Questions matter

A-level

Law

7162/3A Contract

Report on the Examination

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Introduction

Once again, student answers continued to indicate that there has been encouraging progress in study and learning of the law of contract in A-level Law. Inevitably, explanation, analysis/ evaluation and application were of very variable quality across the full range of answers. Nevertheless, students succeeded in demonstrating knowledge and understanding of most areas of law and there was little evidence of the severe gaps in such knowledge and understanding which has sometimes been revealed in earlier series. Answers to the higher value questions, particularly Question 10, were indicative of significant improvement in understanding of how to approach scenario-based questions.

Yet some persistent issues remain, most of which have been identified in previous Reports. In particular:

- when dealing with scenario-based questions, students should try to focus on the specific rules of law which must be explained, analysed and applied to suggest a credible solution or alternative solutions. It is rarely necessary to canvass the whole range of rules on formation of contract, rather than some particular aspect of those rules.
- students should always carefully observe the specific details of the instruction. For example, if, as was the case in Question 08, the instruction specifically calls for a discussion of breach, this is highly unlikely to require any discussion of the elements of formation of contract
- correct terminology is important. As has been explained and emphasised on a number of occasions, rescission is not a universal expression for termination of a contract by an innocent party who has been the victim of a breach of contract. It is an equitable remedy which may be awarded at the discretion of a judge where, say, there has been a misrepresentation or there has been economic duress. Its effect will be to treat the contract as void from the outset, so that it is as if the contract had never been made. By contrast, at common law the innocent victim of a ‘fundamental’ (or ‘repudiatory’) breach of contract will be able to ‘treat the contract as at an end’ (‘elect’ to do so) and will also be able to sue for damages. The effect of that election by the innocent party will be that the contract terminates from the time of communication of the election. Until that time, all rights and obligations remain enforceable
- whilst statutory remedies are very important – for example, those for breach of Consumer Rights Act 2015 terms – so, too, are common law remedies, whether in the context of breach of statutory terms or not. In particular, it is necessary for students to be able to deal with damages as a remedy in a little more detail than is expressed in the simple assertion that “the claimant will be entitled to claim damages” or the conclusion that the amount of the damages will be, effectively, the whole of the contract price (unless, of course, that is genuinely true!).

Question 1

This question required students to select the statement which is false. The correct option was option C:

The consideration supplied by one party to a contract must be approximately equal in value to that supplied by the other party.

Overwhelmingly, students selected this as the correct answer, no doubt fully aware that an equivalence is not required because consideration ‘need not be adequate’. Of the relatively small proportion of students who did not select the correct answer, most chose option B, “an offeror is entitled to specify a precise way in which the offer may be accepted.” However, this is a correct statement. Option A suggested that a request for further information about an offer will not be a rejection of that offer. This also is a true statement. It is well understood that, though a counter offer operates as a rejection of the initial offer, a request for further information about that initial offer, which merely seeks to enable the offeree to understand more about it, will not be a counter offer. So, it will not adversely affect the continued existence of the offer. Equally, in relation to option D, it is clearly established that agreements between family members are subject to a presumption against the intention to create legal relations.

Question 2

This question required students to select the statement which is true. The correct option was option A:

Breach of a term which is a warranty does not entitle the innocent party to terminate the contract.

In view of the significance of the distinction between conditions, warranties and innominate terms (explored in more detail in Question 08, for example), the fact that this option was selected by less than half of the students seemed a little surprising. By comparison with conditions, warranties are regarded as being of less importance to the fulfilment of the obligations under the contract, so that their breach will not fundamentally deprive the innocent party of the benefit that that party expects to gain. Consequently, breach of a term which is a warranty is not a repudiatory breach and does not entitle the innocent party to treat the contract as at an end. A large proportion of students selected option C, "proof of economic duress terminates a contract." This is not a true statement because proof that a party entered into a contract under economic duress will render the contract voidable, so merely entitling that party to argue that the contract should be rescinded by the court. Yet rescission is a discretionary remedy and a court may not award it for a variety of reasons. The suggestion in option B that express terms in a contract are more important than implied terms is unfounded since either variety can be of major (conditions) or minor (warranties) importance. The assertion in option D that rules of law on the effect of termination of a contract by frustration prevent parties from recovering any money already paid under the contract is expressly contradicted by the provisions of the Law Reform (Frustrated Contracts) Act 1943 s1(2).

Question 3

This question required students to identify the kind of person or institution most concerned with the creation of delegated legislation by way of statutory instruments. The correct option was option A, "government ministers". Though this was recognised by a substantial majority of students, a significant minority was divided fairly evenly between Local Councils (option B) and the Supreme Court (option D). The distinction between those with legislative functions, whether primary or secondary, and those with judicial functions is rather central to the traditional notion of the separation of powers. Viewed in that context, though clearly wrong, the choice of Local Councils could be considered to be supported by some rationale. However, equally, the choice of the Supreme Court, an institution definitely without legislative functions, was a little difficult to understand.

Question 4

The UK's break with the EU (Brexit), though very, very substantial, has not yet been completely achieved. A-level Law Specifications are obliged to retain the EU content as it was originally described, save only that it must now take into account the relevant subsequent withdrawal legislation. This question dealt with the process by which action could be brought against a member state of the EU which was not properly implementing EU law. Students were required to identify the institution responsible for beginning legal action against that state. The correct option was Option C, the “European Commission”. This option was chosen by less than a quarter of students. Though incorrect, the most popular selection (about half of the responses) was option B, the Court of Justice of the European Union. This was, perhaps, not surprising. If students were having to make an educated guess, then the Court might appear to be the most likely law-associated institution involved. However, a more helpful analogy (though only very loose) might have been the role of the CPS in England and Wales in advising on criminal charges and undertaking prosecutions, which would then be heard by the courts. Few chose the European Parliament (option D), though substantially more opted for the Council of the European Union (option A).

Question 5

In answering this question, it was necessary for students to recognise that they were being asked to select the statement which would *not* describe an aspect of the rule of law, rather than one which would. The clear choice, then, was option C, “the House of Lords may propose amendments to a Bill”. There is nothing about this statement which is obviously relevant to the meaning or operation of the rule of law, as a large majority of students fully understood. On the other hand, the other options – access to legal representation in criminal trials, equality before the law, protection for judicial independence – all represent key aspects of the rule of law as it is commonly interpreted. The fact that over one fifth of responses selected option D, judicial independence, inevitably prompts speculation that many of the students in question might have been seeking out an option that was very clearly characteristic of the rule of law, rather than the reverse.

Question 6

This question required students to explain how by-laws are made, and to give two examples of matters that might be dealt with using a by-law. To explain how they are made, it was helpful to start by identifying by-laws as a form of delegated legislation, and to refer in some way to Parliament delegating its law-making power, perhaps with reference to an enabling act. The power to make by-laws is given to local authorities to govern certain matters within their area, and to some companies that exercise public or semi-public functions, such as airport operators, railway companies, or the National Trust, to regulate activities on their property.

Examples of matters that a local authority might regulate through the use of a by-law include a prohibition of skateboarding or the drinking of alcohol in a certain area, or the designation of a particular area as a ‘poop scoop area’. A railway company might use a by-law to regulate the behaviour of passengers on its trains, or to restrict access to certain parts of its premises.

The majority of students recognised by-laws as a form of delegated legislation made by local authorities, and some explained the role of an enabling act in delegating law-making power. Only a minority referred to some public companies having the power to make by-laws. Examples were wide-ranging and most students were able to provide at least one. If no example was given, the maximum mark was limited to Band 2 (maximum 3 marks). Inevitably, there was some degree of confusion about what would qualify as a by-law, rather than as a different form of secondary legislation not to be described as a by-law. For example, many answers referred simply to ‘speeding’ or to ‘environmental issues’. It would not be possible to guarantee that such areas were subject solely to by-laws. In the case of speeding, say, the rules could refer to national speed limits imposed centrally, or, perhaps, to particular speed limits imposed by the local traffic authority to meet local conditions. Wherever possible, credit was given for answers which cited examples that could have been appropriate.

Question 7

In this question, students were informed that Ajil had carried out some emergency repair work on a frozen pipe on the exterior of Bushra's house without her knowledge whilst she was away. Ajil was a tradesman and he had often done paid household repairs for Bushra. When Bushra returned, she promised him £70 for the work that he had done on this occasion. However, she subsequently refused to pay any money to him. Students were asked to refer to the rules on past consideration and suggest why there was a possibility that Ajil could enforce Bushra's promise to pay £70 for the work that he did.
The task facing students, then, was briefly to:

- explain the nature of past consideration and the rationale for the proposition that it is not sufficient consideration (Roscorla v Thomas, Re McArdle)
- explain the so-called 'exception' based on the identification of a prior request (express or implied) in circumstances which might be said to carry an implication of payment. This could then be connected to the subsequent promise to pay. This could create the notion that, from the outset, the so-called 'past' consideration was actually consideration supplied in return for the promise, and so was not 'in the past' (Lampleigh v Braithwait, Re Casey's Patents)
- apply the above to suggest that the prior (commercial) relationship between Ajil and Bushra might have been sufficient to create an implied request to do such work, carrying an implied promise of payment which then took specific shape in the subsequent promise to pay the £70.

Many students succeeded in identifying elements of the structure suggested above, notably that past consideration is not regarded as good (sufficient) consideration but that that position may be different when there may be some reason to believe that there was a prior expectation of payment for the work that was done. This formed a basis for the tentative suggestion that the work done by Ajil was not necessarily to be regarded as past consideration in relation to the subsequent promise to pay £70. This certainly produced many answers which fell comfortably within Band 2 but not very often within Band 3. The major deficiency was that neither in explanation nor in application could most students convincingly demonstrate how the prior implied request/promise to pay fused with the subsequent express promise to pay and so could be wrapped around the actual work (the alleged 'past' consideration) to create the appearance of an act (the work) in return for a promise (the payment of £70). In particular, though answers often cited Lampleigh v Braithwait, it was relatively unusual for them to identify the notion of an express or implied prior request. Consequently, the substance of the application depended almost entirely on the perception of an implied promise of payment derived entirely from previous dealings. Equally, few answers specifically connected the subsequent promise to pay £70 with whatever version of the request/implied promise that they had initially asserted.

Much weaker answers were characterised by a variety of approaches that failed correctly to address the issues:

- rather than being the provision of the work by Ajil in repairing the pipe, the past consideration was actually Bushra's promise to pay the £70
- rather than being the provision of the work by Ajil in repairing the pipe, the past consideration was actually Bushra's payments for the work previously done by Ajil at Bushra's request in their previous dealings
- rather than being the provision of the work by Ajil in repairing the pipe, the past consideration was the work previously done by Ajil at Bushra's request in their previous dealings
- Ajil was not entitled to receive any payment because he should not have done the work without first getting Bushra's agreement to it

- this was a case of promissory estoppel – this argument indicated a fundamental misunderstanding of the nature of promissory estoppel as ‘a shield not a sword’.

Question 8

The facts in the scenario in this question revealed that, two weeks before she was due to engage in providing artwork for a fee of £5000 to improve the appearance of Charles’ office, Dua informed him that she was too busy and would not undertake it. However, Charles did not accept the refusal. He continued to expect Dua to do the work and spent £400 making alterations to the office to assist her that he had agreed as part of the deal. The problem for Dua was that, unexpectedly, she had suddenly become very famous, was now very busy and could demand high fees, and so no longer wanted to do the work for Charles. The task for students was to advise Charles as to his rights and remedies against Dua for breach of contract.

In undertaking this task, it was important for students to consider the following elements:

- the kind of breach committed by Dua: this was not yet an ‘actual’ breach, in the sense that the time for performance had not yet arrived. Consequently, it was an ‘anticipatory’ breach which entitled Charles to elect either to accept the breach and sue for the relevant remedies (Hochster v De La Tour) or to treat the contract as subsisting (and so not yet a breach), wait until the time for performance had passed unfulfilled, and then to sue for the breach
- the seriousness of the anticipatory breach: Dua gave notice that she would not do the artwork, her core obligation under the contract. Provision of the artwork was undoubtedly an express term and a condition of the contract (though the quality of the artwork, had Dua actually provided it, could have been regarded as an innominate term under the Consumer Rights Act 2015 s49). Breach of a condition is a fundamental (repudiatory) breach which entitles the innocent party to treat the contract as at an end and to sue for any additional remedy, usually damages but occasionally specific performance
- the response by Charles in electing to continue with the contract, expecting that Dua would fulfil her obligations: Charles could claim that there had been no breach as yet, so that he must continue to perform his own obligations in order to require that Dua should perform hers. On the argument that no breach had yet occurred, he could not be under a duty to mitigate his damage and must incur the expense of £400 to meet his own obligations (White and Carter (Councils) Ltd v McGregor)

- the course of action open to Charles if, ultimately, Dua continued to refuse to perform her obligations under the contract: as indicated above, this breach of the condition would be a fundamental (repudiatory) breach entitling Charles to treat the contract as at an end and to sue for any appropriate remedy. He would be unlikely to be granted the discretionary remedy of specific performance because damages would probably be an adequate remedy and, in any case, it was a contract for personal services
- the damages to be awarded: this might be based on a reliance loss of a maximum of £400 or on an expectation loss that might be difficult to estimate precisely, given the nature, and anticipated effect/value, of the artwork agreed. Could a similar result be achieved by an artist of similar status and skill (as understood at the time the contract was made) and how much would it cost, bearing in mind that the total planned cost to Charles of his deal with Dua was to be £5400?

Stronger answers did succeed in dealing in some form or other, though in varying degrees of detail, with most of the points outlined above, the major weakness usually being in relation to the remedies. This did not prevent answers from reaching Band 3, 'good', though it usually meant that higher marks in that Band were not accessible. However, the quality of most answers to the question placed them within Band 2, 'satisfactory', rather than in Band 3. This was invariably because answers failed to deal with significant aspects of the required explanation, analysis and application. For example, answers often identified the possibility of an anticipatory breach without attempting to explain the alternative courses of action open to the victim/claimant in consequence. Alternatively, answers dealing very clearly with the seriousness of the breach by discussing the distinction between conditions, warranties and innominate terms (sometimes in impressive detail and citing relevant cases such as Poussard v Spiers and Pond, Bettini v Gye and Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd) often failed entirely to recognise that the breach by Dua would be an anticipatory breach. In consequence, they lost the opportunity not only to develop an important part of the analysis of the rights but also of the remedies.

Most answers were very weak in dealing with remedies (see below, additionally, for a discussion of damages). Some did query whether Charles would lose his 'right' to recover the £400 because he already knew of Dua's refusal to undertake the work before he incurred the expense, whether they overtly treated this as a mitigation issue or not. This was creditworthy, since the decision in White and Carter (Councils) Ltd v McGregor has been subjected to vigorous criticism. Yet the argument was rarely linked to the framework of the choice given to a claimant in responding to an anticipatory breach. Some answers correctly dealt with the possible recovery of some or all of the £400 as a matter of reliance loss, though many simply asserted without explanation that it could be recovered. Of the relatively small number of answers that raised the issue of specific performance, few raised any doubts based on the discretionary nature of the remedy and the factors that usually militate against its deployment.

Additionally, there were some common, often rather more serious, errors or omissions:

- many answers asserted that the remedy of rescission would be open to Charles, which would end the contract and enable him to 'recover' the £5000. Treating the contract as at an end in consequence of a fundamental (repudiatory) breach is not at all the same thing as rescission and should not be described as such (see the opening remarks to this Report). Moreover, though perhaps of much less significance, there were no grounds in the facts of the scenario for assuming that Charles had yet paid any of the £5000 fee to Dua
- many answers asserted that Charles was entitled to damages of £5000 without necessarily arguing that it constituted the return of the money that he had already paid to Dua (whether or not he had). Assuming that Charles had not yet paid the £5000, that sum would be highly unlikely to represent the amount of damages that he could claim
- the approach to damages considered above was indicative of a more general failure correctly to explain and apply the standard basis of an award of damages in contract. The aim of damages in contract is, so far as can be achieved by money, to put the claimant in the position in which he/she would have been had the contract been fully performed ('expectation' loss) not to restore the claimant to the position as it was before the contract. As indicated earlier in the list of important elements in the answer, the precise measure of damages to achieve this aim was not easy to determine, so the important thing was to recognise the aim, even if not how to achieve it
- some students fell into the error of spending a lot of time demonstrating that the elements of formation of contract were satisfied (agreement, intent to create legal relations, consideration) to the detriment of any significant consideration of breach. The focus of the task was to explain, analyse and apply notions of breach, which pre-supposed a valid contract and did not require its validity to be established

- the focus on breach in the instruction should also have ruled out any question of termination by frustration but, unfortunately, it did not serve to do so in the eyes of many. Consequently, there were many answers which dealt entirely with frustration or included a substantial treatment of it alongside breach. Some small credit was given to the frustration component, particularly where the answer correctly concluded that, in fact, the contract was not frustrated. However, it should have been absolutely clear that, unexpected and perhaps not reasonably foreseeable though Dua's sudden fame was, the only thing stopping her fulfilling the obligations under the contract with Charles was her own desire to reap the rewards of her fame. In that context, it was clearly her perception that her deal with Charles was of little significance to her. This is not remotely within the scope of the reasons why a contract may be frustrated.

Question 9

This question had two areas of content: a 10-mark part requiring an examination of the concept of justice, and a 5-mark part discussing the extent to which the rules on anticipatory breach might achieve justice for the parties. Most students attempted both parts, and most divided their time appropriately between the two.

An examination of the meaning of justice could initially involve offering synonyms for, and/or explanations of, what justice might entail – eg fairness, equal treatment, impartial decision-making. To develop the examination of the concept of justice, some philosophical theories of justice could be explored, evaluated, and perhaps linked to aspects of the current English legal system. Different types of justice (for example, corrective justice, procedural justice, or substantive justice) might be explained, and again relevant aspects of the English legal system examined to show the presence or lack of a particular type of justice.

Theories of justice often explained in answers included those of Aristotle, Bentham, Marx, Rawls and Nozick. Some stronger answers linked theory to an aspect of the English legal system or to a case, and sometimes evaluated the theory – for example, pointing out the potential injustice to minorities if a utilitarian approach to justice was taken. Different types of justice, such as procedural, corrective, distributive, and substantive, were often identified. Illustrative examples were wide-ranging, including how cuts to legal aid might be seen to undermine procedural justice, or how a sentence or an award of damages, or specific performance might achieve corrective justice. Some explanations of distributive justice were vague and failed to address the different ways in which a 'just' distribution might be achieved – for example, based on merit or need. It was not unusual to encounter answers in which theories were attributed to the wrong philosopher, though this rarely undermined the cogency of the analysis. Answers often also strayed into different debates which were certainly not unconnected with a concept of 'justice' but whose relevance to it was often left opaque. For example, answers debated both what can properly be regarded as a rule of law and what is the connection between law and morality.

In evaluating the extent to which the rules on anticipatory breach of a contract may achieve justice for the parties concerned answers could possibly have dealt with issues such as whether it is just to allow an innocent party:

- to sue immediately for losses when the time for performance has not yet passed
- not to accept a repudiatory breach in the hope of obtaining what was promised
- to continue to perform the contract, if possible, rather than mitigating losses
- to be deprived of rights if, for example, a frustrating event occurs after the innocent party has refused to accept a repudiatory breach.

Of course, alternatively or additionally, answers could have approached the issues from the perspective of the party who has committed the anticipatory breach. Additionally, a comprehensive answer would have related any discussion of aspects above to the framework examination of justice provided in response to the first part of the question.

Most answers did contain some discussion of one or more of the issues raised above. Usually, this took the form of a relatively simple argument that the innocent party receives justice by being given a choice between electing to treat the anticipatory breach as ending the contract (and recovering damages if appropriate) or ignoring it and treating the contract as continuing to subsist. It is perhaps worth noting that this is fully correct only where the breach proposed is a repudiatory breach. Otherwise, the immediate remedy would be an action for damages requiring the innocent party to mitigate the loss but to continue with the contract. This argument was often presented in the context of corrective justice or as an expression of simple 'fairness'. In general, answers to this part of the question were likely to be 'satisfactory' rather than 'good' or 'excellent'. Either of these levels might possibly have been attainable by introducing, for example, some evaluation of the mitigation issue and the controversy around the decision in White and Carter (Councils) v McGregor or the approach to subsequent events, such as frustration, which might deprive the innocent party of rights. Weaker answers often introduced some discussion of potentially relevant aspects but revealed serious confusion about how the doctrine of anticipatory breach operates. For example, many answers suggested that obligations could be satisfied by giving a suitable period of notice that a party did not intend to perform the contract, and that this was 'just'. Others indicated that the purpose of the rules would be to 'balance conflicting interests' in an unspecified way, but certainly one in which little account was to be taken of the degree of responsibility for non-performance to be attributed to each party.

Question 10

This question required students to consider: first, whether Elena had entered into a contract with Gil for the benefit of, and enforceable by, Elena's brother, Ferris for the purchase of a set of ladders. If so, Gil had refused to fulfil his obligations under the contract; second, what rights and remedies were available to Elena against Hana Trading in respect of a vacuum cleaner that Elena had bought but which she alleged had proved very unsatisfactory in operation after only three months.
In relation to Elena/Ferris and Gil, students had to engage with two tasks. The first was to attempt to trace a route through the communications (or lack of) between Elena and Gil in order to discover whether or not a sufficient consensus between them could be identified to represent offer and acceptance. The second was to consider how, if at all, Ferris could take advantage legally of a contract that, if concluded at all, was undoubtedly concluded between Elena and Gil without any apparent involvement of Ferris himself.

Inevitably, there was doubt about the legal interpretation of some of the communications (or lack of) between Elena and Gil, suggesting that students had to be prepared to allow for different possible conclusions about whether a contract between them could be established. If Elena could not establish a contract, then there were no rights of which Ferris could possibly take advantage, irrespective of the status of Ferris as a potential beneficiary of a contract. A comprehensive analysis of the negotiations required students to take account of the following:

- Elena's initial communication with Gil to buy the ladders for £150, including delivery to Ferris. There could be little doubt that this was an offer, given the specific references to price and arrangements for delivery

- Gil's response which, though expressed as an acceptance, contained a significantly different proposal as to transfer of possession of the ladders (collection by Elena rather than delivery by Gil) and could not be interpreted as anything other than a counter offer
- the significance to be attributed to Elena's failure for two days to respond to Gil's counter offer ('silence')
- in view of that silence, which could not be interpreted as an acceptance of the counter offer, the legal effect of the lapse of time over two days on the continued existence of the counter offer at the point when Elena called round to Gil's house to pay for and collect the ladders
- in the (debatable) event that the counter offer did still remain in existence, the legal effect of Elena's attempt to comply with the requirements of the counter offer when she called round, viewed in the context of Gil's statement to her that, "I am not selling the ladders".

The uncertainties around the last two points listed above left open the possibility that Elena and Gil had entered into a contract. This effectively demanded a further analysis of the status of Ferris in terms of privity of contract to consider whether he would have any rights and remedies based on a contract between Elena and Gil. The sensible approach here was to rely on the provisions of the Contracts (Rights of Third Parties) Act 1999. Elena's original offer named Ferris as the person to whom the ladders should be delivered. This might have been regarded as sufficient to satisfy the first statutory requirement (s1(1)(b)) in that the term for purchase of the ladders purported to confer a benefit on Ferris. Equally, it might have been regarded also as satisfying the second requirement, under s1(3), in that it specifically identified Ferris by name. However, a doubt about this might have been that the contract proposed in Elena's original offer was on different terms from those proposed in Gil's counter offer. Specifically, and perhaps crucially, there was no mention of Ferris at all in Gil's counter offer.

If a contract could be established, then Gil's refusal to go ahead with his obligation to sell the ladders and make them available to Ferris (or Elena) would be a fundamental (repudiatory) breach, redressable by an award of damages. The aim would be to put Ferris (or Elena) in the position in which he would have been had the contract been performed. So, the measure of damages would probably be the difference, if any, between what Ferris (or Elena) would have to pay to acquire an equivalent set of ladders and the contract price of £150.

Most answers to this part of the question were at least 'satisfactory', whilst many were 'good' and a reasonable proportion were 'excellent'. Almost invariably, students recognised that the focus was on the agreement aspect of formation of contracts. Within that framework, though in varying detail and often citing a case such as Hyde v Wrench, answers generally identified Elena's initial proposal as an offer and Gil's response as a counter offer which both rejected and terminated Elena's offer. Answers then explained that an acceptance usually requires some form of external conduct by which it is communicated, so that Elena's two days of silence could not constitute acceptance of Gil's counter offer (Felthouse v Bindley) even if it would not in itself be a rejection of the offer. The distinction between stronger and weaker answers commonly emerged in the subsequent legal analysis of the events that followed. Stronger answers carefully examined the possibilities of termination by lapse of time (Ramsgate Victoria Hotel Co v Montefiore) and by revocation directly communicated by Gil to Elena (Dickenson v Dodds in relation to the need for communication) viewed in the context of the possibility that Elena's visit to Gil's house was in itself an attempt to communicate her acceptance of the counter offer. Weaker answers tended to omit any reference to Elena's visit and frequently identified only the lapse of time issue, so that the analysis and conclusions on this aspect were not comprehensive.

Students generally recognised that the instruction required them to discuss the rights and remedies of Ferris rather than of Elena but they were also usually sufficiently astute to understand that this could not be done without first engaging in the analysis above of the contractual relationship between Elena and Gil. Where answers dealt with the 1999 Act, the quality of explanation and application was very variable. Though some clearly understood the dual requirement specified in s1(1)(a)-(b) and s1(3), many answers failed to distinguish between them and often reduced them to a single, rather confused combination of the two. Very occasionally, an answer did recognise that the contract proposed by Gil's counter offer may well have been on terms that differed significantly (in this context) from those originally proposed by Elena but rarely developed the insight into a coherent analysis. Some answers attempted to deal with the privity issue by reference to the pre-1999 Act exceptions to the privity rule, usually by reference to agency or the decision in Jackson v Horizon Holidays. Not surprisingly, these approaches tended to lack substance. Where answers dealt with remedies, they usually identified damages but were rarely specific about either the aim of damages or the measure that might be adopted.

Other errors, some common and more serious, were:

- the failure in any way to address the issues in relation to Ferris. Sometimes this was clearly deliberate and was derived from the view that there was no contract between Elena and Gil, so that Ferris could have no rights and remedies derived from it. Sometimes, there was no evident reason why the role of Ferris went unremarked
- the misinterpretation of the significance of the fact that Elena and Ferris were brother and sister. This fact merely helped to explain why Elena was buying the ladders for Ferris. It did not raise in any way the issue of intent to create legal relations between family members
- the determination to deal in some detail not only with the agreement element of formation of contract but also with consideration and intention to create legal relations. Whilst it could not be wrong to mention the other two formation elements, there was nothing to be gained by spending valuable time analysing and applying them in any detail to the possible detriment of discussion of the agreement and privity elements that were the true focus of the scenario and question.

Elena's purchase of the vacuum cleaner from Hana Trading with the purpose of keeping her house free of pet hairs was a trader/consumer contract for the supply of goods. Consequently, terms as to satisfactory quality, fitness for purpose and description were imposed on Hana Trading in favour of Elena by the Consumer Rights Act 2015 ss9-11. In claiming that goods are in breach of any of those terms, the consumer is entitled to rely on the rebuttable presumption in s19(14) that goods which are found to be in breach at any time within six months of delivery were in breach at the time of delivery. Breach by the trader affords the consumer access to a range of remedies as specified in s19 and subject to further elaboration in ss20-24. The remedies may be claimed according to a prescribed sequence: the short term right to reject (available only within 30 days from, perhaps in most instances, delivery of the goods), the right to repair or replacement, the right to a price reduction or the final right to reject. Hana Trading may or may not have had a valid argument that, when Elena signed the invoice, she had agreed to a term of the contract requiring any complaints about the vacuum cleaner to be reported within six weeks of purchase. However, this purported limitation on, or exclusion of, liability for any breach of the relevant 2015 Act terms would be rendered completely ineffective by s31 of that Act.

In explaining, analysing and applying the 2015 Act rights and remedies to the contract between Elena and Hana Trading, students had to consider:

- the distinction between the capacity of the vacuum cleaner for dealing with general dust and dirt and its capacity for dealing specifically with pet hairs

- the guidance provided in s9(2)-(3) on the factors to be taken into account in determining on an objective basis whether the vacuum cleaner was of satisfactory quality; particularly, price, durability and fitness for any ‘usual’ purpose
- in relation to s10, whether Elena’s obvious desire to buy a vacuum cleaner that would keep her house free of pet hairs was sufficiently evident to Hana Trading
- in relation to both s10 and s11 (description), that there was no evidence in the facts of the scenario that Hana Trading, the manufacturer, or any person authorised to speak on behalf of either, had made any statement describing the capacity of the vacuum cleaner to deal with pet hairs (despite the apparent perception that “the vacuum cleaner was generally considered the best on the market for collecting pet hairs”)
- that, in the event that a breach could be established, the short-term right to reject would be time-barred, forcing Elena to opt for repair or replacement, neither of which she might favour
- that Elena would have no right to a refund or a final right to reject unless repair or replacement failed, or both were unavailable
- that s31 of the 2015 Act would bar any attempt by Hana Trading to limit or exclude liability for breach of any of the relevant terms.

Once again, most answers to this part of the question demonstrated a general understanding of the rights, liabilities and consequent possible remedies concerning the contractual relationship between Elena and Hana Trading. The treatment was usually at least at a satisfactory level but often extended well beyond that into good or excellent. Stronger answers recognised the application of an objective test in the assessment of ‘satisfactory quality’ and the significance of factors such as price, durability and fitness for purpose, though the focus was usually on fitness for purpose. Weaker answers did little more than identify the relevant terms and assert that they had been broken without any attempt to explain, analyse and apply the factors that might support that conclusion. More generally, few answers sought to draw any distinction between the capacity of the vacuum cleaner to deal with general dust and dirt and its capacity to deal particularly with pet hairs. Additionally, whether discussing ‘fitness for purpose’ under s9 or under s10, there was a tendency to assume that any issue about what that purpose was understood to be by Elena and Hana Trading was resolved either by the ‘fact’ that successfully removing pet hairs is one of the ‘usual’ functions of vacuum cleaners, or that Elena had bought it because it was “generally considered the best on the market for collecting pet hairs”. Consequently, most answers suggested that there was a breach of both s9 and s10 and some went on to argue, probably incorrectly, that there was also a breach of s11 because the vacuum cleaner did not conform to its description, whether in general terms as a machine for collecting dust and dirt or, more specifically, for collecting pet hairs (propositions which, of course, were far more relevant to quality and fitness for purpose than to essential description).

Students explained, analysed and applied remedies in a generally comprehensive and impressive manner, demonstrating a strong understanding of the structure and sequencing of those remedies as established by the 2015 Act. Stronger answers recognised that Elena’s use of the vacuum cleaner for three months deprived her of access to the short term right to reject and moved on to explore the structure and content of the remaining remedies. In doing so, they often advanced a view about what remedy might be most likely to satisfy Elena and whether she would be likely to achieve it. Weaker answers tended to list the remedies more or less accurately but rarely supplied any further detail or sought to speculate on which remedy might realistically be available and attractive to Elena. Some answers avoided all reference to the short term right to reject whilst others demonstrated confusion about its meaning and application. Addressing the issue of the purported limitation/exclusion clause (term) proved to be surprisingly challenging to a substantial proportion of students. Many answers accurately explained and applied the presumption contained in s19(14) and so were able to dismiss any anxieties that Elena might experience concerning the three months delay in raising any complaint. However, equally, there were many answers which displayed considerable confusion about the effect of s19(14), failing to understand that it changes the incidence of the burden of proof up to six months. Its effect is to create a rebuttable presumption about the state of the goods as at delivery if they are shown to be in breach at any time within six months of delivery. Instead, answers often argued incorrectly that it resolves the issue of breach at delivery at any time within six months. Conversely, others often incorrectly argued that a breach at delivery cannot be proved after six months. Many answers simply made no reference to the presumption at all.

Stronger answers confidently dismissed any attempt by Hana Trading to rely on the term. Sometimes the analysis and application carefully discussed whether the term had been incorporated into the contract by reference to common law rules before correctly relying on s31. Sometimes, the argument proceeded directly to s31. Either approach was creditworthy, though the first was more comprehensive. Some weaker answers determined that the term might have been incorporated and, rather bizarrely, deemed that, if so, it would be effective to exclude liability despite s31. Others came to that conclusion without any recognition of s31. Still other answers omitted all discussion of this particular aspect.

Question 11

This question required students to consider: first, whether Vince had any rights and remedies against Sara, who appeared to have serviced Vince's racing bicycle very poorly. This had delayed his entry into a series of races in the local bike racing league and deprived him of his opportunity to win a valuable prize awarded to the overall league winner; second, whether Tariq had any rights and remedies against Sara, from whom he had bought a sports watch having been incorrectly told by Sara that it was the same model used by the athletes on a popular television sports programme. The third and final element of the task for students was to assess the role of the judge hearing the trial of an action brought by Tariq against Sara.

The contract between Sara and Vince was a trader/consumer contract for the supply of services. Consequently, terms as to performance of the contract with reasonable care and skill (s49) and within a reasonable time (s52) were imposed on Sara in favour of Vince by the Consumer Rights Act 2015. Any breach in the case of s49 would give rise to a statutory remedy of a repeat performance. Alternatively, if a repeat performance was impossible or was not offered within a reasonable time and/or without significant inconvenience to the consumer, a remedy of a price reduction could be awarded, which could be as much as the full price. In the case of s52, the statutory remedy would simply be a price reduction. However, relevant common law remedies would remain available, too. Where appropriate, they would include the right to treat the contract as at an end for a fundamental (repudiatory) breach and a claim for damages.

In explaining, analysing and applying the 2015 Act rights and remedies to the contract between Sara and Vince, students had to consider whether:

- there was any breach of s52 in view of the fact that Sara had actually embarked on, and completed, the service, albeit very badly – the answer would seem to be that breach of s52 would be a rather improbable claim
- the defects in the service carried out were sufficient to amount to a breach of the requirement for performance with reasonable care and skill (s49) – in view of the failures correctly to deal with gears and brakes, this seemed indisputable

- those failures were sufficiently serious to amount to breach of a condition (assuming the s49 term to be an innominate term), so entitling Vince to treat the contract as ended by a fundamental/repudiatory breach and to claim damages. Alternatively, was Vince to be restricted to, say, the statutory remedies of repeat performance/price reduction and/or common law damages. Again, there was a very powerful argument for classifying the breach as fundamental (repudiatory)
- Vince would want to treat the contract as ended. Vince might have lost all confidence in Sara's ability, though he might be concerned about the time delays if he were to look elsewhere for the service. If he wanted a statutory price reduction, he would first have to give Sara the opportunity to repeat performance of the service
- whether common law damages (and treating the contract as ended) would represent the better choice, and if so, whether an award of damages could include some calculation for Vince's loss of the chance to win the prize (Chaplin v Hicks).

In answering this part of the question, students usually recognised that Sara was a trader offering a service and that Vince was a consumer, so that the rights and remedies under the Consumer Rights Act 2015 were engaged. Most then correctly focused on the provisions of the statute concerning performance of the service with reasonable care and skill (though many did not express the requirement accurately). In doing so, they tended to recognise that there was little to be said about whether Sara's failure properly to deal with the gears and brakes was a breach of the term, since it so obviously was. Stronger answers then gave a reasonably detailed explanation of the statutory remedies, analysing the right to a repeat performance, including requirements and limitations, and the circumstances in which the right to a price reduction might be activated. Weaker answers identified the statutory remedies but supplied little or no supporting analysis, so that application also tended to be brief and superficial.

However, the most significant difference between stronger and weaker answers lay in the approach to the issue of non-statutory remedies. This usually involved the discussion of common law damages, where stronger answers sometimes sought to explain and analyse the general aim of contractual damages and how it might be manifested in an appropriate measure of damages for the breach in question. More often, though, the discussion rapidly moved to the specific problem of compensation for loss of a chance, in which Chaplin v Hicks was frequently cited. Weaker answers simply asserted without any further elaboration that Vince could sue for damages and did not mention the loss of a chance issue at all.

What remained common to both stronger and weaker answers was a failure to consider what remedy or remedies might best suit Vince in his current circumstances, taking into account his distressing experience with the apparently poor quality of Sara's work and his desire to compete in the bike racing league. It was relatively rare to find an answer assessing the probability, and desirability from his perspective, that Vince could treat the contract as ended because of a fundamental breach by Sara. Rarer still was any attempt to consider what effect treating the contract as ended might have had on Vince's right to claim either of the statutory remedies. Instead, answers seemed to depend upon a rather mechanistic approach in which the term was identified, the assertion (correctly) made that it had been broken, and the conclusion drawn that statutory remedies could apply.

Some answers did also discuss the term as to reasonable time for performance (s52) but, in doing so, rarely addressed the implications of the fact that Sara had not actually been late in performing the contract but had simply performed it rather badly. However, since the true focus was reasonable care and skill this lack of precision did not bear very strongly on the overall quality of the response.

In relation to Sara and Tariq, there was no doubt that they had entered into a contract for the sale and purchase of a sports watch. Moreover, the facts in the scenario stated explicitly that this was a 'private' sale between two persons, neither of whom was acting in the capacity of a trader (even though Sara was a trader when dealing with Vince and the racing bike), so that rights and remedies available under the Consumer Rights Act 2015 in a trader/consumer contract for the supply of goods were of no relevance. Though it was not impossible to view the contract as including an express term that the watch was of the same model as that used by the athletes on the popular television sports programme, it did not seem to be a very realistic proposition. Instead, the more profitable approach seemed likely to be that Sara had made a representation which was actually false, and so a misrepresentation. This misrepresentation induced Tariq to enter into the contract. Sara may genuinely have believed the representation to be true, so that it was not made fraudulently but, rather, either innocently or negligently. Alternatively, her evidently cavalier attitude to the truth of what she remembered that "she thought her brother had said about the watch" might indicate that she was aware that it might not be true. In that case, the misrepresentation would have been fraudulent. At the very least, then, Tariq could have sought rescission of the contract and it was very likely that, in principle, damages could have been claimed (based on the assumption that the misrepresentation was most likely to be classified as fraudulent or negligent). However, Tariq's main aim would probably have been to get his money back and there was no evident role for an award of damages.

In answering this part of the question, students invariably interpreted the facts in the scenario as giving rise to an action for misrepresentation. Where, in addition, answers considered the possibility that the offending statement was the possible basis of a term, this was rarely pursued as a serious option. Instead, the debate usually focused on the factors traditionally applied to distinguish between representations and terms and concluded that this was a representation and not a term. When dealing with the elements of misrepresentation, responses were often extensive and detailed. Answers explained, analysed and applied rules on the requirements for statements of fact, proof of falsity, inducement and that the statement was made between parties to the contract eventually concluded. The key issue in application, here, was whether or not the false statement had induced Tariq to enter into the contract. Answers almost inevitably relied upon the statement of fact in the scenario that "Tariq was very impressed by this [Sara's description of the watch] and decided to buy the watch", which was universally interpreted as implying that it was either the decisive factor in his decision to buy or, at the very least, a powerful contribution to that decision. As most answers recognised, either of the above states of mind would have been sufficient, making this a very powerful argument. Answers often included accurate reference to, and use of, case authority such as Spice Girls Ltd v Aprilia World Service BV, Attwood v Small and Redgrave v Hurd. Weaker answers were generally less detailed or occasionally confused in explanation, analysis and application and often omitted one or more elements whilst, nevertheless, succeeding in conveying some knowledge and understanding of the requirements of an actionable misrepresentation.

The quality of explanation, analysis and application of the rules of law on the kind of misrepresentation was much more variable. The strongest answers correctly defined all three kinds, fraudulent, negligent and innocent and carefully examined application of each to the facts in the scenario. The outcome was usually that answers indicated a certainty that the misrepresentation was at least negligent but may even have been fraudulent. This was based first upon the perception that, even if Sara genuinely believed what she said, as a reasonable person she should have been prepared to check her recollections either with her brother or by making some enquiries about the television sports programme. The doubts about fraudulent misrepresentation emerged in relation to the application of the definition of that form of misrepresentation in Derry v Peak as a statement made without belief in its truth. Did Sara really believe what she had said or was she simply closing her mind to the possibility that it was all nonsense in her desire to make the sale? Weaker answers often included careful and accurate explanation and analysis but focused entirely on the distinction between negligent and innocent misrepresentation, usually opting for the former, though occasionally for the latter. Alternatively, the weakness lay in confusion about the definition of the respective forms of misrepresentation. For example, fraudulent misrepresentation was often defined to require knowledge that the statement was untrue and that the 'dishonest' nature implied deliberation with regard to that knowledge. Conversely, it was often suggested that Sara's misrepresentation could not be negligent if she believed that it was true.

In general, consideration of Tariq's remedies arising from Sara's misrepresentation was the weakest aspect of the treatment of the issues. Most students had no difficulty in identifying the remedy of rescission as being available, whatever the kind of misrepresentation. However, few engaged in further analysis which would have explained that the remedy is discretionary and depends upon the possibility of restitutio in integrum, including the consequent barriers to rescission. Similarly, most answers made some reference to the possibility of an award of damages, perhaps citing the Misrepresentation Act 1967 and the court's discretion to award damages in lieu of rescission both for negligent and for innocent misrepresentation. Some also cited negligent misstatement under Hedley Byrne v Heller. Even so, there was little attempt to consider the basis for an award of damages (tortious or contractual?), what damage, if any, Tariq had actually suffered, and so what award of damages could possibly have been appropriate.

In relation to the final element in the question – assessing the role of the judge hearing an action brought by Tariq against Sara – most answers were at least satisfactory, and some were good or excellent, in dealing with a range of issues which included: pre-trial matters, preserving impartiality and independence, paying careful attention to witnesses and their credibility, considering other forms of evidence, making rulings on aspects of applicable law, adopting the correct approach to burden and standard of proof, determining the result and deciding, where appropriate, on remedies. However, some students wrote extensively on what was, in effect, a further consideration, or recitation, of the substantive law previously covered. So, instead of simply dealing with, as it were, the English legal system aspects of the role of the judge – listening to and assessing the evidence, making legal rulings, applying the law – answers detailed which aspects of the law the judge might be considering and how they might apply to the facts of the claim by Tariq against Sara. This was unnecessary detail which, unfortunately, often had the effect of restricting assessment of other relevant aspects of the judge's role. It was also noticeable that many answers incorrectly asserted that a key role of the judge would be to instruct the jury and then to determine any remedies following the decision as to 'guilt' or 'innocence' delivered by the jury. This revealed a surprising inability to distinguish between civil and criminal law.

Mark Ranges and Award of Grades

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