

The Joint Examination Board
Basic English Law Paper : October 2007

Examiner's Comments

General Comments

The approach of Candidates to this paper is often formulaic with Candidates relying on one or two "guaranteed" questions being asked for which generic answers have been prepared. This suggests that Candidates are, on the whole, not as well prepared for this paper as they are for other papers. Whilst timing and resource is clearly an issue for those preparing for their professional examinations, Candidates are still encouraged to read around the subject rather than focus a limited amount of time on passing an examination.

The purpose of this examination is to assess a Candidate's understanding of the subject matter and their application rather than the Candidate's ability to memorise and reproduce a generic and non-specific answer. Those Candidates who applied their knowledge to the facts of the questions scored better as they were able to show their understanding of the subject matter. Even where a Candidate's final conclusion may be incorrect valuable marks are available for those Candidates who are able to show their thought process and application of legal principles to facts.

As with previous years, Candidates are reminded to read carefully and only answer the question asked.

Part A

1. Enumerate and explain the requirements for a valid contract.

(10 Marks)

Answer

- Offer – an unambiguous offer that is capable of acceptance. Comparisons with unilateral offers and offers to the public and comparison with invitation to treat.
- Acceptance – an unqualified acceptance communicated to the offeror. Discussion around transmission of acceptance.
- Consideration – payment, promise or other form of consideration that moves from one party to the other. Discussion around adequacy and timing.
- An intention to create legal relations – commercial versus domestic situations.

Comments

This question was straight-forward and was well answered by all Candidates who attempted it. The question required Candidates to identify each of the four main requirements necessary to establish a contract and to explain with reasonable detail what was meant by each requirement. Those Candidates who scored well were able to explain, with examples, what had to be established under each of the elements to establish a contract and accordingly show an understanding of each element.

- 2. Identify and explain the minimum requirements necessary for the formation of a private limited company (including their function) and describe what forms are required to incorporate.**

(10 Marks)

Answer

- Candidates needed to identify and discuss the purpose of Form 10, Form 12, Articles and Memorandum of Association and documentation relevant to the shares of the company.
- Minimum requirements of a company include the presence of directors, a secretary, share capital and shareholders, registered offices and auditors and the applicable fees.

Comments

Most candidates attempting this question were able to achieve at least half marks by providing a list of applicable forms and documentation. A number of candidates however, failed to identify the personnel and other requirements, such as the issuance of shares, essential to the incorporation and operation of a company or were unable to describe the function or purpose of the various document requirements.

- 3. Describe the English civil court structure, including (i) routes of appeal; (ii) basis for possible appeals; and (iii) which Courts' decisions are binding on others.**

(10 Marks)

Answer

- The civil courts include Magistrates Court, County Court, High Court and its divisions, Court of Appeal (Civil Division) and the House of Lords.
- Appeal routes are generally in order of the court list above but with certain exceptions including the unusual direct appeal from the High Court to the House of Lords (leap frog).
- Decisions of one court are binding on the lower courts but not normally on the same court, save for certain situations before the Court of Appeal.
- All appeals require permission of either the lower or appeal Court.

Comments

This question was popular with Candidates. Virtually all Candidates were able to correctly identify the hierarchy of the English civil court structure and, to an extent, the basis of precedent and which court bound which other courts by their decisions. Candidates were less clear on the rules with regard to when permission was necessary for appeal as well as whether appeals could be based on fact as well as law.

- 4. Describe the differences between the assignment and novation of an existing and binding contract.**

(10 Marks)

Answer

- Assignment is the transfer of the benefit of an agreement but not the burden. Consent of other parties to the contract may not be necessary.
- Novation is the transfer of the benefit and burden to a new party and requires the consent of all parties to the agreement.

- Novation substitutes one party for another.

Comments

This question was not attempted by any Candidate.

- 5. Summarise the sources of English law and provide a concise explanation of three of the sources, including who or what is responsible for their creation.**

(10 Marks)

Answer

- Statute : Parliamentary process, sovereignty, courts may only interpret, repeal only by parliament.
- Delegated Legislation : Approved by minister/elected person in accordance with statute. Limited in scope as derogated by statute, interpreted by Courts who may declare it ultra vires.
- 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 generally answered well by most Candidates. All Candidates were able to generally identify the main sources of English law. Candidates were asked to pick three sources and describe each of them in more detail including how such sources were created. Some Candidates had clearly studied the sources of English law and were able to provide very detailed and conclusive descriptions of how those laws are created and by whom. Most Candidates were able to provide basic information about each source but to achieve higher marks a more detailed explanation of each was required as to its formation, effect and ranking.

Part B

- 6. Identify three final civil remedies available for infringement of an intellectual property right and, for each, explain the basis on which each remedy is granted.**

(15 Marks)

Answer

- Damages – compensatory rather than pecuniary, calculated on loss basis, reasonable royalty in certain circumstances.
- Account of Profits – alternative to damages. Calculated on the profits received by the infringing party.
- Injunction – equitable relief and subject to usual equitable rules such as “clean hands”;
- Delivery Up/Destruction – mandatory order requiring infringing articles to be delivered up or destroyed.
- Effect of the IP Enforcement Directive

Comments

Candidates were generally able to identify three final civil remedies. However, on balance Candidate's responses as to the basis on which each remedy is granted and their effect were fairly limited. Candidates were expected to provide a reasonable discussion with respect to each identified remedy including reference to the judicial application of the remedies. Interestingly, none of the Candidates addressed the implications of the IP Enforcement Directive on remedies.

7. James runs a gardening service. On his first visit to Veronica, he tended her garden as instructed, weeding and pruning the plants. He charged her £100 which Veronica reluctantly paid despite thinking it very expensive. The following week James arrives as Veronica is rushing out to work. He suggests that on this visit he should instead mow Veronica's lawn and that will cost £20. As she leaves, in response, Veronica says "Why don't you mow it? and the £100 I paid you last month should cover the mowing this time, as I thought it was too expensive anyway". Nothing else is said between Veronica and James. James mows the lawn and charges Veronica £20 for the mowing. Veronica refuses to pay £20.

a) Is there a contract between Veronica and James for the lawn mowing? Your answer should mention the elements necessary to establish a contract and an analysis as to whether each element is applicable in this situation.

(10 Marks)

b) As a separate issue, would Veronica be able to enforce a contract had James initially agreed to Veronica's price suggestion but then not mowed the lawn?

(5 Marks)

Answer

- Offer. An unequivocal offer of a promise. Capable of acceptance. Contrast with invitation to treat. Note differences in collateral/unilateral contracts.
- Acceptance. Unqualified acceptance of the full terms of the offer. Acceptance to be communicated in accordance with offer. Compare with a counteroffer. Positive action. Communication to the offeror. Acceptance by conduct. Note differences in collateral/unilateral contracts.
- Consideration. "A detriment in exchange for the promise". Must not be past and must move from promisee. Need not be money. Discussion as to value/adequacy of consideration in these circumstances.
- Intention to create legal relations. Discussion as between domestic and commercial relations.
- The question looks for a discussion as to whether or not there was the necessary acceptance or consideration and the interaction between a counter-offer and an acceptance. Did Veronica's comment amount to a counter-offer? Even had James mowed the lawn would last week's payment amount to good consideration? Past consideration cannot form the basis of a new contract. What are the implications?

Comments

Candidates were able to discuss the basic requirements for the existence of a contract. Whilst this attracted marks those Candidates who scored well on this question went on to apply those legal tests to the facts of the questions and

discuss the implications. Candidates were not marked down for reaching wrong conclusions whereas marks were available to Candidates who were able to demonstrate their understanding of each legal principle necessary to establish whether or not a binding contract existed.

8. Explain the purpose and effect of:

(a) litigation privilege; and

(b) “without prejudice” communications.

Explain the necessary circumstances for each to exist.

(15 Marks)

Answer

- Generally privilege protects the client from having to give disclosure of such information to third parties. Privilege is applicable during disclosure in litigation but also protects the client from having to disclose the advice in other circumstances.
- Litigation Privilege. Applies to communications (written or oral) between advisor, client and a third party when made during or in serious contemplation of litigation. Client’s right and only the client may waive the right. Arises automatically. Compare and contrast with legal professional privilege.
- Without prejudice. Form of privilege existing between parties in a dispute although it does not need to be formal litigation. Comments/discussions made without prejudice may not be used to prejudice the writer in court. Enables the parties to discuss matters more freely and openly without risk of prejudice. Arises only if there is a genuine attempt to settle the dispute irrespective of whether the letter/conversation is referred to as “without prejudice”. Privilege may only be waived with both parties’ consent or used to prove an agreement or enforce terms of settlement

Comments

Those Candidates who answered this question were able to explain the broad effect of each of litigation privilege and without prejudice communications and when they arise. Those Candidates who scored higher marks in this question were able to provide a more definitive explanation of how each of litigation privilege and without prejudice status arose and were also able to provide a more in-depth discussion as to the effects of each. In particular, Candidates who scored well were able to discuss the implications of "without prejudice" communications with respect to costs implications.

9.1 Identify and explain each element necessary to establish negligence.

(8 Marks)

9.2 Identify and explain three defences to the tort, additional to absence of the elements identified in Question 9.1 above.

(7 Marks)

Answer

- Define negligence including the key elements: duty of care and the “Neighbour principle”; breach of the Duty and the applicable standards including identifying any factors taken into consideration in determining standard; damage; causation, foreseeability and remoteness.
- Identify and explain three defences to negligence including contributory negligence; volenti non fit injuria; and ex turpi causa.

Comments

Candidates were generally able to answer the first part of this question well and provided a reasonable discussion as to the necessary elements for establishing negligence and describing what each required. However, a number of Candidates struggled to answer the second part of the question. Some Candidates answered the second part of the question by describing circumstances which meant that negligence did not arise, such as intervening acts breaking the chain of causation, but since this was explicitly excluded in the question no marks were available.

10. Identify and explain for each the principal grounds under which judicial review of a public body's decision can be sought.

(15 Marks)

Answer

- Illegality – activities/decision is outside remit/powers, unlawful sub-delegation, error or ignoring facts
- Irrationality – no reasonable basis for decision
- Procedural impropriety – lack of fairness, bias, failure to follow a procedure or lack of natural justice.

Comments

Few Candidates attempted this question but those who did addressed it reasonably well. Candidates were able to identify the principal grounds for judicial review and provide a limited description of what needed to be proved to establish that ground. Those Candidates who scored well included greater detail in their discussions by providing explanations of how decisions by a public body were illegally or irrationally made.