Examiners' report
F4 Corporate and Business Law (LSO)
December 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 third 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 asking the candidates to explain how the Roman-Dutch law was introduced in Lesotho. The essence of this question was a discussion of Section 2 of Proclamation 2B of 1884. A majority of the candidates did not discuss it. 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 gave superficial answers.

Question 2
This question required candidates to explain tacit terms in the law of contract. Tacit terms are unexpressed terms which are derived from the common intention of parties. The phrase 'common intention' of the parties comprehends not only the actual intention but also an imputed intention. The court implies not only the terms which the parties must actually have had in their mind but did not take the trouble to express, but also terms which the parties may not have had in mind but would have expressed had their attention been drawn to them. Tacit terms, this way, differ from implied terms. The majority of the candidates confused between tacit and implied terms and thought they were synonymous. There are three tests that the courts apply to infer if a tacit

term forms part of a contract were. No one mentioned all three, some candidates did refer to one or two and that too superficially.

Question 3
This question asked candidates to explain the doctrine of fictional fulfilment in the law of contract. The fulfilment of a condition depends upon the happening of a future event which may or may not happen. In certain circumstances, it may be possible for the conditional debtor to prevent its happening. The doctrine of fictional fulfilment applies in these circumstances. A condition is deemed fulfilled as against a person who deliberately prevents its fulfilment with a view to avoid the contractual obligation. The marker expected that the higher band answers would discuss at least *MacDuff & Co v Johannesburg Consolidated Investment Co Ltd* (1924) case. Some candidates did. This topic has been asked in the past in one form or the other however many candidates showed a complete ignorance of the doctrine of fictional fulfilment. Some even did not attempt the question. Many others only explained the principle but could not explain it satisfactorily.

Question 4
This question tested the understanding of candidates as regards the principle of causation in the law of delict. Causation has two elements: factual causation and legal causation. Factual causation is determined by applying *conditio sine qua* non theory. This is also known as the 'but for' test. Legal causation is established by finding out if there is a sufficiently close relationship between the wrongdoer's conduct and its consequence keeping in mind the policy considerations based on reasonableness, fairness and justice.

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. Most candidates did not discuss 'but for' test or what is meant by legal causation. Lack of preparation could be the only reason why this question was not done well.

Question 5
This question tested candidates' understanding regarding constructive dismissal in employment law. The Labour Code does not use the words 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'. Excepting one, no candidate discussed section 68(c).

The majority of the candidates correctly stated that constructive dismissal occurs where the employer repudiates the contract by committing a breach which goes to the root of the contract and that in a constructive dismissal, the employer is willing to continue the employment but the employee is not. However, excepting one or two, no one discussed that 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. Constructive dismissal requires proof that there indeed has been a repudiatory breach going to the root of the contract. In terms of marks, most candidates performed satisfactorily in this question.

Question 6
This question asked candidates if companies in Lesotho could issue shares at a discount. Courts have held that a company cannot be allowed to issue shares at a discount. However, section 56(1)(b) of the Companies Act 1967, recognises that a company could issue shares for consideration other than cash. Since the company's valuation of consideration is accepted as conclusive, it may be possible to 'water' the shares by accepting in payment something actually worth less than their normal value. Courts do intervene if the 'consideration given by way of payment is a mere blind or clearly colourable or illusory.' Section 57 of the Companies Act 1967, which deals with the payment of underwriting commission, ie commission to ensure that if the public did not take up the shares offered, the underwriters would do so, also tends to weaken the rule that shares cannot be issued at a discount.

Most candidates correctly stated the basic rule that companies cannot issue shares at a discount and gave acceptable reasons for the rule. No one discussed section 56(1)(b) or section 57. Almost all candidates performed satisfactorily in this question. Similar questions can be found in past examination papers. Candidates should sit down and do the past examination papers.

Question 7
This question invited candidates to explain in the context of 'corporate governance' to explain how the decision-making power is divided between the shareholders in a general meeting and the board of directors. In terms of performance, this was the worst. Most candidates performed adequately in this question.

Corporate governance is simply the system by which companies are directed and controlled. In the Companies Act 1967, article 79 of Table A states that the business of the company shall be managed by the directors who may exercise all such powers of the company as are required to be exercised by the company in a general meeting. Where article 79 of Table A is employed, the general meeting cannot interfere with a decision of the directors unless they are acting contrary to the provisions of the Act or articles. The candidates here expected to explain it and refer to at least one case. Few candidates did refer to *Barron v Potter* (1914) but no one answered the question in a satisfactory manner.

Corporate governance is a new topic in the syllabus. Questions are likely to be asked on it in the future as well. 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 8
This was a very easy problem scenario question which required the application of the two rules laid down in *Hadley v. Baxendale* (1854) as modified by *Lavery & Co Ltd v Jungheinrich* (1931). Questions based on this case have been asked several times in the past and the facts in the question were based on a well-known leading case.

Lesotho Builders were in breach of contract by failing to complete the work within the agreed period and were, therefore, liable to pay damages to the laundry in accordance with the two rules laid down in the case of *Hadley v. Baxendale* (1854). Lesotho Builders were bound to compensate the laundry for the loss of normal profits caused by the delay in the completion of the work under the first rule of *Hadley v Baxendale* (1854). As regards the loss of a particularly valuable contract which the laundry could not accept because its machines were out of action on account of the delay in the completion of the work, the laundry could only claim them provided, (a) such loss was in the contemplation of both the parties when they entered into the contract, and (b) the parties agreed that loss in respect of any such valuable contract which the laundry may lose as a result of the delay in construction would be compensated by Lesotho Builders. Since it is unlikely that the laundry would be able to establish them, Lesotho Builders are not likely to be liable for the loss of the particularly valuable contract which the laundry lost because its machines were out of action.

Excepting very few, most candidates correctly identified the case of *Hadley v. Baxendale* (1854) but could not apply the two rules to the facts in the problem scenario well.

Question 9
This question required candidates to advise the directors of Dundas Ltd whether they were bound by the agreement with Farm Machinery Ltd and Superb Cars Ltd and whether Dundas Ltd had any claim on the commission paid to John.

The first part of the question required application of the indoor management rule as laid down in *Royal British Bank v Turquand* (1856). The indoor management rule would protect Farm Machinery Ltd because they were not aware that the requisite authority had not been obtained from the shareholders. Table A allows the board to delegate any of their powers to the managing director and the Farm Machinery Ltd was not aware that this had not been done either. Under the circumstances, Farm Machinery Ltd would be protected and Dundas Ltd would be bound by the contract. In terms of performance, quite a few candidates did refer to the indoor management rule and the case but most candidates did not.

The company secretary may be regarded as held out by the company as having authority to sign contracts connected with the administrative side of a company's affairs, such as employing staff and ordering cars, and so forth. In the problem scenario, Dundas Ltd was liable on the contract with Superb Cars Ltd for the payment of the rental fee for the car. The main base on which that liability would rest would be the ostensible authority of such an officer of the company to enter into a contract of the kind dealt with in this case. Very few candidates answered this part of the question correctly.

The last part of the question involved the right of the company to claim commission which was paid to John by Farm Machinery Ltd. Directors owe a duty of loyalty to the company and as such they owe fiduciary duties to the company not to allow conflicts of interest to arise and not to make secret profits. One of the fundamental principles of company law is that directors may not make secret profits out of their connection with the company: See *Regal (Hastings) Ltd v Gulliver* (1967). Breach of a fiduciary duty can be subsequently approved and ratified by the company in a general meeting, provided that the breach did not constitute a fraud on the minority shareholders and was not perpetrated in bad faith. Since this was not done, John is liable to pay the commission he received to the company in full. Some parts of the answer were done correctly by most candidates.

Question 10
This question sought to test the candidates' understanding of liability of the partners for certain contracts laid out in the problem scenario.

This was a familiar question from a familiar topic, which has been examined many times in the past. It was based on the familiar case of *Braker & Co. v. Deiner* (1934) in the law of partnership. In this case, it was laid down that the implied authority of partners extends to all matters necessary for carrying on the business of the firm in the usual way in which businesses of a like kind are carried on. In an ordinary trading partnership like in the problem scenario, every partner has implied authority to purchase on credit such goods as are, or may be, necessary for carrying on its business in the usual way.

Since it was a trading partnership, the purchase of a consignment of tinned fruits certainly was within Samuel's implied power and the firm was liable on this contract. Since a firm of wholesale food distributors would certainly use office equipment in their business, therefore, the purchase of office equipment could be regarded as incidental to the partnership's business. Thus, *prima facie* the firm would be liable on this contract as well. However, the purchase of an expensive car was neither within Samuel's usual or nor implied authority and since Samuel did not have actual authority to purchase such a car for the partnership, the firm would not be liable on this contract.

Lastly, though the partnership was liable on the contract for the tinned fruits and the office furniture, Arthur and Dhondy may be able to claim from Samuel because he entered into these two contracts in breach of the partnership agreement.

No candidate referred to *Braker & Co. v. Deiner* (1934). The relevant legal principles were not identified well and their application was patchy. As a result, the performance was 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.