**SUMMARY QUESTIONS**

**ESSAY QUESTIONS**

1. ‘The presumptions advanced in the assessment of whether parties intended an agreement to create legal relations are wrong. It provides for uncertainty and inconsistent judgments, and should be made more transparent (particularly necessary for vulnerable people).’

Discuss.

**Indicative content outline answer:**

* For the parties to be able to sue and be sued on a contract, they must intend it to create legal relations**.**
* In assessing the intention, the courts have traditionally looked to the parties’ actions and conduct - viewed in light of what a ‘reasonable person’ would have considered the intentions to be (Parker v Clark).
* The presumptions of contract and the intention to create legal relations have fallen into one of two camps.
* Those involving social and domestic arrangements are generally presumed not as intending to be legally binding, unless this is specifically established in the agreement.
* Alternatively, in business and commercial arrangement, the presumption is that the parties do intend to create legal relations, and if one of the parties wishes to rebut this presumption, he/she must produce evidence in support of this contention.
* A third situation exists between these two camps, where the parties have a social relationship but also negotiate an agreement that may be viewed as commercial.
* In such a scenario, the onus is placed on the party wishing to assert the contract to demonstrate tangible grounds that he/she intended to create legal relations (although this onus is less burdensome than if the relationship had been purely domestic - John Sadler v George Reynolds).
* The presumptions may appear fair, but they could also be misinterpreted by parties who do not understand the necessity of outward signs to rebut the presumptions.
* There are several cases that should be used to demonstrate the different approaches taken by the courts – *Balfour v Balfour* and *Merritt v Merritt* for domestic agreements.
* *Hadley and Others v Kemp and Another* could be used to demonstrate potential problems of where social arrangements become commercial arrangements when friends go into business. This is an area where formal legal documents / contracts and advice would be beneficial to clearly identify the legal relationship between the parties – hence a potential concern over the presumptions and their effects.

2. ‘Privity of contract is such an antiquated doctrine, resplendent with exceptions and caveats, that its practical effect is meaningless.’

Discuss this statement in relation to business agreements.

**Indicative content outline answer:**

* The doctrine of privity of contract arose through the common law as a means of regulating the relationships between parties to a contract.
* The doctrine establishes that only parties to a contract may sue or be sued on it, and consequently provides rights and imposes obligations on those parties alone.
* This is important as many situations involve contracts where a right or benefit is to be provided for a third party.
* Even though the contract is for the benefit of this third party, he/she is unable to enforce it as he/she is not privy to the contract.
* Having stated the tests that have developed the doctrine of privity, it must be observed that the doctrine could, in certain circumstances, produce unfairness and inconvenience to the parties. As a consequence the common law created many exceptions.

*Exceptions to Privity*

* **Agency**
* **Collateral contracts:** A contract established between two parties may indirectly create another contract with a third party (Shanklin Pier v Detel Products).
* **Trusts:** A person may transfer property to a second person (known as the trustee) who maintains the property for the benefit of others (known as a beneficiary). The person who has created the trust identifies the rules by which the trust is to be administered, and if these terms are not complied with, the beneficiary may seek to enforce it. (*Les Affreteurs Réunis v Leopold Walford*).
* **Insurance contracts:** A third party may be able to claim under an insurance policy that has been established for their benefit. This is despite the fact that they did not create the contract or pay the premiums.
* **Restrictive covenants:** Restrictive covenants are used to protect land and bind purchasers as to the provisions laid down which benefit adjoining owners and interested parties in the area (Tulk v Moxhay).
* Contracts for interested groups: (*Jackson v Horizon Holidays Ltd*).

*Reform*

* The privity rule was considered unfair as it prevented those parties who had a genuine interest in a contract from being able to take any action on it, and many other countries (including those in Europe, Australasia, and North America) already had provision to allow such individuals to play an active part on the contract.
* This led to legislative action in the form of The Contracts (Rights of Third Parties) Act 1999.
* The legislation was not enacted to replace the common law but rather to add rights for the third party.
* It enabled a third party to enforce the terms of a contract if the contract expressly provided for it, or if the contract conferred on them some benefit (unless the contract did not intend that the relevant term should be actionable by the third party).
* This involves the third party being named in the contract to enable them to claim under the Act.
* This Act further enables the third party to enforce the contract and seek damages as they would have been able to if they had been a full party to it.
* However, the third party will be unable to claim these damages if the injured party has already claimed.
* There are limitations to the Act such as preventing a contract being enforced by a third party against employees in contracts, or in contracts concerning the carriage of goods.

**PROBLEM QUESTIONS**

1. All Bright Consumables (ABC) Ltd manufactures PC components. It runs this aspect of its operation from a factory that it leases from JJ Industrial Rentals Ltd (JJ), and the machines used in the production process are rented from iMachines and Tools Ltd (iMachines Ltd).

Given the economic crises in 2010, and increasing competition from the Far East, ABC is in financial difficulties. In March 2010 ABC wrote to JJ of its financial problems and stated ‘We are suffering severe financial difficulties in these austere times. We both know you have factories that you are unable to rent, and unless you can reduce the rent on this factory we will have no choice but to cease trading and you’ll be left with another unrented factory’. Following a discussion between the managing directors of both companies, JJ agree to accept half rent payment until such a time as ABC’s business picks up.

ABC also informed iMachines Ltd in the same manner about its financial problems and it agreed to take a quantity of the PC components manufactured in lieu of its hire charges for the financial year 6 April 2010 to 5 April 2011.

In January 2011 JJ were suffering financial difficulties and demanded that ABC pay the full rent on the factory from February 2011. It also demanded payment of the rent owed from March 2010. It considers this part-payment of a debt and wishes to exercise its right to obtain payment. At this time, iMachines Ltd discovered that the PC components it had taken in lieu of hire charges were worth only half of the hire charges for the year. It has demanded that ABC pay the balance owed in cash.

Advise ABC as to whether the payments demanded have to be made.

**Indicative content outline answer:**

* The question needs identification of good consideration – particularly the issue of part-payment of a debt and when such payment may indeed settle the full amount owed.
* It is a general rule of contract law that part payment of a debt will not prevent the party owed money from later claiming the balance.
* This is even if they have agreed to take the lower sum, generally because there is no advantage for the party taking a lesser sum than that owed (*Foakes v Beer*).
* A debt may be extinguished by proving something else of value other than money (a good or a service), whether this is to the value of the sum owed or not (as consideration need not be adequate).
* Exceptions exist to the rule regarding part-payment.
* If the party has paid a lower amount, but has done so at an earlier date, then this may amount to consideration; or if there has been goods or another benefit provided along with the lower payment then this may also provide good consideration (D&C Builders Ltd v Rees).
* The major exception to this rule, alongside the others noted above, is the doctrine of promissory estoppel**.**
* Whilst the rule of part-payment not being good consideration was established through the common law, the courts also created an equitable defence, which stops a party that has made a (gratuitous) promise from reneging.
* Essentially, it seeks to suspend rights rather than to remove them (although this is a moot point in many instances).
* Consider the case *Central London Property Trust v High Trees House Ltd*.

Applying these to the case – part-payment is unlikely to be accepted as full consideration (unless High Trees applies). However, items other than money can make the part-payment full consideration of the debt. The value of these other items is for the parties to determine. If it’s a bad bargain, it is still a bargain and this is what consideration requires for an agreement to be legally binding.

2. Juana is the managing director of ABC Ltd. She arrived at the company’s head office to discover the building was ablaze. She called the emergency services and when the firefighters arrived at the scene Juana told them that the contents of her office were extremely valuable and contained irreplaceable items. As such, if they could prevent the fire spreading there she would reward them with £100 each. The firefighters were successful in extinguishing the fire and it did not reach Juana’s office.

Assess the likely success of the firefighters claiming the reward?

**Indicative content outline answer:**

* The courts have identified that consideration must be ‘real and material’ and as such, if the promisor is merely receiving what he/she is already entitled to, then there is no consideration furnished. For example, if you do some act, which you already have an existing duty to perform, then this will not provide a benefit for the promisor and hence a contract based on this will be unenforceable due to lack of consideration (*Collins v Godefroy*).
* This rationale applies to parties to a contract and where the promisee simply fulfils an existing duty in the contract. It seeks to ensure that improper pressure cannot be applied to renegotiate a contract on better terms for the promisee (*Stilk v Myrick* and *Harris v Sheffield United Football Club Ltd*).
* Performance of an existing duty may be held as good consideration where the promisee has actually conferred on the promisor a benefit or has assisted them in avoiding a detriment, and no unfair pressure or duress was used in the renegotiation (*Williams v Roffey Bros. & Nicholls (Contractors) Ltd).*
* If the firefighters are doing no more than their existing duties, then *Collins*, *Stilk* and *Harris* apply. If, however, the firefighters have gone beyond their duties or provided a benefit, then *Williams* will apply.
* The actual advice to Juana is not particularly important as the facts are very basic. What is important is the presentation of the legal arguments and precedent and using these to justify the conclusions drawn.