Chapter 10, Question 1

Francis and Clare are friends. They decide to play the National Lottery each week. Each is to contribute £3 and they will take it in turns to choose three sets of numbers. They agree that any winnings are to be divided equally between the two of them and another friend, Doug. Doug learns of this agreement and tells Clare that he is very happy and grateful for it. In the sixth week, when Francis had chosen the numbers, one of the line of numbers chosen wins a prize of £250,000. Francis, in whose name the ticket was registered, wishes to keep the prize. Advise Francis as to his liability to Clare and to Doug.

The first issue to consider in the case of Francis (F), Clare (C), and Doug (D) is whether F and C have created a valid contract. There appears to be a form of offer and acceptance where the terms of the contract have been agreed. An area of uncertainty is the requirement of an intention to create legal relations; F and C are friends and the agreement could therefore be of a social rather than a legal nature. *Balfour v. Balfour* established that no intention to create legal relations would be found in agreements between spouses. *Jones v. Padavatton* further established that an arrangement within the family would not warrant a finding of an intention to create legal relations. It is more likely that an agreement between two friends where they both contribute funds to a common endeavour would mean that there is an intention to create legal relations. Both parties have provided consideration in the form of the £3 contribution each week, and both parties are competent enough to make a contract. It seems, therefore, that F and C have validly created a contract.

Comment [A1]: See e.g. *Simpkins v Pays* in support of this.

Comment [A2]: Furthermore, the object of the contract is legal.

F's liability to C is easier to determine. As a promisee who has provided consideration for the contract in the form of £3 contributed for six weeks, C is entitled to enforce the contract that F will breach by keeping the entire sum of £250,000. At the very least, C is entitled to one-third of the money, around £83,333. The most appropriate remedy would be specific performance, ordering F to pay the £83,333 to C as it was originally a term of the contract that the sum would be split between F, C, and D. The other option would be an award of damages to C for the amount of £83,333 in order to put C in the position she would be if the contract had been performed. Since C is a party to the contract and has provided consideration for the contract, F is likely to be found liable to C in breach of the contract.

Comment [A3]: Worth raising *Beswick v Beswick* in this regard. But here the obligation simply concerns a 'one-off' monetary payment, so specific performance is unlikely to be granted.

The next issue to consider is whether D acquires any rights as a third party to the contract between F and C. It is clear that both F and C have provided consideration for the contract in the form of the £3 they each contribute to play the National Lottery each week. D, on the other hand, is simply informed of the gains he makes from this contract without making any financial contribution to the contract. Under common law principles, consideration must flow from the promisee. Although D is a promisee, he has not provided any consideration and therefore cannot enforce the promise. Only C, who has provided consideration, would be able to enforce the promise under common law principles.

D would therefore have to employ the Contracts (Rights of Third Parties) Act 1999 in order to determine whether he acquires a right to enforce any of the terms of the contract between F and C.

Section 1(1)(a) and (b) of the Act state that a third party can enforce a term of a contract if the contract expressly provides that he may or the term purports to confer a benefit on him, unless it appears that on a proper construction of the contract it appears that the parties did not intend for the term to be enforceable by a third party. The term of the contract that specifies that the money will be split equally between F, C, and D certainly purports to confer a benefit on D. However, it must be considered whether, as per s 1(2) of the Act, on the proper construction of the contract it appears that the parties did not intend for the term to be enforceable by the third party. Nothing in the facts suggests that F and C did not intend the term to be enforceable by D. F and C mutually agree that D will receive a share of the money. C knows that D is aware of the term of the contract and makes no statement suggesting that D is not meant to be able to enforce the term. Section 1(3) of the Act states that the third party must be identified by name, as a member of a class, or as answering a particular description. It seems to be agreed expressly that the money will be divided equally between F, C, and D. As far as these sections of the Act state, therefore, it appears that D is entitled to enforce the term that states that he will receive an equal share of the £250,000.

Comment [A4]: This should be followed by a reference: (s1(2)). You should distinguish between s1(1)(a) and s1(1)(b) more clearly. Is s1(1)(a) likely to be helpful here? Probably not.

With no relevant defences to D's claim, it is therefore submitted that F is liable to D in breach of the term of the contract stipulating that D would receive the £83,333. Section 1(5) of the 1999 states that once the third party is able to enforce the term of the contract, any remedy that would be available to the third party in an action for a breach of contract had he been a party to the contract will be available to enforce the term in question. D would therefore be entitled to the same remedies that C was entitled to. Either specific performance would be ordered, forcing F to pay the £83,333 owed to D. On the other hand, there may be an award of damages of £83,333 instead to place D in the position he would have been had the contract not been breached by F.

Comment [A5]: Perhaps, but it might be worth asking whether C and F can vary the contract so that they do not have to pay D – to do so you might consider section 2.

It is submitted, therefore, that F would be liable for the original stipulated amount (one-third of £250,000) to C and D respectively.

Overall essay feedback: Good on the core issues, with some very clear and persuasive analysis. It is a shame that you don't discuss the *Panatown* – type issues at all, which are both important and interesting. As a result, this answer would be unlikely to score higher than a mid-2.i in the exam.

Chapter 10, Question 2

Sissy hires Rayburn Ltd to transport her grand piano from Nottingham to Devon. She pays Rayburn Ltd £1,500 for this service. The contract includes the following two clauses:

(a) Rayburn Ltd may employ independent contractors to perform any part of this service.

(b) Liability for any damage to the piano during transportation will be limited to £5,000.

Rayburn Ltd hires Eric to transport the piano. Unfortunately, the piano is damaged by the negligence of Eric during the transport, causing damage to the value of £12,000.

Advise Sissy.

Sissy (S) can potentially bring a claim against Rayburn Ltd (R) *or* Eric (E) for the damage caused to her grand piano, in contract or in tort, but is likely to have to choose between either one as she will not be granted double recovery. The biggest problem that S is likely to face in any claim she brings is enforcement of the limitation of liability clause contained within her contract with R.

Comment [A6]: Make clear no contract between S and E – but perhaps tort of negligence. I see you do this later, but if you do have an introduction to the problem question you have to make sure it is accurate and not misleading.

(i) S' claim against R

S and R are the main contractors and have a contractual relationship. R is likely to be liable for the damage caused to S' piano under an express (or implied) term in the contract. The difficulty with bringing a claim against R is that on the face of the contract, R's liability for any damage to the piano during transportation is limited to £5,000, whereas the actual damage caused is to the value of £12,000, and S will want to recover as much as possible.

Comment [A7]: Is there any way of challenging this limitation clause? Would it be possible under UCTA 1977 at all? Probably unlikely, but worth exploring (see Chapter 15).

(ii) S' claim against E

S will have better chances of recovering the full £12,000 in a claim against E. As there is no direct contractual relationship between S and E, S may bring a claim in e.g. the tort of negligence. E may seek to rely on the limitation clause. However, since he is a third party and is not privy to the contract, the question is whether he may do so, under statute or the common law.

Contract (Rights of Third Parties) Act 1999

(a) Whether the Act applies

E may be able to enforce the contract term in his own right under the 1999 Act. The Act applies only to contracts made between 11 November 1999 and 11 May 2000 which expressly provide that it should apply, and contracts made on or after the latter date. If the contract between S and R was made before the date the Act came into force, E will not be able to rely on the Act to enforce the limitation clause. The same is true if elsewhere in the contract, S and R have expressly excluded the Act's operation. We have no information regarding the date of contract formation nor on any express terms excluding the Act, therefore it is assumed that this is not an issue here.

Comment [A8]: Do you need this? Highly unlikely this contract was entered into before 1999. Indeed, claims for breach of contract must (generally) be brought within 6 years.

s.6 also lists cases where s.1 would not confer rights on a third party. It is unlikely that any of the exceptions apply to exclude the operation of the Act. In particular, although the contract appears to

be a contract of service (potentially falling within the definition of a contract of employment, s.6(4)), E is not seeking to enforce a right *against an employee* or a worker (neither R nor S can be classified as such). Further, even if the contract was a carriage of goods contract as defined by s.6(5) and (6), which is unlikely, since it concerns only a service to transport the piano *within* the UK and is therefore unlikely to be subject to the rules of international transport convention, the Act expressly states that a third party may still avail himself of an exclusion or limitation of liability clause in such a contract, which is the case here. It is very likely that the Act applies to the contract between S and R.

(b) Whether E has acquired a right to enforce a term of the contract

The next issue is whether E can enforce a term of the contract in his own right. s.1 of the Act contains two tests of enforceability, stating that, subject to the provisions of the Act, E may in his own right enforce a term of the contract if the contract *expressly* provides that he may (s.1(1)(a)), or the term purports to confer a benefit on him (s.1(1)(b), subject to s.1(2)). E is unlikely to be able to rely on s.1(1)(a) since the contract does not expressly say that E (or 'a third party') can rely on the limitation clause.

However, E may be able to enforce the limitation clause under s.1(1)(b), since the document is to be read as a whole, and clause (a) of the contract states that R may employ independent contractors to perform the contract. s.1(1)(b) only raises a rebuttable presumption, and rebutted where the parties did not intend to confer the benefit to E. Subsequent cases such as *Nisshin v Cleaves*, and *The Laemthong Glory (No.2)* have demonstrated that it is a strong presumption and is difficult to rebut. Given that the facts do not indicate a strong intention by S and R that E (or another third party) should not be able to enforce the term, the enforceability test under s.1(1)(b) is likely to be satisfied.

s.1(3) of the Act does not require that E is expressly identified in the contract by name; it is sufficient that he is identified as a member of a class, or as answering to a particular description (i.e. an 'independent contractor' employed by R to perform this particular service, under clause (a) of the contract).

Finally, s.1(6) of the Act provides that clause (b), a limitation clause, can be relied upon by a third party, envisaging that it will be easier to protect employees, subcontractors and so on under exclusion or limitation of liability clauses.

Under the Act, it is highly likely that E will be able to enforce the limitation clause for his benefit, meaning that any damages recovered by S from either R or E will be limited to £5,000.

The common law position

Another legal avenue through which E may seek to limit his liability is at common law. s.7(1) of the Act states that s.1 does not affect any right or remedy of a third party that exists or is available apart from this Act.

Comment [A9]: I agree, but think you make a bit of a meal of this section of your answer (which seems straightforward to me).

Comment [A10]: Worth referring to s1(6) here too.

Comment [A11]: Your analysis here is good, but what is the term that purports to confer a benefit on E? You depend upon clauses (a) and (b) being read as one, but worth spending further time on whether that is legitimate.

Comment [A12]: Good – but I would perhaps have explained this earlier.

The leading case is *Scruttons v Midland Silicones*, where similarly a third party sought to rely on a limitation clause. The House of Lords held that a third party (e.g. E) cannot rely on a contract between S and R as a shield if one of the parties sues him.

The Privy Council in *The Eurymedon* circumvented the decision in *Scruttons* by holding that a third party, such as E, may be able to rely on the limitation clause if the court finds a unilateral contract between S and E. This does not create an exception to privity since the court would be looking at a contract which E is privy to. However, the *Eurymedon* principle does not apply to all situations. In the case itself, the court found a unilateral contract providing that, in return for the stevedores unloading the goods, the shipper excluded the stevedores from liability for negligently damaging the goods, (unless the action was brought within a year). The contract clearly provided that e.g. servants, agents and independent contractors are to have the benefit of the limitations contained in that contract. Although there is a clause here envisaging that third parties would perform the contract, the limitations have not been expressly extended to E. Moreover, *The Eurymedon* principle applies in the context of a carriage of goods by sea (which is not likely to be the case here, as the piano was only being transported from Nottingham to Devon). E is unlikely to be able to rely on *The Eurymedon* to avoid the ruling in *Scruttons*, and therefore under common law, he cannot take advantage of the contract between S and R by way of defence.

Comment [A13]: I don't think *The Eurymedon* is so limited – and the Law Commission thought that both *Scruttons* and *The Eurymedon* would be decided in the same way under the 1999 Act.

In conclusion, both R (as a contracting party) and E (as a third party relying on the 1999 Act) are likely to be able to limit their liability to S, unless S is able to show under s.1(2) that neither party intended to confer a benefit to E under the contract.

Overall essay feedback: Good – you spot the key issues and deal with them well. You just seem to make a bit of a meal of a couple of easy issues, which squeezes the time and space you have to explore some of the harder and more interesting points. As a result, this answer may just fall short of being First Class.