CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

SEPTEMBER 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 September 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 paper appears to have performed well in giving rise to a very wide range of responses.

Overall, I consider that these results are within normal boundaries and expectations. The fail rate is on the lower side of normal, but not by a great deal. It does not appear to have pushed the merit and distinction rates up, rather than the bare passes.

On average, candidates performed satisfactorily on Section A. The average score across the ten questions was 21.9. Candidates did not perform well on questions 3, 9 and 10. Reasons are given in the next section, but it is not considered that any of these questions demanded more than might reasonably be expected of a Scenario A question – all related to matters covered in the Unit Spec and went no further than knowledge outcomes.

The three Scenario B questions produced averages of 21.8, 19.4 and 19.2. It is never a surprise that the scenario with offer and acceptance in it is the most popular choice, nor that students do a little better on it than on other questions, on average. These average marks for Scenario B questions are not

outside of the normal range, and are fairly close together in terms of the overall average scores.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Two features of weaker scripts which are routinely referred to in these Chief Examiner reports are as follows:

- Citation of case law or statutory authority: many questions credit marks for appropriate citation, and in some questions, it is not possible to get full marks without it. Candidates should be encouraged to cite case law or statute appropriately, in both Scenario A and B questions.
- In many cases in Scenario B questions, candidates did not apply the law they had just been invited to state. Whilst 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. Examples are noted below.

In Section A, performance was as follows:

Q1 Generally answered very well.

Q2 Generally answered well.

Q3 concerned performance of an existing duty. A significant number of candidates confused with the entire performance rule; and a further significant number were not able to clearly articulate the exception to.

Q4 Generally answered well. This is also a good example of a question where citation of case law would have been credited, and candidates may have dropped marks by not doing so.

Q5 Generally answered well.

Q6 Generally answered well.

Q7 Generally answered well.

Q8 Generally answered well.

Q9 Many candidates were not able to clearly articulate the forward looking purpose of damages in contract, whether articulated as loss of bargain / to put in the position as if the contract had been performed.

Q10 Many candidates were not able to articulate any principles or case law relating to the mitigation of loss.

Scenario 1 of Section B

Candidates generally distinguished offers and invitations to treat in principle, but were not always able to apply the features of an offer to the facts. For example, many candidates referred to the requirement of "willingness to be

bound" in their analysis of what an offer was, but did not then look for features of the email which showed a willingness to be bound.

In relation to the termination of offers, many candidates picked up on the lapse of time point, but many more did not pick up on the Dickinson v Dodds point, hence the poor performance in question 2(b)(i). The performance on acceptance and the Felthouse v Bindley point was mixed.

On the implication of terms, candidates were generally able to identify the different types of implication. In many cases, more precision was needed when identifying terms implied by the Sale of Goods Act 1979 (as amended) – for example, "quality" without reference to "satisfactory quality" was not sufficient. Many candidates incorrectly adjudged the Consumer Rights Act 2015 to be the relevant statute in a commercial sale of goods.

Performance in identifying modes of incorporation was satisfactory, but only a limited number of candidates performed well in applying the law on course of dealings to the fact pattern.

Scenario 2 of Section B

Candidates were not always able to explain the entire performance rule very well. Careful attention should be paid to the suggested answer. The application of the substantial performance exception was very mixed, and there was often misunderstanding of the limited circumstances in which the Hoenig v Isaacs principle of substantial performance might apply.

In relation to privity of contract, candidates were generally able to explain the basic principles of privity and the exception within C(RTP)A. Application of these principles was mixed.

In relation to the "time of the essence" question, average performance was reasonable; many candidates did not "get to the point" of part (a) until part (b), but would have received credit for it nonetheless.

In relation to past consideration, the general principle and exception was well expressed. The question provided a good example, however, of where candidates then decline to stack up the facts against those principles in assessing whether the law applies on the facts.

The final question was answered poorly: there was too little reference to principles of adequacy and sufficiency of consideration, despite the allusions in the fact pattern.

Scenario 3 of Section B

Misrepresentation was generally defined well. For full credit in part (b) of the first question, candidates then needed to address *each element* on the facts.

Candidates struggled with ascertaining the type of misrepresentation. Perhaps this is not surprising given the complexity of the principles set out in MA1967, s2(1), but to attempt this question successfully, it was necessary to be on top of what needs to be established (and by whom) in order for the claimant to have a right to damages. On average, the answers in relation to remedies were no better: the core remedies (damages, rescission) were

generally identified, but there was little application to the facts as to their availability and effect.

In relation to remoteness of loss, candidates were generally able to articulate the basic principles, though a clearer distinction between the two limbs of Hadley v Baxendale would have improved many answers. Application was generally weak, despite the fact that the two following scenarios were standard applications of each limb respectively.

In the final question, candidates were generally able to identify equitable remedies, but only a limited number of candidates gave clear explanations of why specific performance would be unlikely to be granted, as damages would have been an adequate remedy.

SUGGESTED ANSWERS

LEVEL 3 - UNIT 2 – CONTRACT LAW

SECTION A

1. A contract is an agreement giving rise to obligations which are legally binding i.e. can be enforced / are recognised by law.

2. A counter-offer is a response to an offer which is neither acceptance nor a mere request for information, but constitutes a proposal (offer) in its own right (for example, by varying the terms of the offer). Under the principle in Hyde v Wrench (1840), a counter-offer impliedly rejects the original offer.

3. Performance of an existing contractual duty is not normally good consideration for a promise of extra payment - Stilk v Myrick (1809). However, where a party performs (or agrees to perform) additional obligations in exchange, a promise of extra payment will be enforceable - Hartley v Ponsonby (1857). In addition, the practical benefit conferred by performance may be good consideration for a promise of extra payment if the conditions in Williams v Roffey Bros (1991) are satisfied.

4. In social agreements, there is a presumption that the parties do not intend to create legal relations, e.g. Jones v Padavatton (1969). This may be rebutted where the parties are separating or separated, as in Merritt v Merritt (1970), or where there is mutuality in the arrangements such that the intention is to share benefits or a party is at a disadvantage, as in Simpkins v Pays (1955).

5. Express terms are terms which are actually and overtly agreed by the parties. Implied terms are terms which are not expressly agreed, but are treated or regarded by the law as included in the contract between the parties.

6. A condition is a major term in a contract which goes to the root of the contract - Poussard v Spiers & Pond (1876). A breach of condition entitles the innocent party to treat the contract as terminated. A

warranty, on the other hand, is a term which is not central to the main purpose of the contract - Bettini v Gye (1876). The innocent party has no right to treat the contract as terminated for breach of warranty.

7. 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).

8. Examples of types of events which may frustrate a contract include:
   - the destruction of the subject matter of the contract;
   - the illness or death of a party;
   - supervening (i.e. after the formation of the contract) illegality;
   - the non-occurrence of an event upon which the contract depended; and
   - government intervention.

9. Damages may be defined as monetary compensation 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).

10. The innocent party is required to take reasonable steps to reduce the losses they suffer as a result of a breach of contract. They are then said to have 'mitigated' their loss. Losses which could have been mitigated cannot be recovered even if they are caused by the breach of contract.

SECTION B
Scenario 1 Questions

1.(a)

An offer is an expression of willingness to be bound on certain terms. It is capable of acceptance, e.g. Carlill v Carbolic Smoke Ball Co (1893). An invitation to treat, however, is merely an invitation for offers or to open negotiations, e.g. Gibson v Manchester City Council (1979). It does not meet the requirements to be an offer, so cannot be accepted so as to give rise to a binding agreement.

1.(b)

The email from FMC shows a willingness of FMC to be bound, as FMC indicate that the cherry-picker is available to Iqra, and by indicating that she should 'pop in if she wants it', they show their intention to contract if she accepts the offer. It also contains certain terms as to price and model. It is, therefore, an offer.

2.(a)

An offer may be terminated by rejection (including implied rejection by a counter-offer), revocation or lapse. It may also be accepted.

2.(b)(i)

Revocation of an offer must be communicated to the offeree - Byrne v van Tienhoven (1880), but this may be by a reliable third party - Dickinson v Dodds (1876). Iqra knows, from Eric's comment, that the last of the cherry-pickers has been sold. It is therefore clear to Iqra that FMC will no longer

intend to be bound by the terms of their offer. The offer to sell to Iqra is likely, therefore, to have been revoked, in which case no contract is formed by her purported acceptance.

2.(b)(ii)

An offer will lapse after a reasonable time - Ramsgate Victoria Hotel v Montefiore (1866). Because this was the busy summer period, and FMC have indicated that she needs to respond quickly, it is likely that in those circumstances, a reasonable time will be short, and the offer will be taken to have lapsed before the expiry of three weeks. It is unlikely, therefore, that Katrina has accepted FMC's offer.

3.(a)

Acceptance is the final and unqualified assent to the terms of an offer. It must 'mirror' the offer. The general rule is that acceptance must be communicated to be effective - Entores v Miles Far East Corp (1955).

3.(b)

Under the principle in Felthouse v Bindley (1862), the offeror cannot, by stipulation, treat the silence of the offeree as acceptance of the offer. Giles has not himself done anything to accept the offer. As a result, Giles's 'silence' does not constitute an acceptance of the offer, and no contract is formed between Giles and FMC.

4.(a)

Ways that terms may be implied into a contract are:
- by custom;
- by implication of law ('implied in law');
- by implication on the facts of a case, ('implied in fact'), e.g. under the business efficacy test or the 'officious bystander' test.

4.(b)

The contract is a commercial sale of goods, and so the following terms will be implied by the Sale of Goods Act 1979:
- that the goods correspond with the description by which they are sold;
- that the goods are of satisfactory quality;
- that the goods are reasonably fit for purpose.

5.(a)

Ways that terms may be incorporated into a contract include:
- by notice, reasonable or actual;
- by signature;
- by course of dealings;
- by common understanding.

5.(b)

The term may be incorporated into the contract by course of dealings. The dealings between Eric and FMC have been both frequent - monthly for five years - and consistent - as this has happened on all previous occasions - cf.

Hollier v Rambler Motors (1972). It is, therefore, likely that the term is incorporated.

Scenario 2 Questions

1.(a)

The entire performance rule (or 'complete performance') rule is the rule that a party cannot require performance from the other party unless their own performance is precise and exact. It is sometimes known as the Rule in Cutter v Powell, from the case of Cutter v Powell (1795).

1.(b)

Here, the work has not been completed precisely and exactly. However, an exception to the complete performance rule may apply where there has been substantial performance of a contractual obligation - Hoenig v Isaacs (1952). The wrong glass has been used, and the racks are not usable for their primary purpose. The work will cost a large proportion of the contract price to remedy. It is unlikely to have been even substantially performed. As a result, Zak is not entitled to sue for payment.

2.(a)

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).

2.(b)

Zak and Christine are the parties to the contract, as they have reached agreement. David is not a party to the contract; he did not enter into the agreement: he is a third party to it.

2.(c)

An exception to the privity rule exists under s.1 of the Contracts (Rights of Third Parties) Act 1999. This provides that a person who is not a party to a contract may enforce a term if the contract expressly provides that he may, or if the term purports to confer a benefit on him. The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description. While the contract does not expressly provide that David may enforce any term of it, he is expressly identified as the intended beneficiary of the contract, and the contract intends to confer the benefit of a safely stored bike on him. He may, therefore, enforce the terms of the contract by bringing an action against Zak for breach (the failure to store the bike in accordance with the terms of the contract).

3.(a)

A stipulation in a contract that 'time is of the essence' generally makes the time of performance of a contractual obligation one which goes to the root of the contract. The obligation will, therefore, generally be treated as a condition of the contract, entitling the innocent party to terminate the contract if performance is not in time.

3.(b)

Zak has failed to comply with the terms relating to the time of performance. John will therefore be able to treat Zak's performance as the breach of a condition, so that John can treat the contract as at an end. He, therefore, does not now have to let Zak undertake the work.

4.(a)

The general rule is that past consideration (i.e. where a promise is made after the alleged consideration for it was given) is not good consideration, e.g. as in Re McArdle (1951). However, an act or promise in the past may be good consideration for a later promise, where the following conditions are satisfied:

- the act or promise is done or given at the request of the promisor;
- it was understood by the parties that payment would be made for the act;
- the payment would have been legally enforceable had it been promised in advance;

such as in Lampleigh v Brathwaite (1615) or Re Casey's Patents (1892).

4.(b)

On the facts, the replacement of the bathroom door precedes promise of £250, so may, on the face of it, be regarded as a past consideration. Nevertheless, Zak only replaced the door at Nabilah's request, and the payment would have been legally enforceable if promised in advance. The matter, therefore, depends upon whether it was understood that the work would be paid for. Zak is a builder and does not appear to have anything other than a commercial relationship with Nabilah. The work is of the same nature as his trade. The amount of work is not insignificant. As such, it is likely to have been understood that the work was to be paid for. If so, Zak can enforce the promise to pay £250 for it.

5.

Consideration must be sufficient - Thomas v Thomas (1842) - but it need not be adequate - Chappell v Nestle (1960). The work done by Zak will be recognised by the law as a sufficient consideration. It does not matter that it may be regarded as worth less than the market value, as this only relates to the issue of adequacy. Zak will be able to enforce Nabilah's promise to pay the full £10,000.

Scenario 3 Questions

1.(a)

A misrepresentation is an untrue statement of fact made by one party to a contract to the other, which induces the person to whom it is addressed to enter into a contract.

1.(b)

The statement made by Martha is a statement of fact, as it relates to past profitability. It was true when made. A statement may nevertheless be a misrepresentation if it becomes false before the contract is entered - With v O'Flanagan (1936). Here, the statement is untrue at the time of the contract.

It is made by Martha to Jason. It induces Jason to buy the business, as he continues the negotiations in response to it. It is therefore a misrepresentation.

2.(a)

The misrepresentation is not fraudulent, as Martha believed it to be true (and it was true at the time it was made). A misrepresentation is innocent where it falls outside of section 2(1) of the Misrepresentation Act 1967. In order to establish this, the burden of proof is on the misrepresentor to show that they had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true. While Martha did believe the statement to be true, she did not have an objectively reasonable ground for the belief up to the time of the contract, as checking her own books would show the statement to have been incorrect - Howard Marine v Ogden (1978). The statement is therefore a 'negligent' misrepresentation, i.e. falling within section 2(1) of the Misrepresentation Act 1967.

2.(b)

Jason may claim damages under section 2(1) of the Misrepresentation Act 1967 for any loss directly caused by the misrepresentation. These losses will be calculated on the same basis as in the tort of deceit - Royscot Trust v Rogerson (1991). On the facts, Jason may argue that if it had not been induced into entering into the contract with Martha, he would have bought a business making a higher profit than Martha's does. He may therefore claim for the losses he has suffered as a result of this.

Rescission is available as remedy for negligent misrepresentation and involves the setting aside of the contract '*ab initio*' (i.e. from the beginning). However, rescission may be barred if one of the equitable bars to rescission is present. Here, it is nearly a year since Jason purchased the business, so it is likely that rescission is barred here by delay.

3.(a)

An award of damages may be made for losses which are not too remote a consequence of the breach. These may be either losses which arise in the usual course of things, or losses which were in the reasonable contemplation of the parties at the time the contract was made - Hadley v Baxendale (1854). These losses were characterised in Victoria Laundry (Windsor) Ltd v Newman Industries Ltd (1949) as losses which were within the imputed or actual knowledge of the parties.

3.(b)(i)

Both the losses from general trade, and the cost of repair, arise naturally from the failure of the hydraulic jack, as the jack is used for the servicing of vehicles. These losses are therefore not too remote, and are recoverable.

3.(b)(ii)

The losses from the Acomb Road Race are not likely to arise in the ordinary course of business. However, the opportunity arising from the Road Race was expressly brought to the attention of Martha, at the time of the purchase of the business. It is therefore likely that they fall within the second limb of the

remoteness test, being losses in the contemplation of the parties at the time of the contract. This loss too can therefore be recovered.

4.(a)

Two equitable remedies which may be available where a contract is breached are an injunction and an order for specific performance.

4.(b)

Damages will be an adequate remedy. This will allow Jason to pay for the repair of the jack himself, to put him in the position he would have been in had the contract been performed. As a result, no equitable remedy, such as a mandatory injunction to remedy the breach, will be available to Jason.