
Law & Ethics
Republic of Ireland
1st Year Examination

May 2013

Paper, Solutions & Examiner's Report



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Accounting Technicians Ireland
1st Year Examination: Summer Paper 2013
Paper: LAW & ETHICS (ROI)

Wednesday 22nd May 2013 - 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.

Cite any relevant authorities and/or statutory provisions to support your answers. Marks will be awarded for specific reference to sections of the Acts/Orders and decided cases. Answers should be illustrated with examples, where appropriate.

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

Coleman Investments Ltd is a private investment company, selling personal pensions. Over the last number of years the company has made modest profits on behalf of its clients, but has lost a number of clients to some other speculative investment companies, who have generated significant gains for clients by taking bigger risks. Because the profits of *Coleman Investments Ltd* have been modest in nature, no bonuses have been paid to the company's directors, Maxwell, Bentley and Preston since 2009, and they have only received pay increases in line with inflation. Six months ago at the Annual General Meeting of the company the shareholders expressed satisfaction with the investment strategy of the company, and the majority of shareholders agreed that they would rather their pensions were invested in low to medium risk options as opposed to high risk options. The general consensus appeared to be that a modest return with little risk was better than taking a greater risk that could result in a significant loss.

Maxwell, Bentley and Preston discussed the company's investment strategies after this meeting, and agreed to comply with the instructions of the shareholders. However, Bentley was really unhappy about this as he was concerned about his own personal financial position. He has recently divorced his wife and his son is about to start college and therefore a bonus would help to ease these financial worries.

Last month Bentley was attending a breakfast meeting on new corporate governance rules when he overheard a business analyst who worked for a large pharmaceutical company talking on the phone. The analyst commented that there was big news on the way from this company and that the stock market would go wild when they heard this news. Bentley was aware that this company was involved in the research of an anti-cancer vaccine and assumed that this is what the analyst was referring to. He immediately sold € million in government bonds held by *Coleman Investments Ltd* and used the money to purchase shares in the pharmaceutical company. Unfortunately, the pharmaceutical company made a public announcement last week that the testing of the anti-cancer vaccine had proved unsuccessful and that they were now abandoning this research. As a consequence the share price in this company dropped by almost 50% in six hours and has not improved since.

Bentley was devastated when he heard this news, and immediately requisitioned a directors meeting with Maxwell and Preston to explain that he had lost €2.5 million client investment capital because of his speculation. Maxwell and Preston then called an extraordinary general meeting of the shareholder's to explain what had occurred. A resolution was passed at this meeting removing Bentley as a director and requesting that Maxwell and Preston initiate legal action against Bentley for either fraudulent or reckless trading.

A. Discuss the law in relation to BOTH fraudulent and reckless trading, commenting specifically on:

- (i) The definitions of both offences; (3 marks)
- (ii) Liability for both offences; (2 marks)
- (iii) The tests for both offences, including relevant case law or examples of both offences; and (8 marks)
- (iv) The sanctions for both offences. (3 marks)

B. In light of this discussion determine whether Bentley is likely to be successfully prosecuted for either fraudulent or reckless trading, providing reasons for your answer.

(4 marks)

Total 20 Marks

Answer ANY FOUR of the FIVE questions in this Section

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

QUESTION 2

Tabitha and Florence are sisters and following the death of their grandfather they have inherited a commercial property and a substantial sum of money. The sisters' grandfather was a professional tailor, and operated a sole trading business from the property. To honour their grandfather's memory Tabitha and Florence decide to use the money and property to establish a children's designer clothing store. They contact their solicitor who advises them to establish a private limited company. He explains to them that they will need to file a Memorandum of Association, an Articles of Association and a Form A1 with the Companies Registration Office (CRO).

They are unsure as to what any of this means and seek your advice:

- A. List any THREE of the FIVE clauses contained in the Memorandum of Association, and briefly explain the purpose of each. (4.5 marks)
- B. List any THREE of the FOUR pieces of information contained in Form A1. (3 marks)
- C. Explain the purposes of an Articles of Association and list any TWO provisions that could be contained in the Articles of Association. (2.5 marks)

Total 10 Marks

QUESTION 3

Serendipity Publishing Ltd recently contacted their bank, the *People's Bank of Dublin* requesting a €500,000 loan in order to replace some of their printing machinery. The Bank has agreed to this loan on condition that the company give them a fixed charge over the new machinery and a floating charge over their stock. In this regard discuss the following:

- A. Draw a Table outlining any THREE differences between a fixed charge and a floating charge. (6 marks)
- B. List any TWO pieces of information that must be provided to the Companies Registration Office in order to register these charges. (2 marks)
- C. Outline the consequences of non-registration of a charge. (2 marks)

Total 10 Marks

QUESTION 4

Harrison was a director of *Ashbury Travel Ltd* for over fifteen years. In the last year he was removed from his position as director, when the company auditor discovered that he had been lodging cheques payable to the company into his own personal bank account. Harrison has now received notification that an application has been received by the High Court for his disqualification. He is uncertain as to what that means and seeks your advice:

- A. Define a director and list any TWO types of directors.

(3 marks)
P.T.O.→

- B. Explain the effect of a Disqualification Order. (2 marks)
- C. List any TWO grounds upon which a Disqualification Order is automatically imposed. (2 marks)
- D. List any THREE grounds upon which a Disqualification Order may be imposed at the absolute discretion of the Court. (3 marks)

Total 10 Marks

QUESTION 5

- A. Jackson has recently been asked to take on the role of company secretary with *Logan Enterprises Ltd.*

In relation to this position, explain how a company secretary is appointed and discuss any THREE functions of a company secretary.

(5 marks)

- B. Finlay is the recently appointed company secretary of *Moonlight Manufacturing Ltd.* He has been asked to convene an extraordinary general meeting (EGM) and seeks your advice in this regard:

List any FOUR people who can requisition an (EGM) and outline any THREE reasons for which an EGM can be requisitioned.

(5 marks)

Total 10 Marks

QUESTION 6

Twilight Recruitment Ltd has just defaulted on a debenture loan in favour of *Waterford Investment Bank*. This debenture is secured by a floating charge on the entire goodwill of the business and was created on the 10th August 2006 and registered on the 29th August 2006. Upon default *Waterford Investment Bank* appointed Kennedy as a Receiver to try and recover the outstanding debt. Following appointment Kennedy discovered that *Twilight Recruitment Ltd* also secured a second floating charge on the same asset in favour of *Cork Savings Bank*. This charge was created on the 15th August 2006 and registered on the 20th August 2006. There is also an outstanding liability by the company to the Revenue in the amount of €25,000. One week into the receivership Kennedy also discovered that her brother had been employed by *Twilight Recruitment Ltd* from October 2012 to February 2013 as a non-executive director. She is unsure as to whether this impacts her ability to act as Receiver for this company.

- A. Explain the role of a Receiver and the eligibility requirements to act as a Receiver, and based on this discussion determine whether Kennedy is eligible to act as a Receiver in respect of the debt due by *Twilight Recruitment Ltd*.

(5 marks)

- B. Outline the priority of payment of company debts in receivership (or liquidation), and determine the priority of the debts due to *Waterford Investment Bank*, *Cork Savings Bank* and the Revenue.

(5 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

Two months ago Cooper was driving his car at speed down a country road. As he was driving, his mobile phone rang and he reached behind him to the back seat of the car to take the phone from the pocket of his coat. Watson was driving along the same road and collided with Cooper whose car swerved onto the side of the road on which Watson was driving. The Gardaí were called to the scene of the accident and took statements from both Cooper and Watson. As a consequence of the collision Watson's car was completely written off and he incurred some serious personal injuries that have resulted in his absence from work since the accident.

Last week Cooper received a letter from Watson's solicitor stating that Watson was suing Cooper for his personal injuries and the damage to his property arising from Cooper's negligent driving. Yesterday Cooper received a summons from the Gardaí charging him with dangerous driving.

Cooper is confused as he thought that two separate cases cannot arise out of the same incident.

Explain the distinction between civil law and criminal law in Ireland under any FOUR headings (8 marks) and advise Cooper as to whether or not he is correct in his belief that two separate cases cannot arise out of the same incident (2 marks).

Total 10 Marks

QUESTION 8

Morrison recently started dating a girl named Beth. Within two weeks of their first date, Beth was due to celebrate her 20th birthday. Morrison did not want to buy her an expensive gift, as he was unsure as to whether their dating would turn into a relationship. He decided to buy her a bouquet of flowers and a card. While purchasing the card in his local newsagent he also decided to buy her a lottery ticket and he put it into the card. Beth was delighted with her flowers and thanked Morrison for them, as well as the card and lottery ticket. She joked with him about the lottery ticket and teased him, saying "well I'll have to share the prize with you if I win now".

On their next date Morrison and Beth had a huge argument when she discovered that he was also dating another girl, while dating Beth. Morrison told Beth that he was just keeping his options open and didn't think that Beth would be bothered. Beth told Morrison that she would prefer it if he never contacted her again and left.

A week after this argument Morrison heard from a mutual friend that Beth had won the €3 million jackpot in the weekend lottery. He then rang Beth asking her if her lottery win was from the ticket he had given her, and Beth confirmed that it was, but told him that he could forget about sharing in her winnings – that she was not giving him a cent. Morrison is now considering suing Beth for breach of contract.

A. Discuss the law in relation to intention to create legal relations in the context of both social contracts and commercial contracts.

(8 marks)

B. In light of this discussion determine the potential success or otherwise of Morrison's proposed claim against Beth for breach of contract.

(2 marks)

Total 10 Marks

QUESTION 9

The profits of *Sunshine Printing Ltd* have significantly declined in recent years due to the development of e-books. They are now considering making almost 30% of their workforce redundant. In this regard advise the company in relation to the following matters:

- A. Outline the legal definition of redundancy. (2 marks)
- B. Explain any TWO grounds that would amount to fair selection for the purpose of redundancy. (3 marks)
- C. List any FOUR grounds that would amount to unfair selection for the purpose of redundancy. (2 marks)
- D. Discuss the consultation obligations imposed upon *Sunshine Printing Ltd* in respect of these collective redundancies. (3 marks)

Total 10 Marks

QUESTION 10

Mason, a plumber, was shopping in *Richmond Hardware Supplies* when an overhead shelf collapsed and the contents of the shelf fell on Mason. As a result of this accident Mason suffered a broken pelvis and spent six weeks in hospital recuperating.

As a result of his hospitalisation, Mason (who is self-employed) was unable to complete a number of plumbing projects that he was working on, and also could not take on new clients (as he was unsure as to how long his injuries would prevent him working). In addition, Mason (who also models in his spare time) was due to compete in *Ireland's Hunky Handyman* competition a week after the accident. This competition was offering a top prize of €10,000 cash and a holiday to Las Vegas. Because of his injuries he was unable to compete in this competition. Prior to the competition the bookies were tipping Mason as the favourite to win this competition.

Mason is planning on suing *Richmond Hardware Supplies* for his injuries and in this regard he seeks your advice:

- A. In the context of the law of negligence, discuss the concept of remoteness of damages and assess whether *Richmond Hardware Supplies* are obliged to compensate Mason for his personal injuries, his loss of income and his loss of future income. (8 marks)
- B. As he was the bookies favourite Mason is also considering suing *Richmond Hardware Supplies* for the loss of the €10,000 cash and the holiday to Las Vegas. State whether this loss is likely to be recoverable by Mason. (1 mark)
- C. Outline the statute of limitations within which Mason must bring his claim against *Richmond Hardware Supplies*. (1 mark)

Total 10 Marks

QUESTION 11

Discuss any FOUR terms implied into every consumer contract for the sale of goods under the terms of the Sale of Goods and Supply of Services Act 1980.

Total 10 Marks

1st Year Examination: May 2013

Law & Ethics (ROI)

Suggested 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. (i) Definitions:** Fraudulent Trading is defined under Section 297A CA 63, as amended, as occurring where any person “knowingly” and “intentionally” a party to the fraudulent carrying on of the company’s business, with the intent to defraud the creditors of the company, or creditors of any other person, or for any fraudulent purpose **(1.5 marks)** – whereas reckless trading is defined under Section 297A CA 63 as occurring where company officers are knowingly party to the carrying on of any of the company’s business in a reckless manner **(1.5 marks)**
- **A.(ii) Liability for the Offence:** in relation to fraudulent trading – the legislation states that any person can be found liable – this means that the offence can be committed by company officers or any other person who is connected to the fraudulent act **(1 mark)** – whereas reckless trading only applies to company officers (directors, secretaries, auditors, liquidators, receivers etc) **(1 mark)**
- **A.(iii) Tests for the Offences:** the test for fraudulent trading is quite difficult to prove as you must demonstrate “knowledge” and “intent to defraud” – although the fraudulent act may be either a one-off or a continuous action to complete the offence – examples: *Re Hunting Lodges Ltd (1985)*, *Re Kelly’s Carpetdrome Ltd (1983)*, *Re Aluminium Fabricators Ltd (1983)*, *Re Synnott (1996)* – siphoning-off company assets, using company assets for personal purposes, keeping two sets of books of account etc **(4 marks)** – whereas the test for reckless trading asks whether the person was: (1) carrying on the business below the standard of their general knowledge, skill and experience, (2) party to the contracting of a debt by the company where the officers did not honestly believe on reasonable grounds that the company would be able to pay the debt when it fell due for payment as well as other debts, or (3) allowing the company to trade while insolvent - *Re Heffernon Kearns Ltd (No.2)(1993)* – it is not necessary to prove fraud, collective responsibility is not presumed – acting with reckless disregard as to whether their actions will cause loss is the key element **(4 marks)**
- **A.(iv) Sanctions:** in relation to fraudulent trading the criminal sanctions include: on summary conviction imprisonment not exceeding 12 months &/or a fine – conviction on indictment imprisonment not exceeding 7 years &/or a fine) – the civil sanctions encompass personal liability for the debts of the business arising from the fraudulent act **(2 marks)** – whereas with reckless trading there are no criminal sanctions only civil liability attaches in that a person may be held personally liable in the civil courts for the debts of the company which arise from reckless trading **(1 mark)**
- **B. Conclusion:** In the circumstances it is more likely that Bentley will be charged with reckless trading – as although he acted with knowledge that he was acting against the investment strategy endorsed by the creditors, there is no evidence that he did so for the purpose of defrauding them – in fact the scenario alleges that he did it to increase their profits – in order that he would receive a pay increase or bonus – he is

he had no actual knowledge of the information that the business analyst was referring to) and in reckless disregard of the wishes of the creditors **(4 marks)**

Solution to Question 2

- **A. Memorandum of Association:** this document regulates the external activities of the company and contains 5 clauses – (1) name clause – this clause indicates the company name and whether the company is public or private, (2) the objects clause – this clause indicates the objectives for which the company was established and the powers of the company to achieve these objectives, (3) the liability clause – this clause indicates if the company has limited liability, and if so, whether it is limited by shares or guarantee, (4) the capital clause – this clause indicates the company’s total authorised share capital and whether it is divisible into different classifications of shares, and (5) the association/subscription clause – this clause indicates the original shareholders of the company – and how many shares they subscribed for upon incorporation and whether they were also acting as company officers **(any 3 x 1.5 marks = 4.5 marks)**
- **B. Form A1:** This form details (1) the names of the first directors and secretaries of the company – as well as a statutory declaration signed by them stating that they agree to act in these roles, (2) the address of the company’s registered office, (3) a statutory declaration that the terms of the Companies Acts have been complied with, and (4) a statement of issued capital **(any 3 x 1 mark = 3 marks)**
- **C. Articles of Association:** This document regulates the internal activities of the company and contains the internal rules and regulations regarding the governance of the company **(1.5 marks)** – it deals with issues such as share capital, meetings, directors, secretaries, auditors and accounts, dividends, liquidation etc... **(any 2 = 1 mark)**

Solution to Question 3

- **A. Differences between fixed and floating charges:** **(any 3 x 2 marks = 6 marks)**

	FIXED CHARGES	FLOATING CHARGES
(1) Creation	Charge is fixed to an asset	Charge floats over all or part of an asset
(2) Attachment	Charge attaches to asset on creation of the charge	Charge attaches to asset only on crystallisation of the charge
(3) Consent	Company cannot sell the asset without the consent of the lender	Company can trade freely with the assets in the normal course of business without having to gain permission
(4) Advantages for creditor	The repayment of debts secured by a fixed charge takes priority over floating charges	Assets which floating charges are attached to are usually more realisable assets (i.e. sell more easily)
(5) Disadvantages for creditor	Assets may be difficult to sell especially in a poor economic climate	In liquidation, floating charges are only repaid after fixed charges and preferential debts have been satisfied

- **B. Registration Information:** (1) the date of creation of the charge, (2) the description of the charge, (3) the amount of the debt to which the charge applies, (4) the property to which the charge applies, (5) the names, addresses and occupations of the person(s) entitled to it **(any 2 x 1 mark = 2 marks)**
- **C. Consequences of Non-Registration:** (1) the charge is void, (2) the debt becomes unsecured, (3) the debt becomes instantly repayable, and (4) the company is liable to a fine **(any 2 = 2 marks)**

Solution to Question 4

- **A. Directors:** company law defines a director as any person occupying the position of director, by whatever name called **(1 mark)** – types of directors: (1) executive directors, (2) non-executive directors, (3) de facto directors, (4) shadow directors, (5) nominee directors, and (6) managing director **(any 2 = 2 marks)**
- **B. Disqualification Order:** This is an Order brought against directors, auditors, company officers, liquidators, or receivers which disqualifies them from taking part in the promotion, formation, or management of any company, either directly or indirectly for up to 5 years, or any other such period as the Court may direct **(2 marks)**
- **C. Automatic Grounds:** a director will be automatically disqualified if (1) he is convicted of an indictable offence under company legislation involving fraud or dishonesty, (2) where a person is convicted of acting while restricted, except in the limited circumstances permitted by company law, (3) where a person is convicted of acting while disqualified, (4) where a person is convicted of acting as a company promoter, officer, auditor, receiver, liquidator or examiner of a company, while an un-discharged bankrupt, or (5) where a person is a director of a company and there has been a failure to notify the Companies Registration Office, either at the time the Memorandum and Articles were being registered or when there was a change in the Register of Directors, that the person was disqualified in another jurisdiction, and failed to provide the requisite details **(any 2 = 2 marks)**
- **D. Discretionary Grounds:** This occurs as follows: (1) where a person is found guilty of fraud while acting as a company promoter, officer, auditor, receiver, liquidator or examiner, (2) where a person is found guilty of a breach of duty while acting as a company promoter, officer, auditor, receiver, liquidator or examiner, (3) where a person is guilty of fraudulent or reckless trading, (4) where a person is unfit to be involved in the management of a company by reason of their past conduct as a company promoter, officer, auditor, receiver, liquidator or examiner, (5) where a person is unfit to be involved in the management of a company, following an inspectors report under the Companies Acts, by reason of their past conduct as a company promoter, officer, auditor, receiver, liquidator or examiner, (6) where a person is persistently in default of the filing requirements of the Companies Acts (three or more defaults in a five year period prior to the application), (7) where a person has been disqualified in another jurisdiction or is guilty of conduct in another jurisdiction, which would have resulted in disqualification in this jurisdiction, (8) where a person has been restricted as a director and the company of which he was a director is liquidated, within five years of the behaviour prompting the restriction, (9) where a person commits two or more offences in respect of failing to keep proper books of account, (10) where they have been the director of a company which has been struck off the Register of Companies for failure to submit one or more annual returns, unless the company had no liabilities at the time of strike-off, or where the liabilities have since been fully discharged, and (11) where the High Court at its absolute discretion considers that such disqualification is fair and equitable, and is in the best interests of the company **(any 3 = 3 marks)**

Solution to Question 5

- **A. Company Secretary:** the first company secretary is appointed by virtue of Form A1 and thereafter the secretary is appointed in accordance with the terms of the Articles of Association, by a resolution of the Board of Directors **(2 marks)** – functions of a company secretary: (1) to ensure all documents are lodged with the CRO in an appropriate and timely manner, (2) to attend all Board meetings, (3) to provide members with due notice of Board meetings, (4) to process proxy forms, (5) to oversee voting at meetings, (6) to record the minutes of meetings, (7) to correspond with shareholders regarding share issues (transfers, dividends etc...) and with debenture holders regarding interest payments, (8) to register fixed and floating charges, and (9) to maintain the statutory registers etc ... **(any 3 = 3 marks)**
- **B. Persons who can call an EGM:** (1) directors, (2) shareholders with a 10% shareholding, (3) the courts, (4) a liquidator, (5) a receiver, or (6) the auditor **(any 4 x 0.5 marks = 2 marks)** – Purpose of an EGM: (1) to make amendments to the constitutional documents of the company, (2) to change the authorised share capital of the company, (3) to remove a director or auditor, (4) to put the company into liquidation, (5) to grant the directors the authority to allot company shares, or (7) for any purposes the directors think fit **(any 3 = 3 marks)**

Solution to Question 6

- **A. Receiver:** The role of a Receiver is to enforce the terms of a debenture loan, when default occurs – in essence, they take possession of the asset that secures the debenture debt and sell this asset to recover this debt **(1.5 marks)** – Ineligibility: (1) a company, (2) an un-discharged bankrupt, (3) a person who has been an officer or servant of the company within the last twelve months, (4) the partner or employee of an officer of the company, or (5) a spouse, parent, brother, sister or child of an officer **(5 x 0.5 marks = 2.5 marks)** – conclusion that Kennedy must resign as Receiver as she is the sister of a past company officer (within 12 months of liquidation)**(1 mark)**
- **B. Priority of Payment of company's debts upon liquidation:** (a) the costs of liquidation, (b) the fixed charges in the order that they were created (provided that they have been correctly registered within 21 days), (c) the preferential debts (taxes outstanding, employee wages, annual leave entitlements, and local authority rates and charges), (d) the floating charges in the order they were created (provided that they have been correctly registered within 21 days), (e) the unsecured creditors, and (f) the residue to the shareholders **(3 marks)** – conclusion that as the Revenue debt of €25,000 is classed as a preferential debt it is paid in priority to the floating charges – then the floating charge created on the 10th August 2006 in favour of *Waterford Investment Bank* is paid in priority to the floating charge on in favour of *Cork Savings Bank* created on the 15th August 2006 – as this charge was created first (and both were registered within 21 days) **(2 marks)**

Solution to Question 7

Distinction between Civil Law and Criminal Law in Ireland	
(1) Definitions	Civil law is deemed to be private law – and it generally concerns disputes between individuals, where one persons sues another person for a wrong – a civil claim is called an action and the parties are known as the plaintiff and the defendant – whereas criminal law is deemed to be public law – which involves the state imposing codes of conduct and prosecuting an individual for breaching that code – a criminal case is called a prosecution and the parties are known as the prosecution and the defence (accused)
(2) Objectives	The main objective of civil law is compensation and ceasing the unwanted conduct – whereas criminal law's objective is punishment (as well as incapacitation, retribution, deterrence & rehabilitation)
(3) Tests	For a civil court to find a defendant liable the test is <i>the balance of probabilities</i> – for a criminal court to find a defendant guilty the test is <i>beyond all reasonable doubt</i>
(4) Commencement of proceedings	In civil law an action is initiated by way of pleadings – in criminal law a prosecution is initiated by the State/ People/DPP either through a summons or an indictment
(5) Representatives:	The representative of the State in civil cases is the Attorney General – the representative of the State in criminal cases is the Director of Public Prosecutions
(6) Remedies	The main civil remedies are damages, injunctions, court orders, an account for profits etc ... - whereas the main criminal remedies are fines, imprisonment, probation orders, community service orders etc ...
(7) Courts	There are different hierarchies of civil and criminal courts – the main civil courts are the District, Circuit, High (differentiated by monetary jurisdiction) and the Supreme Court (appellate court) – whereas the main criminal courts are the district criminal, circuit criminal, central criminal, special criminal (differentiated by the nature of the offence), the court of criminal appeal and the Supreme Court (appellate courts)

(any 4 x 2 marks = 8 marks)

- Conclusion that Cooper is not correct in his belief that two separate cases cannot arise out of the same incident – the purpose of the civil claim against him is to compensate the victim for his personal injuries and the damage to his property arising from Cooper's negligent driving, whereas the purpose of the criminal action is to punish him for behaviour that society classifies as egregious (his dangerous driving) **(2 marks)**

Solution to Question 8

- **A. Introduction:** the law on intention assumes a valid agreement (offer, acceptance, consideration and capacity) but concludes that an agreement is not legally binding unless intention is present – different presumptions regarding intention are made according to the type of contract created – although these presumptions can be rebutted **(1 mark)**
- **Social Contracts** – these are agreements between family members and friends – the presumption is on a lack of intention to create legally binding relations in these agreements – the law assumes that they are binding in honour only – this is because the law is reluctant to become involved in family disagreements – examples include: Balfour v Balfour (1919), Mackey v Jones (1959), etc... – however, extraneous factors may demonstrate an intention and rebut the presumption, such as in Merritt v Merritt (1969), Courtney v Courtney (1923) etc **(3.5 marks)**
- **Commercial Contracts** – these are agreements where one or both of the contracting parties is a business/commercial entity – in these contracts the presumption of intention to create legally binding relations exists – commercial contracts are even enforceable amongst family members – Snelling v John G. Snelling Limited (1973) – however, in rare circumstances intention can be rebutted – where extraneous factors may demonstrate a lack of intention – such as arose in Cadbury Ireland Limited v Kerry Co-Operative Creameries Limited (1982), Rose & Frank Co. v Crompton (1925) etc **(3.5 marks)**
- **B. Conclusion:** In our scenario as Morrison and Beth do not have a commercial relationship – the contract would be classified as a social one – as a friend is making a promise to another friend the Courts will assume that any promise is not intended to be legally binding – as there is no evidence to rebut this presumption – Morrison cannot sue Beth for non-payment/breach of contract **(2 marks)**

Solution to Question 9

- **A. Redundancy: Definition of Redundancy:** Section 7(2) of the Redundancy Payments Act 1967 defines redundancy as being a dismissal attributable wholly or mainly to (1) the fact that the employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed, or (2) the fact that the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where they were so employed have ceased or diminished or are expected to cease or diminish **(2 marks)**
- **B. Fair Selection Criteria:** employer must utilise an independent selection criteria, such as: (1) last in first out, (2) skills required and qualifications of workers, (3) productivity/performance – provided there is a proper mechanism for assessing this, (4) attendance and disciplinary records (provided people with disabilities are not discriminated against), (5) absence and time keeping records, (6) experience or length of service **(any 2 x 1.5 marks = 3 marks)**
- **C. Unfair Selection:** a selection would be deemed unfair selection if the redundancy decision was based on discriminatory factors (Employment Equality Acts 1998-2008, as amended), such as (1) gender, (2) civil status, (3) family status, (4) religious belief, (5) age, (6) race, (7) disability, (8) sexual orientation, (9) membership of the travelling community, (10) trade union membership, (11) pregnancy or (12) because an employee has exerted (or attempted to exert) their rights under protective legislation etc **(any 4 = 2 marks)**
- **D. Consultation Obligations:** there is also a statutory obligation upon an employer who plans to undertake collective redundancies (more than 10% of the workforce) to consult the trade union or if there is no trade union, the elected body of employee representatives at least 30 days in advance of making the first redundancy – the purpose of the consultation is to look at methods of reducing or avoiding the necessity for redundancies – there is also a statutory obligation for the employer to give written notice to the Minister for Enterprise, Trade and Innovation – failure to comply is treated as a criminal offence and the employer is liable on indictment to a fine of up to €250,000, the Court may also award a protective award (which can be up to a maximum of 90 days' pay for every employee) against the employer **(3 marks)**

Solution to Question 10

- **A. Remoteness of Damages:** this is a device used by the Court to determine whether or not the level of damage caused by the breach could have been reasonably foreseen – if the courts determine that the level of damage caused by the breach was too remote and could not have been foreseen by a reasonable person, they will not hold the defendant liable – this means that although the defendant’s breach may cause the damage, the defendant will not be held accountable for all of the damage – this is because the damage resulting from the breach is so unexpected or ‘remote’ that the court considers it unfair to hold the defendant accountable for a level of damage he could not have foreseen – this test is known as the ‘reasonably foreseeable’ test and was developed in *The Wagon Mound (1961)* – it has also been applied in cases such as *Burke v John Paul & Co Ltd (1967)* and *Turner v Irish Rail (1996)* **(7 marks)** – conclusion that *Richmond Hardware Supplies* are obliged to compensate Mason for his personal injuries, his loss of income and his loss of future income as these losses are all foreseeable **(1 mark)**
- **B.** The loss of the €10,000 cash and the holiday to Las Vegas is not recoverable – as this loss was not foreseeable – they could not have known he was entering this competition, and there is no definitive proof that he would have won **(1 mark)**
- **C. Statute of Limitations:** for all personal injuries arising after 31st March 2005 the statute of limitations is two years for claims arising from negligence – these periods may be extended where the injured party is under a disability, such as lunacy or minority, when the tort was committed **(1 mark)**

Solution to Question 11

- Terms implied into every contract Sale of Goods contract: (1) implied conditions as to title/right to sell – Section 12 – this assumes that the goods are free from charges/mortgages at the point of sale or that the seller has the right to sell **(2.5 marks)** (2) Section 13 – implied conditions as to description – this assumes that goods sold by description must correspond to that description – a sale by description does not preclude a sale where goods are exposed for sale and selected by the consumer – a description includes tags, labels etc... **(2.5 marks)** (3) Section 15 – implied conditions as to sale by sample – Section 15(2) – this assumes that the bulk of the goods purchased must correspond with the sample – the consumer must also be afforded a reasonable opportunity for inspection, **(2.5 marks)** (4) Section 14 – implied conditions as to merchantable quality – this assumes that the goods are as durable as a reasonable person would expect – taking account of the price, description and all other relevant circumstances (time of sale, changing standards) – there is an exception to this term where the defect is brought to the attention of the buyer before the contract is made, or the defect should be obvious to a reasonable person by an application of the doctrine of caveat emptor **(2.5 marks)** – (5) Section 14 – fitness for purpose – this implied term also assumes that the goods are fit for the purpose intended – assuming normal usage – if the goods are going to be used for an alternate purpose, and the seller is aware of this purpose, then the buyer can assume that they are fit for that alternate purpose – where a reasonable alternate use is notorious within the market – then an assumption of fitness for purpose is assumed, unless the seller specifically states otherwise **(2.5 marks) (any 4 x 2.5 = 10 marks)**

1st Year Examination: May 2013

Law & Ethics (ROI)

Examiner's Report

Statistical Analysis – By Question											
Question No.	1	2	3	4	5	6	7	8	9	10	11
Average Mark (%)	54%	70%	70%	61%	62%	59%	81%	51%	64%	42%	61%
Nos. Attempting	772	554	646	677	514	657	681	490	713	554	552

Statistical Analysis - Overall	
Pass Rate	72%
Average Mark	58%
Range of Marks	Nos. of Students
0-39	150
40-49	77
50-59	161
60-69	153
70 and over	260
Total No. Sitting Exam	801
Total Absent	342
Total Approved Absent	59
Total No. Applied for Exam	1202

General Comments:

Overall the performance of candidates was good – with a larger portion of students attaining a pass mark, compared to the results for Summer 2011 and 2012. Unlike in previous years there was no significant disparity in terms of the quality of the answers in Sections B and C of the paper and in particular, the excellent performance of candidates in Question 3, 7 and 11 resulted in the higher pass rate for this exam diet.

The standard of answers to Question 10 (Tort Law) showed a dis-improvement, and remains the question scoring the lowest marks on the paper.

Question 1 (Compulsory Question) remains an obstacle for some students – and in general candidates who failed to attain a pass in this question were less likely to obtain an overall pass in the exam paper (with some exceptions). It was noted that the Dublin scripts appeared to score better in Question 1 in comparison to other centres throughout the country. This general problem with the compulsory question remains unsettling – as Question 1 is always drawn from two specific chapters of the manual and consequently lecturers are asked to remind students of the importance of being *au fait* with these chapters – as this will directly impact their ability to pass this exam paper.

In comparison to previous exam diets, the majority of candidates completed the requisite number of questions in this particular session, which also reflects the increased pass rate.

In general:

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. Do only what you are asked – list means only list and does not require any discussion, explain or discuss means that you must make some attempt to elaborate on the concept/rule.
3. Avoid a discussion of irrelevant issues – this will not gain you additional marks.
4. 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. Where you cannot remember the name of a case – state in a past case and explain the scenario. Where you cannot remember a case put in an example.
5. No marks will be awarded for citing legislation verbatim – where no attempt has been made to explain the application/contextual meaning of the provision.

Section A: Corporate Governance, Offences, Disciplinary and Ethics**Question 1 (Compulsory Question)**

Mixed standard of answers – some excellent, some truly abysmal (and as previously commented, the Dublin centre performed better than the regional centres in this question). Where marks were lost it was generally due to the following:

- A. In this component most candidates were able to define the offences of fraudulent and reckless trading, but were unable to explain the concept of liability in respect of the offences (anyone can be liable for fraudulent, but only officers can be liable for reckless). Candidates should refer to their textbook in relation to this topic. A portion correctly addressed this issue in part (1), but not in part (2) – although the relevant marks were awarded nonetheless. In part (3) a lack of case law relevant to the tests resulted in a loss of marks, and in part (4) the incorrect discussion of fines as a civil sanction for reckless trading resulted in a loss of marks.
- B. In this component most students successfully applied the law and concluded that Bentley was likely to be prosecuted for reckless trading, as although his actions were deliberate there was no intention to defraud. Some candidates stated that he was guilty of both offences, despite the fact that the question clearly required the candidates to choose which offence he was most likely to be prosecuted for. Other candidates completely ignored the question and decided that he was guilty of insider trading – which was not an option given. This resulted in a total loss of marks for this component – and goes back to the earlier statement that candidates need to read the questions carefully and focus on answering what is asked.

Section B: Company Law**Question 2**

Mixed standard of answers – in general Part A and C were better answered than Part B. Where marks were lost it was generally due to the following:

- A. In this component most candidates could list THREE of the clauses in the Memorandum of Association. Marks were lost for a lack of explanation or incorrect explanation (such as references to the address clause?).
- B. In this component candidates appeared confused between Form A1 and the Certificate of Incorporation and provided incorrect answers (often repeating the information provided in Part A and C). Some candidates

stated capital was included – but full marks were only awarded where reference was made to Issued Share Capital being included.

- C. Most candidates could explain the purpose of the Articles and provide examples of the provisions contained in the Articles – although some candidates were confused and included information contained in the Memorandum.

Question 3

High standard of answers (with some excellent answers produced by some candidates, attaining the maximum marks). Where marks were lost it was generally due to the following:

- A. In this component some candidates were confused between the nature of a fixed and floating charge – with some answers stating that you cannot have more than one fixed charge, but you can have more than one floating charge – this is wholly incorrect, and I am unsure as to the logic of this answer. Wholly incorrect answers also stated that a fixed charge has a fixed interest rate whereas a floating charge has a variable interest rate, or that a fixed charge is always for the same amount of money whereas the amount owed changes with a floating charge.
- B. There was some confusion in this component – with students incorrectly mentioning the right to appoint a Receiver, or the information contained in the Memorandum and Articles of Association.
- C. In this component the majority noted that the charge would be void – but then failed to comment that the debt would be immediately repayable, and if not repaid would rank as an unsecured debt.

Question 4

Mixed standard of answers (lower than in some other questions). Where marks were lost it was generally due to the following:

- A. In this component most candidates could define a director and provide two examples – wholly incorrect answers included limited liability or silent partners. Other incorrect answers included Finance/Marketing/Production directors.
- B. In this component most candidates could explain the nature of a disqualification order, although full marks were only awarded if they mentioned that the disqualification period is 5 years or any other period as established by the Court, and that disqualification precludes a person partaking in the formation, promotion or management of a company for the specified time period.
- C. & D. There was massive confusion in this component with the majority of candidates unable to correctly distinguish between the mandatory and discretionary grounds for the imposition of a disqualification order. This is surprising, as this is specifically addressed in the manual.

Question 5

Mixed standard of answers. Where marks were lost it was generally due to the following:

- A. In this component the vast majority were able to discuss THREE functions of a company secretary (although incorrect answers included answering the phone, making tea/coffee etc), but were unable to explain the appointment process, and assumed (incorrectly) that it was the same procedure as appointing directors and auditors.
- B. In this component the majority of candidates correctly listed FOUR people who can requisition an EGM

Incorrect answers listed four different types of directors – this only attained 0.5 marks (as opposed to 2), as this is repetition of the same answer. Other incorrect answers included creditors – although marks were awarded for Receivers/Liquidators/Examiners etc ... Nearly every candidate could outline THREE reasons for calling an EGM.

Question 6

Mixed standard of answers. Where marks were lost it was generally due to the following:

- A. In this component, there was some confusion between the role of a Receiver/Liquidator and Examiner (which is always surprising as examinership is not on the syllabus). Most candidates dealt well with the issue of eligibility but there was some confusion regarding application of knowledge. Because her brother in law was a company officer – she is ineligible to act automatically – the fact that he was a non-executive director is irrelevant, as is the fact that he is no longer an officer – as he was an officer within 12 months of her appointment.
- B. There was some confusion amongst candidates regarding the priority of payment of company debts on liquidation – with a significant number unable to correctly list the priority. Candidates are encouraged to review the past paper questions/solutions on this topic. Incorrect answers confused preference shares and preference debt, and tended to exclude unsecured debt. Regarding application a number of candidates were unable to explain that priority relates to the date of creation of a charge (not registration), provided the charge is correctly registered. Others failed to notice that the Revenue is classed as a preference debt.

Section C: Business Law

Question 7

The majority scored well on this question (with a significant number attaining full marks). Incorrect answers confused the civil and criminal courts and sanctions. It is not sufficient to state that criminal law is heard in the criminal courts and civil law in the civil courts – the relevant courts should have been listed. Furthermore, stating that there is no jury in civil law, but there is in criminal law is not correct – both the District Criminal Court and the Special Criminal Court are non-jury courts, and defamation cases and certain commercial cases are heard with juries in civil courts.

Question 8

This question produced slightly weaker answers than other question on the paper. Marks were lost because of: (1) a lack of definitions of the key concepts, (2) no case law to explain the concepts (full marks were not awarded unless candidates explained one case to illustrate the presumptions or rebuttals in the context of both social contracts AND commercial contracts), (3) discussion of irrelevant issues in relation to contract formation and not addressing the issue of intention as specifically asked, and (4) incorrect application of the law to the facts.

Question 9

This question produced a mixed standard of answers. Where marks were lost it was generally due to the following:

- A. In this component most candidates correctly defined redundancy – but lost marks for definitions that were too narrow and did not explain all the grounds that constitute a genuine redundancy.
- B. In this component some candidates listed the grounds that amount to a fair dismissal and not fair selection for the purpose of redundancy.

- C. Most candidates correctly listed FOUR grounds that amount to unfair selection for the purpose of redundancy.
- D. A lot of candidates lost marks in this component. Incorrect answers discussed the general rights of an employee in a redundancy situation, but failed to discuss the specific consultation obligations imposed when a collective redundancy situation occurs. Full marks required candidates to mention the consultation obligation with Trade Unions/Employee Representatives, and the Minister, as well as the consultation period and the penalties for non-compliance.

Question 10

On the whole this question was not well answered. Where marks were lost it was generally due to the following:

- A. In this component the vast majority could not adequately explain the test for remoteness of loss, supported by case law and instead discussed other tests for other elements of negligence. Regarding application, some candidates incorrectly noted that loss of future income is not recoverable as it is not foreseeable – this is incorrect, loss of future income is potentially always a foreseeable loss in a personal injury claim.
- B. In this component most candidates gave the correct answer – but their reasoning was not always correct.
- C. The term “statute of limitations” confused some candidates, who gave answers wholly unrelated to the question being asked (this is surprising as the term is clearly stated in the manual). Incorrect answers also stated 6 months (the limitation period for using the tribunals in employment law) and 6 years (the limitation period in contract law).

Question 11

Mixed standard of answers (some excellent attaining full marks). There was obvious confusion between the Consumer Protection Act and the Sale of Goods Act, which often led to wholly incorrect answers (including price, weight, country of origin etc). Full marks were only awarded where reference was made to relevant case law.

Some candidates were completely confused by this question and incorrectly discussed the difference between express and implied terms, or the distinction between conditions, warranties and innominate terms.