Examiner's report

F4 Corporate and Business Law (LSO)
December 2010

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.

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.

The key to good 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 the distinction between *ratio* and *obiter dicta* in the context of Lesotho's legal system. The candidates, at the very least, were required to explain that *ratio decidendi* is the part of the decision which deals with the underlying legal principle involved, while *obiter dicta* are remarks made by the judge which illustrate or clarify the principle behind the decision but do not form an essential part of it. However a large number of candidates chose, instead, to discuss the hierarchy of the system of courts or the distinction between binding and persuasive precedents. Only a very small number of candidates dealt with what was asked in the question.

No candidate discussed that distinguishing between *ratio* and *obiter dicta* may not always be easy since a judgement does not indicate which is which. Subsequent judges have to infer which parts of the original judgement are part of the *ratio* and are binding, and which parts are *obiter dicta* and merely persuasive. In reality, it is difficult to identify the *ratio* of a case, especially where a judge has followed two or more different lines of reasoning in reaching a decision, or where, for example, different judges of the Court of Appeal adopt different legal reasoning in a case and, as a result, the different opinions of different judges do not suggest the same *ratio*.

Question Two

This question tested candidates' knowledge and understanding of the law regarding specific performance in the law of contract. Most candidates correctly stated that when a plaintiff claims specific performance, he asks the court to order the defendant to do exactly what he has contracted to do. The important component of the question that the courts do exercise discretion as to whether or not an order for specific performance should be made and that, in certain circumstances the order of specific performance is refused, was discussed by only a small minority.

A number of candidates discussed damages as a remedy for breach of contract as well. Candidates would do much better if they read the question well and then focus on what is asked.

Question Three

This question tested the understanding of the candidates regarding the revocation of a general offer.
As a general rule, an offeror is free to withdraw his offer at any time before it has been accepted. However, revocation becomes effective only when it has been communicated to the offeree. Special rules apply in the case of general offers where the required performance has begun. In that case, there is an implied obligation on the offeror not to prevent the offeree's performance once it has begun. An alternate view is that the real reason is that such withdrawal would amount to a fraud. However, this implied obligation is only presumed if the terms of offer, or its surrounding circumstances, indicate that the offer was intended to be irrevocable once the performance began.

Not a single candidate answered this question correctly. A large majority of candidates answered this question as if it was on revocation of an ordinary offer. Most did state correctly that a general offer can be revoked before it has been accepted and several candidates did mention that the revocation needs to be communicated to the offeree. What was missing was the ability of the candidates to discuss properly the revocation once performance has begun.

Question Four

This question required the candidates to explain the delict of passing off and indicate at least one remedy available to the plaintiff. In a passing off action, the plaintiff must establish that, (a) there is a 'reasonable likelihood' that the public may be confused into believing that the defendant's business is, or is connected with, the plaintiff's business, which had gained a reputation, and, if so, (b) whether such confusion is due to a representation by the passing off trader and if, so, (c) whether confusion will probably cause damage to the plaintiff. *Link Estates (Pty) Ltd v. Rink Estates (Pty) Ltd* (1979) is a good example, which was mentioned by many candidates. Passing off entitles the plaintiff to an interdict to stop the defendant from engaging, or continuing in any further passing off activities which harms the plaintiff's interests. In addition, the plaintiff may also claim damages. He would not be required to prove actual damages, that is, he need not establish the exact loss he suffered as a result of the business lost due to passing off; he only has to show that as a result of the passing off there was a probability of harm to his business. Lastly, the plaintiff may ask for the rendering of an

account. It means that whatever the defendant has gained by passing off was otherwise due to the plaintiff and, therefore, must reimburse him.

Several candidates chose not to answer this question at all. It is dangerous to leave out a topic completely. Several chose to discuss generally what a delictual action is and its consequences and ignored the passing off altogether. Those who discussed passing off did discuss the *Link Estates* case but incompletely. Interdict as a remedy was discussed by some of the candidates. Those who discussed damages as a remedy did so incompletely. No -one discussed the remedy of rendering of an account.

Question Five

This question asked candidates to explain what is meant by constructive dismissal. 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. Examples of constructive dismissal are: (a) Unilateral reduction in pay of the employee, (b) A complete change in the nature of the job, such as a demotion, (c) Change in the employee's place of work, when the contract of employment does not give the employer the right to make this change e.g. forcing an employee to work on the night shift, when his terms of service expressly require him to work on the day shift. 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. Only some gave examples of constructive dismissals. Many candidates chose to discuss the circumstances when an employer can dismiss their employees avoiding constructive dismissal completely.

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.

Question Six

This question asked the candidates to explain the doctrine of separate personality and its consequences. Almost all the candidates performed well in answering this question and scored reasonably good marks. Almost everyone did discuss *Salomon's case*. The candidates would have scored higher marks had they discussed *all* the consequences. Almost everyone mentioned just a few.

Question Seven

This question asked candidates to distinguish between preference shares and debentures. Almost all the candidates perform well in this question as well. Candidates demonstrated good understanding of preference shares and debentures and the differences between the two.

Question Eight

This question was in two parts. In Part (a) was based on the well-known case of *Felthouse v. Bindley* (1862). Mere silence of Sam could not be construed as acceptance of Nick's offer. So Nick could not enforce the contract. However, from the point of view of offeree (Sam), there could be a contract under these circumstances because, in the problem scenario, Nick waived the requirement that Sam should communicate the acceptance of offer to

him. Since Sam acted as directed, a binding contract came into existence. Therefore, by keeping silent Sam could force Nick to abide by his contract. A large number of candidates did answer the question correctly and performed well. A small minority either omitted to answer this part of question completely or answered it incompletely.

Part (b) was based on *Bloom v American Swiss Watch Company* (1915) and, again, most candidates answered this part of the question well.

Question Nine

This problem question related to the syllabus topic legal implications relating to companies in difficulty or crisis. The remedy of judicial management was most appropriate in the problem scenario. Unfortunately only a handful of candidates wrote that. A very large majority of candidates wrote that Salomon should raise money by issuing shares or debentures, or that he should opt for voluntary winding up or that the creditors should force compulsory winding up. Candidates, on the whole, scored inadequately in this question. The facts of the problem were inspired by the well-known case of *Saloman* and the candidates should have spotted that winding up or raising capital was impractical and the only practical alternative was to place the company under judicial management.

Question Ten

This problem question tested candidates' understanding of the rules governing the liability of the partners. Under the Partnership Proclamation, 1957 the registered deed of a limited partnership must identify the special partner, whose liability is limited to the amount of his contribution, and he merely shares the profit of the partnership business and does not participate in its management. However the partnership in the problem scenario was not registered as a limited partnership. The inevitable inference was that it was registered as a general partnership. The mere fact that all partners agreed that Thabo would be a sleeping partner, which alone, in law, did not make him a sleeping partner. In law, mere agreement of the partners cannot alter the status of Thabo from general to that of special partner. Almost every candidate wrote that Thabo was a sleeping partner and, as such, his liability would be limited to the amount of his contribution. In reality, law would consider him in the same way as it did a general partner in the enterprise and consequently he would be held personally and fully liable for the debts of the partnership.

Consequently, Thabo, Monty and Simon were jointly and severally liable for the partnership debts. Tsiu Hu could recover whatever compensation was awarded to him by the court firstly out of the partnership assets, which were merely R5,000, and the balance from the private assets of any of the partners, including Thabo, severally or jointly. It was stated in the problem that nothing could be recovered from the Kramer's business as it had gone bankrupt and there were no prospects of either getting the advance back, or the promised furniture. If a partner — Thabo, Monty or Simon — had paid the whole debt of the partnership, he may recover a proportionate sum from other partner or partners.

Many candidates did state that Monty and Simon were jointly and severally liable for partnership debts. However they did not follow it through properly. On the whole, most candidates could have scored far higher marks in this question had they read the question properly and applied their understanding and knowledge appropriately.