because although security of tenure is not as strongly protected for inferior judges, it is nonetheless important for justice and the rule of law that such judges decide cases independently. This may be regarded as all the more important because the average person is probably more likely to be subject to their jurisdiction at some point in their lives than to the jurisdiction of superior court judges.

Question 05

The correct answer was option B:

‘It is generally well-publicised.’

This answer was chosen by just over half of the students, with just over a quarter incorrectly choosing option D, and the remaining incorrect choices being roughly evenly distributed between options A and C. Option B is false, and so was the correct choice because most delegated legislation is not debated in Parliament and so for this reason, and perhaps also due to its often technical and detailed nature, it does not attract the same level of publicity as parliamentary bills and primary legislation.

Options A, C and D are all very well known characteristics of delegated legislation, and so are all true statements.

Question 06

This question required students to explain two characteristics of the common law as a source of law in a simple and straightforward way, and to provide an example of one of them. It was not intended to invite complex explanations of the mechanisms by which the common law had developed, though, of course, explanations of the operation of the doctrine of precedent were creditworthy. In this simple sense, the essence of the common law as a source of law is that it consists of rules of law developed by judges in decisions made in actual cases to resolve issues to which no legislation yet applies.

Since, traditionally, statute (legislation) and common law are the two major sources of law, an important second characteristic of common law is that its rules are subservient to statute, by which they can be abolished or amended in any way determined by Parliament. Further characteristics include that its development is dependent on the chance that an appropriate issue arises and that there are parties determined to bring it to court, that it tends to be narrowly focused on the specific terms of that issue, is retrospective in its effect and is inappropriate as a vehicle to promote large scale change such as can be achieved by statute.

Students with at least a basic understanding of the common law succeeded in capturing its essence as dependent on the decisions of judges in cases which laid down rules to be followed by judges in subsequent like cases. Unfortunately, answers did not often explain a second characteristic and so were limited to marks in the mid-range. The most cited example of common law rules identified the offence of murder. However, students also frequently referred to the notion of the duty of care in negligence as developed by ***Donoghue v Stevenson***, and also to various rules dealing with formation in contract, particularly agreement. Sometimes, only the example was creditworthy.

There were many answers in which the choice of characteristics was wrong, or in which explanations were confused, incomplete or inaccurate, some common examples of which were those that:

- made no reference whatsoever to the role of judges making decisions in cases, and so could provide no hint as to how the rules were established and applied: for example, that common law is simply based on some generally accessible, universally understood ‘common sense’ - (‘everyone knows that murder should be a crime’)

- assumed that all decisions by judges must involve interpretation and application of the common law (rather than, for instance, of legislation)

- asserted that common law can be created and adjusted quickly and easily, and at little cost

- described common law in terms of primary and secondary legislation

- cited examples of cases interpreting the common law which were, in fact, examples of statutory interpretation

Most surprising, however, was the rather high proportion of students who were unable to attempt any answer at all, despite the fundamental nature of the common law as a source of law.

Question 07

In this question, the facts of the scenario were that Kara had promised to buy a car for her niece, Leah, if Leah succeeded in passing her university examinations. The task for students was to suggest why a court might not decide that Kara would be obliged to buy the car for Leah even if Leah succeeded in passing. The specific focus of the task identified in the instruction was the requirement to prove an intention to create legal relations as a key component of an enforceable contractual agreement. Since it was impossible to interpret the arrangement between Kara and Leah as a commercial agreement, it had to be considered as a domestic or social arrangement. The presumption in such arrangements is that the parties do not intend to create legal relations. However, this is a rebuttable presumption and may be overturned if the party arguing in favour of enforceability can adduce sufficient evidence to rebut it. The facts in the scenario provided little support for any attempt by Leah to rebut the presumption but, at the very least, the legal outcome was not certain and the possibility of rebuttal had to be raised.

Most students understood that Leah's chances of enforcing the promise would be severely affected by the nature of her 'family' connection with her aunt, Kara. However, there was a wide variation amongst answers in the precision and accuracy with which the rules were then explained and applied. The strongest answers clearly characterised the relationship between Leah and Kara as 'domestic' (though, for these purposes, it was unnecessary to speculate on the difference between domestic and 'social' arrangements) and went on to explain the nature of the rebuttable presumption against legal enforceability, citing cases such as ***Balfour v Balfour***, ***Merritt v Merritt*** and ***Jones v Padavatton***. In application, they usually concluded that there was insufficient evidence to rebut the presumption.

Yet, far more common was an approach which did not recognise the rebuttable nature of the presumption against legal enforceability and so did not adequately acknowledge some degree of uncertainty about the legal outcome. Sometimes this was expressed as a bold assertion that in domestic or social arrangements an intention to create legal relations can simply never be proved. Sometimes it was expressed in slightly more nuanced, but ultimately in no less incorrect, terms that there is an irrebuttable presumption against such an intention. Much weaker versions of this approach simply asserted very briefly, without further explanation, that Leah would not be successful because it was a 'family relationship' and so unenforceable. Inevitably, though all of these answers were creditworthy to some extent, they were inadequate to achieve marks in the highest range.

Despite the very clear requirement in the instruction to focus on the relevance of an intention to create legal relations, many students attempted to rely on more general arguments about formation of contract. Usually, this referred to the alleged need to observe certain formalities in the creation of contracts and relied on the incorrect proposition that Kara could not be liable because nothing had been reduced into writing (this is not to deny that some more formal expression of the agreement, as in writing, may be evidence in favour of an intention to create legal relations). An alternative argument was that Kara had simply made 'a promise', but had not demonstrated any intention to enter into legal relations. This terminology is certainly to be found in some of the judgments in relevant cases but it does not seem to advance the argument very far. What more is required beyond an apparently sincere promise still remains open to doubt.

Question 08

The facts in the scenario in this question revealed that Matt and Nirmal, who were neighbours, not only sometimes engaged in a commercial relationship connected with electrical and building work, but also helped each other out in a less formal way by occasionally doing work on each other's houses. Matt might then confidently have expected Nirmal to fulfil his promise to do some building work on Matt's house. Nirmal had made this promise because Matt had earlier voluntarily repaired defects in electrical installations in Nirmal's house which had become apparent whilst Nirmal was away. Unfortunately, Nirmal did not fulfil his promise and Matt was facing a bill of about £700 to have the building work done by others.

The instruction was to advise Matt on his rights and remedies, if any, against Nirmal. In doing so, students were to assume that an intention to create legal relations could be proved but must investigate whether consideration could be established. Consequently, the following issues were important:

- the definition of 'consideration'
- the meaning of the proposition that consideration 'must be sufficient but need not be adequate'
- the definition of 'past' consideration
- the proposition that past consideration is not valid consideration (***Roscorla v Thomas***, ***Re McArdle***)
- the definition of the 'exception' to past consideration and its application to assert that it is valid consideration (***Lampleigh v Braithwait***, ***Re Casey's Patents***) – in commercial dealings, at any rate
- the availability to Matt of any remedy should Nirmal be held to be in breach of a contract to carry out the building work

Students were usually able to explain the meaning of consideration, often relying either on the ***Currie v Misa*** 'benefit/detriment' approach or on Pollock's 'the price for which the promise of the other is bought' alternative formulation. Most also explained that, though consideration must be of some value, it need not be adequate in the sense that it is equivalent in value to that offered by the other party. This explanation was commonly supported by reference to cases such as ***Thomas v Thomas*** and ***Chappell & Co. Ltd v Nestlé Co. Ltd***. However, far fewer students took the opportunity to apply the explanation to the facts of the dispute between Matt and Nirmal. Those who did were able to argue that both Matt's electrical work and Nirmal's proposed building work would have had some value, rendering irrelevant any issue of comparison between them.

Even so, the crucial element in determining whether Matt would be able to claim any remedy against Nirmal was whether Matt's earlier work for Nirmal was 'past' consideration, that is, something preceding any promise made by Nirmal and provided without reference to such a promise. Students generally concluded that, *prima facie*, it was past consideration, though many merely asserted it without seeking to explain its meaning and to apply that meaning to the facts. Equally, for many students, that was the end of the dispute. Matt's consideration was past and ***Re McArdle*** clearly established that he could not rely on it. Hence, there was no contract between Matt and Nirmal for the provision of building work by Nirmal and no rights and remedies accrued to Matt. Arguable though this might have been, it resulted in an analysis which was not comprehensive and a solution which failed to pursue alternative possibilities, and so which could gain only partial credit.

To gain higher marks, students had to explore the possibility that Matt's electrical work, though *prima facie* past consideration, in fact fell within the exception recognised in ***Lampleigh v Braithwait*** and so was not past. This required proof that Matt had performed the work in response to a request to do so from Nirmal and that there was an implicit understanding between them that the work would be paid for, whether actually in money or in kind (say, by the provision of work or other services). The evidence for the request and implied understanding seemed to lie entirely in the history of their working relationship, both commercial and 'neighbourly', and was at best ambiguous. In addition, the courts have not been entirely clear on exactly what is required by ***Lampleigh v Braithwait*** (no request was made in ***Re Casey's Patents*** and it is argued that ***Re McArdle*** might have been covered by the exception had it been a commercial agreement). Consequently, it is not surprising that even stronger answers offered rather tentative conclusions about whether Matt was likely to succeed in surmounting the past consideration hurdle. Weaker answers which drew attention to the possibility tended to express the ***Lampleigh v Braithwait*** requirements in very general and unspecific terms, making application equally imprecise.

Students who argued that there was a contract frequently attempted to identify, explain and apply an appropriate remedy for Nirmal's breach. Overwhelmingly, the remedy chosen was damages and the sum specified was £700, the amount quoted by other builders to do the work. This was understandable, and creditworthy. In reality, however, it is highly unlikely that Nirmal's promise to do the work would have included paying for materials so that, at the very least, the amount of damages awarded to Matt would have excluded the cost of those materials, if they were included in the £700 quoted by other builders. Essentially, Nirmal would be liable to pay a sum representing the profit element expected to be made by another builder. Some students argued that Nirmal could be compelled to do the work, so forgetting that specific performance would not be awarded in a contract for personal services such as this.

Apart from any specific weaknesses in approach identified above, more general errors and confusion which undermined the quality of explanation, analysis and application in many answers included:

- dealing at length with intent to create legal relations, even though the instruction clearly stated that such an intent could be assumed

- dealing at length with *all* the elements in formation of contract, even though the instruction clearly indicated that consideration should be the focus

- attempting to argue that, rather than a possible instance of past consideration, the electrical work carried out by Matt was somehow provided in fulfilment of an existing duty, and so was not 'sufficient' consideration: even were the legal proposition correct, the wholly insubstantial evidence to support it was the reference in the facts to their mutual assistance on previous occasions

- attempting to argue that the issue could be resolved in Matt's favour by relying on promissory estoppel. Unfortunately, it was evident that many students who attempted to rely on it did not properly understand it. In particular, it must be recalled that, though subject to some debate, promissory estoppel operates as a 'shield and not a sword', so that it is not a simple substitute for consideration

- attempting to argue that the 'past' consideration was supplied by Nirmal in making the promise, rather than by Matt in carrying out the electrical work.

Question 09

This question introduced the concept of balancing conflicting interests. It gave students the opportunity to 'examine' (that is, explain and analyse) the role of law in achieving that balance and then to 'discuss' (that is, analyse and evaluate) the extent to which that role is evident in the Law of Contract. A strategy for addressing the first task might have been to impose some version of the following structure on the response:

- what interests might be identified
- what kinds of conflict might arise between/amongst those interests
- what might be argued to represent an appropriate balance between/amongst those interests
- what legal mechanisms or devices might be used to secure that balance
- how successful had the legal mechanisms or devices proved to be in securing an appropriate balance (strictly speaking, this evaluation was not required in the initial examination of the concept, though it would be important in addressing the second task).

Whilst answers varied widely in the scope and depth of approach, most succeeded in dealing with at least some of the elements in this structure, usually those identified in the first two points above. Many answers also included appropriate examples drawn from various areas of law (though sometimes almost exclusively from the Law of Contract), yet did not progress beyond highly superficial accounts of the legal mechanisms/devices they were employing, nor progress beyond equally superficial accounts of what might be argued to represent an appropriate balance between/amongst the interests in conflict.

The examination of interests tended to follow one or other of two rather distinct approaches. The first, and more creditworthy, was to analyse the views of theorists such as Von Jhering (the inevitable requirement to confront conflicts of interests where the stress is on the importance of maintaining individual, and so also societal, rights) and Roscoe Pound (the theory of social engineering, requiring law to be used as a mechanism for solving problems, including those posed by conflicts of interests). From this analysis emerged the recognition of different kinds of interests, individual as well as those described as public or of society, and the argument that individual interests are never well matched against public interests. Marx's views on class interests and oppression were also often debated. The second approach, though also creditworthy, albeit at a lower level, was narrower and much more limited in ambition. It consisted essentially in identifying the interests as being simply between two parties to a dispute, so that it fell much more straightforwardly into a classic notion of a legal dispute between private individuals.

Many students sought to introduce 'justice' theory either in addition to the theory described above or as the exclusive approach to the examination of the concept of balancing conflicting interests. In some instances, the aim seemed simply to ignore the requirements of the question and to present an examination of the concept of justice. This resulted in answers which gained credit only tangentially. However, 'justice' notions such as those of Aristotle, Bentham and (perhaps rather more awkwardly, Rawls and Nozick) were clearly of relevance. Unfortunately, students rarely emphasised that, rather than in relation to the analysis of interests, they could be particularly relevant in relation to the determination of what might be argued to represent an appropriate balance between/ amongst conflicting interests. Stronger students did succeed in bringing together

interests, conflicts and arguments about balance to produce excellent, integrated analyses, though even here there was often a weakness in the way that examples were used. Perhaps the examples of balancing apart from Contract that were cited most successfully were those of *Miller v Jackson*, crime rules such as those on the effect of intoxication on criminal liability, and the approach to the control of terrorism, all of which involved both individual and public interests and afforded an opportunity to reveal a nuanced legal approach, both in developing rules of law and applying them (the legal mechanisms securing the balance). Weaker approaches to the use of examples often argued simply that the aim of judges in cases was to 'satisfy both parties' or achieve some kind of equality of treatment and outcome, a proposition hardly sustainable in relation, say, to highly contested civil cases where a court must decide in favour of one party or the other and award appropriate remedies.

Students who had sought to develop the examination of balancing conflicting interests from a theoretical perspective, and who had used a range of examples excluding, or in addition to, those drawn from Contract, were usually able to go on to discuss the evidence to support the proposition that the law has an important role to play in balancing conflicting interests in the Law of Contract. Yet in this context, even stronger answers tended to treat the interests as purely individual, though there were some attempts to suggest that, say, rights introduced to protect consumers against traders (*Consumer Rights Act 2015*) also served broader social interests. In general, therefore, the conflict of interests was seen as arising out of those individual interests (other examples frequently cited, though often not well explained, included exclusion and limitation clauses, aspects of formation of contract, the rules on privity of contract, and discharge by frustration). In discussing an appropriate balance, and how this was achieved by the law, the tendency was simply to identify a rule or some rules, without engaging in any significant analysis (regard, here, of course, has to be paid to the very limited time available and perhaps to the need to use that time as efficiently as possible by avoiding multiple examples). In consequence, it was rare for any sense of a 'balance', of whatever nature, to emerge. For example, only very occasionally did a student seek to suggest that, though the *Consumer Rights Act 2015* provides consumers with considerable rights and remedies against traders, time limits and other restrictions on the availability of remedies do afford some degree of balance. Weaker answers usually depended on still weaker and more superficial versions of this approach, sometimes merely citing a rule of law or a relevant case without any explanation at all. Perhaps the strongest exception was the discussion of the outcome of discharge by frustration – but only if students had a clear understanding of the provisions of the *Law Reform (Frustrated Contracts) Act 1943*. Here, there is a basic requirement for recovery from party X of sums of money paid by party Y prior to the time of discharge. This is modified by the judicial discretion to award party X a sum to take account of expenses incurred, and/or a sum representing as a maximum the value of any benefit conferred by party X on party Y. These provisions represent a very strong inducement to judges to adjust the outcome to achieve a sound balance between the parties.

The comments above affirm the importance to the answers to both parts of this question of astute choice and perceptive use of examples of the role of the law in balancing conflicting interests. There was no formal requirement to avoid the use of examples drawn from the Law of Contract in analysing the concept of balancing conflicting interests in answering the first part of the question. This left open the possibility that students might choose to use examples drawn exclusively from the Law of Contract in answering both parts of the question and there were indeed many students who did so. The difficulty with this approach was that it tended to restrict the analysis of the interests involved to those between individuals and to produce rather narrow and superficial explanation, analysis and evaluation of the role of the law. In many instances, answers did not progress much beyond a list of varying lengths of such examples which were relatively repetitive

because undeveloped. It was also often unclear whether they were offered as general illustration of the concept or of its application to the Law of Contract. These answers could undoubtedly have been stronger and more comprehensive had they incorporated examples drawn additionally from other areas of law in the first part of the question, opening up the possibility of examination of a broader range of interests, and so a deeper analysis of the role of the law.

Question 10

This question required students to consider: first, whether Ola and Paul had satisfied the rules on agreement in formation of contract, and so had created an enforceable contract of which Paul could take advantage in claiming a remedy against Ola: second, whether Paul could claim remedies against Shirtails for breach of the implied terms as to satisfactory quality, fitness for purpose and description imposed by the *Consumer Rights Act 2015* on consumer/trader contracts for the supply of goods.

In relation to Ola and Paul, when Ola told Paul that she would pay him £2000 if he could '[introduce] her to a person who would sell her a particular kind of watch', she was making an offer to him, the acceptance specified for which was not a *promise* to introduce her to a potential seller but the *actual introduction* to a potential seller. If the acceptance had been completed successfully, a unilateral contract would have come into existence (***Carlill v Carbolic Smoke Ball Co***, 'reward' cases). So, the form of the agreement was a promise made by Ola in return for an act by Paul, that act being the introduction to Ola of the potential seller. Ola would be under an obligation to pay if Paul completed the act but Paul would never be under an obligation to complete the act. The search for a seller, including the expending of time and money in doing so, was not the act required, though it was a preliminary to it. Whilst the general principle is that communication of acceptance is required (***Felthouse v Bindley***), the need for communication is dispensed with in the acceptance of an offer which leads to a unilateral contract. In the case of Ola and Paul, Paul would not need to communicate that he was engaged in the search (***Carlill v Carbolic Smoke Ball Co***). Inevitably, communication of acceptance would actually be contemporaneous with completion of the act. Paul's acceptance of the offer by doing the act would also be executed consideration.

The commercial advantage to Paul of this arrangement would be that, using his knowledge and expertise, he might be able to introduce the potential seller to Ola with little effort and expense and so make a profit out of most of the £2000. On the other hand, if he discovered that the task was much more onerous and expensive, he could simply cut his losses and abandon it. His business would prosper if his successes significantly exceeded his failures. However, Paul would also have to contemplate the risk that Ola herself might choose to revoke her offer before Paul had successfully accepted it. It should be emphasised that this would be revocation of the *offer*, not 'revocation' of the *contract* (leaving no scope for considering the role of the rules on privity of contract at this point). Revocation of the offer had to be communicated, though not necessarily by Ola as offeror. Communication by a reliable third party would suffice (***Dickinson v Dodds***), and Raheem, as Ola's partner, might well have been so described. An alternative route to termination of the offer might have been through lapse of time, meaning a reasonable time in all the circumstances (***Ramsgate Victoria Hotel Co. Ltd v Montefiore***). However, there were no timings in the facts of the scenario and it seems that revocation would have been a much surer route to termination of the offer than lapse of time. Applying all of these rules to the facts in the scenario, it would seem that Paul did not complete the act of introducing a potential seller to Ola before Ola revoked her offer by communication to Paul through Raheem. Consequently, no contract came into existence and Paul could not claim the £2000 (nor, of course, any recompense for his £500 expenditure).

The issue not yet addressed is that of the possible effect of the decision in ***Errington v Errington and Woods***. In that case, Lord Denning held that an offer such as that made by Ola cannot be withdrawn once the other party has embarked on performance and at least until that party has been given a reasonable time to complete performance. As with many of Lord Denning's allegedly 'justice-seeking' judgments, this left the law in a state of some confusion from which it has never been fully rescued in the intervening 70 years. As has been pointed out above, far from being unjust to Paul, the unilateral contract arrangement may have suited him very well. If embarking on performance constituted acceptance, then Paul himself would be contractually bound to go on to completion and Ola herself would have no right to prevent him from doing so by revoking her offer.

An alternative analysis would be that Ola made an express offer (to pay £2000 for the introduction) supported by an implied offer that she would not revoke her express offer once Paul embarked on performance. This implied offer would be accepted by so embarking and would amount to a collateral contract (that is, 'collateral' to the proposed 'main' – unilateral – contract). Were Ola then to revoke her express offer, she would be in breach of obligations under the collateral contract, for which she could be sued. This would have the advantage for Paul that he would not be under any obligation to go on performing but would have rights under the collateral contract as long as he continued to do so prior to completing acceptance of the express offer in the 'main' contract. Conversely, Ola would incur the detriment of being unable to avoid some contractual obligation/liability whilst Paul was embarked on performance. If, ultimately, this resulted in a contract between Ola and Paul which was broken by Ola in not paying the £2000, then the measure of damages payable by Ola to Paul would be £2000, and Paul would eventually profit by £1500.

The foregoing extensive explanation, analysis and application have been supplied because students seemed to find it very difficult to identify just exactly what response this part of the question demanded. Though a small proportion of students did succeed in dealing with most of the issues raised, and so could access marks in the 'good' and 'excellent' ranges, the overwhelming majority wrote answers which could not be described as more than 'limited' or 'satisfactory', or even 'minimal'. The main problem was that few students understood that Ola's offer was a promise in return for an act and so was designed to lead to a unilateral contract. This meant that whole swathes of the explanation, analysis and application presented above were simply omitted, whilst facts such as Raheem's communication of revocation of the offer were simply ignored, or were mischaracterised as revocation of contract and discussed from the perspective of privity of contract. A common approach was to discuss offer and acceptance as if a bilateral contract were in prospect (though there was often a failure to differentiate clearly between the components of bilateral and unilateral contracts, and the latter, when mentioned, were sometimes taken to require offers to the world at large), distinguishing offers from invitations to treat and stressing the need for communication of acceptance, where silence would be insufficient. This usually resulted in some confusion about how Paul had satisfied this requirement and concern about whether he had in fact done enough to accept the offer. Yet these concerns were usually cast aside in an attempt to argue that his conduct in expending time and money on his search must be sufficient evidence that he had accepted.

In slightly stronger versions of this approach, students did address the revocation of offer issue, sometimes correctly arguing that communication could be by a reliable third party but just as often arguing that it must be by the offeror. Alternatively, but more awkwardly, some answers relied on lapse of time as the mechanism for termination of the offer. Unfortunately, answers dealing with revocation in this way were often in conflict with earlier application arguing that a contract had already been created. Ironically, this made the argument that Ola had attempted to revoke the contract, rather than the offer, appear a little more logical, though equally impossible legally. Where students argued that Ola was in breach of the contract, they often suggested that Paul was entitled to claim not only the £2000 but also the £500 in expenses. Even more bizarrely, they often claimed that, even if no contract had been created, Paul should still be able to recover his £500 in expenses.

Examples of a more general failure to address the correct issues included:

- detailed discussion of intention to create legal relations and consideration, both of which were immediately evident in the facts and could have been disposed of in little more than a sentence each

- an attempted, but wholly incorrect, argument that Paul could rely on promissory estoppel

- an attempted, but wholly incorrect, argument that Ola was guilty of misrepresentation

In sharp contrast with the difficulties that they encountered in analysing the contractual arrangements between Ola and Paul, students found little to concern them in the contractual arrangements between Paul and Shirtails. Almost all understood that Paul's rights and remedies against Shirtails after his £200 'slim-fit' shirt had shrunk on first being washed were derived from the operation of the *Consumer Rights Act 2015* in imposing terms as to satisfactory quality, fitness for purpose and description. Variations in quality of answers, and so in the credit actually awarded, related to the comprehensiveness, detail and accuracy of explanation, analysis and application of the following:

- the requirements of the terms imposed by the *Consumer Rights Act 2015 ss9-11*. This could range from the very superficial, being little more than a list of the relevant terms, to the highly detailed consideration of the elaboration of the requirements in *s9(1)-(4)*, *s10(1)*, *s10(3)-(4)*, and *s11(1)-(3)*, sometimes supplemented by discussion of cases decided under *Sale of Goods Act* legislation but still capable of supplying guidance on interpretation of similar provisions in the *2015 Act*, for example ***Grant v Australian Knitting Mills***, ***Lambert v Lewis***, ***Griffiths v Peter Conway Ltd***

- the scope and content of the remedies provided by the *2015 Act* for breach of the terms; in particular, the structure and sequencing of those remedies, so that, given that Paul reacted very promptly after discovering the damage to the shirt, he would be most likely to resort to the short-term right to reject the shirt and recover the purchase price, rather than to remedies of repair, replacement, price reduction or the final right to reject

- the common law approach to terms purporting to exclude or limit liability for breach of terms in a contract: in particular, the requirement for clear incorporation into the contract as revealed by cases such as ***Thomson v LMS***, ***Chapelton v Barry Urban District Council***, and ***Thornton v Shoe Lane Parking***

- the statutory approach to terms purporting to exclude or limit liability for breach, as revealed in the *Consumer Rights Act 2015 s31*. In view of the fact that *s31* renders ineffective any attempt

to exclude or restrict liability for breach of the terms imposed by ss9-11, and that it defines such exclusion/restriction very extensively, its operation may now be seen as having been rather more important to the solution to the issues raised between Paul and Shirtails than the common law approach to incorporation.

Question 11

This question required students to consider: first, whether Tess had any rights and remedies against Vic in connection with deficiencies in Vic's weekly delivery of a sports magazine to Tess: second, what rights and remedies were available to Tess and Will in connection with the contract for attending Punchball events when Punchball was banned by legislation. Additionally, students were required to assess the extent to which justice may have been served in resolving the issues between Tess and Will.

There were two distinct ways in which to approach the contractual relationship between Tess and Vic. The first involved recognising that it was a consumer/trader relationship for the provision of services by Vic to Tess, and so subject to terms imposed by the *Consumer Rights Act 2015*. These terms were under *s49*, requiring performance of the contract with reasonable care and skill, and under *s52*, requiring performance within a reasonable time (assuming that the requirement for delivery of a weekly sports magazine did not in itself impose a time for delivery). The failure to exercise reasonable care and skill was evident in the mistakes that Vic made in compiling his delivery list. In turn, it seems that this led to his failure to deliver the weekly magazine on time. The remedy available for breach of either of those terms would have been a right to a price reduction and additionally, in the case of a breach of the term as to reasonable care and skill, the right to repeat performance. Though not negligible, neither remedy may have satisfied Tess. She would perhaps have lost faith in Vic and simply have wanted to end her deal with him and get someone else to make the deliveries. In this context, it is important to be aware that the *2015 Act* does not prevent a claimant from relying on common law remedies for breach of these terms, where appropriate. The two obvious common law remedies are damages and the right to treat the contract as at an end. Both terms imposed by the *2015 Act* are probably innominate terms (***Hong Kong Fir Shipping Co v Kawasaki Kisen Kaisha Ltd***), so that, whilst damages would have been available, the right to treat the contract as at an end would depend upon the nature and severity of the breach ('fundamental' breach).

The second approach was to argue that, given that the delivery was of a weekly sports magazine, there must be an express term as to time which must have been breached by persistent lateness in delivery of as much as a week ('yesterday's news'). In this analysis, the errors in the delivery list would not constitute a breach of any express contractual term as such but would be the explanation for the breach of the term as to time of delivery. If time is regarded as being 'of the essence' in the dealings between the parties, then under common law it becomes a condition of the contract and so its breach will be a fundamental breach entitling the innocent party to treat the contract as at an end and to sue for damages (***Poussard v Spiers and Pond***).

Most students adopted the first approach and revealed strong knowledge and understanding of the statutorily imposed terms as to reasonable care and skill and performance within a reasonable time, including the remedies available for their breach. However, a common weakness was the failure to develop an analysis of the possible breach of the term as to reasonable care and skill. Sometimes, students simply ignored the term when it came to application, despite having earlier identified and explained it. Sometimes, they argued that the errors in the delivery list were not

attributable to any fault on Vic's part, presumably believing (without any evidence or justification) that the list was compiled by others. In some rather extreme instances, students attempted to argue that this could give rise to termination of the contract by frustration.

Where students adopted the second approach, they, too, usually revealed strong knowledge and understanding of express terms and common law rules, and there were some excellent analyses of the classification of terms as conditions, warranties and innominate terms. The major weakness here was a lack of any real knowledge of the notion of time as being 'of the essence'. Even so, students were much more likely to explore the possibility of termination of the contract for fundamental breach if they adopted the second approach and this tended to develop the analysis and application of remedies in a slightly more realistic way than if the answer remained focused on the statutory remedies.

Some students argued that the issues could be resolved by relying on termination by performance, though they often seemed to think that this could be achieved entirely at the option of Vic, even though Vic's performance seemed to be so deficient that it must amount to a breach of contract. Some credit was available for this approach, though it was perhaps more convincing when combined with the suggestion that the contract could be treated as a divisible contract. Yet again, even here the issue of responsibility for the errors in the delivery list emerged. Some students attempted to argue that the errors (which, they stated, were not Vic's fault) had prevented him from carrying out his own obligations in performance, so that, at the very least, he was entitled to payment on a quantum meruit basis. This ingenious argument fell by the wayside, of course, if (as was undoubtedly the case) Vic was the person responsible for the errors in the delivery list!

In the second set of contractual arrangements to be considered by students, Tess had indulged her interest in the violent new sport of Punchball by buying a ticket for £400 from Will to attend 10 Punchball events organised by Will, at two of which she had succeeded in being present. However, it was highly likely that the contractual relationship between Tess and Will was brought to an end by supervening illegality when "legislation was passed which made it an offence to participate in or promote Punchball in any way" (***Denny, Mott and Dickson Ltd v James B Fraser & Co Ltd***). This legislation was, perhaps, not entirely unexpected since, "Punchball had attracted a lot of public criticism, including calls for it to be banned." This opened up the possibility that termination by frustration would be inapplicable because the alleged frustrating event was foreseeable, even if not actually foreseen by Tess and/or Will (***Davis Contractors Ltd v Fareham Urban District Council***). If that were the case, then Will would have been in breach of contract for his failure to provide the events for which Tess had paid. However, public criticism and calls for events to be banned are not exactly the same as the high probability that Punchball would be banned and it seems that the degree of foreseeability required is very high. Consequently, the better approach was to assume that frustration would apply but acknowledge the alternative possibility and briefly consider breach, too.

In that case, the consequences for Tess and Will would be determined by the provisions of the *Law Reform (Frustrated Contracts) Act 1943*. Essentially, all sums of money paid or payable before the date of termination would be recoverable or cease to be payable (*s1(2)*). However, adjustments could be made at the discretion of a judge (were the issue to be resolved in court) from sums so paid or payable (*s2(1)*) to account for expenses incurred in performance of the contract. Additionally, a judge would have the discretion to award a sum of money not restricted to the maximum of sums paid or payable to recognise a valuable benefit conferred by one party on the other in the performance of the contract before termination (*s1(3)*). So, whilst, *prima facie*, Tess would be entitled to the return of the £400 that she paid for tickets, the judge would have a discretion to make an award to Will from some part of that £400 to take into account expenses

incurred by Will. Additionally, the judge would have a discretion to make an award to recognise the valuable benefit conferred on Tess by her attendance at two events. That might suggest that Will would recover/retain at least £80, and perhaps more.

In general, students displayed very good knowledge and understanding of the rules on termination of contracts by frustration but were usually rather less convincing when considering the outcome, and this weakness could also have an impact on the quality of answers to the evaluative part of the question concerning the justice of the outcome. Almost all students correctly identified termination by supervening illegality, which they explained, analysed and applied appropriately. Perhaps the main criticism that could be made is that this would have been more than sufficient for this part of the task but that many students could not resist engaging in an analysis of the other categories of frustration, which added nothing of substance to the solution but certainly served to consume valuable time which would have been more profitably spent in considering outcomes and assessing justice. Most students also recognised that termination by frustration might be rendered doubtful by the possibility that the alleged frustrating event was foreseeable. Having acknowledged the possibility, most chose to reject it and to assume that frustration applied. Some did consider both frustration and breach and were appropriately rewarded, though discussion of breach was not a requirement for maximum marks. Unfortunately, having identified the possibility of frustration by supervening illegality, a small number of students favoured breach over frustration, which they did not further consider. Clearly, this approach was creditworthy but of less value than if they had also considered the frustration outcome.

The quality of answers in relation to the outcome of frustration between Tess and Will varied enormously. Some students had a very clear understanding of the provisions of the *1943 Act*, particularly those in *s1(2)*. Others understood that sums paid or payable were recoverable or ceased to be payable but did not really understand the further provisions as to expenses and valuable benefit. However, many students did not seem aware at all of the *1943 Act* provisions and were content simply to suggest that Tess would have to give up the £80 which they assumed to represent the value of the tickets for the two events which she had attended. There was also often some evidence of a deeper confusion in which the parties were described as being awarded ‘damages’ as for a breach, rather than that financial adjustments were being made as part of a solution imposed by the operation of law in circumstances where neither party was to blame for the termination of the contract.

In dealing with an assessment of the justice of the outcome, most students attempted to present some definition of justice, whether of a simple nature such as ‘fairness’ or of a more complex nature based on the views of legal theorists. Making use of the definition(s), those who understood the *1943 Act’s* provisions were usually able to conclude that the wide discretion available to the judge was likely to result in a just outcome for both parties. However, for many students, application to the facts was often hindered by a lack of understanding of how the *1943 Act* would be interpreted and applied or, indeed, by an apparent total lack of knowledge of the *1943 Act*. This sometimes led to much more wide-ranging discussion of justice which was unrelated to the outcome as between Tess and Will. For example, students often tried to debate whether it was just that Punchball should have been banned at all, relying on utilitarian arguments. However interesting, these debates did not really address the issue raised in the instruction.

Mark Ranges and Award of Grades

Grade boundaries and cumulative percentage grades are available on the Results Statistics page of the AQA Website.