Examiners' report

F4 Corporate and Business Law (ENG)
December 2008

General Comments

This paper gave rise to the worst level of performance from candidates for a number of years. A couple of the questions required a subtlety of approach that was beyond the ability of students at this level (question 9 being the cited example), however there were many marks available for basic knowledge and indeed question 9 could have been passed well, without the need for the subtly provided in the model answer. This was due to the lack of legal knowledge exhibited by candidates. Even in question such as number eight, in which most candidates achieved a reasonable mark, it was noticeable the extent to which candidates simply did not support their analysis with the legal authority of, in this instance, cases. However markers commented that this lack of legal authority was a shortcoming throughout the paper.

If subtlety of legal application was a problem that might have been expected, what was not predicted was the extent to which candidates struggled with the language of the questions. For example in question one candidates appear to have been confused by the use of the word 'contemporary' or at least not to have understood its meaning. While in hindsight it may have been preferable to have used the word 'modern' to avoid any problem. Another concern that may have been due to difficulties with language was in relation to question ten.The word 'limited' in the question confused some candidates and led them to write about 'limited partnerships'. However it is probably more accurate to say that those candidates chose to write about limited partnerships because that is what they had prepared and consequently misread the question in order to allow them to produce what they knew, even if it was not correct, or accurately located. While it is not suggested that such misreading was wilful in relation to question ten, it almost certainly was in relation to question nine, where a large number of candidates simply read 'member' as 'director' in order to provide a prepared but inappropriate answer on the latter topic. This failure was compounded by the fact that, in most cases, the candidates were to a large extent repeating what they had incorrectly written in response to question six. A smaller number even went on to repeat what was written in questions six and nine in question ten on the basis that they thought the partnership in that question was actually a company and consequently the members could be treated as directors.. The fact that, as usual, candidates prepared answers and delivered them whether they were to the point or not is a constant problem, as is the fact that they tend to provide answers culled from the immediately previous exam paper. Although possible that questions will be repeated, it is unlikely that they would be immediately repeated.

All the above were contributory factors to the inadequate level of performance, but the single most damaging factor for the performance of the candidates was the almost total lack of awareness of the existence, let alone the detailed provisions of the Companies Act 2006. Three of the questions, numbers four, five and six focused on the provisions of that Act in areas where the law had changed significantly. Very few candidates appeared to be aware of the provisions, but perhaps of more concern a considerable number appeared not even to be aware of the existence of the 2006 Act, repeatedly referring to the provisions of the Companies Act 1985. The really surprising, not to say disappointing thing is that this was the second F4 in which the 2006 Act has been the basic legislation. The response to question four was inadequate, given that the examiner had produced an article on that very topic in student accountant.

What follows will consider the individual questions in turn.

Specific Comments

Question 1

This question required the candidates to consider the various sources of contemporary United Kingdom law. The better answers displayed a competent understanding of what was required. There was firstly, a reference to legislation being formulated by Parliament, along with the process involved. Many answers continued with a rather detailed coverage of delegated legislation- examples, advantages and disadvantages. On precedent the

good answers explained the nature of judicial precedent including the legal rule on which a judicial decision is based – ratio decidendi comparing that with other statements of law which do not form the basis of the decision -obiter dicta. However most coverage concerned the hierarchy of authority as a factor in determining the importance of a precedent.

On the debit side a number of responses concentrated either on legislation more usually delegated legislation or precedent, which limited the possible marks available. A noticeable number of answers considered the historical sources – common law and equity but managed some marks if this involved an account of case law. It is maybe that some candidates, especially the overseas ones, were not familiar with the word 'contemporary'.

The third contemporary source of law is of course EU Law but only a few candidates made a reasonable attempt to explain its role and many who mentioned it showed some confusion with the European Convention on Human Rights.

Question 2
This question required candidates to show understanding of what is meant by breach of contract paying particular attention to anticipatory breach. On the whole the question was answered well. Many candidates were able to explain breach and the consequences according to the status of the term broken – either warranty, condition or innominate term, although some candidates did take this as an opportunity to answer a question on terms rather than breach. In this question it is pleasing to note that explanations were very often supported by accurate references to relevant case law.

Anticipatory breach was dealt with equally well on the whole, with many candidates drawing the distinction between express/implied anticipatory breach. Once again the relevant case law was cited in support of the explanations.

However, in spite of the question generally being well done there was considerable room for improvement, not just in terms of being better prepared to answer the question but also in terms of examination technique. Too many candidates spent an inordinate amount of time and effort in producing an introduction to their answer by explaining inconsiderable detail the essential elements of legally binding contracts, when in fact the question assumed the existence of the same. Such an approach not only wasted valuable time but also produced unfocused answers that gained fewer marks that they might otherwise have gained had they limited their time and effort to the essential matter of the question.

Question 3
This question required candidates to explain the concepts of contributory negligence and consent. Answers required focussed on the reduction to damages and the defences to negligence respectively. As in previous sittings, questions on this area proved extremely difficult for candidates to answer.

Answers varied in standard although on the whole, this question was answered very unsatisfactorily. It was apparent that candidates were not comfortable with this area of law. They tended to either write hardly anything at all, or wrote everything they knew on the area starting with the neighbour principle, regularly citing *Donoghue v Stevenson* and going on to write in detail about the consequences of negligent advice. *Hedley Byrne v Heller* featured very frequently in answers. There was also discussion of remoteness of damage and the quantum of damages, which would be awarded in cases of personal injury.

There were some focussed answers which correctly analysed the principles in the question and some sound examples of case law were produced. However, answers such as these were very few in number. Candidates need to realise that there are different elements to the law of tort, just like there are with the law of contract. A complete knowledge regurgitation of every bit of law on the area will not suffice and will not be awarded decent

marks. More practice is needed in this area. That said the area is still relatively new and answers were slightly improved from those at the last sitting.

Although some candidates may have been out off by the Latin tag in part (b), a number of weaker candidates managed to work out from the English explanation of consent what it related to.

Question 4
This question required an explanation of the different types of share capital listed together with an explanation of the difference between the nominal value of shares and their market value. Given that the examiner had provided an article on this very topic, the inadequate performance in this question gives ground for concern. This was the first question that required an understanding of the provision in the Companies Act 2006 and unfortunately the majority of candidates were simply unaware of the changes introduced by that piece of legislation. As a result part (a) was very inadequately done. Answers also indicated that many candidates still are of the opinion that the memorandum of association is still the most important constitutional document for companies and that it contains the company's 'authorised capital', a concept completely removed by the 2006 Act.

The three other parts of the question were done better, for the simple reason that they did not require any real knowledge of the Companies Act 2006 and any legal regulation required in the answers was not changed by it. On some occasions decent performance in the latter three parts was sufficient to compensate for an inadequate performance in part (a).

Question 5
This question required candidates to explain the meaning of and procedure for the passing of (a) an ordinary and a special resolution and (b) a written resolution. Once again although the terms were continued from the previous companies Act, the 2006 Act made significant changes to them.

As a whole, candidates performed well on part (a) with the majority of candidates identifying that resolutions were decisions by members, usually held by a poll or a show of hands at a meeting (either AGM or GM) and that a simple majority is required for the passing of the ordinary resolution and 75% for a special resolution. Some candidates went further and provided examples of when the two types of resolutions would be used. It has to be noted, however, that a number of candidates thought that such decisions were taken by directors rather than members.

Part (b) relating t written resolutions was inadequately answered. Most candidates worked out from the question that this procedure applied only to private companies, but only a few went on to develop their answers. While some candidates were aware that these resolutions were available when such companies did not hold general meetings, some insisted that they were passed at general meetings. As has been said very few candidates were aware of the changes introduced by the 2006 Companies Act.

Question 6
This question required candidates to explain the duty of directors to promote the success of the company and to whom such a duty is owed. This question required specific reference to section 172 of the Companies Act 2006, but only a small minority of candidates appeared to be aware of that Act let alone the detail of section 172. Very few produced satisfactory answers to this question. They were clearly up to speed on the Companies Act 2006 and exhibited a sound knowledge and understanding of directors' duties and, specifically, the duty to promote the success of the company. The others either used the out of date 1985 Act or relied on a general description of directors' duties.

Question 7
This question was on of the few, it has to be said, where candidates performed most satisfactorily. Sound answers to 7(a) precisely identified the statutory grounds covering fair dismissal under Employment Rights Act

1996, viz. capability or qualification, misconduct, redundancy, breach of statutory provision and other substantial reasons. The very best also referred to dismissal upon retirement. All too frequently, however, candidates listed a range of possible fair dismissal scenarios without tying them into the statutory headings, e.g. theft, fraud, violence, making secret profits, failing professional qualifications absenteeism and a range of other possibilities. Many of these overlapped and could have been cited as instances of one of the general headings. Marks awarded depended on the comprehensive nature of these instances, but a number merely cited examples of misconduct and consequently did not gain the level of marks available.

The answers to part (b) were well done. Many candidates were able to adequately define constructive dismissal and to offer one or two case examples.

Simmos v Dowty Seals Ltd (1978) was often referred to. The best answers went on to discuss the contractual basis of constructive dismissal, citing *Western Excavating v Sharp* (1978) and went on to mention possible remedies.

Some answers completely misinterpreted the concept of constructive dismissal, often portraying it as an extra weapon in the employer's armoury in the defence of an unfair dismissal claim. A number of candidates adequately defined constructive dismissal but appeared to believe that it only related to redundancy dismissals.

Question 8

Answers broke the question down into a statement of relevant law and then applying that law to the three customers – Bert, Cat and Del. Credit was given for a brief statement of the key essentials for a valid contract, and then the distinction between an offer and an invitation to treat. The vast majority of students rightly identified that Alvin's notice was in fact an invitation to treat, correctly citing or describing the case of *Fisher v Bell*. However, in applying the law to the scenario, many candidates jumped straight into dealing with each customer as though Alvin's notice was an offer and therefore Alvin was the offeror. Some of these students then went on to reach the correct conclusions – that Bert and Cat had no right to sue Alvin as no contract had been made.

Generally speaking, marks were gained by dealing with Bert since that is when candidates went into detail about Alvin's offer being an invitation to treat, to which Bert responded by making an offer, which Alvin was at liberty to accept or reject. Some students became confused at this stage by saying that Alvin could revoke his offer of £5,000 as long as it was before Bert's acceptance; whereas some candidates kept on track by treating the notice as an invitation to treat which was not capable of acceptance. Therefore Alvin was free to change the price on the notice.

Cat's scenario was more problematic for candidates. Many candidates did not specifically identify the issue concerning the option contract, which would have obliged Alvin to honour any promise he makes to keep the offer open if Cat had paid some consideration for him to do so. The reason for this is that a promise to keep an offer open is only binding where there is a separate contract to this effect. However many candidates did cover the issue of Cat's failure to give consideration so credit was given accordingly. Most students also correctly identified that Alvin did not, in any case, expressly accept Cat's offer. Some candidates raised the issue of counter-offer, but the question was not inviting a discussion of counter-offer.

Del's scenario was a simple case of legally enforceable contract being entered into, with Del being the offeror and Alvin being the offeree. For some reason, many candidates just simply restated the facts given in the question rather than actually concluding that a contract had been reached because the essentials for a contract were all present.

Question 9

This question required candidates to examine the law relating to the power of companies to change their articles of association. As the substantive law, either in the statute or case law relating to this area has not been changed this question allowed even those candidates who were unaware of the Companies Act 2006 an opportunity to do well. Unfortunately it was an opportunity not taken by many candidates, as the question tended to be done inadequately. As has already been stated in the introduction above, a number of candidates wilfully misinterpreted the question as relating to directors' duties and wasted a lot of time and effort in pursuing that path. The majority of candidates recognised that the issue was about the alteration of articles, and recognised that it required the passing of a special resolution with a 75% majority. However very few were able to explain the tests for deciding whether the alteration could be challenged in court. Even those who were aware of the bona fide '*interest of the company as whole'* test tended not to gone to explain it further, with only a small number considering the situation of the '*hypothetical individual*' member.

As a result although many concluded that the alteration could be challenged in the courts, no legal principle or authority was cited to support that conclusion, or irrelevant law relating to directors or indeed partnerships was cited. The final point to mention is that candidates were credited with marks, even if they reached a different conclusion from that suggested in the model answer, just as long as they used the appropriate legal authorities to support their decision.

Question 10

This question required candidates to consider key issues relating to the powers, authority and liability of partners. Candidates were required to exhibit a thorough knowledge of partnership law together with the ability to analyse the problems contained in the question and apply the law accurately. While there were many decent answers to the question, with candidates demonstrating a reasonable understanding of partnership law, once again it has to be said that some candidates simply did not recognise the issues involved in the problem scenario. As has been said a small number of candidates appeared to take the fact that the business of the partnership was limited to the sale of petrol as an indication that it was a limited partnership and produced answers explaining that business form. Others presented general answers on the different possible partnership forms without making any real attempt to deal with the question, a clear indication that they prepared an answer and were going to reproduce it whether it was relevant or not.