

GCE

Law

Advanced GCE

Unit **G156**: Law of Contract Special Study

Mark Scheme for June 2013

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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.

OCR will not enter into any discussion or correspondence in connection with this mark scheme.

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Annotation	Meaning
	Q1 & 3 AP1
	Q1 & 3 AP2
	Q1 & 3 AP3
	Q1 & 3 AP4
	Q1 & 3 AP5 onwards; Q2 synopticism
	Q2 AO2
	Q1 & 3 Critical Point Q2 Bald Case
	Q3 Conclusion
	ALL Not correct / Page checked for response
	Q1 Linked case Q2 Link to source
	ALL Not Relevant or Too vague Also no response or response achieves no credit
	ALL Repetition/or 'noted' where a case has already been used in the response
	Q2 Developed Case
	Q1 & 3 AO1

Before you commence **marking each question** you must ensure that you are familiar with the following:

- the requirements of the specification
- these instructions
- the exam questions (found in the exam paper which will have been emailed to you along with this document)
- levels of assessment criteria *₁ (found in the 'Levels of Assessment' grid at the back of this document)
- question specific indicative content given in the 'Answer' column*₂
- question specific guidance given in 'Guidance' column*₃
- the 'practice' scripts*₄ provided in Scoris and accompanying commentaries

- *₁ The levels of assessment criteria (found in the 'Levels of Assessment' grid) reflect the expectation of achievement for each Assessment Objective at every level.
- *₂ The indicative content in the 'Answer' column provides details of points that candidates **may** be likely to make. It is **not** exhaustive or prescriptive and points not included in the indicative content, but which are valid within the context of the question, are to be credited. Similarly, it is possible for candidates to achieve top level marks without citing all the points suggested in the scheme.
- *₃ Included in the 'Guidance' column are the number of marks available for each assessment objective contained within the question. It also includes 'characteristics' which a response in a particular level is **likely** to demonstrate. For example, "a level 4 response is likely to include accurate reference to all 5 stages of x with supporting detail and an accurate link to the source". In some instances an answer may not display all of the 'characteristics' detailed for a level but may still achieve the level nonetheless.
- *₄ The 'practice' scripts are live scripts which have been chosen by the Principal Examiner (and senior examining team). These scripts will represent most types of responses which you will encounter. The marks awarded to them and accompanying commentary (which you can see by changing the view to 'definitive marks') will demonstrate how the levels of assessment criteria and marking guidance should be applied.

As already stated, neither the indicative content, 'characteristics' or practice scripts are prescriptive and/or exhaustive. It is imperative that you remember at all times that a response which:

- differs from examples within the practice scripts; or,
- includes valid points not listed within the indicative content; or,
- does not demonstrate the 'characteristics' for a level

may still achieve the same level and mark as a response which does all or some of this. Where you consider this to be the case you should discuss the candidate's response with your supervisor to ensure consistent application of the mark scheme.

Awarding Assessment Objectives 1 and 2

To award the level for the AO1 or AO2 (some questions may contain both AO1 and AO2 marks) use the levels of assessment criteria **and** the guidance contained within the mark scheme to establish which level the response achieves. As per point 10 of the above marking instructions, when determining which **level** to award start at the **highest*** level and work down until you reach the level that matches the answer.

Once you have established the correct level to award to the response you need to determine the mark within the level. The marks available for each level differ between questions. Details of how many marks are available per level are provided in the Guidance column. Where there is more than one mark available within a level you will need to assess where the response 'sits' within that level. Guidance on how to award marks within a level is provided in point 10 of the above marking instructions, with the key point being that you start at the **middle*** of each level and work outwards until you reach the **mark** that the response achieves.

Answers, which contain no relevant material at all, should receive no marks.

A
w * Remember: when awarding the level you work from top downwards, when awarding the mark you work from the middle outwards.

Awarding Assessment Objective 3

AO3 marks are awarded based on the marks achieved for either AO1, AO2 or in some cases, the total of AO1 and AO2. You must refer to each question's mark scheme for details of how to calculate the AO3 mark.

Blank pages and missed answers

Sometimes candidates will skip a few pages in their answer booklet and then continue their answer. To be sure you have not missed any candidate response when you come to mark the last question in the script you must check every page of the script and annotate any blank pages with:



This will demonstrate that every page of a script has been checked.

You must also check any additional items eg A, A1 etc, which the candidate has chosen to use. Before you begin marking, use the Linking Tool to 'Link' any additional page(s) to the relevant question(s) and mark the response as normal.

Question			Answer	Marks	Guidance													
1*			Potential answers may :	12	<table><tr><th>AO2 Levels</th><th>AO2 Marks</th></tr><tr><td>5</td><td>11–12</td></tr><tr><td>4</td><td>9–10</td></tr><tr><td>3</td><td>7–8</td></tr><tr><td>2</td><td>4–6</td></tr><tr><td>1</td><td>1–3</td></tr></table>		AO2 Levels	AO2 Marks	5	11–12	4	9–10	3	7–8	2	4–6	1	1–3
			AO2 Levels		AO2 Marks													
5	11–12																	
4	9–10																	
3	7–8																	
2	4–6																	
1	1–3																	
			Assessment Objective 2 – Analysis, evaluation and application		Marks should be awarded as follows:													
			Explain the critical point (CP) of the case: the House of Lords dismissed the music publishers’ appeal, holding that the clause was in restraint of trade for being against the public interest.		CP – Max 3 marks Linked to the material point/ratio – 1 mark is available for the facts of the case but these are not essential to get full marks. An accurate source and line reference is adequate for the facts of the case to receive the one mark available. Where given, the ratio of the case needs to be given an AO2 slant to achieve a mark.													
			Link this case with another relevant case (LC) for development such as: <i>Nordenfelt v Maxim Nordenfelt</i> , <i>Mason v Provident Clothing & Supply Co Ltd</i> , <i>Esso Petroleum v Harper’s Garage</i> , <i>Watson v Prager</i>		AP – Max 6 marks for any Applied Point(s) These may be six single points, three points which are developed, two points which are well-developed or a combination of these up to a maximum of 6 marks													
			Discuss the case analytically (AP), for example making points such as:		LC – Max 3 marks for a relevant, linked case The case must be linked for the purpose of showing development. Marks may be achieved as follows, for example: 1 mark for the name of the case, 1 mark for some development and 1 mark for a link to the question													
			AP1 In-depth discussion of the ratio including for example: a discussion of the public interest in RoT cases; the importance of this case as a HoL binding precedent															
			AP2 A major development is shown in courts’ willingness to scrutinise standard form contracts and reject common use as a public interest justification															
			AP3 This is an example of the basic rules in <i>Nordenfelt</i> being developed by being applied flexibly to a different situation: an exclusive service agreement															
			AP4 It shows the courts becoming willing to use relative bargaining power in their analysis and is arguably very paternalistic															
			AP5 Notably, the court did <i>not</i> engage in an economic analysis of the contract (which may have led to a different outcome)															
			AP6 Any other relevant analytical point.															

Question			Answer	Marks	Guidance											
			Assessment Objective 3 – Communication and presentation Present logical and coherent arguments and communicate relevant material in a clear and effective manner using appropriate legal terminology. Reward grammar, punctuation and spelling.	4	<table><tr><th>AO2 Marks</th><th>AO3 Marks</th></tr><tr><td>10–12</td><td>4</td></tr><tr><td>7–9</td><td>3</td></tr><tr><td>4–6</td><td>2</td></tr><tr><td>1–3</td><td>1</td></tr></table>		AO2 Marks	AO3 Marks	10–12	4	7–9	3	4–6	2	1–3	1
AO2 Marks	AO3 Marks															
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4–6	2															
1–3	1															

Question			Answer	Marks	Guidance												
2*			<p>Potential answers may:</p> <p>Assessment Objective 1 – Knowledge and understanding</p> <p>Explain the basic rules regarding restraint of trade in contract law:</p> <ul style="list-style-type: none">• The restraint of trade doctrine is a common law control of clauses which limit the economic liberty of the contracting party• A number of situations are accepted as being subject to the doctrine but the list is not closed: (<i>Esso Petroleum v Harper’s Garage</i>)<ul style="list-style-type: none">– Sale of a business and its goodwill (<i>Nordenfelt v Maxim Nordenfelt</i>),– Post-employment restrictions (<i>Mason v Provident Clothing, Herbert Morris v Saxelby, Office Angels v Rainer-Thomas</i>)– Exclusive dealing arrangements / ‘Solus’ contracts (<i>Esso, Alec Lobb v Total Oil, A Schroeder Music Publishing v Macaulay</i>)– Cartels (principally under statutory regulation – Competition Act 1988; TFEU Arts 101, 102)– Trade Union agreements (Trade Union and Labour Relations (Consolidation) Act 1992)• RoT clauses are <i>prima facie</i> void due to being contrary to public policy but may be enforceable if they protect a legitimate interest and are reasonable in the interests of the parties and the public (<i>Nordenfelt</i>)• The reasonableness is judged at the time of contracting (<i>Shell UK v Lostock Garage</i>)• The covenantee has the burden to prove that it is reasonable in the interests of the parties (<i>Mason</i>), the covenantor then has the burden to prove that it is unreasonable in the interests of the public (<i>Herbert Morris</i>)• Consideration is relevant to the question of reasonableness (<i>Nordenfelt</i>)• Relative bargaining strength is relevant to the question of reasonableness (<i>A Schroeder Music Publishing</i>)	16	<table><tr><th>AO1 Levels</th><th>AO1 Marks</th></tr><tr><td>5</td><td>14–16</td></tr><tr><td>4</td><td>11–13</td></tr><tr><td>3</td><td>8–10</td></tr><tr><td>2</td><td>5–7</td></tr><tr><td>1</td><td>1–4</td></tr></table> <p>Level 5 Responses are unlikely to achieve level 5 without wide ranging, accurate detailed knowledge with a clear and confident understanding of relevant concepts and principles of the law in this area. This would include wide ranging, developed explanations and wide ranging, developed definitions of this area of law to include statutory/common law provisions, where relevant. Responses are unlikely to achieve level 5 without including 8 relevant cases of which 6 are developed*. Responses are likely to use material both from within the pre-release materials (LTS) and from beyond the pre-release materials which have a specific link to the area of law.</p> <p>Level 4 Responses are unlikely to achieve level 4 without good, well-developed knowledge with a clear understanding of the relevant concepts and principles of the law in this area. This would include good explanations and good definitions of this area of law to include statutory/common law provisions, where relevant. Responses are unlikely to achieve level 4 without including 6 relevant cases, 4 of which will be developed*.</p> <p>Level 3</p>	AO1 Levels	AO1 Marks	5	14–16	4	11–13	3	8–10	2	5–7	1	1–4
AO1 Levels	AO1 Marks																
5	14–16																
4	11–13																
3	8–10																
2	5–7																
1	1–4																

Question	Answer	Marks	Guidance
	<ul style="list-style-type: none"> • Restraints will only be enforceable if they protect a legitimate interest. This could be for example: not competing with the purchaser of your business, client lists, confidential information, trade secrets (<i>Faccenda Chicken v Fowler</i>, <i>Commercial Plastics v Vincent</i>,) • The nature and scope of the legitimate interest being protected is relevant to the question of reasonableness (<i>British Reinforced Concrete Engineering Co v Schelff</i>, <i>Societa Esplosivi Industriali SpA v Ordnance Technologies</i>) • Reasonableness is decided on a case by case basis (<i>Esso</i>, <i>Alec Lobb</i>) • Reasonableness depends on the geographical extent and duration of the restraint (<i>Nordenfelt</i>) • The courts may (<i>Home Counties Dairies Ltd v Skilton</i>, <i>Arbuthnot Fund Managers v Nigel Rawlings</i>) or may not (<i>Lyne-Pirkis v Jones</i>) choose to interpret a widely drawn clause to make it enforceable. • The courts may remove an unenforceable element of a restraint of trade clause only if it is clearly severable (the 'Blue Pencil Test') (<i>Mason</i>, <i>Littlewoods v Harris</i>). 		<p>Responses are unlikely to achieve level 3 without adequate knowledge showing reasonable understanding of the relevant concepts and principles of the law in this area. This would include adequate explanations and adequate definitions of this area of law to include statutory/common law provisions, where relevant. Responses are unlikely to achieve level 3 without including 4 relevant cases, 2 of which will be developed*.</p> <p>Level 2 Responses are unlikely to achieve level 2 without limited knowledge showing general understanding of the relevant concepts and principles of the law in this area. This would include limited explanations and limited definitions of this area of law. Responses are unlikely to achieve level 2 without 2 relevant cases, neither of which are required to be developed.</p> <p>Level 1 Responses are unlikely to achieve level 1 without very limited knowledge of the basic concepts and principles of the law in this area. This would include very limited explanations and very limited definitions of this area of law. Responses are not required to discuss any cases. *Developed = case name + facts (minimal) or ratio (minimal)</p>

Question			Answer	Marks	Guidance												
			<p>Assessment Objective 2 – Analysis, evaluation and application</p> <p>Discuss the extent to which, if at all, the courts’ application of the law on restraint of trade has been broad and flexible. Points may include:</p> <ul style="list-style-type: none">• The courts have been generally broad in their application of the rules<ul style="list-style-type: none">– The range of areas covered has increased from sale of businesses and employment to include Solus agreements and other exclusive dealing situations– The range of areas to which the rules can apply has been explicitly left open-ended– The range of factors considered when analysing reasonableness is extensive– Arguments intending to prevent the rules from applying to standard form contracts have been rejected• The courts have been generally flexible in their application of the rules<ul style="list-style-type: none">– Historically the application and development of the rules has varied widely– The legitimate interest test and reasonableness tests are applied on a case by case basis. There are numerous examples of clauses of similar effect being upheld in some cases and rejected in others– The range of interests held to be ‘legitimate’ has increased over time as the economy has developed– The area over which restraints have been judged to be reasonable has increased as trade has become more globalised– The factors that the courts take into account are varied and open-ended, including (unusually) inequality of bargaining power– The courts have been flexible in their approach to interpretation of restraint of trade clauses. This flexibility has actually been inconsistent and unhelpful• There are also areas in which the courts have been rigid in their application of the rules	14	<table><tr><th>AO2 Levels</th><th>AO2 Marks</th></tr><tr><td>5</td><td>13–14</td></tr><tr><td>4</td><td>10–12</td></tr><tr><td>3</td><td>7–9</td></tr><tr><td>2</td><td>4–6</td></tr><tr><td>1</td><td>1–3</td></tr></table> <p>Level 5 Responses are unlikely to achieve level 5 without sophisticated analytical evaluation of the relevant areas of law, being very focused on the quote and providing a logical conclusion* with some synoptic content.</p> <p>Level 4 Responses are unlikely to achieve level 4 without good analytical evaluation of the relevant areas of law and good focus on the quote.</p> <p>Level 3 Responses are unlikely to achieve level 3 without adequate analytical evaluation of the relevant areas of law and limited focus on the quote.</p> <p>Level 2 Responses are unlikely to achieve level 2 without at least some limited analytical evaluation of the relevant areas of law. Responses are unlikely to discuss the quote.</p> <p>Level 1 Responses are unlikely to achieve level 1 without at least some very limited analytical evaluation of the relevant areas of law. Responses are unlikely to discuss the quote.</p>	AO2 Levels	AO2 Marks	5	13–14	4	10–12	3	7–9	2	4–6	1	1–3
AO2 Levels	AO2 Marks																
5	13–14																
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Question			Answer	Marks	Guidance											
			<ul style="list-style-type: none">– The use of the ‘Blue Pencil Test’ shows that the courts insist upon clear severability. This is beneficially transparent• They have been unable to effectively regulate cartels and monopolies though it is difficult to see how that is a result of a lack of flexibility• They have, in general, refused to enter into economic analysis of their decisions. Is this intellectually inflexible or wisely restrained?• Any other relevant point. Reach any sensible conclusion.		* Conclusion – response has to provide a conclusion to answer and response must show more than 50% commitment (NB conclusion does not need to appear at end).											
			Assessment Objective 3 – Communication and presentation Present logical and coherent arguments and communicate relevant material in a clear and effective manner using appropriate legal terminology. Reward grammar, punctuation and spelling.	4	<table><tr><th>AO1 + AO2 Marks</th><th>AO3 Mark</th></tr><tr><td>24–30</td><td>4</td></tr><tr><td>17–23</td><td>3</td></tr><tr><td>9–16</td><td>2</td></tr><tr><td>1–8</td><td>1</td></tr></table>		AO1 + AO2 Marks	AO3 Mark	24–30	4	17–23	3	9–16	2	1–8	1
AO1 + AO2 Marks	AO3 Mark															
24–30	4															
17–23	3															
9–16	2															
1–8	1															

Question			Answer	Marks	Guidance
3			Potential answers may:		
			<p>Assessment Objective 1 – Knowledge and understanding</p> <p>Define the relevant rules and use any relevant cases as authorities for those rules.</p> <p>Assessment Objective 2 - Analysis, Evaluation and Application</p> <p>In the case of (a):</p> <p>CP Identify that this is a restraint imposed upon the seller of a business and its goodwill</p> <ul style="list-style-type: none">It must protect a legitimate interest and be reasonable in the interests of the public and the parties (<i>Nordenfelt v Maxim Nordenfelt</i>)The zoo purchaser’s legitimate interest centres preventing Daljit poaching their customers <p>AP1 Show that the restraint goes further than necessary in its substantive coverage (<i>Nordenfelt</i>).</p> <p>AP2 Show that the geographical scope of the restraint would probably be seen as reasonable.</p> <p>AP3 Show that the time scale of the restraint would probably be seen as reasonable.</p> <p>AP4 Show that the high price paid may support a finding of reasonableness.</p> <p>AP5 Show that the unreasonable elements are not severable under the Blue Pencil Test (<i>Mason</i>) but that the courts may (<i>Home Counties Dairies</i>) or may not (<i>Lyne-Pirkis</i>) choose to interpret the clause to find it reasonable.</p> <p>CON that, unless the courts interpret around it, it is likely that the courts will find this clause in restraint of trade. Credit alternative conclusion that high consideration is enough to make the clause reasonable.</p>	10 	

Question	Answer	Marks	Guidance
	<p>In the case of (b):</p> <p>CP Identify that this is a restraint upon post-employment liberty</p> <ul style="list-style-type: none"> • It must protect a legitimate interest and be reasonable in the interests of the public and the parties (<i>Nordenfelt v Maxim Nordenfelt</i>) • Evan's senior position would give a considerable LI to protect <p>AP1 Show that the legitimate interest to be protected is reflected accurately in the substance of the restraint</p> <p>AP2 Show that the geographical scope of the restraint, though very wide, would probably be seen as reasonable (<i>Nordenfelt</i>)</p> <p>AP3 Show that the time period is probably reasonable given the fast pace of change in the industry (<i>Mason</i>).</p> <p>AP4 Show that the high wages he received may support a finding of reasonableness.</p> <p>AP5 Credit comment that nothing requires severing or interpreting</p> <p>CON that it is unlikely that the courts will find this clause in restraint of trade.</p> <p>In the case of (c):</p> <p>CP Identify that this is a restraint imposed through an exclusive dealing arrangement</p> <ul style="list-style-type: none"> • It must protect a legitimate interest and be reasonable in the interests of the public and the parties (<i>Esso Petroleum</i>) • Guzzler's legitimate interest is a function of the bargain struck with the hospital <p>AP1 Show that the terms imposed upon Fiona are particularly onerous in terms of time as it goes beyond the loan period (<i>Esso</i>).</p> <p>AP2 The lengthy timescale is exacerbated through the apparent lack of break clauses (<i>Esso/Alec Lobb</i>)</p> <p>AP3 It is particularly onerous in terms of substance as the price is set unilaterally</p> <p>AP4 No obvious inequality of bargaining power may make it seem more reasonable (<i>Schroeder</i>)</p> <p>AP5 Show that the unreasonable elements are not severable under the Blue Pencil Test (<i>Mason</i>). Credit appropriate discussion of interpretation (<i>HCD</i>).</p>		<p>more than 50% commitment (conclusion does not need to appear at end).</p>

Question			Answer	Marks	Guidance
			CON that it is likely that the courts will find this clause in restraint of trade.		

APPENDIX 1

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, or identify all of the relevant points of law in issue. A high level of ability to develop arguments or 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 or identify most of the relevant points of law in issue. Ability to develop clear arguments or 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 or identify the main points of law in issue. Ability to develop arguments or 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 or identify some of the points of law in issue. A limited ability to produce arguments based on their material or 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.

OCR (Oxford Cambridge and RSA Examinations)
1 Hills Road
Cambridge
CB1 2EU

OCR Customer Contact Centre

Education and Learning

Telephone: 01223 553998

Facsimile: 01223 552627

Email: general.qualifications@ocr.org.uk

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