

**The Joint Examination Board  
Basic English Law Paper: November 2009**

**Examiner's Comments**

**General Comments**

As mentioned in previous comments, the approach of Candidates to this paper appears to be formulaic with Candidates spotting questions and often providing pre-determined answers or a simple regurgitation of the Candidate's entire knowledge related to the subject of the question. A number of Candidates however had clearly read around the subject matter and were able to provide well-structured and considered answers that were tailored to the question. As such, these candidates also achieved greater marks since their focused answers were able to address more of the facts and specific interests of each question. Candidates are reminded that the answers set out in these Examiner's Comments are not definitive answers but are a brief outline of a satisfactory answer.

As with previous years, Candidates are reminded to read carefully and only answer the question asked. A number of Candidates wasted valuable time in writing answers that were not relevant to the question.

**PART A** (10 marks per question)

**1. Describe and summarise a party's disclosure obligations under the Civil Procedure Rules.**

Answer

- Provisions of Part 36 CPR. Obligations to run from knowledge/contemplation of litigation and continue throughout litigation.
- Requirements on preservation and search for documents. What documents are covered by the obligation? Criteria for search. Disclosure procedure, disclosure lists and inspections. Impact of privilege on disclosure.

Comments

On the whole, Candidates were able to give a good explanation of a party's principal obligation under disclosure. A number of Candidates were able to show more detailed knowledge of the obligations by discussing the criteria for undertaking searches, the implications of digital records, the impact of privilege on the disclosure obligation and the form in which disclosure lists are to be provided.

2. **Identify and briefly explain each of the three tracks to which a case can be allocated under the Civil Procedure Rules and, for each, explain the implications and the criteria for allocation, both generally and with reference to intellectual property cases.**

Answer

- Small claims : Less than £5,000 claim (excluding personal injury and various other matters where lower limit applies). No legal representation. Costs implications. Speed and reduced procedure. Informal hearings.
- Fast Track : Streamlined cases where small claims doesn't apply. Streamlined procedure with more usual procedural steps on evidence and disclosure. Short trial and cost arrangements.
- Multi-track : Used where small and fast track doesn't apply. More procedural and often longer. Usual procedural mechanisms apply. Costs on broader scale subject to assessment.

Comments

Most Candidates were able to identify each of the three tracks. Candidates were able to distinguish the implications and criteria of the small claims track but on the whole struggled to adequately explain the differences between the multi track and fast track.

Most Candidates' knowledge as to the differentiating factors between multi track and fast track was limited to the financial caps of a proposed claim. Those Candidates who scored higher were able to describe more procedural differences, the implication of each track on a party's ability to recover costs and the speed of each track.

3. **Identify the main sources of English law and for three of those sources explain how they are created, including who or what is responsible for their creation.**

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 was the most popular question of Part A and unsurprisingly this question was well answered by virtually all Candidates.

Whilst Candidates clearly understand case law and how it is developed, weaker Candidates struggled to explain the precise way in which Statutes, directives and regulations became law. However, on the whole most Candidates scored well on this question.

**4. Describe the differences between a contractual condition and a warranty, including the consequences of a breach of each term.**

Answer

- Condition runs to the heart of a contract. Conditions are the primary function of the contract. Unusual to be implied. Breach will entitle termination and damages
- Warranties are statements of promise. Certain warranties are implied by statute. Breach does not give rise to termination right unless agreement expressly provides. Damages available for breach.

Comments

Generally, Candidates who attempted this question were able to identify the main difference between a condition and a warranty but struggled to provide a fuller answer and therefore lost valuable marks.

This question tested a Candidate's knowledge English Contract law. Those Candidates who had read around the subject were able to demonstrate a more thorough knowledge of the technical differences between conditions and warranties. Exceptional Candidates were able to provide examples to demonstrate the differences and also explain how the Courts have historically set about interpreting whether a clause or obligation is a condition or warranty.

**5. Describe the main differences between a debenture and a floating charge.**

Answer

- Debenture – loan secured against the assets of a company. Debenture holders have primary right over the assets. Interest on a debenture takes priority over dividends paid to shareholders.
- Floating charge – a charge for a loan secured over a category of assets from time to time. Floating charge “crystallises” on an identified event when it converts automatically to a fixed charge.

Comments

This was the least popular question of Part A. The few Candidates who did attempt this question did so well and demonstrated that they had read into and understood what each of a debenture and floating charge were.

Whilst such an understanding may seem irrelevant to the practice of intellectual property law, Candidates are reminded that clients will often turn

to them for assistance with the acquisition or licensing of intellectual property rights. The existence of a debenture or floating charge over intellectual property assets is an encumbrance of which a potential acquiror or licensee should be aware and accordingly it is important for Candidates to understand the significance of them.

**PART B** (15 Marks per question)

6. (a) **Identify and describe each element necessary for the formation of a contract.**

(8 Marks)

(b) **Identify and describe what remedies are available for breach of contract.**

(7 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.
- Intention to create legal relations. Discussion as between domestic and commercial relations.
- Remedies : damages (standard assessment), specific performance (equitable remedy for performance).

Comments

This was a very popular question and was answered by virtually all Candidates. Generally part (a) of the question was answered to a very high standard demonstrating that Candidates have grasped a reasonably good understanding of the principle tenets of contract formation.

However, Candidates performed less well on part (b) of the question suggesting that knowledge of the consequences and remedies for breach of contract is less well understood. Candidates were generally unable to explain the principles behind damages and how they are calculated. Similarly, Candidates talked, in general terms, of an injunction as a remedy for breach of contract rather than an order for specific performance.

7. **Identify and describe each ground under which judicial review of a public body's decision can be sought.**

Answer

- Illegality.
  - Describe basis for illegal actions such as acting outside of its permitted scope of its power, unlawful sub-delegation and error of law or fact.
- Irrationality/Proportionality of the decision.
  - Wednesbury Reasonableness
- Procedural Impropriety
  - Failure to follow statutory procedures
  - Breach of natural justice.

### Comments

Generally, Candidates were able to identify the three principle grounds for Judicial Review. However, Candidates failed to secure good marks due to a lack of description of each of the grounds available for Judicial Review. Future Candidates are advised to read into the subject more thoroughly in order that Candidates can provide a reasonably detailed description of each of the grounds.

Those Candidates who scored well on this question did so both by providing a good description of each ground but also by supplementing that description with an example clearly demonstrating this knowledge and understanding.

8. **Your firm has an agreement with a client to pay all renewal fees on their UK intellectual property portfolio as they become due. Your firm has been fulfilling these obligations. However, your firm has failed to pay the renewal fees on one of the client's most important registered designs and has only just noticed the omission after it is too late to restore the registration. Describe what legal action(s) the client could bring against your firm (including an explanation of each element that must be proven) and what remedies, if any, are available to the client against your firm.**

*[Candidates are not expected to include an analysis of restoration of a registered design right nor comment on consequences that may be imposed by a professional body or insurer.]*

### Answer

- Negligence. Duty of care, breach and damage (causation and remoteness). Assessment of professional negligence issues. Good practice in office.
- Contract. General retainer with firm is a contract. Offer, Acceptance, Consideration and Intention. Breach of condition.
- Remedies : Damages are the only viable remedy and answer should include discussion of basis of assessment.

### Comments

This question was extremely popular with Candidates. However the majority of Candidates considered that the question was only concerned with negligence. This observation supports the general comments above, that

Candidates should resist the temptation to “question spot” but rather learn the syllabus and read each question carefully.

The question required Candidates to consider the liability of the firm in both negligence and breach of contract. Candidates who answered this question did well in describing the elements required to establish negligence. A number of Candidates who scored particularly well were able to correctly apply those elements to the facts of the question. Those Candidates who identified the breach of contract element to this question, did well in identifying the key requirements to establish a contract and how the breach arose. Again, the remedies section of the question caused the greatest difficulty for most Candidates.

**9. In so far as the terms relate to an intellectual property right, explain what are the differences between:**

- (a) Legal title and an equitable title;** (6 Marks)
- (b) Tenants in common and joint tenants; and** (7 Marks)
- (c) Equal undivided share.** (2 Marks)

Answer

- Legal Title : Common law right or title to property conferring absolute ownership of the legal right. Enforceable in rem.
- Equitable Title : interest in property held under trust and recognised by the law of equity. Enforceable in personam
- Tenants in common : is a rule of property ownership in equity where ownership is on defined percentage terms (equal or unequal) and is divided between the owners. Does not pass on death.
- Joint tenants : joint ownership without division. Owners have an identical interest in the whole of the property right. Note the right of survivorship under joint tenancy.
- Equal undivided share : Particular application in IP law.

Comments

Candidates were more successful in answering part (b) of this question compared with the other two parts. Candidates showed a reasonable understanding of the differences between joint tenancy and tenancy in common. However, Candidates in general struggled with a more concise explanation of the other terms. With respect to legal and equitable title, Candidates showed that they had outline knowledge of the difference but were unable to accurately explain the differences between the two or the consequences of each.

Candidates, on the whole, did not describe how intellectual property related to each term. Perhaps Candidates may have achieved greater marks under part (a) had they used they concept of an assignment of intellectual property rights to describe the differences between a legal and equitable title.

10. (a) Discuss the principles governing award of costs in High Court litigation. (2 Marks)
- (b) Summarise the powers of the High Court to control costs. (13 Marks)

Answer

- General principle is that the winning party will be awarded costs of litigation. Level of costs is usually inadequate to compensate the winning party fully.
- Case management
- Detailed assessment (formerly taxation) of costs to ensure a “reasonable” level of costs is recovered.
- Various costs awards including standard basis but also indemnity costs for poor behaviour.
- Impact of Part 36 and without prejudice offers on costs.
- Recent introduction of cost capping

Comments

Candidates who attempted this question were able to identify the key principles governing the award of costs in High Court litigation. However, Candidates found the second part of the question more challenging. Candidates were able to refer to the principles of the overriding objective and case management powers but did not go on to explain in reasonable detail how the Court’s case management powers could be deployed in practice.