

**The Joint Examination Board
Basic English Law Paper : October 2008**

Examiner's Comments

General Comments

The syllabus for this paper is reasonably specific on a number of key legal principles. As such, candidates are encouraged to read into and around the syllabus since the principles covered by the syllabus are those that are likely to face a candidate in their professional life when dealing with clients. As mentioned in previous years, the approach of candidates to this paper appears to be formulaic. Candidates will focus on a set of standard answers designed to answer two or three topics that are likely to be addressed in the paper.

A number of candidates however were able to show that they had read around the subject matter in more detail and were able to provide more individual answers tailored to the facts of the questions. These candidates stood out from others because their answers showed their broader knowledge and understanding of the law rather than a formulaic regurgitation of standard answers. These candidates also scored better as they were able to pick up more marks. Candidates are reminded that the standard answers set out in these Examiner's Comments are not definitive answers but are an outline of the answer.

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

PART A

- 1. Discuss the procedural steps taken from the commencement of High Court proceedings for infringement of a UK Registered Trade Mark up to but not including the trial. Your answer should include a concise explanation of each procedural step.**

(10 Marks)

Answer

- Identify each procedural step including issue and service of claim form and particulars of claim, acknowledgement of service, defence (and counterclaim), allocation questionnaire, case management hearing, directions order, disclosure and evidence rounds.

- Each procedural step requires explanation as to what it means and what is involved. It may also be appropriate to discuss how the step interacts with the remaining proceedings. For example, the directions order setting out the timetable to trial.

Comments

This question was answered well by most candidates. However, a large proportion of the answers provided by candidates focused on the early procedural stages often going into too much detail and thereby wasting valuable time that could be deployed elsewhere. The result often meant that whilst the first part of the answer was well written, candidates ran out of time in explaining the later stages of proceedings.

2. Explain the differences between arbitration and litigation and discuss the advantages and disadvantages of each.

(10 Marks)

Answer

- Litigation is a public procedure which is formalised before the courts. It is presided over by members of the judiciary. Judicial authority is provided by parliament and the Crown. Litigation can be imposed on any party where there is a cause of action. Litigation follows precedent and affords various appeal routes. Remedies are variable and not limited solely to damages. Judgments may be enforced ultimately with contempt proceedings.
- Arbitration is a private procedure. The parties to it must consent to arbitration and cannot be forced to attend unless there is an agreement to the contrary. Arbitration is presided over by lawyers, retired judges or other experts. Remedies are usually limited to damages. The usual powers available to courts are not necessarily available in arbitration.
- Timing and costs consequences are different with arbitration over litigation.

Comments

Most candidates were able to identify the main differences between litigation and arbitration; namely that each is before different a forum. A number of candidates had confused arbitration for mediation, which, although another alternative form of dispute resolution, is different from arbitration.

Those candidates who scored well on this question were able to discuss, and explain, with examples or reasons, a number of differences between the two forms of dispute resolution and explain why the differences presented either advantages or disadvantages to potential litigants. The majority of candidates were only able to highlight the differences between litigation and arbitration and so lost the opportunity for valuable marks in failing to explain the advantages or disadvantages.

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

- | | | |
|------------|------------------|------------------|
| (a) | Judge | (3 Marks) |
| (b) | Barrister | (3 Marks) |
| (c) | Solicitor | (4 Marks) |

Answer

- Judge has overall control over proceedings and ensures a fair hearing to all parties. Role involves case management, maintaining the parties on an equal

footing and presiding at trial over the evidence, application of the law and delivering judgment.

- Barrister may be involved early in case preparation in preparing pleadings as well as advising on the evidence gathering stage and presentation of evidence. Barrister's primary role is as the advocate at trial (and at pre-trial applications) presenting the party's case and undertaking examination and cross-examination of witnesses.
- Solicitor is responsible for case management and preparation of the matter for trial working in conjunction with a barrister. Solicitor has the liaison role between the party and barrister. Solicitor is responsible for advising the client and preparing the case for trial.

Comments

This question was answered well by the majority of candidates. All candidates were able to identify the main roles and functions of each individual. Candidates tended to focus on the role of each individual in a trial setting whereas additional marks were awarded to those candidates who identified the role and function played prior to trial.

4. (a) Explain the doctrine of precedent. (3 Marks)
(b) Summarise the structure and organisation of the English civil courts. (4 Marks)
(c) Describe how the doctrine of precedent affects decisions of the English civil courts. (3 Marks)

Answer

- Binding effect of previous judgments on the same/similar facts. Certainty and continuity of the application of the law. Difference between *ratio decidendi* and *obiter dictum* in a judgment
- The various 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 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.

Comments

This is a reasonably well rehearsed question and generally candidates scored well. However, this question demonstrated the need for candidates to read the question properly and answer it rather than providing a generic explanation of the English Civil Court structure. For example, Candidates were asked to explain the doctrine of precedent which required more than a brief explanation of the court structure and routes of appeal.

5. What is the Overriding Objective of the Civil Procedure Rules? What obligations does it impose and on whom? (10 Marks)

Answer

- CPR Part 1 outlines the overriding objective. 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

Nearly all candidates who approached this question scored well. Candidates generally repeated, verbatim, the language of the overriding objective (as set out in Part 1 of the CPR) as the totality of their answer. Whilst this is not incorrect, candidates who scored highly were able to give some background and an explanation as to the purpose and function of the overriding objective and also how effect was given to the obligations.

PART B

- 6. List and provide an explanation of the main classifications of evidence that may be admitted in civil High Court proceedings and how such evidence can be given?**

(15 Marks)

Answer

- Direct Evidence (first hand fact evidence), Hearsay Evidence ("second hand" evidence, admissibility rules, and weight given to the evidence), Opinion Evidence (from those qualified to give opinion e.g. expert, allowable from non-expert if facts are as perceived by a witness), Survey (specific rules on independence etc), Documentary/Real.
- Witness statement, statutory declarations, affidavits, oral testimony, live video, recorded testimony, telephone, depositions, physical exhibits.

Comments

This question was attempted by the majority of candidates. In general candidates were able to identify the different categories of evidence. However, there was a clear distinction between those candidates who were able to provide additional information about each category rather than providing a list. Certain candidates showed an excellent knowledge going into considerable detail on the admissibility of each category, especially that of hearsay evidence. Candidates tended to struggle more with the second part of this question on the ways in which evidence could be submitted.

- 7. Gail's dog has recently gone missing. She put up posters around her town offering £500 reward for information about the whereabouts of her pet. Three days later she receives a call from the RSPCA, who have found her dog. Shortly afterwards, but before she has been able to collect her dog, Peter arrives. He refers to the poster but before Gail can tell him the dog has been found he explains that he saw the dog being picked up by an RSPCA officer and gives Gail the registration details of the RSPCA vehicle. He asks for the £500 rewards but Gail tells him that she won't pay it as she has already been told of the dog's whereabouts.**

Explain with a discussion as to the legal reasoning for your answer, whether Peter has any claim against Gail and if so what his remedy would be.

(15 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. Consideration of the *Carlill v. Carbolic Smoke Ball* case and its analogy with these facts.
- Acceptance – an unqualified acceptance communicated to the offeror. Discussion around timing and method 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 popular with all candidates and, on the whole, was answered well. Candidates were able to describe the different criteria necessary to establish a contract and were able to apply those criteria to the facts of the question.

The question required a discussion around the issues of acceptance and consideration and the majority of candidates had identified those criteria as being fundamental to the answer. Candidates were generally able to explain the impact and status of a unilateral contract and its relevance to the facts of the question.

8. 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

This question required a discussion of the various tests applied by Courts in determining whether or not to grant an interim injunction. Candidates were expected to consider the various points set out in the *American Cyanamid* case, which have been developed further in the Series V decision and more recently in *GSK*. Candidates, on the whole, were able to list the key 3-4 requirements under *American Cyanamid*.

Those candidates who scored high marks for this question were able to explain in reasonable detail what was meant by each of the criteria in *American*

Cyanamid rather than providing a list. High scoring candidates also went on to discuss other factors that fall to be considered on the question of granting an interim injunction including cross-undertakings and “clean hands”.

9. **Chris has just come from the MOT testing garage where his car has failed its MOT because the passenger seat belt is defective. Driving back to his house he sees his friend Jeanine and offers her a lift in the car. Chris does not mention the defective seat belt but Jeanine does not put on her seatbelt as she finds such things uncomfortable. Chris has to make an emergency stop to avoid a child who dashed into the road. Because she was not wearing her seat belt, Jeanine is thrown forward and breaks her wrist.**

Explain with a discussion as to the legal reasoning for your answer, what causes of action, if any, lie against Chris and what remedies are available. (15 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 and causation, foreseeability and remoteness.
- Apply the elements necessary for negligence to the facts of the question and assess whether in principle there is negligence and if so who’s negligence?
- Consider and explain what defences may be applicable to the facts such as contributory negligence. In particular what is the situation concerning Jeanine’s refusal to wear a seatbelt even though it is defective.
- Remedies will be damages – returning the injured party to the position he/she would have been in were it not for the breach. Assessment of damages broken into different categories for pain & suffering, property damage etc. Discussion of foreseeability and remoteness in respect of damage.

Comments

Virtually all candidates attempted this question but few candidates were able to achieve high marks. Candidates were expected to give detailed explanations as to the main criteria necessary to establish whether negligence had occurred. Candidates did not gain marks for merely reaching a conclusion on whether or not there was negligence. Instead marks were awarded to those candidates who were able to argue and explain their reasoning for their decision, whilst applying it to the facts and the law of negligence.

Most candidates struggled to explain what remedies were available other than simply identifying “damages”. The question required a more detailed explanation of the remedy.

10. **Your firm of Patent and Trade Mark Attorneys is acting for a UK client who has recently been sued for infringement of a UK registered design. The client’s managing director, Walter, is however confused. He doesn’t understand the difference between legal professional privilege and his company’s obligation to disclose documents for the trial.**
- a) **Advise Walter as to his company’s disclosure obligations in English civil litigation, with reference to the relevant procedures and mechanisms. (5 Marks)**

- b) Explain how the disclosure obligations interact with legal professional privilege. (3 Marks)
- c) One of the possible documents Walter is concerned about is an opinion your firm wrote in relation to the client's infringement of the registered design under which he has been sued. That opinion was written 18 months earlier and was circulated amongst the Board; the Sales and Marketing team; an external design consultant; and the legal department of Walter's company. Explain, with your reasoning, whether or not that document must be disclosed. (7 Marks)

Answer

- Disclosure : Part 31 CPR, Preserve documents once aware of proceedings or contemplated proceedings. Obligation to disclose documents relevant to pleaded issues. Documents are those in power, custody or control. Disclosure of documents to assist client's case, assist another's case or detrimental to client's case. Disclosure list to be served according to directions timetable. List to identify all relevant documents and identify copies and originals. Disclosure list in 3 parts, documents in power and disclosable, documents in power but privileged and documents relevant but no longer in power. Inspection normally 7 days after lists exchanged.
- Privilege – Legal professional privilege ("LPP") governs communications between advisor and client. Privileged documents need not be disclosed but must be identified (although in general terms). Three Rivers case narrows scope of LPP.
- The opinion may have originally attracted LPP – it was legal advice sought and obtained from external provider. However, it is unlikely that the opinion can still be claimed to attract LPP given its broad distribution, not only within the company but also externally. Consider the implications of Three Rivers and the need for LPP documents to have a small audience.

Comments

Those candidates who answered this question were able to provide a solid answer in respect of the company's disclosure obligations and the requirements of Part 31 of the CPR. However, a significant number of candidates showed weakness in their understanding of legal professional privilege, its application and how the status of privilege can be lost.

A large part of the question (as indicated by the marking schedule) required an explanation as to whether a particular document had to be disclosed. Candidates were expected to explain the interaction between disclosure obligations and the effect of legal professional privilege on the document as well as arguing whether or not legal professional privilege existed, and if so, still applied to the document. Candidates generally failed to provide that explanation.

Some candidates indicated that the opinion was privileged because it was prepared in contemplation of litigation. Litigation privilege could apply if there was reasonable contemplation of proceedings being commenced. However, even if it were, the existence of litigation privilege would likely have fallen away due to its broad distribution.