CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

JANUARY 2020

LEVEL 3 – UNIT 2 – CONTRACT LAW

Note to Candidates and Learning Centre Tutors:

The purpose of the suggested answers is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the January 2020 examinations. The suggested answers set out a response that a good (merit/distinction) candidate would have provided. The suggested answers do not for all questions set out all the points which candidates may have included in their responses to the questions. Candidates will have received credit, where applicable, for other points not addressed by the suggested answers.

Candidates and learning centre tutors should review the suggested answers in conjunction with the question papers and the Chief Examiners' **comments contained within this report,** which provide feedback on candidate performance in the examination.

CHIEF EXAMINER COMMENTS

The candidates appear to have performed well, with a very wide range of responses. Overall, candidates performed very well on Section A, achieving good marks.

Unusually, there was a balanced spread of choice across the three scenarios in Section B. It is possible that unilateral contracts and the battle of the forms deterred a number of candidates from attempting the question containing offer and acceptance issues!

CANDIDATE PERFORMANCE FOR EACH QUESTION

Overall, candidate performance was good.

In relation to weaker candidates, it was often a feature of their answers that they did not apply the law they had just stated. Examples are noted in the next section of the report. While not a universal rule, it is generally the case that where questions in Section B initially require the statement or explanation of legal principles, the next sub-question is likely to involve their application.

Candidates are reminded to take note of the number of marks allocated to questions in deciding how much to write; and are especially reminded that where a question requires an explanation, then more detail is required, and, where appropriate, case names or statutory authority should be cited. Again, candidates missed out on passing or on higher grades because they were failing to cite case names or statutory authority. This is raised after every exam session and it is very easily remedied.

Section A

Q1 Generally answered very well.

Q2 Generally answered very well.

Q3 Generally answered well.

Q4 This question, which was a little more challenging, required candidates to identify the criteria for the exception to the past consideration rule, as well as the rule itself.

Q5 Generally answered very well.

Q6 Generally answered well.

Q7 Generally answered well, though a surprising number of candidates who could not identify any relevant terms.

Q8 Generally answered well.

Q9 Generally answered well.

Q10 Generally answered well, though a fair number of candidates who could not provide any exceptions; perhaps from not understanding what the question required.

Q11 Mostly answered correctly.

Section B
Scenario 1

The offer and acceptance elements were generally answered reasonably well; though given that the questions included unilateral contracts (Question 1) and battle of the forms (Question 2), not quite as strongly as more typical offer and acceptance questions.

However, the remedies aspect (Question 3) was less well answered. Many candidates who undertook this question did not deal adequately with the application of the principles of remoteness of loss; even where they had stated them correctly. The application of the principles relating to damages (Question 3(c)), was particularly poorly answered.

It appeared that candidates were less well prepared for this area of the syllabus. In particular, those who have decided before entering the exam room to do the 'offer and acceptance, question may then have found themselves at a disadvantage.

Scenario 2

A pleasing number of candidates were able to successfully articulate and apply the law relating to innominate terms in Question 1.

In relation to the frustration part of the scenario (Question 2), performance was middling – most candidates got the basics, but answers often lacked detail.

In relation to the 'effects of frustration' part of the scenario (Question 3), candidates sometimes struggled with the detailed application of LR(FC)A s.1(2).

The final question, on legal intention, was generally well answered.

Scenario 3

In Question 1 of this scenario, the consideration issues were generally dealt with satisfactorily.

Candidates performed less well in Question 2, in stating and applying the principles relating to the performance of a public duty.

In Question 3, as noted above, often candidates did not apply the law they had just stated – for example, by stating the Pinnel's Case exceptions, but then not using the exception in relation to the provision of tickets in lieu of part payment.

The misrepresentation part of the scenario was generally attempted satisfactorily; fraudulent misrepresentation being a little easier to cope with than MA 1967, s.2(1).

SUGGESTED ANSWERS

LEVEL 3 – UNIT 2 – CONTRACT LAW

SECTION A

1. Offer and acceptance (agreement), intention to create legal relations and consideration.

2. Privity of contract is the doctrine that a person who is not a party to a contract can neither enforce rights under the contract nor be subject to obligations under the contract; only the parties to the contract can sue or be sued on it - e.g. Tweddle v Atkinson (1861), Dunlop v Selfridge (1915).

3. An offer for a limited period expires at the end of the period; if no period is stated offer lapses after a reasonable time - Ramsgate Victoria Hotel v Montefiore (1866).

4. Past consideration is not good consideration, as the consideration is not given in exchange for a later promise, as in Re McArdle (1951).

   However, where:
   - the relevant act or promise is made at the request of promisor (the person who later promises payment);
   - it was understood that the act or promise was to be paid for;
   - and the later promise of payment would have been legally enforceable if made contemporaneously with the act or promise;

   then the later promise will be enforceable, as in, for example, Re Casey's Patents (1892).

5. The presumption in social agreements is that the parties do not intend to create legal relations, e.g. Jones v Padavatton (1969).

6. Relevant factors in determining whether a statement is intended to be a term of the parties' contract include:
   - the importance of the statement;
   - whether the statement was reduced to writing;
   - the passage of time between the making of the statement and the contract;
   - any special knowledge of the maker of the statement;
   - whether the maker of the statement suggested to the recipient that they should verify its truth.

7. The following are terms which are implied into contracts for the sale of goods (whether by the Sale of Goods Act 1979 or the Consumer Rights Act 2015):
   - that the goods are of satisfactory quality;
   - that the goods are reasonably fit for purpose;
   - that the goods correspond with any description by which they are sold.

8. A warranty is a term which is not central to the main purpose of the contract - Bettini v Gye (1876). The innocent party may claim damages for breach of warranty, but has no right to treat the contract as terminated.
9. A misrepresentation is an untrue statement of fact or law made by one party to a contract to the other, which induced the other party to enter into a contract.

10. The following are exceptions to the 'entire performance' rule:
    - acceptance of partial performance;
    - substantial performance;
    - prevention of performance by the other party;
    - where the obligations under the contract are divisible.

11. Specific performance is an order of the court requiring a party to perform an obligation under a contract.

SECTION B

Scenario 1 Questions

1. (a) A unilateral contract is a contract in which only one party is bound. It is formed by a unilateral offer, which may be an 'offer to the world', e.g. as in Carlill v Carbolic Smoke Ball Co (1893) or other 'reward' cases. It is normally accepted by performance of the act stipulated by the promisor.

   (b) Susan's advertisement contains a commitment to accept the offer of the first person who makes the offer at the time and in the way described. It is, therefore, likely to be construed as a unilateral offer, rather than a mere invitation to treat. Razwana is the first customer to make a conforming offer. This constitutes acceptance of Susan's unilateral offer. Susan is contractually bound to accept Razwana's offer for the robot. By failing to do so, she is in breach of the unilateral contract.

2. (a) A counter-offer is an offer in its own right in response to an offer; not merely a request for information. It contains terms which differ from those of the offer. It impliedly rejects the original offer - Hyde v Wrench (1840)

   (b) A battle of the forms occurs where parties respond to each other's offers with successive counter-offers, which are made on their own standard terms and conditions. A contract only results if one of the parties accepts the other's counter-offer. This result in the contract being concluded on the standard terms and conditions of the counter-offer so accepted. A situation like this was held to have obtained in Butler Machine Tool Co v Ex-Cell-O Corporation (1979).

   (c) Jacob's enquiry is an invitation to treat - it opens negotiations but is not an offer. Susan's reply is an offer, as it evidences a willingness to contract on certain terms, which include a price variation clause. Jacob's purchase order, because it contains different terms, is a counter-offer. This impliedly rejects Susan's original offer. By signing and returning the acknowledgement slip, Susan accepts Jacob's counter-offer. A contract is therefore formed on Jacob's standard terms, which do not include the price variation clause. Jacob only has to pay £80,000 and not the additional £10,000.

3. (a) Damages are intended to put the innocent party in the position they would have been in had the contract been performed, so far as money can - Robinson v Harman (1848).

   (b) A loss which is too remote a consequence of a breach of contract is not recoverable. A loss is not too remote if it arises naturally from the breach (such that the parties have imputed knowledge), or if it was in the reasonable contemplation of the parties at the time the

contract was made (such that the parties had actual knowledge) - Hadley v Baxendale (1854), Victoria Laundry v Newman Industries (1949).

(c) The damage to the eggs is a natural consequence of the defect in the robot. As a result, the loss of £2,000 is not too remote and it is therefore recoverable by Carl.

The loss of the lucrative egg-supply contract is arguably not a natural consequence of the defect. However, Carl had brought the contract with Omletworld to Susan's attention at the time of the contract, and therefore it was in the parties' contemplation (something of which Susan had actual knowledge). As a result, this loss is also not too remote and is recoverable by Carl.

Damages for non-pecuniary losses, such as disappointment or loss of enjoyment are not normally recoverable in contract. Carl cannot therefore recover damages for his distress. The case is not one where pleasure or the avoidance of distress are purposes of the contract.

Scenario 2 Questions

1. (a) An innominate term is a term which cannot be classified at the time of formation of a contract as a condition or a warranty. A party can claim damages for any breach of an innominate term, but can terminate for breach of it only if the breach is sufficiently serious - The Hongkong Fir (1962).

(b) The obligation in clause 5 of the contract is to keep the Katchase in a seaworthy state for the duration of the hire. It is unlikely to be the parties' intention that this gives a right to terminate on any breach, as the clause admits of many possibly minor breaches. So the clause is not likely to be a condition. However, it is likely to be their intention that the contract can be terminated if the breach of the term is serious. So the clause is not likely to be a warranty. It is, therefore, likely to be an innominate term.

(c) (i) There is a breach of clause 5 as a result of the failure leading to the oil leak. However, the breach is minor in relation to the contract as a whole. Jeremy is only deprived of ten days of a year-long hire. So the breach is not sufficiently serious to give Jeremy the right to terminate the hire. However, he may claim damages for the cost of hiring the other boat in the meantime.

(ii) There is a further breach of clause 5 as a result of the failure leading to the fire. This deprives Jeremy of most of the remaining period of the hire, which is a substantial part of the benefit of the contract. It is likely to be sufficiently serious to allow Jeremy the right to terminate the contract. Jeremy may also claim damages for the cost of hiring an alternative boat.

2. (a) Frustration may be defined as an unforeseen event, occurring after the formation of the contract, which is the fault of neither party, and which renders the contract impossible or illegal to perform or

undermines its commercial purpose, e.g. Davis Contractors v Fareham UDC (1956).

(b) The contract is impossible for Shiphire to perform as a result of the requisition of the ship, without any fault on their part. The provision made in the contract provides for a different eventuality, so does not prevent the contract being frustrated by the event which has occurred. The event was not foreseen. The contract will therefore be frustrated by the government requisitioning of the ship.

3. (a) The effect of frustration at common law is to discharge parties from future performance of the contract. Shiphire are no longer obliged to provide the boat for hire, and Jeremy is discharged from the obligation to pay the £3,000 due at the end of the hire.

(b) Under section 1(2) of the Law Reform (Frustrated Contracts) Act 1943, payments made before frustration are recoverable (or sums payable cease to be payable). This, however, is subject to the discretion of the court to allow the payee to retain sums paid or recover sums payable up to the amount of expenses incurred for the purposes of performance of the contract.

On the facts, Jeremy has paid £2,000 in advance, but Shiphire has incurred expenses of £500 in preparation for the hire. As a result, Robert, as payee, may retain up to £500, depending on how the discretion of the court is exercised. Under the principle from Gamerco SA v ICM (1995), the discretion is a broad one to mitigate the harshness of allowing the loss to lie where it falls. Jeremy will be entitled to the return of at least £1,500, and may be more, up to the full amount of £2,000.

4. Both Jeremy and Diane are acting in the course of their respective businesses. The presumption in commercial arrangements is that the parties intend to create legal relations – Edmonds v Lawson (2000). This may be rebutted on the facts. Here, there is a loose social tie between them; and he gives her a considerable discount. However, these may be insufficient to rebut the presumption that Diane's promise is intended to be legally binding; indeed the discount may suggest that this is the extent of their friendship and that the rest is to be enforceable. You would equally have been credited if you had started from the presumption that, as friends, the arrangement was a domestic or social one, and had then considered whether the facts would enable the presumption that the agreement was not intended to be legally binding to be rebutted.

Scenario 3 Questions

1. (a) Executory consideration is where the consideration for a promise takes the form of a promise which has not yet been performed. As Tim has merely promised to pay Malinois, rather than actually paid them, his consideration for their promise is executory.

(b) 'Adequacy' of consideration relates to the amount, or value, of consideration provided in exchange for a promise. It does not need to be of equal value to that for which it is given in exchange - Chappell v Nestle (1960).

(c) Malinois are now famous, and it may be that the value of the services they are providing is significantly more than £100. However, this is still a sufficient consideration to enable Tim to enforce their promise to perform. The consideration does not need to be adequate. Malinois are bound by their promise.

2. (a) Performance of an existing public duty is not good consideration for a promise of payment - Collins v Godefroy (1831). However, such a promise may be enforceable where the promise goes beyond what they are bound by their public duty to do - Harris v Sheffield United FC Ltd (1988).

(b) Redcar Coastguard have an existing public duty. However, this is unlikely to extend to having four boats on standby to enable a rock festival to be held on the beach. It is, therefore, likely that doing so goes beyond their existing public duty. As a result, Tim's promise to pay Redcar Coastguard £40,000 is likely to be enforceable.

3. (a) The Rule in Pinnel's Case is that part payment of a debt is not good consideration ('satisfaction') for a promise by the creditor to release the debtor from the balance of the debt. Exceptions to the Rule in Pinnel's Case include:
- payment at the creditor's request before the due date;
- payment with non-money consideration (such as a chattel);
- the settlement of a disputed claim;
- composition agreements with creditors;
- where payment is made by a third party.

(b) Under the terms of the original contract, Tim was obliged to pay £60,000 for the building of the sandwall. However, Festifence agreed to accept less than the full amount due. The part payment of £50,000 would not normally be good consideration for the full amount due (i.e. for a release from the balance due). However, Tim agreed to provide ten free tickets for the festival in addition to the part payment. These constitute a sufficient consideration for the promise to release him from the balance of the £60,000 sum.

4. (a) Tim has made a false statement of fact: the statement about Beyonce and Metallica is one of fact (i.e. it is capable of being true or false), rather than one of opinion; and it is clearly untrue. The statement was made by Tim to Picky. Picky was induced to enter the contract by the statement. It is therefore a misrepresentation.

(b) The three types of misrepresentation are fraudulent misrepresentation, negligent misrepresentation (within section 2(1) of the Misrepresentation Act 1967) and innocent misrepresentation.

(c) (i) A misrepresentation is fraudulent where it is made knowing it to be false, or made without belief in its truth, or made with reckless carelessness as to its truth - Derry v Peek (1889). Tim's statement was made knowing it to be false, and it is therefore a fraudulent misrepresentation.

(ii) Rescission is available as remedy for fraudulent misrepresentation, and involves the setting aside of the contract '*ab initio*' (i.e. from the beginning). Picky can rescind

	the contract. As the contract would thereby be avoided, she would not be obliged to play the set (though she would not be able to sue for her fee). Picky can claim damages in the tort of deceit. This allows recovery for all losses caused by the fraudulent misrepresentation – Royscot Trust v Rogerson (1991).