# English Law of Contract (JUS 5260)

# Spring 2023

**Exam question with guidance notes**

[**Overall remarks:** This exam is not especially difficult and students should easily be able to tackle the various questions within the permitted word length. When marking, the indicated grade percentages do not need to be followed precisely; they are simply a rough indication to the students of the relative extensiveness of the answer required.]

Answer all of the following six questions, using English law of contract as the applicable law. Expressed as percentages of the final grade, the answer to question 6 will count approximately 25% of the final grade, the answer to question 1 will count approximately 10%, while the answers to the remaining questions will each count approximately 16%.

1. A contract which lacks certainty is:
[A] unenforceable.
[B] repudiated.
[C] voidable.
[D] void.

Which of the above alternatives most accurately reflects English law of contract? Explain your answer.

[**Answer:** The correct answer is alternative [D]. The wording of alternative [D] is a little misleading as a contract lacking certainty never comes into existence, so, strictly speaking, it is somewhat illogical to refer to a 'void contract'. Nonetheless, it is commonly accepted practice to state that a contract lacking certainty is 'void for uncertainty'. As for the other alternatives, these all assume that a contract has come into being—an assumption that cannot be met in a case of lack of certainty. A good answer would also cite relevant case law: eg *Scammell & Nephew Ltd v Ouston*; *Baird Textile Holdings Ltd v Marks & Spencer plc*; *British Steel Corporation v Cleveland Bridge & Engineering Co Ltd*.]

2. Eve wants to hire a boat for a holiday cruise for herself and her family along some of the canals in the countryside of southern England. She looks up the website of a company that hires out boats for such purposes. She chooses a boat that seems to meet her needs and enters into an online rental agreement for hire of the boat for a two-week period beginning on 1 July 2022. The following term is included in the agreement: 'The hirer accepts the boat in good order'. When Eve and her family enter the boat on 1 July, they find that the boat cabin smells of old rubbish, the gas cooking equipment in the kitchen alcove has bits of old food sticking to it; and the mattresses in the sleeping compartment are dirty. Eve wants to cancel the rental agreement. She claims that the boat-hire company has breached a condition of the contract, thereby giving her the right to end the contract.

Is Eve's claim correct? Give reasons for your answer.

[**Answer:** This question tests knowledge of how to distinguish between the various terms of a contract in respect of their normative status and effects, in particular the distinction between a

condition, warranty and innominate term. A good answer would briefly note that a condition is a primary obligation of a contract whereby the contracting parties have agreed, expressly or by implication, that *any* breach of that obligation entitles the non-breaching party to bring the contract to an end. This is often summed up in the phrase that a condition 'goes to the root of the contract'. A very good answer would further note that the parties' intention is crucial for determining a term's status, and that, in ascertaining intention, the courts look to the substance of the term, not its formal designation. On this point, a very good answer would cite *Schuler AG v Wickman Machine Tool Sales Ltd* in support. An excellent answer might also note that legislation and case law occasionally determine that certain standard terms are usually to be treated as conditions—eg 'expected readiness' clauses in shipping contracts and terms deeming time to be 'of the essence' in many other commercial contracts. A good answer would then go on to state that the clause in this scenario operates with a criterion of 'good order' and that this criterion is too vague to fit clearly the classification of a condition, particularly as the effects of its breach could be major or relatively trivial. Thus, a good answer would conclude that the clause is an innominate term pursuant to the line of jurisprudence stemming from *Hong Kong Fir Shipping Co Ltd v Kawasaki Ltd*. A good answer would also draw parallels between the seaworthiness clause in that case and the 'good order' clause in this scenario. Thus, one would have to assess whether the breach of the latter clause is sufficiently serious as to enable Eve to elect to have the boat hire agreement discharged. On this point, it is not expected that students reach a fixed conclusion because the fact situation is difficult to judge. For instance, how odious is the rubbish smell and to what degree has it entered into the cabin fittings? Nonetheless, a good answer would find that if a few hours of tidying, cleaning and airing out of the boat would remedy the problems, the breach is unlikely to be sufficiently serious, also given that such a delay would not constitute a large chunk of the agreed rental period. In such a situation, Eve would have to continue with the boat rental, although she would likely be entitled to compensation for the delay and attendant problems.]

3. Phoebe has a Tesla Model S car that she offers to sell to Harald for £75,000.
Which of the following three situations DO NOT destroy Phoebe's offer? Give reasons for your answer in relation to each situation:
[i] Harald asks Phoebe if she would consider selling him the car for £65,000 but adds that if she does not want to sell it for that price then he would still like the opportunity to purchase it for the original asking price.
[ii] Harald asks Phoebe if hire purchase is available to help him buy the car.
[iii] Harald agrees to buy the car for £75,000 if Phoebe installs new loudspeakers in the car.

[**Answer:** This question tests knowledge of the distinction between a counter offer, which destroys/kills/extinguishes the initial offer, and a request for information, which does not. A good answer would conclude that situation [ii] *clearly* does not destroy Phoebe's offer; Harald is not seeking to vary the terms of her offer, but merely to ask for information. A very good answer would cite *Stevenson, Jacques and Co v McLean* or *Harvey v Facey* as case law in support. A good answer would further conclude that situation [i] is a bit more tricky to assess: it might constitute a counter offer if, objectively, it appears to Phoebe that Harald is intending to reject her offer and replace it with an offer of £65,000. However, a strong argument can be made that Phoebe would reasonably think that Harald's additional remark evinces an intention to keep her offer alive and that his statement, read as a whole, amounts to a request for information. In support of this argument, a very good answer would note the similarity of situation [i] with the fact situation in *Stevenson, Jacques and Co v McLean*. As for situation [iii], this is obviously a counter offer.]

4. Erik runs a restaurant, 'Erik's Eatery', in Coventry. In March 2020, he enters into a wine-purchasing agreement with Exotic Excess, a company that imports exclusive wines from small wine producers in Georgia. The agreement prohibits Erik from purchasing wines for his restaurant from other wine importers for a four-year period. By November 2020, Exotic Excess is facing difficulties in expanding its business due to the Covid-19 pandemic. In order to stimulate business growth, the company decides to offer discounted prices for its wine imports to selected restaurants, including two restaurants in Coventry, but not to Erik's Eatery. Erik is angered by this and finds another supplier of specialty Georgian wine for his restaurant, so that he can maintain his market share in competition with the two local restaurants that are offered the discounts from Exotic Excess. Subsequently, Exotic Excess sues Erik for breach of contract. Erik argues that the agreement with Exotic Excess contains an implied term not to discriminate unfairly against his restaurant business in favour of competing local restaurants and that Exotic Excess has breached this term by offering price discounts to the two other restaurants in Coventry but not to his restaurant.

What is the legal validity of his argument concerning the alleged implied term? Give reasons for your answer.

[**Answer:** This question tests knowledge of the criteria for when a term may be implied into a contract. A good answer would begin by noting that there are four categories of implied terms: those implied in fact; those implied in law; those implied by custom; and those implied by trade usage. A good answer would then go on to find that it is the first category that is potentially relevant here, and that such terms are implied on a 'one-off' basis to give effect to *both* parties' particular intentions. A good answer would note that, over many years, judges have proposed various tests for determining when a term may be implied in fact, with two alternative tests as traditional points of departure: the 'officious bystander' test and 'business efficacy' test. A very good answer would cite leading cases in which these two tests are elaborated, such as *Shirlaw v Southern Foundries* (the officious bystander test) and *The Moorcock* (the business efficacy test). A good answer would then note that the Supreme Court has recently synthesised these tests in its judgment in *Marks & Spencer plc v BNP Paribas Securities Services Trust Co*, along the following lines: the implied term must be (1) necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it, *or* it must be so obvious that 'it goes without saying'; (2) capable of clear expression; and (3) not in contradiction to any express term of the contract. A very good answer would add that a term is not to be implied simply in order to make a contract operate more fairly. In light of all these criteria, a good answer would conclude that Erik's claim is without legal validity.]

5. Margaret is the Chief Executive Officer of an advertising company, Go-Get-It-At-All-Costs. In September 2022, she hires Stephen as her personal secretary. The work contract for Stephen contains the following clauses:

'(j) The personal secretary will dress smartly at all times. Jeans are not an acceptable form of dress in any work situation.
(k) The personal secretary will work whatever hours are required to complete the tasks given to him.'

On 1 October, Margaret requests Stephen to prepare sales statistics that she will present to an important client at a meeting scheduled for 10 a.m. on 2 October. Stephen works until

midnight to prepare the statistics, and comes back to the office at 7 a.m. on 2 October to keep working on the statistics. As there are no other staff at the office then, Stephen wears jeans as he finds these are more comfortable, and his intention is to change into more formal pants before the meeting. When Margaret arrives at the office at 9:30 a.m. she finds that Stephen still has not finished preparing the sales statistics and that he is wearing jeans (he was so preoccupied with the statistics preparation that he had forgotten to change into more formal attire). Margaret is angry and, in front of several staff, tells Stephen that he is fired from his position. Stephen feels upset and humiliated. In subsequent days, he receives medical treatment for depression.

What legal remedies, if any, are available to Stephen under English law of contract? Give reasons for your answer. You do not need to consider the possible impact of legislation concerning employment and workplace conditions.

[**Answer:** This question tests knowledge of several points of law, namely, the criteria for when a term may qualify as a condition, the consequences of breaching a condition, and the degree to which damages are available for non-pecuniary loss arising from breach of contract. A good answer would recognise that Stephen will only have a remedy under English law of contract if he can show that Margaret is not entitled to terminate his employment, that her entitlement to do so depends on the nature of the term(s) that he has possibly breached, and that the extent of a possible remedy for him will depend on the extent to which English law of contract permits claims for non-pecuniary loss. A good answer would further state that there is no doubt that Stephen has breached clause (j) of the employment contract, but that it is less certain whether clause (k) is breached as well (we do not know how much of the statistics preparation remained at 09:30 a.m. and whether the statistics could have been completed by 10 a.m.). A good answer would then go on to discuss whether breach of clause (j) amounted to breach of a condition, thus enabling Margaret to elect to bring Stephen's employment contract to an end independently of whether or not clause (k) was breached. Students are not expected to arrive at a fixed conclusion on this point, but to show familiarity with the factors and case law covered in relation to question 2 above, and to show an ability to consider various lines of argument. One line of argument favouring a view that clause (j) is intended by the parties to be a condition is the stringency with which it is formulated—particularly the element concerning jeans—together with an indication from the scenario that the contract is mutually understood as expressing and producing an exceptionally disciplinarian work culture that tolerates little, if any, slack. A contrasting approach is to argue that it is unlikely that the parties regarded clause (j) as going to the root of the contract as it only concerns attire, which is relatively trivial in an employment situation. Moreover, the fact that the clause may be breached in a variety of ways—some serious, some trivial—suggests that it is an innominate term. A slightly alternative approach pushing towards a conclusion that the clause is not a condition would be to apply the test adopted by Diplock LJ in *Hong Kong Fir Shipping*, asking whether breach of the clause would deprive Margaret's company of 'substantially the whole benefit' of the contract. A very good answer, though, would note that Diplock's test is duly criticised for failing to take account of the fact that not all breaches of conditions necessarily have such serious consequences, and point to a case (eg the *Mihalos Angelos*) in support. A good paper would then consider the remedies for Stephen flowing from each alternative outcome of the preceding discussion. He will have no redress if he has breached a condition. If he has not breached a condition, it is likely that his wearing of jeans is insufficiently serious as to warrant Margaret's termination of his contract, which means that she will have acted unlawfully. In such a case, Stephen would be entitled to damages for pecuniary harm related to his loss of salary but he would not be entitled to damages for non-

pecuniary harm related to his mental distress. A very good answer would cite *Johnson v Unisys Ltd* in support of the last point.]

6. Peter is the lead singer in a punk rock band called 'Never Give Up'. He is also the band's manager. Joy runs a concert business called 'Joyous Division' in Birmingham. Peter enters into a contract with Joy whereby his band will perform at a concert organized by Joy a month later and the band will receive £20,000 for the performance. A few hours before the concert, Peter takes an hallucinatory drug. The effect of the drug is that he is unable to sing properly and, as a result, he and the rest of the band are booed off the stage early in the concert. Joy then receives massive numbers of complaints from the fans who, altogether, had paid her company £25,000 to attend the concert. She returns the £25,000 to the dissatisfied fans. Additionally, she has paid £10,000 to hire the concert venue.

What remedies, if any, does Joy have in respect of the doctrine of frustration under English law of contract? Would your answer be different if Peter's concert performance was ruined by a third party covertly lacing his drink with the hallucinatory drug just before he went on stage, and, if so, what legal consequences would ensue? Give reasons for each answer.

[**Answer:** This question obviously tests knowledge of rules for applying the doctrine of frustration and its effects. A good answer would start off by noting briefly the basic test for determining if a contract has been frustrated, this being that circumstances have arisen, without either party's fault, which render performance of the contract impossible, pointless or radically different from that which the parties envisaged they would undertake pursuant to the contract—and which is more than mere hardship or inconvenience. A very good answer would cite a relevant court judgment to this effect, such as *Taylor v Caldwell*, *Davis Contractors Ltd v Fareham UDC*, *Pioneer Shipping Ltd v BTP Tioxide Ltd, The Nema*. A good answer would also note that the chief effect of frustration is to discharge the parties from further obligations under the contract. A very good answer would cite a relevant case decision on this point, such as one of those listed above. A good answer would then consider how these rules play out in the present situation and conclude that the hurdle for Joy in being able to plead frustration is that the frustrating event cannot be the fault of one of the parties: Peter's inability to sing properly is induced by him consciously taking the hallucinatory drug. A very good answer would cite a relevant case decision on point, such as *Maritime National Fish Ltd v Ocean Trawlers Ltd* or *The Super Servant Two*. Students are not required to consider what alternative remedies Joy might have (particularly the ability to claim damages for breach of the contract by Peter and his group); the question is only focusing on frustration. The next element of the question involves the alternative fact situation involving a third party's covert actions. A good answer would find that the result here would be different—ie frustration applies. A good answer would thereafter consider the consequences flowing from this, namely that the contract is discharged and the contractual obligations of the parties cease from this point. A good answer would also consider the provisions of the Law Reform (Frustrated Contracts) Act 1943, particularly section 1(2). A good answer would note that section 1(2) basically stipulates that, in the case of obligations to pay money, the money is recoverable even if there has been partial consideration given, and that if the party to whom the money was paid (before the frustrating event occurred) has incurred expenses as a result of the contract (before the frustrating event occurred), the court can deduct these expenses (or part of them) from the money that is due to be paid back to the other party. The court's ability to deduct such expenses is discretionary and depends on an assessment of whether it is 'just to do so having regard to all the circumstances of the case'. Students are not expected to arrive at firm conclusions on how these provisions will play out as the scenario does not state whether

Peter's band have received any of the £20,000 they were to be paid by Joy, prior to the concert. If the entire sum was only payable after the concert, Joy clearly does not have to pay it after discharge. A good answer would state that if all or some of the money has been paid to the band, the latter will have to pay back that money, minus any expenses they have incurred in preparing for the concert. Again, though, it is not clear what expenses, if any, the band have incurred. A very good answer would further note that, in the event of litigation, a court has considerable discretion to arrive at a just result, and, as Joy has seemingly sustained much greater losses than the band, a court *might* decide to allow her to recover any prepayment to the band without any deduction for the band's expenses. An excellent answer would cite *Gamerco SA v ICM/Fair Warning (Agency) Ltd* as an instance in which this occurred, noting that the case has parallels to the present scenario. The case concerned a cancelled concert where the concert promoters made an advance payment to the performers and the court made no deduction of expenses for the performers because the promoters' losses far exceeded the prepayment. However, students should not be significantly penalised for omitting mention of this judgment as it was not mentioned in the course lectures. However, the case is presented at some length in the course pensum, so one would expect a diligent student to have read about it.]