

CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

JANUARY 2022

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 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 very similar to the previous examination session, in June 2021. What was notable was an increase in very good answers, with a higher number of candidates reaching Merit and Distinction grades than in recent examinations. As is always the case, performance overall varied from these extremely good answers (including a handful of really exceptionally strong answers which were a pleasure to mark) to much weaker attempts. As usual, one of the key reasons behind a number of failing papers was an inability to answer four questions substantively – as always, I would remind candidates that four average answers are likely to attract more marks than two or three strong answers alone.

Use of case law was relatively good, knowledge of statute law was more patchy, with students not necessarily applying the correct statute where there are similar statutes (e.g. using SGA 1979 not CRA 2015; using CRA 2015 not UCTA 1977). As is usually the case, performance on the Section B questions testing application was stronger than on the Section A questions testing analysis.

In conclusion, a very similar session to the 2021 examinations and all points made in those reports also apply here; in particular, that candidates are advised to ensure they have detailed knowledge of sufficient areas of the syllabus to choose their questions on the day rather than being forced to answer questions on which they do not have sufficient knowledge.

CANDIDATE PERFORMANCE FOR EACH QUESTION

SECTION 1

Question 1

This question tested knowledge of remoteness of damages. This has historically been an unpopular area and is generally considered to be one of the most complex areas of contract law covered at this level. As a result, this question proved to be the least popular on the paper, with only 16% of candidates choosing to answer it.

Question 2

This question focused on misrepresentation, another topic which has historically resulted in lower average marks. The combination of a “difficult” topic and the need to analyse rather than apply the law would explain why the mean was lower than for other questions (especially section B, where candidates tend to be a little stronger). I note that the two parts of the question led to almost exactly the same mean, suggesting that the weaker performance was probably caused by a general lack of detailed understanding of the area.

Question 3

This question related to what is traditionally a very popular area, offer and acceptance, and so it was not surprising that it was the question answered by the highest number of candidates. Performance was very much in line with the paper as a whole. Usually, performance on offer and acceptance questions is notably strong, mainly because this is the first substantive topic candidates are taught and usually considered “easier” as a result. This was not particularly the case in this session, but this can be explained by the fact the question was asked in section A, when it is more often examined (and prepared for) as a section B problem scenario.

Question 4

Consideration is a popular topic usually answered quite well, but candidates tend to prefer it as a section B question.

SECTION B

Question 1

This problem scenario tested knowledge and application of the law relating to privity. After highlighting problems with understanding in this area in numerous previous CE reports, there has been a general improvement in answers, in this area, in recent sessions. In fact, it was the most popular section B question.

Question 2

This question was answered well. The question functioned as intended, with a slightly “harder” topic in part (a) being balanced out by a more straightforward application of the law in part (b) – this shows the difference between applying statute law (which candidates can see in their statute book in the exam) and case law (which must be memorised).

Question 3

Discharge and breach of contract is usually studied very late in a contract course and is not usually looked on favourably by candidates. Had the question not also tested knowledge of intention to create legal relations, it would have been even more unpopular (it was already the second least answered question) and a notable amount of weaker answers only addressed the intention issue, ignoring the discharge and breach points.

Question 4

This was a well-answered two-part question which covered a relatively technical area of law. Exclusion clauses are essentially a distinct and separate topic than can either be studied or ignored, most candidates answering the question had likely prepared the topic specifically.

SUGGESTED POINTS FOR RESPONSE

LEVEL 6 – UNIT 2 – CONTRACT LAW

SECTION A

| Question Number | Suggested Points for Responses | Max Marks |
|--------------------------|--|-----------------|
| 1 | <p>Responses should include:</p> <ul style="list-style-type: none">• Explanation of damages as remedy in contract law.• Basic rule that damages must not be too remote from the breach.• "Traditional" approach from <i>Hadley v Baxendale</i>.• The first limb: usual course of things.• The second limb: contemplation of both parties.• Development of the law post-<i>Hadley</i>.• Reasoned conclusion. <p>Responses could include:</p> <ul style="list-style-type: none">• Detailed discussion of the two-limbed test.• Detailed consideration of case law post-<i>Hadley</i>. Credit breadth and/or depth. Candidates may discuss e.g. attempts to clarify test, attempts to reframe or rephrase test, overlap with and/or distinction from test in tort, exceptional approaches such as "assumption of responsibility" etc.• Further relevant case law to support the above points.• Arguments as to the future direction of the test. | 25 |
| Question 1 Total: | | 25 marks |
| 2(a) | <p>Responses should include:</p> <ul style="list-style-type: none">• Explanation of doctrine of misrepresentation.• Need for an actionable misrepresentation. | 10 |

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| | <ul style="list-style-type: none"> • General rule requiring misrepresentation to induce the claimant to enter into the contract. • Specific issues relating to reliance, e.g. where C did not know of representation, where C based judgment on other sources/factors, where C aware misrepresentation was untrue etc. • Reasoned conclusion. <p>Responses could include:</p> <ul style="list-style-type: none"> • Further discussion of above principles. • Relevant case law explaining, evidencing and expanding on the above principles. | |
| 2(b) | <p>Responses should include:</p> <ul style="list-style-type: none"> • Explanation of rescission as a remedy. • Basic rules as to how and when rescission will operate in a misrepresentation claim. • Bars to rescission, including e.g. affirmation, delay, effect on third party, <i>restitutio in integrum</i> not possible etc. • Relevant case law relating to above principles. • Reasoned conclusion <p>Responses could include:</p> <ul style="list-style-type: none"> • Equitable nature of doctrine • Effect of different “types” of misrepresentation on available remedies. • Overlap with law of tort and aim of the law in this area. • Consideration of the practical effectiveness of rescission as a remedy in different situations. | 15 |
| Question 2 Total: | | 25 marks |
| 3 | <p>Responses should include:</p> <ul style="list-style-type: none"> • Definition of contract and agreement. • Explanation of offer and acceptance approach to finding agreement. • Explanation of basic rule requiring communication of offer. • Explanation of basic rule requiring communication of acceptance. • Some consideration of how basic rule regarding communication of acceptance may alter in different situations, e.g. postal rule, instantaneous communication etc. • Reasoned conclusion. <p>Responses could include:</p> <ul style="list-style-type: none"> • Theoretical approaches to <i>consensus ad idem</i>. • The central position of agreement in contract law. • Judicial and academic arguments relating to certainty, flexibility and justice. • Objective/subjective distinction. | 25 |

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| | <ul style="list-style-type: none"> • Unilateral contracts and communication. • Acceptance by performance. • Offer and acceptance in digital contracts. | |
| Question 3 Total: | | 25 marks |
| 4(a) | <p>Responses should include:</p> <ul style="list-style-type: none"> • Explanation of doctrine of consideration. • Basic rules as to consideration and need for fresh consideration to support new/amended agreement. • Rule that past consideration is not good consideration. • Basic operation of <i>implied assumpsit</i>: at promisor's request, some remuneration intended, consideration is otherwise valid. • Reasoned conclusion. <p>Responses could include:</p> <ul style="list-style-type: none"> • Detailed discussion of operation of <i>implied assumpsit</i>. • Further relevant case law. • Wider policy debates about the law in this area. | 10 |
| 4(b) | <p>Responses should include:</p> <ul style="list-style-type: none"> • Need for fresh consideration to support new/amended agreement. • Traditional rule that part payment is no satisfaction for the whole. • Exceptions to that rule e.g. "a horse, a hawk, a robe", payment by different method, payment earlier, payment by a third party etc. • Emergence of doctrine of promissory estoppel, <i>Central London Property Trust v High Trees House</i>. • Basic requirements for estoppel to arise: clear promise, reliance, inequitable to resile. • Status as "shield not a sword". • Reasoned conclusion. <p>Responses could include:</p> <ul style="list-style-type: none"> • Historic development of estoppel prior to <i>High Trees</i>. • Further detail as to requirements for estoppel to arise. • Key areas of debate e.g. can estoppel be permanent, can it be a cause of action etc. • Potential application of doctrine of consideration as "practical benefit" to part payment of debt. Courts' reluctance to endorse this. • Further relevant case law. • Wider policy debates about the law in this area. | 15 |
| Question 4 Total: | | 25 marks |

SECTION B

| Question Number | Suggested Points for Responses | Marks (Max) |
|--------------------------|---|-----------------|
| 1 | <p>Responses should include:</p> <ul style="list-style-type: none"> • Identification of general rule of privity and its effect to prevent third parties enforcing contracts or having contracts enforced against them. • Exception to general rule where third party can bring claim in the name of the estate of deceased party to the contract. • Exception to general rule where party can claim for distress and loss of enjoyment of third parties where contract is one for leisure. • Main provisions of Contracts (Rights of Third Parties) Act 1999, especially section 1. • Application of above rules to facts. <p>Responses could include:</p> <ul style="list-style-type: none"> • Detailed explanation of concepts outlined above. • Relevant case law illustrating principles outlined above. | 25 |
| Question 1 Total: | | 25 marks |
| 2(a) | <p>Responses should include:</p> <ul style="list-style-type: none"> • Discussion of distinction between terms and representations. • Legal effect of such distinction. • Relevant tests used for distinguishing between terms and representations, e.g. timing of statement, importance of statement, whether reduced to writing, special knowledge, verification etc. • Application of above rules to facts. <p>Responses could include:</p> <ul style="list-style-type: none"> • Detailed explanation of concepts outlined above. • Intention of the parties as the guiding principle in distinguishing terms and representations. • Relevant case law illustrating principles outlined above. | 13 |
| 2(b) | <p>Responses should include:</p> <ul style="list-style-type: none"> • Identification of relevant statute as Consumer Rights Act 2015. • S9 CRA implied term as to quality. • S10 CRA implied term as to fit for particular purpose. • S52 CRA implied term as to reasonable time to perform services. • Application of above rules to facts. <p>Responses could include:</p> <ul style="list-style-type: none"> • Detailed explanation of concepts outlined above. • Ss19-24 CRA remedies for breach of implied terms. • Relevant case law illustrating principles outlined above. | 12 |
| Question 2 Total: | | 25 marks |

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| 3 | <p>Responses should include:</p> <ul style="list-style-type: none"> • Identification of different ways in which a contract can come to an end. • Discharge by performance and the entire obligations rule. • Partial performance not sufficient. • Concept of substantial performance and availability of set-off. • Prevention of performance/ voluntary acceptance of partial performance. • Identification of requirement for the intention to create legal relations when creating a contract. • Presumptions relating to intention to create legal relations. • Application of above rules to facts. <p>Responses could include:</p> <ul style="list-style-type: none"> • Detailed explanation of concepts outlined above. • <i>Quantum meruit</i> payments. • Relevant case law illustrating principles outlined above. | 25 |
| Question 3 Total: | | 25 marks |
| 4(a) | <p>Responses should include:</p> <ul style="list-style-type: none"> • Identification of use of exemption clauses to exclude or limit liability. • Requirement for clause to be incorporated into contract, interpreted to cover the loss, and compliant with relevant legislation. • Rules relating to incorporation by course of dealing and reasonable notice. • Relevant provisions of Unfair Contract Terms Act 1977. • Application of above rules to facts. <p>Responses could include:</p> <ul style="list-style-type: none"> • Detailed explanation of concepts outlined above. • Relevant case law illustrating principles outlined above. | 18 |
| 4(b) | <p>Responses should include:</p> <ul style="list-style-type: none"> • Requirement for clause to be incorporated into contract, interpreted to cover the loss, and compliant with relevant legislation. • Rules relating to incorporation by signature • Relevant provisions of Unfair Contract Terms Act 1977. • Application of above rules to facts. <p>Responses could include:</p> <ul style="list-style-type: none"> • Detailed explanation of concepts outlined above. • Rules relating to interpretation of exclusion clauses. • Relevant case law illustrating principles outlined above. | 7 |
| Question 4 Total: | | 25 marks |