QUESTION GUIDES

These guides are only that: guides. They are suggestions as to how you might approach the questions found at the end of each chapter in the book. There are also some student essays which I have corrected (more will be added as more students write answers!). There is no "model" answer; no two First Class answers look alike. You should try to develop your own writing style and be confident in your approach. This may well involve experimenting and making the most of the opportunity of feedback from your tutors.

One crucial thing to remember, which sounds very obvious but is often forgotten or ignored in an exam, is that you must answer the question set. Not the question you hoped would come up. Or the question to which you have already prepared an answer. Or the question from last year's exam which looks a bit similar... The examiner has asked a particular question for a reason, and part of what is being assessed is your ability to read the question, understand the question, and then answer that question.

Another common and general weakness in student scripts is a lack of authority. It is important to show your ability to engage in legal reasoning and to sustain an argument. But you also want to display your knowledge. In order to do this, I would suggest that you will generally need at least six authorities in your answer. These will often be six different cases, which should all be underlined (or italicised) to make it clear to the examiner upon what you are relying. This is not a strict rule; some answers might require fewer authorities, and sometimes you might spend time discussing five different speeches in a single case which might count as five "hooks" on which you build your answer. Other answers might legitimately spend time discussing secondary sources. The best answers will tend to show evidence of wider reading – especially articles – but it is important to bear in mind that a subject like contract law is very much case-based and you must not prefer secondary sources over primary sources (the cases and legislation). In any event, you want to avoid writing pages of assertion (or waffle) without grounding it in the law.

There is also clearly a difference between problem questions and essays. Essays must have a clear argument that runs through the answer. Your first line, and at least first paragraph, should try to grab the examiner's attention and show that you have something interesting to say about the question that has been asked. And then your argument should be developed throughout the rest of your answer. The argument you make should be balanced, rather than a one-sided rant, but should be clear and consistent. Often students' arguments seem to change through the course of the answer. This is a clear indication that an answer has not been well-planned before starting writing. It is well worth spending a few minutes' longer on planning your answer in order to be confident about what you have to say.

Problem questions are different. Views of tutors differ, but personally I don't think an introduction is very helpful. You want to just start giving advice and dealing with the key issues. The best advice regarding problem questions concerns structure: your answer must be logical and clear. How you do this is up to you, but it might be that you deal with each

claimant in turn, or each defendant in turn, or each issue in turn. As long as your answer is clear, and you deal with all the issues raised, you should be fine.

Chapter 1

This question asks you consider different variations of the 'will theory' and their capacity (or lack thereof) to explain key features of the law of contract. Among other things, you might consider how the various theories fit with the emphasis on objectivity in contract law (Chapter 2), the requirement for consideration (Chapter 7), different judicial approaches to interpretation, implication and rectification (Chapters 12 to 14), and controversies over available remedies (Chapters 26 to 28). Although this question appears in the introductory chapter, it is best attempted at the end of your course, when you have a firm overview of the whole subject.

Chapter 2

Q1. This question requires some discussion of the role of mistake and objectivity in contract formation, and a discussion of cases such as *Hartog v Colin and Shields* [1939] 2 All ER 566, QB. It will also require consideration of whether the intended counter-offer killed off the original offer (see Chapter 3) and a careful use of the facts of the problem.

Q2. This question raises squarely the famous and problematic case of *Smith v Hughes* (1871) LR 6 QB 597. The key issue is whether Laura knew that Alex believed that Laura was promising (as a term of the contract) something which Laura was not promising. *Smith v Hughes* is very much a leading case, and you should be comfortable with it (even though it is a very difficult case!)

Chapter 3

Q1. This is a typical question on offer and acceptance. The key issue from the first paragraph is whether Fitz is making a promise to sell, and how you interpret "I am prepared to sell" (see too Chapter 12).

Olivia's bid is distinguishable from *Harvela Investments Ltd v Royal Trust Co of Canada Ltd* [1986] AC 207, HL because of the maximum set. This then requires discussion of the nature and acceptability of referential bids. You should also consider when the letter is communicated, and whether Fitz's failure to open the letter matters (cf *Blackpool and Fylde Aeroclub Ltd v Blackpool Borough Council* [1990] 1 WLR 1195).

Cyrus' email is complicated and requires you to consider the facts of the problem carefully. Are the parties agreed before the 09.00 deadline? The issue of timing is also relevant to Huck's bid.

When you advise Fitz, you should advise him as to whether he is bound to sell to anybody. It may be that you conclude that no contract has been entered into, depending on the view you take to referential bids and the emails with Cyrus. He might then be free to accept Huck's bid.

Q2. This essay requires you to consider whether there is any contemporary justification for the postal acceptance rule or whether it is a historical relic. If the latter, should it be abolished? Is it enough to say that it should not be abolished simply because it does no harm, or should we insist on a positive justification for the retention of the rule?

You should consider both the case law on the subject, and drawing upon secondary literature such as Gardner's and Hudson's articles could be helpful. You should also draw contrasts with other forms of distance communication, such as fax and email. Is it possible to alight on a justification which explains both the postal rule and the absence of a similarrule for these latter forms of communication?

Chapter 4

Q1. The first thing to consider is whether Jack makes an offer. It would be impressive to note the similarities with *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256 but also perhaps to distinguish *Carlill* since no money is deposited in the bank as a show of sincerity.

One common error concerning Curtis is to think the postal rule applies. This is wrong – the postal rule *only* applies to acceptances.

Jack's second advert might be too late to revoke the offer; this requires discussion of eg *Errington v Errington* [1952] 1 KB 290. And some consideration of how an offer to the whole world can be revoked, given the general need for communication. But in order to consider the rest of the question, you might assume it is arguable that the revocation *could* be effective, or else deal with the other competitors as part of the coda to the question.

David emphasises the possible requirement of communication. Edgar's position might be linked to that in *Dickinson v Dodds* (1876) 2 ChD 463, but is possibly distinguishable if it is not clear that the information comes from a trustworthy source. Tony prompts discussion of whether you need to know of an offer in order to accept it (cf *Gibbons v Proctor*).

Q2. The 'when' aspect of the question requires you to consider whether there is a blanket rule on revocability or whether it depends on the circumstances (eg the terms of the offer). You might also consider whether there are policy reasons for preventing the revocation of an offer (eg to protect the offeree after he has embarked on the act stipulated by the offeror). You must also consider whether the law is satisfactory, which is perhaps best approached by considering critically the two opposing theories as to when acceptance occurs in unilateral contracts. You might also consider whether any other legal analysis might be applicable (such as estoppel) to prevent revocation.

Chapter 5

Q1. This short question raises a number of tricky issues. The first paragraph mentions both a "lock-in" and "lock-out" clause, and you need to be able to discuss, critically, the difference between the two.

You then need to consider the importance and relevance of the agreement being "subject to contract". Has a binding agreement been concluded? If not, has the "subject to contract" bar been waived by the commencement of performance? It might of course be that Chuck has to pay for the services already supplied (whether in contract or unjust enrichment – see further Chapter 28) but that the long-term agreement has not been concluded. Cases such as *RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH and Co KG (UK) Productions* [2010] UKSC 14, [2010] 1 WLR 753 must be considered and distinguished in this answer.

Q2. This essay is primarily concerned with the current state of the law on agreements purporting to impose positive obligations to negotiate on parties. A full answer to this question would probably require you to be familiar with the material in Chapter 19 as well. You might consider the validity of the reasons given for why a 'best endeavours' agreement is enforceable, but a 'good faith' agreement is not. You might also consider whether Lord Ackner was right in *Walford v Miles* to rule out the enforceability of an agreement to negotiate in good faith in all circumstances, or whether there might be some circumstances in which exceptions to this rule might be identified. While the quotation is directed to positive obligations to negotiate, you might also draw contrasts with the law on negative obligations not to negotiate with anyone else.

Chapter 6

Q1. This question requires you to identify what the principles of law are. For example, you might discuss identity/attribute, contracts made in writing at a distance/contracts made face-to-face, void/voidable. And you should assess each principle: is the principle "clear and sound and need no revision" either in isolation or when taken with the other principles? It would be helpful to engage with the reasoning of Lord Hobhouse in *Shogun Finance*, as well as the dissenting judges. You might also consider whether the law has been made clear as a result of *Shogun Finance.* You clearly need to adopt an argument here; whether you agree with the majority or minority in *Shogun Finance*, or have a different view, does not much matter, but you do need to engage with the law and be consistent in your argument.

Q2. This is a problem question that raises a similar issue to the essay question. The contract is made face-to-face, but here it may be that the presumption that Mozzie intends to deal with whoever is in the shop can be rebutted. This might be because Mozzie wants to deal with David Beckham in particular, and also because Mozzie is not simply interested in the creditworthiness of the person in the room: Mozzie wants the car and shirts that only David Beckham can give to him.

Even if there is a contract concluded between Mozzie and Neal, that contract is voidable, and it may be that Mozzie can still rescind the agreement. This is because David Beckham may not enjoy the defence of bona fide purchaser for value without notice, since he knew that he was getting such a good deal.

Chapter 7

Q1. This problem obviously requires careful discussion of promissory estoppel and the decision in *High Trees*. But you should first consider the common law of consideration: the equitable doctrine of promissory estoppel can only apply where the common law does not provide satisfactory relief. Here this looks like an instance of part payment of a debt, so *Foakes v Beer* (1884) 9 App Cas 605 should apply, unless you think that Jay receives some sort of "practical benefit" similar to that in *Williams v Roffey Bros* [1990] 2 WLR 1153. That approach seems to have been rejected for promises to pay less by the Court of Appeal in *Re Selectmove Ltd* [1995] 2 All ER 531, but might be criticised.

Having dealt with the common law, you can then move on to promissory estoppel. You should clearly highlight the requirements of promissory estoppel. Particular issues worth focussing on include whether Phil relied upon the promise (and does it need to be to his detriment?); when is it unconscionable or inequitable to resile from the promise (when Phil inherits under the will or when the investigation clears Phil? Is the promise to accept less rent made because of the investigation or because Phil has no money?); what the effect of promissory estoppel really is (can it extinguish past obligations?)

Q2. This essay requires you to consider possible purposes for the rules of consideration. You might consider whether there are different justifications for the application of the rules for contract formation and those for contract variation. You might also consider whether other doctrines such as intention to create legal relations (see Chapter 8) and economic duress (see Chapter 17) would better fulfil those purposes. Strong answers might refer to various academic theories, but will always remain grounded in the leading cases.

You might also challenge the premise of the quotation. Is it right that *Roffey* and *MWB* would consign consideration to the 'dustbin of history', or would consideration still have some role to play even if *Foakes v Beer* is overruled or sidelined?

Chapter 8

The question asked raises the question of how intention to create legal relations is assessed, and the possible distinction between the business setting and the non-commercial context. It would be possible to answer the question entirely in the abstract, but the best answers will make use of the quotation given. It would be helpful to link the requirements of certainty with those concerning intention to create legal relations, and to set the quotation in context by

offering some explanation and analysis of *Baird Textiles Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274, [2002] 1 All ER (Comm) 737. If you do think that the law is in need of reform, you should also say what reforms you would like to see.

Answers to this sort of question often engage with secondary literature and commentary. That is a good thing. But it must not be the only thing you rely upon: you should use examples and illustrations from the case law as well. The secondary sources should not trump the primary sources. Nevertheless, your own views and arguments must come through clearly.

Chapter 9

The crucial aspect to this question is to maintain a clear and consistent argument. It may be that you think there should be more formalities when entering into a contract. It may be that you think no formality requirements should be needed. Or a position in between. Whatever your position may be, you should explain clearly why certain formality requirements are needed, and what their drawbacks are (the Fuller article is also good on this). The quotation specifically concerns section 4 of the Statute of Frauds 1677, and you should discuss that and, ideally, set the quotation within the context of the decision in *Actionstrength Ltd v International Glass Engineering SpA* [2003] UKHL 17, [2003] 2 AC 541, but your answer should also cover section 2 of the Law of Property (Miscellaneous Provisions) Act 1989.

Chapter 10

Q1. You might first consider whether Doug has any rights under the 1999 Act. The term that the winnings will be divided equally between the three of them does purport to confer a benefit on Doug (s1(1)(b)). There might be a question that then arises as to whether Francis and Clare can unilaterally alter the contract: has Doug communicated his assent to the promisor (s2(1)(a))?

If Doug does not obtain a right under the 1999 Act, then it is unlikely that he could establish a right at common law (trust of a promise?) and will rely upon Clare suing Francis. Given this is an obligation to pay a single sum of money, it is unlikely that specific performance would be granted (cf *Beswick v Beswick* [1968] AC 58, HL). However, if Clare sues for damages there is a difficult question surrounding whether or not she could also recover for Doug's loss (see *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85). It may be that if Doug has a right to sue independently (under the 1999 Act) then he should bring such a claim rather than rely upon Clare (cf *Panatown Ltd v Alfred McAlpine Construction Ltd* [2000] 4 All ER 97, HL).

Q2. Here the focus is on Sissy's claim against Eric in the tort of negligence. Can Eric rely upon the limitation clause in the contract between Sissy and Rayburn Ltd? You might first consider the 1999 Act. S1(6) makes it clear that limitation clauses are covered, and then the crucial section here is s1(1)(b): what term purports to confer a benefit on Eric? Eric wants to rely upon Clause (b), but read by itself this does not purport to confer a benefit on Eric. However, perhaps clauses (a) and (b) can be read together; this is a question of interpretation

(see Chapter 12). If the clauses are adjacent this is more likely than if they are separated by numerous other clauses and 50 pages in a very detailed contract. Section 1(2) and section 1(3) are unlikely to be problematic here.

Having considered the Act, you should then consider the common law (not least because of s7(1) of the Act itself). This question calls for a comparison of *Scruttons* and *The Eurymedon*. Here it seems that it is expressly envisaged that third parties will perform the relevant services, so it seems likely that Eric would be able to rely upon the limitation clause at common law as well. Indeed, the Law Commission thought that the result of *Scruttons* and *The Eurymedon* would be the same under the Act.

Chapter 11

Q1. Signing the contract which says that no warranty has been given might be thought to be determinative if the parol evidence rule is strictly applied. However, it is subject to a number of exceptions. For instance, here there may be a collateral contract. Yet it is unclear whether the guarantee has become a term. The test is clearly objective, but it is surely relevant that Phoebe is not in the business of selling greyhounds (cf *Oscar Chess Ltd v Williams* [1957] 1 WLR 370). If it is a representation, then there may be a claim for misrepresentation (see Chapter 16, noting in particular the potential relevance of section 3 of the Misrepresentation Act 1967).

Q2. This question requires careful consideration of whether clauses (a) and (b) are incorporated into the contract. You must decide when the contract is made. Is it over the telephone? Is it when the email is opened? If at either of those times you might argue that it is too late to include other terms. But perhaps you could say that Clause (b) means the contract should only irrevocably become binding 14 days after the email is opened, or that the existence of Clause (b) means that it is reasonable to include the term. This may be considered strained; Clause (a) is clearly very onerous. Of course, even if the term is incorporated, it may be struck down as unreasonable under UCTA 1977 (see Chapter 15).

Chapter 12

This question requires you to consider critically the nature and scope of interpretation. Leading decisions such as *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101 and *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 all need to be discussed. You might bring out a supposed tension between the meaning of the written document and of the actual agreement. But you must focus on potential limits to the interpretative exercise, such as a need for ambiguity; pre-contractual negotiations; post-contractual conduct. You might also consider whether interpretation should have a broader or narrower scope by reference to an overlap with the doctrine of rectification (considered in Chapter 15).

Chapter 13

This question is based upon a quotation from the recent decision of the Supreme Court in *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72. This is a very important case in this area, and you should be able to engage with the reasoning of the judges. The Supreme Court thought that implication is distinct from interpretation, although in a sense both are concerned with determining the scope of the obligations owed by the parties to one another. The Supreme Court shifted away from the view favoured by Lord Hoffmann in *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10, [2009] 2 All ER (Comm) 1 that implication was just an aspect of a broad doctrine of interpretation. You should express a view about whether this is appropriate, and how the traditional tests of "business efficacy" and "the officious bystander" can be explained. The question is not limited to terms implied in fact (although the quotation from the *Marks & Spencer* case was only concerned with such terms) and it would be legitimate also to consider terms implied at law, for example, and why those implied terms might rest upon a broader basis.

Chapter 14

This question was posed by Lewison LJ in *Cherry Tree*, a case discussed in Chapter 12. This question clearly requires you to take a view on interpretation as well as rectification. If you think that interpretation should have a very broad scope, then you might be prepared to allow that common law doctrine to swallow up the equitable doctrine of rectification. There is obviously more room for rectification to operate if interpretation is more narrowly defined. But in any event, there might be good reasons for maintaining rectification still; some of these were discussed in *Cherry Tree*, and also pointed out by Lord Neuberger in *Marley v Rawlings*. Of course, you might argue that such considerations (such as taking into account pre-contractual negotiations and third party rights) could be accommodated by the common law of interpretation, but you would need to examine critically whether this would be desirable.

Chapter 15

Q1. This problem question concerns limitation clauses. The first issue is whether the clause is incorporated into the contract (see too Chapter 11). Assuming that the clause is part of the contract, and is interpreted such that it covers these claims, you then need to consider the effect of statute.

As regards the office party, Jermaine will seek to rely upon UCTA 1977 section 6 or section 3. This will lead to an assessment of reasonableness. The relative bargaining position of the parties is always relevant, and here it might be that Bret can try to justify the limitation clause as relating to the contract price, distinguishing *St Alban's City and District Council v International Computers Ltd* [1996] 4 All ER 481. If the limitation clause is unreasonable, it may be that some of Jermaine's loss (eg the loss of a chance of future work) is too remote to be recoverable (see Chapter 26).

As regards the birthday party, it is interesting to consider whether Jermaine is a consumer or not. Section 2(3) of the CRA 2015 defines consumer as "an individual acting for purposes that are wholly or mainly outside that individual's trade, business, craft or profession". It is perhaps not entirely clear whether the 2015 applies here. If it does, provisions such as section 31 need to be considered. If Jermaine is not a consumer, then UCTA 1977 applies and a similar analysis to that considered above would be used. It is not clear if Bret has been negligent; if he has, then either UCTA 1977 s2, or CRA 2015 s65 might be invoked. As for recoverable losses, there will again be an issue of remoteness (see Chapter 26).

Q2. This sort of question was particularly popular before the advent of the Consumer Rights Act 2015 when there was a messy overlap between UCTA 1977 and the Unfair Terms in Consumer Contracts Regulations 1999, but is still a worthwhile issue to consider. Is the scope of UCTA too narrow? Should the protection extend beyond exclusion clauses? And is the CRA 2015 satisfactory or over-complicated, and should it be maintained post-Brexit when English courts will no longer be bound by decisions of the Court of Justice of the European Union?

If you do think that the law is defective in some ways – and using further examples from the case law would help to illustrate this - you should also discuss whether the law needs "urgent attention", and what changes you would wish to see. It might be helpful to consider what the common law can achieve regardless of the legislation; drawing further upon the material in Chapter 19, for example, could be useful in this regard.

Chapter 16

Q1. There are two potential misrepresentations here. It might be sensible to deal with each separately. The first concerns the right of way. Easybuck Ltd makes a clear statement which is false, and relied upon by Oxfield Town FC (although it may be arguable, if we had more facts, that Oxfield Town FC was really relying upon its own solicitors: cf *Attwood v Small* (1838) 6 Cl & F 232). The second misrepresentation concerns the ability to use the premises for gambling. Here the representation, if one is made, appears to be through conduct (*Spice Girls Ltd v Aprilla World Service BV* [2002] EWCA Civ 15, [2002] EMLR 27) and even if the representation was true when made, Easybuck Ltd should have corrected it when it became false (*With v O'Flanagan* [1936] Ch 575).

The primary remedy for misrepresentation is rescission, and here you might want to consider whether it is possible to put the parties back into their original positions, and whether there are any possible bars to rescission.

The next remedy to consider is damages. Section 2(1) damages would be best, due to the fiction of fraud measure, which would probably mean that Oxfield Town FC could also recover for the drop in the property market (*Smith New Court Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254). For each misrepresentation, you need to decide whether or not Easybuck Ltd can escape the clutches of section 2(1) (using and perhaps distinguishing *Howard Marine & Dredging Co Ltd v A Ogden & Sons (Excavations) Ltd*

[1978] QB 574). You should also then consider section 2(2), especially if you conclude that a misrepresentation was innocent, and consider the similarities here with *William Sindall plc v Cambridgeshire County Council* [1994] 3 All ER 932.

You might then finally consider the effect of the entire agreement clause, and in particular whether it engages section 3 of the Misrepresentation Act 1967. It would be possible to do this at an earlier stage when considering whether all the elements of a misrepresentation claim have been satisfied. That would be fine; the key thing is to keep a logical, clear structure to your answer.

Q2. Whereas problem questions in misrepresentation tend to have a clear structure (and flow basically in accordance with the flow of Chapter 16) essay questions give you much more scope to choose what material you use and how you present your argument. However, in order to write a strong answer to this question you will need to engage with the language of section 2 closely – and to deal with all the subsections in appropriate depth.

It is understandable why you might focus on section 2(1), for example. Cases such as *Howard Marine & Dredging Co Ltd v A Ogden & Sons (Excavations) Ltd* [1978] QB 574 may seem tough, especially when coupled with the 'fiction of fraud' measure of damages. But you might challenge whether the Act has *necessarily* needed to be interpreted in such a strict manner. When considering the other subsections it would be sensible to engage with recent developments (such as *Salt v Stratstone Specialist Ltd* [2015] EWCA Civ 745 on section 2(2)), and decide whether the results reached are truly unsatisfactory.

Good answers will consider the relationship between the different subsections of section 2, including section 2(4) and the difficult issue of consumer protection. If you do think the section is "unnecessarily complicated", it would be helpful to consider what might be an improvement.

Chapter 17

Q1. This question does raise an issue of duress, but it first raises an important issue of whether the contractual variation is binding. This involves discussing the requirement of consideration, examined in Chapter 7, and in particular the difficult case of *Williams v Roffey*. That case might be distinguished here, because Mike (impliedly?) asks for money from Harvey, rather than Harvey (freely?) offering more money to Mike (which would be more akin to *Williams v Roffey*). If *Roffey* is distinguishable, then you need to go on to consider whether the elements of a claim in duress have been made out. In particular, you might discuss whether Harvey was left with no reasonable practical alternative but to comply with the threat.

Q2. This is a typical exam question that requires you to engage with elements of Consideration (examined in Chapter 7) and duress (Chapter 17). Following the decisions of the Court of Appeal in cases such as *Williams v Roffey Bros* and *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553, [2017] QB 604 there is an argument that the requirements of consideration in the context of contract variation, at least, have been "loosened" since we can now rely upon economic duress to ensure that promises only given as a result of illegitimate pressure are not enforced. A close examination of

Williams v Roffey would therefore be appropriate. At the time of writing, the appeal in the *MWB* case to the Supreme Court is pending, and may help to resolve this issue.

In any event, you need to consider whether we can "rely" on the law of duress. Are the elements of economic duress now clear? It would be sensible to consider the difficulties that still persist within duress itself, and to assess whether the doctrine is sufficiently robust to bear the strain that might be placed upon it if consideration were no longer required for contract variation. How are legitimate commercial (re-)negotiations to be distinguished from illegitimate ones? Would the explicit recognition of lawful act duress destabilise the law? Should this step be taken?

Chapter 18

For this question you should first establish that Josh is acting as a result of Donna's undue influence. But the key to this answer is deciding whether or not Quickbuck Bank had notice of the undue influence such that it cannot enforce Josh's guarantee. You must discuss cases such as *Royal Bank of Scotland v Etridge* here. In particular, it would be helpful to consider whether the bank has done enough to satisfy itself that there is no undue influence here. In accordance with what was said in *Etridge*, the bank has ensured that Josh takes independent legal advice, but the solicitor has also told the bank that Josh would simply do anything Donna told him to do. As a result, it is clearly arguable that the bank did still have notice of the undue influence and should not, perhaps, be able to enforce the guarantee. You might express your own views as to whether the law in this area is satisfactory.

Chapter 19

Q1. This requires you to consider whether the requirements for a contract to be set aside as an unconscionable bargain are too stringent. You might, for instance, consider the emphasis in the case law on the need for the defendant's conduct to be reprehensible – does this set the bar too high? You need also to consider whether the courts were right to reject Lord Denning MR's recognition in *Lloyds Bank v Bundy* of an overarching principle of inequality of bargaining power. Good candidates will note that the quote is taken from a case on lawful act duress and consider whether English law in fact already addresses any issues through other such vitiating factors.

Q2. This requires discussion of unconscionable bargains in a modern context. Is Adam a commercial actor who can look after himself who has just made a bad bargain, or an individual who might deserve more protection under the law? Sainsco might have acted 'badly' – taking advantange of Adam's state and obtaining a vastly inflated price for the land – but is this enough to render the bargain voidable for unconscionability? The idea that consideration must be adequate but not sufficient (see Chapter 7) might also be raised in your answer.

Chapter 20

This is a general and wide-ranging question. It requires you to have a view on good faith, and evidence of wider reading and thinking is often key to achieving the highest marks on this sort of question. You should clearly engage with the recent English decisions on the subject – such as *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] EWHC 111 (QB), [2013] 1 All ER (Comm) 1321, *Mid Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd (t/a Medirest)* [2013] EWCA Civ 200 and *Braganza v BP Shipping Ltd* [2015] UKSC 17 – and bring in knowledge from all areas of contract law. Where the law seems too hard and unfair, should judges be able to invoke general notions such as good faith? Or is the more piecemeal approach of English law satisfactory? You might discuss a perceived tension between 'certainty' and 'fairness', and there are many different ways to write a good answer to this question.

Chapter 21

This is a broad question, and the best answers will engage with the words used in the question itself. You should therefore identify and consider elements which might be thought to be 'confusing' and 'unsatisfactory'. You should also discuss possibility of reform. The focus of your answer will probably be on minors, and some of the old cases that are difficult to reconcile, but discussion of mental incapacity and the recent legislation would also help to provide a full answer.

Chapter 22

Q1. This is an extreme example of illegality. But you would want to consider whether Walter can enforce the contract with Jesse. Specific performance is obviously unlikely, but could Walter sue for damages? Or for restitution on the basis of total failure of consideration? Can Jesse simply keep the deposit? Of course, both parties have committed the criminal offence of conspiracy, and it may be that you think that neither should be able to go to the courts for relief.

The question of whether the law is satisfactory is the burning issue in the law of illegality at the moment. The controversies have not been entirely extinguished by the decision of the Supreme Court in *Patel v Mirza*.

Q2. The Supreme Court in *Patel v Mirza* clearly maintained a defence of illegality, although perhaps of narrower scope. However, should the defence simply be abolished? You would need to consider cases where you think the illegality rules have been misapplied, and created various difficulties.

Chapter 23

Q1. This question requires a careful analysis of *Bell v Lever Bros* and *The Great Peace*. In particular, you must identify whether coherence needed to be 'restored', given the departure from *Solle v Butcher*. You should also consider whether the law is now coherent. Even if you

think that the law is coherent, you might not think it satisfactory, and might suggest potential reforms. Indeed, in *The Great Peace* itself Lord Phillips MR suggested that the remedial consequences might be too strict, and you could consider this against the law on frustration.

Q2. This raises problems of common mistake. The vase had been damaged before the contract was entered into. Amy might argue that there is a common mistake. You might consider whether this is a mistake as to quality, or whether the vase is so damages that it has been destroyed and therefore 'perished'. If the contract is not void for common mistake, is Jake in breach of any implied term (see Chapter 13)? As regards the table, Jake will try to argue that the contract is void for mistake. This is clearly a mistake as to quality, and it is highly unlikely Jake will have any success.

Chapter 24

Q1. This question asks you to compare the law on common mistake and frustration. The view put forward in the Chapters, based on an implied terms approach to the topic, is that the two are closely connected. You should critically consider the utility of this approach and how far the courts have accepted this. You might also consider the effects of common mistake and frustration and what impact this has in reconciling the two areas of the law.

Q2. You should consider each contract Ray enters into separately and in turn. First, there is the contract with Reuben Hotel. Has this been frustrated by the cancellation of the event? Do you think this is more like *Krell v Henry* [1903] 2 KB 740 or *Herne Bay Steam Boat Co v Hutton* [1903] 2 KB 683 (perhaps discussing the cab man example too). Perhaps this will depend on the interpretation of the contract (was it solely for the purpose of this particular match?) and assumes that there is no hardship or force majeure clause that would cover what has happened.

It is also difficult to decide whether Ray's contract with Nigel has been frustrated. Perhaps on a true interpretation of the contract Ray bears the risk of producing both players and is himself in breach. If so, Nigel might sue for damages (including loss of a chance to win the further £10,000 – see Chapter 26). If not, and the contract is frustrated, then you should apply s1(2) as regards the money paid. Perhaps it is reasonable for Nigel to keep the £5000 paid in advance as he might have spent money already on training, preparation and so on (*Gamerco SA v ICM/Fair Warning (Agency) Ltd* [1995] 1 WLR 1226).

Ray might sue Garry for breach of contract in failing to attend, and seek to recover all his losses. But Garry might argue that he is not in breach but instead the contract has been frustrated. This might raise a difficult question about whether Garry is at fault, which is difficult to determine (his conviction might have been for peaceful or violent demonstrations, for example). Perhaps cases such as *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep 1 could be discussed by analogy here.

Chapter 25

Q1. One key issue here is whether 'condition' is used to mean 'condition' in the technical sense, so you need to discuss *Schuler (L) AG v Wickman Machine Tool Sales Ltd* [1974] AC 235. That case is clearly distinguishable here, but even so it is a question of interpretation

(see Chapter 12). If it is a condition, then Brody can clearly terminate for breach. If it is not, then the term is an innominate term. You would then need to consider whether the breach is 'sufficiently serious' to allow Brody to terminate. Using the facts given is important: 2 deliveries out of 8 are late, but that is only 2 out of a possible 24 instalments. Even if you conclude that the late delivery was not a good reason to terminate the contract, you might consider that the termination is still valid because Brody could have terminated due to the stones if the sugar (SGA s14; *The Mihalis Angelos*).

Q2. This question requires you to consider whether the introduction of "innominate terms" in *Hongkong Fir* has improved the law. Discussion of whether a strict condition/warranty distinction would be preferable, and the perceived problems it produced would be important. As would consideration of how *Hongkong Fir* applies in practice: are the outcome of cases predictable? Does it undermine commercial certainty? Or does it lead to greater flexibility, and more "fair" outcomes?

Chapter 26

Q1. Sophie will claim that she has performed her side of the bargain, and so can sue for the agreed sum. There may be a point of interpretation about whether she had to provide the goods at a wedding, but it is clearly at least arguable that she did not need the co-operation of others in order to perform her obligations under the contract. The real issue here is whether Richard and Julia can argue that Sophie did not have a 'legitimate interest' in doing so. This requires you to engage with *White & Carter (Councils) Ltd v McGregor* [1962] AC 413 and subsequent case law. The issue is perhaps particularly striking here since Sophie could easily have mitigated her loss by accepting the offer from Britney and Jason. You must advise on the positive law, and could also offer views as to whether the law is satisfactory and how it might develop.

Q2. In answering the question you should consider both the positive law and what the law should be. In respect of the former, you might consider the split in the Supreme Court in *Geys v Societe General* [[2013] 1 AC 523. In respect of the latter, you might consider (i) which approach would be better as a matter of policy, (ii) which approach fits with underlying principles of contract law and (iii) how legitimate interest is used elsewhere in the law (see eg Chapters 27 and 28). Of course, you might take the view that the legitimate interest bar is erroneous – in which case you should make the case for its abolition, though without straying too far from the question set.

Chapter 27

Q1. The breach of contract committed by Jesse is clear. The focus is on what losses are recoverable. On the traditional approach to remoteness under *Hadley v Baxendale* (1854) 9 Exch 341 the towage and repair costs seem to fall under Limb 1, whilst the missed flight falls

under Limb 2. The latter is difficult: Jesse did know of the flight at the time the contract was made, but is this sufficient for Jesse to recover such losses? This important issue must be considered, and reference to *The Achilleas* [2008] UKHL 48, [2009] 1 AC 61 and the concept of 'assumption of responsibility' should be made.

That is the major aspect of this question. But other issues deserve attention. For instance, is this the type of contract for which Jesse can recover for mental distress (cf *Farley v Skinner* [2001] UKHL 49, [2002] 2 AC 732)? Is it possible to recover for Flynn's loss (cf *Panatown*, and see too Chapter 10)? Is it possible to recover for the supposed loss of a chance here (cf *Chaplin v Hicks* [1911] 2 KB 786)?

Q2. This broad question asks you to consider the "lodestar" as expressed by Lord Scott. *The Golden Victory* itself would be a good case to discuss, critically analysing the split between the majority and minority, and how this was explained by the Supreme Court in *Bunge v Nidera*. You could consider a range of cases where you think the innocent party has not recovered enough (due to restrictions on recovery) or too much (because the award is beyond the loss suffered – see in particular Section 8). You might also consider some of the cases discussed in Chapter 29 on damages that are not based on actual loss suffered.

Chapter 28

Q1. This question concerns a deposit. Following *Makdessi v Cavendish Square Holdings BV* [2015] UKSC 67, it seems that you should first apply the rule against penalties, and then consider whether equitable relief against forfeiture should be granted. On the penalties point, it is important first to establish whether there is a breach of contract, and then to apply the test of penalties as recently stated by the Supreme Court in *Makdessi*. When turning to forfeiture, it is important to decide whether the deposit is reasonable, and whether partial enforcement may be appropriate. Given that the facts raise both penalties and forfeiture, it would perhaps be interesting to see some discussion of the relationship between the two doctrines.

Q2. This question requires a close analysis of *Makdessi* and the "breach rule". Is this a sensible requirement? Can it be easily circumvented by "clever" drafting? And what is the scope of "disguised breach"? It would be useful to contrast *Makdessi* with the decision of the High Court in Australia, and consider whether good reasons can be given for restricting the scope of the penalties rule to the secondary obligations to pay damages. Your discussion might be put in the context of wider concerns of fairness, or commercial certainty, for example.

Chapter 29

Q1. As regards the laying of a new pitch, this does cause loss to Fleetway plc, since it can only sell the stadium for £20,000 less. Is this the only measure of damages? Would it be possible to obtain a 'cost of cure' measure here (cf *Ruxley Electronics and Construction Ltd v Forsyth* [1995] 3 All ER 268; see Chapter 26)? Or are compensatory damages somehow 'inadequate' here, with the result that gain-based relief should be available? A full account of the £100,000 saved seems unlikely (cf *Attorney-General v Blake* [2001] 1 AC 268) but is it arguable that a hypothetical bargain measure of damages would be appropriate here (cf

Experience Hendrix LLC v PPX Enterprises [2003] EWCA Civ 323, [2003] 1 All ER (Comm) 830)? An order of specific performance is unlikely to be granted since money is adequate, but equitable relief in the form of a prohibitory injunction may be available to prevent Blackford RFC from selling any stories.

Q2. This is a very broad question. It requires you to consider a broad range of remedies which are not compensatory damages – including specific performance, injunctions, and an account of profits. Should they al only be awarded in unusual circumstances? That might seem too sweeping – for example, specific performance is the usual remedy in the context of contracts for the sale of land – but you need to consider what touchstone(s) should be used for departing from the "usual" compensatory measure. Good answers might also consider the scope of "compensatory damages" – does this include the hypothetical bargain measure of damages, for example?