LEVEL 4 - UNIT 1 – 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. An offer is a statement of willingness to contract on specific terms. An offer, once met with an acceptance, is legally binding. An invitation to treat is merely an indication that the maker of the statement is willing to receive offers, and has no legal effect. For example, in Carlill v Carbolic Smoke Ball Company (1893) the advertised reward was specific enough to constitute a (unilateral) offer.

2. The presumption that an agreement made in a commercial context is legally binding is a heavy one. However, it can be rebutted where there is clear evidence to the contrary. An example of where the presumption has been rebutted is an honour clause (see e.g. Rose & Frank v Crompton Bros (1925)).

3. The general rule is that past consideration is not good consideration. This can be seen in Re McArdle (1951), where a family member was unable to uphold a promise made to pay for renovating a property, as the work had already been done when the promise was made. However, there is an exception to this rule, namely implied *assumpsit*, where if an act is done at the request of the promisor and it is implicitly understood that some form of payment will be made, a later promise to pay can be upheld. See e.g. Pau On v Lau Yiu Long (1980).

4. There are a number of tests that the court may use to decide if a statement constitutes a term or a mere representation. These include the importance attached to the statement (Bannerman v White (1861)), the relative expertise of the parties (Oscar Chess v Williams (1957)), the timing of the statement and whether the statement was reduced to writing (Routledge v McKay (1954)).

5. The first remedy available in cases of misrepresentation is that of rescission. Rescission is where the court sets aside the contract, and

returns the parties back to their original position, as if the contract had never been made. Rescission is available for all three types of misrepresentation: fraudulent, negligent and innocent.

Damages may also be available in a successful action for misrepresentation. Any damages awarded for fraudulent misrepresentation or under S.2(1) of the Misrepresentation Act 1967 will be on a tortious basis, i.e. attempting to place the parties back as if the contract had never been made, rather than the usual contractual measure of expectation loss.

However, it should be noted that damages may only be awarded for an innocent misrepresentation at the discretion of the court.

6. Where there is a non-commercial relationship between the parties and the presence of undue influence (actual or presumed), the third party will be fixed with constructive notice of that undue influence where it has failed to take reasonable steps to avoid it. The key case on how and when a third party will have constructive notice of undue influence is that of Royal Bank of Scotland v Etridge (No 2) (2001).

7. An anticipatory breach is where one party to a contract informs the other that they will not be performing an upcoming obligation. At this point, the innocent party may treat a breach as having already occurred and, if the breach is repudiatory, treat the contract as at an end.

8. The requirement for 'strict performance', otherwise known as the 'entire obligations' rule, states that in order to be able to claim performance from the other party, a party must exactly and fully perform all of their obligations under the contract. Partial performance is therefore essentially no performance at all. An example of this strict rule in action can be found in Cutter v Powell (1795), where a sailor died during a sea voyage. Despite the fact that the sailor had worked up to the day of his death, his widow was unable to claim any of his wages as he had not fully performed his contractual obligations.

9. When one party breaches a contract, the innocent party is said to be under a 'duty' to mitigate his or her losses. This duty consists of two elements. Firstly, the innocent party must take all reasonable steps to minimise loss. Secondly, the innocent party must not unreasonably incur extra expense after the breach, i.e. they cannot claim compensation for losses that could reasonably have been avoided. See e.g. Payzu v Saunders (1919) for an example of where a party failed to reasonably mitigate losses.

10. Reliance loss is generally only awarded where the usual contractual measure of expectation loss is insufficient or cannot be calculated. When loss is awarded on this basis, the court attempts to set the level of damages at the amount expended and wasted in reliance upon the contract. An example of reliance loss being awarded is Anglia Television v Reed (1972), where an actor's breach of contract cost the claimant the amount already spent on preparing for a programme which had to be cancelled.

SECTION B

Scenario 1 Questions

1. (a) The Consumer Rights Act 2015 has replaced the existing legislation on implying terms into consumer contracts (i.e. the Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982). The Act applies here as this is a consumer contract.

Section 9 of the Act states that goods must be of satisfactory quality, including their appearance and finish. Section 10 of the Act further states that where the consumer makes known to the trader a particular purpose for which the consumer is contracting, it will be implied as a term of the contract that the goods are reasonably fit for that purpose. Furthermore, section 11 of the Act requires goods sold under a contract to supply goods by description to match the description.

Therefore, under these three sections, terms will be implied into the contract between Sadia and Tabatha, stating that the goods will be of satisfactory quality, fit for the purpose specified and match the description given.

(b) The necklace is made from silver, rather than white gold and its design is more simplistic than intended. This means that the appearance and the finish are different to those that were contracted for, in breach of the term implied by s.9 and also fails to match the original description, in breach of the term implied by s.11. Sadia also made it known to Tabatha that the necklace was for a particular purpose (to be wearable in light of her intolerance to other metals) and explained to her that the material used was important. As such, the goods are also in breach of the implied term in s.10.

(c) Breach of the terms implied by the 2015 Act gives rise to three statutory remedies. Firstly, Sadia will have the short term right to reject (sections 20, 22) which allows her to reject the goods within 30 days after delivery. If Sadia exercises this right, Tabatha is required to give her a refund.

Alternatively, Sadia could pursue her second remedy, which is the right to repair or replacement. Tabatha would in this case be required to replace the necklace within a reasonable time, and bear the costs of doing so. This remedy will not be available if the cost of replacement is disproportionate, but this is unlikely in the current circumstances.

Finally, Sadia has a final right to reject the goods under s.24, whereby she is entitled to a price reduction up to and including a full refund, depending upon the circumstances. This right will only arise after there has been an attempt by Tabatha to replace the necklace, or it is agreed that this is not possible.

It should be borne in mind that the existence of these statutory remedies does not affect Sadia's right to sue for common law breach of contract, although she will not be allowed to recover twice for the same loss.

2. Clause 12 is an exclusion clause and therefore will be considered carefully by the courts. The first issue to determine is whether the terms and conditions on Tabatha's website were incorporated into the contract. A term may be incorporated by signature, by reasonable notice, or by a consistent course of dealing. On the facts of this scenario, the only way the term could be incorporated is through reasonable notice.

In order to incorporate a term by this method, it must be shown that the other party was given reasonable notice of the term prior to the agreement. What is reasonable is a matter of fact in each case, and whether or not the other party actually read the term is not relevant (Parker v South Eastern Railway (1877)). It is also important that the terms are contained within a document which is contractual in nature (Chapelton v Barry UDC (1940)).

In this scenario, Tabatha has referred to her standard terms and conditions in her quotation. This is a contractual document which was intended to have legal effect, and tells the reader where to find the terms and conditions. It is therefore at least arguable that the clause is incorporated. However, it is arguable that, as clause 12 is relatively onerous, more should have been done to draw Sadia's attention to it.

In any event, the agreement between Tabatha, as a trader, and Sadia, as a consumer, is one which is governed by the Consumer Rights Act 2015 (note that the 2015 Act has replaced the Unfair Contract Terms Act in relation to consumer contracts). Under section 31 of the Act, a term purporting to exclude or restrict the trader's liability arising under sections 9-17, 28 and 29 will not be binding upon the consumer.

Clause 12 attempts to preclude liability under sections 9-11 as discussed above. Therefore, even if the clause is incorporated into the contract, it will have no effect as it falls under section 31 of the Consumer Rights Act 2015.

It could also be noted that section 65 of the Consumer Rights Act 2015 states that 'a trader cannot by a term of a consumer contract…exclude or restrict liability for death or personal injury resulting from negligence'. Therefore, Clause 12 cannot take effect in relation to Sadia's personal injury if she pursues a claim in the tort of negligence.

3. The aim of damages in contract law is to place the innocent party in the position they would have been in had the contract been carried out satisfactorily (Robinson v Harman (1848)). However, damages can only be claimed for losses that are not too remote from the breach. The test for remoteness comes from the case of Hadley v Baxendale (1854) and consists of two parts: losses which occur naturally, as part of the usual course of things; and losses which were within the reasonable contemplation of both parties. For the second limb to apply, both parties must be aware of the potential loss – so for example in Victoria Laundry v Newman Industries (1949) the damages for late delivery of a boiler included ordinary lost business during the period in question, but did not include the loss of a valuable special contract that the vendor of the boiler was unaware of.

In this scenario, there are three separate heads of loss – firstly, the reduction in value of the necklace itself; secondly, the personal injury

suffered by Sadia; and finally, the cost of the holiday which they subsequently missed. The reduction in value of the necklace clearly falls under the first limb of the test and can be recovered. The injury to Sadia may not be in the usual course of things, and could even be said to fall outside of the reasonable contemplation of both parties – except that Sadia explicitly made Tabatha aware of her skin condition. As such, it will have been in her reasonable contemplation and is not too remote. The holiday is more difficult to claim for – assuming that Tabatha was unaware of the trip, it is hard to see how it would be reasonable for it to be in her contemplation when she agreed to make the necklace.

4. The common law has, for over a century, recognised the doctrine of privity – namely that only the parties to a contract may sue or be sued upon it. This is illustrated in the case of Tweddle v Atkinson (1861), where a bridegroom was unable to enforce a contract between his father and the father of the bride. Therefore, at common law, Richard has no right to sue for breach of contract.

   However, the Contracts (Rights of Third Parties) Act 1999 has created a significant statutory exception to the usual rule of privity. Section 1 of the Act states that where a contract either expressly allows a third party to enforce it, or it is a contract which confers a benefit upon the third party, they may sue upon the agreement as long as they are expressly identified in the contract. The contract is for Richard's benefit and he appears to be expressly identified in the terms, especially as Sadia specifically tells Tabatha that the watch is a present for him. As such, he may be able to sue under the 1999 Act.

Scenario 2 Questions

1. (a) An actionable misrepresentation can be defined as a false statement of fact which induces a party to enter into a contract, as a result of which they suffer loss. It is important that the statement is one of fact, as a statement of opinion or future intention is not normally actionable. However, where the maker of the statement does not truly hold that intention, they are making a false statement of fact about what they intend to do and are making a misrepresentation (see e.g. Edgington v Fitzmaurice (1885)).

   The statement Beata has made, that she intended to hire 'some of the most famous models in the world', is clearly false. It is also extremely likely that it can be said to have induced Alberto to enter the contract, as evidenced by his only entering the contact once this statement had been made. He has suffered considerable loss as a result, as he has missed out on other work. However, Beata will argue that the statement was merely one of future intention – she was telling Alberto what she honestly planned to do, but in the interim her plans were forced to change. In order for there to be an actionable misrepresentation, Alberto would need to show that Beata never intended to book famous models. This may be difficult to prove, especially if the financial problems arose after their conversation.

   (b) Rescission, the remedy by which a contract is set aside and the parties returned to their original, pre-contractual positions, is available for all types of misrepresentation. However, there are a number of bars to rescission, including: the inability to restore the

parties back to their original positions; affirmation of the contract by the innocent party after he discovered the truth; and lapse of time. An example of where rescission was not granted is Leaf v International Galleries (1950).

Alberto appears to have affirmed the contract by agreeing to work on the photoshoot even though he was aware that in the new circumstances there were not 'world famous' models available. Furthermore, there has been a lapse of time of some months between the misrepresentation and the present day. Finally, it would not be possible to truly restore Alberto to his original position – the court cannot give him the wasted weeks of his time.

2. If, after a contract is made, something happens which is not the fault of either party but which makes the contract impossible to perform, it is said to be frustrated (Taylor v Caldwell (1863)). In order for an event to frustrate the contract, it must render the central foundation of the contract meaningless. The courts take a restrictive view of this test and will not allow parties to use the doctrine of frustration to extract themselves from a poor bargain, see e.g. Davis Contractors v Fareham UDC (1956).

   In this situation, the cause of the change of circumstances are Beata's financial difficulties. It is Beata who is choosing to refuse to provide refreshments, and mere hardship or inconvenience will not create frustration. As a result of this approach, it is unlikely that the contract between Alberto and Beata will be found to be frustrated. While the performance has changed, in that no refreshments are being provided, the contract was for Alberto to provide hairstyling services at a photoshoot, and it is still possible for Alberto to provide these services. As such, it is difficult to argue that the contract is impossible to perform or is even radically different.

3. In order for Beata to recover the extra £1500 she paid to Alberto, she must demonstrate that their second agreement, raising the fee to £200 per day, was brought about improperly in some way. When Alberto calls Beata on the morning of the photoshoot, they *prima facie* come to a legally binding agreement, whereby Beata would pay Alberto £200 for each day's work. However, there may be economic duress present, which could make the agreement voidable.

   Economic duress is a doctrine where one party uses illegitimate pressure to force the other party into agreement, such as in The Universe Sentinel (1983) where dockworkers forced a ship-owner into paying a fee for the release of their ship. Two elements are required for a claim in economic duress – that there was a coercion of the will (usually defined as the absence of any practical alternative) coupled with illegitimate pressure – a threat of something unlawful, rather than mere commercial bargaining.

   In this scenario, Beata may be forced to submit to Alberto's demands because the photoshoot is about to begin. It may not be practical to cancel the photoshoot, nor would it be possible to find an alternative hairstylist at such short notice. Regarding the pressure applied, Alberto has threatened to refuse to continue with the work. This is a threat of something Alberto arguably cannot legally do, namely treat the original contract as terminated; therefore there may also be illegitimate pressure. Beata may be successful in a claim for economic duress and, if so, can choose to

avoid this contract, which would make the original contract to pay £100 per day the valid agreement.

4. (a) All valid agreements must be supported by consideration, i.e. a benefit to the promisee or a detriment suffered by the promisor (Currie v Misa (1875)). As such, where party A owes party B money under an existing contract, a promise by B to accept less than the full sum is not on its own a binding contract, as A has failed to provide any consideration in return for this promise. In the words of Pinnel's Case (1602), 'payment of a lesser sum on the day in satisfaction of a greater, cannot be any satisfaction for the whole'.

In more recent years, the equitable doctrine of promissory estoppel has developed to mitigate the harshness of this rule. Following the seminal decision of Lord Denning in Central London Property v High Trees House (1947), the creditor will be estopped from enforcing his rights to the original sum where there is a clear promise, relied upon by the promisee, and it would be inequitable for the promisor to go back on their word.

Applying the law to Beata's agreement with Cheryl, her promise to accept no rent is not supported by any fresh consideration by Beata. Therefore, at common law the original rental contract remains, and she will owe the £4,500 in back rent. However, Cheryl has made a clear promise, which Beata has relied upon, and thus if the court believes it would be inequitable for Cheryl to now demand the £4,500, she may be estopped from claiming it. It should be noted that Beata would have to wait for Cheryl to sue her for the money before she can raise estoppel, as it is a shield, not a sword.

(b) While there has been some dispute about whether estoppel can be truly permanent, the general position of the courts has been that where a promise is made for a clear length of time, it will end once that condition ends. However, when the agreement suspends continuing legal rights, the promisor must give reasonable notice before the original agreement can resume, see Tool Metal Manufacturing v Tungsten Electric Co (1955).

Cheryl's promise was predicated on Beata's financial difficulty. Now that she has found more profitable work, it is likely to no longer be inequitable for Cheryl to revoke her promise. She can ask Beata to resume paying rent once she has given her reasonable notice, which she should do as soon as possible.