**SUMMARY QUESTIONS**

**ESSAY QUESTIONS**

1. ‘The equitable remedy of specific performance is harsh, unfair, and it exposes vulnerable people to potentially unsound contractual obligations. It should be abolished and replaced with a common law damages assessment.’

With reference to case law, critically assess the above statement.

**Indicative content outline answer:**

***Common Law Remedies***

* Any breach of contract entitles the injured party to damages. This is irrespective of whether the term is classified as a ‘condition’ or ‘warranty.’
* Damages (a money payment) exists to compensate the injured party for any losses sustained under the breach of the contract. Damages can be either ‘liquidated,’ meaning the parties have anticipated the consequences of the breach, determined the level of damages to be paid and included this in the contract; or they can be ‘unliquidated’ which are more frequent and determined by the court.
* Damages are used to either place the injured party in the position he/she would have been had the contract been completed (expectation losses); or place the injured party in the position he/she was before the contract had begun (reliance losses). (*Ruxley Electronics and Construction Ltd v Forsyth* and *Anglia Television v Reed).*
* In order for the courts to assess damages, there are underlying principles that must be adhered to, to ensure fairness. The first principle is that the damages must not be too remote; they must be quantifiable by the court; they must be recognised as damages in English law; and the injured party must have sought to mitigate his/her losses as far as is reasonable.
* The general rules for assessing damages include the following considerations (*Hadley v Baxendale*):
1. Do the damages arise naturally in the normal and ordinary course of the contract; and
2. Are the damages within the ‘reasonable contemplation’ of the parties.
* Damages for Injured Feelings: The traditional view of the courts when determining the level of damages applicable in a case has been to ignore any injured feelings or loss of enjoyment suffered. This is due to the problems inherent in quantifying such damages and the potential of opening the floodgates for claimants. However, exceptions to this rule have been developed (*Jarvis v Swans Tours*).

Agreed / Liquidated Damages: Businesses, particularly, may wish to consider the possibility of a contract not being completed on time or being breached, and the parties may seek to agree beforehand the amount to be paid in relation to the breach. This pre-determination of the damages payments is known as ‘liquidated damages’ whereas those determined by the court are referred to as unliquidated damages. In order for liquidated damages to be accepted, it must be a genuine pre-estimate of the loss rather than a penalty clause (*Dunlop Pneumatic Tyre Company v New Garage and Motor Company*).

### *Equitable Remedies for Breach of Contract*

* As stated above, the courts will generally provide damages as a remedy for breach of contract wherever possible (as this is usually the simplest form of a remedy as it is a money payment). There are occasions where money would not provide an appropriate remedy, or would be unjust due to the nature of the contract which has been breached. This led to the development of the equitable remedies of specific performance and injunctions. Being ‘equitable’ remedies, they are awarded at the courts discretion.

### *Specific Performance*

* Specific performance is a remedy that is available when monetary damages are insufficient and do not adequately compensate the injured party for his/her loss. This is a court order compelling the party in breach to perform his/her contractual obligations. As the remedy is only available where monetary damages are inadequate, it is an order generally where the subject matter of the contract is unique – such as the sale of land or antiques which by their nature cannot be replaced (although those examples are not guaranteed to be awarded specific performance).
* Specific performance cannot be ordered in contracts for personal services, or contracts requiring constant supervision by the courts (*Rainbow Estates v Tokenhold*). Finally, as an equitable remedy, it must also be available (potentially) to both parties and would not cause unreasonable hardship (*Co-operative Insurance Society v Argyll Stores*).

### *Injunctions*

* There are two main types of injunction available to the courts, mandatory injunctions and prohibitory injunctions (although interim injunctions may be granted prior to a full hearing to prevent injury to the claimant).
* Mandatory injunctions require the party compelled to perform the contract, whilst the more common type is a prohibitory injunction that stops a party from breaching the contract.
* Failing to follow the order of an injunction will result in the transgressor being guilty of contempt of court – a potentially very serious charge.

***Rectification***

* The remedy of rectification enables a written document (such as contract) to be changed (such as including / removing of clauses) to more accurately reflect the terms that were identified in the oral agreement subsequently reduced in writing.
* In order for a claim for rectification to succeed, the parties must have established an oral contract that identified the terms of the agreement; these terms did not change from the oral agreement until it was written; and the written contract does not accurately provide what was stated in the oral agreement (*Craddock Brothers Ltd v Hunt*).
* The remedy allows the written document to be altered to reflect what the parties agreed orally, but this will only allow the document to reflect this oral agreement, not what one of the parties wanted to have included (*Frederick E Rose (London) Ltd v William H Pim Jnr & Co Ltd*). Rectification may also be available where one of the parties believes that the contract reflects the intentions of the parties, but it does not, and the other party is aware of this mistake (*Commission for the New Towns v Cooper (GB) Ltd*).

2. Identify the methods in which contractual obligations may be discharged. Specifically comment on the differing approaches taken by the judiciary in relation to discharge through frustration.

**Indicative content outline answer:**

* Contracts may be discharged through performance, breach and frustration. As the question specifically asks for discussion of frustration, this outline answer covers just this issue.
* Frustration was a doctrine developed by the courts in order to offer relief in circumstances whereby a contract could not be performed or had become radically different from that contemplated and this was neither of the parties’ fault.
* The effects of frustration result in the parties being discharged from any further performance in the contract and any money paid is returned (at the discretion of the court).
* Frustration is a doctrine of ‘last resort’ and will therefore only be used where the parties have not made their own arrangement for a frustrating event. The courts encourage parties to draft contracts in as detailed a manner as possible to include for eventualities and the method of resolution to be adopted (*force majeure* clauses).
* There are several examples of what may amount to frustration and, whilst each case is decided on its own merits, there are common themes that aid in identifying what may be held to be frustration.

### *The Subject Matter of the Contract Ceases to Exist*

* In a situation where the subject matter of the contract has ceased to exist before the contract has been performed, and it is neither parties’ fault that this has occurred, then the courts consider this frustration (*Taylor v Caldwell*).
* However, *Taylor* was decided because the entire subject matter of the contract was destroyed. Where the sole purpose of the contract has not been destroyed or unable to be completed, and the benefit of the contract remains, the contract will not be considered to have been frustrated (*Herne Bay Steam Boat Company v Hutton*).

***A Person Engaged under a Contract of Personal Service becomes Unavailable***

* If a person has personally agreed to perform a contract and subsequently he/she becomes unavailable then this may constitute frustration. Whether it will invoke frustration depends upon the length of time the person is unavailable. If it is a temporary situation (such as a short illness as part of a sufficiently long or open-ended contract) then this will not be frustration, but if the person is dead or is permanently unavailable then this will frustrate the contract (*Condor v The Barron Knights*).

### *An Event Central to the Contract has not Occurred*

* If parties contract for a specific event, and for some reason this event does not take place, then the contract will be frustrated (*Krell v Henry*).

### *The Contract Cannot be Performed in the Manner Specified*

* If the contract is specific about the manner in which it must be performed, and this cannot be complied with, then the contract will fail due to frustration (*Nickoll & Knight v Ashton, Edridge & Co.*).

### *If the Contract Becomes Illegal to Perform*

* If the parties have agreed a contract, but before the contract is due to be performed it subsequently becomes illegal, then the contract will be frustrated (*Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour*).

***The Contract becomes Radically Different***

* The previous examples have demonstrated where the contract could not be completed due to some event or circumstance. It is also the case that if the contract was to be radically different from that which was envisaged when the contract was formed, then this may constitute frustration (*Davis Contractors Ltd v Fareham Urban DC*).

#### *The Limis to Frustration*

* An essential factor in frustration is that is must not be the fault of either party. If one of the parties has deliberately or negligently led to the contract failing, he/she must accept the loss and / or compensate the innocent party (*Ocean Trawlers v Maritime National Fish*).
* *Herne Bay* involved the charter of a steamboat to view the naval fleet. This event was cancelled and the defendants did not take the charter. The claimants sued for the owed sum and it was held that this did not amount to frustration. There was still a value from sailing around the fleet albeit that the full event was not going to take place, and hence this could not amount to a frustrating event. In *Krell*, the entire event had to be cancelled as the King was ill and hence there was no use for the rented apartment. Had the coronation been rescheduled, then it may have been that *Krell* would not have amounted to frustration.

**PROBLEM QUESTIONS**

1. In June 2016 Tariq entered into a contract with Wagner Brothers Ltd to write a script for an intended play that Wagner Brothers Ltd was to provide to Apollo’s Theatres Ltd. Apollo’s intended to use this for several performances it had scheduled for November 2017. The contract provided that Tariq was to submit the completed script on or before June 2017.

It transpires that Tariq did not have time to write the script as he was busy with other projects and had taken on too much work. On 25 April 2017 Tariq wrote to Wagner Brothers Ltd with notice that he would not be able to complete the script as promised and had no intention of attempting to do so. By this stage, Wagner Brothers Ltd and Apollo’s Theatres Ltd had incurred substantial expenses on the basis of this project. Wagner Brothers Ltd had also entered into preliminary contractual agreements with several television production companies for a mini-series of the script.

Advise Wagner Brothers Ltd and Apollo’s Theatres Ltd of any action they can take for damages.

**Indicative content outline answer:**

* The issues to be raised here are the standard rules for breach of contract and the remedies involved (as already identified above).
* There should also be a discussion regarding anticipatory breach and the options available to the innocent party. Essentially, whether that party should claim immediately when it becomes clear that the other does not intend to adhere to the contract, or wait and claim when the breach actually occurs.
* It is also important to raise the issue of the duty of mitigation and the reasonable steps that Wagner and Apollo could take to minimise the losses incurred.

2. Stephane books a holiday with Super Skiing Holidays Plc who specialize in holidays for single people. Stephane books for a two-week vacation to a resort in Switzerland. The brochure describes the resort as hosting a ‘house party’ where live entertainment will be provided every night and there will be several people to meet and enjoy the resort with.

When Stephane arrives he is unhappy with the quality of the room and the food is of a very poor standard. The only ski boots available are too small for his feet and the skis were designed for children—there were no adult sizes. The entertainment consists of a local plumber who provides his Elvis Presley impersonation for 30 minutes each night on his way home from work. Stephane is joined at the resort by three other guests, each of whom are French and do not speak English, and they leave after five days—leaving Stephane the only person at the resort for the remainder of the holiday.

When Stephane returns home he complains to Super Skiing Holidays but they state it was not their problem and he cannot claim damages for the loss of enjoyment of his vacation.

Advise Stephane.

**Indicative content outline answer:**

* The question is based on the case of *Jarvis v Swans Tours* and involves discussion of claims for injured feelings / disappointment in contract law.
* There is generally no right to claim for disappointment in contract law above losses which are reasonably foreseeable. Exceptions were established in cases such as Malik v Bank of Credit & Commerce International - where the House of Lords held that an employee of the disgraced bank was entitled to damages due to the stigma attached by being employed at the bank, and the problem inherent in obtaining future employment; and Perry v Sidney Phillips - where the Court of Appeal held that distress following the negligence in a survey of a property which subsequently required the execution of substantial repairs, did entitle the injured party to damages.
* The extent of damages in this area of law was clarified in *Jarvis*. Damages awards should conform to the general rules of remoteness of damage. As such, the loss should be in the reasonable contemplation of the parties.
* Whilst damages for mental distress are not usually awarded in commercial contracts, they are applicable to non-commercial contracts.