

## THE JOINT EXAMINATION BOARD

Basic English Law Paper : November 2012

### Examiner's Comments

#### General Comments:

It is important that Candidates follow the instructions on the examination paper and ensure that they answer the question asked, and ensure that they answer the correct number of questions from each section. The approach taken by a number of candidates was to put down on paper everything that they knew or could recall about a topic which may have formed part of a question, but was not necessarily applicable to a full response to the question being asked. Furthermore, setting down lengthy portions of law without applying the content of that law to the facts given in the question, resulted in pointless lengths of text and thus time wasted. An approach of this kind does not demonstrate a knowledge or understanding of the subject matter but rather an ability to memorize passages of law without absorbing the meaning or relevance of the law. A number of candidates, however, had clearly studied the syllabus and beyond and this reflected in the quality of their answers.

Time management is a key element of providing the candidate the best chance of success in the examination. A number of papers indicated that the 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. Candidates are advised to read the examination paper and attempt first those questions with which they are most comfortable and about which they feel most knowledgeable. Within that category candidates should first answer questions from Part B and then those from Part A, leaving those questions about which they are less comfortable until the end. In this way they can maximise on marks on questions where they have a sound knowledge before moving on to less familiar areas.

Candidates are reminded that the standard answer points set out in these Examiner's comments are not definitive answers but are an outline of the answer. Furthermore, reward is always given for sound reasoning particularly where there may be no right or wrong answer to a question.

**PART A**

1. Explain what is meant by the terms:

- (a) stare decisis.
- (b) ratio decidendi;
- (c) obiter dicta; and
- (d) res judicata.

(10 marks)

ANSWER:

These are basic concepts of judicial precedent.

- (a) Stare decisis - "Stand by what has been decided".
  - Follow the law decided in previous cases for certainty and fairness – the doctrine of judicial precedent.
- (b) Ratio decidendi. - The principle or reason for the decision,
  - The principle giving rise to the binding precedent
  - The principle applied to the facts of the case.
- (c) Obiter dicta - "A statement by the way" - definition "other things said"
  - Commentary in a judgment that does not have a binding effect but can be persuasive.
  - The statement may not relate to facts of the case but may be used as an illustrative example.
- (d) 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)

COMMENTS:

This was the most popular question of Part A and was attempted by all candidates. On the whole, the question was well answered as candidates had a good grasp of the concepts of judicial precedent and as a result, candidates scored well.

2. Describe a debenture, a fixed charge and a floating charge and indicate the main differences between them.

(10 marks)

ANSWER:

Debenture - A key source of corporate finance is "borrowing" termed "a debenture". Secured against the assets of a company, with agreed interest (priority over dividends); may be secured or unsecured; unsecured debenture - overdraft facility from the bank - modest sum; secured debenture - company offers security - by way of an asset of the company which can be seized if the debt is not repaid; debenture holders have primary right over the company assets; registrable.

Fixed Charge - A charge is a mechanism for securing a debt against an asset; if loan is not repaid, the lender can take the asset to satisfy the debt; fixed charge attaches to a physical asset of the company such as a building, land or vehicles; the asset cannot be sold without the consent of the lender; failure to register the charge renders it worthless.

Floating Charge - A charge over a class of assets, present and future, eg. raw materials; charge floats over the assets - no consent required from lender for borrower to buy or sell the class of assets; failure to register the charge renders it worthless; the floating charge crystallizes and falls on the particular assets when (a) the company ceases to trade, (b) liquidation of the company, (c) appointment of a receiver to deal with the company assets, and (d) on the occurrence of some event specified in the document creating the charge (ie. default on the loan).

COMMENTS:

The majority of candidates answered this question. This was a straightforward learning exercise. However, overall, few candidates scored well. A number of candidates provided satisfactory definitions of a debenture and a fixed charge, but failed to do the same for a floating charge, and thus they missed out on easy marks.

3. Identify and briefly describe the nature of five equitable remedies.

(10 marks)

ANSWER:

- (a) Injunctions – Final Injunction - Order to one of the parties involved in a case to do something (mandatory injunction) or not to do something (prohibitory injunction).... where damages not an adequate remedy. - Interlocutory Injunction - Temporary injunction granted to protect one party's rights while waiting for the case to be heard and to maintain status quo.
- (b) Freezing Order (formerly Mareva injunction). The freezing order can be made where there is a risk that one party in a case will move their assets out of the UK before the case against them goes to trial. The effect of the order is that the party in control of those assets must freeze them so that they cannot be removed from the account.
- (c) Search Order (formerly Anton Piller Order) - This allows the claimant to search the defendant's premises and remove any documents or other material which could help the

claimant to prove his case.

- (d) Specific performance – An order that a contract should be carried out as agreed. Granted when damages could not adequately compensate the claimant, eg. purchase of land. But never granted in relation to provision of personal services.
- (e) Rescission - Remedy in contract cases. Aims to return the parties as far as possible to their pre-contractual position. Eg. contract rescinded, buyer returns goods and seller returns purchase price. The main grounds for rescission are a misrepresentation which has induced one party to enter into a contract or a mistake which has a fundamental effect on a contract).
- (f) Rectification – The Court will order that where a mistake has accidentally been made in a document so that it is not a true version of what the parties agreed, that the document should be altered to reflect the parties' intention.
- (g) Account of Profits – The account should be of such profits as ought to be treated as having been improperly made by the defendants.
- (h) Delivery up/destruction.

COMMENTS:

This question was not popular with candidates and less than half the candidates sitting this paper selected to answer the question. Overall this question was poorly answered as the majority of candidates who attempted this question, named only two or three remedies thereby losing marks. In addition, many candidates confused equitable remedies and statutory remedies and marks could not be awarded for the latter.

4. List the minimum requirements necessary for the registration of a limited liability company under English law. Describe the function or purpose of each of the required documents.

(10 marks)

ANSWER:

a. Memorandum of Association

- The name of the company
- Situation of registered office.
- The objects of the company – A list of the powers of the company, eg. General Commercial company.
- The limited liability of the members.
- The amount of share capital and the division into shares of a fixed amount.

b. Articles of Association

The Articles of Association contain the regulations governing the internal management and administrative structure of the company:

- Power of Directors

- Power to decrease or reduce nominal share capital.
- Power to borrow money
- Holding of general meetings.
- Management powers
- Dividends
- Accounting and auditors.
- Provisions on winding up.

c. Notification of First Directors and Secretary and Intended Situation of Registered Office

Official Form providing details of the first directors and secretary and the address of the registered office.

d. Declaration of Compliance

Statutory Declaration that the requirements of the Companies Act have been complied with on the application for registration.

e. Official Fee

COMMENTS:

Most candidates attempted this question and those that did demonstrated sound knowledge of the minimum requirements for formation of a company. Although many candidates mentioned the requirement for payment of an official fee, a number lost easy marks for forgetting to mention this.

5. Tom and Paula were married for 15 years. When Paula decided to leave the marital home, she promised to pay Tom £300 per month, as a contribution towards payment of the outstanding mortgage on their house. Paula, at the insistence of Tom, signed a note agreeing to transfer the house into Tom's sole name when the mortgage was paid off. After Tom had paid off the mortgage, Paula refused to transfer the house into his name.

Summarise the legal basis of any contractual claim that Tom may have against Paula.

(Candidates need not make any reference to or mention remedies).

(10 marks)

ANSWER:

1. Terms of a Valid Contract:

- (a) Offer - Unequivocal offer of a promise, capable of acceptance.  
Offer/Invitation to Treat  
Collateral /Unilateral contracts
- (b) Acceptance - Unqualified – Communicated to the offeror  
Acceptance/counteroffer.  
Acceptance by conduct.  
Collateral/Unilateral contracts

- (c) Consideration - "A detriment in exchange for the promise"  
Includes mutual promises  
Must not be past and need not be money - (value/adequacy)
- (d) Intention to create legal relations - Domestic and commercial relations.

2. Tom's position:

- (a) Offer - Paula offers Tom £300 a month towards the mortgage of house.
- (b) Acceptance - Tom agrees.
- (c) Consideration - Tom accepts Paula's £300 a month to pay off mortgage in exchange for Paula's agreement to transfer house to Tom on completion of mortgage payments.
- (d) Intention to create legal relations - Law: In domestic arrangements there is presumption that parties do not intend to create legal relations.
- (e) Conclusion: Tom sues Paula for breach of contract.  
Paula claims "domestic arrangement".  
Tom argues that due to detailed nature of formation stage of the contract (including signed promissory note), both he and Paula had a clear intention that this would be a legal and enforceable agreement and arrangement. Exception to domestic arrangement.  
(Case: Merritt v Merritt (1970))

COMMENTS:

Most candidates answered this question. All that was required in order to get maximum marks for this question was to consider the law of contract and apply the facts of the question to the law. The majority of candidates who answered this question received very good marks for exhibiting sound knowledge of the requirements for formation of a contract and for setting down well thought through argument in order to decide whether Tom had a claim against Paula or whether Paula may successfully argue that there was no intention to create legal relations. Despite the fact that this question was loosely based on a case, candidates were awarded marks for whichever conclusion they drew.

**PART B**

6. Briefly discuss European sources of law, both Primary and Secondary, and explain their application to the United Kingdom.

(15 marks)

ANSWER:

Sources of law:

1. Primary Sources of law:

Treaties -

- Treaty on European Union; Treaty on the Functioning of the European Union, (TFEU) - (as altered and amended) + attached protocols and declarations) – lay out how the EU operates.
- All Treaties signed by UK Government automatically become law.
- Makes community law part of UK law. European Communities Act 1972.
- UK citizens can rely on Treaties, even though not specifically enacted in UK law.
- European Treaty law now interpreted and applied directly by UK Courts.
- Have direct effect (both vertically and horizontally) if give individual rights and are clear.

2. Secondary Sources of law:

(a) Regulations -

- Article 288 (TFEU) - “binding in every respect and directly applicable in each Member State” – ensure uniformity across all member states.
- Do not have to be adopted into UK law.
- Have direct effect (both vertically and horizontally) if give individual rights and are clear.

(b) Directives -

- Article 288 (TFEU) – “bind any member state to which they are addressed as to the result to be achieved, while leaving to domestic agencies a competence as to form and means”.
- Main way in which harmonisation of laws within Member States is reached.
- NOT directly applicable. Implementation in UK normally by Statutory Instrument.
- Must be implemented within time limit set by EC.
- Where no implementation within time limit, Directive has vertical “direct effect” if give individual rights and are clear.

- Individual can claim against the State for loss caused by failure to implement.
- Where no implementation within time limit. NO horizontal direct effect. Individuals not given rights against other individuals.
- UK Courts have a duty to interpret National law in the light of wording and purpose of any relevant directive.

(a) Decisions -

- = Decisions issued under Power of Article 288 (TFEU) and generally administrative in nature.
- = Addressed to Member State or an Individual and "Binding in every respect for the addressees named therein".

COMMENTS:

This was a straightforward question. Candidates were not requested to make any analysis but merely to set down details concerning European sources of law and their application to the United Kingdom. Most candidates who answered this question had sufficient knowledge to attain good marks, although a number of candidates put down everything they know about European sources of law and thus their answers were not the brief discussion requested, which resulted in waste of valuable time and effort on information which was not required in order to gain maximum marks. Candidates should take care to stay focused on the exact requirements of the question.

7. Explain the differences between litigation, arbitration and mediation and the advantages and disadvantages of each:

(15 marks)

ANSWER:

- Litigation

Description:

- Court judgement
- Interpretation according to law

Advantages: - Open, transparent and public  
Compliance with the law.  
Resolution is final and binding, subject to appeal

Disadvantages: Formal and inflexible.  
Public disclosure of facts  
Delay in case being heard.  
Expensive.  
Limited redress.

- Arbitration:

Description:

- Alternate dispute resolution. (ADR)



- Private and confidential.
- Legally based process.
- Before an arbitrator, specialist third party with authority to make determinations and decisions.

Advantages:

- Parties select arbitrator and arbitrators award enforceable.
- The process is private and confidential, and undertaken at times to suit the parties.
- Flexible. Procedure tailored to particular dispute.
- Parties free to choose their representatives (may not be lawyers) for arbitration.

Disadvantages:

- Costly and may be complex.
- Right of appeal on an important point of law only [or serious misconduct].

- Mediation

- Alternate dispute resolution (ADR)
- Private, informal and quick process.
- Voluntary and flexible and parties construct their own settlement.
- Negotiation and bargaining between parties facilitated by a mediator who is a neutral third party who does not impose any decision.

Advantages:

- Assists in disputes where emotions are running high, impasse in negotiations, and distrust between the parties.
- The parties keep control of the dispute themselves, as the settlement is not legally driven and can include what the parties choose.
- Flexible and no outright winner or loser.

Disadvantages:

- The parties are not bound to complete the mediation process and it may break down ending up in court.
- The process can be expensive if there is delay.
- Parties cannot count on legal precedent to be determinative of the result.

COMMENTS:

All but one candidate selected to answer this question and, on the whole, the quality of the answers was very good, thereby achieving comfortable pass marks for the majority of candidates. In order to gain maximum marks on this question all that was required was a sound knowledge of litigation, arbitration and mediation which enabled brief assessment of the advantages and disadvantages of each. Candidates were given credit for every sensible point which they raised relating to the advantages and disadvantages of litigation, arbitration and mediation, and thus the answer was not limited but open to creativeness.

8.

(a) Briefly describe judicial review and each of the principal grounds.

(5 marks)

(b) With reference to the IPREG Rules of Conduct, briefly discuss a situation where a potential client requests a Registered Patent Attorney (“a regulated person”) in private practice to undertake work

on the client's behalf, but the Patent Attorney is aware that an existing client is active in the same general field of technology as the potential new client.

(5 marks)

(c) Acting on the instructions of an existing client for whom he has filed a UK priority patent application and requested various foreign patent applications, including one in the USA, a UK Registered Patent Attorney in private practice deliberately fails to disclose a relevant piece of prior art to the US Attorney responsible for the filing of the US application (despite the US Attorney having specifically requested details of any prior art). Is this deliberate withholding of the prior art by the UK Patent Attorney, who is a regulated person, consistent with the IPReg Rules of Conduct? Explain your reasoning.

(5 marks)

ANSWER:

(a) Judicial Review – Process whereby the judiciary examines the legality of the actions of the executive. The process is procedural and determines whether a public body has acted within its powers or outside its powers.

Principal Grounds: (1) Illegality; narrow or simple ultra vires; errors of law and/or errors of fact; wide ultra vires. (2) Irrationality ; Wednesbury unreasonableness; unreasonable or onerous conditions; proportionality. (3) Procedural impropriety ; statutory procedural requirements; the rules of natural justice; legitimate expectation.

(b) Under IPReg Rules of Conduct assess whether there is a conflict of interest and if so, seek to cure the conflict based on informed written consent from both parties. Should a contentious issue arise between the parties, the regulated person can act for neither.

Rule 7, Guidance 7.3 - - A conflict may not arise simply because the regulated person acts for two or more parties in the same general field of business or technology although on the facts it may do so. More typically a conflict arises by reference to the specific subject matter of a case. However, acting for two or more parties in the same general field of business or technology may give rise to issues of confidentiality.

Rule 7, Guidance 7.4 - Confidentiality safeguards within firms or between branches may be sufficient to "cure" conflict, provided informed written consent is obtained from all parties and suitable arrangements to ensure that confidentiality of information applying to each client are in place. Safeguards cannot however "cure" conflicts to enable the same regulated person to act on behalf of opposing parties in a contentious matter.

Rule 5 – Regulated persons shall at all times act with integrity putting their clients' interests foremost subject to the law and any overriding duty to any Court or Tribunal.

(c) Under IPReg Rules of Conduct, assess whether the regulated person has acted competently, with integrity and honesty in his/her professional activities. Consider integrity. Consider dishonesty in failure to disclose piece of prior art despite having been asked for it. Is there a breach of the Rules of Conduct?

Rule 5 - Regulated persons shall at all times act with integrity putting their clients interests foremost subject to the law and any overriding duty to any Court or Tribunal.

Rule 5, Guidance 5.1(A) - A regulated person should in all professional activities – (a) practice competently, promptly, conscientiously, courteously, honestly and objectively, avoiding unnecessary expense to the client.....

COMMENTS:

This was the least popular question on the Examination paper and less than half of candidates attempted to answer the question. Although a brief and simple description of Judicial Review was all that was required in order to gain five points under Point A, two thirds of the points were allocated to the questions relating to the IPReg Rules of Conduct which required a detailed knowledge of the Rules to apply to the facts of the question. This is an extremely important area of law and candidates should ensure that they have a thorough knowledge of the Rules. Of the candidates who answered this question, only a few gained good marks as they were confident in answering all three sections of the question and had taken note of the relevant Sections of the IPReg Rules of Conduct.

9. Explain what is meant by :

- (a) Legal professional privilege
- (b) Litigation privilege;
- (c) Without prejudice communications.

(15 marks)

ANSWER:

(a) Legal Professional Privilege

- | In civil or criminal proceedings privilege allows information to be withheld from third parties.
- | Protects communications (written or oral) between lawyer and client, thereby enabling client to speak openly and honestly to their lawyer without fear that the conversation may be made public.
- | Does not have to be connected with litigation or even the possibility of litigation. Test broadly interpreted.
- | Extends to documents referred to in documents which are themselves subject to privilege.
- | Automatically arises.
- | Rights of the client and may only be waived by the client.
- | Not all communications between lawyer and client will automatically be subject to privilege. Three Rivers Case, if communications between lawyer and client do not have a legal context, then not the subject of privilege.

(b) Litigation privilege –

Extends to communications (oral or written) between the client (or their lawyers) and a third party, such as witnesses, including expert witnesses, when made during or in serious contemplation of litigation.

Limitation on this form of privilege is that the communication in question must have come into existence for the “dominant purpose” of pending or contemplated litigation. Client's right and only the client may waive the right.

Automatic.

Extends to documents referred to in documents which are themselves subject to privilege, providing such documents have also been created in connection with the provision of legal advice.

Privilege does not protect documents created for the purposes of committing a crime or fraud.

(c) Without prejudice communications –

Without prejudice correspondence is a form of privileged material in relation to negotiations which typically take place between the parties in a civil dispute, although it does not need to be formal litigation.

This form of privilege only arises if there is a genuine attempt to settle the dispute. Comments/discussions made without prejudice may not be used to prejudice the writer in court.

In order to encourage out of court settlement of such disputes, the correspondence between the parties to the dispute (which may contain both offers and admissions) is privileged and cannot be produced in evidence should the negotiations fail and the case ultimately come to trial. This enables the parties to discuss matters more freely and openly without risk.

Privilege may only be waived with both parties' consent or used to prove an agreement or enforce terms of settlement.

Irrelevant whether or not documents are flagged “Without Prejudice”

“Without prejudice save as to costs”

Part 36 offers.

COMMENTS:

All candidates attempted to answer this question. The majority of candidates picked up enough marks to pass. Some candidates scored better marks because they could explain the broad effect of legal professional privilege, litigation privilege and without prejudice communications and when they arise. In addition a number of candidates picked up additional points by demonstrating that they had a more in-depth knowledge, ie. mention of without prejudice save as to costs and Part 36 offers.

10. Mary, who knew that her brother John was an experienced driver, asked him to teach her to drive. After some persuasion John agreed to help. Mary said that their mother wanted to come along on the driving lessons and she asked John if he would mind sitting in the back seat. John agreed but said that, because he would be leaning forward from the backseat to instruct Mary, he was unwilling to wear a seatbelt as it would restrict his movement. For the driving lessons with John, Mary practised her car handling skills on a privately owned disused airfield. On the fourth lesson, Mary swerved and hit a post. On impact, John was thrown forward between the two front seats of the car and injured his head on the dashboard.

Applying legal reasoning, advise John what cause of action may be open to him. Advise whether you think that he may be successful in such action and what remedies may be available.

(15 marks)

ANSWER:

Define Negligence –

- Key elements – Duty of care, “Neighbour principle” – neighbour is one whom you can reasonably foresee as being affected by your acts or omissions  
Breach of duty – “reasonable man” - Owed insofar as he can reasonably foresee the likely outcome of his act or omission. If foreseeing loss or damage to his neighbour he does not take reasonable care to avoid the act he will be in breach of his duty of care.

Causation – Claimant must show on balance of probabilities the defendant’s breach of duty caused the loss which they suffered.

Remedy: Damage - Loss recoverable? Return injured party to the position he would have been in if it were not for the breach. Law limits the extent of recovery - remoteness of damage rules. Compensation.

Apply facts to law :

Duty of care that a learner driver owed to passengers is the same objective standard as any other driver . ((Nettleship v Weston (1971))

Discuss

Applying neighbour principle Mary breached her duty of care to John.

Mary’s actions caused damage/loss/injury?

Recoverable loss?

Consider Novus Actus Interveniens - Has Mary any defences serving to break the chain of causation?

Contributory Negligence: John did not wear seat belt. Note that contributory negligence reduces the damages but does not extinguish liability.

Volenti non fit injuria – “no injury is done to one who consents”

John aware Mary learner, increased risk, but did not wear seat belt.

Remedy: Award of damages – discuss pain and suffering  
Pecuniary loss (loss of earnings), likely reduction in damages

COMMENTS:

This question tests knowledge of the Tort of Negligence and applying the facts given in the question, to the law. This was a very popular question and all candidates who attempted this question achieved pass marks. Moreover, the majority of candidates scored very well. Higher scoring candidates earned their marks by providing well set out answers, identifying the elements necessary for a successful claim under the Tort of Negligence and then defining and discussing those elements in relation to John’s position under the law, and in relation to Mary’s position under the law. Points were awarded for all reasonable arguments and all conclusions which were well supported by reasoning.