



CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

JANUARY 2022

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 January 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

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

- Certainty of terms – where it needed to be made (sufficiently!) clear that terms needed to be sufficiently certain for a contract to be able to be enforced.
- Section 2(1) of the Misrepresentation Act 1967, which many candidates did not recognise does not relate to fraudulent misrepresentation, and in relation to which only a few candidates were able to state the principles fully so as to distinguish it from “innocent” misrepresentation
- The application of the law relating to innominate terms: where a term possibly admits of both major and minor breaches, too often it is concluded that the term must be a condition because of the former possibility, ignoring that the latter possibility may show that the parties intended that the contract should be terminable *only* if the breach was sufficiently serious (such that it would be an innominate term).
- The application of the principles of remoteness of loss to the facts; here, what was required was an accurate statement of the law from *Hadley v Baxendale* (or

Victoria Laundry v Newman Industries), and then for each loss to be assessed against the two limbs of Hadley v Baxendale.

- The statement and application of principles relating to expectation and reliance loss, where a distinction was not always drawn between expenditure wasted in reliance on the contract and loss of profits caused by the breach of contract.
- The effects of frustration: it is the common law, not the Law Reform (Frustrated Contracts) Act 1943, which has the effect of discharging the parties from future obligations upon the frustration of the contract. The Act then regulates the consequences of frustration. The question in this paper concerned the “payer” rule under s.2(1), and the interaction between sums paid or due by/from the payer, with expenses incurred by the payee. Only a very few candidates got so far as considering the nature and parameters of the court’s discretion in this matter.

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 just 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

Q1 Generally answered well.

Q2 Generally answered poorly for a Section A question. “Certainty” is a comparatively unusual question, so this may have been the reason for the poor performance on this question; the limited number of candidates who cited cases may point towards this.

Q3 Generally answered well, though candidates are often not sure what is consideration for what in the context of past consideration, so many candidates dropped the third mark here.

Q4 Generally answered well.

Q5 Answered well where candidates were able to distinguish between modes of incorporation and modes of implication. Many of the 28% of candidates who scored zero had confused the issue with implied terms.

Q6 Answered well where candidates were able to distinguish between types of contract and other issues, though 30% of candidates scored zero on this question.

Q7 Generally answered well.

Q8 This question was not answered well. For the most part this was because they considered that s.2(1) regulated fraudulent misrepresentation, when it does not. Few students were able to state the principles of that section in any detail.

Q9 Generally answered well.

Q10 Many candidates were not able to articulate any principles or case law relating to the mitigation of loss.

Section B Scenario 1

Q1

There was a good spread of marks across the constituent parts of this question.

Q2

There was a good spread of marks across the constituent parts of this question. Only a small proportion of students could deal with the most complex part of part (b) of the question (revocation of a unilateral offer once performance commenced) but there were sufficient marks available to candidates in (a) and the first part of (b) who could not fully apply the principles.

Q3

Candidates performed satisfactorily in explaining the law relating to innominate terms (part (a)), but routinely struggle to apply it well.

Q4

There was a good spread of marks across this question, which was posed as a single question, not separating out the law and its application as it was only 5 marks overall.

Overall on this question, the difficulties of Q3 were compensated for by the familiarity with offer and acceptance questions (Learning Outcome 2) and how to approach them, so the question performed overall much as expected.

Scenario 2

Q1

For part (a), there was a fair spread of marks. Part (b) was very poorly applied, and most candidates were not able to take the two losses in question and then apply the limbs of Hadley v Baxendale to each of them.

Q2

Candidates stated the basics well in part (a) but were not then able to apply them in part (b). Part (c) required the ability to state and apply principles from both *Stilk v Myrick* and *Williams v Roffey*. Even a full application of the first would have scored over half of the available marks, so it seems likely that the candidates did not pick up sufficiency of consideration as the point in issue for the most part.

Q3

Candidates performed better on this question, with the sort of spread of marks one might expect for a scenario B question, both in relation to the statement of principles in part (a) and their application in part (b).

Q4

Candidates performed poorly on both parts of this question, and half of the candidates were not able to score any marks here on an issue which was clearly directed in the question (a) (“expectation” v “reliance” loss), even before part (b) of the question which required its application.

Scenario 3

Q1

There was a good spread of marks across the three constituent parts of this question.

Q2

There was a good spread of marks across the three constituent parts of this question, although for each part of it a small proportion scored no marks. This seems to have been on account of misidentifying the type of misrepresentation. In the second part, it seems to have arisen from not spotting that there were any bars to rescission.

Q3

There was a good spread of marks across the constituent parts of this question, both in law and application.

Q4

This question was done quite poorly, with only a limited number of candidates being able to distinguish between when the governing principles were common law or statute, and having more than a very basic grasp of the principles arising from the Law Reform (Frustrated Contracts) Act 1943.

Q5

This question was attempted reasonably well for a question which related to an issue which is comparatively rarely examined.

SUGGESTED POINTS FOR RESPONSE

LEVEL 3 - UNIT 2 - CONTRACT LAW

SECTION A

Question Number	Suggested points for responses	Max Marks
1	A bilateral contract is a contract in which <ul style="list-style-type: none"> • both parties • have obligations to the other 	2
2	The terms of a contract (or of offer giving rise to it) <ul style="list-style-type: none"> • must be sufficiently certain • for enforceable obligations / void if not • e.g. <u>Scammell v Ouston</u> (1941) 	3
3	<ul style="list-style-type: none"> • not good consideration / must not be past • not given in exchange • for the later promise (or makes clear that act done before later promise) • e.g. <u>Re McArdle</u> (1951) 	3
4	<ul style="list-style-type: none"> • intended to give rise to legal relations • e.g. <u>Edmonds v Lawson</u> (2000) • may be rebutted • e.g. an honour clause or other example • e.g. <u>Rose & Frank v Crompton</u> (1925) 	4
5	<ul style="list-style-type: none"> • by signature • by notice • by course of dealings • by common understanding 	3
6	<ul style="list-style-type: none"> • supply of goods • supply of services • supply of digital content (or media) 	3
7	<ul style="list-style-type: none"> • not central to main purpose / less important • <u>Bettini v Gye</u> (1876) • may claim damages • no right to treat contract as terminated / contract continues 	3
8	falls within s.2(1) unless <ul style="list-style-type: none"> • misrepresentor had reasonable ground to believe and did believe • up to the time contract was made • facts represented were true • belief must be objectively reasonable • <u>Howard Marine v Ogden</u> (1978) • burden of proof is on misrepresentor 	3
9	<ul style="list-style-type: none"> • acceptance of partial performance (no mark for just p.p.) • substantial performance 	3

	<ul style="list-style-type: none"> • prevention of performance • divisible obligations • tender of performance 	
10	<ul style="list-style-type: none"> • required to act reasonably • to reduce loss (/ any explanation or synonym for mitigate) • arising from breach • <u>British Westinghouse v UER</u> (1912) • cannot recover for losses which could have mitigated 	3
Section A Total:		30 marks

Section B – Scenario 1

Question Number	Suggested points for responses	Max Marks
1(a)	<ul style="list-style-type: none"> • R.I. seeks further information about an offer • does not have effect of impliedly rejecting it • does not form a proposal/offer in its own right • <u>Stevenson, Jaques & Co v McLean</u> (1880) • Counter-offer constitutes a new offer in its own right • impliedly rejects the original offer • <u>Hyde v Wrench</u> (1840) • Can be accepted 	4
1(b)	<ul style="list-style-type: none"> • offer may be withdrawn only before valid acceptance • <u>Payne v Cave</u> (1789) • revocation must be communicated • <u>Byrne v van Tienhoven</u> (1880) 	3
1(c)	<ul style="list-style-type: none"> • Council makes an invitation to tender • Laiba's letter of 3 March is an offer • reply of 5 March is a request for further information • makes enquiry about the terms of the offer • with a view to decide whether to accept offer • original offer therefore remains open • reply of 7 March attempts to revoke her offer • the revocation was not communicated • postal rule does not apply to revocation of offer • offer remains open • letter of 9 March is an acceptance of Laiba's offer • a contract has therefore been formed with Laiba 	7
Question 1 Total:		14 marks
2(a)	<ul style="list-style-type: none"> • a contract in which only one party is bound • formed by a unilateral offer • may be an 'offer to the world' • e.g. <u>Carlill v Carbolic Smoke Ball Co</u> (1893) or other 'reward' cases / description of example • normally accepted by performance of the stipulated act 	4
2(b)	<ul style="list-style-type: none"> • commitment to pay £1,000 to the person who fulfils condition • a unilateral offer, rather than a mere invitation to treat 	5

	<ul style="list-style-type: none"> • Elaine has not yet fulfilled the condition • Offeror may not be able to revoke offer once a party has commenced performance • <u>Errington v Errington & Woods (1952)</u> • Elaine has commenced performance of growing tree • arguable that Council is unable to withdraw its unilateral offer 	
Question 2 Total:		9 marks
3(a)	<ul style="list-style-type: none"> • A condition is a major term / which goes to root of the contract. • Breach of condition gives right to terminate irrespective of seriousness of breach • <u>Poussard v Spiers (1876)</u> • An innominate term cannot be classified at time of formation • right to terminate depends on whether breach sufficiently serious • cannot terminate for minor breach • <u>The Hongkong Fir (1962)</u> 	5
3(b)	<ul style="list-style-type: none"> • clause 3 can be breached in both minor and major ways • unlikely to be intention that right to terminate on any breach • likely to be intention that the contract can be terminated if breaches sufficiently serious • It should therefore be categorised as an innominate term 	4
3(c)	<ul style="list-style-type: none"> • breach of clause 3 as a result of failure to cut hedges / missing mows of the green • breach is minor in relation to the contract as a whole • not sufficiently serious to give right to terminate • Council cannot terminate contract 	3
Question 3 Total:		12 marks
4	<ul style="list-style-type: none"> • a person who is not a party to a contract cannot enforce rights under the contract - e.g. <u>Tweddle v Atkinson (1861)</u> • exception under s.1 of Contracts (Rights of Third Parties) Act 1999. • person not a party may enforce a term if contract expressly provides that he may, or if term purports to confer a benefit on him (accept either) • third party must be expressly identified by name, as a member of a class or as answering a particular description (accept any) • Elaine not a party to contract • Elaine has been identified as a member of a class of persons • residents of Weyford • in respect of whom the contract purports to provide a benefit • may therefore enforce terms of contract by virtue of exception 	5
Scenario Total:		40 marks

Section B – Scenario 2

Question Number	Suggested points for responses	Max Marks
1(a)	<ul style="list-style-type: none"> • loss which is too remote is not recoverable • arises naturally from breach • (imputed knowledge) • in reasonable contemplation of parties at time contract made • (actual knowledge) • <u>Hadley v Baxendale</u> (1854), <u>Victoria Laundry v Newman Industries</u> (1949) • Loss for which responsibility implicitly assumed • <u>The Achilleas</u> (2008) 	4
1(b)	<ul style="list-style-type: none"> • loss of profits of £30,000 • arises naturally from failure to provide right number of rooms • not too remote / therefore recoverable by Janet • loss of the £50,000 profits from the TV deal • arguably not a natural consequence of failure to provide any large rooms • Janet brought purpose of room to Spaceco's attention at time of contract, • so it was in parties' contemplation / actual knowledge • not too remote /recoverable by Janet 	7
Question 1 Total:		11 marks
2(a)	<ul style="list-style-type: none"> • 'Adequacy' of consideration relates to amount, or value, of consideration • does not need to be of equal value / adequate • <u>Chappell v Nestle</u> (1960) 	2
2(b)	<ul style="list-style-type: none"> • value of having her exhibit is significantly more than the £200 • still a sufficient consideration to require Arleta to perform • despite the fact that it is not of equal value • Arleta therefore bound by her original promise 	3
2(c)	<ul style="list-style-type: none"> • Performance of an existing contractual duty is not normally good (sufficient) consideration for promise of extra payment • because no new obligation is undertaken by the promisee in return • <u>Stilk v Myrick</u> (1809) • On face of it promise therefore not enforceable • consider rule in <u>Williams v Roffey Bros</u> (1990) • promise of extra payment is made • where there is doubt as to whether a party will complete obligations • where not procured by fraud or duress • practical benefit derived from performance is consideration for promise of extra • Janet obtained practical benefit of being able to go ahead with the exhibition 	7

	<ul style="list-style-type: none"> promise procured by duress of Arleta's threats to destroy Janet's reputation promise of extra payment is not enforceable 	
Question 2 Total:		12 marks
3(a)	<ul style="list-style-type: none"> Performance of an existing public duty not good consideration for a promise of payment <u>Collins v Godefroy</u> (1831) may be enforceable where promise goes beyond what promisee is bound by public duty to do <u>Harris v Sheffield United FC Ltd</u> (1988) 	4
3(b)	<ul style="list-style-type: none"> Weyford Police have an existing public duty extends only to patrolling as normal provision of ten armed police goes beyond existing public duty is consideration for promise of payment Weyford Police can enforce Janet's promise to pay £8,000 	4
Question 3 Total:		8 marks
4(a)	<ul style="list-style-type: none"> compensates claimant for losses / any loss of profits / loss of bargain expected from performance of contract may extend to cost of cure of defects <u>Ruxley Electronics v Forsyth</u> (1996) compensates claimant for wasted expenditure incurred as result of breach can be claimed where difficult to quantify expectation loss <u>Anglia TV v Reed</u> (1972) 	4
4(b)	<ul style="list-style-type: none"> cannot establish loss of profits from performance so cannot claim expectation loss have incurred expenditure in preparing for contract wasted as a result of Janet cancelling the contract may therefore claim reliance losses on the facts amount to £5,000 	5
Question 4 Total:		9 marks
Scenario Total:		40 marks

Section B - Scenario 3

Question Number	Suggested points for responses	Max Marks
1(a)	<ul style="list-style-type: none"> an untrue statement of fact or law made by one party to a contract to the other induced the other party to enter into a contract 	3
1(b)	<ul style="list-style-type: none"> Where the statement is a "half-truth" Where a statement initially true becomes false before contract entered Where contract is one of utmost good faith 	3

	<ul style="list-style-type: none"> • Where contract is made between parties in a fiduciary relationship • Where it is a misleading omission within Consumer Protection from Unfair Trading Regulations 2008 	
1(c)	<ul style="list-style-type: none"> • relates to a matter of fact – whether any other potential buyers • though true when made, became false before contract was entered • Aneela fails to correct it / duty to correct • <u>With v O’Flanagan</u> (1936) • induced Omer to enter the contract • likely, therefore, to be a misrepresentation 	5
Question 1 Total:		11 marks
2(a)	<ul style="list-style-type: none"> • Fraudulent where knows it to be false • or makes it without belief in truth • or is reckless as to whether it is true or not • <u>Derry v Peek</u> (1889) • Aneela knows there are no other buyers / that Omer induced by something untrue. • because deliberately decided not to correct • her misrepresentation is fraudulent 	4
2(b)	<ul style="list-style-type: none"> • Rescission available as remedy for fraudulent misrepresentation. • involves setting aside of the contract ‘ab initio’ • rescission may be barred if one of equitable bars is present (or provide example) • Lauren has acquired an interest in subject matter of contract • as she is now tenant under lease • Third party rights bar applies • not possible for Omer to restore farm to Aneela / rescission barred. 	4
Question 2 Total:		8 marks
3(a)	<ul style="list-style-type: none"> • an unforeseen event • occurring after formation of the contract • fault of neither party • not provided for in contract • renders the contract impossible or illegal to perform • or undermines its commercial purpose • e.g. <u>Davis Contractors v Fareham UDC</u> (1956) 	4
3(b)	<ul style="list-style-type: none"> • contract is impossible to perform as a result of death of Taurus • through no fault of Jayden • no provision made in contract to provide for this eventuality • not foreseen • contract will therefore be frustrated by this event • e.g. <u>Taylor v Caldwell</u> (1863) 	3
Question 3 Total:		7 marks
4(a)	<ul style="list-style-type: none"> • discharge both parties from future performance of contract payment • £18,000 fell due after frustrating event 	3

	<ul style="list-style-type: none"> • Aneela is discharged from liability to pay it 	
4(b)	<ul style="list-style-type: none"> • section 1(2) of the Law Reform (Frustrated Contracts) Act 1943 • payments made before frustration are recoverable (or sums payable cease to be payable) • subject to the discretion of court to allow payee to retain sums paid or recover sums payable • up to amount of expenses incurred for purposes of performance • <u>Gamerco SA v ICM (1995)</u> • discretion is a broad one to mitigate harshness of allowing loss to lie where it falls. • Jayden's expenses of £1,500 are incurred in preparation • Jayden, as payee, can retain expenses • but only up to a maximum of £1,500 of sums paid by Aneela • Aneela can recover at least £500 • consider application of discretion in any form (e.g. loss of bull, harm to Aneela) 	7
Question 4 Total:		10 marks
5	<ul style="list-style-type: none"> • discharged by agreement • may be described as 'accord and satisfaction' • each party is released from future performance of the contract • consideration given by each of them for this release • Aneela pays £900 and gives up future rights, for release of her obligations • Paris gives up right to future payments, for £900 and release of her future delivery obligations 	4
Scenario Total:		40 marks