Examiner's report

F4 Corporate & Business Law (ENG)
December 2009

General Comments
The paper resulted in a mixed outcome. Many candidates performed well but unfortunately a significant number of candidates were less well prepared and unfortunately did not meet the satisfactory standard. It is hoped that what follows will help those in the latter category.

The structure, as usual, consisted of ten compulsory questions. The first seven questions were essentially knowledge based, while the latter three were problem-based scenarios requiring both legal analysis and application of the appropriate law. The firsts point to make about the general structure of answers is that far too many candidates did not complete all ten questions, the result of which was to make it increasingly difficult, depending on the number of questions not attempted, for the candidates in question to gain sufficient marks to pass overall. However, it would seem from an analysis of the papers that this particular problem was the result of a lack of knowledge in relation to particular questions, rather than based on any time pressure, a point emphasised by a number of markers. A second related point to mention is that the questions that tended to be missed out were the last three problem scenario based questions, which would suggest a lack of analysis and application skills if not general knowledge.

It would appear that some candidates engaged in question spotting and as a result supplied prepared but inappropriate answers to some questions. As will be mentioned further in relation particularly to questions 4, 5 and 8 many candidates did not read the question sufficiently closely and as a result either spent time providing unnecessary material or even worse, completely irrelevant material.

What follows will consider the individual questions in and candidates' responses to the individual questions in the paper.

Specific Comments

Question One
This two-part question, each part carrying 5 marks, required candidates to consider the powers of judges to interpret legislation and the rules they apply in exercising such interpretative powers. Although the question requires answers to focus on the two main general approaches, it also requires an explanation of the various traditional rules of statutory interpretation employed by the courts. The format of the question was new but the vast majority of candidates were able to deal with it with little difficulty, indeed many candidates provided considerations of the general approaches as well as the specific rules and were able to explain their relationship and history. Even those who were not totally aware of the general division between literal and purposive approaches were able to give an explanation of the standard rules and usually to provide case authorities in support/as examples.
Where candidates performed unsatisfactorily in this question they tended to treat it as a general question about the English Legal System and to describe court structures and/or operation of the doctrine of precedent.

Question Two
This question, divided into two parts of 5 marks each, referred to two distinct aspects of the law of contract. The first part related to the 'postal rule' or postal exception, as it might be more appropriate to call it. The second part required an explanation of the doctrine of privity, together with the circumstance under which the doctrine can be avoided. This latter required a consideration of both the common and statutory provisions to gain full marks.

(a) Although it has to be admitted that the postal rule is probably of reduced relevance in modern time of electronic communication, it is still in the syllabus and in textbooks and still appears to be popular with students if the answers in this examination are a guide. Candidates, and there were many good answers tot his question, were able to locate the postal rule as an exception to the general rule of acceptance of offers and had little difficulty in gaining 5 marks by explaining its operation and, importantly, when it cannot be used. *Adams* v *Lindsell, Entores* v *Far East Corp and Byrne* v *Van Tienhoven* were used in explanation by some candidates, some of whom actually referred to the limited role of the rule in contemporary business transactions.
Of less satisfactory answers, the majority focused on the formation of contracts, without actually referring to the rule in detail.

(b) Although not done quite as well as part (a), this part on the doctrine of privity was still done fairly well nonetheless. The majority of candidates were able to explain the effect of the doctrine for, both parties to contracts and outsiders and had little difficulty in providing at least some examples of the circumstances under which the doctrine could be avoided. As might be expected reference to *Beswick v Beswick* was common, but it was particularly pleasing to see candidates making reference to collateral contracts and *Shanklin Pier* v *Detel Products Ltd*.

Some candidates referred to both common law and statutory exceptions but a surprising number did not refer to the *Contracts (Rights of Third Parties) Act* 1999.
The least prepared candidates, confused privity with privacy, which led to some rather odd answers about, for example, directors' duties.

Question Three
This question, split into two parts with 7 marks being available for part (a) and 3 marks for part (b), required candidates to explain two aspects of the law relating to damages for breach of contract.

Part (a) required an explanation of the difference between liquidated damages and penalty clauses and on the whole it was dealt with well, but it has to be said that candidates either performed very well or completely missed the point of the question. Some candidates clearly explained what both liquidated damages and penalty clause were and consequently distinguished between them. Some candidates provided good supporting case authority. Some candidates tended to provide a general answer on the topic of damages without sufficiently focusing on the core issue. A number of candidates ran the two categories together and did not distinguish them and some thought that penalty clauses were actually provisions for liquidated damages. Those with even less knowledge took the word liquidated to refer to consequences of liquidation and consequently went completely off the point.

Part (b) referred to the duty to mitigate losses and some candidates picked up full marks by explaining the general concept and the operation of the market rule, with supporting authority. The main weakness in relation to this part of the question was that a number of candidates simply offered a tautological explanation of the duty to mitigate losses, i.e. it means that parties have to mitigate losses. This gained no credit.

Question Four
This question required candidates to explain, in the context of the law of negligence, the extent of a company auditor's duty of care and to whom such a duty is owed.

Although answered well by a minority of candidates, the majority of answers were not particularly well done.

Some answers provided an introduction to negligence generally before moving on to consider the duty of care owed by auditors and to whom that duty was owed. Such candidates made considerable and valuable use of the various auditor cases to structure and explain their answers.
Some answers, and there was a disappointingly large number of these, tended to provide descriptions/explanations of tort law generally, or negligence specifically, while ignoring its application to auditors. Other answers focussed on the role and accountancy duties of auditors within companies to the exclusion of their duty of care in negligence. Such a result could only be the result of a misreading, whether wilful or otherwise, of the question, which was quite explicit in what was required. This is the first example of a significant number of candidates ignoring the actual question, which they might not know the answer to, in order to provide an answer that they did know. Such tactics are not to be recommended as they never work.

Question Five
This question required candidates to explain the concept of limited liability and to consider three alternative categories of companies; the first unlimited in nature, whilst the second and third are limited in different ways. Many candidates performed well in this question, but given the centrality of the topic to the syllabus a disappointing number did not score as highly as might have been expected.
Once again it should be noted that the question was clearly couched in the terms of company law and company formation. However, a significant number of candidates approached the question from the perspective of partnership law. Some candidates thought that the underlying unifying aspect of the question was separate personality, which led them to conclude that only limited companies had such separate personality.

A final point to mention is that, although there are many points that could have been made about the nature of companies limited by shares, many candidates simply settle for repeating in part (b)(iii), what they had already stated in part (a).

Question Six
This two-part question required candidates to explain the meaning of the terms 'compulsory winding up' and 'administration'. Part (a) on winding up, which counted for 4 marks, had been examined before, but part (b), worth 6 marks, had not been examined previously. This question was answered well, with most candidates showing awareness, if not a detailed knowledge, of the administration procedure, and it has to be said that some showed both.

Some of the less well-prepared candidates, at least as regards administration, spent far too much time on compulsory winding up –far more than the allocated 4 marks could ever justify. This raises two related points: the first goes back to the point already made that such candidates had prepared a full winding up answer and were going to deliver, no matter what the question might ask and consequently reward; the second point is that candidates must use the mark breakdown as an indication of how much time they should spend on a question, that is why the have been broken down that way in the first place. As a final point in this regard, and again one that reflects/repeats what has been said previously, those who had prepared the general winding up question tended to explain 'voluntary' winding up, which was specifically excluded from the question. Candidates must read the actual words not what they want to see.

Question Seven
This question, split into two parts with part (a) carrying 6 marks and part (b) 4, required an explanation of the common law duties owed by both employers and employees. The report on this question, *mutatis mutandis,* could be a repetition of the points made in relation to the previous question.

- Candidates should read the words of the question and only deal with what was asked and not waste time on unnecessary material. The question specifically stated that it referred to the 'common law', but so many candidates, who had prepared another topic, focused on statutory rights. Some even claimed that the common law rights were themselves a result of legislation, specifically the Employment Act 1996.
- Candidates should allocate time and words in relation to the mark allocation. Once again, many ignored this advice and even compounded the problem by dealing with part (b) first, so that they would have more time to deal with it.

Nonetheless, all that being said, this question tended to be answered well.

Question Eight
This question required candidates to apply the law relating to exclusion clauses to a specific problem scenario. As the mark scheme for the question stated: 'Marks will be awarded for both knowledge and application, but application is essential.' Unfortunately, in this instance, most candidates performed inadequately.

Only a minority of candidates answered the question by a selective application of the law required, i.e. the common law rules of construction, or more particularly the relevant statutory provisions. Very few were able to describe fully the provisions of either of the appropriate legislative provisions. Most candidates discussed common law incorporation, although that was a given in the question and hence not really required (yet another example of candidates preparing an answer and failing to read the question properly). A small number of candidates thought the question related to general tort law rather than exclusion clauses.

To quote one marker; '[T]he rubric clearly asks candidates to assume that the exclusion clause was properly incorporated into the contract. The facts of the scenario were drawn up so as to achieve that. Despite this, many candidates devoted most of their effort to a regurgitation of the common law rules of incorporation…given that this was strictly irrelevant it was not possible to give more than minimal marks in respect of this part of the answer…many students seemed to know little about the statutory rules, in particular the Unfair Contract Terms Act 1977. So there existed a paradox. Candidates seemed to know a lot about what was irrelevant, but not enough about what was relevant.'

Question Nine
This question required candidates to analyse a problem scenario and explain and apply the law relating to directors' duties generally and in particular directors' contracts with their companies.

Unfortunately, it has become repetitive to say that candidates provided the right answer to the wrong question, but in this instance too, some candidates seemed to recognise this as a question about insider dealing rather than what it was actually about. Perhaps, in this instance, the rubric did not mention directors' duties specifically, but to see the question as being about insider dealing is not only to misunderstand the question, but also to completely misunderstand insider dealing.

Some answers recognised that the question was about directors' duties in relation to their companies, but once again many candidates wasted time and effort by dealing with the full amount of directors' duties, rather than focusing on the key duties involved in the question. Such a response indicates a lack of analytical skill in relation to the scenario questions.

Some candidates honed in on the key aspects of the scenario and were able to cite statute and cases in support of their analysis and importantly to suggest the likely outcome of Caz' conduct, other than the general claim, true though it may be, that they might be dismissed from the board and disqualified.

Question Ten

This two-part problem question required candidates to consider fraudulent trading both under s.993 of the Companies Act 2006 and s.213 of the Insolvency Act 1986, and wrongful trading under s.214 of the Insolvency Act 1986. equal marks were given to both elements.

Again this was not answered well by a significant minority of candidates. The problem stemmed from a general lack of knowledge. Many candidates tended to rewrite the problem scenario as an answer without being able to refer to the detailed law relating to fraudulent trading, only a tiny minority made any reference to s.993 and few were able to explain s.214. That being said the small minority produced some very thorough answers, using the historical problems with fraudulent trading, as expressed through the case law, to explain the development of wrongful trading in s.214.

Although, in general, part (b) on wrongful was better done than part (a), once again only a minority of candidates were able to provide the detail necessary to fully answer the question.