Examiner's report

F4 Corporate & Business Law (BWA)
June 2009

General Comments
There is a need for tremendous improvement in examination technique and communication skills. There were too many candidates who were inadequately prepared to sit this paper. The question report below considers the candidates' performance in more detail.

Specific Comments

Question One
This question invited the candidates to explain the distinction between particular terms in relation to the doctrine of judicial precedent in the Botswana legal system. The candidates' answers indicate that they had an idea of what the doctrine of judicial precedent is about and the distinction between *ratio decidendi* and *obiter dictum*. However the majority of the answers were incomplete when it came to explaining the distinction between reversing, overruling, and distinguishing. Distinguishing is the main device used by the judiciary where they want to avoid following an otherwise binding precedent. The majority of candidates were unable to articulate this procedure.

Question Two
This question invited candidates to state the consequences of breach of contract generally and of repudiation in particular. The question was inadequately answered. Some candidates' answers indicated that they satisfactorily understood what amounts to breach of contract but these answers contained nothing on repudiation.

Question Three
The question asked candidates to discuss the essentials of a partnership. These essentials relate to those features which are unique to the partnership agreement and which distinguish it from other types of agreements. These are contribution: profit as object; and joint benefit. The candidates were unable to state and explain these essentials.

Question Four
This question required the candidates to discuss the fiduciary duties AND the duties of care and skill, which **members** of **close companies** owe to their companies.

Unfortunately all candidates treated the question as if it dealt with the duties of *directors* of ordinary *registered companies*. That misinterpretation was fatal. The candidates were totally unaware that the Companies Act 2003 in Part XIX has introduced a new type of company known as a close company for utilization by small, medium and micro enterprises (SMMEs). Such a close company has no directors but only members instead. Section 264 (2) sets out the fiduciary duties of members.

The candidates' failure to define a close corporation and the confusion of directors' duties with members' duties indicates very clearly the lack of preparedness on the part of the candidates.

Question Five
This question required the candidates to consider two alternative categories of companies: those limited by guarantee and those limited by shares. The main difference relates to limited liability. In a company limited by shares the liability of the **shareholders** is limited to the amount of money unpaid on their shares. Once their shares are fully paid, they are under no further liability to the company or anyone else: *Salomon v Salomon* (1897). See also s.91 of the Companies Act 2003 which codifies the concept of limited liability and amplifies it comprehensively.

In a company limited by guarantee, the liability of the **members** is limited to the amount they have **guaranteed** to pay when the company is in liquidation. Companies limited by guarantee are not very common and are usually used as a vehicle for charitable or quasi-charitable purposes.

The majority of the candidates were totally unable to accurately articulate the difference between the two types of company. In fact, they were totally unaware of the company limited by guarantee. None of the candidates referred to section 91 of the Companies Act 2003.

Question Six
The question invited candidates to consider the meaning and effect of winding up in company law and the all important distinction between voluntary winding up and compulsory winding up. There were a few satisfactory answers. Winding up is largely regulated by statute. The candidates were on the whole unable to refer to relevant legislation especially section 409 of the Companies Act (voluntary winding up) and section 369 (compulsory winding up).

Question Seven
This question was the most inadequately answered. The question required candidates to explain the term money laundering and how such activity is conducted and to explain how the Proceeds of Crime Act 1990 seeks to control money laundering. The candidates had no knowledge at all of what money laundering is under the law and were totally unaware of the existence of the Proceeds of Crime Act 1990. As is the case with the other new areas of the syllabus (e.g. insider dealing and corporate governance), the candidates' answers indicated that they are not yet ready for the examination in such areas. As I have indicted before on numerous occasions, the candidates must be thoroughly instructed and prepared to answer questions on any aspect of the new syllabus. If they are unprepared and they collapse and fail to answer one or two questions, that will prove fatal since all questions are compulsory.

Question Eight
This was a traditional question on contract dealing with offer, counter-offer, acceptance and the effect of silence. The question was generally well answered. This was familiar territory for most candidates as it always is for all individually studying law at one stage or the other in their professions. Several candidates identified the issues, referred to relevant authorities, and arrived at the correct conclusions.

Question Nine
The question required candidates to analyse a problem scenario and explain and apply the law relating to directors' contracts with companies and the law relating to insider trading. Question 9(a) was well answered because once again this is familiar territory. However question 9(b) was not well answered. The candidates' answers exhibited a lack of knowledge of the law regulating insider dealing in Botswana. The answers were inaccurate and tentative. They showed that the candidates were not comfortable dealing with issues of insider trading.

Question Ten
This question tested the candidates' understanding of the rules that govern dismissal in employment law. The question was on the whole satisfactorily answered. Several candidates were aware of the principle in Botswana employment law that a dismissal must be both substantively and procedurally fair. Morena and Kgabo's conduct did not warrant summary dismissal. Both men had clear driving records and the accidents were minor ones. Accordingly, both dismissals were substantively and procedurally unfair. Several candidates arrived at the right conclusion in this regard.