



Examiner's report

F4 Corporate & Business Law (MLA)

December 2009

General Comments

The examination paper consisted of ten compulsory questions, all of which had 10 marks each. In fact, one notes that very few candidates did not attempt all the questions. This does not appear to have been due to time pressure. From the answers given the majority of candidates allocated the same amount of time to the answering of each question as in the majority of cases appropriate detail was given and the length of the replies given were commensurate to the mark allocation of each part of the question.

In most instances it was positive to note that candidates did read the question and identify the requirements of each part of the question. The instances where most candidates failed to do so was in relation to question 8(a) where candidates failed to make reference to whether preference shares could be converted into ordinary shares; question 8(b) in that candidates only sparsely mentioned the procedure for the pledging of shares; question 9(b) where not many candidates explained what action may be taken against a professional for breach of duty. Particularly inadequate answers were given in respect of question 10 where candidates failed to apply their knowledge on the law of contracts to the given facts.

The principal reason for the under performance of candidates is lack of adequate preparation for the examination with many answers not having sufficient detail to be afforded higher marks.

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.

In this session there were some very high performers but in the majority candidates obtained average marks with many just managing to reach the pass mark. This is evidence that with a little more effort better marks can be achieved.

Some general indications of good practice to 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 doctrine of precedent and candidates were required to explain the nature and scope of the doctrine and comment on its applicability locally. After explaining the nature of the doctrine and its status as a source of Maltese law, candidates were to refer to the situation locally and

how this doctrine is applied by the local courts. In this context, invariably were to make reference to the situation in the UK where the doctrine of precedent is binding on the judiciary.

Nearly all candidates attempted this question and most of the answers were very satisfactory with candidates giving sufficient detail on the doctrine and its application locally.

Question Two

This question was also a one part question which specifically dealt with one aspect of contract law, namely the offer and acceptance. These are requirements which must be complied with in order for a valid contract to come into place. A contract is deemed to be concluded when a valid offer is accepted. It is therefore considered to be the first step in the creation of an obligation from which certain legal effects will ensue depending on whether or not the contract is ever concluded and therefore accepted by the other party.

The majority of candidates attempted this question. Many answers given to this question were satisfactory with candidates giving an explanation of both offer and acceptance. It was noted that many candidates gave greater importance to the offer.

Candidates could have been awarded higher marks if equal importance was given both to the offer and acceptance as requirements. Many candidates spoke at length about the requirement of a valid offer and what is required for a valid offer neglecting the requirements of a valid acceptance.

Question Three

This question also dealt with contract law under the Civil Code. The question required candidates to discuss and bring out the differences between contracts, quasi- contracts, torts and quasi-torts.

The question was worded in a straightforward manner and all candidates who attempted this question did understand its requirements and made reference to the provisions of the Civil Code, which refers to the different types of contracts. It was encouraging to note that whereas in previous sessions when a similar question was posed, candidates were not able to make specific references to the legal provisions. From the answers given it is clear that candidates were prepared for this subject. Marks were not higher in certain instances as some candidates were not able to deal with the first part of the question or the second part in sufficient detail.

Question Four

Question 4 was also a one part straightforward question and dealt with one aspect of employment law. The question dealt with the provisions of the Employment and Industrial Relations Act 2002, which deal with the protection afforded at law for employees to ensure their due receipt of wages. The Act dedicates a whole chapter to the protection of wages. The reason for this protection being afforded to employees is obvious, in that, receipt of wages is a fundamental right of every worker.

The law provides for various provisions and in each one there is a rule which must be abided by all employers to ensure compliance with the same.

The majority of candidates who answered this question gave sound answers and made reference and explained adequately most, if not all, the rules found in the law.

Question Five

This question was also a one part question. This dealt with the management of partnerships.

- The administration and representation of the partnership en commandite is vested in the general partners, and unless the deed of partnership otherwise provides, such administration and representation vests in each of the general partners severally. However, managing partners may be appointed. The powers and duties of the managing partner of the partnership en commandite are similar to those of the managing partners of a partnership en nom collectif. In the case of a partnership en nom collectif, one or more partners may be appointed managing partners. Where there is more than one they may be vested with such powers either jointly or severally.

Answers to this question were, in the majority, satisfactory though perhaps lacking in some depth.

Question Six

This question required candidates to deal with the decision making procedures for the shareholders of limited liability companies. The question made reference to both ordinary and extraordinary resolutions making it very clear to candidates that their answer was to focus on these forms of resolutions.

Article 135 of the Companies Act deals principally with resolutions taken in public companies, a resolution is an extraordinary resolution where two conditions are complied with. If one of the aforesaid majorities is obtained, but not both, another meeting shall have to be convened within 30 days in accordance with the provisions for the calling of meetings to take a fresh vote on the proposed resolution. At the second meeting the resolution may be passed by a member or members having the right to attend and vote at the meeting holding in the aggregate not less than 75% in nominal value of the shares represented and entitled to vote at the meeting. However, if more than half in nominal value of all the shares having the right to vote at the meeting is represented at that meeting, a simple majority in nominal value of such shares so represented shall suffice. In the case of a private company a resolution shall nonetheless be deemed an extraordinary resolution where other conditions are complied with. On the other hand, an ordinary resolution is one which is passed by a member or members having the right to attend and vote holding in the aggregate shares entitling the holder or holders thereof to more than 50% of the voting rights attached to shares represented and entitled to vote at the meeting, or such other higher percentage as the memorandum or articles may prescribe.

Therefore candidates were expected to make reference to this specific provision of the Companies Act and reproduce its contents. Most candidates gave satisfactory answers but quite a number failed to bring out the distinction between public and private companies.

Question Seven

This question dealt with a feature of the Companies Act which deals with liquidations and dissolutions of companies, in particular a voluntary winding up of a company. A distinguishing feature between a members' voluntary winding up and a creditors' voluntary winding up is precisely the declaration of solvency which is only issued in the former case. Candidates were required to describe the contents of a declaration of solvency and provide who is to issue the said declaration.

There were those candidates who performed satisfactorily in this question as they clearly demonstrated that they were aware of the declaration and its use. There were some who detailed its contents but failed to provide clearly who would issue such a declaration.

Question Eight

This question is divided into two parts, with the first part having 7 marks allocated to it and the remaining 3 marks allocated to the second part of the question. The first part of the question could be said to be further sub-divided into two parts, with the first part requiring candidates to discuss the rights of the holder of preference shares as against the rights of the holder of ordinary shares. The second part of the first part of the question dealt with changing the nature of the shares.

The shares of a company may only be divided into different classes if this is authorised in its statutory documents. In practice, the articles usually contain a clause authorising the issuance of different classes of shares. Although there are various types of shares, the two most important ones are 'ordinary shares' and 'preference shares'. Although the provisions of the law do not make specific reference to the different rights which may be afforded to the holders of the different types of shares, most candidates were able to deal with and discuss the various rights and their implications.

One of the characteristics of preference shares is that these cannot be converted into ordinary shares. Many candidates failed to bring out this point. Furthermore, even if it were possible to convert preference shares into ordinary shares, the shares donated to Michelle are non-voting, which means that Michelle has no right to vote in general meetings of the company on the basis of those preference shares. Therefore Michelle would not be entitled to exercise any voting power to amend the statutory documents of the company as may be required to place such conversion into effect.

The second part of the question dealt with the procedure to pledge shares locally. The law provides for a particular procedure which must be followed. Accordingly, a pledge must be allowed by the company's statutory documents, a pledge agreement must be entered into and the Registry of Companies must be notified of the pledge.

Most candidates gave very satisfactory answers to the first part of the question and less satisfactory answers to the second part of the question.

Question Nine

This question dealt with the accountancy profession and more specifically with the duty of care, which must be afforded by members of the profession and this in terms of the provisions of the Accountancy Profession Act.

Maltese law regulates the standard of diligence applicable to acts or omissions of a person and the standards to be applied in the performance of contracts and the resulting liability arising from the same. The general rules are drawn from the Civil Code; which rules apply to all persons, including professionals in the exercise of their respective professions. Maltese case law contains a number of judicial decisions on how these general rules are applied to professionals, such as notaries, lawyers and architects. Furthermore, the accountancy profession is also specifically regulated by the Accountancy Profession Act, 1980.

Most candidates gave satisfactory answers to this part of the question clearly showing that they were conversant with the provisions of law on the subject matter. Less detail was however given as to the steps which may be taken for breach of this duty of care.

The second part of the question dealt with a simple practical question as to whether in the circumstances the individual mentioned could audit the financial statements of the company. Reference had here to be made to the disqualifications of auditors in terms of the provisions of the Companies Act. While the good majority of candidates gave the correct answer to this question there were not many who gave the reason for their answers.

Question Ten

This question dealt with contractual obligations and whether a contract could be deemed invalid for lack of consent and appropriate subject matter. Consent and subject matter are essential requirements for a valid contract. Candidates gave relatively inadequate answers and many did not make any reference to the essential requirements for a valid contract but based their answers on what they believed to be a reason for bringing forward an action for breach of contract.

One of the internal requisites is the subject matter of the contract or the object. Anything may form the object of contracts. All things may therefore form the object, whether movable or immovable, corporeal or incorporeal, present or future, and even the use and the possession of a thing may be the object of a contract just as the thing itself. Even future things, such as future produce may form the object of a contract, and in this regard, we must distinguish according to whether the object which the parties have in mind is the future thing itself or merely an expectancy of the future thing.

As a rule, the object of contracts may be anything which is chosen by the parties, because just as the law protects and sanctions the liberty of the citizen in general, it also protects and sanctions this liberty in contracts. .

The requisites of the object of contracts are the same as those of the object of obligations in general. The object of contracts, therefore, must be possible, lawful, *in commercio*, specified or such that it may be specified, and useful to the creditor.

From the facts given while Mr Jones appears to have ordered and paid for an airconditioning system which provides both heating and cooling, the system delivered and installed by the supplier did not provide both functions. In order to verify the facts, the purchase order documents would have to be clearly analysed to determine that Mr Jones' order clearly and specifically provided for a dual function system. If such is not the case it would be difficult for Mr Jones or any court of law to find in favour of Mr Jones and declare the contract of sale null and void.

A further essential requisite which must be present for a contract to be deemed valid, is consent. The consent of the parties entering into a contract is of essence and without which a contract cannot be said to be concluded validly.

The parties in the case under consideration appear to have negotiated the purchase and sale of a particular thing. There was the volition of both parties to enter into the transaction which volition existed both internally and externally. However, we also note that Mr Jones was under the impression

that he was to acquire a dual purpose system, This is not what he was however supplied with. Therefore one questions whether the supplier was under the same impression or not and whether there was unison of wills. This can only be determined by an analysis of the relative purchase documents and only if these support Mr Jones' claim can he claim that consent was vitiated on the basis of an error.

Therefore as can be seen from the above, candidates were expected to argue their contentions. There is no straight forward answer to this question but many failed to put forward any arguments based on their knowledge of the law.