CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

SEPTEMBER 2020

LEVEL 6 - UNIT 2 – CONTRACT LAW

Note to Candidates and Learning Centre Tutors:

The purpose of the suggested answers is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the September 2020 examinations. The suggested answers set out a response that a good (merit/distinction) candidate would have provided. The suggested answers do not for all questions set out all the points which candidates may have included in their responses to the questions. Candidates will have received credit, where applicable, for other points not addressed by the suggested answers.

Candidates and learning centre tutors should review the suggested answers in conjunction with the question papers and the Chief Examiners' **comments contained within this report,** which provide feedback on candidate performance in the examination.

CHIEF EXAMINER COMMENTS

The overall pass rate is a notable improvement on recent sessions although there is caution that this was in some ways a relatively "easy" paper in terms of which learning outcomes were being assessed in each section (e.g. there were essays on agreement and consideration and problems on privity and undue influence – all historically question combinations that students have performed well answering).

CANDIDATE PERFORMANCE FOR EACH QUESTION

Section A

Question 1

This question tested knowledge of exemption clauses. Candidates were generally able to define and explain such clauses and tended to have at least some relevant knowledge of how they are regulated at law – strong answers were able to consider both common law and legislative provisions, but the "average" candidate tended to gravitate to one or the other. Detailed knowledge on interpretation and on the Consumer Rights Act 2015 was rare in particular.

As is often the case with section A in this examination, most answers were mainly hamstrung by taking a purely or at least mostly descriptive approach – analysis was basic on the whole and few considered the specific context in which the question was asked. Centres and tutors are reminded that analytical writing is perhaps the greatest weakness of the typical cohort and that this should be developed wherever possible during tuition.

Question 2

This was an extremely popular question, which is unsurprising given that it focused on invitation to treat and offer. Again, answers were generally defined by depth of knowledge and level of analysis – a worrying proportion of candidates seem to think that *Carlill* is the only case they need to understand in this area and areas such as tenders and auctions were not generally dealt with at the level of depth one would hope for at level 6. Part (b) answers were generally descriptive but showed a good level of knowledge on the whole.

Question 3

This question was not particularly popular and as is often the case, became somewhat self-selecting. Most answers were able to identify the general rule requiring strict performance and at least some exceptions to it, although again the depth of knowledge and the range of cases used were underwhelming across the cohort. A minority of answers really engaged with the question but again analysis was limited in most answers.

Question 4

This was another very popular question which dealt with the issue of consideration in two areas. Knowledge of both areas was relatively good (and better than it has historically been when these areas have been examined) and it was particularly good to see plenty of recent case law discussed in part (b) in particular. Again, most answers would have been improved by a level of critical analysis – candidates are encouraged in section A to always think about *why* the law has developed as it has, and to evaluate whether it meets those objectives.

Section B

Question 1

A relatively popular question, B1 was not generally answered particularly well. Most candidates selecting this question seemed to have a reasonable theoretical understanding of categories of term (at least conditions and warranties, with knowledge of how innominate terms operate somewhat patchy). However, far too many answers appeared to fundamentally misunderstand how the law applies. The majority of candidates began with the effects of the breach, and reasoned back to decide whether the term would suit being a condition or a warranty – this is a serious misunderstanding and few even considered the "deprived of the substantial benefit" element that might make this justifiable in an innominate analysis.

Question 2

This question was generally answered quite well, although again a lack of detailed knowledge was the main reason for answers that failed to reach higher marks. It is reiterated again that at level 6 simply being able to cite general principles is not sufficient – candidates must be able to work with the primary law and be able to command common law and legislative sources to provide authority for their analysis.

Question 3

Essentially the same could be said here as for Q2 above, with the addition of the perennial reminder that the law of undue influence has moved on from the 1990s and failing to discuss or understand the crucial decision in Etridge (No 2) is still shockingly common.

Question 4

This question was generally unpopular and from a small sample size it is difficult to draw many general conclusions. That said, knowledge of specific performance was generally average, knowledge of reliance-based damages was more solid; but knowledge of penalty clauses was lacking in all but a handful of answers.

SUGGESTED ANSWERS

LEVEL 6 - UNIT – 2 CONTRACT LAW

SECTION A

Question 1

The doctrine of freedom of contract establishes that parties must be free to choose whether to enter into contractual obligations on the terms of their choice. One of the foundations of the classical theory of contract law, freedom of contract remains an important theory even today. However, it could be said that contract law has increasingly curtailed such freedom, particularly when attempting to protect parties suffering from unequal bargaining power.

Thus, following the basic doctrine of freedom of contract, it is not surprising that contract law in England and Wales allows for exemption clauses – i.e. clauses which either limit, or outright exclude, liability. However, it is also unsurprising that such clauses have been scrutinised carefully by the courts, and in more recent decades legislated upon by Parliament.

Beginning with the common law, the courts have always required an exclusion clause (like any other) to be enforceable as a term of the contract. This means that the clause must be both incorporated into the agreement, and interpreted to cover the liability being excluded or limited. Regarding exclusion clauses in particular, the courts have developed a series of rules on both of these points which could potentially be argued to impinge on the freedom of contract.

An exemption clause can be incorporated into a contract by any one of three methods: signature, reasonable notice or a consistent course of dealing. It is clear that where a party freely signs a document, even if they have not read it, they will be bound by the terms contained within it (L'Estrange v Graucob (1934)).

In the absence of such a signature, the term can be incorporated by providing reasonable notice. Such notice must, logically, be provided at or before the time of contracting (not afterwards as was the case in Olley v Marlborough Court (1949)) and it must be contained within a document or notice which one could expect to have contractual effect (not a mere receipt, Chapelton v Barry UDC (1940)). Further to this, reasonable steps must have been taken to bring the clause to the notice of the other party. Following the so-called 'red hand rule' first identified in Spurling v Bradshaw (1956), it is clear that the more onerous the term (and of course an exemption clause, by limiting the legal remedies of a party, is onerous indeed) then the greater the steps required (see e.g. Interfoto Picture Library v Stiletto Visual Programmes (1988)).

Finally, an exemption clause may be incorporated through a previous course of dealing, even if it has been mistakenly omitted in the particular instance. The course of dealing must be regular and consistent (see e.g. McCutcheon v David MacBrayne (1964)).

Once the clause is incorporated into the contract, it can only operate to exclude liability if it is interpreted to cover the specific liability in question. The courts have traditionally taken a strict approach to such construction. A clause may fail to exclude liability because it is too narrow (Beck v Szymanowski (1924)), too general (such as not expressly excluding the cause of the harm, White v John Warwick & Co (1953)) or under the rule of *contra proferentem* – that any ambiguity in the clause will be interpreted against the party seeking to rely upon it. A good example of this rule in practice is Houghton v Trafalgar Insurance (1954), where "load" of a car was interpreted to mean total weight carried, rather than the number of passengers (which would have been the more beneficial interpretation for the insurance company seeking to exclude liability). It should be noted that, as explained in Ailsa Craig Fishing v Malvern Fishing (1983), limitation clauses may be more generously interpreted than terms which seek to exclude liability outright.

Since the passage of the Unfair Contract Terms Act (UCTA) 1977 the courts have had another powerful weapon at their disposal in the form of statute. The 1977 Act established that certain exclusion clauses would, as a matter of law, simply fail to have effect (most notably the exclusion of liability for personal injury or death caused by negligence, s2 UCTA). For all other clauses which attempted to exclude or restrict liability, a test of reasonableness was established (section 11). Following EU legislation on unfair contract terms, the law today is found partially in UCTA and partially in the Consumer Rights Act (CRA) 2015, which governs contracts between traders and consumers. Under the CRA *all* terms of a contract can be examined, not merely exemption clauses. The test is now one of fairness, more specifically whether contrary to the requirement of good faith, the term causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer. Both Acts provide further information on how their respective tests are to be applied in the form of Schedules – with CRA Schedule 2 of particular note in establishing a "grey list" of terms which "may" be regarded as unfair.

Clearly the effect of the all of the above is to interfere with freedom of contract, at least in its classical formulation. The common law rules of incorporation can mean that terms a party intends to include are excluded on the basis that insufficient notice has been drawn to them – or vice versa, a term omitted from a particular agreement may be implied on the basis of a consistent course of previous dealings. In both cases, the express "agreement" is not the same as the actual contract the court will uphold.

The element of interpretation has an even greater effect on how far the parties are free to make any agreement they choose. Clearly the courts are willing, at least where ambiguity can be found, to impose a strained construction on the wording of a clause. To take just one notable case as an example, it is difficult to see how the clause stating that the defendant was "not responsible for damage caused by fire to customers' cars on the premises" in Hollier v Rambler Motors (1971) is most clearly interpreted as meaning the defendants were not liable for damage resulting from acts of third parties, but remained liable for damage caused by their own negligence. However, it should be noted that where no ambiguity is present then the clause is effective no matter how extreme (Photo Production Ltd v Securicor Transport Ltd (1980).

Freedom could be argued to be further curtailed by the statutory provisions in this area. It is impossible for parties to contract out of either UCTA or the CRA and so it is simply impossible for certain terms to be validly included in a contract. Even outside of what is expressly prohibited, the tests of reasonableness and fairness again can make what was agreed between the parties no longer valid. It could be said that the law is weaker as a result – how can contract law be considered consistent when, for example, even the most minimal consideration is sufficient (Chappell v Nestle (1960)) but a term which may have been negotiated openly can be held to be invalid on the rather subjective basis of being "unfair"? Indeed, the uncertain nature of the statutory tests undermines one of the main purposes behind freedom of contract – that the parties can be certain as to what they are agreeing to.

However, counter-arguments could be made that much of the law discussed above has only a minimal impact on the freedom of contract. The rule as to signature means that parties have a simple and effective method of ensuring terms are incorporated and arguably the other methods also support the freedom of contract principle – after all, a party must have knowledge of the terms they are agreeing to if they are to be said to have freely agreed. Similarly the issues regarding interpretation can be relatively easily avoided with careful drafting and the avoidance of ambiguity – it is hardly a novel concept that parties are only free to contract on the terms they choose as far as these terms create a workable contract that a court could enforce. It has also been argued, most notably by Lord Denning in George Mitchell (Chesterhall) Ltd v Finney Lock Seeds (1983), that classical notions of freedom of contract are in fact nothing of the sort – merely a "take it or leave it" approach which benefited those with greater bargaining power.

As such, it is undeniable that freedom of contract in its purest and most traditional form is affected by the law relating to exemption clauses. However, for many this is a price worth paying in exchange for the opportunity to regulate the exclusion of legal liability.

Question 2(a)

Agreement is one of the crucial requirements for a contract to exist in law. In the vast majority of cases, the courts will seek to find agreement by using the objective indicators of offer and acceptance. In regard to the former, a distinction is drawn between an offer, which will be legally binding upon acceptance; and an invitation to treat, which has no legal effect. An offer can be defined as a clear and certain statement of terms on which the offeror intends to be bound, while an invitation to treat is merely an invitation to enter into negotiations (see e.g. Gibson v Manchester City Council (1979)).

There are a number of particular situations where the courts approach to distinguishing offer from invitation to treat can be examined. These include advertisements, shop windows and displays, tenders, auctions and many others.

The courts will usually hold advertisements to be mere invitations to treat. Thus in Partridge v Crittenden (1968) the appellant was held not to have committed the offence of offering wild birds for sale, as he had merely advertised them in a newspaper. This was an invitation to treat. The court noted the "limited stock" argument – it would be illogical if a person selling a limited number of items was liable to provide said item to every person who purported to "accept" the advertisement.

However, an example of an exception being made to this rule is demonstrated by the famous case of Carlill v Carbolic Smoke Ball (1893). Here, the defendant company had offered a £100 reward to any customers who used their product but still contracted influenza. Despite arguing that the advertisement had no legal effect, the defendant was found to have made an offer for a unilateral contract rather than a mere invitation to treat. Great weight was placed upon both the clear and certain terms of the offer and upon the evidence of intention to be legally bound, found by the company depositing money in a bank account for potential payouts. It should be noted that where a unilateral offer is involved, with acceptance only being possible by performance, the "limited stock" argument may not apply as the offer is in itself self-limiting – here, no more people could have accepted than bought 'carbolic smoke balls'.

Similar reasoning has been used in relation to goods displayed in shop windows (Fisher v Bell (1961)), on shelves, and in more recent times on websites. Usually the rule is that all of these will constitute invitations to treat, with the actual offer being made by the customer. As well as the limited stock argument, another practical reason for this approach is that the seller may well wish to control who they contract with – thus in Pharmaceutical Society v Boots Cash Chemists (1952) restricted medicines could be displayed on shop shelves because the actual sale would take place at the till, under the supervision of a registered pharmacist.

This approach also extends to when goods are sold at auction. It has long been settled law that by 'offering' an item for auction, in fact the auctioneer is merely making an invitation to treat (Payne v Cave (1789)). This then means that each bid is an offer. This again reflects a practical approach - it would be entirely illogical for a bid to constitute acceptance, as every single bidder of any amount would then have a contractual right to the item!

However, in the more recent authority of Barry v Davies (2000) an interesting subsidiary issue was considered. When an item is auctioned "without reserve", then this is commonly understood to mean there is no minimum price required – the highest bid gains the item, whatever its value. The court agreed, but did not depart from the usual analysis that the bids themselves were merely offers. Instead, it was found that collateral to the auction, a separate unilateral offer had been made by the auctioneer that he would sell to the highest bidder. This offer would be accepted by performance, i.e. making the highest bid. Thus the winning bidder had no contractual right to buy the item – but did have a claim in damages against the auctioneer for breach of the unilateral contract.

The above cases demonstrate time and again that the two crucial indicators of an offer are clear and certain terms, and the intention to be bound immediately upon acceptance. Where a party does not wish to be bound without any further negotiation or deliberation (such as a shopkeeper displaying goods or a person advertising an item for sale) then their communication is likely to be no more than an invitation to treat. The alternative would be to undermine the freedom to choose whom one contracts with and on what terms. However, it should be borne in mind that each case is to be decided on its own facts and any evidence of intention, if coupled with sufficiently clear and complete terms, can lead to a contractual agreement.

2(b)

Once a valid offer has been made, and communicated to the offeree, a contract still requires an acceptance before it is validly created. However, acceptance is only one of a myriad of different ways an offer may come to an end. An offer can be terminated through the response of the offeree (not just acceptance, but rejection and counter-offer), through the actions of the offeror (revocation, expiry of conditions placed on the offer) or even through external circumstances (lapse of time, death of one of the parties).

Looking first at how an offeree may bring an offer to an end, it is clear that acceptance will 'terminate' an offer in that it cannot be accepted again by the same party – if person A offers to sell person B a car for £5,000, person B cannot continue to provide extra acceptances to gain multiple copies of the same car! However, if an offeree does the opposite and rejects the offer, this will also terminate it and mean it can no longer be accepted. The rationale for this is again pragmatic – it would be unfair on the offeror for the other party to suddenly purport to accept an offer they had already rejected.

When parties are negotiating, they may not specifically reject an offer but instead make a counter-proposal. In order to again provide certainty to the original offeror, and to avoid a confusion of multiple offerors at any one moment, the law holds that a counter-offer also impliedly rejects and thus terminates the original offer (<u>Hyde v Wrench</u> (1840)). Any harshness caused by this rule is somewhat mitigated by the fact that a mere request for further information about the offer can be distinguished, and will not terminate the offer (<u>Stevenson, Jaques & Co v McLean</u> (1880)).

The above ensures that offerees have a range of responses to an offer, giving them freedom of contract. However, the courts have also extended freedom to the offeror. Once an offer is made, the offeror is perfectly entitled to revoke that offer (and thus render it incapable of acceptance) as long as the revocation is made and communicated before any acceptance (<u>Routledge v Grant</u> (1828)). This allows a party to change their mind, but not to do so after a contract has been formed. Until acceptance is given, there is no adverse effect on the offeree if the offer is revoked.

However, it should be noted that two situations cause particular problems regarding revocation. The first is where revocation is communicated by noninstantaneous means. This can be problematic because revocation only takes effect when actually received. Thus where an offer is made, then a letter revoking the offer is posted, a valid contract will still be formed if the offeree communicates acceptance after the revocation is sent, but before it is received. This was what occurred in the case of Byrne v Van Tienhoven (1880). The second problem relates to offers for unilateral contracts. Considering such offers are only accepted by full performance, technically an offeror could revoke the offer at any point before then, even if the offeree has already substantially embarked upon performance. While cases such as Errington v Errington and Woods (1952) and Daulia v Four Millbank Nominees (1978) suggest this would not be allowed, the legal basis for preventing revocation once performance has begun is still far from certain.

If an offeror wishes to control the circumstances in which the offer can be accepted, a safer method may be to make a conditional offer rather than rely on revocation if needed. Thus an offer may be only be accepted as long as a condition precedent is fulfilled (or continues to be fulfilled). Such a condition may even be implied, such as that the goods would remain in substantially the same state in Financings Ltd v Stimson (1962). Setting a time limit in which the offer must be accepted could also be considered a condition, and it is clear that an offeror is perfectly entitled to do this. Even where no time limit is imposed, an offer is considered to lapse after a 'reasonable time', which will be a question of fact in each case (Ramsgate Victoria Hotel v Montefiore (1866)). Finally, an offer may expire due to the death of one of the parties. While cases on this scenario are, understandably, rare, the general view is that death of an offeree will certainly terminate the offer (as it leaves no one capable of acceptance) but the position is less clear regarding the death of an offeror.

Question 3

A contract may come to an end in one of four ways: by performance, by breach, by agreement or by frustration. The usual requirement for discharge by performance is that the contract has been performed exactly (Arcos v Ronaasen (1933)) and completely. The latter, sometimes referred to as the "entire obligations" rule, is most starkly illustrated in the case of Cutter v Powell (1795). Here, a sailor who had contracted to crew a ship from Jamaica to Liverpool died toward the end of the journey. On a claim by his widow for his wages up to that date, the court held no money was owed – Cutter had not fully performed what he had promised to do, and thus the contract could not be enforced. As such, the starting point must be that anything less than complete performance can only end the contract as a breach – meaning that the party in default will be unable to enforce its terms and themselves may be liable for damages. It should be noted that even indicating a potential future failure to perform can be enough to allow the contract to be brought to an end, under the doctrine of anticipatory breach.

There is therefore clearly a potential for harsh results under the basic entire obligations rule, thus it is perhaps unsurprising that the courts have developed various mechanisms which can mitigate its strict effects. It has long been accepted that a merely *de minimis* shortfall in performance will be allowed (see e.g. S15A Sale of Goods Act 1979). Even where the outstanding performance is more than minimal, the common law doctrine of substantial performance may assist. Where a party has substantially performed their obligations, the court may consider this sufficient for discharge of the contract – albeit with a set-off to make good the defect in performance. This was neatly demonstrated in Hoenig v Isaacs (1952) where the claimant agreed to decorate and furnish the defendant's property for £750. While the claimant's performance was not precise nor complete, the court held substantial performance had taken place, and the claimant was entitled to the £750 – less the £55 needed to remedy the outstanding defects.

However, while substantial performance may be sufficient, merely partial performance will not. Thus in Bolton v Mahadeva (1972) the installation of a central heating system could not be considered substantial performance when the system did not work without substantial remedial works. If only partial performance is tendered, the only way the contract will be discharged without breach is if the other party accepts this partial performance (Christy v Row (1808)) or has actually prevented the performance themselves (Planche v Colburn (1831)). Even in these cases, the award may actually be based on the *quantum meruit* principle rather than actually allowing the party who has not fully performed to directly sue on the contract. Furthermore, no recovery will be possible if the 'innocent' party does not have a genuine choice as to whether to accept the partial performance (Sumpter v Hedges (1898)). Of course, as an alternative, any contract may be brought to an end by agreement.

Another mechanism which may allow for enforcement of at least some of the counter-obligations under a contract is where the contract is considered to be 'severable' or 'divisible'. Rather than considering the contract as a single unified transaction, under this view some contracts can be divided into a number of discrete obligations. Thus in Regent OHG v Francesco of Jermyn Street (1981) a contract was made for the sale of men's suits across a number of deliveries. One delivery was one suit short, which the purchaser tried to use as a reason to terminate the agreement. The court held that the contract was actually divisible – each delivery (and the payment in return) could be seen as a separate obligation. Thus while one obligation had not been upheld, the other obligations (the other deliveries) had been performed completely and so payment was due. However, this exception will only be effective where division is possible – a key reason for the decision in Cutter v Powell was that it was customary for payment to be calculated as a lump sum in exchange for a whole voyage, not a wage per day or per week.

It should also be noted that there is one other way a party may fail to completely perform and yet see the contract discharged without liability for breach and this is the doctrine of frustration. Until the late 19th century, English law recognised no such concept and so even where performance was made impossible, liability still attached (see for example Paradine v Jane (1647)). However, cases such as Taylor v Caldwell (1867) began to change this position by (somewhat artificially) implying a term into contracts that, for example, the subject matter would continue to exist. The doctrine has since found a firmer footing and cases such as Davis Contractors v Fareham UDC (1956) have made clear that frustration is a mechanism in its own right which may bring a contract to an end. It should be noted that prior to the passage of the Law Reform (Frustrated Contracts) Act 1943 a party who had already performed or partially performed their obligations had no recourse after frustration occurred. This has been mainly mitigated by the provisions of the 1943 Act.

It is still true to say that the starting point of the court will be that exact and entire performance will be expected. There are strong and obvious policy reasons why the court will not wish to encourage anything less than complete performance. However, it cannot be denied that the increasing number of exceptions or alternatives to the entire obligations rule have, to an extent, rendered the statement only partially true. Just as the courts have moved from the classical rules upholding freedom and sanctity of contract above all else, so in this area has the law allowed for increased flexibility, albeit at the usual cost of a loss of certainty. While it could be argued that there is an inherent injustice in allowing any party to 'escape' with performing less than they freely agreed to, there is a strong counterpoint that the law is merely reflecting the, often imperfect, commercial reality.

Question 4(a)

Consideration can be defined either as a benefit accruing to one party or a detriment suffered by the other (Currie v Misa (1875)), or as "the price for which the promise of the other is bought" (Dunlop Pneumatic Tyre v Selfridge (1915)). A crucial requirement for any valid contract, consideration reflects the element of exchange inherent in a contractual agreement.

One of the well-established 'rules' of consideration is that past consideration is not good consideration. By this, we mean that a party cannot use as consideration a promise to perform an act which they have already done. Thus in Re McArdle (1951) Mrs McArdle made various improvements to a family property, unprompted. Once the work was complete, other family members decided to pay her the cost of the improvements, but the money was not paid. When the woman claimed for the money, the court held the agreement was not enforceable as a contract in the absence of consideration – instead, the woman had gifted her work, then later had been promised a gift by the other family members.

However, one exception to the general rule does exist. This is the doctrine of implied *assumpsit*, which stems originally from the rather unusual case of Lampleigh v Braithwait (1615). Here, the defendant had been condemned to death and could only be pardoned by the King. At the defendant's request, the claimant petitioned the monarch and was able to obtain the pardon. A free man, Braithwait gratefully promised Lampleigh a £100 reward, but never paid the money. Despite the fact that this promise came *after* Lampleigh had obtained the pardon, he was entitled to recover. The court reasoned that Lampleigh had only acted due to Braithwait's request, which was in contrast to a voluntary act.

The doctrine was developed in the case of Re Casey's Patents (1892) where the court held that alongside the request, there must also be an understanding at this point that some form of remuneration would be provided. The clearest modern formulation of the doctrine can be found in the judgment of Lord Scarman in Pao On v Lau Yiu Long (1980), which creates a three-part test:

1) The act was undertaken at the promisor's request;
2) The parties understood the act was to be remunerated in some way;
3) That remuneration must have been legally enforceable if promised in advance [i.e. sufficient consideration].

It is clear that the general rule preventing past consideration is intended to preserve the transactional nature of contract – if consideration is the "price for the promise", then how can a previously performed act with no future value be payment? It remains true to say that in usual circumstances, contract law will not enforce a gratuitous gift, even if that gift is being made 'in return' for a previous gratuitous benefit being given.

However, there is a qualitative difference in cases covered by implied *assumpsit*. Here, the act in question is not being given freely – it is being undertaken (most likely at some detriment to the promisee) because of the request of the promisor. As explained in Re Casey's Patents, the later promise merely "fixes the amount of that reasonable remuneration on the faith of which the service was originally rendered" (per Bowen LJ). Ultimately, it could be said that the rule against past consideration does not reflect the parties intentions.

4(b)

As a general principle, the promise of performing an existing public duty cannot be good consideration to support a private contract. This is illustrated in Collins v Godefroy (1831) where a claimant already under summons was unable to rely on an agreement to be paid to give evidence. This rule is supported by reasons of both law and policy. From a legal perspective, it is clear from cases such as Pinnel's Case (1602) and (the traditional interpretation of) Stilk v Myrick (1809) that a party already under a contractual duty cannot use that duty as fresh consideration for a new agreement – thus for the sake of consistency the same rule should apply to public duties. Furthermore, as a matter of policy there is an obvious problem with allowing incentivisation of public duties. The danger of, for example, the emergency services prioritising their duties based on private payments from those in need is clear.

However, if a party promises to exceed their public duty, i.e. do something more than they are required to do by law, then good consideration may be found. The classic example of this principle comes in the case of Glasbrook Bros v Glamorgan CC (1925) where mine owners paid the local police to not only attend in case of violence (as they were obliged to do) but to billet officers at the mine for the duration of a strike, whether or not any crimes were actually committed. While *prima facie* this appears a logical decision – the mine owners had benefitted from extra services they would otherwise not have been provided with, so should pay for those services – the decision can be criticised as to an extent incentivising a public body to act as a private contractor.

The ability of the police to charge for these 'extra' services has recently once again become the focus of litigation, in a series of cases involving the policing of professional football matches. First challenged in the 1980s by Harris v Sheffield Utd (1988), the idea that the police should be paid by clubs for policing their matches was again contested in cases such as Leeds United v Chief Constable of West Yorkshire and Ipswich Town v Chief Constable of Suffolk (2017). In the latter case the football club were successful on appeal, with the court highlighting that while policing of the event itself (such as within the stadium) could be considered an 'extra' service, a charge could not be made for the cost of policing public land near to the stadium (for example on the roads leading to the football ground).

These cases make it very clear that what is considered to be in excess of a public duty will be a question of fact to be decided in each case. The Court of Appeal in Ipswich Town appeared to be keen to limit the principle, suggesting that perhaps the courts will be less willing to find good consideration in similar situations.

On the other hand, there is certainly case authority to suggest that, on occasion, the courts will take a more generous view. Two cases particularly worth noting here are England v Davidson (1840) and Ward v Byham (1956). In the former case, a police constable was entitled to a reward for information leading to a criminal's apprehension, while in the latter an agreement whereby a mother would be paid to look after her child was found to be valid. Both cases appeared to be decided more on the grounds of policy than law – that there was good reason to uphold these agreements (the former because it led to justice, the latter because it ensured the child was properly cared for). It has been argued that to an extent this presages the 'practical benefit' approach seen in regard to pre-existing contractual duties. Certainly it would be interesting to see a higher court faced with a claimant attempting to apply the principles of Williams v Roffey Brothers (1990) to an existing public duty situation.

SECTION B

Question 1(a)

Traditionally the law drew a distinction between two types of contractual term: conditions and warranties. A condition was considered to be a term which went to the 'root' of the contract, i.e. was of central importance; a warranty, while still part of the contract, was a more subsidiary term. The difference is often illustrated by a pair of cases involving professional singers, heard within a year - Poussard v Spiers (1876) and Bettini v Gye (1876)). In the former case, the opera singer breached a term requiring her to appear on the opening night. This was held to be of crucial importance – this was a public performance and as the first of the run, vital to the success of the production. In Bettini however the term breached was merely to attend rehearsals – as a less important requirement, this was a mere warranty.

However the seminal decision in Hong Kong Fir Shipping v Kawasaki Kisen Kaisha (1962) added a third category of term. This is the innominate term, so named because it cannot be labelled as either a condition or a warranty. The courts will classify a term as innominate if the effect of breach can be severe or minor. Thus in Hong Kong Fir Shipping, a term which equated to the ship being chartered being seaworthy was innominate – a minor breach delaying the ship's voyage by hours would not be grounds for the contract to end, but a serious breach that made the ship unusable for the majority of the charterparty should surely allow for termination. Thus innominate terms lead to a 'wait and see' approach where the remedy for breach depends on the severity of that breach.

It should be noted that there has been considerable judicial and academic criticism of innominate terms, as deciding the status of terms 'after the event' and reducing certainty in commercial contracts (see e.g. The Mihalis Angelos (1971)). As a result, "time of the essence" clauses (i.e. those imposing a strict deadline) are usually considered conditions rather than innominate terms for reasons of commercial certainty (see e.g. Bunge Corp v Tradax Export (1981)).

Applying the above to the scenario, it is clear that clause 5 is of major importance to the contract as a whole. The machines are being hired for a specific event scheduled to take place over one weekend. The entire purpose of the contract is to have the machines for this period, so the term clearly goes to the root of the contract. Furthermore the clause can be interpreted as one where time is of the essence. As such, it is highly likely that clause 5 will be considered to be a condition.

Clause 12 is more difficult to categorise. It cannot be said to be of only secondary importance – the whole point of hiring the machines (and thus the contract) is for Arjun's customers to play on them, so the need for them to be in playable condition cannot be a mere warranty. However, it could equally be argued that a minor breach of the term should not give rise to the right to terminate – what if a fault developed (or there was an inherent design quirk for that matter) which meant the machines could not be used for a two minutes during a whole day's play? As such, there is a strong argument that clause 12 should be considered an innominate term. By analogy there is also evidence that the courts will be wary of classing a term as a condition where a very minor breach can have drastic results (see e.g. Schuler v Wickman (1974)).

1(b)

Breach of any term allows for a claim in damages. However, only breach of a condition (or a sufficiently serious breach of an innominate term) will also give rise to the right to terminate the contract. This is at the election of the 'innocent' party – they may choose to end the contract at this point, or to continue (and in either event, claim for damages). If clause 5 is considered to be a condition, then it can be argued that when the machine arrived late Arjun had the right to end the agreement.

However, Arjun accepted delivery of the machines and then used them for the following two days. Repudiation requires positive steps from the party ending the agreement, whereas Arjun, if anything, appears to have affirmed the contract. Thus the contract may continue, as in Glencore Energy UK v Transworld Oil (2010) where the parties were held to have mutually affirmed a contract after continuing with their obligations despite late delivery.

Therefore the status of clause 12 may also be extremely important. As noted above, clause 12 may well be considered innominate. If so, the remedy will depend on the severity of the breach. The first breach of clause 12, the fault which means the machine needs to be reset after every three games, seems unlikely to be serious enough to allow for termination (although a claim for damages could be made). As explained in Hong Kong Fir Shipping, for termination to awarded the breach of the innominate term must "deprive the party…of substantially the whole benefit which it was intended that he should obtain" (per Diplock LJ). However, the second breach, when both machines stop working entirely on the Saturday almost certainly deprives Arjun of substantially the whole benefit – he had hired the machines for a three day tournament and has barely managed to hold the first half. At this point it seems likely Arjun has the right to end the contract.

Question 2

Under the doctrine of privity it is trite law that a third party can neither sue or be sued on an agreement. This can be shown by the famous case of Tweddle v Atkinson (1861) where justification for the rule was given in the argument that the third party seeking to enforce the contract has provided no consideration in exchange for this right. However, the perceived harsh effect of this rule has led to a myriad of exceptions being developed, by both common law and statute. It should be noted that, following the seminal case of Donoghue v Stevenson (1932), a person without a direct contractual right is often best advised to pursue an alternative claim in the tort of negligence – this may well be an option for Harriet and/or Ivanna but is beyond the scope of this answer.

Harriet

For the majority of third parties, the best route to any potential contract law claim is today through the provisions of the Contracts (Rights of Third Parties) Act 1999. Under section 1 of the 1999 Act, a person who is not a party to a contract may enforce a term of it if either the contract expressly provides he may (s1(1)(a)), or the term purports to confer a benefit on him (s1(1)(b)). The courts have generally interpreted this subsection widely – in Prudential Assurance v Ayres (2007) it was held that under s1(1)(b) it is not necessary to show the primary purpose of the clause was to confer the benefit, and it is irrelevant that others also obtained a benefit from the clause. It is important to note that this ground is not available if, on a proper construction of the contract, it appears that the parties did not intend the term to be enforceable by the third party (s1(2)). However, the effect of subsection 1(2) has been limited by the decision in Nisshin Shipping v Cleaves & Co (2003) where it was held that there is a rebuttable presumption that the benefit is intended to benefit the third party.

If a party qualifies under s1(1) there is one further requirement to meet, which is that the party is identified (by name or as a member of a class) within the contract under s1(3).

Harriet wishes to enforce a term which purports to confer a benefit – the toilet facilities. The term refers to "all passengers", which demonstrates that this group will be entitled to the benefit and as explained above it is irrelevant that her fellow passengers also gain this right. It seems unlikely on the facts given that there is sufficient evidence of the contrary intention for s1(2) to apply. Finally, the contract expressly refers to 'KUSS members' so Harriet is clearly a member of a class under s1(3). It seems likely that the Act will allow Harriet to claim directly against Frank.

Ivanna

Again Ivanna will need to rely on the ground that the relevant term is one which purports to confer a benefit. The problem here is that there seems to be much more chance of a successful argument that there was no intention for the term to be enforced by anyone invited to the buffet, just Emil. On similar facts the Act was held not to apply in Bhamra v Dubb (2008). Even if that hurdle is cleared, there is no evidence Ivanna is identified in the contract so s1(3) appears not to be satisfied.

However, the 1999 Act did not remove common law exceptions (as confirmed by section 7(1)). One such exception is sometimes referred to as the 'holiday cases'. It was established in Jarvis v Swan Tours (1972) that contrary to usual principles damages could be awarded for disappointment and distress where a contract is made for the purpose of enjoyment. This principle was extended to allow for recovery on behalf of another in Jackson v Horizon Holidays (1975). While Jackson was disapproved by the House of Lords in Woodar Investment v Wimpey (1980) Lord Wilberforce in particular seemed to suggest that where one person contracted on behalf of family or a social group in a contract 'for pleasure' recovery may still be possible. As such, there is a possibility that Emil may claim on behalf of Ivanna.

Question 3

One of the vitiating factors which may allow for an otherwise valid contract to be set aside is the equitable doctrine of undue influence. While difficult to define precisely, undue influence can be said to comprise of improper or unfair pressure (potentially short of, or more subtle than, outright duress) which renders the agreement voidable.

Prior to the seminal decision of the House of Lords in Royal Bank of Scotland v Etridge (No 2) (2001), undue influence was divided into two "classes" – Class 1, meaning actual undue influence and Class 2, meaning 'presumed' undue influence (see in particular Barclays Bank v O'Brien (1993)). Beyond this, Class 2 was further subdivided into '2A' and '2B' depending upon whether the relationship between the parties fell within a certain set of recognised categories.

Following the decision in Etridge, it is clear that these categories are of limited value and in particular the distinction between Class 2A and 2B is of little practical import. However, there remains an 'evidential lift' when the claimant can prove a relationship of trust and confidence. As long as this relationship exists (and pre-dates the actual transaction, per Perwaz v Perwaz (2018)) influence will be presumed. If the claimant can also demonstrate that the transaction is one which "calls for explanation", the burden of proof shifts to the party arguing against undue influence to demonstrate this.

On the facts given it appears that there is a strong claim that Lidia was actually unduly influenced by her son Markus. From the moment Markus raised the idea of investment in his new business, he applied constant emotional pressure. It is significant that, in a relatively distant relationship, Markus began to call Lidia daily. The most significant pressure was brought to bear during the telephone call after which Lidia signed the mortgage deed – something which can be attested to by Obi. It should be noted that following Perwaz it is highly unlikely that Lidia can benefit from the 'evidential lift', as the evidence suggests she did not have trust or confidence in Markus prior to the mortgage being signed. Thus actual undue influence will need to be explicitly proven by Lidia on the balance of probabilities.

In cases such as the present dispute, demonstrating undue influence is, in itself, of little value. Markus is bankrupt, so Lidia has little recourse against him directly. She wishes to set aside the mortgage contract between herself and the bank, thus will need to demonstrate that the bank's agreement with her was 'tainted' by Markus' undue influence.

It is clear from Etridge that a lending institution will be considered to have notice of undue influence if there is either actual knowledge of the influence, or constructive knowledge. For the latter, what is required is the borrower standing surety for another person and the relationship between the surety and debtor is 'non-commercial'. Notice can be discharged by the lender taking reasonable steps to ensure the borrower enters the transaction with their 'eyes open'. This is usually achieved through the provision of independent advice by a qualified solicitor, explaining the nature and possible effects of the transaction to the borrower in a face-to-face meeting with no other parties present.

Applying this guidance to the current situation, it is clear that Premier Bank should have been on notice as to the risk of undue influence. The transaction, whereby Lidia is standing surety for Markus' business, would mean that the bank had constructive notice, but this is unlikely to be required as clearly what Obi overhears is almost certainly enough to show actual notice (in a similar sense to the Aboody case).

It is also highly unlikely that Premier Bank can argue they have discharged the burden of notice. The advice Lidia receives appears to be inadequate, overly technical and even more importantly provided by an employee of the bank, not an independent legal adviser. Furthermore the advice is not given in a face to face meeting and perhaps most egregiously, Markus is present throughout. It seems extremely likely that the mortgage agreement will be set aside.

Question 4(a)

At common law, the remedy as of right for breach of a contractual term is damages, awarded on the expectation basis. However, other remedies can be available, albeit at the discretion of the court. One such remedy is specific performance, an equitable remedy which compels a party to carry out what has been promised under the contract.

Specific performance will only be granted if damages are inadequate (Beswick v Beswick (1967)) but even when this can be demonstrated there are a considerable number of bars that may prevent the award of this discretionary remedy. In particular, specific performance will not be granted if the decree will require the constant and ongoing supervision of the court (see e.g. Posner v Scott-Lewis (1986)). This is clearly demonstrated by a case with similar facts to the current scenario, Co-operative Insurance Society v Argyll Stores (1997). In this case, the claimant requested specific performance to require the operator of a store in a shopping centre to keep the store open, as had been expressly agreed in the lease. The court refused the request, on the basis that enforcement would require supervision for the next decade (and that it was unclear what exactly the term required).

It is clear that any award of damages (to which SSS are certainly entitled) is likely to underestimate, or even ignore, the intangible benefits an 'anchor store' provides. As such, there is a solid argument that damages would be an inadequate remedy. However, it is very difficult to see how a court would agree to the level of supervision required – the lease extends until 2030. However, it should be noted that the Court of Appeal were willing to grant the order for specific performance in Argyll Stores and some academics have suggested the decision of their Lordships in this case is "open to attack".

4(b)

As noted above, there is a general right to damages for breach of contract. Such damages will normally be calculated on an expectation basis – i.e. to find the amount required to put the innocent party in the position he or she would be in had the contract been performed correctly (Robinson v Harman (1848)).

However, there is case authority to suggest that where it is impossible (or at least extremely difficult) to accurately calculate expectation loss, an alternative basis can be used. In particular, damages for breach can be, and have been, calculated on the basis of reliance loss – i.e. the amount of expenditure wasted in pursuance of the contract. Anglia Television v Reed (1972) provides a clear and analogous example – in this case, an actor breached a contract to star in a film. The court was unable to calculate the possible profit the film may have made, so damages were instead awarded on the reliance basis.

A similar decision seems likely in the current scenario – Ursula Unger's breaches of contract have run up the costs of equipment and crew and now the project cannot be completed, this expenditure is wasted. Even had the documentary been completed and released its impact would be intangible (as it is not made for a direct profit but for publicity) and so it is certainly impossible to calculate damages on the expectation basis.

It should be noted that specific performance, while potentially attractive to SSS, will not be awarded as the courts refuse to compel performance of personal services, seeing this as akin to slavery (De Francesco v Barnum (1890)).

(c)

Traditionally, even in the era of *laissez-faire* classical contract law, the courts have been extremely wary of "penalty" clauses. While parties are welcome (and even encouraged) to attempt to provide for potential breach in the form of liquidated damages, the courts do not wish to allow such clauses to be abused. Thus the traditional test (Dunlop Pneumatic Tyre v New Garage & Motor Co (1915)) will only allow for a clause which is a "genuine pre-estimate of loss".

However, over time a less strict approach was taken (see for example Philips Hong Kong Kong v Attorney-General of Hong Kong (1993)) culminating in new guidance from the Supreme Court in the relatively recent case of Cavendish Square Holding v El Makdessi; ParkingEye v Beavis (2015). While the court was at pains to make clear the traditional rule was not in itself abolished, the test was reformulated in a 3 part enquiry:

1. Is the term a secondary obligation?

2. Was there a legitimate interest in enforcement of the obligation?

3. With regard to that interest is the clause exorbitant or unconscionable?

In Vijay's case, the primary obligation under the contract is to not exceed the amount of time paid for. Therefore the charge levelled is a secondary obligation. There is clearly a legitimate interest – SSS want to manage use of the car park and avoid long-stay motorists from preventing other customers from parking (which was exactly the same legitimate interest identified in the ParkingEye case). Thus whether the £500 charge is enforceable will depend on the third element. This is certainly not a genuine pre-estimate of loss, as parking appears to be worth around £2 an hour – had Vijay left on time and another motorist used his space, that is all SSS would have received. However, it is clear from ParkingEye that now the clause merely needs to not be exorbitant or unconscionable. In that case, a penalty charge of £85 was allowed, on the basis that it was not exorbitant in the context of the legitimate interest in controlling parking, and in comparison to similar charges elsewhere. While little is gained by directly comparing facts of disparate cases, £500 does seem to represent a notably higher charge and ultimately this will be a matter for the court to decide on the particular facts of this case – this is arguably a demonstration of the uncertainty inherent in the new approach to penalty clauses.