

**LEVEL 3 – UNIT 2 – CONTRACT LAW
SUGGESTED ANSWERS – JANUARY 2018**

Note to Candidates and Tutors:

The purpose of the suggested answers is to provide candidates and tutors with guidance as to the key points candidates should have included in their answers to the January 2018 examinations. 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 tutors should review the suggested answers in conjunction with the question papers and the Chief Examiners' reports which provide feedback on candidate performance in the examination.

SECTION A

1. Offer and acceptance (agreement), intention to create legal relations and consideration.
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. It is normally accepted by performance of the act stipulated by the promisor.
3. An act or promise in the past may be good consideration for a later promise where three conditions are satisfied:
 - the act or promise is done or given at the request of the promisor;
 - it must have been understood by the parties that payment would be made; and
 - the payment would have been legally recoverable had it been promised in advance;such as in Lampleigh v Brathwaite (1615) or Re Casey's Patents (1892).
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. Written terms may be incorporated into a contract:
 - by signature;
 - by reasonable notice;
 - by course of dealings; or
 - by common understanding.

6. 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 Hong Kong Fir (1962).
7. Rescission of a contract for misrepresentation may be barred (lost):
 - by affirmation;
 - by lapse of time ('laches');
 - where substantial restoration of the parties to their pre-contractual position is impossible;
 - where rights in the subject matter of the contract have been acquired by an innocent third party.
8. 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.
9. 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.
10. A non-pecuniary loss is a loss which does not compensate for financial or material loss and cannot be calculated precisely. Examples include loss of amenity, such as loss of enjoyment or distress, such as in Jarvis v Swans Tours (1973) and Farley v Skinner (No. 2) (2001).

SECTION B

Scenario 1 Questions

1. (a) An offer is a willingness to contract on certain terms, with the intention that it shall become binding upon acceptance.
 - (b) Features showing it to be an offer are:
 - Damini is clearly willing to sell;
 - she intends to enter a contract if she does not hear back from Farhat, purporting to put the formation of the contract into their hands;
 - the terms on which she proposes to sell are sufficiently certain as to price, the nature of the goods and the date of delivery.
 - (c) For a contract to exist between Damini and Farhat, Farhat must have accepted Damini's offer, and the acceptance must have been communicated (unless some exception applies). Farhat has not communicated any acceptance of the offer. Further, under the principle in Felthouse v Bindley (1862), the offeror cannot by stipulation treat the silence of the offeree as acceptance of the offer. As a result, Farhat's 'silence' does not constitute an acceptance of the offer, and no contract is formed.
2. (a) A battle of the forms occurs where successive offers and counter-offers are made which include standard terms and conditions. Each successive communication is a counter-offer, so that a contract results from any acceptance of the last of the counter-offers. This will result in the contract being concluded on the standard terms and conditions of the last counter-offer which is accepted. A situation like this was held to have obtained in Butler Machine Tool Co v Ex-Cell-O Corporation (1979).
 - (b) Farhat's first communication is an invitation to treat - it opens negotiations, but is not an offer. Damini's reply is an offer, as it evidences a willingness to contract on certain terms, which include a price variation clause. Farhat's order is a counter-offer. Under the principle in Hyde v Wrench (1840), this impliedly rejects Damini's original offer. Damini's signing and return of the acknowledgement slip accepts Farhat's counter-offer. A contract is therefore formed on Farhat's standard terms, which do not include the price variation clause, as in Butler Machine Tool Co v Ex-Cell-O Corporation (1979). Farhat only has to pay £5,000, and not the additional £1,000.
3. (a) Frustration may be defined as an 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 Robert to perform as a result of his serious injury, through no fault of his own. No provision has been made in the contract to provide for this eventuality. The contract will therefore be frustrated by his illness, as in Condor v Barron Knights (1966).
4. (a) The effect of frustration at common law is to discharge parties from future performance of the contract. The payment of £300 fell due after

the frustrating event, and so Damini is discharged from liability to pay it.

- (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), 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, Damini has not paid the £100 falling due before the frustrating event, but Robert has incurred expenses of £60 in preparation. As a result, Robert, as payee, can recover up to £60, 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.

Scenario 2 Questions

1. (a) 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.

(b) Gemma has made a false statement of fact: whether the business had been entered into an auction was a matter of fact (rather than opinion). The statement was made to Angus, and the fact that Angus agreed to buy the business because he was concerned that he might miss out at auction shows that it induced him to enter into the contract with Gemma to buy her business. The statement is therefore a misrepresentation.
2. (a) Gemma's misrepresentation is not fraudulent, as Gemma believes it to be true - Derry v Peek (1889). Whether the misrepresentation is 'innocent' or 'negligent' depends upon whether it falls within section 2(1) of the Misrepresentation Act 1967. Gemma will be liable under this section, unless she had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true. The burden of proof in this regard is on Gemma. The facts suggest she would not be able to discharge this burden, because even if she did believe the statement to be true, she is likely not to have had reasonable ground to do so, given that the auction was cancelled three weeks ago and she had the means to check - Howard Marine v Ogden (1978).

(b) Angus may rescind the contract. This will involve returning the business to Gemma, and Gemma refunding his money, in order to put the parties back into their pre-contractual positions. Whether or not Angus rescinds the contract, he 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).
3. (a) A court will take into account all relevant factors in determining whether a statement is intended to be a term of the parties' contract.

These factors may 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.
- (b) The statement 'Profits averaging £30,000 per annum over the last three years' is likely to be a term of the contract. In particular, Angus has attached importance to the fact that the business is profitable - Bannerman v White (1861); the statement has been included in the memorandum of sale - Birch v Paramount Estates Ltd (1956); and the matter is one in respect of which Gemma, as the maker of the statement, is in the better position to know the truth - Oscar Chess v Williams (1957).
4. (a) Silence may amount to misrepresentation where:
- a half-truth is told;
 - a statement which was initially true becomes false before the contract is entered;
 - the contract is one of the utmost good faith;
 - the contract is made between parties in a fiduciary relationship;
 - it is a misleading omission within the Consumer Protection from Unfair Trading Regulations 2008.
- (b) Gemma's failure to tell Angus about the lack of parking is not a misrepresentation. She has not said anything rendering it misleading to Angus and is under no duty to tell him.
5. (a) A term will be implied on the facts of the case either under the business efficacy test from The Moorcock (1889) or under the officious bystander test from Shirlaw v Southern Foundries (1939).
- (b) The term contended for about parking facilities is not necessary to give business efficacy to the contract, nor does it 'go without saying' under the officious bystander test. It will not, therefore, be implied into the contract.

Scenario 3 Questions

1. (a) Consideration may be defined as a benefit to the promisee or a detriment to the promisor - Currie v Misa (1875), or as the price for which the other party's promise is bought - Dunlop v Selfridge (1915).
- (b) 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, the promise will be enforceable - Hartley v Ponsonby (1857).
- (c) Whether Roopha can enforce Mrs Ali's promise of extra payment, and so claim the full £600 depends on whether they have provided consideration for her promise of extra payment. They have not undertaken any additional obligation, and so, *prima facie*, have not provided any consideration. However, the principle from Williams v Roffey Bros (1991) may apply: the contract between the parties is for goods and services, Mrs Ali has made a promise of extra payment and has obtained the practical benefit of having the work completed in time for the wedding. The promise was not obtained by fraud or duress, and

the practical benefit to Mrs Ali is, therefore, consideration for her promise of extra payment. As a result, the promise of extra payment will be enforceable and Roopha can recover the full amount of £600.

2. (a) Part payment of a debt is not good consideration for a promise by the creditor to release the debtor from the balance of the debt - Pinnel's Case (1602).
 - (b) 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.
 - (c) Whether or not Roopha can recover the remaining £500 from Mr Daffeh depends upon whether any exceptions to the Rule in Pinnel's Case apply. Here, the exception - that the promise to forgo the balance is binding where part payment by a third party is accepted by the creditor in full settlement of the amount due - applies, as the payment is made by Tara, a third party, as in the case of Hirachand Punumchand v Temple (1911). Therefore, Mr Daffeh does not have to pay the remaining £500.
3. (a) Under section 2 of the Consumer Rights Act 2015, a trader is a person who is acting for purposes relating to their trade, business, craft or profession, and a consumer is an individual acting for purposes that are wholly or mainly outside their trade, business, craft or profession.
 - (b) No price has been agreed between the parties. Ms Martin is therefore obliged to pay a reasonable price for the service by virtue of section 51 of the Consumer Rights Act 2015.
 - (c) As the contract between Roopha and Ms Martin is a 'consumer contract', this is a breach of the term implied by section 49 of the Consumer Rights Act 2015, which provides that, 'Every contract to supply a service is to be treated as including a term that the trader must perform the service with reasonable care and skill.'
 - (d) As the service does not conform to the contract, Ms Martin's rights include the following:
 - the right to require repeat performance under section 55 of the Consumer Rights Act 2015 - i.e. to require Roopha to perform the service again, to the extent necessary to complete its performance in conformity with the contract;
 - the right to a price reduction under section 56 of the Consumer Rights Act 2015 - this the right to require Roopha to reduce the price, by an appropriate amount, where repeat performance cannot, or is not, provided;
 - the right to claim damages for the loss suffered as a result of the breach of contract. The loss must be caused by the breach and must not be too remote a consequence of the breach;
 - depending upon the seriousness of the breach, to treat the contract as at an end.