

CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

JANUARY 2023

LEVEL 6 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 January 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

After a concerning drop in the standard of performance as a whole in June 2022, performance in this session returned to closer to the historic standard, although the pass rate was still slightly less than in January 2022.

General skills

As always, there was considerable diversity of performance across the cohort, so these comments are intended as a guide only, rather than as necessarily applying to all candidates. In general, answers tended to use case law quite well, showing a solid knowledge of most areas. Candidates showed a solid ability to explain more settled areas of law. There was some effort to include analysis and to answer the specific question asked in Section A questions – this was done particularly well in A1(a) where candidates really did try to engage with the specific statement in the question about express words of agreement.

Areas where the majority of candidates could improve are providing equally strong answers across the different sub-parts of multi-part questions; coming to a definite conclusion; and in Section B ensuring that the law is fully applied to the facts, not just stated.

Specific areas

Performance was best on the questions relating to agreement; intention to create legal relations; restraint of trade; and the common law provisions governing exclusion clauses.

Performance was weaker on remoteness of damages; privity; consideration and estoppel; and categorisation of terms. It should be particularly noted that answers to B4(a) were very weak, with the vast majority showing almost no familiarity with the law relating to terms implied by fact. Only a minority of candidates were able to identify traditional tests (e.g. business efficacy, officious bystander) while fewer still had any knowledge of more recent decisions in the area.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Section A

Question 1

This question covered two areas which candidates are always particularly keen to answer – agreement and the intention to create legal relations. It is thus unsurprising that this was, by some way, the most popular question on the paper. Performance was strong too, with the second highest mean on the paper.

Question 2

This question was more popular than expected, given that the area of undue influence is one which candidates traditionally find difficult.

Question 3

This was by some way the least popular question on the paper. This was most likely due to the topic area (remoteness of damages) which is seen as a complex and difficult area. Sometimes these more niche questions become somewhat self-selecting, leading to good performance from the minority who answer them.

Question 4

Many answers tended to be considerably stronger on either the common law up to 1999, or the 1999 Act examined in part (b). Had this been a single part question, a candidate could more easily have focused their answer on one or other topic – by being asked to separately discuss both, this exposed those who lacked that breadth of knowledge.

Section B

Question 1.

The topic area was one candidates have traditionally done relatively well in answering (consideration and estoppel). Candidates struggled with the practical nature of the question. The



actual legal principles involved are quite simple, but to perform well on the question there needed to be clear application of the law to the facts. Unfortunately, this is something that candidates often struggle with and this was certainly the case here.

Question 2

Restraint of trade is a very self-contained area – essentially, candidates have either studied it and can answer well, or have not and will not select the question. It also lends itself to a “common sense” approach more easily than e.g. consideration and this would also be a factor in better performance – in particular, weaker answers tend to pick up more marks for speculating about what a court might say than in other areas where this is less predictable.

Question 3

Here candidates needed to demonstrate knowledge of exclusion clauses. Answers tended to show a good knowledge of the common law principles but much less confidence in using the relevant statute in the area.

Question 4

Some candidates definitely chose the question based on one part but did not have the knowledge required on the other. Finally, the general standard of knowledge on implied terms was very poor.

SUGGESTED POINTS FOR RESPONSE

JANUARY 2023

LEVEL 6 UNIT 2 – CONTRACT LAW

Question Number	Suggested Points for Responses	Marks (Max)
1(a)	<p>An answer which consists of reasoned evaluation, offering opinion/verdict which is supported with evidence.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Correct identification of relevant Case Laws and Statutory provisions • Discussion around the above with detailed arguments, for and against being evidenced • Relevant new developments • A reasoned conclusion which is supported with evidence • Response is appropriately structured <p>Responses should include:</p> <ul style="list-style-type: none"> • Identification of importance of agreement to formation of contract 	15



	<ul style="list-style-type: none"> • Explanation of usual approach of offer and acceptance • Consideration of types of offers • Consideration of methods of acceptance • Relevant case law to support above • Reasoned conclusion <p>Responses could include:</p> <ul style="list-style-type: none"> • Comparison of unilateral and bilateral offers • Idea of standing offers • Contracting on standard terms and the battle of the forms • Electronic contracting • Acceptance by silence • Acceptance by conduct • Postal acceptance • Consideration of alternatives to traditional offer and acceptance 	
1(b)	<p>An answer which consists of reasoned evaluation, offering opinion/verdict which is supported with evidence.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Correct identification of relevant Case Laws and Statutory provisions • Discussion around the above with detailed arguments, for and against being evidenced • Relevant new developments • A reasoned conclusion which is supported with evidence • Response is appropriately structured <p>Responses should include:</p> <ul style="list-style-type: none"> • Requirement for intention to create legal relations as part of a valid contract • Presumption that no intention in domestic/social context • Discussion of how presumption can be rebutted • Relevant case law • Reasoned conclusion <p>Responses could include:</p> <ul style="list-style-type: none"> • Comparison to commercial presumption • Critical discussion as to reason for presumption/ applicability in modern society 	10
Question 1 total:25 marks		

Question Number	Suggested Points for Responses	Marks (Max)
2	<p>An answer which consists of reasoned analysis, breaking down the issue into sections and using supporting evidence for and against.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Correct identification of relevant Case Laws and Statutory provisions • Discussion around the above with detailed arguments, for and against being evidenced • Relevant new developments • A reasoned conclusion which is supported with evidence • Response is appropriately structured <p>Responses should include:</p> <ul style="list-style-type: none"> • Recognition of undue influence as an equitable doctrine • Effect of undue influence upon a contract • Explanation of requirement for actual undue influence • Potential for influence to be evidentially presumed • Undue influence and third parties • Leading case law, most notably Etridge (No 2) • Reasoned conclusion <p>Responses could include:</p> <ul style="list-style-type: none"> • Historical development of undue influence • Concept of unconscionability • Old requirement for manifest disadvantage • The “classes” of undue influence • Detailed consideration of when party on notice of undue influence • Detailed consideration of how party can discharge the burden of notice • Case law post-Etridge 	25
Question 2 total:25 marks		
3	<p>An answer which consists of reasoned analysis, breaking down the issue into sections and using supporting evidence for and against.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Correct identification of relevant Case Laws and Statutory provisions • Discussion around the above with detailed arguments, for and against being evidenced • Relevant new developments • A reasoned conclusion which is supported with evidence • Response is appropriately structured <p>Responses should include:</p>	25

	<ul style="list-style-type: none"> • General principle that damage must not be too remote from the breach • Traditional approach established in Hadley v Baxendale • Discussion of “first limb” of traditional test • Discussion of “second limb” of traditional test • Recognition of alternate tests/approaches • Reasoned conclusion <p>Responses could include:</p> <ul style="list-style-type: none"> • Further detail on above points • Detailed consideration of relevant case law • Comparison with test of remoteness in tort of negligence 	
Question 3 total:25 marks		
4(a)	<p>An answer which consists of reasoned assessment, breaking down the issue into sections and highlighting those of higher importance/relevance. There should be a conclusion which indicates merits and flaws and is supported with evidence where appropriate.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Correct identification of relevant Case Laws and Statutory provisions • Discussion around the above with detailed arguments, for and against being evidenced • Relevant new developments • A reasoned conclusion which is supported with evidence • Response is appropriately structured <p>Responses should include:</p> <ul style="list-style-type: none"> • Explanation of basic rule of privity • Discussion of some of the below: <ul style="list-style-type: none"> ○ Agency ○ Collateral contract ○ Exemption clauses and third parties ○ Tort of negligence as alternative cause of action ○ Trust ○ Assignment ○ Statutory exceptions pre-1999 <p>Responses could include:</p> <ul style="list-style-type: none"> • Greater breadth of exceptions • Greater depth of analysis of particular exceptions • Privity as a Victorian invention • Judicial criticism of the rule of privity • Privity as a means of imposing burdens on third parties 	15
4(b)	<p>An answer which consists of reasoned assessment, breaking down the issue into sections and highlighting those of higher</p>	10

	<p>importance/relevance. There should be a conclusion which indicates merits and flaws and is supported with evidence where appropriate.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Correct identification of relevant Case Laws and Statutory provisions • Discussion around the above with detailed arguments, for and against being evidenced • Relevant new developments • A reasoned conclusion which is supported with evidence • Response is appropriately structured <p>Responses should include:</p> <ul style="list-style-type: none"> • Explanation of operation of section 1(1)(a) of 1999 Act • Explanation of operation of section 1(1)(b) • Explanation of operation of section 1(2) • Explanation of operation of section 1(3) • Act as a means of enforcing a benefit, not a burden <p>Responses could include:</p> <ul style="list-style-type: none"> • Path to reform • More detailed discussion of specific working of subsections in section 1 • Other sections of the Act • Case law on the 1999 Act 	
Question 4 total: 25 marks		

SECTION B

Question Number	Suggested Points for Responses	Marks (Max)
1(a)	<p>An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justifications.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Correct identification of relevant Facts and Laws • Discussion around the above with detailed arguments, for and against being evidenced • Relevant alternatives/options available • A reasoned conclusion which is supported with evidence, offering the suggested best option available • Response is appropriately structured <p>Responses should include:</p> <ul style="list-style-type: none"> • Identification of importance of consideration to formation of contract 	10



	<ul style="list-style-type: none"> • Issues of consideration in amending contracts • Identification of general rule that a lesser sum is no satisfaction for the whole • Discussion of case law on “accepting less” • Recognition that giving up a contractual right can be good consideration • Relevant case law to support the above • Application of law to facts • Reasoned conclusion <p>Responses could include:</p> <ul style="list-style-type: none"> • Recent case authority on the topic 	
1(b)	<p>An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justifications.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Correct identification of relevant Facts and Laws • Discussion around the above with detailed arguments, for and against being evidenced • Relevant alternatives/options available • A reasoned conclusion which is supported with evidence, offering the suggested best option available • Response is appropriately structured <p>Responses should include:</p> <ul style="list-style-type: none"> • (Law from (a) if not identified there) • Recognition that agreement likely to fail for lack of consideration • Doctrine of promissory estoppel as equitable alternative • Requirements for estoppel to arise • Effect of notice to terminate estoppel • Relevant case law to support the above • Application of law to facts • Reasoned conclusion <p>Responses could include:</p> <ul style="list-style-type: none"> • Potential applicability of “practical benefit” doctrine • Recent case authority on the topic 	10
1(c)	<p>An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justifications.</p>	5

	<p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Correct identification of relevant Facts and Laws • Discussion around the above with detailed arguments, for and against being evidenced • Relevant alternatives/options available • A reasoned conclusion which is supported with evidence, offering the suggested best option available • Response is appropriately structured <p>Responses should include:</p> <ul style="list-style-type: none"> • (Law from (a) if not identified there) • Recognition that agreement likely to fail for lack of consideration • Temporary nature of estoppel • Relevant case law to support the above • Application of law to facts • Reasoned conclusion <p>Responses could include:</p> <ul style="list-style-type: none"> • Potential applicability of “practical benefit” doctrine • Recent case authority on the topic 	
Question 1 total:25 marks		
2	<p>An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justifications.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Correct identification of relevant Facts and Laws • Discussion around the above with detailed arguments, for and against being evidenced • Relevant alternatives/options available • A reasoned conclusion which is supported with evidence, offering the suggested best option available • Response is appropriately structured <p>Responses should include:</p> <ul style="list-style-type: none"> • Identification of principles relating to restraint of trade • Recognition that such clauses are prima facie void • Unless protecting legitimate interest • And reasonable between the parties and in the public interest • Discussion of law relating to reasonableness • Relevant case law to support the above • Application of law to facts • Reasoned conclusion <p>Responses could include:</p>	25

	<ul style="list-style-type: none"> • Recent case authority on the topic • Severance and the “blue pencil” test 	
	Question 2 total:25 marks	
3	<p>An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justifications.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Correct identification of relevant Facts and Laws • Discussion around the above with detailed arguments, for and against being evidenced • Relevant alternatives/options available • A reasoned conclusion which is supported with evidence, offering the suggested best option available • Response is appropriately structured <p>Responses should include:</p> <ul style="list-style-type: none"> • Explanation of concept of exemption clauses • Recognition that courts will take wary approach to such clauses • Discussion of common law requirement for incorporation • Incorporation by signature • Incorporation by reasonable notice • Rules of interpretation • Identification of Consumer Rights Act 2015 as relevant statute • Explanation of why this is a consumer contract • Operation of relevant sections (especially S62-65) of CRA 2015 • Relevant case law to support the above • Application of law to facts • Reasoned conclusion <p>Responses could include:</p> <ul style="list-style-type: none"> • Recent case authority on the topic • Incorporation by previous course of dealing • Sch 2 CRA 2015 	25
	Question 3 total:25 marks	

<p>4(a)</p>	<p>An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justifications.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Correct identification of relevant Facts and Laws • Discussion around the above with detailed arguments, for and against being evidenced • Relevant alternatives/options available • A reasoned conclusion which is supported with evidence, offering the suggested best option available • Response is appropriately structured <p>Responses should include:</p> <ul style="list-style-type: none"> • Concept of implied terms • Effect of implying term by fact • Usual approach to implying term by fact, that subjective • Tests used to decide whether term should be implied • Relevant case law to support the above • Application of law to facts • Reasoned conclusion <p>Responses could include:</p> <ul style="list-style-type: none"> • Recent case authority on the topic 	<p>10</p>
<p>4(b)</p>	<p>An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justifications.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Correct identification of relevant Facts and Laws • Discussion around the above with detailed arguments, for and against being evidenced • Relevant alternatives/options available • A reasoned conclusion which is supported with evidence, offering the suggested best option available • Response is appropriately structured <p>Responses should include:</p> <ul style="list-style-type: none"> • Traditional categorisation of terms as warranties and conditions • Effect of breach of condition • Effect of breach of warranty • "Time of the essence" clauses • Relevant case law to support the above • Application of law to facts • Reasoned conclusion 	<p>9</p>

	<p>Responses could include:</p> <ul style="list-style-type: none"> • Recent case authority on the topic • Concept of innominate terms 	
4(c)	<p>An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justifications.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Correct identification of relevant Facts and Laws • Discussion around the above with detailed arguments, for and against being evidenced • Relevant alternatives/options available • A reasoned conclusion which is supported with evidence, offering the suggested best option available • Response is appropriately structured <p>Responses should include:</p> <ul style="list-style-type: none"> • If not explained in (b), conditions and warranties etc. • Application of law to facts • Reasoned conclusion <p>Responses could include:</p> <ul style="list-style-type: none"> • Recent case authority on the topic • Concept of innominate terms 	6
	Question 4 total:25 marks	