Examiner's report

F4 Corporate and Business Law (LSO)
June 2011

General Comments

The performance of candidates overall continued to be unsatisfactory with a large number appearing to be unprepared for the examination. However, there is clear evidence of a growing number of candidates performing satisfactorily.

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.

It has to be repeated again that candidates did not prepare for the format. The format does not help candidates who do topic spotting or question spotting. It demands that all candidates have to look at the syllabus, keeping in mind that all topics in syllabus have to be mastered. 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 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 the 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. Candidates would do considerably better if they are asked to do mock examinations based on past question papers. Two or three such mock examinations would reveal where they have to improve upon and go a long way to improve their marks in the examination. In addition, it may be helpful if candidates are told to summarise suggested answers in not more than 2 pages. This would help them to differentiate between relevant and irrelevant. Another suggestion is to ask the candidates to summarise the suggested answers to past examination papers in no more than 2 to 2 ½ pages. This should help them learn the quality of time management and to focus on what is asked in the question.

The key to marks lies in the breadth of knowledge of the leading cases. They are not many in any case. Candidates must also 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 One

This question asked candidates to discuss, in the context of human rights and freedoms in the Constitution of Lesotho, the doctrine of judicial review as it operates in Lesotho. The candidates, at the very least, were required to explain that the doctrine of judicial review empowers the High Court to hold a law to be invalid. They were then supposed to refer to the *Swissborough case* (1994) and point out the four circumstances where the doctrine of judicial review applies.

However, many candidates chose, instead, to discuss the hierarchy of the system of courts or the distinction between binding and persuasive precedents. Only a small number of candidates dealt with what was asked in the question.

Question Two
This question tested candidates' knowledge and understanding of the law regarding the postal rule and the circumstances when it does not apply. Almost all candidates scored well in this question.

Almost all candidates correctly pointed out that where the offeror authorises the offeree to use post as a means of communication of acceptance, the rule is that once the offeree posts a letter of acceptance, properly addressed and stamped, to the offeror, acceptance is communicated and a contract arises as soon as the letter is posted, not when it arrives. Many candidates also discussed *Household Fire Insurance Co. v. Grant* (1874-80) but not one candidate pointed out the reception of the rule in South Africa through *Cape Explosives Works Ltd. v. S.A. Oil and Fat Industries (1921)* and its final adoption by the appeal court in the case of *Kergeulen Sealing and Whaling Co Ltd v Commissioner for Inland Revenue (1939).* Lesotho received the rule through the South African route.

Many candidates did not discuss that the postal rule does not apply if the postal services are disturbed and not operating normally and no -one pointed out that the rule does apply to telegrams, which are treated like posted acceptance.

Question Three
This question tested the understanding of the candidates regarding the legal consequences of a 'condition' as a contractual term to a contract.

A condition is an uncertain future event upon which the operation and consequences of the whole contract is dependent upon. Conditions are either suspensive or resolutive. Whether a condition has been fulfilled or not requires a careful interpretation of the contract to determine if the event actually happened is the event described in the contract. The fulfilment or non-fulfilment of a condition precedent operates retrospectively. A condition is deemed fulfilled as against a person, who deliberately prevents its fulfilment with a view to avoid the contractual obligation.

Very few candidates answered this question correctly. Many candidates chose to discuss exemption clauses, *stipulation alteri*, pre-emption and uncertainty of contractual terms rather than what the question asked. Still fewer discussed fictional fulfilment. Candidates could have scored far higher marks had they answered the question completely.

Question Four
This question required the candidates to explain the concept of wrongfulness in the law of delict. Most candidates did point out that the defendant's conduct is wrongful, if it infringes a legally-protected right or interest of another.

Once it has been determined that there is an infringement of a legally-protected right or interest of another, then the courts inquire if it was unreasonable in the light of the facts and circumstances of the case. Courts often apply the test of *boni mores,* that is whether according to the legal convictions of the community (or legal policy), the causing of the harm was not justified in the circumstances of the case. The *boni mores* test is an objective test based on the criterion of reasonableness. It is this part which, barring a very few, no candidate discussed.

A number of well-known grounds of justification has been developed that serve to exclude the wrongfulness of the defendant's conduct. Self- defence, necessity, consent to injury, voluntary assumption of risk and provocation are some of the examples. Grounds of justification that have been accepted as defences are recognised expressions of the application of the test of reasonableness in particular situations. Many candidates chose to focus on these and wasted their time by writing several pages describing them. Many others chose to discuss unlawful competition, passing off, duty of care and even compensation. Candidates have to focus on what is asked in the question rather than attempt to demonstrate what they know. This does not help.

Question Five
This question asked candidates to explain the meaning of actual authority and ostensible authority.

An agent, who has been expressly appointed may have both express and implied authority. An agent, whose appointment has been implied, has only implied authority. Both express and implied authority are part of the actual authority of an agent. Express authority is conferred by the contract of agency and is usually in writing. Implied authority is the actual authority, which the principal has consented, by implication, the agent should have. It is possible, indeed in some instances necessary, to read into the agent's express authority a certain implied authority. In *Goldblatt's Wholesale (Pty) Ltd v. Damalis* (1953), it was stated that if an agent has the express authority to manage the business of the principal, he has the implied authority as well to do all the things, which are reasonably incidental to carrying on that type of business. Most candidates did explain the concept of express authority well but fell short when it came to explaining the notion of implied authority.

Ostensible (or apparent) authority arises when the alleged principal makes a representation, often by conduct, to a third party that a person is authorised to act on his behalf (even though he may not be) and the third party relies upon that representation. The 'principal' is said to 'hold out' the person represented as his agent and to have authority to act on his behalf. While there is a strong resemblance between implied and ostensible authority, the two are, nevertheless, separate and distinct as pointed out by Solomon J in *Strachan v. Blackbeard & Son* (1910). In the case of implied authority, an actual authority is inferred from the conduct of the parties; in the case of ostensible authority there is no actual authority, but the principal is prevented from relying on its absence to the prejudice of a person whom by his actions or his attitude he has misled. On the whole, candidates could not explain the difference between implied authority and ostensible authority and confused the two.

Question Six
This question required the candidates to explain the ways in which company directors can be appointed and the ways in which they can be removed from office.

Section 142(4) Companies Act (CA) 1967 requires the names of the first directors to be included in Form J and submitted to the Registrar of Companies. Where the company has adopted Table A articles of association, these first directors are required to retire at the first annual general meeting after incorporation but may stand for re-election. Subsequent directors are elected by the shareholders by an ordinary resolution in a general meeting. Not a single candidate answered this question correctly. Many wrote that the first directors would be appointed by other directors. Many also wrote that they would be appointed by a special resolution of the shareholders.

Directors may be removed in number of ways: retirement, removal under section 146 of the CA. 1967, by an ordinary resolution at any time and by disqualification. Again, not a single candidate discussed them all. Most candidates wrote that removal requires a special resolution of shareholders.

Question Seven
This question required candidates to consider the role of the auditors in relation to companies in the context of corporate governance. 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. In Lesotho, corporate governance is still largely governed by what is in the Companies Act, 1967. Auditors have an important role to play in this regard: they are appointed to ensure that the interests of the shareholders in a company are being met. Their key function is to produce independent and authoritative reports confirming, or otherwise, that the accountancy information provided to shareholders is reliable.

While almost all candidates did discuss some of the powers and duties of the auditors, no attempt was made to relate them to corporate governance, for example, why the deficiencies in law make it difficult for them to play their full role in this connection. No- one discussed *Caparo Industries plc v Dickman* (1990) in the context of corporate governance.

Question Eight
This question required candidates to analyse the problem scenario from the perspective of the law of contract. In part (athe label on the windscreen of Toyota indicating its sale price to be R11,000 car did not amount to an offer, but an invitation to treat: See *Crawley v Rex* (1909). Every candidate did this part very well and were rewarded for their efforts.

Part (b) required advising Edward. Edward was willing to purchase the car for the correct price of R110,000 but he needed a week's time to obtain bank finance. Sam could have given him the time by undertaking not to sell the car for a week. This would have resulted in an option and, if accepted by Edward, an option contract. But in the problem scenario, there was no indication that Sam gave that undertaking to Edward. Consequently, Sam was free not to accept Edward's offer to buy the car after obtaining the bank finance. Consequently, Sam was entitled to accept David's offer and sell the car to him. David got a good title to the car. This part was done inadequately by almost all candidates. A great majority of the candidates wrote that there was an option contract and that entitled Edward to claim the car. Very few correctly wrote that Sam never accepted Edward's offer to buy the car after obtaining bank finance. As regards, David, most candidates chose not to write anything about his purchase.

Question Nine
This question required candidates to consider various issues relating to the issuing of shares by companies and the potential liability of a shareholder for acquiring partly-paid shares.

Under section 10(1)(iv) CA, 1967, the memorandum of association of every company limited by shares must state the nominal capital and the nominal value of a share, which represents the extent of a shareholder's potential liability: see *Borland's Trustees v. Steel* (1901). Since there is no requirement that a company should require its shareholder to immediately pay the full value of the shares, there was nothing wrong in Shaka Ltd issuing 100,000 partly paid shares to Milton, but the remaining, unpaid part, could always be called upon if the company required it to pay off its debts: see *Ooregum Gold Mining Co v. Roper* (1892).

Thus, Milton could not avoid liability to pay up to the full value of the shares he took in Shaka Ltd. In relation to the 100,00 shares, he would be liable to pay a maximum of R25,000 (R0.25 x 100,00). The extent of his liability would depend on the actual debts owed by Shaka Ltd but could not exceed the nominal value of the shares.

Most candidates did reach the right conclusion and did discuss why Milton could not escape his liability. They were rewarded for that. However, no candidate discussed all the aspects of the question.

Question Ten
This question asked candidates to explain what is meant by constructive dismissal and then apply it to the problem scenario.

The Labour Code does not use the word 'constructive dismissal' but provides in section 68(c) that dismissal includes a resignation by an employee 'in circumstances involving such unreasonable conduct by the employer as would entitle the employee to terminate the contract of employment without notice, by reason of the employer's breach of a term of the contract'. This provision relates to what is known as 'constructive dismissal.' Constructive dismissal occurs where the employer repudiates the contract by committing a breach which goes to the root of the contract. The employee has to establish that a repudiatory breach occurred, that he left because of it and did not waive the breach, for example, by remaining in the employment for too long. Furthermore, the remedy of reinstatement is usually denied in cases of constructive dismissal unless the employer is a large company which can place the employee in a different position.

Most candidates did demonstrate their understanding of what a constructive dismissal is. Some even gave examples of constructive dismissals, which was not needed. Many candidates chose to discuss all the circumstances when an employer can dismiss their employees including summary dismissals.

Sharp had to establish that there indeed has been a repudiatory breach going to the root of the contract. He had to prove that his employer's conduct — in refusing him an advance against his salary for the month and his request for a loan — amounted to a repudiatory breach of contract, which entitled him to resign. Sharp was not contractually entitled to ask for an advance or a loan from his employer. The employer could, if it so wished, accede to his request or refuse his request. In the circumstances, there was no repudiatory breach of any term of employment contract that Sharp could point out to. Many candidates thought otherwise and wrote that refusing an advance entitled Sharp the remedy of constructive dismissal.

On the whole, candidates could have scored a lot more marks in this question had they framed their answers fully as required by the question.