



EXAMINER'S REPORT

MAY 2001

REGULATORY ENVIRONMENT FOR MARKETING

General Comments

The pass rate this year at 77% shows a significant increase on the 2000 figure of 67%. The main reasons for failure relate to

- (1) Not answering the required number of questions. Only two of the candidates who attempted less than five questions achieved a pass mark.
- (2) In respect to the contract questions, a failure to illustrate and support the answers by reference to relevant precedents.
- (3) Answering a question the candidate wanted to appear on the paper and not the actual question asked.

Question 1

A problem question dealing with the law of contract and specifically the issue of distinguishing between an offer and an invitation to treat. There are numerous illustrative precedents to support an answer to this question and, in particular, to indicate that what is involved is an invitation to treat, and therefore no contract exists between the parties. The better answers made reference to the possibility that the price indication might constitute a breach of the Consumer Information Act, 1978.

Question 2

Candidates were requested in part (a) to 'list' the implied terms in a sale of goods contract. Many candidates ignored this instruction and developed the implied terms. No matter how well the answer 'developed' the implied terms, only five marks could still be awarded. As regards part (b), there continues to be confusion as to when the implied terms can be excluded. In this respect very few candidates developed the test of 'fair and reasonableness' as set out by the Act and the relevant decisions in *O'Callaghan v. Hamilton Leasing* [1983], *Cunningham v. Woodchester Investments* [1983] and *McCarthy v. J. W. Tours* [1991].

Question 3

One of the most popular questions on the paper. The part of the question that presented most difficulties for candidates was part (b). It was particularly important that the answer refer to the concept of strict liability and the need to establish the causal relationship between the defect in the product and the damage to the consumer and his or her property. Apart from this issue, the question was generally very well answered and in particular part (c). The better answers in part (c) referred to the issue of time and the two relevant periods of three years from the time of

establishing the causal relationship between the damage and the defect and ten years from the time that the product was first put into circulation.

Question 4

As with previous years, the question on agency continues to be very popular with candidates no matter what its form or content. Similar comments can be made in respect to part (a) of this question as with part (a) of Question 2. The issue in part (b) of the question was the apparent or ostensible authority of Peter as an agent of Outdoor Sports Ltd. There is a very clear precedent amongst others for this factual situation in *Watteau v. Fenwick* [1893]. Many answers concentrated on the withdrawal of Peter's 'actual' authority by his employer, but this was not communicated to International Sports Equipment plc. The better answers, apart from developing the issue of Peter's apparent or ostensible authority, also indicated that, although the contract could be enforced by International Sports Equipment plc, Peter's employer could instigate disciplinary proceedings against Peter for exceeding his actual authority.

Question 5

Again, a very popular question, but the best marks were obtained by candidates who supported their answers by reference to relevant and illustrative precedents. The question requested the candidates to discuss the 'more important alternative remedies' which are specific performance and an injunction. In respect to both discretionary remedies it was important to develop the circumstances in which a court will avail of such a remedy. Many of the better answers briefly developed both 'Mareva' Injunctions and 'Anton Pillar' injunctions. Marks were also awarded for mention of, and brief development of, the remedies of rectification and rescission. Although not strictly an 'alternative' remedy to damages, some reference to a *quantum meruit* award was also accepted.

Question 6

The Regulatory Environment examination paper will usually contain a question dealing with one of the significant sources of law with the greatest relevance to the marketing activity. These would usually be precedent, legislation and the European Union. On this occasion, the question concerned legislation and, in particular, the issue of statutory interpretation, i.e. the ability to read, understand and apply an act of the Oireachtas. This question was the least popular question on the paper and the relatively small number of answers were of a very mixed character. In part (a) apart from some brief development of the 'presumptions' of statutory interpretation the answer should have concentrated on the literary, golden and mischief rules. Part (b) required the candidate to demonstrate an understanding of the necessity and significance of delegated legislation. Many candidates approached this issue by developing the advantages and dis-advantages of such legislative provisions, which was quite acceptable.

Question 7

Attempted by a substantial number of candidates and usually competently so. The core issues to be developed were Sections 4, 5 and 6 of the 1991 Act, the role of the Competition Authority and the increased powers and, in particular, the powers of investigation and prosecution provided by the 1996 Act. The question specifically asked for illustrative examples of the application of competition law and policy. In particular, it would be appropriate to refer to the Competition Authority's action regarding the farmers blockade of National Dairies in Convoy in October, 2000, and the landmark criminal prosecution for 'price fixing' in respect of motor fuels of Estuary Fuels Ltd. also in October, 2000. In effect, the question required the candidates to demonstrate an understanding of the practical application of Competition Law as a means of protecting and benefiting the consumer.

Question 8

The question dealt with one of the recent acts of the Oireachtas which has substantially revised and reformed Irish law regarding intellectual property rights. The main issues to be developed included the definition of a trade mark, including the issue of graphic representation, the registration of trade marks in respect of both goods and services, the removal of the distinction of Part A and B registration, the duration of registration and protection, the circumstances in which registration would not be allowed, the form of protection available for registered trade-marks, both civil and criminal. Many answers contained illustrative cases but, unfortunately, a substantial number of answers contained little else but such cases with little or no reference to the statutory provisions as contained in the 1996 Act. Such answers were simply a list of disjointed cases which illustrated a particular issue, but failed to provide an overview of the 1996 Act.