CILEx CHARTERED INSTITUTE OF LEGAL EXECUTIVES

LEVEL 6 - UNIT 2 – LAW OF CONTRACT
SUGGESTED ANSWERS – JANUARY 2017

Note to Candidates and Tutors:

The purpose of the suggested answers is to provide students and tutors with guidance as to the key points students should have included in their answers to the January 2017 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 students may have included in their responses to the questions. Students will have received credit, where applicable, for other points not addressed by the suggested answers.

Students and tutors should review the suggested answers in conjunction with the question papers and the Chief Examiners' reports which provide feedback on student performance in the examination.

SECTION A

Question 1

A restraint of trade term is something which restricts a person's right to exercise his trade or carry on business. The law requires the court to balance two opposing interests when considering such terms: the right to work and trade freely on the one hand and the right to protect legitimate business interests on the other.

The judgment of Lord MacNaghten in Nordenfelt v Maxim Nordenfelt Guns & Ammunition Company Ltd (1894) is the foundation of the modern approach to restraint of trade: 'All … restraints of trade of themselves…are contrary to public policy, and therefore void…But there are exceptions … It is sufficient justification … if the restriction is reasonable … in reference to the parties concerned and reasonable in reference to the interests of the public…' Thus any term which appears to be a restraint of trade is *prima facie* void, but this presumption is rebuttable by evidence that the restriction is 'reasonable'. The restraint must be reasonable both with regard to the public interest and between the parties. The burden of proof lies on the person seeking to rely on the term.

When considering the public interest, the party seeking to take advantage of the term must have a legitimate proprietary interest that is worthy of protection: i.e. not an interest held 'in gross': see (e.g.) Vancouver Malt & Sake Brewing Co Ltd v Vancouver Breweries Ltd (1934). Terms that damage a trade or business by limiting, without proper justification, those who may engage in it are contrary to the public interest: see (e.g.) Wyatt v Kreglinger & Fernau (1933) and Kores Manufacturing v Kolok Manufacturing (1959). Mere anti-competition agreements will not be enforced.

Where a term goes beyond what is reasonable, it will not be possible to rebut the presumption that the term is contrary to public policy. The courts have traditionally considered three issues when considering whether the restraint is

reasonable – the activity being restrained; the geographical scope of the term and the time for which the term purports to operate.

Whilst what may be reasonable is essentially a question of fact, some guidance may be taken from what has been previously decided by the courts. Chief considerations turn on the nature of the interest for which protection is sought, the relationship between the parties, the nature of the business or trade in question, and its location.

In a contract for the sale of a business, it is possible to protect the value of the goodwill by preventing the vendor setting up business in competition: (e.g.) Herbert Morris v Saxelby (1916) (HL). The purchaser has provided consideration to obtain the purchased business, and part of what he has legitimately obtained is the goodwill of the business. In such circumstances, because the contract is between two business people, the court is more likely to find the term reasonable, provided there is some equality of bargaining power: (e.g.) British Reinforced Concrete v Schelff (1921).

The questions of the reasonableness of duration and geographical extent of the prohibition turn on the specific facts of the business or trade. Examples of factors the court may consider are where clients are likely to return to a business over a long period and the realistic catchment area for customers.

In employment contracts, a restraint of trade clause will only be effective if the term will protect the employer's business and a 'proprietary interest' exists, which includes an interest in assets such as trade secrets, trade connections, and goodwill. 'Trade secrets' include formulae, processes, and 'know how'. Such confidential information is capable of protection by way an express or, alternatively of an implied term: (e.g.) Foster v Suggett (1918), Littlewoods v Harris (1977), Faccenda Chicken v Fowler (1986) etc.

Employees are, however, protected in so far as an employer may not prevent a former employee using his skill in a particular trade or business, even if that skill was acquired whilst working for the employer: see Morris v Saxelby (1916).

Reasonableness in employment situations, as with contracts for the sale of businesses, are assessed against questions of fact. The court will look to the nature of the interest that the employer seeks to protect, the nature of the employer's business, the status of the employee, and the scope of the employee's employment: (e.g.) Home Counties Dairies v Skelton (1970)).

Other factors the court will consider include; duration, geographical area, and scope of the prohibition in question. Most importantly the question remains whether the nature, duration and geographical extent of the term are reasonably necessary to protect the proprietary interest in question. Where the term relates to the use of information, it is restricted by the 'shelf life' of that information; where it goes to protecting goodwill of the employer's business it will be restricted by considerations of the extent to which an employee had contact with customers (see (e.g.) Austin Knight v Hinds (1994), how long goodwill may endure (see (e.g.) M & S Drapers v Reynolds (1956)), and the geographical area in which goodwill may be affected (see (e.g.) Mason v Provident Clothing & Supply (1913), Fellows v Fisher (1976) etc.).

If a term in restraint of trade is found to be unreasonable and thus void, this may make the entire contract invalid. The court may attempt to avoid this by severing the term from the relevant clause in the contract, but only if doing so does not damage the grammar, or the sense, of the clause, and it does not

undermine the whole contract: see (e.g.) Goldsoll v Goldman (1915) and Napier v National Business Agency (1951).

Question 2(a)

It is traditionally considered that past consideration is no consideration. Consideration cannot be comprised of a promise made subsequent to and independently of a bargain. For example, in Roscorla v Thomas (1842) the plaintiff bought the defendant's horse. After the sale was completed the defendant promised that the horse was 'sound and free from vice'. It later proved vicious and uncontrollable. It was held that consideration was past and the plaintiff could not sue on the defendant's promise. See also re McArdle (1951) where work to improve a property could not support a later promise to provide payment, made after the work had been carried out.

Where there was an implied agreement to pay at the time the contract was entered into, consideration will not be regarded as past, see re Casey's Patents (1892) etc. In Pao On v Lau Yiu Long (1979), Lord Scarman set out three requirements for this exception, known as implied assumpsit, to arise. The act must be done at the request of the other party; there must be an implication that the act will be remunerated in some form (which is a question of fact in each case); and the consideration must have been legally enforceable had it been promised in advance.

Therefore it is not entirely true to say that past consideration is no consideration in every case. However the exception is relatively narrow in scope and will only apply where all three requirements are met.

2(b)

Performance of an existing public duty does not usually amount to consideration. In Collins v Godefroy (1831) a lawyer who was promised a fee of six guineas for attending a trial as a witness was unable to recover the money because he had acted under a public duty: he had been subpoenaed to attend.

On the other hand, a Claimant's actions which exceed the public duty owed may amount to sufficient consideration: see for example Glasbrook Bros v Glamorgan CC (1925). In this case the police force were asked to go beyond their duty of merely attending the scene were violence to break out by instead providing a 'garrison' stationed at the coal mine throughout the strike.

This exception has been further refined in a number of more recent cases, such as Reading Festival Ltd v West Yorkshire Police Authority (2006) and Leeds United FC v Chief Constable of West Yorkshire (2012). In the latter case it was held that while policing a football stadium during professional matches could be considered a special service beyond the usual public duty of the police, policing nearby streets and car parks on match days was part of the usual responsibilities of the local police force and could not be good consideration.

These recent decisions suggest that the exception created in Glasbrook has, in recent years, been more narrowly applied by the courts.

2(c)

The principle discussed in 2(b) above also applies in the case of existing contractual obligations. This issue usually arises where parties attempt to vary a pre-existing agreement. The general rule is the same as where public duties are

concerned, namely that the mere promise of an obligation already owed cannot be fresh consideration. This principle thus means that payment of a lesser sum in settlement of a debt cannot be satisfaction for the whole, see Pinnel's Case (1602) and Foakes v Beer (1884).

In Stilk v Myrick (1809) two sailors deserted a ship and the captain promised the remaining crew members to distribute the deserters' pay among them providing they sailed the ship home safely. The captain later refused to honour his promise. It was held that the sailors' actions were no more than they were contractually obliged to do. Their action therefore failed.

Similarly in the case of Hartley v Ponsonby (1857) sailors deserted the ship. However as so many did so, sailing the ship home was more hazardous for the remaining crew. It was held that this extra hazard was over and above their existing obligation. Consequently it amounted to fresh consideration and the promise of extra payment could be enforced.

This principle was widened by the Court of Appeal in Williams v Roffey & Nicholls (Contractors) (1990). In this case, the defendant contractor had promised the claimant sub-contractor extra sums if work was completed as originally scheduled. The argument that the claimant had merely carried out their pre-existing contractual duty failed. It was held that, in the absence of fraud or duress, where party A has reason to doubt that party B will be able to complete a contract, if A obtains a promise from B to complete the contract on time B will have provided good consideration if A obtains in practice a benefit, or obviates a disbenefit. In Williams, the practical benefit provided to the defendant was the avoidance of a penalty clause in the main contract triggered by late completion.

It is arguable how far this decision has altered or reformed the concept of consideration. However, it can be said that there is now more scope to find good consideration when a party appears to promise a pre-existing duty.

Question 3

The protection of the rights of a consumer who contracts with a business is now mainly found in the Consumer Rights Act 2015, which applies to all such agreements made on or after 1 October 2015. A consumer is defined by s2(3) of the 2015 Act as 'an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession'. The 2015 Act mainly displaces the pre-existing rights found in the Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982, but it should be borne in mind that those Acts are not entirely repealed and will still apply to certain business to business or consumer to consumer contracts.

Part I of the 2015 Act sets out the law protecting consumers in three distinct situations – contracts for physical goods, contracts for digital content and contracts for the supply of services. The main mechanism to provide consumer rights remains the use of statutorily implied terms, as in the previous legislation.

Sections 9 to 17 set out requirements which physical goods supplied, or the trader supplying them, must meet. These include key requirements such as the goods being of satisfactory quality (s9), fit for purpose (s10) and matching their description (s11). Much of the wording of these sections is retained from the similar ss12-15 of the Sale of Goods Act 1979 and thus existing case law is likely to remain relevant in the interpretation of these implied terms.

The 2015 Act also provides a selection of remedies which will apply where an implied term is breached. The consumer gains a 'short-term' right to reject under s22, which entitles the consumer to reject the goods within 30 days from the moment the goods have been transferred and delivered (and if necessary, installed by the trader). This period is shorter where the goods are perishable, becoming instead the time at which the goods perish. The consumer is also entitled to repair or replacement of the goods at the cost of the trader within a reasonable time (s23). Finally, the consumer will gain a right to a price reduction or a final rejection of the goods if they still do not conform to the contract after repair or replacement, or this is impossible or has not been carried out within a reasonable time.

Digital content (defined as data which are produced and supplied in digital form) is governed by similar principles, with implied terms as to quality, fitness for purpose and correspondence with any description given being found in ss34-36. The primary remedy for breach of any of these terms is the right to repair or replacement and, similar to physical goods, where this is not possible or not carried out within a reasonable time, a final right to a refund up to the full purchase price of the digital content. The 30-day short-term period does not apply to digital content, due mainly to the pre-existing rights conferred by the Consumer Contracts Regulations 2013.

Finally, where a trader provides a service to a consumer there are implied terms that it will be performed with reasonable care and skill (s49) for a reasonable price (s51) and in a reasonable time (s52). If the service does not confirm to the contract, the consumer will at first be entitled to repeat performance, and where this is not possible or not carried out, a refund up to the full price paid.

It is clear that a considerable amount of the provisions of the Consumer Rights Act 2015 discussed above have been retained from the earlier legislation. The implied terms which govern both goods and services are taken almost *verbatim* from the Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982 respectively. Those Acts can also be seen in the concept of statutory remedies covering rejection, repair and/or replacement. As a result, it has been argued by many commentators that the 2015 Act is unlikely to have a large impact on most businesses which deal with consumers.

However, it can be argued that the rights of the consumer have been extended by the 2015 Act. Most notably, the separate coverage of digital content is a new addition to domestic law and may lead to an increase in liability for providers of such content, particularly as s33 makes it clear that free content provided with paid content/goods/services is also covered. The new regime for statutory remedies will also have an impact, particularly the short-term right to reject.

Question 4

Damages, i.e. monetary compensation, is the standard common law remedy and will be available as of right in a successful claim for breach of contract. Substantial damages reflect, or attempt to reflect, the true loss to the Claimant. These can be contrasted with nominal damages which do not attempt to reflect actual loss.

The purpose of substantial damages in contract is to compensate the Claimant for breach of contract. As stated by Parke B. in <u>Robinson v Harman</u> (1848), this means placing the innocent party in the position s/he would have been if there had been no breach. This is sometimes referred to as 'carrying the Claimant

forward' and is to be contrasted with damages in tort, which 'carry the Claimant back' to his/her position before the tort.

Expectation loss is the usual measure of damages applied by the courts. This measure of loss is intended to place the Claimant in the position s/he would have been in had the contract been performed properly. It is said to compensate for loss suffered to the Claimant's 'expectation interest': that is, for any benefit or gain that the claimant expected to receive had the contract been carried out. Expectation loss may, for example, take the form of loss of profit; where inferior or faulty goods are supplied, it may take the form of difference in value; and where faulty work is provided it may take the form of cost of cure.

However, in certain situations the courts have shown themselves willing to go further in allowing claims for damages. Expectation loss has been held to include the loss of 'subjective benefits' such as disappointment, loss of enjoyment etc. In the case of Jarvis v Swans Tours Ltd (1973), damages were awarded for disappointment and distress caused by a breach of contract where a holiday was below expectations. Also, as held in Jackson v Horizon Holidays (1975), where a contract has as its main purpose pleasure and relaxation, an award of damages can be made for breach to reflect the disappointment and distress caused, even if this exceeds the actual financial loss suffered (i.e. the difference in price between what was contracted for and what was provided). It should be noted that this line of decisions was restricted to consumer contracts with 'pleasure' as their object in Woodar Investment Development Ltd v Wimpey Construction UK Ltd (1980); although this has been interpreted widely, as in Farley v Skinner (No 2) (2001).

A related situation is where performance is in some way unsatisfactory but the cost of cure is excessive. This is typified by Ruxley Electronics v Forsyth (1996) where the defendant constructed a swimming pool six foot deep, rather than seven foot six inches. Expectation-based damages were difficult for the court to apply – the actual value of the pool was no different than had it been as deep as specified, and on that basis the claimant would recover no damages despite the clear breach. However, the cost of rectifying the error was over £20,000, which was seen as excessive. The House of Lords upheld an award of £2,500 for so-called 'loss of amenity'.

Reliance loss may be awarded instead of expectation loss where the loss is too speculative or a reasonable calculation cannot be made: see Anglia Television v Reed (1972). Reliance loss is simply out of pocket expenses spent during the performance of the contract. This fails to meet the purpose set out by Parke B. Instead it returns the Claimant to the financial position s/he was in before the commencement of the contract. As such it equates to the same measure of damages as those commonly awarded in tort. As a result, it will only be used as a measure of damages where expectation loss is unsuitable or impossible to quantify.

Should the claimant choose to claim reliance loss, the court will not allow such a claim should it result in the Defendant being liable to compensate for losses from a bad bargain, rather than from the Defendant's breach: see C&P Haulage v Middleton (1983). The contract need not prove it would have been profitable in order to receive reliance loss; simply that the contract would at least have broken even. A reliance loss claim would have to be reduced accordingly, where it could be shown the contract would have resulted in a loss.

Finally, the courts may also differ from the usual measure of damages in cases which involve loss of chance: see Chaplin v Hicks (1911) where a proportion of

the potential earnings under the contract was awarded, commensurate with the chance of those earnings being achieved.

The courts also have the discretion to award equitable remedies, such as injunctions, rescission and/or specific performance. However, such remedies will only be awarded where damages cannot provide an adequate remedy and even then may be barred by other principles, such as the refusal of the courts to supervise a contract (Co-operative Insurance v Argyll Stores (1997)).

The courts will apply expectation loss wherever possible. All attempts to claim an alternative measure are doomed to fail where expectation-based damages can be calculated and will result in a reasonable sum; and the various exceptions discussed above have generally been narrowly defined by the courts and limited in their scope. However, where the usual expectation measure would lead to a claimant being under-compensated for actual loss, or alternatively could result in a 'windfall' for either party, the courts will be willing to use an alternative measure if by doing so a more 'reasonable' sum can be calculated.

SECTION B

Question 1

The equitable doctrine of undue influence applies where one party uses illegitimate pressure which falls short of outright duress to persuade the other to enter into a contract. If this is established, the court may set aside the contract or modify its terms to mitigate any disadvantage suffered.

There are two traditional classifications of undue influence; actual undue influence and presumed undue influence. In actual undue influence the claimant must prove that s/he entered into the contract as a result of illegitimate pressure. In Allcard v Skinner (1887) this was described as '… some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating and generally, though not always, some personal advantage obtained by the guilty party'. In presumed undue influence the claimant must demonstrate that the contract was entered into within the context of a relationship that gives rise to a presumption of undue influence; for example, a relationship involving a fiduciary or some element of dominance.

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.

An agreement entered into to provide surety for a bank loan granted to a third party may be tainted by the undue influence of the third party. In which case the person seeking to have the contract set aside needs to demonstrate (a) undue influence by the third party and (b) that the agreement with the bank was tainted by the undue influence.

In Etridge it was held that the test(s) for deciding whether an agreement should be set aside in such circumstances remain those set out in Barclays Bank v O'Brien (1993): (1) was the party to the agreement granting surety subject to undue influence by the third party; and (2) was the bank granting the loan put on notice.

When applying the test to Ayesha's case, the court should therefore ask: (1) was Ayesha subject to undue influence by Brian? and, (2) was there sufficient in the

transaction to fix the bank with constructive notice of the of that undue influence?

Was Ayesha Subject to Undue Influence by Brian?

Ayesha must prove actual undue influence by Brian by establishing that he misled Ayesha as to his business's financial position and the purpose of the loan: see Barclays Bank v O'Brien (1993); CIBC Mortgages' v Pitt (1994).

Brian subjected Ayesha to emotional pressure. In so far as his conduct is 'unfair and improper' and contains elements of 'coercion' and 'cheating' it clearly falls within Lindley LJ's definition of actual undue influence in Allcard v Skinner (1887). Ayesha's argument may be given an 'evidential lift' by the nature of her relationship with Brian. In order to obtain this 'evidential lift' it is necessary to consider the traditional classifications of undue influence and their refinement in BCCI v Aboody (1991) and Barclays Bank v O'Brien (1993).

BCCI v Aboody (1991) restates the traditional classifications of undue influence as Class 1 (actual undue influence) and Class 2 (presumed undue influence). Class 2 was subdivided into 2A and 2B. Class 2A includes special relationships which give rise to a presumption of undue influence, such as trustee and beneficiary, doctor and patient, solicitor and client, religious leader and follower. This category does not include husband and wife. Class 2B deals with situations in which there is no special relationship but where the aggrieved party could prove as a matter of fact that trust and confidence had been placed in the wrongdoer.

Barclay's Bank v O'Brien (1993) saw these classifications approved and applied in the House of lords, only for them to be subsequently disapproved in Royal Bank of Scotland v Etridge (No 2) (2001), for being 'confusing'. Nevertheless, they remain important and useful classifications.

Ayesha will need to establish that she and Brian fall under the old 2B classification, by proving that she placed trust and confidence in him. This would provide evidence of undue influence.

To build on this evidence Ayesha must now show that the influence was 'undue'. She must demonstrate that the transaction would not have been entered into without Brian's improper pressure. Her lack of commercial interest in the unprofitable business, for which she risked significant capital as well as her family home, may be enough to demonstrate this.

Brian's role as the single supporter of Ayesha's family may, however, leave this argument open to challenge by WCBD, as she had a clear interest in the success of Brian's business.

Is the Agreement between Ayesha and WCDB tainted by Brian's Undue Influence?

The bank was aware of the actual nature of Brian and Ayesha's relationship in that it was not commercial, in line with the Etridge requirement that where the relationship between the surety and debtor was 'non-commercial', the creditor is put on notice that there is a risk of undue influence. The bank was aware of the actual nature of their relationship and consequently was put on notice.

WCBD may well strive to demonstrate that it took reasonable steps to inform Ayesha of the practical implications of what she was doing, in order to rebut the

suggestion that the transaction was tainted by undue influence. The guidelines set out in Etridge indicate that proper and independent legal advice would be sufficient. Nothing in the facts of the problem suggests that such advice was received. The presumption is consequently not rebutted.

For the reasons set out above Ayesha has a good arguable case that the agreement with WCDB should be set aside.

Question 2(a)

An exclusion clause within a contract seeks to exclude either liability or the availability of damages, while a limitation clause strives to limit the amount of damages available. Both are examples of exemption clauses and as such are subject to the same common law rules. Though limitation clauses may be treated more leniently by the courts. It is up to the party wishing to rely on the clause to prove its validity. In relation to the contract between Jiro and ICL, Clause 24 is an exclusion clause, while Clause 30 is a limitation clause.

Such clauses must be incorporated into a contract to be valid at common law. This contract is a signed document. There is nothing to suggest either an overriding oral representation or supplementary unsigned documents. The agreement is consequently governed by the rule in L'Estrange v Graucob (1934): once a party has signed a document it is bound by the contents. Jiro has signed the contract and so is *prima facie* bound by the clause.

Exemption clauses are interpreted strictly by the court. Ambiguities are construed *contra proferentem*: see (e.g.) White v John Warwick & Co Ltd. (1953) and Houghton v Trafalgar Insurance (1954). This means that where the wording of a clause is ambiguous, it shall be given the meaning least favourable to the party seeking to rely on the term.

The exclusion of liability in clause 24 is dependant on 'abnormal' use. The concept of what is abnormal is ambiguous, and so the clause will be interpreted *contra proferentem*. It is arguable as to whether this will prevent ICL from relying upon the clause – while the customers appear to have used the product in a different manner to how it was tested, they are still using it in a computer system, which is the normal use for a processor. As such, the clause may not exclude liability for the loss.

2(b)

Exemption clauses are also subject to the Unfair Contract Terms Act 1977 (as this is a business to business contract the Consumer Rights Act 2015 does not apply). Section 3 of the Unfair Contract Terms Act 1977 deals with contractual liability and provides (*inter alia*) that the section applies where one party deals on the other's 'written standard terms of business'. The section goes on to provide that a party cannot by reference to a contractual term claim to exclude or limit liability for breach save in so far as it is reasonable to do so (s3(2)(a)). The Act may also apply through section 6, if it can be shown that ICL have breached one or more of the implied terms from the Sale of Goods Act 1979. In this case, the test of reasonableness would again apply.

Jiro dealt on ICL's standard terms of business. Clauses 24 and 30 fall within s3 and so must be subjected to the test of reasonableness in order to determine their validity.

The technical meaning of 'reasonableness' under the 1977 Act must be applied. It is dealt with in s11 and Schedule 2 of the Act. Section 11(1) provides that reasonableness is judged by whether the clause is fair and reasonable in the light of circumstances that were known, or ought to have been known at the time of the contract. Section 11(5) provides that the burden of proving reasonableness lies upon the party seeking to rely on the exclusion clause.

Section 11(2) directs the court to have regard to Schedule 2 when considering breach of implied terms in contracts for the sale and supply of goods.

Section 11(5) contains special provisions for dealing with limitation clauses: s11(5)(a) directs that regard should be had to the resources of the party seeking to restrict liability and s11(5)(b) directs that regard should be had to the availability of insurance.

The Schedule 2 criteria include the requirement that the parties knew or ought reasonably to have known 'of the existence and the extent of the term'. This goes beyond the common law test of incorporation and requires that consent to the term be real: see AEG (UK) Ltd v Logic Resource Ltd (1996).

The remaining four criteria within the Schedule may be divided into those which require consideration of economic and business matters which may go to the reality (or lack of it) of consent to the disputed clause. They include the strength of the bargaining positions of the parties and whether there had been an inducement to accept the clause.

It is more likely that the court will regard terms as reasonable where they are between experienced businessmen of equal bargaining power. Where one is deemed to have taken unfair advantage of the other, or the term is so unreasonable that it is likely that one of the parties has misunderstood or failed to consider it, the court will interfere: see Watford Electronics v Sanderson (2001).

It appears that both parties dealing with the contact at arm's length are *prima facie* of equal bargaining power. It is arguable that Jiro's bargaining position is weaker: he is under pressure from his customers to stock the Speedster 2.0 processors and ICL is the only supplier.

In the present contract, Clause 24 excludes liability for damage caused by abnormal use. Assuming that the court finds the use of those affected to be abnormal (see 2(a) above), it will be a question of fact as to whether the term is fair and reasonable in the circumstances.

Clause 30 may be treated differently by the court, as it is a limitation clause. Section 11(4) of the 1977 Act directs the court, when considering reasonableness in limitation clauses to have regard to resources and the availability of insurance. Both ICL and Jiro would be expected to insure against their own business risks. They would include (a) product liability (b) consequential harm to its trade and (c) other foreseeable business risks.

It is arguable that as Jiro had no control over the manufacturing process, ICL should not be able to avoid or limit liability for its own errors or faults. It is also unclear why £10,000 has been chosen as the limit on liability and, if likely losses exceeded that figure, this may suggest the clause is unreasonable in this context. The case of Overseas Medical Supplies Ltd v Orient Transport Services Ltd (1999) demonstrates how the court will compare the size of the £10,000 limit to other limits in widely used standard terms.

Jiro's remedy against ICL could possibly be limited to £10,000 if the court holds such a limit to be reasonable in all the circumstances.

Question 3(a)

Tests employed to distinguish a 'mere representation' include: the importance placed upon the statement by the parties; the relative expertise of the parties; the ability for, or suggestion that, the other party to check the truth of the statement made; the time between the statement being made and the formation of the contract; and the reduction of the statement into the written contract.

The more importance attached to a statement, the more likely it is to be an express term of the contract: see Birch v Paramount Estates (1956). A request for specific details would be an indication of the importance of the statement: Bannerman v White (1861). It is clear that the number of existing patients was of crucial importance to Mary as it was the main reason for her decision to buy a pre-existing practice, and it would appear that she communicated this importance to Nathan. This statement is likely to be a term of the contract.

Nathan is also an experienced dentist and is likely to have intimate knowledge of his own practice. The court is therefore more likely to find the statement is a term: see Dick Bentley Productions v Harold Smith (Motors) Ltd (1965).

However, where there is a considerable gap between the making of the statements and the contract formation, and/or the statements made are not replicated in the written contract, the court may regard such a term as not being incorporated: see Routledge v McKay (1954). There has been a gap of a number of weeks in the present circumstances.

It should also be noted that where the maker of a statement suggests that the other party makes their own checks as to its veracity, the statement is more likely to be a representation, as in the case of Ecay v Godfrey (1947).

These arguments, taken together, suggest that apart from the statement regarding the number of patients (which may well be a term), the other statements will probably be held to be mere representations.

3(b)

A false statement of fact (or possibly law), made by one party to the contract to the other party before the contract was made, with a view to inducing the other party to enter the contract, which does induce the other party to enter into the contract is a misrepresentation.

Regarding the first statement by Nathan, that there were over 200 patients on the books, this may appear to be *prima facie* true as many hundreds of people were recorded as patients in Nathan's records. However, in the context in which the statement was made, it may well be a 'half-truth', as it is clear that Mary is given the impression these are active rather than historic clients. The court may well follow the reasoning given in Dimmock v Hallett (1866) where it was an actionable misrepresentation to describe property as fully let when all tenants had given notice to quit.

Mary entered into a contract with Nathan. The statement as to the number of patients was intended to induce, and did induce, Mary into entering into a

contract for the purchase of the practice. There was is no obligation on Mary to investigate the truth of the representation: Redgrave v Hurd (1881).

Regarding the second statement by Nathan, that business could not be better, this at first appears to be at best a statement of opinion and may well be merely a 'flourishing description' (see Smith v Land and House Property Corp (1884)). If a 'mere puff', it will have no legal effect. However, if it could be said that the opinion is one Nathan could not reasonably hold, he is making a false statement of fact about his true views. This could be argued as in the circumstances Nathan must know that business could indeed be better.

The final statement by Nathan, as to the state of the premises, also appears to be an opinion. Statements of opinion are not usually actionable as misrepresentations (see e.g. Bissett v Wilkinson (1927)), unless the maker of the statement has expertise. While Nathan may well have dental expertise, it is unlikely that he is an expert in damp in buildings. As such, this statement may well be inactionable. Again however, as noted above, if Nathan could not reasonably hold this opinion then the statement may be actionable.

Regarding the statement as to the number of patients, the elements necessary for a successful action in misrepresentation are present.

There are three forms of misrepresentation: fraudulent, innocent and negligent. The form with the greatest practical advantages for Mary is negligent misrepresentation under the Misrepresentation Act 1967. The effect of the 1967 Act is to provide the same remedies for a negligent contractual misrepresentation as for fraudulent misrepresentation, and it will be easier for Mary to prove negligence than fraud.

Section 2(1) of the 1967 Act provides:
'… if the person making the misrepresentation would be liable to damages … had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe … the facts represented were true.'

This effectively transfers the burden of proof to the defendant, who must prove that he had reasonable grounds to believe that the facts represented were true.

In Howard Marine and Dredging Co Ltd v A Ogden and Sons (Excavation) Ltd (1978) the Court of Appeal held that the defendant was liable under s2(1) of the 1967 Act. The defendants had failed to prove that they had not been negligent. Per Bridge LJ: 'the statute imposes an absolute obligation not to state facts which the representor cannot prove he had reasonable ground to believe'.

Here Nathan would have great difficulty in establishing reasonable grounds for his belief. He would have been well aware that he had only seen seven patients in the previous year and is therefore likely to be found liable in negligent misrepresentation.

Mary's right to rescind the contract may be affected by the fact that *restitutio ad integrum* is impossible due to the damage to the building. She will, however, be able to recover full compensation for all losses, whether or not foreseeable as a result of entering into the contract: Doyle v Olby Ironmongers (1969); Royscot v Rogerson (1991).

Question 4

In order for Will and Yolanda to bring an action against Thandie, each must show that there was a valid contract in existence. This is done by establishing the presence of agreement, consideration and intention to create legal relations. It is also necessary to show that a term of the contract was breached.

In order to be enforceable there must, at the time the agreement was formed, have been an intention, by the parties, that the agreement should be binding and that it should have legal consequences.

A court is often faced with the difficulty of coming to a judgment on the thoughts of the parties at some time in the past. The mere assertions of the parties to the action are apt to be unreliable or unsatisfactory in some other way.

In order to address this practical, evidential problem the court makes use of the device of 'rebuttable presumption'. A presumption is a supposition that the law allows or requires to be made. 'Rebuttable' in this context means that the supposition will give way to evidence to the contrary.

In the law of contract, decisions on intention have been traditionally divided into (a) social and domestic situations and (b) commercial situations. To these may be added situations in which public policy plays a significant role.

In social and domestic situations, the presumption is that there is no intention to create legal relations. The reasons behind such a presumption include its appropriateness to most social situations: there is no intention to bind in a legally enforceable agreement. 'The ordinary example is where two parties agree to take a walk together, or where there is an offer and an acceptance of hospitality. Nobody would suggest in ordinary circumstances that those agreements result in what we know as a contract…' Balfour v Balfour (1919) per Atkin LJ.

The burden of proof in such situations is upon the party seeking to establish that there was an intention to create legal relations, as it is that party who seeks to rebut the presumption. What may constitute proof of an intention to create legal relations in such circumstances is essentially a question of fact and is decided upon the circumstances of each case. Factors that have proven influential with the court have included: dealing at arm's length (Merritt v Merritt (1970)), putting financial security at risk (Parker v Clarke (1960)), and money changing hands (Simpkins v Pays (1955)).

Will's agreement

Turning first to the agreement made between Will and Thandie, it is clear that this is made in a domestic setting. Therefore the *prima facie* presumption is that the contract is unenforceable. However, there is persuasive evidence that the presumption may be rebutted in this instance: the agreement has been reduced to writing and signed by the parties, suggesting a formal agreement which either party may wish to rely on in a legal context. Furthermore, a large sum of money is to be exchanged under the contract. It is therefore likely that there was an intention to create legal relations in these circumstances.

Any claim by Will must also show that Thandie is not able to simply revoke the contract. The offer made by Thandie is unilateral. A unilateral offer is accepted by performance. Clearly, Will is yet to fully perform under the contract, as he has not yet obtained a degree in Medicine.

However, it is clear from cases such as Errington v Errington (1951) and Daulia Ltd v Four Millbank Nominees Ltd (1977) that the offeror may not revoke a unilateral offer once the offeree has commenced performance. In the latter case, Goff LJ stated: 'Whilst I think the true view of a unilateral contract must in general be that the offeror is entitled to require full performance of the condition which he has imposed and short of that he is not bound, that must be subject to one important qualification, which stems from the fact that there must be an implied obligation on the part of the offeror not to prevent the condition becoming satisfied, which obligation it seems to me must arise as soon as the offeree starts to perform. Until then the offeror can revoke the whole thing, but once the offeree has embarked on performance it is too late for the offeror to revoke his offer.'

As Will has commenced performance in September 2014, Thandie cannot revoke her offer as long as Will continues to perform by studying Medicine at University.

Yolanda's agreement

The same principles noted above may apply to Yolanda, in that she too must rebut the presumption which has arisen, namely that there was not an intention to create legal relations. *Prima facie* it could appear that this case is analogous to the facts in Jones v Padavatton (1968) where an agreement for a mother to pay for her daughter's legal education was held to lack the requisite intention. However, it could be argued that this is actually a contract made in a commercial context, as Thandie was looking to employ Yolanda in her business with payment of an annual salary. Even if the domestic presumption applies, by the fact that the negotiations were conducted at arm's length and that Yolanda put her financial security at risk by leaving her prestigious employment on the basis of her mother's promise, it would again appear that the presumption will be rebutted.

Yolanda must also show that there was a contract formed between her and her mother, which contained a term to the effect that she would gain a share in the business. The court will require objective evidence. The primary and most commonly used method of establishing agreement is offer and acceptance.

Treitel defines offer as an expression of willingness to contract on certain terms, made with the intention that it shall become binding as soon as it is accepted by the person to whom it is addressed, the 'offeree'. An offer has the following characteristics: it is a conditional promise to act or abstain from acting; it lacks any element of negotiation; and is capable of being turned into agreement by acceptance by the offeree. Thandie made an offer to Yolanda when she first emailed her asking her to come home and work for the business.

Treitel defines acceptance as a final and unqualified expression of assent to the terms of an offer. Any alteration or addition to a written offer therefore constitutes not an acceptance but a counter offer (see Hyde v Wrench (1847)). Yolanda has not accepted the offer. She has altered it. This amounts to a counter-offer, which also destroys Thandie's original offer.

Neither did Thandie expressly accept Yolanda's counter offer, although it could potentially be argued that the phrase 'please come' could constitute some form of acceptance, albeit imperfect. The situation is similar to so-called 'battle of the forms' cases where the party who fires the 'last shot' is the one whose terms are preferred. However, the question would still remain as to which email would constitute the last shot – Thandie's, or her daughter's?

The question of finding agreement in such circumstances was addressed in Butler Machine Tools v Ex-Cell-O Corporation (England) Ltd (1979) and in Gibson v Manchester City Council (1979), where Lord Denning expressed the view that the issue of agreement should be one of fact and not law and that all the circumstances of the case should be considered, including conduct and relevant documents. Whilst Lord Denning's approach was rejected by the House of Lords in Gibson, that does not mean that offer and acceptance are the only approach: per Lord Diplock (ibid) 'there may be certain types of contract, though I think they are exceptional, which do not fit into the normal analysis of contract as being constituted by offer and acceptance'.

Brogden v Metropolitan Railway Co. (1877) has shown that the subsequent conduct of the parties can be sufficient to infer agreement. In the present problem Yolanda's counter-offer was not met with express acceptance, but she could argue that by purchasing the air ticket for Yolanda, Thandie has begun to act upon the agreement. It is therefore certainly arguable that a valid contract exists between the parties.

Thandie is likely to have to comply with the terms of both contracts, and thus pay Will £50,000 if he graduates with a degree in medicine and also transfer half of her business to Yolanda.