Examiners' report

F4 Corporate and Business Law (LSO)
June 2008

General Comments

The performance of candidates overall continued to be unsatisfactory with a large number appearing to be unprepared for the examination.

This is the second time that the paper was set in the new format. All 10 questions were compulsory and there were several new topics. As usual, the examination was sufficiently testing to reveal those candidates who did not prepare well for the examination. However it did provide considerable opportunity to candidates to score high marks.

Many answers did not begin on a fresh page; candidates must learn to avoid this.

Candidates did not prepare for the new format. The new format requires candidates to answer all 10 questions. It means that all candidates must master the whole of the syllabus and the old practice of selecting few topics and ignoring others simply cannot work. It also requires them to practise time management. The questions were clear in their demands and, excepting two, in line with the familiar pattern of the past examination papers. Many answers showed very superficial familiarity with the content of the course and the prescribed textbook. The law examination is a technical examination and requires a good knowledge and understanding of the technical rules at the very least; problem scenario questions also require skills to analyse facts and then to apply the rules to the facts. Candidates and teachers should note that the problem scenario questions require much more in the way of analysis and application. The overall result would have been considerably higher had candidates paid sufficient attention to learning the skills in regard to answering questions. Candidates would do well to read suggested answers to the past examination questions to get a feel of what is expected of them. The answers are available on the ACCA website; your course lecturer too could acquire them for you. Pay special attention to problem scenario questions, which used to be in Section B of the past examination papers.

The key to good marks lies in the breadth of knowledge of the leading cases. They are not many in any case. Candidates must practise writing out the answers to questions; their prescribed textbook has many to choose from. This would give them the confidence and the ability to organise their thoughts. It was clear to the marker that the candidates on the whole did not prepare for the examination well, did not revise the syllabus and chose to ignore leading cases, as well as, key statutory provisions of the Companies Act. Too much guesswork and commonsense were used to answer the questions. There is no substitute for hard work and thorough preparation.

Specific Comments

Question 1
This was a straightforward question requiring the candidates to explain the term 'judicial precedent' and to distinguish between ratio decidendi and obiter dictum. While the first part dealing with the term judicial precedent was dealt with reasonably satisfactory, it is the second part that many candidates did not do well. This was surprising because this part of the question has been asked in the past several times in one form or the other. Most candidates ignored or paid very little attention to this topic.

Question 2
This question required the candidates to explain the formalities that must be complied with before a valid contract comes into existence. This question was answered unsatisfactorily This was a direct result of a clear failure to read the content and requirement of the question.

Formalities refer to those requirements relating to the outward, visible form in which the agreement must be cast in order to create a valid contract. A great majority of candidates chose to discuss offer, acceptance, possibility of performance, etc in short the essentials of a valid contract. That was not what the question was about.

Question 3
This question tested the understanding of candidates as regards the notion of fault in the law of delict. A wrongful act is not enough to impose liability on the wrongdoer; he must also be at fault. A wrongdoer is at fault if he acted intentionally or negligently. In addition, contributory fault is a defence, or partial defence.

Some candidates chose not to attempt this question. Delict is a core component of the new syllabus and questions from this topic are likely to be asked again and again. All candidates should have been able to answer this question well. Lack of preparation could be the only reason why it was not.

Question 4
This question asked candidates to explain the legal effects of death of a partner on the partnership. Most candidates correctly wrote that a partnership is a relationship of trust and confidence and that unless there is an agreement to the contrary, the death of any of the partners has the effect of dissolving the partnership. However, several candidates also wrote incorrectly that on death of a partner, his heir will succeed automatically to the partnership and will be admitted to the partnership.

Very few candidates stated that under our Partnership Proclamation, 1957, the partnership deed must specify the procedure that would be followed on the death of any of the partners [s 5(q)]. A partnership agreement may validly provide for its continuance for the benefit of the estate of the deceased. Or that it is also possible to provide in the partnership agreement that the business shall be carried on by the surviving partners, who would purchase the interest of the deceased partner upon his death. Very few candidates discussed these.

Similar questions can be found in past examination papers. Candidates sit down and do the past examination papers.

Question 5
This question required candidates to explain what is meant by the articles of association of a company.

In general, the answers showed lack of preparation. Many candidates wrote incorrectly that articles must contain the objects of the company. Very few discussed relevant case law. One candidate did not attempt this question.

Question 6
This question invited candidates to explain what is meant by 'corporate governance' and its significance for the board of directors of a public company in Lesotho. In terms of performance, this was the worst. Two candidates did not even attempt this question.

Corporate governance is simply the system by which companies are directed and controlled. The corporate governance structure specifies the distribution of rights and responsibilities among different participants in the corporation, such as, the board, managers, shareholders and other stakeholders, and spells out the rules and procedures for making decisions on corporate affairs. By doing this, it also provides the structure through which the company objectives are set, and the means of attaining those objectives and monitoring performance.

Corporate governance is a new topic in the syllabus. Questions are likely to be asked on it in the future. Though Lesotho's Companies Act does not have much by the way of corporate governance, it is essential to emphasise to candidates that they have to have a good understanding of the concept of corporate governance keeping in mind that now all questions are compulsory.

Question 7
This question was in two parts. The first part asked candidates to explain what they understood by insider trading, and the second part, by fraudulent trading. In terms of performance, this was unsatisfactory.

Insider dealing covers broadly situations, where a person buys or sells securities of a company taking advantage of the price sensitive information in his possession, (known to the person but not to the general public), which materially affects their value. Furthermore, the confidential information is in his possession because of some connection which he has with the company whose securities he deals in. For example, such a person could be a director, employee or professional adviser of that company. Alternately, he may have obtained such information from one of these 'insiders'. South African and Botswana have legislation to prevent public trading. Lesotho does not have any. However, Lesotho's Companies Act, 1967, does have some provisions like section 153 for the maintenance of a register of directors' interests in the securities of their company, subsidiary, co-subsidiary or holding company. The Ministry of Trade also has power to appoint inspectors to investigate the true ownership of a company, that is to pierce the protective screen of nominee shareholdings to reveal who the true owners are. [s 135 Companies Act, 1967]. Nobody discussed these.

Fraudulent trading is covered by section 275 of the Companies Act, 1967. It provides that if, in the course of winding up or judicial management of a company, it appears that any business has been carried on with intent to defraud creditors or for any fraudulent purpose, the courts, on the application of the Master of the High Court, the liquidator, the judicial manager, a creditor or a member, may declare that any persons, including present and past directors, who were knowingly parties to the fraud shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company. Only a few candidates discussed this.

Most candidates discussed the *ultra vires* rule or a company trading illegally without obtaining a licence from the Ministry of Trade. These were irrelevant to the question.It was felt that candidates did not look at the new syllabus and the study guide carefully and make a note of the new topics they are now required to be familiar with.

Question 8
This question required candidates to analyse the problem scenario from the perspective of the law of contract. It required an understanding, explanation and application of the law relating to the remedies available for breach of contract. Problem type questions not only require an understanding of the basic principles but their application to the scenario in the examination question.

As regards (a), the courts do exercise a discretion as to whether or not an order for specific performance should be made. The jetty constructed by Fun Ltd is 14.5 metres long instead of 15 metres and 1.8 metres wide in stead of 2 metres. In addition, the coating is not by a waterproof resin. Ordering Fun Ltd to reconstruct the jetty to the agreed specifications may require extensive court supervision and in such circumstances the courts do not order specific performance. Therefore, the court may ask Sonu to claim and prove his damages. Sonu would be required to prove that he actually sustained damages, as a result of the short length and width of the jetty, and the use of a non-waterproof coating. He will also have to establish the extent of his loss. Assuming that Sonu is able to prove his damages, the court may award such amount to Sonu, which it would cost to have the work done by somebody else, as damages. Though several candidates wrote incorrectly that the proper remedy would be specific performance, yet on the whole, the candidates correctly inferred that damages are the proper remedy. However they could not apply the relevant legal rules to the facts of the problem in a competent manner.

As regards (b), where one party, repudiates the contract prior to the actual due date of performance, they may be liable for anticipatory breach of the contract. Boat Ltd informed Sonu expressly on 1 December 2007, that they would not be able to deliver the yacht as agreed on 11December 2007, thus expressly repudiating the contract prior to the actual date of performance. Repudiation by itself does not end the contract; the other party first has to accept the repudiation. Nobody discussed this.

Sonu, as an innocent party has a choice of two courses, either to enforce the contract or to cancel it. Sonu has to accept the repudiation and cancel the contract since courts would not order specific performance. On cancellation, Sonu can sue for damages immediately without waiting for the actual contractual date of performance. He will be entitled to claim damages from Boat Ltd to the extent of the difference in his contractual price as against the price that he will have to pay to get the yacht from someone else, that is R35,000. Almost all candidates failed to discuss this.

Very few candidates performed satisfactorily in question 8(b).

Question 9
The problem question related to the authority of a partner to bind the firm and the position of third parties in such transactions. This was the best answered question.

The general principle is that partners are agents of each other and, as such, have authority to enter into transactions within the scope of the partnership business to bind the other partners and the partnership. Harry has implied authority to ask Goodricks, an attorney, to apply for and obtain a licence for staging live music shows by performing artists. The implied authority of a partner can be varied, limited or even excluded by express agreement to the contrary between the partners. However, if a partner exceeds his authority with a third party who is not aware of the limitation, the partnership is bound by it. Even if Harry was expressly prohibited by Bill from obtaining a licence for staging live music shows by performing artists, the partnership would be liable unless the attorney knew about such a limitation. However, Harry's conduct of asking an attorney to obtain a licence for staging live music shows by performing artists has destroyed the mutual trust and confidence, which is the foundation of any partnership. Therefore, Bill would be justified to renounce the partnership and unilaterally terminate the relationship on the ground that Harry's conduct has resulted in a loss of confidence and that it would not be possible for them to work together any more. In that case, the partnership would have to be dissolved.

The question was based on the familiar case of *Goodrickes v. Hall & another* (1978) and almost all candidates did identify the issues correctly. It was thought that candidates would be able to demonstrate the application of relevant legal principles to the facts clearly and refer to relevant cases. However this was not the case. Many candidates did not discuss the nature of Harry's authority nor the legal effect of restricting the authority of a partner. Hardly anyone referred to *Goodrickes case.*

Question 10
This question sought to test the candidates' understanding of the director's fiduciary duties, and in particular, the duty not to make a profit at the expense of his company.

This was a familiar question from a familiar topic, which has been examined many times in the past. It was based on familiar cases *Regal (Hastings) Ltd v Gulliver* (1942) and *Industrial Development Consultants Ltd v Cooley* (1972). It was therefore, expected the candidates would do very well. However nobody referred to the former case and very few referred to the latter. The relevant legal principles were not identified well and their application was patchy. As a result, marked scored were very average.

The performance of the candidates would go up enormously if they learn to invest more time and effort in writing out the answers to the problems, that can be found in the past ACCA examination papers, as well as, in their text books.