

Examiner's report

F4 Corporate and Business Law (MLA)

June 2014



General Comments

The examination paper consisted of ten compulsory questions, all of which had 10 marks each. A limited number of candidates did not attempt all of the questions. In some cases, candidates left one or a part of a question out while there were a small number of others who left more than one question out. This does not appear to have been due to time pressure but due to lack of knowledge of the subject-matter posed in the relative questions. From an analysis of the answers given, the majority of candidates adopted good time management skills allocating an equal amount of time to answering each question as in the majority of cases appropriate detail was given and the length of the answers given were commensurate to the mark allocation of each part of the question.

While with respect to most questions, one concludes, from the answers given, that candidates did read the questions well and did identify the requirements of each part of the question given, and this can be said for many of the questions in Section A in particular questions 1, 3 and 5. With respect to questions 2 and 4, candidates could have answered the questions more directly. For question 2, for example, candidates were expected to discuss in detail the requisites of causa and subject matter, there were several candidates who dwelt on all the requisites and gave the same detail with respect to all requisites. Once again with respect to question 4 there were several candidates who first described all the characteristics of a partnership and then those of a company when in fact the question required candidates to draw out the differences between both types of entities.

The report will begin with some general brief comments on the overall performance of candidates in this session before going on to look at the questions in the paper in detail. One notes that both positive and negative aspects of performance are given so as to enable candidates to learn from past performers and performance.

In this session there were some high performers, but the large majority of candidates scored average marks and the same number of low performers as in previous sessions. As indicated in previous reports, with more studying and with candidates not shying away from expressing their opinion in applying their knowledge to given facts in the questions in Section B would see higher marks being achieved.

Some general indications of good practice to follow:

- candidates must be well prepared for the exam - on all topics and not on what they consider the 'most important';
- candidates need to manage their time effectively;
- candidates must read carefully and understand the requirements of each question;
- keep in mind that the number of marks that the examiner allocates to each part of the question is indicative of the detail which candidates are required to go into;
- provide concise and complete answers;
- candidates should indicate the question number in the paper on each page of the respective reply;
- start each question on a new page;
- general essay answer format should not be used for problem questions as these will contain little information relating to the specific issues raised in the problem question.



Specific Comments

Question One

Question one required candidates to explain how the adoption of the European Convention Act strengthened the protection of human rights in Malta. The European Convention Act, 1987, was the Act which rendered the European Convention on Human Rights an integral part of Maltese law. In view of the fact that the Maltese legal system is based on dualist principles, any international treaty cannot be said to form part of domestic law until it is domestically incorporated by an enabling law.

There are two main ways in adoption of the European Convention Act could be seen to have strengthened the protection of human rights in Malta. Incorporation of the Convention was essential and necessary, in that, it provided broader rights for the individual and also provided for the possibility that decisions awarded in Strasbourg be enforced locally, after satisfying the condition that prior to availing oneself of international recourse, all local remedies be exhausted. While most candidates referred to first way in which the Act strengthened human right protection in Malta there were several who unfortunately did not make reference to the right which all Maltese citizens gained to apply to the European Court of Human Rights.

Question Two

Question two was also a one-part question. This question referred to the essential requirements for a valid contract requiring candidates to explain the requirements of *causa* and subject matter.

Much debate has taken place over the true nature of the requisite of *causa*. The most acceptable seems to be that which relates to the consideration of the reciprocal performance in the case of onerous contracts and the freedom to perform in the case of gratuitous contracts, as well as the unlawful motive which shall render any contract void. The object or subject-matter of a contract is that which is given rise to by means of the contract, and since the contract aims at creating, regulating or dissolving an obligation or at transferring a real right, it is this which should constitute the subject-matter of contracts. On the other hand, anything may form the object of contracts, including the act of man whether positive or negative. All things may therefore form the object, whether movable or immovable, corporeal or incorporeal, present or future, and even the use and the possession of a thing may be the object of a contract just as the thing itself. Even future things may form the object of a contract.

Many of the answers to this question were satisfactory and provided sufficient detail.

Question Three

This question was also a one-part question which dealt with part-time employment. A whole-time employee is one who is deemed to be in whole-time employment by any recognised conditions of employment. On the other hand, a part-time employee is defined as an employee whose normal hours of work, calculated on a weekly basis or on an average over a period of employment of up to one year, are less than the normal hours of work of a comparable whole-time employee and who is not a whole-time employee with reduced hours

The Employment and Industrial Relations Act, 2002 empowered the Minister to issue Regulations on certain employment issues, one of which is part time employment, through the Part-Time Employees Regulations, 2002 (L.N. 427 of 2002, as subsequently amended). The purpose of these regulations is: (i) to provide for the removal



of discrimination against part-time workers and to improve the quality of part-time work, and (ii) to facilitate the development of part-time work and to contribute to the flexible organisation of working time taking into account the needs of employers and workers.

Many candidates gave satisfactory answers to this question and based their answers on the cardinal fact that an employer cannot treat a part-time employee in a less favourable manner than a whole-time employee. Higher marks could have been achieved in this question had candidates made more reference to the detail found in the Regulations.

Question Four

Question four was also a one-part question and referred to the differences between a commercial partnership and a limited liability company. What was missing from nearly a significant number of answers was the definition of a commercial partnership which provides under Article 4 of the Companies Act, 1995 that a commercial partnership is a partnership en nom collectif, a partnership en commandite (or limited partnership) or a company and that all enjoyed a separate legal personality.

Many candidates described the characteristics of a partnership and then those of a company without comparing the characteristics which were required. Despite this most candidates achieved good marks in this question.

Question Five

This question dealt with a fundamental characteristic of a company, namely limited liability. The fundamental characteristic of corporate structures is that the company is a single entity distinct from its members. It is capable of enjoying rights and of being subject to duties which are not the same as those enjoyed or borne by its members. In view of this, a corporate personality is often described as an artificial person in contact with natural persons. Article 5 of the Companies Act provides that a commercial partnership has a legal personality distinct from that of its members and shall continue to have such until the name of the partnership is struck off the register and shall therefore cease to exist.

The vast majority of candidates gave satisfactory answers to this question and supported their answers by making reference to the pertinent case law on the subject matter.

Question Six

This question was a one part question dealing with the reduction of the share capital of a company. The reduction of share capital is a more complex procedure than the procedure for the increase in share capital, principally due the consequences which it could bring about. Since a reduction of the unissued authorised capital is deemed to be a diminution of share capital, it is submitted that we are here talking of the reduction of the issued share capital of the company. Since a reduction in capital necessarily brings about an alteration to the memorandum of the company, an extraordinary resolution of the shareholders is required to put the reduction into effect. Where there are different classes of shares, the decision by the general meeting concerning a reduction in the issued share capital shall be subject to a separate vote for each class of shareholders whose rights are affected by the reduction, and for every separate vote taken the same majority shall be required as though the shares are not divided into different classes. The latter was mentioned by only a small number of candidates.



Similarly, while reference was made by most candidates that a three month period had to elapse from publication of a notice in the Government Gazette placed by the Registrar of Companies for the reduction in capital to take effect, very few candidates mentioned the limitation to this requirement namely where the reduction is to offset losses.

Answers to this question were however satisfactory clearly showing that candidates were aware of the procedure to be followed in order to reduce the share capital of a company.

Question Seven

Question seven again was a one-part question dealing with the role of the promoter. It was interesting to note how candidates answered this question albeit there are no statutory provisions to make specific reference to.

The term 'promoter' has been widely interpreted to include several persons and since this is not legislatively defined recourse has to be had to case-law. In one UK case, the judge defined it to include 'one who undertakes to form a company with reference to a given project and to set it going, and who takes the necessary steps to accomplish the purpose.' Since before its incorporation a company cannot be said to exist, there must be somebody to act on its behalf. From a review of UK case-law, it can be contended that the promoters stand in a fiduciary relationship with the company and the importance of this rule is seen in its consequences. It is held that there are three basic fiduciary duties which a promoter owes to the company, namely:

- (i) a duty not to make, directly or indirectly, any secret profit at the expense of the company;
- (ii) once promotion of the company has started, the promoter must account to the company for the benefit of any subsequent contract for the acquisition of property which he intends to sell to the company, since this belongs in equity to the company which can insist on taking it at cost; and
- (iii) a promoter must not exercise undue influence or fraud and must not hide his interest through nominees with unlawful intentions.

The vast majority of candidates gave very satisfactory answers to this question providing adequate detail and making reference to the principles arising out of UK case law on the subject matter.

Question Eight

Question eight was a three-part question dealing with capacity under contract law. The facts referred to a person being of a particular age in order to be deemed capable to enter into particular transactions.

The first part of the question concerned what action could be taken by the creditors, namely to place the company into liquidation and follow the procedure at law with respect to a creditors' voluntary winding up. Most candidates replied to this part of the question satisfactorily.

The second part required candidates to explain what action could be taken against Andrew personally. The Companies Act provides for two principal offences for which directors can be held liable in the case where the company continues to trade when in financial difficulties and such company is subsequently dissolved, namely fraudulent and wrongful trading. The main differing feature between the two offences is the intention to defraud which must be found to exist in order to hold a person liable for fraudulent trading. Candidates did make reference to these offences and opined which of the two could apply to the given facts.



The last part of the question referred to consequences which would have been suffered by Andrew if the creditors were successful in their claim. Where a person is held liable for wrongful trading the court may sentence them to make a payment towards the company's assets in such amount as the court thinks fit. A significant number of candidates answered this part of the question correctly.

Question Nine

This question is divided into two parts and deals with aspects of contract law, namely offer, invitation to treat and acceptance.

The first part of the question dealt with differentiating between an offer and invitation to treat. An offer or proposal is a unilateral act as it is made by the proposer to one or more contracting parties or to the public at large. It is the manifestation of the will and intention of one of the contracting parties to enter into an obligation with one or more parties. An offer has to be distinguished from an invitation to treat where a person is not considered to have made an offer but merely expresses themselves to be ready to consider any offers that may be made. Due to the completeness of the offer made as shown above, John made an offer to the public and not an invitation to treat. While many candidates were able to differentiate between an offer and invitation to treat many were not clear in determining whether the given facts gave rise to a valid offer.

The second part of the question referred to the acceptance of the offer and required candidates to outline the characteristics for a valid offer. Most candidates were able to outline these characteristics but many failed to conclude that there was acceptance and support their conclusions with reasoned arguments.

Question Ten

The last question was divided into three parts.

The first part deals with the role of the shadow director. A director is said to include any person occupying the position of director of a company by whatever name they may be called, carrying out substantially the same functions in relation to the direction of the company as those carried out by a director. The Companies Act, 1995 does not provide for a definition of a shadow director but only extends liability for certain offences to such persons in accordance with whose directions or instructions the directors are accustomed to act. The conclusion reached by most candidates was that Simon could be deemed a shadow director. Where answers lacked clarity was in the type of action which could be taken against Simon once it is determined that he is a shadow director

The second part of the question dealt with the issue of disqualification orders. Disqualification orders can be considered as a measure which was introduced into our law in order to raise standards of officers of local companies rendering them more accountable for their actions. In terms of local law, the court may, upon the application of the Attorney General or the Registrar, make a disqualification order against any person who is found guilty of an offence under the Companies Act, other than an offence punishable only with a fine, or who has infringed any requirement of the same legislation with the consequence that the person becomes liable to contribute to the assets of the company or becomes personally liable for the debts of the company. Most answers to this part of the question were satisfactory as were answers to the last part of the question which referred to the termination or otherwise of Simon's contract of employment.