



CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

LEVEL 3 UNIT 2 – CONTRACT LAW

JUNE 2023

Note to Candidates and Learning Centre Tutors:

The purpose of the suggested points for responses is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the June 2023 examinations. The suggested points for responses sets out a response that a good (merit/distinction) candidate would have provided. Candidates will have received credit, where applicable, for other points not addressed by the marking scheme.

Candidates and learning centre tutors should review the suggested points for responses in conjunction with the question papers and the Chief Examiners' **comments contained within this report**, which provide feedback on candidate performance in the examination.

CHIEF EXAMINER COMMENTS

Some individual questions where candidates did not on average score so well are the following:

- Counter offers and acceptance by email. Where there are a succession of communications, candidates need to tease out the chronology of the communications and consider the legal status of each communication in turn and not try to run them all together.
- Section 2(1) of the Misrepresentation Act 1967, which many candidates did not recognise needs to be considered in the context of innocent misrepresentation, to determine whether a misrepresentation gives rise to a right to damages (i.e. falling within that section) or not. This required a careful application of the provisions of that section.
- The application of the principles of remoteness of loss to the facts; here, what was required was an accurate statement of the law from *Hadley v Baxendale* (or *Victoria Laundry v Newman Industries*), and then for each loss to be assessed against the two limbs of *Hadley v Baxendale*.
- Terms implied in fact: this required the application of the business efficacy or officious bystander tests.



Two features of weaker scripts which are routinely referred to in these Chief Examiner reports are as follows:

- Citation of case law or statutory authority: many questions credit marks for appropriate citation, and in some questions, it is not possible to get full marks without it. Candidates should be encouraged to cite case law or statute appropriately, in both Scenario A and B questions.
- In many cases in Scenario B questions, candidates did not apply the law they had just been invited to state. Whilst not a universal rule, it is generally the case that where questions in Section B initially require the statement or explanation of legal principles, the next sub-question is likely to involve their application.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Section A

Question 1 - Generally answered well.

Question 2

Answered reasonably well – the final few marks were harder in this five-mark question on unilateral contracts.

Question 3

Answered reasonably well, though perhaps a surprising number of candidates dropping marks on what was a basic definition.

Question 4 - Generally good performance on presumptions and their rebuttal.

Question 5 - Generally well answered.

Question 6

Poorly answered. A lot of candidates did not even get the right term few identified it as a condition (a harder point) and hardly any used any case law. Overall Section A was a fair assessment.

Question 7

Quite poorly answered – candidates often confused the bars to rescission with other “list” answers, such as frustration or performance, but the question is a fair one and basic knowledge recall.

Question 8 - Fair only, again it was only basic knowledge recall.

Question 9

Fairly answered, credit was only given for the statutory remedies asked for, a point missed by quite a few candidates.

Question 10 - Reasonably well answered.

Overall, the balance of straightforward questions and a few less mainstream questions has achieved the purpose of discriminating between the different levels of candidate performance.

Section B

Scenario 1

Question 1

Candidates averaged just over half of the available marks here. Many candidates were able to identify the main features of innominate terms and conditions, but as is quite often the case, were not able to spot an innominate term in the application of the tests.

Question 2

Candidates scored reasonably, though as this was not really an application question, one might have hoped they would score better.

Question 3

Candidates scored quite poorly on the application of the tests of remoteness, with few answers which were able to distinguish and apply the two limbs of the *Hadley v Baxendale* test successfully.

Question 4

Limited success in application of the innominate term test to a serious breach. Some limited credit was given to candidates who consistently argued that it was a condition and the consequences flowing from that.

Question 5 - Quite well answered, both as to the rule and the application of the statutory exception.

Scenario 2

Question 1

Generally solid enough answers in identifying an offer, but only a few candidates could fully apply the facts to the law.

Question 2

Somewhat disappointing scores here possibly resulting from there being several issues all rolled into one question, with many candidates not being able to fully tease out the different issues and the law relating to each in a structured way.

Question 3

Fair scores on the application of the Postal Rule, though rather too many cursory answers which only considered some of the criteria for its application.

Question 4

Not very well answered. Scores were better on the “law” element, but any candidates, having identified the issue as one of presence or absence of consideration, then treated the application part as an offer and acceptance rather than a consideration issue, and dropped marks accordingly.

Question 5

Reasonable scores on this question, and pleasing to see quite a lot of successful application to a past consideration question.

Scenario 3

Question 1

A well answered question on the definition and application of the basic principles of misrepresentation.

Question 2

A rather thinly answered question on the application of section 2(1) of the Misrepresentation Act 1967 and the remedies available in respect of any such misrepresentation. Performance was a little disappointing overall.

Question 3

Conversely, this was a generally well-answered question on “terms v reps” and related application.

Candidates did, on average, quite well in part (a), defining misrepresentation, but were weaker on its application part (b). Roughly a quarter of candidates gained no marks or just one mark on part (b), and often this was because they were answering the wrong question – namely, explaining what type of misrepresentation a statement was, rather than explaining why it was a misrepresentation of any description. One might have thought that they would have revisited their answers to this question once they had seen what Q4 was asking, but in many cases they did not.

Question 4

A fairly answered question on silence and misrepresentation, better in the law than in the application.

Question 5

Questions on terms implied in fact are difficult to set, as the question is inevitably about what is not in the fact pattern. But it was a little disappointing to see that even the first part of the question, dealing with the general law rather than its application, was not all that well answered.

SUGGESTED POINTS FOR RESPONSE

LEVEL 3 UNIT 2 – CONTRACT LAW

SECTION A

Question Number	Suggested Points for Responses	Marks (Max)
1	A contract is: an agreement (credit offer and acceptance as one mark) giving rise to obligations which can be enforced / are recognised by law	3
Question Number	Suggested Points for Responses	Marks (Max)
2	A contract in which only one party is bound / explanation of “if” contract Formed by a unilateral offer ... which may be an “offer to the world” ... normally accepted by performance of the act stipulated by the promisor ... requirement of communication normally waived e.g. Carlill v Carbolic Smoke Ball Co (1893) or other “reward” case	5

Question Number	Suggested Points for Responses	Marks (Max)
3	A benefit to the promisee/detriment to the promisor; or the price of a promise Case, e.g. <i>Currie v Misa</i> , <i>Dunlop v Selfridge</i>	2
Question Number	Suggested Points for Responses	Marks (Max)
4	Presumption that the parties do not intend to create legal relations e.g. <i>Jones v Padavatton</i> (1969). This may be rebutted: e.g. where the parties are separating or separated e.g. <i>Merritt v Merritt</i> (1970) OR e.g. where mutuality in arrangements such that intention is to share benefits, or a party at a disadvantage e.g. <i>Simpkins v Pays</i> (1955) (Correct case must be with correct explanation)	4
Question Number	Suggested Points for Responses	Marks (Max)
5	A term collateral to the main purpose of the contract / term of lesser importance e.g. <i>Bettini v Gye</i> giving rise on breach to a right to damages but not to treat the contract as terminated by breach / but where the contract continues in force	3
Question Number	Suggested Points for Responses	Marks (Max)
6	Condition Goods will correspond with description by which they were sold Relevant explanation, example or case law e.g: <i>Beale v Taylor</i> (1967)	2
Question Number	Suggested Points for Responses	Marks (Max)
7	Affirmation Third party rights acquired Undue delay (laches) <i>Restitutio in integrum</i> not possible	3
Question Number	Suggested Points for Responses	Marks (Max)
8(a)	Rule that a party must completely discharge their obligation ... before they can demand performance from the other party	1
8(b)	Acceptance of partial performance Substantial performance Divisible or severable contracts One party preventing performance Tender of performance	3
Question 8 Total: 4 marks		



Question Number	Suggested Points for Responses	Marks (Max)
9	Right to require repeat performance right to a price reduction	2
Question Number	Suggested Points for Responses	Marks (Max)
10	Does not compensate for financial or material loss Cannot be calculated precisely Examples include loss of amenity, such as loss of enjoyment or distress (accept any relevant) e.g. <i>Jarvis v Swans Tours</i> (1973), <i>Farley v Skinner</i> (No. 2) (2001).	2
Section A Total: 30 marks		

Section B - Scenario 1

Question Number	Suggested Points for Responses	Marks (Max)
1(a)	An innominate term is a term which cannot be classified as C or W at time of formation of the contract / in respect of which a “wait and see” approach is adopted A party can claim damages for breach of it A party can terminate for breach of it only if the breach is sufficiently serious Case: <i>The Hongkong Fir</i> (1962) Cf. condition is a major term / goes to root of contract Breach gives right to terminate irrespective of seriousness Case: e.g. <i>Poussard v Spiers</i>	6
1(b)	Key obligation is to “maintain in roadworthy condition” It is unlikely to be parties’ intention that this gives a right to terminate on any breach So it is not 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	4
1(c)	Breach of clause 3.1 as a result of maintenance failures Breach is minor / not particularly serious So no right to terminate the contract (but credit candidate who has concluded in 1(b) that the term is a condition with a mark for “right to terminate”) Mayton have paid for hire of alternative vans There is no right to claim damages because no loss has been suffered Nominal damages may be awarded for the fact of breach of contract	5
Question 1 Total: 15 marks		

Question Number	Suggested Points for Responses	Marks (Max)
2	<p>A loss which is too remote a consequence of breach is not recoverable</p> <p>A loss is not too remote if:</p> <p>It arises naturally from the breach...</p> <p>... or has imputed knowledge</p> <p>Or was in reasonable contemplation of the parties at the time of the contract</p> <p>... or has actual knowledge</p> <p>Cases:</p> <p>e.g. Hadley v Baxendale</p> <p>e.g. Victoria Laundry v Newman Industries</p>	5
Question Number	Suggested Points for Responses	Marks (Max)
3	<p>There are breaches of clause 3.1 as a result of further maintenance failures</p> <p>£10,000 cost of hiring of other vans arises naturally from breach</p> <p>£20,000 loss of the Currys contract also arises naturally from breach</p> <p>Therefore not too remote</p> <p>Damages of £30,000 may therefore be recovered</p> <p>Loss of the Amazon contract does not appear to have been in contemplation of parties at the time of contract</p> <p>It is therefore arguable that it is too remote</p> <p>And cannot therefore be recovered</p>	7
Question Number	Suggested Points for Responses	Marks (Max)
4	<p>Over half of the vans are now off the road / many have been off the road since May</p> <p>Breach is arguably sufficiently serious</p> <p>If so, Daleside has the right to terminate the contract</p>	3
Question Number	Suggested Points for Responses	Marks (Max)
5(a)	<p>Doctrine that a person who is not a party to a contract</p> <p>Can neither enforce rights under the contract / sue on it</p> <p>Or be subject to obligations under contract / be sued on it</p> <p>Case e.g. Tweddle v Atkinson</p>	4

5(b)	<p>An exception exists under s.1 of C(RTP) Act 1999</p> <p>Person not a party may enforce a term if contract expressly provides that he may</p> <p>or if contract purports to confer a benefit on them</p> <p>Third party must be expressly identified by name /as a member of class / as answering a particular description</p> <p>AO.com is specifically named</p> <p>And is expressly given such a right by clause 4.5</p> <p>It may therefore enforce terms of the contract if it suffers any loss</p>	6
Question 5 Total: 10 marks		
Scenario Total: 40 marks		

Section B - Scenario 2

Question Number	Suggested Points for Responses	Marks (Max)
1	<ul style="list-style-type: none"> • Invitation to treat: invitation for offers, or to open negotiations • Relevant case law, e.g. Partridge v Crittenden (1968) • Offer: an expression of willingness to contract on certain terms • Relevant case law, e.g. Carlill v Carbolic Smoke Ball Co Ltd (1892) • Credit any three factors which make this an offer, e.g: <ul style="list-style-type: none"> ○ Ravi is happy to sell; indicating willingness ○ Sufficiently detailed terms as to subject (Shadow), price and delivery ○ It is stated to be a proposal, open for a period of time ○ suggests that response may satisfy requirement of “if you want her”, indicating that it would be an acceptance, giving rise to a contract <p>Conclusion: email is an offer</p>	7
Question Number	Suggested Points for Responses	Marks (Max)
2	<ul style="list-style-type: none"> • Petra’s first reply is a request for information • Relevant case law, e.g. Stevenson, Jaques & Co v McLean (1880) • does not have effect of revoking offer, which remains open • distinguishable from counter offer, which impliedly rejects the offer • Relevant case law, e.g. Hyde v Wrench (1840) • Petra’s second reply is, in terms, acceptance • final and unqualified assent to terms of offer • basic rule requires communication of acceptance • Relevant case law, e.g. Entores v Miles Far East Corp (1955) • In case of instantaneous communication, this may be determined by intentions of the parties / sound business practice and/or judging where risk lies • Relevant case law, e.g. Brinkibon v Stahag Stahl (1983) • Acceptance occurs within timeframe 	10

	<ul style="list-style-type: none"> On facts, Ravi's omission to read acceptance is unlikely to prevent its legal effect 	
Question Number	Suggested Points for Responses	Marks (Max)
3	<p>Golda's letter is, in terms, acceptance</p> <p>Final and unqualified assent to terms of offer</p> <p>Postal Rule provides an exception to normal communication rule</p> <p>Such that contract is complete on posting of letter</p> <p>Relevant case law, e.g. Adams v Lindsell (1818)</p> <p>Whether PR applies depends upon whether post is in contemplation of parties as a means of acceptance</p> <p>Letter must be properly stamped and addressed</p> <p>On facts, it clearly is: original email refers to post as a means of responding</p> <p>Letter is posted on 12 December, so contract formed at this point</p> <p>This is before the lapse of offer on 16 December</p> <p>The fact that letter arrives later does not prevent contract from being formed</p>	9
Question Number	Suggested Points for Responses	Marks (Max)
4(a)	<p>General rule is that a creditor is not bound by a promise to accept part payment in full settlement of a debt</p> <p>Relevant case law, e.g. Pinnel's Case (1602), Foakes v Beer (1884)</p> <p>Early payment of a smaller sum at creditor's request is good consideration for such a promise / other Pinnel exception</p> <p>This is one of exceptions to Rule in Pinnel's Case (1602)</p>	4
4(b)	<p>Whether agreement to forgo the £40 is enforceable depends upon whether supported by consideration</p> <p>Felicity has settled account earlier than original contract required</p> <p>With agreement of creditor</p> <p>So she can enforce Ravi's promise to forgo the £40/doesn't have to pay remaining £40</p>	3
Question 4 Total: 7 marks		
Question Number	Suggested Points for Responses	Marks (Max)
5(a)	<p>Past consideration is not good consideration</p> <p>Explanation by reference to time of promise / done before later promise made</p> <p>Relevant case law, e.g. Re McArdle (1951), Roscorla v Thomas (1842)</p> <p>Example of exception or relevant case law, e.g. Lampleigh v Braithwaite (1615), cf. Pau On v Lau Yiu Long (1980)</p>	4

5(b)	Consideration is agreement to pay for Shadow This is past and not given in exchange for later promise that Shadow is a reliably good-natured kitten There is no implied promise at time of the sale which is made express by the later promise Promise not enforceable	3
Question 5 Total: 7 marks		
Scenario Total: 40 marks		

Section B - Scenario 3

Question Number	Suggested Points for Responses	Marks (Max)
1(a)	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	3
1(b)	Whether business entered into auction was a matter of fact (rather than opinion) Statement was not true Statement was made to Angus by Gemma Angus was induced to buy business because concerned he might miss out at auction Statement is therefore a misrepresentation	4
Question 1 Total: 7 marks		
Question Number	Suggested Points for Responses	Marks (Max)
2(a)	Misrepresentation is not fraudulent, as Gemma believes it to be true e.g. <u>Derry v Peek</u> (1889) S.2(1) of Misrepresentation Act 1967 Misrepresentation “negligent” (credit as conclusion): <ul style="list-style-type: none"> • unless Gemma had reasonable ground to believe facts represented were true • <u>Howard Marine v Ogden</u> (1978) • and did believe facts represented were true • up to time contract made Burden of proof on Gemma She is likely not to have had reasonable ground to do so ... as she had means to check with sales agent or had read letter properly	7
2(b)	Angus may rescind contract i.e. return business to Gemma, and Gemma refund his money ... in order to put parties back into their pre-contractual positions May claim damages under section 2(1) of Misrepresentation Act 1967 ... for any loss directly caused by misrepresentation Loss calculated on same basis as in tort of deceit <u>Royscot Trust v Rogerson</u> (1991)	6

Question 2 Total: 13 marks		
Question Number	Suggested Points for Responses	Marks (Max)
3(a)	Importance of statement Whether statement was reduced to writing Passage of time between making of statement and contract Any special knowledge of maker of statement Whether advised to verify	3
3(b)	Courts will consider all relevant factors in deciding Angus has attached importance to fact that business is profitable <u>Bannerman v White</u> (1861) Statement has been included in memorandum of sale <u>Birch v Paramount Estates Ltd</u> (1956) Gemma, as maker of statement, is in better position to know truth <u>Oscar Chess v Williams</u> (1957) “Profits averaging £30,000 per annum over the last three years” likely to be a term of contract.	5
Question 3 Total: 8 marks		
Question Number	Suggested Points for Responses	Marks (Max)
4(a)	Half-truth is told Statement initially true becomes false before contract is entered Contract is of utmost good faith Contract is between parties in a fiduciary relationship Misleading omission within CPUT Regulations	3
4(b)	Gemma’s failure to tell Angus about 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	3
Question 4 Total: 6 marks		
Question Number	Suggested Points for Responses	Marks (Max)
5(a)	Terms may be implied on facts ... under business efficacy test <u>The Moorcock</u> (1889) ... or under the officious bystander test <u>Shirlaw v Southern Foundries</u> (1939)	3
5(b)	Term contended for about parking facilities is ... not necessary to give business efficacy to contract ... nor does it “go without saying” under officious bystander test It will not therefore be implied into the contract	3
Question 5 Total: 6 marks		
Scenario Total: 40 marks		