



EXAMINER'S REPORT

MAY 2006

REGULATORY ENVIRONMENT FOR MARKETING

General Comments

The pass rate this year is 69%. This represents a continuing trend of a declining overall pass rate from a recent 'high' of 82% in 2002. The figure is consistent with the figure from last year and the reasons that candidates fail this subject remain to a large degree consistent with those identified in previous reports.

The identified reasons are as follows:

1. Not answering the required number of questions. However the number of candidates who came within this category fell dramatically this year. It appears that a small number of candidates decide to concentrate on a fixed number of topics in the hope that they will appear on the paper.
2. The failure to use relevant case law to illustrate and support the answer with particular reference to the area on contract law.
3. Not answering the question asked or in the case of a question divided into two or more parts, only answering a part of the question. No matter how thorough the answer is to a part of a question only the marks allocated to that part could be awarded.
4. In the context of 'problem situation' questions such as Question 2 and Question 7 on this paper, a failure either to appropriately identify the legal issues involved and/or the total lack of appropriate authority, such as illustrative precedents, to support the conclusions reached.
5. There continues to be a very poor understanding of some significant features relating to sale of Goods and Supply of Services contracts.

However the examination scripts did contain a number of positive features overall. There was a much more even spread of candidates attempting the entire range of questions on the paper. In previous years there was a tendency for the answers to concentrate on only 4 –5 of the questions. Some questions, such as Question 5, dealing with Competition Law and Policy, demonstrated a substantial level of contemporary access and use of the website of the Competition Authority

Question 1

This was one of the most popular questions on the examination paper. As regards part (a) of the question, the main shortcoming was the failure to illustrate the elements of misrepresentation by reference to appropriate case law. In addition very few candidates developed the issues surrounding the principle that 'silence' will generally not constitute a misrepresentation and the exception to this such as contracts of the utmost good faith. It was appropriate in the context of part (b) of the question to briefly develop the distinction as between fraudulent, negligent and innocent misrepresentation. However the development of the remedy of 'rescission' should have been the core of the answer to this part of the question.

Question 2

This was the most popular question on the paper and the one that resulted in the broadest diversity of quality as regards the answers themselves. The examiner was not necessarily looking for an answer that would concur with a particular outcome but rather how the candidate identified the essential issues involved and applied the appropriate principles of contract law, including relevant case-law, to these issues. The issues included; was there a definite acceptance of the offer, was it necessary to keep the offer open until Saturday and should there have been communication of the withdrawal of the 'offer'?

Question 3

There has always been a question on the paper concerning the law of agency and traditionally it is the most popular question. Whilst this particular question remained one of the more popular questions, it was clear that many candidates would have preferred a different question on agency. This was evident from the number of answers provided that dealt with an aspect of the law of agency but not the one question asked. There is a degree of overlap between the rights of an agent and the duties of a principle. However they can be classified as regards the rights of an agent; the right to indemnity and remuneration and in respect to the duties of a principle; the duty to pay remuneration, not to prevent the agent from performing acts for which he is to receive remuneration, the payment of an agent only on the occurrence of a specific event and the principle of indemnity. It was notable how few candidates who attempted this question who identified the core issue of remuneration of the agent.

Question 4

Previous examiners reports have drawn attention to the fact that supply of services is in many respects equally, if not more significant than, sale of goods as an economic activity in this society. The three main shortcomings identified in the answers to this question were:

- (a) A substantial proportion of candidates who attempted this question had little or no familiarity with the provisions of the SoG & SoS Act 1980 concerning the implied terms and the exclusion of these implied terms in a supply of services contract.
- (b) There was little understanding of the relationship between the concept of 'dealing as a consumer' and the exclusion of implied terms in both sale of good and supply of services contracts.
- (c) The very limited use of relevant case law.

Question 5

Generally, parts (a) and (b) of this question were answered very competently. A majority of candidates who attempted this question were clearly familiar with the related yet distinct application of Section 4 and 5 of the Competition Act 2002. A small number of candidates developed the element identified by the ECJ in particular that would lead to the identification of an abuse of a dominant position. As regards part (b), many candidates developed more than the required two examples and demonstrated a familiarity with the website of the Competition

Authority at www.tca.ie. Examples referred to include the ‘Ticketmaster’ enforcement decision and the Irish League of Credit Unions High Court Decision.

Question 6

As indicated in previous reports, the issue of intellectual property rights now forms a crucial aspect of both new product development and the marketing strategy for such products. It would be unreasonable to expect candidates to have a detailed knowledge of what is a complex legal area. However this question simply required the candidate to demonstrate a familiarity with the scope of the intellectual property that can be protected by statutory provisions and what is required to obtain such protection. The main shortcomings in the answers related to; a failure to define the intellectual property involved, the need for registration or otherwise to obtain protection and the period during which protection will apply.

Question 7

A question dealing with product liability from the perspective of **both** liability in negligence and strict liability as provided for by the 1991 Act. In part (a) of the question it was when discussing the possibility of liability in negligence to reflect the statement in the question that the manufacturer ‘had taken all reasonable care’. As regards the 1991 Act the factual situation clearly points to possible reliance on the defence of ‘the state of the art’, i.e. the current level of scientific and technical knowledge at the time that the product was put into circulation. With respect to part (b) the crucial issue as regards the 1991 Act is the definition of ‘a producer’. In this context, ‘Handipack Ltd.’ is a producer. Some of the better developed answers raised the issue of ‘strict liability’ as regards the implied terms of merchantable quality and fitness for purpose under the SoG & SoS Act 1980.

Question 8

This is a standard question on the European Union as a source of Irish Law which has appeared on a number of papers and in a slightly format over a number of years. The paper itself actually contained an example of the domestic implementation of an EU directive in Question 7 concerning the Liability for Defective Products Act 1991. A number of answers contained several examples of the domestic application of EU legislative provisions. One weakness was the lack of familiarity with the use of the individual ‘decision’ by the EU Commission as a means of the implementation and enforcement of EU competition Law and Policy.