Here is a selection of typical responses for you to consider. Using past papers, scenarios are set out and followed by the individual questions, mark scheme and typical answers. Commentaries on each answer are grouped together at the end of each topic. These can be used to give examples of answers with strengths and weaknesses identified, so that your students can look for improvements and refine their techniques. In some instances, two answers to the same question have been provided, along with commentary. These can be used for purposes of comparison and contrast.

Note that answers are reproduced exactly as written, including grammar and spelling.
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**Scenario 1**

To celebrate 25 years of marriage to Helen, George paid £100 to Kenneth, a book collector, for a signed copy of the first edition of a book by Helen’s favourite author. Though Kenneth assured George that the signature was genuine, George later discovered that it was not, reducing the value of the book to £50. George also paid £300 to Lewis, a specialist repairer of books, to re-bind a set of famous novels which Helen owned. After hearing nothing for a month, George suddenly received a phone call from Lewis asking for a further £100 to complete the work. George reluctantly paid the extra £100. When Lewis finally finished the work a few weeks later, George was dismayed to find that Lewis had damaged a number of pages. When George complained, Lewis reminded him that he had signed an agreement limiting any liability on Lewis for negligent work to 10% of the contract price.

Consider the rights and remedies, if any, of George against Kenneth, and of George against Lewis.  

**Potential Content**

(A) In relation to the rights and remedies of George against Kenneth: analysis of the formation of the contract to determine whether the authenticity of the signature is a term or merely a (mis)representation; consequences of breach of the term, if any; the rules on misrepresentation, including types and remedies. Credit discussion of Sale of Goods Act 1979 s13 (description) as an additional or alternative approach.

- weak sound misrepresentation only
- clear s13 SGA 1979 only

(B) In relation to the rights and remedies of George against Lewis: analysis of sufficient consideration for the additional £100 (existing duty owed to George?); analysis of the terms implied by the Supply of Goods and Services Act 1982 s13 and s14; analysis of remedy of damages and the effect of the Unfair Contract Terms Act 1977 s2 on the attempt to limit liability.

- sound consideration + SGSA + damages and UCTA
- clear consideration + SGSA or SGSA + damages and UCTA
- weak clear any one of consideration/SGSA/damages and UCTA
Student answers for consideration

Answer 1

With reference to George and Kenneth, we have to discuss whether the assurance the signature was genuine is either a term or a representation, or in fact a misrepresentation.

To decide if the assurance of the genuine signature was a term, the court will look at a number of things. Firstly, the importance placed upon the statement, as seen in Couchman v Hill, in this case it appears there is a degree of importance placed upon the fact that the book was signed in that George has paid Kenneth for a signed copy, not a blank copy, however there is nothing to suggest that George has placed extra emphasis on the fact the book was signed, so it would be up to the courts to decide. Secondly, the courts will look if the seller has any specialist knowledge as seen in Oscar Chess v Williams, it is reasonable for the courts to assume in the case that Kenneth, a book collector, would have reasonable degree of knowledge relating to the books he was selling. There is no time lapse and nothing has been signed. If this was deemed to be a term, then Kenneth would be in breach of contract and George would be entitled to sue for Repudiation or Damages if it is decided that the signature on the book goes to the heart of the contract.

If it is decided not to be a term, Kenneth could be liable for a misrepresentation, which is an untrue statement of fact (Bissett v Wilkinson) that induces a party to enter into a contract (Attwood v Small). It appears here that George has placed reliance on Kenneth’s assurance that the signature on the book was genuine. Kenneth could be liable for one of three types of misrepresentation. Firstly, a negligent misrepresentation, where Kenneth would have had to simply have been careless when making the statement, an action can be made in two ways, firstly under the Hedley Byrne principle, where a special relationship and proximity must be proved, or under the Misrepresentation Act 1967, where there is no need to show a special relationship. The second type of misrepresentation is that of fraudulent misrepresentation, this is hard to prove as seen in Derry v Peek and will result in recission and damages, as will the remedies for negligent misrepresentation. Lastly, it could simply be an innocent misrepresentation which would lead to recission or damages. It would be up to the Courts to decide.
Lastly an action could be brought under the Sale of Goods Act 1979, in breach of the condition, section 13, relating to matching it’s description. This is a breach of condition and would lead to repudiation or damages.

With regard to George and Lewis, George would not have to pay the extra £100. Under the rules of consideration, performance of an existing duty is not good consideration for an agreement, as seen in Stilk v Myrick, unless the duty is sufficiently different, as seen in Hartley v Ponsonby or a benefit is derived, as seen in Williams v Roffey. Here, there is no sufficiently different duty or an extra benefit derived.

With regards to the damaged books, George’s action would be under the Supply of Goods and Services Act 1982 and Lewis would be in breach of section 4, in relation to satisfactory quality, section 13, which relates to the work having to be done with reasonable care and skill and section 14, relating to work being completed in a reasonable time. Remedies would include repudiation or damages under section 4 which is treated as a breach of condition which would result in George being able to claim the £300 back, and for the breach of the innominate term (Hong Kong Fir case) it would be up to the courts to decide by looking at the impact of the breach.

In relation to the limitation clause, its validity would be tested under the Unfair Contract Terms Act, which states under section 2(2) that liability arising from negligence can only be excluded if it is reasonable to do so. It would be up to the courts to decide if it was reasonable, which it is not likely to be. Also the rules on incorporation will be considered, so it could be valid seeing as George signed the agreement as seen in L’Estrange v Graucob.
Answer 2

With regard to George’s rights against Kenneth, George would bring an action under the Sale of Goods Act 1979. He would be claiming under s13, meaning that the good did not correspond the description or the sample provided. This would be the case as the signature was not genuine. A breach of s13 is classed as a breach of condition as it is a term which goes to the heart of the contract, as seen in Beale v Taylor, and so the remedy for such a breach is repudiation as of right, and damages as an equitable remedy, available at the courts discretion. However, as George only discovered the value of the book was not genuine a while after as seen in Leaf v International Galleries, it may be seen that he has accepted the good and therefore under s35, he has lost the right to reject the good. But, additional remedies can be found under s48 of the Sale of Goods Act, meaning that even if George has ‘accepted’ the good, he is able to reject it and may be entitled to a repair/replacement at the expense of Kenneth, the seller, all available at the courts discretion.

With regards to George’s rights against Lewis, for the extra £100, the rules of consideration must be taken into account. Consideration is ‘the price of a promise’ meaning that both parties must give and receive something of value. Lewis demanded an extra £100 to complete the work but did not provide any extra consideration for this work. This is called performance of an existing duty as shown in the contrasting cases of Stilk v Myrick and Hartley v Ponsonby. As Lewis has not provided any extra consideration, George would not be obliged to pay the extra money. There is an exception to this rule under Williams v Roffey, where if an additional benefit has been desired by George, then he will have to pay the extra money. However, this does not appear to be the case.

With regard to the damaged pages, George would bring an action under the Supply of Goods and Services Act 1982, under section 14(2) meaning that the service will be carried out with reasonable care and skill. It appears that Lewis is in breach of this as the pages have been damaged. A breach of this term is treated as an innominate term as seen in the Hong Kong Fir case, meaning that the remedy will be decided based on the consequences of the breach. But Lewis is attempting to restrict liability using a limitation clause. For a limitation clause to be relied upon, it must be proved that it was incorporated and valid. A clause is incorporated in a number of ways: if it has been effectively notified at the time of making the contract as seen in Thornton v Shoe Lane
Parking and Olley v Marlborough Court Hotel; and also if the contract has been signed, even if the clause has not been read, as seen in L’Estrange v Graucob. This appears to be the case here as George has signed the agreement. It must next be proved that the exclusion clause is valid and this is decided by the Unfair Contract Terms Act 1977. By s2(2), liability can only be excluded or limited, resulting from negligence, if it is reasonable to do so. There is nothing in the scenario that seems to suggest this would be unreasonable and therefore it would probably be considered that the clause could be relied upon, and therefore Lewis was able to limit liability only 10% of the contract price.
Scenario 2

Knowing that George wanted to sell his car so that he could buy a new one, Faruq sent him an email message saying, “I will give you £3000 for the car.” George replied, “Interesting suggestion. Would you go to £3250?” In response, Faruq sent a further message stating, “Yes. Consider it sold at £3250. No need to reply. I’ll collect it later in the week”. However, Faruq later learned from a mutual friend that George had then accepted a higher offer for the car from someone else. Consequently, he was very surprised when it turned out that George’s other deal had fallen through and that George was now expecting Faruq to buy the car. Faruq angrily refused to do so.

Discuss the rights, duties and remedies, if any, of Faruq and George arising out of the negotiations for the sale of George’s car.  

[25 marks + AO3 5 marks]

Potential Content

(A) Explanation and analysis of initial messages in terms of offer and counter offer/request for further information. Remedies.

(B) Explanation and analysis of subsequent messages/events in terms of offer, counter offer, acceptance and withdrawal of offer through rejection or lapse of time. Remedies.

Note: because of the different possible approaches to be taken by students, the mark scheme for this question was treated flexibly. An alternative was to regard (A) as an analysis based on an initial offer from Faruq, followed by a counter offer from George; and (B) as an initial offer from Faruq followed by a request for further information from George. Additionally, the discussion of the consequences of any breach (remedies) could be located in either (A) or (B).
Student answers for consideration

Answer 3

In relation to the contract in which have been made they are dealt with in different ways.

Faruq made George an offer of £3000, he was then waiting on a reply from George as to whether he would accept this or not. George then emailed back to Faruq with a new sum of £3250 which can be treated as two different things. It may be that this is a counter offer to that of the original offer Faruq originally made. Although it doesn't necessarily change the contract in any way so there may for be classed as a mere enquiry. As seen in Hyde where offering a lower sum of money for a farm constituted a counter offer although in Stevenson asking for metal bars to be delivered in staggered times was only constituted as a mere enquiry.

Faruq then accepts George's offer of £3250 and says in the email that there was no need to reply. Therefore in Faruq's mind the deal was done and the bike was his. Although silence does not actually constitute acceptance so George may not be in breach of the contract if he did have to reply to the message. It would be up to the court to decide whether he had accepted this deal or not.

If George had accepted the deal by reading the email then a contract would have been formed and George would therefore be in breach of that contract. There are 3 main ways in which a contract can be breached, it could be a breach of condition which goes directly to the heart of the contract as seen in Poussard where a singer attended all rehearsals but missed some of the live shows which was said to go to the heart. Next it can be a breach of warranty which isn’t as important but still causes problems to the contract. As seen in Bettini where a singer turned up to all live shows but missed some rehearsals which was seen as a breach of warranty. Finally there is breach of innominate which depends on the consequences of the case. As seen in Hong Kong Fir Shipping case where a boat on hire was being repaired for 18 weeks and it was decided it wasn’t long enough.

In this case in relation to Faruq it is likely to be a breach of condition as it does go to the heart of the contract. This all applies if George seeing the email constitutes
acceptance. Therefore Faruq is entitled to damages and or repudiate the whole contract.

If George seeing the email but not replying isn’t acceptance then it could end up Faruq being in breach of contract for not buying the bike but this all depends on the final decision made.

Under formation of a contract Faruq and George if applicable would be able to claim damages. For Faruq this may be the amount of money different between this bike and another bike he bought. For George it may only be costs he incurs finding someone else to buy the bike. Also if found to be breach of condition for Faruq he can repudiate the contract which therefore means he will be able to walk away from that contract and find a new bike.
Answer 4

The area of law being discussed here is offer and acceptance. It is clear that Faruq was making George an offer when he emailed him saying he would pay £3000 for the car. It must then be decided if George asking if Faruq would buy the car for £3250 was a counter offer or mere enquiry. If it was a mere enquiry then the original offer would still stand and Faruq would not be able to assume the car was sold to him for £3250 until George made the enquiry an offer. In Stevenson v McLean asking if the delivery of the iron rods could be staggered was a mere enquiry. Therefore the company were in breach for selling them to someone else. However it is most likely that the question was a counter offer which will have terminated the original offer. Faruq then accepted this counter offer. In Hyde v Wrench Hyde offered his farm for sale to Wrench for £1000, when Wrench then offered £900 this was a counter offer. Therefore Hyde did not then have to take his acceptance of the original offer. The email stating that George had no need to reply has no effect because it was Faruq accepting George’s counter offer. However, if Faruq had been accepting an offer from George, this would not have constituted as acceptance because mere silence cannot constitute acceptance. In Felthouse v Bindley the statement ‘if I hear nothing else from you I’ll assume the horse is mine’ did not constitute as valid acceptance.

Because Faruq accepted George’s counter offer, George was then in breach of contract when he offered to sell the car to someone else, as George and Faruq had a valid contract for the car. This would mean that Faruq would be able to claim damages that would put him in the position he would have been, had the contract gone ahead. He will also have been entitled to refuse to buy the car from George when his other sale fell through.
Scenario 3

Faruq bought a new TV aerial from Sharpview, who assured him that it would be perfect for improving the quality of his TV reception. Faruq engaged James to install the aerial. James missed two appointments, for which Faruq had taken time off work. When he finally turned up for the third appointment, James broke roof tiles when he dropped tools whilst completing the installation. Though properly installed, the aerial was of poor quality and failed to improve the TV reception in any way. Sharpview refused to accept any responsibility. Additionally, James pointed out that Faruq had signed a 'completion of work' form, which included a statement that James would not be liable for any damage resulting from the installation work.

Discuss Faruq’s rights and remedies, if any, against Sharpview and against James, arising out of the purchase, and the installation, of the TV aerial. [25 marks]

Potential Content

(A) In connection with Faruq and Sharpview: analysis of the rights and duties under the Sale of Goods Act 1979 in relation to satisfactory quality and fitness for purpose. Where dealt with as misrepresentation only, max clear.

(B) In connection with Faruq and James: analysis of the rights and duties under the Supply of Goods and Services Act 1982 in relation to reasonable time for performance and reasonable care and skill.

(C) Consideration of the remedies for breach in (A) and (B), including the significance of business and consumer contracts; rejection (and loss of the right to reject) under the 1979 Act and damages; nature of the implied terms in the 1982 Act and the impact, if any, of the limitation clause (incorporation, and Unfair Contract Terms Act 1977).
Student answer for consideration

Answer 5

Faruq would have different rights and remedies against the two people.

Against Sharpview Faruq would be able to make a claim under the Sales of Goods Act 1979. This act is in place to protect people against goods they have bought which appear to be faulty or not the best quality product. Under s13 of the SoGA the product must fit the description of what was stated. There is nothing here that says that it doesn’t fit the description he bought a tv aerial and that’s what he got. Unlike in Beale where a man who believed he bought a vintage car actually bought two cars put together.

Section 14(2) of the SoGA says that product must be of satisfactory quality. Faruq says that the TV aerial was of poor quality and therefore Sharpview would be liable for this. Products fall under satisfactory quality if the reasonable person believes it too be. As seen in Priest v Last where a hot water bottle burst it obviously wasn't of satisfactory quality.

Finally under s14(3) the products bought must be fit for the purpose. Faruq bought the aerial after being assured that it would improve the quality of his tv. When it didn’t it is obvious that the product isn’t fit for purpose. As seen in Priest where if a hot water bottle bursts it's obviously not fit for purpose.

A breach of s14(2) and section 14(3) are treated as a breach of warranty so therefore Faruq will be able to claim damages. This could be a refund on the item or the difference between the cost of another aerial which does do the task required.

In relation to James it would be addressed under contract terms specifically looking at exclusion and limitation clauses.

Firstly it needs to be addressed whether or not Faruq signed the form in which the clause is incorporated in. It states in the question that he did so therefore he has a binding contract.
Secondly it must be addressed as to whether or not the clause had been notified to Faruq, he must have been aware of the clause in the contract. As seen in Olley where a clause saying they weren't liable for loss of items. This clause wasn't accepted as it was in the hotel room not at reception.

Also it must be known if they have had any previous dealings with the company. Faruq doesn't seem to have had any previous dealings so therefore wouldn't be aware of any clauses present. Unlike in Hollier where a family already knew the clauses in the garage they used so they didn't have to state them every time.

Under the Unfair Contract Terms Act 1999 there are ways to be protected by these clauses. s2(1) states that you cannot exclude any liability for a personal injury due to negligence. This doesn't appear to be apparent in this case.

s2(2) states that you can only accept liable if reasonable to do so. In this case there would be no reasonable grounds to avoid liability for damaged caused. Therefore Faruq may be able to claim for tiles.

Another way of Faruq being able to claim may be under the Supply of Service and Goods Act 1982. Not all parts of this act are relivant to James because he only fitted the aerial so wouldn't be liable for not working as it says it was propably installed. The part of the SoGaSA which may apply would be s13 which states that any work must be done with reasonable care and skill. James managed to break roof tiles by dropping tools on them, this wouldn't be seen as being done with reasonable care and skill. Unlike in Thake v Morris where a vasectomy didn't work, the doctor carried out the operation with reasonable care and skill so therefore was not liable.

A breach of s13 of the SoGaSA is classed as a breach of warranty so therefore Faruq would be able to claim damages for the tiles in which James broke while completing the work. He may also be able to claim damages for the cost of someone coming out to fix the broken tiles.
Evaluation question

Consider whether the current law on exclusion and limitation clauses is satisfactory, and suggest what reforms may be desirable.

[25 marks]

Potential Content

(A) The common law approach to the control of exclusion/limitation clauses: incorporation issues – for example, signature, small print, contractual documents, course of dealing, special notice; interpretation contra proferentem; inherent inability of incorporation approach to correct unfairness.

(B) The statutory approach to the control of exclusion/limitation clauses: obscurity and complexity of the approach adopted in the Unfair Contract Terms Act 1977; confusion with overlapping provisions of the Unfair Terms in Consumer Contracts Regulations 1999; confusion between English and European concepts; deficiencies in particular provision (for example, the protection for small businesses).

(C) Appropriate suggestions for reform in relation to (A) and/or (B). These should be related to the criticisms advanced and should, where possible, draw on substantial proposals (such as those made by Law Reform bodies – for example, Law Com 292 (2005), Unfair Contract Terms – and/or expert commentators).
Student answer for consideration

Answer 6

The courts control the current law on exclusion or limitation clauses through the rules of incorporation. This is where the court considers whether the contract has been signed, has the clause been effectively notified, was the clause notified where the contract was made and has there been a history of previous dealings. It is considered that these controls work well in preventing unfair exclusion clauses alongside the Unfair Contract Terms Act. However, exclusion and limitation clauses can still be made if they meet these requirements, even if the other party to the contract never reads them which can be seen to be unfair. Therefore it is suggested that English Law takes a principle of European law that all parties should ‘act in accordance with good faith and fair dealings’ and that these terms cannot be excluded.

There are also statutory controls that oversee the inclusion of exclusion clauses such as the Unfair Contract Terms Act and UTCCR. The Law Commission did a review of these legislation and filed a report on it. It is felt that the Unfair Contract Terms Act is written in too dense a language that even lawyers find difficult to understand or interpret. This makes it even more difficult for consumers to understand their rights under the act. It is therefore suggested that there should be a new Unfair Contract Terms Act written which simplifies and consolidates the current act of including the UTCCR. One similar disadvantage is that the UTCCR uses a lot of European Principles which the English Lawyers are unfamiliar with and therefore find it difficult to establish the right principles to apply.

The Law Commission's report did recognise a strength in that the office of fair trading can go to court to clarify a term in the contract. This provides the ability to remove any ambiguous terms that are not clear. Another suggestion is that the Office of Fair Trading should be given extra powers to prevent unfair exclusion clauses, such as being able to tell car parks to remove signs with invalid exclusion clauses.

One area of the law on exclusion and limitation clauses that is favoured is the rule of Contra Proferientum. This states that if a clause includes an ambiguous term, the courts will always go against the party which entered the term into the contract. This is argued to be fair as it is often larger firms creating the exclusion clause, therefore they
have more power and resources, generally, than the other party. So it is argued that if they want to exclude liability they should be perfectly clear with the wording of it. In Houghton v Trafalgar Insurance the claimants insurance stated the Company would not be liable for any incidents where the vehicle was carrying an ‘excess load’. When the claimant crashed his car with 6 people in it, the insurance company tried to exclude liability. However the courts felt excess load could mean too many people but more likely meant too much weight. Therefore the claimant was successful.
Commentaries

Comment on Answers 1 and 2

(A) The answers take markedly different approaches. Answer 1 treats the facts as giving rise either to a possible action for breach of an express term or to an action in misrepresentation, though it also contains a brief reference to a sale by description under the Sale of Goods Act 1979 s13. Answer 2 ignores the possibility of a misrepresentation and focuses entirely on a possible breach of s13. Both approaches are acceptable. Both answers display strengths and weaknesses, though Answer 1 contains a greater range of analysis and discussion.

Answer 1 is astute in exploring the distinction between terms and representations, indicating factors recognised by the courts in making the distinction, and in allowing for the possibility that the presence of the author’s signature may be either. The answer also outlines the main elements of the rules on misrepresentation. However, the rules are presented in a superficial manner. The different kinds of misrepresentation are inadequately defined and the resulting remedies are barely explored. Consequently, application to the facts is correspondingly superficial. Throughout, appropriate cases are cited but without any development that would assist explanation and application of the rules.

Answer 2 correctly identifies s13 of the 1979 Act and presents a broadly accurate account of its effect, including issues of rejection and possible loss of the right to reject through acceptance. Once again, however, the analysis is highly superficial. There is no real explanation of the meaning of ‘sale by description’ and, though Beale v Taylor is cited, discussion is not developed in a way which might assist explanation. The same can be said of the failure to utilise the reference to Leaf v International Galleries to explore the loss of the right to reject aspect. The discussion of the additional s48A-s48F remedies appears to ignore the likelihood that this is not a consumer contract because Kenneth is merely a book collector, rather in business to deal in books.

(B) Both answers deal with consideration, the Supply of Goods and Services Act 1982, and the possible effect of the limitation clause on any remedies available. Answer 2 is a little stronger than Answer 1, though both answers are characterised by failure to develop explanations, and so by correspondingly weak application.

Answer 1 outlines the relevant rules on consideration in a highly superficial way. Even though the outline is accurate, and the conclusion may well be correct, it is impossible properly to understand the law and its application from such a brief discussion. All the cases cited are relevant but, in the absence of any further development, do little to assist understanding. And yet again, the analysis of the Supply of Goods and Services Act 1982 provisions lacks depth, consisting merely of identification of s13 and s14 followed by simple assertion that the terms implied by those provisions have been broken (there is also an incorrect reference to satisfactory quality under s4). Similarly, there is little attempt to explain the nature of limitation clauses, the relationship between the common law and statutory approaches to their control, and statutory provisions relating to reasonableness in connection with loss or damage (other than death or personal injury) resulting from negligence. Inevitably, application lacks substance.

Answer 2 is a little more extensive on all three aspects but still does not succeed in escaping from the charge of lack of depth in explanation and application. For example, some indication of the facts in the key cases cited on consideration would have assisted in explaining the circumstances in which the performance of an apparently ‘existing duty’ might not prove fatal to a claim. The discussion of the Supply of Goods and Services Act 1982 does not examine the meaning of the ‘reasonable care and skill’ implied term, and fails to mention s14 at all (except as, in reality, s13), though it does explain the significance of the fact that s13 is regarded as an
innominate term. The examination of the limitation clause is a little stronger, though perhaps some of the detail of the different aspects of incorporation could profitably have been sacrificed for some detail on the statutory approach to reasonableness in connection with loss or damage (other than death or personal injury) resulting from negligence.

Answer 1

(A) clear  (B) some  17 marks + AO3 3 marks  20 marks

Answer 2

(A) some  (B) weak clear  16 marks + AO3 4 marks  20 marks

Comment on Answers 3 and 4

Both answers identify aspects of the analysis, though Answer 4 does so far more successfully and coherently than Answer 3, accurately following one possible route to its logical conclusion, and embarking upon, though not completing, analysis of the alternative route. By contrast, Answer 3 never seems to settle on any clear and logical analysis and, additionally, engages in a rather excessive discussion of the nature and consequences of breach. However, neither answer seeks to develop clear definitions and explanations of crucial elements, such as the meaning of offer, acceptance, request for further information, counter offer, rejection, and termination of offer through withdrawal and lapse of time.

Answer 3 illustrates these comments from the outset. There are numerous references to relevant aspects of agreement in contract, and appropriate cases are cited but there is little evidence of any explanatory framework. The analysis of the significance of the communications descends into confusion when the answer raises the significance of silence as non-acceptance despite arguing that George’s response was a counter offer accepted by Faruq. Given that any breach of contract is likely to be by way of denial of the existence of a contract, and so by a complete refusal to perform (whether by George or Faruq, depending on the analysis), discussion of breach of condition, warranty and innominate terms barely advances the argument.

Essentially, Answer 4 takes the view that Faruq’s email message is an offer and that George’s reply amounts to a counter offer, and then accurately pursues the implications of that decision through the subsequent communications, pointing out that *Felthouse v Bindley* has no application because Faruq is then himself accepting that counter offer, rather than attempting to impose acceptance by silence on George. The answer correctly recognises that, if George’s initial response is a mere request for further information, then *Felthouse v Bindley* becomes relevant. At this point, however, the answer fails to develop any account of the significance of the subsequent events if Faruq is to be regarded as making a further offer to buy at £3250. Consequently, the analysis is strong but not fully comprehensive and, as indicated earlier, suffers a little from a failure to develop framework explanations.

Answer 3

(A) Weak clear  (B) weak some  15 marks + AO3 3 marks  18 marks

Answer 4

(A) Clear  (B) Weak clear  19 marks + AO3 4 marks  23 marks
Comment on Answer 5

(A) The discussion of the Sale of Goods Act 1979 correctly identifies the possible significance of s14(2) and s14(3), and also correctly rules out the application of s13. The explanation and application are broadly accurate but lack the detail which is necessary to achieve a comprehensive analysis. There is no attempt to explain the circumstances in which the implied terms apply (including sale in the course of a business), the factors stated to be relevant to satisfactory quality in s14(2A)-(2C), or the limitation on the application of s14(3). The explanation and application are assisted a little by the use of Priest v Last but reference to case law is otherwise absent.

(B) Strangely, the answer defers discussion of the possible breach of provisions under the Supply of Goods and Services Act 1982 until after the possible effect of the limitation clause has been discussed. Since the answer then begins “Another way of Faruq being able to claim may be under the Supply of Service and Goods Act 1982”, it seems that the relationship between the potential breach of rights under the 1982 Act and the attempt to limit the resulting remedies has been misunderstood. The answer correctly identifies s13 (reasonable care and skill) but omits discussion of s14 (time for performance). However, there is little discussion of s13 and it is incorrectly categorised as a warranty, rather than as an innominate term.

(C) The discussion of remedies is very limited. In relation to those for breach of the Sale of Goods Act 1979 s14(2) and s14(3), the analysis is immediately undermined by a mistake as to their status as conditions (they are classed in the answer as warranties). Consequently, there is no discussion of rejection and loss of the right to reject. Moreover, there is no reference to the additional remedies available to a consumer under s48A-s48F. Equally, the error in classifying the status of the implied term under the Supply of Goods and Services Act 1982 s13 results in discussion only of damages. The discussion of the effect of the attempt to limit liability (which, as indicated above, is not properly related to any possible remedy available to Faruq against James) is relatively strong on the issue of incorporation at common law but much weaker on the statutory control, including the approach to reasonableness under the Unfair Contract Terms Act 1977 s2(2) and s11.

Weak clear (B) Some (C) Some 16 marks

Comment on Answer 6

The answer very properly treats the instruction to consider whether the current law on exclusion and limitation clauses is ‘satisfactory’ as an invitation to consider not only weaknesses but also strengths of the current law. Broadly speaking, the answer is structured in the way that the mark scheme anticipates, so that it discusses the common law approach (PC (A)), the statutory approach (PC (B)) and makes some suggestions for reform (PC (C)).

(A) The answer explains that clauses are subject to common law rules on incorporation, four of which are briefly identified. Though not developed in any detail, the answer makes the valuable point that, in themselves, these rules cannot prevent the incorporation of a term which works unfairly against one of the parties since it is always possible to comply with the rules. The answer later returns to the common law rules in praising the operation of the contra proferentem rule, which is illustrated by a rather detailed account of one case. Though a little superficial, the answer does identify two strong arguments.

(A) The answer makes three points which are all of some merit, namely that the Unfair Contract Terms Act 1977 is written in dense language, that the Unfair Terms in Consumer Contracts
(B) Regulations 1999 use unfamiliar ‘European Principles’, and that the Office of Fair Trading has an important enforcement role. Unfortunately, none of these points is actually developed in any way which reveals depth of understanding. Examples of the ‘dense’ language of the 1977 Act, and of the ‘unfamiliar’ European principles, would have improved the quality of the answer significantly.

(C) The answer contains two or three brief suggestions for reform, none of which goes much beyond a mere hint of what might be proposed. There is some idea that new legislation is required to deal with the overlap and confusion between the 1977 Act and the 1999 Regulations, though no detail on what form this might take. Similarly, there is a suggestion that greater enforcement powers be given to the Office of Fair Trading, with little real indication of what might actually be needed. Once again, the inclusion of a little more detail, drawn most obviously from the Law Commission Report in 2005, would have given much more substance to this aspect of the answer.

(A) Weak clear (B) Some (C) Some 16 marks