

Examiner's report

F4 MYS Corporate and Business Law

December 2012



General Comments

The examination consisted of ten compulsory questions. As usual, questions 1 to 7 were knowledge-based questions while questions 8 to 10 were problem-based questions requiring candidates to demonstrate the ability to identify legal issues and apply it to given situations. Candidates were reasonably well prepared for the examination. On the whole the performance of the candidates was satisfactory.

Candidates displayed adequate understanding of what the questions required. The questions were clear and there was no ambiguity which was likely to cause candidates to misinterpret any question.

The following recurring weaknesses were found:

- **Answers too brief:**

Although there has been a steady improvement over the years, there were still a number of candidates who failed to give full answers. Giving very brief answers or point form answers will not result in high marks. Candidates are reminded that questions must be answered clearly and in full sentences in order to achieve good marks.

- **Failure to answer all parts of a question or the required number of questions:**

This point has also been highlighted before. A small number of candidates did not answer all parts of a question. This also resulted in lower marks. Candidates are advised once again to attempt all parts of a question. Many candidates did not attempt all the ten compulsory questions indicating that they were not fully prepared for the examination.

- **Spotting:**

Spotting questions still remains an area for concern. Some candidates answered some questions very well while not being able to give adequate answers to other questions. This indicates that these candidates concentrated on certain topics while ignoring other relevant topics. This commonly happens when candidates do not have adequate time to prepare fully for the examination. Invariably such selective studying will not be beneficial to the candidate. As questions can come from across the syllabus, candidates are reminded not to study by spotting topics.

- **Time management**

There has been a gradual improvement in time management by the candidates. Nevertheless, it still remains an area of concern. Candidates are reminded once again of the importance of time management in order to do well in the examination. Some candidates answered the first few questions very well but the later answers were too brief indicating that they were short of time to complete the paper. As a consequence of this, the total marks obtained by the candidate were lower than what could have been achieved if the candidate had spaced out their time and was able to answer each question adequately. Candidates are advised to divide their time properly for each question so as to achieve better results.

- **Reliance on past years questions**

Candidates are reminded (as before) that past year questions and answers provide a very useful guide in their preparation for the examination and they could much improve their results by constantly referring to them. However, candidates are also reminded that questions can come from any part of the syllabus and the fact that there have been no questions on particular topics or sub-topics in previous examinations does not mean that

there would be no question on that topic or sub-topic in future examinations. Candidates must always study across the syllabus to be fully prepared for the examination.

Specific Comments

Question One

This question on the Malaysian legal system tested the candidates' knowledge on three rules of statutory interpretation, namely the literal rule, the golden rule and the *ejusdem generis* rule. Candidates appeared to be more knowledgeable on the literal rule and the *ejusdem generis* rule and obtained satisfactory marks. However, many were not very clear about the golden rule and gave confusing answers resulting in them not gaining more marks.

Question Two

This question, on employment law, contained two parts. Part (a) required the candidates to state four ways in which a contract may be terminated under the Employment Act 1955 while part (b) required them to state the period of notice required to be given by employees to their employer if they wished to terminate their contract of service.

This question was very well answered with many scoring almost full marks. For part (a), the majority of the candidates indicated sound knowledge of the ways in which contracts of service may be terminated with many of them being able to refer to the relevant sections. Likewise for part (b) most of the candidates were able to state accurately the relevant periods of notice as stated in the Employment Act 1955. Similar questions have been asked in the past and candidates showed clear familiarity with the law in this area. Only very few candidates displayed lack of knowledge of the law in this area.

Question Three

This question was on partnership law. It contained two parts. Part (a) which carried 2 marks required the candidates to define a partnership. Part (b), which carried 8 marks required the candidates to explain the main characteristics of a partnership.

This question was reasonably well answered. For part (a) most candidates were able to refer to the Partnership Act 1961 and state the definition accurately. Others used their own words to describe a partnership and were able to obtain satisfactory marks.

For part (b), many candidates gave very accurate answers by discussing all the four main elements of a partnership based on the definition in s 3 Partnership Act 1961. Many also referred to relevant case law enabling them to obtain very high marks. However, some candidates made a comparison between a partnership and a company stating the differences between the two mediums of business enterprise. This was not what was expected from them. Nevertheless they were still awarded some marks where the comparison was correctly done.

Question Four

This question on contract law, which contained three parts, tested the candidates' knowledge on three essential elements of a contract.

Part (a) required the candidates to explain a proposal. Part (b) required them to explain an acceptance and part(c) required them to explain consideration.

This question was well answered. For part (a) most candidates were able to explain accurately what a proposal is. Some answers referred to section 2(a) Contracts Act 1950. Some also distinguished the offer from an invitation to treat and were able to obtain higher marks. Part (b) was equally well done. Candidates were generally able to explain the element of acceptance with reference to the Contracts Act 1950. Some gave relevant examples to illustrate their answer. Some candidates were able to distinguish the acceptance from a



counter-offer. Part (c) was not as well answered as the other two parts. Although many gave sound illustrations of what amounts to consideration and obtained satisfactory marks, they did not explain the concept of consideration as accurately as proposal and acceptance. On the whole, however, this question was very well answered with many candidates obtaining high marks.

Question Five

This question on company law contained two parts. Part (a) tested the candidates' knowledge on the duties of a promoter while part (b) tested them on their knowledge of the remedies available to a company against a promoter for breach of their fiduciary duties.

Part (a) was not answered as well as expected. Candidates were expected to mention that a promoter is in a fiduciary position in relation to the company they form and that they owe fiduciary duties. This includes the duty to be honest, duty not to make secret profits and duty of disclosure to either an independent board of directors or to all the shareholders. Many candidates did not mention the important duty of disclosure although they did mention fiduciary duties generally. This resulted in them not obtaining higher marks for this part.

Part (b) was clearly better answered. Most candidates showed competent knowledge of the three remedies of rescission, recovery of secret profit and damages for breach of fiduciary duty. Many achieved very high marks for this part.

On the whole this question was more than satisfactorily answered.

Question Six

This question on company law relating to maintenance of capital contained two parts. Part (a) tested the candidates' knowledge on the rationale for the rule that a company cannot purchase its own shares while part (b) tested them on their knowledge of the exceptions to the rule that a company cannot purchase its own shares.

Part (a) which carried three marks was not answered as well as expected. Candidates were expected to state that the rationale behind the rule was primarily to protect creditors and secondarily to protect shareholders. Many candidates were not able to state so. A large number merely stated that the rationale was to maintain capital and could not get satisfactory marks.

Part (b) which carried 7 marks was also not well answered. Candidates were expected to discuss s 67A Companies Act 1965 in particular. In addition they could also mention s 181(2) (c) and s 61 Companies Act 1965. However, many candidates mentioned the exceptions in s 67(2) which is not the right answer. The exceptions in s 67(2) allow a company to give financial assistance for the purchase of its own shares, but do not allow a company to purchase its own shares.

Question Seven

This question on company law, which contained three parts, tested the candidates' knowledge on company charges.

Part (a) required the candidates to explain and distinguish between a fixed charge and a floating charge. A few candidates gave sound answers with reference to case law. The majority, however, did not clearly distinguish between the fixed charge and the floating charge.



Part (b) was also not well answered.. Candidates were required to state three types of charges that require registration. Many candidates were only able to state two, namely the fixed charge and the floating charge. Thus they were not able to obtain the full three marks for this question.

Part (c) required the candidates to state the consequences of non-registration of a registrable charge. Candidates were expected to state that under the Companies Act 1965, non- registration would result in the charge becoming void against the liquidator and any creditor of the company. Many candidates were not prepared for this part of the question and either did not attempt it or gave unsatisfactory answers.

On the whole this question was not satisfactorily answered.

Question Eight

This problem-based question on company law, which contained two parts, tested the candidates' ability to identify and apply the law relating to wrongful trading and fraudulent trading as well as lifting the veil of incorporation. Part (a) related to criminal liability as well as personal liability for wrongful trading while part (b) related to criminal liability as well as personal liability for fraudulent trading.

Candidates were expected to display knowledge of s 303(3) and 304(2) Companies Act 1965 in relation to wrongful trading and s 304(1) and (5) Companies Act 1965 in relation to fraudulent trading.

This question was not answered as well as expected. Many candidates were unable to identify the issues. A large number mistook wrongful trading for fraudulent trading and vice versa. Many candidates simply stated that there would be no criminal offence committed or personal liability imposed where the directors did not have the intention to defraud, whereas for wrongful trading (which does not require an intention to defraud) s 303(3) clearly states that it would amount to an offence and by s 304(2) personal liability can be imposed by the court upon those who are knowingly party to such fraudulent trading.

Candidates are advised to read the suggested answer to have a clearer understanding of the issues and the law involved in this question.

Question Nine

This problem-based question on company law tested the candidates' knowledge and ability to apply the law on the fiduciary duty of directors to avoid conflict of duty and personal interest and, in particular, the duty not to usurp a corporate opportunity.

. The candidates' performance was inadequate.

Candidates were expected to generally discuss the fiduciary duties of directors with reference to decided cases and examples as well as the Companies Act 1965. They were then to apply the law to the given problem and conclude whether, the director, Ah Kow had indeed breached his fiduciary duties to his company, SEB. If so they were expected to advise SEB whether it could claim the profit made by Ah Kow through the company, AKESB.

There were some sound answers but the majority were very average or below average. Many candidates did not go into a discussion of fiduciary duties generally and the consequences of breach of such duties. A number of candidates went straight to the point stating that since Ah Kow had obtained the consent of the managing director, Tan Sri Kayah, he had made the necessary disclosure and obtained the necessary consent, SEB could not claim the profit made by Ah Kow. Not many candidates identified the point that Tan Sri Kayah's consent was not sufficient and that the approval of the members in a general meeting was necessary.

A number of candidates explained the duties of directors very well but incorrectly concluded that SEB could not claim the profit because of the approval given by Tan Sri Kayah. Some candidates concluded that Datuk Wang



Wang (who had replaced Tan Sri Kayah) could claim the profit from Ah Kow. This was of course incorrect, as the question itself was whether SEB could claim the profit made by Ah Kow.

Candidates are advised to read questions carefully so that they give advice to the correct parties.

Question Ten

This problem-based question on contract law contained two parts. Part (a) tested the candidates' ability to identify and apply the law relating to terms of a contract, in particular, conditions and warranties. Part (b) tested their ability to identify and apply the law on exclusion clauses.

On the whole this question was satisfactorily answered.

In relation to part (a) most candidates were able to identify and explain the issue of conditions and warranties. The larger number of candidates correctly concluded that the wrong tint and alarm system only amounted to breach of a warranty, thus entitling Amarjit to the remedy of damages but not the remedy of rescission. However, there were a number of candidates who came to the incorrect conclusion that it amounted to a breach of warranty.

In relation to part (b) most of the candidates were able to identify the issue of exclusion clauses and correctly state the law. This earned them some marks. The question also expected the candidates to consider the application of the *contra proferentem* rule to exclude the operation of the exclusion clause. A number of candidates failed to consider this point which would have helped them arrive at the correct conclusion. Overall, the majority achieved satisfactory marks for this question.