



CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

NOVEMBER 2023

LEVEL 3 UNIT 2 – CONTRACT LAW

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 November 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

Performance across the paper was in accordance with expected levels. Some individual questions where candidates did not on average score so well are the following:

- the conditions for the application of the past consideration rule (Re Casey's Patents etc)
- the application of principles of remoteness of loss (Hadley v Baxendale etc)
- the statement and application of principles relating to the adequacy and sufficiency of consideration
- the application of the common law and statutory principles relating to the effect of frustration of a contract.

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 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 fairly. Answers occasionally lacked thoroughness on all aspects of the Postal Rule principle.

Question 2 - Answered reasonably well.

Question 3

Answered disappointingly. candidates were often unable to set out the conditions for the application of the exception.

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

Question 5 - A majority of candidates scored the single mark available for this question.

Question 6 - Well answered for the most part.

Question 7 - Generally well answered.

Question 8 - Very good performance on this straightforward question

Question 9 - Generally well answered.

Question 10 - Generally well answered.

Overall, the balance of questions achieved the purpose of discriminating between the different levels of candidate performance.

Section B

Scenario 1

Question 1

A candidate did satisfactorily on this question, but the others struggled.

Question 2 - As above.

Question 3

Candidates were occasionally not able to fully describe the term, although often achieved 1 of the 2 points available.

Question 4

Candidates struggled to deal with issues relating to damages.

Scenario 2

Question 1

Generally answered well, with half the candidates generating 8/10 or more.

Question 2

Fair to good answers on this question. All candidates scored some marks though fewer scored really well compared with Question 1.

Question 3

A full range of marks. Some candidates missed out for failing to fully articulate the more straightforward points.

Question 4

Marks ranged on this question and this was mostly due to lack of detailed authority and application.

Scenario 3

Question 1

Variable answers, but no poor or very good answers. Even the better answers were lacking application in relation to innominate terms.

Question 2

Generally well answered – all four candidates got at least half of the marks available.

Question 3

This was a more difficult question (on the effects of frustration) but two of the candidates got over half of the marks.

SUGGESTED POINTS FOR RESPONSE

NOVEMBER 2023

LEVEL 3 UNIT 2 – CONTRACT LAW

SECTION A

Question Number	Suggested Points for Responses	Marks (Max)
1	<ul style="list-style-type: none">• Exception to the general rule of communication• applies to acceptance of an offer• where parties contemplated acceptance by post / reasonable to use the post• properly posted (stamped and addressed)• effects acceptance of the offer on posting, not receipt• even if the letter does not arrive• case, e.g. <u>Adams v Lindsell</u>	5
2	<ul style="list-style-type: none">• A person who is not a party to a contract• can neither enforce rights under contract / sue on it• nor be subject to obligations under it / be sued on it• e.g. <u>Tweddle v Atkinson</u> (1861), <u>Dunlop v Selfridge</u> (1915)	3
3	<ul style="list-style-type: none">• Act or promise is done or given at request of promisor• Must have been understood by parties that payment would be made• Payment would have been legally recoverable had it been promised in advance• e.g. <u>Lampleigh v Brathwaite</u> (1615) or <u>Re Casey's Patents</u> (1892)/ ref. to implied assumpsit.	4



4	<ul style="list-style-type: none"> • Presumption that parties do intend to create legal relations • Rebutted where parties expressly intend to contract “in honour only” • Or state “subject to contract” or equivalent • e.g. <u>Rose & Frank v Crompton</u> (1925) 	3
5	<ul style="list-style-type: none"> • A term distinctly or overtly stated / a term agreed by the parties 	1
6	<ul style="list-style-type: none"> • A term going to the root of the contract • e.g. <u>Poussard v Spiers</u> • giving rise on breach to a right to damages • And to treat the contract as terminated by breach 	3
7	<ul style="list-style-type: none"> • Untrue • Statement of fact • Made by one party to other • To induce / reliance 	3
8	<ul style="list-style-type: none"> • Fraudulent • Negligent (or within s.2(1) MA1967) • Innocent (or outwith s.2(1) MA1967) 	3
9	<ul style="list-style-type: none"> • Complete performance of contract terms • Agreement • Frustration • Breach of condition / serious breach of innom term 	3
10	<ul style="list-style-type: none"> • Equitable remedy/at court’s discretion • Only considered when damages are an inadequate remedy • An order of court • compelling a party to perform contractual obligations 	2
Section A Total: 30 marks		



Section B - Scenario 1

Question Number	Suggested Points for Responses	Marks (Max)
1(a)	<ul style="list-style-type: none"> • Definition of a term, e.g. a statement forming part of agreement between parties <p>Identification of test for a term - common intention of parties</p> <p>Identify factors considered by the courts:</p> <ul style="list-style-type: none"> • Importance attached • Reduction to writing • Passage of time / stage of negotiation • Special skill of maker of statement 	6
1(b)	<ul style="list-style-type: none"> • Need for efficient device made clear, even if more expensive • Indicates term - <i>Bannerman v White</i> (1861) • Although agreement reached orally over phone it can still be a term • - <i>Birch v Paramount Estates</i> (1956) • Statement made at stage of negotiating terms • Indicates term - <i>Routledge v McKay</i> (1954) • Brian (AIM) has special skill in identifying appropriate product • Indicates term - <i>Oscar Chess v Williams</i> (1957) • Reasoned conclusion 	9
Question 1 Total:15 marks		
2(a)	<p>Any two of the following modes of incorporation:</p> <ul style="list-style-type: none"> • By signature • Explanation or relevant case, e.g. <i>L'Estrange v Graucob</i> (1934) • By notice • Explanation or relevant case, e.g. <i>Parker v SERCo</i> (1877) • By course of dealings • Explanation or relevant case, e.g. <i>Hollier v Rambler Motors</i> • By common understanding • Explanation or relevant case, e.g. <i>British Crane Hire v Ipswich Plant Hire</i> 	4
2(b)	<ul style="list-style-type: none"> • Invoice is a post contractual document /no notice of clause at time of contract • But clause may be incorporated by course of dealing • Parties have dealt 10 times in past 3 years • The invoice is the "usual invoice" • Probably sufficient for consistent course of dealing • Clause is onerous • But is in bold type • Relevant case law, e.g. <i>Interfoto Picture Library v Stiletto Visual Programmes</i> (1988) • Reasoned conclusion 	9

Question 2 Total: 13 marks		
3	<ul style="list-style-type: none"> • Term that goods will be of satisfactory quality • Implied by section 14(2) of the Sale of Goods Act 1979 	2
4	<ul style="list-style-type: none"> • Claim is for damages • Recoverable type of loss - pecuniary loss • To put innocent party in position as if contract not breached (• Relevant case law, e.g. <u>Robinson v Harman</u> (1848) • Breach of contract has caused losses • Consider principle of remoteness • Relevant case law, e.g. <u>Hadley v Baxendale</u> (1854), <u>Victoria Laundry v Newman Industries</u> (1949) • Loss falls within the “ordinary course” (H v B), imputed knowledge (VL v NI) • Consider the principle of mitigation • Relevant case law • Costs of repair could have been mitigated • Reasoned conclusion 	10
Scenario 1 Total: 40 marks		



Section B - Scenario 2

Question Number	Suggested Points for Responses	Marks (Max)
1(a)	<ul style="list-style-type: none"> • Expression of willingness to contract on certain terms • With intention that becomes binding on acceptance • Case: e.g. <u>Carlill v Carbolic Smoke Ball Co</u> • An invitation to treat is merely an invitation for offers or to open negotiations • Case: e.g. <u>Gibson v Manchester City Council</u> • Only an offer can be accepted and so give rise to a binding agreement 	5
1(b)	<ul style="list-style-type: none"> • Tristan's first text does not show any willingness to be bound • Because statement is vague as to willingness ("would you consider") • And is insufficiently certain • Because price is not fixed (£20-30) • Case: e.g. <u>Hillas v Arcos</u> • It is not an offer but is an invitation to treat 	3
1(c)	<ul style="list-style-type: none"> • Kate indicates willingness - "I am prepared ..." • Expressed to be non-negotiable / indicates a proposal • Terms are sufficiently certain • Kate puts matter into Tristan's hands as to whether an agreement is formed 	2
Question 1 Total: 10 marks		
2(a)	<p>An offer may be terminated by:</p> <ul style="list-style-type: none"> • Revocation • Lapse • Rejection • Counter offer (credit as e.g. of rejection) • Acceptance 	3
2(b)	<ul style="list-style-type: none"> • Tristan's second text merely makes enquiries about terms of offer / is a request for information • It is not a counter-proposal rejecting the offer • Case: <u>Hyde v Wrench</u> • Nor is it an acceptance of the offer • It therefore leaves the offer open • Case: <u>Stevenson, Jacques & Co v McLean</u> 	5
2(c)	<ul style="list-style-type: none"> • Text is, in terms, an attempt at revocation of her offer • Revocation of an offer must be communicated • Case: e.g. <u>Byrne v van Tienhoven</u> • As Kate forgot to press "send", she has not communicated her revocation • Her second text therefore fails to revoke her offer • Offer therefore remains open 	5
Question 2 Total: 13 marks		

Question Number	Suggested Points for Responses	Marks (Max)
3	<ul style="list-style-type: none"> • An acceptance is final and unqualified assent to terms of offer • Tristan's text is, in terms, an acceptance • Tristan's text has been communicated • Case: e.g. <u>Entores v Miles Far East</u> <p>He has therefore accepted her offer and a contract has been formed.</p>	4
4(a)	<ul style="list-style-type: none"> • Presumption that social and domestic agreements are normally not intended to be legally enforceable • Case e.g. <u>Jones v Padavatton</u> • Presumption of no intention may be rebutted, however, by circumstances such as separation • Case e.g. <u>Merritt v Merritt</u> • Tristan and Kate are separating, and this is the one outstanding issue to resolve • This may indicate that agreement is intended to be binding, so rebutting the presumption 	6
4(b)	<ul style="list-style-type: none"> • Consideration given is her promise to allow Tristan to have Fido on Saturdays • Consideration must be sufficient • such as to be recognised by / of value in eyes of the law • Case: e.g. <u>Thomas v Thomas</u> • But it need not be adequate • Case: e.g. <u>Chappell v Nestle</u> • She may be argued to be providing very little (inadequate) consideration for amount of money he is paying • But the consideration is still a sufficient consideration • As having Fido is a benefit to Tristan / detriment to Kate <p>She can therefore enforce the promise of payment</p>	7
Question 4 Total: 13 marks		
Scenario Total: 40 marks		

Section B - Scenario 3

Question Number	Suggested Points for Responses	Marks (Max)
1(a)	<ul style="list-style-type: none"> An innominate term is a term which cannot be classified 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 e.g. <u>The Hongkong Fir (1962)</u> 	5
1(b)	<ul style="list-style-type: none"> Key obligation is clause 2 – seaworthiness Unlikely to be parties’ intention that this gives a right to terminate on any breach So it is not likely to be a condition Likely to be their intention that contract can be terminated on serious breach So not likely to be simply a warranty It is therefore likely to be an innominate term 	5
1(c)	<ul style="list-style-type: none"> Breach of clause 2 as a result of the broken rudder Breach is minor in relation to the contract as a whole As it only deprives Grainshift of a single week of a six month charter So the breach is not sufficiently serious to give right to terminate 	3
1(d)	<ul style="list-style-type: none"> Further breaches of clause 2 as a result of engine failure / delays Deprives Grainshaft of most of remaining period of charter This is a substantial part of benefit of the contract Now arguably sufficiently serious to give right to terminate 	3
Question 1 Total:16 marks		
2(a)	<ul style="list-style-type: none"> Event which is the fault of neither party Renders the contract impossible or illegal to perform or undermines its commercial purpose e.g. <u>Davis Contractors v Fareham UDC (1956)</u> 	3
2(b)	<ul style="list-style-type: none"> Provided for in the contract Sufficiently foreseeable (parties can be taken to have assumed risk) Self-induced - i.e. arising from fault or neglect of one of parties Merely more expensive or onerous 	3
2(c)	<ul style="list-style-type: none"> Destruction of the subject matter capable of being a frustrating event e.g. <u>Taylor v Caldwell (1863)</u> Sinking of Aqualine makes the contract impossible to perform But event is due to the act or default of Aquaships In failing to cover the open holds Charter will not be frustrated Aquaships will be in breach of contract 	6
Question 2 Total:12 marks		



Question Number	Suggested Points for Responses	Marks (Max)
3(a)	<ul style="list-style-type: none"> • Frustration brings contract to an end • Parties discharged from future performance of contract • Grainshift discharged from liability to pay further £40,000 • Rodent Shipping discharged from liability to provide Water Rat 	4
3(b)	<ul style="list-style-type: none"> • Section 1(2) of LR(FC)Act 1943 • Payments made before frustration are recoverable (or sums payable cease to be payable) • Subject to discretion of the court • To allow payee to retain sums paid /recover sums payable • Up to amount of expenses incurred for purpose of performance of contract • Grainshift has paid £50,000 falling due before frustrating event • Rodent Shipping has incurred expenses of £10,000 in preparation • Rodent Shipping, as payee, can retain up to £10,000 • Depending on how discretion of the court is exercised • Discretion is a broad one to mitigate harshness of allowing loss to lie where it falls • e.g. <u>Gamerco SA v ICM</u> (1995) 	8
Question 3 Total: 12 marks		
Scenario 3 Total: 40 marks		