CHIEF EXAMINER COMMENTS WITH SUGGESTED ANSWERS

JANUARY 2021

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 2021 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 spread of marks was very wide indeed, and at the high end there were some exceptional answers. Some candidates have clearly taken note of the comments in these reports and have considered past papers and specimen answers. That can only be of benefit to supplement learning on courses.

At the other end, it may be that in some cases, candidates feel that they can approach the examination by revising a limited range of the learning outcomes. This is not a strategy to be recommended.

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. Certainly, candidates should at least start off by thinking whether they can use the law stated in the first parts to apply to the facts in the following parts.

CANDIDATE PERFORMANCE FOR EACH QUESTION

In Section A, performance was as follows:

Question 1 - Generally answered very well.
Question 2 - Generally answered well.
Question 3 - Generally answered very well.

Question 4 - 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.

Question 5 - Generally answered well.
Question 6 - Generally answered very well.

Question 7 - Generally answered poorly. There was a lot of confusion between a half-truth, and a statement which was true when made but became false before a contract was entered.

Question 8 - Generally answered fairly well. Quite a few candidates do not get the point that the point of complete performance is to put the party in the position to demand performance from the other party. But there were enough marks available to students without making this point to score reasonably well.

Question 9 - Generally answered very well.

Question 10 - Generally answered fairly poorly. Candidates are often not able to separate out and articulate the limbs of Hadley v Baxendale. Again, some missed out on straightforward marks by not citing authority.

Scenario 1 of Section B

Question 1

Candidates scored quite poorly on this area. It is one of the less frequently examined areas of offer and acceptance, and that showed in both the rather mediocre performance in part (a) and the inability to apply rules in part (b) relating to certainty (which were in issue) rather than other elements of formation (which were not).

Question 2

Candidates scored reasonably on the first two sub-questions of this question, but surprisingly poorly on the third (which carried the most marks). In almost all cases, this was because candidates had applied the Postal Rule without regard to whether it should apply on the facts ("reasonableness of using the post"). The minority who considered the point did not generally go on to

consider how the offer had lapsed. In essence, candidates had to integrate and apply the law from both of the preceding sub-questions. None of the marks are outside the Unit Spec, but the number of links in this chain made it a somewhat harder question than predicted - particularly as not getting past the first link caused the loss of more marks than not getting past the second link.

Question 3(a)

This was done reasonably well, but part (b) was not. This question required candidates to address potentially three different areas for consideration: damages generally; damages for non-pecuniary loss; and mitigation. As noted above, candidates scored poorly on this. Fewer students than predicted appeared able to address the latter two areas in detail or at all. One explanation may be that the preceding questions did not sufficiently "tee-up" the issues to be addressed, and candidates had to identify them by analysing the fact pattern.

Question 4

This question was not answered particularly well - despite the steer towards equitable remedies, quite a few candidates missed the point.

Scenario 2 of Section B

Question 1

All elements of this question were generally answered quite well, part (a) particularly so. The question is a reasonably standard "knowledge" question, so it may be that some candidates are reading the specimen answers from previous assessments and using that knowledge.

Question 2 Parts (a) and (b) were generally answered well; part (c) a little less so - it may be that the "upgraded plugs" was a little too oblique a reference to the Hartley v Ponsonby "extra" consideration point.

Question 3

Neither the articulation of the law (a) or its application (b) were answered particularly well. It may be that the use of a case in the question (Williams v Roffey) made life a bit more tricky, as without knowing anything about it, this whole question would have been a closed book.

Question 4 This question was answered reasonably – largely divided between those who picked up the privity point and those who did not.

Scenario 3 of Section B

Question 1

Candidates scored well on (a) and (c)(i), and very well on (b), which is a reasonably standard knowledge question. As they only needed to identify three factors from five, candidates could still score well. Part (c)(ii) was not dealt with quite so well, which was a little surprising given that it only required the application of the "term v rep" tests.

Question 2

It was some surprise, having set up this question in (a), where the candidates often successfully identified at least one or other of the two tests of "implied in fact" (business efficacy and officious bystander) that so many candidates were quite unable to then apply those tests to the facts before them in (b) (though even the part (a) performance was a little disappointing). The second thing which may have confused some candidates was that there were some other express terms in the contract, and some candidates tried to infer the answer from what was in the express terms, rather than from what was not. This is a good example of where all that was really required was the application of the stated law to the facts.

Question 3

This question was not answered well. Only a minority of candidates were able to clearly identify the statement as one of opinion or conjecture.

Question 4

In (a), the analyses of whether it was a misrepresentation at all were a little thin: candidates frequently addressed the untruth of the statement but did not comment expressly on whether it was a statement of fact, and whether it induced the representee to enter the contract. Part (b) was answered reasonably well, though some candidates curiously treated Matilda's deliberate decision not to correct her misrepresentation as negligent rather than fraudulent. Part (c), remedies for misrepresentation, is rarely answered very well, though some candidates picked up on the affirmation point.

SUGGESTED ANSWERS

LEVEL 3 – UNIT 2 – CONTRACT LAW

SECTION A

1. Offer and acceptance are the factual indicators of the existence of an agreement.

2. 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. The offer is normally accepted by performance of the act stipulated by the promisor. Such contracts are sometimes called "if" contracts.

3. Executory consideration is in the form of a promise, unperformed at the time it is given. Executed consideration is in the form of an act, i.e. performed consideration.
4. The presumption in commercial agreements is that they are intended to give rise to legal relations, such as in Edmonds v Lawson (2000). The presumption may be rebutted, for example by an honour clause, as in Rose & Frank v Crompton (1925).

5. The Sale of Goods Act 1979.

6. A warranty 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 as a result of a breach but may claim damages.

7. A half-truth is a statement which is literally true, but which is apt to mislead by virtue of not conveying the whole truth, as in Nottingham Patent Brick & Tile v Butler (1866). It can therefore give rise to misrepresentation.

8. The entire performance rule, often known as the 'complete performance rule', or the Rule in Cutter v Powell (from the case of Cutter v Powell (1795)), provides that a party's performance must be complete and exact before they can demand performance of the other party. There are a number of exceptions to the rule, including where the contract is divisible, 'substantial performance', acceptance of partial performance and prevention of performance.

9. Frustration occurs when, without the default of either party, an unforeseen event occurs, which is not provided for in the contract, and which renders the contract impossible to perform, or commercially purposeless or illegal. Examples of cases of frustration include Taylor v Caldwell (1863).

10. A loss which is not too remote is recoverable. The rule in Hadley v Baxendale (1854) provides that a loss is not too remote if it arises naturally from the breach or is in the reasonable contemplation of the parties at the time the contract is made as the probable result of the breach. The rule was reframed in Victoria Laundry v Newman Industries (1949) in terms of the knowledge of the parties, based on their actual knowledge or their imputed knowledge.

SECTION B

Scenario 1

Question 1

(a) The terms of an offer must be sufficiently certain in order to give rise to an enforceable contract if the 'offer' is accepted - e.g. Scammell v Ouston (1941).

(b) The terms of the proposal as to the car and its colour are sufficiently certain. However, the vague price – 'about £15,000' – is insufficiently certain and 'HP terms' are insufficiently certain as to duration, instalments, interest, etc. Winona's email is therefore insufficiently certain to be an offer and is therefore merely an invitation to treat. It is not capable of acceptance by Motazoo, so no contract is formed between them when Motazoo purport to accept her order.

Question 2

(a) The general rule relating to the acceptance of an offer is that acceptance must be communicated to the offeror - Entores v Miles Far East (1955). The Postal Rule is an exception to this general rule. Where the use of the

post is contemplated by the parties as a means of accepting the offer, then a properly posted (stamped and addressed) acceptance is treated as complete on the posting of the letter, not its delivery to the offeror - Adams v Lindsell (1818)

(b) An offer for a limited period will lapse in accordance with its terms, or, if no period is stated, after a reasonable time - Ramsgate Hotel v Montefiore (1866).

(c) Maryam's acceptance is properly stamped and addressed. However, it not likely to be contemplated that the post would be used to accept the offer, as the offer was made by email and only one day given for acceptance of it. The Postal Rule is therefore unlikely to apply. If so, any acceptance would only be on the Thursday, when letter arrives. The offer, however, will have lapsed in accordance with its terms on the Wednesday, prior to the communication of acceptance'; in which case, no contract will be formed.

Question 3

(a) There are a number of remedies provided for by the Consumer Rights Act 2015 in relation to the breach of a contract to supply digital content. They include:

- the right to repair or replacement (s.43)
- the right to a price reduction (s.44)
- the right to a refund (s.45)
- a remedy for damage to device or to other digital content (s.46)
- other remedies which may be available at law (e.g., damages) or in equity.

3(b)

Winona has suffered pecuniary loss from damage to her hard disk and files. This was caused by the breach. She may be compensated under the statutory remedy of compensation for damage to her device (the hard drive) and content (files) under section 46 of the Consumer Rights Act 2015, or by way of a common law claim for damages.

However, Winona is required to act reasonably to mitigate her loss - British Westinghouse v Underground Electric Railway (1912). It is likely that she has failed to mitigate her loss, by ignoring the anti-virus notice. If so, the damage to her hard drive will not be recoverable.

Winona has also suffered non-pecuniary loss. This is recoverable if the purpose of the contract was to provide for pleasure or amenity - e.g., Jarvis v Swans Tours (1973). It is very arguable that a contract for the provision of gaming software in a consumer contract would fall within this type of contract, so Winona may, in addition, be able to claim compensation for her disappointment and frustration.

Question 4

Pink Rose Property Development may seek an order for specific performance of the contract. It is an equitable remedy, by way of a court order compelling

performance of an obligation. If awarded, it will require Maryam to complete the purchase of the premises.

Scenario 2 Questions

Question 1

(a) A condition is a major term, which goes to the root of the contract. Breach of a condition gives the right to terminate irrespective of seriousness of breach – Poussard v Spiers (1876). An innominate term is, however one which cannot be classified at time of formation as a condition or a warranty. The innocent party's right to terminate for breach depends upon whether the breach is sufficiently serious - The Hongkong Fir (1962).

(b) Term 3.1 is breached. However, it is unlikely to be intention of the parties that the innocent party should have the right to terminate on any breach, so the term is not likely to be a condition. On the other hand, it is likely to be their intention that the contract can be terminated on serious breach (for example, if many invoices were not processed). The term is likely therefore to be classified as innominate. On the facts, the breach is not a serious breach, as only two out of 100's of invoices have been processed incorrectly. If so, Newhouse could claim damages for any loss suffered, but would not be able to treat the contract as terminated.

(c) Term 5.2 is breached. This is an important term, as it relates to payment by Newhouse and is expressed in emphatic terms. There are only four payment obligations across the year. It is therefore likely to be a condition. If so, the breach by Newhouse would give SystemsCo can bring the contract to an end, as the contract can be terminated on any failure to meet the terms of clause. Therefore, SystemsCo can still terminate the contract even though the delay is only for a few days. They may also claim damages for any losses caused by the breach.

Question 2

(a) Consideration must be sufficient, i.e. of a type recognised by the law as having value - e.g. Thomas v Thomas (1842).

(b) Performance of an existing contractual duty is not normally good (sufficient) consideration for promise of extra payment, because no new obligation is undertaken by the promisee in return - Stilk v Myrick (1809).

(c) Performance of additional duties not required by the original contract is sufficient consideration for promise of extra payment - Hartley v Ponsonby (1857). On the facts, Electrico have gone beyond their existing duty by providing Grade A fittings as opposed to Grade B fittings. This is a sufficient consideration for the promise of the extra payment of £5,000. The promise is therefore enforceable.

Question 3

(a) The rule in Williams v Roffey Bros (1990) applies where there is a contract for goods or services and a promise of extra payment is made in circumstances where there is doubt as to whether a party will complete

their obligations under a contract. It provides that where a promise of extra payment is made, which was not procured by fraud or duress, the practical benefit which the promisor derives from performance of the existing obligations is consideration for the promise of extra payment.

(b) FreshAirCo has not undertaken any additional obligation, so *prima facie*, has not provided any consideration. However, the rule in Williams v Roffey Bros may apply:

- the contract is for goods and/or services;
- there is a promise of £20,000 extra payment;
- the promise was not obtained by fraud or duress, but arose from labour shortages;
- as a result of making the promise, Newhouse obtained the practical benefit of having the work completed on time for the sale.

This practical benefit is therefore consideration for the promise of extra payment, and so the promise will be enforceable by FreshAirCo.

Question 4

The general rule of privity of contract provides that a person who is not a party to a contract cannot sue under the contract - e.g. Tweddle v Atkinson (1861). Goodhomes is not a party to the contract with PlumbingCo, as that contract was formed between Newhouse and PlumbingCo. It cannot therefore bring any claim in contract against PlumbingCo in respect of it.

Scenario 3 Questions

1. Question 1

(a) A representation is a statement made outside the contract. It may induce a party to enter a contract, but is not, *per se*, a term.

(b) There are a number of factors used to distinguish between a mere representation and a term of the contract. They include:

- the importance of the statement;
- whether the statement was reduced to writing;
- the timing in negotiations when the statement was made;
- any special knowledge of the maker of statement in relation to its content; and
- whether the maker of the statement invited the other party to verify it.

(c) (i) The statement that the cows were 'friendly girls' is likely not to have been intended to be taken as a serious assurance, nor to induce Olaposi to enter into the contract. It is likely to be 'mere puff' and will not ground any legal liability. It might also be regarded as a statement of opinion (also not actionable).

(ii) In relation to the statement that the farm had 50 cows, a significant amount of time has passed between the making of the statement and the time of the formation of the contract, as in Routledge v Mackay (1954). Further, the statement is not reduced to writing, which suggests that it is less likely to be a term of the agreement -

Birch v Paramount Estates Ltd (1956). However, Matilda is acting in course of her business and is in a better position to know whether the statement is true - Oscar Chess v Williams (1957). Further, it is something to which Olaposi attaches importance, as in Bannerman v White (1861). These things may count towards the statement being a term of the contract, though it is arguable that it is not.

Question 2

(a) A term may be implied by the court on the facts under the business efficacy test from The Moorcock (1889), where the contract would lack business efficacy without the term; or under the officious bystander test in Shirlaw v Southern Foundries (1939) – where a notional bystander, if asked if the contract included such a term would say, 'Oh, of course!'

(b) It is arguable that the farm can function without a tractor (as indeed it appears to have done), or that it is contemplated that Olaposi would supply his own tractor, so that such a term is not necessary to give the contract business efficacy. Equally, it is unlikely to 'go without saying' that the contract should include such a term. It is unlikely, then, that the absence of a tractor gives rise to a breach of contract by Matilda.

Question 3

Misrepresentation must be a statement of fact or law, not merely a statement of opinion. Here, Matilda's statement is one of conjecture as to the future. As Olaposi has farmed pigs and sheep whereas Matilda has not, it is likely to be viewed merely as a statement of opinion. This will not ground a claim in misrepresentation.

Question 4

(a) The statement relates to a matter of fact - the profits of the business. It is an untrue statement, as the profits are not £70,000. Even though the statement was true when made, it became false before the contract was entered, and may constitute a misrepresentation if Matilda fails to correct it - With v O'Flanagan (1936). It is made by one party to a contract to the other - Matilda to Olaposi - and it is a reasonable inference that it induced Olaposi to enter the contract. The statement is likely, therefore, to be a misrepresentation.

(b) A misrepresentation is fraudulent where the maker of the statement knows it to be false, or makes it without belief in it, or is reckless as to whether it is true or not - Derry v Peek (1889). On the facts, Matilda knows that the profits have dropped, and that Olaposi is being induced to enter the contract by something she knows to be untrue, as she has deliberately decided not to mention the drop in profits. The misrepresentation is therefore fraudulent.

(c) Rescission is available as remedy for fraudulent misrepresentation. This involves setting aside of the contract '*ab initio*'. However, rescission may be barred if one of the equitable bars to rescission is present. Here, Olaposi has affirmed the contract, by saying that he would keep the farm, even though he knows about the falsehood of Matilda's statement. It is therefore likely that the remedy of rescission is barred. However, the

remedy of damages will still be available to Olaposi for losses he suffers as a result of the misrepresentation. These are assessed on the basis of the tort of deceit, for all losses caused by the misrepresentation - e.g., Royscot Trust v Rogerson (1990).