

# **Mark Scheme for June 2010**

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All Examiners are instructed that alternative correct answers and unexpected approaches in candidates' scripts must be given marks that fairly reflect the relevant knowledge and skills demonstrated.

Mark schemes should be read in conjunction with the published question papers and the Report on the Examination.

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- 1\* Discuss the significance of the decision in the case of *Olley v Marlborough Court Hotel Ltd* [Source 2 page 3 Special Study Material] to the development of the law on exclusion clauses in contracts. [16]

Mark Levels	AO2
Level 5	11–12
Level 4	9–10
Level 3	7–8
Level 2	4–6
Level 1	1–3

Mark Levels	AO3
Level 4	4
Level 3	3
Level 2	2
Level 1	1

Potential answers **MAY**:

**Assessment Objective 2** (12)

- P1** Identify the major issue in the case a woman suffered loss from a hotel but a clause excluding liability was posted on the bedroom door not explained to her when she signed in and therefore formed the contract with the hotel;
- P2** Recognise the key question for the court – whether the notice on the back of the bedroom door formed part of the contract;
- P3** Discuss the principle stated by the court – such notices are not binding because the party subject to them was not made aware of them when the contract was formed;  
Discuss the reasons given by the court:
- (a) That strict proof of the clause forming part of the contract is required;
  - (b) That intention to create legal relations must also be clearly proved;
  - (c) That this is impossible where one party is ignorant of the clause;
- CP** • (d) That the best way of proving the clause is part of the contract is by a written document, signed by the party to be bound, or by handing them, before or at the time of the contract, a written notice specifying its terms and making it clear to him that the contract is on those terms or a prominent public notice;
- (e) That nothing short of one of these three ways will suffice.
- P4** Compare with any relevant case for development eg *Chapelton v Barry UDC* and/or significance reduced through UCTA and/or UTCCR;
- P5** Credit any reference to incorporation principles.

Candidates will not satisfy the level 5 descriptor without three points well explained/discussed, without discussing the critical point (CP) and without making at least some reference to development (eg point 4).

Candidates will not satisfy the level 3 descriptor without two points well explained or a number of points discussed in less depth.

**Assessment Objective 3** (4)

Present logical and coherent arguments and communicate relevant material in a clear and effective manner using appropriate legal terminology. Reward grammar, spelling and punctuation.

- 2\* In Source 5 [page 6 lines 1-2 Special Study Material] Sylvia Elwes suggests that “The principle of freedom of contract would dictate that the terms of a contract should stand in their entirety.”

Discuss how accurately the above statement reflects the development of judicial and statutory controls on the use of exclusion clauses in consumer contracts.

[34]

Mark Levels	AO1	AO2
Level 5	14-16	13-14
Level 4	11-13	10-12
Level 3	8-10	7-9
Level 2	5-7	4-6
Level 1	1-4	1-3

Mark Levels	AO3
Level 4	4
Level 3	3
Level 2	2
Level 1	1

Potential answers **MAY**:

**Assessment Objective 1****(16)**

Define an exclusion clause (exemption clause) as a term in a contract excluding liability of the party inserting it from liability for contractual breaches and negligence;

Explain the judicial controls – courts only recognise exclusion clauses if they have been incorporated into the contract;

Explain that parties are generally bound by the terms of any agreement they have signed *L'Estrange v Graucob*;

Successful incorporation requires express knowledge at the time the contract was formed *Olley v Marlborough Court Hotel*;

If parties have previously contracted on the same terms they are deemed to have express knowledge so are bound by the clause *Spurling v Bradshaw*;

Except where past dealings were inconsistent then only actual knowledge of the clause is sufficient *McCutcheon v MacBrayne*;

Explain that the party wishing to rely on the clause must have effectively brought it to the attention of the other party *Parker v South Eastern Railway Co*; – information on the back of tickets is generally unacceptable *Chappleton v Barry UDC* – as is contracting with machines *Thornton v Shoe Lane Parking*;

Explain the contra preferentem rule – applies where wording is ambiguous *Andrews Bros (Bournemouth) Ltd v Singer & Co* – and prevents the party inserting the clause from relying on it *Hollier v Rambler Motors*;

Explain that oral misrepresentations about the scope of an exclusion clause in a written contract may invalidate the clause *Curtiss v Chemical Cleaning Co Ltd*;

Explain the main provisions affecting consumer contracts in the Unfair Contract Terms Act:

- By section 2(1) a person cannot exclude liability for death or personal injury caused by his or her negligence;
- Section 6(2) invalidates any exclusion clause inserted in a consumer contract to cover breaches of the implied conditions of description (section 13), satisfactory quality (section 14(2)), fitness for the purpose (section 14(3));
- Under section 7(2) similar principles to those in section 6 apply in respect of goods which are transferred under the Supply of Goods and Services Act 1982.

Credit any reference to the broader scope of The Unfair Terms in Consumer Contracts Regulations.

Candidates will not satisfy the level 5 descriptor without a clear full definition of exclusion clauses, and a clear full explanation of both judicial controls (at least four cases well explained) and both UCTA and UTCCR controls with specific statutory referencing.

Candidates will not satisfy the level 3 descriptor without definition and some explanation of both common law and statutory controls (must be at least UCTA).

**Assessment Objective 2****(14)**

Discuss the fact that both exclusion clauses and limitation clauses can be harsh on the party subject to them, particularly where that party is of weaker bargaining strength, which is why judges set controls in place in the first place;

Consider that there was previously no way of avoiding such clauses because of the maxim caveat emptor (let the buyer beware) – the other party had to try to negotiate a contract without the clause in, and even the Sale of Goods Act 1893 allowed for such clauses – so this reflects the view that the terms should stand in their entirety;

Discuss the fact that the objection of the court is not to parties excluding liability but doing it covertly – so judicial controls focus on successful incorporation which is the same for all terms;

Consider that even with the ticket cases and cases such as *Thornton v Shoe Lane Parking* – this is still the point – the judges want a party relying on an exclusion clause to have made it clear to the consumer – so this does not really contradict the quote;

Comment that the contra preferentum rule is much more intrusive to freedom of contract – here the clause is clearly incorporated but judges will only allow it to have effect if it covers the precise breach – so this goes against the quote;

Consider also that this has led to a 'game of cat and mouse' between draftsmen and the judges;

Discuss the fact that statutory controls go much further than judicial controls because certain clauses will always be invalidated in consumer contracts – so this contradicts freedom of contract;

Comment that much of the impetus for consumer protection in recent times has come from membership of the EU;

Credit any comment on the Regulations going even further than the Act because they apply to all terms not just exclusion clauses and they will not allow any unequal terms between seller and consumer – so this is very intrusive to freedom of contract

Reach any logical conclusion.

Candidates will not satisfy the level 5 descriptor without engaging in a discussion, and so to a logical conclusion, and without focus on the quote (freedom of contract) and in the context of both judicial and both statutory controls.

Candidates will not satisfy the level 4 descriptor without focusing on the quote.

Candidates will not satisfy the level 3 descriptor without a range of points and without referring to both judicial and some statutory controls.

**Assessment Objective 3****(4)**

Present logical and coherent arguments and communicate relevant material in a clear and effective manner using appropriate legal terminology. Reward grammar, spelling and punctuation.

- 3 Consider whether a court would enforce the terms of a contract in the following situations (do not refer to the Unfair Contract Terms Act 1977):
- (a) Alice contracts with Cleanitall to have her armchairs cleaned. She read the contract before signing it and was disturbed by a term stating that 'Cleanitall accept no liability for damage to furniture, howsoever caused'. The salesman assured Alice that this only referred to buttons and frills attached to furniture and since hers had none there was no problem. The cleaning caused bad chemical stains to the armchairs and Cleanitall are refusing to compensate Alice for the cost of new armchairs. (10)
- (b) Baljit buys a cup of coffee for £1 from a vending machine on a railway station but, although a cup comes out there is nothing in it. Baljit complains but the station manager points her to a tiny notice on the side of the vending machine which reads 'See terms and conditions'. The station manager then produces a booklet containing the terms of the contract, which reads 'the proprietor accepts no liability for loss of money if the vending machines are empty at any time'. The station manager refuses to give Baljit her £1 back. (10)
- (c) Carlo is moving house but cannot move into his new house for two months so he contracts with Dabhand Storage to store his household possessions in Dabhand's warehouse. Carlo signs a risk note attached to the contract which reads 'Dabhand Storage accept no liability for damage to property caused by fire'. Through the negligence of one of Dabhand Storage's employees the warehouse burns down and Carlo's property is destroyed. Dabhand Storage is refusing to reimburse Carlo for his loss. (10)

[30]

Mark Levels	AO1	AO2	(a), (b) or (c)
Level 5	9–10	17–20	9 – 10
Level 4	7–8	13–16	7 – 8
Level 3	5–6	9–12	5 – 6
Level 2	3–4	5–8	3 – 4
Level 1	1–2	1–4	1 – 2

Potential answers **MAY**:**Assessment Objective 1** (10)

Explain that an exclusion clause (exemption clause) is a term in a contract aiming to exclude the liability of the party inserting it from liability for his/her contractual breaches or even for negligence;

Explain that courts only recognise exclusion clauses if they have been incorporated into the contract;

Explain, however that parties are generally bound by the terms of any agreement they have signed *L'Estrange v Graucob*;

Explain that the party wishing to rely on the clause must have effectively brought it to the attention of the other party *Parker v South Eastern Railway Co*;

So information on the back of tickets is generally unacceptable *Chappleton v Barry UDC* – as is contracting with machines *Thornton v Shoe Lane Parking*;

Explain the contra preferentum rule – applies where wording is ambiguous *Andrews Bros (Bournemouth) Ltd v Singer & Co* – and prevents the party inserting the clause from relying on it *Hollier v Rambler Motors*;

Explain that a party is prevented from relying on an exclusion clause where the effect of the clause has been orally misrepresented *Curtis v Chemical Cleaning Co.*

**Assessment Objective 2**

**(20)**

In the case of **(a)**:

- P1** • Identify that Alice has signed the contract and so generally would be bound by the exclusion clause under *L'Estrange v Graucob*;
- P2** • Identify, however, that there is a contradiction between what is said in the contract and what the salesman told her;
- CP3** • Identify that there is then an oral misrepresentation which overrides the clause;
- P4** • Identify that Alice should be able to recover the cost of her ruined settee despite the presence of the exclusion of liability in the contract.

In the case of **(b)**:

- P1** • Identify that there is an exclusion clause but it is questionable whether the railway station will be able to rely on it;
- P2** • Consider that the notice on the machine was not in clear view and that Baljit did not have the opportunity to negotiate with the machine;
- CP3** • Consider that the term was not sufficiently brought to her attention as in *Thornton v Shoe Lane Parking*;
- P4** • Discuss the fact that the terms and conditions were in the booklet so that exclusion clause was not brought to Baljit's attention before the contract was formed *Olley v Marlborough Court Hotel* – so the clause is not incorporated in the contract and cannot be relied on by the railway station.

In the case of **(c)**:

- P1** • Identify that Carlo has signed the contract and so generally would be bound by the exclusion clause under *L'Estrange v Graucob*;
- P2** • Discuss the application of the contra preferentum rule;
- CP3** • The wording of the clause is ambiguous – it covers damage caused by fire but does not specifically state that it includes fire caused by negligence *Hollier v Rambler Motors*;
- P4** • Consider that with strict application of the rule in interpreting the clause the court is unlikely to allow Dabhand Storage to rely on the exclusion of liability.

If use of UTCCR is made then credit should be given.

Candidates will not satisfy the level 5 descriptor without three points well explained and without analysing the critical point (CP).

**Annotations****Questions 1 and 3**

P1, P2 etc	to indicate the point identified
CP	to indicate the critical point identified
P1p	to indicate that a part of the point has been identified
R	repetition
}	irrelevant (use for more than a couple of lines of text otherwise use the following)
N/R	not relevant
N/Q	not quite
S/O	sort of

**Question 2**

✓	knowledge (AO1)
def	definition (AO1)
def/s	definition / statute (AO1)
C1 etc	to indicate cases (AO1)
C1+	to indicate a case which has been well developed
AO2	to indicate a bold comment
AO2+	to indicate developed comment / discussion
AO2(LTQ)	to indicate a bold comment that is linked to the quote
AO2(LTQ)+	to indicate a developed comment / discussion that is linked to the quote
LTS	indicates either AO1 / AO2 comment that is linked to the source
R	repetition
}	irrelevant (use for more than a couple of lines of text otherwise use the following)
N/R	not relevant
N/Q	not quite
S/O	sort of

## Advanced GCE Law Levels of Assessment

There are **five** levels of assessment of AOs 1 and 2 in the A2 units. The first four levels are very similar to the four levels for AS units. The addition of a fifth level reflects the expectation of higher achievement by candidates at the end of a two-year course of study. There are **four** levels of assessment of AO3 in the A2 units. The requirements and number of levels differ between AS and A2 units to reflect the expectation of higher achievement by candidates at the end of a two-year course of study.

Level	Assessment Objective 1	Assessment Objective 2	Assessment Objective 3 (includes QWC)
5	Wide ranging, accurate, detailed knowledge with a clear and confident understanding of relevant concepts and principles. Where appropriate candidates will be able to elaborate with wide citation of relevant statutes and case-law.	Ability to identify correctly the relevant and important points of criticism showing good understanding of current debate and proposals for reform <b>or</b> identify all of the relevant points of law in issue. A high level of ability to develop arguments <b>or</b> apply points of law accurately and pertinently to a given factual situation, and reach a cogent, logical and well-informed conclusion.	
4	Good, well-developed knowledge with a clear understanding of the relevant concepts and principles. Where appropriate candidates will be able to elaborate by good citation to relevant statutes and case-law.	Ability to identify and analyse issues central to the question showing some understanding of current debate and proposals for reform <b>or</b> identify most of the relevant points of law in issue. Ability to develop clear arguments <b>or</b> apply points of law clearly to a given factual situation, and reach a sensible and informed conclusion.	An accomplished presentation of logical and coherent arguments and communicates relevant material in a very clear and effective manner using appropriate legal terminology. Reward grammar, spelling and punctuation.
3	Adequate knowledge showing reasonable understanding of the relevant concepts and principles. Where appropriate candidates will be able to elaborate with some citation of relevant statutes and case-law.	Ability to analyse most of the more obvious points central to the question <b>or</b> identify the main points of law in issue. Ability to develop arguments <b>or</b> apply points of law mechanically to a given factual situation, and reach a conclusion.	A good ability to present logical and coherent arguments and communicates relevant material in a clear and effective manner using appropriate legal terminology. Reward grammar, spelling and punctuation.
2	Limited knowledge showing general understanding of the relevant concepts and principles. There will be some elaboration of the principles, and where appropriate with limited reference to relevant statutes and case-law.	Ability to explain some of the more obvious points central to the question <b>or</b> identify some of the points of law in issue. A limited ability to produce arguments based on their material <b>or</b> limited ability to apply points of law to a given factual situation but without a clear focus or conclusion.	An adequate ability to present logical and coherent arguments and communicates relevant material in a reasonably clear and effective manner using appropriate legal terminology. Reward grammar, spelling and punctuation.
1	Very limited knowledge of the basic concepts and principles. There will be limited points of detail, but accurate citation of relevant statutes and case-law will not be expected.	Ability to explain at least one of the simpler points central to the question or identify at least one of the points of law in issue. The approach may be uncritical and/or unselective.	A limited attempt to present logical and coherent arguments and communicates relevant material in a limited manner using some appropriate legal terminology. Reward grammar, spelling and punctuation.

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