

GCE

Law

H418/04: The nature of law and the law of contract

A Level

Mark Scheme for June 2024

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This mark scheme is published as an aid to teachers and students, to indicate the requirements of the examination. It shows the basis on which marks were awarded by examiners. It does not indicate the details of the discussions which took place at an examiners' meeting before marking commenced.

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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PREPARATION FOR MARKING
RM Assessor

1. Make sure that you have accessed and completed the relevant training packages for on-screen marking: RM Assessor Online Training; OCR Essential Guide to Marking.
2. Make sure that you have read and understood the mark scheme and the question paper for this unit. These are posted on the RM Cambridge Assessment Support Portal <http://www.rm.com/support/ca>
3. Log-in to RM Assessor and mark the **required number** of practice responses (“scripts”) and the **number of required** standardisation responses.

YOU MUST MARK 10 PRACTICE AND 10 STANDARDISATION RESPONSES BEFORE YOU CAN BE APPROVED TO MARK LIVE SCRIPTS.

MARKING

1. Mark strictly to the mark scheme.
2. Marks awarded must relate directly to the marking criteria.
3. The schedule of dates is very important. It is essential that you meet the RM50% and 100% (traditional 40% Batch 1 and 100% Batch 2) deadlines. If you experience problems, you must contact your Team Leader (Supervisor) without delay.
4. If you are in any doubt about applying the mark scheme, consult your Team Leader by telephone or the RM messaging system, or by email.
5. **Crossed Out Responses**

Where a candidate has crossed out a response and provided a clear alternative then the crossed out response is not marked. Where no alternative response has been provided, examiners may give candidates the benefit of the doubt and mark the crossed out response where legible.

Rubric Error Responses – Optional Questions

Where candidates have a choice of question across a whole paper or a whole section and have provided more answers than required, then all responses are marked and the highest mark allowable within the rubric is given. Enter a mark for each question answered into RM assessor, which will select the highest mark from those awarded. (The underlying assumption is that the candidate has penalised themselves by attempting more questions than necessary in the time allowed.)

Multiple Choice Question Responses

When a multiple choice question has only a single, correct response and a candidate provides two responses (even if one of these responses is correct), then no mark should be awarded (as it is not possible to determine which was the first response selected by the candidate).

When a question requires candidates to select more than one option/multiple options, then local marking arrangements need to ensure consistency of approach.

Contradictory Responses

When a candidate provides contradictory responses, then no mark should be awarded, even if one of the answers is correct.

Short Answer Questions (requiring only a list by way of a response, usually worth only **one mark per response**)

Where candidates are required to provide a set number of short answer responses then only the set number of responses should be marked. The response space should be marked from left to right on each line and then line by line until the required number of responses have been considered. The remaining responses should not then be marked. Examiners will have to apply judgement as to whether a 'second response' on a line is a development of the 'first response', rather than a separate, discrete response. (The underlying assumption is that the candidate is attempting to hedge their bets and therefore getting undue benefit rather than engaging with the question and giving the most relevant/correct responses.)

Short Answer Questions (requiring a more developed response, worth **two or more marks**)

If the candidates are required to provide a description of, say, three items or factors and four items or factors are provided, then mark on a similar basis – that is downwards (as it is unlikely in this situation that a candidate will provide more than one response in each section of the response space.)

Longer Answer Questions (requiring a developed response)

Where candidates have provided two (or more) responses to a medium or high tariff question which only required a single (developed) response and not crossed out the first response, then only the first response should be marked. Examiners will need to apply professional judgement as to whether the second (or a subsequent) response is a 'new start' or simply a poorly expressed continuation of the first response.

6. Always check the pages (and additional objects if present) at the end of the response in case any answers have been continued there. If the candidate has continued an answer there then add a tick to confirm that the work has been seen.
7. Award No Response (NR) if:
 - there is nothing written in the answer space

Award Zero '0' if:

 - anything is written in the answer space and is not worthy of credit (this includes text and symbols).

Team Leaders must confirm the correct use of the NR button with their markers before live marking commences and should check this when reviewing scripts.
8. The RM Assessor **comments box** is used by your team leader to explain the marking of the practice responses. Please refer to these comments when checking your practice responses. **Do not use the comments box for any other reason.**

If you have any questions or comments for your team leader, use the phone, the RM Assessor messaging system, or e-mail.

9. Assistant Examiners will send a brief report on the performance of candidates to their Team Leader (Supervisor) via email by the end of the marking period. The report should contain notes on particular strengths displayed as well as common errors or weaknesses. Constructive criticism of the question paper/mark scheme is also appreciated.
10. For answers marked by levels of response: Not applicable in F501
- To determine the level** – start at the highest level and work down until you reach the level that matches the answer
 - To determine the mark within the level**, consider the following:

Descriptor	Award mark
On the borderline of this level and the one below	At bottom of level
Just enough achievement on balance for this level	Above bottom and either below middle or at middle of level (depending on number of marks available)
Meets the criteria but with some slight inconsistency	Above middle and either below top of level or at middle of level (depending on number of marks available)
Consistently meets the criteria for this level	At top of level

11. Annotations

Annotation	Meaning
	Accurate explanation
	Relevant case, statute or key thinker
	Evaluation point
	Developed point
	Extended point
	Further extension to the point
	Applied point
	Conclusion
	Not applicable to the question
	Incorrect or unclear
	Nothing to be credited
	Repeated content

Subject Specific Marking Instructions

Section A

1 'Justice is a theoretical goal which is difficult to achieve in practice'. Discuss the extent to which the above statement is reflected in the English legal system.

Assessment Objectives	<p>AO1: Demonstrate knowledge and understanding of the English legal system and legal rules and principles. 8 marks.</p> <p>AO3 1b: Analyse and evaluate legal concepts and issues. 12 marks.</p>
Additional guidance	<p>The 'indicative content' is an example of valid content. Any other valid content is acceptable and should be credited in line with the levels of response. It is not expected for candidates to cover all of the indicative content.</p>

AO1 Indicative content

Answers **may** include:

- Definitions of justice (e.g. Chaim Perelman) and different types of justice: formal justice, substantive justice, distributive justice and corrective justice
- Theories of law and justice e.g. Natural Law theories (Aristotle, Aquinas, Fuller) and Positivist theories (Bentham, Hart and Austin), John Rawls, Marxism, Nozick, Rule of Law, credit any other relevant theories
- Examples of formal justice – legal institutions such as the police, courts, judiciary, juries, and appeals
- Examples of substantive justice – legal rules e.g. fault and defences in criminal law, fault in tort law, rights and freedoms in the Human Rights Act and fairness in contract law
- Examples of distributive justice - the fair allocation of resources e.g. wealth, power, rights, resources such as anti-discrimination laws, minimum wage and reallocation of wealth through taxation and the welfare state
- Examples of corrective justice – sentencing in criminal law e.g. retribution and remedies in tort and contract

Credit any other relevant point(s)

AO3 Indicative content

Answers **may** include:

- Discuss the struggle to create a common definition of justice that is shared by all members of society
- Discuss the varied theories of law and justice and the struggle to create justice in a society
- Credit any other relevant evaluation of the theories of justice

Discuss the **different types of justice** with examples from the whole course of study

- **Formal justice** –evaluate systemic issues within the criminal justice system, such as miscarriages of justice. The findings of the Runciman Commission and the Criminal Cases Review Commission. The Stephen Lawrence case and the findings of the McPherson Report
- Criticisms could be made of the judiciary
- Evaluation of the jury system of ‘trial by peers’ and the concept of jury equity

- **Substantive justice** – discussion of any legal rule and whether it achieves justice
- **Distributive justice** – how the law struggles to create justice for everyone regardless of class, wealth, gender, race or disability
- Discuss how this can lead to inequality e.g. anti-discrimination laws for workers, tax evasion of rich corporations, blue collar crime, institutional racism in the police force following the murder of Stephen Lawrence, institutional misogyny following the Sara Everard case
- **Corrective justice** – in criminal law discuss factors considered in, for example, sentencing, and in civil law discuss, for example, proportionality in loss distribution

- Discuss the theme in the question – based on the evidence above, what evidence is there that the theoretical aims are achieved in practice?

Reach any sensible conclusion

Credit any other relevant point(s).

	AO1	Mark	AO3 1b	Mark
Level 4	Excellent knowledge and understanding of the English legal system, rules and principles. The response is accurate, fully developed and detailed. There will be excellent citation of fully relevant statutes and case law, where appropriate to the question.	7-8	Excellent analysis and evaluation of a wide range of legal concepts and issues. The response is wide ranging and has a sustained focus on the question. The key points are fully discussed and fully developed to reach a valid conclusion where required by the question. There is a well-developed line of reasoning which is clear and logically structured. The information presented is relevant and substantiated.	10-12
Level 3	Good knowledge and understanding of the English legal system, rules and principles. The response is detailed, but not fully developed in places. There will be good citation of mostly relevant statutes and case law, where appropriate to the question.	5-6	Good analysis and evaluation of a range of legal concepts and issues. The response has a consistent focus on the question. Most of the key points are well discussed and well developed to reach a valid conclusion where required by the question. There is a line of reasoning presented with some structure. The information presented is in the most-part relevant and supported by some evidence.	7-9
Level 2	Basic knowledge and understanding of the English legal system, rules and principles. The response is partially developed. There will be some reference to statutes and case law, where appropriate to the question.	3-4	Basic analysis and evaluation of legal concepts and issues. The response is partially focused on the question. Some of the key points are discussed and partially developed to reach a basic conclusion where required by the question. The information has some relevance and is presented with limited structure. The information is supported by limited evidence.	4-6
Level 1	Limited knowledge and understanding of the English legal system, rules and principles. The response will have minimal detail. Citation of relevant statutes and case law is limited.	1-2	Limited analysis of legal concepts and/or issues. The response has limited focus on the question. Discussion of any key points is minimal. The information is basic and communicated in an unstructured way. The information is supported by limited evidence and the relationship to the evidence may not be clear.	1-3
Level 0	No response or no response worthy of credit.	0	No response or no response worthy of credit.	0

2. 'One function of law in society is to provide a mechanism of social control'. Discuss the extent to which law is an effective mechanism of social control.

Assessment Objectives	AO1: Demonstrate knowledge and understanding of the English legal system and legal rules and principles. 8 marks. AO3 1b: Analyse and evaluate legal concepts and issues. 12 marks.
Additional guidance	The 'indicative content' is an example of valid content. Any other valid content is acceptable and should be credited in line with the levels of response. It is not expected for candidates to cover all of the indicative content. 12 marks

AO1 Indicative content

Answers may include:

- Define society and the idea of shared beliefs, culture and language
- Describe the role pluralism plays in our society
- Contextualise the role of law in society through, for example, the elements required in a society to underpin the concept of the rule of law
- Roles of the law according to Lord Bingham – protect people from harm, ensure the common good, settle disputes, act as a persuasive factor in individual decision-making
- Law may shape social norms
- Society can influence law making via protests, strikes and civil disobedience
- Describe the theories underpinning social control through law such as Rosco Pound's social-ethical principles
- Explain the relationship between social control and rules with examples. What are the implications of issues such as controversy, public acceptance, inconsistency and misinterpretation? What leads to the failure of social controls or even a breakdown of social order, and what are the consequences?
- Give examples from criminal law (e.g. self-defence/consent) and/or contract law (e.g. consumer rights) and/ or tort law (e.g. balancing the rights of individuals against the wider social context)
- Explain the relationship between law and society through informal social controls such as family, schools, religious organisations and peer groups (e.g. bystander intervention and citizen patrol groups); and formal social control mechanisms such as prisons, the judiciary and the police
- Explain theories such as consensus and conflict, labelling and left and right realism

Credit any other relevant point(s)

AO3 Indicative content

Answers may include:

- Discuss how effectively the law uses its power to influence and change social norms to reduce the instances of social unrest
- Discuss how effectively the law reacts to civil disobedience e.g. recent increased police powers to deal with protestors and the harsh treatment of rioters
- Discuss examples of when society has managed to influence social change through protest such as gay rights and the abolition of the poll tax
- Discuss the influence of the media in pushing the political agenda of political parties and/or the government
- Discuss the issues surrounding changing moral values in a pluralist society
- Discuss how informal social control is achieved through socialisation to create social norms shared by groups and society as a whole, and how effective this is
- Link to the relevant factors of theories such as consensus and conflict, labelling theory and left/right realism
- Considering the evidence above, discuss how effective the law is as a mechanism of social control

Reach any sensible conclusion

Credit any other relevant point(s).

	AO1	Mark	AO3 1b	Mark
Level 4	Excellent knowledge and understanding of the English legal system, rules and principles. The response is accurate, fully developed and detailed. There will be excellent citation of fully relevant statutes and case law, where appropriate to the question.	7-8	Excellent analysis and evaluation of a wide range of legal concepts and issues. The response is wide ranging and has a sustained focus on the question. The key points are fully discussed and fully developed to reach a valid conclusion where required by the question. There is a well-developed line of reasoning which is clear and logically structured. The information presented is relevant and substantiated.	10-12
Level 3	Good knowledge and understanding of the English legal system, rules and principles. The response is detailed, but not fully developed in places. There will be good citation of mostly relevant statutes and case law, where appropriate to the question.	5-6	Good analysis and evaluation of a range of legal concepts and issues. The response has a consistent focus on the question. Most of the key points are well discussed and well developed to reach a valid conclusion where required by the question. There is a line of reasoning presented with some structure. The information presented is in the most-part relevant and supported by some evidence.	7-9
Level 2	Basic knowledge and understanding of the English legal system, rules and principles. The response is partially developed. There will be some reference to statutes and case law, where appropriate to the question.	3-4	Basic analysis and evaluation of legal concepts and issues. The response is partially focused on the question. Some of the key points are discussed and partially developed to reach a basic conclusion where required by the question. The information has some relevance and is presented with limited structure. The information is supported by limited evidence.	4-6
Level 1	Limited knowledge and understanding of the English legal system, rules and principles. The response will have minimal detail. Citation of relevant statutes and case law is limited.	1-2	Limited analysis of legal concepts and/or issues. The response has limited focus on the question. Discussion of any key points is minimal. The information is basic and communicated in an unstructured way. The information is supported by limited evidence and the relationship to the evidence may not be clear.	1-3
Level 0	No response or no response worthy of credit.	0	No response or no response worthy of credit.	0

Section B

Q3 Advise whether there is an intention to create binding contracts in each of the agreements between Layla and Fizzerz, Yoshi and Sasha.

Assessment Objectives	AO1: Demonstrate knowledge and understanding of the English legal system and legal rules and principles. 8 marks. AO2: Apply legal rules and principles to given scenarios in order to present a legal argument using appropriate legal terminology. 12 marks.
Additional guidance	The 'indicative content' is an example of valid content. Any other valid content is acceptable and should be credited in line with the levels of response. It is not expected for candidates to cover all of the indicative content.

AO1 Indicative content

Answers **may** include:

Explain the requirement of an intention to create legal relations in order to make a contract legally binding

- Explain that where a contract is not clearly domestic or commercial it will be for the person seeking to enforce it to show legal intent, *Sadler v Reynolds*, *Blue v Ashley*

Intention to create legal relations in commercial agreements:

- Explain that in commercial cases there is a presumption that the parties intend to be legally bound – *Esso v Commissioners for Customs & Excise*, *Edwards v Skyways*, *Carlill v Carbolic Smokeball Co.*
- Explain that the commercial presumption can be rebutted if clear words are used to show no legal intent – *Rose and Frank v Crompton*, *Jones v Vernon Pools*

Intention to create legal relations in social and domestic arrangements:

- Explain that contracts made between friends or family members have a presumption that there is no intention to create legal relations – *Jones v Padavatton*, *Balfour v Balfour*
- Explain that the presumption can be rebutted in certain circumstances:
 - Where the parties are not contracting on a domestic basis – *Albert v Motor Insurer's Bureau*, *Snelling v Snelling*
 - Where there has been reliance on the contract – *Parker v Clarke*
 - Where there is an agreement to share winnings and the agreement is clear and specific – *Simpkins v Pays*, *McGowan v Radio Buxton*, *Peck v Lateau*, *Wilson v Burnett*

Credit any other relevant case(s)

Credit any other relevant point(s)

AO2 Indicative content

Answers may include:

Layla and Fizzerz

- Identify that Layla and Fizzerz relationship is business related and so there is a presumption of legal intent
- Identify that the presumption can be rebutted if Layla and Fizzerz contracts show an unambiguous desire to rebut the presumption
- Identify that both sides have given consideration when agreeing to be equally bound
- Identify that the words used 'binding in honour only' would be seen to rebut the presumption
- Conclude that Layla and Fizzerz do not have intention to create a binding contract

Layla and Yoshi

- Identify that Layla and Yoshi are brother and sister so there is a presumption of no legal intent
 - Identify that Yoshi has the burden of proof to show legal intent
 - Identify that the nature of the contract they made is commercial, so the presumption will be rebutted
 - Identify that both sides have given consideration to the agreement
 - Conclude that Layla and Yoshi have the intention to create a binding contract
- Credit a reverse argument that comes to the same conclusion, that the contract is commercial in nature and so there would be a presumption of legal intent, that the fact they are brother and sister would not be enough to rebut the presumption

Layla and Sasha

- Identify that as Layla and Sasha are friends there is a presumption that they do not intend to be legally bound
 - Identify that this presumption can be rebutted if there is evidence that the agreement to share winnings was clear and specific enough
 - Identify in this case the agreement to share winnings can be seen as vague, and as they have never had to put this into practice before there is no evidence that the parties had a common understanding and showed a willingness to share winnings in a specific way
 - Conclude that there is no intention to create a legally binding agreement
- Credit an alternative argument that the parties were specific enough in their agreement to share winnings and that both sides have given consideration in agreeing to be equally bound, so there is legal intent.

Reach any sensible conclusion

Credit any other relevant point.

	AO1	Mark	AO2 1a/1b	Mark
Level 4	Excellent knowledge and understanding of the English legal system, rules and principles. The response is accurate, fully developed and detailed. There will be excellent citation of fully relevant statutes and case law.	7–8	Excellent application of legal rules to a given scenario. Excellent presentation of a legal argument which is accurate, fully developed and detailed. Fully appropriate legal terminology is used.	10–12
Level 3	Good knowledge and understanding of the English legal system, rules and principles. The response is detailed, but not fully developed in places. There will be good citation of mostly relevant statutes and case law.	5–6	Good application of legal rules to a given scenario. Good presentation of a legal argument which is detailed but not fully developed in places. Appropriate legal terminology is used.	7–9
Level 2	Basic knowledge and understanding of the English legal system, rules and principles. The response may lack detail in places and is partially developed. There will be some reference to statutes and case law.	3–4	Basic application of legal rules to a given scenario. Basic presentation of a legal argument which may lack detail in places and is partially developed. Some appropriate legal terminology is used.	4–6
Level 1	Limited knowledge and understanding of the English legal system, rules and principles. The response will have minimal detail. Citation of statutes and case law is limited.	1–2	Limited application of legal rules to a given scenario. Limited presentation of a legal argument which has minimal detail and is unstructured and/or unclear. Minimal legal terminology is used.	1–3
Level 0	No response or no response worthy of credit.	0	No response or no response worthy of credit.	0

Q4 Advise whether each of Jane's contracts with Heidi, Zippy and Bagit can be made void for economic duress.

Assessment Objectives	AO1: Demonstrate knowledge and understanding of the English legal system and legal rules and principles. 8 marks. AO2: Apply legal rules and principles to given scenarios in order to present a legal argument using appropriate legal terminology. 12 marks.
Additional guidance	The 'indicative content' is an example of valid content. Any other valid content is acceptable and should be credited in line with the levels of response. It is not expected for candidates to cover all of the indicative content.

AO1 Indicative content

Answers may include:

Explain the consequences of economic duress on a contract - that it becomes voidable

Explain the threats that could amount to economic duress:

- That economic duress is pressure which goes beyond the usual rough and tumble of business dealings – *The Siboen and Sibotre, Interfoto v Stiletto Visual Programmes*
- That there must be an unlawful threat, e.g. to breach a contract – *Atlas Express v Kafco*
- That ordinary commercial pressure will not amount to an unlawful threat – *CTN Cash and Carry v Gallagher, Times Travel v Pakistan Airlines*
- That a legitimate threat could be unlawful if made in bad faith – *Times Travel v Pakistan Airlines, Progress Bulk Carriers Ltd v Tube City*

Explain that the threat must have vitiated the consent of the other party and left them with no realistic alternative but to comply with the demand – *Atlas Express v Kafko, Pao On v Lau Yiu Long*

Explain the other factors that will be taken into account when deciding whether there has been economic duress:

- That the party seeking to claim economic duress must have protested at the time – *Pao On v Lau Yiu Long, DSND Subsea v Petroleum Geo-Services*
- Explain that if a party seeks legal advice before complying with a threat they may be seen as having taken a business decision and be unable to claim duress – *Pao On v Lau Yiu Long*
- Explain that the right to end a contract for duress may be lost through lapse of time – *The Atlantic Baron*

Credit any other relevant case(s)

Credit any other relevant point(s)

AO2 Indicative content

Answers may include:

Jane and Heidi

- Identify that Heidi must have made an unlawful threat
- Identify that it would not be seen as unlawful in this case as Heidi does not indicate that she will take unlawful action, merely that she will not make new contracts in the future
- Identify that Heidi's threat vitiates Jane's consent and leaves her with little choice
- Conclude that although Jane is left with no choice, Heidi's actions will not amount to economic duress
- Credit any further application of the reasoning in *Times Travel* – that if Heidi has manipulated Jane into a position of vulnerability, Heidi's threat could be seen as illegitimate even though lawful

Jane and Zippy

- Identify that Zippy have made an unlawful threat when they say they will break the contract and not deliver Jane's goods
- Identify that Zippy's threat caused Jane to agree to pay extra
- Identify that due to the threat of disruption to her business she is faced with no real alternative but to pay the extra
- Identify that Jane has consulted with her solicitors and this would mean a finding of economic duress is less likely as she will be seen as having taken a business decision
- Identify that she did not protest before agreeing to pay the extra and this will also mean that the courts will be less likely to find economic duress
- Come to any reasoned conclusion

Jane and Bagit

- Identify that Bagit's threat to breach the contract could be seen as illegitimate
- Identify that there is no indication that Jane was left with no alternative course of action as she merely didn't have time to look for another supplier
- Identify that as a result of this threat Jane has agreed to pay extra
- Identify that Jane has waited 18 months before complaining and so she will be prevented from claiming duress through lapse of time
- Conclude that Jane will not be able to claim economic duress

Reach any sensible conclusion

Credit any other relevant point.

	AO1	Mark	AO2 1a/1b	Mark
Level 4	Excellent knowledge and understanding of the English legal system, rules and principles. The response is accurate, fully developed and detailed. There will be excellent citation of fully relevant statutes and case law.	7–8	Excellent application of legal rules to a given scenario. Excellent presentation of a legal argument which is accurate, fully developed and detailed. Fully appropriate legal terminology is used.	10–12
Level 3	Good knowledge and understanding of the English legal system, rules and principles. The response is detailed, but not fully developed in places. There will be good citation of mostly relevant statutes and case law.	5–6	Good application of legal rules to a given scenario. Good presentation of a legal argument which is detailed but not fully developed in places. Appropriate legal terminology is used.	7–9
Level 2	Basic knowledge and understanding of the English legal system, rules and principles. The response may lack detail in places and is partially developed. There will be some reference to statutes and case law.	3–4	Basic application of legal rules to a given scenario. Basic presentation of a legal argument which may lack detail in places and is partially developed. Some appropriate legal terminology is used.	4–6
Level 1	Limited knowledge and understanding of the English legal system, rules and principles. The response will have minimal detail. Citation of statutes and case law is limited.	1–2	Limited application of legal rules to a given scenario. Limited presentation of a legal argument which has minimal detail and is unstructured and/or unclear. Minimal legal terminology is used.	1–3
Level 0	No response or no response worthy of credit.	0	No response or no response worthy of credit.	0

Q5*/8* Discuss the extent to which the rules on incorporation of terms are satisfactory and suggest ideas for reform.

Assessment Objectives	AO1: Demonstrate knowledge and understanding of the English legal system and legal rules and principles. 8 marks. AO2: Apply legal rules and principles to given scenarios in order to present a legal argument using appropriate legal terminology. 12 marks.
Additional guidance	The 'indicative content' is an example of valid content. Any other valid content is acceptable and should be credited in line with the levels of response. It is not expected for candidates to cover all of the indicative content.

AO1 Indicative content

Answers may include:

Explain the rules for incorporation of terms

- Explain that terms must be prominent, clear and available at the time of contracting - *Thornton v Shoe Lane Parking*
- Explain that any harsh or unusual terms must be made clear - *Interfoto v Stiletto Visual Programmes*

Explain the rules for incorporation of pre-contractual statements as terms of the contract

- Explain that a statement is more likely to be incorporated as a term if it is:
 - Of particular importance - *Bannerman v White*
 - Where the party making the statement has more knowledge - *Schawel v Reade, Oscar Chess v Williams*

Explain when terms will be implied into a contract

- Through the Consumer Rights Act 2015 which implies terms that goods must be satisfactory quality, fit for purpose and as described
- Through common law implies terms if required for business efficacy - *The Moorcock*, or the officious bystander test - *Shirlaw v Southern Foundries*

Explain the rules for incorporation of terms by course of dealings

- Explain that a term will be incorporated by course of dealings if its use is regular and consistent, even if it comes after acceptance - *Kendall v Lillico*
- Explain that this is less likely to be the case where one party acts as a consumer - *Hollier v Rambler Motors*
- Explain that this will be more likely if the parties are both in the same industry - *British Crane Hire v Ipswich Plant Hire*

Credit exclusion clauses as they relate to incorporation of terms but not classification or statutory regulation

Do not credit classification of terms (conditions, warranties and innominate terms)

Credit any other relevant case(s)

Credit any other relevant point(s)

AO3 Indicative content

Answers **may** include:

Evaluate the rules for incorporation for contract terms

- Discuss whether the rule that terms must be available before acceptance is satisfactory. The rule makes sense as parties must be clear about the terms of the deal they are making
- Discuss whether the requirement that harsh or unusual terms must be particularly prominent is satisfactory. The rule interferes with freedom of contract but protects parties from unscrupulous traders
- Discuss whether incorporation by a course of dealings is satisfactory. This probably makes sense in a commercial contract when the parties are clear about the terms they are expecting in a contract but would be unfair in a consumer contract
- Discuss whether common law implied terms are satisfactory. They interfere with the freedom of the parties to make their own contracts and they are rarely used so this may indicate that the courts are usually unwilling to interfere with the deal struck by the parties
- Discuss whether statutory implied terms are satisfactory. It is submitted that they are as they provide essential consumer protection
- Discuss whether it is satisfactory to allow pre-contractual statements to become a term of the contract. The rules are vague as several different rules have to be compared. Also, since the Misrepresentation Act 1967 pre-contractual statements are rarely argued to be terms of the contract as they would be pursued as misrepresentations instead

Make suggestions for reform:

- Abolish common law implied terms
- Abolish the rules for incorporation of pre-contractual statements as a contract and make them actionable as misrepresentations only
- Credit any other suggestion for reform which is clearly explained
- Candidates can be credited for more than 1 suggestion for reform
- At least 1 suggestion for reform is required in order to achieve Level 4 marks for AO3

Draw any reasonable conclusion

Credit any other relevant point.

	AO1	Mark	AO2 1a/1b	Mark
Level 4	Excellent knowledge and understanding of the English legal system, rules and principles. The response is accurate, fully developed and detailed. There will be excellent citation of fully relevant statutes and case law.	7–8	Excellent application of legal rules to a given scenario. Excellent presentation of a legal argument which is accurate, fully developed and detailed. Fully appropriate legal terminology is used.	10-12
Level 3	Good knowledge and understanding of the English legal system, rules and principles. The response is detailed, but not fully developed in places. There will be good citation of mostly relevant statutes and case law.	5–6	Good application of legal rules to a given scenario. Good presentation of a legal argument which is detailed but not fully developed in places. Appropriate legal terminology is used.	7-9
Level 2	Basic knowledge and understanding of the English legal system, rules and principles. The response may lack detail in places and is partially developed. There will be some reference to statutes and case law.	3–4	Basic application of legal rules to a given scenario. Basic presentation of a legal argument which may lack detail in places and is partially developed. Some appropriate legal terminology is used.	4–6
Level 1	Limited knowledge and understanding of the English legal system, rules and principles. The response will have minimal detail. Citation of statutes and case law is limited.	1–2	Limited application of legal rules to a given scenario. Limited presentation of a legal argument which has minimal detail and is unstructured and/or unclear. Minimal legal terminology is used.	1–3
Level 0	No response or no response worthy of credit.	0	No response or no response worthy of credit.	0

Q6 Advise whether Ryan has completed sufficient performance to claim any money for his work in the kitchen and bedrooms and whether Dev was entitled to cancel the ballroom contract.

Assessment Objectives	AO1: Demonstrate knowledge and understanding of the English legal system and legal rules and principles. 8 marks. AO2: Apply legal rules and principles to given scenarios in order to present a legal argument using appropriate legal terminology. 12marks.
Additional guidance	The 'indicative content' is an example of valid content. Any other valid content is acceptable and should be credited in line with the levels of response. It is not expected for candidates to cover all of the indicative content.

AO1 Indicative content

Answers **may** include:

Explain the rules of performance of a contract

- That payment cannot be claimed unless performance is both complete - *Cutter v Powell* and exact - *Re Moore and Landauer*

Explain relevant exceptions to the rule:

- That a contract may be severable (or divisible) into different obligations, each of which may be seen as a different obligation - *Taylor v Webb*
- That the contract may have been substantially performed, and so a claim may be made for the contract price minus an amount for fixing whatever work needs to be done - *Hoenig v Isaacs*
- That the substantial performance rule will not apply where there is no real benefit from the contract or the work is dangerous - *Bolton v Mahadeva*
- That the other party may accept partial performance, *Roberts v Havelock*
- That when a party offers to perform the contract within the specified time this will discharge their obligations under the contract - *Startup v Macdonald*

Explain the rules on time of performance:

- That where a time has been made a condition of the contract, late performance will be a repudiatory breach - *Astea v Time Computers*
- That a party may give reasonable notice that the other has to perform within a certain time - *Rickards v Oppenheim*
- That otherwise late performance is breach of an innominate term and repudiation depends on the severity of the consequences - *Hong Kong Fir Shipping v Kawasaki Kisen Kaisha*

Explain the rules on anticipatory breach

- That if a party indicates that they are not going to perform a contract the other party may repudiate and take action immediately - *Hochster v De La Tour*

Do not credit answers based on the Consumer Rights Act implied terms as this is not a consumer contract

Credit any other relevant case(s)
Credit any other relevant point(s)

AO2 Indicative content

Answers **may** include:

Ryan and the kitchen light

- Identify that performance is not complete or exact and so Ryan may not be able to claim payment for the work to the kitchen
- Identify that as the work is only a very small part of the contract with regard to the work in the kitchen, that most of the work could be said to be substantially performed
- Identify that the unfinished work may not deprive the hotel of substantially the whole benefit of the contract
- Conclude that Ryan can claim payment for the work minus an amount that it will cost the hotel to get someone else to finish the work

Ryan and the bedrooms

- Identify that performance is not complete and so Ryan may not be able to claim payment for the bedrooms
- Identify that too much remains to be done for this to be substantial performance
- Identify that the hotel has not agreed to partial performance
- Identify that the contract for the bedrooms could be seen as severable as each one is a different job and the benefit to the hotel does not depend on all the rooms being finished
- Identify that this may not be the case however as a single price was given for the electrical work to the rooms, not a price per room
- Come to a reasoned conclusion

Ryan and the ballroom

- Identify that if the work could have done by 1st October Dev has no right to terminate Ryan's contract
- Identify that It will be an anticipatory breach if it has become impossible for Ryan to perform the ballroom contract in time
- Identify that if so the hotel need not wait until the date for completion and Dev can end the contract
- Identify that Dev can be seen as giving reasonable notice when he asks Ryan to start work within the next week
- Identify that Ryan's failure to start will be seen as a repudiatory breach
- Come to a reasoned conclusion

Reach any sensible conclusion
Credit any other relevant point.

	AO1	Mark	AO2 1a/1b	Mark
Level 4	Excellent knowledge and understanding of the English legal system, rules and principles. The response is accurate, fully developed and detailed. There will be excellent citation of fully relevant statutes and case law.	7–8	Excellent application of legal rules to a given scenario. Excellent presentation of a legal argument which is accurate, fully developed and detailed. Fully appropriate legal terminology is used.	10-12
Level 3	Good knowledge and understanding of the English legal system, rules and principles. The response is detailed, but not fully developed in places. There will be good citation of mostly relevant statutes and case law.	5–6	Good application of legal rules to a given scenario. Good presentation of a legal argument which is detailed but not fully developed in places. Appropriate legal terminology is used.	7-9
Level 2	Basic knowledge and understanding of the English legal system, rules and principles. The response may lack detail in places and is partially developed. There will be some reference to statutes and case law.	3–4	Basic application of legal rules to a given scenario. Basic presentation of a legal argument which may lack detail in places and is partially developed. Some appropriate legal terminology is used.	4–6
Level 1	Limited knowledge and understanding of the English legal system, rules and principles. The response will have minimal detail. Citation of statutes and case law is limited.	1–2	Limited application of legal rules to a given scenario. Limited presentation of a legal argument which has minimal detail and is unstructured and/or unclear. Minimal legal terminology is used.	1–3
Level 0	No response or no response worthy of credit.	0	No response or no response worthy of credit.	0

Q7 Advise whether Flashlight can obtain any remedies to force Amos, Sam or Taylor to fulfil their contracts. Assume each of the contracts is binding.

Assessment Objectives	<p>AO1: Demonstrate knowledge and understanding of the English legal system and legal rules and principles. 8 marks.</p> <p>AO2: Apply legal rules and principles to given scenarios in order to present a legal argument using appropriate legal terminology. 12 marks.</p>
Additional guidance	The 'indicative content' is an example of valid content. Any other valid content is acceptable and should be credited in line with the levels of response. It is not expected for candidates to cover all of the indicative content.

AO1 Indicative content

Answers **may** include:

Explain when specific performance **will** be awarded:

- It may be awarded where damages are inadequate e.g., for unique property such as land
- It will be awarded where damages would only be nominal - *Beswick v Beswick*

Explain when specific performance **will not** be awarded:

- Explain that specific performance is an equitable remedy and it will only be awarded at the court's discretion
- In contracts which require monitoring of an ongoing obligation - *Ryan v Mutual Tontine*
- Where it would cause hardship - *Patel v Ali*
- Where the contract was obtained unfairly or through taking advantage of the other party's mistake - *Walters v Morgan*
- In contracts of service - *Chappell and Others v Times Newspapers Ltd and others*, unless the employment relationship has not broken down *Irani v Southampton AHA*

Explain when injunctions **will** be awarded:

- Injunctions may be awarded to prevent a future breach of contract or to force someone to do something - *Lauritzencool v Lady Navigation*

Explain when injunctions **will not** be awarded:

- Where it would be unfair to the defendant - *Shell v Lostock Garage*
- If the effect is to give specific performance where it would not normally be awarded e.g. an employment contract - *Page One Records v Britten*

See comment in Ao2 for awarding marks for a discussion of damages. These can be credited as both AO1 and AO2.

Credit any other relevant case(s)

Credit any other relevant point(s)

AO2 Indicative content

Answers may include:

Flashlight and Amos

- Identify that specific performance may be suitable as land is unique
- Identify that specific performance is an equitable remedy and will not be awarded when it would be unconscionable/unfair
- Identify that if Flashlight has tricked Amos into selling the land for a low price, then this will be seen as unfair
- Conclude that Flashlight will not be able to get an order of specific performance to order Amos to sell the land

- Credit an alternative argument that there is no requirements for flashlight to disclose their reason for buying the property and so specific performance could be awarded

Flashlight and Sam

- Identify that specific performance may be awarded when the contract is for something unique
- Identify that a piece of artwork is unique and damages would not be an appropriate remedy
- Identify that just because Sam could get more money for the art from someone else, this does not make the contract unfair
- Conclude that Flashlight will be able to get an order of specific performance to force Sam to sell them the sculpture

Flashlight and Taylor

- Identify that specific performance will not normally be ordered in contracts for services or employment
- Identify that it can be if the relationship has not broken down
- Identify that in this contract the relationship has broken down as Flashlight have argued with Taylor
- Conclude that Flashlight will not be able to get an order of specific performance to order Taylor to complete the contract

- Credit any comments that flashlight may seek an injunction to prevent Sam selling the sculpture to someone else, or prevent Taylor from working for someone else, and that Flashlight may not be able to obtain the junction if it would amount to specific performance by the back door
- Credit a discussion of remedies available to Flashlight, having made a binding contract with Amos, Sam or Taylor, including the availability of damages. This could include the different basis on which damages could be claimed and the duty to mitigate. No credit is available for a discussion of remoteness.

Reach any sensible conclusion
Credit any other relevant point.

	AO1	Mark	AO2 1a/1b	Mark
Level 4	Excellent knowledge and understanding of the English legal system, rules and principles. The response is accurate, fully developed and detailed. There will be excellent citation of fully relevant statutes and case law.	7–8	Excellent application of legal rules to a given scenario. Excellent presentation of a legal argument which is accurate, fully developed and detailed. Fully appropriate legal terminology is used.	10-12
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Level 0	No response or no response worthy of credit.	0	No response or no response worthy of credit.	0

Q8* SEE ABOVE FOR Q5* – SAME QUESTION AND MARK SCHEME.

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