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## Law and Ethics Republic of Ireland

1<sup>st</sup> Year Examination

May 2014

Exam Paper, Solutions & Examiner's Comments



### 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: Summer Paper 2014**  
**Paper: LAW & ETHICS (ROI)**

Wednesday 21<sup>st</sup> May 2014 - 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 SIX questions.**

**Section C answer ANY FOUR of the SIX 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 – MONEY LAUNDERING**

Marley is a trainee accounting technician employed by the firm of *Dickson and Shaw*. One of the clients of *Dickson and Shaw* is a restaurant called *Armadillo Street*. Marley has primary responsibility for the maintenance of this restaurant's financial accounts. In recent months Marley has become concerned regarding these accounts. In particular, she is anxious regarding the significant sales income being recorded by the restaurant, despite the fact that their supplier expenses are really low, the cost of their electricity is negligible, and the only staff members employed by the restaurant are the owners – who are not qualified chefs. Over the last month Marley has walked by the restaurant on her way home from work on a variety of occasions, and on all of these occasions the restaurant was closed. Despite this fact, Marley received a box of receipts and invoices from the owners of *Armadillo Street* yesterday recording income over the last month, and for evenings when the restaurant was shut.

Marley is suspicious that this restaurant may be a front for money laundering.

- (a) Define the term money laundering. **(1.5 marks)**
- (b) Discuss the elements of the offence of money laundering as established by the Criminal Justice (Money Laundering and Financing Terrorism) Act 2010. **(4.5 marks)**
- (c) In the context of money laundering, financial institutions and other designed bodies are required to undertake due diligence with customers. In this regard:
- (i) Explain the requirements that must be complied with to ensure due diligence. **(5 marks)**
- (ii) State when enhanced due diligence is required to be undertaken. **(2 marks)**
- (d) Outline the THREE requirements imposed upon financial institutions and other designated bodies to prevent and detect money laundering activities. **(4.5 marks)**
- (e) Advise Marley of the obligation imposed upon her in relation to her suspicions regarding *Armadillo Street* restaurant and state the sanction that she may be exposed to in the event of non-compliance. **(2.5 marks)**

**Total 20 Marks**

**P.T.O.→**

## SECTION B

Answer ANY FOUR of the SIX questions in this Section

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

## QUESTION 2 – PARTNERSHIPS

Dexter is a partner in the firm of *Ruby & Jones Accountants*. At a recent partner's meeting, the possibility of opening another branch of the firm was discussed. Dexter was asked to liaise with estate agents for the purpose of finding suitable premises. Last week Dexter received a call from an estate agency that he had been dealing with, informing him that the owners of a premises that he had already viewed and had an offer rejected on, had now agreed to a lease at the annual rental income he had offered. To avail of this deal Dexter was informed that the contract needed to be signed that day. Dexter tried to contact the other partners in the firm, but they did not answer their phones, so he signed the lease agreement on behalf of the firm. When the other partners in *Ruby & Jones Accountants* discovered what Dexter had done they contacted the estate agents to rescind the contract, on the basis that this action was outside the scope of his rights and authority as a partner.

- (a) List any FIVE rights of an active partner in a partnership. (5 marks)
- (b) Assess whether the contract created by Dexter is binding on the firm of *Ruby & Jones Accountants* by reviewing the authority of a partner to contract on behalf of the firm. (5 marks)

**Total 10 Marks**

## QUESTION 3 – SHARES, SHAREHOLDERS AND DEBENTURE HOLDERS

- (a) Regan has just purchased shares in *Candy Cane Catering Plc*. These shares have a nominal value of €1.50, but the company issued 500,000 of these shares onto the market at a premium of €1.

Explain how this premium will be accounted for in the company's accounts and outline any TWO purposes for which this premium can be used by *Candy Cane Catering Plc*. (4 marks)

- (b) Regan is also considering purchasing debenture stock in *Candy Cane Catering Plc*. She has requested your advice regarding the distinction between being a company shareholder compared to a debenture-holder.

Draw a table outlining any THREE differences between shareholders and debenture-holders. (6 marks)

**Total 10 Marks**

## QUESTION 4 – DIRECTORS APPOINTMENT AND RESTRICTION ORDERS

Turner has been a director of *Hope Springs Motel Ltd* for the past five years. He was also a director in an interior design company, *Bright Interiors Ltd*. Unfortunately *Bright Interiors Ltd* was placed in insolvent liquidation last year, and the High Court has just imposed a Restriction Order upon Turner for three years arising from this liquidation.

- (a) Advise Turner on the consequences of a Restriction Order, and outline the THREE circumstances where the Court will not impose such an Order on the director of an insolvent company. (5 marks)
- (b) *Hope Springs Motel Ltd* now needs to appoint a director to replace Turner. State the various methods by which a director can be appointed to a company. (5 marks)

**Total 10 Marks**

P.T.O.→

**QUESTION 5 – MEETINGS**

In the context of company meetings, explain the following:

- (a) The role of the Chairperson at company meetings. (3 marks)
  - (b) The rules regarding quorums at meetings. (4 marks)
  - (c) The meaning of the term *Proxy* and the rules regarding the appointment of a proxy. (3 marks)
- Total 10 Marks**

**QUESTION 6 – VOLUNTARY LIQUIDATION**

- (a) Outline the THREE circumstances in which a company can be voluntarily liquidated. (3 marks)
  - (b) Explain the procedure to be followed to effect a creditors' voluntary liquidation of a company. (7 marks)
- Total 10 Marks**

**QUESTION 7 – MISCELLANEOUS**

- (a) List any THREE pieces of information included in a company's annual return. (3 marks)
  - (b) Outline any THREE characteristics of a fixed charge. (3 marks)
  - (c) *A company is viewed as a separate legal entity to its members.*  
Discuss the meaning of this statement and explain the consequences of separate legal personality. (4 marks)
- Total 10 Marks**

**P.T.O.→**

## SECTION C

Answer ANY FOUR of the SIX questions in this Section

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

## QUESTION 8 – THE CONSTITUTION AND LEGISLATION

- (a) The Irish Constitution (Bunracht na hEireann 1937) is the primary source of law in Ireland. Explain the purpose of the Constitution and state how the Constitution can be amended, citing any ONE example of a recent amendment.

(6 marks)

- (b) Article 15 of the Constitution states that the Parliament has the sole and exclusive right to make laws for the Irish State. These laws can take different forms. In this regard explain the meaning of the following terms, and state one example of each:

(1) Amending Act, and

(2 marks)

(2) Consolidating Act.

(2 marks)

**Total 10 Marks**

## QUESTION 9 – CONTRACTUAL REMEDIES

Hayward signed a contract to purchase Rhett's house for €225,000. Following the signing of the contract Rhett informed Hayward that he was no longer in a position to sell the house, as he was made redundant after signing this contract and his bank has now withdrawn its mortgage offer to purchase a bigger home. Therefore, as he was no longer able to purchase another property, he could not now complete the sale of his home to Hayward.

- (a) Discuss the remedy of an Order for Specific Performance and determine the likelihood of Hayward obtaining such an Order from the Court to compel Rhett to complete the sale of his house.
- (b) If Hayward fails to obtain such an Order and instead sues Rhett for damages, the law requires Hayward to mitigate his losses. Explain the meaning of the term *mitigation of losses*.

(8 marks)

(2 marks)

**Total 10 Marks**

## QUESTION 10 – UNFAIR DISMISSAL

Henley suffers from Crohn's disease and as a consequence he has been absent from work for the last twenty weeks. During this period he submitted medical certificates to his employers, attended an independent medical consultant at his employer's request, and has attended three different meetings with his employer's Human Resource Manager to discuss his illness and the possibility of him returning to work in the future. Last week Henley was shocked when he received a letter from his employer stating that his contract of employment was being terminated based on his lack of capacity to fulfil his employment duties. He has contacted you for advice regarding this letter:

- (a) Explain the right of an employer to dismiss an employee on the grounds of lack of capacity.

(2 marks)

- (b) Discuss the procedures that should be adopted by an employer to effect a fair dismissal of an employee. In light of this discussion assess whether Henley's dismissal is likely to be classed as fair or unfair, citing reasons for your answer.

(6 marks)

- (c) If Henley's dismissal is classed as unfair, state the remedies available to him under the terms of the Unfair Dismissals Acts 1977-2011.

(2 marks)

**Total 10 Marks**

P.T.O.→

**QUESTION 11 – NEGLIGENCE AND DUTY OF CARE**

- (a) Explain the meaning of the term *negligence*. (1 mark)
- (b) In the context of duty of care in negligence explain how the following TWO tests operate in order to determine the existence of a duty to take reasonable care:
- (i) The neighbour principle (4 marks)
  - (ii) The modern day test (5 marks)
- Total 10 Marks**

**QUESTION 12 – SALE OF GOODS AND SUPPLY OF SERVICES ACT**

- (a) Define a contract for the sale of goods, pursuant to the terms of the Sale of Goods Act 1893, as amended. (5 marks)
- (b) *Sanders Aluminium Providers* has recently been contacted by a client and informed that they are being sued for the negligent installation of an aluminium door, which fell on top of the client when she was trying to open it. The action is being brought for a breach of the service obligations imposed under the Sale of Goods and Supply of Services Act 1980.

List any TWO main service obligations imposed upon service suppliers under the legislation, and state any THREE remedies available for breaches of the Act.

(5 marks)  
**Total 10 Marks**

**QUESTION 13 – MISCELLANEOUS**

- (a) In the context of the operation of the doctrine of precedent, explain the meaning of the term *stare decisis*. (2 marks)
- (b) List any FOUR prohibited practices pursuant to the provisions of the Consumer Protection Act 2007. (4 marks)
- (c) In relation to redundancy, explain any TWO eligibility requirements to receive a redundancy payment and explain how redundancy payments are calculated. (4 marks)
- Total 10 Marks**



# 1st Year Examination: May 2014

## Law and Ethics ROI

### Suggested Solutions and Examiner's Comments

**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.

| Statistical Analysis – By Question |     |     |     |     |     |     |     |     |     |     |     |     |     |
|------------------------------------|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|
| Question No.                       | 1   | 2   | 3   | 4   | 5   | 6   | 7   | 8   | 9   | 10  | 11  | 12  | 13  |
| <b>Average Mark (%)</b>            | 51% | 58% | 76% | 44% | 77% | 39% | 70% | 65% | 41% | 62% | 54% | 46% | 55% |
| <b>Nos. Attempting</b>             | 896 | 214 | 598 | 292 | 748 | 464 | 768 | 425 | 332 | 788 | 650 | 467 | 641 |

| Statistical Analysis - Overall    |                         |
|-----------------------------------|-------------------------|
| <b>Pass Rate</b>                  | 69%                     |
| <b>Average Mark</b>               | 55%                     |
| <b>Range of Marks</b>             | <b>Nos. of Students</b> |
| 0-39                              | 201                     |
| 40-49                             | 80                      |
| 50-59                             | 198                     |
| 60-69                             | 207                     |
| 70 and over                       | 221                     |
| <b>Total No. Sitting Exam</b>     | <b>907</b>              |
| <b>Total Absent</b>               | <b>370</b>              |
| <b>Total Approved Absent</b>      | <b>50</b>               |
| <b>Total No. Applied for Exam</b> | <b>1327</b>             |

#### General Comments:

*Overall the performance of candidates was good. The two additional questions, creating greater internal choice within the paper, proved to be advantageous to students, and this was reflected in the overall performance. This is also reflected in the fact that there are a significant portion of candidates attaining marks in the higher award classifications – which is to be commended.*

*Unfortunately, there was a disparity in terms of the quality of the answers in Sections B and C of the paper – with the latter generating lower marks. Lecturers and students need to ensure that they are equivalently prepared in Sections B and C.*

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

*In comparison to previous exam diets, the majority of candidates completed the requisite number of questions in this particular session, which also reflects the increased pass rate. Those who didn't attempt the requisite number of questions or all components of questions tended to not attain an overall pass mark.*

***In general:***

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

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

**Examiner's Comments on Question One**

- Part A:** *Good definitions of money laundering – generally attaining full marks.*
- Part B:** *Students were confused by this question and tended to misunderstand the meaning of the term "offence". Instead some discussed sanctions and lost all available marks. Others discussed the methods by which the offence can be committed and in this instance where they were explained correctly students were given the benefit of the doubt and awarded 3/4.5 marks.*
- Part C (1):** *Students appeared confused by what was required in this component – and instead often discussed the obligations on financial institutions to prevent and detect money laundering (Part D) as opposed to the obligations regarding due diligence – again benefit of the doubt applied.*
- Part C (2):** *This segment generated a variety of incorrect answers – and very few correct answers, focusing on politically exposed persons and their family members.*
- Part D:** *The comment re Part C(1) also applies here, with some students confusing both concepts and overlapping C(1) with D – where possible, some marks were awarded.*
- Part E:** *Most students stated that she should report her suspicions – but were not always clear as to whom she should report to – stating the relevant authorities did not attain full marks, as the answer required precise knowledge – re sanctions, the majority of students stated the sanctions for money laundering and not for failing to report a suspicion as asked by the question.*
- Some students focused purely on reporting obligations to Accounting Technicians Ireland and sanctions that can be imposed by the Institute – and although some marks were awarded for this, full marks were not.*

**Solution to Question 1**

- **A. Money Laundering:** money laundering is the way in which criminals attempt to turn cash and other assets obtained from criminal activities into genuine assets through the financial services system and through established businesses **(1.5 marks)**
- **B. Elements of the offence:** the offence is regulated in Ireland by the Criminal Justice (Money Laundering and Financing Terrorism) Act 2010 – according to Section 7(1) money laundering arises where a person: (1) conceals or disguises the true nature, source, location, disposition, movement or ownership of property or rights in relation to property connected to criminal activity, (2) converts or transfers that property (or provides advice or assistance in relation to conversion or transfer), for the purpose of avoiding prosecution or handles any property (receives it, or undertakes or assists in its retention, removal, disposal or realisation – or arranges to do any of these things), or (3) removes it from the State or brings it into the State, knowing or believing or acting in reckless disregard as to whether that property is, in whole or in part, directly or indirectly representing another person's proceeds of drug trafficking or other criminal activity **(4.5 marks)**
- **C.(1) Due Diligence:** this requires financial institutions and other designated bodies to: (1) establish the identity of customers based upon reliable documents or information (such as those issued by government sources), (2) identify any beneficial owner connected with the customer or service concerned, (3) obtain information in relation to the purpose and nature of the business relationship **(3 marks)**, and (4) monitor customer dealings on an ongoing basis by reviewing the source of wealth and funds to determine whether they are consistent with (a) their knowledge of the customers, the customers business and pattern of transactions, and (b) any knowledge that the person may have that the customer may be involved in money laundering **(2 marks)**
- **C.(2) Enhanced Due Diligence:** this must be undertaken where the customer is a politically exposed person or an immediate family member or close relative of a politically exposed person, and where the designated body is entering into a correspondent banking relationship with another credit institution **(2 marks)**
- **D. Necessary Measures to Prevent and Detect Money Laundering:** (1) establishing adequate internal policies and procedures to: (a) assess and manage the risk of money laundering, (b) identify and monitor complex or unusual transactions that have no apparent economic or visible lawful purpose, (c) prevent products or transactions that favour anonymity, and (d) monitor and manage compliance with anti-money laundering policies, (2) undertake the education and training of employees to ensure that they are aware of the provisions of the legislation, and how to proceed if such a transaction is identified, and (3) to maintain records relating to customer due diligence for a period of five years, as well as all information gathered in relation to the customer **(3 x 1.5 marks = 4.5 marks)**
- **E. Conclusion:** in accordance with the legislation Marley is obliged to report any suspicious transaction that may involve money laundering to the relevant authorities (DPP, ODCE etc), as well as to Accounting Technicians Ireland, as her regulatory body **(1.5 marks)** – a failure to report can result in a criminal prosecution and up to 5 years imprisonment **(1 mark)**

**Examiner's Comments on Question Two**

**Part A:** *Although a large portion of students attained full marks in this section, those who lost marks tended to be confused between the rights of a partner and the duties of a partner. These are not the same thing and students should ensure that they understand the differences between these concepts.*

**Part B:** *The majority drew a correct conclusion, but not always for the right reason. Correct answers attaining full marks related this discussion to agency and the actual authority (express or implied) of a partner to create a contract on behalf of the firm, as well as the ostensible authority – where they act beyond the scope of their actual authority. Full marks were only awarded in this component where relevant case law was mentioned.*

*There were also some wholly irrelevant discussions in this section in relation to the powers bestowed by the Memorandum and Articles of Association – these documents only relate to companies and have no impact whatsoever on partnerships. In addition, incorrect answers also included discussions regarding agency of necessity – this only applies where you have not already been authorised to act as an agent – whereas an active partner has a right to act as an agent, unless otherwise stated in the Deed of Partnership – so no marks were awarded for this discussion.*

### Solution to Question 2

- **A. Rights of a Partner:** (1) to be treated by the other partners in good faith and with mutual confidence, (2) to be involved in the management of the firm and in key decision making, (3) to share in the profits of the firm as per the partnership agreement, as well as the losses of the firm on a joint and several basis, (4) to not be expelled from the partnership, unless there is evidence that the partner is not acting in good faith or not acting in breach of his duties, (5) to veto the introduction of a new partner to the firm – this decision requires unanimous approval of all existing partners, (6) the right to attend and vote at all partnership meetings, (7) the right to examine the books and financial statements of the partnership, and (8) to be indemnified by the firm against all liabilities incurred in the ordinary course of partnership business **(any 5 = 5 marks)**
- **B. Authority of a Partner:** all partners are classed as agents of the partnership and in general they have the actual authority to create contracts on behalf of the firm – if this authority is stated in the Deed of Partnership it is classed as express actual authority, if not stated, it is classed as implied actual authority – this is often known as ostensible authority – and allows a third party to assume that a partner has the right to contract on behalf of the firm – even if a partner acts outside the scope of his actual authority the contract may still be binding upon the firm provided (a) the contract is created in the name of the firm, (b) it is connected with the business of the firm, and (c) there is no reason for the third party to be suspicious that this contract is not in the normal course of business – relevant case law includes *Mercantile Credit Co Ltd v Garrod (1962)* **(4 marks)** – therefore, the contract created by Dexter is binding on the firm of *Ruby & Jones Accountants* as he was acting within his actual authority, whether express or implied **(1 mark)**

### Examiner's Comments on Question Three

**Part A:** *This question appeared to throw some students, who did not understand the meaning of the word 'premium'. Students were told that the nominal value was €1.50 and the shares were sold at a premium of €1, so they should have concluded that the market value was €2.50 – whereas some incorrectly assumed that they were discounted by €0.50. Those who did not misunderstand the meaning of the term premium generally attained full marks in this section and could list two uses of the Share Premium Account.*

**Part B:** *The vast majority attained full marks for their comparisons – although there were a variety of incorrect answers by a minority of students. Despite the fact that the question specifically asked them to draw a table, some failed to do this and were deducted some marks.*

*Overall, this was one of the best answered questions on the paper.*

### Solution to Question 3

- **A. 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 mark)** – 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 2 x 1.5 marks = 3 marks)**

- **B.** Differences between Shareholders and Debenture-Holders:

|                       | <b>SHAREHOLDER</b>  | <b>DEBENTURE HOLDER</b>   |
|-----------------------|---|---|
| <b>ROLE</b>           | Member and creditor of a company  | Creditor of a company   |
| <b>RIGHTS</b>         | Members have rights 'in' relation to the company  | Creditors have rights 'against' company   |
| <b>PARTICIPATION</b>  | They are involved in the company as they have the right to attend meetings, and possess voting rights that can be exercised at these meetings (only ordinary shareholders have the right to vote) | They have no role in the company and cannot attend company meetings or vote (although they may include a restrictive covenant in the debenture – limiting the rights of the company until the loan is repaid) |
| <b>COST</b>           | Shares cannot be sold at a discount   | Debentures can be sold below their nominal value i.e. at a discount   |
| <b>CAPITAL GROWTH</b> | Shareholders have a right to capital growth (if there is any surplus capital on liquidation)  | Debenture holders have no right to capital growth. They only have a right to repayment of the principal sum plus interest.  |
| <b>RETURN</b>         | Shareholders have a right to a dividend payment if the company is making a profit, and it is declared. If not the shareholders will receive no return   | Debenture holders have a right to repayment plus interest on the loan even if the company is making losses  |
| <b>RISK</b>           | Shareholders are the last to be paid on liquidation of a company so they carry a higher risk  | Debenture holder's debt is satisfied before shareholders so their financial investment is considered more secure  |

(any 3 x 2 = 6 marks)

#### **Examiner's Comments on Question Four**

**Part A:** *There appeared to be confusion between Restriction and Disqualification Orders by some students. Marks were lost where answers were too brief and failed to adequately explain the concept of a Restriction Order. In particular, a large portion could not explain the THREE grounds where the Order will not be imposed, and instead gave three variations on acting honestly and responsibly – only one mark was awarded for this ground – despite the multitude of variations.*

**Part B:** *Some answers were too narrow and lost marks for not discussing appointment pre-incorporation, or in the case of a casual vacancy. Others incorrectly stated that a special resolution is required for appointment. There were some wholly incorrect answers that discussed removal of directors and not appointment as asked – this resulted in a complete loss of marks.*

#### **Solution to Question 4**

- **A.** Restriction Order: consequences – when this Order is imposed a directors can be restricted from acting directly or indirectly as a director or secretary of any company for a period of up to five years, in order to prevent the conduct of phoenix trading (**2 marks**) – circumstances: the applicant is entitled to a Restriction Order, unless the director can prove that (1) he acted honestly and reasonably, and there is no other reason why it would be just and equitable to restrict him; or (2) he was a director solely as a nominee of a financial institution lending to the company, and that institution had not obtained any personal guarantee of repayment from the director, and the director had acted honestly and reasonably; or (3) he was a director solely as a nominee of a venture capital company, and the director had acted honestly and reasonably (**3 marks**)

- **B.** Appointment of a Director: (1) Form A1 or the Articles of Association are used upon incorporation to state the names of the first directors of a company, (2) thereafter, all subsequent appointments are governed by Articles of Association – Section 181 CA 63 provides that a director may only be appointed individually by an ordinary resolution of the shareholders, (3) Table A provides that an appointment may also arise following a retirement by rotation process provided the person is eligible for re-election, and wishes to be re-appointed – this is again done by an ordinary resolution of the shareholders at an AGM, and (4) the Board of Directors can also appoint a person to act as a director where a casual vacancy arises between AGM's but at the next AGM this person must resign and if they desire/are eligible they can ask the shareholders for re-election **(5 marks)**

#### ***Examiner's Comments on Question Five***

**Part A:** *Although the majority attained full marks in this component, those who did not tended to either (1) confuse the role of the chairperson and the company secretary, or (2) confuse the role of the chairperson of a meeting and the chairperson of the Board of Directors.*

**Part B:** *The majority attained full marks in this component – some marks were lost for not mentioning the 30 minute rule or the quorum requirements established in Table A.*

**Part C:** *The majority attained full marks in this component – some marks were lost for not mentioning that the proxy forms need to be received by the company secretary 48 hours in advance of the meeting (quite a few students incorrectly stated 21 days).*

*Overall, this was one of the best answered questions on the paper.*

#### **Solution to Question 5**

- **A.** Chairman: (1) They are responsible for running the meeting and ensuring that the meeting covers all the topics on the agenda, (2) they oversee voting at meetings, (3) they sign the minutes of previous meetings and once signed they are *prima facie* records of those meetings, (4) they ensure that the meeting is quorate, and (5) they maintain order during the meeting and have the power to dissolve or adjourn the meeting, if it becomes disorderly **(3=3 marks)**
- **B.** 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)**
- **C.** Proxy: This is both a document appointing and the appointment of a person to attend, vote, and speak on behalf of another shareholder at a meeting **(1 mark)** – 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 apply to a company having share capital – and the ability to appoint a proxy must be authorised by the Articles of Association **(2 marks)**

**Examiner's Comments on Question Six**

**Part A:** *This segment was not well answered – with discussions of compulsory liquidation grounds and not voluntary as asked by the question. Students are encouraged to ensure that they know the difference between these concepts.*

**Part B:** *Again, this was not well answered – with students discussing the procedures to effect a members' voluntary liquidation and a Court ordered liquidation and not a creditors' liquidation as asked. Some students stated that an application to the Court must be made for a creditors' liquidation – this is wholly incorrect and indicates that students need to revise this area, and particularly the nature of voluntary liquidations.*

**Solution to Question 6**

- **A. Voluntary Liquidation:** Section 251 Companies Act 1963 states that a company may be voluntarily liquidated in any one of THREE circumstances, namely: (1) if the period fixed for the duration of the company expires, (2) if the company resolves by special resolution to liquidate voluntarily (members' voluntary liquidation), and (3) if the company resolves that it cannot carry on business because it is insolvent and a resolution is then passed to liquidate (creditors' voluntary liquidation) **(3 = 3 marks)**
- **B. 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, (4) 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, (5) 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, (6) a vote is then taken by the creditors to agree to a creditors voluntary liquidation, and a liquidator will be appointed, and (7) a Committee of Inspection may also be appointed to assist the liquidator **(7 marks)**

**Examiner's Comments on Question Seven**

**Part A:** *There appeared to be a lot of guessing in this component, with student listing three financial documents/pieces of information – this is not correct – the financial documents are attached to the returns, not information included in it. However, in the interest of fairness one mark was awarded where the financial documents were mentioned.*

**Part B:** *This was generally well answered and the majority attained full marks. However, a small portion incorrectly discussed fixed charges in the context of a fixed payment – this is wholly incorrect and received no marks.*

**Part C:** *This was generally well answered and the majority attained full marks. Marks were lost where students failed to reference the key case that provides the precedence for this concept. In addition, marks were also lost where students focused only on limited liability as a benefit of separate legal existence – and failed to mention the other benefits. Conversely some students lost marks for failing to mention limited liability.*

**Solution to Question 7**

- **A. General information included in the annual return:** (1) the company address, (2) the location where the register of members is kept, (3) details pertaining to shares and company debt, (4) details of company members and their particular shareholdings, and (5) particulars of the Directors and Secretaries **(any 3 = 3 marks)**

- **B.** Characteristics of a Fixed Charge: (1) this is where a company borrows money and secures the borrowing on a fixed asset, (2) this charge attaches to a fixed asset from the moment of creation, thereafter the borrowing company cannot deal in the asset (sell, alter, use to create a further charge) without the consent of the charge-holder, (4) this charge ranks in priority to other charges, and (5) it is usually created by means of either a legal or equitable mortgage (lender's beneficial interest in the property is registered on the title documents/or the lender takes possession of the title documents until the debt is repaid) **(any 3 = 3 marks)**
- **C.** Separate Legal Entity: This concept means that a company has a separate legal status from its members – and in reality has a distinct personality from the natural persons who set up the company – this was first recognised in the case of *Salomon v Salomon & Co Ltd (1897)* **(1 mark)** – this separate personality means that a company can: (1) own their own property, (2) enter in contractual relations with either natural persons or other companies, (3) commit crimes and be held responsible for such crimes, (4) have perpetual existence, (5) be sued or sue other persons – and (6) in addition, this separate personality also gives the shareholders of the company limited liability **(any 3 = 3 marks)**

### **Examiner's Comments on Question Eight**

**Part A:** *This segment produced average answers. Full marks were only awarded where students mentioned BOTH fundamental human rights and the creation of the organs of state. Regarding amending the Constitution – most students correctly mentioned referendums – but incorrect answers discussed the Parliament and the EU. It was notable that many could not give an example of a recent referendum, despite the fact that there have been a number of them in recent years. Wholly incorrect answers included (1) the smoking ban, and (2) the restriction re mobile phone use in cars.*

**Part B:** *Although most students made a reasonable attempt at an amending Act, a large portion were unable to explain the meaning of a consolidating Act – I would have assumed that the answer was obvious from the word “consolidation”.*

### **Solution to Question 8**

- **A.** The Constitution: This is a legal document that establishes the principles of how Ireland as a country should be governed – the provisions of the Constitution create the organs of State – the Executive, Legislative, Judiciary – and state their legal role – in addition, the provisions of the Constitution guarantee protection and recognition of people's fundamental human rights – both enumerated and unenumerated rights **(3.5 marks)** – Constitutional Amendment: any amendment requires the consent of the people – this is done by a referendum voted on by the people – if the referendum is successfully passed the President of Ireland signs the amendment into Law – examples of recent referendums include the law on divorce, which was introduced by a constitutional amendment in 1996, and more recently the ratification of the Lisbon Treaty and the referendum to facilitate the introduction of abortion rights in Ireland – in limited circumstances **(2.5 marks)**
- **B. (1)** Amending Act: This is a piece of legislation aimed at rationalising or amending certain provisions of existing legislation – its purpose is not to replace it in totality, but rather to alter some component of it – such as the Companies (Amendment) Act 2012 **(2 marks)**
- **B. (2)** Consolidating Act: This is a piece of legislation designed to bring provisions contained in numerous pieces of legislation together into one definite Act – it may or not may alter the provisions while consolidating them into one source – an example would be the Health, Safety and Welfare at Work Act 2005 or the proposed Companies Consolidation Bill 2012 **(2 marks)**



**Examiner's Comments on Question Nine**

- Part A:** *There were very weak answers in this component – with a significant portion unable to explain the nature of such an Order and the grounds upon which it will not be granted. A large portion focused the question on frustration – this is not correct, his redundancy is not a frustrating event as he never created a contract to sell his house subject to obtaining loan approval to purchase another property. These would be two separate contracts, so the concept would not apply.*
- Part B:** *Poor standard of answers – with the majority unable to correctly explain the concept of mitigation of losses. Students are encouraged to ensure that they understand this concept more clearly.*

**Solution to Question 9**

- A. Order for Specific Performance: this is where the court orders the defaulting party to perform their specific obligations under the contract on the terms agreed **(1 mark)** – the courts will only do this when damages are an inadequate compensation and importantly, where the order would not cause undue hardship on the party in breach – the Court will never grant an order for specific performance in the following contracts: (1) Contracts for Personal Services: these would include employment contracts, or contracts to perform at a specific concert/event or to take part in a film or television project – the rationale behind this exclusion is that such an order would be analogous to forced labour and is futile where the other party simply refuses to perform or performs to an inadequate standard (2) Contracts to advance money, (3) Where the court cannot supervise performance of the contract (where constant supervision by a court is required), (4) Where one of the parties is an infant/minor, and (5) Where the contract is neither fair nor just – and where the conduct of the party seeking specific performance is questionable **(6 marks)** – conclusion that it is unlikely that the Court will grant the Order as this may cause hardship to Rhett and damages will adequately compensate Hayward **(1 mark)**
- B. Mitigating of Losses: this means that an injured party in the event of a breach of contract is required to take steps to mitigate or reduce the losses they are likely to be exposed to following the breach – the injured party is only required to take reasonable steps in this scenario – if after taking reasonable steps the loss is not mitigated then he is entitled to compensation for the actual loss – a failure to take steps to reasonably mitigate losses will result in a reduction of any damages awarded **(2 marks)**

**Examiner's Comments on Question Ten**

- Part A:** *Although well answered by a large portion of students, some were confused between lack of capability and competency – and incorrectly discussed training and monitoring performance, and invoking the warning system. Capability is a wholly different thing and asks whether you are physically and mentally capable of doing the job that you have been employed to do. It is important that students understand that an employer has no obligation to offer an alternative position to an employee who is incapable of performing their duties.*
- Part B:** *Similarly, some students focused on procedures for lack of competency and not capability. Most drew the correct conclusion but not always for the correct reason and attained some marks. The better answers mentioned lack of fair procedures in effecting his dismissal.*
- Part C:** *Although generally well answered, there was some confusion with students incorrectly mentioning redundancy as a remedy.*

**Solution to Question Ten**

- **A. Lack of Capability:** this relates to the health and the mental and physical ability of the employee to perform the required tasks as stated in their employment contract – before a decision is taken to dismiss in this situation alternative options must be considered – any decision to dismiss must be based on medical information that indicates that the employee will not be in a position now or in the foreseeable future to fulfil his duties – such as arose in *Bolger v Showerings (1990)* **(2 marks)**
- **B. Fair Procedures:** the employer must (1) tell the employee of any allegations against him, (2) give the employee a copy of any evidence, (3) give the employee a right to respond and make representations, (4) allow the employee to bring a witness/representative to the disciplinary meeting, (5) give the employee the right to address a adjudicating body and make any pleas in mitigation *Re Haughey (1971)*, and (6) give the employee a statement of the reasons for the dismissal - *Redmond v Ryanair (2006)* **(4 marks)** – conclusion that Henley’s employers have not employed fair procedures as there was no notification to him during his period of absence that the company was considering dismissing him based on his incapacity – and no warning system was invoked against him in relation to his prolonged absence – in addition, there was no disciplinary meeting, employing the procedures outlined above **(2 marks)**
- **C. Remedies:** (1) reinstatement: where the employee is restored to the same position of employment with the same employer and treated as if they had not been dismissed and are restored to exactly the same job with the same rights and conditions, (2) re-engagement: when the employee is restored to employment with the employer but on terms and conditions as set down by the Court/Tribunal – this could be in a different job role/position/roster etc, or (3) compensation – maximum 2 years salary – maximum 4 week’s salary where there is no evidence of loss **(2 marks)**

**Examiner’s Comments on Question Eleven**

**Part A:** Most students gave an adequate definition of negligence to attain full marks.

**Part B(1):** The majority gave a reasonable explanation of the neighbour principle. Marks were deducted where the precedent case was not mentioned or where the concept of a “neighbour” was not adequately explained.

**Part B(2):** Weaker answers in this component, with students confusing the modern day test with standard of care, causation, remoteness and contributory negligence. It is possible that the fact that the modern day test looks at whether the harm was foreseeable confused students – who linked this to remoteness of loss – this distinction needs to be highlighted by lecturers teaching this module.

**Solution to Question 11**

- **A. Negligence:** This is defined as the unintentional breach by one party of a legal duty to take reasonable care that causes loss or damage to the injured party **(1 mark)**
- **B.(1) Neighbour Principle:** this was original test for duty of care and arose from the decision of Lord Atkins in *Donoghue v Stevenson (1932)* – in effect the principle states that you are liable for your negligent acts to your neighbour – this is 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)**
- **B.(2) Modern Day Test:** the neighbour principle has been expanded in recent years in *Caparo Industries Plc v Dickman (1990)* – which established the modern day/three-tier test to determine the existence of a duty of care – this test asks: (1) was the harm reasonably foreseeable: this means that the Court must determine whether the defendant could have foreseen that his act or omission would cause harm to the plaintiff, (2) whether there a relationship of proximity between the parties: in this scenario the Court reviews the basis of the relationship between the parties, and determines whether it is proximate enough from a legal perspective to impose liability, such as in *Ward v McMaster (1988)*, and (3) whether considering the circumstances, is it fair, just and reasonable to impose a duty of care: in this scenario the

Court takes into consideration any special circumstances in the case and the impact of its decision on public policy, such as in *Glencar Exploration plc v Mayo County Council (2002)* **(5 marks)**

### **Examiner's Comments on Question Twelve**

**Part A:** *This was not well answered (despite the fact that it has already been assessed in Summer 2011) – with students explaining the implied terms under Sale of Goods and not the definition of a Sale of Goods contract as specifically asked by the question.*

**Part B:** *There was obvious guess work in this component regarding service obligations and this is an area that students need to revise. Regarding remedies, a large portion failed to realise that the remedies re goods also apply to services.*

### **Solution to Question 12**

- **A. Sale of Goods: Section 1(1) SGA 1893** – a contract in which a seller transfers or agrees to transfer ownership of goods to a buyer “for a money consideration called the price” **(0.5 marks)** – 3 elements: (1) transfer of property in goods (excludes land, shares or a contract for services) – the term “goods” covers all chattels personal, including existing, future, specific and unascertained goods **(1.5 marks)** – (2) the contract must be for a sale – a transfer of goods by way of a pledge, mortgage or loan (or consumer credit contracts) is precluded under the Act, as are gifts **(1.5 marks)** – (3) the goods to be sold must be given a price tag or a price – may include a trade-in situation provided it involves a price tag on the new item or a specific allowance for the traded-in item – exception under *Flynn v Macken (1974)* – an agreement to provide goods against trading stamps or other tokens, or the transfer of goods in exchange for the performance of services or in exchange for the payment of the debt are not classified as sales **(1.5 marks)**
- **B. Obligations upon Service Providers:** (1) a service provider must have the necessary skill to carry out the service, (2) they must supply the service with reasonable care, skill and diligence, (3) to use materials that are sound and reasonably fit for purpose, (4) to supply goods that are of satisfactory quality, (5) to supply the service within a reasonable period of time at a reasonable price **(any 2 = 2 marks)** – remedies available: (1) repudiation of the contract, where there has been a breach of condition, (2) repair/replacement: provided that the repair or replacement does not cost more than was originally paid for the item, (3) refund – this depends upon when the good was purchased, and (4) compensation, where the consumer incurs damage **(any 3 = 3 marks)**

### **Examiner's Comments on Question Thirteen**

**Part A:** *The majority could explain this concept well – even where they could not translate its meaning. Nonetheless full marks were awarded for correct explanations.*

**Part B:** *There was obvious confusion between prohibited practices and misleading or aggressive practices, which resulted in a loss of marks.*

**Part C:** *Regarding redundancy eligibility – there was confusion re (1) service requirement (2 years minimum – whereas a large portion incorrectly stated 1 year), (2) age requirements (you are eligible if you are over 16 – provided you have 2 year's service over 18 years of age), and (3) employment status (you need to be an employee – but you do NOT have to be full-time, all employees are entitled).*

*Regarding payments, there was minor confusion regarding the multiple of the years of service, the bonus week and the capping at €600. Full marks were only awarded where all three were correctly referenced.*

**Solution to Question 13**

- **A. *Stare Decisis*:** this means “let the decision stand” – it means that the decision of a higher court stands over or binds the decision of a lower court, when dealing with similar legal issues **(2 marks)**
- **B. Prohibited practices include (but are not limited to):** (1) a representation that the trader has an approval, authorisation or endorsement of a regulatory body that the trader does not have, (2) a representation that the trader is about to cease trading or move premises, if the trader is not, (3) a representation that describes a product as “gratis”, “free”, “without charge” or anything similar, if a consumer has to pay anything other than the necessary and reasonable cost of - (i) responding to the representation, and (ii) collecting the product or having it delivered, (4) making a false representation that a product is available only for a limited time, or on particular terms for a limited time, in order to elicit an immediate decision from a consumer, depriving the consumer of sufficient opportunity or time to make an informed choice in relation to the trader’s product, (5) using editorial content in the media to promote a product (if a trader has paid for that promotion) if it is not made clear that the promotion is a paid promotion, whether in the content itself or in any oral, written, visual or descriptive representation in the promotion, (6) promoting a product (similar to that of another manufacturer) in such a manner as to deliberately mislead or deceive a consumer into thinking that the product is manufactured by that manufacturer, when it is not, (7) operating, running or promoting a competition or prize promotion without awarding the prizes described or reasonable equivalents, (8) failing to comply with a consumer’s request to leave the consumer’s residence or to not return (except in circumstances and to the extent justified or permitted by or under law in order to enforce a contractual obligation), (9) persistently failing to comply with a consumer’s request to cease (i) communicating or initiating unwanted or unsolicited contact with, or (ii) making or sending unwanted or unsolicited representations to, the consumer by telephone, fax, email or any other electronic means or remote media (except in circumstances and to the extent justified or permitted by or under law in order to enforce a contractual obligation), or (10) in relation to any product that a consumer does not solicit, demanding that the consumer (i) make immediate or deferred payment for the product, or (ii) return or keep the product safe (inertia selling) **(any 4 x 1 = 4 marks)**
- **C. Redundancy: Eligibility requirements** – (1) the worker must be over 16, (2) be employed under a contract of service, and (3) have been employed by the employer for at least 2 years after their 18th birthday **(any 2 = 2 marks)** – redundancy payment: statutory redundancy payments amount to two weeks pay per every year of service, regardless of age, plus a bonus week – maximum ceiling of €600 per week – although an employer may provide a higher redundancy payment as a voluntary measure **(2 marks)**