CONTRACT LAW READING LISTS
2023-2024

Plan of reading lists
THE BASICS
1. The basic rules
2. Formality and formalisation
3. The terms of the contract
4. Contractual remedies
GETTING OUT OF A BAD DEAL
5. Unfair terms
6. Termination of contract
7. Mistake and misrepresentation
8. Duress and undue influence

Books
On the reading lists, I'll be referring to Davies, *J C Smith's The Law of Contract*, 3rd ed (OUP, 2021) ('Davies' on the reading list). We will also be referring from time to time to Nick McBride, *Key Ideas in Contract Law* (Hart Publishing, 2017) ('McBride' on the reading lists) and Jonathan Morgan, *Great Debates in Contract Law*, 3rd ed (Palgrave Macmillan, 2020) ('Morgan' on the reading lists). You should also have a copy of *Blackstone's Statutes on Contract, Tort and Restitution*: the copy you used last year for Tort Law should be fine.

Cases
The reading lists will refer you to a number of key cases – you will be expected to read them. But having read them, don't stop there. You will need to know a lot more cases than these for the exam. Use your textbook, various casenotes and articles I will refer you to, your lectures, and researches on Westlaw, to get a much better all-round knowledge of the cases in this area of law.

mcbridesguides
I have written a number of essays for you to help you out with various aspects of your Contract studies. These are available on my website www.mcbridesguides.com . I have concentrated on areas of the law that are not dealt with at all well in the textbooks. I will indicate on the reading lists as and when you will need to read one of these essays. When I do, MAKE SURE YOU READ IT before the supervision. It is far more important that you read these essays than anything else on the reading list. I will be pretty displeased if I have to spend time in the supervision going over points that I have worked hard to set out clearly and at length in an essay for you. I want to use the supervisions to focus on going over past paper questions, and any queries that you still have AFTER you have read everything I have told you to read.

Aims and objectives
Each week, I will set out the aims and objectives that you should have in mind in going through the reading. Check your progress against these aims and objectives, and if you are failing to achieve these aims and objectives, see if a different approach to your work would help; if not, ask me in the supervision about any areas of the law where you are still not up to speed.

Written work
Every two supervisions, you will be expected to do some written work and hand it in, in the supervision. What written work will be specified on the reading list.

Questions for the supervision
Every week (other than the last week), I will set you some questions that you should consider before the supervision: we will go through them in the supervision. They will help guide your reading by pointing you towards the kinds of issues that the examiners are likely to ask about in the exams, as well

as helping you develop your understanding of the law by thinking about how it applies in concrete situations – it is very easy to get lost in the abstractions of contract law (something which your textbooks don't exactly encourage you not to do) and it is necessary always to try to pull the subject down to the ground and get a sense of how it works in practice.

Past paper questions
At the end of every supervision reading list, you will find some past paper questions relevant to the reading for that supervision. We will be aiming to go through some of these questions in the supervision – so it would be a good idea to have a look at them before the supervision and get some general idea of what the questions are about and how you might try to answer them.

Supervisions
Please note that (other than in 5th week of Lent Term, when I will be out of the country):

****I will not be holding any supervisions on Zoom this year****

If you are feeling ill, do not struggle on and attend the supervision and potentially make others sick. Simply get in touch with me (my email address is below) and we can see about slotting you into a later supervision group when you are better. If that isn't possible, you will always be able to get the notes for the supervision from someone else in your year. One person disregarded these rules last year, and as a result I was made very seriously ill – please respect these rules and do not try to circumvent them.

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SUPERVISION 1. THE BASIC RULES

Reading
McBride, ch 1
(1) The need for consideration
mcbridesguides → Contract Law → Tests of Enforceability → Doctrine of consideration
Davies, 76-86
(2) Offer and acceptance
mcbridesguides → Contract Law → Contract Formation → Offer and acceptance
Davies, chs 3-4
Carlill v *Carbolic Smoke Ball Co* [1893] 1 QB 256
Errington v *Errington* [1952] 1 KB 290
McBride, 51-53
Harvela Investments Ltd v *Royal Trust of Canada* [1986] AC 207
Blackpool and Fylde Aero Club v *Blackpool BC* [1990] 1 WLR 1195
(3) Objectivity
mcbridesguides → Contract Law → Terms of Contract → Objective Test
mcbridesguides → Contract Law → Contract Formation → Battle of the forms
Davies, chs 2, 11
Thornton v *Shoe Lane Parking Ltd* [1971] 2 QB 163
Interfoto Picture Library v *Stiletto Visual Programme* [1988] 2 WLR 615

Aims and objectives
In doing this reading, you should aim:

(1) To get a good idea of the aims and functions of contract law.

(2) To understand the distinction between a unilateral contract and a bilateral contract.

(3) To get a basic understanding of the doctrine of consideration, and a good understanding of the law on contract formation (offer and acceptance), and in particular how the law on contract formation applies to auction situations.

(4) To understand how the 'objective test' for determining the terms of a contract works, and in particular how it applies in cases involving standard form contracting.

Questions for the supervision

1. Is there a contract in the following situations:

(a) *Mother* promises *Daughter* that if *Daughter* does not get pregnant at university, *Mother* will pay *Daughter* £1,000 on graduation. Unknown to *Mother*, *Daughter* is a lesbian with zero interest in having sex with men. *Daughter* has now graduated, without ever getting pregnant.

(b) *Teen* offers to caddy for *Pro* for free at a golf tournament in *Teen*'s town. *Pro* agrees to *Teen*'s generous offer. On the day of the tournament, *Teen* is nowhere to be found, and *Pro* has to carry his own clubs around the greens.

(c) *Father* bets £100 on his son, *Champ*, to win a Major golf tournament before he is 21 at odds of 1,000-1, and promises *Champ* that he will split any winnings with him 50-50. *Champ* did win a Major before he was 21, and *Father* won £100,000.

(d) *Sad* puts up posters on trees in her neighbourhood asking if anyone has seen her lost cat and offering £100 for his safe return. The cat had made its home two houses up the road in *Lonely*'s house. *Lonely* sees the posters and returns the cat to *Sad*.

2. Is there a contract in the following situations:

(a) A offers to sell his car to B for £1,000. B posts A a letter at 8 pm on Wednesday, saying that he will take the car at the offered price. At 9 pm A rings B to say he doesn't want to sell the car anymore.

(b) The same as (a), but B sends an email to A's office saying he will take the car at the offered price.

(c) The same as (a), except A never rings B, and at 9 pm B rings A to say he has changed his mind and doesn't want the car anymore and A should ignore his letter when it arrives.

(d) In return for £10,000, *Author* agrees to negotiate with *Disney* over the sale of the film rights to her book for two months, before offering the book to any other film production company.

(e) *Jeff* promises to give *Sandy* £5,000 if she swims 100 lengths of the Cambridge swimming pool in under two hours. She has swum 10 lengths in 10 minutes.

3. *Charlie* is producing a play. He auditions *Sally* and *Frances* for the lead female role. He texts *Sally* to offer her the part. When he doesn't hear anything from *Sally* for a day, he emails *Frances* to offer her the part instead. *Frances* immediately emails back to say she accepts the role. One hour later, *Sally* texts *Charlie* to say that she accepts the role; she apologises for being so late to let her know but she had lost her mobile phone for a while.

4. *Bill* advertises his motorbike for sale on the Internet on Monday: 'For sale to highest bidder by deadline of 11.59 pm on Friday.' Various people bid for the bike, including *Sam*. On Wednesday, *Charlie* contacts *Bill*, saying 'I can't wait until Friday: I'll give you £5,000 for the bike if you agree to sell it to me right now.' *Bill* agrees and closes the website down on which he was conducting the auction. At that time, the highest bidder was *Sam*, with a bid of £3,000. Can *Sam* sue *Bill*?

Past paper questions

3 Answer **both** (*a*) **and** (*b*):

(*a*) Is past consideration good consideration? Should it be?

and

(*b*) Glitzy Ltd, a clothes manufacturer, supplied women's clothing to Aardvark Ltd, a well-known department store, for over 30 years. Under the arrangement Glitzy supplied Aardvark with garments year by year on a seasonal basis; Glitzy allowed Aardvark to be closely involved in the design and manufacture of the garments so to be supplied; and Glitzy maintained a workforce and manufacturing capacity sufficient to meet and be highly responsive to Aardvark's continuing requirements. However, no express contract was ever concluded between the parties to regulate this on-going relationship. A high proportion of Glitzy's sales were to Aardvark. Glitzy believed, on the basis of its dealings over the years and statements by Aardvark's representatives, that Aardvark had implicitly promised that the relationship would continue in the long term and would be terminable only upon the giving of reasonable notice. Indeed, Glitzy organised its business on this basis. In January 2001 Aardvark informed Glitzy that once current orders had been met all supply arrangements with Glitzy would be terminated forthwith.

Advise Glitzy.

1 On Friday Andy wrote to Basil, Cohn, and Don as follows: 'Ian Botham's Headingley bat, as used in the 1981 Leeds test-match: sale to highest bidder: submit your best bid by 9 a. m. next Thursday.' The following responses were made:

(i) On Saturday Basil faxed Andy: 'I'm prepared to pay £9,000'. Five minutes later, Basil e-mailed Andy: 'ignore my fax; I retract my bid'. Andy read the fax, but deleted the e-mail without reading it, wrongly assuming that it merely confirmed the fax.

(ii) On Tuesday Cohn sent Andy a letter, correctly stamped and addressed, stating: 'I will pay £6,000 or £1,000 more than the highest fixed price bid, subject to maximum of £10,000'. This letter was lost in the post.

(iii) On Thursday at 8.55 a. m. (just before the dead-line), Don e-mailed Andy: 'I can pay £8,000 if you give me two months to pay'. Andy e-mailed at 8.59 a.m.: 'Keep it simple. I assume that you're bidding £8,000 for immediate payment'. Don replied at 9.01 a.m.: 'Agreed; I'll pay £8,000 in cash on delivery'.

To whom, if anyone, is Andy bound to sell?

5 On 1 April 2014, Olive, a dealer in sports medals, inserted an advertisement in the magazine *Sporting Heroes*: 'Goalkeeper's World Cup Winner's Medal (1966) for sale; offer to be accepted by post or e-mail by midnight, end of 9 April 2014; sale to highest clear price in excess of £5,000.' Olive supplied both her business postal address and e-mail address in the same advertisement. The following responses to the advertisement were made:

(i) on 2 April Olive received from Angel an e-mail which stated: 'my price is £7,000 or £1 more than the highest bid (fixed or referential), but my highest possible price is £40,000'; Olive read the e-mail on the same day;

(ii) on 3 April Beryl posted a letter ('letter 1') which stated 'my price is £15,000, sincerely, Beryl'; on 4 April Beryl delivered by hand a letter ('letter 2') cancelling her acceptance, but Olive was too busy to read it at this point; letter 1 arrived on 5 April; on 10 April Olive read letter 1 and Olive tore up letter 2 without reading it, fearing (correctly) that letter 2 might contain a change of mind;

(iii) on 5 April Chuck and Olive were swimming when Chuck said: 'I'm prepared to give you £13,000 for that World Cup medal'; because of the noise in the swimming pool, Olive misheard and thought that Chuck had said '£30,000'; on 10 April, Chuck delivered a letter enclosing a cheque for £13,000 with a note which read 'as agreed'.

The deadline has long since passed, but Olive has yet to decide to whom, if any, she must sell the medal and for how much.
Advise Olive.

5 *(a)* Rufus publishes a national newspaper advertisement offering a £100,000 prize to the first person to sail single-handed from Southampton to Sydney, sailing on 1 April 2012. Ahab, Pugwash and Bligh all independently decide to compete. All three purchase supplies for the journey and Bligh buys a new boat. They separately set sail from Southampton on 1 April. Rufus changes his mind on 10 April and places an announcement to this effect in all national newspapers. The news is radioed to Ahab and Bligh on the same day by their support teams in Southampton. Ahab decides to abandon the race and proceeds directly to the nearest port. Bligh decides to press on with the race anyway. Pugwash is unaware of Rufus's change of mind. Pugwash reaches Sydney on 14 May and telephones Rufus to claim the prize. Bligh reaches Sydney on 15 May.
Advise Rufus, Ahab, Pugwash and Bligh.

(*b*) Quentin offers to sell his collection of Andy Warhol silkscreen prints to Rosa for £800,000. Rosa replies by letter, 'I am prepared to pay £870,000 for your Warhols'. Realising that Rosa meant to write £780,000, Quentin immediately sends her a fax stating 'Warhols sold to you for £870,000'. Rosa writes to Quentin pointing out her mistake and says she now accepts Quentin's original offer of £800,000. Can Quentin demand that Rosa buy the collection for £870,000, or Rosa that Quentin sell it for £800,000?

(b) 'Traditional offer and acceptance analysis is to be applied in battle of the forms cases. That has the great merit of providing a degree of certainty which is both desirable and necessary in order to promote effective commercial relationships.' (DYSON LJ, *Tekdata Intercommunications* v. *Ampenol Ltd*, 2009)

Discuss.

1 *(a)* The following communications took place in early 2005:

(i) on Wednesday 26 January, Vince e-mailed Peter and said: 'Class "A" peanuts for sale at £10 per kilogram; please notify any bulk order'.

(ii) At noon on Sunday 30 January, Peter e-mailed Vince and ordered: '500 kilograms of class "A" peanuts at £10 per kilogram; to be dispatched immediately; no need for you to confirm'.

(iii) An hour later, Peter left this message on Vince's home answering machine: 'Peter here; ignore e-mail recently sent; deal is now off'.

(iv) On Monday 31 January, at 10.00 am, Vince, who had been staying with a friend for several days and so was unaware of Peter's telephone message mentioned at *(iii)*, read Peter's e-mail, mentioned at *(ii)*. Vince then left the goods at Peter's warehouse, together with a note which read: 'Please send cheque to Vince within 14 days'.

(v) At 10.15 am on Monday 31 January, Vince e-mailed Peter and said: 'Goods just dispatched as requested; price is as specified during earlier correspondence or the market price at close of London dealing on day of delivery, whichever is higher'. (The market price at the end of that day was £15 per kilogram.)

Advise Vince whether there is a contract on these facts and, if so, at what price.

and

(b) 'Rather than solving the problem of the battle of forms, [the law on this point] could be said to create one by encouraging the parties to keep on sending their forms in the hope that theirs will be the "last shot".' (LINDA MULCAHY)

Discuss.

5 *(a)* Chris will start studying law at Halebury College in October 2017. On 1 September 2017, Adam, a law student at the same college who will be in the second year in October, sends a letter to Chris, asking him whether he wants to buy Adam's first-year law books for £150. On 3 September 2017, Chris posts a letter to Adam saying that he will happily buy the books for that price and that if he does not hear from Adam, he will assume they have a deal. The next day, Chris reads online that Halebury College is planning a second-hand book sale for first-year law students on 1 October 2017. He immediately sends a text to Adam's phone, saying that he is no longer interested in buying Adam's books. Due to problems with Adam's phone, Adam never receives Chris's text. Chris's letter arrives on 5 September 2017. Assuming he has a deal with Chris, Adam does not try to sell his books at Halebury College's second-hand book sale. On 2 October 2017, Adam discovers Chris's change of mind. Adam can no longer sell his first-year law books to any first-year law student at Halebury College. The local bookshop is willing to buy them for £50.

Advise Adam.

SUPERVISION 2. FORMALITY AND FORMALISATION

Reading

(1) The uses of formality

Fuller, 'Consideration and form' (1941) 41 Columbia LR 799, 799-806

(2) Contracts requiring writing to be valid

Davies, 115-21

Law of Property (Miscellaneous Provisions) Act 1989, s 2

(3) Using a deed to make a gift promise valid

Davies, 3

Law of Property (Miscellaneous Provisions) Act 1989, s 1

McBride, 97-99

Gordon, 'A dialogue on the doctrine of consideration' (1990) 75 Cornell LR 987

(4) Using nominal consideration to make a gift promise valid

McBride, 100-101

(5) Informal gift promises (1): gratuitous variations of contract terms

Davies, 86-93

McBride, 101-106

Morgan, 48-58

Williams v *Roffey Bros & Nicholls* [1991] 1 QB 1

MWB Business Exchange Centres Ltd v *Rock Advertising Ltd* [2017] QB 604 (noted, mcbridesguides → Contract Law → Contract Law Casenotes; O'Sullivan, (2017) 133 LQR 191; Davies, (2016) 75 CLJ 455)

Rock Advertising Ltd v *MWB Business Exchange Centres Ltd* [2019] AC 119, at [18] (per Lord Sumption), [20] (per Lord Briggs)

Coote, 'Consideration and variations: a different solution' (2004) 120 LQR 19

(6) Informal gift promises (2): the effect of the law on estoppel

mcbridesguides → Contract Law → Tests of Enforceability → Estoppel

Davies, 93-102

McBride, 18-23, 54, 112-20

Morgan, 58-72

(7) Formalisation required by the law (1): intent to create legal relations

mcbridesguides → Contract Law → Tests of Enforceability → Intent to Create Legal Relations

Davies, chapter 8

Blue v *Ashley* [2017] EWHC 1928 (Comm)

(8) Formalisation required by the law (2): the need for certainty over terms

Davies, ch 5

Trakman and Sharma, 'The binding force of agreements to negotiate in good faith' (2014) 73 CLJ 598

(9) Formalisation by the parties (1): reducing their agreement to writing and the parol evidence rule

Davies, 163-64

(10) Formalisation by the parties (2): 'no oral modification' clauses

Rock Advertising Ltd v *MWB Business Exchange Centres Ltd* [2019] AC 119 (noted, Davies, (2018) 77 CLJ 464; O'Sullivan, (2019) 135 LQR 1)

Morgan, 86-95

Aims and objectives
In doing this reading, you should aim:

(1) To understand why the law sometimes requires contracts to be in writing to be valid, and to understand why the parties to a contract might positively want to reduce their contract to writing (and how the law respects, and sometimes does not respect, that wish through the application of the 'parol evidence rule').

(2) To understand that the law has no problem with enforcing bargained-for promises made in a domestic context, but requires before it does so that the parties make it clear that they intend those promises to be legally binding; and to understand why the law imposes no such requirement in relation to promises made in a commercial context.

(3) To obtain a very good understanding of how the doctrine of consideration applies in cases: (i) where someone promises to pay more for services he already is contractually entitled to; and (ii) where someone promises in return for part payment of a debt to waive the rest of the debt.

(4) To understand when someone will be subject to a promissory estoppel, and what the effect of that estoppel will be. In particular, you should aim to have a very good understanding of how the law on promissory estoppel applies in cases (i) and (ii), under (2), above.

Written work

Answer **either**

1 Answer **both** *(a)* **and** *(b)*.

(a) Austen contracted to supply Bertram with 100 computers for delivery to Bertram's premises on 15 July. The contract stressed the importance of the delivery date and imposed a severe financial penalty on Austen if she failed to deliver on time. Austen then contracted with Crawford, who runs a road transport business, for Crawford to supply a driver and lorry to collect the computers from Austen's factory and deliver them to Bertram's premises on 15 July.

At 9 am on 15 July, Crawford rang Austen and said that all his drivers and lorries were busy on other jobs and that he could not collect the computers from Austen for at least another week. Austen explained her difficulties and Crawford said he could pull a driver and lorry off another job if Austen was willing to pay an extra £1,000. Austen felt she had no choice and agreed to pay the additional sum. The lorry turned up and the computers were delivered to Bertram on time.

Advise Austen as to whether she must pay the extra £1,000 to Crawford.

and

(b) Rushworth, an impoverished student, borrows £1,000 from Yates. The day after repayment is due, Rushworth offers to pay Yates £500 in cash if Yates will write off Rushworth's debt. Rushworth explains that this is all the money he has to his name. Yates agrees and takes the cash on offer. Rushworth is so pleased that he takes out all his College friends for an expensive meal, which he pays for with his credit card. A week later Yates reads that Rushworth has won a large sum on the National Lottery.

Advise Yates as to his rights against Rushworth.

or

***9.** *Ellen* has a cottage by the seaside which she decides to let out at a rate of £1,000 a week during the month of August. She advertises it in two local newspapers, The Mail and The Herald, giving her telephone number and e-mail address for enquiries.

Fred reads the advertisement in The Mail, which by mistake has printed the price as £100 a week. He immediately telephones *Ellen*, and tells her that he 'would like to rent the cottage for the first week of August, at the price mentioned in The Mail'. *Ellen* is delighted to obtain such a quick response, and immediately agrees. She asks him to send a 10% deposit, and only discovers the mistake when, the next day, she receives *Fred*'s cheque for £10.

Georgina reads the advertisement in The Herald (which has printed it correctly), and on Tuesday she telephones to say that she would like to take the cottage for the last week of August. By now, *Ellen* has already received many other enquiries, and she tells *Georgina* that the price is £1,200. *Georgina* hesitates; and *Ellen* says that she will give her time to make up her mind, and will not let the cottage to anyone else before Friday. On Thursday, *Georgina* telephones *Ellen*; *Ellen* does not answer but has left her answering machine switched on, so *Georgina* leaves a message saying that she will take the cottage at the higher rent. Immediately afterwards, she also sends an e-mail message to *Ellen*, repeating the message she left on the answering machine.

Ellen is away on Thursday, and returns on Friday. The answering machine is not working properly, so she does not hear *Georgina*'s message when she checks the messages on her return. She has received another offer from *Harry* for the use of the cottage for the last week of August, which she accepts on Friday morning. She checks her e-mail messages at lunch time on Friday, and finds *Georgina*'s message.

Advise *Ellen*.

Questions for the supervision

1. *Hopeless* owes *Rich* £10,000. *Rich* tells *Hopeless* that if *Hopeless* pays him £3,000, he will waive the rest of the debt. *Hopeless* pays *Rich* £3,000. What is the position?

2. *Shameless* agrees to sing at *Putin*'s birthday party for £1m, forgetting that she has already agreed to sing that day at the opening of *Kim*'s nightclub for £500,000. *Shameless* tries to get out of her contract with *Kim*, but he threatens to sue her for £2m if she backs out. *Shameless* tells *Putin* that she will not be able to sing for him unless he ups her fee to £3m, which will cover her potential liability to *Kim*. *Putin* agrees to this, and *Shameless* sings at his birthday party. What is the position?

3. *Star* entered into a two album deal with *Record Company* under which he promised to record for them two albums, and in return they promised to pay him 25% royalties on sales of the albums, plus an advance of £500,000, repayable against royalties from the sales of the albums. *Star*'s first album was terrible, and only made £200,000 for him in royalties, leaving him owing *Record Company* £300,000. *Star*'s attempts to record a second album were seriously impaired by the financial pressure he was operating under, and so *Record Company* promised that if he completed the second album, they would forget the £300,000 he owed them. *Star* went on to record the second album, which proved to be a huge hit. Can *Record Company* deduct £300,000 from the royalties payable to *Star* on his second album?

4. *Chairman*'s non-league football team has just, amazingly, won an FA Cup semi-final at Wembley. *Chairman* jumps into the team's changing room bath, drinks an entire bottle of champagne, and then tells the team 'If you win the final, I'll pay each of you a bonus of £100,000.' Even more amazingly, the team goes on to win the FA Cup. What is the position?

Past paper questions

2 Do you consider that modern decisions support the view that the doctrine of consideration has little, if any, relevance to agreements to *modify* or *discharge* contracts?

(b) The following quotation refers to so-called 'increasing pacts', that is, consensual variations whereby parties to subsisting contracts agree that one party will pay more than originally agreed for the other party's contractual performance:

'Now that there is a properly developed doctrine of the avoidance of contracts on the ground of economic duress, there is no warrant for the Court to fail to recognise the existence of some consideration even though it may be insignificant and even though there may have been no mutual bargain in any realistic use of that phrase.' (HOBHOUSE J., 1989)

Discuss.

5. Has the requirement of consideration for the creation of an informal contract outlived its usefulness? How might this area of law be reformed?

1 Should the requirement of consideration for the binding modification of contracts be abolished?

4 'English law does not need both the doctrine of consideration and the concept of intention to create legal relations in order to decide what promises it will enforce.'

Discuss.

3 ' "Consideration" should govern commercial dealings and "intent to create legal relations" should govern non-commercial dealings. Unfortunately, the current law allows each doctrine to invade each other's territory and this causes unnecessary overlap.'

Discuss.

***9.** Heating Services plc (HSP) enters into a contract with Edith to install central heating at her house. The price under the contract is £20,000 payable within 28 days of completing the installation.

HSP satisfactorily completes the work. The day afterwards, Edith loses her job. On the 28th day after the installation she tells HSP that, unless the price is reduced, she will not be able to pay anything until a later date. HSP is experiencing serious cash-flow difficulties. It reluctantly agrees to drop the price by £2,000 and to give Edith an extra six months to pay the balance provided Edith immediately drives over to HSP's head-office (which is in the next town) and pays £12,000 in cash, which she does. Edith also promises HSP to recommend them to her neighbour who she knows is intending to install central heating.

Three months later, HSP demands the balance (£8,000) of the original contract price immediately plus interest. When Edith protests that the balance had been agreed to be reduced to £6,000 and that she had a further three months to pay, HSP threatens to take her to court.

Advise Edith.

1 '...if [an agreement] is no more than an "agreement to agree" then it constitutes an unenforceable agreement between the parties.' (AIKENS LJ, *Barbudev* v. *Eurocom Cable Management Bulgaria*, 2012)

Discuss.

4 Answer **both** *(a) and(b):*

(a) Brimstone leases supermarket premises from Axle Ltd., at a monthly rent of £30,000. Axle agreed to reduce the rent to £10,000 per month during the second quarter of 2003 (April to June) because business at the store was very slack. Axle said, 'this reduction is without prejudice to our strict rights.' At Axle's request Brimstone paid the reduced rent in cash rather than by cheque.

In July, Brimstone's business prospered because it spent £60,000 on staff-training, using all the money saved as a result of the rent reduction. Brimstone is willing to pay the original rent for July and later, but refuses to pay the unpaid rent of £60,000 for the second quarter of 2003.

Advise Axle.

and

(b) On 10 March, Joan accepted Stud-pools's quotation to 'build a sunken patio for £6,000, work to start 13 March and be finished (as discussed) 17 March in time for client's wedding celebration.' On 12 March, Joan's boy-friend, Tarquin, told her, 'the wedding will have to be postponed: I'm already married to Xanthe.' On 13 March, Stud-pools told Joan, 'the ground's so hard to excavate that we might not make your dead-line.' Joan did not tell Stud-pools about Tarquin's 'bomb-shell'. Instead she told Stud-pools, 'you have me over a barrel, but you can have another £4,000 if you finish on time.' In fact Stud-pools finished one day early, but Joan has refused to pay more than the original £6,000.

Advise Stud-pools.

4 *(a)* On 1 August 2010, Sam agreed to re-tune Ruby's wind organ, consisting of 2,000 pipes, for £20,000, the job to be finished by 1 October 2010. On 15 September, Sam told Ruby, 'I'm sorry but I have only re-tuned 1,000 pipes; it's tougher going than I had thought; do you think you might improve on the price?' Ruby replied, 'I am not at all happy about this, but from now on you can have an extra pound or so per pipe, provided you finish on time. But let's wait until you're finished before finalising this increase.' Sam finished on time on 30 September, and on 1 October Ruby promised Sam 'a £1,000 bonus, as already discussed, for having finished on time.' Ruby has since refused to pay more than the £20,000 originally agreed.

Advise Sam.

and

(b) Fred owed Gareth £10,000 'payable in cash, on 1 April 2011, either to Gareth or to a person nominated by Gareth.' Fred failed to pay on time. On 2 April, Gareth agreed `to accept £7,000 and to release you, Fred, from the balance, provided you make this £7,000 payment by inter-bank transfer into the account of Hannah, my wife, within five days.' Consider whether Gareth remains entitled to the unpaid £3,000 in **each** of the following alternative situations:

(i) Fred failed to pay the £7,000, but spent £3,000 on a luxury cruise, acting on the assumption that Gareth would honour his promise of 2 April;

(ii) Fred immediately paid the £7,000 to Hannah by inter-bank transfer, as agreed on 2 April; but Gareth has now discovered that Fred had failed to tell him that Fred and Hannah had been having an affair.

SUPERVISION 3. THE TERMS OF THE CONTRACT

Reading

(1) Interpretation of contracts

Davies, ch 12

Grabiner, 'The iterative process of contractual interpretation' (2012) 128 LQR 41

Stevens, 'Contract interpretation: what it says on the tin' (2014) (available at https://d17g388r7gqnd8.cloudfront.net/2017/08/lecture_stevens_2014.pdf)

McLauchlan, 'The lingering confusion and uncertainty in the law of contract interpretation' [2015] LMCLQ 406

Sumption, 'A question of taste: the Supreme Court and the interpretation of contracts' (at https://www.supremecourt.uk/docs/speech-170508.pdf)

Hoffmann, 'Language and lawyers' (2018) 134 LQR 553

Notes on *Wood* v *Capita Insurance Services Ltd* [2017] AC 1173 by McLauchlan, (2017) 133 LQR 546, and Havelock, (2018) 76 CLJ 18

(2) Rectification of contracts

Davies, ch 14

Evans v *Andrea Merzario* [1976] 1 WLR 1078

Rose v *Pim* [1953] 2 QB 450

Commission for the New Towns v *Cooper* [1995] 2 WLR 677

McLauchlan, 'The "drastic" remedy of rectification for unilateral mistake' (2008) 124 LQR 608

Davies, 'Rectification versus interpretation: the nature and scope of the equitable jurisdiction' (2016) 75 CLJ 62

Stevens, 'What is an agreement?' (2020) 136 LQR 599

(3) Implied terms (1): terms implied in fact

mcbridesguides → Contract Law → Terms of Contract → Implied Terms

Davies, 184-89

Attorney General of Belize v *Belize Telecom Ltd* [2009] 1 WLR 1988 (noted, Peters, (2009) 68 CLJ 513; Low and Loi, (2009) 125 LQR 561)

Marks and Spencer plc v *BNP Paribas* [2016] AC 742 (noted, mcbridesguides → Contract Law → Contract Law Casenotes; O'Sullivan, (2016) 75 CLJ 199)

(4) Implied terms (2): terms implied in law

Davies, 189-94, ch 20

At common law:

Liverpool City Council v *Irwin* [1976] QB 319 (just read Lord Denning MR, dissenting); [1977] AC 239 (make sure you also read this!)

Peden, 'Policy concerns behind implications of terms in law' (2001) 117 LQR 459

Hooley, 'Controlling contractual discretion' (2013) 72 CLJ 65

mcbridesguides → Contract Law → Contract Law Casenotes → Mid Essex Hospital Services NHS Trust v Compass Group

Whittaker, 'Good faith, implied terms and commercial contracts' (2013) 129 LQR 463

By statute:

Sale of goods: Consumer Rights Act 2015, ss 3, 9-10 (business to consumer); Sale of Goods Act 1979, s 14 (business to business)

Supply of services: Consumer Rights Act 2015, ss 48-49 (business to consumer); Supply of Goods and Services Act 1982, s 13 (business to business)

(5) Discussion of law

Morgan, 74-79, ch 4

McBride, 6-10, 12-18, 25-34, 43-46

Aims and objectives
In doing this reading, you should aim:

(1) To understand why the remedy of rectification is necessary, and when it will be awarded.

(2) To understand when the courts will need to interpret the terms of a contract and what they are trying to do in interpreting the terms of a contract.

(3) To consider in what ways (if any) are the intentions of the parties relevant to (i) rectification, (ii) interpretation, and (iii) implication of terms into a contract.

Questions for the supervision:

1. *Tailor* visits the UK from Hong Kong, offering to make Savile Row quality made to measure shirts and suits for customers. *Fussy* visits the hotel room out of which *Tailor* is working, and is measured up for a suit. They agree a price of 4,500 'dollars' for the suit. *Fussy* thinks that *Tailor* is referring to Hong Kong dollars (in which case the suit would cost roughly £375) but *Tailor* meant to refer to US dollars (in which case the suit would cost roughly £2,750). The suit has now been made. What is the position?

2. *Harold* and his son, *Lloyd*, have been queuing for hours to go on the exciting new ride at Death Canyon. When they get to the head of the queue, they discover there is a height restriction for people going on the ride, and *Lloyd* just fails to make the required height. There was no mention of a height restriction, or the size of the restriction, at the point where they joined the queue. What is the position?

3. *Vera* joins an online 'book of the month society'. As a member of the society, *Vera* will be sent a book every month: if she wants to buy the book 'all you have to do is keep it, and we will charge your bank account with the cost of the book', if she doesn't want to buy the book, 'all you have to do is return it to us within seven days, no questions asked.' For a few months, the system worked very well, and the books *Vera* was sent were inexpensive paperbacks in the sort of genres *Vera* liked – crime and romance. However, when *Vera* returned from a two week holiday, she discovered the society had sent her a Folio Society edition of Thucydides' *The Pelopponesian War*, and £200 had been deducted from her bank account. What is the position?

4. *Gastro* orders a meal in an expensive restaurant. When he gets the bill, he discovers that a 25% service charge has been added to the bill. When he objects, he is told that the service charge is compulsory. What is the position?

5. *Fred* buys an economy class ticket to Sydney, Australia – a 24 hour flight. He discovers that he has been sat next to a child who won't stop playing on an electronic game that makes incessant bleeps and other noises; any time the child's parents try to take the game away from the child, he cries incessantly. *Fred* summons a stewardess and demands to be given another seat, away from the child. The stewardess explains that this will not be possible as the only seats they have free are in business class. What is the position?

Past paper questions

1 'The problems with which both the principles of rectification and the principles of construction grapple are closely related.' (LORD CLARKE, *Oceanbulk Shipping and Trading SA* v. *TMT Asia Ltd*, 2010)

Discuss.

2 **'**The wording of a written contract is open to re-construction in two ways: (i) employing the modern rules of "interpretation", the text can be construed in a different sense in order to solve very obvious problems of expression which cry out for correction; or (ii) the wording can be rectified under the principles of Equity.'

Discuss.

2 Compare and contrast the respective roles of rectification and contractual interpretation when a document fails to record accurately the intentions of the parties.

7 '[T]he requirement that the implied term must "go without saying" is no more than another way of saying that, although the instrument does not expressly say so, that is what a reasonable person would understand it to mean.' (LORD HOFFMANN, *Attorney General of Belize* v. *Belize Telecom Limited*, 2009)

Discuss.

5. 'There is a ...variety of implication, which I think Lord Denning M.R. favours,...and that is the implication of reasonable terms. But...I cannot go so far as to endorse his principle; indeed, it seems to me, with respect, to extend a long, and undesirable, way beyond sound authority' (LORD WILBERFORCE, *Liverpool City Council* v. *Irwin* (1976)).

On what basis are terms implied into contracts? On what basis should they be implied?

3 'Where the court considers implying terms in law, it is constructing a skeleton or paradigm of a particular category of contract which parties may add to or detract from … Where it considers implying terms in fact, it is fleshing out a necessarily incomplete agreement between the parties. Whilst the two roles are somewhat dissimilar, the differences between them can be exaggerated.' (LOW and LOI, 2009)

Discuss.

5 '[T]he court should not fill a perceived gap in the contract unless, without doing so, the contract will not work…The starting point should be an assumption that no term will be implied if the express terms of the contract produce a result which is workable.' (LORD GRABINER QC)

Discuss.

1 'Interpretation is not the same as the implication of terms. Interpretation of the words of a document is the precursor of implication. It forms the context in which the law may have to imply terms into a document, where the court concludes from its interpretation of the words used in the document that it must have been intended that the document would have a certain effect, although the words to give it that effect are absent.' (LORD HODGE, *Trump International Golf Club Scotland Ltd* v. *The Scottish Ministers* (2015))

Examine the roles of interpretation and implication of terms in the light of this statement.

2 'The difficult question arising out of *Chartbrook Ltd* v. *Persimmon Homes Ltd* (2009) is whether Lord Hoffmann was right to suggest that, accepting that rectification depends on establishing a mistake, the issue as to whether there was in fact a mistake should be assessed objectively rather than subjectively – ie by asking what a reasonable person who observed what passed between the parties up to the time that the contract was created would have thought, rather than by asking whether, as a matter of fact, the parties were in fact mistaken.' (LORD NEUBERGER, 2016)

Discuss.

SUPERVISION 4. CONTRACTUAL REMEDIES

Reading for supervision
McBride, 10-12
Davies, ch 27
(1) Action for debt
Davies, 388-400
McBride, 53-55
(2) Action for damages (expectation measure)
mcbridesguides → Maths for Lawyers → Maths for Contract Lawyers, §§1, 2, and 7
Cost of cure
Ruxley Electronics & Construction Ltd v *Forsyth* [1996] AC 344 (noted, McMeel, [1995] LMCLQ 456)
Morgan, 291-302
Damages for distress
mcbridesguides → Contract Law → Remedies → Consumer surplus
Farley v *Skinner* [2002] 2 AC 732 (noted, Pearce, (2002) 61 CLJ 24; Capper, (2002) 118 LQR 193)
Remoteness of loss
McBride, 'Remoteness of loss' in Chen-Wishart & Saprai (eds), *The Routledge Research Handbook on Contract Law* (forthcoming – I will supply you with this essay separately)
Transfield Shipping v *Mercator Shipping, 'The Achilleas'* [2009] 1 AC 61 (noted, O'Sullivan, (2009) 68 CLJ 34; Peel, (2009) 125 LQR 6)
(3) Specific performance and injunction
Davies, 464-73, 455-56
Co-operative Insurance Society Ltd v *Argyll Stores (Holdings) Ltd* [1998] AC 1 (noted, McMeel, (1998) 114 LQR 43; Jones, (1997) 56 CLJ 488)
Consumer Rights Act 2015, ss 23, 55
Morgan, 272-91
(4) Other actions for damages available to promisee
Reliance measure – NOTE: <u>non-existent</u>
Davies, 431-33
mcbridesguides → Maths for Lawyers → Maths for Contract Lawyers, §5
McLauchlan, 'The redundant reliance interest in contract damages' (2011) 127 LQR 23
Account of profits and 'negotiating damages'
Davies, 458-460, 428-30, 433-36
Morgan, 303-12
Morris-Garner v *One Step (Support) Ltd* [2019] AC 649 (noted, mcbridesguides → Contract Law → Contract Law Casenotes)
Compensation for third party's loss
Davies, 132-37
McBride, 106-110
Coote, 'The performance interest, *Panatown* and the problem of the loss' (2001) 117 LQR 81
(5) Actions by third parties (OPTIONAL reading – will not be lectured on until next term)
Davies, 123-27, 141-45
Morgan, 281-92
Contracts (Rights of Third Parties) Act 1999
Stevens, 'The Contracts (Rights of Third Parties) Act 1999' (2004) 120 LQR 292

Aims and objectives
In doing the reading for this supervision, you should have the following aims in mind:

(1) To understand the variety of specific and monetary remedies that may be available in the case where someone commits a breach of contract: (i) action for debt; (ii) specific performance; (iii) injunction; (iv) compensatory damages; (v) restitutionary damages.

(2) To understand when remedies (ii), (iii) and (v) will be available.

(3) To understand in particular what damages will be available to a contractual promisee in situations where it is hard to see what loss that promisee may have suffered as a result of a breach of contract (for example, in cases where there is a breach of a contract to construct a building for the promisee, but the breach has not caused any depreciation in value to the building; or where the building is no longer in the promisee's hands).

(4) To understand the varying views as to the basis of the rule in *Hadley* v *Baxendale* as expressed in *The Achilleas*, and what implications those views have for how concrete cases are decided (for example, where someone hires a taxi to take them to the airport, or fills their car up with petrol on the way to the airport).

Written work

Answer the following question:

Answer (a) **AND** (b) **AND** (c) **AND** (d):

(a) Mumbo-Jumbo magazine plans a larger print run to cover a royal wedding in April. Oliver, the magazine's chief photographer, plans a lavish offering of glossy pictures. Mumbo-Jumbo contracts for Nathan to supply the paper for the entire issue but the paper is not supplied due to problems in Nathan's factory. Mumbo-Jumbo always ran on a tight budget and could not afford to buy the paper elsewhere because it had paid Nathan in advance. The special edition is not produced at all.

Advise Mumbo-Jumbo on the above facts.

AND

(b) How would your answer to (a) differ if evidence established an industry-wide practice that limits damages to the difference between the contract price of the paper and the market price of substitute paper?

AND

(c) How would your answer to (a) differ if Mumbo-Jumbo had no photographs for the proposed issue because Oliver's camera containing all his shots is stolen?

AND

(d) How would your answer to (a) differ if, in May, Mumbo-Jumbo discovers that Oliver had, in breach of his employment contract with Mumbo-Jumbo, sold his photographs to a rival magazine, Purple Prose, for £100,000?

Questions for the supervision

1. *Juliet* is getting married. *Fancy* is designing her wedding outfit. *Juliet* stipulates that four diamonds should be stitched into the soles of each of her wedding shoes, as she plans to go down the aisle while Paul Simon's 'Diamonds on the Soles of her Shoes' is playing. *Fancy* is unable to obtain suitable diamonds for the shoes and instead plans to use imitation diamonds instead. Consider the following two alternative scenarios:

(i) *Fancy* goes ahead with his plan and *Juliet* only discovers what he did after she comes back from her honeymoon.

(ii) *Fancy* tells *Juliet* six weeks before the wedding that he cannot locate suitable diamonds for her shoes and that she will have to do with imitation diamonds instead.

2. *Flash* hails a taxi on the street in London, and tells the driver, *Gary*, he wants to go to Heathrow airport. He tells Gary, 'I have to get to Manchester by 6 pm for a medical, or my transfer to City will fall through.' *Gary* gets hopelessly lost on his way to the airport and *Flash* misses his flight. Can *Flash* sue *Gary* for the money he would have made had his transfer gone through – conservatively estimated at £2m?

3. *Trader* contracts to sell *Collector* a car that once belonged to James Dean. They agree a price of £120,000 for the car. *Rival* then offers *Trader* £300,000 for the car, and *Trader* accepts.

Past paper questions

6. 'To compensate the injured party fully for all loss that can, in some sense, be said to flow from a breach of contract would often lead to undesirable results' (TREITEL).

Discuss.

3 '[T]he Court gives specific performance instead of damages only when it can by that means do more perfect and complete justice.' (LORD SELBORNE L.C., 1874)

Discuss. Should specific performance be the primary remedy for breach of contract?

4 'Assumption of responsibility, which forms the basis of the law of remoteness of damage in contract, is determined by more than what at the time of the contract was reasonably foreseeable.' (LORD HOPE of CRAIGHEAD, *Transfield Shipping* v. *Mercator Shipping ('The Achilleas')*, 2008)

Discuss.

(*b*) Lord Folderol's estate looks out over farmland owned by Ovine, a farmer. Having attended a lecture on 'The picturesque in English landscape', Lord Folderol decides that his outlook would be immeasurably improved if fluffy white sheep were dotted around Ovine's farmland. He signs a contract with Ovine under which, in exchange for a single payment of £25,000 Ovine agrees to graze 100 sheep permanently on the pastures overlooked by the estate for five years.

The sheep graze contentedly for a year, but then Ovine discovers that he can make a profit of £100,000 by growing oilseed rape on the land during the remaining four years instead of running sheep on it. Over Lord Folderol's voluble protests, he removes the sheep and plants oilseed rape.

What remedies might be open to Lord Folderol, assuming that the market value of his land is not diminished by one penny by the removal of the sheep?

1 In January 2005 Amy made a contract with Brenda, a professional dressmaker, under which Brenda agreed to make Amy's wedding dress for her wedding on 8 July, for a total price of £3000 (inclusive of materials and labour). The contract specified that the dress would be made from genuine Indian silk. Amy paid a deposit of £500 on making the contract and the balance of £2500 was to be paid on collection of the dress. Consider each of the following (alternative) scenarios:

(a) On 1 May, when Brenda had already cut out and pinned the sections of silk for the dress, but had not yet sewn them together, Amy telephoned her and said, 'My fiancé Clifford has called off our wedding and I am distraught: I no longer want anything to do with my wedding dress and I am cancelling our contract.' Brenda replied, 'Sorry, it is far too late to cancel now'. Thereafter, Brenda finished the dress exactly in accordance with the contractual specification, even though she had at least two other clients of a similar size to Amy, each wanting a silk wedding dress of identical design. Although Amy's engagement had been irrevocably broken off and her wedding cancelled, Brenda telephoned her on 1 July informing her that the dress was ready and that her bill for the balance of £2500 was in the post.

Advise Amy.

and

(b) Amy's engagement and wedding preparations proceeded blissfully, without any disagreements with her fiancé. Brenda completed Amy's wedding dress in good time and Amy paid the balance of the price. However, Amy discovered on her wedding morning that Brenda had used a revolutionary man-made fabric to make the dress, almost indistinguishable from the contractually specified form of silk in appearance and texture, but considerably cheaper. Although Amy had no choice but to wear the dress and, indeed, nobody noticed that it was not made of genuine silk, she was nonetheless mortified by Brenda's 'betrayal' and felt that her 'big day' was entirely ruined.

Amy seeks your advice as to whether she can recover the price of the dress and additional compensation from Brenda for having ruined her wedding day.

7 Answer both (*a*) and (*b*):

(*a*) Richard's parents, who live in Manchester, plan to drive to Cornwall for Richard and Samantha's wedding. Walter, Richard's father, drives to Ulrich's petrol station and asks Ulrich to fill the car up with a specified type of oil. He remarks to Ulrich that he is driving to Cornwall to attend his son's wedding. Ulrich fills the car with the wrong sort of oil and does not replace the oil filter cap properly. A short distance from the petrol station the car breaks down because of this. When it becomes clear that the car cannot be fixed, Walter orders a taxi to take him and his wife to Cornwall but they arrive too late, miss the wedding and are extremely upset. The taxi fare is £300 and the costs of repairs and towage amount to a further £700.

Advise Walter.

and

(*b*) Samantha engages Tom to take photographs of her wedding for a fee of £400. One of the terms of the contract, which is on Tom's standard terms, is that 'Tom's liability in the event of breach shall be no more, and no less, than £50'. In breach of contract Tom misses the wedding. Samantha, her husband Richard, and her parents are very upset at having no photographs.

Advise the parties.

5 Catherine, a law student at St Jean's College, Cambridge, wanted to become an investment banker. She applied for a job with Tilney & Co, a London bank, and was short listed for interview. The bank made it clear to Catherine that she was in competition with Isabella, also a law student from St Jean's, for one job.

The day before her interview, Catherine booked a driver and car from Executive Limousines Ltd to collect her from St Jean's at 9am the next day and drive her all the way down to London for her interview at 12 noon. When Catherine made the booking over the telephone she stressed to the person she was dealing with that 'It is absolutely vital that your driver turns up on time. If I am late and, because of that, I don't get the job, I will hold your company responsible.' 'Whatever', came the reply.

No car turned up at 9am the next day or at all. For the next hour Catherine tried to contact Executive Limousines but no one answered the telephone. No other firm could supply a car or taxi at such short notice and so Catherine was forced to take the train. As a result, Catherine turned up 10 minutes late for her interview only to be told that, as punctuality was the hallmark of a good banker, Isabella had got the job.

Catherine was furious. She considered herself to be a much stronger candidate than Isabella as she had never dropped a mark in any exam in her entire life, was a Blue in 10 different sports and, by popular acclaim, was the best looking student in the University. Catherine was so upset that she had a nervous breakdown and has not had a job since leaving University. Isabella has made a fortune at Tilney & Co.

Advise Catherine as to her rights against Executive Limousines Ltd.

(a) In 1998, Asinus agreed with Bing-Bong Ltd, a company controlled by Clarissa, to build a footbridge over a lake on Clarissa's land. Bing-Bong paid Asinus the agreed fee of £1,000,000. The bridge was dangerous because Asinus used unsuitable materials, in breach of its contract. Clarissa paid £500,000 to another builder to rectify this defect.

Advise Bing-Bong whether it can recover damages of £500,000 from Asinus as representing either its own or Clarissa's loss.

2 'The key to understanding the principles of remoteness of damage in contract [involves this] question: what obligation to make compensation for breach of contract would a reasonable observer understand the contracting party to have undertaken? In the ordinary way, that will be compensation for any loss which the parties would reasonably have regarded as likely to flow from the breach. But there may be cases in which a reasonable man would consider that a greater or lesser obligation was being accepted.' (LORD HOFFMANN in the *Edinburgh Law Review*, 2010)

Discuss.

(b) By a separate contract, Dallas agreed that, from 1 January 2004 it would maintain Cherub's new boiler for three years for £30,000, payable in three sums of £10,000 at the end of each year. Clause X of that contract, which was inserted at the insistence of Cherub, reads: 'Special condition: Dallas must visit the site each week during the three-year period to inspect the boiler and ensure its safe and efficient performance'.

Dallas then made each of its agreed weekly maintenance visits, apart from the last week in June when all its maintenance staff had fallen ill after eating undercooked food at a staff barbecue party. In late July 2004, Cherub told Dallas: 'because you have failed to make all the specified visits, we are terminating the maintenance contract, and you will not be entitled to any payment under that agreement'.

Advise Dallas whether Cherub is entitled to terminate the maintenance agreement and to refuse to make any payment under that contract.

(b) On Agatha's 80th birthday in January, her nephew Bertie promises to take long-term care of her garden. Bertie employs Jeeves Ltd to provide weekly gardening services in Agatha's garden. After Jeeves Ltd's first visit in February, Agatha sends Bertie a large cheque in gratitude and gives away her lawnmower to charity (since Jeeves Ltd use all their own tools).

The arrangement continues well until Bertie (in financial difficulties) cancels the contract with Jeeves Ltd with their agreement (for which he pays Jeeves Ltd £100). Jeeves Ltd's last gardening visit is on 1 May. Agatha's garden rapidly becomes overgrown thereafter. She humiliatingly comes last in the Borsetshire Best Garden Competition, when the judges arrive to inspect her garden on 15 June. Agatha had won the prize (worth £1,000) several times in past years, and had paid her £10 entry fee for the competition in March before Bertie cancelled the contract with Jeeves Ltd. Agatha is also very upset.

Advise Agatha.

SUPERVISION 5. UNFAIR TERMS

Reading

(1) Legislation against 'unfair terms'

Morgan, 95-106

Unfair Contract Terms Act 1977 (does <u>not</u> apply to terms in contract between business and claimant if claimant is a consumer)

Davies, 216-224

UCTA, ss 2 (claimant suing in negligence), 3 (claimant suing for breach of contract), 6(1A) (claimant business suing defendant business for breach of implied term under s 14 of Sale of Goods Act 1979)

Photo Production Ltd v *Securicor Transport Ltd* [1980] AC 827

George Mitchell (Chesterhall) Ltd v *Finney Lock Seeds Ltd* [1983] QB 284 (Lord Denning MR's judgment only)

Consumer Rights Act 2015

Davies, 226-33

CRA, ss 61(1) (only applied to terms in business-consumer contracts), 62 (unfair term not binding on consumer; test for fairness), 64 (terms not to be assessed for fairness), 65 (business not allowed to restrict liability in negligence to consumer for death or personal injury), Sched 2 Part 1 (illustrative list of terms that may be regarded as unfair)

Notes on *Office of Fair Trading* v *Abbey National plc* [2010] 1 AC 696 by Davies, (2010) 69 CLJ 21, and Chen-Wishart, (2010) 126 LQR 157

Whittaker, 'Unfair contract terms, unfair prices and bank charges' (2011) 74 MLR 106

CRA, ss 31(1)(a), (b) (business cannot exclude liability to consumer for quality of goods), 57 (business cannot exclude liability to consumer for quality of services)

(2) Common law relief from penalty and forfeiture clauses

Davies, 438-55

Makdessi v *Cavendish Square Holding BV*, *ParkingEye Ltd* v *Beavis* [2016] AC 1172, [1]-[101] (Lords Neuberger and Sumption), [162]-[170] (per Lord Mance), [256]-[267] (per Lord Hodge) (noted, mcbridesguides → Contract Law → Contract Law Casenotes; Conte, (2016) 132 LQR 382)

McBride, 57-61, 68-71

Dawson, 'Determining penalties as a matter of construction' [2016] LMCLQ 207

Morgan, 251-68

Aims and objectives

In doing the reading for this supervision, you should have a number of aims:

(1) To understand when a term will be unenforceable under the Unfair Contract Terms Act 1977, and the Consumer Rights Act 2015.

(2) To understand when a term will be held to be a penalty clause; and when a claimant will be prevented from enforcing his strict legal rights under a forfeiture clause.

Questions for the supervision

1. *Tycoon* contracts with *Builder* for the construction of a swimming pool in *Tycoon*'s back garden. In negotiations, *Tycoon* specified that he wanted the swimming pool finished by June 1st, but expressed some scepticism as to whether *Builder* was capable of finishing it by then. *Builder* assured him that he was, and said, 'Why don't we make it more interesting? If I don't get the pool completed by June 1st, we'll cut the price in half. But if I do get it done by then, you pay me a 30% bonus on the original contract price.' *Tycoon* agreed to this. The swimming pool was finished on June 5th.

NOTE: In doing problem questions involving exclusion clauses, the only method of doing these questions that will ensure that you see ALL the issues raised by the question is the 'CICU method', which was taught to me when I was a contract law student by my tutor. The method goes as follows:

Cause of action – first of all ignore the exclusion clause completely, and identify what cause of action (action for breach of contract (and if so, what kind of breach of contract), action for debt, action for tort (and if so, what kind of tort)) the claimant will want to rely on in suing the defendant, and whether or not the claimant has a good claim under that cause of action (disregarding the exclusion clause).

Incorporation – if the claimant does, in principle, have a good claim against the defendant, then see whether the exclusion clause is incorporated into a contract between the claimant and the defendant. (This turns on the principles we looked at in the third supervision.)

Construction – if the exclusion clause was incorporated into a contract between the claimant and the defendant, then see whether – properly construed, or interpreted – the clause applies to the sort of claim that the claimant wants to bring against the defendant.

Unfair terms legislation – if the exclusion clause – properly construed, or interpreted – does apply to prevent the claimant suing the defendant, then the defendant will be entitled to rely on it to defeat the claimant's claim, unless he is prevented from doing so by unfair terms legislation.

2. *Dad* saw a 'child-friendly computer' advertised online, for £25. He ordered the computer for his daughter, but when he opened the box containing the computer, he discovered that what was in the box was a toy model of a computer rather than a working computer. The box comes with a leaflet, which says in large letters, 'We hope you are pleased with this product. If you wish to return it, we will be happy to give you a full refund so long as you return the product in its box, unopened.'

3. *Bert* regularly travelled on a ferry to work. On the ferry, notices would be displayed prominently, saying 'No responsibility accepted for the safety of the passengers, or their property.' Due to the incompetence of the ferry's captain, the ferry rammed the dock that it was supposed to moor at, and *Bert* fell over and injured his knee. Can *Bert* sue (a) the ferry company; (b) the ferry captain?

4. The same as 3, except that *Bert* did not fall over; instead, he dropped his computer and it was damaged.

5. *India* wanted her hair tinted red for her wedding. She went to her local beautician, *Morticia*, to have the dye job done. *Morticia* had *India* sign a document which said, among other things, 'No liability accepted for any unexpected effects that any hair treatment might have.' Unfortunately, having applied the dye to *India*'s hair, *Morticia* left it on for too long because she was distracted by another customer, and the dye had the effect of turning *India*'s hair bright pink. *India* feels she has no alternative but to cancel her wedding. Can *India* sue *Morticia*, and if so for how much?

Past paper questions

(a) 'Statutory control of exclusion clauses can force a party to pay for contractual protection which he does not necessarily want. Furthermore, open-ended criteria such as "reasonableness" and "good faith" offer scant protection in practice and produce uncertainty.'

In the light of these comments, consider whether the present statutory controls upon exclusion clauses are satisfactory.

1. 'The English law of contract is an unsatisfactory compromise. Many of its rules are based on an assumption that contracts are entered into between businesses. But in relation to claims by or against consumers, the rules have to be varied, or even fundamentally re-written.'

Does the law of contract adequately protect the interests of both businesses and consumers?

1 On Monday, Claire rang Dan, an entertainer, and hired him for £200 to perform at her son's birthday party on Sunday. Dan said: 'I'll send you my usual terms'. These arrived on Tuesday and Claire read them. Clause 13 states: 'Dan assumes no liability for injury or damage unless caused by his gross negligence; in no circumstances will liability exceed hire price.' On Wednesday, Claire told Dan, 'please note that Tom, my son, will be 9 years old and that the youngest child will be 8.'

At the party, all the children were greatly disappointed because Dan's show was suitable only for 3 year-olds. Dan shouted at Tom 'shut your ugly face' when Tom started to swear at Dan. Tom then burst into tears and could not be consoled by Claire. She seeks the following damages for breach of contract:

(i) £10,000 for her 'hurt feelings when Tom was reduced to tears'; and

(ii) £1,200 for 'all the children's disappointment with the show.'

Dan has yet to be paid and is demanding the agreed fee of £200.
Advise Dan.

4 'The doctrine of penalties can be regarded as meeting the criticism levelled against unqualified freedom of contract, namely the possible inequality of bargaining power.'

Consider critically the current state of the English law on penalties in the light of this statement.

7 Answer **both (a) and** *(b)*:

(a) Vaisey agreed in writing to sell to Pym a block of flats in London for £20 million, completion to take place on 1 April 2004. Pym pre-paid £5 million, as a deposit of 25 *per cent.* It was a term of the contract that 'all purchase monies shall be received by the Vendor by noon on 1 April 2004; Purchaser's failure to pay punctually shall entitle the Vendor to withdraw the property from sale and to declare the deposit forfeited.' Because Pym's payment was fifteen minutes late, Vaisey has notified him that 'the deal is ended, and you have forfeited the deposit.'

Advise Pym whether Vaisey can retain the deposit.

and

(b) When will a clause requiring a party to pay a specified sum in the event of non-performance be invalidated as a 'penalty'? Is the law satisfactory?

8 *(a)* In September 2003, Dallas Heating Ltd ('Dallas') agreed to fit a new boiler in Griffin Court at Cherub College, Camford ('Cherub') during the college's Christmas 'close-down' period. Before the agreement was reached, Dallas's managing director had overheard Cherub's Bursar tell the college's Master, 'we've got an important conference booked for Griffin Court in January'. The written contract stated: 'Work to be completed by 31 December 2003'. The installation contract was drawn up on Dallas's standard terms, which the Bursar signed without reading. Clause 13 reads: 'If Dallas fails to satisfy the contractual date for completion of the work, Dallas will pay £500 for each week of delay but aggregate liability will not exceed £5,000'. However, Dallas did not fit the boiler until 1 February 2004 because it experienced exceptional difficulty hiring skilled labour for this specialised work.

As a result of this delay, Cherub was forced to cancel an attractive booking by Hyperion, a London investment bank, for use of Griffin Court for one week in January 2004 as a conference facility. This booking would have yielded £50,000 profit, which is twice the usual rate of profit for Camford conferences. Because news of this cancellation spread quickly, Cherub failed to secure re-bookings for other conferences during 2004 from its usual clients. Those possible re-bookings would have produced a net profit of £100,000. In June 2004, Cherub spent £20,000 on a large party to try to attract more conference trade. But this hospitality did not have any impact on bookings.

Dallas seeks your advice whether it is liable to pay any of the following items of compensation:

(i) £50,000 in respect of the lost Hyperion booking;

(ii) £100,000 for the additional loss of revenue; and

(iii) £20,000 for the expense of the unsuccessful hospitality.

7 Answer **all** parts of this question.

(a) Elliot agrees with Croft to build a new house with a swimming pool on land owned by Croft. The price is £500,000 with payment to be made on completion of the project. Elliot builds the house but is unable to finish the pool because cash flow difficulties mean that he is unable to pay his workmen. Elliot leaves the site and never returns. It will cost Croft £50,000 to complete the pool.

Advise Croft as to his rights and liabilities.

(b) Wentworth, a wealthy philanthropist, wants to pay for a new roof to go onto the cricket pavilion owned by his local cricket club. Wentworth enters into a contract with Musgrove for Musgrove to do the work for £10,000. Musgrove strips the old slates off the roof but soon loses interest in the job. It will cost the cricket club £5,000 to complete the job.

Advise the cricket club as to its rights as against Musgrove.

(c) Russell takes his daughter's car to a local garage for repair. Russell explains that the car belongs to his daughter, Anne, and asks the garage to do a good job. The contract signed by Russell clearly states that the garage will not be liable for any damage done to the car, whether through negligence or otherwise, whilst the car is in its possession. The next day the car's rear bumper is badly scratched when one of the garage's employees carelessly reverses the car into an oil drum. When Anne comes to collect the car she sees the damage to the bumper and complains, but the garage points to the terms of the contract it had entered into with her father and denies liability.

Advise Anne as to her rights against the garage.

SUPERVISION 6. TERMINATION OF CONTRACT

Reading

(1) Termination for breach (1): establishing a right to terminate

Davies, 374-88

Union Eagle v *Golden Achievement Ltd* [1997] AC 514 (noted, Stevens, (1998) 61 MLR 255; Heydon, (1997) 113 LQR 385)

Termination where sale of goods: Consumer Rights Act 2015, s 20 (business to consumer); Sale of Goods Act 1979, s 15A (business to business)

(2) Termination for breach (2): consequences of termination

Davies, 460-62

Consumer Rights Act 2015, ss 24, 56

mcbridesguides → Maths for Lawyers → Maths for Contract Lawyers, §3

(3) Termination for breach (3): situations where there is no option but to terminate

Davies, 396-400

McBride, 53-55

mcbridesguides → Maths for Lawyers → Maths for Contract Lawyers, §4

White & Carter (Councils) Ltd v *McGregor* [1962] AC 413

Geys v *Société Générale London Branch* [2013] 1 AC 523 (noted, Blackham, (2013) 72 CLJ 269; Aitken, (2013) 129 LQR 335)

Carter, '*White and Carter* v *McGregor* – how unreasonable?' (2012) 128 LQR 490

Liu, 'The *White & Carter* principle – a restatement' (2011) 74 MLR 171

(4) Frustration

Davies, ch 24

McBride, 38-43

Herne Bay Steam Boat Co v *Hutton* [1903] 2 KB 683

Krell v *Henry* [1903] 2 KB 740

Amalgamated Investment & Property Co v *John Walker & Sons* [1977] 1 WLR 164

Law Reform (Frustrated Contracts) Act 1943, ss 1(2), 1(3), 2(4)

Morgan, ch 6

Aims and objectives

You should have a number of aims in doing the reading for this supervision:

(1) To understand when the victim of a breach of contract will be entitled to terminate the contract, and to understand why he/she might want to terminate that contract.

(2) In particular, to understand what the difference is between a condition and an intermediate term, in terms of when someone will have a right to terminate a contract for breach of these two types of term; and to understand when a term will be classified as a condition and when as an intermediate term.

(3) And in particular, to understand when someone will be entitled to terminate a contract because before the time for performance is due: (i) the other party has expressly indicated that he or she will not abide by one or more terms of the contract; or (ii) it looks like the other party will not find it possible to abide by one or more terms of the contract.

(4) Understand when a contract will be frustrated by the occurrence of some event after the contract was entered into. In particular, understand when a contract will be frustrated because while performance is still possible, performance is now useless to one of the parties to the

contract because of some event that occurred after the contract was entered into (this is called a frustration of purpose case).

(5) Understand exactly what the Law Reform (Frustrated Contracts) Act 1943 says (or has been held to say).

(6) Understand the debates about what is the basis of the rules on when a contract will be frustrated – do those rules give effect to the party's intentions? or some dictate of fairness as between the parties? or some dictate of public policy? Also ask yourself why these debates matter.

Written work

Answer the following question:

9 Harvey, who owns a recording company, agrees to hire Basil's entire luxury hotel and marina in Cornwall to host a lavish entertainment for 100 guests on 1 and 2 June. The agreed price is £100,000, £50,000 of which Harvey pays in advance. As Basil is aware, Harvey's purpose in hiring the hotel is to celebrate the recent award of a tenth gold disc to one of his recording stars, Katter Waul. There will be a banquet, a disco, and yachting and mackerel fishing for the hardier guests.

Under the terms of the contract Basil has repainted the hotel dining room in khaki paint, Katter Waul's favourite colour, at a cost of £3,000; Basil's chef has also made a gigantic cake at a cost of £1,000, decorated in khaki icing with the words, 'The first ten are the hardest, Katter Waul. Now, what about a Nobel Prize'?

Harvey has also contracted with Katter Waul's favourite singer, East Anglian country and western artist, Travis Ryland, who, for a fee of £20,000 paid in advance, has agreed to come out of retirement to sing for Katter Waul.

On 30 May Harvey learns that Katter Waul has just died of a drug overdose. Harvey immediately contacts Basil and says, 'Its all off.' Basil however says, 'Katter Waul's death was hardly unexpected. We both know that she lived in the fast lane. The show must go on. And it's too late to pull out.' Harvey nevertheless rings around and informs as many of the guests as possible that the event has had to be cancelled. In the excitement, however, he forgets to inform Travis Ryland.

Thirty of the original guests turn up at the hotel on 1 June. On learning of Katter Waul's death, they decide to hold an impromptu wake, consuming large quantities of oysters and champagne and demolishing the khaki-iced cake. As the guests are growing drunk and boisterous, Harvey, who has been vainly trying to persuade them all to leave, asks Travis Ryland, who has just arrived at the hotel unaware that Katter Waul has died, to sing. Travis Ryland says, 'No way. Now that Katter Waul is dead, I don't feel like singing. In any case, I've got appalling laryngitis. I'm going back to Biggleswade. I'll return half my fee.'

Discuss.

Questions for the supervision

1. *Builder* contracts to renovate *Davina*'s bathroom for £10,000, with £6,000 paid upfront. *Builder* rips out the existing bathroom, but he then goes missing. Every time *Davina* contacts him, he says, 'You are definitely near the top of my list of jobs to do, but I've got something else on at the moment that is more pressing. I'll be in touch soon.' What can *Davina* do?

2. The same as 1, but this time *Builder* completes the job, except he installs a power shower in the bathroom, and not the rain shower that *Davina* had requested. Can *Davina* refuse to pay *Builder* the remaining £4,000 that is due on completion?

3. *Pembroke* College enters into a contract with *New World Wines* that it will supply *Pembroke* with 30 bottles of Australian white wine each month for the next five years. It is discovered that 15 of the bottles supplied by *New World Wines* in the first month are corked; and in the second month, *New World Wines* supplies *Pembroke* with 20 bottles of Australian white wine and 10 bottles of Bulgarian white wine, along with a note saying that 'This month we have had insufficient supplies of Australian white wine.'

4. *Sheila* appoints *Charlie* to act as a nanny to *Sheila*'s baby *Freddie*, making it clear that she wants *Charlie* to look after *Freddie* from 8.30 am to 6 pm every weekday, and that she wants *Charlie* to look after *Freddie* exclusively between those times. Two days before *Charlie* is due to take up her job looking after *Freddie*, *Charlie* rings *Sheila* and tells her that she won't be able to look after Freddie on Wednesday lunchtimes because she's started a car maintenance class which is held every Wednesday at lunchtime; she also tells *Sheila* that on Fridays, she will be looking after a young girl as well as Freddie because 'I need the money – you don't pay me enough.'

5. *Peter* booked a room in a hotel and a table at the hotel's restaurant for Valentine's Day – the intention being to treat and romance his girlfriend, *Lucy*. *Peter* paid a deposit of £200 for the package deal. *Lucy* dumped *Peter* on February 13th. What is the position?

6. *Fatty* signed up for membership at a gym, at a special discounted rate available to people who paid for two years' membership in advance. *Fatty* paid £2,000 – as opposed to the normal rate for two years' membership, which would have been £3,500. Having paid the money he walked out of the gym, and promptly dropped dead of a heart attack. The membership contract (which *Fatty* signed when he paid his money) specified on page 5, in small print, that 'No refunds of monies paid in advance will be given under any circumstances.'

7. *Bernard* hires a ship, *The Star of the East*, and its crew to take him and his friends along the Thames on the evening of his birthday. *Bernard* paid a deposit of £3,000, with the remainder of the £5,000 fee for hiring the ship payable at the end of the voyage. What is the position in the following alternative circumstances:

(a) On the evening of *Bernard*'s birthday, there is a heavy thunderstorm accompanied by lightning. The owner of *The Star of the East* and its crew are willing to go out, but *Bernard* and his friends don't fancy it.

(b) Unknown to *Bernard*, some of his friends smuggled some fireworks onto *The Star of the East* and set them off halfway through the journey. One of the fireworks landed in the engine of *The Star of the East* and started a fire which destroyed half the ship.

8. *Johanna* contracted to sing at *Rupert*'s party. The night before she got drunk, and was arrested by an over-aggressive police officer. *Johanna* resisted arrest so fiercely that she was charged with obstructing a police officer in the course of his duty, and was held in custody for two days until she could appear in court. Can *Rupert* sue *Johanna*?

Past paper questions

(b) Edgar hired Gourmet Events ('Gourmet') to cater a sit-down dinner for 50 persons on each of the four Saturdays in October 2008 at Edgar's mansion. The entire cost for all four occasions was agreed to be £40,000. Edgar drew up a contract, which Gourmet signed. Clause 3 stated: '*Condition:* the dining tables shall be dressed by Gourmet in purest white linen cloth.' Clause 6 stated: '*Further Important Term:* staff to arrive no later than 3.00 pm, to prepare for us to sit down and eat at 7.00 pm sharp.' Clause 15 stated: 'A single breach might suffice, but two (or more) breaches of any of the preceding clauses will certainly justify termination of the whole contract.'

On the first of these dates, 4 October, Gourmet breached clause 3 by using pink linen cloths and clause 6 by arriving at 3.15 pm (although the meal was ready when Edgar announced dinner at 7.00 pm). Edgar drew attention to these breaches at the end of the evening and said, 'I will reflect on the consequences overnight'. The next day Edgar notified Gourmet: 'In view of the grave problems to which I referred last night, I am cancelling the remaining three Saturday bookings and, because of your failures last night, I owe you nothing.'

Advise Gourmet whether:

(i) Edgar must pay for the meal on 4 October; **and** *(ii)* whether Edgar is entitled to terminate the contract for the remaining three occasions.

(b) By a separate contract, Dallas agreed that, from 1 January 2004 it would maintain Cherub's new boiler for three years for £30,000, payable in three sums of £10,000 at the end of each year. Clause X of that contract, which was inserted at the insistence of Cherub, reads: 'Special condition: Dallas must visit the site each week during the three-year period to inspect the boiler and ensure its safe and efficient performance'.

Dallas then made each of its agreed weekly maintenance visits, apart from the last week in June when all its maintenance staff had fallen ill after eating undercooked food at a staff barbecue party. In late July 2004, Cherub told Dallas: 'because you have failed to make all the specified visits, we are terminating the maintenance contract, and you will not be entitled to any payment under that agreement'.

Advise Dallas whether Cherub is entitled to terminate the maintenance agreement and to refuse to make any payment under that contract.

6 In 2002 Meg, who is elderly, moved into 'Sleepy Nook', a home run by Grans-RUs. She paid a deposit of £500 and signed a contract agreeing to pay a year's residence fee of £12,000 in monthly instalments. The contract contained the following term (which Meg never read): 'Grans-R-Us undertakes to provide first class and exclusive accommodation, superb professional care and nutritious meals three times a day.'

Meg's first three months were disastrous. She had to share a bedroom with two other guests; the home was under-staffed; and Meg suffered food poisoning three times because of the cook's incompetence.

Advise Meg.

Consider also what the position would be if the contract had not included this express term.

7 '[Frustration] is really a device by which the rules as to absolute contracts are reconciled with a special exception which justice demands.' (LORD SUMNER)

Discuss.

8 '[I]n England, there are relatively few restrictions on the right of termination [for breach]. Where the defaulting promisor is in repudiatory breach, the injured promisee enjoys a broad ability to terminate. This facilitates his expeditious release from the contract, enabling him to put his resources to better, potentially mitigatory, use elsewhere. It reflects a wider policy in English law…that contracting parties should not be tied together when their contract has failed.' (ROWAN)

Discuss.

6 On 1 January, 2001, Pete, a timber merchant, agreed to sell to Arkwright, a maker of wooden punt boats, '1,000 oak planks fit for punt boat construction, at £100 each'. The wood was to be supplied in four monthly lots (250 planks each time), starting on 1 February and finishing on 1 May. Pete was to ensure that each of these four deliveries was accompanied by a certificate from an independent expert that the wood was free of woodworm. Arkwright paid £10,000 straightaway and agreed to pay the balance of £90,000 on delivery of the final 250 planks.

Advise Pete on his legal position in **each** of the following *alternative* situations:

(*i*) the first 250 planks, although satisfactory and free of woodworm, were delivered three weeks late because of Pete's inefficiency and no certificate was supplied. Arkwright rejected this delivery and told Pete he was cancelling the whole contract.

(*ii*) unknown to either party, legislation had been enacted on 20 December 2000 which makes it illegal to use oak planking in the construction of boats. This legislation came into effect on 30 January 2001. On 31 January Arkwright told Pete not to supply any planks, arguing that the contract was not binding on him because of mistake, or that it had been frustrated.

(*a*) Nerd, a builder who was building a small estate of twelve houses, contracted with Octapus Ltd., a concrete contractor, for the provision of driveways for the houses. The contract provided that the work was to be carried out within ten days, and, as the matter was one of great urgency, the contract stated 'Price to be settled at a later date'.

Two days after signing the contract Nerd was advised by his surveyor to stop work indefinitely on the site, which was suspected of being liable to subsidence. Nerd wrote to Octapus regretting that "in all the circumstances the contract must be regarded as cancelled" and offering Octapus work at another of Nerd's sites. Octapus did not reply, but three days later entered the empty original site and installed the driveways, and then sent a bill to Nerd for £25,000 (which was in fact a normal rate in the trade for jobs of this sort).

Advise Nerd.

(a) What is 'self-induced frustration', and is the law on this topic satisfactory?

2 Answer **both** *(a)* **and** *(b)*.

(a) Mr and Mrs Gardiner decide to celebrate their Golden Wedding with a tour of Israel and Egypt. Mr and Mrs Gardiner are aware that there have been threats to foreign tourists by extremist groups in the region but feel that the risk of harm is slight as they have booked their holiday with Holy Land Travel Ltd, who have considerable experience of running tours in the Middle East. The day before Mr and Mrs Gardiner are due to fly out to Israel, they receive a telephone call from a representative of Holy Land Travel to say that the tour has been cancelled. The representative explains that one extremist group in Egypt has just threatened suicide bomb attacks against foreign tourists and that, in the light of this threat, for Holy Land Travel to guarantee the security of those on the tour would be prohibitively expensive.

Advise Mr and Mrs Gardiner. What, if any, difference would it make to your answer if the reason the tour had been cancelled was that the UK Government had issued an order prohibiting British citizens from travelling to the Middle East?

and

(b) On 1 May 2007, Collins agrees to sell a vintage Bentley motor car to Lucas for £50,000 with property not to pass until delivery of the car to Lucas in a week's time. Collins also agrees to restore Lucas's classic Rover P5B motor car for £10,000. Lucas pays Collins £60,000 in advance and leaves the Rover with him. The restoration goes well and by 5 May it is almost complete. However, that night a bolt of lightning hits Collins's garage and destroys both cars.

Discuss the legal issues arising.

6 *(a)* 'Despite the Law Reform (Frustrated Contracts) Act 1943, the remedies available to parties in the case of unforeseen events are not adequate.'

Discuss.

and

(b) Projections Ltd. undertook to provide live webcasts of the degree ceremony at Snootytown University to relatives of graduands. Relatives pay £20 one week in advance of the ceremony and in return receive an exclusive password to access the live webcast. Owing to a heavy snowfall the day before the degree ceremony, only students living within five miles of the University are able to attend the ceremony. All the same, the degree ceremony goes ahead at the scheduled time and Projections Ltd. provides the webcast. Tony, a graduand who lives 50 miles away from the University, is unable to attend the ceremony. His uncle Urban paid Projections Ltd. to receive the webcast and has received it, but is disappointed not to see his nephew receive his degree. Tony's aunt Victoria also paid to receive the webcast. Because of a power blackout in her local area, which lasted during the entire duration of the degree ceremony, she is unable ever to watch it.

Advise Urban and Victoria.

7 Jessica owns a manor house in Camford which is 'Listed' as being of historic architectural value and so may only be altered with local authority permission. Jessica decides to install double-glazing to save energy. She commissions Happy Glaze Ltd to construct (to order) 50 special aluminium double-glazed windows in the same style as those existing for £200,000. She pays Happy Glaze Ltd a 'non-refundable deposit' of £10,000. The following day, an architect friend advises Jessica to cancel the contract because Camfordshire County Council states on its Listed Buildings webpage that aluminium windows are never acceptable in Listed buildings. Jessica immediately emails Happy Glaze Ltd explaining the problem and informing them that they should not proceed with the order. Although they have not yet begun work on Jessica's special order, Happy Glaze Ltd refuse to cancel such a lucrative contract. They manufacture and punctually deliver the windows to Jessica, presenting her with a bill for £190,000, which Jessica refuses to pay.

Advise Jessica and Happy Glaze Ltd.

SUPERVISION 7. MISTAKE AND MISREPRESENTATION

Reading

NOTE before you start:

A contract that is entered into because of a mistake will either be void, or binding according to its terms. It is not *voidable* (that is, initially valid but liable to be made void (as though it had never been entered into) by the mistaken party.

A contract that is entered into as a result of a misrepresentation by the other party to the contract (or – sometimes – by a third party) will not be void, but may be voidable. So if A enters into a contract with B because of a mistake, A will find it very easy to get out of the contract if A can establish that his mistake was induced by B's misrepresentation. However, sometimes it will be important to A that he establish his contract with B was void, and not merely voidable.

This is the case where (i) A has sold goods on credit to B, (ii) the goods are now in the hands of a third party purchaser, C, who bought the goods in good faith, and (iii) B has disappeared, and has failed to pay A for the goods. If the A-B contract was void, then A never transferred title to the goods to B, and can accordingly sue C in conversion for the value of his goods on the basis that C is in wrongful possession of A's goods. If, by contrast, the A-B contract was voidable, then A did transfer title to the goods to B, albeit a voidable title. This title would have revested in A (so that A could then claim the goods belonged to him) if A rescinded (made void) the A-B contract before B transferred title to the goods to a bona fide purchaser for value without notice. However, in the case we are considering, B has already transferred the goods to such a purchaser, C. So A's only chance of recovering the value of his goods in this case is to establish that the A-B contract was void, not voidable.

There is a fair amount of reading for this supervision, so I have (exceptionally) starred the cases that it is most important you know about. You can read the others later, when you have time.

(1) Mistake as to terms

Davies, 13-17
McBride, 6-8

(2) Mistake as to identity

Davies, ch 6
Lewis v *Averay* [1972] 1 QB 198
**Shogun Finance Ltd* v *Hudson* [2004] 1 AC 919 (noted, McLauchlan, (2005) 121 LQR 9; Phang *et al*, (2004) 63 CLJ 24; MacMillan, (2004) 120 LQR 369)
MacMillan, 'Rogues, swindlers and cheats: the development of mistake of identity in English contract law' (2005) 64 CLJ 711

(3) Mistake as to circumstances

Davies, ch 23
McBride, 34-38
Sale of Goods Act 1979, s 6
Bell v *Lever Bros* [1932] AC 161
Solle v *Butcher* [1950] 1 KB 671 (Denning LJ's judgment)
Associated Japanese Bank v *Credit du Nord* [1989] 1 WLR 255
**Great Peace Shipping* v *Tsavliris Salvage* [2002] 3 WLR 1617, [1]-[94], [162]-[167] (noted, Hare, (2003) 62 CLJ 29; Reynolds, (2003) 119 LQR 177)
McRae v *Commonwealth Disposals Commission* (1951) 84 CLR 377

Brennan v *Bolt Burdon* [2005] QB 303
Smith, 'Contract – mistake, frustration and implied terms' (1994) 110 LQR 400
Tettenborn, 'Agreements, common mistake and the purpose of contract' (2011) 27 J of Contract Law 91
Morgan, 'Common mistake in contract' (2018) 77 CLJ 559

(4) Rescission for misrepresentation
Davies, 235-50
Bisset v *Wilkinson* [1927] AC 177
Leaf v *International Galleries* [1950] 2 KB 86
Peekay Intermark Ltd v *Australia & New Zealand Banking Group* [2006] EWCA Civ 386
**Hayward* v *Zurich Insurance plc* [2017] AC 142
Misrepresentation Act 1967, s 2(2)
Government of Zanzibar v *British Aerospace* [2000] 1 WLR 2333 (noted, O'Sullivan, (2001) 60 CLJ 239; Malet, (2001) 117 LQR 524)

(5) Other responses to misrepresentation (1): contractual action for breach of warranty (binding guarantee that facts represented were true)
Davies, 149-61
Oscar Chess v *Williams* [1957] 1 WLR 370
**Dick Bentley Productions Ltd* v *Harold Smith (Motors) Ltd* [1965] 1 WLR 623
Consumer Rights Act 2015, s 50

(6) Other responses to misrepresentation (2): action for damages for money lost as a result of relying on representation
Under s 2(1) of the Misrepresentation Act 1967
Davies, 250-53
Royscot Trust Ltd v *Rogerson* [1991] 2 QB 297 (noted, Oakley, (1992) 51 CLJ 9; Wadsley, (1992) 55 MLR 698)
Spice Girls Ltd v *Aprilla World Service BV* [2002] EMLR 27
Under common law (action for fraud, or in negligence if Hedley Byrne style assumption of responsibility)
Davies, 253-58

(7) Attempts to exclude liability for misrepresentation (especially through use of clauses acknowledging no reliance on any representations)
Davies, 224-26, 259-62
Morgan, 79-86
McMeel, 'Documentary fundamentalism in the senior courts: the myth of contractual estoppel' [2011] LMCLQ 185
Axa Sun Life Services Plc v *Campbell Martin Ltd* [2011] EWCA Civ 133 (noted, Trukhtanov, (2011) 127 LQR 345)
First Tower Trustees Ltd v *CDS (Superstores International) Ltd* [2019] 1 WLR 637

Aims and objectives
You should have a number of different aims in doing the reading for this supervision:

(1) To understand when exactly a contract will be void because one of the parties has entered into it as a result of making a mistake as to the circumstances surrounding the making of the contract.

(2) To understand the other routes by which such a party might seek to get out of the contract – for example, by arguing that there was an implied condition precedent in the contract, according to which the contract would not be binding if the facts were not as that party believed them to be.

(3) To understand the difference between rescinding a contract and terminating a contract for breach.

(4) To understand why in the mistaken identity cases, it was not good enough for the seller to establish that his contract with the buyer was voidable for misrepresentation by the buyer (as to his identity or creditworthiness) but had to try to argue that he or she had entered into *no contract at all* with the buyer who was standing in front of him or her.

(5) To understand the different remedies that may be available when A has induced B to enter into a contract with A by telling B that *x* is true, when it is not:

(i) B may be able to sue A for breach of contract (or breach of warranty) on the basis that when A said that *x* was true, he was guaranteeing that *x* was true – if B can sue A on that basis, B will be entitled to damages designed to put him in the position he would have been in had *x* been true.

(ii) B may be able to sue A for damages under the Misrepresentation Act 1967, s 2(1) to compensate him for any losses (which not only include actual financial losses, but also foregone gains) he suffered as a result of entering into the contract with A. B will be entitled to this remedy if A did not have reasonable grounds for believing that *x* was true when he said *x* was true.

(iii) B may be able to rescind his contract with A, and get back what he gave A under that contract. This will always be the case – no matter how innocent A was in misrepresenting that *x* was true – unless something has happened to make rescission no longer available as a remedy. Rescission will no longer be available in A and B's case if too much time has elapsed (this is known as the defence of laches) since B entered into the contract with A; or if it is no longer posible for A to give back to B, and B to give back to A, what each received from the other under the contract (this is known as the defence of restitutio in integrum is impossible).

(6) To understand when B will be barred from relying on one or more of these remedies because there is an exclusion or exemption clause in his contract with A; and in particular to understand what sort of exclusion or exemption clauses may be held not to be valid under the Misrepresentation Act 1967, s 3, and more importantly, what sort of exclusion or exemption clauses will not be covered by that section.

Questions for the supervision

1. Is there a contract in the following situations:

(a) A wants to hire *Angela Lansbury* to appear in his Christmas panto; but when he looks up her agent's details he ends up with the details of B, the agent of a different actress, also called *Angela Lansbury*. A rings up B and says, 'I want Angela Lansbury for my Christmas panto. I can pay up to £100,000. Is she free?' B says, 'Yes, absolutely – she'll do it for

£100,000.' B was a bit surprised that A was offering so much for his client's services, as she is relatively unknown.

(g) *Star* books into a hotel over the Internet under her maiden name, using a credit card that is still in that name. She does so to avoid being hassled by the paparazzi when she turns up. The hotel would not have accepted *Star*'s booking had they known it was her, as she was a real nuisance the last time she stayed at the hotel.

2. *Arty* had always admired *Maria*'s Rembrandt etching, and when *Maria* fell on hard times, *Arty* saw his chance and offered *Maria* £100,000 for the etching. *Maria* accepted the offer. Two days later, an art expert published a book identifying a number of works thought to be by Rembrandt – including *Maria*'s etching – as in fact being by one of Rembrandt's students. The expert's analysis has been generally accepted, and the etching is now valued at £10,000. What is the position?

Past paper questions

Oxbridge Computers places an advertisement in the local student newspaper, 'Computers available to students at massive discounts! £500 off on presentation of a student card.' James, who is not a student, borrows a student card from his friend Daniel, and pays in cash for a computer from Oxbridge Computers' store. He receives a £500 discount.

(a) Sam advertised his Rolls-Royce car for sale, and Tim responded. When the two met, Tim impersonated Unctuous, a public relations consultant from Ely, from whom Tim had stolen a cheque-book earlier that day. Sam successfully checked in the telephone directory that Unctuous lives in Ely. He then handed the car-keys to Tim in exchange for a cheque for £40,000 which Tim signed, forging Unctuous's signature. Tim drove the car away.

Two days later, Sam discovered the impersonation because the cheque did not clear. At 2.00 p.m. the same day, Sam notified the police of this fraud. At 2.15 p.m., unaware of Sam's communication with the police, Dim-wit Cars bought the car in good faith from Tim.

Advise Sam who wishes to sue to recover the car, or its market value, from Dimwit Cars.

7 *(a)* Anson is a notorious murderer who has recently been released from prison. On 1 September 2004, in a face-to-face deal, Anson impersonated Chitty, a London lawyer, and bought 'The Fifoot', a river boat, from Pollock Boats Ltd ('Pollock'). Pollock immediately handed Anson a note which read: 'Sale of "The Fifoot" to Chitty for £30,000'. Anson paid £30,000 in counterfeit notes, and Pollock allowed Anson to remove 'The Fifoot'.

On 2 September, Pollock discovered that Anson had impersonated Chitty and that the notes were counterfeit. On 3 September, Pollock asked the police to help trace and recover possession of 'The Fifoot'. On 4 September, Anson impersonated Espinasse, Pollock's managing director, and fooled Dullard into paying £50,000 in cash to buy the boat.

Dullard now has possession of 'The Fifoot'. Anson has disappeared. Pollock wishes to sue Dullard in the tort of conversion. Pollock makes the following alternative allegations: that the apparent contract between it and Anson was a complete nullity; or, if there had been a contract between Pollock and Anson, that Pollock had successfully rescinded that sale before 4 September, when Anson dealt with Dullard.

Advise Pollock on the merits of its claim against Dullard.

(b) Paul is a maker of electric guitars. On 1 April 2017, S. Norris Ltd, claiming to be a music school that offers electric guitar lessons, sends Paul an order for five electric guitars, worth £1,000. The order is on S. Norris Ltd headed notepaper and is accompanied by a brochure promoting the music school, and a cheque for £1,000. In fact, no such school exists, and both the brochure and the cheque are fakes. Paul knows that the renowned guitar player, Steve Norris, has recently retired from his band in order to set up a music school. Thinking that the order is from him, Paul sends the guitars by courier on the same day to the address on the headed notepaper. On 2 April 2017, S. Norris Ltd sells the guitars to Zephan for £500 in cash. On 3 April 2017 Paul discovers that the cheque is a fake.

Advise Paul.

(a) 'We can understand why the decision in *Bell* v *Lever Bros Ltd* (1932) did not find favour with Denning U (in *Solle* v *Butcher (1950)).* An equitable jurisdiction to grant rescission on terms where a common fundamental mistake has induced a contract gives greater flexibility than a doctrine of common law which holds the contract void in such circumstances.' **(LORD PHILLIPS MR** in[1] *Great Peace Shipping Ltd* v *Tsavliris Salvage (International) Ltd,* 2002, CA)

Discuss.

Or *(b)* 'There is no need for a "doctrine of common mistake" and in fact the existence of this so-called doctrine is a myth. Problems of common mistake can only be resolved by construing the contract, implying terms where appropriate.'

Discuss.

(b) Lenny, an antiques dealer, is offering a 19th century pewter tankard for sale in his shop for £500. The tankard is worth £150. If it had been made in the 16th century, the tankard would be worth £1500. The tankard is clearly labelled as '19th century'. Meldrew, who is short-sighted and has forgotten his glasses, thinks that the label reads '16th century'. As he approaches the till, Meldrew says to Lenny, 'This is great! I only collect 16th century pewter, you know, and this is such a bargain.' Lenny allows Meldrew to purchase the tankard without correcting him.

Advise Meldrew as to his contractual position.

9.** ***Ernest**, a mechanic, wishes to buy an independent car-repair business. He answers an advertisement in a newspaper by** ***Frederick*****, who has such a business for sale in a town some 20 miles away.** ***Frederick*** **tells** ***Ernest*** **that the turn-over of the business for the accounting year 2002-2003 shows a profit of £45,000; he explains that the accounts for the subsequent year (2003-2004) have not yet been drawn up, but offers** ***Ernest*** **the papers so that he can look for himself.** ***Frederick*** **tells** ***Ernest*** **that he will tell all his customers to carry on having their work done at the car-repair business; he also advises** ***Ernest*** **that the independent car-repair trade is flourishing and that his business has no competitors in the immediate locality.**

Ernest**, who buys** ***Frederick*****'s business without looking at the financial papers which** ***Frederick*** **offered, takes out a second mortgage on his home at a very high rate of interest in order to raise the contract price of £150,000. Six months later,** ***Ernest*** **realises that the business was running at a loss in the year 2003-2004 and that it is continuing to do so. He is told by a fellow mechanic that the downturn in trade is caused by consumer preference for car-repairs to be undertaken by large undertakings linked to manufacturers.** ***Ernest*** **also discovers that** ***Frederick*** **has not told the customers of the business to carry on having their work done there, but has instead told them that he is himself carrying on business as a car-repairer some 10 miles away;** ***Ernest*** **notices that there are two other car-repair businesses within 5 miles of his own business. Overall, the business is not flourishing and would have been worth only £100,000, except that** ***Ernest*** **discovers a serious instability in the foundations of its premises which would make it worth only £50,000.**

Nevertheless, ***Ernest*** **carries on running the business for a further month after these discoveries. As a result of buying and running the business,** ***Ernest*** **accumulates mounting debts and is evicted from his home on its repossession by the mortgagees for failure to pay the interest.** ***Ernest*** **suffers from depressive illness as a result of his experience.**

Advise ***Ernest*****.**

5 On 15 April 2010, during telephone negotiations between Pugwash and Sinbad for a twelve-month hire of Sinbad's vessel, *The Superb*, a river-going pleasure boat, Sinbad said: '*The Superb* is not perfect, but it should be suitable for your passengers. Ultimately, it's your decision.' Without inspecting the boat, Pugwash signed an agreement of hire on 16 April. The total hire was £50,000, which Pugwash paid straightaway.

Clause 3 of the contract states: 'The Owner assumes no liability, contractual or otherwise, for unwritten remarks made at any stage concerning the boat's physical condition or its fitness for any purpose, and the Purchaser hereby affirms that he has not relied on any such unwritten remarks. In any event, the Owner will not be liable for damages in excess of the hire payment (£50,000).'

On 17 April 2010, Pugwash discovered that at all times the boat's bottom had been in need of urgent repair, and that repairs to rectify this would cost £40,000 and could not be completed before 1 September 2010. Hire of a substitute vessel for the period of repair would cost £35,000. On 1 April 2010, Pugwash had gained a very good contract with Triton Tours to take tourists in May 2010 on the River Cam between Ely and Jesus Lock, Cambridge. The net profit from this contract would be £200,000. Pugwash had specifically mentioned this deal during his negotiations with Sinbad.

Advise Pugwash.

4 Gulliver was the managing director and sole shareholder of a small family company, which made picture hooks. He entered into negotiations with Lilliput, an old friend and former business colleague, who was interested in purchasing the company. Gulliver was an optimist and, though very good at making picture hooks, turned a blind eye to the financial circumstances of his company. He told Lilliput that, 'In my view, business is ticking along nicely and finances are tight but secure'. Lilliput decided to purchase the shares in the company. The consideration for the sale of the shares was to be a cash price of £50,000 (of which half was payable immediately, the other half a year later) plus a promise by Lilliput to indemnify Gulliver in respect of the latter's guarantee of the company's bank loan. To save money (and in recognition of their long term friendship), neither party instructed lawyers to advise on the transaction and Lilliput did not instruct an accountant to check the paperwork.

Gulliver prepared a share sale agreement (based on a precedent he obtained on the internet), which contained the following clause: 'Each party acknowledges that no representations have been made prior to this contract.' The company's latest accounts were reproduced in a schedule at the back of the agreement, which (if read carefully) would have revealed the true, dire state of the company's finances. The contract was made in June 2005: Lilliput signed the main part of the agreement after reading it carefully, but merely initialled the schedule without reading it, and paid £25,000 to Gulliver.

Within days, it became apparent that Gulliver's description of the company's business prospects and finances was wildly optimistic, and also that Gulliver had failed to mention that the company had not being keeping up its repayments on its bank loan. For three months, Lilliput struggled to keep the business afloat, but was finally defeated in September 2005 when the company went into liquidation. When this happened, Lilliput wrote immediately to Gulliver saying, 'I regard our contract as null and void. Please repay my £25,000 immediately.' Gulliver, who has so far resisted repaying the £25,000, is now suing Lilliput claiming the balance of the purchase price and seeking to enforce the indemnity given by Lilliput in the share sale agreement.

Advise Lilliput.

3 Steele and Brandon enter into negotiations for the sale and purchase of Steele's dairy business. Brandon, an accountant, has no experience of running a dairy but does know how to read a balance sheet. Steele lets Brandon inspect the previous year's accounts which show the business to be in a profitable state. Brandon asks Steele if there is anything he should be made aware of which could have a materially adverse effect on the profitability of the business. Steele says there is not although, if he had taken the trouble to look, he would have seen that the latest edition of his trade journal, *The Cow*, carried an article stating that Willoughbys, a much larger dairy, was about to open in the area.

Brandon borrows money at a high rate of interest from his bank and, without seeking any legal advice, signs the sale and purchase agreement which is produced by Steele's solicitor. Within six months Willoughbys opens up its dairy and the profits of Brandon's new business slump. Brandon feels that he was misled by Steele and tells him that if he had known at the start of their negotiations what he knew now he would never have bought Steele's business but would instead have invested his money in a local pizzeria, which was also on the market at the time and which is now doing a fine trade. Brandon tells Steele that he can have his dairy back and that he wants 'full compensation' from him. Steele denies liability, claims that he acted in good faith and directs Brandon to clause 14 of the sale and purchase agreement which provides:

'No statement made by one party to the other party prior to this agreement being entered into constitutes a representation or a term of this contract. Each party acknowledges that he has not relied on any pre-contractual statement made by the other party.'

Advise Brandon.

8 Basil advertises for sale his 'bed and breakfast' guesthouse as a going concern. Owing to a misprint in the advertisement, the turnover of the business is stated to be 'average £50,000 a year' (rather than 'up to £50,000 a year'). Polly sees the advertisement and views the guesthouse. Basil allows Polly to inspect the accounts of the business which clearly show annual turnover of around £50,000 up to 2008, after which the business went into decline, falling to £20,000 in 2011. Polly glances very quickly through the accounts and declares that 'everything seems in order'.

A contract for sale of the guesthouse buildings and business is signed by Basil and Polly. It contains the term: 'No collateral contracts or oral warranties exist and neither of the parties relies on any information other than that contained within this contract.' The contract makes no mention of the turnover of the business.

Polly had calculated that she would make profits of £10,000 a year assuming turnover of £50,000. In fact, few guests stay at the guesthouse and with annual turnover of less than £20,000 Polly finds she is losing money at £5,000 a year. Polly starts to fall behind with the mortgage payments and needs to raise money urgently. She is forced to sell an old family portrait, of great sentimental value, for £3,000 (considerably less than its recent valuation at £12,000).

Advise Basil and Polly.

SUPERVISION 8. DURESS, UNDUE INFLUENCE AND UNCONSCIONABILITY

Reading
McBride, 61-71
(1) Duress
Davies, ch 17
Times Travel (UK) Ltd v *Pakistan International Airlines Corp* [2021] UKSC 40 (noted, mcbridesguides → Contract Law → Contract Law Casenotes)
Ukraine v *Law Debenture Trust Corp plc* [2023] UKSC 11, [171]-[183], [217]-[221] (look on Westlaw for casenotes on this)
Branford, 'Reconceiving wrongdoing in lawful act duress' (2023) 139 LQR 629
Morgan, 210-23
(2) Undue influence
mcbridesguides → Contract Law → Vitiating Factors → Undue influence
Davies, ch 18
Credit Lyonnais Bank Nederland v *Burch* [1997] 1 All ER 144
Royal Bank of Scotland plc v *Etridge (No 2)* [2001] 4 All ER 449
R v *HM Attorney-General for England and Wales* [2003] UKPC 22
Cheese v *Thomas* [1994] 1 WLR 129 (noted, Dixon, (1994) 53 CLJ 232; Chen-Wishart, (1994) 110 LQR 173)
Nature Resorts Ltd v *First Citizens Bank Ltd* [2022] 1 WLR 2788 (noted Mills, (2023) 82 CLJ 21)
Morgan, 223-30
(3) Unconscionability
Davies, 288-92
Capper, 'Undue influence and unconscionability: a rationalisation' (1998) 114 LQR 479

Aims and objectives
You should have a number of different aims in doing the reading for this supervision:

(1) To understand the difference between duress, and undue influence as grounds for rescinding a contract.

(2) To understand when a contract may be rescinded on grounds of duress – in particular: (i) when a contract may be rescinded on grounds of duress where the threat made to induce the rescinding party to enter into the contract was a lawful one, on its face; and (ii) what sort of causal link between the threat and the entering into the contract has to be established if the person entering into the contract as a result of that threat is going to be entitled to rescind the contract.

(3) To understand the difference between actually establishing that you entered into a contract under undue influence ('actual undue influence') and raising a presumption that you entered into a contract under undue influence ('presumed undue influence'); and to understand when exactly you will be able to make out a presumption of undue influence.

Written work

Answer the following question:

Answer **BOTH** (a) **AND** (b):

(a) Kathy, a hospital receptionist, whose husband has recently died, is very concerned about how she is going to manage without his income. She explains her worries to Len, a friend, who is a successful businessman and has advised her many times in the past. He suggests that she should 'downsize' by selling her five-bedroomed house and moving into a smaller property. Later he offers to buy the house for £500,000 and Kathy accepts this offer and enters into a written contract to sell the house to Len. Two weeks after signing the contract she discovers that the house is actually worth over £800,000.

Advise Kathy.

AND

(b) Mark runs a business which is in serious financial difficulty. Mark already owes Orchid Bank £200,000 and asks the bank to lend him a further £150,000. Orchid Bank agrees to do so provided Mark's wealthy wife, Naomi, gives the bank a written guarantee of all Mark's debts. The bank draws up the contractual documents and Mark tells the bank that he will ask Naomi to sign the guarantee. Mark takes the documents home and tells Naomi that the guarantee relates to the additional loan of £150,000 and that, unless she signs it, his business is doomed. Mark also tells her that the bank insists that she consults her own lawyer before signing, but she goes ahead and signs immediately saying that she does not trust lawyers. Mark returns the signed guarantee to the bank and fills in a form confirming that his wife has taken her own legal advice. Mark's business has since failed and he is unable to repay the bank. The bank demands that Naomi pay the £350,000 owed by Mark.

Advise Naomi.

Past paper questions

(*a*) 'I would … dispute the utility … of subdividing 'presumed undue influence' into further categories. All these classifications, to my mind, add mystery rather than illumination.' (*Royal Bank of Scotland* v. *Etridge (No. 2)* (2001) *per* LORD CLYDE)
Discuss.

7. 'Cases of alleged undue influence have caused considerable difficulties for the courts in recent years. The difficulties relate, not to the existence of the doctrine, but to its scope and its relationship with other doctrines, particularly duress and other cases in which courts have intervened to protect the vulnerable or those who have been exploited' (MCKENDRICK).

Is there a place for a distinct doctrine of undue influence in the law of contract?

3 'If the intention was produced by an unacceptable means, the law will not permit the transaction to stand. The means used is regarded as an exercise of improper or "undue" influence, and hence unacceptable, whenever the consent thus procured ought not fairly to be treated as the expression of a person's free will. It is impossible to be more precise or definitive. The circumstances in which one person acquires influence over another, and the manner in which influence may be exercised, vary too widely to permit of any more specific criterion.' (LORD NICHOLLS, *Royal Bank of Scotland* v. *Etridge*, 2002)

What is undue influence? How does this doctrine differ from the doctrines of 'duress' and of 'unconscionability'?

4 'Undue influence is about A's impaired consent, not about B's wicked exploitation of A… The source of A's impairment is the character of the relationship between A and B.' (BIRKS and CHIN, 1995)

'Undue influence has concentrated…upon the unfair exploitation by one party of a relationship which gives him ascendancy or influence over the other.' (LORD HOFFMANN, *R* v. *Attorney-General for England and Wales*, Privy Council, 2003)

What is the legal basis of undue influence?

3 What is the basis of the doctrine of undue influence?

1 *(a)* Ann, a student, is inexperienced in investment and business. She wins a large sum of money in the lottery on her 18th birthday. A week later, Belinda, her step-mother, persuades her to make an unsecured loan of £100,000 at below the market rate of interest to Dreams, a new business which Belinda's friend Celia is starting and of which Celia is the managing director. Belinda tells Ann that Celia is a very successful businesswoman and that this will be a sound investment until after she finishes university. In presenting the business to Ann, Celia fails to disclose that her last three business ventures went bankrupt, all within the last three years. The Easyloan Bank promises to lend Dreams a further £100,000 and Celia persuades Ann to sign a guarantee for the loan. Within three months, Dreams goes bankrupt and there are no assets to repay the loan to Ann. Easyloan is asking Ann to pay £100,000.

Advise Ann.

and

(b) In what circumstances will consent be vitiated for economic duress?

3 Allie is a young and inexperienced graduate. Her neighbour, Betty, is an experienced professional. Allie frequently asks Betty's advice on financial transactions and follows Betty's advice without consulting others. Allie has just got a job far away from her current home in a small town where it is difficult to rent property. Betty tells Allie that Betty's daughter, Chloe, is willing to offer a three-year lease of a nice flat in that town. The amount of the rent is double the local market rate. Allie signs the contract with Chloe.

The contract contains a clause stating that 'the landlord will provide the tenant with keys to the property'. Allie is given one swipecard key. A week after the signature of the contract, Allie asks Chloe for a second key to the flat. She is told that a further swipecard key will cost £500, because Chloe will have to commission the key specially. Allie needs the spare key to permit her cleaner to enter while she is at work, and so she agrees to pay reluctantly.

Advise Allie.