
Law & Ethics

Republic of Ireland

1st Year Examination

May 2012

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.

There are often many possible approaches to the solution of questions in professional examinations. The examiner will accept alternatives to the suggested solution shown herein as long as that alternative is appropriate.

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

1st Year Examination: Summer Paper 2012

Paper: LAW & ETHICS (ROI)

Friday 18th May 2012 - 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

Barnaby and Brooks Ltd has operated as a very successful private limited company for the past fifteen years in the gourmet food manufacturing sector. The shareholders of this company have recently decided to convert their business into a public limited company and are in the process of applying for a listing on the Irish Stock Exchange. As part of this process their solicitors have informed them that they will need to comply with the Combined Code on Corporate Governance. At present Brooks is the Chief Executive Officer, as well as the Chairperson of *Barnaby and Brooks Ltd*. Both Barnaby and Brooks are the only directors of the company and both of them act in an executive capacity. In addition, both consented to the appointment of each other as executive directors and both unanimously decide their own salaries and have service contracts of five years each. Their solicitors have commented that certain internal rules and procedures will have to be altered in order to comply with the rules on corporate governance. As Barnaby and Brooks know nothing about corporate governance they seek your advice in this regard.

A. List and explain any SIX principles of the Combined Code on Corporate Governance.

12 Marks

B. Outline to Barnaby and Brooks any THREE changes that they will need to make to the internal rules and procedures of the company in order to ensure compliance with the rules on corporate governance.

3 Marks

C. Irish criminal law (the Criminal Code) is also a source of corporate governance. List any TWO pieces of legislation that impose criminal sanctions for breach of corporate governance obligations upon Irish companies, and briefly outline the provisions of this legislation.

5 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

Chris and Adam are recently graduated software design engineers, who have designed a software program that allows users to be able to track the location of any of the persons listed in their mobile phone address book. They have decided to register a company to exploit this invention and have entered into negotiations with numerous technology companies to licence the use of this program. They have decided to name the company "*Assersoft Global Manufacturing*".

- A. Advise Chris and Adam on the limitations imposed upon the choice of company name under the Registration of Business Names Act 1963 and determine whether the name *Assersoft Global Manufacturing* is capable of registration.

7 Marks

- B. Although Chris and Adam have decided to establish a private limited company they are unsure as to whether this company should be limited by shares or limited by guarantee. Explain the distinction between a company limited by shares or a company limited by guarantee and advise Chris and Adam which of these is the most suitable choice of business form.

3 Marks

Total 10 Marks

P.T.O.→

QUESTION 3

In the context of company capital explain the following:

- A. The distinction between the Authorised Share Capital and the Issued Share Capital of a company, and where you would discover the value of a company's authorised share capital and issued share capital. **3.5 Marks**
- B. The distinction between the *Nominal Value* and the *Market Value* of a share. **2 Marks**
- C. The meaning of the term "share premium" and any THREE purposes for which the Share Premium Account can be utilised.

4.5 Marks
Total 10 Marks

QUESTION 4

Eden is the managing director of *Prestige Investments Ltd*. The main business of the company is to offer investment advice and to manage investment funds on behalf of clients. Eden's husband Leahy is the Chief Executive Officer and majority shareholder in *Turnwell Telecommunications Plc*. This company has been in financial difficulty for the past two years and is on the verge of insolvency. Last year Leahy and Eden discussed this situation and Eden agreed to help her husband by recommending to investment clients of *Prestige Investments Ltd* that they should invest in *Turnwell Telecommunications Plc*.

As a consequence of this advice a total of €450,000 was invested in *Turnwell Telecommunications Plc* by clients of *Prestige Investments Ltd*. Despite this injection of funding, *Turnwell Telecommunications Plc* was unable to turn around its business losses and in March 2012 the company was placed in compulsory liquidation on the grounds of insolvency. Following the failure of this business one of the investment clients of *Prestige Investments Ltd* discovered that Leahy and Eden are married, and he has brought a civil claim against *Prestige Investments Ltd* to recover his lost investment based on a breach of ethics and duties by the company to its clients.

Following the initiation of this claim *Prestige Investments Ltd* removed Eden as managing director of the company and is considering suing her for breach of her fiduciary duties. In this regard they seek your advice as follows:

- A. Explain (in brief) the role of a managing director. **2 Marks**
- B. Discuss any TWO fiduciary duties that a director owes to a company. **6 Marks**
- C. Assess whether Eden has breached her fiduciary duties to *Prestige Investments Ltd*.

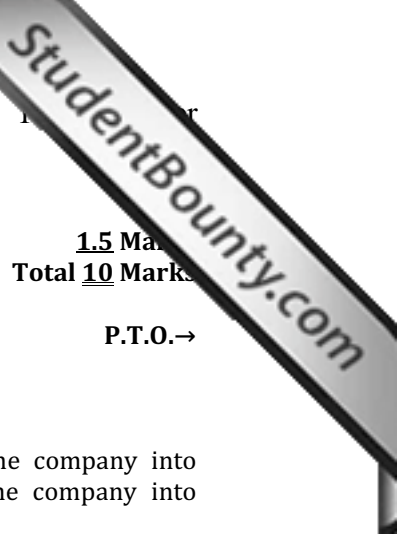
2 Marks
Total 10 Marks

QUESTION 5

Hambridge Toy Manufacturers Ltd has recently been incorporated and Franklin has agreed to act as the company secretary. Franklin has been advised by their company solicitor that one of his duties as the company's secretary is to ensure that *Hambridge Toy Manufacturers Ltd* hold's Annual General Meetings (AGM's). Franklin has never heard of an AGM and seeks your advice in this regard.

Advise Franklin in relation to the following matters:

- A. The time limits imposed upon companies in relation to the calling of an AGM. **1.5 Marks**
- B. The notice required to call an AGM, the details that must be included in this notice, and the documents that must be attached to the agenda for the AGM. **4 Marks**
- C. The general issues/business dealt with at the AGM. **2 Marks**



- D. The penalties that can be imposed upon a company which fails to call an AGM.

1.5 Marks
Total 10 Marks

P.T.O.→

QUESTION 6

As a consequence of declining sales, *Hampton Homes Ltd* is considering placing the company into liquidation. As the company is insolvent the directors are considering placing the company into compulsory liquidation and seek your advice as follows:

- A. Define the term "liquidation".
1.5 Marks
- B. List any TWO grounds (excluding insolvency) under the Companies Acts 1963-2009 that facilitate an application for the compulsory liquidation of the company.
2 Marks
- C. Outline any THREE grounds upon which the High Court can order the compulsory liquidation of the company on the basis that it is "just and equitable" to do so.
3 Marks
- D. List any THREE persons who have the right to apply for the compulsory liquidation of the company.
1.5 Marks
- E. Determine whether the directors of *Hampton Homes Ltd* are correct in their belief that as the company is insolvent the only liquidation option available to the company is a compulsory liquidation.

2 Marks
Total 10 Marks

SECTION C

Answer ANY FOUR of the FIVE questions in this Section

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

QUESTION 7

The European Union has recently decided to enact a law requiring each member state to impose age limits for entry to and exit from primary level and secondary level education. Under EU law this provision may be enacted as either a European Regulation or a European Directive.

Discuss the nature of and the distinction between European Regulations and European Directives and determine whether a Regulation or a Directive is the most appropriate legislative form in this situation.

Total 10 Marks

QUESTION 8

Chester recently wrote to *Manfield College* requesting information regarding one of their accounting courses. In the letter he requested information on when the course was commencing, the cost of tuition, and whether he was eligible to study on this course. He enclosed a copy of his leaving certificate results with this letter. Two weeks later Chester received a letter from *Manfield College* stating that, based on his leaving certificate results, they were happy to offer him a place on the course commencing in two weeks time. They stated that the fees for the course were €3,000 per annum payable in advance of commencement onto the course.

Chester wrote back to *Manfield College* that same day and stated that he was accepting a place on the course, but that he could only afford to pay them €2,000 now, but that he would pay them the remaining €1,000 within four weeks of the commencement of the course. A day after sending this letter Chester received another letter from the Central Applications Office (CAO) stating that following a request for a recheck on his leaving certificate result for Accounting, his mark was being increased from a B1 to an A2 and that he now had enough points to do a BA in Accounting and Finance at *Preston University* (a national non-fee paying university).

Chester immediately completed the form at the end of the CAO letter and accepted his place at the university. That same day he wrote to *Manfield College* stating that he wanted to revoke his acceptance of a place on their accounting course and requesting the return of his €2,000. On receipt of this letter the admissions officer of *Manfield College* contacted Chester and informed him that as he had created a contract with the College they would not be returning his €2,000 and that they intended to sue him for the balance of the €1,000 due.

Chester seeks your advice in this regard.

Explain whether a valid and enforceable contract exists between Chester and *Manfield College* by discussing the law in relation to offer, termination of an offer and acceptance and determine whether Chester is entitled to the return of his €2,000 or whether he is obliged to pay them the balance of €1,000.

Total 10 Marks

QUESTION 9

Jacob has been employed by *Copperpot Catering Ltd* for the past six years, as their Director of Sales and Marketing. Recently Jacob was called to a meeting with the management of *Copperpot Catering Ltd* and informed that they were not satisfied with his performance and the sales record of the company in the past year. They advised him that they were transferring him from their head office in Dublin to their regional sales office in Galway with immediate effect. They further stated that the position he would be taking in the Galway office was that of regional sales manager, and that his salary would be reduced from €80,000 per annum to €55,000. They also stated that they planned on monitoring his performance for six months and that if it did not improve that they would have no option but to dismiss him. When Jacob protested to these changes he was told that he had no option – he either accepted them or quit his position.

Jacob is considering resigning from his position and suing *Copperpot Catering Ltd* for constructive dismissal.

- A. Define the term “constructive dismissal” and explain the burden of proof when such a claim is raised.
2.5 Marks
- B. Explain any THREE actions that may amount to a fundamental breach of contract and facilitate a claim for constructive dismissal.
4.5 Marks
- C. Assess the potential success or otherwise of Jacob’s proposed claim of constructive dismissal.
1.5 Marks
- D. If Jacob decided not to resign but to accept the position as regional sales manager in the company’s Galway offices and if his performance does not improve in the next six months can *Copperpot Catering Ltd* lawfully dismiss Jacob on the grounds of a lack of competence?

1.5 Marks
Total 10 Marks

QUESTION 10

Austin recently audited the accounts of *Westwall Construction Ltd* and provided an unqualified auditor’s report to the shareholders of the company at its Annual General Meeting (AGM). Subsequent to this report the company has been investigated by the Office of the Director of Corporate Enforcement (ODCE) for fraudulent activity. The ODCE has discovered that the financial accounts of the company have been falsified in terms of sales records, purchases records, stock and the value of its fixed assets (which have not been depreciated in line with current market value). As Austin had not attended *Westwall Construction Ltd’s* stock take in the previous five years he was unaware of the falsified purchases, sales and stock records.

The shareholders of *Westwall Construction Ltd* have recently appointed new directors to the company. These directors have contacted Austin to inform him that they plan on suing him for all losses arising in the company as a consequence of his negligence.

- A. Draw a table outlining the FOUR elements of negligence and list the tests applied by the Court to determine the existence of each of these elements.
8 Marks
- B. Assess the potential success or otherwise of *Westwall Construction Ltd’s* claim against Austin for negligence.

2 Marks
Total 10 Marks

P.T.O.→

QUESTION 11

Jessica, a caterer, recently purchased ten 1kg bags of flour from *Crompton Flour Mills*. She planned to use this flour to make a cake and desserts for a wedding that she was catering. When she weighed out the flour she discovered that there was only 0.90kg's in every 1kg bag of flour. She contacted *Crompton Flour Mills* but they have ignored her telephone calls, letters and emails. Jessica has now decided to address her complaint against *Crompton Flour Mills* to the National Consumer Agency as she thinks that this is a misleading practice in breach of the Consumer Protection Act 2007.

- A. Define a "misleading commercial practice" under the Consumer Protection Act 2007. **1.5 Marks**
- B. Outline any FIVE misleading commercial practices prohibited by the Consumer Protection Act 2007 and determine whether the actions of *Crompton Flour Mills* could be classified as a misleading commercial practice. **5.5 Marks**
- C. List any THREE sanctions that can be imposed for breach of the Consumer Protection Act 2007. **3 Marks**
- Total 10 Marks**

1st Year Examination: May 2012

Law & Ethics (ROI)

Suggested Solutions

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

Solution to Question 1

- A. Combined Code on Corporate Governance: the Code requires that companies must have the following: (1) Effective Board: collectively responsible for the success of the company – acting *bona fide*, (2) Balanced and Independent Board: a strong, involved board of directors (no individual/small group can dominate board decision making) with a balance of executive and non-executive directors, including (two) independent non-executive directors, (3) Chairperson and Chief Executive: a clear division of responsibilities between the chairman (responsible for the working of the board/meetings) and chief executive (full operational control to carry out board policies), (4) Information for the professional development of the Board: the provision of timely, quality information from the board – the Chairperson must ensure the accuracy of this information, (5) Appointments to the Board: formal, transparent procedures for the appointment of new directors (maximum period of employment contract of 1 year), (6) A Process for the Re-Election of Directors: regular re-election of all company directors, (7) Transparency of Remuneration: independent determination of remuneration – a committee (usually NED's) to decide the remuneration of the executive directors (8) Financial Reporting: balanced and understandable financial reporting; (9) Auditing: transparent arrangements for considering how the Board should apply the financial reporting and internal control principles and how to maintain an appropriate relationship with the company's auditors; and (10) Internal Controls: maintenance of a sound system of internal control **(any 6 x 2 marks = 12 marks)**
- B. Internal Changes: (1) separate the role of the Chairperson and CEO – Brooks should not have both roles, (2) appointment of non-executive directors to the Board, (3) formal procedures for the appointment of directors to the Board, (4) reduction of directors service contracts from 5 years to 1 year, and (5) adopt procedures to ensure transparency of the directors remuneration **(any 3 x 1 mark = 3 marks)**
- C. Criminal Law Sources of Corporate Governance: (1) The Corporate Law Enforcement Act 2001: this Act imposed a number of positive obligations upon company directors to ensure compliance with the Companies Acts, and established the Office of the Director of Corporate Enforcement, whose main function is to ensure that companies comply with company law, to investigate any alleged breaches of the legislation and to initiate prosecutions, where necessary, (2) The Criminal Law (Theft and Fraud Related Offences) Act 2001: this Act updated the criminal code on corporate fraud and false accounting, and imposed reporting requirements on auditors, where it appears that offences under the Act may have been committed, (3) The Companies (Auditing & Accounting) Act 2003: this Act was introduced to improve the current structures for corporate governance for companies operating in Ireland today, it established the requirement that all public limited companies must have an audit committee, and that large private companies are required to establish an Audit Committee or state why not in their directors' report **(any 2 x 2.5 marks = 5 marks)**

Solution to Question 2

- A. Company Names: All company names must be registered under the Business Names Act 1963 – and a name is automatically disallowed if it is considered undesirable by the Minister for Jobs, Enterprise and Innovation (Section 21 CA63) – however, there is a possible appeal to the High Court where a name is refused registration **(0.5 marks)** – names considered undesirable: (1) offensive, immoral or blasphemous names, (2) names suggesting a connection with any government department, local authority or State agency, where no such connection exists (3) a name that uses “bank, society, co-operative or insurance” in its name, unless it has obtained the appropriate permission from the Minister, (4) a name that includes a registered trademark, without production of the consent of its owner, (5) a name that it regarded as being misleading or confusingly similar to a registered name, or (6) a name of an existing company **(any 5 = 5 marks)** – “Assersoft Global Manufacturing” – likely to be refused registration on the grounds that (1) it may be classified as offensive (*ass*), (2) it is confusing similar to a trademarked name “Acer”, (3) it is misleading as this is not a global company nor are they involved in manufacturing, and (4) the word “limited” is omitted from the name **(any 2 = 1.5 marks)**
- B. Companies Limited by Shares: this applies to both public and private companies irrespective of the company’s objectives – in this instance the liability of shareholders is limited in relation to the value of fully-paid shares – they are liable to pay up the un-paid portion of partly paid shares in the event of liquidation **(1.5 marks)** – whereas Companies limited by guarantee are eligible to act as private limited companies only and are usually non-profit-making organisations whereby the members do not provide money on formation/incorporation but contribute a pre-determined amount to the assets in the event of liquidation **(1.5 marks)**

Solution to Question 3

- A. Capital: Authorised Share Capital is the term used to describe the maximum amount of capital that a company is authorised to issue – in effect it is the ceiling for capital, although it can be increased/reduced in accordance with the terms of the Articles of Association – the Authorised Share Capital is stated in the Capital Clause of the Memorandum of Association **(1.5 marks)** – whereas the Issued Share Capital refers to the amount of capital that the company has issued to date – where shares are issued on a partly-paid basis the amount of money paid is known as the paid-up/called-up share capital and the amount unpaid is known as the unpaid/uncalled capital – the Issued Share Capital is stated in Form A1 upon incorporation, and thereafter in the company’s annual return – details of the issued capital (and to whom it is issued) is also contained in the Register of Members **(2 marks)**
- B. Shares: the nominal value of a share is the base value of the share set upon the incorporation of the company and stated in the Capital Clause in the Memorandum of Association whereas the market value of a share is the price that the share is worth and is trading at on the Stock Market **(2 marks)**
- C. Share Premium Account: a share premium is where a company issues shares above their par nominal value – the excess in value is the premium and must be lodged into the share premium account **(1.5 marks)** – under Section 62 CA 63 the account can only be utilised as follows: (1) paying up un-issued shares for use in a bonus issue (a gift of shares to existing shareholders that converts the premium into share capital) – (2) to write off the preliminary expenses of the company (such as a promoters preliminary expenses) – (3) to write off the expenses, commission or discount relating to any issue of shares or debentures by the company or (4) the paying of any premium due on the redemption of redeemable shares/debentures **(any 3 x 1 mark = 3 marks)**

Solution to Question 4

- A. Managing Director – their role is to: (1) oversee the day-to-day management of the company, (2) to exercise a second or casting vote in the event of the vote being tied at a Board Meeting, (3) to bind a company to all contracts, and (4) to ensure that the objectives and policies formulated by the Board Directors are implemented **(any 2 = 2 marks)**
- B. Fiduciary Duties: **(any 2 x 3 marks = 6 mark)**
 - (1) The directors must act in good faith and in the best interests of the company as a whole: this requires them not to act for their own personal benefit/gain – but to act in a manner beneficial to the shareholders/creditors – in *Parke v Daily News (1961)* an action of the directors that benefitted them personally to the detriment of the shareholders was held to amount to a breach of duty
 - (2) The directors must exercise their powers for the purposes for which they were conferred: these powers may only be exercised in furtherance of the company's objectives (intra-vires), and for a proper purpose (cannot be an illegal contract) – directors cannot exceed their authority/power as established in the Articles of the company – this occurred in *The Royal British Bank v Turquand (1893)* and the directors were sanctioned accordingly
 - (3) All Directors must avoid transactions that amount to conflict of interest: these include (a) interests in company contracts, (b) interests in company shares and debentures, (c) substantial property transactions, (d) diverting business from the company, (e) setting up in competition to the company and (f) making a secret profit – in certain situations a full disclosure of the conflict will suffice to relieve them of liability
 - (4) Directors must maintain voting impartiality: directors must keep their discretion/decisions unfettered by external influences in all voting decisions (there is a permissible exception relating to Nominee Directors and proxy voting)
- C. Conclusion: Eden breached her fiduciary duties as (1) she was not acting in the best interest of *Prestige Investments Ltd*, (2) she failed to disclose her conflict of interest, and (3) she exercised her powers for an improper purpose when she recommended to investment clients of *Prestige Investments Ltd* that they should invest in *Turnwell Telecommunications Plc* **(any 2 = 2 marks)**

Solution to Question 5

- A. Time Limits: the first AGM of the company must take place within 18 months of incorporation – and thereafter they should be held annually with a maximum period of 15 months permissible between these meetings **(1.5 marks)**
- B. Notice: 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)** – the following documents must 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 **(1.5 marks)**
- C. 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)**
- D. Penalties for non-compliance: in accordance with Section 131 CA 1963 a company that fails to hold an AGM is guilty of an offence and liable to the imposition of a fine **(1.5 marks)**

Solution to Question 6

- A. Liquidation: this term means the dissolution of the company – where the liquidator is authorised to sell the assets of the company, pay the debts of the company, compromise any outstanding claims and strike the company off the register **(1.5 marks)**
- B. Statutory Grounds for Compulsory Liquidation: (1) the company has passed a special resolution to liquidate, (2) the company is unable to pay its debts, (3) the company has failed to commence trading within 12 months of formation or has failed to trade in the last 12 months, (4) the company has failed to file an annual return for two consecutive years, and (5) breach of Section 205 CA 63 in relation to the protection of minority rights **(any 2 = 2 marks)**
- C. Just and Equitable Grounds for Compulsory Liquidation: (1) failure in substratum, (2) deadlock in corporate management, (3) illegal or fraudulent objectives, (4) where the company is a corporate instrument of fraud, or (5) where the company is in reality a quasi partnership **(any 3 = 3 marks)**
- D. Persons who can apply for Compulsory Liquidation: (1) the company itself, (2) a creditor who has a readily ascertainable debt, (3) the Director of Corporate Enforcement, (4) the CRO, or (5) a members of the company **(any 3 x 0.5 marks = 1.5 marks)**
- E. *Hampton Homes Ltd* is not correct in their behalf that as the company is insolvent the only liquidation option available to the company is a compulsory liquidation – although they could not opt for a members voluntary liquidation (where the prerequisite is solvency), they could opt for a creditor's voluntary liquidation, which is generally a much quicker and cheaper way to liquidate the company **(2 marks)**

Solution to Question 7

- Regulation – this is a piece of EU legislation that is binding in its entirety, and directly applicable on all the member states – a Regulation sets down a date for its implementation in the member states – and the member states need take no further legislative action – Regulations are published in the Official Journal of the EU, and they enter into force on the date specified therein – it is not feasible for all EU laws to be enacted by means of a Regulation – as the social, economic, cultural, legal infrastructure etc of the member states are different, therefore in some instances enactment of a Directive is more appropriate **(4.5 marks)**
- Directive – this is a guideline/instruction to member states as to how they should standardise legislation in a particular area (given a particular timeframe in which to achieve this standardisation) – a Directive is binding as to the result to be achieved – but is not directly applicable – the Directive gives the individual member states the choice as to the form and method of implementation – in Ireland Directives become part of Irish law through either an act of the Oireachtas (where it involves a substantive issue) or a statutory instrument (where it involves more of a technical issue) – the idea embodied in the Directive is enacted as legislation – but the exact particulars are at the discretion of the member states – examples include the Organisation of Working Time Act 1997, and the Minimum Wage Act 2000 **(4.5 marks)**
- A Regulation would be appropriate if education policy is similar in each of the member states, and if there are no budgetary restraints, otherwise a Directive is the better option – as the law can be adjusted to match that of the member state **(1 mark)**

Solution to Question 8

- A. Contract Formation: to create a contract an offer must be met by acceptance and supported by consideration **(1 mark)** – one of the key issues in the question is whether the offer made by *Manfield College* was accepted by Chester – an offer can be defined as “a clear and unambiguous statement of the terms and conditions under which the parties are willing to contract” whereas acceptance can be defined as the “final and unequivocal expression of agreement to the terms of the offer” **(2 marks)** – to be acceptance the response must be a mirror image of the offer – where acceptance is not a mirror image of the offer – but rather a variation, abrogation or provisional acceptance – it is classified as a counter-offer – this is where the response includes new conditions – the general rule is that a counter-offer amounts to the termination of the offer by the creation of a new offer – this new offer can be turn be accepted or rejected – relevant case law includes: *Swan v Miller (1919)* and *Hyde v Wrench (1840)* – Regarding Chester: *Manfield College* made him an offer but the response by Chester was not an unequivocal acceptance of *Manfield College's* offer (as it varied the requirement regarding payment from €3,000 per annum payable in advance of commencement onto the course to €2,000 now, and the remaining €1,000 within four weeks of the commencement of the course), but a counter-offer – this counter-offer would require communication of acceptance by *Manfield College* – which they did not communicate acceptance to **(4.5 marks)** – Chester’s revocation of the offer is valid as the rule is that revocation can take place at any time prior to acceptance of the offer (as *Manfield College* did not communicate acceptance to Chester’s counter-offer he was free to revoke this offer) **(1.5 marks)** – therefore Chester is entitled to the return of his €2,000 as there is no contract between him and *Manfield College* **(1 mark)**

Solution to Question 9

- A. Constructive Dismissal: this is where the employee terminates the contract under which they are employed because of the conduct of the employer – the conduct of the employer must be sufficiently serious as to entitle the employee to resign from their employment – in this instance the onus lies on the employee to prove that what has happened amounted to a dismissal **(2.5 marks)**
- B. Fundamental Breach of Contract: (1) Changes to employee’s pay – such as a reduction in pay even by a small amount – *Industrial Rubber Products v Gillon (1977)* or the non payment of employee’s tax and PRSI payments – *Branigan v Collins (1977)* (2) Change in hours of work – or to the shift pattern (*Simmonds v Dauty Seals Ltd (1977)*) unless the employer has a contractual right to do so – *Dal v A S Orr (1980)*, (3) Change in the location of the employment – assuming that the contract does not contain a mobility clause – *Bass Leisure Ltd v Thomas (1994)*, (4) Unjustified series of warnings - to force the employee to leave rather than to encourage him to improve – *Walker v Josiah Wedgewood & Son (1994)*, (5) Failure to investigate sexual harassment or abuse claims – such as in *O’Doherty v Hennessy (1993)*, (6) Failure to make the workplace employee friendly – such as failure to implement a ‘no smoking’ policy – *Waltons & Moose v Dorrington (1977)*, or failure by an employer to make reasonable adjustments to a workplace for an employee suffering with a disability – *Nottinghamshire County Council v Meikle (2004)* **(any 3 x 1.5 marks = 4.5 marks)**
- C. Conclusion: that Jacob’s claim is likely to be successful as there was a unilateral alteration to his contract by (1) altering his salary, (2) requiring him to relocate, and (3) demoting him through changing his job title/description – and although Jacob has attempted to discuss this with his employer his employer has acted unreasonably in the circumstances by telling him that he either accepted the changes or quit his position **(1.5 marks)**
- D. Lack of Competence: if Jacob decided not to resign but to accept the position as regional sales manager in the company’s Galway offices, if his performance did not improve in the next six months *Copperpot Catering Ltd* could still not effect a lawful dismissal of Jacob on the grounds of a lack of competence – as they would be required to invoke the warning system, monitor his performance, re-train and supervise him, if necessary before they could effect a fair dismissal – in addition, they would have to prove that the decline in sales can be attributed to Jacob’s lack of competence and not due to external economic factors **(1.5 marks)**

Solution to Question 10

A. Elements of Negligence	Tests
Duty of Care:	(1) Neighbour Test (2) Modern Day Test: A. Was it reasonably foreseeable that the defendant's action would cause harm? B. Is there sufficient proximity between the plaintiff and defendant? C. Is it fair, just and reasonable to impose a duty of care on the defendant? (3 marks)
Standard of Care:	Reasonable Man Test – taking into consideration: A. The probability of causing damage B. The seriousness/gravity of the likely damage C. Issues of cost and practicalities in taking precautions D. The social value of the defendant's actions (2.5 marks)
Causation:	A. Single Cause: the "but for" test B. Multiple Causes: whether or not the actions of the defendant <u>materially or substantially</u> contributed to the plaintiff's injury (1.5 marks)
Remoteness:	Reasonable Foreseeability (1 mark)

- B. Conclusion that: (1) Austin owed *Westwall Construction Ltd's* a duty of care (based on foreseeability and proximity), (2) he breached the standard of care by not attending *Westwall Construction Ltd's* stock take in the previous five years, (3) *but for* the actions of Austin the shareholders of *Westwall Construction Ltd* may not have suffered a loss, and Austin's actions materially and substantially contributed to this loss, and (4) these losses are reasonably foreseeable – thereby Austin is liable in negligence to *Westwall Construction Ltd* **(2 marks)**

Solution to Question 11

- A. Definition of a Misleading Commercial Practice: these are practices that mislead the consumer through the provision of false information or the deceptive presentation of a product, and the action deceives the consumer in relation to: (1) the existence or nature of the product and/or (2) the main characteristics of the product and the action causes the consumer to make a different economic decision **(1.5 marks)**
- B. Misleading Commercial Practices: misleading information regarding: (1) the present, past or recommended retail price of a product/service, (2) weight of goods – if you buy goods by weight the store must provide a weighting scale where the consumer can weigh the goods for themselves – the provision does not apply to pre-packed and pre-weighted goods by a different manufacturer, (3) method of manufacture, (4) origin of manufacture, (5) operation/performance, (6) composition/ingredients/ components, (7) previous history, (8) indication of services, (9) provision of services – or persons providing the service, (10) the benefits of the products – including its expected results and fitness for purpose, (11) the quality of the product (such as the grade, standard, style, status or model), (12) the customer assistance available after the sale, (13) the procedures for handling consumer complaints, (14) the method and date of delivery, and (15) claims regarding any part, servicing or necessary repair **(any 5 x 5 marks)** – conclusion that the actions of *Crompton Flour Mills* may be classified as a misleading commercial practice as they have packaged the flour as 1kg when in fact it is only 0.9kg's (although this is unlikely as the Act states that it only applies to goods that are not pre-packaged) – but this action is in breach of the Sale of Goods Act provisions regarding sale by description and Jessica will be entitled to a remedy under this legislation **(0.5 marks)**

- C. Sanctions: (1) where a summary offence is committed the party in breach is liable to a fine not exceeding €5000 and/or a term of imprisonment for a period up to one year, (2) where the offence is prosecuted on indictment, then liability is limited to a fine not exceeding €100,000 or at the

Solution 11 (*Cont'd*)

discretion of the court, to imprisonment for a term not exceeding two years or to both the fine and the term of imprisonment, (3) in addition to prosecution the National Consumer Agency can order (a) a compliance notice, (b) prohibition order, (c) fixed payment order or (d) require an undertaking from any part in breach of the legislation **(any 3 = 3marks)**

1st Year Examination: May 2012

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 (%)	53%	62%	67%	61%	62%	50.5%	76%	43%	64%	51%	59%
Nos. Attempting	747	548	614	755	696	587	584	634	706	485	601

Statistical Analysis - Overall	
Pass Rate	63%
Average Mark	53%
Range of Marks	Nos. of Students
0-39	231
40-49	82
50-59	147
60-69	177
70 and over	212
Total No. Sitting Exam	849
Total Absent	277
Total Approved Absent	43
Total No. Applied for Exam	1169

General Comments

Overall the performance of students was good – with over 60% of candidates attaining a pass mark (and with a significant portion attaining over 70). Unlike in previous years there was no significant disparity in terms of the quality of the answers in Sections B and C of the paper.

Furthermore, the standard of answers to Question 10 (Tort Law) showed a significant improvement, some of which can be attributed to changes in the manual.

Question 1 (Compulsory Question) remains an obstacle for some students – and in general students who failed to attain a pass in this question were less likely to obtain an overall pass in the exam paper. This position remains unsettling – as Question 1 is always drawn from two specific chapters of the manual and consequently I would ask lecturers to remind students of the importance of being au fait with these chapters.

this will directly impact their ability to pass this exam paper.

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

1. Read the question carefully and only answer the question being asked.
2. Do only what you are asked – list means only list and does not require any discussion, explain or discuss means that you must make some attempt to elaborate on the concept/rule.
3. Avoid a discussion of irrelevant issues – this will not gain you additional marks.
4. Always define the legal concepts, and include explanatory case law, where appropriate. Even if your application is not correct – you will still be awarded marks where you have explained the relevant concepts. Where you cannot remember the name of a case – state in a past case and explain the scenario. Where you cannot remember a case put in an example.
5. No marks will be awarded for citing legislation verbatim – where no attempt has been made to explain the application/contextual meaning of the provision.

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

Mixed standard of answers – some excellent, some truly abysmal. Where marks were lost it was generally due to the following:

- A. In this component students confused the terms of the Combined Code on Corporate Governance, with either: (1) the Accounting Technicians Ireland Code of Ethics, or (2) the general rules on company law. These rules are clearly outlined in the manual, so I am unsure as to the source of the confusion.
- B. In this component most students successfully applied the Code to the scenario presented. Some students who incorrectly answered Part A, successfully answered Part B – consequently I allocated relevant Part A marks based on Part B answers.
- C. In this component few students attained full marks – although the majority were awarded some marks – where the legislation and offence were correctly cited full marks were awarded. Where two offences (and no legislation) were cited, 4 out of 5 marks were awarded, and where two pieces of legislation were cited (and no offences mentioned) 2 out of 5 marks were awarded.

Section B: Company Law**Question 2**

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

- A. In this component students lost marks for not detailing FIVE grounds upon which a name is refused registration under the Registration of Business Names Act 1963 by the Minister for Enterprise, Trade and Innovation. Some incorrect application was also displayed in this question – as the name could potentially be refused registration on a variety of grounds, including: (1) the use of the word "Ass" in the name, (2) the similarity to Acer computers and Microsoft, (3) the fact that the name is misleading as it is neither a "global" or "manufacturing" company, and (4) the omission of the words limited or public limited company (or their abbreviations) from the name.
- B. In this component most students gave a good explanation of a company limited by shares, but a significant portion did not understand the meaning of a company limited by guarantee.

Question 3

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

- A. In this component most students gave a good definition of the difference between authorised and issued capital (although there were some dreadfully incorrect answers by a minority). Some marks were lost for a failure to state correctly where these figures could be discovered.
- B. In this component most students attained full marks for explaining the distinction between the nominal and market value of a share.
- C. In this component a large portion correctly explained the meaning of a premium and the uses to which it can be put – incorrect answers related to dividend payments, paying the debts of the company and buying assets.

Question 4

Mixed/weak standard of answers (especially Part B). Where marks were lost it was generally due to the following:

- A. In this component most students could explain at least one characteristic of a managing director. Mentioning two characteristics resulted in full marks for this component.
- B. In this component there was general confusion between fiduciary duties, statutory duties and the common law duty of care and skill (which is NOT a fiduciary duty). There was also discussion of partners' duties (not directors) in this section. The inclusion of any relevant case law resulted in full marks for this component. The poor performance in this component is surprising, given that fiduciary duties are included as a table in the Manual.
- C. In this component, the majority identified that there was a breach – mentioning two specific breaches resulted in full marks for this component.

Question 5

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

- A. In this component a vast majority were unable to correctly state the time periods for calling an AGM. Incorrect answers included (1) every year (which was awarded no marks) and (2) every couple of months (which is ridiculous considering that it is an ANNUAL general meeting).
- B. In this component about half the students correctly stated the notice period as 21 days. The majority could outline what is included in the notice – but the majority either omitted or incorrectly stated the documents attached to the notice. Although it is not part of the sample answer I awarded marks where they mentioned (1) proxy forms, or (2) the text of resolutions – as these are technically correct.
- C. In this component, most students could reflect on THREE issues dealt with at the AGM. Incorrect answers referred to any matter that can be dealt with at meetings (such as alteration of constitutional documents) and not the general business of an AGM – no marks were awarded for these answers.
- D. In this component, most students explained one of the sanctions – full marks were awarded for reference to both. (Note: the amount of the fine was NOT required – the fact that a fine is the penalty is all that required mention).

Question 6

Weak standard of answers in comparison to other questions. Where marks were lost it was generally due to the following:

- A. In this component, most students gave an acceptable definition of “liquidation” – however, stating that it is when a company is insolvent/cannot pay its debts is NOT a correct answer. A solvent company may undergo liquidation for a variety of reasons.
- B. and C. In these components – there was wholesale confusion. Some students answered Part B in C and vice-versa. Marks were awarded for any correct answer irrespective of whether it was stated as Part B or C. Incorrect answers included fraudulent/reckless trading, insider dealing etc... This is incorrect – where a company is an instrument of fraud or has fraudulent objectives is a valid ground – but company officers committing offences is NOT a liquidation ground. Furthermore, some appallingly incorrect answers included the death/incapacity of shareholders/directors and partners (??) – as well as the bankruptcy of company officers/shareholders/partners. This demonstrates massive confusion between company law and partnership law and a complete lack of understanding of the concept of separate legal personality.

- D. In this component the majority could list THREE parties who can be liable for compulsory liquidation. Incorrect answers included (1) the Court (this is a very common answer as the application is to the Court), and (2) the Receiver (which shows a complete lack of understanding of the concept of receivership). Students who listed THREE types of directors – were still only given one mark. Student who listed the owners, shareholders and members were also only given one mark (these are the same).
- E. Mixed answers in this component. A portion mentioned voluntary liquidation as an option, but full marks were only awarded where a creditors' voluntary liquidation was mentioned. Incorrect answers stated that as the company is insolvent voluntary liquidation is not an option – this is NOT correct. Some answers suggested examinership – which is not what the question asked (the question asked liquidation options) – and was surprising to see as this topic is NOT on the syllabus. Nonetheless where mentioned I awarded 1 out of 2 marks. Some answers mentioned receivership, which was not the question asked and again shows a complete lack of understanding of the concept of receivership.

Section C: Business Law

Question 7

The majority scored well on this question – although some students mixed the two options up, but nonetheless marks were awarded. To attain full marks the following should have been included: (1) examples of each, (2) the fact that a Regulation has direct effect and requires no further action by the member state, and (3) the fact that a Directive is implemented as either an Act of the Oireachtas or a statutory instrument.

Incorrect answers confused Regulations and Directives with delegated legislation (particularly, with regard to examples) and stated that Regulations are binding whereas Directives are not.

With regard to application, either answer (Regulations or Directives) was awarded a mark – as long as there was a valid reason for this conclusion.

Question 8

This question produced some of the weakest answers on the papers. Marks were lost because of: (1) a lack of definitions of the key concepts, (2) no case law to explain the concepts, (3) the failure to recognise the counter-offer by Chester, and (4) incorrect application of the law to the facts.

Some students answered this question from the perspective of frustration, which is wholly incorrect and ridiculous considering that the question specifically asks them to answer it from the perspective of the law in relation to offer, termination of an offer and acceptance.

Question 9

This question produced some of the best answers on the papers. Where marks were lost it was generally due to the following:

- In this component some students defined unfair and not constructive dismissal and incorrectly stated the burden of proof. This is surprising, given that the problem question is about a forced resignation.
- In this component some students listed the grounds upon which a dismissal is presumed fair and not the grounds that facilitate a claim for constructive dismissal based on the contract test.
- Most students drew the correct conclusion – with only a tiny minority giving an incorrect answer.

- D. A lot of student lost marks on this component. Incorrect answers stated accepting the demotion/transfer that there was a new contract – this is NOT correct – there is an alteration to terms but the contract remains. The majority flagged incompetence as a ground for dismissal but few students explained that fair procedures must be followed in order to effect a fair dismissal.

Question 10

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

- A. In this component a vast majority could still not draw a table outlining the elements of negligence and the tests. This was flagged as a key area at the liaison day, and specifically included in the Manual, in order to increase student's proficiency in this area.
- B. In this component it was obvious that a significant portion of students did not understand the meaning of the term "unqualified auditor's report" – it is NOT the auditor that is not qualified – but rather that the report is NOT qualified – this confusion led to some bizarre conclusions. Marks were awarded wherever possible in this component.

Question 11

Mixed standard of answers (some excellent). There was obvious confusion between the Consumer Protection Act and the Sale of Goods Act, which often led to wholly incorrect answers. Where marks were lost it was generally due to the following:

- A. In this component most students gave an adequate definition of a misleading commercial practice.
- B. In this component some students confused misleading practices with either: (1) aggressive practices, (2) prohibited practices, or (3) the Sale of Goods Act and lost the marks allocated. Only one student from almost 850 recognised that as the flour was pre-packed it was not covered by the Consumer Protection Act and was covered by the Sale of Goods Act (sale by description) instead – I only awarded 0.5 marks for this part of this component, as I was aware that it was difficult, but I thought that the better students would pick up on it – only one student did (from 855).
- C. In this component any three appropriate sanctions were accepted. Incorrect answers included remedies under the Sale of Goods Act and the discussion of prosecution as a sanction. This is NOT a sanction as they may not be found guilty – a sanction upon prosecution would be a fine or imprisonment.