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Question 1,

To what extents are terms likely to be incorporated into a contract if the parties did not discuss them at the time of formation?

Terms of a contract refers to 'Conditions and Warranties'[1] which will be commonly discussed at the time of the contract formation. These conditions and warranties can be oral and much preferred if it is written. This conditions and warranties also called as 'Express Terms'[2]. Condition is a fundamental obligation[3] of the contract. While warranty is a subsidiary obligation which is not so vital that a failure to perform[4] as in contract.

But if in case the parties did not discuss the terms at the time of formation of contract as asked in the question, the Implied Terms will take charge. This means the Terms Implied by Custom, Court or Statute.

Terms implied by custom refers potent source of implied obligations. These terms can be said as common practiced terms. Refers to commonly used terms in certain type of trading or local contracts. For example, if the person A rented a land from person B, the intention of the person A on the land is to use for farming and he had involved in the farming procedures and works by buying and seeding the seeds and hiring people to work on the farm. The intention of A is to make profit from the land. And the person B (land lord) noticed A to quit the land. At this point, the terms will be implied by custom that B need to pay the allowance for farm labours and seeds as this is practiced terms that B is liable for A's investment on the land because there is no express terms saying 'B can notice A to quit the land at any time'. This example was illustrated based on the case 'Hutton v Warren (1836)'. The case of Hutton v Warren is similar to the given example whereas Hutton, the plaintiff is the tenant while Warren, the defendant is the landlord. The Custom terms was implied on the contract and Hutton successfully claimed for a fair allowance for seeds and labour.

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[1] Denis Keenan, Advanced Business Law, 10th Edition, Pitman Publishing, 1997, Page 137.
[2] Paul Richards, Law of Contract, 1st Edition, Pitman Publishing, 1992, Page 103.
[3] Denis Keenan, Advanced Business Law, 10th Edition, Pitman Publishing, 1997, Page 137.
[4] Denis Keenan, Advanced Business Law, 10th Edition, Pitman Publishing, 1997, Page 138.

On the other hand, terms implied by court revert to give business efficacy irrespective of the intentions of the parties or the fact of a particular case. The court will imply the terms to make the contract meet the business efficacy. This means when a case arises with absence of express terms, the court will consider the angle of 'business efficacy' to imply the terms and give judgment according to it. Business efficacy looks into how efficient the business 'was' and 'will' base on the case. This meets the basic 2 questions; how efficient was the business? And how efficient will the business be? And finally the court will imply terms base on; how efficient must the business be?

For example, if employer A hired employee B to work for the business and B failed to do his work with reasonable care and skills. As a result of this, A fired B. And B filed a case against A. When this case reaches the court, the court will answer the questions; how efficient was the business before hiring B? And how efficient the business will be if fired B? The answer to these questions will be based on; how efficient must the business be? So, as conclusion of it, if the employee B failed to use reasonable care and skill on his work and resulted to the business to not being efficient, then definitely terms will be implied by the court as 'employer must work with reasonable care and skill for business to move efficiently'. This example case was extracted from the real case Lister v Ramford Ice & Cold Storage Co Ltd (1957)[1]. Lister was the plaintiff, the employee, who is a lorry driver hired by the defendant, the employer.

Terms implied by statute are terms which implied into all contracts which may relevant to Sale of Goods Act (SOGA) 1979 as amended by the Sale and Supply of Goods Act (SSGA) 1994[2]. This means the Act already exist and implied in all contract which related to sales and supply of goods or services. Some example of cases can be extracted here to explain and understand the fact of the Sections or Subsection of these SOGA and SSGA. Such as the case Rowland v Divall (1923), Statutory implied terms of Section 12 that the seller had the right to sell the goods. This means, if party A bought a good which is actually a stolen good from party B, once the police had recovered the good from A and returned it its respective owner. Then A is eligible claim the loss which

[1] Penny Booth, Jean Holden, Gorden Mcleish & Jill Spencer, Lecturer Notes Series : A Level Law – Paper II, 2nd Edition, Cavendish Publishing Ltd, 1997, Page 38.
[2] Penny Booth, Jean Holden, Gorden Mcleish & Jill Spencer, Lecturer Notes Series : A Level Law – Paper II, 2nd Edition, Cavendish Publishing Ltd, 1997, Page 39.

is the price that he paid for the good from B, who was the seller only if B can be found. At the same time, section 8(2) is about paying a fair and reasonable for the goods for services that a person consumed if in case the price was not determined.

Thus the section 13 implies a term that goods which sold with description, the goods must comply with that description. Example of the case is Beale v Taylor[1]. This case is regarding a car sale which does not meet with its description. Therefore, the seller, defendant was in breach of Section 13 and held liable to the plaintiff. This SSG Act (SSGA) was introduced with concept of satisfactory quality and fitness for purpose. The other Act is Late Payment of Commercial Debts (Interest) Act 1998. Section 1(1) of this act mentions clearly that it is an implied term in a contract to which this Act applies that any qualifying debt created by the contract carries simple interest.

As conclusion, we can understand that a contract which absent of express terms due to the parties did not discuss them at the time of formation is rightfully law protected by incorporating the implied terms such as Custom implied terms, Court implied terms and Statute implied terms.

Word Count: 980 Words

[1] Penny Booth, Jean Holden, Gorden Mcleish & Jill Spencer, Lecturer Notes Series : A Level Law – Paper II, 2nd Edition, Cavendish Publishing Ltd, 1997, Page 39.

Question 2,

To what extent will an exemption clause be allowed to protect a party from liability under a contract?

Exemption clause is also known as exclusion clause. This exclusion clause was constructed into a contract to protect a party from liability which he or she might not be responsible to. This exclusion clause can be incorporated either by signature or notice. Exclusion clause which incorporated by signature means that it was in the form of written and the parties agreed to the exclusion clauses at time of the formation and they signed the papers. This is where the exclusion clause is said to be bound. Therefore both of the parties will be limited by the exclusion clause with they had signed. Once the exclusion clause is signed, there is no turning point and the contract is subjected to the exclusion clause even if the party signed the papers without reading or understanding the exclusion clauses. This situation is applied in the case of L'Estrange v Graucob (F) (1934)[1]. In this case, the defendant sold a cigarette slot machine to plaintiff and the machine failed to fit the purpose because it was often jammed and became unusable. Therefore the plaintiff requested a claim. This claim was rejected by the court as the plaintiff had signed an exclusion clause: 'Any express or implied condition, statement or warranty, statutory or otherwise, is hereby excluded'. This held clearly that the defendant is limited to his liability, and defendant is not liable for the machine that he sold. The court will not consider neither the plaintiff read the exclusion clause or not at the moment of signing.

Anyhow, this exclusion clause will be cancelled or not accepted by the court if only the document was signed by misrepresentation as in the case of Curtis v Chemical Cleaning and Dyeing Co (1951)[2]. The plaintiff send wedding dress to defendant shop for cleaning. He was asked to sign on the receipt which contain the exclusion clause: 'This article is accepted on condition that the company is not liable for any damage howsoever arising.' But when the plaintiff asked the shop assistant what for he need to sign? The assistant answered 'it was to accept any responsibility for damage to beads and sequins'

[1] Denis Keenan, Advanced Business Law, 10th Edition, Pitman Publishing, 1997, Page 143.
[2] Denis Keenan, Advanced Business Law, 10th Edition, Pitman Publishing, 1997, Page 144.

and the plaintiff signed the receipt. After that the dress was returned stained. The plaintiff won the case and this is due to clear misrepresentation. Therefore the defendant was liable and he is not protected from liability.

Exclusion clause incorporated by notice means it is unsigned. The notice may be bound if it is reasonable and had brought to his or her attention. The reasonable of a notice is measured by few factors. One of the factors is; the document must be a contractual document[1]. Whether a document had contractual force or not depends on reasonable man test. This means a simple test whether a reasonable man could accept the document as contractual document? In the case of Chapelton v Barry UDC (1940), the plaintiff was given a ticket for hiring a deck-chair. He did not read the ticket as at the back of the ticket was stated that the Council would not be liable for any damages or injuries while using the chair. The chair was defective and resulted injuries and the plaintiff claimed for damages. And it was held that the ticket is merely a voucher or receipt and not a contractual document.

Next factor is what degree of notice is required? This means a reasonable degree of notice needed for an exclusion clause to be effective. This is a factor where the sufficient of the notice is measured. A notice, an unsigned exclusion clause must be sufficient for it to be effective on the contractual parties. In the case of Thornton v Shoe Lane Parking Ltd (1971)[2], it was held a motorist could anticipate clause purporting to exclude liability for loss or damage to his vehicle and not to exclude liability for personal injury. And it was said that in order for the owner of car-park to seek protection to exclude liability for personal injury, he would have take special precautions to draw the exclusion clause to the attention of customers using the car-park. Therefore the owner was not protected from liability by the exclusion clause. While in the case Spurling v Bradshaw (1956), the Lord Denning had stated that ‘some clauses would need to be printed in red ink on the face of the document with read hand pointing to it before notice could be held as sufficient.

The other factor is: when was the notice of exclusion clause given? This focuses to the statement that ‘the exclusion clause must be brought to attention to parties before

[1] Paul Richards, Law of Contract, 1st Edition, Pitman Publishing, 1992, Page 126.
[2] Paul Richards, Law of Contract, 1st Edition, Pitman Publishing, 1992, Page 128.

or at the time of contracting and not after that'. The case that represents best for this statement is Olley v Marlborough Court Ltd (1949). Where a couple had booked into a hotel and paid one week's stay in advance, this is the time of contracting. When they entered the room they saw notice stating that 'the proprietors will not hold themselves responsible for articles lost or stolen unless handed to the manageress for safe custody'. The wife had valuable flur coats which she left in the room and later stolen. When sued, the court decided that the contract had already been entered into before the notice of exemption clause had been brought to plaintiff's attention. Therefore, the defendant was not protected from liability.

Besides this, exclusion clauses do not protect a third party from liability under a contract. Example of case that suits this situation is, Adler v Dickson (1954). In this case, the sailing ticket issued to plaintiff stated: 'Passengers are carried at passengers' entire risk. The company will not be responsible for and shall be exempt from all liability in respect of any injury of any passenger whether such injury shall occur on land, on shipboard or elsewhere and whether the same shall arise from or be occasioned by the negligence of the Company's servants in the discharge of their duties, or whether by negligence of other persons directly or indirectly in the employment or service of the company under any circumstances whatsoever'. The plaintiff was injured while she walking up to board when the gangway was moved. The plaintiff brought an action against the captain and boatswain of the ship. The plaintiff won the case as it is clear law that the exclusion clauses only offer protection for the company and not other persons such as servant or staffs.

The most important for a exclusion clause to protect a party from liability is, the clause must not against The Unfair Contract Terms Act 1977. The law is enforced to protect the consumer and public from any sort of fraud. While this Act majors on protecting consumers or contractors from Unfair Contract Terms. According to this act, the main rule of exclusion clause is, it must be fair at most of all. Any unfair exclusion clauses are against the law to be incorporated in a contract. Any party of the contract can seek for protected under this Act if they found that any term of the contract is unfair.

The fact that can be extracted from the Act is that any exclusion clause cannot protect a party from any liability which caused by negligence resulted death or injuries to

others unless the exclusion clause notice satisfies the requirement of reasonableness[1]. The Act also mentions that manufacturer's guarantee cannot exclude for loss or damage arising from the defects in goods when used by consumer which result from negligence in manufacture or distribution[2]. For example, if A bought a vacuum cleaner and he was injured due to electric shock which using the goods which caused by defective wiring of the vacuum cleaner calls back to negligence in manufacturing and the party cannot be protected from liability.

This Act related to the Sale of Goods Act 1979 and the Supply of Goods Act 1973 which are Implied terms of a contract whereas mentions that the goods are fit for purpose or of satisfactory quality. This means the exclusion clause cannot protect a party from liability if it breach the Implied Terms. This can be illustrated in Hire Purchase cases where the goods, for example a car is purchased to fit its purpose which is to be roadworthy but if it did not fit it's purpose then the consumer is protected by the law while the other party are not protected from liability due to breach of Implied Terms although the exclusion clause may exist and will fail to protect the party from liability.

Conclusion of this, we can clearly identify that signed exclusion clauses is bound and will able to protect the party from liability as long as it is fair. Anyway, the signed exclusion clauses cannot protect the party from liability due to misrepresentation. On the other hand, unsigned exclusion clauses can protect the party from liability. The rules of it are, the document must be contractual document, with certain degree of notice and the exclusion clause must be brought to attention before or on the time of contracting. Anyway, any third party is not protected from liability by the exclusion clause. All of these exclusion clauses must obey and not against the Unfair Contract Terms Act 1977 (UCTA).

Word Count: 1543 Words

[1] Paul Richards, Law of Contract, 1st Edition, Pitman Publishing, 1992, Page 141.
[2] Denis Keenan, Advanced Business Law, 10th Edition, Pitman Publishing, 1997, Page 152

Question 3,

Analyze the circumstances in which the performance of an existing duty may amount to valid consideration.

Consideration is yet playing important part in an enforcement of a contract. In the case of Currie v Misa (1875), consideration was defined as; a valuable consideration in the sense of the law, may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other[1].

Generally, consideration can be categorized in two which is, executed and executory. Executed means, the consideration, the promise of a party is executed or in better named as 'done'. One party had done his obligation or responsibility toward and as in the contract while another party will need to complete their obligation or promised responsibility in future. For example, if party A and B get into a contract whereas Party A promises reward for a lost dog, in here the party A had executed his promise while waiting for the Party B to complete his task to find the dog in future. This is where it is called executed. Once the dog was found by B, and returned to A thus B is eligible for the reward.

In the other hand, executory means that the both party of the contract promises to complete their responsibility or task in the future. The common situation where this executory consideration may exist is hire-purchase agreement. Whereas one party promise to deliver the car while another party promises to pay the monthly installation for the car.

In the above paragraph, we was talking about valid consideration but how about an invalid consideration may exist? The common scene is when past consideration is questioned about. According to the English Law, it is clear in place that past consideration is not a consideration. This means, when we are talking and mentioning bout the past consideration on a contract, definitely it is an invalid consideration. An example situation is, when a party did something valuable and then enters the contract,

[1] Paul Richards, Law of Contract, 1st Edition, Pitman Publishing, 1992, Page 49.

this is not accepted. His consideration classified as invalid. As happened in the case of Re McArdle (1951)[1]. In this case is questioning about a renovated house. The wife had renovated the house. And then, get into written contract that he is eligible to claim back the price of renovation. But later the court dismissed the claim and held that past consideration, means the renovation is not a valid consideration.

The question is going more detailed into performance of an existing duty and how far it is judged as valid or invalid consideration. Performance of an existing duty and consideration is often linked to the rule of sufficiency[2]. There are 3 situations where performance of existing duty or obligation may be questioned as valid or invalid. They are:

First is existing public duty. Here, it is clearly stated that performing an existing public duty cannot be calculated as a valid consideration as they already having their public duty to work out or fulfill their obligation. Public duty can be said as work or task of a public servant such as a policeman. Policemen carry a public duty to safe and protect the public from criminals or frauds. It is their official duty. And their duty cannot amount to a valid consideration for another contract. For example, when a Party A calls policeman and ask for protection and promises for reward, and the policeman had done his task to protect the party A. But, the policeman's act cannot be taken as a valid consideration for the reward because he is already in an existing public duty to protect the public. This does not conclude that the policeman's entire act is not a valid consideration. There is a part whereas their consideration may amount to be valid if in case they exceeded their public duty. For example, the policeman has public duty to protect the public until his shift ends at 6pm. And if he protected the party above the 6pm, here is where he placed a valid consideration to his obligation. If he protected the party until 9pm. Then he is said had put in a valid consideration and eligible for the reward promised by the Party A. This example was illustrated based on the case England v Davidson (1840)[3].

[1] Denis Keenan, Advanced Business Law, 10th Edition, Pitman Publishing, 1997, Page 32.
[2] Denis Keenan, Advanced Business Law, 10th Edition, Pitman Publishing, 1997, Page 41.
[3] Penny Booth, Jean Holden, Gorden Mcleish & Jill Spencer, Lecturer Notes Series : A Level Law – Paper II, 2nd Edition, Cavendish Publishing Ltd, 1997, Page 22.

Second is existing contractual duty. Here it is clearly said that Performance of an existing duty may not amount to consideration at all. This means the consideration is not accepted and invalid. Example situation, Party A already have contractual duty with Party B whereas Party A promised to Pay $100 to complete a task. Then later, if the Party A promises again to Party B that he would pay $200 to complete the existing duty. Then the secondly promised statement may not amount to valid consideration. As in the case Stilk v Myrick (1809) where the employer promises to pay extra wages and this is not a valid consideration. Anyway, the reverse situation might happen if, Party A promises Party B to pay $200 if he could finish the task faster than the said period so the Party A can be excluded from any liability or might possible for Party A to be benefited from this. When this happen, the court will held that Party A had furnished valid consideration as it will benefit him and Party B can claim his $200. This situation extracted from case Williams v Roffey Bros & Nicholls Ltd (1990)[1].

Third is existing contractual duty to third party. Here, the law fixed that promises from a third party may amount valid consideration. This is much clear in situation where Party A is already in a contractual duty to Party B. Lets assume that Party A promised Party B to load goods into a ship and Party B promised to pay $100. While Party C involves into this and promises Party A to pay $50 if he if load goods into the same ship. This is clear that, Party A only need to do one task, load the goods into the ship which he already obligated with Party B for $100 and another Party, who is Party C promises another $50 for the same task. By doing one task, is it legal for Party A to be paid by both Party B and Party C? The law fixed it as legal and the consideration is definitely valid. This situation was explained based on facts of the case New Zealand Shipping Co Ltf v A.M. Satterthwaite & Co Ltd, The Eurymedon (1975)[2].

Those are the circumstances in which the performance of existing duty may amount to valid consideration.

Word Count: 1100 Words

[1] Penny Booth, Jean Holden, Gorden Mcleish & Jill Spencer, Lecturer Notes Series : A Level Law – Paper II, 2nd Edition, Cavendish Publishing Ltd, 1997, Page 23.
[2] Paul Richards, Law of Contract, 1st Edition, Pitman Publishing, 1992, Page 61.

Question 4,

Why do the courts require legal intent in the formation of a contract? How is this determined?

The courts are responsible to give the right judgment in any case. Therefore, the court will be serious in term of understanding the seriousness of the contract. Thus they also measure the contractual relationship between the parties on a contract. It is a fact that the parties must have legal intention to be legally binding. However, the parties are always accepted to declare their intention of not entering into a legally binding relationship. This is yet how simple the matter can be. But legal intention is not simply accepted by their words or promises. They are more into the relationship of the parties and their intention of a contract.

Legal relationship is mostly discussed in 2 manners which is: Domestic and Social agreement; and commercial agreement. The domestic and social agreement is also known as Family agreement. In general, husband and wife are normally not intended to create a contractual relationship. This means, if the husband promised to give the wife $100. This cannot be taken serious as they are not legally binding. But the same case will be reserve if the husband and wife separated and the husband then promised to give $100 to his wife. Because when they are separated and giving promises, they are talking about their future and it is a legally binding contract if the husband promised to give the money. This situation happen in the case Balfour v Balfour (1919) where the husband and wife was said to not intended to create contractual relationship. It was been reverse in the case of Merrit v Merrit (1970) where they was said to have contractual relationship as they were separated and bargaining about their future. Cases between parents and children are also treated the same way as they are not intended to create contractual relationship.

On the other hand, the commercial agreements took the advantage of the court to prove that the party was intended to create contractual relationship. Some how, the most commonly questioned are the advertisements. Do advertisement shows their intention to create legal relationship? The answer is only one which is ‘no’. But there is a possibility for the party had published the advertisement with intention to create contractual

relationship if he placed sincerity which is more than just an advertisement. This happen in the case Carlill v Carbolic Smoke Ball Co (1893) where the party who published the advertisement also did more than that by depositing $1000 to show their sincerity[1]. As a result of it, the court held that the party published the ad had intended to create legal relationship with the party on the other end.

Commercial agreements will be accepted by the court as they intended to create legal relationship if they managed to prove adequate evidence to the court. As said in the previous paragraph, the party can deny that they did not intended to create a contractual relationship and the court will accept their statement if they produced adequate evidence. This happened in the case of Jones v Vernon's Pools Ltd. The defendant denied his legal intend as he added exclusion clause: 'the transaction should not give rise to any legal relationship or be legally enforceable but binding in honor only'. This was evidence for the court to accept the defendant statement which they do not have legal intention.

The evidence will represent the parties and prove either they had legal intention or not at the time the contract was made. The case Kleinwort Benson Ltd v Malaysian Mining Corporation Berhad (1989) illustrates the statement better. In this case the plaintiff bank, had gave loan to MMC Metals Ltd which is subsidiary of its parent company Malaysian Mining Corporation Berhad. This loan was given based on the letter of comfort which was received from the defendant company stating that 'it is our policy to ensure that the business of MMC Metals Ltd is at all the times in a position to meet its liabilities to you'[2]. This letter of comfort was accepted by the bank and provided the loan. Once the MMC Metal Ltd failed to pay back the liabilities, the bank attempted to claim it from the parent company. The evidence that the Malaysian Mining Corporation Berhad intended to create legal relation by their letter of comfort giving indirect guarantee for their subsidiary company which is MMC Metals Ltd. In this case, the question rise whether a letter of comfort of the usual kind contain legal obligation?[3] Here the High Court Mr Justice Hirst decided that the letter shows there was a legal obligation. But the company Malaysian Mining Corporation Berhad appealed to Court of Appeal. The Court

[1] Penny Booth, Jean Holden, Gorden Mcleish & Jill Spencer, Lecturer Notes Series : A Level Law – Paper II, 2nd Edition, Cavendish Publishing Ltd, 1997, Page 29.
[2] Paul Richards, Law of Contract, 1st Edition, Pitman Publishing, 1992, Page 75.
[3] Denis Keenan, Advanced Business Law, 10th Edition, Pitman Publishing, 1997, Page 57.

of Appeal stated that the letter only shows the policy of the company and it was only a moral one. Therefore, the Malaysian Mining Corporation Berhad was release from liabilities.

Those explanations and example shows that legal intention is important in the formation of a contract. It is determined based on the party's relationship, intention, and evidence.

Word Count: 831 Words

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21. Denis Keenan, Advanced Business Law, 10th Edition, Pitman Publishing, 1997, Page 57.

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It includes reference document and articles which was collected from varies source with the motive of completing this assignment.