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# Law & Ethics Republic of Ireland

1<sup>st</sup> Year Examination

**August 2011**

**Paper, Solutions & Examiner's Report**



### NOTES TO USERS ABOUT THESE SOLUTIONS

The solutions in this document are published by Accounting Technicians Ireland. They are intended to provide guidance to students and their teachers regarding possible answers to questions in our examinations.

Although they are published by us, we do not necessarily endorse these solutions or agree with the views expressed by their authors.

There are often many possible approaches to the solution of questions in professional examinations. It should not be assumed that the approach adopted in these solutions is the ideal or the one preferred by us. Alternative answers will be marked on their own merits.

This publication is intended to serve as an educational aid. For this reason, the published solutions will often be significantly longer than would be expected of a candidate in an examination. This will be particularly the case where discursive answers are involved.

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**Accounting Technicians Ireland**  
**1<sup>st</sup> Year Examination: Autumn Paper 2011**  
**Paper: LAW & ETHICS (ROI)**

Friday 19<sup>th</sup> August 2011 - 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**

Westin is an employee and executive director of Concept Media Ltd. The company has been suffering substantial losses in recent months and the auditors have been asked to review the accounts for the purpose of introducing measures to curb unnecessary spending. During the course of the review the auditors discover discrepancies between the company's sale records, stock invoices and cheques received. Following a detailed investigation, involving the bank and the company's debtors, they have come to the conclusion that Westin has been drawing company cheques payable to cash and crossing cheques paid by the company's debtors and lodging them both into his own personal bank account.

Concept Media Ltd has contacted Accounting Technicians Ireland, of which Westin is a qualified member, and told them of their suspicions. They have also provided them with a copy of the evidence upon which their suspicions are based. Accounting Technicians Ireland referred the matter to the Complaints Committee and the outcome of the Committee was that the matter was too serious to be dealt with by them. Accordingly, the complaint was passed to the Disciplinary Tribunal. The Disciplinary Tribunal have convened a hearing for this matter and Westin seeks your advice in relation to this hearing and this allegation.

- a) Explain the composition and process for appointment of members to the Disciplinary Tribunal.  
**4 Marks**
- b) Outline any FIVE rights of a member at a hearing of the Disciplinary Tribunal.  
**5 Marks**
- c) Discuss any THREE potential outcomes of a hearing of the Disciplinary Tribunal.  
**3 Marks**
- d) Concept Media Ltd has also reported Westin to the Gardaí on suspicion of fraudulent trading. Explain the elements of this offence and discuss the sanctions that can be imposed upon Westin if he is found guilty of fraudulent trading.  
**8 Marks**

**Total 20 Marks**

**SECTION B**

**Answer ANY FOUR of the FIVE questions in this Section**

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

**QUESTION 2**

Elaine and Frank have been running a successful auditing and accounting practice in partnership for the past fifteen years. They have just been notified by their solicitor that a new European Directive has been enacted allowing auditors to establish limited liability companies. The solicitor has recommended to them that they should convert the partnership into a company, due to its many advantages.

Explain to Frank and Elaine the characteristics of a modern Irish limited company.

**Total 10 Marks**

**QUESTION 3**

Harvest Cereals Ltd has just been put into compulsory liquidation. Richard is a shareholder in this company, owning 100,000 €1 preference shares of which 80 cent is fully paid. Richard is unsure of his rights and obligations in respect of these shares upon the liquidation of the company.

a) Define a share.

**1 Mark**

b) Outline the characteristics of preference shares.

**6 Marks**

c) Explain the nature of a partly-paid share and assess whether Richard has any liability to Harvest Cereals Ltd upon liquidation in relation to his preference shares.

**3 Marks**

**Total 10 Marks**

**QUESTION 4**

In the context of company directors explain the following:

a) The distinction between a *De Facto* Director and a Shadow Director.

**3 Marks**

b) Any THREE legal reasons that require a director to vacate (resign) his office.

**3 Marks**

c) The procedure to effect the lawful removal of a director.

**4 Marks**

**Total 10 Marks**

**QUESTION 5**

Firelight Pharmaceuticals Ltd has recently discovered that their company auditor has been passing on trade secrets to a competitor. Consequently they have decided to call an EGM for the purpose of removing the auditor. In this regard advise them as follows:

- a) What is the notice requirement to call an EGM to remove an auditor?  
**1 Mark**
  - b) What type of resolution is required to effect this removal?  
**1 Mark**
  - c) What are the rules regarding quorums and meetings?  
**4 Marks**
  - d) What are the rules regarding proxy voting at meetings?  
**2 Marks**
  - e) What are the rules regarding the minutes of company meetings?  
**2 Marks**
- Total 10 Marks**

**QUESTION 6**

The auditors of *Coltrane Classic Musical Supplies Ltd* have recently notified the company that it is insolvent. The directors do not want to trade while insolvent and risk prosecution for reckless trading, therefore they have decided to effect a creditors' voluntary liquidation of the company.

- a) Discuss the procedure to effect a creditors' voluntary liquidation.  
**5 Marks**
  - b) Outline the priority of payment of company debts upon liquidation.  
**3 Marks**
  - c) List any TWO reasons why a liquidator may vacate or be removed from his position.  
**2 Marks**
- Total 10 Marks**

**P.T.O.** 

**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**

In the context of the doctrine of precedent discuss the following:

- a) The meaning of the terms "*stare decisis*" and "*ratio decidendi*".

**3 Marks**

- b) The situations where precedent must be followed and the situations where precedent may be departed from.

**3 Marks**

- c) Any TWO advantages and any TWO disadvantages of the doctrine of precedent.

**4 Marks**

**Total 10 Marks**

**QUESTION 8**

The Clariton Hotel obtained the following bookings for the last weekend in April:

- (1) Matt and Kate booked their wedding reception for 300 guests in the hotel's main function room. They paid a deposit of €5,000 and a further €10,000 was due to be paid on the day of the wedding.
- (2) Jenny booked a surprise 40<sup>th</sup> wedding anniversary party for her parents to be hosted in the hotel's gardens. She paid a deposit of €2,000 with the balance of €2,000 to be paid on the day of the party.
- (3) The Irish Animation Federation (IAF) booked the Hotel's conference room to host a presentation by Gregory Steinback, an Oscar winning animator running Hollywood's most successful animation studio. The IAF have already paid the hotel the €3,000 for the room and tea/coffee and lunch facilities for the delegates and the presenter.

On the Friday before the last weekend in April the hotel manager received the following calls: (1) Matt rang informing the hotel that he had to cancel the wedding reception as Kate has contracted leprosy following a period working abroad and has been quarantined on the instructions of the Department of Health, (2) Jenny rang to tell the hotel that the anniversary party was cancelled as her mother has just discovered that her father is a bigamist and has been married to another woman for the past 23 years, and (3) the IAF rang cancelling the conference as the sole speaker has just died of a massive heart attack.

- a) Define frustration and explain any THREE circumstances under which a contract may be discharged by frustration.

**7.5 Marks**

- b) Determine whether the contracts created between the Clariton Hotel and (1) Matt and Kate, (2) Jenny and the (3) IAF are frustrated and outline the consequence if frustration arises.

**2.5 Marks**

**Total 10 Marks**

**QUESTION 9**

Ethel has been employed as a locum dentist with the Eastern Health Authority for the past eight years. Her contract describes her as an independent contractor, and states that she is entitled to be paid at a rate of €200 per day, without statutory deductions. Her duties revolve around providing cover for absent dentists employed by the Eastern Health Authority in hospitals, clinics and residential treatment facilities under their jurisdiction. In working as a locum dentist Ethel is required to contact the administration offices of the Eastern Health Authority each Friday so that they can notify her of where they require her to work for the next week. Ethel is not required to use her own dental tools (new tools are provided to her free of charge every year by the Eastern Health Authority) and although she uses her own car when travelling to and from dental facilities she is paid a maintenance fee for the car of €2,000 per year. This year the Eastern Health Authority sent Ethel on a training course in relation to advancements in cosmetic dentistry and covered all of her expenses while completing this course.

Two months ago Ethel caused an allergic reaction in a patient when she administered an anaesthetic that was contra-indicated, due to an existing medical condition. The patient's medical chart clearly indicated the allergy but Ethel had not bothered to read the chart as she was extremely busy that day. The patient is planning on suing for his injuries – but is unsure whether he should sue Ethel or the Eastern Health Authority.

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

**2 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 marks x 2**).

**6 Marks**

c) Determine whether the patient should sue Ethel or the Eastern Health Authority in respect of his injuries, providing reasons for your answer.

**2 Marks**

**Total 10 Marks**

**QUESTION 10**

Abbey is a self employed accountant. For the last three years she has been preparing the accounts of *Tasty Treats Confectionary*, a national chain of confectionary stores. She received a call three months ago from the Managing Director of *Tasty Treats* informing her that a multinational company was considering purchasing the company, and asking her to prepare an up-to-date financial statement to present to his company. She completed this task as requested and the takeover was successfully completed. However, she has recently been contacted by the Chief Financial Officer of the multinational company informing her that they have discovered serious errors in the accounts she prepared. In particular, they noted that she had failed to depreciate the value of *Tasty Treats* buildings, in light of the downturn in the Irish property market, that she had seriously over-valued the company's stock, and that she had omitted any reference to the former director's retirement bonuses and pensions. As a consequence of these errors the multinational believes that it over-paid for *Tasty Treats Confectionary* in the amount of €230,000 and they intend to sue Abbey in negligence for this loss.



- A. Discuss the various tests used by the Courts to determine the existence of a duty of care, and based on this discussion advise Abbey whether she owed the multi-national company a duty of care in relation to the accounts of *Tasty Treats Confectionary*.  
**8 Marks**
- B. Outline the statute of limitations for actions arising from negligence.  
**2 Marks**
- Total 10 Marks**

**QUESTION 11**

- A. Sarah is the office manager of *Eddison Accountants*. As part of her duties Sarah regularly orders office supplies from *Fortrum and West*. Last month Sarah handed in her notice to *Eddison Accountants* and informed them that she and her husband were establishing their own wedding planning business. Last week *Eddison Accountants* received an invoice from *Fortrum and West* for the payment of office supplies in the amount of €2,000. As *Eddison Accountants* could not locate any of the supplies listed on the invoice they decided to investigate the matter further. Following investigation it has been discovered that the goods were ordered by Sarah and that she took these goods from *Eddison Accountants* to use in her own business. *Eddison Accountants* are now refusing to pay *Fortrum and West* for these goods on the basis that Sarah was acting for her own purposes when she ordered these goods and not on behalf of *Eddison Accountants*.

Explain the rule that a contract of agency may be created by estoppel and in light of this explanation assess whether *Eddison Accountants* is legally obliged to pay the €2,000 due to *Fortrum and West*.

**5.5 Marks**

- B. List and explain any THREE duties owed by an agent to a principal.

**4.5 Marks****Total 10 Marks**

# 1st Year Examination: August 2011

## 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.

#### Suggested Solution to Question 1

- A. Disciplinary Tribunal – Composition/Appointment: it consists of not less than nine persons, a majority of the members must be person's who are not members of Accounting Technicians Ireland, and at least three of whom are qualified lawyers, and three of whom are members of Accounting Technicians Ireland **(2.5 marks)** – appointment: appointments are made by the board of management of the Accounting Technicians Ireland for a term of five years, which may be renewed for one subsequent term **(1.5 marks)**
- B. 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)**
- C. Potential Outcomes of the Disciplinary Tribunals: (1) exclusion or suspension from membership of Accounting Technicians Ireland, (2) withdrawal of licence or permit to practice, (3) the imposition of a reprimanded or a severe reprimand (fine), or (4) a fine not exceeding €30,000 **(any 3 x 1 mark = 3 marks)**
- D. Fraudulent Trading: definition under Section 297A CA 63 – as amended – elements of the offence: where a company officer "knowingly" and "intentionally" was a party to the fraudulent carrying on of the company's business, with the intent to defraud its creditors – 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 **(5.5 marks)** – criminal sanctions (on summary conviction imprisonment not exceeding 12 months &/or a fine – on conviction on indictment imprisonment not exceeding 7 years &/or a fine) – civil sanctions (personal liability for the debts of the business arising from the fraudulent act) **(2.5 marks)**

**Suggested Solution to Question 2**

- Characteristics: (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) **(2 marks)** (2) Perpetual Succession: a company has perpetual existence and will only cease to exist where it is liquidated/struck off the Register of Companies **(1.5 marks)** (3) Liability: company shareholders have limited liability – on liquidation they are not required to make a contribution towards company debts where their shares are fully-paid **(1.5 marks)**, (4) Formation: a company must be registered with the Companies Registration Office (through lodging a Memorandum of Association, an Articles of Association, and Form A1) **(2 marks)**
- Miscellaneous issues: (1) Governing Legislation: companies are governed by the Companies Acts 1963- 2009, (2) Taxation – company profits are assessed for the purpose of corporation tax, (3) Subscription: company membership can be 2-99 (private company) or 7+ (public company), (4) Publicity requirements – companies have significant publicity obligations in return for separate legal existence (such as Registers, Annual Return and Accounts, Constitutional Documents), (5) 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 3 x 1 mark each = 3 marks)**

**Suggested Solution to Question 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. Preference Shares: these are shares that carry one or more rights than ordinary shareholders (such as the right to a dividend or capital) – generally they are more expensive to purchase than ordinary shares and in exchange preference shareholders will receive some form of preferential benefit or additional benefit over ordinary shareholders – rights attached to preference shares may include: (1) a preference shareholder is entitled to a fixed dividend payment, when declared by the company – presumed to be cumulative (unless otherwise stated – if the preference shares are preferred as to the dividend then the dividend is paid ahead of ordinary shareholders), (2) a preference shareholder is entitled to a return on their capital investment on liquidation, if surplus funds are available and to share in any surplus on liquidation (unless otherwise indicated by the company's own Articles of Association), (3) if the preference share is preferred as to capital this entitles the shareholder to have his or her capital investment in the company repaid in full before the ordinary shareholders are returned their capital in a winding up, (4) preference shareholders do not usually have the right to vote or participate in general meetings – although they do have the right to attend all company meetings – generally they provide more security and less risk than ordinary shares **(6 marks)**
- C. Partly-Paid Shares: Richard has purchased partly-paid preference shares – the paid-up amount is reflected on the balance as paid-up/called-up issued share capital – 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) – as the company is in liquidation Richard is obliged to pay the unpaid portion (€20,000) **(3 marks)**

**Suggested Solution to Question 4**

- A. *De Facto*/Shadow Directors: a *de facto* director is a director who is not formally appointed as a director, but acts as having undertaken the role of a director – he is 'held out' by the company as a director even though he has not been officially appointed as a director and in the event of a breach will be liable as if they were properly appointed – whereas a shadow director is a person in accordance with whose directions or instructions the directors of a company are accustomed to act – this person does not take the title of director and remains in the background of a company, but they instruct and direct the board of directors as to how to act in relation to company matters **(3 marks)**
- B. Mandatory Resignation: (1) the director becomes bankrupt, (2) he becomes of unsound mind, (3) he is absent for 6 months or more from the company, without the prior permission of the directors, (4) he is convicted of an indictable offence, (5) he does not hold the requisite share qualification and is disqualified under Section 180 of the Companies Act 1963, or (6) he becomes Restricted or Disqualification by virtue of Section 150/160 of the Companies Act 1990 **(any 3 x 1 mark = 3 marks)**
- C. Removal of a Director: (1) a director can be removed from office by the passing of an ordinary resolution at a general meeting, (2) extended notice of 28 days or more must be served by the company on the shareholders indicating the intention to remove the director, (3) a copy of the resolution proposing to remove the director must be given to the director concerned, (4) the director has a right to make written representations and have them circulated by the company to all the members before the general meeting, (5) if the representations are not sent they must be read out at the general meeting, (6) the director has the right to speak at the meeting, (7) a vote is then taken and if passed by a majority of those present the CRO must be notified **(4 marks)**

**Suggested Solution to Question 5**

- A. Notice: the notice requirement is 28 days clear notice **(1 mark)**
- B. Resolution: an ordinary resolution with extended notice of 28 days is required to effect the removal of an auditor **(1 mark)**
- C. Quorum: This is the minimum number of people that must attend a meeting in order for it to be valid – a company's quorum is generally stated in its Articles of Association – Table A states that the statutory minimum in public and private companies is 2/3 persons – the quorum may be present in person or by proxy – if there is no quorum within 30 minutes of the commencement of the meeting then the chairperson must adjourn the meeting to a later date (usually the same place and time one week later) – although if the quorum was present during the meeting – but not present at voting the votes cast are still valid **(4 marks)**
- D. Proxy: This is a document appointing and the appointment of a person to attend, vote, speak on behalf of another shareholder at a meeting – company law requires that the form nominating a person as proxy must be received by the company at least 48 hours prior to the meeting – proxies only applies to a company having share capital – and the ability to appoint a proxy must be authorised by the Articles of Association **(2 marks)**
- E. Minutes: all companies are required to keep minutes of all company meetings – these minutes are usually maintained by the company secretary and are recorded

evidence of the proceedings of the meeting once signed by the chairperson – a member of a company has the right to inspect the minutes of all general meetings (2 marks)

### Suggested Solution to Question 6

- A. Creditors Voluntary Liquidation: (1) a company unable to make a declaration of solvency because of insolvency must initiate a creditors' voluntary liquidation, (2) the members of the company must pass a resolution to liquidate the company, (3) the company must then call a meeting with the creditors within 10 days of the resolution being passed to commence a creditors' voluntary winding up (notice of the creditors' meeting must be sent to all the creditors at least seven days before the meeting and also be advertised in two daily newspapers circulating in the area), (4) at the creditors meeting the directors must lay before it a statement of affairs showing particulars of the company's assets, debts and liabilities, as well as a list of the creditors and the debts owed, and explain to the creditors that the company is insolvent and cannot pay its debts, (5) a vote is then taken by the creditors to agree to a creditors voluntary liquidation, and a liquidator will be appointed, and (6) a Committee of Inspection may also be appointed to assist the liquidator (5 marks)
- 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)
- C. Vacation of Office: (1) after presentation of his final report at the creditors meeting, (2) if he becomes disqualified from holding the position, (3) in prescribed circumstances (such as incapacity, bankruptcy, lack of independence etc) (any 2 x 1 mark = 2 marks)

### Suggested Solution to Question 7

- A. Definitions: "*stare decisis*" means "let the decision stand" – it means that the decision of a higher court stands over or binds the decision of a lower court (1.5 marks), and "*ratio decidendi*" means the "reason for the decision" – this describes the core part of a legal decision dealing with the question of law under review (1.5 marks)
- B. Precedent: precedent must be followed when the material facts/legal issues of the case in question are sufficiently similar to the previous case establishing the precedent (1.5 marks) – the court will not have to apply the precedent if the decision was either incorrectly made or was overturned by a higher court – in exceptional circumstances precedent will not be applied if it would undermine the interests of justice to do so (1.5 marks)
- C. Advantages/Disadvantages: advantages – (1) Consistency: the same principles are applied resulting in a set of consistent decisions, which ensures a just legal system, (2) Certainty: the use of binding precedent means that lawyers and clients will know how their issues will be resolved and have some certainty as to the outcome of their case, and (3) Efficiency: it enables judges to make new laws in

reaction to particular circumstances arising from recent developments in society (not much faster than having to wait for the legislature to enact new law) **(any 2 = 2 marks)** – disadvantages: (1) Inflexibility: it unnecessarily forces courts to follow previous decisions (other common law countries do not have the doctrine of binding precedent – for example, France), (2) Unfairness: a judge may create an unfair precedent that must then be followed by other courts until a higher court overrules it, (3) Unclear: binding decisions may be unclear or the wording ambiguous forcing the judges to spend time deciphering the law, and (4) Vast numbers: many decisions become case law and there is the possibility of two conflicting precedents being created **(any 2 = 2 marks)**

### Suggested Solution to Question 8

- A. Frustration: this is where a contract cannot be completed as agreed due to some unforeseeable factor outside the control of the contracting parties **(1.5 marks)** – circumstances where a claim of frustration will be upheld: (1) when the subject-matter of the contract is destroyed – in *Taylor v Caldwell (1863)* the destruction of a music hall by a fire 4 days before a performance was due to take place was held to amount to frustration, (2) where government interference prevents performance of the contract – in *Ross v Shaw (1917)* a contract to purchase yarn from a mill in Belgium could not be lawfully performed once the mill was occupied by German troops during World War One and was deemed frustrated, (3) where performance of the contract becomes illegal, (4) in contracts of personal service, the death or incapacity of one party will amount to frustration – in *Flynn v Great Northern Railway Company (1953)* the employment contract of a van driver was deemed frustrated when medical evidence proved that he would not be able to return to his job, (5) an inordinate delay or interruption of the contract, (6) commercially different circumstances (this scenario arose in a number of coronation cases, including *Krell v Henry (1903)*, when the coronation procession of Edward VII had to be cancelled due to the illness of HRH – consequently many arrangements made in which persons obtained the right to view the procession from hotels and rooms overlooking the route came before the English Courts – and the Courts ruled that the contracts were frustrated), and (7) where a particular event, which is the sole reason for the contract fails to take place **(any 3 x 2 marks = 6 marks)**
- B. Conclusion that the contracts between the Clarendon Hotel and (1) Matt and Kate, and the (2) IFA are frustrated – due to (1) government interference preventing the performance of the contract and (2) death – the contract between the Hotel and Jenny is not frustrated as the frustration is self-induced **(1 mark)** – consequences of frustration – the contract automatically comes to an end and any rights and obligations that existed before the frustration still remain but any rights and obligations that exist after the frustration are extinguished by the frustration – in effect, the “the loss lies where it falls” except if there is a total failure of consideration **(1.5 marks)**

### Suggested Solution to Question 9

- 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 employee (PAYE) and a contractor (self-assessed) **(any 2 = 2 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 marks = 6 marks)**
- C. Conclusion: Ethel is an employee as she is controlled regarding when and where she works – there is no evidence of entrepreneurship as her tools are provided and a sum is paid towards the maintenance of her car by the Eastern Health Authority – in addition, there is evidence of integration – by the Eastern Health Authority paying for her to attend a training course – consequently, the patient should sue the Eastern Health Authority as they are vicariously liable for the actions of employees **(2 marks)**

### Suggested Solution to Question 10

- A. Duty of Care: original test based on the decision of Lord Atkin in (Donoghue v Stevenson (1932)) – known as the “neighbour principle” – in effect you are liable for your negligent acts to your neighbour – a person so closely and directly connected to you that you should have them in mind as affected by your acts or your acts of omission (including words) – examples of where the relationship arises: solicitors/clients, doctors/patients, accountants/ auditors/ clients, employers/ employees **(4 marks)** – expansion of the doctrine in recent years in Caparo Industries Plc v Dickman (1990) – now three-tier test: (1) was the harm reasonably foreseeable, (2) was there a relationship of proximity between the parties Ward v McMaster (1988), and (3) considering the circumstances, is it fair, just and reasonable to impose a duty of care, Glencar Exploration plc v Mayo County Council (2002) **(3 marks)** – conclusion that a duty of care exists between Abbey and the multi-national company as (1) the harm was foreseeable (as she was aware that her up-to-date financial statement assessing the financial position of the company would impact the takeover price), (2) there was a degree of proximity between the parties, and (3) there are no reasons to justify exclusion of the duty **(1 mark)**

- B. Statute of Limitations: for all personal injuries arising pre 31<sup>st</sup> March 2005 the statute of limitations is three years for claims arising from negligence – all personal injuries arising after 31<sup>st</sup> 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 **(2 marks)**

### Solution to Question 11

- A. Agency by Estoppel: 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) – in these circumstances the agent does not have *actual* authority, but instead the agent has apparent or ostensible authority **(4.5 marks)** – conclusion that *Eddison Accountants* is legally obliged to pay the €2,000 due to *Fortrum and West* as she has acted as an agent of *Eddison Accountants* in the past and in this situation *Fortrum and West* had no reason to believe that she was acting outside the scope of her duties and for her own personal interest – the only option available to *Eddison Accountants* is to seek recompense of this €2,000 from Sarah **(1 mark)**
- B. Duties of an Agent: (1) Duty to act with due care and skill: an agent should apply a reasonable standard of care and if he holds himself out to have expertise then the agent must apply the appropriate standard that a reasonable person with that skill would do, Chariot Inns v Assicurazioni Generali SPA (1981), (2) Duty to obey instructions and duty not to exceed authority: an agent should carry out his instructions as laid out in the contract or as stated to him by the principal and should not exceed his authority as he may be held liable under the contract, (3) Duty to avoid conflicts of interests and make full disclosure: an agent is under an obligation to make full disclosure of all facts material to the contract, including any potential conflicts of interest, McPherson v Watt (1877), (4) Duty not to make a secret profit: an agent is under a duty not to make a profit out of the transactions he carries out on behalf of his principal – although he is entitled to keep any profits if the principal has knowledge of these profits, Sherrard v Barron (1923), (5) Duty not to delegate: an agency relationship is usually a personal relationship and the agent should not delegate his duties unless authorised to do so by the principal, John McCann & Co v Pow (1974), (6) Duty to Account: an agent is under a duty to keep proper accounts of all dealings and provide accounts for all monies received from transactions – the agent must be prepared to disclose his accounts to the principal upon request, and (7) Duty to communicate and keep confidentiality: an agent should communicate all relevant information to the principal and keep all information confidential – any authorised disclosure to a third party is actionable **(any 3 x 1.5 marks = 4.5 marks)**



# 1st Year Examination: August 2011

## Law & Ethics ROI

### Examiner's Report

Overall the performance of students was good – with almost 2/3's of candidates attaining a pass mark. Students outside Dublin performed better than their Dublin counterparts (68.3% pass outside Dublin, 59.25% pass in Dublin) – this is based on where the exam was taken and not necessarily where the student studied. Students performed better in Questions 3, 5, 8, 9 and 11. As highlighted in Summer 2011 there were huge gaps in knowledge in Questions 10, with students discussing completely irrelevant issues and not the question being asked.

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.

#### Pass Rates by Exam Centre:

Bishopstown Cork 17/24 (70.8%)	Enniskillen 2/3 (66.6%)
Cork IT 1/1 (100%)	Dublin 64/108 (59.25%)
Limerick 9/14 (64.3%)	Waterford IT 7/13 (53.8%)
Galway 13/14 (92.85%)	Carlow 13/20 (65%)

#### Question 1 (Compulsory Question)

- Part A: The composition aspect of this part of the question was generally well answered by the majority – but there were weaker answers vis-a-vis the process of appointment – with a lot of students not attempting this component.
- Part B: The majority of students scored full marks in this component.
- Part C: There was some confusion in certain answers between the outcomes of a hearing of the Disciplinary Tribunal with the Complaints Committee and the Appeals Tribunal. Surprisingly, a significant number of students stated that the Tribunal can send members to prison – this is grossly incorrect, and shows a complete lack of understanding.
- Part D: Generally, well answered – with full marks awarded when students referred to any relevant case law. Unfortunately some students still confused fraudulent trading – with either reckless trading, insider trading or money laundering. Regarding sanctions, full marks were awarded where both civil and criminal sanctions were discussed – including the maximum fines for summary and indictable prosecutions.

### Question 2

Quite surprisingly, students did not do as well as anticipated in this question. A significant number omitted key characteristics – such as separate legal personality, registration requirements and perpetual existence. Most mentioned limited liability – but some explained it incorrectly.

### Question 3

- Part A: Full marks were awarded for any appropriate definition of a share.
- Part B: The majority of students scored full marks in this component.
- Part C: This component was weaker – with some students unable to discuss partly paid shares in the context of unpaid capital and reserve capital. There was also some incorrect application of knowledge in terms of Richard's obligation to pay the unpaid portion of his share.

### Question 4

- Part A: Mixed answers – some very weak – some students answered the question in terms of executive and non-executive directors, as opposed to shadow and de facto, as asked. The key thing to mention was that neither has been formally appointed to the Board – but both are fully liable for their actions as if they were.
- Part B: The majority of students could provide three reasons for resignation/vacation of office – although citing three examples of breach of duties or three examples of an indictable offence still only counted as one ground. Some students were confused between the concept of vacation of office and removal of a director.
- Part C: Mixed standard of answers – to attain full marks answers should have looked at it from two perspectives; (1) the rights of the director upon

removal, and (2) the actual procedure for removal. Answers tended to address either one or the others – but not both. In addition, students are still incorrectly stating that removal requires a special resolution – this is not correct. An ordinary resolution with extended notice of 28 days is all that is required.

### Question 5

- Part A: The majority of students answered this incorrectly – stating either 7, 14 or 21 days – the correct answer is 28 days.
- Part B: Again, about 90% of answers were incorrect – stating that a special resolution is required to remove an auditor, whereas only an ordinary resolution is required.
- Part C: Most students gave an adequate explanation of quorums – although it was obvious that some had no clue as to what was being asked and just discussed the general rules re meetings.
- Part D: Most students gave an adequate explanation of proxies – full marks were only awarded where the answers mentioned the obligation to provide 48 hours (not days as some answers stated) notice.
- Part E: Most students scored half of the marks on this component. Full marks were awarded where the answer mentioned that maintaining minutes is the responsibility of the company secretary and that they are maintained at the companies registered office. Some students confused the concept of minutes with agendas – these are not the same thing.

### Question 6

- Part A: This component was poorly answered – with students discussing the general rules on liquidation and not the creditor's voluntary liquidation. Some students incorrectly stated that a creditor's voluntary liquidation requires Court approval – this shows a complete lack of understanding of the nature of a voluntary liquidation.
- Part B: Very disappointing component – in that a large number of students incorrectly stated the priority of debts upon liquidation. This question has been asked in other papers, is on the pilot paper and is clearly outlined in the manual. As a core area of knowledge I cannot understand how students are still answering incorrectly.
- The most common omission was the "unsecured creditor" and a vast majority confused preference debts with preference shares.
- Part C: Most students gave an adequate explanation of vacation of office – but again (as in question 4) citing two examples of breach of duties or two examples of an indictable offence still only counted as one ground.

### Question 7

This was not a popular question.

- Part A: Although most students gave an adequate explanation of *stare decisis*, there was a vast array of incorrect answers regarding *ratio decidendi* – with obvious and incorrect guesses relating to the rationing of the decision!
- Part B: Average answers – with the majority making a reasonable attempt.
- Part C: Average answers – with the majority making a reasonable attempt.

### Question 8

Generally, this question was well answered – with a significant number of students attaining almost full marks (8.5/10).

- Part A: Most students were able to define frustration and give three examples of frustrating events – it was obvious when students were guessing when they stated that the parties agreed to bring the contract to an end because they were frustrated with it!
- Part B: Weaker application – although the majority flagged (1) and (3) as frustrating events – a lot failed to recognise (2) as a non frustrating event, as it was self induced. The party was not illegal (therefore the ground of illegality does not apply). In addition, weaker answers regarding whether the monies were recoverable – with a lot of students not applying the loss lies where it falls rule.

### Question 9

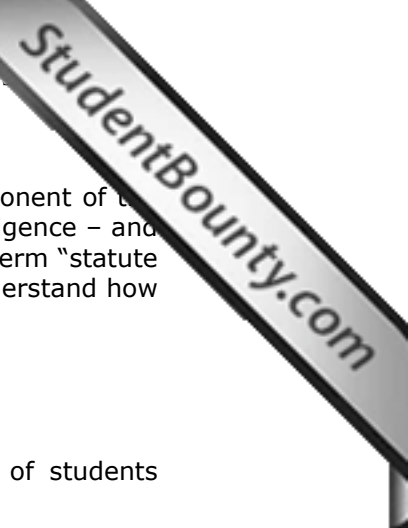
Generally, this question was well answered – with a significant number of students attaining full marks.

- Part A: Most students were able to explain the importance of the distinction – incorrect answers focused on how what they did is different – not on the significance of the distinction
- Part B: Nearly all students could explain two tests – but full marks were only awarded where answers mentioned a case or the problems with the test.
- Part C: The majority of students classified Ethel as an employee and explained that her employer should be sued.

### Question 10

This was the worst answered question on the paper (as it was in Summer 2011). I don't really understand why students do not understand this concept – but as it is a core area it will keep appearing on the paper. A table outlining each of the elements and tests has been added to the manual to make this area easier to understand and hopefully to clearly delineate the various elements and tests. In addition, one whole on-line learning session has been dedicated to this topic to try and increase understanding.

- Part A: Most students failed to deal with the two main tests for duty of care: (1) the neighbour principle, and (2) the modern day test – and instead discussed the tests for standard of care, causation and remoteness.



Part B: The majority of students failed to understand what this component of the question was asking vis-a-vis the statute of limitations in negligence – and instead incorrectly discussed remedies and defences. As the term “statute of limitations” is explained in 7.8 in the Manual – I cannot understand how students did not even know what the word meant.

**Question 11**

Generally, this question was well answered – with a significant number of students attaining almost full marks.

Part A: Most students made a good attempt to explain agency by estoppel and correctly applied the law to the question. Full marks were awarded where a student used a case/example to explain the concept.

Part B: The majority of students scored full marks in this component.