
Law & Ethics Republic of Ireland

1st Year Examination

May 2010

Paper, Solutions & Examiner's Report



NOTES TO USERS ABOUT THESE SOLUTIONS

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Accounting Technicians Ireland
1st Year Examination: Summer Paper 2010
Paper: LAW & ETHICS (ROI)

Friday 21st May 2010 - 9.30 a.m. to 12.30 p.m.

INSTRUCTIONS TO CANDIDATES

For candidates answering in accordance with the law and practice of the Republic of Ireland.

Section A is a compulsory question and must be attempted.

Section B answer ANY FOUR of the FIVE questions.

Section C answer ANY FOUR of the FIVE questions.

If more than the required questions are answered in Section B and Section C, then only the correct number of questions, in the order filed, will be corrected.

Candidates should allocate their time carefully.

Marks will be awarded for specific reference to sections of the Acts/Orders and decided cases. Candidates are expected to answer the questions in their own words in order to demonstrate their understanding of the points at issue. The mere transcription of sections of the Acts/Orders, or the citing of references therein, by itself, will not be regarded by the Examiner as a sufficient answer.

Answers should be illustrated with examples, where appropriate. Cite any relevant authorities and/or statutory provisions to support your answers.

Question 1 begins on Page 2 overleaf.

SECTION A**Compulsory Question**

Cite any relevant authorities and/or statutory provisions to support your answers

QUESTION 1

- a)** Peter works as an in-house solicitor for a communications company called Alphabet Communications Plc. In February 2010, he was told in confidence that a rival company, Yellow Brick Road Communications Plc was planning to take over the company. Two days before the proposed takeover was made public, Peter's brother, James, bought 80,000 Alphabet Communications Plc shares at €1.30 per share. On the first Monday in May the takeover was announced at an agreed share price of €1.80. As a result of the price increase, James made a profit of €40,000. Three weeks later, James bought Peter a new car valued for €20,000, exactly half of the profit made from the Alphabet Communications Plc shares trade.

Discuss the elements of the offence of insider trading, and determine whether Peter and James are guilty of this offence. Comment also on the sanctions likely to be imposed upon both Peter and James if they are found guilty of insider trading.

12 Marks

- b)** In the context of the Appeals Committee of Accounting Technicians Ireland, explain the following:

1) Outline the composition of the Appeals Committee.

2 Marks

2) List any THREE grounds for appealing an Order of the Complaints Committee or Disciplinary Tribunal.

3 Marks

3) List any TWO potential findings of the Appeals Committee.

2 Marks

4) State the time limit for appealing an Order of the Complaints Committee or Disciplinary Tribunal to the Appeals Committee.

1 Mark

Total 20 Marks

SECTION B

Answer ANY FOUR of the FIVE questions in this Section

Cite any relevant authorities and/or statutory provisions to support your answers

QUESTION 2

- a) Edward and Emmet are considering converting their private company, Cullen Enterprises Ltd, into a public limited company and have heard that they will require a trading certificate to trade as a public limited company. Outline the prerequisite requirement to obtain a trading certificate, and list the information that must be submitted to the Companies Registration Office in order to apply for this certificate.

6 Marks

- b) One of the main characteristics of a registered company is "*separate legal personality*". Explain the meaning of this term.

4 Marks

Total 10 Marks

QUESTION 3

Philosophy Ltd has been in financial difficulty for the last two years and needs to raise extra finance to keep the company trading. In this regard they are proposing to issue 100,000 €1 preference shares at a discount of €0.30 per share. They are also considering calling for payment on their reserve capital valued at €20,000. In this regard explain the following:

- a) The nature of a preference share.

4 Marks

- b) The rules regarding issuing shares at a discount, and whether Philosophy Ltd can issue discounted shares.

4 Marks

- c) Define the term "Reserve Capital" and explain whether Philosophy Ltd can call for the payment of reserve capital.

2 Marks

Total 10 Marks

P.T.O.→

QUESTION 4

- a) Bella has been an executive director of Denali Enterprises Ltd, a management consultancy company, for the past three years. Denali Enterprises Ltd's contract for management consultancy services with Waterford City Council has recently come up for renewal and Denali Enterprises Ltd has been informed by the Council that as they have been unhappy with the level of service and costs provided by Denali Enterprises Ltd, that they will not be renewing the contract. Within a week of this notification Bella is contacted by a Senior Principal Officer in Waterford City Council and told that throughout the tenure of Denali Enterprises Ltd's contract with the Council, they were always satisfied with the work done by Bella, and that if Bella left Denali Enterprises Ltd and established her own company, they would be happy to award her a five year contract for management consultancy services. Following this discussion Bella resigns her position with Denali Enterprises Ltd and establishes a company to undertake the management consultancy contract with the Council. When Denali Enterprises Ltd discover what Bella has done they sue her for breach of her fiduciary duties as a company director to: (1) act in good faith and in the best interests of the company, and (2) to avoid conflict of interest situations. Discuss the nature of both of these duties and assess whether Bella is in breach of her duties, and the likely consequences of any such breach.

8 Marks

- b) Outline the obligations imposed upon company directors in relation to the maintenance of proper books of account.

2 Marks**Total 10 Marks****QUESTION 5**

Aromatic Manufacturing Ltd has decided to call an extraordinary general meeting (EGM) to change their Articles of Association. In this regard they seek your advice on the following matters:

- a) The notice requirements to call an EGM for the purpose of alteration of the Articles of Association.
- b) The type of resolution required to effect an alteration of the Articles of Association.
- c) A list of any THREE persons who can call an EGM.
- d) The various methods by which voting can be effected at an extraordinary general meeting.

2 Marks**1 Mark****1.5 Marks****5.5 Marks****Total 10 Marks**

P.T.O.→

QUESTION 6

a) Define the term "Liquidation".

2 Marks

b) Outline any FOUR differences between a Member's Voluntary Liquidation and a Creditor's Voluntary Liquidation.

8 Marks

Total 10 Marks

SECTION C

Answer ANY FOUR of the FIVE questions in this Section

Cite any relevant authorities and/or statutory provisions to support your answers

QUESTION 7

a) Explain the criminal jurisdiction of the following courts:

i. District Criminal Court

2 Marks

ii. Circuit Criminal Court

2 Marks

iii. Central Criminal Court

2 Marks

iv. Special Criminal Court

2 Marks

b) List the FOUR possible outcomes where a case is appealed to the Court of Criminal Appeal.

2 Marks

Total 10 Marks

QUESTION 8

Megan works as a book-keeper with Brown & Barnaby Solicitors. Last Saturday night Megan won the €2 million jackpot in the Irish lottery. First thing on Sunday morning Megan contacted the managing partner at Brown & Barnaby Solicitors and informed him that she was resigning her position with immediate effect, despite the fact that her employment contract requires her to give the practice one month's notice to terminate her employment. The managing partner is very distressed by this news as the Law Society of Ireland is due to visit the practice this week to review their client accounts, and Megan had sole responsibility for the maintenance of these accounts.

- a) Discuss the remedy of an Order for Specific Performance and determine the likelihood of Brown & Barnaby Solicitors obtaining such an Order from the Court to compel Megan to return to work and complete her notice period, as stated in her contract.

8 Marks

- b) Assuming that Brown & Barnaby Solicitors fail to obtain such an Order, outline any other remedies available to the firm in respect of Megan's breach of contract.

2 Marks**Total 10 Marks****QUESTION 9**

Owen has been employed as a security officer with the Galway Airport Authority for the past FIVE years. His contract states that he is employed to work from 9.00 a.m. to 5.30 p.m. five days a week. Last month he was called to a meeting with the Airport's Human Resource Department and informed that he was being switched to the night shift, working from 12.00 a.m. to 9.00 a.m., with effect from the 1st July 2010. Owen explained that due to his family situation that he was not in a position to work the night shift, but he was told that he had no option but to switch to the night shift, and that if he did not switch to this shift that he would be dismissed.

Since this meeting Owen has made several attempts to meet with the Human Resource Manager to discuss this proposed contractual alteration, but the manager has refused to meet with Owen, stating that his decision regarding the alteration is final. In light of this situation, Owen is considering resigning from his position and suing his employer for constructive dismissal.

- a) Define the term "constructive dismissal" and explain the burden of proof when such a claim is raised.

2.5 Marks

- b) Explain any FOUR actions that may amount to a fundamental breach of contract and facilitate a claim for constructive dismissal.

6 Marks

- c) Assess the potential success or otherwise of Owen's proposed claim of constructive dismissal.

1.5 Marks**Total 10 Marks**

QUESTION 10

Three months ago, Alice went to her doctor complaining of chest pains and shortness of breath. Her doctor assessed her and sent her to the hospital for further tests. The hospital diagnosed her with a heart condition and she was prescribed medication to manage this condition. Last week she was back at her doctor's office again, complaining that she felt worse. On review her doctor has discovered that she was prescribed the incorrect medication and that this medication has made her condition worse.

Alice has taken legal advice and is planning on suing the hospital for negligence. In the context of negligence, explain the various factors that the Court will take into consideration in determining whether there has been a breach of the standard of care by the hospital.

Total 10 Marks**QUESTION 11**

a) The Consumer Protection Act 2007 contains a reference to 32 practices that are considered unfair and prohibited in all circumstances. Outline any FIVE of these prohibited practices.

7.5 Marks

b) Discuss the main functions of the National Consumer Agency.

2.5 Marks**Total 10 Marks**

1st Year Examination: Summer 2010

Law & Ethics (ROI)

Solutions

Students please note: These are suggested solutions only; alternative answers may also be deemed to be correct and will be marked on their own merits.

Solution to Question 1

- A. Peter works as an in-house solicitor for a communications company called Alphabet Communications Plc. In February 2010, he was told in confidence that a rival company, Yellow Brick Road Communications Plc was planning to take over the company. Two days before the proposed takeover was made public Peter's brother, James, bought 80,000 Alphabet Communications Plc shares at €1.30 per share. On the first Monday in May the takeover was announced at an agreed share price of €1.80. As a result of the price increase, James made a profit of €40,000. Three weeks later James bought Peter a new car valued for €20,000, exactly half of the profit made from the Alphabet Communications Plc shares trade.

Discuss the elements of the offence of insider dealing, and determine whether Peter and James are guilty of this offence. Comment also on the sanctions likely to be imposed upon both Peter and James if they are found guilty of insider trading.

(12 marks)

- B. In the context of the Appeals Tribunal of Accounting Technicians Ireland, explain the following:
- 1) Outline the composition of the Appeals Tribunal. **(2 marks)**
 - 2) List any THREE grounds for appealing an Order of the Complaints Committee or Disciplinary Tribunal. **(3 marks)**
 - 3) List any TWO potential findings of the Appeals Tribunal. **(2 marks)**
 - 4) State the time limit for appealing an Order of the Complaints Committee or Disciplinary Tribunal to the Appeals Tribunal. **(1 mark)**

Total 20 Marks

- A. Insider dealing: definition and overview of the prohibition against insider trading – effect of abuse of price sensitive information on share prices – artificiality – manipulation – effect on the integrity of the stock market **(1 mark)** – action is now generally regulated by the Investment Funds, Companies and Miscellaneous Provisions Act (IFCMPA) 2005, which transposed an EU Directive (Directive 2003/6/EC) – the 2005 Act prohibits the use of the inside information, the disclosure of inside information and recommending or inducing another to use the inside information – new definitions: (1) inside information: information of a precise nature relating directly or indirectly to one or more issuers of financial instruments or a

Solution to Question 1 (Cont'd)

financial instrument(s), which has or has not been made public and which, if were made public, would be likely to have a significant effect on the price of those financial instruments or on the price of related derivative financial instruments or information that a reasonable investor would be likely to use as part of the basis of the investor's investment decisions; (2) information of a precise nature – relates to information that: (a) indicates: (i) a set of circumstances which exists or may reasonably be expected to come into existence, or (ii) an event which has occurred or may reasonably be expected to occur, and (b) is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or events, as the case may be, on the prices of financial instruments or related derivative financial instruments; (3) financial instrument' is defined to include 'transferable securities'; (4) a person may be defined as an insider as a consequence of their of membership of professional bodies (especially those who issue financial instruments), by virtue of their capital holding, through employment or professional duties; or through criminal activity **(7 marks)** – penalties for breach of the legislation: civil liability – compensation to any party to the transaction who sustained a loss; and an account to the company for all unlawful profit made, statute of limitations is 2 years – criminal liability – on summary conviction a term of imprisonment not exceeding 12 months and/or a fine not exceeding €5,000; on indictment a term of imprisonment not exceeding 10 years and/or a fine not exceeding €10m; and a prohibition from any dealing for 12 months from the date of conviction **(2 marks)** – conclusion that both Peter and James are liable for insider trading – through the disclosure and use of information of a precise nature likely to impact the value of shares **(2 marks)**

- B.1) Composition of the Appeals Tribunal: members are appointed by the Disciplinary Tribunal – composition: (1) one lawyer, who is not a member of Accounting Technicians Ireland, who will act as chairman and (2) two other persons, one of whom should be a member of Accounting Technicians Ireland and the other who should not be a member of Accounting Technicians Ireland – can't be a members of the Appeals Committee if you are involved in the Complaints Committee or Disciplinary Tribunal **(2 marks)**
- B.2) Grounds for Appeal: (1) the finding is wrong, (2) the Order is excessive, (3) the finding and/or the Order is flawed because of a serious procedural irregularities or other irregularities in the proceedings before the Complaints Committee or Disciplinary Tribunal, and/or (4) the award of costs against the member is manifestly excessive **(any 3 x 1 mark = 3 marks)**
- B.3) Outcome of Appeals Tribunal: (1) they can affirm, vary or rescind any finding or Order of the Disciplinary Tribunal in respect of which the appeal was brought, (2) they can substitute any other finding or Order which the Disciplinary Tribunal might have made on the original formal complaint, (3) they can order that the formal complaint that resulted in the finding or Order of the Disciplinary Tribunal, in respect of which the appeal was brought, be heard *de novo* by a different Disciplinary Tribunal, or (4) they can make an order for costs **(any 2 x 1 mark = 2 marks)**
- B.4) Time Limit for an Appeal: 21 days **(1 mark)**

Solution to Question 2

- A. Edward and Emmet are considering converting their private company, Cullen Enterprises Ltd, into a public limited company and have heard that they will require a trading certificate to trade as a public limited company. Outline the prerequisite requirement to obtain a trading certificate, and list the information that must be submitted to the Companies Registration Office in order to apply for this certificate. **(6 marks)**
- B. One of the main characteristics of a registered company is "*separate legal personality*". Explain the meaning of this term. **(4 marks)**

Total 10 Marks

- A. Trading Certificate: prerequisite requirement is that the company meets the minimum statutory requirements regarding share capital – a public company must have a minimum of €38,100 allotted share capital with at least 25% of this sum fully paid up by the members i.e. €9,525 **(2 marks)** – the information that must be submitted to the CRO to receive this certificates includes: (1) details indicating that the nominal value of the company's share capital is not less than the authorised minimum, (2) the amount paid, at the time of the application on the share capital of the company, (3) the preliminary expenses of the company and the persons who have been paid or are payable, and (4) any intended payment or benefit to be paid to the company's promoters (persons establishing the company and doing everything necessary to effect formation) **(4 marks)**
- B. Separate Legal Personality: this concept means that a company has a separate legal status from its members – and in reality has a distinct personality from the natural persons who set up the company – this was first recognised in the case of Salomon v Salomon & Co Ltd (1897) – this separate personality means that a company can: (1) own their own property, (2) enter in contractual relations with either natural persons or other companies, (3) commit crimes and be held responsible for such crimes, (4) has perpetual existence, and (5) can be sued or sue other persons – in addition, this separate personality also gives the shareholders of the company limited liability **(4 marks)**

Solution to Question 3

Philosophy Ltd has been in financial difficulty for the last two years and needs to raise extra finance to keep the company trading. In this regard they are proposing to issue 100,000 €1 preference shares at a discount of €0.30 per share. They are also considering calling for payment on their reserve capital valued at €20,000. In this regard explain the following:

- A. The nature of a preference share. **(4 marks)**
- B. The rules regarding issuing shares at a discount, and whether Philosophy Ltd can issue discounted shares. **(4 marks)**
- C. Define the term "Reserve Capital" and explain whether Philosophy Ltd can call for the payment of reserve capital. **(2 marks)**

Total 10 Marks

Solution to Question 3 (Cont'd)

- A. Preference Shares – these are shares issued by a company – with a fixed preferential dividend – this dividend is normally cumulative, so if no profit is declared in any particular year, the right to a dividend may accumulate to the next profit period – generally these shares have no ability to influence company policy as they have no voting rights – they are only repaid upon liquidation once all external debt has been satisfied (and are paid in priority to ordinary shares) – they provide no capital gain upon the liquidation of the company if there are available assets upon winding-up, only entitled to repayment of original investment sum but this is paid in priority to ordinary shareholders **(4 marks)**
- B. Shares at a discount: there is a general prohibition in company law in relation to issuing shares at a discount and this act affects the integrity of the capital account **(1.5 marks)** – there are 2 exceptions to the rule: (1) where the discount arises as a consequence of paying any commission on the issue of shares, and (2) where shares are issued for non-cash consideration (provided there is an independent valuation of the asset) **(2 marks)** – Philosophy Ltd cannot issue shares at a discount as the discount does not relate to either of the two exceptions **(0.5 marks)**
- C. Reserve capital – this capital arises where a company issues partly-paid shares and reserves the amount of unpaid capital exclusively for the liquidation of the company - Philosophy Ltd cannot call for the payment of the reserve capital, as the company is not in liquidation **(2 marks)**

Solution to Question 4

A. Bella has been an executive director of Denali Enterprises Ltd, a management consultancy company, for the past three years. Denali Enterprises Ltd's contract for management consultancy services with Waterford City Council has recently come up for renewal and Denali Enterprises Ltd has been informed by the Council that as they have been unhappy with the level of service and costs provided by Denali Enterprises Ltd, that they will not be renewing the contract. Within a week of this notification Bella is contacted by a Senior Principal Officer in Waterford City Council and told that throughout the tenure of Denali Enterprises Ltd's contract with the Council that they were always satisfied with the work done by Bella, and that if Bella left Denali Enterprises Ltd and established her own company, that they would be happy to award her a five year contract for management consultancy services. Following this discussion Bella resigns her position with Denali Enterprises Ltd and establishes a company to undertake the management consultancy contract with the Council. When Denali Enterprises Ltd discover what Bella has done they sue her for breach of her fiduciary duties as a company director to: (1) act in good faith and in the best interests of the company, and (2) to avoid conflict of interest situations. Discuss the nature of both of these duties and assess whether Bella is in breach of her duties, and the likely consequences of any such breach.

(8 marks)

B. Outline the obligations imposed upon company directors in relation to the maintenance of proper books of account.

(2 marks)**Total 10 Marks**

- A. Directors Fiduciary Duties: (1) to act in good faith and in the best interests of the company – this means that this must act in the best interest of the shareholders of the company as a whole, and its employees (when the company is solvent) and in the best interest of the creditors (when the company is insolvent) – this duty is

Solution to Question 4 (Cont'd)

determined subjectively – therefore even if the director's actions did not benefit the company, the court will examine whether or not the director believed that his actions would benefit the company – *Clarke v Workman (1920)*, **(3 marks)** and (2) to avoid conflicts of interest – this relates to any situation in which a director has a direct or indirect conflict with the company – this means that a director cannot: (1) have an interest in a competing company contract, without disclosure and/or, (2) personally buy a company asset or sell a personal asset to the company, without disclosure and/or, (3) divert business opportunities from the company in order to benefit personally from them – *Industrial Development Consultants Ltd v Cooley (1972)* **(3 marks)** – conclusion that a breach of these duties may result in a claim for damages, compensation or an account for profits against the director for any loss the company suffered as a result of the breach **(1 mark)** – and that it is likely that Denali Enterprises Ltd will sue Bella for breach of these duties based on the case of *IDC v Cooley* and that she may have to account for profits **(1 mark)**

- B. Duty to Maintain Proper Books of Account: a director is under an obligation to take all reasonable steps to ensure that the company maintains proper books of account on a continuous and consistent basis – these accounts should at all times enable the financial position of the company to be determined with reasonable accuracy – directors should also ensure that proper books of accounts are kept for the appropriate time period and that they give a true and fair view of the financial affairs of the company **(2 marks)**

Solution to Question 5

Aromatic Manufacturing Ltd has decided to call an extraordinary general meeting (EGM) to change their Articles of Association. In this regard they seek your advice on the following matters:

- A. The notice requirements to call an EGM for the purpose of alteration of the Articles of Association. **(2 marks)**
- B. The type of resolution required to effect an alteration of the Articles of Association. **(1 mark)**
- C. A list of any THREE persons who can call an EGM. **(1.5 marks)**
- D. The various methods by which voting can be effected at an extraordinary general meeting. **(5.5 marks)**
- Total 10 Marks**

- A. Notice Requirements: generally the notice requirements of an EGM is 7 days in a private company, and 14 days in a public company – but the alteration of the Articles requires a special resolution – and the notice of any meeting where a special resolution is proposed is 21 days **(2 marks)**
- B. Alteration of the Articles: this always requires a special resolution **(1 mark)**
- C. Persons who can call an EGM: (1) Directors, (2) Shareholders with a 10% shareholding, (3) the Courts and (4) the Auditor **(any 3 x 0.5 marks = 1.5 marks)**
- D. Voting at Meetings: voting is governed by a company's Articles of Association – the general rule is that it takes place first by a show of hands – and a result is declared by the chairperson of the meeting – this declaration is deemed conclusive – after a show of hands the chairperson or 3 shareholders (present in person or by proxy) or 10% of the voting shareholders present in person or by proxy, can demand for poll (secret ballot) – the results of the poll take precedence over show of hands – poll voting depends upon number of shares held by the shareholder – the right to conduct a poll cannot generally be excluded by the Articles **(5.5 marks)**

Solution to Question 6

- A. Define the term "Liquidation". **(2 marks)**
- B. Outline any FOUR differences between a Member's Voluntary Liquidation and a Creditor's Voluntary Liquidation. **(8 marks)**
- Total 10 Marks**

- A. Liquidation: this is the process by which a company is brought to an end – the company ceases to exist and the powers of the directors are transferred into the hands of the liquidators – the aim of liquidation is to resolve the company's affairs, pay off the company's debts and distribute the remainder of the assets to the shareholders **(2 marks)**
- B. Members versus Creditors Voluntary Liquidation: (1) Members – company is solvent, Creditors – company is insolvent, (2) Members – initiated by the directors following a declaration of solvency and special resolution, Creditors – initiated absent a declaration of solvency following the passing of a resolution where the insolvency

Solution to Question 6 (Cont'd)

of the company is highlighted, (3) Members liquidation – the members appoint the liquidator – whereas Creditors liquidation – the creditors appoint the liquidator, (4) Members – the members supervise the liquidators exercise of his powers, Creditors – the Committee of Inspection supervise the liquidators exercise of his powers, (5) Members – role of the liquidator is to realise the company's assets and pay the creditors in full, Creditors – role of the liquidator is to realise the company's assets and distribute the proceeds to the company's creditors, and (6) Members – on completion the liquidator will present a final report to the shareholders and be released from his office –the liquidator will notify the CRO of the holding and the results of the EGM, Creditors – on completion the liquidator will present a final report to the creditors and shareholders and be released from his office – the liquidator will notify the CRO of the holding and the results of the general meeting **(any 4 x 2 marks = 8 marks)**

Solution to Question 7

A. Explain the criminal jurisdiction of the following courts:

- | | |
|----------------------------|------------------|
| 1) District Criminal Court | (2 marks) |
| 2) Circuit Criminal Court | (2 marks) |
| 3) Central Criminal Court | (2 marks) |
| 4) Special Criminal Court | (2 marks) |

B. List the FOUR possible outcomes where a case is appealed to the Court of Criminal Appeal. **(2 marks)**

Total 10 Marks

- A.1) District Criminal Court: this Court deals with summary offences' (minor offences) – such as road traffic offences, public order offences, littering, loitering, shoplifting etc – the maximum sanction that can be imposed by the court is a 12 months imprisonment and/or a fine not exceeding €1905**(2 marks)**
- A.2) Circuit Criminal Court: This Court hears all indictable (serious) offences except murder, rape, aggravated sexual assault, treason and perjury – all proceedings will commence with the arraignment of the accused where he will be brought before the Court and asked to plead guilty or not guilty **(2 marks)**
- A.3) Central Criminal Court: This Court hears all serious crimes that are not heard in the Circuit Court – like the Circuit Court the proceedings will commence with the arraignment of the accused where he will plead guilty or not guilty **(2 marks)**
- A.4) Special Criminal Court: This court is reserved for cases involving dangerous criminals and terrorist cases – there is no jury, but three (rather than the usual one) judges reside – this court is not a permanent court but established as necessary to deal with cases that cannot be properly heard in the other courts **(2 marks)**
- B. Outcomes: (1) allow the appeal and acquit the defendant, (2) allow the appeal and reduce, vary or increase the sentence, (3) allow the appeal and order a retrial of the case, or (4) dismiss the appeal **(4 x 0.5 marks = 2 marks)**

Solution to Question 8

Megan works as a book-keeper with Brown & Barnaby Solicitors. Last Saturday night Megan won the €2 million jackpot in the Irish lottery. First thing on Sunday morning Megan contacted the managing partner at Brown & Barnaby Solicitors and informed him that she was resigning her position with immediate effect, despite the fact that her employment contract requires her to give the practice one month's notice to terminate her employment. The managing partner is very distressed by this news as the Law Society of Ireland is due to visit the practice this week to review their client accounts, and Megan had sole responsibility for the maintenance of these accounts.

- A. Discuss the remedy of an Order for Specific Performance and determine the likelihood of Brown & Barnaby Solicitors obtaining such an Order from the Court to compel Megan to return to work and complete her notice period, as stated in her contract.

(8 marks)

- B. Assuming that Brown & Barnaby Solicitors fail to obtain such an Order, outline any other remedies available to the firm in respect of Megan's breach of contract.

(2 marks)

Total 10 Marks

- A. Order for Specific Performance: this is where the court orders the defaulting party to perform their specific obligations under the contract on the terms agreed **(1 mark)** – the courts will only do this when damages are an inadequate compensation and importantly, where the order would not cause undue hardship on the party in breach – the Court will never grant an order for specific performance in the following contracts: (1) Contracts for Personal Services: these would include employment contracts, or contracts to perform at a specific concert/event or to take part in a film or television project – the rationale behind this exclusion is that such an order would be analogous to forced labour and is futile where the other party simply refuses to perform or performs to an inadequate standard (2) Contracts to advance money, (3) Where the court cannot supervise performance of the contract (where constant supervision by a court is required), (4) Where one of the parties is an infant/minor, and (5) Where the contract is neither fair nor just – and where the conduct of the party seeking specific performance is questionable **(6 marks)** – conclusion that it is unlikely that the Court will grant the Order as this is a contract for personal services **(1 mark)**
- B. Remedies: only other available remedy is a claim for damages – a sum of money to compensate Brown & Barnaby Solicitors for losses sustained as a consequence of Megan's breach of contract (to put them in the same position they would be in had the contract been properly performed) – quantum is based on the remoteness of the loss **(2 marks)**

Solution to Question 9

Owen has been employed as a security officer with the Galway Airport Authority for the past FIVE years. His contract states that he is employed to work from 9.00 a.m. to 5.30 p.m. five days a week. Last month he was called to a meeting with the Airport's Human Resource Department and informed that he was being switched to the night shift, working from 12.00 a.m. to 9.00 a.m., with effect from the 1st July 2010. Owen explained that due to his family situation that he was not in a position to work the night shift, but he was told that he had no option but to switch to the night shift, and that if he did not switch to this shift that he would be dismissed.

Since this meeting Owen has made several attempts to meet with the Human Resource Manager to discuss this proposed contractual alteration, but the manager has refused to meet with Owen, stating that his decision regarding the alteration is final. In light of this situation, Owen is considering resigning from his position and suing his employer for constructive dismissal.

A. Define the term "constructive dismissal" and explain the burden of proof when such a claim is raised.

(2.5 marks)

B. Explain any FOUR actions that may amount to a fundamental breach of contract and facilitate a claim for constructive dismissal.

(6 marks)

C. Assess the potential success or otherwise of Owen's proposed claim of constructive dismissal.

(1.5 marks)

Total 10 Marks

- A. Constructive Dismissal: this is where the employee terminates the contract under which they are employed because of the conduct of the employer – the conduct of the employer must be sufficiently serious as to entitle the employee to resign from their employment – in this instance the onus lies on the employee to prove that what has happened amounted to a dismissal **(2.5 marks)**
- B. Fundamental Breach of Contract: (1) Changes to employee's pay – such as a reduction in pay even by a small amount – *Industrial Rubber Products v Gillon (1977)* or the non payment of employee's tax and PRSI payments – *Branigan v Collins (1977)* (2) Change in hours of work – or to the shift pattern (*Simmonds v Dauty Seals Ltd (1977)*) unless the employer has a contractual right to do so – *Dal v A S Orr (1980)*, (3) Change in the location of the employment – assuming that the contract does not contain a mobility clause – *Bass Leisure Ltd v Thomas (1994)*, (4) Unjustified series of warnings – to force the employee to leave rather than to encourage him to improve – *Walker v Josiah Wedgewood & Son (1994)*, (5) Failure to investigate sexual harassment or abuse claims – such as in *O'Doherty v Hennessy (1993)*, (6) Failure to make the workplace employee friendly – such as failure to implement a 'no smoking' policy – *Waltons & Moose v Dorrington (1977)*, or failure by an employer to make reasonable adjustments to a workplace for an employee suffering with a disability – *Nottinghamshire County Council v Meikle (2004)* **(any 4 x 1.5 marks = 6 marks)**
- C. Conclusion: that Owen's claim is likely to be successful as there was a unilateral alteration to his contract – by a change in shift pattern – and although Owen has attempted to discuss this with his employer – his employer has acted unreasonably in the circumstances **(1.5 marks)**

Solution to Question 10

Three months ago Alice went to her doctor complaining of chest pains and shortness of breath. Her doctor assessed her and sent her to the hospital for further tests. The hospital diagnosed her with a heart condition and she was prescribed medication to manage this condition. Last week she was back at her doctor's office again, complaining that she felt worse. On review her doctor has discovered that she was prescribed the incorrect medication and that this medication has made her condition worse.

Alice has taken legal advice and is planning on suing the hospital for negligence. In the context of negligence, explain the various factors that the Court will take into consideration in determining whether there has been a breach of the standard of care by the hospital.

Total 10 Marks

- Standard of Care: issue of whether or not the standard of required care is breached is ascertained based upon the reasonable man test – in effect would a hypothetical person of reasonable prudence, common sense & common knowledge have committed the act complained of **(2 marks)**
- In determining whether a reasonable man would act in a certain manner the Court review the following factors: (1) the probability of the accident – the higher the probably of an accident – the higher the standard of care it carries – in Healy v Bray UDC (1962/3) and Bolton v Stone (1951) the minuscule probability of an accident relieved both defendants of liability **(2 marks)** (2) the gravity of the threatened injury – the higher the gravity, the higher the standard imposed – in Paris v Stepney Borough Council (1951) because the gravity of the injury was high the failure of the defendant to take reasonable measures to reduce a risk breached the standard of care **(2 marks)** (3) the social utility of the defendant's actions – the motivation behind the defendants conduct may be a factor in determining negligence, Watt v Hertfordshire County Council (1954) **(1 mark)** and (4) the cost of eliminating the risk – where the risk is low and the cost is high, failing to eliminate a risk completely may not amount to negligence – however where the risk or gravity is high – cost is not a factor – in Donaldson v Irish Motor Racing Club (1959) the Court held that the organisers of a motor race were not liable when one of the cars veered off the road and ploughed into the spectators as to remove spectators to such a distance or to guard them with such protective screens as would ensure complete safety would in most cases diminish the view, so as to render watching unattractive and put an end to the entertainment **(2 marks)** – none of the factors are conclusive of themselves and all relevant factors are taken into consideration by the Courts – although based on the facts it is likely that the actions of the doctor are in breach of the required standard **(1 mark)**

Solution to Question 11

A. The Consumer Protection Act 2007 contains a reference to 32 practices that are considered unfair and prohibited in all circumstances. Outline any FIVE of these prohibited practices.

(7.5 marks)

B. Discuss the main functions of the National Consumer Agency.

(2.5 marks)

Total 10 Marks

- A. Prohibited practices include (but are not limited to): (1) a representation that the trader has an approval, authorisation or endorsement of a regulatory body that the trader does not have, (2) a representation that the trader is about to cease trading or move premises, if the trader is not, (3) a representation that describes a product as "gratis", "free", "without charge" or anything similar, if a consumer has to pay anything other than the necessary and reasonable cost of - (i) responding to the representation, and (ii) collecting the product or having it delivered, (4) making a false representation that a product is available only for a limited time, or on particular terms for a limited time, in order to elicit an immediate decision from a consumer, depriving the consumer of sufficient opportunity or time to make an informed choice in relation to the trader's product, (5) using editorial content in the media to promote a product (if a trader has paid for that promotion) if it is not made clear that the promotion is a paid promotion, whether in the content itself or in any oral, written, visual or descriptive representation in the promotion, (6) promoting a product (similar to that of another manufacturer) in such a manner as to deliberately mislead or deceive a consumer into thinking that the product is manufactured by that manufacturer, when it is not, (7) operating, running or promoting a competition or prize promotion without awarding the prizes described or reasonable equivalents, (8) failing to comply with a consumer's request to leave the consumer's residence or to not return (except in circumstances and to the extent justified or permitted by or under law in order to enforce a contractual obligation), (9) persistently failing to comply with a consumer's request to cease (i) communicating or initiating unwanted or unsolicited contact with, or (ii) making or sending unwanted or unsolicited representations to, the consumer by telephone, fax, email or any other electronic means or remote media (except in circumstances and to the extent justified or permitted by or under law in order to enforce a contractual obligation), or (10) in relation to any product that a consumer does not solicit, demanding that the consumer (i) make immediate or deferred payment for the product, or (ii) return or keep the product safe (inertia selling) **(any 5 x 1.5 marks = 7.5 marks)**
- B. National Consumer Agency: this is an independent body and was given statutory footing by the Consumer Protection Act 2007 – its main functions include: (1) to promote and protect the interests and welfare of consumers, (2) to enforce the relevant statutory provisions including by summary prosecution, (3) to encourage compliance, (4) to investigate suspected offences, and (5) to refer cases to the Director of Public Prosecutions **(2.5 marks)**

1st Examination: Summer 2010

Law & Ethics (ROI)

Examiner's Report

General Comments: Law & Ethics – Year 1 & 2

Overall the performance of students was very disappointing – with a significant percentage failing to attain a pass mark. There were huge gaps in knowledge – and continuous discussions of irrelevant information. This flags that the students were anticipating certain areas being on the exam paper and gambling with what they chose to study. This is not advisable!

Those students who failed to attain a pass mark and who plan on re-sitting this examination are advised to remember the following points when answering the exam questions:

1. Read the question carefully and only answer the question being asked.
2. Avoid a discussion of irrelevant issues – this will not gain you additional marks.
3. Always define the legal concepts, and include explanatory case law, where appropriate. Even if your application is not correct – you will still be awarded marks where you have explained the relevant concepts.
4. No marks will be awarded for citing legislation verbatim – where no attempt has been made to explain the application/contextual meaning of the provision.

Question 1:

This question produced a mixed standard of answers. In Part A, quite a few students did not understand the concept of insider trading – and discussed irrelevant issues such as (1) money laundering, (2) fraudulent trading, (3) reckless trading, and (4) the IATI Code of Ethics. Some of those who explained insider trading – could not apply the theory in the context of James and incorrectly assumed that as he was not a company officer, that he was not liable.

In Part B – some students were completely confused between the IATI appeals procedure and the appeals procedure that operates within the Irish legal system. Some students obviously did not understand the meaning of the word “composition” in section 1, and discussed the role of the Appeals Tribunal in detail – rather than its composition, as asked.

Question 2:

Part A of this question produced a weak standard of answers – with students discussing the content of the Memorandum of Association, Articles of Association and Form A1 and not the content of the application for the trading certificate, as asked.

Part B of the question was generally well answered – maximum marks were awarded where students referenced the fact that the concept of separate legal personality was recognised in *Saloman v Saloman & Co Ltd*.

Question 3:

This question produced a mixed standard of answers – generally Part A was answered well – there was some confusion in Part B (with some students being completely unaware of the prohibition and exceptions – and others discussing the share premium account – which was completely irrelevant). Part C was mixed – some excellent answers, some abysmal.

Question 4:

This question was answered poorly by the majority of students. Part A required a discussion of two specific fiduciary duties. Most answers made no reference to case law, and could not list the situations where a conflict of interest must be disclosed – nor apply the law to the scenario presented. Very few students recognised the similarity of the facts to the case of the *IDC v Cooley*.

Part B was answered better than part A but most who answered Part B were very vague in their answers – and failed to outline the specifics of the duty re maintenance of accounts.

Question 5:

This question was answered well by a large number of students. In (A) – some students failed to recognise that a special resolution requires 21 days notice, in (B) some students incorrectly stated that alteration of the Articles requires an ordinary resolution, and in (C) some students listed every type of director – when discussing who can call a meeting. This did not result in additional marks! Others listed the members and shareholders as separate things – this is not correct. In (D) some students discussed quorums, proxies and resolutions – rather than a show of hands/poll. Although not 100% correct – I awarded some marks for these answers.

Question 6:

This question produced a mixed standard of answers – most could define liquidation, but were confused with the distinction between members and creditors voluntary liquidation. Some kept incorrectly stating that voluntary liquidation is granted by the Court.

Question 7:

This question resulted in a mixed standard of answers. Although most were aware of the functions of the criminal court – they were confused as to actual jurisdiction. In particular there was confusion between criminal and civil jurisdiction.

Question 8:

This question produced some exceptionally weak answers. A significant number of students had no knowledge as to the purpose of an Order for Specific Performance as a contractual remedy and the circumstances where it will not be granted.

Question 9:

This question was answered reasonably well by most students with a significant number scoring full marks on this question. There appeared to be some confusion by certain students between unfair and constructive dismissal. Surprisingly, even where the law was incorrectly stated – most students came to the correct conclusion.

Question 10:

This question produced some exceptionally weak answers, which was very surprising as this question is on the pilot papers. Students lost marks for discussing negligence in general and not the specific question asked i.e. standard of care. Some even discussed defences – which was neither asked nor required.

Question 11:

Again, this question produced some exceptionally weak answers – with students discussing the concept of misleading practices under the Consumer Protection Act and the terms of the Sale of Goods Act – and not prohibited practices under the Consumer Protection Act, as asked. In addition, some students were unable to discuss the role of the National Consumer Agency.