LEVEL 6 - UNIT 2 – CONTRACT LAW

CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

JANUARY 2020

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 January 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

Overall performance was an improvement on previous examinations, with the pass rate above 50% for the first time in some time. However, performance across individual questions was very mixed and often the deviation in marks on any given question was as high or higher than has been seen in recent years.

It has become a common refrain in these reports that candidates must be prepared to answer questions across a range of topic areas, but this feels even more vital in the wake of this examination. A number of candidates were able to pass only due to excellent performance on one or two questions – however, they may want to reflect on the fact that they clearly had the ability to obtain a merit or even a distinction if they had been able to maintain this level across the paper.

In terms of common errors when answering individual questions, the usual comments can be made regarding a lack of analysis in answering Part A questions and a lack of structure in answering Part B questions. A number of weaker candidates also tried to "rewrite" the question to suit their knowledge

area. It should be noted that with the relatively strict mark schemes imposed for this particular qualification this is rarely a sensible strategy.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Section A

Question 1

As only a small minority answered the question it is hard to provide much in the way of general feedback, as it may well have been somewhat self-selecting. Good answers were those which were able to explain anticipatory breach and that understood a) that the "innocent" party would have an election and b) that the choice is between affirmation and repudiation (NOT rescission). The strongest answers provided a similar level of coverage to the suggested answer, looking at the risk inherent in each choice and considering issues such as excessive damages when affirming.

A minority of weak answers tried to treat the question as one examining frustration instead - very little credit could be awarded in these cases.

Question 2

Performance in this question was very poor overall. Considering that a pass mark could be achieved by a relatively straightforward description of two commonly examined concepts (statement of fact and reliance/inducement) the lack of knowledge of many candidates was extremely concerning. Strangely this was by far the most popular Section A question with more than 75% of the cohort answering, despite a real issue with knowledge leading to the lowest average mark of all questions.

The most common issues were an inability to consider alternatives to statements of fact (e.g. of opinion, of intention, silence etc.); an inability to go beyond a basic "but for" analysis of inducement; and a complete lack of any critical analysis or discussion. Stronger answers were notable for providing all of the above and considering the rationale behind the legal rules in question.

Question 3

Most answers were able to explain the basic concept of rescission, although as always there was considerable confusion with repudiation/termination. Most answers at least touched on bars to rescission and on its role in misrepresentation in particular. However, weaker answers were often let down on section (b) by a lack of understanding of how specific performance operates (many weaker answers seemed to confuse the remedy with an injunction) and reasons it may not be granted. That being said, there were some truly excellent answers that showed real depth of knowledge and the mean mark was considerably higher than the average, suggesting the weakest answer pulled down performance as a whole.

Question 4

Just less than 40% of candidates attempted this question. The vast majority of answers to this question fell within a relatively narrow band of marks, from just below the "pass" mark to just above it. This was due to most candidates showing a relatively good amount of knowledge of the Act but taking a highly descriptive approach without providing much (or any) analysis. The weakest answers resorted to copying large sections of the statute verbatim, but most candidates were at least able to paraphrase.

In terms of analysis, a good number of candidates appreciated how the law had remained very similar in relation to goods and services yet expanded to cover digital content. Fewer candidates were able to analyse other areas e.g. the new remedies under the Act, or the approach to "unfair" terms.

Section B

Question 1

This question was the third most popular overall, attracting around two thirds of candidates. Consideration is generally quite well answered as a problem question and this was indeed the case here, with the second-best average mark (behind B2). Far fewer candidates confused the issue of part payment with past consideration or with 'practical benefit' than in previous papers, suggesting a definite and lasting improvement in this area. That said, weaker answers struggled to go beyond the basic rules and tended to struggle with promissory estoppel in particular.

Question 2

Unsurprisingly the offer and acceptance question proved extremely popular, and also attracted a good overall standard that led to the highest average mark. This was mainly due to almost all candidates being able to discuss and distinguish offers and invitations to treat, with solid application usually also provided regarding the potential unilateral contract for the grandfather clock.

The distinguishing claim tended to be the "battle of the forms" issue, which certainly rewarded candidates with both breadth and depth of knowledge. In general, stronger answers showed a wider knowledge of case law and an ability to clearly apply the law to the given facts.

Candidates are advised to think before applying case law - a very common error was to suddenly include some kind of "exclusion clause" in the analysis just because there was a point of incorporation by signature.

Question 3

Restraint of trade has generally proved more popular as an essay question but more than 40% of the cohort did attempt this question. Performance was mixed - the average mark was relatively low, but the standard deviation was extremely high, which bears out the anecdotal evidence that this question was one that candidates either "got" or did not. The weakest answers confused the area with exclusion clauses and/or consideration. Taking aside this minority of very low marks, weaker answers were those which provided a narrative, descriptive approach which reported the result of individual cases without extracting or applying more general principles.

Question 4

Knowledge and application were generally good on at least part of this question, although an unfortunate number of candidates appeared to lack the knowledge to answer both parts to the same standard. Regarding duress, there appears to be some confusion as to the key requirements, with many seeing whether a party protested or had some alternative however impractical as more important than the truly crucial requirements: coercion of the will and illegitimate pressure.

Regarding undue influence the "classes" still exert a malign influence and many candidates merely acknowledge Etridge before carrying out a very mid-1990s application of the law. Knowledge regarding constructive notice was generally quite good.

LEVEL 6 - UNIT 2 – CONTRACT LAW

SUGGESTED ANSWERS

SECTION A

Question 1

A contract is an agreement giving rise to obligations which are enforced or recognised by law. A contract can come to an end through performance, agreement, frustration or by the breach of one of the parties. Breach can be defined as the failure of a party to perform a term of the contract. While breach of a mere warranty, or an insufficiently serious breach of an innominate term, will lead only to a claim in damages (i.e. the contract continues), breach of a condition or a sufficiently serious breach of an innominate term will give the 'innocent' party the right to repudiate the contract. Note that this repudiation is the choice of the innocent party - the contract does not automatically come to an end, however serious the breach may be.

English law has long recognised that the innocent party may become aware that the other party intends to breach the contract before this actually takes place. A classic example is the case of Hochster v De La Tour (1853) where the claimant agreed to provide a courier service to the defendant in June but was informed in May that the defendant would not require such services. The court held that, as the claimant knew breach would occur, he was entitled to bring an action in May once he had that knowledge, thus did not have to wait for the actual breach to take place. This principle has widened to the extent that it can be said that where a party to a contract expressly or impliedly notifies the other that they will not be performing a sufficiently serious term at some point in the future, the innocent party may repudiate the contract immediately on the basis of anticipatory breach. Of course, the innocent party still retains the right of election, and may choose to continue with the contract - this will be discussed later in this answer. It should also be noted that the right to claim damages is not immediately affected by the innocent party's choice. Election, once made, is then irrevocable in the period between election and the time for performance: (Fercometal SARL v Mediterranean Shipping Co, The Simona (1989))

If a party elects to accept the repudiation, the contract is brought to an end immediately. All obligations outstanding under the contract are therefore void. As such, the innocent party can immediately treat the contract as at an end. The courts have accepted that such an important decision may require time to be made. Cases such as Stocznia Gdanska v Latvian Shipping (2002) the lack of an immediate repudiation is not itself affirmation, although taking an unreasonable amount of time may mean the right to repudiate for the anticipated breach has been lost. However, what constitutes a reasonable period will be case dependent and could be suggested to be rather uncertain.

What is more certain is that in order to repudiate, the innocent party must communicate their decision. This issue was considered closely by the House of Lords in Vitol SA v Norelf Ltd, The Santa Clara (1996) where Lord Steyn stated that while acceptance of the repudiation required no special form, it must be in "clear and unequivocal" language; and that while it need not be notified personally, it must come to the attention of the other party. While this may allow for mere non-performance by the innocent party to constitute notification, it is clearly preferable that express notification is provided. It should be noted that *per* cases such as Arcos v Ronaasen (1933) the innocent party does not need to give a 'good' reason for electing to accept repudiation - if they have the right, they may exercise it, whatever the underlying reason for doing so.

Alternatively, the innocent party may choose to affirm the contract. This means that the contract will continue and the right to repudiate in advance of breach is lost, although assuming the breach actually occurs, there will then be a second opportunity to accept repudiation. Affirmation can be implied by the actions of the innocent party, especially in continuing performance of their own obligations under the contract (see e.g. Davenport v R (1877)).

Continuing performance by the innocent party can lead to the somewhat illogical situation where that party is performing against the wishes of the party planning breach. In White and Carter (Councils) Ltd v McGregor (1962) the parties entered into a three-year contract which the defendants wished to cancel within a day of agreement. Had the claimants accepted the repudiation their losses would be in the form of the profit expected to be made. The claimants refused to accept repudiation and continued with performance for the full three years, then claimed the full price due under the contract. The House of Lords was split on the matter but held by a bare majority that the claimants could recover, on the basis that the claim was for debt rather than damages (which would have led to an accusation of failure to mitigate, which their Lordships dissenting based their decision upon). Subsequent case law has somewhat limited this principle, with courts relying on part of Lord Reid's judgment in White and Carter which stated that continuing the contract might not be allowed where the innocent party had "no legitimate interest" in performance. An example of this can be found in e.g. Clea Shipping v Bulk Oil International, The Alaskan Trader (1984) where after one year of a two-year shipping charter the ship required extensive repairs. The defendants had no further use for the ship and indicated they would not pay, but the claimants proceeded to repair the ship for £800,000 and kept the ship ready until the end of the charter. The claimants had no legitimate interest in doing this and were restricted in claiming damages for losses after the anticipatory breach. A more recent example of the same approach can be found in Reichman v Beveridge (2006). Furthermore, Lord Reid limited the right to affirm by stating that it was not an option when continuing would require the party in breach to perform.

The doctrine of anticipatory breach has an obvious commercial justification, in allowing an innocent party to exit a doomed contract as soon as possible. However, there is a logical issue in allowing recovery for a 'wrong' which is yet to be committed and it can be argued that the doctrine can actually work against the innocent party's interests. Electing to accept repudiation and therefore ceasing performance can lead to breach by the innocent party if it later transpires the anticipatory breach was not sufficiently serious to allow for repudiation (a particular issue with innominate terms). For an example see e.g. Federal Commerce & Navigation v Molena Alpha (1979). Attempts to mitigate the harshness of this rule has led to further confusion, see cases such as Woodar Investment Development v Wimpey Construction (1980).

Electing to affirm the contract may also leave the innocent party in a worse position, such as in Avery v Bowden (1856) where the contract was frustrated between the affirmation and the time the breach was to take place, leaving the innocent party with no right to damages (although note frustration has been reformed since the Victorian era).

There remain areas where the extent of the doctrine is unclear, such as what constitutes a 'legitimate interest' in continuing the contract and the issue of wrongful repudiation - the recent Supreme Court decision in Bunge SA v Nidera BV confirming that post-breach events can be taken into account when assessing damages is unlikely to end the academic debate on this issue.

Question 2(a)

An actionable misrepresentation is usually defined as a false statement of fact made by one party to another, which induces the representee to enter into the contract as a result. A crucial element of that definition is the need for a statement of existing fact, for example "this car has travelled 20,000 miles" or "the business made a profit last year". However, there are a number of types of statement that can potentially give rise to actionable misrepresentation despite not appearing *prima facie* to be of existing fact.

One type of statement distinguished by the courts is a statement of opinion. The standard rule is that such statements are not actionable, as an opinion is different to stating a matter of fact. This can be seen in cases such as Bisset v Wilkinson (1927) where an honest opinion as to the grazing potential of land did not give rise to a claim for misrepresentation. However, it should be noted that in two cases a statement of opinion may be actionable. Firstly, where the representor did not, or could not possibly, hold the opinion claimed (seen for example in Smith v Land and House Property (1884)). This can be justified by stating that there is underlying false statement of fact - the misrepresentation is not the opinion itself, it is the false statement that the opinion is truly that of the statement maker. Secondly, a statement of opinion can lead to liability where the maker of the statement has expertise in the matter (see e.g. Esso v Mardon (1976)). This is harder to justify as an underlying statement of fact, but the exception has been upheld by the courts.

Similar rules apply to statements of intention. A statement about future intentions honestly held cannot give rise to liability, even if circumstances mean that the statement maker cannot carry out what they intended to do. However, a false statement of fact as to what one's true intention is at the moment the statement is made will give rise to liability, as seen in e.g. Edgington v Fitzmaurice (1885) where a loan contract was agreed on the basis that the intention of the borrower was to finance a business expansion - in

fact, the borrower was misrepresenting his state of mind as he intended to use the money to pay previous debts. This does not preclude a party from changing their mind - thus in Wales v Wadham (1976) a woman who represented she had no intention of remarrying was not liable in misrepresentation when her intentions later changed. At the time she made the statement, she was representing her honest intentions at that point.

Traditionally there was also a belief that statements as to the law could not form actionable misrepresentations. This was tied to the idea that the doctrine of mistake did not encompass "mistake of law" because of the general common law rule that every person must be taken to know the law. This meant that when the House of Lords overturned the idea that there was no "mistake of law" In Kleinwort Benson v Lincoln City Council (1999) it was almost inevitable that this would also do away with the refusal to accept "misrepresentation of law". This was confirmed in Pankanhia v London Borough of Hackney (2002) and today a statement of how the law applies is treated as any other statement of fact.

Finally, there is the situation where no statement is made at all. While silence in itself will not give rise to misrepresentation (essentially on the grounds of *caveat emptor* and the general reluctance of the English common law to create liability for omissions) there are circumstances where misrepresentation can be found despite the lack of an express false statement. These include: misrepresentation by conduct (such as in Spice Girls v Aprilia World Service (2002)); where a 'half-truth' is told (for example describing property as fully leased without mentioning that tenants had given notice to quit, Dimmock v Hallett (1866)); where a previous statement becomes false before the contract is signed and no statement is made to correct it (e.g. With v O'Flanagan (1936) and in contracts *uberrimae fidei*.

Clearly the common law rules of misrepresentation are intended to, on the one hand allow recovery where false statements have lured the representee into a contract, but on the other protect the relatively 'innocent' statement maker merely giving an honest opinion or stating their future intention. It could be argued that the overall trend has to been to widen what constitutes a 'statement of fact' (note for example the relatively recent authority on, *inter alia*, statements of law, misrepresentation by conduct etc.) and a parallel could be drawn with the widening of liability in tort law following the decision in Hedley Byrne v Heller & Partners (1963). However, it could also be stated that to some extent the widening in common law of what statements are actionable is in turn balanced by the protection now offered by s2 Misrepresentation Act 1967, allowing the defendant to plead 'innocent' misrepresentation.

2(b)

As noted above, an actionable misrepresentation also requires that the representee be induced to enter into the contract. There is some debate as to quite what inducement should mean, with some academics arguing that the concept of the reasonable man is of relevance, while other commentators suggest that the test is purely subjective and asks whether this particular claimant was induced by this particular representation. The matter is not purely academic, as it leads to the question of whether the burden is on the claimant to prove inducement or on the defendant to prove a lack of it. What does appear clear is that the statement need not be the sole factor in inducing the claimant to contract (see Edgington v Fitzmaurice (1885)).

There are three situations where issue of inducement tends to arise, where there is a question as to: (i) whether the claimant was aware of the misrepresentation; (ii) whether the claimant knew the misrepresentation to be false; and (iii) where the claimant did not allow the misrepresentation to affect his or her judgement.

Clearly a claimant cannot be induced by a representation that is never communicated and by analogy this means any attempt to misrepresent the truth not noticed by the claimant (such as the attempted concealment of a defect in a gun in Horsfall v Thomas (1862)) will not give rise to a claim in misrepresentation. Similarly, it would be illogical to allow a claimant to argue they relied on a statement known to them to be false, thus again this will prevent an action (see e.g. Cooper v Tamms (1988)).

The third category is more difficult, as the court must inquire into the mind of the representee. Certainly, where there is clear evidence that the claimant relied on other sources of information instead of the misrepresentation (such as in Attwood v Small (1838)) there is no question of inducement. But considering 'mixed motives' can be allowed, as in Edgington, the line is hard to draw. A related source of some debate is how far the claimant is expected to find out the truth of a representation if he or she is given the means to do so. The traditional view epitomised in Redgrave v Hurd (1881) is that there is no duty whatsoever on the claimant, however more recent cases such as Smith v Eric Bush (1990) and Peekay Intermark v Australia and New Zealand Banking Group (2006) have cast some doubt on this proposition. In the latter case, the Court of Appeal ruled that by reading and signing later documents which contained the true position, the claimant was barred from arguing it had relied on an earlier misrepresentation.

Question 3(a)

The equitable remedy of rescission is used in a number of contractual doctrines, including misrepresentation, mistake and undue influence. It involves not merely setting aside the contract but in making it *void ab initio*, with the intention of returning the parties to their pre-contractual positions. However, it should be noted that rescission in a voidable contract will be at the discretion of the innocent party, who may instead choose to affirm the agreement. As an equitable remedy, rescission is granted at the discretion of the court and may be prevented either due to the general maxims of equity (for example that the party seeking rescission does not come with clean hands) or due to one or more of the 'bars' to rescission.

The most obvious bar to rescission is the prior affirmation of the contract. Any express affirmation will lose the right to rescission, and this can also be implied through conduct. Thus in e.g. Long v Lloyd (1958) the claimant was induced by misrepresentation to purchase a vehicle and the right of rescission arose. Unfortunately, the claimant used the vehicle (once) after he became aware of the defects and this action was held to be an implied affirmation. It should however be noted that it is a long-held principle of law that affirmation can only be given once the claimant has actual knowledge of the facts giving rise to the right to rescind (see e.g. ICCI Ltd v The Royal Hotel Ltd (1998)).

To some extent there is an overlap between such implied affirmation and the bar of delay. Historically the case of Leaf v International Galleries (1950) was often cited as a classic example of delay preventing rescission where the representee waited five years to claim the remedy. However, this authority

was doubted in the recent Court of Appeal decision in Salt v Stratstone Specialist Ltd (2015) as being founded on grounds which no longer apply (in short, the court in Leaf did not want to place a representee in a better position than the innocent victim of breach of contract, but this issue is resolved by a combination of the Misrepresentation Act 1967 and consumer legislation passed since the 1940s). However, an unreasonable delay may still be sufficient grounds to make rescission inequitable and, in any event, the longer the delay, the more likely another ground may arise.

One such ground is the inability to restore the parties *in integrum*, i.e. to their true original positions. While historic common law called for this to be exact, equity has always allowed for a pragmatic approach. The general view is that as long as the parties are substantially returned to their original positions, this will suffice. A good example is the court allowing the return of vehicles despite minor depreciation in the interim (as in Salt v Stratstone). A number of reported cases suggest that the court may balance any 'loss' caused by the rescission with an order for compensation from the relevant party. However, there still must be substantial restoration of the original position and courts cannot simply order damages in lieu of rescission (note the decision in Salt which specifically requires rescission *in integrum* to be possible for the court to use its discretion to order damages in lieu to be awarded under the Misrepresentation Act 1967.)

Finally, a closely related bar on rescission is where the restoration will inequitably affect third parties. Most obviously, if a third party has in good faith and in exchange for valuable consideration acquired rights in chattels required to be returned, rescission cannot be normally be granted as this would prejudice 'equity's darling'.

Perhaps unsurprisingly due to its equitable and discretionary nature, rescission can be both criticised for its uncertainty and praised for its flexibility. All of the bars discussed above have the same common theme, that the more impracticable rescission becomes and the less it restores the true original position, the less likely the court is to grant the remedy.

3(b)

Another equitable remedy available to the court for use in contractual disputes is that of specific performance. As its name suggests, this remedy is an order of the court requiring a party to perform a contractual obligation. As an equitable remedy specific performance will only be granted at the discretion of the court and the general rule is that this will only be exercised when the usual remedy of damages is inadequate. An example is where the vendor of a property fails to transfer title to the purchaser on receipt of the purchase price - the buyer could argue that as no two properties are alike, no sum of damages could fairly compensate for his loss of a property he has a right to own (see e.g. Johnson v Agnew (1980)).

However, even when damages are inadequate, the grant of specific performance is far from guaranteed. There are a number of potential reasons to refuse the remedy, including a lack of mutuality, contracts for personal services and contracts requiring supervision of the court. Looking first at mutuality, this principle states that specific performance should only be granted against party B if it could also be granted against party A. Thus, for example a minor failed to obtain an order in Flight v Bolland (1828) as no such order could be made against him.

The courts have also refused specific performance whenever it has been applied for to compel a party to perform personal services under a contract. The common law abhors the interference with personal liberty this would involve, and the award of the remedy has been compelled to a form of legalised slavery (see e.g. De Francesco v Barnum (1890)). It should be noted that the Human Rights Act 1998 would only strengthen this argument. Other cases have pointed to the "breakdown of trust" between the parties as the reason why specific performance would be unsuitable (see e.g. R. v Incorporated Froebel Educational Institute, Ex p. L (1999)).

Such contracts often also fall afoul of a further reason to refuse specific performance, namely the need for constant supervision. The courts, understandably, are wary of making an order which may remain in effect for a long period, requiring continual supervision by the court. Thus the request for an order to compel a landlord to provide a permanent porter for the use of its tenant was denied on the grounds that the court would have to superintend the contract for the entire length of the tenancy (Ryan v Mutual Tontine Association (1893)). More recently the principle was upheld by the House of Lords in Co-operative Insurance Society v Argyll Stores (Holdings) (1997), where specific performance would have required supervision of whether a business was being run as contractually agreed for over a decade. It should be noted that, *obiter,* it was also suggested the term was too imprecise to specifically enforced.

This leads to a final residual category where the remedy has been rejected on many other grounds including it being practically impossible (e.g. where the defendant is no longer in a position to perform the obligation), causing hardship (e.g. in Patel v Ali (1984) an order was overturned on appeal on the basis it would leave its target homeless) or the agreement itself being too vague. It should also be noted that the general equitable maxims will apply and may prevent grant of the order.

Some commentators have suggested that after a period of relative generosity, the courts in the wake of Argyll Stores are now more reluctant to grant specific performance. While a highly effective tool in certain cases (Beswick v Beswick (1967) being a classic example of where only specific performance could constitute a just remedy) there are good reasons to keep the order within narrow boundaries, both to avoid an intolerable burden upon the courts time and because of the draconian possibilities if the order was allowed unchecked.

Question 4

The Consumer Rights Act 2015 (CRA 2015) was described by the government as the "biggest overhaul of consumer rights in a generation" and in terms of consumer contract law represents perhaps the most important legislation since the Sale of Goods Act 1979 (SGA 1979), Supply of Goods and Services Act 1982 (SGSA 1982) and Unfair Contract Terms Act 1977 (UCTA 1977), three pieces of legislation that, in the consumer context, it largely supersedes.

That context is crucial, as the main provisions of the CRA 2015 only apply in contracts between a "trader" and a "consumer". By section 2 of the Act, a "consumer" is defined as an "individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession", and a "trader" as a "person acting for purposes relating to that person's trade, business, craft or profession, whether acting personally or through another person acting in the trader's name or on the trader's behalf". Contracts

between parties not falling within these definitions (e.g. between two private individuals acting outside the purposes of trade, business etc.; or between two entities both acting within those purposes) will not be covered by the Act and will not be discussed further in this answer.

Part 1 of the CRA 2015 applies to contracts for the supply of goods (ss. 3 - 32), digital content (ss. 33 - 47) and services (ss. 48 - 57). The implied terms mechanism used in preceding legislation such as SGA 1979 is retained, and many of these provisions are in very similar form as previous legislation. Thus for example goods must still be of "satisfactory quality" (s9) and "fit for particular purpose" (s10) and services must be provided with "reasonable care and skill" (s49). While these provisions go further than the SGA 1979 and SGSA 1982, much of the additional content in Part 1 is drawn from other existing law (see for example the distance selling provisions in section 11).

What is entirely new is Chapter 3, which provides a detailed regime governing the sale to consumers of digital content, something which was of course essentially unknown when the 1979 and 1982 Acts were passed. While the terms implied by the Act are broadly similar to those for the supply of physical goods, it is a key extension of liability and also covers situations such as free digital content provided along with goods.

The other major change in Part 1 is the creation of a set of bespoke remedies within the CRA 2015. Previous legislation had largely left remedies as a matter for the common law (usually leading to a remedy in damages). However, the CRA 2015 instead provides three distinct remedies: the short-term right to reject (within the first 30 days, applies only to physical goods); the right to repair or replacement (applies to goods, digital content and services); and a final right of rejection/price reduction/refund. Essentially the Act creates a clear set of steps to follow in the event of a consumer dispute - a first opportunity to reject (at least for goods), a right for the trader to attempt to rectify the problem, and if this is not satisfactorily achieved, a level of compensation up to (but not under the Act beyond) the original price paid. The Act does still allow for common law remedies to be sought but it is expected that this will be the exception rather than the rule.

Part 2 of the CRA 2015 collects and reforms the law relating to unfair terms in consumer contracts. UCTA 1977 despite its name only applied to exclusion clauses, while more recent European-derived law such as the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR 1999) had a wider scope. The CRA 2015 collates almost all of this law into Part 2 and imposes a single test for all terms alleged to be unfair within a consumer contract - whether, under s62(4) "contrary to the requirement of good faith, [the term] causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer." A further step beyond UCTA 1977, although again presaged in UTCCR 1999, is the 'grey list', a list of terms which *may* be unfair which can be found in Schedule 2 of the Act. However, in other areas the existing law is preserved, with for example section 65 CRA 2015 maintaining the ban on excluding negligence liability for personal injury that was introduced in UCTA 1977 section 2.

A little over four years on from the passage of the Act, it may be too soon to evaluate the more long-term effects of the legislation but there are already plenty of opinions both in favour of, and more critical of, the Act. One of the key aims of the CRA 2015 was to bring together what was becoming an increasingly unmanageable tangle of different pieces of legislation, dating

from different decades and from different sources (notably UK legislation compared to that with its source in the EU). The Act has to a large extent achieved this, making the law more straightforward and easier to find. A good example is the end of the bifurcated position with overlap between UCTA and UTCCR. Furthermore, much of the somewhat archaic terminology found in older statutes such as the SGA 1979 has been simplified and modernised. The government which brought the Act through Parliament stressed the aim of making consumer law easier to understand and therefore easier for consumers to enforce.

However, it could be argued that the CRA 2015 is still far from a 'one stop shop' for consumer rights. Older statutes such as the SGA 1979 and SGSA 1982 remain (although mainly outside of consumer contracts) and consumer law continues to be found in other legislation. The Act may be in 'simpler' language, but it is still a hefty and complex piece of law for a layperson to comprehend and many sections will in any event require knowledge of case law (at present mainly based on the previous Acts but in future referring to the CRA itself) to interpret. Indeed, while there is a level of certainty provided by the wholesale retention of much existing law, this also means that existing problems also remain. One example is exactly where the line is drawn between 'goods' and 'services', something which is no clearer post 2015 than it was previously.

Critics have also found issue with the novel parts of the CRA 2015, including the new system of remedies. It could be argued that there is a restitutionary element to the remedies provided by the Act, with a focus on returning the consumer to their original position through price reductions etc., as compared to the expectation-based damages provided by common law. Some commentators have characterised the remedies as essentially allowing retailers a 'free opportunity' to breach a contract, by giving the right to repair/replace defective goods or services. However, while it is something of a backhanded compliment, the Act can be praised for providing a pragmatic dispute resolution procedure whereby traders are aware they must attempt to make good defects, saving consumers the time and trouble of going to court - that time and expense being perhaps one of the strongest arguments against the effectiveness of all consumer legislation. Furthermore, the coverage of digital content has been almost universally welcomed and fills what had become a very obvious gap in consumer law.

Looking critically at Part 2 of the CRA 2015, again there is certainly reason to compliment the changes made by the Act. The completely different scope and tests provided by UCTA 1977 and UTCCR 1999 made this area of law extremely confused prior to 2015 and thus the use of a single yet flexible test, with the copious guidance provided by the Schedule 2 grey-list can be welcomed. Other improvements are also of assistance to consumers, such as the removal of the exemption of "individually negotiated" terms. However, as in any area of law, flexibility comes with the price of uncertainty and the subjective nature of the test could be argued to create confusion, especially for traders who had for many years relied on the 'reasonableness' test of s11 UCTA 1977. Finally, while the courts have become increasingly confident in using the concept of 'good faith' over the past few decades, the European influences on the CRA 2015 may become more problematic in a post-Brexit legal landscape

SECTION B

Question 1

In order to be valid a contract requires agreement, the intention to create legal relations, and consideration. The latter can be defined as a benefit to the promisee and/or a detriment to the promisor (Currie v Misa (1875)), or "the price for which the promise of the other is bought" *per* Lord Dunedin in Dunlop Pneumatic Tyre v Selfridge (1915). Without sufficient consideration, a contract will be invalid. This also means that when the terms of a contract are altered, fresh consideration must be provided by both parties.

As a result, there is a long-standing rule at common law that "part payment is no satisfaction for the whole". This rule has its origins in Pinnel's Case (1602). Where a creditor proposes to accept less than he or she is due from a debtor, the creditor is clearly providing consideration - they are agreeing to accept less than their strict legal rights. However, without more the debtor is providing no fresh consideration - they are merely repaying some of an amount they already owe an existing contractual duty to repay.

While their Lordships professed some discomfort with the rule *obiter*, the House of Lords decision in Foakes v Beer (1884) upheld the rule that part payment is no satisfaction for the whole. More recently, Re Selectmove (1995) made it clear that the Court of Appeal 'practical benefit' analysis in Williams v Roffey Brothers (1990) could not therefore apply in cases of 'accepting less' and in the recent decision in MWB Business Centres v Rock Advertising (2018) the Supreme Court declined the opportunity to change that position.

Thus, *prima facie* it may appear that Andy will find it difficult to uphold any of the arrangements he has entered into. However, both common law and equity have provided some exceptions which can mitigate the harshness of the general rule.

Turning first to the agreement with CTI, Andy originally agrees to pay £80,000 in two instalments. After the first instalment is paid as agreed, Andy is unable to pay the second £40,000. Instead, his new business partner Elizabeth makes a payment of £30,000 "in full and final settlement". Had this payment been made by Andy, it would have been no satisfaction for the whole and the remaining £10,000 would likely have been available to claim under the principle from Foakes v Beer. However, because the payment is made by a third party, Elizabeth, the exception from the case of Hirachand Punamchand v Temple (1911) can be used. In that case a father paid a smaller sum in settlement of his son's debt to a money-lender. On an action by the money-lender to recover the remainder from the son, the court refused the claim on the grounds that to allow it would be a fraud on the father. Thus, CTI have given up their rights by agreeing with Elizabeth to accept £30,000.

Andy has also paid a lesser sum to Dave, namely £1,000. However, he has provided fresh consideration in addition to the money by agreeing to give Dave and his wife a lift to Bingo. From the very beginning of the rule it has been accepted that providing something new alongside the lesser sum would suffice - the examples given in Pinnel's Case being "a horse, a hawk, a robe…" It does not matter that the value of this lift is potentially much less than

£2,000 - consideration must only be sufficient (meaning of monetary value), it need not be adequate (see e.g. Chappel and Co v Nestle (1959)).

Finally, there is the matter of the garage rent. It is established that there is an existing contract between Andy and Ferdinand whereby Andy pays £2,000 per month in exchange for use of the garage. As Andy provides no fresh consideration in exchange for Ferdinand's promise to accept £1,000, there is no valid variation in the terms as a matter of law. However, the doctrine of promissory estoppel may be of assistance to Andy. Under this doctrine, first fully formulated by the then Denning J in High Trees House v Central London Property Trust (1947) (relying somewhat arguably on the earlier authority of Hughes v Metropolitan Railway (1877)), equity may step in to prevent a creditor who has promised to accept less than his or her full legal rights from resiling from that promise.

The doctrine requires three factors to be present: a clear promise (which there arguably is here as Ferdinand expressly promises to lower the rent to £1,000 "until your Christmas money comes in" – but see comment at end); reliance on that promise by the promisee (we can presume Andy relies by agreeing to and paying the lowered rent and continuing to use the garage); and it must be inequitable for the promisor to now insist on his strict legal rights. By analogy with the decision in High Trees itself, it would appear that it is inequitable for Ferdinand to change his mind in January 2020 and reclaim the back rent of £3,000. However, as in High Trees the promise is conditional, and so it is likely that it expires at the point Andy receives the money for his Christmas bookings. Furthermore, even where a promise is open-ended the estoppel will come to an end once notice is provided that the promisor wishes to return to the original terms (Tool Metal Manufacturing v Tungsten Electric Co (1955)) and here Ferdinand's letter would constitute notice.

As promissory estoppel is a "shield not a sword", Andy has no right of action against Ferdinand. However, he may well be able to use estoppel as a defence against a claim for the "missing" £3,000, although Andy should now pay the full £2,000 from this month onwards.

It could be questioned whether Ferdinand actually promised Andy a reduction in the rent until the Christmas money arrived, or if he merely promised to delay his demands for payment of the other £1,000 each month until then. If the latter view was taken by the court, then Andy would be forced to repay the extra £3,000.

Question 2

Agreement is one of the key elements required to create a valid contract. English law has long recognised the use of an objective test for agreement, which seeks to identify a valid offer by one party that is accepted by the other. An offer can be defined as a statement of specific terms on which the offeror is willing to be bound. However, a potential party may instead merely issue an invitation to treat, which does not have legal force and is instead an invitation to enter into negotiations (see e.g. Gibson v Manchester City Council (1979)).

In the case of Pharmaceutical Society of Great Britain v Boots Cash Chemists (1952) the court was asked to analyse where and by whom the offer and acceptance is made when a contract for the sale of goods is formed in a shop. The court held that it would be illogical for goods upon the shelf to be

considered an offer in themselves - this would have the unhelpful effect of binding both customer and shopkeeper into a contract as soon as the customer placed the goods in their basket. Instead, it is settled law that the offer is made at the till by the customer, which then gives the cashier the option whether to accept the offer made or not.

Applying the above to the dispute between Gabriella and Hafizur, the statue is merely an invitation to treat. Hafizur has not got as far as making an offer to buy the statue never mind any potential acceptance, so contractually there is no obligation upon Gabriella to sell the statue.

The second issue regarding offer and invitation to treat is the poster Gabriella places in the window. Authority such as Fisher v Bell (1961) states that goods displayed in a shop window are usually merely invitations to treat; and Partridge v Crittenden (1968) is an example of the general rule that advertisements of goods tend to also be mere invitations to treat. The reasoning for both of these decisions is the same - the seller of the goods will only have a limited stock, so cannot be liable to sell to everyone who sees the goods/advertisement.

However, it is possible that in Gabriella's case the poster is actually an offer for an unilateral contract. As famously demonstrated in the case of Carlill v Carbolic Smoke Ball Co (1893), an advertisement may be considered an offer if there are certain terms and evidence of an intention to be bound. There appears to be sufficient terms on which to found a contract (the price and the product, although possibly the latter may be an issue if Gabriella has more than one grandfather clock for sale.) The poster stating "first come first served" would also suggest a willingness to be bound. That line is also important in refuting the limited stock argument - as only the first person to offer £100 cash can take the clock, there is no issue of others "accepting" the offer. By binding herself but not the readers of the poster, Gabriella is making an offer for a unilateral contract to the world - and as with all such offers, it can be accepted by performance, which is what Ioana attempts to do. It can certainly be argued that Ioana may have a claim to the clock by doing what the poster specified in being the first person to offer £100 cash for it. It should be noted that Gabriella cannot be considered to have revoked the offer until at least the time she takes the poster down and this comes too late (see e.g. Byrne v Van Tienhoven (1880)). As a unique item, it is worth noting that if Ioana is able to claim successfully she may seek specific performance to have the specific clock delivered up to her.

Looking at the dispute with Jamie, it is important to first and foremost establish the legal status of each of the emails between the parties. When Jamie contracts Gabriella initially, his email is too vague to be considered an offer - it is merely an expression of interest. Gabriella is the one to make the first offer, when she replies setting a price of £5,000.

It should be noted at this juncture that if an offer is replied to with a new offer on different terms, this so-called 'counter-offer' will destroy the original offer (Hyde v Wrench (1840)). However, Jamie's response does not alter the terms of Gabriella's offer but merely seeks clarification upon them, making it a request for further information which has no effect on the validity of the offer (Stevenson, Jaques & Co v McLean (1880)). Gabriella's reply also has no legal effect, but when Jamie emails purporting to agree "as long as you will restring the instrument" this constitutes a counter-offer. Gabriella's original offer is no

longer available for acceptance by Jamie - instead, Jamie has become the offeror and Gabriella can choose whether or not to accept this new offer.

Gabriella's conduct in then delivering the violin is the crux of the issue between the parties. It could be argued by Jamie that Gabriella has accepted his counter-offer by performance (see e.g. Brodgen v Metropolitan Railway Co (1877)) when she delivers the violin. If that is the case, then the price includes Gabriella having the instrument restringed.

However, if one takes the 'battle of the forms' view demonstrated in cases such as Butler Machine Tool Co v Ex-Cell-O Corporation (1979), it is the party who fires the 'last shot' whose terms will prevail. Applying this argument to the scenario, Gabriella could argue that she is actually making a fresh counter-offer when she presents Jamie with the invoice to sign, *before* giving him the violin. It is in signing that invoice that Jamie accepts the offer, and as a result contracts on Gabriella's terms which exclude restringing the instrument. It is only after this that Gabriella gives Jamie the violin.

Question 3

Since the Victorian era the courts have recognised the potential unfairness caused by contracts in restraint of trade. As Lord MacNaghten stated in the seminal case of Nordenfelt v Maxim Nordenfelt Guns & Ammunition Company (1894) any clause in restraint of trade will be *prima facie* void as being contrary to public policy. However, such clauses can be enforced if the party seeking to rely upon them is able to demonstrate that the clause protects a legitimate interest and is reasonable in doing so, both between the parties and with regards to the public interest. This is often tested in practice by looking at the area, duration and scope of the restraint. It should also be noted that the courts will subject clauses between employers and employees to particular scrutiny due to the potential imbalance in bargaining power between the parties (see e.g. Esso Petroleum Co Ltd v Harper's Garage (1968)).

Noah

Looking first at clause (a), Noah is prevented from working for a competitor "creating or selling" magic tricks for 12 months after leaving MML. There is clearly a legitimate interest being protected here - the trade connections and customers of MML. The question is whether the clause goes no further than is reasonable in protecting this interest. It should be noted straight away that Noah is a senior member of staff ('Chief Engineer') who has been with the company for over a decade. This means that a higher degree of restraint may be reasonable than compared to a more junior employee.

Looking at the area of the restraint, it applies worldwide. This may seem on the face of it unreasonably wide, however it could be argued that this is a very specific role in a niche industry and that therefore worldwide protection is needed - one can imagine that stage magicians probably constitute such a small market that MML are competing on an international level. The scope of the clause is to prevent Noah from working for firms specialising in "creating or selling magic tricks or illusions or any products of a similar nature." It could be argued that as an engineer Noah is much more likely to be involved in the creation of tricks than their sale - this will be returned to later. Finally, the duration of the restraint is one year - this does not seem a particularly

excessive time given the specialised nature of the work and is comparable to a period of "gardening leave" for a senior staff member.

Clause (b) purports to restrain Noah from using confidential information for a period of five years after he leaves MML. Trade secrets and other confidential information have long been recognised as a legitimate interest, see e.g. Fitch v Dewes (1921). The leading case of Faccenda Chicken v Fowler (1987) suggests that the nature of the employment, the nature of the information, whether the employee knew the information was confidential and whether the information could be separated from non-confidential information were all relevant factors. Here, Noah clearly has a role where he will be handling trade secrets (how the magic tricks work), this information remaining secret is clearly crucial to MML's ability to sell such tricks, he can be presumed to know the information is confidential and it can be separated from other information such as customer details. As such, the clause may be considered reasonable - although the five-year duration could be seen as overly long.

Oliver

Oliver is in a very different position to Noah, as he only worked for MML for three months, in their retail division. As such, the court are likely to be considerably less predisposed to allow restraints on his trade. Considering how junior an employee Noah is, it is very difficult to see why he should be prevented from selling magic tricks elsewhere. He may have become known to some customers but seems highly unlikely to take a large portion of shop's custom to a new employer. This also makes the geographical restriction (or rather lack of it) seem particularly unreasonable - perhaps a clause limiting his employment within London may have been reasonable but worldwide seems clearly excessive (see for example Mason v Provident Clothing & Supply Co (1913) and Marley Tile Co v Johnson (1982)). Finally, the wording of the clause could be said to be unreasaonably vague, such as the term "products of a similar nature" (see e.g. Norbrook Laboratories (GB) Ltd v Adair (2008)).

It could also be argued that Oliver is not even in contravention of the clause, as it is very debateable whether the toy shop he works for is "specialising…in selling magic tricks".

Clause (b) similarly seems far more restrictive than can be justified in regard to Oliver. He most likely was not party to any true trade secrets during his time working at MML and cases such as FSS Travel & Leisure Systems Ltd v Johnson (1998) make it clear that the information must not only be confidential, but its dissemination must be likely to harm the employer. It is unlikely Oliver is in possession of such information. Again, the time and scope of the clause seem unreasonable in the circumstances and it cannot be said that the clause is no more than is adequate to protect MML's legitimate interests (Office Angels v Rainer-Thomas (1991)).

Overall it seems highly unlikely that the court would consider either clause in Oliver's contract enforceable. It should also be noted that simply attempting to enforce the clauses would, in the circumstances, appear somewhat draconian and in any event appears to be a waste of resources for MML who are under no threat from Oliver's new part-time job.

Regarding Noah the position is less clear. The clauses are widely drafted but Noah has worked for MML for a long time and will have built up a considerable store of both customer goodwill and confidential information. If the court feels

it is the scope in particular that is problematic, they could sever the offending part of the clause using the so-called 'blue pencil' test. This test operates to prevent the court from adding to, or modifying, the existing words of the agreement and the clause must continue to make sense after severance, see e.g. Goldsoll v Goldman (1915) and Napier v National Business Agency (1951). In clause (a), it could be argued that either or both of "or selling" and "or any products of a similar nature" could be removed to narrow the clause. The main issue with clause (b), the length of time, could not be dealt with through severance as merely removing words would not shorten the time period the clause applies for. As such, it must either stand or fall in its entirety.

Question 4(a)

The doctrine of economic duress grew from the original idea of physical duress but is clearly now established as a vitiating factor in its own right. While the 'test' for economic duress has been stated in a number of different ways, the usual starting point is that there must be both "coercion of the will" and "illegitimate pressure" (see e.g. R v Attorney General (2003)).

Coercion of the will is a somewhat ethereal concept but is often simplified to asking whether the party claiming duress had any realistic alternative than to agree to the terms offered. In Universe Tankships Inc v ITWF, The Universe Sentinel (1983) the court suggested that a lack of alternatives could be demonstrated by a lack of independent advice and protest at the terms imposed, although these are sometimes considered as separate requirements.

The second part of the test, the need for illegitimate pressure, means pressure that is unlawful and goes beyond mere hard commercial bargaining. Thus in CTN Cash and Carry v Gallaher (1994) economic duress was not found, as the threat was simply to not contract with the claimant in future. In comparison, a threat to breach the existing contract in Atlas Express v Kafco (1989) was considered illegitimate pressure.

Applying the law to the facts, it could be argued that Yvonne could have chosen to turn down WWL's offer. However, in the circumstances it is hard to see this as a realistic option - it would leave Yvonne with 20 specialist dresses that appear to be difficult to sell elsewhere, and with no money at all from WWL at a time when her business is already struggling. This would also mean that Yvonne can hardly afford the time and expense of suing WWL for breach of contract as an alternative. She also appears to have received no independent advice and clearly protested by calling the terms "daylight robbery".

Assuming Yvonne is able to demonstrate "coercion of the will", we must look to see whether the pressure she was under is illegitimate. Unlike in CTN Cash and Carry v Gallaher WWL is not merely threatening to refuse to contract, but instead threatening to breach an existing contract. This is both unlawful and acting in "bad faith" (see DSDN Subsea Ltd v Petroleum Geo-Services ASA (2000)).

It would appear that Yvonne has a relatively strong claim for economic duress. Were she to be successful, the likely remedy is rescission of the second contract (amending the price to £5,000), which would in practice mean Yvonne could then claim the £7,000 extra payable under the original contract.

4(b)

The equitable doctrine of undue influence applies where one party uses illegitimate pressure, falling short of outright duress, to persuade the other to enter into a contract. If this is established, the court may set aside the contract.

Prior to 2001 much was made (in cases such as BCCI v Aboody (1992)) of the different "classes" of undue influence; actual undue influence (Class 1) and presumed undue influence (Class 2). A victim could establish actual undue influence by proving that such influence resulted in the transaction (as in Aboody itself). An example of presumed undue influence is Allcard v Skinner (1887) where the superior position or ascendency of the religious leader meant that the gifts of money by a disciple were presumed to be a result of undue influence.

In the current leading case on undue influence, the House of Lords decision in Royal Bank of Scotland v Etridge (No 2) (2001) it is established that it is now necessary to demonstrate in all cases that there was actual undue influence.

However, the legacy of 'presumed' undue influence lives on as an evidential presumption. Etridge (No 2) confirmed that where a claimant can demonstrate both a relationship of trust and confidence (which is presumed in some cases but must be proved between romantic partners) and a transaction which 'calls for explanation', this will establish a presumption of undue influence with the burden moving to the defendant to prove otherwise.

Applying the above to Yvonne and Zimran, it is possible that Zimran can simply prove actual undue influence - especially as Yvonne has made overt threats and has clearly spent considerable time trying to unduly pressure him into agreeing the loan. However, there may be a lack of evidence beyond Zimran's own word if this occurred 'behind closed doors'. Therefore, it would be prudent for Zimran to attempt to set up the evidential presumption. While the court will not presume a romantic relationship to be one of 'trust and confidence' in this context, on the facts it seems likely that Zimran could prove this to be the case. The transaction, whereby Zimran risks his home for the benefit of his partner's business strategy does also seem to "call for an explanation". However, it could be argued that as Yvonne's partner Zimran was willing to take a risk investing in her business, as he may well have shared in the rewards had the business succeeded.

If undue influence can be established against Yvonne, Zimran then needs to demonstrate that it has tainted his contract with Xenolith Bank. Through a number of cases, notably Barclays Bank v O'Brien (1992) the courts have attempted to provide a test for when a bank's transaction may be affected by undue influence by a third party. Again, the law today comes from the judgment in Etridge (No 2) - that a bank will have 'constructive notice' that there may be undue influence if one person stands surety for another's loan and the relationship between the surety and debtor is 'non-commercial'. In that case, the bank must demonstrate that a series of steps prescribed in Etridge (No 2) have been taken in order to discharge the burden of notice. These steps involve the surety receiving independent legal advice, provided to the surety without the debtor's presence; and the bank being assured that this has taken place prior to granting the loan.

In the current case Xenolith Bank should have been on notice once they realised that Zimran as surety was in a non-commercial relationship with Yvonne as debtor. There is no evidence that Xenolith then took the necessary steps as Zimran does not appear to have received any independent advice at all. As such, the Bank may well be fixed with constructive notice and as a result the transaction set aside.