CARIBBEAN EXAMINATIONS COUNCIL

REPORT ON CANDIDATES' WORK IN THE ADVANCED PROFICIENCY EXAMINATION MAY/JUNE 2010

LAW

GENERAL COMMENTS

The revised syllabus, CXC A23/U2/09, was examined for the first time this year. The 2010 examinations for each unit consisted of two external papers, Paper 01 and Paper 02, and an internal assessment, Paper 03. Paper 01 comprised 45 compulsory multiple-choice questions, 15 based on each module replacing the nine short-answer questions (three based on each module). Paper 01 contributed 30 per cent to the examination for a unit.

Paper 02 comprised six essay or problem-type questions, (two based on each module). Candidates were required to answer a total of three questions, one from each module. This format replaced the previous one in which there was a compulsory question in Section A and nine questions (three based on each module) in Section B, where candidates were required to do three, one from each module. Paper 02 contributed 50 per cent to the examination for a unit.

There were no changes in the requirements for Internal Assessments, Paper 03. Candidates were required to write a research paper of 2000–2500 words, based on any topic from any module in the Unit. Paper 03 contributed 20 per cent to the examination for a unit.

The weaknesses evident in Papers 02 and 03 were largely in the areas of analysis and application. To help students to improve their analytical skills, teachers are encouraged to use the suggested stimuli which appear in the syllabus such as debates and critiques. In this way, students will become accustomed to the language of the discipline which is intrinsic to a better application of the information they have gathered and to presenting improved answers.

Candidates are advised to manage the examination time wisely. Too often they shortchanged themselves by writing long responses to their first and second questions and then either not completing questions attempted towards the end of the paper, or making half-hearted attempts at such responses.

It is imperative that candidates develop a good writing style fostered by reading legal texts and writings. They must show greater care in complying with the instructions given. Candidates and teachers are reminded of the following:

1. Candidates are to 'write on both sides of the paper and start each answer on a new page' as instructed on the answer booklet.

2. Questions attempted are to be noted, in order of responses, on the cover page of scripts.

3. Each candidate's number and centre number are to be recorded in the space provided on the cover page, and throughout the answer booklet, where required.

4. Where applicable or required, the jurisdiction to which a particular area of law applies must be identified. (Note, especially, those questions that require reference to 'a named Commonwealth Caribbean state'.)

With respect to internal assessments:

1. Candidates' names recorded on the assignments and internal assessment forms must be consistent with the names at registration.

2. Comments and marks by teachers are to be erased before internal assessments are submitted as samples.

3. Careful note must be taken of syllabus requirements to ensure compliance.

The following are repeated in the hope that they will help candidates to respond to questions appropriately:

1. Candidates must follow instructions. Responses should not be merged, for example, Part (a) must be answered separately from Part (b).

2. Candidates must use language that is grammatically correct, formal and impersonal, not general, vague or colloquial.

3. Candidates are encouraged to use the following format (summarized as IRAC) when answering problem-type questions.

   I - issue (identification)

   R - rule of law (refer to)

   A - application of law to facts

   C - conclusion

4. The conclusion should relate to the problem and should not be the candidate's fanciful construction bearing no relation to the facts, or simply rewriting the facts.

5. Candidates must support their responses with legal authority, namely:

   - Case Law
   - Statute
   - Legal writers

6. Candidates must deal with issues and applicable law, refraining from restating the question, except in so far as a principle of law relates to stated facts. Instead, candidates should strive to answer the questions precisely.

7. Candidates need to be more familiar with definitions of terms and concepts, and should offer definitions of terms as appropriate.

DETAILED COMMENTS

Paper 01 – Multiple Choice

Candidates were required to demonstrate a broad understanding of the subject as they were tested on wider areas of the syllabus than had been the case previously. The performance was encouraging with more than 50 per cent of candidates achieving the required standard.

For Unit 1, the mean score was 55.7 per cent; the standard deviation was 11.6. The scores obtained on this paper ranged from 19 to 84 from a maximum of 90 marks.

For Unit 2, the mean score was 52.5 per cent, the standard deviation was 11.5.

There were some glaring weaknesses in areas of elementary principles of law where candidates were obviously unaware of the following:

- 'Transferred malice' does not apply to things but to persons
- Where two persons own property as joint tenants and both die at the same time, the older is presumed to have died first, so the property passes to the estate of the younger person.
- Strict liability crimes are based in statute.
- The distinction between positive law and natural law.
- When an employer is vicariously liable for the acts of his employees.

UNIT 1

Paper 02 – Essay Questions

While this report is not intended to comprise 'model answers', outlines of some questions have been included in the hope that they will be of some assistance in the preparation for future examinations.

Module 1: Caribbean Legal Systems

Question 1

Candidates were required to (a) describe the court structure in a named Commonwealth Caribbean country, showing how the structure facilitated the doctrine of judicial precedent and (b) discuss two advantages and two disadvantages of judicial precedent.

Most candidates could define judicial precedent satisfactorily. Although they showed knowledge of the court system, a number of them did not have the hierarchy correctly represented. Candidates did not sufficiently show that they understood the concept of judicial precedent: sometimes showing knowledge, but lacking coherence. It was evident that there was a good knowledge of the area, but the concepts of the topic, and its various interpretations were often confused. There needs to be greater clarity of the terms and principles, at the preparation stage.

Candidates ignored instructions to indicate a named Commonwealth Caribbean country in their response to Question 1. Instead, they amalgamated information in the hierarchy of the court system in various territories, with disastrous results. Some of the courts which the candidates identified did not exist in the territories for which they were mentioned.

An outline of an expected response is presented below.

Outline of Question 1

(a) Judicial precedent is a source of law. It refers to the process by which decisions handed down by the higher courts are followed by the lower courts in the same jurisdiction and on similar matters. The decisions may either be binding or persuasive. Binding decisions are decisions which must be followed by courts at the same level or at a lower division. Persuasive decisions are followed by courts which operate in a similar system (common law), for example, a case from Australia may be persuasive to a court in the Commonwealth Caribbean.

There exists a hierarchy of the courts in all jurisdictions. In Jamaica, for example, the highest court is the Judicial Committee of the Privy Council. Below that is the Court of Appeal, then there is a Supreme Court which is higher than the Resident Magistrate's Court. At the bottom of the court structure in Jamaica is the Petty Sessions Court, which is usually presided over by Justices of the Peace.

The Privy Council has been replaced by the Caribbean Court of Justice (CCJ) in some jurisdictions. Presently, not all Caribbean countries have the CCJ as the final appellate court. The Privy Council binds all lower courts and itself. The Court of Appeal binds both itself and the lower courts and is also bound by decisions of the Privy Council. In the case of Jamaica, for example, the Supreme Court is bound by the decisions of the Privy Council, Court of Appeal and itself, binding all lower courts. The Resident Magistrate's Court does not bind any other courts, however, its decisions are binding on itself. The situation would be different in those jurisdictions where the CCJ is the highest Court of Appeal, and not the Judicial Committee of the Privy Council.

The application of judicial precedent to the decision-making process in any relevant jurisdiction is facilitated by the court structure outlined above. One element of how the hierarchy operates and its effectiveness is through the principle of *ratio decidendi*. This is a fundamental aspect of the doctrine of judicial precedents which means that a principal rule of law is being proposed. *Ratio decidendi* means the decided rationale, and constitutes the core and most important element of a decision made by a previous tribunal. With the application of binding precedent, an element like the *ratio decidendi* can apply almost automatically from a higher to a lower court. By extension, the principle of *obiter dictum*, translated literally to mean statements said 'by the way', facilitates the use of other aspects of a judgment in persuading a court when unable to bind it. This provides us with the notion of a persuasive precedent which would exert less influence over a decision being made by a tribunal. These notions facilitate the principle of *stare decisis*, translated to mean 'let the decision stand', which ensures greater stability in the development of law in the Commonwealth Caribbean by allowing the doctrine of judicial precedent to be demonstrated in either its binding or persuasive application.

(b) Two advantages of judicial precedents are certainty and time saving.
Two disadvantages are fixity/rigidity and unconstitutionality.

By way of advantages, the doctrine of judicial precedents allows for certainty in the decision making process. The essence of the common law is found in its ability to assure contesting parties of the state of the law. This means that persons are aware of their rights and obligations under the law, as well as the results of their actions or omissions. There need be no uncertainty about the status of the law which remains essentially 'common' to the jurisdictions. It also ensures that a standard is established and maintained as acceptable, and is not open to multiple interpretations.

The time saving aspect of judicial precedence is most obvious when we examine how the judges arrive at their decisions. They look at the decisions of higher courts in matters similar to the ones over which they are presiding and are able to spend less time recording the law, investigating the issues and constructing their judgments, as they would already have had the benefit of existing judgments.

Unfortunately, one major disadvantage of judicial precedent is the fixed nature of decisions made. Binding precedents are more pronounced as disadvantageous, as a tribunal will find itself unable to deviate from a binding decision where it is unable to distinguish between the issues on any important points of law or fact. This is highlighted where there is a similar area of law decided upon by a superior court,

particularly where the degree of difference between the two is less pronounced. This can create a great degree of rigidity and may also stifle the development of the law especially where there are new phenomena, new statutes or new technologies to consider.

Judicial precedents may also lead to some degree of unconstitutionality. Often, following decided cases slavishly may result in breaches of constitutional rights. For example, dealing with the death penalty in the *Pratt and Morgan* case, it was observed by the Judicial Committee of the Privy Council that following the previously decided cases on the death penalty would have amounted to a breach of the appellants' constitutional rights. Accordingly, there would be need to depart from the judicial precedent.

Question 2

This question focused on equity. Candidates demonstrated that they had some knowledge of the general development of equity. With more in-depth knowledge of the area, performance would have been better. There was an acceptable understanding of the history and development of the subject but its application was seriously misconstrued. There was evidently a need for greater detailed information and a better understanding of law to answer the question. Candidates often ignored the parameters set by the wording of the question and took the opportunity to write dissertations on all they could remember about equity. Those candidates who scored higher marks for this question were those who noted the area where the information would be relevant, and observed the specific requirements for each section. A number of candidates referred to the case of *Stockhert* v *Geddes* and it was not a relevant case in support of the point they attempted to advance on the application of equity today. Candidates too often spent much time dealing with the 'common law' and not 'equity' as was required of them. There were, however, some excellent answers in which candidates applied equitable maxims and used relevant cases and examples in support of the position which they advanced.

Module 2: Principles of Public Law

Question 3

This question on the Rule of Law required candidates to present an incisive and analytical response to the statement attributed to Professor Fiadjoe. While there were some excellent answers in which candidates received full marks, or close to full marks, there were far too many instances where the paucity of information submitted by candidates and their inability to critically assess the statement resulted in weak answers.

As required, some candidates identified the Diceyan concept of the Rule of Law as fundamental to their own assessment and presentation. They presented a historical overview, indicating how the accountability of the three arms, executive, legislative and judicial, must interrelate, with checks and balances clearly in place, in order for the Rule of Law to be effective. These candidates were able to show, as required, that the Rule of Law and the Separation of Powers doctrine are interrelated, and that this philosophy is enshrined in the Constitutions of all Commonwealth Caribbean states.

Candidates were also expected to show that *ultra vires* actions of those vested with state power are directly opposite to the Rule of Law. Further, not only do the Constitutions so provide, but that international bodies such as the United Nations, of which Commonwealth Caribbean states are members, either directly, as in the case of independent states, or through the United Kingdom as in the case of non-independent states, subscribe to the principle. Some candidates also referred to the fact that in the case of non-independent states, European Law was also a factor.

From the available cases to which candidates were expected to make reference, they could have arrived at their own conclusions as to the sustainability of the Rule of Law in the Commonwealth Caribbean.

Some of these cases include:

Sugar Producers Ltd. v *Phillips*
Carr v *AG*
Pratt and Morgan v *AG*
Baron Card v *AG*
Hinds v *R*
Emanuel v *AG*
Astaphan v *Comptroller of Customs*

Candidates are to be reminded that merely citing cases is not sufficient; the application of the case to the issue being discussed must be clearly demonstrated. An essay-type question, such as this, requires candidates to use cases and other relevant sources aptly in order to enhance the quality of their responses.

Question 4

This question required candidates to show how the doctrine of *ultra vires* operates in ensuring that public bodies follow proper procedures and apply only relevant considerations.

The majority of candidates who attempted this question had some knowledge of substantive and procedural *ultra vires* and were able to define the terms and to distinguish between them. Where most of them were weak was on the application of the principle of *ultra vires* as evident in decided cases. This proved to be a severe disadvantage for most candidates who failed to show that it is by virtue of judicial review that actions which are deemed *ultra vires* will be nullified.

There were some excellent answers, albeit a small minority, in which candidates approached the question in a mature and authoritative manner, citing and discussing cases and making reference to the importance of independence of the judiciary in performing its functions.

Among the cases which were referred to by some candidates in illustrating their points were:

CCSU v *Minister of the Civil Service*
AG of Antigua & Barbuda v *James*
AG of Antigua & Barbuda v *Coconut Marketing Board*
Ali v *Elections and Boundaries Commission*
Singh v *Public Service Commission et al*

Module 3: Principles of Criminal Law

Question 5

This question required that candidates demonstrate a good understanding of strict liability offences. They were expected to highlight that this area of the law evolved from a stricter approach to a more modern application of the principle as seen in decisions balancing public policy and criminality. A requirement too was that cases such as *Cundy* v *LeCocg*, *Alphacell* v *Woodward, B (a minor)* v *DPP* and *Sweet* v *Parsley* were to be highlighted in candidates' responses.

The majority of candidates failed to recognize that strict liability offences are statutory offences which do not require the *mens rea* in order to be constituted. They misconstrued strict liability offences as the more grave offences such as rape and murder.

Candidates who fulfilled the necessary requirements showed how cases such *as Sweet* v *Parsley, Alphacell* v *Woodward* illustrate the operation of strict liability offences as incurring liability without the intention or fault element. These candidates clearly defined the offence of strict liability. Additionally, they pointed out some of the offences such as pollution, spirit licence violations or violation of road traffic acts as examples involving strict liability, the outcomes of which stand towards some flexibility, even a somewhat liberal approach by the courts.

The vast majority of candidates failed to show an evolution of strict liability offences from a more traditional approach, being one of absolute liability in the favour of public interest to a standpoint of exercising discretion as to the requirement for *mens rea*. They failed to appreciate that when Parliament is silent on the point and when words such as 'knowingly', 'willfully' and 'permitting' are used, the courts would read into the statute the requirement for *mens rea*. Candidates could also have shown how cases of indecency with children and abuse of drugs, have expanded the law in this area.

Question 6

Part (a) of this question required that candidates define 'insane automatism' as well as refer to case law such as *Bratty* v *AG for Northern Ireland* and *R* v *Quick and Paddison.*

Candidates who scored highly on this part of the question were able to recognize the close relationship between insane automatism and insanity. Noticeably too, they were able to define insane automatism as being uncontrollable behaviour caused by a disease of the mind. Included in their responses were cases such as *Bratty* v *AG for Northern Ireland* and *R* v *Kemp.*

However, some candidates failed to recognize and differentiate between insane automatism and non-insane automatism, sometimes referring to insane automatism as being caused by an external factor. These candidates also failed to highlight the distinction between the two defences that insanity negatives the *mens rea* and automatism negatives the *actus reus*.

A number of candidates discussed intoxication as non-insane or self-induced automatism. Some candidates failed to mention leading cases but applied appropriate cases such as *Hill* v *Baxter* to illustrate insane automatism.

Part (b) required candidates to identify the issues in the problem, apply the law to the facts, as well as use decided cases to support their answers. Approximately 20 per cent of the candidates were able to recognize the facts scenario as close to those of *Hill* v *Baxter* and used this as an authority for the argument that Rory's behaviour amounted to automatism. These candidates were also able to recognize the impact of external forces on Rory's liability as negativing both the *mens rea* and *actus reus* as the *actus reus* was involuntary.

Therefore, due to the fact that the elements of criminal liability were absent, these candidates came to the correct conclusion that Rory may not be held liable.

However, the vast majority of candidates did not recognize 'automatism' as a complete defence which totally absolves criminal liability and instead stated it to be a partial defence which reduces murder to manslaughter.

A large number of candidates failed to recognize the facts presented as being close to those of *Hill* v *Baxter* and, as such, failed to cite the case and use it as authority for the arguments presented and the advice to be given. These candidates wrote long discussions on murder and manslaughter and whether or not provocation, recklessness or negligence would absolve Rory of a murder charge. The murder and manslaughter cases such as *Hyam* v *DPP* and *R* v *Maloney* were discussed, but were of no assistance as such discussions were off the mark.

UNIT 2

Paper 02 – Essay Questions

Module 1: Law of Tort

Question 1

Generally, the majority of candidates who attempted the question did fairly well with several of them attaining 20 or more marks.

However, as for the other problem-type questions, most candidates were unable to adequately answer the question using the FILA (facts, issues, law, application) or IRAC (issues, rules, application and conclusion/advice) technique. With that in mind, the common weaknesses identified in the responses are as follows:

1. While some candidates could briefly indicate the difference between private and public law, the majority were unable to identify the major characteristics that distinguished both nuisances. For example, many candidates failed to mention that public nuisance is a crime which is actionable by the Attorney General.

2. Some candidates confused the elements of negligence with nuisance. For example, in their responses, they wrote extensively on the elements of negligence including the reasonable man, duty of care, foreseeability, and the neighbour principle. Some also used the *Donoghue* v *Stevenson* case as an example of public nuisance.

Candidates displayed a good knowledge of remedies, frequently citing damages, abatement and injunction.

Question 2

In Part (a), most candidates failed to address the central issue of malicious prosecution. Their focus was shifted to other elements of trespass to person, such as assault, battery and false imprisonment. Also, most candidates dealt extensively with defamation.

Only some of the elements of malicious prosecution were addressed in this question. For example, in most of the responses, no mention was made of the point that the plaintiff or claimant must show that the defendant instituted the prosecution against him and the prosecution terminated in his favour.

Most candidates failed to note the link between Parts (a) and (b). They discussed the malicious prosecution element of the question, focusing only on false imprisonment. This, in the examiners' opinion, shows a lack of understanding of both concepts by candidates.

In Part (b), candidates failed to address whether proper procedures were followed in detaining Kevin. Further, there were weak responses on the point regarding whether the arrest was lawful in relation to the facts.

Many candidates addressed the possible remedies and defences available to Donman and the security guard, such as lawful arrest, the right to be searched by the security guard and arrest through an agent.

An outline of an expected response is presented below.

Outline of Part (a) Trespass to person – re: malicious prosecution

Malicious prosecution is committed where the defendant maliciously and without reasonable and probable cause, initiates against the plaintiff, a criminal prosecution which terminates in the plaintiff's favour and which results in damage to the plaintiff's reputation, person or property.

1. Actions for malicious prosecution are often combined with actions for false imprisonment.

2. Unlike malicious prosecution where damage must be proved, false imprisonment is actionable per se, that is, without proof of damage.

3. In malicious prosecution the onus is on the plaintiff to show that the prosecution is unjustified, whereas in false imprisonment the defendant has to prove that the false imprisonment is justified.

4. Requirements for a successful action for malicious prosecution are as follows:

    (a) The defendant must have instituted the prosecution against him.

    (b) The prosecution terminated in his favour.

    (c) The prosecutor had no reasonable and probable cause for having prosecuted him.

    (d) The defendant's motive was purely malicious.

    (e) The plaintiff suffered damage to his reputation, person or property.

Cases

Jhaman v *Anroop*
Rowe v *Port of Spain City Council*
Tewari v *Singh*
Martin v *Watson*

In Part (b), Kevin could succeed in a claim against Donman and the policeman for malicious prosecution and false imprisonment. Kevin in his claim for false imprisonment needs to prove that he suffered loss of his liberty; that there was injury to his feelings, that is, the indignity, disgrace, humiliation and mental suffering arising from the detention; that there was physical injury, illness or discomfort resulting from his detention, injuries to reputation and any further pecuniary loss which is not remote and a consequence of the imprisonment.

Cases

Quashie v *AG*
Walter v *Allfools*
Robinson v *AG*
Jangoo v *Gomez*

Likely outcome

The duty of the police when they arrest without warrant is to be quick to see the possibility of the crime but equally they ought to be anxious to avoid mistaking the innocent for the guilty. In this case, the policeman made no inquiry of anyone but acted with great haste and without knowledge of the facts. He made up his mind to arrest and prosecute Kevin and is therefore liable to a claim for false imprisonment. With regard to the claim for malicious prosecution, all the elements for the offence were present in the scenario. Kevin can establish that he was prosecuted for theft alleged to have been committed by him, and that the charges were dismissed by the magistrate and was determined in his favour. Thus, when the police and Donman brought prosecution against Kevin, they had no reasonable or probable cause for doing so, and are therefore liable for the offences of malicious prosecution and false imprisonment.

Module 2: Law of Contract

The answers outlined below are provided for guidance.

Question 3

In Part (a), the focus was on the termination of an offer. An offer may be terminated in the following situations:

1. Revocation: This is where the offeror withdraws from the offer. It must be done before acceptance by the offeree. In *Byme* v *Van Tienhoven*, on 1 October, D in Cardiff posted a letter to P in New York offering to sell a tin plate. On 8 October, D wrote revoking the offer. On 11 October, P received D's offer and telegraphed their acceptance. On 15 October, P confirmed their acceptance by letter. On 20 October, D's letter of revocation reached P who had by this time entered into a contract to resell the tin plate. Held: revocation was not effective until it was received, so a contract came into being on 11 October.

   Revocation can be effectively communicated by a third party: *Dickenson* v *Dodds*.

2. Lapse of time: An offeror may set a time for acceptance. Once this time has passed the offer lapses. In cases in which no time period is stipulated for the offer, an offeree cannot make an offeror wait forever. The offeror is entitled to assume that acceptance will be made within a reasonable time or not at all. A reasonable time period will be dependent upon the circumstance of the case. In *Ramsgate Victoria Hotel* v *Montefiore,* D offered by letter dated 8 June 1864 to take shares in a company. No reply was made by the company but on 23 November 1864 they allotted shares to D and demanded payment of the balances due on them. D refused to take the shares and the court held that the refusal was justified. His offer had lapsed through the company's delay in notifying their acceptance.

3. On failure of a condition precedent, that is, something which must happen if the contract is to be effective — *Financings* v *Stimson* — an offer to take a car on hire purchase lapsed when the car was involved in an accident. It was held to be a condition precedent of the contract that the car should be in a good condition.

4. Counter offer: This acts as a rejection. If an offeree rejects an offer, it is at an end. In *Hyde v Wrench,* D offered to sell his farm for £1,000. P's agent made an offer of £950 and asked for a few days to think about it. D then wrote saying he would not accept the offer of 950 pounds. P then wrote purporting to accept the offer of £1,000. D did not consider himself bound to sell and P sued for specific performances. Held: P could not enforce this acceptance because his counter-offer of £950 was an implied rejection of the original offer to sell at £1,000 and the original offer was therefore no longer in existence.

5. Death: If the offeror dies, the offer may lapse. A party cannot accept an offer once notified of the death of the offeror but that in circumstances, the offer could be accepted in ignorance of death. The death of an offeree probably terminates the offer in that the offeree's personal representative could not purport to accept the offer.

   An acceptance by an offeree will make a valid contract provided that:

   (i) She or he did not know of the death.
   (ii) The contract does not involve personal services.

Part (b) required a discussion on offer and acceptance. An offer is an expression of willingness to contract on certain terms. It must be made with the intention that will become binding upon acceptance. It must be distinguished from an invitation to treat which is a stage in negotiation and cannot be accepted. An acceptance must be an agreement to each of the terms of the offer. See cases: *Stoner* v *Manchester City Council* and *Gibson* v *Manchester City Council*.

In determining whether Evan is entitled to the reward, the following issues arise:

1. What type of offer was made? It is possible for an advertisement to contain an offer, if it is an offer to the world at large. This is possible if the contract is unilateral requiring the other party to do something which amounts to both acceptance and performances of their part of contract. As in the case of *Carlill* v *Carbolic Smokeball Co,* The Court of Appeal decided that there was a binding contract. The advertisement was an offer to the world at large and P had accepted by using the smokeball.

To be effective an offer must be communicated, *R* v *Clarke*, since the offer must be present in the mind at the time of acceptance.

1. Was there was a valid revocation by Donna?
   Definition of revocation is required. Publication of revocation must have the same degree of circulation as an offer.

   If the court decides that the revocation was sufficient, Evan is not entitled, if not the opposite applies. It is important to note that because there is no legal commitment until a contract has been formed, either party may change minds and withdraw from negotiations. *Routledge* v *Grant*

2. When was Evan's acceptance by e-mail valid?

   Where an acceptance is instantaneous, actual communication is required and the postal rule does not apply. A contract comes into being at the moment acceptance of an offer is communicated to the offeree in *Entores* v *Miles Far Eastern Corporation.*

   An acceptance sent by telefax from Holland to England was held to be effective upon receipt, so that the contract was governed by English law, as the contract was made in England.

Question 4

Part (a) required a discussion on the incorporation of exclusion clauses into contracts. An exclusion clause may be defined as a clause inserted into a contract to exclude or limit liability of one of the parties for certain types of breach of contract. For an exclusion clause to be relied upon, it must be incorporated into the contract by signature, notice or course of dealing.

With reference to signed documents, once a party has signed the contract that party is bound by his signature even if he has not read or understood the contract once there is no misrepresentation as seen in *L'Estrange* v *Graucob*. In this case, a woman bought a cigarette machine and signed a contract containing an exclusion clause without reading it. It was held that she was bound by her signature.

With regard to unsigned documents such as tickets, reasonable notice must be given for the exclusion clause to have been incorporated. Notice of the clause must have been given before or at the time the contract was made. Therefore, if the notice is introduced later it will not be incorporated into a contract as illustrated in *Olley* v *Marlborough Court Hotel.* In this case, the contract for the use of the hotel room was made at the reception desk but the clauses excluding the loss of luggage was displayed in the hotel. The court found that the use of the exclusion clause was not incorporated because it was introduced too late.

The third way in which an exclusion clause can be incorporated into a contract is by course of dealing. This course of dealing must be regular for the clause to be relied upon as seen in *Spurling* v *Bradshaw*. In this case, the defendant received the document acknowledging the receipt of the barrels of oranges and on its face it referred to the exemption clauses printed on the back. He argued that the notice was sent too late. However, it was held that he was bound by the clauses since similar documents were sent during previous dealings.

For an exclusion clause to be relied upon, it must be incorporated by signature, notice or course of dealing.

Part (b) required an evaluation of the facts considered by the courts in determining whether or not an exclusion clause covers the breach which has occurred. The factors considered by the courts are the rules of construction such as the *contra proferentem* rule, main purpose rule and doctrine of fundamental breach.

With reference to the *contra proferentem* rule, the courts have been strict with this and ambiguity in the exclusion clause is interpreted against the party that is trying to rely on the clause as seen in *Houghton* v *Trafalgar Insurance*. In this case, a reference in an insurance contract to excess loads did not apply where a car was carrying more passengers than the number which it had been constructed to carry.

Pertaining to the main purpose rule, if the exclusion clause is repugnant to the main purpose of the contract it will not be interpreted to cover the breach which has occurred as seen in *Evans* v *Andrea Merzario*. In this case, there was an oral promise made by the defendants that they would continue to stow the goods of the plaintiffs below deck. On one occasion, they did not do this and sought to rely on an exclusion clause contained in the standard conditions of the forwarding trade. It was held that the oral promise overrode the exclusion clause since the clause was repugnant to the main purpose of the contract.

With reference to the doctrine of fundamental breach, the courts used to hold that an exclusion clause was not effective against fundamental breach of contract. This included a breach related to an obligation central to the contract and where consequences of breach were exceptionally serious. This approach was reviewed in *Photo Production Ltd.*v *Securicor Transport Ltd.* In this case, the plaintiffs who owned a factory engaged the defendants to provide security services and one of the defendant's guards started a fire on the premises which destroyed the entire factory. However, the plaintiffs had exclusion clause covering the serious breach which had occurred. The court held that there was no rule of construction which prevented an exclusion clause from being effective against a fundamental breach of contract. Thus, the parties had freedom of contract.

Whether an exclusion clause covers the breach which has occurred would depend upon the interpretation of the clause and the courts will use the rules of construction as *contra proferentem* rule, main purpose rule and doctrine of fundamental breach in their evaluations.

Module 3: Real Property

Question 5

The question focused on tenancy and presented many challenges to several candidates. Too many were unable to differentiate between 'joint tenancy' and 'tenancy-in-common'. The outline of an expected response is presented below.

Outline of Question 5

(a) Tenancy is where two or more persons have an interest in land. The parties are considered to be co-owners of the property, all being entitled to possession at the same time. There are two types of tenancy, joint tenancy and tenancy-in-common.

In a joint tenancy, the parties are considered as a single owner. There are four unities of a joint tenancy; unity of possession, unity of interest, unity of time and unity of title.

Unity of Possession: This means that all the joint tenants are equally entitled to the physical possession, use and profits derived from the entire parcel of land. No one joint tenant can point to any part or piece of the land and claim it as his own to the exclusion of the other joint tenants. It follows that one joint tenant cannot evict another joint tenant or claim rent from him. For example, Tom and Jim are joint owners of a parcel of land with a mango tree to the side that Jim occupies. Jim cannot prevent Tom from coming onto the portion of the land that the tree occupies as they are both entitled to possession and use of the entire parcel of land. Neither can Jim prevent Tom from picking mangoes from the mango tree on the land as they are both equally entitled to the mangoes on the tree.

Unity of Interest: All the joint tenants hold an interest in the land to the same extent, nature and duration: *Singh v Singh*. 'Extent' simply means that each share is equal. If there are three joint tenants each joint tenant is deemed to hold the entire land as a single owner. There are no distinct measurable shares. 'Nature' means that they own all the land as opposed to one joint tenant owning a stable or a tree that is on the land while the other owns the actual land. It means further that one joint tenant cannot be a freeholder and the other a leaseholder, they must all be freeholders. 'Duration' means that they all hold for the duration of their lives.

Unity of Title: Joint tenants should obtain their interest from the same source document. This may be a will, a deed of conveyance or a Duplicate Certificate of Title. For example, both Tom and Jim should have their name on the same Duplicate Certificate of Title. If they obtained the land by will, it should have been left to them in the same will.

Unity of Time: The interest of all the joint tenants should vest at the same time. For example, the land should have been conveyed, transferred or devised to Tom and Jim at the same time and the document that vests the interest — whether a will, deed of conveyance, a Duplicate Certificate of Title — usually contains the date on which the interest vests in all the joint tenants.

(b) Joint tenancy and tenancy-in-common are the two forms of co-ownership known to the modern law. In a joint tenancy, the joint tenants own the land as a single owner having the same rights of possession and the same interest in the land. On the other hand, while the parties in a tenancy-in-common have the simultaneous right to possession, they are said to hold undivided shares in the land. For example, one-half, one-quarter albeit that the land is a single unit. This is also one of the main differences between a joint tenancy and tenancy-in-common. The size of the interest may also be different, that is, one tenant in common can own a half while the others hold a quarter each.

Joint tenancy-in-common also differs in that whereas a joint tenancy has the four unities of possession, interest, time and title, a tenancy-in-common only has the unity of possession. A tenancy-in-common can be presumed where the other three unities are absent.

Another way in which a joint tenancy differs from tenancy-in-common, and this is the most relevant to the question, is that whereas in a joint tenancy there is the right of survivorship or *ius acrescendi*, in a tenancy-in-common, there is no such right. The right of survivorship in a joint tenancy means that a joint tenant cannot devise his interest in the land by will so his interest cannot be passed to his heirs. The last surviving joint tenant has the right to the entire parcel of land after the other joint tenants have died. In a tenancy-in-common, however, the tenant in common holds an undivided share in the property which can be sold or may be devised/passed to whomever the tenancy-in-common wishes to give in a will.

With respect to the Chang Fungs, the option to be recommended is a tenancy-in-common. There is no indication that there is any strife in the family but that is a real possibility with family arrangements concerning land. Given the structure of the Chang Fung family and the number of children of either parent who are not products of the marriage, the tenancy-in-common would allow each parent to devise their share of land giving consideration to the children who are not products of the marriage. If the property is purchased as a joint tenancy, the right of survivorship applies. This means that if Mr Chang Fung dies first, for example, Mrs Chang Fung would own the entire property in fee simple to the exclusion of the children. Therefore, Mrs Chang Fung would enjoy the fruits of the land during her lifetime and, if she so pleases, she could devise the land to her children excluding Mr Chang Fung's five boys who are not products of the marriage. A tenancy-in-common would allow all the children to benefit from their deceased parent's estate.

Question 6

This question focused on easement. Again, several candidates found the topic challenging. It seems much more preparation is needed in this area. The outline of an expected response is presented below.

Outline of Question 6

Definition of Easement: An easement is a right over the land belonging to another person (Re *Ellenborough Park*). For example, a landowner may wish to grant an adjoining landowner a right to pass or repass over his land.

Requirements for an Easement

There are four requirements for an easement:

1. There must be a dominant and a servient tenement as noted in *London Bienham Estates Ltd* v *Retail Parks Limited*. The easement must be connected to the land and not merely personal in nature. The dominant tenement is the land to which the right is attached while the servient tenement is the land over which the easement is exercised. The easement can be acquired even if the easement dominant owner is a lessee (*Thorpe* v *Brummitt*).

2. The dominant tenement and the servient tenement must have different owners. This is simply because a person cannot have a right over his own land. If the dominant and the servient tenements become owned by the same person the easement ceases to exist.

3. An easement must accommodate the dominant tenement. The easement must confer a benefit on the dominant tenement itself and must not be personal to the landowner (*Hill* v *Tupper*). Whether the easement benefits the dominant tenement will be determined by the purposes for which the dominant tenement is used. The easement must serve to make the dominant tenement a better and more convenient property. This means that the easement must increase the value of the dominant tenement and make it saleable. There must be some nexus between the two tenements but they need not lie next to each other.

4. The easement must be capable of forming the subject matter of a grant (*Copeland* v *Greenhalf*). This means that the right must be sufficiently defined, that is, it must not be too vague. This must not substantially deprive the servient owner of possession of the servient tenement, a right will not be recognized as an easement if it substantially deprives the owner of the land or if it amounts to a claim to joint possession of the servient tenement.

5. It appears that Kodilinye adds a fifth requirement for forming an easement. An easement must be negative from the point of view of the servient owner, that is, it must not involve the servient owner in any expenditure.

   A right cannot be an easement if it involves expenditure by the alleged servient owner. There are at least two exceptions:

   (a) Where there is an easement of fencing.
   (b) Where the parties have expressly or impliedly agreed that the servient owner is to be responsible for the maintenance.

   An easement may be required by any of the following methods:

   1. Statute: Statute/Legislation may provide for easements (*Wright* v *McAdams*).

   2. Express Grant: This is usually by deed, will or other written agreement with express words giving an easement to the owner of the dominant tenement (*McNanus* v *Cooke*). The owner of the servient tenement may expressly give the easement of the owner of the dominant tenement.

   3. Implied Grant: There are three categories of easements that may be implied in favour of the purchaser:

(a) Easements of Necessity: That is, without the easement, the land cannot be enjoyed at all.

(b) Intended easement : That is, to give effect to the common intention *(Wong* v *Beaumont Property Trust Limited)*

(c) Easement within the rule in *Wheeldon* v *Burrows* : This rule states the following:

(i) The easement needs to be continuous and apparent.

(ii) The easement must be a right used for a substantial period of time so that it can be seen or discovered, for example, a well-worn path.

(iii) The easement must be necessary to the reasonable enjoyment of the land.

(iv) The right must have been in use at the time of the conveyance.

4. **By Prescription:** Prescription is based on acquiescence by the servient owner in allowing somebody to exercise what amounts to an easement over his land for a long time without doing anything to stop him (*Dalton v Angus*). The requirements for prescription are that the long enjoyment must be:

(a) As of right: The enjoyment must not be by force, in secret or by permission (*nec vi, nec clam, nec precario*).

(b) Continuous: This requirement does not necessarily demand that the use be non-stop or continuous on a 24-hour basis, rather, the degree of continuity needed depends on the type of easement claimed.

(c) In fee simple: The user cannot ripen into an easement unless it is by or on behalf of a fee simple against another fee simple owner.

Paper 03 - Internal Assessments (IA)

Performance in this area has remained fairly constant over the years and this year a number of students presented interesting papers, demonstrating that they took the research component of the examinations very seriously, and applied themselves diligently.

A major concern, however, was that some students presented papers which appeared to have been hastily put together, not much thought being given to the requirements of the syllabus which state that the *Internal Assessment is an integral part of student assessment in the course covered by this syllabus, intended to assist students in acquiring certain knowledge, skills and attitudes that are associated with the subject* (emphasis supplied).

Despite the weaknesses evident in some papers, commendation must be given to those students whose work was evidently original, well-researched and where applicable, was accompanied by exhibits of the instruments they developed in conducting their research.

On the other hand, there were some papers which were lacking in originality and others which exhibited pictures which were inappropriate. Students are to be encouraged to use exhibits where these enhance their presentation, but must ensure that, while they attempt to include the realities, they must remain within the bounds of appropriateness.

Students are to be urged to observe the word limit and to observe the usual requirements for research, chief among them being to avoid plagiarism and to attribute to any source relied upon ensuring that a full bibliography is included.

It is recommended that in the preparation of their internal assessments, students pay close attention to the syllabus.