

**The Joint Examination Board
Basic English Law Paper : October 2006**

Examiner's Comments

General Comments

Answers from Candidates, both this year and in previous years, has demonstrated that there is a certain amount of "question-spotting" whereby Candidates will review past papers and make an educated guess as to the likely questions that will arise in the paper they are to sit. Whilst such practice is not wrong it should not be relied upon as the sole determining factor within a Candidate's study and revision scheme.

Candidates are encouraged to read around the subject matter to gain a broad understanding of the law. In preparing for this examination some Candidates appear to have relied upon question-spotting rather than having undertaken more thorough preparation. Whilst some answers to questions by such Candidates may be technically correct, they do not score highly since they do not address the facts of the question but merely recite a standard answer that has been rehearsed from past papers. The purpose of an examination is to test a Candidate's understanding of the underlying subject matter. It is more important, and consequently where high-achieving Candidates score well, for the Candidate to demonstrate in his or her answer that they have read the question, understood it and applied the relevant law to the facts.

Every year Candidates are reminded to answer the question but several Candidates still continue to talk about legal principles in the abstract which can often be irrelevant to the question. This does not benefit a Candidate when what is being examined is the Candidate's knowledge of the law and his/her ability to apply the same.

Part A

**1. Explain what is the Overriding Objective under the Civil Procedure Rules.
(10 Marks)**

Answer

- Deal with cases justly including; (a) ensuring the parties are on an equal footing; (b) saving expense; (c) dealing with the case proportionately (i) to the amount of money involved, (ii) to the importance of the case, (iii) to the complexity of the issues, and (iv) to the financial position of each party; (d) ensuring the case is dealt with expeditiously and fairly; and (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.
- The court must seek to give effect to the overriding objective when it (a) exercises any power given to it by the Rules, or (b) interprets any rule.
- The parties are required to help the court to further the overriding objective.
- The court must further the overriding objective by actively managing cases

Comments

This question was straightforward and was well answered by all Candidates who attempted it. It required knowledge only of the overriding objective of the Civil Procedure Rules. All candidates should be aware of the overriding objective and the responsibilities it imposes. There was no analytical assessment required or application of the provisions to a scenario and it was clear that Candidates had learnt it, almost, word for word.

2. Explain what is meant by each of the following terms:

- 2.1 ratio decidendi**
2.2 res judicata; and
2.3 obiter dicta.

(10 Marks)

Answer

- Ratio decidendi : the principle or reason for the decision, the principle giving rise to the binding precedent, principle applied to the facts of the case.
- Res judicata : “the matter is already judged”, the same facts/dispute as between the same persons can not be reheard again (but this does not apply to an appeal of a lower Court’s decision);
- Obiter dicta : “by the way” comments, commentary in a judgment that does not have a binding effect but can be persuasive, may not relate to facts of the case but may be used as an illustrative example.

Comments

This question was answered by most Candidates. Some Candidates in discussing “ratio decidendi” went on to discuss the hierarchy of the English court structure which was not relevant to the question asked. Candidates who scored well in this question explained the principles of ratio decidendi and obiter dicta with reference to examples as to how different parts of the judgment may be interpreted in accordance with those principles.

3. Describe the functions and roles of each of the following in civil litigation:

- 3.1 Judge;**
3.2 Barrister;
3.3 Solicitor.

(10 Marks)

Answer

- Judge : Before trial – case management role, presides over interim applications. During/post trial – rules on procedural applications, determines fact and law, assesses evidence, delivers judgment, awards remedies.
- Barrister : tactical advice and case assessment (working in conjunction with the solicitor), settling pleadings and procedural documents, advocacy at hearings before the Court (both trial and interim), settling evidence, preparation for trial including skeleton arguments.
- Solicitor : client contact, general advice, case assessment, filing procedural documents & pleadings (in conjunction with the Barrister), interim court applications including case management conferences, settlement discussions, disclosure, narrowing of issues, witness interviews, evidence preparation and response, trial, effect of advocacy qualifications.

Comments

Candidates who attempted this question, in general, scored at least 5 marks. Candidates tended to provide only a limited and general description of the function/role of each person but did not provide detail about the individuals’ functions in civil litigation. Time is clearly a limiting factor in this examination and that is presumably the reason for a lack of detail but to score well on this question a fuller explanation of each person’s role is required.

4. Identify three sources of English law and for each explain how they are created.

(10 Marks)

Answer

- Statute : Parliamentary process, introducing a paper and a bill, various readings before both houses, royal assent, implementation.
- Delegated Legislation : Approved by minister/elected person in accordance with empowering statute. Limited in scope as derogated by statute.
- EC Directives : European commission, approved by EU parliament and require implementation in UK legislation. Direct effect if not implemented.
- EC Regulation : European council, Direct effect
- Case Law/Precedent : Ratio/Obiter, Hierarchy of court systems, rules of precedent.
- Custom : Time immemorial

Comments

This question was popular and was answered by almost every Candidate. Candidates generally scored well on this question being able to identify three sources of law and provide detail as to how they are created. Candidates seemed to understand how statutes, SIs and case law were created but those who identified European sources were less clear.

5. Identify and explain each element necessary to establish malicious falsehood

(10 Marks)

Answer

- False statement – untrue statement
- Publication – other than to the subject of the malicious falsehood
- Malice and damage – recklessness and intention, note also the application of s. 3 of the Defamation Act and its effect waiving the requirement to prove special damage if the offending words are calculated to cause pecuniary loss and are published.
- Consider also DSG v. Comet – on the issue of malice and “advertising puff”.

Comments

This question was probably the least popular in Part A of the paper. The question was straightforward and required Candidates to identify the four requirements necessary to establish malicious falsehood and describe each element to demonstrate their understanding of what was required. Candidates who scored poorly on this question did so since they were unable to correctly or clearly describe what the necessary elements meant or required.

Part B

6. Identify and explain the various criteria necessary in order to establish grounds for an interim injunction.

(15 Marks)

Answer

- Governed by the principles in American Cyanamid
- Arguable case (consider also Series 5)
- Balance of convenience/risk of damage to both parties

- Speed/urgency linked with balance of convenience
- Unquantifiable damages/damages as an inadequate remedy
- Public policy, “clean hands”,
- Status quo
- Cross undertakings

Comments

Candidates who answered this question were able to identify the main criteria required to establish a basis for an interim injunction. Most Candidates also went on to explain, with a reasonable degree of detail, the “balance of convenience”. Most Candidates however did not provide much explanation of the other criteria which meant available marks were lost on this question.

- 7. Richard, a partner in a leading patent and trade mark practice, was instructed by his long-term client Jeremy to file a UK Registered Design application. The Patent Office objected to the application on a technical ground. Richard advised Jeremy that the objection could not be overcome and the application was finally rejected without any right to appeal.**

The following week Jeremy was sitting next to a colleague at a dinner party and realising his opportunity for free advice told the colleague the facts of the case. It became apparent that, due to a very recent change in the law, Richard has made a mistake and that the technical objection could have been overcome to enable the application to proceed to grant.

- 7.1 Leaving aside any complaint to Richard’s professional body, advise Jeremy as to what rights (if any) he has against Richard and his firm. Your answer should identify and explain the necessary elements to establish each cause of action identified.**

(10 Marks)

- 7.2 Explain how your answer could be different if Richard was known to Jeremy as his conveyancing solicitor with no experience of design rights but who had agreed, as a favour to Jeremy, to help him out?**

(5 Marks)

Answer

- Professional Negligence : discussion of the basic criteria to establish negligence including duty of care (particularly relevant in professional relationships), standard, breach and damage. Also required mention of pure economic loss.
- Breach of Contract : discussion of the elements of a contract and the fact that Richard was under a contractual retainer. Discussion as to whether there was a breach of the agreement due to oversight.
- The second part of the question required a discussion under negligence about whether the duty of care existed and also whether the standard to be applied was different given Richard’s expertise. Under contract, the issue was whether there was a contract and if so whether the contract was breached.

Comments

This question was answered by most Candidates although virtually all Candidates only discussed the negligence aspects of the problem. Very few Candidates spotted or discussed the contractual aspect to Richard’s relationship with Jeremy. Effectively those Candidates who failed to discuss the contractual element lost half of the marks available for the question. This is a good example of the general comment made

above that Candidates often appear to "question-spot" and in so doing consider that each question will only deal with one particular topic.

8. Mildred attends her local antiques auction. In the catalogue she spots a dresser that she wants for her house. The catalogue clearly states that payment is to be made on delivery or collection of items, whichever is earlier. She bids on the dresser at the auction making an initial bid at £80. Another person places a higher bid and exceeds Mildred's original limit of £150. However, she is so caught up in the excitement that she raises her paddle and places a bid for £270 and then the auctioneer's gavel falls. Suddenly realising her horror she tells the auctioneer that she isn't bound to buy the dresser. He tells her she is and takes her address. Two days later the dresser is delivered to Mildred's house. The delivery men demand the £270 payment. Mildred hands them £150 explaining that she didn't want to pay more than that and that the £150 is all that the auction house is getting from her. The delivery men take the £150. Four days later she receives a letter from solicitors on behalf of the auction house demanding payment of the balancing sum of £120.

8.1 Was Mildred obliged to buy the dresser as the auctioneer told her?
(10 Marks)

8.2 Is the auction house entitled to the balancing sum of £120?
(5 Marks)

In each case your answer should include a full discussion as to why you reach your conclusion and a detailed analysis of the various elements required to establish legal obligations. Explain your reasoning.

Answer

- Offer. An unequivocal offer of a promise. Capable of acceptance. Contrast with invitation to treat. Note differences in an auction context.
- Acceptance. Acceptance in auction environment being the fall of the gavel. Brief discussion of the bidding process and counteroffers.
- Consideration. "A detriment in exchange for the promise". Must not be past and must move from promisee. Discussion as to what the consideration was in this problem – namely the final bid price in exchange for the dresser.
- Intention to create legal relations.
- Was the auction house entitled to the balancing sum? Yes. This question looked for a discussion surrounding part payment of a debt and the rule in *Foakes v. Beer* (part payment of a debt on the due date not being satisfaction of the whole debt) as compared to settlement payments.

Comments

Candidates answered the first part of this question well and were able to explain how contracts were formed within an auction. Candidates were able to explain the differences between invitations to treat, offers and acceptances and applied that to the facts of the question. The second part of the question produced varied answers from the Candidates. A number spotted that it required a discussion of the rule in *Foakes v. Beer* whereas others incorrectly discussed the situation as being a new contract between Mildred and the auction house's delivery men.

9. Your client wants to understand each of the principal procedural steps that are taken from commencement of a copyright infringement claim through to trial and judgment.

(10 Marks)

Answer

- Issue, service of claim form, acknowledgement of service, defence/counterclaim, reply/defence, directions/allocation & Case Management Conference, Further information/admissions, Disclosure and inspection including the requirement to search for all “documents” having an impact on either party’s case whether positive or negative and to declare whether any applicable documents have been lost or destroyed, Witness statements (fact and expert), Reply evidence, Pre-trial review, Trial, Judgment.

Comments

Candidates who answered this question found themselves running out of time. Most answers started well with a thorough explanation of the early stages in legal proceedings but either ran out of time or were unclear as to the latter stages including disclosure and evidence. Candidates were able to pass this question by providing a relatively basic summary of the procedure but higher marks were only available where the Candidate was able to elaborate, in reasonable detail, on the process and function of each stage.

10. Explain with examples what is meant by the following terms in so far as they relate to a property right:

10.1 Legal title; **(4 Marks)**

10.2 Equitable title; **(4 Marks)**

10.3 Tenants in common; and **(4 Marks)**

10.4 Joint tenants. **(3 Marks)**

Answer

- Legal title : Common law right or title to property. Absolute ownership. Enforceable in rem. Compare with equitable title.
- Equitable title : an interest in a property right held under trust and recognised by the law of equity. Equitable right is an encumbrance on the legal title. Compare with the legal title.
- Tenants in common : rule of property ownership, where ownership is on defined and severable percentages. Does not pass automatically on death. Compare to joint tenants.
- Joint Tenants : Property ownership, where ownership is held jointly without division or severance. Owners have identical interest in the whole of the property right. Note the right of survivorship and compare to tenants in common.

Comments

This was an unpopular question with Candidates. Those who answered were able to discuss the basic difference between legal title and equitable title but were unable to expand on the fundamental difference in sufficient detail to score highly. Most Candidates also struggled to explain the differences between joint tenancy and tenants in common and accordingly those who attempted the question were only able to answer half of it.

