FHS JURISPRUDENCE

DIPLOMA IN LEGAL STUDIES

(MAGISTER JURIS)

Examiners' Report 2007

FHS under Old Regulations and under New Regulations
This year, the new BA syllabus was examined for the second time. 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 one case (to the examiners' knowledge) candidates chose to be examined under the New Regulations rather than the Old. The Examiners' Report 2007 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:

	2007	2006	2005	2004
FHS Course 1	201	229	241	224
FHS Course 2	31	30	30	29
Diploma	21	18	15	17
Magister Juris	38	43	48	44

Classifications: FHS Course 1 and 2 combined

	2007		2006		2005 *		2004 *	
Class	**No**	**%**	**No**	**%**	**No**	**%**	**No**	**%**
I	40	16.87	43	16.60	29	10.70	28	11.07
II.i	176	74.26	192	74.13	219	80.81	208	82.21
II.ii	14	5.90	21	8.11	18	6.64	17	6.72
III	1	0.42	2	0.77	3	1.11	0	
Pass	0	0	0		1	0.37	0	
Fail	1	0.42	0		1	0.37	0	
Honours **	0	0	1	0.39	0	0	0	
Totals	232		259		271		253	

* Old Regulations
** 'declared to have deserved Honours'

Classifications: FHS Course 2 (Law with Law Studies in Europe)

	2007		2006		2005 *		2004 *	
Class	**No**	**%**	**No**	**%**	**No**	**%**	**No**	**%**
I	9	29.03	10	33.33	8	26.67	5	17.24
II.i	21	67.74	18	60	21	70	24	82.76
II.ii	1	3.22	1	3.33	1	3.33	0	
III	0		1	3.30	0		0	
Totals	31		30		30		29	

* Old Regulations

Results: Diploma in Legal Studies

19 candidates passed, one gained Distinction and one candidate failed.

2. Vivas

Vivas are no longer used in the Final Honour School. One viva was held in the Diploma in Legal Studies for a candidate with two papers on the pass/fail borderline.

3. Marking of scripts

Double marking of scripts is not routinely operated. 618 out of 2,151 (2,088 FHS plus 63 DLS) scripts (28.73%) were in fact second marked. This total compares with 35.15% in 2006, 34.3% in 2005 and 34.3% in 2004. Third marking was used in exceptional cases (eg medical cases) and 1 MJur and 1 FHS script were read a third time. Further details are given in Part Two (A.1.).

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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 2006, 2005 and 2004. 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.

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 all failing scripts. 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 four 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.

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 all scripts receiving an agreed mark (out of 618 scripts second marked). In previous years there had been scripts on which the markers were unable to agree a mark: these were then third marked (5 in 2006; 3 in 2005 and 8 in 2004).

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. Ethics papers were also second marked before the first marks meeting. 183 (8.51%) scripts were second marked on this basis (281 (11.77%) in 2006, 261 (10.5%) in 2005 and 183 in 2004). These scripts exclude those marked on a borderline 9 mark; all such scripts are second marked between the two marks meetings and fall within (iii) below. Failed scripts, however, are second marked before the first marks meeting and fall within the figure above.

(ii) *Scripts which had been marked 4 or more below the average mark for that candidate*.
224 scripts (10.41%) 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 (4) 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 were 10 failing scripts (mark below 40). 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, the Gibbs prizes (performance in Contract, Tort, Land Law and Trusts) and some individual subject prizes a small number of scripts with marks ending in 8 and 7 were second marked and are also included here. 310 scripts (14.41%) were second marked on this basis (286 (11.98%); 264 (10.6%) in 2005 and 344 (15%) in 2004).

First Mark	Number of Scripts	Number agreed in Higher Class	%
69	39 (47)	6 (13)	15 (28)
68	66 (83)	10 (10)	15 (12)
67	63 (92)	10 (13)	16 (14)
59	50 (45)	26 (18)	52 (42)
58	47 (76)	18 (24)	38 (32)
57	33 (47)	9 (6)	27 (13)
49	2 (3)	1 (1)	50 (33)
48	0 (7)	0 (3)	0 (43)
47	1 (4)	1 (2)	100 (50)
Special/fail	10 (1)	0 (0)	0 (0)

For the purposes of comparison the figures for 2006 are given in brackets (NB in 2007 first and second markers returned agreed marks in all cases of borderline scripts).

The overall success rate in reaching a higher class was 26.13% (22.22% in 2006, 26.6% in 2005 and 30.2% in 2004). The success rate of borderline scripts ending in 8 and 7 was 23.08% (18.77% in 2006; 23.9% in 2005 and 20.7% in 2004).

2. Third marking

There were no scripts third marked because of failure by markers to agree a mark. The examiners re-read one fail script in the course of deciding on the classification of a particular candidate.

3. Examiners' agreed marks

The examiners considered the marks of a number of scripts. In most cases this was because of short weight (see below 8) or because of information in medical certificates.

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

19 medical certificates were forwarded to the examiners (compared with 24 in 2006; 33 in 2005 and 21 in 2004). In addition, 5 candidates were certified as dyslexic or dyspraxic (1 also had a medical certificate which is included in the 19 such certificates).

5 candidates wrote some or all of their papers in college (compared with 11 in 2006; 6 in 2005 and 3 in 2004). A further 5 candidates wrote some or all of their papers in a special room in the Examination Schools. 5 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 12 medical certificates and similar documents (from 5.06% 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. One medical certificate was forwarded to the examiners in respect of a DLS candidate.

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 13 candidates for a total of 35 scripts. This compares with 23 for 50 scripts in 2006; 12 candidates for 52 scripts in 2005; 17 candidates for 65 scripts in 2004.

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. 10 candidates submitted short weight scripts, (16 scripts in all) 3 of whom had special (medical) circumstances. No candidates committed a breach of rubric. One candidate missed a paper entirely (due to medical circumstances).

Markers were 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 in 2005 the markers submitted agreed marks for every question and the overall script mark. In 2006 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. This year there was in most cases very little difference between the markers' marks, and agreed overall marks were submitted in all cases.

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). In both 2005 and 2006 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, out of 15 candidates, 2 had Ethics marks which were more than 4 below their average mark (7 below in each case) and 1 had an Ethics mark which was more than 4 above the average (5 above, being the only II:i mark in a II.ii 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 1 case the Jurisprudence mark was 11 marks higher than the Ethics mark, in 3 cases the Jurisprudence marks were 7 marks higher and in 2 cases they were 6 and 5 marks higher. In 1 case the Jurisprudence mark was 2 higher and in 2 cases 1 higher. In 2 cases the Jurisprudence mark was 2 below the Ethics mark and in 2 cases it was 3 below.

10. The computerized database

The computer software worked satisfactorily with only a few minor hiccups. The existing software is still being used, pending the development of a new database.

11. External Examiners

This year we had the valuable assistance of Professor C. Mitchell of King's College London and Professor S. Shute of Birmingham University. Their active involvement and advice at all stages was extremely helpful and we are very grateful to them. The external examiners report to the Vice-Chancellor about their views of the examination process, and their 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, Ray Morris and Caroline Norris who have helped us, not least in making deliveries to and collections from colleges. In addition to the examiners, 47 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:

	2007				2006				2005				2004			
	Male		Female		Male		Female		Male		Female		Male		Female	
	No	%	No	%	No	%	No	%	No	%	No	%	No	%	No	%
I	15	16	16	14	16	17	17	13	14	12	7	6	10	12	13	9
II.i	65	69	90	80	71	75	103	77	91	79	107	85	69	80	115	83
II.ii	9	10	4	4	7	7	13	10	5	4	12	10	7	8	10	7
III	0		1	1	0		1	1	3	3	0		0		0	
Pass	0		0		0		0		1	1	0		0		0	
Fail	1	1	0		0		0		1	1	0		0		0	
Hons.	0		0		1	1	0									
Total	90		111		95		134		115		126		86		138	

The gender breakdown for Course 2 was:

	2007				2006				2005				2004			
	Male		Female		Male		Female		Male		Female		Male		Female	
	No	%	No	%	No	%	No	%	No	%	No	%	No	%	No	%
I	2	14	7	41	4	31	6	35	4	36	4	21	2	18	3	17
II.i	11	79	10	59	7	54	11	65	7	64	14	74	9	82	15	83
II.ii	1	7	0		1	8	0		0		1	5	0		0	
III	0		0		1	8	0		0		0		0		0	
Pass	0		0		0		0		0		0		0		0	
Fail	0		0		0		0		0		0		0		0	
Total	14		17		13		17		11		19		11		18	

The gender breakdown for Course 1 and 2 combined was:

	2007				2006				2005				2004			
	Male		Female		Male		Female		Male		Female		Male		Female	
	No	%	No	%	No	%	No	%	No	%	No	%	No	%	No	%
I	17	16	23	18	20	19	23	15	18	14	11	8	12	12	16	10
II.i	76	73	100	78	78	72	114	76	98	78	121	83	78	80	130	83
II.ii	10	10	4	2	8	7	13	9	5	4	13	9	7	7	10	6
III	0		1	1	1	1	1	1	3	2	0		0		0	
Pass	0		0		0		0		1	1	0		0		0	
Fail	1	1	0		0		0		1	1	0		0		0	
Hons.	0		0		1	1	0									
Total	104		128		108		151		126		145		97		156	

It is worth pointing out that this year the percentage of female candidates obtaining firsts was greater than the percentage of male candidates.

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

	2007	2006	2005	2004
Roman Law (Delict)	3	1	3	4
Comparative Law of Contract	5	16	11	8
Crim. & Pen	60	72	71	59
Public International Law	78	69	71	91
History of English Law	16	20	16	14
Ethics *	14	10	10	16
International Trade	21	26	22	16
Family Law	84	94	99	85
Company Law	26	45	45	39
Labour Law	65	61	60	43
Criminal Law	8	11	6	11
Principles of Commercial Law	31	50	32	33
Constitutional Law	8	10	6	11
Taxation **	12	27	22	
Environmental Law ***	10			
EC Competition Law and Policy ***	5			
Copyright Trade Marks & Allied Rights ***	19			

* This paper is not marked by FHS examiners
** This paper was examined for the first time in 2005
*** This paper was examined for the first time as a standard subject in 2007

2. Numbers writing scripts in Diploma in Legal Studies

	2007	2006
Contract	19	17
Tort	19	15
EC Law	5	4
Comparative Law of Contract	2	2
Company Law	3	6
Jurisprudence	5	1
Principles of Commercial Law	0	1
Public International Law	4	5
Criminal law	2	3
Copyright, Trademarks and Allied Rights	2	
Trusts	1	
International Trade	1	

3. MJur candidates taking FHS papers

	2007	2006	2005	2004
Jurisprudence	3	0	0	0
Contract	7	9	14*	10
Tort	0	0	1	0
Family Law	0	0	1	0
Comparative Law of Contract	0	0	0	0
Public International Law	4	4	5	4
European Community Law	5	4	11	13
International Trade	0	2	2	4
Company Law	9	10	9	10
Principles of Commercial Law	0	3	0	1
Constitutional Law	1	1	0	0
Trusts	2	3	1	1
Administrative Law	1	1	1	1
Labour Law	2	1	1	0
Criminal Law	1	1	1	0
Copyright, Trademarks and Allied Rights	2			
Ethics	1			

* 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		6	9	3	21	35	7	17		0	0	232
Contract*		7	8	9	20	36	8	10			0	232
Tort		5	8	15	26	34	8	3	0	0		232
Land Law		5	14	9	24	32	6	7	0	1	1	232
Trusts	0	5	8	3	19	42	7	14		1	0	232
Admin. Law		8	14	12	25	28	9	3		0	0	232
Comparative Law			40	20		40						5
Crim. & Pen.	3	12	5	10	22	38	2	8				60
PIL	3	8	13	4	26	40	3	5				78
History of English Law		13	6		19	44	13	6				16
Ethics		7		14	7	50	7	7	7			15
International Trade		5	24	10	14	29		14			5	26
EC Law	0	3	9	5	27	38	6	9		1	1	232
Family Law		6	14	17	39	20	1	1		1		84
Labour Law		9	6	9	31	28	6	11				65
Company Law		8	12	8	27	31	8	8				26
Criminal Law			13	25	38	13		13				8
Principles of Commercial Law		3	3	10	32	39	6	3		3		31
Constitutional Law			13	13	38	38						8
Taxation		17	8	8	17	42		8				12
Roman Law (Delict)			33	33		33						3
Copyright, Trade Marks and Allied Rights			26	16	37	21						19
EC Competition Law and Policy			40			40	20					5
Environmental Law			22	33	11	33						10

* 1 candidate did not write this paper

D. Comments on papers and individual questions

These appear in Appendix 5

R. Bagshaw
J. Cartwright
A. Davies
K. Grevling
L. Gullifer (Chair)
M. Macnair
D. Nolan
R. Smith

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

APPENDIX 1

University of Oxford

FHS Jurisprudence, Diploma in Legal Studies

External Examiner's Report

(1) Academic standards set for the awards

The marking standards and degree classification criteria used were entirely appropriate for the award of an undergraduate degree or diploma in law.

(2) Assessment processes

The assessment processes were rigorous, ensured equity of treatment for students, and were fairly conducted within institutional regulations and guidance. In my view, blind double-marking of examination scripts is the fairest marking method. However I recognise that the number of scripts and tight time constraints under which the Oxford examiners work would make this difficult to achieve, and the system which has been adopted in its place goes a long way towards achieving a comparable level of impartiality and fairness to the candidates.

(3) Standards of student performance

Given that entry onto the Oxford degree course is highly selective, and that students receive significant amounts of individual attention under the tutorial system, it would be worrying if they did not perform to a high level by the end of the course. Nevertheless it is to their teachers' credit that the students collectively demonstrated strength in depth. A healthy (but not an implausible) number achieved a 1st class degree and almost all of the remainder achieved a 2:1 degree. There was no significant 'tail' of students performing at a 2:2 level or below, of the kind which characterizes the student bodies of most comparable institutions.

(4) Matters for the attention of the Law Faculty Examinations Committee

The Examinations Committee could usefully consider amending three of the rules/ conventions that are currently used in the examinations process. I have discussed these with the other members of the Examinations Board and I understand that the Chair is separately recommending that they be considered by the Committee.

(a) The degree classification rules currently provide that for a 1st class degree, four papers out of nine should receive a mark of 70 or above, with no paper receiving a mark lower than 60. These rules could be usefully amended to add that a 1st class degree will also be awarded to students with 5 marks of 70 or above, 3 marks in the 60s, and 1 mark in the 50s (but no lower).

(b) The current rules on the marking of short weight papers make no distinction between papers with three questions and papers with four questions, and they also deal unsatisfactorily with the situation where no attempt is made by the candidate to answer half of a two-part question.

(c) Second markers are currently told the reasons why scripts are sent out to them (e.g. because the mark awarded by the first marker ends with a 9, or because the mark awarded is 4 or more below the candidate's average mark). This is unsatisfactory as this information is bound to affect their judgment and they are meant to be assessing the scripts on their objective merits. If it were decided not to reveal this information to second markers, then this would bring the practical benefit that all scripts given a mark ending with 9 could be marked before rather than after the second marks meeting.

(5) Final comments

My term in office as external examiner has now come to an end. I would like to record that the two Chairs under whom I have served, Ann Kennedy and Louise Gullifer, have both carried out their work with exemplary efficiency and good humour, and that the administrative support provided to the Examination Board by Julie Bass has been outstanding.

Professor Charles Mitchell
School of Law
King's College London

The Vice-Chancellor
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17 September 2007

Dear Vice-Chancellor

External Examiner's Report for the Final Honour School of Jurisprudence, University of Oxford

I was appointed an external examiner for the Final Honour School of Jurisprudence in October 2006. In this capacity, I attended a number of examiners' meetings in Oxford. I also attended a pass/fail viva that had been arranged for a law diploma student. The viva covered two different subjects: jurisprudence and contract law. It was, as I understand it, the first law viva to have been held in the University for quite a number of years.

Overall, I thought the examination process for the FHS ran very smoothly indeed. I was impressed by the attention to detail, hard work and skill shown by the members of the Examination Board and by its Chair (Louise Gullifer). The Examination Board was also ably supported by the Faculty of Law's Director of Examinations, Ann Kennedy.

The standards applied in assessing candidates on the FHS were at least equal to those applied by comparable universities and the procedures used in marking and classification were robust, consistent and reliable.

I have two other comments to make about the process which are, perhaps, worthy of further reflection:

(i) The viva was a very dispiriting affair. The student had, it seemed, done very little by way of preparation.

(ii) The University does not have September resits for finals students. This means that if a candidate is required to take papers again because of (say) illness, then that candidate will have to wait a year to do so. The difficulties with this arrangement are exacerbated when, as in the FHS, work completed in the third term of the first year, the whole of the second year, and the whole of the third year is examined at the end of the programme. The University might like to consider, therefore, whether it would be feasible to offer such candidates September resits.

I hope these thoughts are of help.

Yours sincerely

Professor Stephen Shute

APPENDIX 5

INDIVIDUAL REPORTS

JURISPRUDENCE

The overall performance was satisfactory rather than brilliant. Most scripts hovered just above the upper second mark. There were a few failures, primarily because they assumed they could get by without any reference to the literature (or to jurisprudence). The most popular questions were Q 14 (a) and (b), on the obligation to obey and civil disobedience and Q. 10, on regulating people's private conduct. Most of the answers to these questions, however, were worryingly close to the corresponding lectures delivered on the subject in Hilary Term. In addition, the answers to Q. 10 gave some uninspired accounts of the Hart/Devlin debate, without expanding into the more interesting terrain of autonomy, or liberty and liberalism. Some, however, did discuss Raz's theory of autonomy and perfectionism in very interesting ways and deserved first class marks. Other questions were as follows. Q1 was misunderstood by a number of candidates. The quote from Rawls did not mean that the correct answer required a summary of Rawls' general theory of justice or an account of its many critics. The question was only about the relative austerity or richness of a theory of law. Some students gave excellent answers but many who attempted it failed to notice what it was about. Q. 2 was a straightforward invitation to discuss the methodology of jurisprudence and those who attempted it did well. Q. 3 was not popular, since it required some creative use of one's knowledge of the theories. Few noticed that Dworkin's theory also depends on power. Q. 4 and Q. 5 were popular and offered generally competent accounts of the Hart/Dworkin debate. Q. 7 was answered either very well – by those who knew about Raz's theory of authority - or very badly, by those who took authority to mean Austin's power to command. Q. 8 had few takers as did Q. 9. They both offered opportunities for more creative use of the materials. Q. 11 was answered with good references to Raz and Fuller, although little emphasis was put on the fact that even the formal account of the rule of law takes it to be an ideal. Q. 13 and Q. 14 were not popular. Q. 15 offered an opportunity to many of the best qualified candidates to offer a discussion of Hart's internal point of view and its problems.

Generally, students were cautious and were concerned to cover ground that was familiar. Few had the grounding or self-confidence to offer answers using materials from different parts of the course. It is also evident that the lecture series is taken to be a quasi-textbook in the minds of many candidates. If this prevents them from engaging with the primary arguments and materials, it is something that should perhaps be looked at by the subject group.

CONTRACT

There were 250 (including MJur and DLS) candidates for this paper. The standard was similar to that of the last few years.

Question 1 (Consideration Essay)
This was by far the most popular essay question. It was generally well done, with candidates for the most part addressing the question directly rather than trotting out a pre-prepared essay on the topic. Most candidates discussed the relationship between consideration and intention

to create legal relations and duress, and many also brought in privity, estoppel and formalities. Some of the weaker answers discussed the relationship between consideration and these other doctrines without first identifying the functions traditionally performed by the former, and in the discussion of duress there was often a failure to distinguish between the functions performed by consideration at the formation stage and at the modification stage.

Question 2 (Expectation Damages Essay)
This was a fairly popular question. Some of the answers were very good, but many were too narrow, and focused on only one of the many issues that could have been discussed. For example, while there was a good deal of discussion of *Ruxley* there was rather less analysis of *Panatown*. The very best answers covered a lot of ground, as well as drawing on the academic literature to good effect, by for example arguing that the expectation interest encompasses both a rights-based 'performance interest' and ideas of compensation for loss. It was surprising how few candidates mentioned qualifications on the expectation measure such as mitigation and remoteness.

Question 3 (Undue Influence Essay)
This was not a very popular question. On the few occasions when it was attempted, there was a tendency to discuss the doctrines of undue influence and unconscionability separately, with little consideration being given to whether the former should be subsumed into the latter. There were, however, some answers which considered the similarities and differences between the two doctrines, and the implications of fusing them.

Question 4 (Termination for Breach Essay)
Perhaps surprisingly, this question was also not very popular. It may be that candidates were put off by the reference to good faith. In any case, those who did attempt it tended to produce solid answers, which were stronger on the descriptive part of the question. Very few discussed the circumstances in which the right to terminate for breach is lost, although the wording of the question was designed to cover this. Some candidates thought that a term was only classified as a condition if that was the expressed intention of the parties.

Question 5 (Unilateral Mistake Essay)
This was a popular question. It was generally well answered, although there was a marked tendency to focus almost entirely on the mistake as to identity issue, and to skate over the issue of unilateral mistakes as to subject-matter. *Shogun Finance* featured heavily, and was dealt with reasonably effectively, although many candidates adopted a rather superficial policy-based critique without acknowledging the conceptual obstacles in its way.

Question 6 (Implied Terms Essay)
This question was not popular. When answered, the quality varied widely, with the best candidates considering the rationale of implied terms in considerable depth, and the weakest simply trotting out a few examples of implied terms, some of which were statutory in origin.

Question 7 (Standard Form Contracts Essay)
This question was not particularly popular, but those candidates who did attempt it tended to do quite well. There was naturally a good deal of discussion of the statutory controls on exclusion clauses and other unfair terms, and frequently the specific references in the legislation to standard form contracts were highlighted. Less attention was sometimes paid to the common law methods of control, but this was not true of the strongest answers, some of which also distinguished between the problems of 'unfair surprise' and 'lack of choice', and

considered the law's response to standard form contracts in those terms. Finally, a number of candidates demonstrated a pleasing capacity to think across the divisions of their reading lists by bringing in a discussion of the 'battle of the forms' problem.

Question 8 (Formation Problem)
This was the most popular question on the paper. Most candidates dealt well with the offer and acceptance problems raised by the exchanges between Adrian and Craig, but other issues were often either dealt with superficially or missed out altogether. For example, an astonishing number of candidates failed to discuss intention to create legal relations as regards Adrian and Bob, and many also ignored the certainty issues raised by the agreement between Adrian and Craig that the price be fixed by a third party who later died. Most responses to the acceptance by silence point were superficial in the extreme, and simply cited *Felthouse v Bindley* for the proposition that a silent acceptance is ineffective, without then considering whether *Felthouse* could be distinguished, or whether a blanket rule of this kind was justified. The stronger answers picked up these points and dealt with the complexities of the offer and acceptance issues in a thoughtful and considered way, reasoning by analogy from the existing rules in order to deal with the problems posed by new technologies. Finally, it was unfortunate that a number of candidates devoted precious time to considering whether Craig's advertisement was an offer or an invitation to treat, even though this in no way affected the legal position.

Question 9 (Frustration and Common Mistake Problem)
This was a reasonably popular question, but some parts of it were dealt with better than others. The first part of the problem tended not to be well handled, with few candidates demonstrating a firm grasp of the remedial issues involved. Previous complaints about candidates' inability properly to apply the Law Reform (Frustrated Contracts) Act 1943 had clearly not been taken on board, and the result tended to be a very basic (and frequently confused) application of s 1(2) of that Act, and no mention of the possibility that s 1(3) might be used. Moreover, candidates who did mention s 1(3) almost always uncritically applied *BP v Hunt*, despite the criticisms which have been made of the reasoning of Goff J in that case. On the other hand, the second part of the problem was generally handled well, and the dividing line between *Krell v Henry* and *Herne Bay Steamboat Co v Hutton* explored effectively, although all too often the common mistake counter-factual was dealt with very briefly in the rush to move on to the next question.

Question 10 (Duress and Privity Problem)
A fair few candidates attempted this question, but in most cases they would have been better off if they had left it well alone. Although there was a superficial similarity with the facts of *William v Roffey Bros*, that was all it was, since here the permission to use the ground floor of the Manor was clear consideration for Ian's promise to pay more. The existence of this legal benefit rendered the all-too-frequent discussion of practical benefit entirely otiose. What is more, this focus on the irrelevant was all too often accompanied by a complete failure to discuss the duress issues which did in fact arise. Even when duress was discussed, the quality of the analysis was generally rather poor, and there was little sign of the importance attached to the topic by the core reading list, where six duress cases are marked as essential reading. A similar picture emerged when it came to the application of the Contracts (Rights of Third Parties) Act 1999: one had the sense that candidates who might have well have been able to write a thoughtful essay on the Act were quite unable to apply it to a set of facts with any degree of confidence. Some candidates managed to mangle the basic test of enforceability in the Act, while few really thought about what it means to say that a third party must be

expressly identified in the contract by name, class or description. The more subtle points were pretty much missed by everyone.

Question 11 (Misrepresentation Problem)
This was a popular question, but overall the quality of the answers was disappointing, with some notable exceptions. It seems astonishing that so many candidates are still unable to structure a response to a misrepresentation problem in a logical and effective way, and when it came to the substance of the problem many of the answers were also found wanting. When considering whether misrepresentations had been made in the first place, candidates frequently glossed over the difficulties raised by the facts, glibly equating silence with a half-truth or baldly asserting that a representation of opinion made by an expert is a representation of fact! As with frustration, the remedial issues were often mishandled or simply ignored: rescission and damages were frequently run together, and section 2(1) of the Misrepresentation Act was treated as if it were some kind of panacea, with little or no understanding of its real significance and/or its limitations. Finally, many candidates failed to identify the difficulties raised by a 'non reliance' clause of the kind in the problem.

Question 12 (Remedies Problem)
Surprisingly, this was not a very popular question. The quality of the answers varied hugely, but there was a general tendency to focus on one or two aspects of the problem and to ignore or skate over the others. Most candidates dealt reasonably well with the possibility of specific performance, and the reliance damages route tended to be explored in full, but the possibility of a gain-based award tended to be dismissed briefly (if discussed at all) and a disappointingly high number of candidates ignored the issue of damages for reputational damage. The remoteness point was picked up, but not always dealt with in any real depth.

TORT

Question 1 ('Proximity' in duty of care) A popular question. Pleasingly, the majority of candidates focused on 'proximity' rather than recycling general discussions of duty of care.

Question 2 (Paternalism in tort law) Most of the answers addressed a range of relevant issues in an interesting way, but a handful of candidates attempted the question without understanding the meaning of the term 'paternalism'.

Question 3 ('Defect' within CPA 1987) Very few candidates chose to answer this question. Only the best provided a detailed assessment of the relevant cases on the agreed reading list.

Question 4 ('Omissions') A relatively popular question. There were some excellent answers, discussing current *exceptional* situations where both private and public defendants can be liable for failing to 'tender a helping hand', and evaluating current and alternative patterns. There were also, however, some weaker answers, some of which offered a very sketchy account of the law and some of which paid little attention to the second half of the question ('Should these rules be modified?').

Question 5 (Illegality defence) Very few candidates chose to answer this question. But there were some good answers.

Question 6 (Professional liability to a third party). A relatively popular question. There were some excellent answers which properly reflected the complexity of the law. (A minor concern might be that several of those who chose to discuss why a negligent builder is not liable in negligence for financial losses suffered by a subsequent purchaser of a house did not appear to be familiar with the *reasons* which the House of Lords relied on to reach this conclusion.)

Question 7 (Framework for developing the economic torts). Very few candidates chose to answer this question. Unfortunately a significant proportion of those who did attempt it treated it as concerning negligence liability for pure economic loss.

Question 8 (Problem. Negligent advice. Loss of a chance. Defences.) Answers were generally satisfactory. Good answers tended to be distinguished by the quality of discussion of the standard of care (retired mechanic and a newly-developed technique) and causation. Mistakes in weak answers included a significant number of candidates asserting that scratching a car's paintwork involves the infliction of *pure* economic loss to the owner.

Question 9 (Problem. Duty of supplier of sportscar. Assessment of damages.) Perhaps surprisingly, very few candidates thought it required detailed discussion to advise that a garage owes a duty not to supply high-powered sportscars to young footballers without supervision. (Some candidates assumed that *because* the defendant dealership had forbidden unsupervised test drives it was *therefore* negligent to allow them.) The cases on the agreed reading list concerning assessment of damages, particularly those relating to s 4 of the Fatal Accidents Act, were known by very few candidates.

Question 10 (Problem. Defamation) Answers were generally satisfactory, and the best answers were very accomplished. Some notable, but fortunately uncommon, errors in weak answers included the belief that a newspaper editor who had no reason to know that a defamatory story was false could rely on the defence of justification and a surprising readiness to find that 'Q has been harassing me by sending me pornography by e-mail' was *comment*.

Question 11 (Problem. Nuisance, *Rylands*, etc). Answers were generally satisfactory. Many answers gave a rather superficial account of the principles underlying *Rylands* v. *Fletcher*, and often one which made no reference to *Transco*. Even good answers struggled with 'nuisances' causing business losses and (perhaps) harming animals on neighbouring land.

Question 12 (Problem. Occupiers. Psychiatric injuries) Answers were generally satisfactory. The very best answers were notable for their willingness to explore solutions beyond an inflexible application of *Alcock*. Some answers confused 'warnings about danger' with 'exclusions of liability': and some weak answers made errors in the application of s. 1(3) of the Occupiers' Liability Act 1984. (Although it is a minor point, a substantial proportion of candidates believed that s. 1(3) OLA 1984 is s. 3, and that s. 2(4)(a) OLA 1957 is s. 4(a), etc.)

LAND LAW

The vast majority of candidates attempted Q6; Q4 and Q8 were also very popular indeed. The remaining essays all had some takers, with Q2 marginally the most popular. The same was true of the remaining problems. Perhaps candidates were suspicious that each of Q7 and Q10 involved a combination of topics and hence felt unprepared to attempt them. Or it may be that

some candidates could not pick out the principal issues in these problems: for example, those who did attempt Q7 often spent a disproportionate time on considering whether B's right bound D, sometimes even to the exclusion of the main issue of whether B could resist a sale of the property. And those who attempted Q10 often skated over the key actual occupation issue: their failure to engage with the case-law was noticeable, and their lack of familiarity with the statutory wording caused them particular problems when considering the possible effect of X's knowledge of the trust.

Q1: There were a handful of very good answers from candidates who showed their awareness of the effect of electronic conveyancing on a number of different areas. However, despite the clear reference to formality principles in the question, the majority of those tacking the issue concentrated solely on the registration aspect. The worst of them wrote generally on the effect of the 2002 Act, without considering the specific effects of electronic registration requirements. It is apparent, but disappointing, that registration is somehow seen as separate from formalities, despite the general rule that a party can only acquire a legal property right by registration.

Q2: The best answers answered the question by discussing not just the results of the cases, but also the reasoning used to support them. It was disappointing that more candidates did not refer to Robert Walker LJ's judgment in *Jennings v Rice*. In the light of past examination reports, it is worth noting the pleasing fact that few candidates fell into the trap of *only* discussing academic views of the subject.

Q3: This question gave a chance for those candidates who had thought carefully about the relationship between easements and covenants to impress. Weaker candidates tended to treat it as a covenants essay with a brief comparison to easements tacked on at the end. The unthinking nature of the comparison was shown by the fact that these candidates tended to argue that the easements analogy *supported* the view that positive covenants should be allowed to bind third parties.

Q4: This question was extremely popular and generally well-handled. The better candidates stated the current law, including the impact of *Oxley v Hiscock*, succinctly and focussed on the ways in which it might be seen as "arbitrary". Weaker candidates gave a general narrative about the development of the current law: such narratives were often misleading and always unhelpful, particularly as they caused candidates to ignore the post-*Rosset* cases.

Q5: Like Q3, this question tended to be chosen by stronger candidates who used it as a chance to show their familiarity with a number of different areas. Contractual licences featured prominently in most answers, but a fair number of weaker candidates made the mistake of producing a general essay on that topic without responding to the question asked.

Q6: An overwhelmingly popular question. It was reasonably well done. Common weaknesses included a tendency to state that a term was a "sham" without explaining the test for a sham, or testing the closeness of the term to those labelled as shams or pretences in decisions such as *Antoniades v Villiers*; an inability to state precisely the reasoning in *Mikeover v Brady*; and (surprisingly) a failure to realise that K could have a monthly periodic tenancy. There was also a strangely common view that, even if I or K had only a contractual licence, that right could nonetheless bind L as she had not paid for the house and garage. Others entered into a full-scale discussion of overriding interests, despite the fact that L was not a purchaser.

Q7: This attracted few takers, and hardly any good answers. It was often mistaken for a question about the general remedies available to a mortgagee rather the specific provisions of ss.14 and 15 of the Trusts of Land and Appointment of Trustees Act 1996 (and the Insolvency Act 1986). It seems candidates were either unaware of those sections, or of the potential subtleties in their application. Even fewer were able to apply *Shaire* (and the later cases) to the facts.

Q8: A very popular question, perhaps more out of necessity than choice. The usual weaknesses were evident: long and pointless descriptions of the *re Ellenborough* criteria; a tendency to assume s.62 of the LPA can work all sorts of magic (e.g. in giving P an easement when M transfers to Q); and an assumption that if a party has an easement, that right will necessarily bind a third party. The issue involving drainage was very badly handled, with very few candidates calmly analysing the possibilities in a case where s.62 cannot apply. It was surprising that, although most candidates discussed *Wheeldon v Burrows* when considering the coal bunker easement, hardly any even considered whether it could apply to imply a promise to grant an easement into the contract for the sale of Red Tiles. The registration principles were often badly handled, with little understanding of when para 3 applies.

Q9: This question was reasonably well handled. The better candidates carefully considered each issue in turn and made good use of the relevant authorities. The weaker candidates, whilst citing some names of cases, did not properly explain the results or reasoning of those decisions, or the possible differences between those cases and the facts of the problem. There was also a tendency to throw everything and anything related to mortgages at the question and hence to spend insufficient time discussing the relevant issues.

Q10: This attracted very few takers, but was better done than Q7. The formalities point at the start was noticed in less than half of the answers, with fewer still going on to discuss *Rochefoucauld v Boustead*. The severance point was generally spotted, but candidates seemed unfamiliar with either the wording of s.36(2) or decisions on its effect. As noted above, a large number of candidates glossed over the complexities of actual occupation and, as a result, struggled to see the relevance of the variation at the end of the question.

ROMAN LAW DELICT

There were five candidates for the FHS-exam. No question chosen showed problems in the answering, the distribution was reasonable in as far as can be aid with this number of participants. All in all a good result.

COMPARATIVE LAW OF CONTRACT

This year the number of candidates taking this paper was smaller than usual, but in general terms the standard was very sound to very good indeed. There were no weak scripts at all, and the candidates showed a good grasp not only of their English contract law, and the French law, but also of the necessary comparative law techniques.

The most popular questions were questions 4 (*la cause*), 5 (third parties) and 6 (change of circumstances). No candidate answered question 7 (precontractual liability), 8(b) (*violence*) or 9 (identification of obligations).

As always, the strongest candidates directed their answers to the particular question asked, and presented clearly argued essays which wove together from the start the relevant strands of the two systems' legal principles in a comparative assessment. Candidates who were able to focus on close detail of the law, and offer criticism of it, were rewarded. For example, in answering question no. 4 the best answers focused on some of the recent French cases which have used the doctrine of *la cause* in order to deal with unfair contract terms—and linked this into the quotation given in the question. Some candidates also, in answering this question and others, made very good use of the *Avant-projet de réforme* as a tool for critical discussion of the current French law. Occasionally, however, candidates—even candidates who in their other answers showed that they had very high competence in the comparative law of contract—fell into the trap of re-writing their prepared essay to fit the question on the paper.

CRIMINAL JUSTICE AND PENOLOGY

This was a good year for Criminal Justice and Penology. Although a small number of students failed to make sufficient reference to the research literature when answering questions, on the whole candidates made very good use of the material that had been taught throughout the course. In particular, many of the better candidates appeared to appreciate the need to look beyond single sources, and attempted to examine the ideas and debates surrounding specific issues rather than the views of individual authors. There was also more critical engagement with the topics at hand than in previous years, which is a very encouraging sign. Finally, it was also heartening to see that there were very few short-weight papers.

One matter of substance that deserves mention regards the topic of restorative justice. Some students appeared confused by what is meant by the term restorative justice, and mistakenly equated it with a crudely utilitarian approach to punishment. Students need to understand that the "restorative approach" now goes well beyond theories of punishment, and encompasses issues relating to the demands of victims, matters of procedure, and the appropriate role of the state in the criminal justice system.

PUBLIC INTERNATIONAL LAW

Overall, the performance of candidates in this paper was very pleasing with more than 25% of candidates placed in the first class category. Practically all the questions on the paper were answered by a good number of candidates. Even question 2 which dealt with a topic covered in the lectures but on which most (if not all) tutors did not offer tutorials was answered by a decent number of candidates and answered very well. However, Q. 8 which was also not covered in tutorials was not popular. Although there were only 3 problem questions on the paper, most candidates answered at least one problem question. It is again important to remind candidates of the importance of reading the instructions. Some candidates who attempted Q. 5 on the use of force failed to answer both parts of the question and were penalised for this.

All questions attempted produced some very good answers. However, Q. 1 which required candidates to comment on the nature of the international legal system produced answers which were either excellent or rather weak. It is important to emphasise that exam questions are not intended to provide opportunities to candidates to write all that they can remember about a particular topic with the examiner being tasked to find, within that general discussion, what he or she thinks may be relevant. Good answers are those which address the particular issue raised by the question and make arguments which integrate the range of material students are expected to have studied on the issue.

HISTORY OF ENGLISH LAW

Some of the questions on this paper needed more careful reading than they received and some might have done better had they taken the opportunity. Just under 20% of candidates got First class marks and 56% took Upper Seconds. The remainder were Lower Seconds. The most popular questions were 3 (entails); 6 (covenant and debt); 7 (trespass); 4 (trusts) and 1 (fee simple). The better answers to 3 treated it like a legal problem, looking at the difficulties caused by a now well-formed land law, and tried, having guessed the intention of the legislator to see how established principles of law aided or obstructed his plans, and illustrated the difficulty by reference to the writs and to examples. In Q.6 the role of deeds in covenant was picked up and the contrast with the various mechanisms in debt, but whether covenant could be used for money obligations and the tricky playing with the parties which Moyle J is engaged in was barely picked up. The trespass question produced a decent spread of answers to a quite similar but different question from the one set and it was not always clear what that question was. Too many candidates failed to read into the second line and so failed to consider the possibility of an action being both land and trespass, whatever either of those words meant. The trusts question was generally competently done at a broad level, but more familiarity with the case and statute law would have made a real difference to some grades. Finally it was disappointing that some good answers on the nature of the fee simple failed to look either at the other forms of fee or at the wide range of attributes which the developed tenant in fee simple would have.

EUROPEAN COMMUNITY LAW

The quality of the scripts was broadly similar to that encountered most years. In common with most years the stronger candidates tended to distinguish themselves not only by the depth and breadth of their knowledge but also by the more basic skill of reading and answering the whole question. This was particularly evident on questions 2 - 5 and 7 which all contained invitations to pursue two (closely connected) lines of inquiry. Candidates who ignored or only scraped the surface of the second (and typically more normative) part of the question robbed themselves of the chance to soar. This is a basic question of technique, and its neglect was especially apparent in answers to Qs 4 and 5, though less so on Q2 which was popular and generally well handled. At a more detailed level Q3 produced a great many answers which berated EC trade law for its emphasis on market freedoms at the expense of national social and moral choices, relying for evidence on SPUC v Grogan. But neither the Court nor the Advocate General in that case would have set aside the Irish practices challenged under EC free movement law. Stronger candidates provided a more nuanced appreciation of that ruling, and supplemented it with analysis of more recent cases (such as Schmidberger, Omega Spielhallen and Mary Carpenter) which show how the Court tries to weave together a law of free movement which is influenced by more than economic rights and interests. Similarly in Q8 only a few (richly rewarded)

students managed to reflect on whether Member State E's purported justification for its law (assuming it to be a trade barrier within the meaning of Article 28 EC, itself an awkward issue) might itself be tainted by disrespect for principles such as equality and freedom of expression. Stronger answers to Q5 tended to be built around an argument that wherever (if anywhere) the line should be drawn to limit the impact of Directives before national courts its current location is ill-conceived, though there was healthy disagreement on whether improvement should be secured by extending or reducing that impact. Stronger answers to several questions, perhaps most of all Qs5 and 7, tended to be marked by reflection on the degree of restraint the Court should show in renovating the law given the possibility of Treaty revision as a source of change.

COPYRIGHT, TRADE MARKS AND ALLIED RIGHTS

The standard on the Copyright section of the paper was good overall. Question 1 was popular, and was generally done well, with most students distinguishing immediately between the nature of copyright (as statutory property) and the question of its normative basis, and proceeding from there to consider the implications of that distinction for copyright's term. Question 2 was handled less confidently. No one discussed the treatment of Lord Oliver's dictum by Lord Justice Jacob in *Sawkins v Hyperion Records*, and few seemed confident to state whether or not skill, labour or judgment in copying can confer copyright. Question 3 was received as an invitation to discuss the cases on infringement, which was good but not always grounded in a discussion of copyright's appropriate 'strength'. Question 4 was handled in different ways, with some students focusing on judicial interpretations of fairness and others discussing the development of the law more generally. The less successful answers focused exclusively on parody. Surprisingly few students answered question 5, although those that did answered it well. Question 6 was probably the most difficult and least popular question.

Part B comprised essay questions on trade mark and unfair competition law, covering expansion of passing-off, celebrity personality rights, dilution, infringement, shape marks, and exhaustion. As for Part B, two questions required to be attempted. The standard of answers was satisfactory overall.

INTERNATIONAL TRADE

The standard was good, but not outstanding, even at the top end. The impression formed in earlier years appears to have been confirmed: that this is a paper in which candidates know some areas well, but lack the overall understanding to cope with questions other than the well trodden type. This was borne out by the answers to problem questions with questions 6 (Himalaya clause, deck stowage) and 8 (property in bulk) proving to be popular and generally well done, whereas, by contrast, the answers to questions 9 (*Gill & Duffus v Berger*, *Kwei Tek Chao*) and 10 (charterparties: breach and demurrage) were patchy and indicated a lack of understanding of the reasoning of certain of the relevant decisions. Question 7 (withdrawal clause) was answered by only one candidate, despite it being one of the more straightforward of the problems set. The essays were less popular than the problems, but the invitation to consider the implications of *Groom v Barber* and *Manbre Saccharine v Corn Products* produced some very good answers.

TRUSTS

There were some very good scripts, but also a large number of disappointing ones.

The commonest weaknesses were a failure to address the question asked, and a failure to tell an intelligible story. Both these weaknesses were on display in the numerous answers consisting of a list of allusions (and insofar as they were explicated, often inaccurate allusions) to the secondary materials in the question's general area, the candidate's own contribution comprising only an unreasoned statement of agreement or otherwise with these materials. The avoidance of plagiarism (or what would be plagiarism, were the borrowing accurate) may be a necessary condition of a good performance, but it is nowhere near a sufficient one. Candidates must be prepared actually (and of course relevantly) to *do* the law: themselves to engage in hands-on reasoning about it, in the manner of judges or academics.

These weaknesses were most frequently and strikingly to be seen in the numerous answers to Q 2 (resulting trusts). But they also meant that many candidates struggled especially to do well on the problem questions. Very few attempted more than the required minimum of one such question. Of those on offer, Q 5 (certainty) was by far the most popular; those who attempted the alternatives – Qs 6 (constitution), 13 (remedies against strangers) and 14 (*Quistclose*?) – often seemed to have little idea what they were about. But a substantial proportion of the answers even to Q 5 were poorly done, key issues being missed altogether, and knowledge not being effectively woven into a focused response. Had two problem answers been required in this paper, as in some others, many candidates would have found themselves in substantial difficulties.

The following comments on individual questions refer only to more specific issues.

Q 1 (essence of a trust): some, while aware of the material on purpose trusts, showed little sense of the argument for insisting upon a beneficial interest.

Q 3 (unincorporated associations): most who answered had a surprisingly undeveloped idea of 'discretion'.

Q 4 (*Rochefoucauld v Boustead*/*Lloyds Bank v Rosset*): many had a strong idea of only one of the two doctrines to be compared.

Q 5 (problem: certainty): many went into much (though not always accurate) detail on *Re Baden (No 2)*, while forgetting about *McPhail v Doulton* itself. References to 'capriciousness' were common, being used as a way of suggesting that a provision was invalid without the trouble of saying exactly why. Many candidates went to excessive lengths to establish that a trust of the residue of an estate is not void for uncertainty of subject-matter.

Q 6 (problem: constitution): of the few who attempted this question, a large proportion made no reference at all to the *Re Pryce* group of cases, whether by name or indeed by substance.

Qs 9 (fiduciary duties), 10 (tracing) and 12 (exclusion clauses): not popular, though generally well enough done.

Q 13 (remedies against strangers): of the few who attempted this question, a substantial proportion failed to identify the areas of law in question.

Q 14: (problem: *Quistclose*?): some answered without reference to *Quistclose*; others focused so hard on *Quistclose* that they forgot to consider other possibilities (eg whether the 'primary' element might have been a beneficial trust for the twins). In discussions of *Quistclose* itself, Lord Wilberforce's own account was often overlooked entirely.

ADMINISTRATIVE LAW

Generally the standard of answers was good, but the examiners were concerned that far too many candidates took the questions as an opportunity to discuss the subject-matter at an unduly general level (for example in terms of broad concepts such as relative institutional competence, deference, and separation of powers) without a full appreciation of the details of the broader ideas and without relating them to the mechanics of the case law. As in any other FHS subject, a good quality answer entails sophisticated analysis of the *details* of both theory *and* case law, and an appreciation of the connections between the two.

1. A reasonably popular question. Sadly, very few candidates thought about the finer points of the *ultra vires* debate (e.g. its implications for Parliamentary sovereignty, the nature of common law/prerogative as opposed to statutory powers, etc.), instead giving fairly general accounts of the competing theories. Such candidates were not rewarded generously. However, stronger candidates managed to move beyond the standard debate, and some successfully brought aspects of Harlow and Rawlings' 'traffic lights' into their answers – although just writing about this in the abstract was not rewarded.

2. Another reasonably popular question. The most significant problems in answers concerned lack of detail. Most candidates had heard of *E*, but hardly any were able to cite and discuss the specific criteria laid down by Carnwath LJ for a successful claim under this heading. Very few were able to discuss in detail the law concerning specific counts of review for error of law prior to *E*, nor subsequent developments. Weaker answers (of which there were a fair few) instead tended to depend far too heavily on Paul Craig's *Public Law* article and to give a general account of error of law and fact combined.

3. By far the most popular question. While most candidates managed a general discussion of the history of *Wednesbury* and cases such as *Daly*, not all cited or discussed *British Civilian War Internees*, and insufficient numbers could explain what the proportionality test specifically entailed beyond general references to 'balancing'. Similarly, many candidates assumed without discussion that proportionality always entails more intensive review than *Wednesbury*, although stronger candidates discussed the theoretical questions raised by the proportionality test and its operation in specific Convention/HRA and EC law cases.

4. A relatively unpopular question. Good answers discussed the curative principle, the impact of A6 in *Medicaments (No.2)* and *Porter* v. *Magill*, and the giving of reasons. Weaker answers did not engage much with A6 itself, either citing its scope wrongly or failing to deal with the concepts of 'independence and impartiality' or 'civil rights and obligations' at all. A few very good answers branched out into consideration of *Osman* and *Z*. Very weak answers discussed natural justice generally without focusing on A6 – the central issue in the question – at all.

5. A very popular question. The best answers contained their own analysis and views and dealt in detail with the case law and theoretical justifications for legitimate expectations. The most

common mistakes were to assume that the case law stopped at *Coughlan* or *Begbie*, and to fail to consider the justifications fully. Lack of knowledge of detail let many candidates down, particularly those who assumed, without further thought, that the justification issue could be dealt with merely by citing reliance and legal certainty. Weak candidates sought to use the question – despite the focus of the title – as an excuse to discuss *ultra vires* expectations, or to focus on the procedural/substantive expectation debate to the exclusion of all else.

6. A reasonably popular question. Good answers dealt with the case law governing public authorities and functions before branching out into a discussion of the theoretical perspectives and, crucially, Oliver's theory itself. Unfortunately, large numbers of candidates did not know the law to a detailed enough extent and too many scripts failed to mention crucial cases such as *Clark* or *Datafin*. Weaker answers assumed – quite wrongly – that the debate about the public law-private law distinction is synonymous with the debate about what remains of the exclusivity rule, and seemed unconcerned – despite the very clear steer in the essay title – with theoretical arguments about the distinction.

7. A popular question. Good answers demonstrated a detailed knowledge of both the case law and academic commentary, but too many candidates answered the question as if it read 'does' rather than 'should'. Some candidates spent a long time analysing what might be meant by 'nature' and 'importance' which sometimes produced interesting insights from the better candidates and at other times seemed to be the refuge of those who had less to write. The difference between the outcome on the facts and the *dicta* in the *IRC* case meant that candidates differed widely in their analysis of its effects.

8. An unpopular question, most answers to which discussed tort rather than contract. The best answers focused on all public law torts (misfeasance being an obvious candidate given the title) and displayed good knowledge of case law and secondary literature. Weaker candidates tended to focus on negligence. The very few answers on contract tended to deal with *ultra vires* issues.

9. An unpopular question. Stronger answers compared the strengths and weaknesses of the Parliamentary Commissioner for Administration with judicial review, examining whether the two systems have the same role. Weaker answers just listed general strengths and weaknesses of the PCA.

10. The least popular question, and generally the answers were weak. Hardly any answered the question within the rubric (talking about procedural fairness in general or justifications for procedural fairness as a concept, rather than the procedures which should be used *at inquiries*). The marks awarded reflected this and illustrated the perils of failing to read or answer a question properly.

FAMILY LAW

The performances in this year's family law paper were generally good. Very few papers were below 60, with most candidates able to demonstrate a sound knowledge of the law and the theoretical issues. Fewer candidates than previous years were outstanding. Many seemed content with a good knowledge of the main case law and the materials covered in lectures. Comments on particular questions follow:

1. Children's rights. This was a popular question. Weaker answers to this question simply sought to discuss whether children should have rights. Good answers discussed more carefully the circumstances in which children should have more rights than adults, as well as when they should have fewer.

2. Contact. This question was generally answered well. Many candidates discussed the controversial issues surrounding the making and enforcement of contact orders where the resident parent opposes contact. Only the best considered in depth the question of whether more ought to be done to compel those non-resident parents who do not want to have contact with their children to do so.

3. Fathers. This was not a particularly popular question. Weaker answers simply discussed whether unmarried fathers should get parental responsibility automatically. Stronger answers looked more broadly at the issues surrounding the status of fathers. Excellent answers were able to consider more widely the extent to which mothers do and should control the legal status of fathers.

4. Child protection. There were very few answers to this question. They tended to be of a good quality, mainly focussing on the problems with the courts' interpretation of the threshold criteria.

5. Domestic violence. This was not a popular question. However, the standard of answers that did address it was high. Good answers focussed on the difficult issues surrounding victim's autonomy in this area and problems of proof.

6. Financial orders. This was a popular question. Weaker answers tended to repeat everything they knew about ancillary relief. Stronger answers focussed on the question asked. It is was good to see quite a number of answers emphasising that the cases that come before the courts are not typical, involving extremely rich couples. Generally a good knowledge the recent case law was demonstrated.

7. Divorce. This was a popular question. Some good answers considered whether the current law in effect allowed "divorce on demand". There was also some good discussion of the role of the state on divorce. Weaker answers talked about the reforms of the Family Law Act 1996 without considering what lessons could be learned from their abandonment.

8. Mediation and Fault. These questions were not very popular at all. The answers on fault tended to be weak and focus on divorce and not consider the wider circumstances in which fault could be relevant.

9. Civil Partnership and Gender Recognition. The Civil Partnership Act question was generally very well answered. It was pleasing to see candidates focus the issues raised by the quotation. A good number of answers showed wide reading and careful thought about the issue. The majority of answers supported the Civil Partnership Act and most of those that did not regarded it as too conservative.

10. Cohabitation. This was a fairly popular answer. Most were able to take in a consideration of the Law Commission's proposals for reform.

11. Unfairness to women. This was not a popular question. Those that answered it tended to focus on ancillary relief and parental responsibility.

12. Welfare principle. This was a popular question. A surprising number of answers found it difficult to explain how a human rights approach differed from a welfare based approach, despite this being covered in depth in lectures. A few excellent answers were able to do this very well. Many answers focussed on the disputes over how to balance the interests of parents and children.

COMPANY LAW

The standard of answers was very competent and the candidates obviously had come to grips with the Companies Act 2006. Given the Companies Act 2006, director's duties were covered in a number of questions. The significance of the role that the common law regime would play in the interpretation of the statutory duties was not always fully developed. Also, on ratification of director's wrongs, section 239 of the 2006 Act could have been more fully analysed. All the problem questions had takers and they were competently answered. Questions 1, 3, 4, 7, 10 and 11 were popular. Question 8 had only one taker. Question 7 (floating charges) was well answered but a number of candidates did not deal with the important issue of the effect of the failure of the chargee to exercise control over the charged asset after the charge has been created on the characterisation of a charge. Also, some candidates considered, without developing the argument, that section 40 of the 2006 Act conferred on an individual director power to bind the company – this is highly questionable.

LABOUR LAW

This year's FHS Labour Law examination was sat by 67 candidates. All levels of ability were represented in this large cohort. The very best scripts were highly sophisticated and displayed a pleasing level of engagement with the material. However, there were some weak candidates who had failed to master the legal detail and sought to rely on 'general knowledge'. There was also a worrying tendency among some candidates to write three good answers and to omit or neglect the fourth question.

Questions 1 and 2 (labour law policy) did not attract many takers. Question 3 (atypical work) was more popular. Here we expected a discussion of the concept of worker alongside attempts to regulate particular types of atypical work such as part-time and fixed-term work. Although there were some good answers, weaker candidates lacked detailed knowledge of the Regulations on part-time and fixed-term work. Question 4 (grounds of discrimination) attracted a few takers, though some candidates failed to spot the reference to grounds and treated the question as a general one on all aspects of discrimination law.

Question 5 (direct and indirect discrimination) proved popular and most candidates were able to give a relatively sophisticated account of the definitional problems, though they were weaker on how these problems might be addressed. Question 6 (working time) was attempted by a very large number of candidates. The reference to 'work-life' balance seemed to confuse some candidates who wanted to talk about health and safety (last year's question) instead. Few candidates sought to define the notion of 'work-life' balance. The best candidates included a discussion of family-friendly policies, such as the right to request flexible working, alongside a discussion of the Working Time Regulations 1998. Question 7 (national minimum wage) again

attracted a large number of candidates and was, on the whole, competently tackled. Question 8 (wrongful dismissal) had a fair number of takers. Some of the answers were excellent and offered a highly sophisticated analysis of the case-law. Weaker candidates were unable to explain the precise role of implied terms at common law, or to draw clear distinctions between common law and statutory elements of the regulatory framework.

Question 9 (unfair dismissal) was not particularly popular. Most candidates treated it as an opportunity to give a general account of the legislation and its weaknesses, ignoring the specific requirement to discuss the courts' interpretation of the legislation. Better answers explored the meaning of 'managerial prerogative'. Question 10 (information and consultation) produced some sophisticated answers, though weaker candidates lacked detailed knowledge of the Regulations themselves. Question 11 (freedom of association) attracted a very large number of candidates. The examiners were expecting candidates to consider Article 11 in the round, looking both at rights against employers and at the relationship between union members and their unions, but only the best candidates tackled both areas. Finally, Question 12 (industrial action) attracted some good answers, though not all candidates were able to separate out the legitimacy issues raised by the second part of the question.

CRIMINAL LAW

Performance in this years criminal law paper was generally satisfactory. Candidates showed a sound knowledge of the case law and principles of criminal law. What was rather disappointing was the lack of detailed awareness of the theoretical issues raised by the subject. Generally the papers were solid and able, rather than excellent. Comments on specific questions are as follows:

1. Accomplices, attempts, conspiracy. There were very few answers to these questions.

2. Definition of offences. This question was not attempted by candidates.

3. Reform of homicide. This was a popular question. Most were able to summarise the Law Commission's proposals well, but few were able to discuss the broader issues raised by them. Many ignored the sentencing issue.

4. Rape. This was answered by a few candidates. Good answers were able to bring out the tension between protecting the positive and negative aspects of sexual autonomy. Although there was no real analysis of how to resolve the tension.

5. Duress, self-defence and necessity. Rather surprisingly these were not popular questions. The discussion of whether the line can be drawn between self-defence and duress was generally rather disappointing, with little awareness shown of the relevant academic discussion.

6. Homicide, provocation problem. This was a very popular question. Most candidates spotted that a murder charge could be laid either on the basis of the throwing of the bottle, or on the basis of an omission (leaving the scene without summoning help). It was generally assumed that in the case of the omission this had to be gross negligence manslaughter. Few candidates contemplated whether there could be murder by omission and then whether or not

provocation could be claimed in relation to an omission. Generally a good knowledge of the law on provocation was shown.

7. Attempted rape. This was also a popular question. The discussion of the *mens rea* for attempted rape following the Sexual Offences Act 2003, was generally very weak. Many assumed, without discussion, that *Khan* still represented the law. The consideration of the presumptions in the Act was generally good.

8. Assaults. This was answered by only a few candidates. Generally a solid knowledge of the case law was shown, although only the best candidates discussed the issues surrounding conditional threats.

9. Homicide, causation, incitement. This was a fairly popular question. It was generally well answered. Most candidates were able to demonstrate a good knowledge of the law on causation. The treatment of the incitement issues was generally rather poor.

10. Intoxication, consent and assault. This was not a popular question. Most struggled with the issues surrounding intoxication and insanity which were raised by the alternatives.

PRINCIPLES OF COMMERCIAL LAW

The standard of the scripts was generally very competent, but there were fewer outstanding scripts this year than in previous years. On the other hand, there were very few very weak scripts.

Question 1
This was a popular question and answers were generally good. The best answers first examined the relevant statutory provisions before then turning to the ways in which the parties might try to minimise their effect. Looking at attempts to recharacterise floating charges as fixed charges was appropriate if done within reason, but prepared answers on characterisation which did not engage with the question were given short shrift. Other issues to be examined included the effect of negative pledge clauses, subordination agreements and automatic crystallisation clauses, although many candidates spent too much time considering the circularity issues which potentially arose by the use of the first two devices. Few candidates considered the effectiveness of automatic crystallisation clauses against other creditors, especially execution creditors.

Question 2
Most answers concentrated on statutory registration requirements: an effective retention of title need not be registered, whereas other security interests do. Good answers gave an overview of retention of title clauses effective without registration and asked what assets financiers would take security over. Very few candidates were aware of the reforms involving Purchase Money Security Interests suggested by the Law Commission.

Question 3
This was not a popular question. Most answers concentrated on *Dearle v Hall* and on how priority disputes might be avoided by some sort of registry. Excellent answers were more far-reaching, discussing non-assignment clauses and the controversies surrounding them, and the

anomalies caused by assignments being possible in equity and by statute, but not at common law.

Question 4
The few answers that were attempted to this question were disappointing, with one notable exception. Very few candidates demonstrated an appreciation of the fact that the reason why bills of lading were developed was the difficulty of attornment during transit – a difficulty obviated by electronic communication.

Question 5
Again, this was not a popular question. Most answers were rather descriptive in nature – they summarised the provision and gave an overview of the recent caselaw in which it has been considered. Few considered why a buyer might prefer rejection to damages, or why the right to reject had to be limited. There was little weighing up between the seller's and the buyer's interests.

Question 6
Many candidates failed to read this long question carefully enough. Thus, many thought that the machinery had not been replaced with equivalent machinery, contrary to the terms of the charge. This meant that they then failed to discuss the interesting point whether *Holroyd v Marshall* and *Re Cimex* survive *Spectrum* as far as the replacement of the charged assets by equivalent assets is concerned. On the other hand, the rest of the question was answered competently by most candidates.

Question 7
This question was generally answered competently, but a disturbing number of answers showed a profound lack of understanding of the different *nemo dat* exceptions. Sometimes the devil is in the detail – most candidates assumed that the Hire Purchase Act applied to laptops! Maybe more worryingly, far too many answers demonstrated a profound lack of understanding of the current law of *contract* relating to unilateral mistake.

Question 8
This question was generally answered well. The problem with questions on bills of exchange is the multiplicity of parties – this makes structuring the answer difficult. On the whole a good level of knowledge and understanding was demonstrated, even though many answers barely touched on the sales issues raised by the question.

Question 9
Again, most answers were generally competent, but the number of candidates who had not understood the distinction between a 'true' document of title and a statutory document of title was surprisingly high. Most candidates saw the relevance of time of payment in the second part of the question, but the discussions of this point tended to be rather superficial.

Question 10
This question found few takers, even though the issues it raised were not complex or surprising. Most of those who attempted the question did a good job.

CONSTITUTIONAL LAW

The FHS Constitutional Law paper was sat by nine candidates this year. The overall standard was good with a few excellent scripts. Given the small number of candidates, it is not helpful to comment on each question, though in general it was noticeable that candidates preferred 'core' constitutional topics such as separation of powers, sovereignty and the Rule of Law, to the civil liberties topics. But most popular of all was the question on the 'horizontal' effect of EC directives in the law of member states; on this question the answers were generally competent but formulaic, and few candidates distinguished themselves. For the most part, candidates displayed a sound knowledge of the material, though there was a worrying tendency among the weaker candidates to regurgitate prepared answers instead of focusing on the exact terms of the question set.

TAXATION LAW

The performance of the 12 candidates in the taxation law exam was very good. The answers to the questions were generally of a high standard with candidates making very good use of relevant cases and statutory provisions. As in previous years, 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. 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 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. Q.5 (comparing employees and the self employed) was attempted by nearly all the candidates while Q.6 (inheritance taxation of inter vivos gifts and reservation of benefits) was not attempted at all. The problem questions were very popular – three-quarters of the candidates attempted at least one of the problems and a third answered both problems.

Q.1 on 'ability to pay' required integration of tax policy and technical material for a complete answer; two-thirds of the candidates attempted it, but many of the answers were weak. Q.2 concerned capital taxation policy (IHT and CGT); again the answers were comparatively weak with little engagement with the literature. Most answers to Q.3 on the Ramsay principle and judicial anti-avoidance were quite good, which was not surprising as this is a very central and popular part of the course. However there is a tendency for students to fall into a standard historical overview of the cases which produced weaker answers than those which focused on more recent case law. Q.4 on the capital taxation of trusts required a blend of policy and technical understanding. The answers were very well done by all four of the candidates who attempted this question. Q5 concerned the common law tests for determining whether a taxpayer is employed or self-employed, and the different regimes governing the deductibility of expenses. Answers that analysed the case law on both issues in some depth and discussed the policy issues raised were awarded high marks. As already mentioned Q6 was not attempted, likely owing to its comparatively narrow focus on a technically complex area.

Turning to the problem questions, Q.7 was very well done. The facts raised a host of major and minor employment tax issues, with particular emphasis on the taxation of various employment benefits. Most of the candidates attempting this question provided very strong, complete and well-organised answers and were duly rewarded. Q.8 was not answered as well as Q7. The key

issue was whether the taxpayer was trading as there were facts pointing both for and against this conclusion. The best answers demonstrated a thorough knowledge of the cases, arrived at a properly-supported conclusion and also provided some discussion of what the tax treatment would be under the alternative conclusion. Most candidates also considered the less obvious *Sharkey v Wernher* issue as well as the small IHT point on gifts in contemplation of marriage.

EC COMPETITION LAW AND POLICY

The paper comprised ten questions of which five were essay questions and five problem questions. Candidates were asked to answer four questions including at least two problem questions. The first essay question focused on the European approach to discounts and rebates. The second essay question dealt with the control of horizontal, vertical and conglomerate mergers. Question three addressed the abuse of a dominant position in light of the recent proposal by the European Commission for an 'economic approach' to Article 82 EC. Question four focused on parallel conduct and the application of Article 81 EC. The fifth essay question considered the private enforcement of competition law in national courts of the Member States. The five problem questions focused on Article 81 EC, Article 82 EC, the European Merger Regulation and the public enforcement of European competition law. The examination was taken by 5 candidates. On the whole, the scripts showed a good command of the subject and good analytical skills with two out of the five papers being awarded distinction.

ENVIRONMENTAL LAW

This was the first year that environmental law has been offered as a full undergraduate option. The general standard of papers was very good and most students displayed a nuanced and detailed understanding of legal frameworks and case law. Where some of the papers were weaker was in relation to having a sophisticated understanding of environmental problems and how the nature of those problems affected how the role of law is understood and how it can and should operate. While certain questions (Qs 3,5(a), 7, & 9) were particularly popular it was interesting to note that students tended to answer a wide range of questions which involved all aspects of the subject. In particular, every student attempted at least one problem question (with a number doing two) even though problem questions were not compulsory.