LEVEL 3 - UNIT 2 – CONTRACT LAW
SUGGESTED ANSWERS – JANUARY 2017

Note to Candidates and Tutors:

The purpose of the suggested answers is to provide students and tutors with guidance as to the key points students should have included in their answers to the January 2017 examinations. The suggested answers do not for all questions set out all the points which students may have included in their responses to the questions. Students will have received credit, where applicable, for other points not addressed by the suggested answers.

Students and tutors should review the suggested answers in conjunction with the question papers and the Chief Examiners' reports which provide feedback on student performance in the examination.

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

3. The phrase, 'consideration need not be adequate' means that the consideration for a promise does not need to be of equal value to that for which it is given in exchange - Chappell v Nestle (1960).

4. (a) The principle that a third party cannot, under a contract, either be subject to obligations (and so be sued) or acquire rights (and so sue).

   (b) Under section 1 of the Contracts (Rights of Third Parties) Act 1999, a third party may enforce a term of a contract if the contract expressly provides that he may, or if the term purports to confer a benefit on him (unless on a proper construction of the contract it appears that the parties did not intend the term to be enforceable by the third party).

5. In commercial relationships, there is a presumption that the parties do intend to create legal relations. This may be rebutted where, for example, the parties expressly intend to contract 'in honour only', such as in Rose & Frank v Crompton (1925).

6. A term may be implied by law as a matter of policy into contracts of a particular type, where it is a necessary incident of the relationship between the parties - Liverpool City Council v Irwin (1976); or it may be implied on the facts of a particular contract, either under the business efficacy test - The Moorcock (1889); or under the officious bystander test - Shirlaw v Southern Foundries (1926) Ltd (1939).

7. A condition in a contract is a term going to the root of the contract - Poussard v Spiers & Pond (1876). The effect of a breach of condition is that the innocent party may treat the contract as discharged by breach, and has the right to claim damages for breach of contract.

8. 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, and where rights in the subject matter of the contract have been acquired by an innocent third party.

9. (a) The entire performance rule is that a party must perform their own obligation precisely and exactly before they can demand the performance of the other party.

   (b) The rule is mitigated by the following doctrines:

   - where the innocent party agrees to accept partial performance;
   - where on a true construction of the contract, the parties' intention is that counter-performance can be demanded where there has been substantial performance;
   - where the innocent party is prevented by the other party from completing their performance;
   - where the obligations under the contract are divisible into separate obligations.

10. An order for specific performance is a court order requiring a party to perform a contractual obligation.

SECTION B

Scenario 1 Questions

1. An invitation to treat is an invitation for offers, or to open negotiations. It is not capable of being accepted. An example of relevant case law is Partridge v Crittenden (1968). An offer is an expression of willingness to contract on certain terms. An example of relevant case law is Carlill v Carbolic Smoke Ball Co Ltd (1892). An offer is capable of being accepted and thus giving rise to a contract. Here, there are features which suggest that Ravi's email contains an offer:

   - Ravi is 'happy to sell'; indicating willingness;
   - the email contains sufficiently detailed terms as to the subject matter of the contract (Shadow), price and delivery, so it is sufficiently certain to constitute an offer;
   - it is stated to be a 'proposal', open for a period of time, indicating that the recipient's actions before its expiry may have a legal effect (i.e. potentially, acceptance of the offer);
   - it suggests that a response may satisfy the requirement of 'if you want her', indicating that it would be an acceptance.

   A suitable conclusion would therefore be that Ravi's email is an offer.

2. Petra's first reply is a request for information - she does not respond with a counter-proposal, but merely enquires further about Shadow. Mere enquiries are to help the offeree to decide whether to accept the offer or not, and do not have the effect of revoking the offer, which remains open.

Stevenson, Jaques & Co v McLean (1880) is authority for this proposition. This makes the situation distinguishable from a counter offer, which impliedly rejects the offer, under the principle from Hyde v Wrench (1840).

Petra's second reply is, in terms, acceptance - it is a final and unqualified assent to the terms of the offer. The basic rule requires communication of acceptance before the acceptance is effective - Entores v Miles Far East Corp (1955). In the case of instantaneous communication, this may be determined by the intentions of the parties, sound business practice and/or judging where the risk lies - Brinkibon v Stahag Stahl (1983). On the facts, Ravi's omission to read the acceptance is unlikely to prevent its legal effect: the risk of overlooking his emails, when he has allowed for a response by email, should fairly rest with him.

3. Golda's letter is, in terms, acceptance - a final and unqualified assent to the terms of the offer. The Postal Rule provides an exception to the normal communication rule, such that the contract is complete on the posting of the letter - Adams v Lindsell (1818). Whether the Postal Rule applies depends upon whether the post is in the contemplation of the parties as a means of accepting the offer. On the facts, it clearly is: the original email refers to post as a means of responding to Ravi's email. The letter is posted on 12 December, so the contract is formed at this point. This is before the lapse of the offer. The fact that the letter arrives later does not prevent the contract from being formed.

4. (a) The general rule is that a creditor is not bound by a promise to accept part payment in full settlement of a debt - Pinnel's Case (1602), Foakes v Beer (1884). However, early payment of a smaller sum at the creditor's request is good consideration for such a promise - this is one of the exceptions to the rule in Pinnel's Case (1602).

   (b) Whether Ravi's agreement to forgo the £40 is enforceable depends upon whether it is supported by consideration. As Felicity has, at Ravi's request, settled the account earlier than the original contract required, she can therefore enforce Ravi's promise to forgo the £40: her early repayment of the balance is consideration for Ravi's promise to forgo the balance. She does not have to pay the remaining £40.

5. (a) Whether a promise is enforceable depends upon whether it is supported by consideration. The general rule is that past consideration is not good consideration i.e. an act performed or a promise made in the past is not good consideration for a later promise from the other party - Re McArdle (1951), Roscorla v Thomas (1842).

   (b) On the facts, the only consideration provided by Felicity was her agreement to pay for Shadow. This is 'past consideration', not given in exchange for the later promise that Shadow was a reliably good-natured kitten. Further, there is nothing to indicate that there was any implied promise at the time of the sale which is made express by the later promise - Lampleigh v Braithwaite (1615), cf. Pau On v Lau Yiu Long (1980).

Scenario 2 Questions

1. (a) A statement is a term if it forms part of the agreement between the parties. Whether a statement is a term of the contract or not depends upon the common intention of the parties. There are a variety of factors considered by the courts to determine the parties' intentions, though none are likely to be conclusive. They include:

- the importance attached to the statement by the recipient of it;
- where the contract is reduced to writing, whether or not the statement has been included within the written agreement;
- the passage of time between the making of the statement and the formation of the contract;
- any special skill the maker of the statement has.

(b) Whether Brian's statement that the Gremlin 123 was capable of chipping 250kg of twigs and branches per hour was a term of the contract between Shehnaz and AIM, depends upon the application of these tests. Shehnaz's need for an efficient device was made clear, even if it was more expensive for her. This factor suggests that the statement may be a term, as in Bannerman v White (1861). The agreement was reached orally over the phone – the fact that the statement was not reduced to writing is unlikely, therefore, to prevent it from becoming a term – cf. Birch v Paramount Estates (1956). The statement was made close to the point of contract, at the stage of negotiating terms. This factor suggests that the statement may be a term – Routledge v McKay (1954). Finally, Brian (AIM) has special skill in identifying the appropriate product. This indicates that the statement may be a term – cf. Oscar Chess v Williams (1957). On balance, it is submitted that the statement is likely to be a term of the contract between AIM and Shehnaz.

2. (a) You may have considered any two of the following modes of incorporation:

- by signature, where a party is bound by a contract which they have signed, whether or not they have read or understood its terms - L'Estrange v Graucob (1934);
- by notice, where reasonable notice has been given of the relevant terms - Parker v South Eastern Railway Co (1877);
- by course of dealings, where a term is implied into an oral contract on the strength of a course of dealings between the parties - Hollier v Rambler Motors (1972);
- by common understanding, where it is the common understanding of the parties that the usual conditions of one party would apply - British Crane Hire v Ipswich Plant Hire (1975).

(b) Here, the invoice is a post contractual document, and its terms will not resultantly form part of the parties' contract – Olley v Marlborough Court Hotel (1949). However, it contains terms which may have been incorporated into the oral agreement reached on the phone by the parties' previous course of dealings. The fact that the parties have dealt 10 times in the past 3 years, on the terms of the 'usual invoice' is probably sufficient for a consistent course of dealing. Notwithstanding this, the term will only have been incorporated into the parties' previous agreements if reasonable notice has been given of the

relevant terms – Parker v South Eastern Railway Co (1877). Where the relevant clause is onerous, explicit attention must be drawn to it – Thornton v Shoe Lane Parking (1971), Interfoto Picture Library v Stiletto Visual Programmes (1988). On the facts, the relevant clause is on the front of the invoice in large, bold type, and it is submitted that this is sufficient for it to form part of the contract as a result of the course of dealings between the parties.

3. The term in the contract between Shehnaz and AIM which has been breached by the snapping of the wood-chipping machine blades is the term that that the goods supplied under the contract are of satisfactory quality, implied into the contract by section 14(2) of the Sale of Goods Act 1979.

4. Shehnaz's claim is for damages for breach of contract. The purpose of damages for breach of contract is to put the innocent party in the position he would have been in if the contract had not been breached - Robinson v Harman (1848). If the contract had not been breached, Shehnaz would not have had to incur expenditure in repairing the blades. The loss for which she is claiming is a recoverable type of loss (pecuniary loss). Shehnaz needs to show:

   - That the breach of contract has caused the losses - here, this test is satisfied, as had the blades been of satisfactory quality, the cost of repair would not have been incurred.
   - That the loss was not too remote - under the principle in Hadley v Baxendale (1854), losses are not too remote if, inter alia, they flow naturally from the breach of contract. Clearly, the cost of repair flows naturally from the failure of the blades.
   - That the innocent party has attempted to mitigate their loss. Here, it is arguable that Shehnaz could have done more to mitigate the costs of repair. This may have the effect of reducing the level of her damages to those which would have been suffered if she had taken reasonable care to mitigate her loss - perhaps by seeking a cheaper cost of repair.

Scenario 3 Questions

1. (a) Frustration occurs when, without the fault of either party, an event occurs which renders the performance of the contract radically different from that contemplated by the parties or makes the contract incapable of being performed – Taylor v Caldwell (1863), Condor v The Barron Knights Ltd (1966).

   (b) You may have considered any three of the following ways in which a contract might be frustrated:

      - destruction of subject matter;
      - supervening illegality;
      - government interference;
      - illness / death of a party;
      - non-occurrence of fundamental event.

   (c) The arrival of the bats was not the fault of either party, and the contract cannot now be performed, as it would be illegal to disturb the bats. This may be regarded as an example of illegality, as in, for example, Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd (1943). In order for the event to be a frustrating event, it must be

an event which is not anticipated or provided for; here, the arrival of the bats and subsequent closure of the venue is likely to satisfy this test – the contract makes no provision for this eventuality.

2. (a) 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 payable in order to defray expenses incurred for the purposes of performance of the contract. On the facts, Parveen has paid £5,000 before frustration, but the Hotel has incurred expenses of £2,000 in moving the orange trees to prepare for the party. As a result, Parveen can recover between £3,000 and £5,000 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.

   (b) The effect of frustration of the contract is to discharge parties from future performance of it. As the second instalment under the contract fell due after the frustrating event, Parveen is therefore discharged from liability to pay it.

3. (a) A misrepresentation is an untrue statement of fact which induces the the person to whom it is addressed to enter into the contract.

   (b) Damien's statement that three other customers were coming to look at the party suite is clearly untrue: no other customers were looking at the venue; it is a statement of fact: it is a matter which can be shown to be true or false, rather than a statement of opinion, or puff. Finally, it induced Parveen to enter into the contract - she entered the contract because of her concern that the venue would be secured by one of the other customers if she did not enter the contract. Under the principle from Redgrave v Hurd (1881), the fact that Parveen had the opportunity to inspect the diary does not prevent Damien's statement from being a misrepresentation.

4. (a) A misrepresentation may be 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). A misrepresentation may be 'negligent', where it falls within section 2(1) of the Misrepresentation Act 1967, where the misrepresentor cannot establish that they had reasonable grounds to believe the statement to be true, and that they did believe it to be true up to the time of the contract. Finally, a misrepresentation may be wholly innocent, where the misrepresentor can establish reasonable grounds to believe the statement was true and belief in its truth up to the time of the contract.

   (b) Damien knows the statement to be false, or is reckless as to its truth, as he makes the statement saying that he has checked the book when he has not. His misrepresentation is therefore fraudulent within the test of Derry v Peek (1889).