FHS JURISPRUDENCE

DIPLOMA IN LEGAL STUDIES

(MAGISTER JURIS)

Examiners’ Report 2006

FHS under Old Regulations and under New Regulations
This year, the new BA syllabus was examined for the first time and the examiners ran two FHS examinations, one under the Old Regulations for candidates who began their course before October 2002 (Course 2) or October 2003 (Course 1), and one under the New Regulations. In a few cases (3 to the examiners’ knowledge) candidates chose to be examined under the New Regulations rather than the Old. The Examiners’ Report 2006 on the FHS under the Old Regulations is attached as Appendix 2. The main body of this Report deals with the FHS under the New Regulations.

PART ONE

A. Statistics

1. Numbers and percentages in each class/category

The number of candidates taking the examinations were as follows:

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<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>FHS Course 1</td>
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<td>224</td>
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<tr>
<td>Diploma</td>
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<tr>
<td>Magister Juris</td>
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<td>44</td>
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Classifications: FHS Course 1 and 2 combined

<table>
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</thead>
<tbody>
<tr>
<td></td>
<td>No</td>
<td>%</td>
<td>No</td>
<td>%</td>
</tr>
<tr>
<td>I</td>
<td>43</td>
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<td>29</td>
<td>10.70</td>
</tr>
<tr>
<td>II.i</td>
<td>192</td>
<td>74.13</td>
<td>219</td>
<td>80.81</td>
</tr>
<tr>
<td>II.ii</td>
<td>21</td>
<td>8.11</td>
<td>18</td>
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<tr>
<td>III</td>
<td>2</td>
<td>0.77</td>
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<td>Fail</td>
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<td>Honours **</td>
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</tr>
<tr>
<td>Totals</td>
<td>259</td>
<td>271</td>
<td>253</td>
<td>267</td>
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</tbody>
</table>

* Old Regulations
** ‘declared to have deserved Honours’
Classifications: FHS Course 2 (Law with Law Studies in Europe)

<table>
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<tr>
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</thead>
<tbody>
<tr>
<td></td>
<td>No</td>
<td>%</td>
<td>No</td>
<td>%</td>
</tr>
<tr>
<td>I</td>
<td>10</td>
<td>33.33</td>
<td>8</td>
<td>26.67</td>
</tr>
<tr>
<td>II.i</td>
<td>18</td>
<td>60</td>
<td>21</td>
<td>70</td>
</tr>
<tr>
<td>II.ii</td>
<td>1</td>
<td>3.33</td>
<td>1</td>
<td>3.33</td>
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<tr>
<td>III</td>
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<td>3.30</td>
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<td>0</td>
</tr>
<tr>
<td>Totals</td>
<td>30</td>
<td>30</td>
<td>29</td>
<td>23</td>
</tr>
</tbody>
</table>

* Old Regulations

Results: Diploma in Legal Studies

All 18 candidates passed; two gained Distinction.

2. Vivas

Vivas are no longer used in the Final Honour School. There may be vivas in the Diploma in Legal Studies, but none were held this year.

3. Marking of scripts

Double marking of scripts is not routinely operated. 839 out of 2,387 (2,333 FHS plus 54 DLS) scripts (35.15%) were in fact second marked. This total compares with 34.3% in 2005; 34.3% in 2004 and 30.8% in 2003. Third marking was used in exceptional cases (eg medical cases) and 5 FHS scripts were read a third time. Further details are given in Part Two (A.1.).

B. New examining methods and procedures

There were no significant changes to the papers or examining methods this year. The procedures for ensuring the accuracy of marking were the same as in 2005, 2004 and 2003. Second marking of all scripts with marks ending in 9 (except those included in the random sample of scripts second marked to ensure uniform standards of marking) was delayed until the period between first and second marks meetings. They were therefore all marked as borderline in the sense that the markers treated them as likely to affect the candidate’s overall classification if the mark were raised and there is a tendency amongst markers to be generous at that stage. Third marking was confined to scripts which had been second marked as part of the sampling process.

The procedures for ensuring the accurate marking of scripts took the same two forms as in the last three years. That is, first, during the first marking process checks were made to ensure that markers were adopting similar standards. In larger subjects, this took the form of a statistical survey of marks and distribution between classes. Where any significant discrepancy was found, scripts were second marked to establish whether similar marking standards were in fact being applied. In smaller subjects, a proportion of scripts chosen at random were second marked with the same objective. The purpose of making checks at this stage is to ensure that first markers can adjust their marks (for all scripts) if they are out of line with other markers.
Second, scripts were automatically second marked if they were out of line with other marks achieved by the candidate in question. The test applied was whether the script was 4 or more marks below the average for the scripts of that candidate.

As in previous years, all scripts with marks of 39, 49, 59, 69 were second marked and also the only failing script. In addition, borderline scripts with marks ending in 8 or 7 were second marked if a higher mark in that paper might affect the candidate’s overall result.

C. Possible changes to examining methods, procedures and conventions

1. Setting and checking the paper and marking are the responsibility of a team of up to six members (larger subjects) and up to three members (smaller subjects). The leader of each team has considerable additional responsibility to ensure that procedures are carried out and deadlines met. These procedures worked very smoothly.

2. The examiners applied the classification and results conventions as previously agreed by the Law Board and notified to candidates. Under the New Regulations FHS candidates take 9 papers (9 standard papers or 8 standard and 2 special papers).

D. Examination Conventions
These are detailed in paragraph 10 of the Notice to Candidates (Appendix 4 to this report).

PART TWO

A. General comments

1. Second marking
The procedures for second marking were identified in Part One (B) above. The timetable for marking is tight and was reviewed by the Examinations Committee in 2005 which concluded that there was no scope for seeking alterations, as it is important that candidates have sufficient time before the start of the examination for revision and a later start date would create an unmanageable overlap with the BCL and MJur examinations.

Resolving differences
As last year, first and second markers were required to discuss their marks and, wherever possible, agree a mark. This worked well with only 5 scripts (3 in 2005; 8 in 2004 and 12 in 2003) not receiving an agreed mark (out of 839 scripts second marked). These 5 scripts were third marked, and in 3 of these cases the candidate’s overall class might have depended on the outcome.

Statistics on second marking and agreed marks
As in the last two years, there were three separate grounds for second marking. Second marking was undertaken blind.
(i) **Checks to ensure consistency between markers.**

The scripts were chosen at random, though in some small optional subjects all scripts were second marked. 281 (11.77%) scripts were second marked on this basis (261 (10.5%) in 2005; 183 in 2004 and 245 in 2003). These scripts exclude those marked on a borderline 9 mark (or failing); all such scripts are second marked and fall within (iii) below.

(ii) **Scripts which had been marked 4 or more below the average mark for that candidate.**

272 scripts (11.4%) were second marked on this basis (326 scripts (13.12%) in 2005; 272 (11.7%) in 2004 and 268 (11%) in 2003). These scripts exclude those marked on a borderline 9 mark (or failing); all such scripts are second marked and fall within (iii) below. A small number (7) identified as being 4 or more marks below the average but which might also, if raised, affect the candidates final overall result are also included in (iii) below.

(iii) **Scripts second marked because they were borderline or failing.**

This year there was only 1 failing script (mark below 30). All scripts with marks ending in 9, whether second marked before or after the first marks meeting, are included here, together with scripts with marks ending in 8 and 7 where, if the mark were raised, the candidate’s overall final result might be affected. In order to decide the winners of the Wronker overall prizes and the Gibbs prizes (performance in Contract, Tort, Land Law and Trusts), a small number of scripts with marks ending in 8 and 7 were second marked and are also included here. 286 scripts (11.98%) were second marked on this basis (264 (10.6%) in 2005; 344 (15%) in 2004 and 224 (9%) in 2003).

<table>
<thead>
<tr>
<th>First Mark</th>
<th>Number of Scripts</th>
<th>Number in Higher Class after Second Marking</th>
<th>%</th>
<th>Number agreed in Higher Class</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>69</td>
<td>47 (71)</td>
<td>13 (18)</td>
<td>28 (25)</td>
<td>13 (18)</td>
<td>28 (25)</td>
</tr>
<tr>
<td>68</td>
<td>83 (94)</td>
<td>10 (19)</td>
<td>12 (20)</td>
<td>10 (15)</td>
<td>12 (16)</td>
</tr>
<tr>
<td>67</td>
<td>92 (71)</td>
<td>13 (5)</td>
<td>14 (7)</td>
<td>13 (3)</td>
<td>14 (14)</td>
</tr>
<tr>
<td>59</td>
<td>45 (51)</td>
<td>18 (23)</td>
<td>42 (45)</td>
<td>18 (22)</td>
<td>42 (43)</td>
</tr>
<tr>
<td>58</td>
<td>76 (74)</td>
<td>24 (24)</td>
<td>32 (32)</td>
<td>24 (24)</td>
<td>32 (32)</td>
</tr>
<tr>
<td>57</td>
<td>47 (59)</td>
<td>6 (21)</td>
<td>13 (36)</td>
<td>6 (17)</td>
<td>13 (29)</td>
</tr>
<tr>
<td>49</td>
<td>3 (4)</td>
<td>1 (3)</td>
<td>33 (75)</td>
<td>1 (3)</td>
<td>33 (75)</td>
</tr>
<tr>
<td>48</td>
<td>7 (2)</td>
<td>3 (0)</td>
<td>43 (0)</td>
<td>3 (0)</td>
<td>43 (0)</td>
</tr>
<tr>
<td>47</td>
<td>4 (5)</td>
<td>2 (3)</td>
<td>50 (60)</td>
<td>2 (3)</td>
<td>50 (60)</td>
</tr>
<tr>
<td>Special/fail</td>
<td>1 (16)</td>
<td>0 (3)</td>
<td>0 (19)</td>
<td>0 (3)</td>
<td>0 (19)</td>
</tr>
</tbody>
</table>

For the purposes of comparison the figures for 2005 are given in brackets (NB in 2006 first and second markers returned agreed marks in all cases of borderline scripts).
The overall success rate in reaching a higher class was 22.22% (26.6% in 2005; 30.2% in 2004; 38.9% in 2003). The success rate of borderline scripts ending in 8 and 7 was 18.77% in 2006 (23.9% in 2005; 20.7% in 2004; 28.5% in 2003).

2. Third marking
Of the 5 scripts third marked, 2 were re-read to resolve a difference between first and second markers (1 of these was an Ethics script). 3 were re-read as borderline scripts as the candidate’s overall class might be affected if the script mark were raised.

3. Examiners’ agreed marks
There were no cases in which the examiners were required to allocate an appropriate script mark; in the 4 cases where first and second markers did not agree the marks, the matter was resolved by a third marker (see paragraph 2 above).

4. Examination schedule
As in previous years, the Examination Schools were responsible for producing the timetable. An attempt was made to avoid candidates’ having two papers on the same day. It is only in the second full week of the examination (when most candidates took two optional subject papers) that two papers were timetabled for the same day. Without extending the examination period, it proved impossible to ensure that no candidate had two papers on the same day.

5. Medical certificates, dyslexia/dyspraxia and special cases
24 medical certificates were forwarded to the examiners (compared with 33 in 2005; 21 in 2004; 22 in 2003). In addition, 2 candidates were certified as dyslexic or dyspraxic (1 also had a medical certificate which is included in the 24 such certificates).

11 candidates wrote some or all of their papers in college (compared with 6 in 2005; 3 in 2004; 5 in 2003). A further 5 candidates wrote some or all of their papers in a special room in the Examination Schools. 9 candidates had special arrangements in the examination room (eg water, dextrose sweets) because of medical conditions.

The following additional specific details have been requested by the Proctors. In the FHS 22 medical certificates and similar documents (from 8.50% of candidates) were forwarded to the examiners under sections 11.8 – 11.9 of the EPSC’s General Regulations for the Conduct of University Examinations (see Examination Regulations 2005, page 34), and in 3 cases the candidate’s final result was materially affected. No medical certificates were forwarded to the examiners in respect of DLS candidates.

6. Materials in the Examination Room
There were no problems with the provision of statutory materials. The list of statutory materials is included in Appendix 4.

Permission for the use of a bilingual dictionary has to be sought from the Proctors at the time when candidates submit their examination entry forms (in Michaelmas
Term) and late applications are not permitted. The absence of problems with unauthorized dictionaries in the examination room indicated that colleges and candidates are now quite familiar with this strict rule.

Candidates are required to display their University card on their desk to enable their identity to be checked. Very few failed to bring their cards to each examination paper. Those who did so fail were required to undergo identity and handwriting checks carried out by the staff of the Examination Schools.

7. **Legibility**
   Typing was requested from 23 candidates for a total of 50 scripts. This compares with 12 candidates for 52 scripts in 2005; 17 candidates for 65 scripts in 2004; 6 candidates for 43 scripts in 2003.

8. **Short weight and breach of rubric**
   No change was made by the Examinations Committee to existing practice as to what to treat as short weight (or how to deal with rushed or incomplete answers). Where a full question has been omitted, 10 marks are deducted for a paper requiring four questions to be answered. Suppose a candidate has answers marked at 62, 67 and 72 on a paper requiring four answers. The mark over the three questions averages at 67. 10 marks are deducted on account of the omitted fourth question; this produces a final mark of 57. Pro rata deductions are made for the minority of papers where 2 or 3 answers are required, and where part of a question has been omitted. Breach of rubric incurs similar penalties, but breach of rubric is treated as if half a question has been omitted. 15 candidates submitted short weight scripts, 2 of whom had special (medical) circumstances. 3 candidates committed a breach of rubric (ie failed to include a required problem question).

Markers are reminded that a single very weak answer should not be allowed to reduce the overall mark by more than 10 marks; it should not be treated as worse than an omitted answer. More generally, markers are encouraged to take an overall view of the quality of the script when deciding on the overall mark, even though this may not represent an arithmetical average.

9. **Ethics**
   The Ethics paper is set and marked by Philosophy examiners and is routinely blind double marked. In the past (recently in 2002 and 2003) concern has been expressed at the variations in the marks awarded, but there was little difference between the two marks awarded in 2004, and in 2005 the markers submitted agreed marks for every question and the overall script mark. This year there was little difference between the two marks awarded and the markers submitted agreed overall script marks in 9 cases. In 1 case the two markers could not agree the overall script mark and that script was third marked. In 2003 the examiners were concerned that the final marks of Ethics candidates were markedly lower than those for other papers they took. The occurrence of this problem was much reduced in 2004 (in only 3 out of the 16 cases was the Ethics mark seriously out of line with marks for that candidate’s other papers) and in 2005 (in only 1 out of the 10 cases was the Ethics mark out of line with that candidate’s other papers, and not seriously out of line as it was one of two first class marks in an otherwise class II.i profile). This year in only 1 case was the Ethics mark out of line with that candidate’s other papers, and not seriously out of line as it was one of two first class marks in an otherwise class II.i. profile. The examiners also looked at the
variation between candidates’ marks for Ethics and their marks for the Jurisprudence paper. In 1 case the marks for both papers were the same, in 2 cases the Jurisprudence marks were 9 and 11 marks higher and in 2 cases they were 4 and 5 marks higher. In the other 5 cases the Jurisprudence mark was lower than the Ethics mark; in 1 case 16 marks lower, in another 8 marks lower and in the remaining 3 cases between 1 and 4 marks lower.

10. The computerized database
The computer software worked satisfactorily with only a few minor hiccups. It did not prove possible to commission and produce a new database during the summer 2005, so the existing software was adapted for the New Regulations FHS and DLS with some manual additions (eg to cope with 2 special subjects being equivalent to 1 standard subject).

11. External Examiners
This year Professor C. Mitchell of King’s College London was not able to join us, but we had the valuable assistance of Professor F. D. Rose of Bristol University. His active involvement and advice at all stages was extremely helpful and we are very grateful to him. The external examiner reports to the Vice-Chancellor about his views of the examination process, and his report is attached as Appendix 1.

12. Thanks
Our examinations officer, Mrs. Julie Bass, organizes and runs the examinations with the superb efficiency and attention to detail which we have come completely to rely upon. She is mistress of the whole operation and we are very much in her debt. Tight deadlines impose a strain on everyone but she remains calm and cheerful throughout, ever ready to adapt to our needs. She anticipates problems before they arise, and then diverts or solves them. We are very conscious of what we owe to her and are extremely grateful. We are also very grateful to others in the faculty office; Marianne Biese, Lorna Costar, Jennifer Kotilaine, Ray Morris, Caroline Norris and Hannah Thomas who have helped us, not least in making deliveries to and collections from colleges. In addition to the examiners, 52 colleagues were assessors, involved in setting and marking, and we owe our thanks to them all.
B. Equal Opportunities issues and breakdown of the results by gender; ethnicity analysis

The gender breakdown for Course 1 was:

<table>
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</thead>
<tbody>
<tr>
<td></td>
<td>Male</td>
<td>Female</td>
<td>Male</td>
<td>Female</td>
</tr>
<tr>
<td>I</td>
<td>16</td>
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<td>12</td>
</tr>
<tr>
<td>II.i</td>
<td>71</td>
<td>75</td>
<td>91</td>
<td>79</td>
</tr>
<tr>
<td>II.ii</td>
<td>7</td>
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<td>4</td>
</tr>
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<td>III</td>
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<td>Fail</td>
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<td>1</td>
<td>0</td>
<td>0</td>
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The gender breakdown for Course 2 was:

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<tr>
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<td>Female</td>
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<tr>
<td>I</td>
<td>4</td>
<td>31</td>
<td>4</td>
<td>36</td>
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<tr>
<td>II.i</td>
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<td>64</td>
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<td>Fail</td>
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<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Hons.</td>
<td>13</td>
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<td>11</td>
<td>19</td>
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</table>

The gender breakdown for Course 1 and 2 combined was:

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<th></th>
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</thead>
<tbody>
<tr>
<td></td>
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</tr>
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<td>I</td>
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<td>9</td>
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<td>1</td>
<td>1</td>
<td>1</td>
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<tr>
<td>Pass</td>
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<td>0</td>
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<td>1</td>
</tr>
<tr>
<td>Fail</td>
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<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Hons.</td>
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<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>108</td>
<td>151</td>
<td>126</td>
<td>145</td>
</tr>
</tbody>
</table>
The examiners were not asked to produce an ethnicity analysis of the results. No question of ethnicity is asked in the examination entry form.

C. Detailed numbers taking subjects and their performance

1. Numbers writing scripts in optional subjects: FHS Courses 1 and 2

<table>
<thead>
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<th>Subject</th>
<th>2006</th>
<th>2005</th>
<th>2004</th>
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</tr>
</thead>
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<td>Land Law *</td>
<td>271</td>
<td>249</td>
<td>266</td>
<td></td>
</tr>
<tr>
<td>Roman Law (Delict)</td>
<td>1</td>
<td>3</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>Comparative Law of Contract</td>
<td>16</td>
<td>11</td>
<td>8</td>
<td>14</td>
</tr>
<tr>
<td>Crim. &amp; Pen *****.</td>
<td>72</td>
<td>71</td>
<td>59</td>
<td>69</td>
</tr>
<tr>
<td>Public International Law</td>
<td>69</td>
<td>71</td>
<td>91</td>
<td>101</td>
</tr>
<tr>
<td>History of English Law</td>
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<td>16</td>
<td>14</td>
<td>8</td>
</tr>
<tr>
<td>EC Law *</td>
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<td>83</td>
<td></td>
<td>121</td>
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<tr>
<td>Ethics **</td>
<td>10</td>
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<td>16</td>
<td>16</td>
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<tr>
<td>International Trade</td>
<td>26</td>
<td>22</td>
<td>16</td>
<td>9</td>
</tr>
<tr>
<td>Trusts *</td>
<td>270</td>
<td>253</td>
<td>267</td>
<td></td>
</tr>
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<td>250</td>
</tr>
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<td>63</td>
</tr>
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</tr>
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* Under the New Regulations these papers are no longer optional
** This paper is not marked by FHS examiners
*** This paper was examined for the first time in 2005
**** These papers were not available in 2006
***** One candidate was absent from this paper in 2006
2. Numbers writing scripts in Diploma in Legal Studies

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3. MJur candidates taking FHS papers

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* One candidate did not write this paper

4. Percentage distribution of final marks by subject: FHS Courses 1 and 2

|                | 75-79 71-74 70 68-69 65-67 60-64 58-59 50-57 48-49 40-47 39 or less Nos. writing scripts |
|----------------|-----------------------------------------------|-----------------------------------------------|
| Jurisprudence  | 5 10 5 14 43 9 12 2 259                           |
| Contract       | 5 7 12 20 36 7 12 259                           |
| Tort           | 3 7 5 19 39 7 16 1 1 259                        |
| Land Law *     | 2 13 9 24 31 6 15 1 258                        |
| Trusts         | 5 11 5 18 42 6 12 1 2 259                      |
| Admin. Law *   | 3 16 11 30 32 3 5 258                          |
| Comparative Law | 6 13 19 50 13 16 258                           |
D. Comments on papers and individual questions

These appear in Appendix 5

A.S. Burrows
J. Gardner
L. Gullifer
A.S. Kennedy (Chair)
A.V. Lowe
E. McKendrick
J. Payne
F.D. Rose
S.J. Whittaker

Appendix 1: Report of External Examiner (Old and New Regulations)
Appendix 2: Report on Old Regulations FHS
Appendix 3: Notice to Old Regulations Candidates (Examiners’ Edict)
Appendix 4: Notice to New Regulations Candidates (Examiners’ Edict)
Appendix 5: Reports on individual New Regulations papers
Appendix 1

University of Oxford University

FHS Jurisprudence, Diploma in Legal Studies

External Examiner’s Report

This report adopts the headings suggested this year on the basis of the QAA code of practice on external examining.

(i) Whether the academic standards set for the awards are appropriate.

These are generally excellent. The overall level of class marks is high and this reflects the general quality of the scripts. However, care needs to be exercised to ensure that the quality of student performance is not too readily assumed. An adjustment of conventions this year has lead to a welcome increase in the number of First Class degrees this year, better reflecting the high quality of the candidates at the upper end. However, it may be necessary to correct the drift to awarding both upper and lower Second Class degrees at the lower ends of the divisions, as well as to be more prepared to recognise performances below Second Class level where this is merited.

(ii) The extent to which assessment processes are rigorous, ensure equity of treatment for students and have been fairly conducted within institutional regulations and guidance.

The assessment procedures are the most meticulous and professional that I have encountered. Institutional regulations and guidance are detailed and clearly based on an accumulation of experience as well as being kept under constant careful review. In particular, the procedures ensure consistency of approach despite the use of a large number of examiners in different subject areas and that all factors which might affect the overall result are carefully examined or re-examined before the final decision was made.

(iii) The standards of student performance.

This overlaps with (i) above, q.v. The students generally performed very well and there were few who appeared to be weak but examiners need to remain vigilant that they are not being overly tolerant at the lower end, in particular as this diminishes the achievements of those more clearly deserving the class in question.

(iv) Comparability of standards and student achievements with other higher education institutions

Those at Oxford are in both respects generally higher than in other institutions. From the point of view of such comparisons, Oxford may not be out of step with a general drift towards generosity, particularly below traditional upper Second class levels, in other institutions; but, even so, this is not a reason for relaxing vigilance in maintaining proper standards.

(v) Good practice
Oxford scores heavily in providing at least two opportunities for scrutinising the draft papers and the marks to be awarded to scripts. Most institutions would not regard the degree of attention accorded to the examination process as either possible or necessary. It is certainly time consuming but it is also beneficial in sorting out issues of possible concern. Moreover, there is a clear advantage in having a small board of examiners, rather than for all of those involved in the examination process to be, nominally at least, engaged at all stages. A small board, in which the members are expected to be actively concerned with the process, is likely to be more efficient in dealing with issues which arise. Moreover, it avoids the problem that may be presented in most institutions where matters of detail are often negotiated between the chair and individual examiners or assessors without necessarily being referred back for a collective decision. Indeed, the board may provide useful support for the chair in instances where an individual examiner or assessor is resistant to reasonable efforts, as he sees it, to trespass on his own turf.

(vi) Other matters

I need not repeat points made in last year’s report, which has received attention and in respect of which I have received feedback. Nor need I repeat most of the points made in the general Examiners’ Report, q.v. However, a few points may be made.

(a) Short weight and breach of rubric

This is discussed in the main Examiners’ Report. There was some concern that there might not be a consistent understanding of the effects of failure to comply exactly with the requirements of the paper and that a candidate apparently penalised for short weight (by deduction from the average performance in the parts answered) might in fact be advantaged by it rather than if an absent question or part of question were given no marks. A simpler and clearer approach would be to allocate marks equally to questions or divided parts of a question (if appropriate, formally dividing distinct parts of a question) and to make clear that a candidate who does not answer all that is required will simply get no marks for the omission. This would treat all candidates equally.

(b) Problem questions

There is no single right approach to teaching or learning Law or assessing student performance; and a broad approach to legal education is to be welcomed. Nonetheless, it is undeniable that law is concerned with the practical world. Moreover, although it should not be determinative of how university law courses are conducted, it is clear that many Law students intend to practise Law and will expect their Law degrees to comply with the requirements of professional bodies. It is therefore regrettable that there is a noticeable decline in universities generally in the setting of problem questions in examination papers and in the requirement that a certain number of problem questions be answered. Problem questions impose a particular challenge to recognising issues and to marshalling knowledge and arguments to deal with them, skills which are useful whether or not a Law graduate intends to practise Law. Admittedly, it takes time, thought and care to construct good problem questions but it is effort well expended to maintain the standards of good legal education. It is therefore hoped that traditional requirements for problem questions may be revived.
(c) Individuals

No matter how carefully an institution constructs its procedures, their implementation is a matter for individuals. It is they who have to make sure they work and that unanticipated problems – in particular this year the threatened AUT boycott – are resolved. It is therefore not superfluous to conclude by noting that a great deal of the success of the examination process is attributable to the work and dedication of the chair, Ann Kennedy, and the examinations officer, Julie Bass.

F.D. Rose  
Professor of Commercial Law  
University of Bristol
Appendix 5

INDIVIDUAL REPORTS

JURISPRUDENCE

All questions were attempted. By far the most popular were Q. 6(b) (where very many answers ignored the question whether there is a single principle defining law’s proper limits), and Q. 11 (where few candidates explored the question whether cases in which the law lacks moral obligatoriness are also, by entailment, cases where it lacks moral authority). The other distinctly popular questions were Q. 4 (are unjust laws laws?) and 13 (should legal theory try to reproduce the internal point of view?). Least popular were Q. 12 (distinction between criminal and civil law), Q. 6(a) (tolerating the intolerant), Q. 16 (radical critiques), and Q. 2 (legislative authority to override longstanding – and therefore, surely, positive – rights). Some candidates argued in Q. 1 for a free-booting use of the Dworkinian moral soundness criterion, but in Q. 4 for a rigid social-fact sources theory. A good many of those who attempted Q. 14 did not distinguish between morality and the (Fullerian) “inner morality of law”. Very few candidates are aware that Hart speaks explicitly of more than one kind of external point of view. The verb “prophesy” is almost unknown, and substitutes, even the most popular (“prophecize”), seem spur-of-the-moment inventions. A sadly large number think they know about one John Stuart Mills.

CONTRACT

The overall performance on the paper was rather disappointing. Although there were some very good scripts, there were too many lower second class answers, candidates often being pulled down by errors which could be avoided by a sharper attention to the detail of the law. Three general weaknesses should be highlighted. First, many candidates do not deal at all well with statutory material. This has been commented upon regularly in examiners’ reports, but candidates do not seem to learn from it—and this year there were again notable errors in the use of the Unfair Contract Terms Act 1977 and the Law Reform (Frustrated Contracts) Act 1943. Secondly, the structuring of answers to both essay and problem questions was often poor. In the case of problem questions, a candidate who writes in a well-structured way is much more likely to arrive at the correct answers or to spot the legal difficulties than someone who writes without clearly separating out the issues. Thirdly, in answering problem questions too many candidates view the law through the structure of their tutorial topics, and seem to have difficulty seeing that more than one week’s work might be relevant to answer a question. So, for example, when they see a misrepresentation they ignore mistake, or breach; or when they see frustration in one part of a question, they assume that the whole question must be about frustration.

Question 1. This question attracted a small number of answers of mixed quality. The best answers drew on a wide range of topics within contract, comparing the protection of consumers and businesses. But too many candidates saw this as the peg on which to hang their prepared essay on the Law Commission’s proposals for reform of the law on unfair terms. An answer which was limited in this way did not fully address the question, and so could not achieve the highest marks.

Question 2. This was a popular question, and was generally done well. The best answers focussed on the issue raised by the quotation (the adequacy of damages bar), although a very good answer could still be written that also looked more generally at the issue of
whether specific performance is (or should be) the primary remedy. The candidates who were given lower marks drifted into writing a general essay on the performance interest and Ruxley v Forsyth, which was not what the question asked (although some room might certainly have been found for a limited discussion of Ruxley).

Question 3. This was the most popular essay question, and most candidates who answered it had a good understanding of the place of section 2 within the scheme of the Act; and were able to discuss it critically taking into account the Law Commission’s proposals and recent literature. Some failed to notice that section 2(1) gives the default position and that, under section 2(3), the parties by an express term can ensure that their intentions as to rescission and variation are provided for. Most candidates rightly avoided a lengthy explanation of the law before the enactment of the 1999 Act, although a few (as always, it seems) felt it necessary to lay out the old common law exceptions to privity.

Question 4. The quality of answers to question 4 was mixed. It is surprising that some candidates do not appear to know of the doctrine of intention to create legal relations. It was not possible to obtain the highest marks without some discussion, at least, of this; although beyond that there were different ways in which candidates successfully dealt with the question. Some focussed almost entirely on intention to create legal relations, and discussed it (and its case law) in real depth. Others went on to discuss whether a requirement of intention lies behind other rules relating to the formation of contracts: especially offer and acceptance, and consideration. Some of the best answers also explored, in this context, the meaning of ‘intention’, and this took them into the objective/subjective test. But, on the other hand, some of the weaker answers were from candidates who just re-hashed a prepared essay on whether intention is subjective or objective, without setting this in the broader context which the question required.

Question 5. This question was not popular, but was generally answered very competently. The less strong answers tended to be rather descriptive, but better answers were more normative and linked their answers into the quotation.

Question 6. This was a popular question, and most candidates used a range of topics within the damages rules to discuss it. Unfortunately, some found in this question yet another opportunity to write at length on Ruxley; or used it as the peg for their prepared essay on the difference between the ‘expectation’ and ‘reliance’ measures of damages. But most used it to discuss such things as remoteness (some wrote exclusively on this), mitigation, causation and intangible losses.

Question 7. This question attracted a small number of answers, but some were very good indeed. The best answers focussed (as all should have done) on the word ‘distinct’ in the question; and structured their answers around the relationship between undue influence and other doctrines, looking at the relatively recent developments hinted at in the quotation, both in undue influence itself (notably Etridge), and the expansion of economic duress, and the place which might be played by unconscionability. The weaker answers gave a pre-digested general account of duress and undue influence; and a very few sought to answer the question without even any mention of Etridge.

Question 8. This was a difficult problem question which contained a wide range of issues, and the examiners set their expectations accordingly. It was possible to score a very high mark without covering all the issues in full detail; the most important thing was to present the structure of the answer in a clear and logical fashion, avoiding some of the regrettably-usual failings in this topic. Some candidates rose to the challenge and wrote very good
answers, separating out the claimants and their possible causes of action (Cristal v Alphaphone, Cristal v Bob, and Danielle v Bob); saw that the primary claims were against Bob for breach of contract (the implied term under s. 14 Sale of Goods Act 1979); and considered the incorporation and interpretation of the limitation clause and correctly applied the relevant statutory provisions to test its validity. The very best answers identified the possibility of a collateral contract between Cristal and Alphaphone; that there was a privity issue relating to the use by Alphaphone of the limitation clause in the contract between Cristal and Bob; and that Danielle’s status as a consumer gave her advantages in the claim against Bob (Sale of Goods Act 1979, s. 14(2D) and Part 5A). But these were the icing on the cake, which the examiners expected to see in only the best answers. What we had not quite been prepared for was the very poor analysis of far too many candidates. Some spotted the misrepresentation made by Alphaphone, and proceeded to treat the whole question simply as one of (precontractual) misrepresentation, even if they had seen that the contract of sale was not with Alphaphone. Previous examiners’ reports have commented on the poor use of the legislation on unfair terms, but again candidates used rather indiscriminately ss. 2, 3, 5 and 11 of the Unfair Contract Terms Act 1977 (sometimes using the “reasonableness” test of s. 11 without apparently linking it to any primary operative section of the Act). Far too few used s. 6. And even some who did just said that s. 6 imposed a “reasonableness” test without noticing how the section distinguishes between a consumer and a non-consumer.

Question 9. This was generally well done; candidates were able to discuss the issues of mistake in relation to the contract between Ellen and Fred; and offer and acceptance between Ellen and Georgina. Most candidates can give a sound account of the limitations of the existing case law on offer and acceptance, and make a good attempt at reasoning by analogy to situations which are not covered by the authorities. There were, however, some common errors: a number of candidates treated the validity of the contract between Ellen and Fred as resting on the rules relating to common mistake, without noticing that they did not make the same mistake about the price. Rather few candidates asked themselves about the significance of Ellen’s statement that she would not let the cottage to anyone else before Friday. But the most serious failing was in a surprisingly large number of candidates who assumed that, if Ellen had entered into a contract with Harry, she could not also enter into a valid contract with Georgina; and so one or other contract must be void (for common mistake) or frustrated.

Question 10. Most candidates dealt with this question quite well, and saw that there were issues of both mistake and misrepresentation; and that the void/voidable distinction (in relation to the contract between John and Ivan) was fundamental to John’s claim against Karen. Some candidates read in facts which were not stated: some assumed that Ivan had absconded, and so there was no point in discussing any remedies against him. Some assumed that a sale to a third party (Karen) prevented rescission of the contract as against Ivan without at least asking themselves whether Karen was an innocent purchaser. Some, perhaps blinkered by the structure of their tutorial reading lists, saw this as just either a misrepresentation problem or (more commonly) a mistake problem, without considering the full range of remedies. Relatively few candidates saw that there was two mistake issues: the ‘identity’ of Ivan, and the subject matter of the contract (gold or gold-plate jewellery). And even fewer saw that, if Ivan was still available to be sued, and solvent (or, as one candidate put it, ‘soluble’), the best claim might in fact—depending on the relative values of real old Russian gold and the price paid by John—be in contract.

Question 11. This was the most popular question. Most candidates saw the key issues: the action for the price (and the complications of White & Carter v McGregor) in (a); the
contractual variation (and how these facts compared with, or should be distinguished from, *Williams v Roffey*) in (b); and frustration in (c). A few candidates were determined to answer the entire question on the basis of frustration. A few others did not really know *White & Carter*; and of those (many) candidates who did, there was a tendency to write a short prepared piece about the problems of the decision, highlighting Lord Reid’s limitation based on ‘legitimate interest’ without also looking at whether (in general; or on the facts here) the party seeking to affirm the contract could perform her own obligations without the other party’s co-operation. Candidates often criticised *White & Carter* in relation to the avoidance of the duty to mitigate; but a surprising number appeared to think that the duty to mitigate applied even if Lucy affirmed the contract. The most serious—and most common—weakness, however, was in the use of the Law Reform (Frustrated Contracts) Act 1943 in (c). Many of those candidates who knew that the Act was relevant tried to apply s. 1(3) rather than s. 1(2); and even many of those who used s. 1(2) did not know how to apply it. The relevance of these provisions in dealing with a question of frustration should be well known by candidates; and when the statute is provided in the examination room, the examiners are entitled to expect candidates to be able to use its relevant provisions competently. Another common error in relation to frustration is the loose or inaccurate use of terminology. Too many candidates described the consequences of frustration in imprecise terms (leaving the impression that they were not quite sure about the impact of frustration on the contract), and some used terminology that is clearly wrong: frustration was often said to result in the ‘setting aside’ of the contract; or the contract was ‘voidable’.

Question 12. This was another popular question, which was generally well done. In relation to the late completion of the project, most candidates (but by no means all) saw that they had to discuss whether the £250/day deduction was a penalty or a liquidated damages clause, and many were able to use relevant case law to explore the principles underlying the distinction in order to offer an answer on the facts of this case. There were however some misunderstandings about the relationship between a liquidated damages clause and a claim for damages for actual loss (a surprising number of candidates thought that the claimant could recover under both). In relation to the defective performance by Olive, candidates generally gave a good account of the issues flowing from *Ruxley* and sought to distinguish it (this was the question on the paper where a detailed discussion of the case was clearly called for); and saw the issues relating to Neil’s mental distress, and problems of mitigation and/or remoteness in relation to the possible closure of his business. However, a surprising number of candidates spent a substantial part of their answer discussing whether Olive’s obligations were conditions, warranties or innominate terms, so as to decide whether Neil had the right to terminate the contract for breach, without apparently asking themselves (and certainly without explaining in their answers) how the right to terminate might be relevant on these facts.

**TORT**

There was a good range of marks across the scripts this year, ranging from some excellent first class papers to a number of third class scripts. Generally, students demonstrated a strong awareness of recent case-law and solid knowledge of the law, but weakness in applying the law to the question and, in particular, directly answering the essay questions.

Question 1 (Compensation culture). This question, on a topic of strong contemporary interest, appeared to puzzle many candidates who strove, valiantly, to convert it into a question concerning “no fault” liability. The strongest candidates used it as a basis to
survey the development of tort law, notably the tort of negligence, in recent years. It was
disappointing that many candidates seemed to believe that reference to the
Atiyah/Burrows debate would suffice, despite the clear wording of the question.

Question 2 (Vicarious liability). This question proved very popular. The better answers
addressed both the case-law operation of the doctrine and the issue of justification and
produced some sophisticated answers. Nevertheless, a number of weak answers showed
little understanding of recent trends in this area of law and little attempt to understand its
basis.

Question 3 (Nuisance and negligence). Another popular question, ranging from some
excellent answers with good reference to academic literature to some weak attempts to
reproduce lecture notes.

Question 4 (Pure economic loss). Responses to this question were disappointing. Only a
few candidates recognised what the question was looking for, whilst the majority tried to
convert it into a question on negligently-inflicted pure economic loss.

Question 5 (Causation). This was the most popular question on the paper. Candidates
were generally well-prepared and, in general, handled recent developments well. There
was, however, over-reliance on revision lectures without sufficient critical analysis.

Question 6 (Defamation). This was not very popular, but those who attempted it generally
did well. The best candidates demonstrated good knowledge of post-Reynolds case-law
and an ability to analyse the impact of human rights law in this area of tort. However, a
few weak candidates offered no more than a general treatment of the chilling effect of
defamation law.

Question 7 (Omissions). This question was less popular and received a mixed response.
Many candidates did not undertake the comparison evident in the question between public
authorities and private actors and answered the question either generally on omissions or
solely in relation to public authorities.

Question 8. This problem was undertaken by many candidates who, generally, handled
the question well. Although there was some confusion as to the difference between
Annabel and Belinda’s claims (obviously significant after D v. East Berkshire Community
NHS Trust), students divided up the claims well and the majority of candidates identified
Mrs Cruise’s claim to relate to stress in the workplace.

Question 9. This question was undertaken by many who demonstrated the usual
difficulties in a question dealing with liability and quantum, in that one part was dealt with
brieﬂy and the other in detail. Many students failed to recognise that striking another
would amount to trespass to the person and strove to ﬁt it within negligence liability.
Many also missed the causation point at the end.

Question 10. This question was undertaken by a significant number of candidates. There
was evident confusion for many candidates as to the relevant defendants and some rather
odd opinions of what might be expected of a 13 year old boy (reliance on Phipps, despite
the fact that he was at school and a teenager?) Many missed the causation point or dealt
with it very simplistically.
Question 11. This question was undertaken by many candidates, who generally did well, although few identified all the relevant legal points, notably the possible claim under the Consumer Protection Act 1987 for the stage. There was also a worrying failure to recognise the nature of Frank’s loss for damage to his cow.

Question 12. This proved very popular with candidates. The majority of candidates identified correctly the relevant issues and the most important case-law, with good use of the Defective Premises Act 1972. Many candidates, however, seemed to believe that it was sufficient to identify the relevant case-law and assume that it applied. Did Smith v. Bush, for example, apply in favour of a financial consultant working in the City of London?

LAND LAW

For the first time in recent years, candidates (other than those taking the examination under “Old Regulations”) had to answer at least two problem questions. This change was taken on board, at least in as much as no candidate answered three essay questions.

The essay questions were, generally speaking, competently but unambitiously handled. Few candidates took the ample opportunities afforded to answer the specific question set: for example, in response to question 1, many candidates wrote in general about overriding interests (the annual error of assuming that these are synonymous with the rights of those in actual occupation naturally re-appeared) rather than asking if the Law Commission’s supposed rationale could actually explain why any of those interests are overriding. As in question 3, candidates also shied away from the “should” part of the question, which was disappointing. This tendency to seek refuge in describing the law depressed the marks of candidates tackling question 5, as this question clearly requires more than a backward-looking analysis of the law to date. The best candidates were able to use their discussion of past developments to inform their views as to the future, and also considered not only if the status of contractual licences should be changed, but also how, if at all, such a change might occur.

The paper offered five problem questions and each was devoted to a specific topic: inevitably, points relating to the registered land system appeared in each problem but, that excepted, there was no overlapping of subject areas. The best candidates took advantage of this and applied their sound knowledge of the cases and statutes to give simple and direct answers to the points raised. However, a surprisingly large number of candidates, many of whom scored reasonably well on the essay questions, struggled with the problems. Question 6 was not as popular as expected: perhaps candidates mistook the priorities point for one which demanded detailed knowledge of the law of mortgages. Of those who tackled the question, surprisingly few started their discussion of B’s position by simply setting out the two limbs of the Rosset test; rather, much use was made of Gissing, and even Pettit. Candidates, particularly those with aspirations to practise law, should realise that if the House of Lords goes to the trouble of distilling a simply-stated test then it is a good idea to use it.

Question 7 concerned leases, and therefore a small but committed core of candidates insisted, in the face of overwhelming evidence, that it must be about shams and the presence or absence of exclusive possession. The fairly straightforward formality issue in part (a) was generally spotted, but was often clumsily executed. In particular, candidates often referred to sections of the Land Registration Act 2002 without mentioning s.52 of the Law of Property Act 1925: is it possible that they assume the former repealed the
latter? As to (c), there was a trend, even among strong candidates, to assume that s.116(a) of the LRA 2002 assured H Ltd of success against J, whether H Ltd’s unregistered “equity by estoppel” was overriding or not.

Question 8 was reasonably straightforward, and led to some very good answers. It did however prove that even simple covenants problems can cause confusion: a large number of candidates discussed the “passing of benefit” and “running of burden” without making clear who was trying to claim against whom, and for what. There was, Crest Nicholson notwithstanding, an almost universal tendency to assume, without argument, that Federated Homes means each and every covenant is annexed to each and every part of any land which may benefit from any covenant.

Question 9 held some traps: for example, B’s express easement of drainage needed to be registered to bind C; B’s claimed right of way involved a reservation and hence B could not rely on Wheeldon or s.62 of the LPA 1925. However, an astonishingly large number of candidates provided their own petards, by assuming, in the first part of the problem, that A’s conveyance of land to C could, by means of s.62, create a new easement for C over B’s land. The argument that a grant from A to C might give C a new right over B’s land is, to put it mildly, not one which the examiners had hoped to see explored. This blunder may be the product of spending a disproportionate time on considering whether the shared use of a swimming pool could amount to an easement (one candidate, showing the risk of overstating a good analogy, claimed such use was “identical” to that considered in Miller v Emcer) and then skating over the more demanding question of how, on the facts, such an easement might have been acquired by A.

Question 10, like question 6, was not terribly popular. Candidates who knew their stuff on severance were able to work through the first part; those who made a sensible stab at the very difficult issues in the second part were rewarded.

One of the rationales for moving to two compulsory problem questions was to indicate to candidates the importance of relying on primary material (i.e cases and statutes) rather than referring immediately to academic commentary. Their failure to do so was a problem noted in last year’s examiners’ report; it was always very unlikely that such a shift in attitude could take place in a year. Two particular aspects of the problem were evident in this year’s scripts. First, a tendency to concentrate in revision on those aspects of a topic which excite the most academic debate. So, for example, question 7 on leases caused difficulties as it looked at some very basic (and practically important) aspects of leases rather than, for example, academic debate about shams or the Bruton decision. Secondly, a tendency to discuss general issues rather than to apply specific rules to the facts of a problem question. So, for example, the Rosset test was underplayed in question 6, and answers to question 8 often meandered through the methods by which the benefit of a covenant can be passed without considering whether particular methods, were on the facts, realistic possibilities. Underlying both these tendencies is, perhaps, an unwillingness to accept that land law is a system of principles and rules (even principles as basic as A cannot grant C a right over B’s land) that, before they can be discussed and critically analysed, need to be learned and understood.

ROMAN LAW

There was one candidate – please see Part Two, C.4. of the Examiners’ Report.

COMPARATIVE LAW OF CONTRACT

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Overall, the standard of work for this paper was good to very good, with a pleasing number of candidates producing first class responses to the questions. There were very few weaker scripts. The better answers responded well to the nuances of the questions or quotations as set, drawing on a range of material and undertaking thoughtful comparisons between French law and English law.

All the questions were answered, except question 5(a) (unfair pressure) and question 6 (on the interpretation and regulation of contracts); questions 3 (conceptions of contract), 5(b) (erreur sur la substance and mistake), 8 (exceptions to relative effect and privity) and 9 (supervening circumstances) were particularly popular.

Question 1 (Cour de cassation and House of Lords). This was a difficult question, but answers considered the function of the Cour de cassation as contrasted with the juges du fond and its role in ‘ensuring the unity and modernisation of the law’ and then compared the position as regards the House of Lords.

Question 2 (Art. 1101 Code civil and conceptions of contract). This question asked specifically for a comparison of the conceptions of contract in the two systems in the light of art. 1101. Better answers addressed this more theoretical question, considering a possible contrast between the centrality of agreement and the significance of obligation in French law and the tension in English law between agreement and consideration, and the arguable inappropriateness of using ‘obligation’ in English law. Somewhat weaker answers spent too much time describing the approach of the two systems to offer and acceptance.

Question 3 (equivalents in English law of la cause?). This question was generally wellanswered, many candidates seeing it as an opportunity to compare or contrast la cause with the doctrine of consideration. The best answers looked more generally at the functional as well as apparently conceptual equivalents of la cause, drawing on a range of English legal materials.

Question 4 (good faith in the making of contracts). This question did not invite a general discussion of differences in the understanding of contracts, contrasting good faith in French law and its absence as a general requirement in English law (though this did need to be said), but rather asked for a discussion of the substantive changes which might be suggested if good faith were introduced into English law. Most candidates did indeed respond to this question, looking at obligations d’information and liability for breaking off negotiations in French law and comparing the position in English law.

Question 5 (a). No candidate answered this question.

Question 5(b) (erreur sur la substance/English mistake). This question attracted a number of very good discussions of the French and English law governing mistake of quality/substance. Better answers drew well on the respective case-law, explained the differing attitudes in the two laws and brought in the relationship of erreur/mistake to other doctrines, notably dol and misrepresentation.

Question 6. No candidate answered this question.

Question 7 (a) (termination of a contract). This question was generally well-answered, with candidates explaining the positions in French and English law by reference to the
sources. Better answers also explained the reasons behind these positions and offered appropriate criticisms.

Question 7(b) (‘contractual fault’). Very few candidates attempted to answer this difficult question.

Question 8 (exceptions to privity/relativity of agreements). This question was generally well-answered, though some candidates saw it as an opportunity to set out a prepared answer on stipulation pour autrui and the Contracts (Rights of Third Parties) Act 1999. This question did require some discussion of this material, but invited discussion of the relationship between the binding force of contracts and privity/relativity and then the exceptions to the latter principle more generally, notably in the French context, actions directes.

Question 9 (supervening circumstances). Candidates generally explained competently the French law of force majeure, the rejection of imprévision by private law and undertook comparisons with the law of frustration, though their explanations as to the effects of these various doctrines were often less sure.

CRIMINAL JUSTICE AND PENOLOGY

The overall quality of scripts this year was quite high. Some of the best answers revealed a very sound grasp of the issues and considerable familiarity with the scholarship upon the issue raised by the exam question. The weaker answers showed far less engagement with the literature and failed to demonstrate familiarity with the readings. The best marks went to candidates that supported their answers by reference to the socio-legal literature.

In some cases candidates provided a reasonable answer but failed to directly address the specific question that had been posed. The most popular questions in terms of frequency of responding related to privatization of prisons, the effect of the criminal justice reforms pertaining to sentencing and restorative justice. The least popular question examined the exercise of discretion by the CPS.

PUBLIC INTERNATIONAL LAW

Although there were fewer first class marks than in previous years, overall, candidates in this exam performed well. Most questions on the paper were attempted by a decent number of students though there was a lack of enthusiasm for questions 3 and 8 which dealt with topics that were covered in the lectures but on which most tutors did not offer tutorials. Questions 1 and 10 which did not deal with specific topics but required candidates to comment on nature of international law tended to produce answers which were either very good or rather weak. Candidates should be reminded of the importance of reading the instructions. Some candidates who attempted question 7 failed to answer both parts of the questions as required by the instructions and were penalised for this.

As in previous years, the weaker answers were those which tended to provide a general description of the topic or topics covered by the question without focussing on the specific issues raised by the question. Better candidates were able to make good use of cases and periodical literature and provided analysis that went beyond the lecture material and the material included in the textbooks.

HISTORY OF ENGLISH LAW
The scripts (20 candidates total) were on the whole competent and some strong, though there was a slightly larger number of scripts at the weaker end than in recent years. The strongest scripts engaged clearly both with the questions set, and with the ways in which the conceptual structures in use in the past of English law diverged from modern concepts. The numbers taking the paper are too small and the choice of questions attempted too dispersed for useful comment on individual questions, with one exception. 15 candidates (75%) attempted question 1 (ownership and possession in relation to the early real actions and feudalism). The answers tended to be expositions of Milsom's arguments which showed no awareness of the debate about these in the recent literature.

**EUROPEAN COMMUNITY LAW**

The good papers (and there were a number) showed a sound and thoughtful understanding of the EU legal system and indicated that candidates

- could understand a legal development in its wider legal context;
- could make a distinction between relevant and irrelevant legal detail;
- had a good grip on the reasoning in the case law;
- made good critical use of secondary material.

Many candidates did not demonstrate such qualities. In particular, candidates tended to follow the structure of textbooks and lectures in discussing issues and were often very vague on legal detail (particularly the reasoning in cases). On a number of questions (qu 2, qu 8, qu 9) candidates confused actions against Member States and community institutions which suggested a lack of basic understanding of the EU system. A pervasive failing was a simple refusal to answer the question set and insistence on regurgitation of a prepared essay generally relevant to the field in question. A substantial minority of candidates showed real difficulty in identifying and addressing the issue in problem questions. As regards the particular questions (reference is to the new regulations paper) we make the following comments. Question 1 (subsidiarity) was answered by many candidates. The best appreciated the difference between substantive and procedural review by the Court of Justice and saw development of the latter as a means of making judicial review more effective. Many candidates however did not draw the above distinction and had only a sketchy knowledge and understanding of the Court’s case law. Most candidates, though by no means all, showed awareness of the provisions of the Constitution Treaty for monitoring of subsidiarity by national Parliaments. Question 2 (fundamental rights) was answered well by a minority who addressed, as required, other principles such as legitimate expectations, as well as fundamental rights, and concentrated on the protection of individuals from infringement by Community institutions. Numerous candidates were simply determined to offer a set piece essay on “human rights” and refused to pay even lip service to the question posed. Question 3, on indirect effect and incidental direct effect, elicited some very good answers from candidates who had read the cases and the literature, understood the issues, and were prepared to use their knowledge to answer the question. Question 4 (Keck/advertising) – the better answers were very well done and tried to address the question “was it a mistake to treat advertising as a “selling arrangement”?” Weaker answers simply synthesized post Keck case law, without discussion. There were surprisingly few references to, let alone comments on, Douwe Egberts. Question 5 (when may Member States discriminate directly on grounds of nationality?) tended to be answered by candidates with a fairly detailed knowledge of relevant provisions and case law on employed and self-employed persons. Question 6 on EU Citizenship produced some good answers from candidates who understood both the distinction drawn between
the rights of economically active and economically inactive persons in Directive 2004/38/EC and the ways in which the Court of Justice was eroding limits on the rights of individuals in both categories in its case law on Citizenship. An uncomfortably large number of candidates appeared to have fairly superficial knowledge of the actual reasoning in the cases. Question 7 (establishment of lawyer compared with service provision by lawyer) was answered by a number of candidates on the basis of general principle and case law, and without any reference at all to the relevant EC Directives. Those candidates who dealt with the relevant secondary legislation needless to say scored rather more highly than those who did not. Question 8 (quasi problem on competence to adopt various measures under Article 95 EC) produced numerous answers which simply treated the Commission as if it were a Member State, and tested its options for compliance with Article 28 EC. Only a minority addressed the question put and discussed the options in the light of the Tobacco Advertising and Swedish Match cases. Discussion of proportionality tended to ignore the wide margin of discretion accorded to the Community institutions. Question 9 (problem on state liability/duty of highest court to refer) produced some rather good answers addressing the issues systematically and fairly comprehensively. There were a number who addressed one or two aspects of the question but neglected others. Some candidates clearly encountered difficulties in identifying the issues in the problem and offering a legal analysis of those issues. A number of candidates mistakenly believed that a national measure could be directly challenged by an individual under Article 230 EC. Question 10 (problem on standing to challenge a directive, grounds of invalidity, possible reference on validity, and Community liability) produced some very good answers. Some candidates had a tendency to latch on to a point in the problem, for example standing, and write a mini essay on standing, then take another point, such as a reference on validity, and write a short essay on that, without really using the law to “solve” the problem. Overall, more candidates than might have been expected appeared to be experiencing more difficulties than might have been expected in applying the law to hypothetical facts in problems.

INTERNATIONAL TRADE

This year’s scripts showed a wider range of quality than in many previous years. This may reflect the fact that there were more candidates (28 including MJur candidates) than usual and tutors should be reminded that weaker candidates can be badly caught out by the technical complexities of this subject. On a first reading, there were six 1sts, sixteen 2.1s, five 2.2s, and two 3rd.

Each of the essay questions was attempted by a handful of candidates. The best answers were generally on question 3 (the ‘autonomy principle’ in relation to letters of credit) and on question 4 where candidates were asked to assess critically 2 of 3 important cases.

Question 1 caused a surprising amount of confusion. The best answers correctly saw that part (a) was dealing with whether a bill of lading evidences or contains a contract, where there is no prospect of a charterparty containing the contract, so that the main discussion should have focussed on cases such as The Ardennes [1951] 1 KB 55 and Leduc v Ward (1888) 20 QBD 475 and whether s 5(1) of the Carriage of Goods by Sea Act 1992 has affected Leduc v Ward. Part (b) then should have focussed on where a charterparty does contain the contract and in particular The Dunelmia [1970] 1 QB 289 and the wording of the Carriage of Goods by Sea Act 1992 s 2(1). Many candidates tended to confuse parts 1(a) and (b).
Of the problems, question 6 (primarily on the identity of the carrier, and *Grant v Norway* and the statutory exceptions to it), question 7 (primarily on unauthorised deck stowage, package limitations, an ‘arrived ship’ and laytime), question 8 (primarily on s 20A of the Sale of Goods Act 1979) and question 9 (primarily on *Gill and Duffus v Berger* [1984] AC 382, *The American Accord* [1983] 1 AC 168 and ‘market loss’ damages applying the *Kwei Tek Chao* case [1954] 2 QB 459) were all very popular.

In question 6, a surprising number of candidates did not discuss the leading case of *The Starsin* [2004] 1 AC 715 on the identity of carrier problem. Also surprising was that some thought there could be a claim against the carrier for the sugar being of coarse rather than fine quality. Many did not see that the variation meant that COGSA 1992 s 4 did not apply and, although less clear-cut, that the Hague-Visby rules probably did not either (depending on whether a non-negotiable sea waybill is ‘a bill of lading or similar document of title’ under COGSA 1971 s 1(4)).

In question 7, the variations (b) and (c) were not easy and the answers not clear-cut. Where the wheat was ‘to be shipped on the Red Rose’ the question raised was whether there was a ‘bulk … identified in the contract or by subsequent agreement between the parties’ under s 20A(1)(a) of the Sale of Goods Act 1979. In variation (c) most saw this as meaning that s 24 of the Sale of Goods Act 1979 applied, so as to give P good title to the 1000 tonnes, although the best answers queried whether s 20A might also have here applied (perhaps depending on whether the sale to P took effect after the bulk had been reduced to 1000 tonnes).

In question 9, some weaker answers did not see that part (d) directly raised the question of *Kwei Tek* damages.

The final problem (question 10) was less popular. It principally dealt with *The Berge Sisar* [2002] 2 AC 205 and ‘spent’ bills of lading.

**TRUSTS**

**General**

So far as the approach to this exam as a whole was concerned, there were three areas of concern. First, there was a general failure to focus on the precise question asked. This was most pronounced in relation to questions 2 (certainty of objects), 8 (constructive trusts), 10 (*Quistclose* trusts), and 11 (charitable trusts). Examiners never ask candidates to write all they know about a particular topic. Yet, from the answers given, the impression made is that this was the instruction given. Candidates should realise that much thought goes into the framing of questions, and reward is consequently given to candidates who put a similar amount of thought into their answer. Time spent thinking about an answer before and during writing is never wasted.

The second area of concern was a general lack of understanding of basic rules of legal method. As any Scot will tell you, in the sphere of private law there is no such beast as ‘UK Law’. What we study in this course is the law of trusts in England and Wales, with reference to the practice in other common law jurisdictions where appropriate. And though there is undoubtedly a vibrant law of trusts north of the border, we do not routinely
venture beyond the Tweed. More worrying, however, was a failure to be able to quote accurately the words of statutes, an unforgivable sin when a book of statutes was provided. Nowhere, for example, does section 53(1)(b) of the Law of Property Act 1925 use the words ‘transfer’ or ‘disposition’, yet many candidates talked of such transactions being governed by the subsection. There was a similar problem with the use of case-law. At times, cases were cited for propositions they did not contain, eg, that *Morice v Bishop of Durham* (1805) lays down the complete list test for certainty of objects, and that *Ottaway v Norman* (1972) holds that secret trusts are exempt from s 53(1)(b) LPA 1925. There was also a dangerous level of ignorance concerning the rules of precedent. Some, for example, thought that there was no longer any such thing as an automatic resulting trust following *Westdeutsche Landesbank Girozentrale v Islington LBC* (1996), not apparently knowing that an *obiter dictum* from a single Law Lord, no matter how distinguished, cannot overturn *ratio* in a previous decision of the House of Lords (*Vandervell v IRC* (1967)), or, for that matter, any court. Others did not seem to realise that first instance decisions do not bind.

The final area of concern was with the treatment by candidates of problem questions. Many, though they could spot the relevant issues, failed completely to cite, let alone apply the relevant principles of law to resolve the problem. Another worry was that case-law was seen as an inviolate. It is difficult to know why this should be so in a problem question but not in an essay. In truth, there is no difference. If a particular case is wrongly decided, or could be argued to be wrongly decided, then the examiners want to hear about it, whether through the medium of an essay or a problem. Particular examples were *re Keen* (1937) (qu 13) and *re Pryce* (1917) (qu 6).

Question 1 (retention theory). This essay question, which raised a fundamental issue about the nature of trusts, had virtually no takers. This was surprising, given the fact that if the quote from Lord Browne-Wilkinson is right, and there are views either way, it throws into doubt many of the leading cases in the subject.

Question 2 (certainty of objects). A very popular essay question on certainty of objects, though not particularly well done. The biggest failing by far was in candidates not stating clearly the tests variously laid down by the courts before seeking to evaluate them. Few candidates explored the workability of Megaw LJ’s test, nor that of the alternatives in *re Baden (No 2)* (1972). Nor was there much by way of reference to the vast academic literature this topic has spawned.

Question 3 (beneficiary principle). This essay question on the beneficiary principle was popular and in the main competently done. Some candidates, however, failed to mention either *Leahy v A-G for NSW* (1959) or *re Endacott* (1959), the two cases which are most difficult to reconcile with Goff J’s judgment in *re Denley* (1968). There was some intelligent discussion of the question whether an express trust should be seen as a form of property ownership rather than an equitable obligation, though the difficulty, that the personal obligations which an express trustee comes under falsify this dichotomy, was hardly noticed.

Question 4 (resulting trusts). This essay question on resulting trusts was popular and generally well done. There were, however, problems concerning the use of authority (see above). Moreover, many of those who did manage to see the decision of the House of Lords in *Vandervell* as still good law failed to notice that the reasoning of their Lordships as to exactly why there was a resulting trust was founded on the ‘retention’ theory rejected
by Lord Browne-Wilkinson in *Westdeutsche*. Poor answers just recited all candidates knew about the issue without any attempt to deconstruct the question.

Question 5 (formalities). This problem question on formalities was popular, but surprisingly badly done, especially since the fact scenarios used are discussed in all the leading textbooks. Candidates were especially weak on those parts which required a discussion of s 53(1)(b) LPA 1925. The impression given was that candidates had learnt s 53(1)(c) but had not bothered with 53(1)(b). Though they are different types of provision, they are treated alongside one another in both the syllabus and the textbooks, thus making it dangerous to prepare one without the other. As to the individual parts, many candidates failed to consider *Hodgson v Marks* (1971), s 60(3) LPA 1925, the fact that *Vandervell v IRC* (1967) involved shares rather than a painting, the possibility that *Vandervell* might be inconsistent with *Grey v IRC* (1960), and the impact of s 205 LPA 1925 on s 53(1)(c) of the same Act.

Question 6 (covenants to settle). This had few takers, and was only poorly done. There was an utter failure in far too many cases in seeing the difference between trying to do something and merely promising to do it. Indeed, many of those attempting the question seemed to have no idea what it was about. Some saw it as concerned with imperfect gifts, and produced pages on that subject. But that was only a minor point, and certainly not one which involved (yet again) *re Rose* (1951), for the facts expressly stated that the attempted transfer was made using the wrong rather than the right form. In that sense, it was closer to *Milroy v Lord* (1861). Those who did see what the question was about nevertheless did not always seem to know what a covenant was, one candidate going so far as to ask whether this particular covenant was contained in a deed! Other errors were saying that if Cathy could take advantage of the Contract (Rights of Third Parties) Act 1999, then she could obtain specific performance (has the Act dispensed with the rule that equity will not enforce voluntary covenants?) and that Bertie was a fiduciary because he was Norman’s brother. Not only am I not my brother’s fiduciary, but nothing whatever turned on the correct categorisation of Bertie. The point about the correctness of decisions such as *re Pryce* (above) was particularly pertinent here.

Question 7 (trustee investment). This essay question on the investment duties of trustees had very few takers.

Question 8 (constructive trusts). This essay question was quite popular and generally well done. Many, however, saw it as concerned solely with remedial constructive trusts, not apparently realizing that even ‘institutional’ constructive trusts effectively involve the courts taking rights from one person and giving them to another. One only has to think of institutional cases such as *re Rose* (1951) and *A-G for Hong Kong v Reid* (1994) to see this. Others were content to talk generally about constructive trusts, or, worse still, to reproduce their land law learning on trusts of the family home, which may or may not be constructive. Of those who did write more generally, some odd things were said about *Rochefoucauld v Boustead* (1897). Although some argued that it involved an express trust, they often said that it should nevertheless be classified as constructive so as not to upset notions of parliamentary supremacy, not, it would appear, appreciating that classifying dogs as cats for the purposes of achieving a desired result can itself undermine constitutional principles.

Question 9 (‘knowing’ receipt). This essay question had surprisingly few takers given the great amount of controversy in this area. Of those who attempted it, few noticed that
Nourse LJ’s worries about upsetting commerce could be allayed by pointing to the availability of the bona fide purchase defence.

Question 10 (Quistclose trusts). This was a popular question. But the answers were disappointing. Many produced almost identical answers, comprising a general discussion of the Quistclose trust and the anodyne conclusion that though it did not fit our orthodox understanding of trusts, we should nevertheless just accept it as a trust sui generis. In other words, these answers said, stop engaging in legal analysis. But it is legal analysis which the examiners were after, and it was Lord Millett’s assertion in Twinsectra that the Quistclose trust posed no problems of legal analysis which needed to be addressed. To be fair, a good number did explain the different models of the operation of the trust put forward by his lordship over the years, explaining why the latest is better than any which went before. But the issue which was disappointingly not addressed was the exact juridical basis of the trust. In other words, not how it works but why it comes into being at all.

Question 11 (charities). This was not a popular question; nor was it very well done. Most candidates just talked about anything or everything they knew about charitable trusts. Many saw it as a question about public benefit in general even though the quote makes clear that the discussion is to be confined to the fourth Pemsel head. Few discussed the defects of the analogy approach which Russell LJ was railing against in the quote, nor the workability (and authority) of his alternative. And there was a very poor treatment of the Charities Bill. Many were content just to list the 12 heads, with few noticing that the Bill expressly adopts the analogy approach in sub-clauses 2(4)(b) and (c). Some went so far as to say that there was no longer any need for the analogy approach since the fourth head of charity would be redundant under the Bill.

Question 12 (fiduciary duties). This had very few takers. Of those who attempted it, some failed even to mention Boardman v Phipps (1967), and more particularly the difference between majority and minority speeches in that case. It might have been possible to contend that Boardman was not relevant to the question, but the argument was not made.

Question 13 (secret trusts). This was popular, but not that well done. For a start, too few could even identify the issue, viz the admissibility of evidence to prove the declaration of trust which was not in the form required by s 9 Wills Act 1837. If the issue is not identified, it is little wonder that candidates will struggle to find the correct answer. Indeed, some seemed oblivious altogether to the existence of this statute. Too many candidates failed to look at the precise words used by Gerry and to keep open the possibility that they might or might not reveal a trust on the face of the will; many simply went straight for a half-secret trust. And of those who did pay attention to the wording of the will, some simply said that the ‘disposition would fail’ as a fully secret trust and went on to say that there would nevertheless be a half-secret trust. Very few were able to cope with the disclaimer point, while some had apparently never heard of the decision of Romer J in re Gardner (No 2) (1923). The s 53(1)(b) LPA 1925 point was missed by a surprising number, and of those who did spot it, some fell into the manifest error of saying that Ottaway v Norman (1971) was authority for the proposition that the statute had no application to cases of secret trusts. The only message that sent out to the examiners was that the candidate had clearly never bothered to read the case.

Question 14 (tracing). This was not a popular question. Although most who did it saw the question as involving tracing, and more specifically questions of so-called ‘backwards tracing’, many did not mention and deal with the supposed requirement that there be a
fiduciary relationship somewhere in the story. And of those who did see the requirement, some saw it as satisfied by the fact that protagonists were flat-mates or through the (invented) fact that they were joint tenants of a lease of the flat! Very few saw the relevance of James’ note to himself.

**ADMINISTRATIVE LAW**

Most students managed time quite well and answered four roughly equal questions. However, quite a few students made the mistake of running out of time on the fourth question; or alternatively, spending a very long time on one or two questions to the detriment of other questions, and this was reflected in the mark. The stronger papers engaged with secondary commentary, but many candidates failed to incorporate sufficient secondary academic commentary into their answers.

Question 1: This was an extremely popular question. Aside from the tension between legal certainty and legality which most students raised, there were very few other suggestions as to underlying justifications for upholding legitimate expectations: one notable omission, which was only mentioned in a few good essays, was equality and consistency in the application of policies. Also often the justifications for upholding legitimate expectations were stated without any attempt to link the justifications to whether or not reliance should be a requirement. Apart from one or two very good candidates, the second part of the question was rarely discussed as a normative question, but rather usually involved a reference to *Nadarajah* with a comment to the effect that the test was now ‘proportionality’ and, most of the time, with a conclusion that this was to be welcomed. A few better answers attempted to find a correlation between the importance of legitimate expectations and the test to be applied.

Question 2a: This question was answered well. A few very good answers addressed the question of entitlement to Article 6 protection (civil rights and obligations) and whether this differed from the common law/had the potential to affect the common law.

Question 2b: Answers to this question tended to be quite confused and usually opted for the conclusion that natural justice was concerned with both aims. Essays tended to cite lists of cases: sometimes with a tentative conclusion as to which aim they thought each case served. The second part of the question regarding difference in law was often ignored.

Question 3a: Answers to this question generally demonstrated a good understanding of the theoretical issues involved in this debate and a good awareness of secondary commentary. However, the mistake made by many students was that they tended to discuss the question in the abstract, without really scrutinising whether proportionality, as applied in the case law, has actually resulted in more searching judicial review, which was the focus of the question.

Question 3b: Answers to this question tended to be quite descriptive and tended to agree with Lord Slynn; but some of the better candidates availed themselves of the opportunity to comment on whether proportionality *should* become a head of review.

Question 4: Very few candidates answered this question and those who did tended to produce answers that were descriptive and did not really address the issue of adequacy.
Question 5: Answers to this question tended to focus on the human rights jurisprudence; although a number extended the discussion to ultra vires; *Wednesbury* review and non-HRA review of discretion; and even procedural fairness. A few students overlooked the legislative/executive distinction, but most addressed it in some form, although most often deference to the executive was the focal point of discussion.

Question 6a: This was often answered solely as an error of law question, although some candidates referred to procedural fairness and review of discretion.

Question 6b: Most students focused on error of law; although quite a few at least mentioned the law/fact distinction, although the distinction was not always developed in the answer to the question. The exceptions to Page (although often not all of them) were mentioned by most students. Answers to this question tended to be quite descriptive rather than critical.

Question 7: This question was generally answered well, with students demonstrating a good knowledge of the case law and of both the justifications for a separate procedure and the criticisms of those justifications. The second part of the question received less attention; and most students, when answering this part of the question, restricted themselves to the procedural divide (although they received good marks if they presented a good analysis here). The stronger answers however tended to branch out into a broader discussion of the public-private divide generally and incorporated discussion of the substantive public-private divide.

Question 8a: Hardly anyone answered this question. The few who answered tended to disagree with the proposition, but then struggled to offer principles shaping provision of damages.

Question 8b: Answers to this question demonstrated a good understanding and knowledge of the case law. However many students criticised the case law without suggesting criteria which they believed should apply to recovery of damages in this area. Thus, the discussion tended to be focused around individual cases, although some of the better essays had concluding remarks which tried to draw the case analysis together. Barely any student referred to possible alternatives (such as in EC law/*ex gratia* payments) to put the negligence cases in context.

Question 9: Quite a few students answered this question. Generally, there was a lot of detail, but less in the way of structured argument. Stronger essays explored the question thematically (e.g. access, remedies), but quite a few essays just listed the attributes of ombudsmen.

Question 10: Few students answered this question, but those who did generally answered it fairly well. The focus was on the ultra vires debate and on red light/green light theories of judicial review. There was a tendency to discuss the debate in the abstract, without indicating the light public law theory shed on principles of administrative law. Those who attempted this second step did better.

**FAMILY LAW**
This year the performances in the family law paper were generally good. Most candidates demonstrated a good knowledge of the law and the broader theoretical issues. Comments on particular questions follow:

Comments on individual questions

1. (Children’s rights and protection) Generally this question was answered fairly well. Only the best candidates were able to emphasise the possible distinction between protecting children and protecting their rights. Weaker answers tended to have a superficial discussion of the case law.

2. (Contact) There were some extremely good answers to this question. The best answers questioned whether there were rights in this area and, if so, how far decisions on contact should be governed by rights-based reasoning.

3. (Same-sex couples). There were some very good answers. Quite a few candidates simply compared civil partnerships with marriage. The question required candidates to discuss some of the broader issues facing same-sex couples in the family law context.

4. (Marriage). This question was not well answered by quite a number of candidates who simply listed the differences between married and unmarried couples, without any further discussion. Stronger answers were able to look at the broader issues raised by the law’s treatment of married and unmarried couples.

5. (Domestic violence). Only a few candidates answered this question. Most of those who did tended to write very impressively. Weaker answers lacked adequate analysis of the law itself.

6. (Welfare principle). There were some very good answers carefully analysing the academic theories on how the interests of parents and children should be accommodated. Some candidates had clearly put a great deal of thought into the answer to this question.

7. (Human Rights Act). This was not a popular question. The complexity of the quotation may have put some candidates off. Weaker candidates used it to focus on a single issue, but stronger candidates showed a good awareness of the issues across a broad spectrum of topics.

8. (Ancillary relief). This was generally answered fairly well. Most candidates had a good knowledge of the law. Only the best were able to discuss the theoretical approaches that could be used.

9. (Right to know/Parenthood) Quite a few candidates answered either on the ‘right to know’ or the allocation of parenthood, with little or no attention to the other part of the question. Good answers reflected on the value that should be attributed to genetic links and whether the law adequately reflected that value in both the ‘right to know’ and the allocation of parenthood. The very best candidates discussed the links between the two topics.

10. (Divorce). This question was answered satisfactorily. Too many candidates were rather vague on the law and were not able to make precise points on the theoretical issues.
11. (Parental Responsibility). This was an extremely popular question. Some candidates simply gave their standard answers to ‘should all fathers automatically have parental responsibility?’ The best answers carefully analysed the question of whether parental responsibility is simply a status or gives practical rights to a father, before examining the impact of their answer on the debate on the allocation of parental responsibility.

12. (Child protection). This question was answered by very few candidates indeed. When attempted it was done very well.

COMPANY LAW

Overall the standard was high, with candidates displaying a good understanding of the basic principles of Company Law. There were very few disappointing scripts and one or two papers were outstanding.

There was no question that was untouched. The most popular problem questions were question 9 (directors’ duties, derivative actions and reflective loss) and question 12 (corporate opportunities and competing directorships), although all four proved popular and it was pleasing to see a sizeable number of candidates tackling the problem question on company capital (question 10). It was common for candidates to tackle two problem questions and a small number even attempted three problem questions. In question 9, most candidates dealt adequately with the breach of duty by the director, and most were able to discuss the effect of her resignation. The derivative action was handled competently by most, although the application of *Smith v Croft (No 2)* to the facts seemed to cause some difficulty to some candidates. Question 9(b) was handled more variably. There were some very good answers dealing with reflective loss, but some candidates failed to spot that this was a reflective loss issue at all. Question 10 was generally well handled by those who answered it, as was question 11, although some weaker candidates did not analyse or apply *O’Neill* very well, and talked vaguely of legitimate expectations without pinning down the basis for any claim. Question 12 was generally well handled, and the case law was analysed thoroughly and well by most candidates. The weakest part of the answers to question 12 dealt with the effect of the competing directorship.

Of the essay questions, the most popular were question 2 (a lifting of the veil question) and question 6 (fixed and floating charges) with question 1 also proving popular. Question 1, which asked candidates to consider whether and when shareholders are constrained as to how they exercise their vote, was often disappointingly answered, with too many candidates merely making a brief reference to the vote as a piece of property idea before reiterating the *Allen v Gold Reefs* line of cases, without any real consideration of why the alteration of the articles warrants a different rule, whether this rule should be expanded into other areas of company law, whether it is appropriate in the alteration of articles cases or whether the perceived mischief in this area can be tackled more appropriately by other means. Candidates who were prepared to address these issues in anything other than cursory way were rewarded appropriately. Question 2, regarding lifting the veil, was competently handled but weak candidates tended to describe the law and stopped short of considering the appropriateness of the current principles. Question 3 concerned the duty of care and skill imposed on directors. Again weak candidates tended to describe the law on this topic and did not address the second half of the quotation.
provided, concerning whether the difficulties in this area are due to the nature of the role of the director. Questions 4 and 5 were less popular and called for some thought, and candidates who were prepared to tackle these questions generally did well. One or two weak candidates answered question 4 with an analysis of the demise of the ultra vires doctrine without tackling the second half of the quotation. Question 6 was generally well handled, and the coverage of this material was impressive. Any candidates who tackled the last part of the question (whether the boundary between fixed and floating charges is capable of precise definition) were well rewarded. In question 7 again the weak candidates answered only the first half of this quotation and omitted any reference to the company’s capital. Stronger candidates managed to combine a discussion of the maintenance of capital doctrine with the more general discussion of whose interests the directors of a solvent company ought to consider. Question 8 (dealing with company contracts) generally produced competent but unexciting answers which explained the law and its complications but often did not adequately tackle the issue of third party protection, or indeed the need to weigh this against any protection for the company.

**LABOUR LAW**

Although there were a few very weak scripts, the overall quality was good. Most candidates demonstrated a sound knowledge of the legal provisions and were able to locate them in an appropriate theoretical context. One minor complaint is that some candidates used their own shorthand in essays (e.g. ‘leg’ for legislation, ‘moo’ for mutuality of obligation). This does not seem likely to save candidates much time, and makes the task of reading essays very difficult. It would be helpful if candidates could confine themselves to abbreviations in common usage, such as ECJ, and write other words out in full.

Question 1: statutory interpretation. This challenging question only attracted a few answers, though those candidates who did attempt it made good use of examples from the case-law.

Question 2: equality. A popular question attracting some good responses. Most candidates were able to identify different conceptions of equality and to illustrate them with examples from the statutes. Although many mentioned dignity or social inclusion as alternative justificatory principles, few were able to explain these in any detail.

Question 3: mutuality of obligation. By far the most popular question on the paper, attempted by nearly all candidates. Most had a good knowledge of the cases and the critical literature but some otherwise good answers were let down by a failure to explain the basics clearly: to define mutuality of obligation and to explain its role in both the employee and worker definitions.

Question 4: part-time and fixed-term work. This question attracted no takers. This material is taught with the material relating to question 3, and could perhaps be emphasised a little more strongly in lectures and tutorials in future years.

Question 5: working time. A popular question tackled by over half the candidates. Most showed a good knowledge of the Regulations and were able to suggest reforms. The best candidates could discuss recent Commission proposals in some detail. Somewhat surprisingly, few candidates made the connection between the reference to health and safety in the question and the Treaty basis of the Working Time Directive.
Question 6: minimum wage. One of the less popular questions. Most answers gave a good critical account of the legislative provisions but only the very best candidates made interesting points about possible links with collective bargaining.

Question 7: unfair dismissal. This question attracted a fair number of takers. Most showed a good knowledge of the legislation though some accounts of the procedures in the Employment Act 2002 were rather vague. Some candidates limited themselves to a discussion of either potentially fair or automatically unfair reasons for dismissal when in fact it was highly important to the question to discuss both. A few weaker candidates regurgitated a prepared essay comparing unfair and wrongful dismissal even though the question did not ask about wrongful dismissal, highlighting the dangers of this ‘strategy’.

Question 8: information and consultation. One of the less popular questions. This attracted some excellent answers from candidates with detailed knowledge of the new provisions and interesting ideas about the relevance of voluntarism. One or two very weak candidates thought that the question was about consultation generally or even about the statutory trade union recognition procedure.

Question 9: recognition and collective bargaining. This question attracted a fair number of takers. The vast majority avoided the mistake of assuming that all recognition is statutory and most provided a good outline of the recognition procedure and its problems. Stronger candidates also considered other statutory supports for collective bargaining such as rights to information and time off. Very few candidates picked up the hint in the quotation to compare the role of statutory support for collective bargaining with the role of ‘industrial muscle’.

Question 10: personal contracts. This question attracted only a handful of answers, even though it is usually a popular topic and well prepared by most candidates. Perhaps the absence of any explicit reference to the Wilson case in the question put some candidates off. Those who did attempt it displayed a good knowledge of the Wilson litigation and the statutory provisions, though few gave a clear sense of what they thought the law should be.

Question 11: union membership. A very popular question tackled by over half the candidates. The best answers explained the common law and statutory controls over trade union membership criteria and critiqued them in the light of a clear understanding of the role of a trade union in modern society. They also made appropriate reference to ILO standards and to the relevance of Article 11 ECHR. Weaker candidates did not seem to be able to give an overview of the law here, tending to concentrate instead on one aspect such as political party membership or strike-breaking, and presenting their chosen topic as if it was the only restriction placed upon unions.

Question 12: industrial action. This challenging question attracted only a few answers of varying quality. Most assumed (incorrectly) that there had been no changes to the law on industrial action since 1997, though some had interesting things to say about social partnership.

CRIMINAL LAW

Overall the standard was disappointing and there was only one paper of first class quality. Candidates were often reluctant to engage with the more subtle and complex aspects of theory and doctrine, and this was reflected in the preponderance of low 2.1 and 2.2 marks.
Better candidates avoided this simplistic and reductive approach to legal analysis. They were prepared to tease out the ambiguities in legal propositions, engage with policy arguments, and explore broader theoretical dimensions to legal problems. This was reflected in a clever use of judicial authority and relevant secondary literature.

Question 1. No candidates answered this question.

Question 2. Very few candidates answered this question, and it was not generally well-answered. Answers tended to offer a superficial description of the offence structure, with the odd glance towards Rule of Law principles. No candidates engaged with the notion of action-descriptions in offence definition (particularly in the light of Dica and the erosion of the inflict-cause distinction), or the relation between the correspondence principle and the Rule of Law.

Question 3. This was generally well-answered by candidates.

Question 4. This attracted answers of poor quality. Candidates had a superficial grasp of the proposals in the Consultation paper, with few candidates providing interesting analytical comment on the proposals and their relation to the current law. Candidates made very little use of the vast secondary literature on homicide and its reform.

Question 5. This was generally well-answered by candidates.

Question 6. Most candidates attempted this question. Unfortunately, most candidates were oblivious to many of the legal nuances raised by the problem situation. For example, few candidates explored the ambiguities in the divide between voluntary and involuntary intoxication. Instead, there was a tendency to simply state that Hardie governed the situation as if the answer followed axiomatically from that. Similarly, few candidates engaged with the difficulties of the act/omission divide in the context of assault. This was symptomatic of the tendencies outlined in the general overview of candidates’ performance.

Question 7. This question attracted some competent answers, but a surprising number of candidates thought that s 76 SOA 2003 dealt only with impersonation rather than ‘nature or purpose’ of the act. Even fewer candidates engaged with the interpretive difficulties of that phrase when addressing the question of conclusive presumptions under the legislation.

Question 8. This was generally well answered.

Question 9. This was generally well answered.

Question 10. This was generally well answered.

**PRINCIPLES OF COMMERCIAL LAW**

The standard of scripts was, on average, lower this year than in previous years. This may well be due to the fact that there were getting on for twice as many candidates (including DLS and MJur candidates) this year than usual. College Tutors are reminded that weaker candidates will in general have more problems with this course than with other optional courses and should therefore be discouraged from choosing Commercial Law.
Of the essay questions, question 1 and 5 were the most popular, with the best answers being generally on question 5. It was possible to answer question 1 on a number of different levels; the best answers engaged with the quote and demonstrated that this was not just about the nemo dat exception in s. 25 of the Sale of Goods Act 1979 but about the phenomenon of relative title. The very few excellent answers pointed out that May LJ here fell into the same trap as Atkin LJ (as he then was) in *Rowland v Divall* [1923] 2 KB 500, at 506. A surprisingly large number of candidates simply noted that the quote was from *National Employers’ Insurance v Jones* [1990] AC 24 and proceeded to discuss that case without engaging with the quote at all. Others, again surprisingly many, simply wrote a standard essay about the various nemo dat exceptions. This was not just a problem with question 1 – similarly, many candidates chose to offload their prepared essays on undisclosed agency (question 2), documents of title, including bills of exchange (question 3) or goods in bulk (question 4), ignoring that all three of these questions required a comparison between different legal concepts. It was not possible to achieve more than a 2:2 mark if an answer lacked this element of comparison.

Of the problems, question 7 was the most popular by a long way, which was surprising given the complexity of the question. The most common error was that candidates failed to split the assets into the book debts on the one and the wine on the other hand, although it had been stressed very strongly in seminars that this type of question is best answered by treating the assets separately. All attempts of question 7 which failed to split the assets were hopelessly muddled.

A common weakness in question 6 was that candidates spent a lot of time discussing the bill of exchange, which then left insufficient time to discuss the issues good answers should have focused on in rather more detail. One suspects that candidates spotted the magic words ‘bill of exchange’, assumed that this was the question for them and started answering it without thinking and, possibly, without reading the whole paper (which would have shown that question 10 was primarily concerned with bill of exchange issues).

Question 8 (a) required consideration of the undisclosed principal doctrine. Surprisingly, many candidates simply assumed that the situation was covered by the case of *Watteau v Fenwick* without stopping to think whether that case might not be distinguishable on the facts. Question 8 (b) raised the issue whether a breach of s. 12 of the Sale of Goods Act gave the buyer a right to reject the goods even if he suffered no loss as a result of the breach due to the operation of a nemo dat exception. Unfortunately, only a minority of candidates realised this (although the issue had been covered in lectures).

Question 9, a fairly standard question on implied terms in sale of goods contracts, caused a surprising amount of difficulty. A worrying number of candidates assumed that if the goods could not be rejected (for whatever reason), then there was no claim for damages. Many candidates seemed to think that if there was no breach of condition implied by ss. 13, 14 or 15 then there was no breach of contract – their preoccupation with implied terms led them to forget all about express terms!

Question 10 combined some sale of goods issues with issues arising from payment by bill of exchange. Most answers of this question were good or very good.

**CONSTITUTIONAL LAW**

There were no very poor papers, and few excellent papers. Any student attempting Finals constitutional law should approach it as an opportunity for creative explanation of the
basics of the constitution, informed by familiarity with other finals subjects (in particular, administrative law and European law). The candidates, instead, wrote cautiously and tentatively. To give one example, every candidate who attempted the popular question on the effect of EC directives received a low-to-mid-2:1 mark for competently reciting standard arguments. If anyone had given any serious discussion of the reasons why European law has such a thing as directives (and the implications for their effect in the law of member states), it would have been more rewarding.

TAXATION LAW

The performance of candidates in the taxation law exam was very good with 26% of the students achieving first class marks overall and only 7% in the lower second category; the rest obtained upper second class marks. The answers to the questions were generally of a high standard with candidates making very good use of relevant cases and statutory provisions. As was the case in the previous year, however, not enough students showed signs of reading beyond the textbooks and key cases. Those candidates who used the literature referred to on reading lists properly in their answers were duly rewarded.

There were 8 questions (6 essays and 2 problems) which gave considerable choice given that the students all cover all of the core material in a seminar format. Every question was attempted by a significant number of candidates (at least 8). Q.7 (capital taxes problem) was the most popular and Q.1 (comprehensive income tax) was attempted the least. Those answers to essay questions which were not focussed on the precise question asked, but instead provided a general description of the area, were not awarded high marks. There was also a tendency in some areas to answer pre-prepared questions rather than those asked. For example, the question on avoidance (Q.4) required detailed case law analysis, and, unlike previous questions the students had seen on this topic, a discussion of the advantages and disadvantages of a general statutory anti-avoidance provision. However, some students fell too easily into a standard historical overview of the cases and many students spent little or no time discussing a general statutory anti-avoidance provision despite being specifically directed to do so. The problem questions were very popular – almost all candidates attempted at least one of the problems and nearly half answered both problems.

Q.1 on comprehensive income tax required integration of tax policy and technical material for a complete answer; the answers were comparatively weak. Q.2 concerned a topic debated by the students in a seminar class (flat tax); the question attracted a range of answers of mixed quality– again the best answers engaged with the literature. Most answers to Q.3 on the deduction of employment expenses other than travel expenses were quite good, but some needed more critical analysis, particularly with regard to the rationale underlying the ‘harshness’ of the general rule and possible reforms. Q.5 on the capital taxation of trusts required a blend of policy and technical understanding. Answers were generally solid but not spectacular, which was a somewhat disappointing result since this topic was covered in lectures, seminars and a tutorial. Q.6 (trading receipts and self-supply) was fairly straight-forward and generally well answered; candidates who offered several reasons why a receipt might not be included in a trader’s taxable profits (eg capital, not derived from the trade), referred to some of the literature on Sharkey v Wernher, and analysed the case law on both issues in some depth were awarded high marks.

Turning to the problem questions, Q.7 was very well done. The facts raised a host of major and minor CGT and IHT issues, testing the candidates’ understanding of the two regimes and how they interrelate. Several candidates provided very strong, complete and well-
organised answers and were duly rewarded. Q.8, the problem question on employment/self-employment, required careful structuring for a good answer as the same basic facts needed to be reviewed twice under two different regimes – first for an employee and then for a self-employed person performing substantially the same activities. The best answers demonstrated a thorough knowledge of the cases as well as an appreciation that, while the self-employed generally can deduct work-related expenses more easily than employees, the reverse may apply in the case of certain types of travel expenses.

**INTRODUCTION TO THE LAW OF COPYRIGHT AND MORAL RIGHTS**
There were too few candidates for additional comment to be useful – please see Part Two, C.4. of the Examiners’ Report.

**LAWYERS’ETHICS**

There were too few candidates for additional comment to be useful – please see Part Two, C.4. of the Examiners’ Report.

**PERSONAL PROPERTY**

There were too few candidates for additional comment to be useful – please see Part Two, C.4. of the Examiners’ Report.