

The Joint Examining Board

Basic English Law Paper : November 2013

Examiner's Comments

General Comments:

The purpose of this paper is to test a Candidate's understanding and application of English law and Candidates are encouraged to read into and around the syllabus in its totality since principles covered by the syllabus are those that are likely to face a candidate in their professional life when dealing with clients. It is important that Candidates realise that studying only some areas of the syllabus on the basis that they are likely to come up in the Examination will not serve them well. This limited approach results in Candidates putting down everything they know about a particular topic when it comes up in a question in one form or another rather than demonstrating that they have studied the syllabus and topics comprehensively, in which case answers applied knowledge of the law to the specific facts of the question and sound reasoning is provided. It should be noted that 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 and sound reasoning...

It was clear from the papers that Candidates overall showed strength in relation to some topics, but weaknesses in others. It was particularly noted that the question on the IPReg Rules of Conduct was very unpopular with Candidates. Candidates should appreciate that knowledge of this topic is vital to their everyday practice and Candidates are strongly encouraged to gain sound knowledge of the IPReg Rules for their own reference and also for future examinations.

Candidates are reminded that the answers set out in these Examiner's comments are not definitive answers but serve as a brief outline of a satisfactory answer.

PART A

1(a) In relation to ownership of a property right, define the following and explain the differences:

(i) Tenants in common and (ii) Joint tenants. (8 marks)

(b) Explain what is an equal undivided share. (2 marks)

(10 marks)

Answer:

- (a) Tenants in common - a rule of property ownership between two or more co-owners. Ownership is defined on percentage terms. If permitted by the agreement, either party may divide out their share and deal separately with it. On death of one party, their share does not automatically pass to the surviving party/is part of their estate and passes according to the will.

Joint tenants - Joint ownership in equity without division. All owners have an identical interest in the entire property/unified title. No individual right to deal with the property.

Passes on death to/automatically vests in other joint tenant(s) despite the will of one stating otherwise.

- (b) Equal undivided share: a particular manifestation of tenancy in common, defining the proportions held by each co-owner.

Comments:

This was a popular question and generally answered adequately by those candidates who selected to attempt it, even though there tended to be little or no discussion of differences, but a focus on providing individual definitions. In some cases candidates provided too many details and examples, and in doing so lost valuable time, whilst others struggled to explain the nature of an equal undivided share. In cases where Candidates confused joint tenants with tenants in common and vice versa, no marks could be given.

2. Identify the main sources of English law and provide a concise explanation of three of the sources. (10 marks)

Answer:

Statute: Parliamentary process; introduction of a paper and a bill; various readings before both houses of Parliament; Royal assent; Implementation.

Delegated Legislation: includes both Statutory Instruments and local by-laws; prepared by Minister/nominated institution in accordance with empowering statute; limited in scope defined by statute; Statutory Instruments subject to parliamentary scrutiny, either affirmative or negative resolution.

EC Directives: European commission, approved by EU Parliament; require implementation in UK legislation; may have direct effect (individual can enforce) in UK if not implemented.

EC Regulation: European Council; direct effect.

Case law/Precedent: Ratio decidendi/obiter dicta; hierarchy of Court system; rules of precedent.

Custom: time immemorial.

International Convention/Treaty; negotiated in relevant international body; signed by HMG according to particular treaty requirements but must be ratified by Parliament before becoming effective in UK; may require implementation by primary or secondary legislation.

Comments

This question was attempted by every candidate and on the whole candidates demonstrated sound knowledge of the main sources of English law. The majority of candidates achieved good pass marks in this question and those who achieved the best marks absorbed the detail of the question and merely listed the main sources, before selecting three upon which to focus in some detail. However, some candidates tended to go into too much detail, in particular in relation to the case law, precedent sources, when all that was required was a concise explanation. This lost valuable time which could have been spent on other questions.

3. Discuss the differences between the assignment and novation of an existing contract.

(10 marks)

Answer:

Assignment: Right or obligation under a contract of one party is transferred to another party; privity of contract exists between the original parties; one party to the contract transfers the benefit of a performance which they are to receive under the contract to a third party; the third party will be able to enforce performance of the contract in their own right; in order to assign the benefit of the contract to a third party the consent of the other original party is not required; an agreement between original contracting party and third party in order to assign the burden of the contract to a third party, consent of all three parties is required.

Novation: Novation means to replace or substitute; one party to a contract transfers all of their obligations and benefits under a contract to a third party; the third party replaces an original party to the contract; when a contract is novated the other contracting party must be left in the same position as they were before novation took place; their rights and obligations will not be affected; in order for a novation to occur all three parties will have to agree to it; following novation the original contract will be annulled and replaced by a new contract between original party and third party.

Comments.

This question was straightforward and was answered well by those Candidates who attempted it. A number of candidates provided very concise explanations for assignment and novation which achieved good marks, but extra marks could have been achieved by actually discussing the differences between the two. Some candidates used ABC/XYZ diagrams and tables to try and demonstrate the difference between assignment and novation but these diagrams and tables tended to complicate the issues and made assessment more time consuming for the Examiner. However no marks were lost for using diagrams and tables.

4. In the context of a contract, what is meant by:

- (i) misrepresentation.
- (ii) condition; and
- (iii) warranty.

Discuss the consequences/available remedies for breach in each case.

(10 marks)

Answer

(i) Misrepresentation: factually incorrect inducement to persuade one party to enter into a contract; not a term within the contract; no damages for breach; equitable remedy of rescission may apply.

(ii) Condition: a major/fundamental term of the contract; one which goes to the very root of the contract; may be expressly designated within the contract or necessary implication.

(iii) Warranty: A contractual representation relevant to the main thrust of the contract but not fundamental; may be expressly designated within the contract or an implied term.

Breach of Condition: Injured party can sue for damages as of right; option to terminate the contract or can affirm the contract and continue performance.

Breach of Warranty: Injured party has only the right to sue for damages.

Comments:

This was a straightforward question and in order to gain good marks, all that was required was to demonstrate knowledge of contract law. No analytical assessment or application was required by candidates in order to answer this question and consequently it was selected by all but one candidate. Answers demonstrated good knowledge of conditions and warranties. However a number of candidates mistakenly identified misrepresentations as contract terms, whereas other candidates who had clearly dug deeper, benefited from additional marks for briefly describing wilful, negligent and innocent misrepresentations made as inducements prior to execution of a contract. On the whole candidates scored well on this question, particularly where they provided more than the bare essentials required to achieve a pass.

5. List the categories of responses available to a defendant in a negligence action. Explain each category.

In your answer, assume that the defendant has in fact actually acted negligently towards the claimant.

(10 marks)

Answer:

Volenti non fit injuria - The claimant voluntarily agrees to undertake the legal risk of harm at his own expense; complete defence to an action for negligence; Claimant acts voluntarily - an exercise of free choice; the defendant has committed a tort but the causation is broken; if defence is successful the claimant will recover no damages.

Contributory negligence - Damage which the claimant has suffered was their own fault and partly by defendant; the claimant's fault has contributed to their damage; the defendant must prove that the claimant failed to take reasonable care for their own safety and this failure caused the damage; claimant's damage reduced in proportion to their fault.

Ex turpi causa - "From a bad cause no action arises"; a person involved in a criminal act at the time injured may be denied an action; no duty of care is owed; connection between the illegality and the damage suffered by the claimant; Narrow rule - cannot recover for damage which is the consequence of a sentence imposed for a criminal act; Wider rule - cannot recover compensation for loss suffered in consequence of claimant's own criminal acts.

Comments:

This was the least popular question in Part A of the Examination Paper. It was however merely a learning exercise. Of the candidates who attempted this question, the majority achieved pass marks by identifying the three categories of responses which could be expected in a negligence action. Those candidates who identified the three categories, provided sound definitions and examples, were rewarded with good pass marks. At the other end of the spectrum, however, it was apparent that some candidates had not studied the topic in sufficient detail and therefore were unable to accrue sufficient marks to pass based on their sketchy knowledge.

PART B

6. Under the Civil Procedure Rules:

- (a) Explain the nature of a Part 36 offer. (2 marks)
- (b) In what instances can a Part 36 offer be made? (4 marks)
- (c) When can a Part 36 offer be made? (2 marks)
- (d) Who can make a Part 36 offer and what formal requirements are necessary for each party in making a Part 36 Offer? (7 marks)

(15 marks)

Answer:

(a) A Part 36 offer is an offer to settle; to be compliant with the rules of the Court, a Part 36 Offer must be a genuine offer to settle and be made “without prejudice except as to costs”

(b) A Part 36 Offer can be made in the following instances: - in both money and non-money claim; - in respect of the whole or part of the claim or in relation to an issue that arises.

(c) A Part 36 Offer can be made at any stage of a dispute before or after proceedings have commenced and in Appeal proceedings.

(d) A Part 36 Offer can be made by a claimant or a defendant in a dispute:

- If made by a claimant it must be in writing, state on its face that it is intended to have the consequences of Part 36, specify a period for acceptance of not less than 21 days within which the defendant will be liable for the claimant’s costs if the offer is accepted (“the relevant period”), state whether it relates to the whole of the claim or to part of it or to an issue that arises in it and, if so, to which part or issue, state whether it takes into account any counterclaim, contain sufficient information to allow the offer to consider the offer comprehensively.

- If made by the defendant, it must be in writing, state on its face that it is intended to have the consequences of Part 36, specify a period for acceptance of not less than 21 days within which the defendant will be liable for the claimant’s costs if the offer is accepted (“the relevant period”), state whether it relates to the whole of the claim or to part of it or to an issue that arises in it and, if so, to which part or issue, state whether it takes into account any counterclaim, contain sufficient information to allow the offer to consider the offer comprehensively, in the case of an offer to pay a

sum of money) state that the offer is to pay a single sums of money, state that the sum will be paid at a date not later than 14 days following the date of acceptance

Comments:

This being the first question in Part B, it was to be appreciated by Candidates that more would be required from them by the Examiner than the calibre of Part A answers with 15 marks at stake. Most candidates attempted this question. In order to answer it adequately candidates required a sound and thorough knowledge of Part 36 CPR. Candidates needed to stay focussed, to be clear and concise and keep within time constraints, thereby seeking to maximise marks allowable for each separate section of the question. However, generally although many candidates could explain the nature of a Part 36 Offer in order to satisfy Part (a), it became clear that knowledge beyond that, was somewhat patchy, hit and miss and in some cases incorrect altogether, particularly in relation to when a Part 36 Offer could be made. Therefore on the whole candidates who answered this question achieved only poor to mediocre marks, with few passes.

7.

7(a) Explain the burden of proof and standard of proof required: (i) in civil litigation; and (ii) criminal prosecutions. (5 marks)

7(b) Briefly describe a freezing order, and list the conditions which must be met by the Applicant in order for the English Courts to grant a freezing order. (10 marks)

(15 marks)

Answer:

7 (a) (i) - Burden of proof and Standard of Proof in Civil Law; the burden of proof rests on the claimant to prove his or her case against the defendant; the standard of proof is "on the balance of probabilities" - a much lower standard than that in criminal cases.

7 (a) (ii) - Burden of proof and Standard of Proof in Criminal Law; the defendant is presumed innocent until proven guilty; it is for the prosecution to prove this guilt, not for the defendant to prove his or her innocence; due to the serious consequences of guilty verdict, including loss of freedom, that standard of proof is high - "beyond all reasonable doubt".

7 (b) A freezing order is an interim order which restrains a party from disposing of or dealing with its' assets; Conditions: The English court must have jurisdiction; the applicant must have a cause of action; the applicant must demonstrate to the court that he has a good arguable case; there must be sufficient assets in existence to meet the claim; there must be a real risk of disposal or dissipation of the assets; the applicant must provide an undertaking to the court to pay any damages to the respondent if it is later shown that the injunction should not have been granted.

Comments:

This question was very popular and all but one candidate chose to answer this question. Generally the standard of answers was very good indicating that candidates had studied these topics well and they were rewarded accordingly. In particular question 7(a)(i) and (ii) presented candidates with a means of picking up five marks quickly based on simple rote knowledge and many candidates achieved high marks on this portion of the question. However, 7(b) required candidates to be more

selective in their answers and therefore it was important to focus on the nub of the question. No extra points were gained by describing any other type of interim injunctions. On the whole this question was answered well.

8. Your colleague, Joe Bloggs, is a litigation practitioner as defined by the IPReg Rules of Conduct with a specialist qualification in IP advocacy and litigation. In relation to an English Court case relating to IP infringement, Joe has been instructed by a firm of foreign attorneys to act for their client, IPSA S.L. of Spain. At the case management conference, it becomes apparent that the case also involves complex employment law issues. Because Joe had studied A-level employment law at night school, he is instructed by the firm of foreign attorneys to represent IPSA S.L. in Court in connection with these issues as well. However, IPSA S.L. send an urgent email directly to Joe instructing him to immediately stop acting for them in relation to the employment law elements of the case. Advise Joe.

(15 marks)

Answer:

IPReg Rules of Conduct -

Rule 1 - Interpretation - "Client" - In the face of foreign originating work, the "Client" is the principal for whom the work is ultimately being done, although the instructions may come from an intermediary foreign attorney, to whom the regulated person will also owe a duty of professional care.

Rule 4 - Competence - Guidance 4.3 - A regulated person must only undertake advocacy and litigation work which is within their expertise and competence. Normally the regulated person only undertakes litigation and advocacy where the primary issues relate to IP.

Where a case raises issues not within regulated person's competence, they must supplement their team with other specialist legal advisers.

Undertaking advocacy or litigation in cases unrelated to IP will be considered a breach of Rule 4 of IPReg Rules of Conduct. Under Guidance 4.5 - If a regulated person is found to have used rights inappropriately this can result in severe disciplinary sanctions including removal of rights to conduct litigation and/or advocacy and removal of a registered person's name from their relevant professional Register.

Advice to Joe:

IPReg Rules of Conduct - "Interpretation". Joe is working for IPSA S.L. They are his "client" and his "principal" although he takes instructions from their Foreign attorneys. Therefore, on receipt of instructions from IPSA direct, Joe should immediately stop work in relation to the employment law issues, confirm that he has done so and seek further instructions from IPSA S.L. as to whether he may supplement his litigation team with a specialist in employment law.

In relation to representing IPSA S.L. in Court on employment issues, Joe is in breach of Rule 4 of IPReg Rules of Conduct. He is acting outside his expertise and competence. He could face disciplinary sanctions including removal of rights to conduct litigation and removal of his name from the relevant Register.

Comments:

This question was the least popular question on the Examination paper. The IPReg Rules of Conduct are included in the syllabus for the Basic English Law Paper and are an important area of law. However, it appears from the small number of candidates who selected to answer this question that on the whole candidates may be either uncomfortable with this area of law, or that they have not appreciated the importance of gaining a sound knowledge of the IPReg Rules of Conduct. This topic will be examined in future examination papers and candidates are strongly advised to spend time thoroughly studying the IPReg Rules of Conduct. Of the very few candidates who answered this question, the majority gained pass marks.

9. Jonathan had been saving up his wages to try and buy a motorcycle because although he had qualified as a bike mechanic, he had been unable to afford his own motorbike. After saving for a year Jonathan has £750. While looking at a local newspaper, Jonathan is excited to see an advertisement saying "Motorbike for sale, needs some mechanical work, £700. Call Kevin on 0208 654444 or see, by appointment, at 2 Chalmers Road, London". Excited to see a motorbike for only £700, Jonathan immediately calls Kevin and he is told that the motorbike is still for sale. Not believing his luck, Jonathan says to Kevin "I'll give you £700 cash and I can do the work. I'm coming to get in straight away". Before Kevin can say anything Jonathan hangs up and rushes over to Kevin's address. On his arrival, about an hour later, Kevin has sold the motorbike to someone else. Considering the relevant legal principles, advise Jonathan whether there was a contract between him and Kevin.

(15 marks)

Answer:

Consider Law in relation to the facts of question:

1. Terms of 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 a 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. Discussions points: (a) Offer + acceptance = Agreement; discuss whether Kevin's advertisement was an offer or an invitation to treat. (b) Invitation to treat: - an invitation to treat is a preliminary stage at which someone is invited to make an offer for something; dependent on the circumstances; the person making the invitation to treat is not bound to accept any offers made to them; case law - small advertisements in newspapers or magazines are invitations to treat (Partridge v Crittenden (1968)); the customer cannot insist on the goods being sold to them. (c) Offer - offer is expression of a willingness to contract on certain terms made with the intention that a binding agreement will exist once the offer is accepted; an offer may be express or implied; an offer can be specific (one person or group) or it can be general and not limited as to whom it is directed at; an offer must be certain; the offer must still be in existence when it is accepted. (d) Acceptance - Acceptance of the offer is necessary for the formation of a contract; acceptance must correspond with the terms of the offer; acceptance must be communicated to the offeror. May be oral or in writing; the acceptance must be unequivocal and positive.

3. Reasoned Conclusion: Kevin's advertisement was an invitation to treat; therefore as no offer by Kevin there could be no acceptance and no formation of a contract; Jonathan did not give Kevin time to accept his offer and there is probably no contract; Jonathan could have raised his expectations, creating a reasonable belief of acceptance by conduct.

4. Marks awarded to candidates who provided sound argument in relating the relevant law to the facts given in the question, whichever outcome was concluded.

Comments:

This question was very popular and answered by every Candidate. The question tests knowledge of the law of contract and applying the facts given in the question, to the law. Most candidates scored well on this question, and those which gained the highest marks identified the necessary elements to establish a contract, applied the facts of the question to each and then drew a conclusion as to whether a contract existed. Candidates are reminded that drawing an immediate conclusion without providing any framework in support of the conclusion resulted in much lower marks. It should be noted that candidates did not lose marks for reaching a decision either way, provided they explained their reasoning.

10. Since leaving school at 18, Mark has worked as an apprentice for a water company. Last year when inspecting one of the giant turbines, Mark fell and injured his leg as a result of the Company's failure to repair the metal gantry surrounding the turbine. The water company was found negligent and Mark was left with severe weakness in his leg, which often gives way as a result of his injury. The water company asked Mark to stay on and continue to work for them because he is their most talented apprentice and likely to eventually qualify as an engineer.

Whilst conducting an inspection in a new turbine hall, Mark noticed that a light bulb over one of the turbines needed replacement. Without looking for his co-worker or calling for assistance, Mark started to climb a flight of narrow steep metal steps which had no handrails to access the turbine. Halfway up the steps, Mark's weak leg gave way and he fell backwards on to a concrete floor and suffered multiple injuries.

Identify what cause of action may be open to Mark and, considering the relevant legal principles, advise Mark as to whether you think that he may be successful in such action. If so, what remedies may be available to him?

Ignore any employment law or Health and Safety aspects.

(15 marks)

Answer:

Consider law in relation to the facts of the question:

1. Define Negligence - Duty of care - "Neighbour principle"; Breach of duty - "Reasonable man" reasonably foresee the likely outcome of his act or omission; Reasonable care to avoid the act he will be in breach of his duty of care; Causation or foreseeable loss or injury - remoteness - balance of probabilities - breach of duty caused the loss suffered.

2. Discussion: Apply facts to the law: Duty of care - Water company owed a duty of care to its employees; Did the water company breach their duty of care? Was the type of flight of steps without a handrail standard in a waterworks premises? Risk factors - probability of harm? Was the damage reasonably foreseeable? Did the defendant behave as the reasonable person would have in the circumstances? — weak leg; thin skull test; “But for” test; remoteness/type of damage.

3. Discussion: Consider Novus Actus Interveniens - chain of causation broken? Contributory Negligence - it was not an emergency situation. Mark climbed the stairs knowing his leg gives way and he did not ask for help from co-workers; Volenti non fit injuria - no injury is done to one who consents; Consider: the chain of causation was broken and therefore no negligence (McKew v Holland & Hannen & Cubitts (1969) 3 All ER 1621 (HL).

4. Discussion : If there had been negligence - remedy - damages - Special damages. General damages - pecuniary/non-pecuniary.

Marks were awarded to Candidates for sound argument supporting their outcome.

Comments:

This question tested knowledge of the Tort of Negligence. In order to do well candidates should have commenced by considering the relevant law and then apply the facts of the question to the law. This question was answered by every Candidate and the majority of Candidates scored very well. This demonstrated that Candidates had studied well and clearly understood the law, and they could therefore apply the law to the facts comprehensively. Most candidates provided well set out and reasoned answers, including discussion supporting negligence or dismissing negligence, as well as touching on remedies which may be available. Most Candidates scored well on this question.