**SUMMARY QUESTIONS**

**ESSAY QUESTIONS**

1. ‘Consumers have always been in a poor bargaining position with traders and those running businesses. Parliament was right to equal the balance of power through its intervention with various protective statutes.’

Critically discuss the above statement with reference to the legislation passed and how it protects consumers.

**Indicative content outline answer:**

***The Sale of Goods Act***

* The significance of SOGA 1979, is that certain terms are implied into the contract that offer a level of certainty, and security, for the goods contracted.
* These place obligations on the seller of the goods to ensure that ss. 12-15 are adhered to.
* These implied terms are held as conditions of the contract and hence allow an injured party to repudiate the contract within a reasonable time if they are breached. Further, after this reasonable time, the terms are held as warranties and allow an injured party to seek damages (but he/she will not be in a position to repudiate the contract).
* The other major advantage of SOGA 1979 is that the liability is strict and hence it does not matter how the good fell below the standard required, the seller has responsibility. Sections 12, 13 and 15 apply to all sales contracts. Sections 14(2) and 14(3) apply to contracts made by a consumer with a seller acting in the course of business. The definition of a consumer is found in the Unfair Contract Terms Act 1977 s. 12.

### *The Supply of Goods and Services Act 1982*

* The legislation governs the supply of services, and the supply of faulty goods and materials provided with the services.
* It requires that a supplier of a service, acting in the course of business, provide that service with reasonable skill and care; within a ‘reasonable’ time (unless there is an express agreement to the contrary); and to make a reasonable charge for the service.
* Part I of the Act provides protection by implying terms into contracts involving the transfer of property in goods, and into contracts for the hire of goods. The Act complements the rights provided in SOGA 1979.
* A contract under this part of the Act includes any contract where the title to the goods passes to another, and is not a contract for the sale of goods, or contracts under hire-purchase agreements (as other statutes offer protection).

**The Sale and Supply of Goods to Consumers Regulations 2002**

* These Regulations were enacted to provide rights for consumers who obtained goods with a guarantee.
* Whilst there remains no requirement for goods to be provided with a guarantee, where one is provided (and increasingly they are being provided, particularly with expensive goods) the guarantee becomes effective and part of the contract when the goods are delivered.
* The guarantor, or the person who is selling the goods must make the guarantee available to the consumer, who can request that this is available in writing or some other ‘tangible’ form.

### *The Unfair Terms in Consumer Contracts Regulations 1999*

* An extension to the protection provided through UCTA 1977 came in the form of the Unfair Terms in Consumer Contracts Regulations 1999.
* The Regulations can be used in conjunction with UCTA 1977 to ensure that terms in a contract satisfy the requirements of both pieces of legislation. To avail themself of the Regulations, there is the requirement of consumer status, but the Regulations are broader than UCTA and cover all the terms in the contract, not just exclusion clauses.
* The Regulations provide criteria for determining which terms may be unfair, and the effect is that those terms that fail the fairness test will be struck down. The remainder of the contract though, if it continues to be viable following the removal of the offending term, will still be effective and bind the consumer and the supplier/seller contracted with (a process known as ‘blue pencilling’).
* These Regulations cover any non-negotiable term in the contract (such as a standard form contract) established between a consumer (defined as a natural person rather than a company) and a seller / supplier of goods and services.
* The limitations of the legislation is often the requirement of consumer status and the practical problems in accessing the rights. Many companies insist that they adhere to the statutory terms and leave an affected consumer to have to pursue court action to enforce their rights – which many will not do.

***The Consumer Rights Act 2015***

* Given the inconsistencies of these legislative provisions and the uncertainty this provided consumers an attempt to simplify the law was established through the enactment of the Consumer Rights Act 2015.
* Part 1 is concerned with consumer contracts for goods, digital content and services (some of which has already being enacted and is contained in Chapter 10);
* Part 2 deals with the unfair terms; and
* Part 3 considers miscellaneous provisions such as investigatory powers, enforcement mechanisms and collective redress and other private actions relating to anti-competitive behavior in competition law.
* Collectively the law provides a greater range of protections, in some cases bringing the law up to date with, for example, digital content contracts, and in others, it provides for consistency relating to returns of goods or repairs and replacements.

2. Given that many of the cases involving the statutory protections in the sale of goods are disputes between businesses, how fair has the application of the reasonableness test been in UCTA?

**Indicative content outline answer:**

* UCTA 1977 contains provision for how the reasonableness or otherwise of an exclusion clause will be determined.
* This has caused considerable problems when the case law is examined. In the case of *SAM Business Systems v Hedley and Co.* a software supplier was entitled to rely on an exclusion clause that enabled it to supply an inadequate product, and this term was considered ‘reasonable.’ (Note that this case was between two businesses.
* The courts assume businesses should be in a better position to protect themselves than consumers dealing with a business). The obligation on demonstrating that the clause is reasonable rests with the party relying on the clause, and it will have to show that in all the circumstances the clause was reasonable and was brought to the other party’s attention, or it should have been in their ‘reasonable contemplation.’ Schedule 2 outlines the tests that the courts will use in determining the reasonableness of an exclusion clause:

1. the strength of the bargaining positions of the parties relative to each other (the most important statutory consideration);

* Where the parties are of equal bargaining strength, the courts are more likely to accept exclusion clauses than if the contract was between a consumer and a business. *Watford Electronic Ltd v Sanderson CFL Ltd* demonstrated that an otherwise unreasonable exclusion clause would be allowed unless the term is so unreasonable that the court must move to restrict it. In this case, involving the supply of computer equipment, an exclusion clause limited liability to £104, 596, and this was considered reasonable even though the actual losses sustained were £5.5 million.

1. whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other persons, but without having to accept a similar term;
2. whether the customer knew or ought reasonably to have known of the existence and extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties - *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*);
3. where the term excludes or restricts any relevant liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would by practicable; and
4. whether the goods were manufactured, processed or adapted to the special order of the customer.

* The practical use by the courts of a consideration of the reasonableness of an exclusion clause has been demonstrated through case law such as *George Mitchell v Finney Lock Seeds,* where seeds were sold between businesses, but an exclusion clause restricted any claim for loss to the cost of the seed, not the potential harvest (which naturally would have been substantially greater). The House of Lords rejected the clause as unreasonable. When the farmers placed the seeds in the ground it was not possible to identify the quality or type of the seed, and the seller could have obtained insurance at a cheap price.
* Perhaps one of the most problematic areas when considering exclusion clauses is in assessing what amounts to ‘unreasonableness’. Despite the guidance provided through the statute as noted above, the courts still maintain discretion as evidenced in the case law presented. This discretion can lead to unusual results, and, as stated in *George Mitchell*, appeal courts will not interfere with the decision in the original case unless the judge had made his/her decision based on an ‘erroneous principle or was plainly and obviously wrong.’
* Beyond the guidance provided in UCTA 1977 with regards to what amounts to reasonableness when attempting to exclude a potential liability, the House of Lords offered further assistance in the following case.
* *Smith v Eric S Bush*: The claimant purchased a house on the basis of the defendant’s negligent valuation report. The report had been produced and issued incorporating an exclusion clause disclaiming any liability for negligence. The surveyor of the property had not identified serious defects in the property, but soon after the purchase had been completed, the chimney collapsed causing significant damage. When the claimant sued the defendant for the damage, the exclusion clause was relied upon but the House of Lords held it to be unreasonable under s. 2(2) UCTA 1977. It would be unfair and unreasonable to place potential risk of loss on a buyer for the negligence and incompetence of a surveyor providing a valuation.
* The Lords identified factors that would be used in determining the reasonableness of an exclusion clause:

1. Whether the parties were of equal bargaining power;
2. In situations involving advice, was it practicable (in costs and time) to obtain alternative advice;
3. The level of complexity and difficulty in the task which was subject to the exclusion of liability; and
4. Which of the parties was better able to bear any losses and should insurance have been sought.

**PROBLEM QUESTIONS**

1. Jessica and her family were shopping for various goods and have experienced the following:

Jessica’s son Buzz broke his mother’s bone china vase. He visited a DIY shop and explained to the store assistant what had happened and how he needed to fix the vase before his mother returned home. The assistant sold Buzz a special clay adhesive which he said would fix the vase, but it fails to do the job.

Jessica’s son Buzz bought a catapult from the corner shop to use to hit tin cans off the wall of his garden. He used the catapult, hit three tin cans and the next time he used it the elastic broke striking his eye. Buzz subsequently lost the sight in that eye due to the trauma.

Jessica bought a new washing machine from the local high street electrical retail outlet. It stopped working the first time Jessica used it to wash the blood out of the shirt worn by Buzz following the accident with the catapult.

Jessica purchased a new pair of training shoes for use at the gym. She selected the pair described as having ‘gel-filled soles’ and being suitable for running on a treadmill. When Jessica used the trainers they begin to fall apart during the first session at the gym and she discovered the soles are not ‘gel-filled’ as advertised.

Jessica’s husband Woody decided to purchase a barbeque cooker for the garden. He selected a gas barbeque from the DIY shop which was priced at £25. Woody used the barbeque during much of the summer, but when he used it for a party in the last week of August it failed to produce sufficient heat to thoroughly cook the pork chops he was preparing for his family and friends. As a consequence of this, the guests who ate the pork chops sustained food poisoning as the parasites inside the food had not been destroyed during the cooking process.

Advise the parties as to their rights and liabilities.

**Indicative content outline answer:**

* There are various issues that require application of the statutory protection afforded consumers.
* To avail oneself of protection under the Sale of Goods Act 1979, the buyer must have been a consumer contracting with the other party who was acting in the course of business. Therefore, private sales do not provide protection under the Act – caveat emptor applies.
* Further, these implied terms are conditions, so a claim will generally allow the person to end the contract and claim damages in the event of a breach. Action to end the contract, where this applies, must be taken quickly.

***The Vase***

### *Section 13 Sale of Goods Act 1979 / s. 11 CRA 2015 – Description of Goods*

* Goods that are sold by description must correspond to that description. This may be evidenced in situations involving the sale of products where it may be particularly difficult or time consuming for the buyer to verify the claims.
* It enables sales to take place with the protection for the buyer that the item possesses the features that they were assured. Section 13 allows the buyer protection when he/she relies on the description provided, but not where the buyer has not relied on the description and has taken the responsibility for verifying the good him/herself (*Harlingdon and Leinster Enterprises v Christopher Hull Fine Art*).
* The protection of s.13 / 11 also applies to advertisements and sales materials that the buyer relies on.
* Section 13 / 11 is not concerned with the quality of the product, which may be perfectly fine in terms of its quality and fitness for purpose, but not as described. This would still allow a remedy under SOGA.
* Therefore the glue is not as described nor is it fit for its intended purpose under s. 14(3) / s. 10 CRA 2015. Products sold for a particular purpose must be suitable and ‘fit’ for that purpose. In the case of *Grant v Australian Knitting Mills Ltd* these were underpants that would be worn against the skin. Due to the chemicals present, this was impossible and hence the garment failed s. 14(3). This is a case of implied reliance on the quality of the good. The buyer can gain protection from either implicit or explicit reliance.

***The Catapult***

* The injured parties have claims under the tort of negligence and possibly the Consumer Protection Act 1987 where the injury / loss sustained was in excess of £275.
* For the owner of the corner shop, s.15 / s. 13 CRA 2015 sale by sample, of SOGA will give protection. The owner can assume the bulk responds (in terms of poor quality) to the sample sold to Buzz. *Godley v Perry* is authority here.

***The Washing Machine***

* The intended purpose of a washing machine is to clean clothes and hence when it fails to do this, a claim may be made under SOGA s. 14(3) / s. 10 CRA – fitness for intended purpose.

***Running Shoes***

* Assuming that the gym is acting in the course of its business, and these have not been bought in a private sale, Jessica is entitled to rely on the description of the goods – as outlined above.

***The BBQ***

* The gas BBQ may be fit for its intended purpose but then it stops working. It may be appropriate to look at SOGA s. 14(2) / s. 9 CRA 2015 – quality of goods. It is expected that goods are of a reasonable quality and this would relate to issues such as durability. If the BBQ was bought in the beginning of summer, and only lasted until August, despite its price of £25, it could be argued that it should have lasted a longer time.
* Remember, SOGA will only compensate for the item – not for the illnesses sustained due to the cooking. This would require a claim under torts (negligence) or the Consumer Protection Act 1987.

2. Larry wishes to purchase a van for his domestic use of transporting equipment for his hobby of surfing. He visits Vans and only Vans Ltd (a company specializing in selling used vehicles) and views a white van with a notice in the window reading:

‘1990 Ford Escort Van. 100,000 miles; 1.8 litre engine; one previous owner and good little runner.’

Larry discusses the van with the salesman who informs Larry that the vehicle is in very good condition, however, it has a defective clutch (but it will drive with no problems for at least two months). The company will fix the clutch before purchase or Larry can take the van in its present condition and can have a £70 discount if he wishes to have the clutch fixed himself. Larry thinks he can get the clutch fixed for a cheaper price and therefore purchases the van minus the £70 discount.

In his first week of ownership the clutch fails and Larry has to have the van towed to his local garage where he is informed of the following facts:

• The van is in fact stolen and does not belong to Vans and only Vans Ltd.

• Larry checks the logbook, which identifies that there have been five previous owners of the vehicle.

• Previous MOT certificates demonstrate that the van has travelled over 250,000 miles.

• The van has a 1.4 litre engine.

• The clutch will cost £300 to fix.

Advise Larry of the legal consequences of these issues.

**Indicative content outline answer:**

* As Larry is acting as a consumer, and is dealing with another which is acting in the course of business, he will likely have protection under the CRA 2015.
* The applicable issues under the Act are as follows:

***Title to Goods***

* Section 12–title to goods: A fundamental aspect to a contract of sale is that in order for a ‘true’ sale to take place, one party must be free to transfer ownership (good title) to the other. The buyer is then able to enjoy ‘quiet possession of the goods’. In order to achieve this, the first party must possess the title to transfer or have the owner’s consent to dispose of the good. The case of Rowland v Divall should be identified as authority that as Vans and only Vans Ltd does not own the car, Larry will have the return of his money.

### *Section 11 – Description of Goods*

* Goods that are sold by description must correspond to that description. This may be evidenced in situations involving the sale of products where it may be particularly difficult or time consuming for the buyer to verify the claims.
* It enables sales to take place with the protection for the buyer that the item possesses the features that he/she was assured. Section 11 allows the buyer protection when they rely on the description provided, but it does not where the buyer has not relied on the description and has taken the responsibility for verifying the good him/herself (*Harlingdon and Leinster Enterprises v Christopher Hull Fine Art*).
* The protection of s.11 also applies to advertisements and sales materials that the buyer relies on.
* Section 11 is not concerned with the quality of the product, which may be perfectly fine in terms of its quality and fitness for purpose, but not as described. This would still allow a remedy under SOGA.
* Larry relies on the description as to the MOT, number of previous owners and engine size fails here and hence a claim could be sought under s. 11.

### *Section 9 – Quality of Goods*

* Section 9 incorporates a term in sales established in the course of business requiring the goods to be of a satisfactory quality. ‘Quality’ will vary between products depending on issues such as whether the good was brand-new or used.
* The van is second-hand and hence it will be expected that it has cosmetic wear. As he has been informed about the defective clutch before he completes the purchase, he may be unable to claim under s. 9 on this ground - *Bartlett v Sidney Marcus Ltd.*

### *Section 10 – Fitness for Purpose*

* The Act continues regulating the quality of goods by providing that the item should be fit for its intended purpose. If the item purports to provide some function, it must do so (*Grant v Australian Knitting Mills Ltd*).
* Products sold for a particular purpose must be suitable and ‘fit’ for that purpose. In the case of Dr. Grant, these were underpants that would be worn against the skin. Due to the chemicals present, this was impossible and hence the garment failed s. 14(3) SOGA (the previous incarnation of s. 10). This is a case of implied reliance on the quality of the good. The buyer can gain protection from either implicit or explicit reliance, as demonstrated in the following cases.
* As the car breaks down despite being told that it will last several months, it may be argued that the van is not fit for its intended purpose.