

The Joint Examination Board
Basic English Law Paper: November 2010

Examiner's Comments

General Comments

Candidates are reminded to read each question carefully and to answer the question asked. As mentioned in previous comments, some Candidates approach this paper in a formulaic manner, looking to “question spot” and answer questions generally, rather than demonstrating their understanding of the law as it applies to the specific facts of the question. Other Candidates demonstrated a good knowledge and understanding of the subject matter by applying their knowledge to the facts of each question and scored well.

Candidates are reminded, as with all examinations, that careful time management is required in order to complete as much of the examination as is possible. It was evident from a number of Candidates' papers that certain Candidates had spent a disproportionate amount of time answering questions from Part A of the paper compared to those in Part B which carry higher marks. Such Candidates could have achieved greater scores had they started with Part B of the examination and then moved to Part A.

PART A (10 marks per question)

1. **Explain what is meant by each of the following terms:**
- a. **ratio decidendi;**
 - b. **res judicata; and**
 - c. **obiter dicta.**

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

Candidates were, on the whole, able to explain the meaning of ratio decidendi and obiter dicta and were able to distinguish between the two. However, a number of Candidates were unable to explain the meaning of Res Judicata and had assumed it was linked to binding precedent. Generally, most Candidates were able to score well on this question.

2. 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 was answered well 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.

**3. Explain the difference between:
(i) the burden of proof; and
(ii) the standard of proof;
required in civil litigation as against criminal prosecution.**

Answer

- Discussion as to how burden of proof can shift in both criminal and civil law;
- In criminal law legal burden is normally on prosecution (exceptions apply where defendant admits issues or pleads automatism or insanity, or where statute reverses the burden) but consider evidential burden changes eg silence enables adverse inferences to be drawn etc.
- Also note how burden can shift in civil cases e.g. prima facie validity of registered rights or assumption of copying under copyright law.
- Criminal law: "Beyond all reasonable doubt"– much higher test than for civil proceedings;

- Civil law: “Balance of probabilities”– lower test than for criminal proceedings;

Comments

This question was the least popular of Part A and supports the general comment that there is a “question spotting” approach to this paper. This question required Candidates to demonstrate an understanding of both the burden and standards of proof in both civil and criminal trials.

Generally Candidates struggled to provide complete answers to this question. Whilst most Candidates were able to identify, in general terms, the standard of proof in civil and criminal trials, a number failed to discuss the burden of proof.

4. Explain the structure and hierarchy of the English civil court structure including an explanation of all routes of appeal.

Answer

- The various civil courts include Magistrates Court, County Court, High Court and its divisions, Court of Appeal (Civil Division) and the Supreme Court (formerly 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 Supreme Court (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 all Candidates and was answered well. 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 courts bound the others 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.

Some Candidates included references to the criminal courts which was irrelevant to the question.

5. Identify each of the different varieties of evidence with examples.

Answer

- Direct: First hand evidence given by way of witness statement or oral testimony given on oath.
- Opinion: Expert evidence.
- Hearsay: Evidence of what another person said (e.g. second hand evidence), given by way of statement or oral testimony. Generally only allowed under a Civil Evidence Act notice.
- Real: Physical exhibits.
- Documentary: documents used to provide evidence.

Comments

This question was attempted by over half of the Candidates. In general the question was answered well although a number of Candidates failed to provide examples of the different types of evidence as required by the question.

PART B (15 Marks per question)

- 6. Describe and compare the advantages and disadvantages each of operating a business via:**
- a) a limited liability company**
 - b) partnership formed under the Partnership Act 1895; and**
 - c) as a sole trader.**

Answer

- Sole Traders – the greatest disadvantage for the sole trader is the risk of unlimited liability. However advantages include the ability to run the business privately, personally and with limited formalities.
- Partnerships – disadvantages of a partnership include the risk of unlimited liability and joint and several liability for each partner. Advantages include the ability to share risk and assets.
- Limited Company – disadvantages include the publication of the company's activities and financial accounts and the more onerous formalities. Advantages include limited liability and easier contract formation.
- Candidates are also expected to identify a number of other advantages and disadvantages in respect of each entity.

Comments

This question was attempted by virtually all Candidates and was generally well answered. All Candidates identified liability as being either an advantage or disadvantage of each means of operating a business. Whilst important, this feature of itself, was not sufficient to pass the question and those Candidates who scored well were able to identify other unique benefits or disadvantages of each method of conducting a business.

- 7. Summarise the rights to object to a new company name at Companies House and the Company Names Tribunal.**

Answer

- Companies House objection on the basis of (i) the name being too similar to an existing registered name (the differences are to be so trivial that the public will be confused or that the names look and sound the same); (ii) misleading information was supplied; or (iii) the name is misleading of the business activities.
- Company Names Tribunal will uphold objection where a company name has been registered with the aim of extracting money or to prevent the rights holder from registering the company name itself in which it has goodwill/reputation.

Comments

This was the least popular question of Part B. The question asked Candidates to demonstrate their knowledge of the procedures available

before Companies House and the Company Names Tribunal to challenge and object to the registration of a company name. The question was not looking for an analysis of trade mark law (or remedies for trade mark infringement or passing off) but the specific statutory procedures laid out in the Companies Act. The question proved challenging for the majority of those Candidates who attempted it.

8. **Describe what is meant by privilege and provide an explanation of:**
- a) the different types of privilege, together with relevant examples;**
 - b) how each is created; and,**
 - c) how each can be lost.**

Answer

- Privilege: A right to withhold disclosure of a particular document/category of information/documents. Generally arises automatically.
- Legal Professional Privilege: privilege arising upon the provision of legal advice between qualifying adviser and client. Owned by the client. Arises automatically where advice provided is “legal” advice. Note that business advice is not privileged. Lost by disclosure to third party or broad distribution.
- Litigation Privilege: Applies to advice obtained in the contemplation of proceedings.
- Without Prejudice: Form of privilege under which details disclosed to either party cannot be used against the disclosing party. Arises automatically where the purpose is towards a settlement.
- Immunity: Statements made in court cannot be held against the maker.

Comments

On the whole this question was reasonably well answered by those Candidates who attempted it. Candidates were able to describe what is meant by privilege. Some Candidates were less clear in their answers when trying to distinguish between litigation privilege and legal professional privilege. Most Candidates had a reasonable understanding of without prejudice communications, their purpose and how privilege arose. A number of Candidates also went on to discuss Part 36 payments in to court which was not required by the question.

9. **Chris and Fred are neighbours. They want to jointly repair the fence between their respective properties. Chris agreed the day before to hire and pay for the hire of a mini digger from his local hire shop, Hire R Us, to dig foundations for the fence posts, on the basis “you don’t sue me if I damage your property”. Fred laughed and said he agreed.**

As Chris digs the first hole, despite Fred’s warning Chris manages to dig straight through Fred’s sewage pipe. Fred is furious and demands Chris pay for the repairs. Chris refuses and angry, walks away. Fred then uses the mini-digger himself but receives a severe electric shock. It transpires that the digger was poorly repaired from its last hire.

Identify the causes of action that Fred may have arising out of the circumstances described above. Explain your reasoning in relation to each defendant. Indicate possible defences in relation to each cause of

action. For each cause of action explain what Fred would need to demonstrate in order to establish his claim.

Answer

- Negligence claim necessary to establish a duty of care, breach, causation and damage.
- Contractual claims: necessary to establish the four requirements for a contract to exist, offer, acceptance, consideration and intention to be bound.
- Issues for Chris: Was Chris negligent? Did he owe a duty of care, and if so did he breach the standard and cause the damage. Consider that Fred and Chris are not professionals or experienced in using the digger. Furthermore, is there a defence to any negligence of Chris? Furthermore, was there a contract between Chris and Fred under which Fred waived his right to bring a claim?
- Issues for Hire R Us. The digger was defective and caused injury. Fred cannot sue for breach of contract since there was no contract between Fred and Hire R Us. Could Fred claim in negligence? Did Hire R Us owe a duty of care? Consider that Chris hired the digger. Was Fred a foreseeable neighbour? If so did Hire R Us breach the standard and as a result did that cause damage?

Comments

This was a complex question that raised a number of legal topics and issues to the set of facts. The question was looking for Candidates to demonstrate their ability to apply their legal knowledge to the facts.

The majority of Candidates had spotted that the question raised issues of negligence by Chris and most Candidates were able to explain the requirements necessary to establish negligence. Those Candidates who scored well however were able to apply the facts and make arguments both in favour and against why a claim for negligence would succeed. However, a significant number of Candidates did not identify the contractual element to the question and therefore lost valuable marks. It should be noted that Candidates did not lose marks for reaching a decision as to whether or not there was negligence, provided that they explained their basis for their decision.

- 10. Your client, Keith has come to see you regarding an infringement of his registered design. Copycat Limited, a new company, has been importing and selling a similar design to that for which Keith has a three-year old design registration. The product at issue is the only product Copycat Limited currently markets.**

Keith first became aware of the infringing copies approximately 3 months ago. However, he has only just gotten around to speaking to you. Keith is easily distracted and so failed to call you. He has also been on holiday for the last 3 weeks. Keith now demands that you obtain an interim injunction for him.

Explain to Keith, by reference to the various criteria required, what must be established to successfully obtain an interim injunction. Your explanation should make reference to the facts above and also explain

the potential risks to, and likely success of Keith in seeking an interim injunction.

Answer

- Need to show grounds under *American Cyanimid* i.e. damages inadequate remedy, reasonable prospect, balance of convenience v. preserve status quo, cross-undertaking, clean hands, diligence to prosecute. Consider *Series V*.
- Implications from the facts include (i) Keith's delay seems excessive and without good explanation, (ii) Copycat only have one product so consider balance of convenience, (iii) is there a reasonable prospect since the design is similar? Risks to Keith include the cross undertaking and costs.

Comments

This question was very popular and was answered by all Candidates without exception. This question required a reasonably detailed explanation as to the criteria a court would assess in determining whether or not it was appropriate to grant an interim injunction. As such there are a number of important tests and criteria to analyse and those Candidates who scored well were able to identify and explain with some detail and examples what each criterion required. A simple bullet point list of the "tests" applied by the Court was insufficient to score well on this question and too few Candidates applied the actual facts of the question (as asked) to the answer.