Examiners' report

F4 Corporate & Business Law (LSO)
June 2009

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

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 one problem type question, 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 problem type 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.

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. 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 One
This was a straightforward question asking the candidates to explain and illustrate the literal rule.
The essence of this question was that the literal rule requires that the words of a statute must be interpreted in their ordinary, literal and grammatical meaning. 1884. A majority of the candidates did discuss it. Some candidates, however, did not answer the question. This was surprising because this question has been asked in the past several times in one form or the other.

Question Two
This too was a relatively easy question requiring candidates to explain the postal rule in the law of contract. Almost all candidates correctly emphasised that the postal rule applies only where the offeror authorises the offeree to use post as a means of communication of acceptance. But quite a few did not discuss the rule itself, namely that once a letter of acceptance properly addressed, and stamped to the offeror is posted, acceptance is communicated and a contract arises. The circumstances when the rule does not apply were not properly discussed by the candidates generally. The postal rule is a familiar topic and has been a subject of examination many times in the past.

Question Three
This question required candidates to distinguish between express terms and implied terms in relation to the law of contract. Express terms are statements expressed in so many words, whether in writing or orally, made by one of the parties with the *intention* that they be part of the contract. It is this declaration of *intent* that distinguishes a contractual term from mere representation. This was *not* emphasised by any of the candidates. Implied terms are incorporated into the contract by implication and could be implied by operation of law or by trade or usage. The latter part was not discussed by a large number of candidates. Those who did were rewarded.

Question Four
This question was one of the easiest question and asked candidates to discuss the employer's main duties provided under the Labour Code Order, 1992. All candidates answered this question satisfactorily.

Question Five
This question tested candidates' understanding regarding the fiduciary duties of partners. It was a familiar question and it was surprising that most candidates did not do it well. The three key components of the answer were: duty not to compete with the firm, duty to guard against a conflict of interest and duty of full disclosure. A large number of candidates discuss duties of care and skill and other non-fiduciary duties. Probably this was a result of not revising the course materials well.

Question Six
This question asked candidates to explain the objects clause, and provide one example of its application. Most candidates correctly stated that all limited liability companies must have an objects clause. Few also discussed the impact of 1985 amendments. A majority of candidates, however, did not provide an example of the application of the objects clause. Almost all candidates answered this question satisfactorily.

Question Seven
This question tested candidates' understanding regarding the duties of an auditor. The duties of an auditor are both statutory and those provided by the common law. All candidates answered this question satisfactorily. Very few discussed the duties in a comprehensive manner; most discussed only some.

The key to scoring high marks is to master the syllabus and practise writing out the answers in mock examination like conditions.

Question Eight
This was a problem scenario question which asked candidate to decide whether Joseph can claim against the Security Ltd for losses sustained.

An exclusion clause has to be incorporated into the contract. A large number of candidates answered this part of the question reasonably well. However, even if the exemption clause was incorporated in the contract, courts, while interpreting it 'lean against it', that is the courts will not allow a party to exempt itself from liability unless the exemption clause clearly covered the breach that has occurred. In short, exemption clauses are construed narrowly. This part of the question was discussed by a very small number of candidates. This was a key part and required candidates to apply it to the facts of the problems scenario.

Only a minority of candidates answered this question satisfactorily.

Question Nine
This question required candidates to advise Peter if he has any claim against the Insurance Company in the law of agency. This was a challenging question. It was expected that well-prepared candidates would accept the challenge and answer it well. However none answered satisfactorily.

Peter could succeed against Insurance Company only if he could prove that Sam had ostensible authority from Insurance Company to provide financial advice to Peter within the scope of his employment. Some candidates did attempt to discuss ostensible authority. But the discussion was not focussed and to the point.

Cases point out that the expression 'financial adviser' was equivocal and ambiguous because financial advice may cover all sorts of things and, therefore, could not be a basis for creating an agency by estoppel. Providing financial advice could never include promising Peter that Sam would ensure that the borrower provided adequate security for the loan. Peter should have himself checked the creditworthiness of Joe and ensured that he provided adequate security before handing over his money: see *Weedon v. Bawa (1959)*.

Since an unambiguous representation is the corner stone of an agency by estoppel, the court is unlikely to hold that the Insurance Company ostensibly authorised Sam to provide financial advice to members of the public. Peter, therefore, should be advised not to pursue his claim against the Insurance Company for a relief. This part of the question was not even touched by any candidate. The question itself was based on a decided case, which features in the candidates' prescribed textbook. The marker expected the candidates to revise and master the prescribed textbook and had they done so, this question would have been answered correctly.

Question Ten
This question sought to test the candidates' understanding of liability of individual directors for contracts entered into by them on behalf of their company.

This was a familiar question from a familiar topic, which has been examined many times in the past. An individual director is not, as such, an agent of the company. However, an individual director could be an agent in two circumstances: (a) when he has been conferred agency powers by a competent organ of the company (actual authority), or (b) when he has been allowed to represent himself to outsiders as the company's agent (ostensible authority).

It is not unusual for the board to entrust to and confer upon a managing director, under article 108 of Table A of the Companies Act, 1967, all or some of the powers exercisable by the board of directors. In such a case, it is the managing director who runs and administers a company and the company is bound by any contract entered into by the managing director. However, in the question, there was nothing to indicate that John has been expressly authorised to enter into a contract with Sandeep and so the company cannot be made liable on this basis.

Authority could have been conferred on John impliedly as well as in *Hely-Hutchinson v. Brayhead Ltd* [1967]. Or, an individual director could be held out by other members of the board of directors as having the authority to bind the company as in *Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd* (1964). In fact, the problem was based on these two very familiar and leading cases. This contract was clearly within the scope of a managing director's implied and ostensible authority. Consequently, Maseru (Pty) Ltd are liable to pay Sandeep R1 million for the work done or face an action for breach of contract.

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, which can be found in the past ACCA examination papers, as well as, in their textbooks.