
Law & Ethics

Northern Ireland

1st Year Examination

August 2011

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.

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Accounting Technicians Ireland
1st Year Examination: Autumn Paper 2011
Paper: LAW & ETHICS (NI)

Friday 19th August 2011 - 9.30 a.m. to 12.30 p.m.

INSTRUCTIONS TO CANDIDATES

For candidates answering in accordance with the law and practice of Northern 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

Westin is an employee and executive director of Concept Media Ltd. The company has been suffering substantial losses in recent months and the auditors have been asked to review the accounts for the purpose of introducing measures to curb unnecessary spending. During the course of the review the auditors discover discrepancies between the company's sale records, stock invoices and cheques received. Following a detailed investigation, involving the bank and the company's debtors, they have come to the conclusion that Westin has been drawing company cheques payable to cash and crossing cheques paid by the company's debtors and lodging them both into his own personal bank account.

Concept Media Ltd has contacted Accounting Technicians Ireland, of which Westin is a qualified member, and told them of their suspicions. They have also provided them with a copy of the evidence upon which their suspicions are based. Accounting Technicians Ireland referred the matter to the Complaints Committee and the outcome of the Committee was that the matter was too serious to be dealt with by them. Accordingly, the complaint was passed to the Disciplinary Tribunal. The Disciplinary Tribunal have convened a hearing for this matter and Westin seeks your advice in relation to this hearing and this allegation.

- a) Explain the composition and process for appointment of members to the Disciplinary Tribunal.
4 Marks
- b) Outline any FIVE rights of a member at a hearing of the Disciplinary Tribunal.
5 Marks
- c) Discuss any THREE potential outcomes of a hearing of the Disciplinary Tribunal.
3 Marks
- d) Concept Media Ltd has also reported Westin to the Police on suspicion of fraudulent trading. Explain the elements of this offence and discuss the sanctions that can be imposed upon Westin if he is found guilty of fraudulent trading.
8 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

Elaine and Frank have been running a successful auditing and accounting practice in partnership for the past fifteen years. They have just been notified by their solicitor that a new European Directive has been enacted allowing auditors to establish limited liability companies. The solicitor has recommended to them that they should convert the partnership into a company, due to its many advantages.

Explain to Frank and Elaine the characteristics of a limited company.

Total 10 Marks

P.T.O. 

QUESTION 3

Harvest Cereals Ltd has just been put into compulsory liquidation. Richard is a shareholder in this company, owning 100,000 £1 preference shares of which 80 cent is fully paid. Richard is unsure of his rights and obligations in respect of these shares upon the liquidation of the company.

- a) Define a share. **1 Mark**
- b) Outline the characteristics of preference shares. **6 Marks**
- c) Explain the nature of a partly-paid share and assess whether Richard has any liability to Harvest Cereals Ltd upon liquidation in relation to his preference shares. **3 Marks**
- Total 10 Marks**

QUESTION 4

In the context of company directors explain the following:

- a) The distinction between a *De Facto* Director and a Shadow Director. **3 Marks**
- b) Any THREE grounds on which a director may be disqualified. **3 Marks**
- c) The procedure to effect the lawful removal of a director. **4 Marks**
- Total 10 Marks**

QUESTION 5

Firelight Pharmaceuticals Ltd has recently discovered that their company auditor has been passing on trade secrets to a competitor. Consequently they have decided to call a General Meeting for the purpose of removing the auditor. In this regard advise them as follows:

- a) What is the notice requirement to call a General Meeting? **1 Mark**
- b) What type of resolution is required to effect the removal of an auditor? **1 Mark**
- c) What are the rules regarding quorums and meetings? **4 Marks**
- d) What are the rules regarding proxy voting at meetings? **2 Marks**
- e) What are the rules regarding the minutes of company meetings? **2 Marks**
- Total 10 Marks**

QUESTION 6

The auditors of *Coltrane Classic Musical Supplies Ltd* have recently notified the company that it is insolvent. The directors do not want to trade while insolvent and risk prosecution for wrongful trading, therefore they have decided to effect a creditors' voluntary liquidation of the company.

a) Discuss the procedure to effect a creditors' voluntary liquidation.

5 Marks

b) Outline the priority of payment of company debts upon liquidation.

3 Marks

c) List any TWO reasons why a creditors' liquidator may vacate or be removed from his position.

2 Marks

Total 10 Marks

P.T.O. ☐

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

In the context of the doctrine of precedent discuss the following:

- a) The meaning of the terms "*stare decisis*" and "*ratio decidendi*".

3 Marks

- b) The situations where precedent must be followed and the situations where precedent may be departed from.

3 Marks

- c) Any TWO advantages and any TWO disadvantages of the doctrine of precedent.

4 Marks

Total 10 Marks

QUESTION 8

The Clariton Hotel obtained the following bookings for the last weekend in April:

- (1) Matt and Kate booked their wedding reception for 300 guests in the hotel's main function room. They paid a deposit of £5,000 and a further £10,000 was due to be paid on the day of the wedding.
- (2) Jenny booked a surprise 40th wedding anniversary party for her parents to be hosted in the hotel's gardens. She paid a deposit of £2,000 with the balance of £2,000 to be paid on the day of the party.
- (3) The Northern Ireland Animation Federation (NIAF) booked the Hotel's conference room to host a presentation by Gregory Steinback, an Oscar winning animator running Hollywood's most successful animation studio. The NIAF have already paid the hotel the £3,000 for the room and tea/coffee and lunch facilities for the delegates and the presenter.

On the Friday before the last weekend in April the hotel manager received the following calls: (1) Matt rang informing the hotel that he had to cancel the wedding reception as Kate has contracted leprosy following a period working abroad and has been quarantined on the instructions of the Department of Health, (2) Jenny rang to tell the hotel that the anniversary party was cancelled as her mother has just discovered that her father is a bigamist and has been married to another woman for the past 23 years, and (3) the NIAF rang cancelling the conference as the sole speaker has just died of a massive heart attack.

- a) Define frustration and explain any THREE circumstances under which a contract may be discharged by frustration.

7.5 Marks

QUESTION 8 (*Cont'd*)

- b) Determine whether the contracts created between the Clariton Hotel and (1) Matt and Kate, (2) Jenny and the (3) NIAF are frustrated and outline the consequence if frustration arises.

2.5 Marks
Total 10 Marks

QUESTION 9

Ethel has been employed as a locum dentist with the South Eastern Health Board for the past eight years. Her contract describes her as an independent contractor, and states that she is entitled to be paid at a rate of £200 per day, without statutory deductions. Her duties revolve around providing cover for absent dentists employed by the South Eastern Health Board in hospitals, clinics and residential treatment facilities under their jurisdiction. In working as a locum dentist Ethel is required to contact the administration offices of the South Eastern Health Board each Friday so that they can notify her of where they require her to work for the next week. Ethel is not required to use her own dental tools (new tools are provided to her free of charge every year by the South Eastern Health Board) and although she uses her own car when travelling to and from dental facilities she is paid a maintenance fee for the car of £2,000 per year. This year the South Eastern Health Board sent Ethel on a training course in relation to advancements in cosmetic dentistry and covered all of her expenses while completing this course.

Two months ago Ethel administered an anaesthetic on a patient that caused an allergic reaction. The patient's medical chart clearly indicated the allergy but Ethel had not bothered to read the chart as she was extremely busy that day. The patient is planning on suing for his injuries – but is unsure whether he should sue Ethel or the South Eastern Health Board.

- a) List TWO reasons outlining the importance of the distinction between an employee and independent contractor.

2 Marks

- b) Outline any TWO tests used by the Courts to distinguish between a person employed under a contract of service and a contract for service. **(3 marks x 2)**

6 Marks

- c) Determine whether the patient should sue Ethel or the South Eastern Health Board in respect of his injuries, providing reasons for your answer.

2 Marks

Total 10 Marks

QUESTION 10

Abbey is a self-employed accountant. For the last three years she has been preparing the accounts of *Tasty Treats Confectionary*, a national chain of confectionary stores. She received a call three months ago from the Managing Director of *Tasty Treats* informing her that a multinational company was considering purchasing the company, and asking her to prepare an up-to-date financial statement to present to his company. She completed this task as requested and the takeover was successfully completed. However, she has recently been contacted by the Chief Financial Officer of the multinational company informing her that they have discovered serious errors in the accounts she prepared. In particular, they noted that she had failed to depreciate the value of *Tasty Treats* buildings, in light of the downturn in the Northern Ireland property market, that she had seriously over-valued the company's stock, and that she had omitted any reference to the former director's retirement bonuses and pensions. As a consequence of these errors the multinational believes that it over-paid for *Tasty Treats Confectionary* in the amount of £230,000 and they intend to sue Abbey in negligence for this loss.

- a) Discuss the various tests used by the Courts to determine the existence of a duty of care, and based on this discussion advise Abbey whether she owed the multi-national company a duty of care in relation to the accounts of *Tasty Treats Confectionary*.
- b) Outline the limitation periods in which a plaintiff must bring their action arising from negligence.

8 Marks**2 Marks****Total 10 Marks****QUESTION 11**

- a) Sarah is the office manager of *Eddison Accountants*. As part of her duties Sarah regularly orders office supplies from *Fortrum and West*. Last month Sarah handed in her notice to *Eddison Accountants* and informed them that she and her husband were establishing their own wedding planning business. Last week *Eddison Accountants* received an invoice from *Fortrum and West* for the payment of office supplies in the amount of £2,000. As *Eddison Accountants* could not locate any of the supplies listed on the invoice they decided to investigate the matter further. Following investigation it has been discovered that the goods were ordered by Sarah and that she took these goods from *Eddison Accountants* to use in her own business. *Eddison Accountants* are now refusing to pay *Fortrum and West* for these goods on the basis that Sarah was acting for her own purposes when she ordered these goods and not on behalf of *Eddison Accountants*.

Explain the rule that a contract of agency may be created by estoppel and in light of this explanation assess whether *Eddison Accountants* is legally obliged to pay the £2,000 due to *Fortrum and West*.

5.5 Marks

- b) List and explain any THREE duties owed by an agent to a principal.

4.5 Marks**Total 10 Marks**

1st Year Examination: August 2011

Law & Ethics NI

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.

Suggested Solution to Question 1

- A. Disciplinary Tribunal – Composition/Appointment: it consists of not less than nine persons, a majority of the members must be person's who are not members of Accounting Technicians Ireland, and at least three of whom are qualified lawyers, and three of whom are members of Accounting Technicians Ireland **(2.5 marks)** – appointment: appointments are made by the board of management of the Accounting Technicians Ireland for a term of five years, which may be renewed for one subsequent term **(1.5 marks)**
- B. Rights of a Member at the Disciplinary Tribunal: (1) to attend and be heard, (2) to be represented (by legal counsel or a member of Accounting Technicians Ireland), (3) to receive any material regarding the complaint from Accounting Technicians Ireland in advance of the hearing, (4) to cross-examine witnesses, (5) to adduce documentary evidence, (6) to call witnesses, and (7) to make any submission that they desire **(any 5 x 1 mark = 5 marks)**
- C. Potential Outcomes of the Disciplinary Tribunals: (1) exclusion or suspension from membership of Accounting Technicians Ireland, (2) withdrawal of licence or permit to practice, (3) the imposition of a reprimanded or a severe reprimand (fine), or (4) a fine not exceeding £30,000 **(any 3 x 1 mark = 3 marks)**
- D. Fraudulent Trading: definition under CA 2006 –elements of the offence: where a company or any person “knowingly” and “intentionally” was a party to the fraudulent carrying on of the company's business, with the intent to defraud its creditors – the fraudulent act may be either a one-off or a continuous action to complete the offence – examples: *Re Hunting Lodges Ltd (1985)*, *Re Kelly's Carpetdrome Ltd (1983)*, *Re Aluminium Fabricators Ltd (1983)*, – siphoning-off company assets, using company assets for personal purposes, keeping two sets of books of account etc **(5.5 marks)** – criminal sanctions (on summary conviction imprisonment not exceeding 6 months &/or a fine – on conviction on indictment imprisonment not exceeding 10 years &/or a fine) – civil sanctions (personal liability for the debts of the business arising from the fraudulent act) **(2.5 marks)**

Suggested Solution to Question 2

- Characteristics: (1) Separate Legal Entity: a company is a separate legal entity from its members (it can contract in its own name/sue or be sued in its own name etc) **(2 marks)** (2) Perpetual Succession: a company has perpetual existence and will only cease to exist where it is liquidated/struck off the Register of Companies **(1.5 marks)** (3) Liability: company shareholders have limited liability – on liquidation they are not required to make a contribution towards company debts where their shares are fully-paid **(1.5 marks)**, (4) Formation: a company must be registered with the Companies House (through lodging a Memorandum of Association, an Articles of Association, and other forms) **(2 marks)**
- Miscellaneous issues: (1) Governing Legislation: companies are governed by the Companies Act 2006, (2) Taxation – company profits are assessed for the purpose of corporation tax, (3) Subscription: company directors must be +1 (private company) or 2+ (public company), (4) Publicity requirements – companies have significant publicity obligations in return for separate legal existence (such as Registers, Annual Return and Accounts, Constitutional Documents), (5) Management of the business: in a company the shareholders own the company but the directors are responsible for its management – therefore there is a theoretical distinction between ownership and management **(any 3 x 1 mark each = 3 marks)**

Suggested Solution to Question 3

- A. Share: a share represents an investment in a company – it was defined in *Borland's Trustee v Steel Bros & Co Ltd (1901)* as "... the interest of the shareholder in the company, measured, for the purposes of liability and dividend by a sum of money" **(1 mark)**
- B. Preference Shares: these are shares that carry one or more rights than ordinary shareholders (such as the right to a dividend or capital) – generally they are more expensive to purchase than ordinary shares and in exchange preference shareholders will receive some form of preferential benefit or additional benefit over ordinary shareholders – rights attached to preference shares may include: (1) a preference shareholder is entitled to a fixed dividend payment, when declared by the company – presumed to be cumulative (unless otherwise stated – if the preference shares are preferred as to the dividend then the dividend is paid ahead of ordinary shareholders, (2) a preference shareholder is entitled to a return on their capital investment on liquidation, if surplus funds are available and to share in any surplus on liquidation (unless otherwise indicated by the company's own Articles of Association), (3) preference shareholders do not usually have the right to vote or participate in general meetings – although they do have the right to attend all company meetings – generally they provide more security and less risk than ordinary shares **(6 marks)**
- C. Partly-Paid Shares: Richard has purchased partly-paid preference shares – the paid-up amount is reflected on the balance as paid-up/called-up issued share capital – unpaid portion is reflected as unpaid capital/reserve capital (where the unpaid portion is reserved exclusively for liquidation purposes) – payment is required at either a pre-agreed future date or upon liquidation of the company (whichever arises first) – as the company is in liquidation Richard is obliged to pay the unpaid portion (£20,000) **(3 marks)**

Suggested Solution to Question 4

- A. *De Facto*/Shadow Directors: a *de facto* director is a director who is not formally appointed as a director, but acts as having undertaken the role of a director – he is ‘held out’ by the company as a director even though he has not been officially appointed as a director and in the event of a breach will be liable as if they were properly appointed – whereas a shadow director is a person in accordance with whose directions or instructions the directors of a company are accustomed to act – this person does not take the title of director and remains in the background of a company, but they instruct and direct the board of directors as to how to act in relation to company matters **(3 marks)**
- B. Disqualification: (1) the director becomes bankrupt, (2) he becomes of unsound mind, (3) he is absent for 3 months or more from the company, without the prior permission of the directors, (4) he is convicted of fraud, (5) general misconduct in connection with companies (6) he becomes Disqualified by virtue of the Companies Act 2006 **(any 3 x 1 mark = 3 marks)**
- C. Removal of a Director: (1) a director can be removed from office by the passing of an ordinary resolution at a general meeting, (2) extended notice of 28 days or more must be served by the company on the shareholders indicating the intention to remove the director, (3) a copy of the resolution proposing to remove the director must be given to the director concerned, (4) the director has a right to make written representations and have them circulated by the company to all the members before the general meeting, (5) if the representations are not sent they must be read out at the general meeting, (6) the director has the right to speak at the meeting, (7) a vote is then taken and if passed by a majority of those present the Companies Registry must be notified **(4 marks)**

Suggested Solution to Question 5

- A. Notice: the notice requirement is 21 days clear notice for a public company and 14 days for a private company **(1 mark for either one)**
- B. Resolution: an ordinary resolution with special notice of 28 days is required to effect the removal of an auditor **(1 mark)**
- C. 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 persons – if it is a one person company then one person required for a quorum (s.318 Companies Act 2006) - the quorum may be present in person or by proxy **(4 marks)**
- D. Proxy: This is a document appointing and the appointment of a person to attend, vote, speak on behalf of another shareholder at a meeting – 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 applies to a company having share capital – and the ability to appoint a proxy must be authorised by the Articles of Association **(2 marks)**
- E. Minutes: all companies are required to keep minutes of all company meetings – these minutes are usually maintained by the company secretary and are recorded evidence of the proceedings of the meeting once signed by the chairperson – any

member of a company has the right to inspect the minutes of all general meetings **(2 marks)**

Suggested Solution to Question 6

- A. 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 14 days of the resolution being passed to commence a creditors' voluntary winding up (notice of the creditors' meeting must be sent to all the creditors at least seven days before the meeting and also be advertised in a Belfast newspaper and two daily newspapers circulating in the area), (4) 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, (5) a vote is then taken by the creditors to agree to a creditors voluntary liquidation, and a liquidator will be appointed, and (6) a Liquidation Committee may also be appointed to assist the liquidator **(5 marks)**
- B. Priority of Payment of company's debts upon liquidation: (a) the costs of liquidation, (b) the fixed charges in the order that they were created (c) the preferential debts (occupational scheme contributors and employees), (d) the floating charges in the order they were created (e) the unsecured creditors, (inland revenue) and (f) members dividends (g) the residue to the shareholders **(3 marks)**
- C. Vacation of Office: (1) after presentation of his final report at the creditors meeting, (2) if he becomes disqualified from holding the position, (3) in prescribed circumstances (such as incapacity, bankruptcy, lack of independence etc) **(any 2 x 1 mark = 2 marks)**

Suggested Solution to Question 7

- A. Definitions: "*stare decisis*" means "let the decision stand" – it means that the decision of a higher court stands over or binds the decision of a lower court **(1.5 marks)**, and "*ratio decidendi*" means the "reason for the decision" – this describes the core part of a legal decision dealing with the question of law under review **(1.5 marks)**
- B. Precedent: precedent must be followed when the material facts/legal issues of the case in question are sufficiently similar to the previous case establishing the precedent **(1.5 marks)** – the court will not have to apply the precedent if the decision was either incorrectly made or was overturned by a higher court – in exceptional circumstances precedent will not be applied if it would undermine the interests of justice to do so **(1.5 marks)**
- C. Advantages/Disadvantages: advantages – (1) Consistency: the same principles are applied resulting in a set of consistent decisions, which ensures a just legal system, (2) Certainty: the use of binding precedent means that lawyers and clients will know how their issues will be resolved and have some certainty as to the outcome of their case, and (3) Efficiency: it enables judges to make new laws in reaction to particular circumstances arising from recent developments in society (it is much faster than having to wait for the legislature to enact new law) **(any 2 = 2 marks)** – disadvantages: (1) Inflexibility: it unnecessarily forces courts to follow

previous decisions (other common law countries do not have the doctrine of binding precedent – for example, France), (2) Unfairness: a judge may create an unfair precedent that must then be followed by other courts until a higher court overrules it, (3) Unclear: binding decisions may be unclear or the wording ambiguous forcing the judges to spend time deciphering the law, and (4) Vast numbers: many decisions become case law and there is the possibility of two conflicting precedents being created **(any 2 = 2 marks)**

Solution to Question 8

- A. Frustration: this is where a contract cannot be completed as agreed due to some unforeseeable factor outside the control of the contracting parties **(1.5 marks)** – circumstances where a claim of frustration will be upheld: (1) impossibility- when the subject-matter of the contract is destroyed – in Taylor v Caldwell (1863) the destruction of a music hall by a fire 4 days before a performance was due to take place was held to amount to frustration; in contracts of personal service, the death or incapacity of one party will amount to frustration – in Condor V Barron Knights(1966) the employment contract of a drummer was deemed frustrated when medical evidence proved that he would not be able to work 7 nights a week, (2) illegality/government intervention: where government interference prevents performance of the contract – in Avery v Bowden and Fibrosa Spolka where the Crimean war and Second World War forced the Governments to implement procedures which meant that it was impossible to carry out their contractual obligations and so the contracts were deemed frustrated, (3) non-occurrence- where a particular event, which is the sole reason for the contract fails to take Krell v Henry (1903), when the coronation procession of Edward VII had to be cancelled due to the illness of HRH – consequently many arrangements made in which persons obtained the right to view the procession from hotels and rooms overlooking the route came before the English Courts – and the Courts ruled that the contracts were frustrated) **(3 x 2 marks = 6 marks)**
- B. Conclusion that the contracts between the Clarendon Hotel and (1) Matt and Kate, and the (2) NIFA are frustrated – due to (1) government interference preventing the performance of the contract and (2) death/incapacity – the contract between the Hotel and Jenny is not frustrated as the frustration is self-induced **(1 mark)** – consequences of frustration – the contract automatically comes to an end and any rights and obligations that existed before the frustration still remain but any rights and obligations that exist after the frustration are extinguished by the frustration – in effect, the “the loss lies where it falls” except if there is a total failure of consideration **(1.5 marks)**

Suggested Solution to Question 9

- A. Importance of the Distinction: (1) statutory protection is only afforded to employees not to independent contractors, (2) an employer is vicariously liable for the actions of employees but not generally independent contractors, (3) an employee has priority of payment over an independent contractor in the event of the liquidation of a company, (4) an employee may obtain social benefits (health insurance, pension, training, education etc) from an employer that are not accessible to a contractor, (5) the social welfare code distinguishes between an employee and a contractor for the purpose of benefits, and (6) the tax code distinguishes between an employee (PAYE) and a contractor (self-assessed) **(any 2 = 2 marks)**
- B. Tests: (1) Control Test: questions whether the employer controls all aspects of the employees work – in effect have they control over the work done, the method of completion, the means employed to achieve the result, and the time and place the task is to be done – there are inherent problems with this test especially as business sizes increased and technology advanced (2) Integration Test: this test asks whether the worker is employed as part of the business, and the work done is integral to the organisation–“is part and parcel” of the organisation- application of this test is illustrated in *Cassidy v Minister for Health* (1957)–resident surgeon employee as integral part of hospital- *Whittaker v Minister of Pension and Health Insurance* (1967)- trapeze artist was integral part of the circus although she carried out other tasks- *Beloff v Pressdam* (1973)- worked own hours and for other newspapers but held to be integral part of business the main problem with the integration test is the difficulty in defining ‘integration’ and ‘organisation’, (3) Economic Reality/Multiple Test: this test questions whether the person works in return for remuneration, subject to the employers control to a certain degree, and considers if provisions are consistent with a contract of service- see *Ready Mixed Concrete v Ministry of Pensions* (1968)- operated own business that carried own financial risk therefore independent contractor- (4) Mutuality of Obligation Test: favoured test in NI Industrial tribunals- is the employer obligated to provide work and is the person obligated to- examine numerous factors- duration of employment, regularity of employment, ability to refuse work- *Carmichael v National Power* (2000)- no obligation on power station to provide work and no obligation for worker ‘the tour guide employed on a causal basis’ to accept work. **(any 2 x 3 marks = 6 marks)**
- C. Conclusion: Ethel is an employee as she is controlled regarding when and where she works – there is no evidence of entrepreneurship as her tools are provided and a sum is paid towards the maintenance of her car by the South Eastern Health Board – in addition, there is evidence of integration – by the South Eastern Health Board paying for her to attend a training course – consequently, the patient should sue the South Eastern Health Board as they are vicariously liable for the actions of employees **(2 marks)**

Suggested Solution to Question 10

- A. Duty of Care: original test based on the decision of Lord Atkin in (Donoghue v Stevenson (1932)) – known as the “neighbour principle” – in effect you are liable for your negligent acts to your neighbour – 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)** – expansion of the doctrine in recent years in Caparo Industries Plc v Dickman (1990) – now three-tier test: (1) was the harm reasonably foreseeable, (2) was there a relationship of proximity between the parties Swiney v Chief Constable of Northumbria Police (1999), and (3) considering the circumstances, is it fair, just and reasonable to impose a duty of care, Hill v Chief Constable of West Yorkshire (1988) **(3 marks)** – conclusion that a duty of care exists between Abbey and the multi-national company as (1) the harm was foreseeable (as she was aware that her up-to-date financial statement assessing the financial position of the company would impact the takeover price), (2) there was a degree of proximity between the parties, and (3) there are no reasons to justify exclusion of the duty **(1 mark)**
- B. The Limitation Act 1980: claim in negligence and some other torts is 3 years from the date of the wrongful act or from the date that the damage resulting from the wrongful act became known. **(2 marks)**

Suggested Solution to Question 11

- A. Agency by Estoppel: this is where the principal allows a third party to believe that the person is his agent – or where the actions of the principal have postulated this fact – this situation may arise where a person acted as agent in the past and continues to act as such after the agency relationship has been terminated – it may also arise by a course of dealing – such as in the case of employees, examples include: *Freeman & Lockyer V Buckhurst Park Properties (Mangal) Limited (1964)* – in these circumstances the agent does not have *actual* authority, but instead the agent has apparent or ostensible authority **(4.5 marks)** – conclusion that *Eddison Accountants* is legally obliged to pay the £2,000 due to *Fortrum and West* as she has acted as an agent of *Eddison Accountants* in the past and in this situation *Fortrum and West* had no reason to believe that she was acting outside the scope of her duties and for her own personal interest – the only option available to *Eddison Accountants* is to seek recompense of this £2,000 from Sarah **(1 mark)**
- B. Duties of an Agent: (1) Duty to act with due care and skill: an agent should apply a reasonable standard of care and if he holds himself out to have expertise then the agent must apply the appropriate standard that a reasonable person with that skill would do, *Chariot Inns v Assicurazioni Generali SPA (1981)*, (2) Duty to obey instructions and duty not to exceed authority: an agent should carry out his instructions as laid out in the contract or as stated to him by the principal and should not exceed his authority as he may be held liable under the contract, (3) Duty to avoid conflicts of interests and make full disclosure: an agent is under an obligation to make full disclosure of all facts material to the contract, including any potential conflicts of interest, *McPherson v Watt (1877)*, (4) Duty not to make a secret profit: an agent is under a duty not to make a profit out of the transactions he carries out on behalf of his principal – although he is entitled to keep any profits if the principal has knowledge of these profits, *Sherrard v Barron (1923)*, (5) Duty not to delegate: an agency relationship is usually a personal relationship and the agent should not delegate his duties unless authorised to do so by the principal, *John McCann & Co v Pow (1974)*, (6) Duty to Account: an agent is under a duty to keep proper accounts of all dealings and provide accounts for all monies received from transactions – the agent must be prepared to disclose his accounts to the principal upon request, and (7) Duty to communicate and keep confidentiality: an agent should communicate all relevant information to the principal and keep all information confidential – any authorised disclosure to a third party is actionable **(any 3 x 1.5 marks = 4.5 marks)**

1st Year Examination: August 2011

Law & Ethics NI

Examiner's Report

General comments:

The performance of students was very good in this examination with over two thirds of students gaining a pass and a number of these students gaining a merit grade. I was very pleased with the standard of answers given and could clearly see that some students have worked very hard.

Students generally did better in the company law section and produced answers of a very high standard. The general law section was not as well answered and question 10, as in previous years was very poorly answered. In relation to the compulsory ethics question most students gained at least half marks in this question.

Many students who did not pass the examination did produce at least one good answer in the exam. Therefore, as I have said before, I encourage these students to take the time to revise this course, as they clearly have the ability to pass the exam, provided they put in the required revision.

For students who are re-sitting this exam I would advise:

1. Revise topics from the manual and not from past paper solutions
2. Read questions carefully and answer all parts (if you do not know the answer to one part have a guess- do not leave blank spaces as marks cannot be awarded).
3. Answer only what you have been asked. A factually correct lengthy paragraph will not gain you any marks if it does not answer the question being asked.
4. Avoid giving one word answers unless the answer so requires. It is important that the examiner knows that the student understands what they are writing.
5. Avoid giving case names without any reference to the facts of the case. Also, if you cannot remember the case name tell the examiner the facts of the case.
6. Students should always look at the marks awarded for each question as a guideline as to how much or how little detail is required.

In terms of presentation, I was very pleased with the papers this year and would remind students to:

1. Write clearly in a dark coloured pen
2. When a question is divided into separate parts, for example sections (a) and (b), students should answer each section separately showing a clear division between each answer.

Question 1 (compulsory question):

This question was generally very well answered. Students however, tended to score poorly when answering section (d). I urge students to revise the ethics chapters (chapters 16 and 17) in the manuals inside out as you are guaranteed a question worth 20 marks on these chapters in the exam.

- (A) This section was generally well answered with students referring both to the composition and the appointment of members. Students who lost marks failed to answer one or the other.
- (B) This section was generally very well answered with students referring to at least 5 rights. Students who lost marks listed less than five rights.
- (C) This section was generally well answered. Many students however incorrectly listed 'imprisonment' as a potential outcome.
- (D) This section was quite poorly answered. Many students gained full marks in the above sections and then failed to gain few or no marks at all in this section. Many students could not define fraudulent trading and some discussed money laundering and other irrelevant offences.

Question 2:

This question produced mixed results. Many students failed to mention key characteristics of a limited company, such as being a separate legal entity and as having perpetual succession. Some students produced lengthy but irrelevant answers that discussed the registration process of a company.

Question 3:

This question was generally well answered.

- (A) The majority of students correctly defined a share
- (B) Many students scored nearly full or full marks in this question. Some students discussed the differences between ordinary and preference shares and produced a comparison table using one or two word answers, such as 'less risky' or 'more security'. I would encourage students to focus on the question asked i.e. characteristics of a preference share and provide answers with sufficient detail, so that the examiner is sure that you understand fully what you are writing.
- (C) This section was not so well answered. Many students failed to define what a partly- paid share means and an even greater number of students incorrectly stated that Richard was not obliged to pay the unpaid portion of his share capital i.e. £20,000.

Question 4:

This answer produced mixed results overall.

- (A) Many students were unable to define with clarity the distinction between *de facto* and shadow directors. Those students who did score well had obviously revised this section of the manual in detail and many referred to the case of *Secretary of State for DTI v Deverell* (2000).
- (B) This part was very well answered and students were able to list at least three grounds for disqualification
- (C) This section was not well answered. Many students were not able to give even a very basic guide to the procedure of removing a director.

Question 5:

Candidates produced a varied standard of answers.

- (A) Many students failed to give the correct notice periods of either 14 days for a private company or 21 days for a public company. Either answer scored the full one mark.
- (B) Very few students correctly advised that an ordinary resolution with special notice is required to effect the removal of an auditor.
- (C) Students who understood what was meant by 'quorum' did well in this question. Many students were unable to define a quorum as the minimum number of people required to attend a meeting and therefore scored poorly.
- (D) Again, as with section (c) above students who understood what was meant by 'proxy' did well in this question. However, many students were not able to show the examiner that they understood what a proxy was.
- (E) Some students scored full marks in this question and most students gained at least one mark by referring to the requirement in company law that minutes of all meetings are kept.

Question 6:

This question produced some disappointing results. However, some students did score well and displayed a competent knowledge of the liquidation process.

- (A) Few students scored full marks in this question and many students failed to score any marks. It was clear that students generally had not revised the procedure to effect a creditors' voluntary liquidation. Many students recited the differences between voluntary and compulsory liquidation and various other past paper solutions.
- (B) Surprisingly, many students failed to provide a correct outline of the priority of payment of company debts upon liquidation. This is a basic and core element of the topic of liquidation which all students should learn. Those students who had prepared well were able to give the correct order and scored full marks.
- (C) This section was generally very well answered.

Question 7:

This question was not very popular with students but some students scored very well.

- (A) Some students scored full marks but the majority of students failed to gain any marks. Some stated that they were Latin terms but then did not go on to expand what they meant.
- (B) This section was better answered and nearly all students scored well.
- (C) Most students could correctly list at least one advantage and one disadvantage, but I must warn students that one word answers should be avoided. Some students simply listed the words 'Consistency' 'Certainty' and 'Efficiency' without explaining what they meant by these words. Other students confused the advantages and disadvantages of delegated legislation with those of precedent.

Question 8:

Overall, this question was one of the best answered questions in this year's paper with many students scoring full marks or nearly full marks.

- (A) The majority of students could define what was meant by frustration and were able to give at least 3 circumstances of frustration and provide case law examples.
- (B) Students lost one or two marks in this section by incorrectly stating which contracts were frustrated or not frustrated. Unfortunately, only very few students referred to the consequences and the majority incorrectly stated that deposits would be refunded etc. Students should remember the rule that in frustration 'the loss lies where it falls.'

Question 9:

This question was generally well answered and those candidates who performed well in the exam displayed a very competent level of knowledge of this topic.

- (A) This section was well answered and most students provided at least two reasons. Students should note that they were only asked to provide two reasons and that the question had a maximum of two marks.
- (B) Some students displayed a very competent level of knowledge of the tests used by the Courts and referred to case law. However, many students did not score well and failed to refer to any of the four tests but stated that the two tests were called 'contract of service' and 'contract for services.'
- (C) Stronger candidates correctly stated that the South Eastern Health Board should be sued.

Question 10

The majority of candidates who chose to answer this question failed to answer the question set.

- (A) The majority of candidates could not define the tests used to establish a duty of care. Very strong candidates referred to the 'neighbour' test and the three tier 'modern day test' citing case law examples. The majority of candidates who attempted this question discussed the other elements of negligence and despite being factually correct could not be awarded any marks.
- (B) Many candidates did gain some marks in this question by answering part (b) in relation to limitation periods correctly even if they had not attempted part (a). In some situations these additional two marks brought a student up from a fail mark to a pass mark. Therefore, I encourage students to always attempt to answer each part of a question. Some students gave incorrect answer such as '24 hours' as the limitation period.

Question 11:

The answers to this question provided mixed results. Strong candidates provided detailed answers and gained close to full marks. Weaker candidates discussed irrelevant aspects of agency law and recited some past paper solutions, such as the duties of agents or the differences between express and implied authority.

- (A) Generally students who performed well in this question correctly stated that Eddison Accountants were legally obliged to pay and that they may have an option to then sue Sarah. Stronger students were also able to refer to case law or provide practical examples.
- (B) Weaker students confused duties of an agent with duties of directors. However, the majority of students gained at least some marks in this section by referring to the general duty to act with due care and skill.