NOTE:

1. This examination is OPEN BOOK. Candidates may use any materials they have brought into the examination room (with the exception of library and textbook) during the examination and the reading period.

2. I advise you to use the reading period to read through the whole of the examination, identify the issues raised by the questions, and think about possible approaches to answering the questions. You may write on scrap paper during this period if you wish. **YOU MUST NOT WRITE IN YOUR EXAMINATION BOOKLET OR TYPE ON YOUR COMPUTERS DURING THE READING PERIOD.**

3. Do not concern yourself with statutes, cases or other sources not covered in the course materials.

4. It is better to cover more points in brief than fewer points in detail. State clearly any facts you assume in answering the questions. You should describe the arguments that might be made on both sides of an issue, and give some sense of the relative strengths of the arguments.

5. Full citations of cases are not necessary. You may refer to cases in short form.

**THIS EXAMINATION CONSISTS OF 2 MAIN QUESTIONS**
Jane and Joan, both first year university students, start a small painting company in May to earn some money during the summer. The two have no business experience. They put up posters in various neighborhoods and take out advertisements in local papers to try to get business. They use up all of their savings and max out their credit cards to buy a van, ladders, and other equipment. But things don’t go well. They wait for a week, and then another. The phone never rings. After a third week with no calls, they start to feel desperate. "I guess we were a bit too eager," Jane says to Joan, as they’re having a coffee at the Bean There coffee shop, one of four shops of a successful local chain. "We may know how to paint but we sure don’t know anything about running a business." Dick, the owner of Bean There's four stores, just happens to be standing nearby.

"I couldn’t help but overhear you," Dick says. "My painters cancelled, and I need to paint all four of my stores this summer. Do you want the job? I’ll pay you each $160 a day, minus expenses. Are you in?" Jane and Joan can't believe their luck. "You bet," says Joan. Dick tells the two to come back in a couple of hours so they can sign a contract. When they return Dick is nowhere to be found. One of the servers sees them and tells them Dick had to leave, but that he left a document for them to sign. "You can call him on his cell phone if you have any questions," she says. Joan says: "That’s fine we’ll just sign. It’s not like we can change it. We really don’t have much choice. We need the work.” They sign the document.

Had they read the two-page document (with printing on both sides of each page), Joan and Jane would have seen the first two clauses on the first page:

1. Jane and Joan shall each receive a fee of $160 a day for painting the interiors and exteriors of all four Bean There stores by September 1, 2018.

2. Dick shall purchase all supplies necessary to complete the job and arrange and pay for all necessary preparatory work. IMPORTANT TO READ: ALL AMOUNTS SPENT ON SAID SUPPLIES AND PREPARATORY WORK WILL BE DEDUCTED BY DICK FROM THE FEES OWING TO JANE AND JOAN.

Had they read further, Joan and Jane would have seen the following provision at the bottom of the back of second page, in small and faint print:

3. In the event the expenses paid by Dick for supplies and preparatory work (as hereinbefore described in clause 2) exceed the fees owed by Dick to Jane and Joan, Jane and Joan shall reimburse Dick, within a reasonable time, for the entirety of those excess expenses, regardless of their amount.
Painting the first store was a breeze, and Jane and Joan finished ahead of schedule. After expenses for paint and other supplies were deducted by Dick, each of Jane and Joan received, on average, around $100 a day, which they were happy with. The same pattern held for the next two stores, but not for the fourth.

At the fourth store, the interior walls had large areas of dry rot which had to be repaired before they could be painted. Dick, who honestly did not know about the dry rot before he entered the contract with Joan and Jane, hired a crew to repair the walls. Once the repairs were done Jane and Joan painted the walls. The job took 10 days and the paint and other supplies cost $600, like for each of the other stores, meaning Jane and Joan were together owed $2600 in fees after the deduction of paint and supply costs under clause 2. But because the unexpected wall repairs had cost Dick $3600, he, again relying on clause 2, refused to pay Jane and Joan the $2600 in fees. Moreover, he claimed that, by virtue of clause 32, Jane and Joan actually owed him $1000.

Discuss the following:

Dick sues Jane and Joan for the $1000, invoking clause 32. Jane and Joan defend against the claim on the three grounds stated below. Assess their chances of success for each.

1. Jane and Joan did not read clause 32, so they should not be bound by it (30 marks; 36 mins)

2. Clause 32 is unconscionable (20 marks; 24 mins)

3. Clause 32 is void or voidable for mistake because neither party knew or could have known that the walls at the fourth store were compromised by dry rot (20 marks; 24 mins)
QUESTION II

TOTAL: 30 marks; 36 mins

Discuss ONE of the following passages or questions with illustrations from the course materials:

1. "None of you nowadays will remember the trouble we had, when I was called to the Bar, with exemption clauses. They were printed in small print on the back of tickets and order forms and invoices and contracts. They were contained in catalogues or timetables. They were held to be binding on any person who took them without objection. No one ever did object. He never read them or knew what was in them. No matter how unreasonable they were he was bound. All this was done in the name of 'freedom of contract'. It was a bleak winter for our law of contract." Lord Denning, Mitchell v. Finney Lock Seeds, 1983.

Has the bleak winter turned to spring?

2. "Unconscionability is a form of public policy intrusion into free contract. As such it is inimical to the system of free enterprise which underlies the law of contract, and therefore its application by the courts will perpetually be a source of difficulty and dissatisfaction.” S. Wheeler and J. Shaw, Contract Law

3. "The fundamental question [raised by both mistake and frustration] is, why does the court intervene? The answer must surely be that the occurrence of the unexpected event is so much outside the range of risks that the agreement allocates — so fundamental a piece of the framework within which the bargain was struck has dropped out — that the values favouring enforcement are outweighed. No mechanical rule of thumb will ever be available to determine when the balance tilts....” S.M. Waddams, The Law of Contracts

4. It is widely understood that the reason for compensating victims of breach of contract for expectation losses is to put them in the position they would have been in had the contract been performed. How well does the law, as manifest in the cases we examined, achieve that purpose?

-END OF EXAMINATION-