LEVEL 4 - UNIT 1 – 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. A contract can be defined as an agreement made between two parties, which gives rise to obligations recognised by law.

2. A unilateral contract is one which only binds the offeror. It is dependent upon the performance of a condition, thus a unilateral offer can be accepted by such performance (see e.g. Carlill v Carbolic Smoke Ball Co (1893)). A bilateral contract is one in which both parties are bound, as both take on obligations at the point of acceptance. Acceptance of a bilateral offer must be communicated.

3. The general rule is that a promise to perform an existing contractual duty does not constitute good consideration, see Stilk v Myrick (1809). However, where A has a contract with B to pay B for services given, A promises to pay B more and as a result obtains a benefit or obviates a disbenefit, then (in the absence of duress or fraud) this will constitute a practical benefit and thus good consideration. This doctrine was first established in the case of Williams v Roffey Brothers (1990).

4. A person who is not party to a contract (a 'third party') cannot sue or be sued upon a contract. An example of the rule can be found in Tweddle v Atkinson (1861).

5. Candidates received credit for discussing any two of:
   - by the courts as a matter of law, as demonstrated in Liverpool CC v Irwin (1976);
   - by the courts as a matter of fact, as demonstrated in The Moorcock (1889) and Shirlaw v Southern Foundries (1939);
   - by statute, an example being section 9 of the Consumer Rights Act 2015;
   - by custom or trade practice, as demonstrated in Hutton v Warren (1836).

6. The usual rule is that a statement of intention is not a statement of fact and so does not create liability for misrepresentation. However, case law shows that where a party does not (or could not) hold their stated intention, they can be liable. This is because such a party is making a misrepresentation of fact as to the state of their mind.

7. In order to create the presumption of undue influence, a claimant must first demonstrate that the relationship is one of 'trust and confidence'. Some relationships, such as that between a solicitor and client, are automatically recognised as such. Otherwise, such a relationship would need to be established on the facts of the case. Secondly, the claimant must show that the transaction is one which 'calls for explanation', (Royal Bank of Scotland v Etridge (No 2) (2001)).

8. Students could have identified any two of:

   - subject matter destroyed;
   - subject matter unavailable;
   - failure of event which is subject matter of contract;
   - supervening illegality;
   - death or illness;
   - extreme delay.

9. Damage can only be claimed in contract law if it is not too remote. The seminal case of Hadley v Baxendale (1854) established a two-limbed test for remoteness. The first limb of the test allows for recovery of damage 'arising naturally' as part of 'the usual course of things'. The second limb allows for recovery of special losses, as long as they were in the contemplation of both parties at the time the contract was made.

SECTION B

Scenario 1 Questions

1. (a) In order for an exclusion clause to be effective, it must be incorporated into the contract. This may be done in one of three ways: signature, reasonable notice or a previous course of dealings. To incorporate a term by reasonable notice, reasonable steps must be taken to bring the clause to the other party's attention at or before the time of contracting (so in e.g. Olley v Marlborough Court Hotel (1949) the notice was given too late to take effect). The courts have also held under the so-called 'red-hand rule' that the more onerous the effect of the clause, the greater the degree of notice required, see e.g. Interfoto Picture Library v Stilletto Visual Programmes (1989).

   From the facts as given, there is no evidence of the clause being incorporated by signature or by a previous course of dealings, therefore, Royal Castle Hotel (RCH) must rely on having given reasonable notice. The notice appears to be brought to Anna's attention at the time of contracting at the reception desk, but whether the requisite degree of notice has been given is unclear. This is likely to depend on how prominent the sign is and whether Anna's attention was drawn to it by the receptionist.

   It should also be noted that the clause must be interpreted to cover the loss. Historically, the courts have been wary of widely drafted clauses (see e.g. White v John Warwick (1953)), although this doctrine diminished in importance after the enactment of legislation on exclusion clauses. That said, there is an argument that the clause is drafted too widely to specifically exclude liability for negligence.

   (b) Exclusion clauses in consumer contracts are now governed by the Consumer Rights Act 2015. Anne may claim for breach of the implied term under section 49 of the Act, which is that services will be performed with reasonable care and skill. If so, section 57 operates to prevent liability under section 49 being excluded, by making any term purporting to do so not binding on the consumer.

   Alternatively, if Anne were to claim in negligence, the term would be examined under section 62 of the Act, which states that a term will not take effect if it is 'unfair', which means that, contrary to the requirements of good faith, the term causes a significant imbalance in the rights and obligations of the parties. Examples of such unfair terms are given in Schedule 2 of the Act. In this situation, RCH is attempting to exclude all liability for loss or damage even where caused by their own negligence. Clearly RCH is in a better position than Anne to protect against theft from hotel rooms and to ensure that the room safes are correctly installed and maintained. As such, it would appear that the term causes a significant imbalance and is likely to be found unfair. In this case, RCH would be unable to rely on it to prevent a claim.

   (Note: students were only expected to consider either one of the two possible claims – both answers are provided for completeness)

2. (a) An actionable misrepresentation is a false statement of fact which induces the other party to enter into a contract. An honest statement of opinion is not considered a statement of fact and so does not create

liability, see for example Bisset v Wilkinson (1927). However, where a party possesses expertise in the area, the statement may create liability. For example, in Esso v Mardon (1976) Esso had expertise in predicting the throughput of a new petrol station and so were liable for their false statement. Furthermore, a false statement of fact that a party holds an opinion they in fact do not (or could not) will also create liability, see Smith v Land and House (1884).

Deborah's statement may appear at first to be a mere statement of opinion, but her expertise as manager of the spa is likely to make this a statement of fact. Furthermore, it could be argued that she could not possibly hold the opinion that the treatment would never cause any skin problems. It is clear from the facts that Deborah's statement has induced Anne to enter into the contract. As such, the statement will constitute an actionable misrepresentation.

(b) A misrepresentation will be categorised as fraudulent if it was made knowingly, without belief in its truth, or recklessly (Derry v Peek 1889).

Deborah has made the statement in order not to lose the sale, which suggests that she does not believe in its truth, or at the very least is behaving recklessly. As such, the misrepresentation may well be fraudulent.

(c) The contract between Anne and RCH/the spa is clearly a consumer contract, as RCH is a 'trader' and Anne is a 'consumer'. The contract will thus will be governed by the Consumer Rights Act (CRA) 2015. S.9 CRA implies a term into consumer contracts for goods, that the goods are of satisfactory quality. Clearly the result of using the cream demonstrates that the cream is not of satisfactory quality.

S.10 CRA implies a term that, where a consumer makes a particular purpose known to the trader, the goods are reasonably fit for that purpose (as long as it is not unreasonable to rely on the skill or judgment of the trader). Anne has made her purpose known to Deborah and the goods are clearly not fit for that purpose. It would seem eminently reasonable for Anne to have relied on Deborah's skill or judgment.

RCH is in breach of these implied terms of the contract.

3. The general rule of privity states that a third party gains no rights under a contract. However, an exception to the common law doctrine has been created by the Contracts (Rights of Third Parties) Act 1999. Section 1(1) of the Act states that a third party may enforce a term of the contract if it either expressly provides that he may, or the term purports to confer a benefit upon him (on a proper construction of the contract, see S.1(2)). In either case, the claimant must also show that he was identified in the contract (S.1(3)).

Cinzia is a third party and so, at common law, will be unable to claim under the rule of privity. The contract is made for her benefit (to obtain the face cream) but it is unclear whether she was identified in the contract which Anne has made. If she is, Cinzia will be able to enforce the contract directly under the 1999 Act as a result.

Scenario 2 Questions

1. Under the 'entire obligations' rule, a party must complete all of their obligations under a contract exactly, in order to gain the right to enforce the corresponding obligations of the other party. This is shown in Cutter v Powell (1795), where the estate of a sailor who died before the end of a voyage was unable to claim any of his wages for that voyage.

   There are a number of exceptions to this harsh rule, one being the doctrine of 'substantial performance'. As in the case of Hoenig v Isaacs (1952), where a party substantially performs the contract except for minor defects, they may be able to recover the amount due in return, less the cost of remedying these defects. Olav may argue he has substantially performed (by completing eight rooms and half-completing the remaining two) so that he could claim the £7,500, less the £1,000 it cost Marcus to remedy the outstanding work, thus £6,500. However, the fact that two rooms are not decorated would appear to be more than a minor defect with Olav's work and so substantial performance is unlikely to apply.

   Alternatively, Olav could attempt to claim that this is a severable contract. Under this doctrine, where a contract is composed of discrete obligations, it may be possible to recover the amount to be paid for the obligations which have been performed, but not for those which have not (see e.g. Regent OHG v Francesco of Jermyn Street (1981)). Under this doctrine, Olav would claim that rather than being paid £7,500 for 10 rooms, the contract is on its true construction as 10 separate obligations, each consisting of redecorating one room in exchange for £750. On this basis Olav could claim £6,000 in total, i.e. 8 x £750.

2. Alongside agreement and consideration, the element of the intention to create legal relations is necessary to create a valid contract. The courts have developed two presumptions to assist in finding whether this element is present. For contracts made in a domestic or social context, the presumption is that there be no such intention (see e.g. Balfour v Balfour (1919); while for contracts made in a commercial setting such an intention will be presumed. The presumptions may be rebutted by evidence to the contrary (see e.g. Merritt v Merritt (1970)).

   As Marcus and Pauline are siblings, the domestic presumption could be argued to apply. However, the degree of mutuality in the transaction, and the fact that it has a commercial aspect, would likely be enough to rebut this presumption. Alternatively, it is probably more likely that the commercial presumption will apply from the start, as Pauline is contracting in the course of her business rather than as Marcus' sister. In either case, the intention to create legal relations is likely to be found in the agreement and, therefore, Marcus should pay Pauline the £1,000 as he is contractually obligated to.

3. The usual measure of damages in a claim for breach of contract is that of expectation loss. The court will award the sum required to place the party in the position he should have been in had the contract been performed properly (see e.g. Robinson v Harman (1848)). Often this will be based on the 'cost of cure', i.e. the sum needed to remedy the breach. However, where the cost of cure is unreasonable, the court may refuse to award damages on this basis, as in the case of Ruxley Electronics v Forsyth (1996).

The cost of cure in this case is £20,000, which is £5,000 more than the original contract was worth. It might seem unreasonable to award this sum to Marcus, particularly as he would be under no obligation to use it to deepen the pool. Instead, the court might award a lower sum under the head of 'loss of amenity' to reflect the inconvenience caused by the shallow pool. For example, in the decision on similar facts in Ruxley, this sum was £2,500.

4. (a) Undue influence is an equitable doctrine which provides relief from contracts entered into under improper pressure. Where undue influence is found, the court may set aside the contract. Following the key case of Etridge (No 2) (2001), the categories of undue influence are of limited relevance, but it can still be said that cases tend to fall into those where there is express evidence of actual undue influence (see e.g. BCCI v Aboody (1992)) and those where a presumption of undue influence arises through a relationship of trust confidence coupled with a transaction which 'calls for an explanation'. Such a relationship can arise through the fiduciary nature of a particular relationship (e.g. lawyer-client) or can be proven on the facts. Once these elements are shown, the burden of proof will shift to the defendant to prove that there was not undue influence.

   Nadia may be able to demonstrate actual undue influence, if she has evidence of her husband's behaviour in, for example, threatening or cajoling her into the transaction. If not, as long as she can demonstrate that her relationship with Marcus is one of 'trust and confidence' (note this will not be presumed between a husband and wife), then the transaction does also appear to be one which calls for explanation. As such, on the facts as given there appears to be a good chance that Nadia can successfully establish undue influence.

   (b) However, the contract which Nadia needs to set aside is that with the bank (i.e. the mortgage). The courts have held that a contract may be set aside if one party has notice that the other party has been unduly influenced by a third party. Such notice may be actual, but can also arise constructively where there is a non-commercial relationship between the party standing surety for the third party's debts and the third party. At this point, the bank must show that they took reasonable steps to discharge the burden, most notably that either the other party received independent legal advice on the transaction, or that they had a private meeting with the bank. If Queensbridge Bank are unable to demonstrate such steps then the court may well set their contract with Nadia aside.