

# **FHS Jurisprudence and Diploma in Legal Studies**

## **Examiners' Report 2020**

### **PART I**

#### **STATISTICS**

##### **A.**

(1) Numbers and percentages in each class/category

(a) Classified examinations

FHS Course 1, BA Jurisprudence

Class	Number			Percentage (%)		
	2019/20	2018/19	2017/18	2019/20	2018/19	2017/18
I	54	41	38	30.86	20.19	21.11
II.I	120	155	139	68.57	76.35	77.22
II.II	1	5	1	0.57	2.46	0.56
III						
Pass			2			1.11
Fail		2			0.98	

FHS Course 2, BA Law with Law Studies in Europe

Class	Number			Percentage (%)		
	2019/20	2018/19	2017/18	2019/20	2018/19	2017/18
I	12	2	10	30.77	6.66	30.30
II.I	13	28	23	69.23	93.33	69.70
II.II						
III						
Pass						
Fail						

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FHS Course 1 and 2 combined

Class	Number			Percentage (%)		
	2019/20	2018/19	2017/18	2019/20	2018/19	2017/18
I	66	43	48	30.84	18.45	22.53
II.I	133	183	162	68.70	78.54	76.06
II.II	1	5	1	0.46	2.14	0.47
III						
Pass			2			0.94
Fail		2			0.85	

## (b) Unclassified Examinations

### Diploma in Legal Studies

Category	Number			Percentage (%)		
	2019/20	2018/19	2017/18	2019/20	2018/19	2017/18
Distinction	11	7	7	36.67	25.92	20.59
Pass	19	20	27	63.33	74.07	79.41
Fail						

### (2) If vivas are used:

Vivas are no longer used in the Final Honour School. Vivas can be held for students who fail a paper on the Diploma in Legal Studies, but none have been held for the last six years.

### (3) Marking of scripts

A rigorous system of second marking is used to ensure the accuracy of marking procedures. This second marking occurs in two stages.

The first stage takes place during initial marking before the first marks meeting. In larger subjects, marking teams meet to ensure that a similar approach is taken by all markers. Where there is a discrepancy in marking profiles among the team, a sample of scripts are sent for second marking to ensure consistency. In smaller subjects, a random sample of scripts are second marked, again to ensure consistency of marking. This sample should be at least six scripts, or 20% of the candidates, whichever is larger. In all subjects, any script where the first mark ends with a 9 (69, 59, 49) or any mark below 40 is also second marked at this stage. All potential prize scripts should be second marked at this time also. In 2020, 395 scripts were second marked prior to the first marks meeting.

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Additional scripts are sent for second marking following the first marks meeting. In all instances, where a script mark was 4% below the candidate's average mark, the script was second marked. Further, where a script ended with an 8 and where a change in one or more scripts could affect the candidate's overall award classification, the script was second marked at this stage, and was flagged as a borderline script. Where a candidate needed a change in only one script to alter their overall classification, and where the candidate had a script ending with a 7, this was also sent for second marking as a borderline script. In 2020, 188 scripts were second marked following the first marks meeting.

Overall, the level of second marking was broadly similar to the last few years.

	Number			Percentage %		
	2019/20	2018/19	2017/18	2019/20	2018/19	2017/18
Total Scripts	1915	2219	2154			
First stage	395	431	371	20.62	19.42	17.22
Second stage	188	224	270	9.81	10.09	12.53
All second marking	583	655	641	30.44	29.51	29.75

### **Jurisprudence Procedure**

As the two elements of the Jurisprudence assessment are marked separately, a slightly different procedure is used for second marking.

During first marking, the standard procedure is used for the exam element. That is, profiling and sampling is undertaken for each marker. On the basis of a recommendation from the Examinations Committee in September 2017, the Jurisprudence marking group agreed that all mini-option essays would be second marked at the initial marking phase, reducing the need for additional essay marking between the exam board meetings.

Following the first marks meeting, additional second marking takes place. Some scripts are sent for second marking where one or both elements is four below the candidate's average. Second marking also occurs where the combined marks leave the student on the borderline between classifications.

There were 12 instances of Jurisprudence Examination second marking between the marks meetings.

### **NEW EXAMINING METHODS AND PROCEDURES**

**B.**

#### **1. Format of exams**

The Covid-19 crisis resulted in the closure of most University buildings, including the Examinations School, and an instruction to students who had returned home for the Easter

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break not to return Oxford for Trinity Term. This necessitated a change in the format of exams.

## Coursework

Three papers (Medical Law and Ethics, Comparative Private Law and Advanced Criminal law) are take-home assessments under the existing Regulations. The questions had been set during HT 2020, were not subsequently changed. The date for the release of the questions (due to be in the first week of the Easter holiday) was delayed by a week. Otherwise the form of assessment was unchanged.

## Open-book exams

For the remaining papers there was a change in the format of the assessment, as we moved from a 3-hour closed book format (normally sat in the Examinations Schools) to a 4-hour open-book exam, which would be sat remotely. The papers were made available to candidates online, who then had a 4-hour timeslot to download the paper, answer the questions, and upload their answers. Adjustments were made for different time-zones.

In terms of the content of the papers, almost all papers had been set before the lockdown measures came into place, meaning that the papers were in the traditional format. In a communication in April 2020 I asked setters to consider if any of their questions would need to be changed in light of the open-book format, although they were not invited to make wide-ranging changes. No paper was changed significantly as a result of this. As such, the papers remained of the type and nature that students would have been accustomed to sitting from Mods and collections.

## **2. Mitigating the impact of the changes**

The Board recognised that the changes to the form of the assessment could have a significant impact on individual candidates as well as the cohort as a whole. The exam period is a stressful one in a normal year, and the disruptions of the lockdown will obviously have added to this for several candidates. We thought it was important that the nature of the exams and the criteria for assessment should not change this year. This was a matter of fairness to students, as they were used to dealing with papers of a certain type (as a result of Mods, collections and revision practice). We sought to reassure students in our communication with them that although the form of the assessment would change, the type of papers they would be sitting would not. Specific steps taken to mitigate the impact included:

### **a. Safety net**

A safety net was put in place to ensure that this year's cohort performed at least as well as the previous three years' cohorts had done on average. Specific commitments were:

1. The proportion of Class I overall (ie. not individual papers, but overall Class I) awarded would be no less than the proportion of Class I overall awarded, on average, over the last three years across Course I and Course II taken together;
2. The combined proportion of Class I and Class II.i overall (ie. not individual papers, but overall Class II.i) awarded will be no less than the combined proportion of Class I

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and Class II.i overall awarded, on average, over the last three years across Course I and Course II taken together;

3. Subject to exceptional circumstances (such as incomplete scripts), the proportion of Fail overall (ie. not individual papers but overall Fail) will be no greater than the proportion of Fail overall awarded, on average, over the last three years across Course I and Course II taken together.

## *b. Marking conventions*

Furthermore, the marking conventions for each degree classification were lowered. The most significant change was that the 'no mark below' condition of Class I and Class II.i classification was lowered by 5 marks.

## *c. Guidance to markers*

In a communication to markers in May 2020 it was explained that the marking criteria remained the same for the 2020 cohort, and that markers should not expect papers to be of a higher standard. The following guidance was given to markers:

"A key commitment made to this year's finalists, as part of the Faculty's 'safety net', is that the marking criteria for scripts (set out in 'FHS Instructions to Setters and Markers') would not change. This is a matter of fairness to candidates, given that they have prepared for a typical finals paper and have no relevant experience of open-book exams. As such, markers should apply the normal criteria for Class I, Class II.i, Class II.ii etc, as found in the FHS Instructions to Setters and Markers.

Furthermore, we would discourage markers from expecting papers to be of a higher quality as a result of the open-book format. Although candidates will be able to consult materials during the exam, they will have roughly the same amount of time as they would in any other year to write their answers (the additional hour permitted this year is to allow candidates to download the paper and upload their answers). Candidates are unlikely, therefore, to have time to read over their answers or check their references. As such, markers should not penalise scripts for a lack 'polish' unless they would have done this in a previous year."

The same point was communicated to students, where it was explained that they should continue to revise and prepare for the exams as they would have done in any other year. Students were also directed to the University's guidance on preparing for open-book exams.

## *d. Changes in teaching, learning opportunities*

All FHS teaching was completed by the end of HT, meaning that candidates did not miss any learning opportunities. Revision classes continued as normal in TT, albeit that they were delivered remotely.

## *e. Materials available to candidates*

In our communication to setters in April 2020, setters were asked to identify core materials that were not available in electronic form. Furthermore, setters were asked to avoid setting

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questions that were predominantly about, or required significant knowledge of, resources not available to candidates.

We reviewed core paper reading lists and were of the view that the vast majority of core materials (mainly cases and academic articles) were available on-line. The only subject that was a cause for concern was Jurisprudence, which relies heavily on academic monographs. Paul Burns worked with the Bodleian to ensure that most of these monographs were made available online.

Paul Burns also did a lot of work auditing reading lists for options. Again, most material was available in electronic form. Possible problems were highlighted in respect of History of English Law and Criminology, and I contacted the convenors of each subject. For Criminology the convenors were able to upload most material online. As to History of English Law, the convenors said that the core texts (Baker's IELH and Baker & Milsom Sources of English Legal History) were available online, as well as most cases and statutes. There were some sources that were not available, but were of the view that there was enough for candidates to be able to prepare properly for the exam.

As to materials made available in the exams, Blackstone's Statutes were made available in electronic form to candidates. Case-lists were deposited in a file on weblearn. Where papers had bespoke statutes bundles, these were also made available to candidates. Of course, as the exams were open-book format, there was no restriction on the materials that candidates could prepare themselves.

## **3. Operation of Exams**

Difficulties were encountered in the first few days of the exam period. There was a specific issue with the Land law paper as it contained the incorrect rubric (it required candidates to answer 2 problem questions rather than 1). There was no way of communicating this mistake to candidates taking the paper in GMT time, as we had instructed them to turn off their emails during the exam. After the exam, the Board decided to apply a special marking convention to the Land law paper, whereby: (1) If a candidate had answered 2 PQs and their lowest mark was a PQ then this would be replaced with an average of the other 3; and (2) If a candidate had applied the real rubric and answered only 1 PQ then that would not be treated as a breach. The Board also accepted that these conventions may not reduce all unfairness, as the mistake may have caused confusion and anxiety that would have had a more general impact upon the paper. The Board, therefore, paid close attention to mitigating circumstances which referred to the Land law exam, and borderline candidates where the Land law paper was a sensitive mark.

A further issue was encountered with Criminal law, a paper sat by candidates who are reading for Law as a second BA. Unfortunately, the 2019 paper was made available to these candidates. Most candidates spotted the error quickly and the correct paper was uploaded and the 4-hour time re-started.

Following these problems there was an urgent review of all papers that had been uploaded to the Examination School's website, to ensure correctness. No further issues of this type arose for the remainder of the exam period.

## **4. Procedure of the Exam Board**

The final significant change concerned the procedure for consideration of Mitigating Circumstances (MCEs) by the Exam Board in its final marks meeting. In addition to

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consideration of individual MCEs, the updated Regulations (Exams and Assessment Framework para 11.7.3) meant that the Board had to identify what impact the COVID pandemic has had upon the cohort as a whole.

At the beginning of the final marks meeting, the Board considered the steps taken (as detailed above) to mitigate the disruption caused by Covid-19. Furthermore, at this stage we had a preliminary view of the likely proportion of Class I and Class II.i degrees, and noted that the 2020 cohort appeared to have performed better than previous years. In light of this the Board was confident that sufficient steps had been taken to minimise the disruptions experienced this year.

In terms of consideration of individual MCEs, there were considerably more MCEs this year (approximately 120) than in previous years. Prior to the final marks meeting, the chair of the Board read through all MCEs. The members of the Board were then divided into groups of two, and each group assigned 20-30 MCEs to review and record comments upon. During the final meeting, for each candidate with an MCE application, the application was noted before consideration of the candidate's marks.

Apart from these changes, the Board conducted its business in the normal way.

## **5. Future changes**

Should finals be taken remotely in 2021, a system needs to be put in place that will allow setters of papers to communicate with candidates during the exam. In a normal year the setter of a paper will attend the beginning of their exam to conduct a final check of the paper and answer questions should issues arise. The move to an online format this year meant that we lost the benefit of this procedure. Furthermore, we had instructed candidates to turn off their email during the exams, meaning that there was no way to communicate corrections during the Land Law and Criminal Law papers. If online exams are held in 2021 then we should ask the Examinations School should put in place a means of communicating with candidates during the exam.

## **6. Thanks**

The Exam Board would like to record its thanks to Heather Schofield, Paul Burns and Clara Elod. The changes to this year's examining format presented considerable challenges to all involved. The work of Heather, Paul and Clara, which was done in very difficult circumstances, allowed the Exam Board to conduct its business in a proper and timely fashion. We also would like to thank James Lee and Gavin Phillipson, who did far more than would normally be expected of external examiners.

## **PART II**

### **A. GENERAL COMMENTS ON THE EXAMINATION**

The most notable change for the 2020 cohort is that the number of Class I degrees awarded is approximately 10 percentage points higher than in 2019 and 2018.

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Although the marking conventions had changed this year, with the 'no mark below' requirement being relaxed for the Class I degree, this accounted for very little movement between the Class II.i and Class I boundary.

The percentages for the 2020 cohort are affected by the fact that the withdrawal rate was much higher this year (we had approximately 30 fewer candidates than in previous years). Had this not happened, we may assume that the breakdown of the results would have been much closer to that seen in previous years. However, it remains the case that the absolute number of Class I degrees awarded in 2020 was higher than in previous years. This may be the result of a number of factors, including the longer times that candidates had to write their answers, the open-book format, or the increase in mitigating circumstances applications.

### B. EQUALITY AND DIVERSITY ISSUES AND BREAKDOWN OF THE RESULTS BY GENDER

FHS Course 1, BA Jurisprudence

	2020				2019				2018				2017			
	Male		Female		Male		Female		Male		Female		Male		Female	
	No	%	No	%												
I	31	41	23	23	18	20	23	20	23	29	15	15	21	27	17	15
II.I	43	57	76	77	69	78	85	75	56	69	83	84	56	71	90	82
II.II	1	1	0	0	1	1	4	4	1	1			2	2	3	3
III																
Pass									1	1	1	1				
Fail					1	1	1	1								
Total	75		99		89		113		81		99		79		110	

FHS Course 2, BA Law with Law Studies in Europe

	2020				2019				2018				2017			
	Male		Female		Male		Female		Male		Female		Male		Female	
	No	%	No	%												
I	5	55	7	44	1	8	1	6	4	33	6	29	6	35	5	28
II.I	4	45	9	56	12	92	16	94	8	67	15	71	11	65	12	67
II.II															1	5
III																
Pass																
Total	9		16		13		17		12		21		17		18	

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FHS Course 1 and 2 combined

	2020				2019				2018				2017			
	Male		Female		Male		Female		Male		Female		Male		Female	
	No	%	No	%												
I	36	43	30	26	19	18	24	18	27	29	21	17	27	28	22	17
II.I	47	56	85	74	81	80	101	78	64	69	98	82	67	70	102	80
II.II	1	1		1	1	4		3	1	1			2	2	4	3
III																
Pass									1	1	1	1				
Fail					1	1	1	1								
Total	84		115		102		130		93		120		96		128	

There has been an increase in the percentage of Class I degrees awarded to both male and female candidate. However, the increase has not been proportionate. In 2019 male and female candidates performed equally well, with 18% of each group being awarded a Class I degree. This year male candidates have performed much better, with 43% of their group being awarded a Class I, as compared to 26% from female candidates. The difference of 17 percentage points is clearly a cause for concern.

It should be noted that the results in 2019 did reflect a change in the trends shown in the previous years. In 2017 and 2018 the gap in the proportion of Class I results awarded to male and female candidates was between 11-12 percentage points. This more closely reflects the gap between male and female candidates in 2020, although the difference (17 percentage points) is more marked this year.

## C. DETAILED NUMBERS ON CANDIDATES' PERFORMANCE IN EACH PART OF THE EXAMINATION

Students on the BA programmes take nine papers as part of the FHS examinations. These are made up of seven compulsory papers and two optional papers. Students chose from a list of 23 option papers for this year's FHS. The distribution of students across the option papers is shown below:

	2020	2019	2018	2017	2016
Advanced Criminal Law	25	15			
Civil Dispute Resolution	4	5	5		
Commercial Law	-	11	25	11	17
Company Law	12	13	2	20	10
Comparative Private Law	15	17	14	11	12

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	2020	2019	2018	2017	2016
Advanced Criminal Law	25	15			
Competition Law and Policy	17	15	1	33	28
Constitutional Law	5	9	6	9	5
Copyright, Patents and Allied Rights	-	9	34	29	22
Copyright, Trade Marks & Allied Rights	16	15	18	13	8
Criminal Law	5	9	6	5	5
Criminology and Criminal Justice	16	16	12	27	24
Environmental Law	12	16	3	6	9
Human Rights Law	20	18	17	20	19
Family Law	41	57	60	49	29
History of English Law	3	5	3	2	5
International Trade	15	10	13	8	5
Labour Law	1	13	15	21	15
Media Law	23	30	28	1	20
Medical Law and Ethics	51	85	73	78	47
Moral and Political Philosophy	35	17	24	34	18
Personal Property	16	12	2	17	13
Public International Law	31	29	41	46	39
Public International Law (Jessup Moot)	5	6	3	4	
Roman Law (Delict)	16	5	7	9	18
Taxation Law	15	27	16	22	12

Students on the DLS take three papers, and choose from a shortened list of FHS option papers. The distribution of DLS students across the core and option papers is as follows:

	2020	2019	2018	2017	2016
Administrative Law	1		1		2
Company Law	12	6		6	6
Competition Law and Policy	5	5		5	3
Constitutional Law	4	4	3	5	5
Contract	25	22	28	27	27
Copyright, Patents and Allied Rights		3	3	2	6
Copyright, Trademarks and Allied Rights	6	2	4	4	2
Criminal Law	2		6		1

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	2020	2019	2018	2017	2016
Criminology and Criminal Justice	2	3	4	2	2
Environmental Law	1	4	1		
European Union Law	3	4	5	8	7
Family Law		1			
History of English Law			1		
Human Rights Law				4	5
Labour Law		1	2	3	2
Media Law	2	1			
Medical Law and Ethics			4	3	
Public International Law	6	5	9	5	3
Roman Law (Delict)		2		1	
Taxation Law	2		4		
Tort	23	17	23	23	22
Trusts	2	1	4	4	4

The distribution below is shown as percentages. Where 0 is shown, less than 0.5% of students fell into this range. A blank field indicates that no students fell into this range.

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	Student Count	75-79	71-74	70	68-69	65-67	61-64	60	58-59	50-57	48-49	40-47	39 or less
Administrative Law	200		8	17	14	32	22	3	2	2			
Contract	222		7	12	10	28	28	5	5	5			
European Union Law	202	0.5	8	16	17	45	12	1.5					
Jurisprudence	197	1	11	12	12	26	29	6	1.5	1.5			
Land Law	201		6	14	7	25	33	5	5	4	0.5	0.5	
Tort	223	0.5	9	20	13	37	15	1.5	2.5	1.5			
Trusts	203		6	11	5	31	35	6	2	4			
Advanced Criminal Law	25		4	20	20	40	16						
Civil Dispute Resolution	4	25		25	25	25							
Commercial Law	-	-	-	-	-	-	-	-	-	-	-	-	-
Company Law	23			13	30	26	17.5	4.5	4.5			4.5	
Comparative Private Law	16	6	19	16	19	6	16	6	6	6			
Competition Law and Policy	22		4.5	28	9	32	17		4.5	4.5			
Constitutional Law	9		1	2	1	3	2						
Copyright, Patents and Allied Rights	-	-	-	-	-	-	-	-	-	-	-	-	-
Copyright, Trade Marks and Allied Rights	22		9	9	18	27	32			5			
Criminal Law	7			43	28.5	28.5							
Criminology & Criminal Justice	18		17	17	17	22	27						
Environmental Law	13		15	15	8	47	15						

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	Student Count	75-79	71-74	70	68-69	65-67	61-64	60	58-59	50-57	48-49	40-47	39 or less
Family Law	41	2	10	17	15	34	17			5			
History of English Law	3		33.3	33.3	33.3								
Human Rights Law	20		10	20	30	25	15						
International Trade	14			14	7.5	50	21		7.5				
Labour Law	1								100				
Media Law	24	4	13	8	8	38	21	4	4				
Medical Law and Ethics	51		10	6	10	31	28		11	4			
Moral and Political Philosophy	34	3	20	15	3	29	15	6	6	3			
Personal Property	15		7	47		27	19						
PIL	36		11	19	17	33	14	3			3		
PIL Jessup Moot	5		40		60								
Roman Law (Delict)	16		6	31	13	31	19						
Taxation Law	17		24	17	6	24	17	6		6			

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### **D. COMMENTS ON PAPERS AND INDIVIDUAL QUESTIONS**

#### **ADMINISTRATIVE LAW**

The overall standard of scripts was good. Most candidates understood the issues raised by the questions, demonstrated a sound understanding of the relevant case law and academic literature and offered clear, structured answers. There was, however, significant variation in the degree of precision with which candidates addressed the question. The strongest answers analysed the question carefully and drew on the relevant materials to offer clear and focused responses. In contrast, weaker scripts sometimes offered broad overviews of the relevant area of law or focused on tangential issues (which had perhaps been the focus of earlier tutorial essays). As in previous years, it was important for candidates to be aware of recent developments in the case law and literature.

Many candidates produced answers which were very close to the upper word limit of 2,000 words. While many of the longer answers were good, in some cases they included discussion which was superfluous. Many of the strongest answers, furthermore, were somewhat shorter than 2,000 words. Candidates would do well to remember that word limits are not targets and that the most important thing is producing an answer which directly addresses the question.

Some questions were notably more popular than others. Questions 1 (constitutional foundations), 2 (review of discretion), 3 (legitimate expectations), 7b (standing), 8b (reasons) and 9 (error of law) attracted large numbers of answers. In contrast, questions 5 (tribunals), 6b (damages under the Human Rights Act) and 7a (judicial review procedure) attracted very few responses.

#### **CIVIL DISPUTE RESOLUTION**

There were only 4 students who sat the exam this year. Two students obtained first class honours and two students obtained strong 2is. 8 of the 10 questions were attempted. There were no answers to the PQ on disclosure, privilege and time limits or the history question. There were some very thoughtful answers on the subject of ADR, including on the legitimacy of prioritising ADR in certain types of disputes, in light of the use of non-disclosure agreements for sexual harassment and assault revealed by the me too movement. There were also strong answers on bias, costs, and the PQ on interim remedies, case management and apparent bias. The prize winner demonstrated not only an exceptional command of the material on the reading list but was able to persuasively incorporate primary and secondary materials from other FHS subjects including administrative law and jurisprudence.

#### **COMPARATIVE PRIVATE LAW**

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This was the third year that this course has been examined by the submission of extended essays. Having now experienced three different cohorts, the examiners feel confirmed in their initial assessment that the change of examination format has been a success and that it is very well-suited to assess a subject which inherently requires candidates to have both a broad (three different jurisdictions) and deep (contextual) understanding of the materials they have studied.

As in previous years, candidates had to choose one of three different questions relating ranging across the law of obligations (contracts and tort/delict) and property law. Half of the candidates opted for an obligations topic, the other half chose property law. The overall quality of the submitted work was good, with some truly outstanding essays. Given the relatively small number of candidates, the examiners do not think it appropriate to engage with particular points or questions, but instead want to highlight a few general themes and trends.

Candidates chose a range of different approaches to tackle the material, and it is impossible to say that one approach was superior to another. What mattered was that essays engaged directly with the terms of the question set; developed the answer in a clear, coherent and well-structured way; made good use of the source material, referencing it appropriately; displayed a good overview of the problem under consideration within each of the three jurisdictions, yet at the same time managed to weave the discussion of the three systems into a lively and interesting comparative account; and extracted a thoughtful and meaningful conclusion from the comparison.

### **COMPETITION LAW AND POLICY**

The paper comprised eight questions of which four were essay questions and four problem questions. FHS and DLS candidates were asked to answer three questions including at least one problem question. This was the first year in which FHS students were asked to answer three (rather than four) questions. The change was introduced to enable FHS students to engage in more detailed analysis of the relevant policy and law.

The first essay question required candidates to reflect on a quote drawn from the landmark judgement of the Court of Justice of the European Union in the case of *Intel v Commission*. This was a fairly popular question attempted by over a third of students. Answers were of a good standard with two candidates obtaining a mark of 70% or over. Amongst the remainder, the average mark obtained was 62%.

The second essay question dealt with the timeless debate over the dividing line between “by-object” and “by-effects” restrictions of competition. Half of the students who submitted a script attempted this question. The average mark obtained was 66%, with two candidates reaching 70% or more.

Question three required candidates to reflect on a quote from Advocate General Darmon, which discussed another enduring controversy, namely that of price signalling and parallel conduct.

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In question four, candidates were given the opportunity to reflect on the goals of European competition law. This was another unpopular question.

Problem questions focused on the application of Article 101 TFEU, Article 102 TFEU, the European Merger Regulation and the enforcement of competition law, with significant crossover in all four of the questions on offer.

Question five contained a multitude of issues including whether there were undertakings involved, jurisdiction, several potential restrictions caught by Article 102 TFEU (predominantly), and Article 101 TFEU, as well as the lawfulness of various acts carried out by the European Commission. On the whole, the eight students who attempted this question performed very strongly. The average mark obtained was 67.

Question six similarly cut across several areas of the course, with issues revolving around vertical restraints under Article 101 TFEU, pricing practices under Article 102, horizontal cooperation requiring interfacing between Article 101 TFEU and the European Merger Regulation, as well as the lawfulness of several actions taken in the context of a dawn raid. Thirteen students attempted this question, making it the most popular choice. The average mark overall was 65%, with three examinees obtaining a mark of 70% or above.

Question seven predominantly concerned issues in relation to horizontal cooperation under Article 101 TFEU and the European Merger Regulation. Overall, students performed strongly, averaging 66%. Of the seven candidates who attempted the question, three obtained a mark of 70% or above.

Question eight dealt predominantly with issues relating to the European Merger Regulation and several pricing practices under Article 102 TFEU. The question was another very popular choice with half of the students who submitted a script attempting it. Performance-wise, the standard was once again very good with an overall average of 66%. Two candidates achieved marks of 70% or above.

Twenty-three students were registered to sit the examination. Twenty-one papers were submitted for marking. On the whole, the scripts showed a very good command of the subject and good analytical skills. Five candidates (24%) achieved an overall first-class mark in their exam.

As in previous years, students generally chose to spread their answers across both essay and problem questions, although there was a clear preference for the latter. First class answers generally displayed excellent grasp of the underlying material, evidenced by sustained references to case law and commentary, balanced with robust analytical engagement and creative reasoning. Weaker answers tended to miss important substantive issues, neglect critical analysis and misrepresent the relevant law.

### **CONTRACT LAW**

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The examiners were struck by the excessive length of answers this year. Long answers were rarely to a candidate's advantage. Many answers, especially at the top end, were diminished by the (unnecessary) recitation of general points – in the style of a textbook – which were not focused on the questions and by the inclusion of entirely irrelevant comments. Very long answers were also more likely to contain errors (of varying degrees of seriousness). In addition, the examiners were surprised by the number of candidates who chose not to discuss or, in some instances, even cite relevant cases on the Faculty's case list; for some reason, several candidates thought it best to refer instead to cases which do not appear on the Faculty's case list. Here too, this practice was rarely to a candidate's advantage since the cases which appear on the Faculty's case list are there for very good reasons. Furthermore, it was not always obvious that candidates had actually read the other cases which they cited. The examiners can expect candidates to have read the cases which they cite or to cite the secondary source in which such cases are used. This is a fundamental prerequisite of scholarship.

The best answers to essay questions and problem questions paid close attention to the relevant issues and discussed the relevant law accurately, precisely and comprehensively and evaluated it where the rules were uncertain or controversial. The best essays answered the specific question which was asked and contained a clear thesis which was outlined at the beginning and substantiated throughout.

### Question 1:

This question was reasonably popular. The examiners expected candidates to refer to and think critically about the relevant arguments outlined in the key cases on offer and acceptance. Some candidates who argued in favour of abolition struggled to address satisfactorily the second half of the question. Without a good grasp of the advantages of the postal rule, it was difficult to see what exactly might need to be replaced.

### Question 2:

This question was very popular. The strongest answers assessed the most recent developments and focused on the term 'meaningful'. The examiners were surprised to find that implied terms in law were omitted entirely or marginalised for no convincing reason in some answers.

### Question 3:

This question attracted few candidates but the answers were generally very good. The most impressive answers engaged in a close analysis of the terms in the question and assessed the impact of *Makdessi* with critical acumen. The examiners were pleased to see that candidates generally addressed both parts of the question adequately.

### Question 4:

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The very few candidates who answered this question were generally able to address the uncertainty of the test in UCTA, although some failed to give convincing examples from the cases. The second part of the question was sometimes overlooked or addressed only in a cursory way.

### Question 5:

This question was very popular but the answers were variable in quality. Weaker answers focused almost exclusively on consideration at the expense of estoppel or, more rarely, *vice versa*. Several candidates decided to treat the question as an invitation to talk only and generally about cases on part payment of debt; in some instances, even that was not done comprehensively. Equally problematic was the omission of *MWB* or the inability to discuss accurately this leading case. The best answers avoided these problems and often integrated effectively – and examined critically – theoretical arguments on this topic (developed by Atiyah in particular).

### Question 6:

This question was reasonably popular. There were some worrying errors in accounts of the law: for example, some candidates stated that any breach of contract justified termination while others said that only a breach of condition could lead to this outcome. Similar to other questions with descriptive and normative dimensions, the better the candidate's knowledge of the arguments in the leading cases, the easier it was to write persuasively about what the law should be.

### Question 7:

This question was very popular. The best answers explored all or some of the following issues: non-economic loss (eg *Jarvis* and *Ruxley*), account of profits (*Blake*), reliance loss (*Anglia/ Omak*) and negotiating damages (*One Step*). Having noticed that *Robinson* was discussed in some of these cases, the best answers explored the extent to which, if at all, these heads of damages were actually consistent with the passage cited in the question. Credit was also given for appropriate discussion of limitations upon the recoverability of damages, including rules of mitigation and remoteness, alongside the central question of measure.

### Question 8:

This was the least popular problem question although there were, still, quite a few answers. Most candidates examined and applied the doctrines of unconscionable bargain and non est factum in the first half of the question. The strongest answers noted how the particular facts in the problem related to specific aspects of the reasoning in the leading cases on these doctrines. The second half of the question was generally not handled as satisfactorily as the first. Several answers discussed undue influence only or, more rarely, misrepresentation only. The examiners were perplexed by this trend since both doctrines are invoked in *Etridge* and *O'Brien*, the seminal cases. With respect to undue influence, the discussion

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of the law was not always sufficiently accurate and precise. Candidates also needed to consider whether the bank was put on inquiry and if so, whether reasonable steps were taken. An inadequate grasp of *Etridge* sometimes precluded a satisfactory answer to this part of the question.

### Question 9:

This question was reasonably popular. The examiners were surprised to see that several candidates thought that the presumption against an intention to create legal relations applies within families only. The case of *Blue v Ashley* – on the Faculty's reading list – ought firmly to have disabused candidates of such a notion. Most candidates considered and applied sections 1 and 2 of the 1999 Act. The best answers explored how the terms 'assent' and 'relied' ought to be interpreted by reference to cases on the 1999 Act and principles drawn from other areas of contract law. Few candidates noticed the significance of the laugh and the explicit reference to the statute for the discussion of intention to create legal relations. The issue of acceptance by silence was often addressed perfunctorily: candidates need to consider carefully the judgments in and, thus, the limits of *Felthouse v Bindley*. The issue of certainty was generally handled well although several candidates thought that the contract might have been frustrated without having considered the logically prior question of whether there could even be a contract on the facts.

### Question 10:

Many candidates attempted this question. There were a few excellent answers on the difficult – and largely unsettled – issues raised by unilateral contracts. The issue of intention to create legal relations was frequently omitted perhaps for the reason noted above in our comments on question 9. A surprisingly high number of candidates thought that the postal rule was relevant. With respect to revocation, most candidates identified the relevance of *Dickinson v Dodds* but, oddly, many failed to state correctly and appraise the limits of this rule. A further common error was the failure to see that if there was a contract, the claim would be for the agreed sum rather than damages. Several candidates who went down the latter route made inaccurate assertions about what damages would be awarded. In contrast, the final part of the question, on mistake, was often well handled although a worryingly high number of candidates made the serious error of thinking that contracts are voidable on the ground of mistake of identity i.e. even when there is no misrepresentation.

### Question 11:

This question was very popular. There were some excellent answers which identified and discussed in depth the specific points which were relevant. The most common weaknesses were the following: the failure to discuss section 2(1) of the 1967 Act, to discuss correctly the relationship between sections 2(1) and 2(2), to deal adequately with the exclusion clause and to engage accurately and meaningfully with the counter-factual. Furthermore, many answers contained aimless discussions of what supposedly constituted 'misrepresentation' without reference to the particularities of the specific claims which could be brought. In addition, when considering certain types of loss (notably B being 'very upset'), some candidates switched from tort to contract without realising that they had done so and thus without recognising that there would need to be

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a claim for breach of contract (and that, in the case of distress, such loss is not recovered as a matter of course). The examiners were also surprised by the number of candidates who did not discuss any cases on section 3 of the 1967 Act.

Question 12:

This question on frustration, damages for breach and mistake was reasonably popular. Most candidates identified the need to discuss self-induced frustration. The weaker scripts failed to notice that if the contract for the transfer of the lorry was not frustrated, there would be a breach of contract and it would be necessary to consider the measure of damages. The examiners were surprised by the number of answers which failed to identify or apply correctly the relevant provisions of the 1943 Act. The best answers explored the meaning of the term 'benefit' in light of *BP v Hunt*. The final part of this problem question was generally handled less competently. The weakest candidates did not identify that the contract could be void on the ground of mistake. The very best candidates noticed the relevance of and applied correctly the doctrine of rectification.

### **CRIMINOLOGY AND CRIMINAL JUSTICE**

This year eighteen candidates took this paper, two of whom sat the DLS paper, answering three, rather than four questions. Eight papers were marked by the second assessor, representing the range of marks and including any borderline papers. The agreed marks ranged from 61% (low upper second class) to 74% (first class), with 6 candidates' marks at or above 70%.

The first class answers were well written, critically engaged with the academic literature, rather than simply describing it, and showed a good understanding of the theoretical perspectives underpinning arguments raised within the literature or by criminal justice professionals.

Those papers that were awarded an upper second class mark showed sufficient attention to detail and a sound knowledge of policy, practice and academic debate, but may have had occasional errors or inaccuracies or were not sufficiently well grounded in a strong theoretical framework.

None of the papers were poor and all showed a good appreciation of criminal behaviour, and criminal justice policy and practice.

As last year, some questions were more popular than others; for example, of particular interest to the students this year were the question addressing the over-representation of young black men in the criminal justice system, questions about victimisation, and of police accountability as well as theoretical models of criminal justice.

### **ENVIRONMENTAL LAW**

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These were overall, an impressive set of answers in a course that requires students to engage with a variety of legal material and legal questions. All questions on the paper were answered and students showed confidence and deft ability in the range of different legal contexts that the

study of environmental law requires.

Stronger answers were those that addressed the questions in a direct way. Stronger answers also showed an impressive mastery of relevant legal detail so as to provide a thorough answer. Where some answers were weaker is in using pre-prepared frames of analysis to address some points that were not always as relevant to a question as they could be. Overall though, this was a good set of exam answers with students showing a robust understanding of how environmental problems give rise to a range of legal issues.

### EU LAW

#### GENERAL

By and large, candidates coped well with the move to the online examination in EU law. Nevertheless, problems arose when candidates used pre-existing answers (tutorial essays) to another year's questions to answer this year's. This meant that the groundwork was already there, even though the texts very often pushed the word limit. As a consequence, there was a lack of engagement with the specific question, rather than with the general subject area to which it referred. The better answers were those that were either specifically written for this exam, or that thoroughly adapted the existing text to the new question. It is not clear to the examiners which method was less laborious.

#### Q1

This question did not have many takers. The quality of the answers was mixed. Regarding the first part of the question, 'what are they', some of the points that candidates might have thought about were: rules relating to 'selling arrangements' vs 'product requirements'; background to *Keck: Dassonville, Cassis, Sunday trading*; attempt at a definition: list of examples, or abstract; how to distinguish one type of rule from the other, and can the same measure be both (*Gourmet, de Agostini, Familiapress*) or neither (*Bluhme, Alfa Vita*)?

When it comes to the second part, 'what role do they play?', some items for consideration might have been: relationship with discrimination test; starting point of the assessment (need for a definition), or not even part of it?; presumption (reversal of the burden of proof) that 'product requirements' do, and 'selling arrangements' do not breach Article 34?; meaning of para 17 of *Keck*, 'not by nature ...'?; *Keck* overruled in *Moped trailers* or other judgments?; *Keck* transposed/transposable to the other freedoms of movement (*Alpine Investments, Bosman, Lehtonen, Deliège*)?

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Concerning the marking, a 2:2 was awarded where the answer provided no context, no definition, nothing on the role of 'selling arrangements' in the assessment overall, and/or contained fundamental mistakes.

Answers in the lower half of 2:1 contained imprecise, incomplete, or partly wrong (mere) re-telling of cases; an intuitive (i.e., lacking definitions) use of 'discrimination', 'selling arrangements', 'product requirements'; misunderstandings regarding 'mandatory requirements'; cast no sideways glances at the other freedoms; and engaged little or not at all with the literature.

A mark from the upper half of 2:1 was awarded for an accurate summary of Keck and other cases, albeit without much systematic reflection on the role of 'discrimination' and 'market access' in the assessment, often implying that a finding of 'selling arrangements' precludes any further questions; there would be an engagement with literature (often a mere parroting from the most widely used textbooks), but no critical discussion.

Answers were placed in the 1<sup>st</sup> class if they showed the strength of the previous category, and additionally, a critical discussion of case law & literature, and a perspective on other freedoms.

Q2

This question had a good number of takers. Knowledge of *My* was not expected, but that candidates would note the contrast with, in particular, *Grzelczyk*. This might have given rise to the question how the two judgments could be reconciled, whether, for instance, the qualification of an individual as 'worker' is crucial. This could have led to a reflection on the case law concerning students (of which *Grzelczyk* is an example). Another question that arises in this context is which (if any) of the provisions on citizenship, and on free movement of workers, are *leges speciales*? Some candidates may have noticed that there is a parallel with the same question in relation to Article 18 and 45. Directive 2004/38 can be read to side with *Grzelczyk*. Nevertheless, because a directive ranks below the TFEU, no conclusive argument follows from the Directive. Positions in the literature are divided: this could have been the starting point of a discussion in which candidates would ideally have developed their own position.

Banding: a 2:2 would be awarded if there was little or no engagement with the question, rather than a mere reproduction of commonplaces on Union citizenship, or fundamental mistakes.

A 2:1, lower half was given to scripts that contained much case re-telling (with a prominent role played by the judgment in *Ruiz Zambrano*). Such scripts would typically show merely superficial engagement with the quotation, especially with the question of the relationship between Articles 20/21 and 45.

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A script was placed in 2:1, upper half, if there was some reflection on relationship between Articles 20/21 and 45, maybe also Article 18 (invoked in *Grzelczyk*). Such scripts would also make reference to the Directive and to some literature, but without much discussion.

Scripts qualified for a 1<sup>st</sup> class mark if there was close engagement with the quotation, and ideally also with the wording of Articles 20, 21, as well as a reflection on the scheme of the entire chapter on non-discrimination & citizenship, especially on the repeated reference to 'rights and duties', 'conditions & limits', 'limitations & conditions'. Equally rewarded was a close (and potentially critical) look at *Grzelczyk*'s formula of Union citizenship as a 'fundamental status'. This might have been concluded with some reflection on the question whether *My* has been forgotten, overruled, or consigned to its own niche.

### Q3

This was among the most popular questions. Strictly speaking, it addresses only Article 114, but candidates legitimately used it as a springboard for a discussion of the principles of conferral, subsidiarity, and proportionality, and some had very little on Article 114 at all. Starting point for the discussion might have been the Court's usual formula as found, for instance, in *Vodafone*, paras 32, 33, and other cases on the reading list.

The Court's formulation of a "mere finding of disparities between national rules" might have reminded candidates of *Cassis*. This could have prompted a discussion relationship between this formula and "differences between national rules which are such as to obstruct the fundamental freedoms". A wider question that arises from this concerns the relationship between Articles 34–36 and 114, or "can selling arrangements be harmonised?" (G Davies).

Still with regard to the Court's formula, what is a 'direct effect' on the functioning of the internal market? What is an indirect effect (if there is such a thing)? Is this a question of degree, as some judgments might be read to indicate? This could be meant when the Court demands that distortions of competition be 'significant' for legislation under Article 114 to be permissible. The reference to 'distortions of competition' is apparently borrowed from Article 116 TFEU. In that provision, however, such distortions have different consequences. Is this 'competition' as in Article 101/102 (how could it be – among national legal orders?) or Article 107(1) (state interference through subsidies in private competition)? Similarly, candidates might have asked when the emergence of obstacles is 'likely', and how likely it must be.

From the Court's demanding that a measure be 'designed to prevent' the obstacle, the question follows which objectives the EU may pursue beside the establishment and functioning of the internal market. Many candidates were under the impression that creating the internal market must be the only aim, and that the pursuit of goals such as public health or the protection of the environment precludes recourse to Article 114.

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This is related to the requirement that a measure “genuinely be to improve the conditions for the establishment and functioning of the internal market”. This appears directly opposed to judgments in which the Court held outright prohibitions to be permissible such as *Arnold André*, paras 34, 35.

The above discussion at the same said everything that needed to be said for this question about the principle of conferral. As long as they had said something about Article 114, candidates were free to connect this with the principles of subsidiarity and proportionality under Article 5 TEU.

Banding: a 2:2 was awarded only if the candidate was unable coherently to retell any case law (at the very least, *Tobacco Advertising*), Article 114, or one commentator or other's opinion as found in one of the popular text books.

A 2:1, lower half was the mark if there were misunderstandings and mistakes, but the candidate knew some case law and literature, without much discussion or the expression of an opinion. Some of the above points were addressed, more or less explicitly.

A script attracted a 2:1, upper half if there was more case law and literature, correctly summarised, as well as more of the above points, more thoroughly addressed. *Tobacco advertising* would feature prominently. Candidates would discuss public health, may cite the concluding words of Article 168(5) TFEU, and might say or imply that pursuing that objective is not permissible under Article 114.

1<sup>st</sup> class answers reflected on the concept of the internal market and the four freedoms, as well as on their relationship with Article 114. Candidates will address many or most of the above points.

Q4

This question about the supremacy of EU law over national law was a very popular choice. Apart from *Simmenthal*, other leading cases in which the Court set out the doctrine are *Costa v ENEL*, *Internationale Handelsgesellschaft*, as well as human rights cases from the 1970s and more recently. Representative of dissenting views by national court are the Danish judgment in *Ajos*; the Czech in *Landtová*; the French in *Cohn-Bendit*; the British (preferably with some indication that this is of limited relevance post-'Brexit') in *HS2* and *Pham*, and older cases such as *Bulmer v Bollinger*. Most such challenges came from the German Federal Constitutional Court, in cases *Solange I, II*, *Brunner* ('identity review'), *Honeywell* (re *Mangold*) and others, and most recently in *Public Sector Purchasing Programme* (5 May 2020). The latter prompted many candidates to cite Weatherill's 'bark/bite' metaphor.

Banding: a 2:2 was awarded if a candidate could not give a coherent account of either the EU or the national view.

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A script was placed in the lower half of 2:1 if it contained a simple re-telling of case law and maybe some literature. Such scripts placed emphasis only on human rights, while more recent issues ('identity review', 'co-operation between courts') were merely touched.

Scripts in the upper half of 2:1 gave accurate summaries of the different positions, and reflected some of the debate concerning 'pluralism'. Candidates in this bracket typically sided with someone else's opinion whether one or both points of view are preferable or correct.

1<sup>st</sup> class scripts engaged critically with the case law, national as well as EU, and also reflected in the same way on the literature, attempting to formulate an individual point of view.

### Q5

This question was of middling popularity. Starting point for the discussion could have been that Article 51(1) CFR does not say, "covered/governed/falls within the scope" as the Court used to, but instead, "implementing" (also one of the Court's earlier formulae). Further clues could have been gleaned from the Charter's preamble and from the explanations published with the Charter.

The question whether the various formulations lead to different results becomes relevant when a Member State invokes derogations in the Treaty, or 'mandatory requirements/imperative reasons in the public interest'. The Member State then 'act[s] within the scope of the Treaty', but is it 'implementing' EU-public policy, morality, health ...? What does 'implementation' mean? It might mean the EU telling MSs *that* they need to do something, and *what* it is, as in the paradigm case of directives, or it might mean something else. Candidates would here be rewarded for creative suggestions. The background is that individuals are to enjoy the same protection against measures taken by national authorities as against EU institutions, when national authorities 'stand in' for the EU, i.e. when the substance of their action is largely determined by EU. What is more, fundamental rights exist as laid down in the CFR, and alongside as 'general principles' of EU law, Article 6(3) TEU. The relationship between the two might be worth exploring in this context. Potential cases to be analysed here are *Åkerberg Fransson*, *Egenberger*, *Dano*, *Alimanovic*, and a number of others from the reading list.

Banding: scripts were classed as 2:2 if the question was only superficially understood, if there was no more than incoherent re-telling of the cases, or little awareness of the potential conflict between 'old' and 'new' formulae.

Scripts in the lower half of 2:1 displayed little more than a re-telling of cases, and an acknowledgement that there are different formulations.

In scripts in the upper half of 2:1, there was a more developed understanding of the case law and the conflict, but no opinions or criticism that go beyond the case law or literature. Some background in the development of EU human rights law was in evidence. Candidates might see the case of Directives, and note Article 6(3) TEU.

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1<sup>st</sup> class scripts explained the conflict, and had critical opinions on case law and literature.

### Q6

This was this year's variation on the evergreen question concerning 'direct effect, indirect effect, incidental effect, general principles, *Francovich*', and a very popular question, too. Starting point is the judgment in *Marshall*, as confirmed in *Faccini Dori*: no horizontal direct effect of Directives. Directives can only be invoked by individuals vis-à-vis Member States. Some student also drew a distinction between 'objective' and 'subjective' direct effect. The difference did not always become entirely clear. The traditional account in the literature has it that the Court introduced several work-arounds to *Marshall*. Given how well-trodden this area is, the challenge for candidates was to say anything remotely original.

*Francovich* was not central to the question, because the question focussed on legal relationships between individuals. Nonetheless, *Francovich* completes the picture. First-class answers might even ponder whether and with what (if any) modifications *Francovich* applies to individuals, should one want to extend direct effect to relations between them, and what clues in this respect the Court's judgments in *Defrenne* and in *Courage v Crehan* hold.

Banding: A 2:2 was awarded if a candidate did not even parrot the standard account in the literature without flaws.

Scripts in the lower half of 2:1 drew on some case law, but merely re-told this without much application or reflection.

Scripts placed in the upper half of 2:1 gave a coherent account of the traditional interpretation in the literature, illustrated with coherently summarised case law.

1<sup>st</sup> class scripts articulated critical opinions on case law and literature, regardless of the position adopted.

### Q7

'Judicial hierarchy' – starting point is Article 19(1), 2<sup>nd</sup> sentence TEU: "[The CJEU] shall ensure that in the interpretation and application of the Treaties the law is observed." The hierarchy comes from the binding effect *erga omnes* of the Court's rulings under Article 267. This is not a hierarchy in the traditional sense, though: CJEU can quash judgments at first instance by the General Court, but not by any national court. Only in proceedings for interim relief can the CJEU give instructions to the parties to a dispute before the CJEU, Article 279 TFEU and Article 160(1), (2) of the Rules of Procedure. This does not apply to Article 267.

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The Court is not in that sense an 'apex' court. Nevertheless, its interpretation is the final word when it comes to EU law. Candidates may (again) mention the *PSPP* judgment of the German Federal Constitutional Court of 4 May 2020 here, and maybe past criticism of, say, *Mangold*.

'Ultimate Constitutional Court for the EU' – "Constitutional Court" invites reflection the Treaties as constitutions (*Les Verts*), and on the nature of the EU as not quite a state but not a traditional international organisation, either (*Staatenverbund* was the German FCC's neologism in *Brunner/Maastricht*). 'Ultimate' is correct within the sphere of the EU alone, but has to be taken with the above qualification when it comes to the Member States.

'Assisted by national courts' – not so much in the interpretation of EU law, but in its application.

Regarding interpretation, candidates may talk about which national courts are under duty to refer. From there it is not far to *CILFIT* but also to the inevitable *Foglia v Novello* (some may yet again draw on *Mangold*, another case in which the parties were in complete agreement with each other as to the desired outcome). There may be discussion of the 'relationship of cooperation' (*Pham, HS2*) between the CJEU and national courts. *Pfeiffer* (and more generally, 'indirect effect') may be cited as examples of national courts' interpreting EU law (as the first step towards a conforming interpretation of national law).

When it comes to application, supremacy, human rights, and direct effect are likely to be mentioned. Judicial review under Article 267(b)/263, and EU administrative law might also crop up. It is for the national courts to grant interim relief when the CJEU cannot (see above).

Banding: Scripts were classed as 2:2 if there was a lack of coherence, and merely a patchy understanding of both Article 267 and the jurisprudence.

Scripts in the lower half of 2:1 merely retold some cases (as it turned out, *Foglia v Novello* featured disproportionately, and few had thought much about the judgment), with little or no discussion of the quote, never mind questioning of any of its assumptions.

Scripts ranked in the upper half of 2:1 gave a coherent account of the case law under Article 267, and how this relates to the quote, but little critical discussion. Nevertheless, such scripts identified a number of the above points.

1<sup>st</sup> class scripts engaged in a critical discussion, and identified a greater number of the above points.

Q8

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This question was another classic, and found many takers. This year, it came in the guise of a semi-problem question. This required candidates to pay close attention to the quote. As virtually all students had at one point written a tutorial essay on this topic, a lot of 'copy and paste' occurred, often at the expense of attention to the question. Even those who were aware of the nature of the question faced the challenge of grafting some sort of engagement with the quote on a text that as originally written was wholly unrelated to the question.

Starting point is the *Plaumann* formula. The predominant take was that this is too restrictive, with Craig & de Búrca and AG Jacobs, especially his opinion in *UPA*, as the most prominent witnesses. Common arguments are that the more people are affected, the less likely it will be that the measure can be challenged by each (the 'mirage' criticism), and that whole factories cannot be built over night (the 'economic' criticism). Arguments of democratic accountability (AG Kokott) were also raised. Alternatives to *Plaumann* that candidates suggested mostly their cues from AG Jacobs' 'substantial adverse effect' formula and the AG's analysis of the shortcomings of Article 267(b).

The quote sits awkwardly with all this. Its emphasis is on rights of participation in the adoption of the measure that the individual subsequently seeks to challenge. It has a precursor in, for instance, *Binderer*. This procedural angle came as a surprise to those who think, with the bulk of the literature, that standing is all about substantive disadvantages being visited on individuals. The *Plaumann* formula does not necessitate such a reading when it refers to 'attributes peculiar to [the applicant]' and 'circumstances in which they are differentiated from all other persons', so that they are 'distinguished individually just as in the case of the person addressed'.

The question regarding the Treaty of Lisbon invited a discussion of the new heading, "... against a regulatory act which is of direct concern to them and does not entail implementing measures." From the case law it is clear that this refers to non-legislative acts as in Article 290(1). Whether the applicants in *Greenpeace* would fare better now depends on whether the ERDF grants financial assistance by way of delegated, non-legislative acts.

Banding: a coherent and mostly correct account of the rules on standing was the minimum for a lower 2:1. For at least very good (upper 2:1) answers it was necessary to place the quote in the big picture of the jurisprudence, with some awareness of the interplay between Articles 263, 277, and 267(b), as well as (for the second question) of Article 290(1). (A common misunderstanding regarding the latter provision was that the source of the rule is not the Treaty article, but the judgment in *Inuit*). Outstanding answers (1<sup>st</sup> class) will use the opportunity to reflect critically on the interpretation that they find in the literature.

Q9

As usual when it comes to problem questions, few candidates chose this one. As there were a good number of issues in the scenario, a generous standard was applied to the answers. The outline below is complete to an extent that was not expected of candidates.

Move to London:

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Handel becomes established in London, Article 49 TFEU. Short distinction from Article 56: H seeks permanent integration into the economy of the host-Member State. As a consequence, Dir. 2004/38 applies to him, Article 3(1) Dir. Farinelli as a famous singer does likewise, but we do not hear anything about his subsequent activities. To be safe, his derived rights should therefore also be assessed. We have no indication of any economic activity on Cosima's part, so that she can only have rights derived from H and/or C.

Farinelli and Cosima have the right to move with H under the conditions of Articles 3(1), 2(2)(a)-(d) Dir. Comments on F's sexuality and on the platonic-incestuous nature of the relationship between H and C are likely but beside the point. None of lits a-d apply. We do not know enough to say whether Article 3(2)(a) applies to C, but (b) applies to her and F if H can provide 'due attestation' (tentative definition to be supplied by the candidates). This can be presumed.

'Lord Mayor will not allow ...' may refer to entry to England, but denial is unlikely to come within the LM's jurisdiction. Discussion of Article 5 Dir. is therefore redundant but if without major mistakes, did not lead to deductions. Settlement in London should be the focus. The problem is that Article 7(4), second sentence, excludes Article 3(2)(b). Then again, the latter provision clearly speaks of residence. That might mean for up to three months only, under Article 6. Can this be overcome by an invocation of the right to marry and to found a family, Article 9 CFR?

Those who continue after this point (hypothetic discussion is acceptable) will have to assess Article 27(1) and (2). The permissible grounds are exclusively public policy, public security, and public health. Candidates can find the definitions in the case law on Articles 45(3) and 52 TFEU. None fit the moral indignation that seems to speak from 'louche and scandalous'.

Rejection of the anthem:

Is there the necessary cross-border element for Article 49 to apply? Not decisive is that H is now a British citizen: those who have availed themselves of free movement rights can invoke these rights on return even against the Member State whose nationals they are (*Kraus, Singh, et al.*) or have become (*Scholz*).

What does Article 49 prohibit when it speaks of 'restrictions'? From Article 52, it would appear that it prohibits at least 'special treatment for foreign nationals', i.e. distinctly applicable measures that, absent a justification on one of the grounds as in the Article, would amount to direct discrimination. Jurisprudence clarifies that indirect discrimination is also prohibited.

A condemnation of all his oeuvre from such an august and expert body might destroy his reputation and thus restrict his freedom of establishment. 'Flimsy and devoid of any enduring appeal', by contrast, are value judgments on this particular composition. There is no discernible connection to H's origin and training in another Member State. For the same reason, Article 18 TFEU does not help him. Finally, nobody denies H the right to establish himself at all and to seek musical commissions.

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Alteration of the text:

'Speaks to the nation' is a criterion that applies to everyone in equal measure in law. The alteration of the text from another Member State's language to the host Member State's is likely, however, to impose a graver factual burden on those who are in the habit of using a foreign language over the host Member State's. The majority of those will be nationals of other Member States. The same is true of those like H who can invoke free movement rights against their own Member State. Here, this was a choice because the royal couple are German speakers, but that choice recommended itself to H because he is himself one.

The enforced change of language therefore requires a justification. None of the grounds in Article 52 fits, including 'public policy'. The UK is not bound to this catalogue, however, because the criterion of an 'appeal to the nation' is indistinctly applicable. It can also invoke 'imperative reasons in the public interest'. This can here be phrased as, "the function of the monarchy as representing the (traditionally and predominantly English-speaking) nation", or anything similar. Decisive is the test of proportionality. No particular outcome is obviously preferable over another.

Trainee's fees:

Is the situation governed by Dir. 2005/36? No 'regulated professional activity', Art. 3(1)(a) Dir, because H was free to accept the commission without a qualification from an English conservatoire.

The situation is again governed by Article 49, and again encompassed are those migrants who can invoke the freedom vis-à-vis their own MS. 'English' qualifications serve as the criterion for determining the fees. As anyone is free to study at English conservatoires, the criterion is not distinctly applicable. The majority of those possessing degrees awarded in a Member State will, however, be nationals of that Member State. Conversely, those not holding such degrees will in their majority be nationals of other Member States. The criterion thus leads to factual inequality.

Justification? No grounds in Article 52. 'Imperative reasons ...'? Protection of those who commissioned the composition? Preservation of the dignity of the occasion? Cultivation of national musical traditions? Ultimately decided under proportionality. Any rationally deduced result acceptable.

No suits against the Crown:

This is modelled on *Factortame* as an application of the principle of 'procedural autonomy of the Member States'. National rules of procedure are inapplicable if they make it impossible (or 'excessively difficult') for those benefitting from EU rights to assert these rights in the national courts. Accordingly, the rule here is likely to remain out of application.

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Banding:

A 2:2 was awarded only for those who mostly fail to identify the legal problems, and cannot think of any applicable case law or the Directive(s).

A script was placed in the lower half of 2:1 if candidates identified some of the issues and showed some knowledge of relevant case law. No higher marks were given to those who showed little or no understanding of Dir. 2004/38.

A mark in the upper half of 2:1 went to those who identified most issues and were able to apply the Directive, despite some confusion about the consequences of H's change of nationality. In this bracket, the assessment under the freedoms may be untechnical, and candidates may not see the Diplomas-directive at all, but (as expected) drew on *Vlassopoulou* instead. (This would require some explanation because it was about access).

Scripts received a 1<sup>st</sup> if most issues were identified, and candidates showed good command of Dir 2004/38 and at least a not entirely botched attempt at applying Dir 2005/36 (with a likely fall-back on *Vlassopoulou* again). The assessment under the freedoms was more sure-footed than under the class below. Candidates would not be flustered by the 'unprecedented' grounds of justification, and have sensible things to say about proportionality.

Q10

This problem question was even less popular than the preceding one.

Ø's case

Should the matter be brought before the General Court of the EU under Article 263, or a national court referring under Article 267(b)? Ø will presumably want to get the meals back, and must at least demand their return lest it be accused of contributory negligence in a subsequent damages action against the EU or the UK. The General Court can under Article 263 only annul secondary EU law. It cannot issue a mandatory interim relief order against national authorities, as they are not parties to the proceedings (see above). Also, EU legislation may not prove unlawful, but the national authorities may have breached it: this is also beyond the reach of the General Court (it would instead be for the Commission to decide on bringing an action under Article 258 to the CJEU).

Ø will therefore start proceedings in the national court. (Going to both courts would not be impermissible, but would occasion double fees without being faster.) Disadvantage: would have to persuade national court to refer (parties have no right to a reference – see AG Jacobs in *UPA*). On pain of national and *Francovich/Köbler* sanctions, however, national courts must refer questions regarding validity (*Foto Frost*).

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Assessment by the CJEU under Article 267(b):

Standing rules under Article 263(4) are not applicable.

No discernible procedural irregularities in the adoption of the Directive.

Legal basis? EP & Ccl used Article 168(2), but does not fit. Possibly Article 168(4)(b), or Article 114. Candidates ought to spell out the conditions for legislating under this provision; too little to go by. Legal basis can be presumed. Adoption on the 'wrong' legal basis harmless if the conditions of the 'right' one are fulfilled?

Substance: restriction of free movement of goods? Import/export restrictions, meals made in DK, seized in UK. Justification: public health. Right to property & to conduct a business restricted; proportionality?

Assessment by the GC under Article 263:

Standing under (4) – Direct concern? Authorities must seize if threshold for e-coli exceeded. *Plaumann* formula for individual concern. No right under either legal basis to participate in the adoption of the Directive, hence no standing. On other interpretations of 'individual concern', assessment of legality as above.

Assessment by the national court:

Authority seized more than merely the batch. Even that may have been excessive, as Ø can explain how the contamination came about.

Å's case

Å can challenge the Directive, or the Commission's Decision. Choice of court(s) as above, also assessment of the Directive.

Assessment by the GC of the Decision:

Å is not the addressee of the Decision, but is specifically named in it. This may confer standing (*Roquette*). Does having samples taken equate to having rights to participate in the Decision's adoption? Tenable argument in favour. Different interpretation of *Plaumann* may lead to same result. Question of direct concern arises under both. Regulatory act? Doubtful whether 'general' application, Article 290(1). Direct concern: Commission 'may' adopt decision, in its discretion, no automatism. Tenable to argue Å has standing. In that case follows substantive assessment as below.

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Assessment by the CJEU under Article 267(b)

The Decision imposes burdens on Å and therefore needs a valid legal basis in the Directive. The Directive may be excessive because it allows the seizing of all meals by the same manufacturer, even those that pose no danger, with no reasons given why such a drastic restriction of free movement of goods, and of the right to property and to conduct a business, should be unavoidable. Principle of precaution? For want of a valid legal basis, the Decision is also unlawful. If candidates came to a different conclusion, the fact would remain that the Commission acted on the prompting of only one national authority, rather than five.

Banding

This problem raises all sorts of exotic questions and alternative solutions, next to some stalwarts of past exams. The utmost generosity was therefore applied to candidates' answers.

2:2 – no grip on the question, and only rhapsodic treatment of the familiar questions that do arise.

2:1, lower half – sees that the involvement of the national authorities complicates matters. Has some idea that this may influence the choice of court. (There is a problem question on this on the reading list.) Will go straight to Article 263, and largely ignore seizing of the goods.

2:1, upper half – candidates reflect openly on the seizing of the goods, and how it influences the choice of court, but will go to the familiar Article 263, possibly prompted by AG Jacobs' opinion in *UPA* with its jeremiad on Article 267.

1<sup>st</sup> – candidates see that both companies will want their goods back, and that the EU judiciary cannot help with that. They will explain the choice between Article 263 and Article 267, and address a good part of the above points. Even more points for spotting the problem with Article 168(2).

### FAMILY LAW

Name of Paper	Family Law
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No. of students taking paper	
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### Summary reflections on the paper as a whole

Please comment on the distribution of questions answered, the overall quality of the scripts, the distribution of marks and anything else worth noting and learning from (including suggested actions).

*The family law paper was well answered this year. Students generally made good use of the opportunities offered by the 'open book' style of exam, while avoiding the dangers. A few students sought to replicate pre-prepared work without using it to address the question answered and their marks were generally weak. But the vast majority of students sensibly used their materials to produce a targeted response. One danger that emerged was students 'playing it safe' by showing a good knowledge of the cases and of the primary theoretical approaches, but not doing much analysing of the material or exploring why different academics took different views. Such answers would obtain good marks, but just short of a first class standard.*

### Brief remarks on individual questions

Please note the number of students answering the question, the range of marks, the overall quality of answers, notable weaknesses in the answers (and/or question) and anything else worth reporting and learning from (including suggested actions).

Question 1	
No. of students who answered this question	
Range of marks	
Comments	
This was not a popular question. It was certainly a challenge for those who had not considered it before. There were some very strong answers which explored some of the boundaries of family law and whether there was an 'ethos' of family law.	

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### Question 2

No. of students who answered this question	
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Range of marks	
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**Comments**

This was a popular question. The best candidates explored carefully whether there was more to age than simply being a marker of capacity and also the difficulties in assessing capacity.

### Question 3

No. of students who answered this question	
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Range of marks	
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**Comments**

This was not a particularly popular question. The best answers moved beyond the "Gillick" case law and explored how rights could be relevant in a wide range of children's cases.

### Question 4

No. of students who answered this question	
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Range of marks	
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**Comments**

Few candidates selected this question. Those that did undertook some excellent analysis of Re G and Re M. The concept of secularity was critically examined by the best candidates.

### Question 5

No. of students who answered this question	
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Range of marks	
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**Comments**

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This was a popular question. Solid answers explained some of the alternative definitions of domestic abuse. The best answers critically examined the role of patriarchy in domestic abuse and the challenges and benefits of using a gendered lens to explore the phenomenon.

### Question 6

No. of students who answered this question	
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Range of marks	
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#### Comments

- (a) was not at all popular, which was perhaps surprising given the prominence of the recent *Akhtar* decision.
- (b) Was a very popular choice. Writing on divorce in the family exam is problematic. It is relatively easy to set out the law and some of the arguments about it. It is more of a challenge to find novel and interesting things to say that will raise the answer to a first class standard. Only a few candidates did this.

### Question 7

No. of students who answered this question	
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Range of marks	
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#### Comments

This was a fairly popular question. It was generally well answered, with some good knowledge of the case law. The best answers were able to explore at a theoretical level the nature of parental rights in child protection cases.

### Question 8

No. of students who answered this question	
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Range of marks	
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#### Comments

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This was a popular question and was generally well answered. Strong answers drew on the material on domestic abuse to challenge the presumption of shared parenting.

### Question 9

No. of students who answered this question	
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Range of marks	
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#### Comments

This was not a particularly popular question. Its breadth no doubt put some candidates off. Strong answers explore the links between parental responsibility and parental rights and the concept of parental discretion.

### Question 10

No. of students who answered this question	
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Range of marks	
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#### Comments

This was not an especially popular question but was generally very well answered by those who had attempted it. Several candidates explored effectively the hold of the hetero-normative family over family law.

### Question 11

No. of students who answered this question	
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Range of marks	
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#### Comments

This was a fairly popular question. Many candidates pointed out the complex interplay with socio-economic factors for the significance of marriage. There was an assumption in many answers that the problems of inequality within marriage could not also be found in unmarried couples.

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<b>Question 12</b>	
No. of students who answered this question	
Range of marks	
<b>Comments</b>	
This was a fairly popular answer. There was a good awareness of the inequalities that can result from the distribution of caring responsibilities in marriage. More could have done to explore alternative ways these inequalities could be addressed.	

## HISTORY OF ENGLISH LAW

The class of three sat the paper by remote means, without incident. The standard attained was high. Two attained first class results; the third was very close.

All candidates attempted the question on the evolution of uses and trusts, and offered capable answers. Here it was important to engage closely with the statute in question and set it against other regulatory statutes stretching back to thirteenth-century mortmain controls, and not to rehearse the entire history of equitable property rights.

The other questions attempted were as follows:

- History of Precedent, which inevitably embraced the nature of common-law reasoning;
- Development of Feudal Land Law, touching on political and economic as well as jurisprudential change;
- Nuisance (two questions), which could encompass issues of standing, criminality, prosecutorial discretion and zoning for the public side; and on the private side, the interaction of real writs, assizes and trespass claims in defending the use and easements of land;
- Negligence, navigating the interaction of causes of action including theories of fault and causation embedded in the relevant actions;
- Contract litigation and *Slade's Case*, looking at the hiving off of damages from debt claims;
- Consideration, concerning ideas of bargain and the philosophical bases for legally-enforceable promising.

No-one attempted the questions on books of authority, statutes, leasehold, or the trespass/ case boundary.

Candidates should in general be reminded to pay close attention to what exactly the question is asking, rather than trying to put in everything they know about the general area of the question. Next year this option will move to submitted essays in place of the examination; the point will be if anything more important.

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### HUMAN RIGHTS LAW

Overall, this was a solid year in Human Rights Law. As to the distribution of marks, there were 6 firsts with the remainder of scripts receiving a 2:1.

The strongest answers were dotted across questions – with students writing excellent responses to questions on prisoners' rights (Q3), proportionality (Q5), the margin of appreciation (Q7), the right to life (Q8). It was gratifying to see detailed engagement with case law drawn together with critical work.

Where responses fell slightly short was in providing purely descriptive answers or not responding directly to the question. Responses of this kind were, however, rare, with most answers engaging with scholarly literature and staying on topic.

### INTERNATIONAL TRADE

The overall standard was similar to that in previous years. It was disappointing that more candidates did not attempt an essay question. As no essay question was answered by more than one candidate, no comments will be made about the essays.

#### Question 6

This was a popular question. Most candidates realised that this was a cif contract so that S had done all that was required of him by tendering conforming documents, though some spent rather too much time on this point than was strictly warranted. There were good discussions of the contractual carrier point and the Hague/Visby Rules were, on the whole, applied competently, with some good analyses of the relationship between the *faute nautique* exception and the duty to secure the cargo safely and below decks as contractually agreed (though in some weaker answers the deck stowage was not treated as a separate breach of contract, but only as an aspect of III.2 HVR). Most candidates went on to discuss the actual carrier problem as well as possible claims in tort against the stevedores.

#### Question 7

Key to this question, again quite a popular one, was to identify who would be suing whom. Careful analysis was then required when it came to any damages, the main question (which some ignored) being whether the market loss would be thrown on F or stay with G. Most candidates saw the possible fraud and peas/beans exceptions in variation (b), though some failed adequately to differentiate fraud, peas/beans and the genuine document issue. There were sophisticated analyses of the impact of the false dating in variation (c), with most seeing the *Procter &*

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*Gamble* point, and a possible 'locked-in' argument, though some candidates made the mistake of thinking that because the shipment was on time the false dating of the bill of lading was not a breach at all.

### Question 8

One of the two less popular problem questions, though still plenty of takers. A pleasing proportion of scripts contained a good discussion of s. 20(2) Sale of Goods Act 1979 and there were excellent analyses/distinctions of *Cunningham v Munro*, although not all candidates adequately differentiated arguments from risk from those based on an independent obligation giving rise to recovery. There was some confusion in the context of cancellation of the *Nina*'s charter, with some candidates being under the impression that damages in respect of the damaged rice were recoverable from L (as opposed to just the difference in freight).

### Question 9

This question was the least popular problem question. It raised complicated issues involving overlapping bulks which are not readily answered by s. 20A Sale of Goods Act 1979 which were spotted by the best candidates. There was some excellent discussion of the meaning of 'bulk' in s. 20A, and application of this to the facts.

A number of candidates took the point that the delivery orders were probably not *ship*'s delivery orders so that their holders did not acquire rights of suit under s. 2(1)(c) Carriage of Goods by Sea Act 1992. The question was ambiguous on this point, which caused the better answers to discuss both possibilities (rather than to take the easy route out of the difficulty by denying the right of action). The discussion of possible cargo claims was generally sound, though some of the weaker answers missed the issue.

### Question 10

(a) Most candidates realised that there was a potential variation of contract point, but this was resolved in a myriad of different ways. Some rejected the possibility of variation out of hand, while others acknowledged the possibility but then failed to go on to consider the consequences adequately. Some candidates invoked the concept of 'waiver' without making it clear exactly what they meant by this.

(b) This was a standard *Afovos* point and most candidates dealt with this with the brevity it deserved.

(c) A pleasing number of candidates did not only see that relief against forfeiture is on the cards for demise charters, but went on to consider the merits of the case in contrast with the *Jotunheim* decision.

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(d) Only a minority of candidates appreciated that withdrawal pursuant to the withdrawal clause would have worked to W's disadvantage in this scenario. Better answers gave full consideration to the relationship between the express withdrawal clause and termination for breach, while weaker ones failed to engage properly with the damages issue.

### LAND LAW

The Land Law FHS paper was unfortunately uploaded with an incorrect rubric, directing candidates to answer at least two of the problem questions, rather than to answer at least one of those questions. The marking team and the Exam Board took both specific and general steps to mitigate this problem. Specifically, candidates who complied with the expected rubric and so answered four questions, at least one of which was a problem question, were not treated as having breached the rubric. Further, if a candidate answered two problem questions among their four answers, and one of the problem questions answers received the lowest mark of their four answers, that answer was given the average of the three other marks, and so the mark for that answer was thus disregarded in calculating the overall mark for the candidate's script. More generally, markers and the Exam Board were aware of the disruption and uncertainty caused by the incorrect rubric and took that into account in reaching an overall view of candidate's performance in the paper.

Notwithstanding the problem with the rubric, the overall standard of scripts was impressive. Candidates' overall performance in the subject was stronger than in 2019, with a significantly higher percentage of first class marks, and a significantly lower percentage of marks lower than 60. The percentage of marks lower than 60 was also lower than the percentage of such marks awarded in 2018. This was a product of the standard of the answers given, rather than of the special approach to marking discussed above.

Question 1: This was not a very popular question. At the top end, some excellent answers engaged with the distinction between description and understanding and considered both relevant secondary literature (such as articles by Hargreaves and Cheshire) and case-law (such as Lord Templeman's use of ownership to assist in the definition of a lease in *Street v Mountford*).

Question 2: This was a very popular question. It attracted a large number of good answers, which engaged with the specific question, and in particular the advantages and disadvantages of statutory or judicial reform. An ability to set out the law clearly and concisely also marked out the better answers. The weaker answers consisted of general discussions of this area of law and included only cursory, if any, consideration of the specific question. In setting out the developments since 2000, many answers would have benefitted from separating out more clearly the tests used by the courts at the initial stage of establishing a beneficial interest from those used at the subsequent stage of ascertaining the extent of that interest.

Question 3: This was not a very popular question but some excellent answers looked carefully at Article 1 of Protocol 1 of the ECHR and its application in cases such as *Pye and Mott*, noting for example the distinction between control of use and deprivation.

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Question 4: This was not a very popular question but it led to some very thoughtful answers reflecting on the development of the restrictive covenant as an interest in land and comparing it to the easement. Strong answers also sought to identify specific functions performed by the restrictive covenant, and the strongest linked those functions to the specific content of the restrictive covenant, and asked whether effective performance of such functions requires changes to the current law.

Question 5: This was not a very popular question but good answers carefully considered both equitable and statutory control of the mortgagor-mortgagee relationship, and strong answers focussed on limits to the legislative intervention and considered whether equity might have a role to play in such cases.

Question 6: Although some way behind Question 2 in terms of responses, this was the second most popular of the essay questions. It provided an opportunity to consider both the general question and to reflect on the specific issue arising in relation to rights to rectify the register in *Swift 1st*. Stronger answers considered the specific role played within a registration scheme by each of overriding interests and indemnity payments.

Question 7: Like all the problem questions, this was a reasonably popular question and those choosing it generally showed good knowledge of the relatively recent case-law (such as *NRAM v Evans* and *Gold Harp*) on the definition of mistake in the context of rectification. Answers were not always clear on the detail of the specific protection given to a registered proprietor in possession and some otherwise strong answers failed to advise the parties on the possibilities of receiving an indemnity payment.

Question 8: This was a reasonably popular question and the points on severance were generally well handled, although some candidates were less assured on the rules applying to determine if the parties were initially joint tenants in equity. Weaker answers failed to engage properly with the priority issues and would have benefitted from separating out the possible arguments T Bank might make to claim priority, such as the consent of S; priority under s 29 of the 2002 Act; and overreaching under s 2 of the 1925 Act.

Question 9: This was the most popular question on the paper, and most candidates gave an assured treatment of at least one of the major issues, although it was surprisingly rare for answers to give an appropriately deep treatment of the *Bruton* and certainty of term issues and of the question of whether a new obligation was assumed by E. Some candidates referred to a "licence coupled with a grant" as a means for an occupier to bind a third party and thus showed their lack of understanding of the concept, which was not relevant at all.

Question 10: This was a popular question and there was some good discussion of the *Regency Villas* decision and its possible limits. The question contained a large number of points so candidates were not expected to spot all possibly relevant points, although it was a little surprising that the reference to an "exclusive" right (in relation to storing equipment and bird-watching) alerted almost no candidates to the

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possible relevance of *Hill v Tupper*. Some perennial errors as to easements appeared, such as the assumption that an implied easement must be equitable, and that s 62 can operate to create a new easement in a conveyance which only involves the transfer of the supposed dominant tenement to a new owner. A small number of answers wrongly thought that *all* of the three possible means of a legal easement's having overriding effect under Sch 3, para 3 (ie actual knowledge/obvious on a reasonably careful inspection of the servient tenement/ use in the last year) had to be satisfied before an easement can be overriding. The inclusion of leases also caused more problems than expected or intended.

Question 11: This was a popular question and candidates were generally confident in setting out and applying the main elements of a proprietary estoppel claim, and comparing the facts to relevant case-law, such as *Crabb* and *Cobbe*. There were also some strong analyses of the different approaches that a court might take to determining the extent of a possible right arising through proprietary estoppel. Some otherwise very good answers were marred by wholly overlooking the priority aspect of the question in relation to M.

### MEDIA LAW

In the 2019-20 academic year, 24 students took Media Law. 6 candidates gained first class marks, 17 gained upper second class marks, and 1 gained a lower second class mark.

The scripts were mostly of a very high quality, with candidates demonstrating a very good knowledge of the materials, the literature and debates.

On question 1, candidates critiqued the public figure doctrine in privacy law. Many drew on the Hughes article and discussed case law such as *Ferdinand*, *Trimingham* and *Campbell*.

On question 2, the vast majority of students focused on the serious harm requirement. That is understandable as that has received the most attention in the caselaw and literature. A smaller number considered the single publication rule under s.8. Some also tried to incorporate discussion of the public interest defence, though such discussion strayed from the question.

In discussing duties and responsibilities as a condition for media freedom in question 3, most candidates were familiar with the public interest defence in the Defamation Act 2013. Most scripts also connected the issue with the rationale for media freedom. To get higher marks, candidates drew on other areas of media law that require the fulfilment of certain responsibilities.

The question on source protection raised a difficult issue about the rationale for source protection. Most candidates explained the protection in terms of the public interest. The best scripts also considered which rationale could best explain the protection of sources in relation to surveillance powers, and whether a journalist should be permitted to waive any protection.

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Question 5a on open justice was generally well answered, looking at anonymity orders and restrictions in specific areas. Stronger scripts engaged with the question more closely, with some welcoming a wider range of restrictions and arguing that open justice is over-protected. Others argued against restrictions and called for greater transparency (including televising of some court hearings).

On 5b, the candidates answering this question explained the progression of the Article 10 case law and the ambiguities in any right of access.

On question 6, about digital platforms, a number of candidates focused solely on the debates about the online harms regulation proposals. However, the question had a slightly different focus, asking about the rationale for holding platforms responsible for content. Stronger scripts also considered the established case law on when a platform can be held legally responsible (for example in defamation law).

Question 7a was a broad question on the future of broadcast regulations. A number of good answers looked at the changes to the audio-visual sector and some also considered the case for continuing (or changing) the impartiality rules.

Question 7b invited candidates to discuss the incentives for joining a recognised press regulator. Most candidates were familiar with the debates surrounding s.40.

While most candidates considered the case for a public interest defence in question 8, many of the stronger scripts also considered the proposed changes to the damage requirement and mens rea for offences under the Official Secrets Act 1989.

The answers to question 9 were very good, with most candidates exploring the difficulties with obscenity law, and the challenges in finding a workable alternative to the current law.

### **MEDICAL LAW AND ETHICS**

As in previous years, despite repeated warnings not to do so, some students still offered generic essays on topics from the course, bookended by an introduction and conclusion that purported to show how the essay answered the very specific question asked. Students were very clearly urged not to do this, and hence those who chose to do so were penalised accordingly. Given that students have a considerable amount of time to think about what they have been asked, there is no excuse for failing to answer the question asked, either, yet this was also prevalent. Only those who directly answered the precise question asked were awarded first class marks. Many students also failed to clearly outline the topics they were drawing on, or actually draw on them in any detailed way to answer the questions. Some chose to make up acronyms, but the examiners ask that this is refrained from in the future. Numerous candidates also included text in the footnotes, despite having been repeatedly told that such text would not be read. It was not read.

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That said, there was a marked improvement in the approach to the 'two topics' aspect of questions on the part of many candidates. Some did a very good job of using various parts of the course to make broader points in relation to the questions asked, and they were suitably rewarded. A few candidates produced genuinely outstanding treatments of the questions by taking this approach. These essays stood out because they drew carefully on the substantive law and literature, while weaker candidates were a bit more broad brush and their work was weaker as a result. The very best candidates showed a highly detailed knowledge, and use, of the material, which they drew on to support their own well-considered responses.

### **MORAL AND POLITICAL PHILOSOPHY**

About 1/3 of this year's examinations were of high quality, with the last four or so trailing significantly from the top seven papers and one truly outstanding paper. All of the stronger answers had a clear structure, good arguments, and clear writing. The very best had an original argumentative stance that was substantiated with good arguments and strong objections and replies as well as familiarity with the relevant literature. Many 2.1-class essays had competent recitation of material but lacked any argumentative verve.

As usual, the paper was divided into Part A (moral philosophy, 8 questions) and Part B (political philosophy, 4 questions). Candidates had to answer at least one question from each part. The distribution of answers was as follows:

Part A:

Q1 - 4

Q2 - 12

Q3 - 2

Q4 - 11

Q5 - 3

Q6 - 8

Q7 - 6

Q8 - 8

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Part B:

Q9 – 9

Q10 – 15

Q11 – 6

Q12 – 17

Every question had some takers. There was a decent spread of answers, with clustering around the moral luck, law and freedom, and equality/priority and well-being questions. Twenty-one students answered two questions from Part A and thirteen students answered two questions from Part B.

The less popular questions were those that arguably required greater reflection and thought beyond material covered in tutorials. Q3, about whether ethics provides a reason to be moral, had few takers. Q5, about whether moral conflicts are always rationally resolvable, is a central question in moral philosophy and yet only three candidates chose to tackle it. It is worth noting that the strongest paper (which received the prize) answered this question. One way for a candidate to stand out is to write a stunningly good answer to a question less-travelled.

One general problem with some of the less strong essays was that they appeared to be a patchwork of stitched-together pre-written modules rather than a carefully laid out arguments tailored to the question at hand. In addition, several essays did not directly address the question but instead recited or wrote material that was only tangentially relevant. Weaker answers to Q2, for instance, reported and discussed Nagel's four kinds of moral luck without diving deeply into the arguments for or against thinking that the one driver was blameworthy while the other was not.

There was also some tendency to 'pull apart' the parts of a question, which is often a reasonable way to proceed but not at the cost of failing to understand the question as a whole. Weaker answers to Q8, for example, answered two distinct questions: i) Is determinism incompatible with free will? and ii) Is determinism not incompatible with moral responsibility? without connecting these answers in ways that would illuminate a coherent relation among free will, determinism, and responsibility. Some candidates who answered Q6 did not seem to understand the question and instead offered a slate of standard objections to Millian utilitarianism. Q11 provided candidates a platform for speaking in their own voice while drawing on material from the course, but some answers veered towards a superficial shooting-from-the-hip rather than making sophisticated, scholarly arguments. Some of the answers to Q9, about whether it is unjust to distribute wealth and income according to natural talents, were unfocussed and meandering. The best answers to Q12 took a clear argumentative stance and argued in support of it instead of simply running through the different views of sufficientarianism, telic egalitarianism, prioritarianism, and deontic egalitarianism. Overall, there was a clear demarcation between strong and weak firsts, on the one hand, and upper seconds, on the other. Lower seconds suffered from

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some serious defect, such as not answering the question posed or failing to show sufficient argumentative sophistication or grasp of the relevant literature.

### **PERSONAL PROPERTY**

The overall performance of students in this paper was very good. Of the 15 who sat it, eight were awarded firsts, with seven 2:1s. The paper contained eight essay and two problem questions, with students being free to answer any four questions. Although every question was tackled, question 7 (sale of goods) had only two takers. The most popular questions were question 1 (protection) and question 4 (bona fide purchase). Given the small number of candidates, it is difficult to say anything in general about student performance, save that the best candidates drew on their knowledge of Land Law and Trusts to make good comparisons with the law of Personal Property.

### **PUBLIC INTERNATIONAL LAW**

The overall performance by students in this paper was excellent, with over 80% of students being marked at an Upper Second or First Class level (there were 11 firsts), and the rest of the candidates being marked at a Lower Second mark. In general, the scripts reflected a high degree of conceptual clarity and understanding. Even the weaker scripts reflected understanding of core concepts, with the weaknesses deriving less from conceptual fuzziness than from limited engagement with the specific issues raised by the question, lack of structure and flow to the argument, and scanty use of case law and academic authority.

As in previous years, the paper contained a mixture of problem questions (4) and essay questions (5). Although not required to do so, all 36 candidates who sat the exam elected to answer at least one problem question, many chose two, with selections focussing on the use of force (question 5, 28 chose this), statehood and recognition (question 8, 13 chose this), state responsibility (question 6, 12 chose this) and dispute settlement (question 7, 11 chose this).

The use of force problem question, as in previous years, proved the most popular, and elicited some excellent answers from the candidates, with the best among them drawing on a range of state practice, and exploring the fine distinctions between anticipatory and pre-emptive self defence. Also popular were the essay questions on treaties (question 3, 20 chose this), the enforcement of international law (question 1, 20 chose this) and immunity (question 4, 15 chose this). Less popular were the questions on sources, (specifically the relationship between erga omnes and jus cogens norms, which only 6 chose) and specialized regimes of international law (international environmental law, law of the sea, or WTO law, which only 2 chose). As in previous years, the weaker answers were those that provided a general description of the topic or topics covered by the question without focussing on the specific issues raised. For example, weaker answers to the question on treaties provided a general description of the legal framework for treaty reservations, rather than engaging, as the question required them to do, with differing interpretations of 'state consent' reflected in differing positions on severance of impermissible reservations. The general question on enforcement of international

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law drew some of the best as well as some of the weakest answers. The best answers presented a nuanced argument, weaving in theory and practice, supported by illustrations from specific areas in international law, and referencing current events. The weakest ones presented a rambling set of unconnected reflections on the nature of international law. More generally, the best answers to both essay and problem questions were those which made thoughtful use of case law and academic authority, thereby providing insightful analysis that demonstrably went beyond the basic textbook material.

### **ROMAN LAW (DELICT)**

<b>Name of Paper</b>	<b>Roman Law (Delict)</b>
<b>No. of students taking paper</b>	<b>16</b>

#### **Marks distribution for [FHS Roman Law (Delict)]\***

<b>Category of Marks</b>	<b>Frequency</b>
>70% (Distinction)	37.5%
65 – 69% (Merit)	37.5%
50 – 65% (Pass)	25%
<50 (Fail)	

Mean: 67.56

St. Dev: 2.99

#### **Distribution of answers for [FHS Roman Law (Delict)]\*:**

<b>Q. No</b>	<b>No. of answers</b>
1	10
2	11
3	14

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4	7
5	7
6	3
7	2
8	1
9	4
10	5

### ***Comments on the examination of [FHS Roman Law (Delict)]:***

**General comments:** Please comment on the overall quality of the scripts, the distribution of marks and anything else worth noting and learning from (including suggested actions).

The overall result was impressive.

Candidates were asked to answer at least two of the four first questions, all requiring close textual analyses ('gobbets'). These questions were chosen more often than necessary to meet this requirement.

Of the remaining questions two were least popular, one a quote concerning the delineation of praetor/iudex- competence (Q6), the other a concise Roman law text concerning theft of a treasure (Q7). No specific cause can be identified why candidates were shy to tackle these Qs.

**Comments on individual questions:** Please comment on the overall quality of answers, notable weaknesses in the answers (and/or question) and anything else worth reporting and learning from (including suggested actions).

The quality of answers was evenly distributed across the range of questions.

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### TAXATION LAW

As in prior years there were 8 questions (6 essays and 2 problems) which gave considerable choice since the students all cover all of the core material in lectures, seminars and tutorials. Q.3 (essay question on tax avoidance) and Q.7 (problem on employment tax) were the most popular. Q.6 (two-part question on taxpayer intention) and Q.4 (essay on IR35 and the employment/self-employment determination) were less popular. Nearly all of the candidates attempted at least one of the problems—although not required to do so—and about one-half of candidates attempted both problems.

Q.1 on tax policy invited the candidates to consider whether tax policy makers should be concerned with inequality. The better answers delved into issues such as fairness and progressivity, weighed up the advantages/disadvantages of increasing progressivity, and engaged with the recent literature on inequality. Weaker answers failed to consider the meaning of inequality or whether it was necessarily bad tax design if some are doing really well at the top so long as those at the bottom are doing ok. Q.2 asked candidates to evaluate the effectiveness of the capital gains tax and inheritance tax regimes, which provided an opportunity to examine the statutory provisions in some detail, consider the relationship between IHT and CGT, and draw on the academic literature. Q.3 concerned the cases on tax avoidance and the GAAR and was answered quite well overall. Those students who focused on the specific wording in the question's quote from *UBS/DB* rather than writing generally about avoidance were duly rewarded. Q.4 concerned the different tax regimes applicable to employees and the self-employed with particular emphasis on the IR35 regime, which relies on the employment/self-employment classification body of case law. It required a good understanding of the case law tests as well as an appreciation for the topical nature of these issues as reflected in recent legislative changes and also policy work by eg the Taylor Review and the Office of Tax Simplification. Q.5 asked candidates to consider the role of neutrality in the design of the CGT and IHT regimes as they apply to trusts. Better answers demonstrated a high degree of comfort with the technical rules and the difficulties in applying neutrality in the context of trusts. Q.6 was a relatively straightforward two-part question on the relevance of taxpayer intention in the cases on the meaning of 'residence' for private residence relief purposes and in the 'badges of trade' cases; better answers considered a good range of cases and examined them in appropriate depth.

The facts in Q.7 raised a broad spectrum of major and minor employment tax issues, particularly employee benefits but also deductions and whether the payment for image rights was 'from' employment. Q.8 raised a number of issues on the taxation of a self-employed person, and challenged candidates to think carefully about the interaction of the CGT and ITTOIA rules. Candidates for the most part spotted the correct issues, but the depth of analysis of those issues was variable especially on the CGT implications of the sale of the antique cabinet and also the sale of the statue which, if the vendor was not a trader, raised a *Marren v Inglespoint*.

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### Tort Examiner's Report

The paper generated some excellent overall performances and few that were very weak. The top answers were able to engage critically with the essay questions and offered an analysis including secondary literature and a pointed and focused approach which drew on the case law to offer detail and depth. Some attempts to shoe-horn pre-prepared/tutorial essays into answering essay questions were not so successful and were duly downgraded, but most managed to focus on the questions set and offer well organised and directed answers to each. The problem questions were generally also well handled by most in a clear and organised fashion, with candidates making good use of the completion of papers on a computer to present their answers in a structured way.

### Question 1

This was a popular essay question, and received some strong, critical analysis from many candidates, able to look at a range of cases where the assumption of responsibility concept has been used in different ways and at different stages, reflecting upon its coherence, consistency and usefulness in explaining the outcomes and offering a framework that can be applied in future. Weaker answers tried to copy and paste from practice essays (etc) without focusing upon the thrust of the particular quotation and its implications.

### Question 2

This question challenged candidates to examine notions of employees and independent contractors in the law on vicarious liability. The strongest answers were able to identify issues across a wide range of case law and also consider what might replace the current approach and concepts if changes were to be made. Weaker answers focused narrowly only on a few or recent cases without covering the wider range of issues, or else contented themselves with criticising the status quo without offering suggestions for improving the rules as they stand, and seemed content with leaving the judiciary to act *ad hoc* rather than offering clearer guidance as to when vicarious liability would be established.

### Question 3

Strong candidates here were able to assess both the specific loss of chance cases and place them in the context of other issues of proof and departures from the balance of probabilities approach, including discussion of *Fairchild* and related cases. Weaker candidates did not get much

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beyond *Hotson*, *Chester v. Afshar* and *Gregg v. Scott*. But overall this question was relatively popular and was answered well and clearly by most candidates.

### **Question 4**

This was not the most popular question, but it received a range of rather strong answers as well as some weaker and disorganised efforts which struggled to structure the case law and explain the shifts in approach and their significance. The best candidates were able to highlight the dangers of inconsistency and *ad hoc* judicial decisions, while also noting the difficulty in providing a consistent formulation that could address all possible instances where illegality would affect tort liability.

### **Question 5**

Few candidates attempted this broader question, which invited answers which looked beyond a focus purely on compensation as a remedy, encouraging consideration of ways of reflecting the nature or gravity of a wrong committed. Those who did answer the question dealt well with issues of exemplary and punitive damages, and those cases which seem to go beyond pure compensation yet are unwilling to acknowledge that this is what is happening in substance.

### **Question 6**

Again, this was not a question answered by many candidates, but those who did were generally able to assess the role of the tort of defamation and defences thereunder, looking at whether the 2013 Act has made any significant difference to the balance, as well as raising other issues beyond those mentioned in the question (e.g. proof, impact upon freedom of expression and both amateur and professional journalism, online intermediary roles and liability) which might be considered to be the 'real problem(s)'.

### **Question 7**

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This was a challenging question referring to the different elements of the economic torts, but the open book nature of the examination this year allowed the relatively small number of candidates attempting this question to manage this rather well and there were some clear, strong and critical answers provided which showed good understanding of the case law, its complexity and implications and the varying contexts in which such rules might be applied.

### **Question 8**

This problem question garnered some solid answers addressing issues of *novus actus*, questions of warning and how the patients would have responded (*Chester v. Afshar*), and more broadly what degree of warning of risks can be expected (*Montgomery*). Stronger answers also addressed loss of a chance questions and the issues concerned the extent of damages that each could claim (injury, employment, etc).

### **Question 9**

This problem question on nuisance, *Rylands* and trespass to land received a good number of answers, many of which were strong and very nicely organised, noting difficulties of standing to sue and the range of harms that were suffered, linking them to the appropriate torts. A common gap was not noting the trespass to land issue, but most key issues were at least raised, while some stronger answers dealt well with the nuances and were able to differentiate the different possible torts and harms involved.

### **Question 10**

This question received a goodly number of answers, most of which were capable of highlighting the product liability and related issues (intended purpose, remoteness of some harms from the defect, contributory negligence, vicarious liability for the bus driver's conduct, etc). Some weaker answers ignored the product liability issue and tried to deal with the whole thing under negligence.

### **Question 11**

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This problem question focusing on occupiers' liability was popular and generally well answered in an organised and structured manner. The role of the child and the implications of this were generally well handled, the responsibility of his father was more variably treated, with some not engaging with that issue when addressing the occupier's liability. Some answers got a bit confused with the status of the gardening services provider, not seeing the relationship between it and the manor and the manor's own gardener very clearly, with consequences for how issues of independent contractors and vicarious liability were addressed. But overall, this problem question was dealt with rather well, with many solid and some outstanding answers.

### **Question 12**

This problem question was answered by many candidates, who generally showed a good grasp of the pure economic loss case law, the different and potentially overlapping duty categories and the difficulties in applying them to such social-professional hybrid situations. The strongest candidates were also able to address the details concerning the causal links and remoteness issues concerning the share price drops. Weaker candidates did not get much beyond drawing loose parallels with the duty of care cases here, without dealing with the details of the particular situation or the questions of harm and assessment of damages.

## **TRUSTS**

### General comments

Too many candidates answered the questions they had hoped to see rather than engaging with the precise terms of those actually set. This is scarcely a new observation, but its persistence leads to the united view of this year's Trusts markers that it needs to be said again. That said, there were many strong performances too, demonstrating serious preparation, across a particularly challenging year, coherent formation and pace of argument, and awareness of the positions taken up by the leading players, both judges and academics – as well as careful attention to the actual question asked. In this most extraordinary of examination years, it was this last feature that still remained key for promotion to the first class division of the FHS.

### Questions

Q1. (Maitland quotation about nature of ownership of trustee and *cestui que trust*). Not answered by many candidates. Too many answers payed insufficient attention to the quotation itself, choosing to talk more generally about the issues and discuss other commentators' views,

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rather than analyse the precise point Maitland was making. But there were also some very good answers which explored a wide range of case law in depth, and used it to assess directly the claims in the quotation.

Q2. (Imperfect gifts question). There was a tendency to focus only on *Pennington v Waine*, or *Pennington* and *Re Rose*, with some candidates thinking that *Re Rose* was an application of the maxim that 'equity looks upon as done that which ought to be done', suggesting an obligation of some sort to make gifts. Better answers also discussed DMC, the rule in *Strong v Bird*, and proprietary estoppel cases; as well as considering the reasoning of Clarke LJ, as well as Arden LJ, in *Pennington*, and post-*Pennington* case law. The strongest answers also considered *how* to assess whether the law in this area is 'satisfactory': critically considering underlying policy factors suggested by the cases and commentators, and assessing the current state of the law against them, integrating proposals for reform as appropriate.

Q3. (Lord Millett, *Quistclose* trusts quotation). There was a frequent general failure to discuss the reasoning of the judges in the leading authorities in this area, concentrating instead exclusively on academic views; and a failure to engage carefully with the actual quotation. Many candidates assumed that Lord Millett was straightforwardly repeating his view in *Twinsectra*, and wrote an essay directed at critiquing that speech. Those who did engage with the quotation were able to impress with critical assessment of Lord Millett's references to 'trust and confidence' and 'betrayal' of it by misapplication, and to consider issues such as the point at which the trust arises, the circumstances in which it does so, and the rights and duties of the parties both before and after insolvency. Some of the strongest answers showed consideration of what would make an explanation 'adequate', and how the explanation could affect the operation of the trust, in the process arguing for their own views on what would be desirable and why.

Q4. (Resulting trusts quotation). Some answers over-emphasised automatic resulting trusts and almost excluded presumed resulting trusts from their discussion. A persistent fault was to fail to explain what presumed resulting trusts and automatic resulting trusts actually are, and a failure to show knowledge of the cases, or even connect the quotation with the facts in *Westdeutsche* itself, despite those facts providing such a clear example of why it matters to know what the trigger is for a presumed resulting trust. Better answers engaged with the issue of 'common' intention (whether it is in fact required, and whether it ought to be), and with the implications of the *Vandervell* litigation and *Air Jamaica* for the sense in which it is sensible to refer to 'intention' in relation to automatic resulting trusts and whether they really do operate 'automatically'.

Q5. (Section 53, LPA 1925 question). Often poorly done. Frequent failure to separate out paras (b) and (c) properly or at all, and unthinking and poor application of Fuller (is there really a 'channelling' function here?), and failure to notice that para (b) is not addressed just to a settlor, and was often mistakenly described by candidates as a rule governing 'creation', rather than concerning evidence of creation. Many candidates were reluctant to discuss either *Grey* or *Vandervell v IRC* on para (c). Some candidates suggested that the provisions needed reform, but without indicating what the required reform ought to be. Stronger answers, on other hand, were sensitive to the differences between paras (b) and (c) and showed nuance in assessing the useful function(s) that they might have. Really excellent answers were able to combine the two

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and either defend the provisions in their current wording, or make appropriate proposals for repeal or reform. Most candidates, however, seemed extremely hesitant to recommend statutory reform, despite calls for repeal in the literature, e.g. from Elias and Gardner.

Q6. (Public benefit in charity). Answered by very few candidates, and frequently the quotation from Lord Simmonds in *Oppenheim* was simply ignored, and the question used as an opportunity for a general discussion of the 2011 Act. But there were also a small number of very strong answers to this question, showing excellent knowledge of the case law and understanding of the issues arising and their significance.

Q7. (Lord Neuberger quotation from *FHR*). Few candidates attempted this question, but there were some strong answers examining the link between the basis for the remedy, and the remedy itself; and paying particularly impressive attention to the quotation given, and to its range and context.

Q8. (Trustee investment decisions question). Answered by too few candidates for meaningful remarks to be made.

Q9. (Backwards tracing question). Rather few takers, but generally competently done. Answers paid good attention to both parts of the question and showed careful attention to the case law as well as to the commentators. The strongest answers confronted the underlying justification for any kind of tracing and how far that might then justify backwards tracing.

Q10. (Recipient and assistance liability question). Not answered by many candidates, and there were some poor answers which failed to address the focus of the question on the idea of 'participation'. But there were also strong answers that picked up on the idea of 'participation' and made serious attempts to assess the case law against it. Weaker answers relied too much on (unjustified) assertions about the nature of the liability, rather than arguing towards such justifications from a position of familiarity with the case law.

Q11. (Secret Trusts problem). There was a tendency for candidates not to realise that there was a preliminary point whether the trusts were fully or half secret, and those who did often seemed oddly unsure as to how to go about assessing the issue. *Re Gardner* (No 2) point was only spotted by some candidates, as was the floating trust issue. The s 53(1)(b) point was also frequently missed, and those who spotted the *Re Keen* issue hardly ever offered any criticism of that decision. Candidates ought to be encouraged to set out the arguments they would present to the Supreme Court, rather than assuming that they are bound for all time by an obiter HL comment and the second ground of a CA decision. The *Snowden* point was generally spotted by candidates, but again most were not confident about discussing/applying/criticising it.

Q12. (Objects problem). By far the most popular of any question, and done by almost all candidates. There were strong answers, but too many candidates demonstrated poor knowledge of *Re Baden* (No 2), with answers, for example, asserting that Sachs LJ had there laid down the 'one person' test. Even when correct tests were identified, they were often poorly (or not at all) applied to the facts of the problem set. Similar errors were made when *Re Barlow* was considered, which many candidates seemed to regard as a solution to far too many difficulties. Similarly, the

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*Re Tuck* point was sometimes dealt with well, but also sometimes badly, with candidates referring only to the Denning judgment, and to no other authority or point of view; nor was it seen as at all controversial by many candidates. When it was dealt with well, candidates provided accurate and discerning consideration and application of the *obiter dicta* in *Re Tuck*, and related their discussion to other cases such as *Dundee Hospitals* - and, importantly, to the interpretation of what Kate had actually written on the facts of the problem.

Many wasted valuable time discussing certainty of intention when clearly this was not an issue on the facts. There was a general failure to distinguish between *different* arrangements (fixed trusts, discretionary trusts, powers of appointment, conditions precedent) in examining issues of conceptual and evidential certainty, as if conceptual certainty in particular were a fixed rule with no variance according to the legal structure the testator had actually attempted to establish. It seemed that many candidates either did not appreciate the differences between those possibilities, or did not realise the connection to the certainty of objects discussion.

Q13. (Unincorporated association problem). Answered by relatively few candidates. There was generally good focus on the question of what to do with the assets, but too ready an assumption that 'contract-holding' should apply to everything, whatever the circumstances, leading candidates to miss opportunities to analyse different approaches and to assess the reasoning in the cases in the face of particular facts, and to demonstrate appreciation of other possibilities (including *bona vacantia*) which would doubtless be argued on the facts of the problem set. The majority needed to re-read *Re West Sussex*, and to appreciate the tension between the reasoning of Goff J in that case and Walton J in *Re Bucks*. Too few candidates referred to the *Hanchett-Stamford* case.

Q14. (Breach of trust problem). Answered by very few candidates, and A/B issues frequently overlooked entirely. Even when A/B was discussed, there was little careful criticism offered. No credit was given for discussion of proprietary claims and tracing: the question was explicitly about personal liability. A small number of candidates were able to discuss the relevant statutory provisions as well, in a way that leads to a united discussion with the case law; which would be else a missed opportunity.

### **F. NAMES OF MEMBERS OF THE BOARD OF EXAMINERS**

Dr S Douglas (Chair)  
Dr I Goold  
Prof J Goudkamp  
Prof B Häcker  
Mr J Lee (External)

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Prof B McFarlane  
Prof G Phillipson (External)  
Dr R Taylor  
Dr A Tzanakopoulos  
Prof R Williams