Question 1

On the whole this question was answered reasonably well.

This question required an analysis of which if any of the terms were essential, thereby giving a right of termination. Better answers assessed each term in turn, but focused on those that had been breached by Allan. This involved not only discussing the principles involved in differentiating between warranties, conditions and intermediate terms, but good answers also discussed the possibility of a *de minimis* breach.

In relation to (b), most students addressed the key issue of the potential for Millie to breach or repudiate the agreement, but better answers sought to distinguish whether her decision to shut down her business was in reaction to the breaches by Allan or independent of them and the consequences of that. The timing of her decision was also important and this would effect the analysis. Both (b) and (c) also involved a discussion of whether Millie was ready willing and able to perform her obligations under the contract.

Some students also raised the issue of frustration due to the World Cup and correctly identified that this was unlikely to terminate the agreement.

Question 2

This question was generally answered quite well. But some answers were not complete, as there were several elements to the answer, but most students covered a sufficient number of the aspects of the problem.

Most students identified that the first key issue was the incorporation of the exclusion clause. Good answers addressed this in terms of incorporation by notice, incorporation by signature and incorporation by course of dealings. On the whole there was good reference to the “ticket cases” and to relevant authorities on incorporation by course of dealing. But not all answers clearly distinguished these approaches.

Good papers also addressed the possible incorporation of the representation made by Nick regarding refrigeration, not only as a contractual issue, but also potentially as misleading and deceptive conduct, pursuant to s 18 if the ACL. Some students dealt with this issue in terms of contractual misrepresentation, but this fails to account for the fact that such a cause of action gives rise to a right of rescission and this would be a difficult and probably unwanted remedy here.

The problem then required an analysis of the effectiveness of the exclusion clause. Most students discussed at least one aspect of this, but fewer discussed all of the authorities that are relevant to this issue.

The final issue was that of causation and remoteness of damage and this was generally identified and analysed.
Question 3

This question was not answered as well as the other two and some students did not focus on the key issue of consideration. All three sub-parts involved a discussion of whether there was sufficient consideration for the new agreement. Good answers discussed this.

Additionally, most students identified the issue of possible duress and dealt with this aspect well.

In relation to the paper as a whole, generally, good answers quickly focused on the analysis of the facts and the application of the law to them. In this regard, students should be careful to avoid:

(a) re-writing the problem in the answer by setting out the facts in detail, bereft of any analysis; or

(b) raising the issues in the problem, but without assessing them or attempting to discuss some form of resolution.