Examiner's report

F4 Corporate and Business Law (ENG)
June 2011

General Comments

The performance in this paper was better than in the previous December paper. While many candidates performed well, it still has to be recognised that a significant number of candidates were less well prepared and unfortunately did not meet the required standard to pass the examination. As has been stated repeatedly, it is an unfortunate fact that *post hoc* reports such as this one tend to focus on what went wrong, but we should initially congratulate those who did well in passing the exam and the substantial number who performed exceptionally well.

The structure of the examination paper, as usual, consisted of ten compulsory questions, each carrying ten marks. Each of the first seven questions was subdivided into smaller subsections and it is thought that this may have helped candidates to structure their answers. Although this structure may have had the consequence that candidates wrote more than necessary to gain the marks available it is felt, nonetheless, that the structure was advantageous on the whole. These first seven questions were essentially knowledge based, while the latter three were problem-based scenarios requiring both legal analysis and application of the appropriate law.

The number of candidates who did not attempt all of the questions remains lower than when the current syllabus and structure were initially introduced. This would appear to support the conclusion that candidates and teaching providers are coming to terms with the width of the syllabus. Regretfully, however, it has to be sated that the topic of tort remains a major weakness for candidates, especially given the readiness with which they approach contract questions.

Where candidates failed to attempt all of the questions, this appeared to be as a result of a general lack of knowledge in relation to particular questions, rather than based on any time pressure or structural difficulties in the questions. That being said it is still a fact that the last three problem scenario based questions continue to provide grounds for concern. Too many candidates were let down by their performance in those questions, which continues to suggest a general lack of analysis and application skills if not general knowledge.

It also still remains the case that that some candidates are engaging in question spotting and as a result produce prepared, but inappropriate, answers to some questions. This was particularly the case in response to questions three, five and ten, as will be considered further below in the detailed question analysis.

Specific Comments

Question One

This question was divided into two parts.

(a) The first part, carrying 7 marks, required candidates to explain the difference between criminal and civil law and to demonstrate their understanding by providing examples of each category. Although this topic had never been examined previously, it was done particularly well, with a significant number of candidates scoring full marks. Some candidates did struggle with the need for statutory examples, but were awarded marks where they outlined the types of cases brought civilly compared to those which were criminal. Where candidates did not perform well this tended to be because they engaged in irrelevant discussion on the difference between common law and statute and/or the rules of legal interpretation.

Part (b) for 3 marks, required candidates to identify the courts that deal with civil law and criminal law. In an attempt to limit the scope of the question, and the length of answers, the question was restricted to those courts *below the level of the Court of Appeal*. Again this was extremely well answered, with only a small number of candidates making mistakes. Some candidates did draw the full court structure, including the Supreme Court, which was not required to answer this question.

Question Two
This question required candidates to explain two related aspects of the law of contract relating to offers. Part (a) required an explanation of the meaning of the term 'offer' and part (b) required an explanation of how such contractual offers can be brought to an end.
Most candidates were extremely comfortable in dealing with these topics and most candidates scored high marks, with a significant number gaining full marks.

Answers to part (a) followed a well-worn, but welcome, path:

- define offer
- explain its consequences
- explain what are not offer, essentially invitations to treat.

As usual, but correctly, much use was made of the *Carlill* case.

The majority of candidates performed satisfactorily in part (b) with a significant number gaining full marks.
As expected *Hyde v Wrench* was much cited, but other case and instances were also provided by the vast majority of candidates.

Question Three
This question on the tort of negligence was divided in to two parts, each carrying 5 marks. As in previous sittings, this question was inadequately done.

Part (a) required a consideration of the *standard* of care owed in relation to the tort of negligence. Unfortunately candidates still appear to be experiencing some problems with the law of tort. The majority of candidates chose to interpret the element of the question as being on *duty* of care and discussed the circumstances in which a duty will be applied. They did not understand that the standard of care owed differs from the actual duty owed. Only a small number actually wrote about the standard of care and where they did, marks were awarded. In those circumstances, answers were very detailed and displayed a sound grasp of the subject matter discussing the standard of care applied where there are children involved, the reasonable man test, the thin skull rule, cost and practicability and the standard expected from skilled persons. Therefore it was apparent that some candidates understood the fundamental point of the question and answered it as it was, rather than interpreting it into a question they wanted and had prepared for.

Part (b) required an explanation of contributory negligence in relation to negligence. On the whole it was done much better than part (a). Most candidates were able to define that contributory negligence is, where a claimant contributes to his injury and *Sayers v Harlow* was cited regularly, as it tends to be in relation to every negligence question. Many candidates cited *ICI v Shadwell* and discussed *volenti* in some detail, which might indicate that they had learned a general defences topic and were not totally secure in their detailed knowledge of the topic. The higher marks were awarded to candidates who recognised that contributory negligence does not extinguish liability altogether instead it reduces the damages awarded by the percentage applicable, depending on the level of contribution.

Question Four
This question was once again divided onto two parts, each carrying 5 marks.
Part (a) required candidates to explain the law relating to company promoters. Although not examined particularly frequently, it is a topic that appears to appeal to candidates and on the whole it was done fairly well, although perhaps not as well as it might have been done. While most candidates recognised that a promoter was a person who takes steps to form a company, some candidates spoke at great length about a promoter having a duty to "promote a company" in terms of the marketing, advertising and generating of revenue, which demonstrated a misunderstanding of the question and terminology. Most candidates stated that a promoter had

a duty to submit Form 10, the articles and memorandum of association, but a number failed to acknowledge promoters' fiduciary duties and the consequences of breaching those duties. Some answers gained their marks from their general knowledge of the procedure for registering companies, rather than any detailed awareness of the rules relating specifically to promoters, which again indicates a dangerous reliance on topic spotting.
One related point worth making in relation to this part of question 4 was the number of candidates who wrote about pre-incorporation contracts, which was the topic specifically of part (b). This would indicate that candidates had either not read the full question, or were regurgitating prepared answers. This meant that on many occasions candidates repeated what they had written in part (a) in part (b), a waste of time that a closer reading of the question, or a more confident knowledge of the topic, would have avoided.

In part (b) most candidates were able to recognise that a pre-incorporation contract was one which was entered into prior to the formation of the company, almost but not quite a given. Some answers went a step further and explained the circumstances of such contracts, liability on them and how personal liability could be avoided. This was generally well done.

Question Five
This question required candidates to consider the procedures relating to the issuing of shares to the public and the rules relating to the payment for shares issued. Part (a) related to payment at a premium and carried 5 marks, as did part (b) which related to payments at a discount. Before considering each part in detail it should be noted that, although the question specifically located the issues in the context of the doctrine of capital maintenance, very few candidates referred to that issue, which could have been addressed in either element of the question. Invariably those who did consider capital maintenance gained very high, if not full, marks.

Part (a) was an accountancy focussed question and it was expected that candidates would score quite highly. However, answers tended to be brief and merely too state that a share was an interest in a company, a premium was the difference between market value and nominal value, and did not go any further. Where, as was required, candidates gave examples of a share premium and explained the function of the share premium account and the fact that it was an undistributable reserve, marks were awarded.

In part (b) most candidates explained that shares were issues at a discount if they were issues at less than market value. In many instances, detailed explanations of the difference between bonus issues and rights issues and the rights of existing shareholders then ensued. This was not relevant and showed a lack of understanding in this area around the terminology and the impact of issuing shares at a discount overall. In addition, it is an example an on-going problem that has been referred to in previous exam reports, namely the use of previous exam questions/answers as templates for immediately current exam questions. In this instance, the immediately preceding examination of December 2010 had contained a question about share issues, focussing on rights and bonus issues. Clearly some candidates for the current examination used the model answer for the December 2010 exam as the basis for their answer this question, totally erroneously.

Question Six
This question required candidates to explain three specific aspects of corporate governance

Part (a) for 3 marks, required an explanation of what was actually meant by the term 'corporate governance'. Answers were mixed. Most candidates scored at least one mark by stating that corporate governance was a set of rules and regulations which advised how companies should operate. Some answers explained the need for rules relating to corporate governance in the context of recent corporate scandals and crises. Some mentioned the various committees that led to the current code, which showed a sound understanding of the history of the corporate governance rules.

Part (b) also for 3 marks, required some substantive knowledge of the current code of corporate governance. Quite a few candidates omitted this part of the question. For those who did attempt it, answers were either

accurate and very well informed or guessed at what the governance code was designed to do, often repeating the rules and regulations point from part (a).

Part (c) for 4 marks, required a consideration of the role of non-executive directors (NED) in the context of corporate governance. On the whole it tended to be very well done, with most candidates able to explain the role of the NED. However, some candidates chose to interpret this question as being about the different types of directors and their duties. It would once again seem that candidates had prepared for a question that had appeared in a previous exam paper and consequently a lot of time was wasted making irrelevant points for those candidates who adopted this approach.

Question Seven
This question on different, if related, aspects of employment law was divided into 3 parts.

Part (a) carried most marks, a total of 5 were available and required an explanation of unfair dismissal. Most candidates understood that unfair dismissal was a statutory concept and were able to state easily the circumstances in which dismissal is automatically unfair and circumstances which are fair. They were also able to cite the remedies for any instance of unfair dismissal. A significant number of candidates scored highly on this part and many achieved full marks. If there was a downside to the way this question was dealt with, it was that some that candidates produced over-long and detailed answers, more suitable for a 10 mark question rather than a 5 mark one, as this was.

Part (b) referred to constructive dismissal and carried 3 marks. While a lot of candidates understood that constructive dismissal involved a resignation in circumstances where the employer made it impossible for an employee to continue, some candidates merely repeated what had been said in part (a) or discussed redundancy and the payments in great detail. As stated in relation to part (a) it appeared that they had prepared for a 10 mark question on unfair dismissal and were determined to provide all that they had prepared in that regard. Again this was not worthwhile and did not answer the question set.
Part (c) referred to the no-statutory claim for wrongful dismissal and only carried 2 marks. Only a small number of candidates actually answered this part accurately. Some candidates were mixed up between constructive and wrongful dismissal, whilst a high number thought that wrongful dismissal was a fair dismissal where an employee had done something "wrong", such as misconduct, turned up late for work etc. This was surprising, given the strength of the answers which were produced for 7a. Nonetheless, given the small number of marks available, inadequate performance in this part did not generally have a serious effect on the overall performance in question 7.

Question Eight
This was the first of the three analysis/application questions. It required an understanding of, and an ability to apply, the rules relating to part payment of contractual debts and the waiver of existing contractual rights. It was extremely encouraging to see that a significant number of candidates interpreted the question correctly and were comfortable discussing the rule in *Pinnels* case, *Foakes v Beer* and *DC Builders v Rees*. High marks were awarded where candidates identified the issue correctly and then cited the relevant authority.
However, a significant number of candidates incorrectly applied the law and concluded that Cas was still liable for the debt, even though they had earlier cited payment by a third party as being one of the exceptions to Pinnel. On the whole, high scores were attained on this question. A significant number of candidates, however, did totally misinterpret the question. A lot of candidates thought that the question revolved around consideration and went on to describe executed consideration, past consideration and executory consideration. Very broad answers on contract formation were also seen, together with some misapplication and misinterpretation - *Edwards v Skyways* was frequently seen, as some candidates thought that these weren't actually contracts, but domestic agreements. Low marks were scored in these instances.

On the specific exception to Pinnel's case, that is promissory estoppel, although it was credited as such, some candidates incorrectly used it as the basis for attempting to deal with all the instances in the problem. It would appear that they had prepared an estoppel answer and were determined to use it.

Question Nine

This question focussed on director's authority and whether the informal chief executive had the authority to enter into a contract. It required knowledge of, and application of, the rules relating to the powers of agents generally and the powers of directors as agents, specifically. The better answers made reference to the foregoing and in particular cited the authority of *Freeman and Lockyer* v *Buckhurst Park Properties (Mangal) Ltd* in support of their analysis. The very best also cited *Hely-Hutchinson* v *Brayhead Ltd*.

Whilst some quality answers were produced, a significant number of candidates thought that the scenario involved a pre-incorporation contract and that Hope was a promoter – even though the question was extremely clear that the company had been formed some 12 months ago. The adoption of such an approach is an instance of a technical weakness that has been commented in previous exam reports; the use of topics which appear in the first seven questions to answer the problems in the final three scenario questions. It is extremely unlikely that there will be any *significant* overlap between the two sections of the paper and candidates may be counselled to that effect.

Some candidates also interpreted the question to be about directors' duties in general and so a lot of time was wasted describing the statutory duties which a director has. However once again that is clearly what those candidates had prepared for on the basis of recent past papers.

Question Ten

This question focussed on limited liability of shareholders and the payments due in winding up of a company. Whilst the majority of candidates recognised this, there were a lot of answers which discussed the procedure for winding up, the difference between a voluntary and compulsory winding up and the fact that this was a partnership and not a limited liability company. Some candidates also went down the route of wrongful and fraudulent trading and "lifting the veil of incorporation". This question, did cause a few problems but as in other questions within this exam, candidates often chose to write about what they wanted, rather than the actual question set.

Some quality answers were produced though, which recognised the differences in priority between fixed and floating charges and the impact of a personal guarantee.