



A-LEVEL

LAW

7162/3A: Paper 3A - Contract
Report on the Examination

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Introduction

This was the first Contract examination in the new A-level Law specification and the structure was very different from that adopted in previous A-level Law specifications. A probable consequence was that, although some students were able to produce very effective answers throughout the paper, some students had difficulty in attempting some or all of questions.

One particular aspect of the paper which students should note is that, as the questions progress from 6 to 11, the maximum mark allocation increases. For example, question 6 is allocated a maximum of five marks, question 8 ten marks, and questions 10 and 11, 30 marks. This means that students must devote much more time in answering the later high-mark questions. It was often the case, however, that students had not left themselves sufficient time to give an extended response to questions 10 and 11.

Question 1

The one true response was statement D: specific performance may be awarded where the contract is for the supply of a unique item.

Approximately only one fifth of students opted for this answer, although the majority went for option B (a victim of a breach of contract is entitled to specific performance where the contract is for the supply of personal services). The important points to remember in relation to this remedy are that it will **not** be awarded

- if damages are an adequate remedy (for example where suitable substitute goods are available); or
- in the case of a contract for personal services; or
- where the contract requires constant supervision by the court.

The reason why specific performance may be awarded where the contract is for the supply of a unique item is that this is a good example of where damages would not be an adequate remedy, as a substitute is not available.

Question 2

The one false statement was statement C: it requires the use, or threatened use, of physical force.

This statement was obviously false, as economic duress requires financial pressure rather than physical threats. Approximately two-thirds of students opted for this answer.

Question 3

The one false statement was statement C: The European Court of Justice is the final court of appeal on all law for all member states.

Approximately only one-seventh of students identified this answer, yet statement C was false because the ECJ is not the final court of appeal on **all** law, as it is the final court of appeal on EU law only. In fact, about one half of students selected, as the one false statement, option A (The Council of the European Union has law making powers), but this was a true statement as the Council shares legislative powers with the European Parliament.

Question 4

The one false statement was statement D: it supports attempts by governments to limit access to the civil justice system by reducing state funding for bringing claims.

Approximately two-thirds of students selected this answer. The other three (true) statements were each selected by similar numbers of students, but, given that the rule of law is concerned with principles such as fairness and clarity of the law, a fair judicial process and equality before the law, limiting access to the civil justice system by reducing funding is clearly inconsistent with it.

Question 5

The one true statement was statement A: a court may declare delegated legislation invalid if it is not within powers granted to a minister by the enabling Act.

About one-half of students selected this option, which is based on the principle of *ultra vires*. A very large number of students, however, selected statement B (by-laws can only be made by local authorities), which was incorrect as by-laws can also be made by public corporations on issues which involve the public.

Question 6

This question required students to 'Explain **two** ways in which the law tries to ensure the independence of the judges.'

The mark scheme made it clear, however, that, where only **one** aspect was explained, 3 marks could be awarded for a correct answer.

The mark scheme also specified any of the following arguments as deserving credit:

- security of tenure for superior judges. The government cannot dismiss judges, only the Monarch can, following a petition from both Houses of Parliament after an independent investigation of a complaint
- immunity from suit. Judges cannot be pursued by criminal or civil action for acts carried out in relation to their judicial function, including actions for defamation (see, for example, **Sirros v Moore**)
- the rule barring judges from hearing/deciding a case in which they have a personal or other special interest (see in **In Re Pinochet**)
- freedom from interference by the executive and judicial separation from law-making by the legislature (see s.3 Constitutional Reform Act 2005).

Some students were well-prepared on this topic and were able to gain 5 marks by accurately explaining two of the above, while others gained 3 marks by explaining one of them. It was surprising, however, to see many answers in which students seemed to be unaware of how the independence of judges is achieved. For example, many answers referred to judicial precedent and statutory interpretation, which gained no marks. Other answers gained one mark by hinting at a valid argument without full explanation, for example, by stating that judges are independent from Parliament, but without explaining that they are independent from Parliamentary law-making.

Question 7

This question asked students to apply the rules on offer and acceptance in contract and to suggest why Ben would probably have no rights and therefore no remedies against Alex. Students should have noted that responses merited a maximum of 5 marks. It was therefore important for explanations to be accurate but also simple and brief.

The question could be broken down into the following three stages:

- Ben's message to Alex, 'How much do you want for your car? I think it's worth about £2500.'
- Alex's reply, 'Correct. A deal at £2500, then. No need to reply. Collect when you are ready.'
- when Ben went to collect the car, Alex had sold it to someone else.

The issue in relation to Ben's message was whether it contained a contractual offer, which many students accurately defined as a promise showing a willingness to contract on defined terms. Many students also accurately explained that Ben had not made an offer but merely a request for information and a statement of price, which amounted to an invitation to treat rather than an offer to buy.

In analysing Alex's reply of '...A deal at £2500, then...', many responses correctly suggested that this was an offer, as it was a firm proposal to sell the car.

The issue which some students found problematic was whether there was an acceptance by Ben (of Alex's offer) which requires an unconditional response to the terms of the offer. The important aspect of Alex's reply to Ben in this connection was his statement, 'No need to reply.' This meant that he was trying to impose silence on Ben as a method of acceptance, which well-prepared students explained was invalid, citing the authority of **Felthouse v Bindley**. Some students sought to explain the **Felthouse** rule as meaning that silence cannot amount to acceptance and, although this was not quite accurate, full credit was awarded for it.

Since there was no contract, Alex was not liable to Ben for breach of contract.

Note – many students were awarded credit for the citation of important authorities such as **Harvey v Facey** (a mere statement of price is not an offer) and, as pointed out above, **Felthouse v Bindley**.

Question 8

This scenario-based question required students to advise Clive as to whether he had any rights and remedies against Dan in misrepresentation.

The main features of the scenario were as follows:

- Dan offered to sell a football shirt for £100 which he said had been worn by Eduardo, a famous footballer
- Dan's only reason for saying so was that his friend had told him that 'it looked like' Eduardo's shirt
- Clive wanted to buy the shirt but asked his friend Gary to inspect it. Gary agreed that the shirt could have been worn by Eduardo so Clive paid Dan £100 for it
- it later turned out that Eduardo had never worn the shirt.

Students who were prepared on this topic correctly began by explaining the elements of an actionable misrepresentation. These are

- an untrue (false) statement of fact
- which induces another to enter into a contract.

Dan's statement was clearly untrue, but one of the major issues was whether Clive sufficiently relied on it in entering into the contract. The problem was that Clive had asked for the advice of Gary, which was that Gary agreed that Eduardo 'could have' worn the shirt. Clive then paid Dan the £100.

The law is that a misrepresenter is legally liable for his misrepresentation if it is an 'effective cause' of the entry of the other party into the contract. On the other hand, if the misrepresentation did not influence him at all into making the contract, there is no liability. This means that, if Clive wholly relied on Gary's advice as the reason for buying the shirt, Dan would not be liable. Many students considered this possibility, citing the decision in **Attwood v Small**. In fact, either approach was arguable and gained marks. It was also arguable that, since reliance on the misrepresentation could be partial rather than total, Dan could be liable if Clive relied on his statement and Gary's advice.

A further aspect to consider was whether Dan's misrepresentation was fraudulent, negligent or innocent. Some students referred to the **Derry v Peek** definition of a fraudulent misrepresentation as a false statement made either knowingly, without belief in its truth, or recklessly. Some students argued that Dan knew that his statement was false but this was doubtful, although it was possible that it was fraudulent on the basis that it was made recklessly. Others argued that the statement was negligent on the ground that Dan did not have reasonable grounds to believe that it was true, since his only reason for believing it was his friend's opinion that it 'looks like Eduardo's shirt.' Either approach, fraud or negligence, was rewarded and, although some students argued that the misrepresentation was wholly innocent, this was unlikely, given that Dan did not have reasonable grounds for believing it to be true.

The other aspect which students needed to address related to remedies, which, to a certain extent, depended on the type of misrepresentation identified. All misrepresentations render a contract voidable, meaning that the victim can elect to rescind the contract with the result that both parties are restored to their pre-contractual positions. Thus, if Clive opted to rescind, he would get his £100 back, but he would have to return the shirt. Very few students explained the detailed rules of rescission. In particular, few pointed out that the right to rescind is lost by the victim affirming the contract (treating it as still in force), or by being unable to make substantial restitution of the misrepresenter's property, or by lapse of time. The victim of a fraudulent or negligent misrepresentation also has the option of suing for damages for loss suffered. The victim of a fraudulent misrepresentation can sue at common law, whereas the victim of a negligent one can claim damages under s.2(1) Misrepresentation Act 1967. The victim of an innocent misrepresentation, however, can only claim damages in lieu of (instead of) rescission under s.2(2) of the 1967 Act.

Few students explained the above remedies in detail, but students gained some credit for identification of them. On the other hand, there were some very effective responses on the other aspects of the question. For example, credit was awarded for distinguishing statements of fact from statements of opinion and 'puffs'.

Question 9

This question asked students to ‘Examine the role of law in balancing conflicting interests. Discuss the extent to which the provisions of the Law Reform (Frustrated Contracts) Act 1943 enable a judge to achieve an appropriate balance of conflicting interests where a contract terminates by reason of frustration.’

The question consisted of two parts:

- a concepts of law element (examine the role of law in balancing conflicting interests) and
- a substantive law element (the 1943 Act aspect).

Part 1

The important aspects of the first part of the question which students should have addressed were as follows:

- explanation of the term ‘interest’ and the different categories of ‘interest’, especially public and private
- explanation of the tools/mechanisms by which the law seeks to achieve a balance of interests, especially the substantive law and rules governing the legal process;
- explanation and analysis of areas in which the law has sought to achieve an appropriate balance of conflicting interests. These could involve any area of law, for example, contract, the criminal process, the substantive criminal law, and so on. But, whatever examples were selected by students, it was important to precisely identify the conflicting interests involved, and the way in which these were balanced.

Examples of areas selected by students which illustrated the balancing process were: the law of private nuisance (**Miller v Jackson**), the granting or refusal of bail, the defence of intoxication in the criminal law, rules protecting national security, the rules of contract protecting a (weak) consumer from a stronger business party, and so on. The defence of intoxication, as analysed by the House of Lords in **Majewski**, was a particularly good example. The court identified the interests in conflict as the public interest in protecting the public from violence by drunken individuals, which conflicts with the private interest of a defendant who commits a crime but is so drunk that he does not possess the mens rea of the crime. The public interest leads to intoxication not being allowed as a defence, whereas the private interest leads to the opposite conclusion that it should be. The balancing of these interests in **Majewski** was achieved by the compromise that intoxication is a defence to crimes which require intention, but not those which can be committed recklessly on the basis that getting drunk in itself supplies the recklessness for the crime.

Some students referred to the view or views of the various philosophers who were in favour of the balancing of interests (for example, Bentham, Roscoe Pound and so on) for the promotion of the social good, and these views were credited so long as the points referred to above were also addressed.

In relation to the performance of students in answering the first part of question 9, the more effective responses selected examples of legal scenarios which demonstrated interests which were clearly in conflict, but tended not to define precisely the nature of the interests nor the mechanism by which a balance was achieved. Many students, on the other hand, struggled with this question. Some did not make an attempt.

Note – several responses suggested that an appropriate balance of conflicting interests required that both of them received equality of treatment. This was incorrect. It is true that one type of balance is a compromise, but an appropriate balance can also be one which gives priority to one of them over the other, as was the case, for example, in the private nuisance case of **Miller v Jackson**.

Part 2

The important points of this part which students should have addressed were as follows:

- the overall purpose of the Law Reform (Frustrated Contracts) Act 1943 is to give a judge, following the termination of a contract for frustration, a very wide discretion to arrive at just decisions regarding the financial positions of one party or another
- the basic rules stated in s.1(2) are that any sum paid by one party to the other under the contract before the frustrating event can be recovered, and that any sum payable before that date, but still unpaid, ceases to be payable
- the proviso to s.1(2), however, deals with the situation in which a sum has been paid or is payable by party A to party B, but where B incurred expenses in carrying out the contract before the frustrating event. In order to compensate B for this expenditure, the judge can exercise a discretion, if it is just to do so in the circumstances, to allow B to retain all or part of a sum already paid by A to B, or to recover from A all or any part of a sum payable. But the judge's discretion regarding the amount awarded to B is limited. The judge cannot award more than the sum of money paid or payable, and only up to the value of the expenses. If B's expenses are greater than the sum paid or payable, B cannot be fully compensated
- S.1(3) deals with the situation in which party A has obtained a 'valuable benefit' (other than the payment of money) before the frustrating event as a result of party B's performance of an act under the contract, for example, building a house on A's land. S.1(3) allows B to recover from A a sum which the court thinks just, but the court must take account of all the circumstances in deciding whether any sum is payable, and if so, how much. For example, if the valuable benefit was a structure which B was building on A's land, and it was destroyed by an accidental fire (the frustrating event), then no sum would be payable by A to B as the valuable benefit did not survive the frustration. A factor which would affect the amount of the sum payable would be if A incurred expense in performing the contract before the frustrating event.

Students were not expected to analyse in the above detail the opportunity which courts have under the Act in balancing the financial position of either or both parties, but they should understand:

- the basic rule in s.1(2) regarding sums paid or payable
- the discretion the courts have in allowing a party to claim for expenses from the sums paid or payable
- the circumstances in which under s.1(3) a party who has obtained a tangible benefit under the contract may have to pay the other a just sum.

Question 10

This question produced a very wide range of responses. Some were very effective, displaying very detailed knowledge of the various areas of law involved in the scenario and analysis of the issues. Others were competent but could have been improved by a more detailed knowledge. Some displayed a lack of knowledge and therefore scored very low marks.

There were essentially three separate parts within the scenario:

- Hal's purchase of the faulty tent from Outward, which raised the issue of Outward's implied obligations to Hal under the Consumer Rights Act 2015 to supply goods which were of satisfactory quality (s.9) and reasonably fit for their purpose (s.10)
- Hal's rights under the Consumer Rights Act to remedy Outward's breach of contract in failing to comply with s.9 and 10
- the existence or otherwise of a contract between Jed and Hal.

The issues regarding satisfactory quality and fitness for purpose

Well-prepared students began by explaining that the agreement between Hal and Outward was a contract for the supply of goods by a trader to a consumer. Hal was a consumer as he was an individual acting for purposes wholly or mainly outside his trade, business, craft or profession ie buying a tent for his private use, and Outward was a trader as he was a person acting for purposes relating to a trade, business, craft or profession (s.2 CRA). It was not absolutely necessary for students to quote the words of s.2 perfectly, but it was important at least briefly to explain that Hal was a consumer and Outward a trader and why.

Students then sought to explain, in varying levels of detail, the elements of the terms that goods supplied must be of satisfactory quality (s.9) and reasonably fit for their purpose (s.10). In relation to satisfactory quality, most students merely explained that the tent supplied by Outward was clearly not of satisfactory quality as the tent was 'badly made' and 'would not stand up' and this type of argument scored some marks. However, other students examined the various factors mentioned in s.9 which determine whether goods are of such quality or not. For example, s.9 provides that goods are of satisfactory quality if a reasonable person would regard them as such, taking account of any description of the goods, the price paid and other relevant circumstances, This is a very important aspect of s.9 which means that:

- whether the goods are of satisfactory quality is an objective test and does not depend on the opinion of the seller or buyer; and
- the higher the price paid, the more likely it is that faulty goods are not of satisfactory quality; and
- since the description of the goods is relevant, it is more likely that faulty goods are not of satisfactory quality if they are sold as new rather than as second hand.

Some students referred to these factors by arguing that the test of satisfactory quality is an objective one, and that Hal had paid £200 for the tent and that, since this was (possibly) a high price, it was not of satisfactory quality. Other students also explained that the 'quality' of goods includes their 'state and condition' and also, in appropriate cases, their durability and appearance and this received credit.

In relation to s.10, the implied term of fitness for purpose, this becomes a term of the contract only if the consumer, before the contract is made, makes known to the trader, expressly or by implication, any particular purpose for which he wants to buy the goods. If the consumer does so, the contract is treated as including a term that the goods are reasonably fit (suitable) for that purpose. However, the case law relating to this provision in the Sale of Goods Act 1979 (replaced by the Consumer Rights Act 2015 for consumer/trader relationships) establishes that, if the consumer wants the goods for an obvious purpose (for example food to eat or clothes to wear), he/she does not need to make this known to the trader (see, for example, **Priest v Last and Grant v Australian Knitting Mills**). This principle would obviously be relevant to Hal's tent as he bought it for the obvious purpose of camping.

Many students were able to explain and apply s.10 to Hal's tent and they correctly concluded that it was not fit for purpose as it 'would not stand up' and this conclusion gained marks.

Note – many students referred to s.11 CRA which implies a term that, where goods are supplied by description, they must correspond with the description, but this factor was not credited as there was no reference in the scenario to any description being applied to the goods.

The remedies made available by the Consumer Rights Act to a consumer for a breach of sections 9 and 10

There are potentially five remedies.

- **The short term right to reject the faulty goods (s.20/22).** This gives the consumer the right to reject the goods (to terminate the contract of sale) and obtain a refund of the price paid. In order to reject, the consumer must make it clear to the trader, by words or conduct, that they are terminating the contract. Once the contract is terminated, the trader must give the consumer a refund within 14 days and the consumer must make the goods available for collection by the trader. The major restriction of this remedy is that it must be exercised by the consumer within 30 days from the date on which they obtained delivery of the goods, unless the trader agrees to a later date
- **The right to require the trader to repair or replace the faulty goods (s.23).** If the consumer requires this, the trader must do so within a reasonable time and without significant inconvenience to the consumer and bear any necessary costs of labour and/or materials. A major restriction on these remedies, however, is that consumers cannot require either of them, for example, replacement, if it is impossible (for example, if the goods are unique) or disproportionate. The same restriction applies to repair. A remedy is disproportionate if it (repair, say) imposes unreasonable costs on the trader compared with the other (replacement), or vice versa.

Note – a 'repair' of the goods means making the goods conform with the contract. A 'replacement' must also conform with the contract.

Note – a consumer can ignore the short term right to reject and immediately request a repair or replacement.

- **The right to a price reduction or the final right to reject the goods (s.24).** The right to a price reduction is the right of the consumer to require the trader to reduce the price by an appropriate amount and to refund any money already paid by the consumer above the reduced amount. The reduction can be the full amount of the price. The final right to reject the goods is the right to terminate the contract and to require a refund of money paid under the contract.

It is important to note that the consumer can only exercise **one** of these, **not** both, and that he/she can only exercise the remedy decided on in **one** of the following circumstances:

- where, after one attempt at repair or replacement by the trader, the goods still do not conform with the contract; or
- where the consumer has required repair or replacement but the trader failed to repair or replace the goods within a reasonable time or without significant inconvenience to the consumer; or

- where the consumer can require neither repair or replacement, for example, because both are impossible.

There were some competent responses to this aspect of question 10 which gained satisfactory marks, but there were other answers which displayed good or excellent understanding of the consumer remedies, including the 30 day limit on the short term right to reject. Many students, however, seemed to be unaware of s.31 CRA which provides that a trader cannot enforce a term which seeks to exclude or restrict any liability arising under s.9, 10 or 11 CRA, or exclude or restrict a remedy which would otherwise be available to a consumer in connection with that liability. This was the key to resolving the issue in the second paragraph of the question that Outward, the trader, insisted that Hal was bound by an invoice he had signed stating that goods could only be returned if a fault was reported within 21 days. Students who were aware of s.31 could deal with this very simply by arguing that the limitation was invalid but those who were not aware of it tended to struggle.

Another area which deserved mention was s.19(14) and (15). This is a very important provision in favour of the consumer, which provides that goods which do not conform with the contract at any time within 6 months beginning with the date on which the goods were delivered to the consumer must be taken not to have conformed to it on the delivery date. The consequence is that the burden of proof is on the trader to show that the goods did conform on the delivery date if the trader wants to avoid liability. If, however, the goods are found not to conform after the first 6 months, the burden is on the consumer to prove that they did not conform on the delivery date. The limitation on the 6 month rule is that it applies in relation to the remedies of repair and replacement, price reduction/final right to reject, but not to the short term right to reject.

The existence or otherwise of a contract between Jed and Hal

The agreement between Jed and Hal was that Hal, a builder, promised Jed to carry out repair work on Jed's house in return for Jed having lent Hal a tent for his holiday in the summer, but Hal never did the work. Jed then paid another builder £500 to do the repair work. The issue was whether Jed had rights and remedies against Hal.

In attempting this part of the question, some students argued that there was a contract for the supply of a service under the Consumer Rights Act 2015 between Jed and Hal. They then suggested that Hal had failed to carry out the contract with reasonable care and skill, in breach of s.49 of the Act. The problem with such an argument was that it presumed that a legally binding contract had been formed between the parties whereas this was the very issue to be considered. As a result, such an argument failed to score marks.

There were basically two issues relevant to whether Jed and Hal had formed a contract:

- did they intend to create legal relations?
- did Jed furnish sufficient consideration? Was there past consideration?

The intention to create legal relations issue

Jed was the next-door neighbour of Hal and since Jed had lent Hal a tent, it was reasonable to assume that they were friends. This suggested that the agreement was a domestic or social agreement. The legal presumption in such a situation is that there is no intention to create legal relations, supported by authorities such as **Balfour v Balfour** and **Jones v Padavatton**. On the other hand, there is a presumption that business and commercial agreements are intended to be legally binding. In either case, however, the presumptions can be rebutted by evidence to the

contrary (see, for example, **Parker v Clarke**, in which what appeared to be a social or family agreement was held to be legally binding). Many students explained the above rules and scored well. Many also suggested that the presumption in the case of a social relationship was not rebutted, although others suggested that it was rebutted because Hal had made the agreement in his business capacity as a builder. Both these approaches gained marks.

The consideration issue

Students generally explained the requirement of consideration in the formation of a contract, and, in particular, the principle that ‘past consideration is no consideration’ as established in authorities such as **Roscorla v Thomas** and **Re McCardle**. Some students explained and illustrated the meaning of past consideration, for example, by arguing that Jed had not provided good consideration as his action in lending Hal his tent occurred before the agreement between the parties, and this approach earned marks. On the other hand, some students did not explain, or inaccurately explained, what it meant and were awarded a more basic mark. To gain top marks, however, students were expected to explain the so-called exception to the past consideration rule established in authorities such as **Lampleigh v Brathwaite** and **Re Casey’s Patents**. This principle provides that if A requests B to perform a service, which B then does, and A then promises to pay B money or confer some other benefit, then B’s performance of the service is good consideration as the court implies into A’s initial request a promise to pay a reasonable sum or to confer some other benefit on B. This rule will only apply, however, if the situation is such that A intended to confer a benefit on B and that B expected the benefit. Some students were aware of the **Lampleigh** rule but generally and accurately argued that it did not apply to Jed and Hal as there was no evidence that Hal had asked if he could borrow Jed’s tent. On the other hand, few explained the **Lampleigh** rule clearly.

Question 11

This question required students to:

- consider the rights and remedies of Phil and Katie against the Lander Hotel; and
- consider the rights and remedies of Katie against Nina; and
- assess the likely effectiveness of the remedies available to Phil and Katie.

The rights and remedies of Phil and Katie against the Lander Hotel

This part of the question involved Phil and Katie, who hired a room for £300 at the Lander Hotel for Katie’s 30th birthday. They also paid a deposit of £150. It was agreed that the room was to be available until 1.30am and that food, drink and music would be provided. Two weeks before the party was due to take place, the hotel informed Phil that an ‘unfortunate double-booking’ meant that Katie’s party would have to be transferred to a smaller room which would only be available until 11.30 pm and no food would be available. Phil refused to agree to the alternative facilities and the hotel refused to refund the deposit. Phil and Katie then booked another room at a different venue at a cost of £500.

In determining the rights and remedies of Phil and Katie, the first task of students was to classify the terms relating to the facilities originally offered by the hotel. In this connection, many students explained that the terms were express (stated in the contract) and that they were probably conditions and not warranties. The reason for arguing this was that a condition is a major term which ‘goes to the root’ of a contract, whereas a warranty is a minor term, and it was clearly arguable that the terms regarding the facilities for the birthday were conditions as they were of vital importance for a celebration. The result of this distinction is that a breach of condition entitles the

victim of the breach to terminate the contract and/or to sue for damages, whereas a breach of warranty only gives rise to a claim for damages. Another important point, which fewer students referred to, was that the relevant terms could be classified as innominate terms, with the result that, as the breach was serious (repudiatory) this also gave rise to the right to terminate the contract and/or claim damages (see, for example, **Hong Kong Fir Shipping v Kawasaki**, which some students cited).

A further issue in relation to breach of contract, which some students identified, was the distinction between:

- an actual breach of contract; and
- an anticipatory breach.

An actual breach is a total or partial failure to perform a contract committed at a time **when performance should have already begun**. An anticipatory breach, however, occurs when a party makes it clear to the other **before the time for performance** that he has no intention of performing the contract. This was relevant to the scenario as the hotel committed a repudiatory breach of contract two weeks before Katie's party. The remedies available in such a case are that the victim can accept the breach and terminate the contract or affirm the contract (treat it as still continuing) and claim any damages for loss suffered.

In summarising Phil and Katie's rights, as the Lander Hotel committed a repudiatory breach of contract in refusing to honour the terms of the original agreement for the party, they were entitled to terminate that agreement. This also included the right to recover the £150 deposit. They were also entitled to recover damages for loss of expectation, meaning that they could recover the difference between the £300 payable to the Lander and the £500 paid to the new venue. The point here is that the object of an award of damages for breach of contract is to put the victim of the same position as if the contract had been properly performed. The qualification on this is that Phil and Katie had a duty to take reasonable steps to mitigate their losses and if they failed to do so, the damages would be reduced by the amount they could have saved. For example, could they have got a replacement room more cheaply than £500?

A further possibility was that Phil and Katie could be awarded damages for disappointment, or loss of amenity or for distress and some students briefly referred to this type of claim.

Note – students were awarded credit for discussing frustration but they should have concluded that the frustration was self-induced by a decision within the control of Lander Hotel. It should also be noted that there is a significant difference between facts which raise a prima facie case of frustration and facts which do not (as in the case of the Lander Hotel). In the first case, it is appropriate to discuss whether, nonetheless, the frustration was 'self-induced' (as in, say, **Maritime National Fish Ltd v Ocean Trawlers Ltd**). In the second, the issue of frustration never arises and the debate is simply about breach. In the case of Phil and Katie and the Lander Hotel, there was never any hint of a frustrating event outside of the control and anticipation of the Lander Hotel. Any difficulty that the Hotel had in fulfilling its obligations to Phil and Katie was entirely attributable to its own conduct.

The rights and remedies of Katie against Nina

In this part of the scenario, Phil paid for Katie to have a small dragonfly tattooed on her arm at Nina's tattoo salon. Katie became distressed when she saw the tattoo on her arm, which was much larger than she expected and looked more like a child's drawing of an aeroplane. When Katie complained, Nina said that Phil had paid for it and not Katie.

This scenario raised three issues:

- Privity of contract and the Contracts (Rights of Third Parties) Act 1999
- the obligation of a trader supplying a service to use reasonable care and skill under s.49 Consumer Rights Act 2015
- the remedies of a consumer for a failure to use reasonable care and skill under the Consumer Rights Act.

The privity of contract issue

The problem facing Katie was that Phil paid Nina for the tattoo and therefore the contract was made between Phil and Nina. The result was that Katie was not a party to the contract and, generally speaking, could not sue Nina by virtue of the doctrine of privity. However, under the exception to the doctrine in the 1999 Act, a third party can enforce a contract if the contract expressly provides that the third party can enforce it or if the contract purports to confer a benefit on the third party. In addition, the contract must either identify the third party by name or as a member of a class or as a person answering a particular description. Since Phil, in paying for the tattoo, would have probably given Nina Katie's name and told her that he was paying for Katie to have the tattoo, Katie would probably be able to sue Nina for the poor service under the 1999 Act.

Students in general explained the doctrine of privity and many had some knowledge of the 1999 Act, although the requirements were rarely well-explained.

The reasonable care and skill issue

It was clear that Nina, in tattooing Katie's arm, was supplying a service for the purposes of the Consumer Rights Act 2015. It was also clear that Katie was a consumer and that Nina was a trader. S.49 of the Act provides that a contract for a service is treated as including a term that the service will be carried out with reasonable care and skill. This means that the service should be competently carried out so that a failure to do so is tantamount to negligence. A typical test of reasonable care and skill is 'general and approved practice', meaning that, if the person carrying out the service adopts procedures and practices which are usual in a particular area of expertise, then he/she will probably be using reasonable care and skill. Since Nina created a tattoo which was much larger than Katie expected and looked like a child's drawing of an aeroplane, it was likely that Nina did not use reasonable care and skill.

Many students displayed at least a competent knowledge of s.49.

The remedies of a consumer for a failure to use reasonable care and skill under the Consumer Rights Act

The effect of s.55 Consumer Rights Act is that, if the trader supplying the service does not use reasonable care and skill, the consumer has the remedy of the right to repeat performance, requiring the trader to repeat the service so that it complies with the contract. If the consumer requires this remedy, the trader must provide it within a reasonable time and without significant inconvenience to the consumer and bear any necessary costs of labour and materials. The one limitation on this remedy is that the consumer cannot require it if it is impossible for repeat performance to make the service conform with the contract. This might have applied in Katie's case as it might have been impossible to make the tattoo look like she wanted it to. The other remedy which might have been available to Katie was the right to a price reduction under s.56,

together with a refund of money paid above the reduced amount. However, the consumer will be entitled to a price reduction only in one of the following situations:

- if he/she had required repeat performance but the trader did not do so within a reasonable time or caused significant inconvenience to the consumer; or
- the consumer cannot require repeat performance on the ground that it is impossible to achieve conformity with the contract.

The probable outcomes for Katie were that she would not want repeat performance as she probably had no confidence in Nina's ability, and that she would ask for a price reduction and damages for the cost of hiring a third party to remedy the poor work. She would probably also be entitled to damages at common law for distress and disappointment.

An assessment of the likely effectiveness of the remedies available to Phil and Katie

Some students attempted this part of the question but many did not. Those who did suggested that Phil and Katie's remedies were effective in relation to financial losses but were less effective in remedying emotional problems such as disappointment and stress. This was argued by some students in relation to Katie's disappointment following the poor tattoo.

Mark Ranges and Award of Grades

Grade boundaries and cumulative percentage grades are available on the [Results Statistics](#) page of the AQA Website.

Use of statistics

Statistics used in this report may be taken from incomplete processing data. However, this data still gives a true account on how students have performed for each question.