LEVEL 3 - UNIT 2 – CONTRACT LAW
SUGGESTED ANSWERS – JUNE 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 June 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. The Postal Rule is an exception to the normal rule that acceptance must be communicated. It applies to the acceptance of an offer which is posted, where the parties contemplated that acceptance might be made by post. It provides that an offer is accepted when a properly stamped and addressed acceptance is posted, rather than when it is received, e.g. Adams v Lindsell (1818); indeed, even if the letter is not received.

3. Consideration may be defined as a benefit to the promisee (the recipient of a promise) or a detriment to the promisor (the maker of the promise) - Currie v Misa (1875); or it may be defined as 'the price for which the promise of the other party is bought' - Dunlop v Selfridge (1915).

4. There is a presumption that commercial agreements are intended to give rise to legal relations (i.e. intended to be legally binding), e.g. Edmonds v Lawson (2000). The presumption may be rebutted by evidence to the contrary, such as in Rose & Frank v Crompton (1925) through the use of an 'honour clause', showing that the promise was intended to be binding in honour only.

5. Relevant factors in determining whether a statement is intended to be a term of the parties' contract 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; and

- whether the maker of the statement suggested to the recipient that they should verify its truth.

6. A warranty is a term which is less important because it is collateral to the main purpose of the contract - Bettini v Gye (1876). The innocent party may claim damages for breach of warranty, but breach of a warranty does not entitle the innocent party to treat the contract as terminated.

7. A misrepresentation is innocent where it falls outside of section 2(1) of the Misrepresentation Act 1967. The burden of proof is on the misrepresentor to show that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true.

8. Frustration occurs when an event which is the fault of neither party, and which is not provided for in the contract, renders performance of the contract impossible (or illegal or purposeless) - e.g. Davis Contractors v Fareham UDC (1956).

9. Examples of frustrating events 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.

10. An injunction is a court order (normally) preventing a party from doing something.

SECTION B

Scenario 1 Questions

1. (a) 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 Hongkong Fir (1962). By contrast, 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).

   (b) The key obligation is clause 3.1 of the contract, which is to maintain the vans in roadworthy condition. It is unlikely to be the parties' intention that this gives a right to terminate on any breach (so it is not likely to be a condition). But it is likely to be their intention that the contract can be terminated on serious breach. It is therefore likely to be an innominate term.

   (c) There is a breach of clause 3.1 as a result of the maintenance failures. However, the breach is minor/not particularly serious, as it only involves the failure of three out of the forty vans. So the breach will not give Daleside the right to terminate the contract. Further, as Mayton has paid for the hire of alternative vans, Daleside has not suffered any loss, and so it has no right to claim damages.

2. A loss which is too remote a consequence of a breach of contract is not recoverable. A loss is not too remote if it arises naturally from the breach (such that the parties have imputed knowledge), or if it was in the reasonable contemplation of the parties at the time the contract was made (such that the parties had actual knowledge) - Hadley v Baxendale (1854), Victoria Laundry v Newman Industries (1949).

3. There are further breaches of clause 3.1 as a result of further maintenance failures. Both the cost of hiring other vans, and the loss of profit from the Curry's contract arise naturally from the breach. They are therefore not too remote. For these losses, damages of £30,000 (£10,000 + £20,000) may therefore be recovered. The loss of the especially lucrative Amazon contract does not appear to have been in the contemplation of the parties at the time of the contract. It is therefore likely that it is too remote and cannot be recovered.

4. Over half of the vans are now off the road, and many have been off the road since May, leaving only eighteen vans to conduct the deliveries. This breach of clause 3.1 is now arguably sufficiently serious to give Daleside the right to terminate the contract, as it deprives them of a substantial part of the benefit of the contract.

5. (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).

   (b) An exception exists to the general rule of privity of contract 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. AO.com is expressly identified in the contract by name, and is given such a right by clause 4.5. It may therefore enforce clause 3.1 of the contract if it suffers any loss, by virtue of the exception contained in this Act.

Scenario 2 Questions

1. (a) Express terms may be incorporated into a contract:

- by signature, e.g. L'Estrange v Graucob (1934);
- by reasonable notice, e.g. Olley v Marlborough Court (1949);
- by course of dealings e.g. Hollier v Rambler Motors (1972);
- by common understanding - e.g. British Crane Hire v Ipswich Plant Hire (1975).

(b) The Contract Note is not signed so is not incorporated by signature. The clause may nevertheless be incorporated by reasonable notice. The notice is given before the formation of the contract. The clause is likely to be contained in a contractual document as it is described as a 'Contract Note' (cf. Chapelton v Barry UDC (1940)). The clause may be incorporated by notice, given the reference to 'See Back', even if Mary does not actually read it. Onerous clauses, however, require additional steps to be drawn to the other party's attention, such as in Interfoto Picture Library v Stiletto Visual Programmes (1988). The clause may be regarded as an onerous one, as the price is a significant term, so clear notice should be given of any right to vary it. As no special attention has been brought to the clause, it may therefore not form part of the contract.

2. (a) Terms may be implied into a contract:

- By statute, such as by the relevant sections of the Sale of Goods Act 1979 or the Supply of Goods and Services Act 1982;
- By custom, for example of a location or trade practice;
- 'Implied in law', by the courts as a matter of policy, e.g. as in Liverpool City Council v Irwin (1976);
- 'Implied in fact', by the courts on the facts of a case, e.g. as in The Moorcock (1889).

(b) The following terms are terms implied into the contract by the Sale of Goods Act 1979:

- that the goods are of satisfactory quality;
- that the goods are reasonably fit for purpose;
- that the goods correspond with any description by which they are sold.

3. (a) The 'entire performance' rule provides that the party who has agreed to perform their obligation first cannot sue for performance from the other party unless their own performance is precise and exact.

(b) Jassan's fitting of the shelving is not precise and exact, so he has not performed the contract precisely and exactly. Without any exception to the 'entire performance' rule (the Rule in Cutter v Powell [1795]), Mary would not have to pay. However, an exception to the 'entire

performance' rule exists where the doctrine of substantial performance applies. He may sue for performance if he has substantially performed the contract, e.g. Hoenig v Isaacs (1952), Bolton v Mahadeva (1972). On the facts, there are only two out of twenty defective shelves, and the proportion of the contract price to fix them is less than 10% of the overall total. He is therefore likely to have substantially performed the contract. His right to payment is, nevertheless, subject to a deduction in respect of the defects, by way of set-off or counterclaim. He will therefore only be entitled to £1,850 (£2,000 - £150).

(c) George has not completed the work so is not entitled to sue for the price of it. However, he has been prevented from performing the contract by Mary. Whilst he cannot sue for the contract sum, he may sue for the value of the work he has done so far, i.e. a *quantum meruit*. Alternatively, he may sue in contract for the loss of profit caused to him by Mary's repudiation of the contract - Planche v Colburn (1831).

Scenario 3 Questions

1. (a) An offer is an expression of willingness to contract on certain terms with the intention that it should become binding on acceptance, e.g. Carlill v Carbolic Smoke Ball Company (1893). An invitation to treat is merely an invitation for offers or to open negotiations, e.g. Gibson v Manchester City Council (1979). Only an offer can be accepted and so give rise to a binding agreement.

(b) Tristan's first text is vague as to his willingness to be bound - he uses the phrase 'would you consider'. It is also insufficiently certain (see e.g. Hillas v Arcos (1932)), as the price is clearly still open to negotiation. It is not an offer but is an invitation to treat.

(c) Kate does indicate a willingness to be bound - she uses the phrase 'I am prepared …', coupled with terms which are sufficiently certain. She puts the matter into Tristan's hands as to whether an agreement is formed. Her text is an offer.

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

(b) Tristan's second text merely makes enquiries about the terms of the offer ('would that include …'). It is not a counter-proposal, which would impliedly reject the offer, as in Hyde v Wrench (1840). It is merely a request for information, which leaves the offer open, as in Stevenson, Jacques & Co v McLean (1880). It therefore has no legal effect on Kate's first text.

(c) Kate's second text is, in terms, an attempt at revocation of her offer. However, revocation of an offer must be communicated - Byrne v van Tienhoven (1880). As Kate forgot to press 'Send', she has not communicated her revocation. Her second text therefore fails to revoke her offer, which remains open for acceptance.

3. An acceptance is the final and unqualified assent to the terms of the offer. Tristan's text is, in terms, an acceptance, and has been communicated (see e.g. Entores v Miles Far East Corp (1955)). He has therefore accepted her offer and a contract has been formed.

4. (a) There is a presumption that social and domestic agreements are normally not intended to be legally enforceable, e.g. Jones v Padavatton (1969). The presumption of no intention may be rebutted, however, by circumstances such as separation, as in e.g. Merritt v Merritt (1970). Tristan and Kate are separating, and this is the 'one outstanding issue' to resolve. This may indicate that the agreement is intended to be binding by rebutting the presumption.

(b) The consideration given by Kate for Tristan's promise of payment is her promise to allow Tristan to have Fido on Saturdays. Consideration must be sufficient (such as to be recognised by the law), e.g. Thomas v Thomas (1842). However, it need not be adequate, e.g. Chappell v Nestle (1960).

Kate is arguably providing very little (inadequate) consideration for the amount of money Tristan is paying but the consideration is still a sufficient consideration. She can therefore enforce the promise of payment.