Examiner's report

F4 Corporate and Business Law (LSO)
December 2012

General Comments

The examination consisted of ten compulsory questions. Three of them were problem scenario questions. As usual, the examination was sufficiently testing to reveal those candidates who did not prepare well for the examination. However it did provide considerable opportunity to candidates to score high marks.

The vast majority of candidates attempted all ten questions, and there was little evidence of time pressure. However, many candidates left one or more questions unanswered. This appeared to be due to a lack of knowledge or poor examination technique, as opposed to time pressure.

The performance of candidates overall continued to be unsatisfactory with a large number appearing to be unprepared for the examination. However, there is clear evidence of a growing number of candidates performing satisfactorily.

The format does not help candidates who do topic spotting or question spotting. It demands that all candidates have to look at the syllabus, keeping in mind that all topics in syllabus have to be mastered. The old practice of selecting few topics and ignoring others simply cannot work. It also requires them to practise time management. The questions were clear in their demands and in line with the familiar pattern of the past examination papers. Many answers showed very superficial familiarity with the content of the course and the prescribed textbook.

The law examination is a technical examination and requires a good knowledge and understanding of the technical rules at the very least; problem scenario questions also require skills to analyse facts and then to apply the rules to the facts. Candidates and teachers should note that the problem scenario questions require much more in the way of analysis and application.

The overall result would have been considerably higher had candidates paid sufficient attention to the suggested answers to the past examination questions to get a feel of what is expected of them. The answers are available on the ACCA website; your course lecturer too could acquire them for you. Pay special attention to problem scenario questions. Candidates would do considerably better if they are asked to do mock examinations based on past question papers. Two or three such mock examinations would reveal where they have to improve upon and go a long way to improve their marks in the examination. Another suggestion is to ask the candidates to summarise the suggested answers to past examination papers in not more than 2 to 2 ½ pages. This should help them learn the quality of time management and to focus on what is asked in the question.

The key to marks lies in the breadth of knowledge of the leading cases. They are not many in any case. Candidates must also practise writing out the answers to questions; their prescribed textbook has many to choose from. This would give them the confidence and the ability to organise their thoughts. It was clear to the marker that the candidates on the whole did not prepare for the examination well, did not revise the syllabus and chose to ignore leading cases, as well as, key statutory provisions of the Companies Act. Too much guesswork and common sense were used to answer the questions. There is no substitute for hard work and thorough preparation.

A number of common issues arose in candidate's answers:

- Failing to read the question requirement clearly and therefore providing irrelevant answers which scored few if any marks.
- Inadequate time management between questions, some candidates wrote far too much for some questions and this put them under time pressure to finish remaining questions.
- Not learning lessons from earlier examiner's reports and hence making the same mistakes.

Specific Comments

Question One

This question asked candidates to explain the doctrine of the separation of powers as embodied in the Constitution of Lesotho. The Constitution of Lesotho establishes the three organs of the state, namely the legislature, the executive and the judiciary and defines their relationship *inter se*. It embodies the doctrine of separation of powers in a modified sense. In Lesotho, the legislature and the executive are not really separate because the Prime Minister and all government ministers are the members of legislature as well. No candidate discussed this.

The separation of powers doctrine imposes on the three organs of the state a degree of overlapping responsibility, a duty of interdependence as well as independence, in the absence of which it would not be possible to govern a state effectively. The judiciary, of course, is separate from the other two. The doctrine of separation of powers is essential to the role of the Constitution as a source of law and a protector of human rights. Many candidates referred to *Swissborough* case (1994) and few State v Buzani Dodo (2001) as well but overall, the answers were unsatisfactory and incomplete.

Many candidates chose to discuss the division of powers between shareholders and directors and the general meeting. Many others thought that the executive is the Senate. Quite a few just narrated the list of human rights. It is important that the candidates read the question carefully before attempting to answer it.

Question Two

This question tested candidates' knowledge and understanding about the techniques courts use to determine that an agreement has been reached between the two parties.

Agreement refers to a meeting of minds of two or more parties. However, for legal purposes there must be proof of this agreement. What the parties have said and done will often be used to conclude if there has been an agreement. So long as the parties *appear* to have agreed on the terms of the contract, there is, in law, a contract even though the parties to that contract may not actually be in agreement. The court places itself in the position of a reasonable person to find out if an *apparent* agreement was made. Accordingly, so long as the parties appear to have agreed on the terms of the contract, there is, in law, a contract, even though the parties to that contract may not actually be in agreement. What is important is the manifestation of their wills and not the expressed will.

Most of the candidates chose to discuss offer, acceptance, *justa causa,* capacity to contract and the like. Only a minority of candidates discussed the principle of quasi-mutual consent and a case like Pieters & Co v Salomon (1911) to illustrate the principle.

This principle operates only in favour of a party whose understanding and actions have been those of a reasonable person. However it is not necessary to establish that the person taking advantage of the principle has suffered any prejudice. The justification for the principle is that without it trade and commerce would be very difficult. This aspect of the answer was not discussed by any candidate.

Question Three

This question asked the candidates to explain whether an offeror may expressly or impliedly make his offer irrevocable for a fixed time.

Very few candidates answered this question correctly. Many candidates chose to discuss conditional contracts and general offers. This suggests that perhaps the candidates chose not to prepare this topic for the examination.

An irrevocable offer usually results in an *option*. An option is an offer to contract, whereby one party (the grantor) undertakes to keep an offer open for acceptance for a certain period by the other party (the grantee). In other words, in an option contract, the offeror expressly or impliedly makes his offer irrevocable for a fixed time. An option contract consists of two offers: (a) An offer to enter into the main contract; and (b) an offer to keep the offer (a) open for acceptance for a certain period. A contract of option results if the offer (b) has been accepted. The offeror (grantor) is contractually bound to keep his offer open, and if he breaks this contract of option by disabling himself from performing it or by expressly or impliedly repudiating it, he is liable for damages for any loss that the grantee may suffer as a result. The grantee is also entitled to obtain an interdict restraining the grantor from breaking his contract of option. *Boyd v Nel* (1922) is a good example and was expected in candidate's answers.

A large number of candidates chose not to discuss the option contract. Only a small minority discussed option contracts but very superficially. Very few referred to the *Boyd's* case (1922).

Question Four

This question required the candidates to discuss when pure economic loss can be recovered in the law of delict.

Courts are reluctant to impose delictual liability for pure economic loss because it may allow plaintiffs to claim losses from defendants of unascertained amounts for an unascertained period in unascertained situations. Pure economic loss could be caused by negligent misrepresentations, as well as by negligent conduct. As regards negligent misrepresentations the leading case is *Administrator, Natal v Trust Bank (1979)*.
A legal duty to furnish correct information would lie if the defendant knew, or subjectively foresaw, that the plaintiff would rely on it. In short, the defendant's legal duty, and the consequent liability, is restricted to plaintiffs whose identity is known to him. Only in such cases, if the defendant furnishes incorrect information, does he act wrongfully. In addition, to be liable in delict, he should have also acted negligently, that is, he should not have acted the way a reasonable person would have acted in similar circumstances. Only very few candidates discussed this.

As regards negligent conduct causing pure economic loss, the leading case is in *Coronation Brick (Pty) Ltd v Strachan Construction* (1982). Various factors play a role in determining the reasonableness of the defendant's conduct. The most important factor is the subjective foreseeability, rather than reasonable foreseeability of causing damage to the plaintiff that determines the existence of legal duty in law. Other factors that may play a role are: whether practical steps could have been taken by the defendant to avert the economic loss. Again very few candidates discussed negligent conduct.
A vast majority of candidates thought that this question invites them to discuss generally the elements of a delict and they wrote many pages on that. Candidates have to focus on what is asked in the question rather than attempt to demonstrate what they know. This does not help. Out of all the questions candidates scored lowest in this question.

Question Five

This question asked candidates to discuss the liability of an ordinary partner for the debts of a partnership registered under the Partnerships Proclamation 1957.explain the meaning of actual authority and ostensible authority.

The 'partnership debts' are, in law, the debts in *solidum* of all the partners: see *Michalow NO v Premier Milling Co Ltd* (1960). Partners are jointly and severally liable, each for the whole of the debts of the partnership, provided the debts were incurred with the authority of the partnership, and in its name. A vast majority of candidates discussed this well and fully.

The rule of practice does not allow an individual partner to be sued personally on a partnership debt while the partnership is in existence. A creditor must proceed against the partnership and its assets are used to pay for partnership debts in the first place. Only when they are found to be inadequate is a creditor allowed to proceed against the private assets of an individual partner: see *Muller v Pien*aar (1968). Only a very small minority discussed this.

This rule does not apply if a partnership has been dissolved. A creditor of a dissolved partnership can sue the members of the partnership jointly and severally for the partnership debt. He can execute the judgements on the assets of an individual partner or partners, as the case may be: see *Lee v Maraisdrif (Edms) Bpk* (1976). Only one or two candidates discussed this.

Question Six

This question required the candidates to discuss the legal position of the managing director in a company in relation to the board of directors under company law.

The real power within a company lies with the board of directors: See Article 79 of Table A. The general meeting retains ultimate control, but only through its powers to amend the articles and to remove the directors and substitute others more to its taste. Powers are conferred on the directors collectively as a board and they can only be exercised at a board meeting. However, directors may entrust to, and confer upon, a managing director any of the powers exercisable by them upon such terms and conditions and with such restrictions as they may think fit. Either collaterally with, or to the exclusion of, their own powers, the directors may from time to time revoke, withdraw, alter or vary all or any such powers. A managing director may be appointed on terms that he shall only perform such duties as are from time to time assigned to him by the board and that he shall conform to their orders and instructions. This is a common practice: see Article 108 of Table A. If the service agreement with a managing director purported to confer exclusive powers upon him without expressly reserving a right of

supervision, then the board may not exercise those powers during the subsistence of the agreement. In such a case, the managing director is substituted for the directors, and it is he who runs and administers a company. When that happens, then there is a third organ of power in the person of the managing director. The general meeting may remove both directors and the managing director. The board too can remove the managing director from the appointment which it has conferred upon him.

Candidates chose to use the provisions of the Companies Act 2011 to answer this question rather than the Companies Act 1967. Most discussed the duties of directors generally under the Companies Act 2011 at great length and referred to various cases. However the question did not require it. Many thought that the managing director is appointed by election by the shareholders. Almost all candidates performed unsatisfactorily in this question. This could have been avoided had they focussed on what was asked in the question. Perhaps, this was one of the topics candidates chose not to prepare for the examination.

Question Seven

This question required the candidates to explain the meaning and effect of 'winding up' in company law, Part (a) was answered well. Winding up is the *process* whereby the life of the company is brought to an end and its assets realised and distributed to its members and/or creditors. However, very many candidates confused the "process" of winding up with the "consequences" of winding up and chose to limit their answer to the latter.

As regards part (b), most candidates chose to answer the question in terms of Companies Act 2011 rather than the Companies Act 1967. Candidates should ensure they read the examinable documents on ACCA's website for the examination carefully.

Question Eight

This question required the candidates to distinguish contracts *of* service from contracts *for* services and then apply them to the problem scenario. A very large majority of candidates answered this question well. They referred to and applied various tests competently and were rewarded with marks for their efforts. However, a minority of candidates, perhaps due to lack of preparation, did not refer to or apply any of the tests and answered the question using their common sense. This does not help and a thorough revision of all the topics is the only guarantee of success.

Question Nine

This problem scenario question was based on the well-known case of *Felthouse v. Bindley* (1862). A large number of candidates answered the question competently. Indeed, this was one of the highest scoring questions that the candidates answered. Only a small minority chose to answer this question in terms of the postal rule and lost an opportunity to score high marks.

Question Ten

This question required the candidates to discuss a number of matters relating to the conduct and business of company meetings.

The first part of the question dealt with the statutory requirements which need to be satisfied in order to call a meeting of shareholders to change the authorised share capital and the name of the company. This part also required a discussion of the required resolutions to give effect to the proposed changes. An extraordinary general meeting to effect the changes in terms of Table A, regulation 49, with a minimum of 21 days of notice, by virtue of section 100 Companies Act 1967, was required. Under section 63 Companies Act 1967, an alteration to

the capital of a company, if allowed by the company's articles, requires passing an ordinary resolution in a general meeting. To change the name of a company, a special resolution is required. (section 106 Companies Act 1967). Almost all the candidates chose to answer this question in terms of the Companies Act 2011.

The second part of the question required the candidates to advise a majority shareholder how he could remove four directors of the company. Sam could make use of section 106 Companies Act 1967 to put the matter on agenda. By virtue of section 146 Companies Act 1967, a company may, by ordinary resolution, remove a director before the expiry of the director's period of office. Under regulation 53 of Table A, a quorum for meetings is fixed at three members present in person. If the directors failed to attend the meeting Sam could make use of section 101 Companies Act 1967 and ask the court to direct that one member present in person or by proxy shall be deemed to constitute a meeting. All candidates chose to answer this question in terms of Companies Act 2011.No candidate answered this part of the questions satisfactorily.