



CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

JANUARY 2021

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 2021 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

Candidate performance was, as an overall mean, relatively strong. The pass rate has improved again for the third examination in a row, which is very pleasing and in general the "average" standard bore this out.

As has been noted in previous reports, candidates remain more likely to obtain the majority of their marks for knowledge outcomes rather than those assessing analytical ability. However, a good number of scripts did show an ability to analyse the law (in section A) and apply the law (in section B) and there was a drop in "rote" answers that simply named everything the student could remember about the topic. It is suggested that this increased focus on answering the actual question asked played an important role in the improved pass rate.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Section A

Question 1

This question was attempted by just over a third of the cohort but attracted the second highest mean mark. While answers did tend toward the descriptive, most candidates attempting this question had at least a solid base knowledge of the general approach to restraint of trade clauses and were able to name some of the principles that the court may look at to decide if such a clause will be upheld. Stronger answers were usually better structured and included a more express argument, as well as including more complex issues such as the blue pencil test.

Question 2

This question was the most popular section A question although performance was below the overall average. Candidates are reminded that the syllabus includes both the "traditional" law of privity, i.e. the rule and the various exceptions to it created pre-1999; and the Contracts (Rights of Third Parties) Act 1999. Good knowledge of both areas is essential for a good answer to a privity question.

Question 3

Again, breadth of knowledge was very important. Good answers showed an ability to analyse both duress and undue influence, whereas the weakest answers tended to be those where knowledge of only one of these doctrines was displayed. Another very common issue was candidates relying far too heavily on the pre-*Etridge* case law in part (b). *Etridge* is now 20 years old, and it makes little sense to treat it as an afterthought.

Question 4

This was the least popular question on the paper and given the very small number of candidates who attempted it is difficult to draw any general conclusions, beyond answers generally faring better on part (a) (expectation loss) than part (b) (injunctions).

Section B

Question 1

This was a popular question and performance was generally very solid, although there was a greater number of pass answers as opposed to a wider range of marks being awarded. This was, from experience, perhaps due to a large number of answers that could apply the basic principles (e.g. past consideration not good consideration, must be sufficient but need not be adequate, a very basic use of "practical benefit") but could not discuss the law in depth or detail. There was also a notable lack of case knowledge in answers to this question.

Question 2

This question received the lowest mean mark and from experience of marking it, as well as the statistics for the cohort, this was mainly due to a lack of answers at the very highest mark bands as well as a number of answers obtaining very few marks. This was most likely due to a lack of knowledge on some or all parts of the question – a number of candidates seemed unaware of the continuing existence of the Sale of Goods Act 1979 and there was a surprising tendency to assert very strongly that Fazal was acting as a consumer rather than in the course of his business.

Question 3

Unsurprisingly for a question examining offer and acceptance, this was the most answered question on the paper and the best-performing question in terms of the mean mark awarded. Generally, answers were stronger on the offer and acceptance elements than on the intention to create legal relations point in (c); while stronger answers tended to be those which were willing to discuss and hypothesise about the facts rather than simply drawing a very quick conclusion.

Question 4

As has historically been the case candidates seemed to struggle with B4 as a problem question on misrepresentation. As has been said in previous reports, it is important that candidates take a structured approach and try to separately assess whether an actionable misrepresentation(s) has taken place; and then consider what type of misrepresentation this may be (and remedies). That said, there were some excellent answers to this question which demonstrated that a very good answer in the time limit was certainly possible.

SUGGESTED POINTS FOR RESPONSES

LEVEL 6 – UNIT 2 – CONTRACT LAW

The purpose of this document 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 2021 examinations. The Suggested Points for Responses do not for all questions set out all the points which candidates may have included in their responses to the questions. Candidates will have received credit, where applicable, for other points not addressed.

Candidates and learning centre tutors should review this document in conjunction with the question papers and the Chief Examiners' reports which provide feedback on candidate's performance in the examination.

Section A

Question Number	Suggested Points for Responses	Marks (Max)
QA1	<p data-bbox="363 327 1318 432">An answer which consists of reasoned analysis, breaking down the issue into sections and using supporting evidence for and against.</p> <ul data-bbox="411 472 1310 1137" style="list-style-type: none">• Definition of restraint of trade clauses• Explanation of how such clauses operate• General rule – void as against public policy• However, can be allowed if protecting legitimate interest and reasonable between parties/public interest• Critical analysis as to overall approach/ how often clauses void/ how 'easy' it is to show reasonable etc.• Mention of relevant Case Law and Statutory provisions. Discussing detailed arguments, for and against being evidenced and mention of any relevant recent developments• What is "reasonable" looking at e.g. area, scope, time etc.• Comparison between clauses on sale of business and those in employment contracts• Issues of bargaining power and 'sanctity of contract'• Anti-competition agreements and contracts in gross• Rescuing clause using severance, detail re: "blue pencil" test etc.	25
Total: 25 marks		

Question Number	Suggested Points for Responses	Marks (Max)
QA2	<p data-bbox="371 230 1318 297">An answer which consists of reasoned evaluation, offering opinion/verdict which is supported with evidence.</p> <ul data-bbox="413 338 1318 1010" style="list-style-type: none"> <li data-bbox="413 338 1209 405">• Explanation of rule of privity at common law, with suitable examples. <li data-bbox="413 409 1318 477">• Discussion of development of various “exceptions” to the rule prior to 1999 (may focus on breadth or depth) <li data-bbox="413 481 1278 548">• Identification of Contracts (Rights of Third Parties) Act 1999 as crucial legislation in this area. <li data-bbox="413 553 1283 586">• Explanation of 1999 Act and case law subsequent to it. <li data-bbox="413 591 1297 658">• Critical evaluation of the continuing importance (or lack of it) of the doctrine today. <li data-bbox="413 663 1289 797">• Mention of relevant Case Law and Statutory provisions. Discussing detailed arguments, for and against being evidenced and mention of any relevant recent developments <li data-bbox="413 801 1209 869">• Artificial nature of the rule, introduction as part of Classical period of contract law <li data-bbox="413 873 943 907">• Link to doctrine of consideration <li data-bbox="413 911 1262 945">• Greater detail as to the various exceptions to the rule <li data-bbox="413 949 1262 1016">• Criticisms of the rule and the background to the 1999 Act, e.g. Law Commission Report 242 etc. 	25
Total: 25 marks		

Question Number	Suggested Points for Responses	Marks (Max)
QA3a	<p>An answer which consists of reasoned analysis, breaking down the issue into sections and using supporting evidence for and against.</p> <ul style="list-style-type: none"> • Explanation of doctrine, seen as vitiating factor which renders the contract voidable • Key elements of claim e.g. coercion of the will, illegitimate pressure, need for protest etc. • Effect of claim – contract voidable, usual bars to rescission apply etc. • Critical analysis of how doctrine has developed • Mention of relevant Case Law and Statutory provisions. Discussing detailed arguments, for and against being evidenced and mention of any relevant recent developments • Original limitation – duress to person only • Breadth and depth on elements of claim, with use of range of case law • Key areas of debate e.g. distinguishing coercion from mere commercial bargaining, possibility that lawful act can amount to illegitimate pressure etc. • Link to undue influence and other related concepts 	13
QA3b	<p>An answer which consists of reasoned analysis, breaking down the issue into sections and using supporting evidence for and against.</p> <ul style="list-style-type: none"> • Explanation of concept of undue influence, equitable nature • Concept of actual undue influence, with case examples • Introduction of “presumed” undue influence and “class” system • Seminal decision in RBS v Etridge (No 2) • Effect of undue influence by 3rd party on e.g. loan contract • Critical analysis of how doctrine has developed • Mention of relevant Case Law and Statutory provisions. Discussing detailed arguments, for and against being evidenced and mention of any relevant recent developments • Greater detail as to “classes”, especially subdivision into 2A and 2B • “Manifest disadvantage” and its replacement with the “calls for explanation” principle • Detail as to constructive notice and how burden can be avoided • Effect of doctrine and remedies • Link to duress and other related concepts 	12
Total: 25 marks		

Question Number	Suggested Points for Responses	Marks (Max)
QA4a	<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> <ul style="list-style-type: none"> • Expectation loss as usual measure of damages • Aim to place claimant in position as if contract performed • Different methods of calculation e.g. market value, cost of cure etc. • Critical analysis of courts approach to these issues • Mention of relevant Case Law and Statutory provisions. Discussing detailed arguments, for and against being evidenced and mention of any relevant recent developments • Comparison to other heads of damages e.g. reliance loss • Issues around time of assessment • Effects of taxation • Non-pecuniary loss • Consumer surplus issues • Issues relating to remoteness of damage 	19
QA4b	<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> <ul style="list-style-type: none"> • Equitable nature of remedy • What C must establish to claim injunction • Bars to granting injunction • Mention of relevant Case Law and Statutory provisions. Discussing detailed arguments, for and against being evidenced and mention of any relevant recent developments • Consideration of effectiveness of remedy • Comparison to common law remedy of damages • Case examples 	6
Total: 25 marks		

Section B

Question Number	Suggested Points for Responses	Marks (Max)
QB1	<p data-bbox="363 327 1318 432">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> <ul data-bbox="427 472 1318 1249" style="list-style-type: none"><li data-bbox="427 472 1193 533">• Identification of consideration as key element in formation of contract.<li data-bbox="427 539 1318 607">• Definition of consideration and explanation that must be sufficient, need not be adequate.<li data-bbox="427 613 1166 647">• Explanation of rule against past consideration.<li data-bbox="427 654 1227 721">• Explanation of requirement for fresh consideration when amending an existing agreement.<li data-bbox="427 728 1211 795">• Explanation of "practical benefit" analysis used in Williams v Roffey Brothers.<li data-bbox="427 801 983 835">• Application of above rules to facts<li data-bbox="427 842 1302 965">• Mention of relevant Case Law and Statutory provisions. Discussing detailed arguments, for and against being evidenced and mention of any relevant recent developments<li data-bbox="427 972 1259 1039">• Detailed explanation of concept of consideration and different definitions of such<li data-bbox="427 1046 1267 1113">• (Brief) explanation of exception of implied assumpsit and recognition that does not apply here.<li data-bbox="427 1120 1259 1216">• Detailed discussion of decision in Williams v Roffey Brothers and argument on both sides as to potential application/distinction in this case.<li data-bbox="427 1223 1294 1249">• Relevant case law illustrating principles outlined above	25
Total: 25 marks		

Question Number	Suggested Points for Responses	Marks (Max)
QB2a	<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> <ul style="list-style-type: none"> • An explanation of how a contract is made up of terms, express and implied • An explanation of how terms can be implied by statute, especially the Sale of Goods Act (SGA) 1979 • Discussion of the contracts to which SGA 1979 applies and section 14 of the Act. • Application of above rules to the facts • Mention of relevant Case Law and Statutory provisions. Discussing detailed arguments, for and against being evidenced and mention of any relevant recent developments • Further detail as to the provisions of SGA 1979 • Remedies under SGA 1979 • Relevant case law illustrating principles outlined above • if considering the similar provisions of the Consumer Rights Act 2015 instead 	10
QB2b	<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> <ul style="list-style-type: none"> • An explanation of how terms can be implied by the courts, as a matter of fact • An explanation of at least one relevant test for implication of terms by fact • Application of this test to the facts • Mention of relevant Case Law and Statutory provisions. Discussing detailed arguments, for and against being evidenced and mention of any relevant recent developments • Further tests for the implication of a term as a matter of fact • The difference between implying a term by fact and by law • if considering the implication of a term as a matter of law instead 	10
QB2c	<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> <ul style="list-style-type: none"> • An explanation of how terms can be implied by statute, especially the Consumer Rights Act 2015 	5

	<ul style="list-style-type: none">• Discussion of the contracts to which CRA 2015 applies and section 51 of the Act.• Application of above rules to the facts• Mention of relevant Case Law and Statutory provisions. Discussing detailed arguments, for and against being evidenced and mention of any relevant recent developments• if considering the similar provisions of the Supply of Goods and Service Act 1982 instead	
Total: 25 marks		

Question Number	Suggested Points for Responses	Marks (Max)
QB3a	<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> <ul style="list-style-type: none"> • An explanation of the need for agreement to create a valid contract • The finding of agreement through an objective approach to offer and acceptance • The requirements for a valid offer • The effect of a counter-offer • Application of above rules to the facts • Mention of relevant Case Law and Statutory provisions. Discussing detailed arguments, for and against being evidenced and mention of any relevant recent developments • Alternative approaches to finding agreement • Relevant case law illustrating principles outlined above 	9
QB3b	<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> <ul style="list-style-type: none"> • The effect of a request for further information • The need for communication of acceptance • The legal rules as to communication via instantaneous methods • The legal rules as to the revocation of offers • Application of above rules to the facts • Mention of relevant Case Law and Statutory provisions. Discussing detailed arguments, for and against being evidenced and mention of any relevant recent developments • Relevant case law illustrating principles outlined above 	9
QB3c	<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> <ul style="list-style-type: none"> • An explanation of the need for the intention to create legal relations • The rebuttable presumption used by the court in social and domestic contexts • Methods of rebutting the presumption 	7

	<ul style="list-style-type: none">• Mention of relevant Case Law and Statutory provisions. Discussing detailed arguments, for and against being evidenced and mention of any relevant recent developments• The rebuttable presumption used by the court in social and domestic contexts• Relevant case law illustrating principles outlined above	
Total: 25 marks		

Question Number	Suggested Points for Responses	Marks (Max)
QB4	<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> <ul style="list-style-type: none"> • A distinction between representations and "mere puffs" • An explanation of what will constitute an actionable representation • Discussion of what will constitute a statement of fact • Discussion of the need for reliance on the representation. • Identification and explanation of the "categories" of misrepresentation. • Explanation of remedies available for misrepresentation • Application of the above rules to facts • Mention of relevant Case Law and Statutory provisions. Discussing detailed arguments, for and against being evidenced and mention of any relevant recent developments • Detailed discussion of statements of future intention and the issue of silence in a "change of circumstances". • Detailed discussion of the effect of delay on reliance and the ability of the claimant to have found out the true position • Detailed discussion of "categories" of misrepresentation and the tactical advantages bestowed by a claim under the Misrepresentation Act 1967 • Detailed discussion of remedies including measure of damages and bars to rescission • Relevant case law illustrating principles outlined above 	25
Total: 25 marks		