
Law & Ethics

Republic of Ireland

1st Year Examination

August 2013

Paper, Solutions & Examiner's Report



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Accounting Technicians Ireland

1st Year Examination: Autumn Paper 2013

Paper: LAW & ETHICS (ROI)

Wednesday 28th August 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

Parker has been employed as a qualified accounting technician with *Sheldon Scientific Research Ltd* for the past five years. As well as acting as an accounting technician Parker is also the company's office manager. Last year the company's contract with its main laboratory equipment supplier came up for renewal and the directors of the company asked Parker to investigate whether he could source these lab supplies from an alternate supplier at a cheaper cost.

Following a review, Parker reported back to the directors that he could source these lab supplies for 8% less than they were currently paying if they signed a three year contract with *Booth Industries*. Based on Parker's reassurances that *Booth Industries* were offering the best deal the directors of *Sheldon Scientific Research Ltd* agreed to this contract.

Within six months of entering into this contract the directors of *Sheldon Scientific Research Ltd* have expressed dissatisfaction with the quality of the supplies being provided by *Booth Industries* and their ability to deliver on schedule. Following an independent review of *Booth Industries* the directors of *Sheldon Scientific Research Ltd* have discovered that: (1) the business is in fact owned by Parker's brother, (2) that Parker received a cash gift of €10,000 from this business when this contract was signed, and (3) that there were in fact cheaper alternate suppliers available with better business reputations for quality, service and reliability than *Booth Industries*.

As a consequence of these discoveries *Sheldon Scientific Research Ltd* has dismissed Parker and reported him to Accounting Technicians Ireland, for breach of his ethical obligations.

- A. Define the concept of "ethics". (3 marks)
- B. Explain the TWO main safeguards that members and student members should follow to ensure compliance with Accounting Technicians Ireland's Code of Ethics. (4 marks)
- C. If the Complaints Committee of Accounting Technicians Ireland considers that the actions of Parker are too serious and refer the case for adjudication to the Disciplinary Tribunal, outline any FIVE rights of Parker as a member at a hearing of the Disciplinary Tribunal. (5 marks)
- D. If the Disciplinary Tribunal upholds the complaint against Parker and excludes him from membership of Accounting Technicians Ireland, discuss the appeals process available to him via the Appeals Tribunal commenting specifically on the following:
- (1) The time limit for lodging an appeal. (1 mark)
- (2) Any THREE grounds for an appeal. (3 marks)
- (3) Any TWO outcomes of an appeal. (2 marks)
- E. Comment on whether you consider that the actions of Parker are in breach of Accounting Technicians Ireland's Code of Ethics.

Note: a discussion of the actual terms of the Code is NOT required.

(2 marks)
Total 20 Marks

P.T.O.→

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**

Wilson and Grover have operated a successful management consultancy business in partnership for in excess of ten years. Recently their accountant has recommended to them that they consider converting the partnership into a limited liability company to obtain the benefits of separate legal existence. Both Wilson and Grover think that this is a good idea, but are unsure whether to establish a public limited company or a private limited company.

Draw a table and outline to Wilson and Grover any FIVE differences between public limited companies and private limited companies in Ireland.

Total 10 Marks**QUESTION 3**

Following the death of her great-aunt Josephine, Shannon has just inherited a number of shares as follows:

100,000 €1 shares in *Rosen Enterprises Plc*, €0.20 paid.

300,000 €1 shares in *Buttercup Designs Ltd*, discounted to €0.80 payable per share.

Shannon does not understand the meaning of these bequests and seeks your advice as follows:

A. Define a share.

(1 mark)

B. Explain the nature of the shares that she has inherited in *Rosen Enterprises Plc* and discuss her liability, if any, in relation to these shares.

(4 marks)

C. Discuss the rules regarding issuing shares at a discount, and assess the liability, if any, of Shannon in relation to the shares that she has inherited in *Buttercup Designs Ltd*.

(5 marks)**Total 10 Marks****QUESTION 4**

Dawson is an executive director of *Quantum Logistics Ltd*. Radley is a non-executive director of this company, and is also a qualified accounting technician. As the company's profits were declining in recent years Radley undertook an independent review of the accounts in order to ascertain whether costs could be reduced. In the course of this review Radley discovered that Dawson had borrowed €200,000 from the company in 2008. To date no repayments have been made by Dawson on foot of this loan. Radley has requisitioned a meeting of the Board of Directors to discuss this situation.

A. Explain the distinction between executive and non-executive directors.

(4 marks)

B. In the context of directors' loans:

(1) Discuss the rule regarding directors' loans.

(2.5 marks)

(2) Outline any TWO exceptions to this rule.

(2 marks)

(3) List any THREE sanctions that can be imposed where a breach occurs.

(1.5 marks)**Total 10 Marks****P.T.O.→**

QUESTION 5

In the context of company meetings discuss each of the following:

- A. The main **THREE** differences between ordinary resolutions and special resolutions (**4.5 marks**), including **ONE** example of a matter that can be passed by an ordinary resolution and **ONE** example of a matter that can be passed by a special resolution (**1.5 marks**).
(6 marks)
- B. The **TWO** methods by which voting can be effected at a company meeting.
(4 marks)
- Total 10 Marks**

QUESTION 6

Paisley Engineering Ltd has recently been put into liquidation following a resolution of its creditors. The creditors have appointed Kennedy as the Liquidator and a Committee of Inspection to liaise with Kennedy on behalf of the creditors. Sherlock is an unsecured creditor of *Paisley Engineering Ltd* and is unsure as to the powers and duties of a Liquidator or the role of a Committee of Inspection.

- A. Outline any **NINE** powers and duties of a company Liquidator.
(9 marks)
- B. In addition to liaising with the Liquidator on behalf of the creditors, state any other function of the Committee of Inspection.
(1 mark)
- 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

Riley is a qualified accounting technician who has recently been arrested by the police and charged with laundering money on behalf of his employer. He is aware that he is facing a criminal prosecution, but is unsure of the jurisdiction of the criminal courts or the consequences of a successful prosecution.

- A. Discuss the jurisdiction of the following criminal courts:
- (1) The District Criminal Court (2 marks)
 - (2) The Circuit Criminal Court (2 marks)
 - (3) The Central Criminal Court (2 marks)
 - (4) The Special Criminal Court (2 marks)
- B. List any **FOUR** criminal sanctions that can be imposed where a person is found guilty of a criminal offence.
(2 marks)
- Total 10 Marks**

P.T.O.→

QUESTION 8

Cassidy recently booked a spa break with the *Hamptons County House Hotel and Spa*. She booked this trip over the phone and paid for it by credit card at the time of the booking. After checking into the Hotel she went down to the spa where she had an appointment for the pamper package. At the spa reception desk she was given a key to a locker in the changing room and told to go and change into a robe and that a beauty therapist would then take her into the therapy suites. In the changing room she noticed a sign on the wall which stated:

“Items are left in the changing room and lockers entirely at the users own risk. The Hamptons County House Hotel and Spa does not accept any liability, whether express, implied or statutory for the loss or theft of, or damage to, items left in the changing room or lockers howsoever, whensoever or wheresoever such loss, theft or damage occurs”.

As Cassidy was wearing her diamond engagement ring when she checked into the spa she decided to remove it in case the oils from the beauty treatment caused it to tarnish. She put it into the locker and locked it. She believed that the ring would be safe in the locker as she had possession of the key.

After her treatments were completed she returned to the changing room, but was shocked to discover that her locker had been emptied and that her ring and purse were missing. Following discussions with the receptionist Cassidy learned that another client had told the receptionist that she had lost her locker key and the receptionist had given her a master key that could open all the lockers. It now transpires that more than a dozen different lockers were opened and the contents stolen.

Cassidy has contacted both of the managers of the Hotel and the Spa and informed them that she plans on taking legal action against them in respect of her stolen ring and purse. The *Hamptons County House Hotel and Spa* are not denying liability for this loss, but have informed Cassidy that they intend to rely on the exemption clause in the changing room to escape liability.

- A. Explain any TWO methods by which an exemption clause can be incorporated into a contract. (6 marks)
- B. Assess whether this clause is incorporated into Cassidy’s contract with the *Hamptons County House Hotel and Spa*. (2 marks)
- C. Assuming that the clause is part of Cassidy’s contract, outline whether the *Fundamental Breach Rule* of construction of an exemption clause would or would not allow the *Hamptons County House Hotel and Spa* to escape liability in this situation. (2 marks)

Total 10 Marks

QUESTION 9

- A. In the context of employment law, describe any FIVE methods by which a contract of employment can be terminated. (5 marks)
- B. In relation to the law on unfair dismissal, outline the TWO main eligibility requirements to initiate a claim (2 marks), and list any SIX classes of workers precluded from suing for unfair dismissals (3 marks)

(5 marks)
Total 10 Marks

P.T.O.→

QUESTION 10

- A. Last year Griffin was admitted to hospital following a house fire. As a consequence of his exposure to smoke, Griffin was prescribed medication to prevent further damage to his lungs. Before taking this medication, the risks of this new treatment were explained to him and Griffin signed a form consenting to the treatment. Last month Griffin collapsed in work complaining of a sharp pain in his left leg. On admission to hospital he was diagnosed with a blood clot. It now transpires that the blood clot was caused by the medication he was prescribed for his smoke exposure. Griffin has now written to the hospital and informed them that he is considering suing the hospital for negligence. On receipt of his letter the hospital contacted Griffin and told him that they plan on invoking a defence of voluntary assumption of risk in respect of his claim.

Discuss the nature of this defence and assess the potential impact of this defence on Griffin's claim.

(4 marks)

- B. Reynolds stole a car. While driving this car he saw his girlfriend Avery. He stopped the car and asked Avery if she wanted to go for a midnight drive. Avery asked Reynolds where he had gotten the car from and he told her that if someone was stupid enough to leave the keys in the car then they deserved to have their car stolen. Avery laughed and got into the car with Reynolds. Later that evening Reynolds got into a high speed chase with the Gardaí who recognised that the car had been reported as stolen. During this chase, Reynolds collided with another vehicle and then smashed the car into a wall. Reynolds suffered only minor injuries in this incident, but Avery's spine was crushed causing paraplegia.

Avery's family is now considering suing Reynolds for negligence, but their solicitor has informed them that any claim is likely to be countered by a defence of illegality.

Discuss the nature of this defence and assess the potential impact of this defence on Avery's claim.

(4 marks)

- C. In the context of remedies in tort actions, explain the concept of "punitive/exemplary damages".

(2 marks)

Total 10 Marks

QUESTION 11

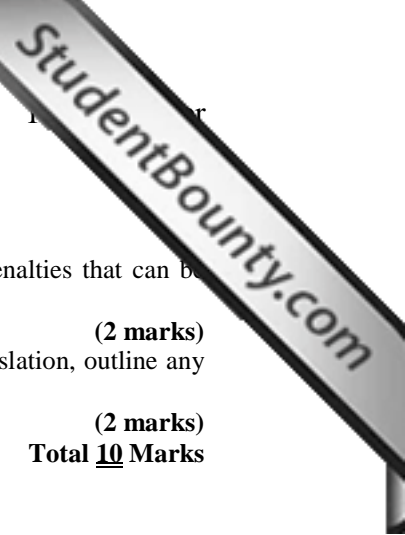
Late one evening last month, a door-to-door salesman for *Kitchen Haven* called to Casey's home. The salesman was selling pressure cookers and when Casey told him that she wasn't interested and that she was putting her three-year old son to bed, he pushed his way into her home and told her that he would set up a demonstration for her while she took her son upstairs and put him to sleep. When Casey came down the stairs ten minutes later the salesman then proceeded to do a thirty minute presentation on the use of the pressure cooker and its benefits. At many points during the presentation Casey told the salesman that she had no interest in purchasing this item, but he proceeded with the demonstration nonetheless. After the demonstration Casey again told the salesman that she had no interest in purchasing this item, but he told her that as she had wasted thirty minutes of his time that he was not leaving until she agreed to purchase a pressure cooker. Anxious to get him to leave, as her son was crying upstairs, she agreed to buy a pressure cooker. Two days later the pressure cooker was delivered to Casey as well as an invoice for €200. Casey has since contacted *Kitchen Haven* telling them that she has changed her mind and wants to return the item. *Kitchen Haven* then contacted Casey and told her that they operate a strict no refunds policy and that all sales are final.

Casey has now contacted you for advice on this matter.

- A. Define an "aggressive practice" under the terms of the Consumer Protection Act 2007. (2 marks)
- B. List any TWO factors taken into consideration by the Court in determining whether a sales practice is aggressive. (2 marks)
- C. Assess whether you consider that the actions of the salesman acting on behalf of *Kitchen Haven* amount to an aggressive practice, providing reasons for your answer. (2 marks)

(2 marks)

P.T.O.→



QUESTION 11 (*Cont'd*)

A. If *Kitchen Haven* is found guilty of engaging in an aggressive practice discuss the penalties that can be imposed upon the company and its officers.

(2 marks)

B. In addition to the investigation and prosecution of suspected breaches of consumer legislation, outline any other TWO functions of the National Consumer Agency.

(2 marks)

Total 10 Marks

1st Year Examination: August 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 1:

- A. Ethics: These can be defined as a series of rules and regulations, often established as part of a code or a series of principles governing the business relationship between parties. In professional relationships ethics govern the relationship between members, professional bodies and their clients – a breach of which will often result in a disciplinary action **(3 marks)**
- B. Safeguards: (1) ensure compliance with external professional rules, legislation and regulations – this can be achieved by education, training and continuing professional development, and (2) operating proper internal control safeguards – such as regularly training employees in professional ethics and imposing sanctions for breaches **(2 x 2 marks = 4 marks)**
- C. Rights of a Member at the Disciplinary Tribunal: (1) to attend and be heard, (2) to be represented (by legal counsel or a member of Accounting Technicians Ireland), (3) to receive any material regarding the complaint from Accounting Technicians Ireland in advance of the hearing, (4) to cross-examine witnesses, (5) to adduce documentary evidence, (6) to call witnesses, and (7) to make any submission that they desire **(any 5 x 1 mark = 5 marks)**
- D.(1) Time Limit for an Appeal: 21 days **(1 mark)**
- D.(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)**
- D.(3) Outcome of Appeals Committee: (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)**
- E. Conclusion: that Parker is: (1) in breach of his duty of objectivity by not disclosing that *Booth Industries* is in fact owned by Parker's brother, (2) in breach of his duty objectivity and professional behaviour by not disclosing the cash gift of €10,000, and (3) in breach of his duty of professional competence, due care and skill by not determining that there were in fact cheaper alternate suppliers **(any 2 x 1 mark = 2 marks)**

Solution 2:

Differences Between Public Limited Companies and Private Limited Companies	
(1) Subscription	Company membership is limited to 2-99 in a private company (and can be a minimum of 1 in a single member private company) but requires a minimum of 7 shareholders where the company is a public company
(2) Capital	A public company must have a minimum issued share capital of €38,100 – 25% of which must be fully paid, whereas a private company can trade with a minimum of 1 €1 share if it is a single member private company or 2 €1 shares if it is a private limited company
(3) Trading	Upon receipt of the Certificate of Incorporation a private company can commence trading – whereas a public company can only trade upon receipt of a trading certificate from the CRO (this document evidences everything about the company that makes it public)
(4) Transfer of Shares	A public company can sell its shares freely on the market – whereas there is a prohibition against offering shares to the public in a private limited company
(5) Stock Market	A public limited company can be listed on the stock market whereas a private company cannot
(6) Registration	In a public limited company the application for registration must state that it is a public limited company, whereas in a private limited company the application for registration must state that it is a private limited company

(any 5 x 2 marks = 10 marks)**Solution 3:**

- A. Share: a share represents an investment in a company – it was defined in *Borland's Trustee v Steel Bros & Co Ltd (1901)* as "... the interest of the shareholder in the company, measured, for the purposes of liability and dividend by a sum of money" **(1 mark)**
- B. Partly-Paid Shares: Shannon has inherited partly-paid shares in *Rosen Enterprises Plc* – this is where shares are purchased and the full nominal value of the shares is not paid for upon subscription – but where a portion is paid upon subscription and the balance is due at a later date – the paid-up amount is reflected on the balance as paid-up/called-up issued share capital – the unpaid portion is reflected as unpaid capital/reserve capital (where the unpaid portion is reserved exclusively for liquidation purposes) – payment is required at either a pre-agreed future date or upon liquidation of the company (whichever arises first) **(3 marks)** – if the date for payment arrives and a call is made for payment or if the company goes into liquidation then Shannon is obliged to pay the unpaid portion (100,000 x €0.80 = €80,000) **(1 mark)**
- C. 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 two 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 if the company is a public limited company) **(2 marks)** – Shannon would only be liable to repay the discounted portion of the shares if she purchased them knowing that they were discounted – as she has inherited the shares in *Buttercup Designs Ltd* she will have no future liability, and the company and its officers will be liable for the discount, plus commission **(1.5 marks)**

Solution 4

- A. Executive Directors – these are Directors who are involved in the operational management of the business – they provide continuous attention to the affairs of the business – more often an employee – example, Managing Director – usually hold important positions within the day to day running of the business **(2 marks)** – Non-Executive Directors – these are Directors appointed to manage the business on a transient basis – more involved in strategic management at board level, not involved in the operational running – appointed due to their expert knowledge, experience, attainment or skills – their role is to act as monitors of the executive directors (by ensuring that they are acting within their powers and the companies objectives) and to provide the board of directors with additional expertise and an objective view point **(2**

Solution 4 (Cont'd)

- B.(1) Loans to Directors/Rule: Section 31 CA 90 contains a prohibition against loans/quasi loans/credit transactions and guarantees from a company or its subsidiaries to a Director or any connected person **(2.5 marks)**
- B.(2) Exceptions to this prohibition: (1) where the loan is less than 10% of the value of the company's net assets (Section 32) or (2) intra-company transactions (Section 35), or (3) the advancing of money to a Director for reasonable business expenses (Section 36) – which must be vouched for within a reasonable time period, and (4) where the transaction is in the normal course of business – in regular trade terms (Section 37) – such as where the company is a bank or financial institution **(any 2 = 2 marks)**
- B.(3) Sanctions for breach of Section 31: (1) contract is voidable (unless restitution is not possible) – (2) the officer may be accountable for any personal gains or (3) he may be required to indemnify the company against losses – or (4) if liquidation arises as a consequence of the unauthorised loan then he may be personally liable for the debts of the business **(any 3 = 1.5 marks)**

Solution 5:

- A. Resolutions: the main differences between ordinary and special resolutions are: (1) how it is passed (ordinary requires a majority – whereas a special requires 75%), (2) notice to members (ordinary – requires no specific notice except to remove a director/auditor, which requires 28 days – special requires 21 days notice), and (3) registrar (ordinary does not need to be registered whereas all special must be delivered to the CRO within 15 days, otherwise the company is liable to the imposition of a fine) **(3 x 1.5 marks = 4.5 marks)** – Matters to be voted on (ordinary: (a) consideration of the company's financial statements, (b) election or re-election of directors, (c) the appointment of an auditor, (d) the remuneration of auditors, and (e) the declaration of dividends – special: (a) change to the company's constitution (Memorandum or Articles of Association), (b) change of company name, (c) reduction of the share capital of the company, and (d) re-registering a company from private to public or vice versa) **(any 1 of each = 1.5 marks)**
- B. 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 **(4 marks)**

Solution 6:

- A. Duties of a Liquidator: (1) to take possession of the company's assets, including debtors for the purpose of sale - where the liquidator proposes to sell a non-cash asset to any person who was a Director in the last three years whose value exceeds €63,500 or 10% of the company's relevant assets, then the creditors must be notified in advance of the intended disposal (Section 231 CA 63), (2) to execute all necessary documents on the company's behalf, including bills of exchange, promissory notes or mortgages on the company's assets, (3) to arrange a list of creditors and contributors and seek monies due (the liquidator can also institute legal proceedings to recover monies due, where necessary), (4) to resolve all disputed claims and where necessary request the Court to adjudicate on them, (5) to bring or defend an action in the company's name, (6) to provide security for costs in the name of the company, (7) to apply the proceeds of the sale of company assets to the payment of the company's debts and liabilities in accordance with the rules governing the priority of payments, (8) where the asset realisation creates a shortfall the liquidator may make any compromise or arrangement with creditors, (9) if there is a surplus after asset realization, the liquidator must distribute any surplus amongst the shareholders in accordance with the provisions of the Companies Acts, and the company's Articles of Association, (10) to appoint agents to do such work that the liquidator himself is unable to do, and (11) he must call a meeting of creditors and company at the end of first year of liquidation, and on each successive year, within three months of the end of the year – to accounts for his actions – and he must send a copy of the accounts to the CRO – in effect the liquidator is obliged to do all things necessary for the orderly wind-up of the company – (12) following

Companies Acts, including notification to the CRO to strike the company off the Register – (15 marks)
 CLEA 2001 provides that within 6 months of appointment the liquidator of an insolvent company

Solution 6 (Cont'd)

report to the Director of Corporate Enforcement on the conduct of the Company Directors for the purpose of determining whether restriction/disqualification (Section 150/160 CA 90) proceedings are justified – where they are justified the Liquidator is obliged to bring proceedings, unless excused by the ODCE (any 9 x 1 mark = 9 marks)

- B. Committee of Inspection: (1) they monitor the Liquidator in the exercise of his power in relation to the wind-up of the company, and (2) they may decide the salary of the Liquidator (any 1 = 1 mark)

Solution 7:

- 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 – in general the maximum sanction that can be imposed by the court is a 12/24 months imprisonment and/or a fine not exceeding €1905 – it can also hear some indictable offences – where they are tried summarily (where the accused has waived his right to trial by jury, the offence is relatively minor, and the DPP consents) (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 preside – 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. Criminal Sanctions: (1) fines, (2) imprisonment, (3) Community Service Orders, (4) Probation Orders or (4) Forfeiture Orders (any 4 x 0.5 marks = 2 marks)

Solution 8:

- A. Incorporation of an Exemption Clause: (1) this may arise by signature: where the injured party has signed the contract containing an exemption clause – if the injured party signs without reading the contract, the clause will still be considered validly incorporated into the contract - *L'estrage v Graucob (1934)*, - it may also arise in an unsigned written contract, provided the notice is prominently displayed and the clause is not hidden amongst a mass of other printed material, (2) by reasonable notice: a party to a contract that contains an exemption clause must be given reasonable notice of the clause either before or at the time of entering the contract, not after – when determining whether reasonable notice was given the courts will have regard to all the circumstances and take into account factors, such as when the notice was given, what form the notice was given in and how serious the effect of the limitation or exemption has on the injured party - *Chapleton v Barry Urban District Council (1940)*, *Thornton v Shoe Lane Parking Ltd (1971)* or (3) by a course of dealing: even if insufficient notice of the exemption clause has been given, the courts may still determine that the clause is validly incorporated if the parties have had previous dealings on a regular/consistent basis with each other – *Spurling Ltd v Bradshaw (1956)*, *Rambler Motors (1972)* (any 2 x 3 marks = 6 marks)
- B. Validity of the Clause: it is unlikely that this clause will be deemed valid by the Court as it was only brought to Cassidy's attention after she entered into the contract – it was not brought to her attention either before or at the time she made the booking – and as she is not a regular customer – it cannot be incorporated by a course of dealing (2 marks)

- C. Construction: the fundamental breach rule states that an exemption clause will be invalid if the party seeking to uphold it has committed a fundamental breach of contract or where it attempts to exclude its obligation of the contract **(1 mark)** – conclusion that this clause is automatically invalid as it is trying

Solution 8 (Cont'd)

exclude all core contractual obligations, therefore the *Hamptons County House Hotel and Spa* cannot use this clause to escape liability in this situation **(1 mark)**

Solution 9:

- A. Discharge of an Employment Contract: (1) Performance – where the employee carries out their duties and receives remuneration – such as in a fixed term contract, (2) Agreement – where both the employer and employee agree to terminate the contract, (3) Breach – where one of the parties to the contract commits a fundamental breach of contract, (4) a Frustrating Event – where an action beyond the control of the contracting parties means that the employment contract cannot be completed as agreed – such as a fire in a timber manufacturer, (5) Notice – either specified by legislation or as stated in the contract, (6) Dismissal – in accordance with fair procedures and proper notice and where substantive grounds exist, or (7) Redundancy – where the position for which the employee was hired no longer exists or does not exist in the same way or in the same location, or where the demand for labour has diminished **(any 5 x 1 mark = 5 marks)**
- B. Eligibility Requirements for Unfair Dismissal: (1) an employee with more than one year's continuous service (except where dismissal results from maternity, trade union membership, or exerting the right to minimum wage), (2) a person employed under a contract of service **(2 = 2 marks)**
- Precluded Workers: (1) an employee who has reached normal retiring age, (2) an employee who is a member of the Defence Forces or the Garda Síochána, (3) a person who is employed by their family member in their home or on their farm, (4) persons employed at sea, (5) persons employed on a probationary period, (6) persons working illegally within the state, and (7) certain public servants **(any 6 x 0.5 marks = 3 marks)**

Solution 10:

- A. Voluntary Assumption of Risk: this defence arises where the injured party is assumed to have consented to harm inflicted by way of negligence, nuisance, trespass etc – the defence is governed by the Civil Liability Act 1961 (Section 34(1)(b)) – which defines it as the waiving of legal rights by means of a contract or an agreement (either express or implied) – a successful defence may nullify any claim for damages, examples include: *Regan v Irish Automobile Club (1990)*, *Morris v Murray (1991)* **(3 marks)** – conclusion that the Court is likely to allow the defence as Griffin consented to the risk of injury by voluntarily signing the consent form – wherein the risks were explained to him – this will mean that his claim for damages is likely to be unsuccessful **(1 mark)**
- B. Illegality: this defence is based on the rule that no action can be found based on a wicked/illegal act – the reasoning behind the rule is a public policy objection in allowing a person engaged in illegal activity to sue for injuries arising from that activity (although it is important to note that not all illegal acts will bar a claim) – examples include: *Cummings v Granger (1971)*, *Revill v Newberry (1996)* **(3 marks)** – this case is very similar to *Ashton v Turner (1981)* and based on that case it is likely that the Court allow the defence as Avery knew that she was involved in criminal activity (joy-riding) and there is no duty of care owed between participants in criminal activity for acts committed in furtherance of that activity – therefore her claim is likely to fail **(1 mark)**
- C. Punitive/Exemplary Damages: these are damages awarded in cases where the Court strongly disapproves of the defendant's behaviour and wishes to punish the defendant for this behaviour – they are rarely awarded as the purpose of damages is compensation not punishment – but may arise in cases such as defamation or gross negligence **(2 marks)**

Solution 11:

- A. Aggressive Practice: this is defined as a practice that: (1) causes significant impairment of consumers freedom of choice, and (2) causes the average consumer to make a different economic decision (2 = 2 marks)

Solution 11 (Cont'd)

- B. Factors: in determining whether a practice is aggressive the Court takes into consideration: (1) the language used by the trader, (2) the timing of the contract, and (3) the location of the contract (any 2 = 2 marks)
- C. Conclusion: the actions of *Kitchen Haven* amounts to an aggressive practice as harassment, coercion or undue influence were exercised by the salesman in order to pressurise Casey into creating a contract (2 marks)
- D. Penalties: on summary conviction a fine not exceeding €5,000 and/or up to 12 months imprisonment (where a first offence a fine of exceeding €3,000 and/or up to 6 months imprisonment) (1 mark) – where prosecuted upon indictment a fine not exceeding €100,000 and/or up to 2 years imprisonment (where a first offence a fine of exceeding €60,000 and/or upto 18 months imprisonment) (1 mark)
- E. Functions of the National Consumer Agency: (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 with consumer law (any 2 = 2 marks)

1st Year Examination: August 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 (%)	61%	55%	42.5%	51%	51.5%	57%	57%	40%	54%	41.5%	59.%
Nos. Attempting	157	135	110	108	110	119	122	77	147	103	96

Statistical Analysis - Overall	
Pass Rate	54%
Average Mark	49%
Range of Marks	Nos. of Students
0-39	47
40-49	26
50-59	40
60-69	25
70 and over	20
Total No. Sitting Exam	158
Total Absent	97
Total Approved Absent	12
Total No. Applied for Exam	267

General Comments:

The results achieved in this sitting of the exam paper were generally below par with the results from the Autumn sitting in previous years (54% pass rate, as opposed to 55% in 2012). It is worth noting that the pass rate increased significantly in Summer 2013, and this most likely accounts for the reduction in the Autumn pass rate. Between both sittings in 2013, the pass rate will represent an increase on the combined 2012 rate.

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.
5. Students should attempt all required questions, and all components of questions.

Question 1:

Mixed standard of answers – students lost marks as follows:

In Part A:

Most students gave an adequate definition of ethics, but some lost some marks as they failed to state that they apply in professional contexts to govern the relationship between members, professional bodies and clients.

In Part B:

This section was not well answered – students were unable to adequately discuss internal and external safeguards, and instead incorrectly discussed the obligations imposed on members by the Accounting Technicians Ireland Code of Ethics.

In Part C:

The majority of students could explain FIVE rights of a student member at a disciplinary meeting – but stating that they have a right to a fair hearing is not really adequate, as the question was asking for specific detail on the rights of a member in order to ensure that the hearing is fair.

In Part D:

(1) There was confusion as to the time limit, with some students stating the time limit to bring a claim for unfair dismissal, as opposed to lodging an appeal.

(2) This component was answered quite badly by some students, who focused on the issue of penalties and not the various other grounds.

(3) This component was also weak with some students discussing outcomes in terms of penalties only and some outlining the remedies for unfair dismissal – very few mentioned a *de novo* hearing.

Part E:

Most students reached the correct conclusion, but did not always have the correct logic as to why they reached this conclusion.

Question 2:

This is a relatively straightforward question, which has been asked in the past – however, some answers were exceptionally weak. There was confusion between partnerships and companies, and confusion between the characteristics that are different between public and private companies. Incorrect answers related specifically to (1) liability, (2) publicity obligations and (3) regulation – which are generally exactly the same in public and private companies. Some students discussed common characteristics, which did not result in any marks, as the question specifically asked students to review the differences between public and private companies.

Question 3:

Part A generally received full marks – and any correct definition of a share was accepted. In Part B, some students failed to recognise that the shares in Rosen Enterprise were partly-paid and incorrectly stated that they had fallen in value. In Part C, a large portion of students failed to correctly explain the rules in relation to issuing shares at a discount, and in particular, the exceptions to the prohibition and the consequences of a breach. Incorrect answers assumed that these shares had increased in market value and that she could sell them at a profit. Incorrect answers tended not to actually answer the question being asked.

Question 4:

- A. Most students could adequately explain the distinction between executive and non-executive directors, with comprehensive answers being awarded full marks.
- B. The majority of students could not adequately explain the rules regarding directors' loans, and incorrectly assumed they were permissible if agreed by the directors. This area has been assessed in previous papers, and there was an obvious lack of basic knowledge by a large portion of students attempting this question.

Question 5:

- A. Most students could provide two examples of the distinction between ordinary and special resolutions, but quite a few struggled to provide a third difference.
- B. Average standard of answers – with most students understanding the basic rules, but unable to provide sufficient detail. One student incorrectly stated that “shaking hands” was a method of voting – as opposed to a show of hands – I awarded a mark nonetheless and assumed the error was due to exam stress.

Question 6:

Most students produced an average/good standard of answer to this question – marks were lost where students could not state nine powers/duties of a liquidator, but kept stating variations on the same duty (such as the duty to pay shareholders, creditors, debenture holders etc... – this is one duty, to pay the debts in order of priority, and not three separate duties). There were some wholly incorrect answers in relation to the role of a Committee of Inspection.

Question 7:

- A. This portion of the question produced varying answers – with some students providing excellent answers, but others discussing the civil jurisdiction of the courts and not the criminal jurisdiction, which was asked. Answers that were too general and lacking in specificity tended to lose marks – for example, stating that the Circuit Criminal Court dealt with serious crimes, without mentioning that it deals with indictable offences subject to specific exclusions, lost the students marks.
- B. This was the most disappointing component question on the paper. Most students could mention 2-3 criminal sanctions, but a large proportion could not give a fourth. Incorrect answers dealt with civil sanctions, and a number of students gave (1) fines, (2) imprisonment, or (3) both – as three separate answers, when they are only two – both is not a sanction!

Question 8:

- A. Students lost marks for failure to identify two methods of incorporation, supported by case law. A large portion correctly mentioned one method, but could not explain a second method.
- B. The majority drew the correct conclusion – but not always for the correct reasons and related their answers to the construction issue and not the incorporation issue.
- C. The majority drew the correct conclusion – but not always for the correct reasons – the majority answered in the context of the exclusionary rules and the inability to exclude negligence acts in certain contracts – as opposed to defining and applying the fundamental breach of contract rule, as specifically asked by the question.

Question 9:

- A. In this section most students could list methods to terminate an employment contract – a large portion could not describe five methods, as asked. Incorrect answers gave numerous examples of gross misconduct that would result in a dismissal – but dismissal was only marked as one ground, irrespective of how many examples were provided.
- B. This component produced some abysmal answers, with a large portion of students unable to discuss eligibility requirements and precluded workers – a significant number of students just listed the unfair dismissal grounds in this component – which had nothing to do with the question that was asked.

Question 10:

This question produced the weakest answers in the exam – with students unable to explain the concepts of voluntary assumption of risk, illegality and punitive damages. A large portion of answers were discussed from a common sense perspective – without any legal theory or case law support. In addition, there was incorrect analysis regarding the defence of illegality – the fact that Avery did not steal the car is irrelevant – she voluntarily got into a stolen car, and therefore she cannot claim for her damages and no action can arise based on an illegal act.

Question 11:

- A. Most students could define an aggressive practice – but lost marks where they failed to mention that it causes the consumer to make a different economic decision.
- B. Most students could not list the factors used to determine whether a practice is aggressive – and there was very obvious guess-work in a variety of scripts.
- C. Most students drew the correct conclusion.
- D. The majority could not give any specific detail regarding penalties – and incorrectly mentioned disqualification orders and an order to close down the issue.
- E. Most students made an adequate attempt to discuss the functions of the National Consumer Agency.