

## CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

### JUNE 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 June 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

While not quite as high as in the previous session, the pass rate remained well over 50% and thus signalled a continuation of the general improvement in the standard of papers since some particularly low pass rates in 2017-18. A good number of candidates achieved merit marks and while (unsurprisingly) only a very small percentage, some candidates achieved distinction level. The nature of the CILEx Level 6 papers is in itself challenging and students reaching these levels are to be commended.

Overall, candidate performance was therefore good. Most candidates seemed equipped to answer at least three questions to a good standard and it felt that there were fewer candidates failing to provide at least some form of answer to four questions as required. However, it should still be noted that this is probably the most common reason for fail scripts – that a fourth question is not (or not properly) attempted.

Candidates generally were able to cite authority although there remains a tendency to focus on “textbook cases”. A good example would be the question on innominate terms, where most answers seemed unable to go beyond *Bettini v Gye*, *Poussard v Spiers* and then the Hong Kong Fir case. This is often the difference between bare pass and higher marked answers and centres should ensure students are encouraged to really engage with the primary sources of law.

Much of what has been said in previous reports could be repeated in terms of how to improve, with weaker scripts tending to lack some or all of:

- Clear structure (especially in section B, a failure to use IRAC issue-by-issue)
- Legal knowledge
- Ability to explain law/principles clearly and accurately
- Application/analysis of the law

## CANDIDATE PERFORMANCE FOR EACH QUESTION

### Section A

#### Question 1

This question focused on the law of privity. This reflected the bulk of answers to the question which tended to do enough to pass, in describing the basic principle of privity and some of the exceptions to it, but which failed to go on to provide any analysis or evidence of detailed knowledge beyond brief mentions of various exceptions.

As is common with privity questions, knowledge of the Contract (Rights of Third Parties) Act 1999 was mixed at best. Candidates are reminded that simply writing out entire sections of a statute does not obtain any marks and rewriting sections in the candidates' own words gains little credit either.

#### Question 2

This was the most popular Section A question. Most answers were able to explain the traditional categorisation of terms as conditions or warranties and to go on to at least outline some of the characteristics of innominate terms. Weaker answers often struggled to define what an innominate term actually was, relying on pat phrases such as "wait and see terms" or suggesting innominate terms "became" a condition or a warranty.

Most answers did however give a solid definition, but only stronger answers then went on to consider the case law on the topic over the last 50 years and/or provided argument for/against the particular question asked.

#### Question 3

This question on consideration was also relatively popular and answered relatively well. Again, answers tended to fall into three categories similar to those outlined above. Answers below the pass standard failed to properly consider how the law of consideration in regard to pre-existing contractual duties had developed (or focused entirely on related but distinct issues such as part payment of debt or public duties). Answers at the pass standard were descriptive and tended to pursue a straight line from Stilk to Hartley to Roffey Bros. Such answers could usually explain what the decision in Roffey was but did not consider its impact on the law subsequently. Strong answers were able to do this, and the best answers related this to the argument raised by the question.

#### **Question 4**

This was the least popular Section A question, answered by less than a third of candidates, and also received the lowest mean mark of any Section A question (and the second lowest across the paper).

The question required knowledge of both the different 'types' of misrepresentation and the remedies available in such a claim. Poor performance may well have partly been due to the fact that multi-part questions, such as this one, tend to be less well answered. There also seemed to be a real lack of understanding of remedies in particular, with many answers struggling to go beyond simply naming rescission and damages to actually looking at how and when these remedies will operate.

### **Section B**

#### **Question 1**

This question related to offer and acceptance, so it was no surprise that it was both the most popular and the best answered question on the paper. Most answers tended to do relatively well in distinguishing offers from invitations to treat and gave Dina the correct advice. Knowledge of the potential unilateral offer to consider the competition entry was more mixed, although some answers dealt with this point really well. Knowledge of the postal rule was generally good, and most candidates provided at least some relevant discussion regarding Geraint.

#### **Question 2**

This question, on the intention to create legal relations and duress, was one of the less popular and less well answered questions on the paper. Most candidates scoring lower marks on this question tended to be let down by a combination of two issues: a lack of depth to their knowledge of ICLR and physical duress (especially in terms of being able to cite and apply relevant cases) and a failure to understand what is required for economic duress. A considerable proportion of answers suggested that a threat to breach an existing contract was entirely legitimate commercial pressure, a rather unlikely interpretation of the facts of the question. In general, candidates seem overly concerned with whether a party has protested at the expense of considering illegitimate pressure and coercion of the will.

#### **Question 3**

This question tested knowledge of restraint of trade clauses and was generally answered relatively well. However, a number of answers would have been improved by greater use of case law and more consideration of each facet of each clause, rather than a general discussion of "reasonableness". A small but notable minority of candidates confused the topic with exclusion clauses and tried to produce an answer based on this area of law.

#### Question 4

This question attracted the lowest mark mainly due to a considerable number of the candidates attempting it lacking any more than a cursory knowledge of frustration. Candidates are reminded that simply giving a very basic general overview of a doctrine is simply not sufficient at Level 6 and detailed knowledge of an area of law must be demonstrated. In terms of the different elements tested by the question, performance was below expectations on part (a), with a considerable number of candidates unable to even give a basic definition of frustration; relatively good on part (b) with most candidates identifying that frustration was probably self-induced; and as expected part (c) proved most difficult in that it particularly tested knowledge of the legislation in the area.

#### 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 June 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	Max Marks
Q1	<p>An answer which consists of reasoned analysis, breaking down the issue into sections and using supporting evidence for and against.</p> <p>Responses should include:</p> <ul style="list-style-type: none"><li>• Explanation of basic rule of privity</li><li>• Explanation of historic exceptions</li><li>• Discussion of Contract (Rights of Third Parties) Act 1999 Critical analysis as to when and how a third party can enforce a contract</li><li>• Reasoned conclusion</li></ul> <p>Responses could include:</p> <ul style="list-style-type: none"><li>• Reasons for the rule of privity</li><li>• Criticisms of the rule of privity</li><li>• Further detail as to historic exceptions</li><li>• Case law interpreting the 1999 Act</li></ul>	25
<b>Total</b>		<b>25 marks</b>

Question Number	Suggested points for responses	Max Marks
Q2	<p>An answer which consists of reasoned analysis, breaking down the issue into sections and using supporting evidence for and against.</p> <p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Explanation of traditional categorisation of terms as conditions and warranties</li> <li>• Discussion of advantages and disadvantages of the traditional system</li> <li>• Explanation of creation of innominate terms and how such terms will operate</li> <li>• Discussion of advantages and disadvantages of innominate terms</li> <li>• Reasoned conclusion</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Relevant case examples to support argument</li> <li>• Reference to judicial/academic opinion</li> <li>• “Time of the essence” clauses</li> </ul>	25
<b>Total</b>		<b>25 marks</b>
Question Number	Suggested points for responses	Max Marks
Q3	<p>An answer which consists of reasoned evaluation, offering opinion/verdict which is supported with evidence.</p> <p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Explanation of doctrine of consideration</li> <li>• Basic rules as to consideration and need for fresh consideration to support new/amended agreement</li> <li>• “Traditional” approach prior to <u>Williams v Roffey</u></li> <li>• The doctrine of “practical benefit”</li> <li>• Reasoned conclusion</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Detailed discussion of <u>Stilk v Myrick</u> and reclassification in Roffey</li> <li>• Detailed consideration of judgment in Roffey</li> <li>• Key areas of debate e.g. duress, commercial reality etc.</li> <li>• Evaluation of advantages and disadvantages of doctrine of practical benefit</li> <li>• Subsequent case law</li> <li>• Limitations of doctrine as applied to payment of a lesser sum</li> </ul>	25
<b>Total</b>		<b>25 marks</b>

Question Number	Suggested points for responses	Max Marks
Q4(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>Responses should include:</p> <ul style="list-style-type: none"> <li>• Definition and explanation of fraudulent misrepresentation</li> <li>• Definition and explanation of negligent misrepresentation</li> <li>• Definition and explanation of innocent misrepresentation</li> <li>• Analysis of the above</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Further exploration of law relating to each “category”</li> <li>• Historical development of law of misrepresentation</li> <li>• Links to tortious doctrine of negligent mis-statement</li> <li>• Consideration of advantages/disadvantages of each category</li> <li>• Consideration of advantages/disadvantages of categorising different types of misrepresentation</li> <li>• Further critical analysis</li> </ul>	11
Q4(b)	<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>Responses should include:</p> <ul style="list-style-type: none"> <li>• Identification of remedies available for each “category”</li> <li>• Discussion of damages</li> <li>• Discussion of rescission</li> <li>• Reasoned conclusion</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Tortious nature of damages and resulting issues relating to remoteness</li> <li>• Concept of damages in lieu for innocent misrepresentation, and when available</li> <li>• Bars to rescission</li> <li>• Advantages and disadvantages of each remedy</li> <li>• Indemnities</li> <li>• Case law supporting arguments</li> </ul>	14
<b>Total</b>		<b>25 marks</b>

**Section B**

Question Number	Suggested points for responses	Max Marks
Q1	<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>Responses should include:</p> <ul style="list-style-type: none"> <li>• Identification of agreement as key element in formation of contract.</li> <li>• Usual approach to finding agreement: objective and using offer and acceptance</li> <li>• Explanation of invitations to treat and distinction from offers</li> <li>• Explanation of where offer and acceptance occur in a consumer transaction</li> <li>• Explanation of concept of unilateral offer</li> <li>• Explanation of and distinction between counter-offer and request for further information</li> <li>• Explanation of communication of acceptance and postal rule</li> <li>• Explanation of how offers may come to an end</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>• Death of offeror/offeree</li> <li>• Alternative approaches to finding agreement</li> <li>• Discussion of remedies for "loss of a chance"</li> <li>• Relevant case law illustrating principles outlined above</li> </ul>	25
<b>Total</b>		<b>25 marks</b>

Question Number	Suggested points for responses	Max Marks
Q2(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>Responses should include:</p> <ul style="list-style-type: none"> <li>• An explanation of the intention to create legal relations</li> <li>• Explanation of one of the two presumptions</li> <li>• Application of above rules to the facts</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Discussion as to which presumption applies/both presumptions</li> <li>• Relevant case law illustrating principles outlined above</li> </ul>	8
Q2(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>Responses should include:</p> <ul style="list-style-type: none"> <li>• An explanation of the concept of economic duress</li> <li>• Identification of the requirements for economic duress to apply, e.g. coercion of the will, illegitimate pressure etc.</li> <li>• Application of above rules to the facts</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Further discussion of the requirements for economic duress</li> <li>• Relevant case law illustrating principles outlined above</li> </ul>	12
Q2(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>Responses should include:</p> <ul style="list-style-type: none"> <li>• An explanation of the concept of physical duress</li> <li>• Application of above rules to the facts</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Discussion of whether there remains a doctrine of "duress to goods"</li> <li>• Relevant case law illustrating principles outlined above</li> </ul>	5
<b>Total</b>		<b>25 marks</b>

Question Number	Suggested points for responses	Max Marks
Q3	<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>Responses should include:</p> <ul style="list-style-type: none"> <li>• An explanation of restraint of trade clauses</li> <li>• Discussion of how such clauses are prima facie void as a matter of public policy</li> <li>• Discussion of when a clause may be upheld and what will be considered "reasonable"</li> <li>• Relevant considerations as to what is "reasonable", e.g. scope, area, time etc.</li> <li>• Application of above rules to the facts</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• The distinction between contracts for sale of a business and employment contracts</li> <li>• "Non-poaching" agreements and contracts against competition</li> <li>• The "blue pencil" test and severance</li> <li>• Relevant case law illustrating principles outlined above</li> </ul>	25
<b>Total</b>		<b>25 marks</b>
Question Number	Suggested points for responses	Max Marks
Q4(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>Responses should include:</p> <ul style="list-style-type: none"> <li>• A definition and explanation of the doctrine of frustration (N.B. as this is a problem scenario, no credit is given for discussion of the history of the doctrine pre-1943).</li> <li>• An explanation of what can constitute a frustrating event</li> <li>• Discussion of when/if delay can frustrate a contract</li> <li>• Application of the above rules to facts</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Detailed discussion of delay as a potentially frustrating event</li> </ul>	10

	<ul style="list-style-type: none"> <li>• Discussion of whether event was foreseeable/ potential use of a force majeure clause</li> <li>• Discussion of potential alternative claim for breach of contract</li> <li>• Application of Law Reform (Frustrated Contracts) Act 1943 if frustration has occurred</li> <li>• Relevant case law illustrating principles outlined above</li> </ul>	
Q4(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>Responses should include:</p> <ul style="list-style-type: none"> <li>• An explanation of "self-induced" frustration or "fault of a party"</li> <li>• Application of the above rule to facts</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Discussion of potential alternative claim for breach of contract</li> <li>• Relevant case law illustrating principles outlined above</li> </ul>	5
Q4(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>Responses should include:</p> <ul style="list-style-type: none"> <li>• An explanation of what can constitute a frustrating event</li> <li>• Discussion of when subsequent illegality/ government intervention can frustrate a contract</li> <li>• Application of Law Reform (Frustrated Contracts) Act 1943 if frustration has occurred</li> <li>• Application of the above rules to facts</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Discussion of whether event was foreseeable/ potential use of a force majeure clause</li> <li>• Detailed discussion of 1943 Act and "valuable benefit" rule</li> <li>• Relevant case law illustrating principles outlined above</li> </ul>	10
<b>Total</b>		<b>25 marks</b>