A-LEVEL

LAW

7162/3A Paper 3A - Contract
Report on the Examination

7162/3A
June 2023

Version: 1.0

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Introduction

Despite the difficulties arising from events over recent years, there were encouraging signs in student answers of continuing progress in study and learning of the law of contract in A-Level Law. As always, quality of responses across the range of questions remained variable. However, there was strong evidence in the higher value, extended answer questions, in particular, of improvement in developing explanation, analysis and application of relevant rules of law.

Even so, it is perhaps worth repeating some of the general comments made in the Report on the 2022 Examination:

- 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. It is rarely necessary to canvass the whole range of rules on formation of contract, rather than some particular aspect of those rules. Students often failed to recognise this in answering Questions 08, 10 and 11.

- 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 or what is clear by necessary implication (for which, in either case, no credit will be available). For example, in Question 08, students were instructed to focus on the agreement aspect of formation of contract, removing the requirement to discuss consideration and intent to create legal relations. Yet many students did spend valuable time writing about the latter elements. Conversely, in Question 11, many students failed to respond to the clear evidence in the facts of the scenario that Lewis and Karol had agreed on what each was to provide in return for the agreement of the other, thus eliminating the need for any significant discussion of offer and acceptance (agreement) in formation.

- 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.

- whilst students generally demonstrated a strong understanding of statutory remedies for breach of Consumer Rights Act 2015 terms, including their sequencing, they appeared to be less well-informed about common law and equitable remedies. It is worth remembering that, though vindication of rights in itself may be an aim pursued, and worth pursuing, by claimants, the main concern of both claimant and defendant is likely to be about the practical outcome, that is, about the remedies eventually awarded where the claimant is successful.

  Consequently, unless a scenario-based question on substantive law is framed in such a way that discussion of remedies is not required, students should try to draw conclusions about liability which include consideration of the appropriate remedy or remedies. In relation to damages, perhaps the most common remedy that will be sought, students should understand the general approach to compensation for breach adopted by the law of contract, be able to

distinguish between expectation loss and reliance loss, and have a basic understanding of how, for example, expectation loss might be determined (for example, by comparison between the contract price and the market price for goods or services). Students may also be expected to consider the issue of remoteness of damage at a relatively basic level.

Additionally, it is perhaps worth drawing attention specifically to the provisions of the Law Reform (Frustrated Contracts Act) 1943 which determine the possible consequences of a finding that a contract has been frustrated. These provisions exclude the application of common law remedies such as damages and direct the manner in which the losses may be distributed between the parties, given that neither party is to blame for the fact that the contract has been discharged without full performance. Students rarely demonstrate a full understanding of the operation of these provisions, though there has been some evidence of improvement in 2022 and 2023.

Question 01

The correct answer was option C:

‘The CRA imposes a term requiring performance of the service with absolute care and skill.’

This question proved difficult for a significant number of students, though the majority chose the correct option. Option C was the false statement, and so the required choice, because the standard prescribed by the Consumer Rights Act 2015 s49 for performance of a service is one of reasonable care and skill, not absolute care and skill.

The incorrect option chosen most frequently was option A, ‘The CRA creates a right to a price reduction in some circumstances if the service does not comply with the requirements of the contract.’ Yet this is a true statement in relation to breaches of both s49 and s52 (reasonable time for performance). Options B and D were equally true, as clearly provided in the 2015 Act.

Question 02

The correct answer was option D:

‘Liability cannot be excluded or limited.’

This proved to be the more difficult of the two substantive law questions and by far the most difficult of all of Questions 01-05, yet the true statement, and so the correct choice, is clearly evident in the provisions of s31 of the statute, to which many students were to refer accurately in dealing with later questions:

‘A term of a contract to supply goods is not binding on the consumer to the extent that it would exclude or restrict the trader's liability arising under any of these provisions— (a) section 9 (goods to be of satisfactory quality) …’

Consequently, the provisions of s31 also operate to render false all the other choices, which allowed for exclusion or limitation of liability in some circumstances.

Question 03

The correct answer was option B:

'The claimant sues the defendant.'

This answer was chosen by all but a minute percentage of students, demonstrating an almost universal understanding of a simple aspect of the operation of the process in a civil law action such as in contract, and of the relevant terminology.

Perhaps the most surprising aspect of the choices made in response to this question was that the minute proportion of students who made an incorrect choice actually did so, and in consequence mistook the criminal trial process and terminology for the civil law counterpart.

Question 04

The correct answer was option D:

'Partly in common law and partly in statute law.'

This answer was chosen by a very high proportion of students, who clearly recognised that most general areas of law will be comprised of a mixture of common law and statute. In contract itself, whilst many of the rules derive from common law (for example, rules on formation, incorporation and nature of terms, remedies, vitiating factors, breach), many have been supplemented, modified or replaced by statutory provisions (for example, the Law Reform (Frustrated Contracts) Act 1943, the Misrepresentation Act 1967, the Contracts (Rights of Third Parties) Act 1999, the Consumer Rights Act 2015).

None of the options A-C could possibly have been the correct choice because they insisted, variously, on locating the source entirely in the common law or in statute, or in neither.

Question 05

The correct answer was option C:

'The statutory instrument has gone beyond the powers granted by Parliament to make laws.'

This option was chosen by well over half of the students, though over a third of all students in total chose option A or option B. In simple terms, the expression 'ultra vires' translates as 'beyond the powers of' and describes a restriction on the scope of action by Ministers and others to whom Parliament delegates powers to promulgate statutory instruments and other forms of delegated legislation. In doing so, they must remain within the confines of the powers granted to them. If they exceed those powers, the delegated legislation may be challenged in an action for judicial review and declared invalid.

All other option choices simply did not provide a correct explanation of the meaning of 'ultra vires'.

Question 06

This question required students to explain two ways in which the law tries to achieve judicial independence. Judicial independence is the idea that judges should be free to decide cases based on the law and unconstrained by any improper influences (for instance, political or personal) that could undermine the fairness and legitimacy of their decision. This requires that judges be clearly

separate from institutions engaged in governance. Threats to independence might lie, for example, in the location of the power to appoint and remove judges, the power to affect their remuneration, and in their relationship with other bodies exercising powers over law-making and enforcement, such as the legislature and the executive. Independence might also be threatened by fear of being personally liable for any aspect of their conduct in dealing with cases, including things said and done during the course of a trial and sentences imposed or remedies granted. Equally, any suggestion that a judge had a personal interest in the outcome of a case with which they were dealing would inevitably cause serious concern.

Consequently, students were expected to identify and briefly explain the two ways required by reference to any of the following:

- security of tenure for superior judges - they can only be removed by the monarch on petition by both Houses of Parliament (Senior Courts Act 1981, Constitutional Reform Act 2005) and there is an independent office to investigate complaints (Judicial Conduct Investigations Office)
- appointment of judges (other than justices of the Supreme Court) by the independent Judicial Appointments Commission
- financial security related to arrangements for determining and paying judicial salaries (including prohibition on reducing salaries and on any performance-related element)
- immunity from suit – immunity from criminal and civil actions in relation to acts carried out in performance of judicial function, including immunity from actions in defamation (**Sirros v Moore**)
- freedom from interference by the executive and separation from legislative law-making (separation of powers) – Constitutional Reform Act 2005 s3
- prohibition on participation in cases where a judge may have a personal or other special interest – **Re Pinochet**.

There were some strong answers to this question, citing, particularly, security of tenure, immunity from suit, or exclusion from hearing a case on grounds of personal interest. Although an example was not required, and students could gain full marks if their two ways were clearly explained, many did provide examples that enhanced their explanations (such as **Re Pinochet** for the idea that a judge must be independent from the case, or examples of Government Ministers being held to account for lockdown breaches, showing independence from the Executive). Less frequently but often accurately and comprehensively, students stressed the importance of financial stability and security related to protection from interference in salaries or the broader issue of the separation of powers and the significance of the creation of the Supreme Court, comparing it with its predecessor, the Appellate Committee of the House of Lords. If only one way of seeking to achieve judicial independence was explained, the maximum marks were limited to band 2.

Unfortunately, it was evident that a significant proportion of students had little or no understanding of the notion of judicial independence or how it might be protected. In some instances, this resulted in answers which seemed to confuse judicial independence with the power of judges to engage in legal decision-making, emphasising the operation of precedent and statutory interpretation; in other instances, it was related to the idea of the separation of the functions of judge and jury in criminal trials. Some answers simply asserted the fact of judicial independence from Parliament without providing any explanation of how this was achieved. Unfortunately, some answers focused entirely on Parliament's role in promoting primary or secondary legislation and did not mention judges at all. Equally unfortunately, a significant number of students made no attempt to answer the question.

Question 07

In this question, the facts of the scenario were that Asif had given Belle advance notice of 7 days that he would not perform his obligations under a contract agreed between them. Belle had refused to accept this and had subsequently spent £500 in fulfilling her own obligations and in the hope/expectation that Asif would, after all, perform his side of the contract. Asif had not done so, and Belle now sued for damages, including the £500. The specific focus of the task identified in the instruction was to suggest why Belle would probably be successful in her claim for the £500. The principle underlying any doubt about Belle's success would be that the victim of a breach of contract is under an obligation to take appropriate steps to mitigate any loss. Consequently, Belle's decision not only to reject Asif's refusal to perform (so, positively affirming the contract) but then actually to go ahead and spend £500 might seem to be in conflict with that principle.

It has long been established (**Hochster v De La Tour**) that an anticipatory breach of contract by D entitles C, the innocent party, to elect immediately to accept the breach as grounds for treating the contract as at an end and to sue for damages, or to elect to continue to affirm the contract and to persist in expecting D's performance of contractual obligations. On one interpretation, if C elects to affirm the contract prior to the time for performance by D, then as yet there is no breach by D and any action by C in performing obligations cannot involve any issue of mitigation (**White and Carter (Councils) Ltd v McGregor**). Doubt has been cast, and restrictions placed, on the application of **White and Carter (Councils) Ltd v McGregor** but it would provide Belle with a strong argument for success in a claim for recovery of the £500.

The two key propositions, then, in arguing for success for Belle were, first, that she had the right to refuse to accept Asif's repudiation of the contract and, second, that, in continuing to affirm the contract, she would be entitled to go on to do anything necessary for her to perform her own obligations, including spending £500. Maximum marks in band 3 (4-5) were available for an accurate explanation and application of the rules supporting these two propositions, and maximum marks in band 2 (1-3) for accurate explanation and application of one only. Though explanation of the mitigation issue would have added clarity and coherence to the exposition, it was not required for maximum marks.

A substantial number of students succeeded in explaining and applying both rules and so gained marks in band 3. Failure to achieve maximum marks was generally attributable to a slight confusion in the explanation of Belle's entitlement to make the election or to a lack of precision in explaining the connection between the election she made and the consequent requirement for her to do what was necessary to be able to fulfil her own obligations, specifically, to spend £500. Marks in band 2, then, were gained by students who explained and applied only one set of rules indicated above, or who attempted to deal with both but perhaps in a confused or incomplete manner. Frequently, students gaining a mark in this band in discussing the damages aspect relied too heavily on a mere repetition of the relevant facts in the scenario (that "this included spending £500 necessary to carry out [his own] obligations"), stressing the 'necessary' element without linking it to the requirement for Belle to fulfil her own obligations in view of the decision that she had made to treat the contract as still subsisting.

There were three commonly recurring errors or elements of confusion regarding the issues and the rules in answers:

- the assertion that the true problem for Asif was that he had simply given Belle insufficient notice of his intention not to perform, the wholly unfounded implication being that he could have avoided any liability for 'withdrawing from' or 'revoking' or 'cancelling' the contract by giving a longer period of notice

- the assertion that Belle was entitled to damages, including the £500, simply because Asif was in breach of contract, with no attempt whatsoever to explain the anticipatory breach aspect, or to distinguish the £500 from any other damages that might be claimed

- the assertion, wholly unfounded, that Belle was entitled to the £500 in damages because, had Asif performed his obligations, he would have spent the £500 and it only became necessary for Belle to do so because Asif had not done so. Clearly, Belle had to spend the £500 because the money, or the conduct that it supported, was an integral element in Belle's performance of her obligations.

Question 08

The facts in the scenario in this question revealed that Cora and Del were engaged in negotiations for the sale and purchase of a racing bike and gym weights owned by Cora. However, the negotiations had proved far from straightforward and it was by no means certain that any agreement had been reached. The task for students was to attempt to disentangle the various strands of the negotiations and discover whether or not it was possible to identify a continuous connection between them sufficient to amount at any point to an agreement as the basis of an enforceable contract.

In undertaking this task, it was important for students to grapple with at least some aspects of uncertainty in applying legal classifications to the various elements in the different stages of negotiations. This involved considering the implications of alternative interpretations of some of the key communications, as indicated below, though it did not require students to address all of them to be able to gain maximum marks:

- was Cora's advertisement in the local newspaper an offer, or merely an invitation to treat?
- was Del's response an offer (or a counter offer) or merely a request for further information?
- was Cora's subsequent response a rejection of any offer/counter offer from Del, a resurrection of her original offer (if any), or merely an indication that she had not yet made a decision whether or not to accept an offer/counter offer (if any) from Del?
- if there was an offer/counter offer from Del still in existence, was Cora's delay of four days before attempting to accept it sufficient to terminate that offer by lapse of time?

Perhaps the most convincing analysis would be that Cora's advertisement was an invitation to treat (**Partridge v Crittenden**), to which Del's response was a request for information (**Stevenson v McLean**). This would have extended the scope of the negotiations but not provided any opportunity for agreement in the form of one decisive reply in acceptance. The likely outcome would then have been that no contract was ever agreed, leaving Cora with no rights and remedies. However, it was possible to construe Del's response as an offer (not a 'counter' offer, on the argument that Cora had not initially made an offer). In that case, Cora's initial response to that offer did not sound like a rejection but a delay to give her time to give further consideration to any possible deal. Her subsequent definite statement of acceptance would then have created an agreement and an enforceable contract unless the delay of four days resulted in a termination of Del's offer by a lapse of time (**Ramsgate Victoria Hotel Co. Ltd v Montefiore**). Whether or not a delay of four days was a sufficient lapse of time (an unreasonable length of time not to communicate an acceptance) was entirely open to debate, so that the answer would have to contemplate the serious possibility that Cora and Del had entered into a contract, and that Del's refusal to buy the items was a breach of the contract.

In the event of a breach of contract by Del, the issue of damages would then arise. Cora would not be entitled to the full price of £1000 offered by Del because she could not expect to have the racing bike and the gym weights whilst also claiming the money. Instead, Cora would have been able to claim the difference between the price of £1000 agreed and the amount that she could expect to receive when selling the racing bike and gym weights on the open market, if that amount was less than £1000.

A substantial number of students gained at least half marks or more on this question, with a high proportion of those students achieving marks in the highest band (band 3) or at the top of the band below (band 2). This indicated that many were able to engage in a complex analysis and evaluation of the legal significance of the various strands of the negotiations between Cora and Del. At the higher end of the range, students perceptively interrogated the rules on offer and acceptance in the context of the facts, recognising alternative possible legal interpretations of the conduct of Cora and Del and so canvassing the possibility of different outcomes or solutions. Towards the lower end of this range, students were more likely to ignore these alternative interpretations and to opt for a much more straightforward approach in which an assertion about the legal effect of conduct by one of the parties led directly to an equally confident assertion of the legal effect of the response by the other party. Nonetheless, this rather more restricted approach still afforded students the opportunity to display considerable knowledge and understanding in the explanation, analysis and application of the relevant law. Answers frequently incorporated reference to the cases referred to above (**Partridge v Crittenden**, **Stevenson v McLean Ramsgate Victoria Hotel Co. Ltd v Montefiore**), as well as to others such as **Carlill v Carbolic Smoke Ball Co**, **Fisher v Bell** and **Hyde v Wrench**.

Weaker answers tended to lack a coherent structure within which a logical evaluation of the sequence and meaning of the various transactions and analysis and application of relevant legal rules could be pursued. Consequently, these answers often introduced relevant legal rules in a rather haphazard and confused manner and could not establish a well-founded solution or alternative solutions to the issues raised.

There were some commonly recurring errors or elements of confusion in answers:

- immediately addressing the interpretation of Del's response to Cora's advertisement without ever first examining the legal interpretation of that advertisement
- arguing that the advertisement was an invitation to treat but nonetheless discussing Del's response as being a response to an offer, without seeking to explain any reason for this change in direction
- arguing that the advertisement was an offer rather than an invitation to treat, describing it as a 'unilateral' offer by reference to the decision in **Carlill v Carbolic Smoke Ball Co**. So, the assertion was that it could be accepted by conduct by Del, even though the negotiations clearly contemplated that any contract would be based on an exchange of promises, and so would be a bilateral contract
- arguing that, if Del had made an offer or a counter offer, he had revoked it by buying a racing bike from someone else before Cora 'accepted' his offer, even though Del had never informed Cora that he had bought a racing bike
- arguing that Del was in breach of the contract but failing to discuss a remedy, or simply suggesting that Cora would receive 'damages', or suggesting that she would be entitled to claim the full contract price of £1000
- failing to observe that the instruction focused on 'the rules on agreement in formation of contract' and including an often detailed explanation of other aspects of formation of a contract which were not in issue (intent to create legal relations, consideration).

Question 09

This question gave students the opportunity to deal with the relationship between law and morality, and then to consider that relationship in the context of the law of contract.

A sensible decision in tackling the required explanation and analysis in the first part of the question was to begin with definitions of law and morality. This afforded a framework within which to begin to explore the relationship between legal rules and moral rules, enabling students to examine a range of similarities and differences between them. The elaboration of similarities and differences could be considered in relation to aspects such as origins, acceptance/implementation, methods of enforcement, range of application, and process for change. Further exploration and illustration of the relationship could focus on areas of convergence and divergence between legal and moral rules. Examination of theoretical work of philosophers of law and morality could also lend greater depth to answers to this part of the question.

Many students had obviously given considerable thought to the general issues raised by questions about the relationship between law and morality. There were some impressive explorations of similarities and differences between legal and moral rules, and of overlap and divergence between the two, often enhanced by pertinent examples. Students pointed to the differing sources of authority and enforcement of legal and moral rules, the periods of time over which each might be recognised and developed, and also modified or abandoned entirely. Murder and theft were often cited as examples of overlap, where a legal rule was underpinned by a moral rule. Adultery or parking offences were cited as examples of divergence (though some students did draw attention to the fact that adultery, though not illegal in England and Wales, may be treated as unlawful in other legal jurisdictions). Some students referred to matters such as sexual assaults in marriage, homosexuality, and legal relationships between same sex couples, as examples that changes in the one can, over time, influence changes in the other. Many students showed a perceptive understanding of philosophical approaches, making accurate and detailed reference to natural law theory, positivism, sometimes utilitarianism, and the Hart/Devlin debate. Weaker answers tended to focus on simple statements defining and illustrating law and morality, or relied predominantly on examples with little supporting analysis. Where there was any attempt to deal with the views of philosophers, the answer was generally limited to brief, often rather confused expression of those views which did not succeed in accurately representing the arguments.

Though some students did not attempt to deal with the second part of the question, “Discuss the extent to which rules in contract law reflect rules of morality”, most students did, albeit with varying degrees of success. The strongest answers were provided by students who were adept at choosing areas of the law of contract which had specific features which clearly revealed the presence of some kind of moral imperative. Surprisingly, few of even these answers took the opportunity to examine the broad proposition that the law of contract is founded on the importance of the moral injunction to keep promises. In turn, those who did examine it nevertheless avoided the further opportunity to discuss the extent to which the proposition is undermined by the failure of the law to enforce gratuitous promises. More commonly, answers discussed the importance attached to levels of dishonesty apparent in the conduct of parties and/or the approach to evidence of undue pressure applied by one party to another when considering the effect on remedies. So, moral issues around telling lies and around taking unfair advantage of some position of power afforded by economic circumstances emerged in discussions of misrepresentation and economic duress. This might also be supplemented by discussion of attempts by the law to adjust the inevitable imbalance of power between traders (business) and consumers in relation to supply of goods and services (Consumer Rights Act 2015), and especially in respect of what were usually alleged to be dishonest or deceitful efforts by traders to avoid their obligations by the use of terms excluding or restricting liability for breach.

Weaker answers tended to rely on citing specific rules in contract, perhaps potentially of relevance, but without establishing any particular underlying moral rule(s) through which the effect of moral or ethical values could be demonstrated. A common example of this was the reference to specific terms and their associated remedies for breach imposed by the Consumer Rights Act 2015 in relation to goods and services. It seems that many students simply deemed it self-evident that some moral principle supported the imposition of these terms. Though generally worthy of some credit, this response could rarely rise above 'satisfactory'. More difficult still to understand were arguments relating to various aspects of offer and acceptance, including the effect of silence and of the postal rule on acceptance. These seemed much more like simple pragmatic responses by the law to the need to establish workable rules which would resolve uncertainty about formation, the equivalent of rather arbitrary rules on driving on the left or parking in designated areas only. Reference to the rules on privity of contract as a way of protecting a person from incurring obligations or preventing a person from acquiring rights were potentially of more relevance but, once again, answers rarely indicated what moral rules supported the approach and did not consider how to accommodate exceptions to the privity rule within the argument. In consequence, though there were some very good or excellent answers to this part of the question, the general level did not progress beyond 'satisfactory'.

Question 10

This question required students to consider: first, whether Fred had any rights and remedies against Ezra, from whom he had bought a shirt he believed to be made of cotton, and so unlikely to crease heavily, after specifically asking Ezra to confirm that the material was cotton. Ezra had assured him that the material was cotton, though the truth was that it was a blend of cotton and linen and so was more prone to creasing than Fred expected: second, what rights and remedies Fred and Greta would have in consequence of flooding on Greta's land. Greta had contracted with Fred for him to landscape the garden accompanying her house. However, though the work on the garden was still possible, the flooding had so severely damaged Greta's house that it would have to be demolished.

In relation to Ezra and Fred, there was no doubt that they had entered into a contract for the sale and purchase of a shirt which had been given to Ezra as a present and which he did not want because of its colour. There was equally no doubt that this was a private sale between two persons, neither of whom was acting in the capacity of a trader, so that rights and remedies available under the Consumer Rights Act 2015 in a trader/consumer contract for the supply of goods were of no relevance. It was possible to approach the analysis of Fred's rights and remedies in three different ways, any one of which would have merited maximum marks if fully developed:

- there was an express term in the contract requiring the material of the shirt to be cotton only. This term would be so important that it was a condition. When Ezra supplied a shirt of a blend of cotton and linen, this was a repudiatory breach of the contract, entitling Fred to treat the contract as ended and to sue for damages.

- there was a representation (which could also have been a term) made by Ezra that the shirt was made only of cotton. Since it was not true, it was a misrepresentation. It induced Fred to enter into the contract. Ezra believed his representation to be true, so it was not made fraudulently but, rather, either innocently or negligently. A remedy of rescission would almost certainly be available, and possibly of damages.

- a combination of the two approaches above, inevitably involving slightly less detail in the explanation, analysis and application of either or both.

Realistically, Fred would simply want to return the shirt and recover his money. The most direct route in law to achieving this end would be to rely on proving an actionable innocent misrepresentation. This would be very likely to make available the equitable remedy of rescission. The contract would be treated as void ab initio, requiring full restitutio in integrum for both parties: that is, Fred would recover the money paid and Ezra would recover the shirt. The alternative route of relying on proof of a breach of contract in relation to an express term might not prove problematic in respect of the term and the breach. However, in a contract between two parties both of whom were acting in a private capacity, the precise way of dealing with the damages issue might prove a little more difficult since the requirement seemed to be far more aligned with notions of (literally) restitution than with those of reliance or expectation loss.

Overwhelmingly, students chose to pursue the second of the routes listed above, sometimes also dealing with the express term issue. In the latter case, this tended to be presented as the familiar term/representation discussion preliminary to a focus on misrepresentation and so rarely extended into a further discussion of the nature of the express term as a condition. Accordingly, there was usually no discussion of breach of the term and possible remedies. In a small number of instances, students did explore the term aspect in much more detail but this was almost always accompanied by a substantial exploration of misrepresentation, the combination amounting to the third approach listed above. However, some students incorrectly discussed the term as derived from the Consumer Rights Act 2015, failing to recognise that this was a private sale and not one between trader and consumer.

When dealing with the elements of misrepresentation, responses were often extensive and detailed. Answers explained, analysed and applied rules on the requirements for statements of fact, proof of falsity and inducement. Some students interpreted Ezra's statement that the material was cotton as a 'half truth', arguing that it could not be denied that the shirt was made of cotton, only that it was exclusively made of cotton. There was general agreement that, whether a half-truth or not, the statement was substantially false and that Fred would not have bought the shirt if he had known the truth. Answers often included accurate reference to, and use of, case authority such as **Spice Girls Ltd v Aprilia World Service BV**, **Dimmock v Hallett**, **Attwood v Small** and **Redgrave v Hurd**. Similarly, most students understood that there was no real evidence of fraudulent misrepresentation, interpreted as a statement made without belief in its truth (**Derry v Peek**), though there was disagreement about negligent misrepresentation. Many argued that, though Ezra believed that his statement was true, it was unreasonable for him to do so because he did not fully understand the meaning of the description "100% natural fibres" and could easily have made some attempts to research it further. Others felt that his belief was justified by that statement, though some incorrectly assumed that a genuine belief in truth was sufficient in itself to signify innocence and eliminate negligence. Whilst usually making some reference to damages, students generally recognised that rescission was the appropriate remedy but few explained that the remedy is discretionary and depends upon the possibility of restitutio in integrum. Many students cited the Misrepresentation Act 1967 for propositions about the meaning of negligent misrepresentation and the availability of damages, and about the court's discretion to award damages in lieu of rescission both for negligent and for innocent misrepresentation. Some also cited negligent misstatement under **Hedley Byrne v Heller**. Weaker answers omitted discussion of at least one of the required elements of misrepresentation discussed above or fell into error or confusion when defining and applying the kinds of misrepresentation and their consequences.

Evidence of rather more serious error, confusion or uncertainty was apparent in answers which:

- engaged in analysis of rights and remedies based on the assumption that the contract between Ezra and Fred was a trader/consumer contract subject to the provisions of the Consumer Rights Act 2015. There was absolutely no basis for this assumption in the facts of the scenario.

- failed to interpret the significance of the statement, "Fred bought the shirt for £80" as resolving any issue about the need to establish the general elements of formation of contract (agreement, intent, consideration), and so devoted far too much time to a discussion of any or all of those elements, to the detriment of discussion of terms and/or vitiating factors (misrepresentation).

In relation to Fred and Greta, they had entered into a trader (Fred)/consumer (Greta) contract for services, though the rights and remedies conferred on the parties in such a contract by the Consumer Rights Act 2015 were not at the forefront of the concerns. Clearly, the true issue was how that contract might be discharged. Fred's obligation was to design and create the garden that was to be located on the land that Greta had bought to extend the grounds of her house. There seemed little doubt that this work could be done, since the flooding that had occurred had not substantially affected the relevant land. However, the flooding had so severely damaged the house that it would have to be demolished. The consequence, therefore, was that if the contract was to be discharged without performance, Greta would be the party hoping to achieve that outcome since a garden without the house was something totally different from what she desired. From Greta's perspective, then, there were only two courses of action open to her: either, first, to reach an agreement with Fred to terminate the contract, probably at the cost of making some payment for work already done and expenses incurred (quantum meruit basis); or, second, to argue that the contract had been terminated by frustration of the common venture because, though Fred's only obligation was to design and create the garden, it might be argued that creating the garden without the house was a completely different enterprise from that which the parties had contemplated.

If the contract was frustrated, the outcome would be determined by application of the provisions of the Law Reform (Frustrated Contracts) Act 1943 s1(1)-(3). Sums of money paid or payable to Fred by Greta before the date of discharge by frustration would be recoverable or cease to be payable (s1(2)). However, Fred might be permitted, at the discretion of the court and where considered just, to retain or be paid an amount not greater than, the sums paid or payable, in respect of expenses incurred by him for the purpose of the performance of the contract (s1(2)). Additionally, Fred might be able to claim a sum considered just by the court in respect of any benefit that he had conferred on Greta in performing the contract prior to the discharge by frustration (s1(3)).

If there was no agreement to terminate, and if the contract was not frustrated, then any attempt by Greta to prevent Fred from performing his obligations would amount to a repudiatory breach of contract, entitling Fred to treat the contract as ended and to sue for damages. Though Fred had "partly completed the work when heavy rain … resulted in serious flooding", this was insufficient to suggest that Fred would be able to rely on the doctrine of substantial performance to claim that his obligations had, effectively, been performed and that he was entitled to claim the contract price, subject, perhaps, to some deduction for minor deficiencies in performance (**Hoenig v Isaacs**).

Maximum marks were available for a comprehensive exposition and application of the rules on frustration, including the effect of the 1943 Act. Where students chose to argue that there was no sufficient frustrating event, then, for maximum marks, it was incumbent upon them to address the issue of breach by Greta if she refused to go ahead with the contract. Other approaches to the evaluation and analysis of the basis of discharge (agreement, substantial performance) were creditworthy but had to be regarded as subsidiary to discharge by frustration/breach.

Answers were of widely varying approach and quality. Most did address the issue of frustration, though not always as the preferred explanation of how the contract might be discharged, and the explanation, analysis and application of the kinds of frustrating event were generally stronger than the treatment of the outcome for Fred and Greta if frustration could be proved. There were many excellent answers in respect of the nature of the frustrating event as being frustration of the 'common venture', in that creation of the garden without the house would become a meaningless project (**Krell v Henry**, **Herne Bay Steamboat Co v Hutton**) devoid of the basis on which the contract had been founded. Yet, whilst acknowledging that Fred's obligations did not extend in any way to the house, many other answers still argued that the appropriate kind of frustrating event was 'destruction of the subject matter' (**Taylor v Caldwell**) because the house would have to be demolished, rather than frustration of 'the common venture'. In a relatively small number of cases, answers dealt correctly and comprehensively with the provisions of the Law Reform (Frustrated Contracts) Act 1943 s1(1)-(3). However, the analysis and application of those provisions were much more likely to be incomplete and/or inaccurate, particularly in relation to the possible recovery by Fred of sums of money in respect of any part of his expenses or any benefit that he might have conferred on Greta. Answers frequently, and incorrectly, treated the sum of £7000 spent by Fred on materials as recoverable in full under the first paragraph of s1(2), whilst answers correctly identifying the second paragraph as the relevant provision almost always failed to note that such recovery would be restricted to a maximum of the sums paid or payable by Greta before the date of discharge by frustration (£5000). Fred's claim for any additional sum of money would then depend on the application of s1(3).

Additionally, weaker answers to this part of the question often displayed one or more of the following characteristics:

- a perfectly credible argument that the contract had not been frustrated because the conditions for a frustrating event had not been met but then lacking any attempt to consider how, alternatively, the contract might be discharged, whether by breach or otherwise.

- a perfectly credible argument that the contract had been frustrated followed by a failure to examine the operation of the Law Reform (Frustrated Contracts) Act 1943 but, instead, reliance on an attempt to explain and apply common law remedies for breach of contract or remedies derived from the Consumer Rights Act 2015.

- fundamental misunderstanding of who would be likely to argue for discharge of the contract without full performance. This resulted in answers which attempted to argue that Fred would be trying to avoid his obligations and so would be in breach, perhaps of the Consumer Rights Act 2015 s52 (reasonable time for performance) or s49 (performance with reasonable care and skill – incorrectly asserting that Fred was somehow implicated in causing, or not preventing, the flooding and expected demolition of the house) or, more generally, of a repudiatory breach at common law. This approach also often resulted in uncreditworthy discussion of Greta's right to a reduction in price and/or to a repeat performance.

- misunderstanding of other ways apart from frustration in which the contract might be discharged. Answers often assumed that either Fred or Greta would be able to discharge the contract simply by referring to 'part performance' and receiving payment on a quantum meruit basis (Fred) or by making such a payment (Greta). Such answers took no account of the need for agreement between the parties in such circumstances. Alternatively, answers argued that Fred could claim 'substantial performance' without ever exploring properly what that would entail.

- uncertainty about the focus of the issues, leading to unnecessary discussion of the elements required for formation of contracts.

Question 11

This question required students to consider: first, whether Lewis had entered into a contract with Karol by which Karol promised (but failed) to carry out a significant amount of gardening work for Lewis in return for a promise by Lewis to give Karol a £10 gift voucher: second, what rights and remedies were available to Lewis against NiceCook Ltd in respect of a garden barbecue bought for him by his sister, Mandy, as a birthday present but which had proved to be less than satisfactory to Lewis both in appearance and in operation. Additionally, students were required to assess whether the Consumer Rights Act 2015 is successful in balancing the interests of traders and consumers.

The facts of the scenario made it abundantly clear that Karol had agreed to do the gardening work for Lewis, so that there was no issue about that aspect of the elements of formation of the contract. Instead, the focus was on issues of intent to create legal relations and consideration. In view of the rebuttable presumptions adopted by English law about domestic/social agreements (against intention to create legal relations – **Balfour v Balfour**) and commercial agreements (in favour of intention to create legal relations – **Edwards v Skyways**), the facts posed the problem of how to interpret the competing indications as to the status of the agreement. Lewis and Karol were neighbours who obviously had a social relationship, and Karol had agreed to do a lot of work for very little reward. These factors told strongly in favour of a presumption against an intention to create legal relations. Of course, it would be possible to produce evidence to rebut the presumption that an agreement made in the context of a social relationship was not intended to create legal relations (**Simpkins v Pays**). The facts that Karol was a professional gardener and that he was committing himself to do a lot of work for Lewis, albeit for apparently small reward, might constitute such evidence. This could have been a more profitable way to utilise such evidence than attempting to demonstrate that the agreement was a commercial one from the outset. It might also tend to suggest that the agreement was made between two persons contracting in a private capacity rather than as trader and consumer. At the very least, even if intention to create legal relations could be established, it did not follow that Karol's status as a professional gardener inevitably converted the agreement into a contract for services subject to the provisions of the Consumer Rights Act 2015.

The other potentially problematic aspect of formation of contract, consideration, was somewhat less troublesome. The proposition that consideration need not be adequate but must be sufficient (in the sense that it must be of some, however minimal, substance and value, though need not be in any way proportionate to the consideration promised or supplied by the other party) ensured that the promise by Lewis to give Karol a £10 voucher was certainly sufficient consideration for Karol's promise to do the work on the garden, even if of minimal value by comparison with the obligation being undertaken by Karol (**Chappell v Nestlé**, **Thomas v Thomas**, **Mountford v Scott**).

Consequently, whilst an argument that there was no contract because there was no intention to create legal relations was perfectly feasible, it was advisable for students to consider also the possibility that there was an enforceable contract in which both intention to create legal relations and consideration were present. In that case, Karol's failure to perform his obligations amounted to a repudiatory breach entitling Lewis to treat the contract as ended and to sue for damages for an amount representing his expectation loss (the difference between what Lewis would have to pay for equivalent work on the garden and the price that he had contracted to pay Karol). Interestingly, simply to express it in that way casts some doubt after all on whether this was a legally enforceable agreement in the first place! It is also unlikely that Lewis would gain anything if the contract were treated as between trader and consumer. It could be argued that there was a breach of the term requiring performance within a reasonable time (Consumer Rights Act 2015 s52), though this

hardly seems an adequate description of a complete failure to perform, but the remedy of a price reduction (s54(5)) for such breach would be of no value to Lewis. So, Lewis would in any case be forced to rely on the common law rights of repudiation and damages, as indicated above and as preserved by the 2015 Act in the context of trader/consumer contracts for the supply of services.

Most students understood that the facts in the scenario raised issues of formation of contract and focused on intent to create legal relations and consideration. They often presented excellent or very good explanation, analysis and application of the relevant rules, citing the authority of a number of cases, usually drawn from within the range indicated above. Weaker answers identified both requirements but treated them rather more superficially, both in explanation/analysis and application, or dealt with only one, usually intent to create legal relations. Conversely, some students deemed it necessary to explore every aspect of consideration, however remote from the specific issue of adequacy/sufficiency, and very frequently to the detriment of discussion of that very key issue. Some students concluded that no contract was formed and so ignored any issue of breach. Many others, however, decided that there probably was a contract, often arguing that it was a trader/consumer contract, and that Karol was guilty of a breach. This led them correctly to argue that damages would be the remedy but rarely to explain how the damages would be calculated. Students arguing that it was a trader/consumer contract for the supply of services attempted additionally or alternatively, but almost inevitably in an unconvincing way, to suggest that Lewis could pursue a right to a price reduction.

Approaches indicative of more general confusion and/or uncertainty included:

- discussion of offer and acceptance issues, notwithstanding that there were none since the facts clearly stated that an agreement had been reached between Lewis and Karol on what each promised to supply.

- discussion of ‘past’ consideration in a way which suggested that it had application to the facts because by the time that Lewis would be expected to hand over the voucher, Karol would already have done the work, which would then be ‘past’ consideration – a fundamental misunderstanding of the basis of the contract and, particularly, of consideration in bilateral contracts.

The purchase of the garden barbecue from NiceCook Ltd by Mandy was clearly a trader/consumer contract for the supply of goods. Consequently, terms as to satisfactory quality, fitness for purpose and description were imposed on NiceCook Ltd in favour of Mandy by the Consumer Rights Act 2015 ss9-11. Almost certainly, the terms as to satisfactory quality (s9) and fitness for purpose (s10) were broken by the fact that it seems to have been impossible to operate the barbecue at a sufficiently high temperature to cook food properly. ‘Satisfactory quality’ is to be judged on an objective basis according to the standards of a reasonable person and is defined by s9(3)(a) to include ‘fitness for all the purposes for which goods of that kind are usually supplied’. Cooking food to an appropriate temperature is definitely one of the purposes ‘for which goods of that kind are usually supplied’. Additionally, s10 imposes a specific requirement that goods should be reasonably fit for any particular purpose intended by the consumer and which the consumer has made known to the trader before the contract is made. However, this is understood implicitly to encompass any purpose for which goods of that kind are usually supplied, whether or not the consumer mentions it. In such a case, as with Mandy, where the consumer requires the goods for a ‘usual’ purpose, the fitness for purpose provisions in s9 and s10 are essentially co-extensive.

Whether the supply of the barbecue with a lid on which the paint was ‘noticeably scratched’ amounted to a further instance of breach of s9 was perhaps more open to question. It is true that s9(3) provides that ‘the quality of goods includes their state and condition’ and further provides that

'appearance and finish' (s9(3)(b)), 'freedom from minor defects' (s9(3)(c)) and 'durability' (s9(3)(e)) are aspects of the quality of goods. Consequently, it could be argued that a noticeable scratch on perhaps the most obviously visible part of the barbecue (the lid), perhaps also making it more prone to rusting, would render the item unsatisfactory in quality. Yet barbecues subjected to highs and lows of temperature, the effects of cooking a variety of foods, the use of cooking and cleaning utensils and cleaning agents, and exposure to the elements when left outdoors are commonly expected not to retain their 'new' appearance for very long. Equally, it is very doubtful whether there was any breach of s11, description. A barbecue with a scratched lid is still a barbecue. No doubt supplying a second hand or 'used' barbecue where the barbecue is explicitly or implicitly described as 'new' would infringe the description but a new barbecue with some minor defects does not do so. Similarly, a barbecue which, it transpires, does not cook properly may still be described as a 'barbecue'. In legal terms, its deficiencies are adequately accounted for by ss9-10, as discussed above.

Mandy would be entitled to claim remedies including the right to repair or replacement (s19(3)(b)) and the right to a price reduction or the final right to reject (s19(3)(c)). The short term right to reject (s19(3)(a)) would not be available because it could not have been exercised within the required 30 days. In making any claim for remedies, Mandy would be able to rely on the presumption (s19(14)) that failure of the barbecue to conform to the relevant terms at any time within the first six months of delivery by NiceCook Ltd was to be taken as such failure on the date of delivery.

However, the instruction in the question was to consider the rights and remedies of Lewis, not Mandy, against NiceCook Ltd. Mandy had bought the barbecue as a present for Lewis and had asked NiceCook Ltd to send it directly to him, including a note wishing him 'many happy barbecues'. This clearly raised issues of privity of contract and the strongest argument in favour of Lewis being able to benefit from the rights and remedies previously analysed above in relation to Mandy was that he could take advantage of the provisions of the Contract (Rights of Third Parties) Act 1999. To do so, Lewis would have to prove that, in relation to any term, the contract expressly provided that he might enforce it (s1(1)(a)), or that the term purported to confer a benefit on him (s1(1)(b)) and (in either case) that he was expressly identified by name (in this instance) in the contract. In view of the circumstances in which Mandy bought the barbecue and gave the delivery instructions to NiceCook Ltd, it seems that Lewis might well succeed in establishing his rights and remedies as a third party.

Once again, most students understood the basis of the rights and liabilities concerning the dealings between Lewis/Mandy and NiceCook Ltd and were able to explain, analyse and apply the relevant law to determine whether or not NiceCook Ltd had broken any of the terms of the Consumer Rights Act 2015 and, if so, what remedies would be available. The treatment was generally at least at a satisfactory level but often extended well beyond that into good or excellent. In relation to the terms and their breach, the general consensus was that the scratch on the lid rendered the barbecue of unsatisfactory quality (there was no evidence of any dissent or doubt about this across the whole range of answers), with a minority also recognising fitness for purpose as an aspect of satisfactory quality under s9. However, understandably, most related (un)fitness for purpose to s10. Variation in quality of answers here generally depended on the extent of the detail supplied in analysis of the relevant sections of the 2015 Act. Stronger answers, for example, referred to the objective test of satisfactory quality as perceived by a reasonable person and explored at least some of the factors determining satisfactory quality, as indicated in s9(2)-(3). Weaker answers tended to contain little of this detail and hurried into a rather more factual application, treating the legal effect of the scratch as more or less self-evident. Many students were convinced that the scratch and/or the failure to reach the correct temperature for cooking constituted a breach of the s11 term as to description. Though this conclusion was probably incorrect, for the reasons discussed earlier, the discussion was creditworthy.

Students explained, analysed and applied remedies in a generally comprehensive and impressive manner, demonstrating a strong understanding of the structure and sequencing of those remedies as established by the 2015 Act. Stronger answers recognised that the reference to 'two months' since Mandy had 'given' Lewis the barbecue as a birthday present probably ruled out any possibility of his relying on the short term right to reject and so moved on to the sequence of remaining remedies (repair/replacement, price reduction/final right to reject), often citing the presumption as to existence of the defect(s). Weaker answers failed to recognise the time issue in relation to the short term right to reject and/or did not identify the presumption but, nonetheless, usually dealt with other remedies appropriately, though occasionally with some confusion. Rarely, students also mentioned the possibility that the undercooked food would have been wasted, so that Lewis could include a claim for damages for consequent loss under the preserved common law remedy of damages for breach.

Treatment of the privity of contract issue was significantly more variable in quality. Many answers simply failed to address it and proceeded as if Lewis had himself made the contract with NiceCook Ltd. Others recognised it but dismissed it rather briefly, sometimes asserting that, ultimately, Lewis would have no rights and remedies and that Mandy would have to pursue them. However, the majority of students did understand that Lewis might be able to overcome the difficulty and most argued convincingly that he would be able to meet the requirements of the Contract (Rights of Third Parties) Act 1999, albeit occasionally with some confusion about exactly what those requirements are. Some students recognised the issue but opted instead to argue that Lewis would be able to rely on the approach taken in **Jackson v Horizon Holidays**. Though creditworthy to some extent, this attempt to deal with the issue tended to ignore the limitations of, and subsequent doubts about, the decision in that case and represented a strange choice, given the much more obvious route to success for Lewis available through application of the provisions of the 1999 Act. For the purposes of a holistic judgment of the quality of answers to Question 11, answers to the privity of contract issue in this part of the Question were considered alongside the formation of contract issues in relation to Lewis and Karol in the earlier part of the Question.

In the final aspect of the Question, students were asked to assess whether the Consumer Rights Act 2015 is successful in balancing the interests of traders and consumers. Most students attempted some kind of response, though many did not. Commonly, those who did provide a response argued, in varying levels of detail, that the provisions of the 2015 Act operate to correct an otherwise inevitable imbalance in power between 'business' (traders) and 'ordinary people' (consumers). This argument was supported by reference mainly to the terms imposed by the statute in respect of supply of goods (satisfactory quality, fitness for purpose, description) and their associated remedies, and frequently also by reference to the provisions preventing traders from excluding or limiting liability for breach of those terms (s31) and more generally controlling unfair terms (2015 Act, Part 2). In some instances, students sought to deal at a more granular level with issues of balance, examining for example not only the remedies available to consumers but also limitations on those remedies (and so favouring traders) in respect, say, of the time restrictions on claims and/or the impossibility or disproportionate nature in some cases of a requirement for repair or replacement. Relatively few students attempted to frame these arguments within the context of a wider discussion of exactly whose interests were being served or what might be the yardstick of a suitable balance, though there were some praiseworthy efforts to introduce a more philosophical approach by reference to the views of theorists such as Pound and Jhering. On the whole, therefore, answers were more likely to remain at the level of satisfactory rather than to be considered good or excellent.

Mark Ranges and Award of Grades

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