
Law and Ethics

Republic of Ireland
1st Year Examination

Autumn 2009

Paper, Solutions & Examiner's Report



NOTES TO USERS ABOUT THESE SOLUTIONS

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Accounting Technicians Ireland
(Formerly The Institute of Accounting Technicians in Ireland)

1st & 2nd Year Examination: Autumn Paper 2009

Paper: LAW & ETHICS (ROI)

Friday 21st August 2009 – 9.30 a.m. to 12.30 p.m.

INSTRUCTIONS TO CANDIDATES

Candidates may refer to the under-mentioned items of legislation in answering this paper.

Republic of Ireland

Companies Act, 1963
Companies (Amendment) Act, 1977
Companies (Amendment) Act, 1982
Companies (Amendment) Act, 1983
Companies (Amendment) Act, 1986
Companies Act, 1990
Companies (Amendment) Act, 1990
Company Law Enforcement Act, 2001
Companies (Auditing and Accounting) Act 2003
Investment Funds and Miscellaneous Provisions Act 2005/6
Companies Acts 1963 - 1990 by
Horwath Bastow Charleton

Republic of Ireland

Partnership Act, 1890
Limited Partnerships Act, 1907

The above items of legislation, and only those items, may be brought into the examination by candidates and used as reference material therein. Reference items must not contain any written notes or commentaries. Candidates will not be permitted to refer to any index published separately from the legislation.

Section A answer QUESTION 1 (COMPULSORY) and ANY THREE of the FOUR remaining questions. Section B answer ANY FOUR of the FIVE questions. If more than the required questions are answered in Section A and Section B, then only the correct number of questions, in the order filed, will be corrected.

Candidates should allocate their time carefully.

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

Answers should be illustrated with examples, where appropriate.

Question 1 begins on Page 2 overleaf.

SECTION A**Answer Questions 1 (Compulsory) and ANY THREE of the four remaining questions****QUESTION 1 (Compulsory)**

(a) Callum and Kate have recently converted their business partnership into a private limited company. As a consequence of the conversion they have been informed by the Companies Registration Office that they will have to appoint an auditor to audit their company accounts. In this regard they seek your advice on the following matters:

(i) The procedure for the appointment and removal of a company auditor.

7.5 Marks

(ii) A list of any *three* powers of a company auditor.

3 Marks

(b) Callum and Kate have also been advised that they may be eligible to apply for an audit exemption in the future. Advise them on any TWO conditions that must be satisfied in order for them to obtain an audit exemption.

2 Marks**Total 12.5 Marks****QUESTION 2**

In the context of Debentures, explain the main differences between a fixed charge and a floating charge and comment on which charge you consider to be the most secure.

Total 12.5 Marks**QUESTION 3**

In the context of a company's annual general meeting (AGM) explain the following:

(a) The notice required to call an AGM and the details that must be included in this notice.

2.5 Marks

(b) The general issues/business dealt with at the AGM.

3 Marks

(c) The documents to be attached to the agenda for the AGM.

2.5 Marks

(d) The methods by which voting is effected at the AGM.

4.5 Marks**Total 12.5 Marks****QUESTION 4**

APPLE CATERING Ltd. has recently defaulted in repaying a debenture due to the People's Bank Plc. The Bank has decided to appoint a receiver to recover the loan, which is secured on a building owned by APPLE CATERING Ltd. In this regard explain the following to the People's Bank Plc:

(a) The qualifications of a Receiver.

3 Marks

(b) Any *five* duties of a Receiver.

5 Marks

(c) Any *three* effects of the appointment of a Receiver.

4.5 Marks**Total 12.5 Marks****QUESTION 5**

Compare and contrast the characteristics of private limited companies and public limited companies operating in Ireland.

Total 12.5 Marks

SECTION B**Answer ANY FOUR of the FIVE questions in this Section****QUESTION 6**

Describe the main differences between civil law and criminal law in Ireland.

Total 12.5 Marks**QUESTION 7**

Luke is a qualified accountant. Last month his flatmate Chris, who works as a freelance journalist, asked him to review his financial accounts in order to assist him in declaring his taxable income to the Revenue. Luke completed Chris's accounts and filed all the appropriate documentation with the Revenue. Yesterday, Luke presented Chris with a bill for €300 for his services. Chris is refusing to pay Luke and says that a friend should not charge another friend for doing him a personal favour. Determine whether or not Chris is obliged to pay Luke the €300 fee by discussing the law relating to intention to create legally binding relations.

Total 12.5 Marks**QUESTION 8**

Jude has been employed as a make-up artist with an independent film company, Reality Productions, for the past five years. Her contract describes her as an independent contractor. Jude submits invoices on a monthly basis, which are paid without the deduction of tax or PRSI by the film company. Jude is told what projects to work on by the film company and is usually given 24 hours notice by the company of which set she is required to work at on any given day. Jude is required to provide all her own make-up products and tools for use on the various film sets – but every month the film production company pays her €300 towards the costs of her materials. Last month they also paid for Jude to attend a course on make-up for special effect productions. Reality productions have also provided Jude with the use of a company car to assist her travelling to the various film locations.

Last week Jude was called to a meeting with a senior production manager and was informed that due to economic constraints her services were no longer required and that her contract was terminated with immediate effect and with no compensation. Jude is outraged as she believes that she is an employee of Reality Productions and therefore should be entitled to compensation.

(a) List *three* reasons outlining the importance of the distinction between an employee and independent contractor.

3 Marks

(b) Outline any *two* tests used by the Courts to distinguish between a person employed under a contract of service and a contract for service (**3.5 Marks x 2**).

7 Marks

(c) Do you consider that Jude is entitled to compensation for the loss of her job? If so, how much is Jude entitled to?

2.5 Marks**Total 12.5 Marks**

QUESTION 9

(a) Define an agent and explain the various parties involved in a contract of agency.

2 Marks

(b) In the context of the creation of agency, explain the following terms.

(i) Agency by estoppel/ostensible authority.

5 Marks

(ii) Agency by necessity.

5.5 Marks

Total 12.5 Marks

QUESTION 10

(a) Outline the composition of the Complaints Committee of the IATI.

2 Marks

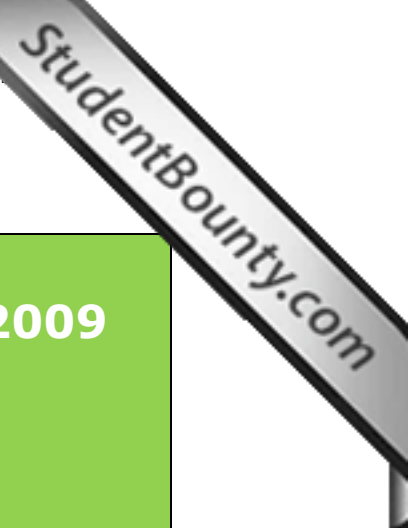
(b) List any *five* rights of a member/student where a case is presented to the Disciplinary Tribunal.

7.5 Marks

(c) Following a referral of a complaint by the Disciplinary Tribunal to the Appeals Committee state any *three* actions/decisions that the Appeals Committee can reach.

3 Marks

Total 12.5 Marks



1st & 2nd Year Examination: Autumn 2009

Law and Ethics (ROI)

Solutions

Solution to Compulsory Question 1

- a) Callum and Kate have recently converted their business partnership into a private limited company. As a consequence of the conversion they have been informed by the Companies Registration Office that they will have to appoint an auditor to audit their company accounts. In this regard they seek your advice on the following matters:

1) The procedure for the appointment and removal of a company auditor.

(7.5 marks)

2) A list of any THREE powers of a company auditor.

(3 marks)

- b) Callum and Kate have also been advised that they may be eligible to apply for an audit exemption in the future. Advise them on any TWO conditions that must be satisfied in order for them to obtain an audit exemption.

(2 marks)

Total 12.5 Marks

- A.1) Appointment of the Auditor: Section 160 CA 63 states that the first Auditor of the company is appointed by the Directors before the first AGM, and holds office until that meeting – if the Directors fail to make the appointment then the general meeting can make the appointment, if there is no Auditor at the AGM then the Minister can make the appointment – at this first AGM the Auditor is required to retire and will be re-appointed automatically without any resolution being passed, unless: (1) the Auditor is not qualified for re-appointment, (2) the Auditor does not wish to be re-appointed and has provided prior written notice to the company of this fact, and (3) a resolution has been passed to appoint another person as Auditor – if an Auditor is re-appointed at an AGM he thereafter holds office until the conclusion of the next AGM – the Directors also have the capacity to appoint a person to act as Auditor to fill a casual vacancy arising during the year **(4 marks)** Removal of the Auditor – Section 160 CA 63 provides that an Auditor may be removed from office by an ordinary resolution, requiring 28 days extended notice to members – a copy of this resolution must be sent to the CRO within 14 days and to the Auditor whose removal is intended – the Auditor has the right to contact the company and shareholders for the purpose of canvassing for his re-appointment, and may attend the relevant company meeting or make a representation in writing to the company – if this representation is received in advance of the meeting then it should be circulated to all members, at the company's expense **(3.5 marks)**
- A.2) Powers of the Auditor – (1) to access all written information regarding financial affairs of the company, (2) to ask questions/request explanations by the company's officers, (3) to call an EGM, (4) to be heard at company meetings on any matter that affects him in his role as Auditor, and (5) to receive notice of all company meetings **(any 3 of the 4 = 3 marks)**
- B. Audit Exemption Requirements: (1) turnover does not exceed €7.3m, (2) assets do not exceed €3.65m at the end of its financial year, (3) average number of employees does not exceed 50, (4) the business is not a subsidiary, bank or insurance company, and (5) the annual return of the company for the year is up to date, having been filed on time with the CRO **(any 2 of the 5 = 2 marks)**

Solution to Question 2

In the context of Debentures explain the main differences between a fixed charge and a floating charge and comment on which charge you consider to be the most secure.

Total 12.5 Marks

- Debenture secured by a Fixed Charge: a company borrows money and secures that borrowing on a fixed asset – the charge attaches to a fixed asset from the moment of creation – thereafter the borrowing company cannot deal in the asset (sell, alter, use to create a further charge) without the consent of the charge-holder – this charge ranks in priority to other charges – it is usually created by means of either a legal or equitable mortgage (lender's beneficial interest in the property is registered on the title documents/or the lender takes possession of the title documents until the debt is repaid) **(5 marks)**
- Debenture secured by a Floating Charge: a company borrows money and secures that borrowing on a non-specific company asset – the charge was defined in Re Yorkshire Woolcombers Ltd as a charge on an asset both present & future, which changes in the ordinary course of business and the company can deal with the charged asset during the normal course of business, until the charge crystallises – crystallisation can arise on default on the debenture, company liquidation, receivership, or the cessation of business – or

alternatively on a pre-determined future date – upon crystallisation the floating charge becomes affixed to the charged asset over which it previously floated – this results in a transfer of equitable title from the company to the debenture holder – the priority of floating charge upon crystallisation is that it is only paid after the fixed charges and the preferential debts have been discharged **(6.5 marks)**

- Conclusion that a fixed charge is more secure as it has priority of payment, and the charge-holder is restricted in his dealing with the asset **(1 mark)**

Solution to Question 3

In the context of a company's annual general meeting (AGM) explain the following:

- a) The notice required to call an AGM and the details that must be included in this notice. **(2.5 marks)**
 - b) The general issues/business dealt with at the AGM. **(3 marks)**
 - c) The documents to be attached to the agenda for the AGM. **(2.5 marks)**
 - d) The methods by which voting is effected at the AGM **(4.5 marks)**
- Total 12.5 Marks**

- A. Notice of AGM: all shareholders must receive 21 days clear notice of the AGM **(1 mark)**, specifying the time, date and place of the meeting and including an agenda for that meeting **(1.5 marks)**
- B. General business of the AGM: (1) consideration of the accounts, (2) consideration of the Director's and Auditor's reports, (3) declaration of a dividend, (4) retirement by rotation and re-election of Directors, and (5) re-appointment/appointment of the Auditor **(3 marks)**
- C. Documents to be attached to the Agenda: (1) the accounts (profit and loss, plus the balance sheet), (2) the Director's Report, and (3) the Auditor's Report **(2.5 marks)**
- D. Voting at Meetings: voting is governed by a company's Articles of Association – the general rule is that it takes place first by a show of hands – and a result is declared by the chairperson of the meeting – this declaration is deemed conclusive – the main disadvantages of voting by a show of hands is that (1) there is no privacy – everybody sees how you vote, (2) it does not reflect shareholdings, (3) it does not facilitate proxy voting, (4) it can be inaccurate (as no actual count is taken) – 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 disadvantage of the poll is that it is more time consuming and administrative in nature – albeit more accurate – the right to conduct a poll cannot generally be excluded by the Articles **(4.5 marks)**

Solution to Question 4

Apple Catering Ltd has recently defaulted in repaying a debenture due to the People's Bank Plc. The Bank has decided to appoint a receiver to recover the loan, which is secured on a building owned by Apple Catering Ltd. In this regard explain the following to the People's Bank plc:

- a) The qualifications of a Receiver. **(3 marks)**
 - b) Any FIVE duties of a Receiver. **(5 marks)**
 - c) Any THREE effects of the appointment of a Receiver. **(4.5 marks)**
- Total 12.5 Marks**

- A. Qualifications of the Receiver: there are no positive qualifications – they are all in the negative in that the Receiver cannot be: (1) a body corporate, (2) an un-discharged bankrupt, (3) a person who is, or has been, within 12 months of the commencement of the Receivership, an officer or servant of the company, (4) a connected person i.e. a parent, spouse, brother, sister or child of an officer of the company, a person who is a business partner of or in the employment of an officer or servant of the company, or (5) any person disqualified from acting as a Receiver of the company's holding or subsidiary company or a subsidiary of its holding company **(3 marks)**
- B. Duties of the Receiver: (1) notification of his appointment, (2) provision of information to all third parties affected by his decisions, (3) to hand over all documentation to the company on cessation of his duties, (4) to take reasonable care in the disposition of the charged asset – and to obtain the best possible price for the asset, (5) duty to guarantors to obtain the best possible price for the charged asset in order to mitigate their liability under the guarantee, (6) duty to report to the CRO, debenture holder/Court via a statement of affairs, (7) duty to apply the proceeds of sale in order of priority **(any 5 = 5 marks)**
- C. Effect of the Appointment of the Receiver: (1) all floating charges crystallise, and become affixed to the assets/undertakings over which they were created, (2) the powers of the company and the Director's authority are suspended in relation to the assets affected by the Receivership, and can only be exercised with the consent of the Receiver, (3) where the Receiver is appointed as Receiver Manager, then he is entitled to carry on the business of the company, (4) the Receiver may, if he considers that the interests of the Debenture-Holder so require, dispose of any asset of the company affected by the Debenture, including the entire undertaking, (5) the Receiver is not liable on foot of contracts entered into by the company prior to his appointment (although these contracts remain binding on the company), unless he specifically agrees to be – *W&L Crowe Limited v ESB (1984)*, (6) the Receiver is personally liable for contracts entered into by him in the performance of his functions – although he may negotiate indemnification **(any 3 = 3 x 1.5 marks = 4.5 marks)**

Solution to Question 5

Compare and contrast the characteristics of private limited companies and public limited companies operating in Ireland.

Total 12.5 Marks

- Comparison: all companies, whether public or private have the following characteristics in common: (1) separate legal entity: a company is a separate legal entity from its members (it can contract in its own name/sue or be sued in its own name etc) – this also means that a company has perpetual existence and will only cease to exist where it is struck off the CRO, (2) liability: all company shareholders have limited liability – on liquidation they are not required to make a contribution towards company debts where their shares are fully-paid, (3) formation: a company must be registered with the CRO (through lodging a Memorandum of Association, an Articles of Association, and Form A1), (4) all companies are governed by the Companies Acts 1963-2005 – as a consequence there is a significant degree of formality involved in running the company, (5) publicity requirements – all companies have significant publicity obligations in return for separate legal existence – the degree of publicity depends on the size of the company and not whether it is public or private, and (6) management of the business: in a company the shareholders own the company but the directors are responsible for its management – therefore there is a theoretical distinction between ownership and management **(any 4 comparisons = 4 x 1.5 marks = 6 marks)**
- Contrast: (1) subscription: company membership is limited to 2-99 in a private company and requires a minimum of 7 shareholders in 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) 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 **(4 x 1.5 marks = 6 marks)** – a private company must have limited, ltd or the Irish equivalents after its name – a public company must have public limited company, plc or the Irish equivalents after its name **(0.5 marks)**

Solution to Question 6

Describe the main differences between civil law and criminal law in Ireland.

Total 12.5 Marks

- Definitions: civil law is deemed to be private law – and it generally concerns disputes between individuals, where one person 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 marks)**
- 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) **(2 marks)**
- Tests – for a civil court to find a defendant liable the test is *the balance of probabilities* – for a criminal court to find a defendant guilty the test is *beyond all reasonable doubt* **(2 marks)**
- 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 **(1 mark)**
- 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 **(1 mark)**
- 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 ... **(2.5 marks)**
- Courts: There are different hierarchies of civil and criminal courts – the main civil courts are the District, Circuit, High and Supreme Courts – whereas the main criminal courts are the district criminal, circuit criminal, central criminal court, special criminal court, court of criminal appeal and the Supreme Court **(2 marks)**

Solution to Question 7

Luke is a qualified accountant. On last month his flatmate Chris, who works as a freelance journalist asked him to review his financial accounts in order to assist him in declaring his taxable income to the Revenue. Luke completed Chris's accounts and filed all the appropriate documentation with the Revenue. On yesterday Luke presented Chris with a bill for €300 for his services. Chris is refusing to pay Luke and says that a friend should not charge another friend for doing him a personal favour. Determine whether or not Chris is obliged to pay Luke the €300 fee by discussing the law relating to intention to create legally binding relations.

Total 12.5 Marks

- 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 & 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 **(4.5 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 **(4.5 marks)**
- Conclusion: In our scenario although Luke and Chris are flatmates – they are acting in a commercial capacity – as an accountant and a freelance journalist – therefore the contract would be viewed as commercial and assumed legally binding – as there is no evidence to rebut this presumption – Luke can sue Chris for non-payment/breach of contract **(2.5 marks)**

Solution to Question 8

Jude has been employed as a make-up artist with an independent film company, Reality Productions, for the past five years. Her contract describes her as an independent contractor. Jude submits invoices on a monthly basis, which are paid without the deduction of tax or PRSI by the film company. Jude is told what projects to work on by the film company and is usually given 24 hours notice by the company of which set she is required to work at on any given day. Jude is required to provide all her own make-up products and tools for use on the various film sets – but every month the film production company pays her €300 towards the costs of her materials. On last month they also paid for Jude to attend a course on make-up for special effect productions. Reality productions have also provided Jude with the use of a company car to assist her travelling to the various film locations.

On last week Jude was called to a meeting with a senior production manager and was informed that due to economic constraints her services were no longer required and that her contract was terminated with immediate effect and with no compensation. Jude is outraged as she believes that she is an employee of Reality Productions and therefore should be entitled to compensation.

- A. List **THREE** reasons outlining the importance of the distinction between an employee and independent contractor. **(3 marks)**
- B. Outline any **TWO** tests used by the Courts to distinguish between a person employed under a contract of service and a contract for service **(3.5 marks x 2)**. **(7 marks)**
- C. Do you consider that Jude is entitled to compensation for the loss of her job? If so, how much is Jude entitled to? **(2.5 marks)**

Total 12.5 Marks

- A. Importance of the Distinction: (1) statutory protection is only afforded to employees not to independent contractors, (2) an employer is vicariously liable for the actions of employees but not generally independent contractors, (3) an employee has priority of payment over an independent contractor in the event of the liquidation of a company, (4) an employee may obtain social benefits (health insurance, pension, training, education etc) from an employer that are not accessible to a contractor, (5) the social welfare code distinguishes between an employee and a contractor for the purpose of benefits, and (6) the tax code distinguishes between an employee (PAYE) and a contractor (self-assessed) **(any 3 = 3 marks)**
- B. Tests: (1) Control Test: questions whether the employer controls all aspects of the employees work – in effect have they control over the work done, the method of completion, the means employed to achieve the result, and the time and place the task is to be done – there are inherent problems with the test in the context of professional workers – who are subject to limited control – such as in Tierney v An Post (2000), (2) Integration Test: this test asks whether the worker is employed as part of the business, and the work done is integral to the business – the application of this case was illustrated in Re Sunday Tribune (in Liquidation) (1984) and in Kelly v Irish Press (1985) in the context of journalist/editors who were described as contractors but integrated into the business – the main problem with the integration test is the difficulty in application to small businesses, (3) Enterprise Test: this test questions whether the person has engaged himself to perform services as a person in business on his own account – it asks whether the worker has made a financial investment in the work, can he reap a reward/profit from effective performance of the job, and whether there is a financial risk in undertaking the work – in McDermott v Loy (1982) the lack of entrepreneurship indicated an employee relationship – problems with the enterprise test arise in the context of employees paid on a commission basis, (4) Mixed/Reality Test: in this test all factors are considered equally (more focus on control in the mixed test) and an overview is taken – relevant factors include: method of pay, right to select and dismiss, ability to delegate performance of duties, provision of training and equipment, level of financial risk undertaken by the worker, whether the worker has the opportunity to profit from effective management of the task – the application was seen in Mahon v Henry Denny & Sons Ltd 1997 where the worker was classified as an employee by taking a holistic view of all aspects of the working relationship **(any 2 x 3.5 marks = 7 marks)**
- C. Conclusion: by applying the tests Jude is likely to be classified as an employee (she is controlled (hours/place of work), integrated (training course), and shows a lack of entrepreneurship (she is reimbursed for expenses and cannot profit from the effective performance of her job) and therefore in reality will be viewed as an employee for the purpose of the law – and as a contractor for taxation purposes) – therefore she is entitled to redundancy for the loss of her job – the amount of payment is 2 x length of service + a

bonus week x weekly salary (capped at €600) i.e. $2 \times 5 + 1 = 11$ x weekly salary or €600, whichever is less (2.5 marks)

Solution to Question 9

- A. Define an agent and explain the various parties involved in a contract of agency. (2 marks)
- B. In the context of the creation of agency, explain the following terms. (5 marks)
- 1) Agency by estoppel/ostensible authority. (5 marks)
 - 2) Agency by necessity. (5 marks)
- Total 12.5 Marks**

- A. An agent is a person who creates a contract on behalf of another person (1 mark) – the person the agent is representing is called the principal, and the person they create the contract with is called the third party – once the contract is created – the remaining contract that exists is between the principal and third party (1 mark)
- B.1) Agency by Estoppel/Ostensible Authority: this is where the principal allows a third party to believe that the person is his agent – or where the actions of the principal have postulated this fact – this situation may arise where a person acted as agent in the past and continues to act as such after the agency relationship has been terminated – it may also arise by a course of dealing – such as in the case of employees, examples include: Panorama Developments (Guildford) Limited v Fidelis Furnishing Fabrics Limited (1971), Freeman & Lockyer V Buckhurst Park Properties (Mangal) Limited (1964) (5 marks)
- B .2) Agency by operation of law/ necessity – this is where a contract of agency is implied to exist in the event of extraordinary circumstances – in effect, where an emergency situation arises relating to the transportation of goods or where one person has possession of another's goods they may become an agent of necessity – for this to occur the following factors must exist: (1) the agent must be entrusted with the goods of the principal, (2) an emergency must arise, (3) the agent must attempt to contract the principal, & (4) the agent must be acting in good faith and in the best interest of the principal & to protect the principal's interest – in these circumstances the Court will imply that you are acting as an agent of necessity, examples include: Great Northern Railway v Swaffield, 1874, Sachs v Miklos (1948) (5.5 marks)

Solution to Question 10

- A. Outline the composition of the Complaints Committee of the IATI. (2 marks)
- B. List any FIVE rights of a member/student where a case is presented to the Disciplinary Tribunal. (7.5 marks)
- C. Following a referral of a complaint by the Disciplinary Tribunal to the Appeals Committee state any THREE actions/decisions that the Appeals Committee can reach. (3 marks)
- Total 12.5 Marks**

- A. Composition of the Complaints Committee: Not less than 9 members, the majority of whom are not members of the IATI (2 marks)
- B. Rights of a Student/Member at the Disciplinary Tribunal: (1) to attend and be heard, (2) to be represented (by legal counsel or a member of the IATI), (3) to receive any material regarding the complaint from the IATI 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 1.5 marks = 7.5 marks)
- C. Actions of the Appeals Committee: (1) dismiss the complaint, (2) uphold the complaint, (3) confirm any sanction against the member decided by the Disciplinary Tribunal, or (4) vary the sanction by increasing/reducing its severity (any 3 x 1 mark = 3 marks)

1st & 2nd Year Examination: Autumn 2009

Law and Ethics (ROI)

Examiner's Report

Correction Report: Law & Ethics – Year 1 & 2

On average students did not perform well in this exam – with a significant percentage scoring below a 50. However, it is important to note that given the high pass rate in Summer 2009, this cohort of repeat students was quite weak.

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

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

Question 1:

Weak standard of answers – students lost marks as follows:

In Part A:

1. Failure to discuss that the appointment and removal of an auditor is effected by an ordinary resolution of the shareholders (with the exception of the appointment of the first auditor) – a significant number of students stated that the responsibility lies with the directors.
2. Some students discussed (in detail) the qualifications and eligibility requirements to act as a company auditor – this was not the question asked and no marks were awarded.
3. Re powers – a significant number of students discussed the duties of the auditor and not his powers (as specifically asked).

In Part B:

1. A significant number of students made no attempt at this portion of the question.
2. Some students discussed turnover/balance sheet total – without reference to actual figures – I awarded some marks (but not total marks) where this arose.

Question 2:

Average answers by some students who understood the basic differences between fixed and floating charges. Some students incorrectly guessed at this question – stating that a fixed charge has a fixed interest rate and a floating charge a variable interest rate (a wholly incorrect answer).

Question 3:

Average overall answers. Most students were aware of the details included in the notice of the AGM – although a significant number were unaware of how much notice is actually required (quite a few stated 48 hours – when in fact the correct answer is 21 days). Most students made an average guess at the business and documents – but some were completely confused re voting. Where students discussed types of resolutions, quorums and proxies re methods to effect voting, I awarded them some marks.

Question 4:

Most students scored below a pass mark in this question – some students were completely confused regarding the role and duties of a Receiver and discussed the role of an Examiner instead (which was very surprising – given that examinership is NOT actually on the syllabus).

Question 5:

Most students scored average marks in this question. Although it was obvious that some students were completely confused as they discussed the comparison between companies and partnerships and not public and private limited companies (as specifically asked). Quite a few students stated that a private company has limited liability whereas a public company has unlimited liability (or vice-versa) – this is wholly incorrect and demonstrates a complete lack of knowledge of the basic principles of company law.

Quite a few students incorrectly stated that the maximum number of shareholders in a private company is 50 – this has increased to 99 – although I did award full marks for 50 shareholders – as an out-of-date text book may confuse students on this matter.

Question 6:

Most students produced an average/good standard of answer to this question – marks were lost where students incorrectly stated that the civil courts dealt with less serious crime and the criminal courts dealt with more serious crime – again this demonstrates a complete lack of understanding of the classifications of law. In addition, almost most students could list the civil courts, the majority could not actually name all of the criminal courts.

Question 7:

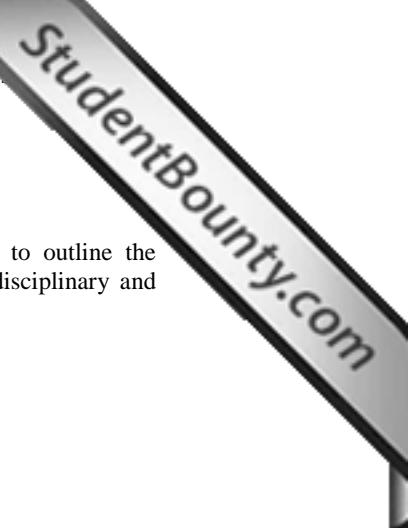
This question produced the lowest marks from any of the questions on the paper. The rationale for this appeared to be that the students failed to read the question correctly. The question only asked for a discussion of the law relating to intention to contract. Most students omitted this discussion and instead focused on the elements of offer, acceptance and consideration – and accordingly, lost significant marks.

Question 8:

Well answered by the majority of students who attempted this question. Where students lost marks it was mainly due to an inability to discuss the various tests to distinguish employees from contractors.

Question 9:

Very unpopular question – producing very weak answers. Most students were able to provide a competent answer to Part A – but were unable to elaborate on Part B. There was complete confusion regarding agency by necessity – with students stating that sometimes a sector of business requires the existence of an agent and stating that this is a necessary agent. This is wholly incorrect and a good answer would have included reference to the conditions that should exist in order to imply the existence of an agency of necessity.



Question 10:

Again a weak standard of answers to an unpopular question. Most students were unable to outline the composition of the Complaints Committee and stated that it was comprised of complaints, disciplinary and appeals. Some good guesses in Part B and C were awarded marks.