



Examiners' report

F4 Corporate and Business Law (MLA)

June 2009

General Comments

The examination paper consisted of ten compulsory questions, all of which had 10 marks each. The majority of candidates attempted all questions. In this session candidates appeared to have acknowledged that all questions have the same mark allocation and therefore appeared to dedicate the same amount of time to all questions as opposed to the trend in previous sessions where candidates treated the three problem/application questions at the end of the paper differently and dedicated too much time dealing with these questions to the detriment of their general performance.

Although marks are not awarded according to the length of the answers given, one cannot but remark that higher marks could be awarded if candidates provide some more detail in answering questions. Candidates must also read and understand the question before attempting to answer it. Similarly, where questions are divided into more than one part, candidates are expected to attempt each part giving due consideration to the mark allocation to each part. On the other hand, there are still those candidates who fail to insist on regurgitating all they know about a subject and do not concentrate on that part of the subject which has been included in the question. In application based questions, candidates are expected to apply their knowledge to the given facts and not state all they know about the subject- matter covered by the given facts. Not applying this method of answering questions affects overall performance as precious time is lost in answering the other questions in the paper.

The report will begin with some general brief comments on the overall performance of candidates in this session before going on to look at the questions in the paper in detail. One notes that both positive and negative aspects of performance are given so as to enable candidates to learn from past performers and performance.

At the outset one can state that there were some sound performances. However, there were also many average performances. The latter were due to candidates not being fully prepared for the examination. The inadequate performance of many candidates was once again evidenced by a clear failure to carefully read the content and requirements of questions, which impacted particularly on the performance in the narrative questions.

Some general indications of good practice follow:

- candidates must be well prepared for the exam - on all topics and not on what they consider the 'most important';
- candidates need to manage their time effectively;
- candidates must read carefully and understand the requirements of each question;
- keep in mind that the marks that the examiner allocates to each part of the question is indicative of the detail which candidates are required to go into;
- provide concise and complete answers;
- candidates should indicate the question number in the paper on each page of the respective reply;
- candidates should indicate the questions done in the box on the front of the paper;
- start each question on a new page;
- use both sides of the booklet;
- general essay answer format should not be used for problem questions as these will contain little information relating to the specific issues raised in the problem question.

Specific Comments

Question One

This question dealt with the sources of Maltese law requiring candidates to explain the primary and secondary sources of Maltese law. The sources of law are divided into primary sources, which are directly and authoritatively sources of law and the secondary sources which are of an authoritative nature but not necessarily binding but are usually referred to in order to interpret the law, as in the case of judgements and the writings of authoritative text writers.

All candidates attempted this question and most of the answers were satisfactory with candidates giving sufficient detail on both the primary and secondary sources of Maltese law.

Question Two

This question was also a one part question which specifically dealt with one aspect of contract law, namely the concept of the privity of contract. The majority of candidates attempted this question. Many answers given to this question were satisfactory with candidates giving an explanation of the concept, namely that a contract only binds the parties to it (and their heirs). Third parties, that is all those persons who are not parties to a contract, either personally or indirectly through an authorised representative, are not bound by it.

There were also those candidates who gave further detail and mentioned specifically those cases found in our law, which provides for certain limitations to the principle of privity of contract both with regards to promises of the performance of an obligation by a third party and to stipulations for the benefit of a third party.

Question Three

This question was also worded in a straightforward manner and required candidates to deal with the external essential requisites of a contract as opposed to the internal requisites. The common essential requisites may be internal and external. While the external requisites refer to the form of a contract, the internal requisites result from the very notion of a contract, namely agreement between the parties. Normally the form of a contract is free and the parties may use any form they wish even omitting any type of formality and express their agreement by word of mouth. However there are cases where the law requires certain conditions and certain formalities by which consent is to be expressed.

Despite the fact that the question was worded in a clear manner pointing out to candidates this distinction, there were those who dealt with the internal essential requisites and not the external requisites. Marks cannot be awarded to candidates who dwell on areas which are not covered by the specific question; hence the importance of carefully reading the question and answering 'to the point'. Those who dealt with the external requisites gave satisfactory answers referring to the instances in local civil law, where the particular form of the contract is stipulated depending on the nature of the contract.

Question Four

This question dealt with employment law. The question dealt with the information which employers must give their employees in the absence of a written contract of employment.

In replying to this question candidates were expected to deal with the provisions of Legal Notice 431 of 2002 entitled Information to Employees Regulations, 2002 which provides for such information. Where no written contract of employment has been signed between the employer and the employee, and/or where the written contract does not cover all or some of the information required to be notified to the employee by these Regulations, the employer shall be bound to give or send to the employee a letter of engagement, or a signed statement, within eight working days from the commencement of employment.

The majority of candidates who answered this question did make reference to the correct information, which must be included in the afore-mentioned written statement. Higher marks were awarded to those candidates who gave some detail on the information to be provided and not merely listed the information required.

Question Five

This question was a two part question dealing with the division of the share capital of a limited liability company into shares. Although *prima facie* the rights carried by all the shares in the company rank *pari passu*, that is the shareholders participate in the benefits of membership equally, the memorandum or articles may authorise the company to divide its shares into different classes having the same or different rights. The first part of the

question dealt with ordinary shares and the second part of the question with preference shares, including the manner in which preference shares are redeemed.

Both parts of this question were well answered by most candidates and candidates went into the required detail, in particular with reference to the second part of the question, where candidates made reference to the different rights which may be afforded to the holders of preference shares. Candidates also drew out the appropriate distinctions between the rights of the holders of preference shares as against the rights vested in the holders of ordinary shares.

Question Six

This question was a very straightforward question and required candidates to deal with the company secretary, being one of the officers of a limited liability company. In terms of the Companies Act, every company must have a company secretary. In terms of the definition section under the Companies Act, 1995, an officer of a company is said to include a director, manager, or company secretary, but does not include an auditor.

In terms of the Companies Act, the company secretary shall be responsible for keeping:

- the minute book of general meetings of the company;
- the minute book of meetings of the board of directors;
- the register of members;
- the register of debentures; and
- such other registers and records as the company secretary may be required to keep by the board of directors.

In addition, the company secretary is to ensure that proper notices are given of all meetings; and is to ensure that all returns (as for example, the annual return which is to be filed with the Registrar of Companies on an annual basis) and other documents of the company are prepared and delivered to the Registrar in accordance with the requirements of the Companies Act.

Very satisfactory answers were provided by candidates to this question and the majority clearly explained the role of the company secretary

Question Seven

This question dealt with a fundamental feature of company law, namely the concept of the separate legal personality and candidates were requested to explain the instances when such may be ignored. Candidates were expected to start their answers by giving a brief explanation of what the separate legal personality of a company is, and then deal with those instances where this may be ignored.

Lifting the veil, in simple terms, is action taken rendering the shareholders of a limited liability company liable for their actions despite the fact that their liability is normally deemed to be limited to the unpaid part of the issued capital of the company. Such action is taken when the acts of the shareholders are serious enough to warrant personal action being taken against them.

While the Companies Act does provide for instances when the corporate veil may be lifted, there are those instances when the courts may penetrate the veil without their being specific mention of such in the law. There were those candidates who achieved satisfactory marks in this question as they clearly demonstrated that they were aware of those instances and referred not only to those specifically provided for in the law.

Question Eight

This question is divided into two parts, with the first part having 8 marks allocated to it and the remaining 2 marks allocated to the second part of the question. The facts given are about shares in companies, AAA plc and BBB plc and the acquisition of shares in the companies. The question dealt with the offence of market abuse and the liability or otherwise of the persons mentioned in the question. In order to determine the liability of Philip and Michael candidates first had to determine whether they fall within the purview of the Prevention of Financial Markets Abuse Act, 2005. The Act is aimed at preventing market abuse which includes both the prohibited use of inside information and the practice of market manipulation.

The Act contains a definition of a person discharging managerial responsibilities within an issuer which means a person who is: (a) a member of the administrative, management or supervisory bodies of the issuer; or (b) a senior executive, who is not a member of the bodies as referred to in paragraph (a), having regular access to inside information relating, directly or indirectly, to the issuer, and the power to make managerial decisions affecting the future developments and business prospects of the issuer. Philip would clearly fall under this definition.

Philip's liability is clearly provided for under the general prohibition found under the Act, which provides that no person shall use inside information to trade in any financial instrument admitted to a regulated market or in any other way to acquire or dispose of, or attempt to acquire or dispose of such financial instrument, whether for his own account or for the account of a third party, either directly or indirectly, if he is in possession of information related to such financial instrument by virtue of (a) his membership of the administrative, management or supervisory bodies of the issuer (as is Philip, since he is a director of both companies); (b) his holding in the capital of the issuer (also is the case with Philip); (c) his having access to the information through the exercise of his employment, profession or duties; or (d) his criminal activities.

The second part of the question required candidates to discuss Michael's position and candidates were expected to determine whether Michael could be held liable as a secondary insider.

Most candidates were able to give satisfactory answers to both parts of the question and give reasons for the conclusions reached, which is one of the primary purpose of the problem based questions as opposed to the theoretical ones.

Question Nine

This question was about Create Limited and employees of this company, Julian and James. The question was a two part question, with the first part dealing with the termination of employment in terms of the provisions of the Employment and Industrial Relations Act 2002 and the second part dealing with the voluntary resignation of an employee.

With regards to the first part candidates were expected to make reference to the provisions which dealt with the termination of definite contracts of employment. Contracts for a definite period may be terminated, either:

- (i) At the lapse of the fixed period;
 - (ii) By either party during probation. The first six months of employment shall be probationary employment unless both parties agree for a shorter period. During probation either party may terminate the employment at will without giving any reason for doing so. The only limitation laid down is that if employment is terminated during probation and employment has continued for more than one month a week's notice has to be given. In the case of a contract of service, or of an industrial agreement, in respect of employees holding technical, executive, administrative, or managerial posts and whose wages are at least double the minimum wage for that year, such probationary period shall be of one year unless

otherwise specified in the contract or agreement, which wording seems to imply that probation can be increased to any period;

- (iii) By either party for any reason provided that the penalty stipulated at law is paid; or
- (iv) By either party for a good and sufficient cause, in which case no penalty shall be payable.

On the other hand, indefinite contracts may be terminated:

- (i) by either party during probation;
- (ii) by the employee for any reason whatsoever, provided that the required notice is given as prescribed by law. Therefore, James would have to present a letter of resignation to his employer advising him of his intent to terminate his employment and the relative notice period depending on his length of employment would apply;
- (iii) by the employer on grounds of redundancy, provided that the required notice is given. Redundancy is not defined in our law. An employee whose employment is terminated on grounds of redundancy shall be entitled to re-employment if the post formerly occupied by him is again available within a period of one year from the date of termination of employment, in which case he cannot be re-employed at conditions which are less favourable than those to which he would have been entitled if his contract had not been terminated. Furthermore, any person so re-employed shall be considered to have continued in his employment notwithstanding the termination on grounds of redundancy. The 'last in first out rule' must be applied by employers terminating employment on grounds of redundancy. The employer has to terminate the employment of that person who was last engaged in the class of employment effected by such redundancy. If the last person employed in that class is related to the employer, then that person, who was employed before him shall be declared redundant; or
- (iv) by either party for a good and sufficient cause.

Most candidates gave satisfactory answers to both parts of the question though there were a few who were unclear as to the type of payment that has to be made by an employer when terminating a fixed term contract of employment prior to the lapse of the agreed period.

Question Ten

This question dealt with the offences of fraudulent and wrongful trading in terms of the Companies Act 1995. This question was also divided into two parts, with the first part requesting candidates to determine and analyse whether action could be taken against the chairman, and the second part of the question dealing with any defences which the dissenting director could raise in the event that he be accused of such offences.

The Companies Act provides for two principal offences for which directors can be held liable in the case where the company continues to trade when in financial difficulties and such company is subsequently dissolved, namely fraudulent and wrongful trading. The main differing feature between the two offences is the intention to defraud, which must be found to exist in order to hold a person liable for fraudulent trading.

Where it appears that a person who was a director (including a shadow director) and who knew or ought to have known prior to the dissolution that there was no reasonable prospect that the company would avoid being dissolved due to its insolvency, such person shall be held liable for wrongful trading. This provision can be said to concern in principal two persons, namely the liquidator who has to bring forward the application before the court, and the director or directors against whom the action is brought.

On the other hand, if in the course of winding up, it appears that any business of the company has been carried on with the intent to defraud creditors of the company or any other person or for any fraudulent purpose, the



court may declare that any persons who were knowingly parties to the carrying on of the business, be held liable for fraudulent trading.

On the whole most candidates replied to this question in a satisfactory manner and clearly demonstrated that they had an in-depth knowledge of this area of company law and the consequences arising from such offences.