

## **The Joint Examination Board**

**November 2003**

**Basic English Law Paper**

**Examiner's Comments**

### **General Comments**

Candidates are reminded to read the question and answer the question asked. Wordy answers do not gain extra marks. Some candidates' approach to questions was to put down on paper everything they knew or could recall about a particular topic even though it was not applicable to the question asked. Such an approach does not demonstrate a knowledge or understanding of the subject matter but rather an ability to memorise answers. This approach is disadvantageous to candidates and is strongly advised against. Irrelevant material wastes a candidate's time. Furthermore, the more general the candidate's answer the more obvious it is that the candidate does not understand or cannot apply the subject matter. Such factors are taken into account when determining borderline candidates.

Candidates are reminded that Part B of the paper carries more marks than Part A. Accordingly, more time should be allocated to answering Part B. Generally it was felt that candidates spent either an equal proportion of the two hours on Part A or, in some cases, more time on Part A than Part B. This is counterproductive and an inefficient use of time.

### **Part A**

**1. Identify the essential requirements necessary for the formation of a valid contract and explain each one.**

**(10 Marks)**

#### Answer

- Offer. An unequivocal offer of a promise. Compare with invitation to treat. Collateral/unilateral contracts.
- Acceptance. Unqualified acceptance of the full terms of the offer. Compare with a counteroffer. Positive action. Communication to the offeror. Collateral/unilateral contracts.
- Consideration. "A detriment in exchange for the promise". Must not be past and must move from promisee. Discussion as to value of consideration.
- Intention to create legal relations. Discussion as between domestic and commercial relations.

#### Comments

This question was attempted by every candidate. All candidates were able to identify the four requirements for a contract and were able to provide basic descriptions of each element. However, there was a clear difference between those who had read deeper into the subject thereby being able to discuss each element in greater detail than those who simply had a basic understanding of the topic. It is not enough, simply to know the four elements. Candidates must familiarise themselves with the principles governing each element of a contract.

**2. Describe what is meant by an "interim injunction" and what must be established to obtain one.**

**(10 Marks)**

Answer

- A temporary/emergency order to stop/do something pending further determination, often at trial. Granted by a Court.
- Arguable case, balance of convenience/risk of damage to both parties, unquantifiable damages/damages as an inadequate remedy, public policy, "clean hands", status quo, cross undertakings in costs, speed. Mention of American Cyanamid and Series 5.

Comments

This question was answered by the majority of candidates although candidates' answers often comprised a simple list of factors taken into account by the Court when determining whether or not to grant an interim injunction without any real description or explanation of each factor. This demonstrated a lack of understanding and a simple list was not sufficient to pass this question.

A number of candidates failed to explain exactly what was an interim injunction whereas others went on, without scoring additional marks, to talk about Mareva injunctions and Anton Piller/Search & Seizure Orders.

**3. Identify and describe the main elements necessary to prove negligence and summarise the heads of damages recoverable under negligence.**

**(10 Marks)**

Answer

- Duty of care. "Neighbour principle", when does it arise, conditions to consider when it arises.
- Breach of the Duty. Standard expected. Factors taken into consideration in determining standard.
- Damage. Causation. Foreseeability/Remoteness
- Compensatory/Non-pecuniary. Pain & suffering, loss of amenity, tariff scales etc.
- Pecuniary. Loss to property, loss of earnings, damage to goods etc.

Comments

This was another popular question although the second half on damages demonstrated that candidates did not understand the different heads of damages that were recoverable under negligence. Virtually all candidates were able to identify the three elements necessary to establish negligence. However, as with all questions asking candidates to "identify and explain all necessary elements"

this question could only be passed if candidates were able to explain some of the fundamental principles underlying what was meant by duty of care, breach and damages.

As touched on above, candidates' knowledge of damages was poor. This was evidenced by candidates either entirely failing to address this part of the question or candidates making very limited and generic comments.

**4. What is the doctrine of precedent? Summarise the effect of the doctrine on the structure and organisation of the English courts.**

**(10 Marks)**

Answer

- Principle that inferior courts follow superior court's ruling. Materiality of facts and ratio decidendi compared with obiter dicta.
- Provides a body of law and gives certainty.
- Requires hierarchy of court structure.
- Criminal division : Magistrates, Crown Court, Divisional Court, Court of Appeal and House of Lords
- Civil division : Magistrates, County Court, High Court, Court of Appeal and House of Lords
- Appeal routes, when is permission required and on what matters can appeals be made.

Comments

This question was popular with the candidates and was generally answered well. Most candidates were able to explain the English court structure including both civil and criminal branches and also the appeal routes between those courts.

Many candidates had a reasonable knowledge of the doctrine of precedent and were able to explain the relevance of ratio decidendi and its importance to the doctrine. However, candidates seemed more concerned to talk about the hierarchy of the Court system rather than discussing in greater detail the doctrine of precedent, its history and function in today's legal system.

**5. Discuss and contrast, with examples, what is meant by the terms "Offer" and "Invitation to Treat" in contract law.**

**(10 Marks)**

Answer

- Offer. An unequivocal offer of a promise. A proposal capable of being accepted on the offered terms and conditions. Precise and definite offer to be bound. Discussion of Collateral/unilateral contracts.
- Invitation to treat. Provision of information. Non-binding statement of intention. Offer to consider offers. Compare with collateral/unilateral contracts.
- Discussion of cases/examples : Pharmaceutical Society of Great Britain, Carilll Carbolic Smoke Ball Company, Fisher v. Bell. Advertisement, Goods for sale. Auction sales etc.

Comments

This question was the least favoured of Part A of the examination. The reasons for this are likely to be in line with the comments made above regarding question 1 that candidates did not have sufficient understanding of the individual

components of a contract. Furthermore, where candidates did attempt this question, it was on the whole answered poorly.

Candidates were unable to accurately describe what was meant by an offer or an invitation to treat although from certain examples it was clear that they had an understanding of the difference. In this case, where candidates were unable to precisely define differences they benefited by describing the differences in the form of examples and also reference to the established case law on the subject.

This question sought a legal analysis of the difference between an offer and an invitation to treat. Unfortunately the majority of those candidate who attempted the question lacked sufficient legal knowledge of the topic to provide that analysis.

## Part B

### 6. Discuss what is meant by the "over-riding objective" in the Civil Procedure Rules. What obligations are imposed by the over-riding objective both on the Court and on the Court user?

(15 Marks)

#### Answer

- Deal with cases justly including; (a) ensuring the parties are on an equal footing; (b) saving expense; (c) dealing with the case proportionate (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 straight-forward. 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 both on the Court and on the Court user. There was no analytical assessment required or application of the provisions to a scenario. Accordingly, the question only required identification by the candidate of the key provisions of CPR Part 1.

Candidates' answers were either very good or very poor indicating that candidates either had or had not read the overriding objective of the CPR.

7. (a) Explain what is meant by the term "without prejudice". (2 Marks)
- (b) When and how are the "without prejudice" provisions applicable? (5 Marks)
- (c) Summarise the effect of Part 36 - Offers to Settle and Payments into Court - under the Civil Procedure Rules. (8 Marks)

Answer

- Without prejudice. Comments/discussions made without prejudice may not be used against the writer in court. Enables the parties to discuss matters more freely and openly without risk of prejudice.
- Either before, during or after court proceedings. Fundamentally it requires a genuine attempt at settlement of the dispute. Either oral or written discussions. No rules on acceptance. Applicable only if the intention is there to settle. Does not apply if merely written on document/mentioned in discussions. Arises automatically.
- Part 36 – is concerned with settlement after commencement of proceedings and payments into court. Strict rules under CPR Part 36 on the form of a Part 36 Offer. It must be made in writing and set deadline for acceptance. Strict rules on acceptance of Part 36 offer. Costs implications of both Part 36 and Without Prejudice offers. Generally, must beat offer to avoid cost implications.

Comments

This was a popular question with candidates but was not answered very well. Candidates generally knew what was meant by without prejudice and were able to describe when and how the without prejudice provisions became applicable. However, the majority of candidates had a poor general knowledge of Part 36 of the CPR. Although Part 36 of the CPR contains complicated provisions, candidates were not expected to know nor were they examined on those aspects. Instead candidates were expected to have a basic knowledge of Part 36, what it is concerned with and the financial implications of accepting and rejecting Part 36 offers. The majority of candidates were unable to accurately discuss the basic principles of Part 36 nor comment upon the financial implications of Part 36 offers.

8. Identify the different types of remedies available for infringement of intellectual property rights together with an explanation of each remedy. (15 Marks)

Answer

- Damages – financial compensation based on loss to proprietor as a result of infringement. Consideration of basic damages principles including "but for", actual and foreseeable loss, mitigation.
- Account of Profits – enquiry into the profit obtained as result of infringing acts. Alternative to damages.
- Injunction – mandatory order prohibiting or forcing something to be done. Limited in time. Equitable and discretionary right.

- Delivery up/Destruction/Seizure – Delivery up of infringing goods to claimant or destruction of the same.

Comments

On the whole, this question was well answered with most candidates identifying the remedies available for infringement of intellectual property rights. However, in order to obtain additional marks and pass the question candidates needed to explain each remedy, how it worked, what was its purpose and other general principles concerning it.

A number of candidates made reference to Mareva injunctions and Anton Piller/Search & Seizure Orders. Whilst such orders may be useful when prosecuting an infringement case they are not remedies for intellectual property infringement and reference to these specific types of injunction and orders suggested that candidates either had not read the question properly or did not fully understand what was being asked of them.

Candidates failed to explain the basic principles as to how damages are calculated and also the importance of mitigation of damage by the claimant.

- 9. Prepare a summary for your client, who is the claimant in proceedings for unregistered design right infringement, of each stage of court proceedings in the High Court from issue of a claim form through to trial (inclusive), together with an outline description of each stage.**

**(15 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, Witness statements (fact and expert), Reply evidence, Pre-trial review, Trial, Judgment.

Comments

This question was on the whole poorly answered by those candidates who attempted it. The question required candidates to summarise and discuss in general terms the different procedural stages in English High Court proceedings. Candidates were generally able to discuss the early stages of litigation in some detail, namely the issue and service of proceedings, acknowledgement of service and filing a defence. However, thereafter candidates' knowledge became less clear and lacked detail.

Candidates were also expected to discuss each stage of proceedings in the correct order in which they take place although marks were not deducted where candidates did not do so.

This question, although unpopular, showed a poor knowledge of the procedural steps involved in High Court proceedings.

**10. Explain how each of the following businesses are formed and for each one provide an explanation of the advantages and disadvantages of operating a business in such a manner:**

- (i) a sole trader;** **(5 Marks)**
- (ii) a partnership; and** **(5 Marks)**
- (iii) a limited company.** **(5 Marks)**

Answer

- a sole trader:
  - Automatically created. Single proprietor.
  - simple to set up, private, no requirement for formal accounts (n.b. tax), own business
  - Personally liable without limitation,
- a partnership;
  - two or more people in business with a common aim. Automatically formed or by means of partnership deed; contrast with limited liability partnerships.
  - arises out of conduct, private, no formal accounts, share risk/liability
  - personally liable without limit (contrast with LLPs), jointly and severally liable with fellow partners, concerns about contracting with a partnership by third parties, bound by actions of other partners, old partners can continue to be liable for past matters.
- a limited company:
  - Formation requirements, forms 10, 12, memorandum and articles of association and fee. Director, secretary, members, registered office.
  - Separate legal entity. Limited liability, taxation issues, more recognisable/easier to contract with.
  - Formalities, additional expenses, public, shareholders control.

Comments

This question was answered by almost every candidate and on the whole was well answered. Whilst candidates were able to list a series of advantages and disadvantages of each business the question did seek an explanation. It was clear that a number of candidates had simply learnt a list of advantages and disadvantages without truly understanding why such factors were either advantageous or disadvantageous to that particular form of business.