

## CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

### LEVEL 6 - UNIT 2 – CONTRACT LAW

JUNE 2022

#### 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 2022 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

Overall performance was weaker in this exam session, something which was disappointing to note after some relatively strong cohorts in recent years. Weaker performance was consistent right across the paper – while there were, as always, different mark spreads for different questions, the mean marks for most questions were not wildly dissimilar.

As such, it is probably not particularly helpful to look at each question in great detail, so instead a list is provided of key areas on which knowledge was particularly lacking across the cohort.

A1: UCTA 1977, CRA 2015

A2: Any cases about implied terms in fact since the Moorcock was decided 133 years ago.

A3: the idea of “lawful act” duress

A4: The 1943 legislation

B1: Statements of law as misrepresentations, what constitutes an expert, remedies

B2: Auctions without reserve (and as such unilateral offers)

B3: Severance

B4: Penalty clauses

Candidates are strongly urged to ensure that they understand that being able to refer to relevant cases and statutes is absolutely required at Level 6, and that writing an answer of 100-200 words is simply not going to provide enough evidence of knowledge and understanding for a pass mark.

## CANDIDATE PERFORMANCE FOR EACH QUESTION

### Question 1

This question tested knowledge of exemption clauses. The question required candidates to both discuss the law on such clauses and relate it to the crucial concept of bargaining power. Knowledge was (as will be a recurring theme) surprisingly weak on the area as a whole. Candidates seemed to have a cursory understanding of the main cases at common law, but the question also required substantive discussion of the two crucial statutes in the area. Knowledge here was poor, with few candidates even able to cite the relevant provisions or analyse them.

### Question 2

This was one of the lowest scoring questions and this is surprising. It was expected that more of the candidates' knowledge would be required for the more complex parts of this area. What was surprising was that so few candidates were even able to cite the original Victorian tests for implying a term, something which the vast majority of candidates have been able to do in previous papers.

### Question 3

Again, the lack of knowledge in some answers was worrying, although on the whole this was anecdotally one of the better answered questions. However, many of the answers were quite basic.

### Question 4

The same comments for A3 apply to this question. Answers were on the whole not as weak as some other questions, but they were very basic and there was no reference to the relevant provisions of the relevant act, bearing in mind the Act only has two substantive sections.

## Section B

### Question 1:

This was another seemingly innocuous question which has been asked in similar forms many times before, where candidates seemed to just have a small fraction of the usual knowledge.

### Question 2

This was the question on offer and acceptance, which historically is always one of the best scoring questions on the paper. This was an accessible offer and acceptance question asked, however the vast majority of candidates struggled to access the full mark range.

### Question 3

This question was answered relatively well in relative terms, but there was a real lack of legal detail in most answers.

### Question 4

This was one of the lowest performing questions, and the actual marks awarded were well below expectations. As noted above, this did cover some complex legal topics and that probably accounts for the fact that it was one of the lowest scoring questions.

## 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"><li>• Explanation of concept of bargaining power</li><li>• Explanation of common law rules of incorporation</li><li>• Explanation of common law rules of interpretation</li><li>• Explanation of relevant provisions of Unfair Contract Terms Act 1977</li><li>• Explanation of relevant provisions of Consumer Rights Act 2015</li><li>• Evaluation of how successfully the above protects those with less bargaining power</li></ul> <p>Responses could include:</p> <ul style="list-style-type: none"><li>• Specific examples of unequal bargaining power</li><li>• Further detail as to case law on incorporation</li><li>• Further detail as to case law on interpretation</li><li>• Critical analysis of how far common law rules remain relevant</li><li>• Further detail as to statutory law, most likely making reference to the relevant Schedules of each Act</li><li>• Comparison of the two Acts</li></ul>	25

**Question 1 Total: 25 marks**



Question Number	Suggested Points for Responses	Marks (Max)
<b>2(a)</b>	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Identification of concept of implied terms</li> <li>• Recognition of effect of applying term in fact, on immediate contract only</li> <li>• Traditional tests used for implying terms in fact</li> <li>• More recent case authority as to implying terms in fact</li> <li>• Conclusion as to current approach of the courts</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Consideration of whether approach in these cases is purely subjective</li> <li>• Further discussion of traditional tests</li> <li>• Examples of tests application in subsequent cases</li> <li>• Further discussion of recent authority</li> </ul> <p>Critical analysis of concepts of necessity and reasonableness</p>	<b>15</b>
Question Number	Suggested Points for Responses	Marks (Max)
<b>(b)</b>	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Identification of concept of implied terms</li> <li>• Recognition of effect of applying term in law, to all contracts of a type</li> <li>• Competing approaches used in judgments in Liverpool v Irwin (1976)</li> <li>• More recent case authority as to implying terms in law</li> <li>• Conclusion as to current approach of the courts</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Consideration of whether approach in these cases is purely objective</li> <li>• Further discussion of specific judgments in Liverpool v Irwin</li> <li>• Examples of tests application in subsequent cases</li> <li>• Further discussion of recent authority</li> <li>•</li> </ul> <p>Critical analysis of concepts of necessity and reasonableness</p>	<b>10</b>
<b>Question 2 Total: 25 marks</b>		

Question Number	Suggested Points for Responses	Marks (Max)
<b>3</b>	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Definition of duress</li> <li>• Requirements for economic duress to arise: <ul style="list-style-type: none"> <li>○ Illegitimate pressure</li> <li>○ Which causes C to enter the contract</li> <li>○ Because no practical/reasonable alternative</li> </ul> </li> <li>• Identification of lawful/unlawful act distinction</li> <li>• Discussion of what may be considered illegitimate</li> <li>• Reference to modern case authority</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Historical development of duress in relation to economic interests</li> <li>• Basis for economic duress and idea of “coercion of the will”</li> <li>• Identification of illegitimacy of pressure as current key issue</li> <li>• Detailed discussion of what way be considered illegitimate</li> <li>• Analysis of wider policy reasons for/against lawful act duress</li> <li>• Specific/detailed reference to modern case authority</li> </ul>	<b>25</b>

**Question 3 Total:25 marks**

Question Number	Suggested Points for Responses	Marks (Max)
<b>4(a)</b>	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Explanation of doctrine of frustration</li> <li>• Discussion of types of frustrating events</li> <li>• Difference between impossible and impractical obligations</li> <li>• Limits on frustration e.g. cannot be self-induced, cannot be foreseeable</li> <li>• Case authority to support the above</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Historic reluctance to acknowledge frustration and reasons for this</li> <li>• Analysis of types of frustrating events with reference to the issue raised by the question</li> <li>• Detailed discussion of “frustration of purpose” cases</li> <li>• Detailed discussion of a range of limits on frustration</li> <li>• Further case authority to support the above</li> </ul>	<b>15</b>

Question Number	Suggested Points for Responses	Marks (Max)
<b>4(b)</b>	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Explanation of traditional approach, 'loss lay where it fell'</li> <li>• Discussion of Law Reform (Frustrated Contracts) Act 1943</li> <li>• Treatment under Act of sums paid</li> <li>• Treatment under Act of sums payable</li> <li>• Treatment under Act of benefits received</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Doctrine of total failure of consideration</li> <li>• Further detail as to provisions of Act outlined above</li> <li>• Case authority on application of the Act</li> </ul>	<b>10</b>
<b>Question 4 Total: 25 marks</b>		

## SECTION B

Question Number	Suggested Points for Responses	Marks (Max)
<b>1(a)</b>	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Identification of misrepresentation as a cause of action</li> <li>• Discussion of basic requirements for misrepresentation to be actionable <ul style="list-style-type: none"> <li>▪ Statement must be false</li> <li>▪ Statement must be one of fact, not opinion</li> <li>▪ Statement must induce contract</li> <li>▪ Statement must cause loss</li> </ul> </li> <li>• Discussion of different categories of misrepresentation (fraudulent, negligent, innocent)</li> <li>• Effect of Misrepresentation Act 1967</li> <li>• Potential remedies for misrepresentation</li> <li>• Application of above rules to facts</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Detailed explanation of concepts outlined above</li> <li>• Statements of law and misrepresentation</li> <li>• Tactical advantages of bringing claim under 1967 Act</li> <li>• Detailed discussion of basis of damages</li> <li>• Detailed discussion of availability of rescission</li> <li>• Relevant case law illustrating principles outlined above</li> </ul>	<b>18</b>

Question Number	Suggested Points for Responses	Marks (Max)
<b>1(b)</b>	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Identification of requirement of intention to create legal relations to create binding agreement</li> <li>• Usual presumption in commercial agreements</li> <li>• Methods of rebutting the presumption</li> <li>• Application of above rules to facts</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Detailed explanation of concepts outlined above</li> <li>• Weight of commercial presumption/ difficulty of rebutting</li> <li>• Relevant law on “honour clauses” specifically</li> <li>• Relevant case law illustrating principles outlined above</li> </ul>	<b>7</b>
<b>Question 1 Total: 25 marks</b>		
Question Number	Suggested Points for Responses	Marks (Max)
<b>2</b>	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Identification of requirement of agreement to create binding contract</li> <li>• Usual approach to finding agreement – an objective search for offer and acceptance</li> <li>• The nature and effect of counter-offers</li> <li>• The rule that acceptance must be communicated</li> <li>• The ‘postal rule’</li> <li>• The contractual position in auctions</li> <li>• Application of above rules to facts</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Detailed explanation of concepts outlined above</li> <li>• Destruction of offer by lapse of time</li> <li>• Acceptance by silence</li> <li>• Revocation by a faster method and the postal rule</li> <li>• Relevant law on “without reserve” auctions</li> <li>• Collateral unilateral contracts in such auctions</li> <li>• Relevant case law illustrating principles outlined above</li> </ul>	<b>25</b>
<b>Question 2 Total: 25 marks</b>		

Question Number	Suggested Points for Responses	Marks (Max)
<b>3</b>	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Identification of general principle preventing covenants made in restraint of trade</li> <li>• Enforceability of such covenants where reasonable with reference to both interest of parties and of general public</li> <li>• Subsequent law relating to reasonableness of such covenants</li> <li>• Application of above rules to facts</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Detailed explanation of concepts outlined above</li> <li>• Relevant case law illustrating principles outlined above</li> <li>• Discussion as to general approach of courts to restraint clauses in context of sale of business</li> <li>• Limitations on restraint clauses, especially to protect alternative business of purchaser</li> <li>• Prohibition of representing that carrying on business of former business.</li> <li>• Application of “blue pencil” test to remove offending parts of clause(s)</li> </ul>	<b>25</b>
<b>Question 3 Total: 25 marks</b>		
Question Number	Suggested Points for Responses	Marks (Max)
<b>4(a)</b>	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Identification of usual expectation basis for contractual damages</li> <li>• Alternative measures including reliance or restitution-based damages</li> <li>• Application of above rules to facts</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Detailed explanation of concepts outlined above</li> <li>• Relevant case law illustrating principles outlined above</li> </ul>	<b>5</b>
Question Number	Suggested Points for Responses	Marks (Max)
<b>(b)</b>	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Identification of discharge by breach/ remedy of repudiation</li> <li>• What constitutes a repudiatory breach</li> <li>• Election for innocent party</li> <li>• Application of above rules to facts</li> </ul>	<b>7</b>



	<p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Detailed explanation of concepts outlined above</li> <li>• Relevant case law illustrating principles outlined above</li> <li>• Dangers of incorrectly treating breach as repudiatory</li> <li>• Restrictions of use of specific performance in contracts for personal services</li> </ul>	
Question Number	Suggested Points for Responses	Marks (Max)
<b>4(c)</b>	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Concepts of liquidated and unliquidated damages</li> <li>• Modern law relating to penalty clauses</li> <li>• Usual rule that non-pecuniary losses unrecoverable</li> <li>• Availability of damages for loss of reputation when foreseeable result of breach</li> <li>• Application of above rules to facts</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Detailed explanation of concepts outlined above</li> <li>• Relevant case law illustrating principles outlined above</li> <li>• Historic law relating to penalty clauses</li> </ul>	<b>13</b>
<b>Question 4 Total: 25 marks</b>		