

CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

LEVEL 6 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

The considerable increase in pass rate demonstrates that this is an examination which is in many ways as hard or easy as specific groups of candidates find it. In comparison with recent sessions, especially June 2022, this cohort had a stronger knowledge of contract law, used the case law more effectively and had better exam technique (especially in answering four questions rather than three). Congratulations to those involved.

Regarding specific areas of knowledge, candidates performed particularly well regarding restraint of trade and frustration. Areas of weakness were categorisation of terms, implied terms in fact, misrepresentation, and above all duress. Candidates, tutors and centres are reminded of the importance of staying current with legal developments, and the almost complete absence of knowledge on duress cases in recent decades (especially when there was major Supreme Court authority on the point in 2021) is concerning.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Section A

Question 1

This was the best answered question on the paper. It focused on restraint of trade, which is an area candidates tend to either gravitate toward or entirely leave alone. This means quite a 'self-selecting' group answering the question. It is also a very contained area, so to an extent does not rely on wider knowledge like some other questions may. For these reasons, I am not hugely surprised by the strong performance.

Question 2

This was an extremely popular question on a topic candidates usually study quite early in learning contract law. With the large numbers answering the question, it is therefore not at all surprising that performance was mixed but on average fell very much in the middle of the overall performance.

Question 3

This was a poorly answered question on the whole, although some outlying high marks showed that if candidates had the requisite knowledge, it was not actually particularly difficult to answer. The key point is knowledge – duress is a complex area which has changed within the last five years, and clearly many candidates are simply not aware of the modern law.

Question 4

This is quite a technical area about recollecting knowledge, rather than deep critical analysis.

Section B

Question 1

This was a popular question, as offer and acceptance tends to be. Offer and acceptance questions have traditionally led to above average marks and the three part question made the paper more balanced. Judging by the statistics, this was successful.

Question 2

This was a well-answered question, with a range of marks showing different levels of knowledge/ability.

Question 3

There has been a notable decline in performance on misrepresentation questions in recent examinations, even though the law has not changed radically. This is picked up in the public comments.

Question 4

The question tested two distinct areas of knowledge within a single learning outcome – implied terms and categorisation of terms. Frustratingly, many candidates were able to answer well on one, but not the other (across both topics)

SUGGESTED POINTS FOR RESPONSE

LEVEL 6 UNIT 2 – CONTRACT LAW

Question Number	Suggested Points for Responses	Marks (Max)
1	<p>Responses should include:</p> <ul style="list-style-type: none"> • Identification of idea of restraint of trade clauses • Explanation of courts’ reluctance to uphold such clauses • Explanation of when a clause may be upheld • Discussion of relevant law on what is considered reasonable • Some attempt to define competing interests in this area • Some attempt to conclude with a clear answer to the question asked. <p>Responses could include:</p> <ul style="list-style-type: none"> • Discussion of policy reasons why such clauses are treated with suspicion • Distinction between what is reasonable in the public interest and what is reasonable between the parties • Different approaches based on respective bargaining power/ type of contract • More detailed discussion of relevant law • Clear identification of reasons for and against enforcing such clauses • A detailed and persuasive conclusion 	25
Question 1 Total: 25 marks		



Question Number	Suggested Points for Responses	Marks (Max)
2	<p>Responses should include:</p> <ul style="list-style-type: none"> • Identification of consideration from both parties as a necessary ingredient of a valid contract • Definition of consideration • General requirement for good consideration • Some discussion of pre-existing promises in the context of a fresh agreement to “give more”, e.g. <u>Williams v Roffey Brothers</u> (1990) • Some discussion of pre-existing promises in the context of a fresh agreement to “accept less” • Some attempt to conclude with a clear answer to the question asked <p>Responses could include:</p> <ul style="list-style-type: none"> • Competing definitions of consideration • Further detailed discussion of pre-existing promises in the context of a fresh agreement to “give more” • Further detailed discussion of pre-existing promises in the context of a fresh agreement to “accept less” • Reference to recent case authority • By analogy, (brief) discussion pre-existing public duties and fresh agreements • Promissory estoppel • A detailed and persuasive conclusion 	25
Question 2 Total: 25 marks		
Question Number	Suggested Points for Responses	Marks (Max)
3(a)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Identification of doctrine of duress • Discussion of development of specific concept of economic duress • Reference to key case law as part of this development • Explanation of modern requirements for a straightforward case of economic duress • Examples of what may be an unlawful act • Some attempt to conclude with a clear answer to the question asked. <p>Responses could include:</p> <ul style="list-style-type: none"> • Further discussion of relevant case law • Specific discussion of idea of unlawful act and why this gives rise to a claim for duress • Discussion of remedy of rescission and/or bars to remedy • A detailed and persuasive conclusion 	16

3(b)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Explanation of lawful as opposed to unlawful acts • Case example(s) of a lawful threat • Some attempt to conclude with a clear answer to the question asked <p>Responses could include:</p> <ul style="list-style-type: none"> • Discussion of multiple cases involving lawful act duress • Consideration of recent case law on the area • Discussion of purpose of doctrine of duress and judicial statements on the doctrine • A detailed and persuasive conclusion 	9
Question 3 Total:25 marks		
Question Number	Suggested Points for Responses	Marks (Max)
4(a)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Definition of exemption clauses • Explanation of basic common law requirement of incorporation • Some discussion supported by case law of methods of incorporation • Explanation of basic common law requirement of interpretation of clause to cover the loss • Some discussion supported by case law of interpretation in practice • Some attempt to conclude with a clear answer to the question asked. <p>Responses could include:</p> <ul style="list-style-type: none"> • Distinction between exclusion and limitation clauses • Further discussion of requirements of incorporation • Further discussion of requirements of interpretation • Consideration of perceived need to legislate in the area in 1970s and 2010s. • A detailed and persuasive conclusion 	13
4(b)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Identification of Unfair Contract Terms Act 1977 • History/scope of Act: originally applicable to commercial and consumer contracts, now solely commercial due to CRA 2015 • Explanation of basic provisions of Act regarding negligence • Explanation of reasonableness test • Some attempt to conclude with a clear answer to the question asked. 	12

	<p>Responses could include:</p> <ul style="list-style-type: none"> • Discussion of further provisions of UCTA 1977 • Consideration of how reasonableness test applied in practice and guidance on the test • Comparative discussion of provisions of CRA 2015 • Comparison of the regime under the two Acts • A detailed and persuasive conclusion 	
Question 4 Total:25 marks		

SECTION B

Question Number	Suggested Points for Responses	Marks (Max)
1(a)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Identification of agreement as a necessary ingredient of a valid contract • Explanation of usual approach of finding agreement through offer and matching acceptance • Definition of invitation to treat and distinction from offer • Explanation of unilateral offer • Discussion of when and how unilateral offer can or cannot be revoked • Discussion of need for communication of unilateral offer • Application of above law to the scenario <p>Responses could include:</p> <ul style="list-style-type: none"> • Further depth and breadth of discussion on above points • Mention of lapse of time as method of bringing an offer to an end/ conditional offers. • Further relevant case law to support the above 	11
1(b)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Identification of usual measure of damages as expectation-based • Recognition of difficulty of using this measure in this instance • Discussion of at least one potential alternative basis for damages (e.g. loss of a chance, reliance loss, loss of amenity) • Application of above law to the scenario <p>Responses could include:</p> <ul style="list-style-type: none"> • Discussion of further alternative basis for damages • Further relevant case law to support the above 	6

1(c)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Recognition of requirement for communication of acceptance • Identification of “receipt rule” • Application of above law to the scenario <p>Responses could include:</p> <ul style="list-style-type: none"> • Detailed consideration of case law relating to electronic means of communication • Discussion of perceived requirement to send within business hours • Distinction between when message sent and when message available to be read • Mention of lapse of time as method of bringing an offer to an end/ conditional offers. 	8
Question 1 Total: 25 marks		
Question Number	Suggested Points for Responses	Marks (Max)
2	<p>Responses should include:</p> <ul style="list-style-type: none"> • Recognition of doctrine of frustration as a method of bringing a contract to an end • Identification of basic requirements for doctrine to operate • Discussion of what may constitute a frustrating event – illness • Some recognition of “frustration of purpose” as a frustrating event • Discussion of what may constitute a frustrating event – subsequent illegality • Discussion of what may constitute a frustrating event – unavailability of subject matter • Some recognition of Frustrated Contracts Act 1943 and basic rules as to losses/payments • Application of above law to the scenario <p>Responses could include:</p> <ul style="list-style-type: none"> • Further detail on what may constitute a frustrating event • Self-induced frustration as a bar to frustration • Foreseeability as a bar to frustration • Further discussion of provisions of 1943 Act • Further relevant case law to support the above 	25
Question 2 Total: 25 marks		

Question Number	Suggested Points for Responses	Marks (Max)
3	<p>Responses should include:</p> <ul style="list-style-type: none"> • Identification of misrepresentation as a cause of action • Discussion of basic requirements for misrepresentation to be actionable <ul style="list-style-type: none"> ○ Statement must be false ○ Statement must be one of fact, not opinion or intention ○ Statement must induce contract ○ Statement must cause loss • Discussion of different categories of misrepresentation (fraudulent, negligent, innocent) • Some explanation of effect of Misrepresentation Act 1967 and potential remedies for misrepresentation • Application of above law to the scenario <p>Responses could include:</p> <ul style="list-style-type: none"> • Detailed explanation of concepts outlined above • Meaning of “false” statement • Half-truths • Ability of representee to verify the statement • Tactical advantages of bringing claim under 1967 Act • Detailed discussion of basis of damages • Detailed discussion of availability of rescission • Relevant case law illustrating principles outlined above • Further relevant case law to support the above 	25
Question 3 Total: 25 marks		
Question Number	Suggested Points for Responses	Marks (Max)
4(a)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Identification of some of the relevant ‘tests’ developed by courts to distinguish between term and representation <ul style="list-style-type: none"> ○ Importance attached ○ Special knowledge ○ Timing ○ Whether reduced to writing ○ Opportunity to verify • Application of above law to the scenario <p>Responses could include:</p> <ul style="list-style-type: none"> • Recognition of overall objective approach to determining the question • Based on the intention of the parties • Further application (breadth and/or depth) of the tests • Further relevant case law 	11

4(b)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Explanation of concept of implying term as a matter of fact • Recognition that this is a subjective process which applies only to the immediate contract • Identification of at least one 'traditional' test (officious bystander, business efficacy) • Some discussion of more modern approaches to implying terms in fact • Application of above law to the scenario <p>Responses could include:</p> <ul style="list-style-type: none"> • Detailed consideration of how tests might apply • Flaws with traditional tests • Attempts to move away from these tests • Modern approach based on most recent authority from higher courts • Further relevant case law to support the above 	14
Question 4 Total: 25 marks		