

# Examination Paper, Solutions and Examiner's Report

Paper: Business Law

April 2010

## **SECTION A – Answer THREE COMPULSORY questions**

### **QUESTION 1**

Howard owns a shop selling computer hardware. As part of a midweek promotion, Howard puts a new monitor in his shop window on Wednesday morning with a sign saying:

“Special Deal. Exceptional Value. Don’t Miss Out – Monitor on offer for £600. Usually £850.”

Sam sees the sign on Wednesday morning whilst sitting at traffic lights in a taxi on the way to the airport. The monitor is just what he is looking for. So, at 10.30 am, just before boarding his flight, he sends Howard an email saying that he will buy the monitor for £600.

At the same time as Sam is driving by in the taxi, Martha goes into Howard’s shop and offers him cash of £550 for an immediate sale. Howard refuses Martha’s offer but says he would accept £600. Martha says she is willing to pay only £550 and leaves the shop. She soon realises that Howard’s price is very competitive so, at 10.30 am that morning she sends Howard an email saying that she will pay the £600 asking price.

Later that same day Jake goes into Howard’s shop and offers him £550 for the monitor. Since trading has been particularly slow Howard agrees to sell the monitor to Jake for £550. Jake promises to return the next morning with the money.

The next morning Howard reads both Sam and Martha’s emails before Jake turns up to pay for and collect the monitor.

#### **Required:**

- (a) **In relation to the law of contract, explain the difference between an offer and an invitation to treat and why the distinction between them is important. In your answer you should make reference to appropriate case law.**

**(12 marks)**

- (b) **With reference to the events in the above scenario, advise Howard of his legal position as regards (i) Sam, (ii) Martha and (iii) Jake.**

**(8 marks)**

**(Total 20 marks)**

## **QUESTION 2**

Jonathan, a sole trader, has been trading successfully for a number of years as a financial consultant. With a view to expanding his business and to marketing it nationally he has decided to incorporate the business as a company.

**Required:**

- (a) **Explain to Jonathan the three different ways in which private companies are classified by the Companies Act 2006.**

**(3 marks)**

- (b) **Explain to Jonathan how the statutory rules differ as between public companies and private companies, regarding the requirements to be satisfied before trading can commence.**

**(4 marks)**

Every company must have Articles of Association.

**Required:**

- (c) **Briefly outline the type of information contained in a company's Articles of Association.**

**(2 marks)**

- (d) **Explain the rules relating to amending a company's Articles, including the provisions of the Companies Act 2006 relating to conditional entrenchment.**

**(4 marks)**

**(Total 13 marks)**

### **QUESTION 3**

It is generally recognised that debt can be bought and sold. It greatly promotes the marketability of debt if it is in negotiable form.

**Required:**

**(a) Describe the features of non-negotiable debt that make it not readily marketable and compare these features with those of a negotiable debt instrument.**

**(5 marks)**

**(b) Explain two ways in which a bill of exchange can be dishonoured and describe the steps a holder of a dishonoured bill is required to take in the event of dishonour. How would your answer differ if the bill was a foreign bill?**

**(4 marks)**

**(c) Describe the characteristics of a letter of credit and explain the advantages and main disadvantage of using such an instrument.**

**(4 marks)**

**(Total 13 marks)**

**SECTION B – Answer THREE questions** in each of Parts 1, 2, 3, 4, 5 & 6

**Part 1**

1. Explain the role of the sponsor in the listing process.
2. State six main differences between the admission criteria for the main market of the London Stock Exchange and the Alternative Investment Market.
3. Describe three offences under the Proceeds of Crime Act 2002.
4. Define the term ‘inside information’.

**(9 marks)**

**Part 2**

1. State three reasons why a company’s creditors might agree to a company voluntary arrangement.
2. Describe three key differences between a members’ voluntary liquidation and a creditors’ voluntary liquidation.
3. Define the term ‘wrongful trading’ and explain the only defence available to a director charged with wrongful trading.
4. In relation to European insolvency regulation, explain the difference between a ‘centre of main interests’ and an ‘establishment’.

**(9 marks)**

**Part 3**

1. In relation to bringing a case to court, explain what is meant by a court’s ‘jurisdiction’ and outline the rules relating to jurisdiction which must be adhered to by a claimant in a civil case.
2. In respect of both new UK legislation and existing UK legislation, what are the key provisions of the Human Rights Act 1998?
3. What is meant by the term ‘direct effect’ when applied to European Union law? What conditions must be met before a Treaty provision can have direct effect?
4. Describe the five stages through which a Public Bill passes before it becomes an Act of Parliament.

**(9 marks)**

#### **Part 4**

1. Explain the difference between an agent's express authority and an agent's implied authority to act for a principal.
2. Describe briefly three rights which an agent has in his relationship with his principal.
3. State the information which must be supplied to the Registrar of Limited Partnerships in order validly to create a limited partnership under the Limited Partnerships Act 1907.
4. In relation to a partnership under the Partnership Act 1890, explain the liability of a retiring partner for partnership debts.

**(9 marks)**

#### **Part 5**

1. Briefly explain the facts and outcome in the case *Re Hellenic and General Trust Limited* 1976.
2. Describe the role of the Competition Commission in a merger situation.
3. Explain the types of company to which the City Code on Takeovers and Mergers applies.
4. With reference to the takeover provisions of the Companies Act 2006, explain the right of a minority to be bought out.

**(9 marks)**

#### **Part 6**

1. With reference to warranties in a sale and purchase agreement, explain why it is usual to provide for maximum and minimum levels of liability.
2. Describe and explain three types of creditor conduct which can terminate a contract of guarantee.
3. Explain the difference between a continuing guarantee and a non-continuing guarantee.
4. Explain what an indemnity is and how liability under an indemnity arises.

**(9 marks)**

**(Total 54 marks)**

## **SOLUTIONS**

This solution covers all of the points that the examiner had expected to see in answers to the examination paper. As such, the solution includes more than would be expected from an individual candidate in the time available to answer the question under exam conditions.

Although comprehensive, the solution is not intended to be exhaustive

### **SECTION A**

#### **Question 1**

**(a)** In order for a contract to exist, the parties must show that they have firmly committed themselves to the agreement that they themselves have established. Such a commitment is often expressed in the concept that one party must make an offer, which must be fully accepted by the other party.

The general features of an offer are that it will be definite, capable of being accepted, and the person making the offer intends to be legally bound by the consequences of it being accepted.

Sometimes it is difficult to identify whether an offer has been made or whether one party has simply shown an indication of willingness to consider offers (known as an 'invitation to treat') or has made a statement in response to a request for information, or has given a quotation. Unless such statements have the general features of an offer they will not constitute an offer. This was clearly illustrated in the case of *Harvey v Facey*, where the court held that a response to a request for information was not an offer to sell and could not, therefore, be accepted.

However, where the statement has the characteristics of an offer it will be treated as being an offer as in the case of *Bigg v Boyd Gibbons* where, in the course of correspondence the defendant stated 'for a quick sale I would accept £26,000 ...' The claimant accepted this price of £26,000 and the defendant acknowledged his acceptance. The court held, in this case, that an offer had been made by the defendant and accepted by the claimant.

A definite offer, however, does not have to be made to a particular person. It may be made to a class of persons or to the world at large. This was clearly illustrated by *Carlill v Carbolic Smoke Ball Co* where the claimant, having seen an advertisement for a smoke ball to prevent flu bought the smoke ball, used it in the prescribed manner and then caught flu. She was able to successfully sue for a £100 reward which the manufacturers had promised to pay to anyone using the smoke ball in accordance with the instructions and catching flu.

Hence, an offer, when accepted, will constitute a binding contract. On the other hand, an invitation to treat cannot be accepted to form a contract. The key types of invitation to treat are advertisements and a display of goods for sale.

Generally speaking an advertisement of goods for sale is an attempt to induce offers; it is not an offer proper (*Grainger & Son v Gough*). Having said that, as we have seen, there are situations (*Carlill v Carbolic Smoke Ball Co*) where an advertisement can constitute an offer.

The other key example of an invitation to treat is the display of goods for sale. This rule was firmly established in the case of: *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* where it was made clear that goods on shop shelves are an invitation to treat so there is no contract until the customer's offer to buy the goods is accepted at the till. This rule was affirmed in the later case of *Fisher v Bell* which related to goods on display in a shop window.

In summary, therefore, an offer can be accepted to form a contract whereas an invitation to treat cannot.

**(b)** With reference to the scenario, Howard's legal position regarding Sam, Martha and Jake is as follows:

- i) In relation to Sam, Howard's promotion of the monitor with a stated price in the window of his shop amounts to an invitation to treat (per *Fisher v Bell*) and not an offer. Therefore, there was no offer for Sam to accept. It is Sam who has in law made an offer to Howard to buy the monitor from him for £600. Howard and Sam do not have a contract.
- ii) In relation to Martha, she made Howard an offer to buy the monitor from him for £550 but Howard did not accept this and indeed he counter-offered with £600. Martha rejected Howard's counter-offer and left the shop. When Martha emails Howard accepting his offer of £600 Howard's offer has ceased to exist in law because Martha has already rejected it. Martha and Howard do not have a contract.
- iii) Jake offered Howard £550 for the monitor which Howard accepted. Jake's promise to return the following morning with the money and Howard's promise to give him the monitor amounts to executory consideration. Therefore, Howard and Jake do have a contract. If Jake fails to turn up with the money he will be in breach of his contract with Howard. Only then would Howard be in a position to accept an offer from another party.

## **Question 2**

**(a)** The three different ways in which private companies are classified by the Companies Act 2006 ('CA 2006') are as follows:

- A company limited by shares. This is where the liability of the members is limited by the amount, if any, unpaid on the shares they hold. A company limited by shares can be either a public company or a private company.
- A company limited by guarantee. This is where members guarantee to contribute a certain amount on a winding up of the company, and their liability is limited to that amount.
- An unlimited company. This is where the liability of the members is unlimited, but the company is still a separate legal person.

**(b)** Both public companies and private companies must obtain a certificate of incorporation from the Registrar of Companies. In the case of a private company it can start trading on receipt of the certificate of incorporation.

However, in addition to a certificate of incorporation, a public company, once incorporated is not allowed to commence trading until it obtains a trading certificate. The Registrar will not issue a trading certificate until the nominal value of the company's allotted share capital is not less than £50,000 and not less than one quarter of the nominal value of the issued shares plus the whole amount of any premium has been received.

**(c)** The Articles of Association contain all the key internal rules relating to the administration of a company and include matters like the allocation of powers between the members of a company and its directors.

**(d)** If a company wishes to alter its Articles following formation, it would make the alteration by passing a special resolution. Company law does not allow a company to provide in its Articles that a clause can never be altered or repealed. However, a company can provide for conditional entrenchment either at the time of formation or subsequently. In order to conditionally entrench a provision in the Articles, a company requires unanimous agreement of the members. Once a provision is conditionally entrenched it means that alterations/repeals of those provisions can only be done in accordance with the conditions set out in the Articles, even if those conditions are more restrictive than would be required by special resolution.

The conditional entrenchment provisions, however, will never operate to prevent amendment of the Articles by unanimous shareholder consent.

### Question 3

- (a) The general rule is that a creditor can always transfer his claim to a third party, without the consent of the debtor. However, if the debt is in a non-negotiable form notice of the assignation/assignment to a new creditor should be given to the debtor to inform him who to repay going forward. Furthermore, the assignee ie the new creditor cannot obtain any better right to payment from the debtor than the original creditor had ie the new creditor will only be entitled to receive the amount the debtor actually owes which may not be clear from the documentation.

These are the factors which make non-negotiable debt not readily marketable

In contrast, where a negotiable instrument is transferred, no assignation/assignment or intimation to the debtor is needed and provided the new creditor takes the document in good faith, for value and without notice of any defect in the transferor's title then he will obtain a good title even if the transferor had no title or had a defective title.

- (b) If a negotiable instrument is presented for payment but not paid because, for example, the drawee has become insolvent, the bill is said to be dishonoured by non-payment. If a bill is refused acceptance by the drawee or if the drawee cannot be found the bill is said to be dishonoured by non-acceptance.

In the event of dishonour, the holder should immediately send a "notice of dishonour" to every party that he wishes, or may wish, to hold liable on the instrument and ideally this should be done on the day on which the dishonour takes place.

If the bill was a foreign bill then, in addition to issuing a notice of dishonour, the bill should be 'protested'. In the UK it is only necessary to 'protest' a foreign bill; it is not necessary to 'protest' an 'inland' bill. Protesting should normally be done by a notary public who presents the bill for payment and if payment is still unobtainable the notary may attach a piece of paper to the bill giving details of the dishonour which provides proof to a court that the bill was indeed presented and dishonoured.

- (c) A letter of credit is an undertaking by a bank to make a payment to a named beneficiary within a specified time, against the presentation of documents which comply strictly with the terms of the letter of credit. If the terms of the letter of credit are not precisely met then payment will not be made. Letters of credit are typically used for import/export transactions.

The main advantage of a letter of credit is that it provides security to both the exporter and the importer. For the exporter a letter of credit, apart from cash in advance, is the most secure method of payment in international trade as long as the terms of the credit are met. When an exporter asks for payment

by letter of credit, he is transferring the risk of non-payment by the buyer to the issuing bank providing the exporter presents the required documents in strict compliance with the credit.

The disadvantage of using a letter of credit is the additional bank charges which it attracts.

## SECTION B

### Part 1

1. The sponsor takes a central role in the flotation process by advising the company on a wide range of issues including the appointment of other advisers. Specifically, the role of the sponsor is to assess the company's suitability for listing in the light of its organisational structure and capital requirements. It will then advise on the structure and make-up of the board, the best method of flotation and the flotation timetable. As the flotation approaches it will advise on the pricing and underwriting of the shares.
2. Six main differences between the admission criteria for the Main Market and the Alternative Investment Market are as follows:
  - For the main market a minimum of 25% of the shares must be in the hands of the public but for the AIM there is no minimum requirement
  - For the main market normally a 3 year trading record is required but for the AIM no prior trading record is required
  - For the main market prior shareholder approval required for substantial acquisitions and disposals but, in most cases, for the AIM, no prior shareholder approval for transactions
  - For the main market pre-vetting of admission documents is required by the UKLA whereas for the AIM admission documents are pre-vetted by a nominated adviser
  - For the main market, sponsors are needed for certain transactions only but for an AIM company a nominated adviser is required at all times
  - For the main market there is a minimum market capitalisation requirement (ie £700,000, but there is no minimum for an AIM company)
  - For the main market the company must comply with the rules of the UKLA but for an AIM company there is much more flexible regulatory control.

[Candidates are required to provide six of the above seven differences to obtain full marks]

3. Three offences under the Proceeds of Crime Act 2002 are as follows:
  - concealing, disguising, converting, transferring or removing criminal property from the UK
  - entering into or becoming concerned in an arrangement which a person knows or suspects, facilitates someone else in acquiring, retaining, using or controlling the proceeds of crime
  - acquiring, using, or having possession of criminal property unless adequate consideration was given for the property
  - it is a criminal offence for anyone who works in a regulated financial firm to fail to disclose any dealing that they suspect, or ought to suspect, involves the proceeds of crime

- it is a criminal offence where a person in a regulated financial firm does or says anything that might 'tip off' someone else that they are under suspicion of acquiring, retaining, using or controlling the proceeds of crime

[Candidates are required to make reference to any three of the above offences]

4. Inside information is information which is 'price sensitive' and:
  - has not yet been made public
  - if it was made public would be likely to have a significant effect on the price of any securities
  - is specific or precise ie it is more than a tip to buy particular securities
  - relates to particular securities or a particular issuer rather than to securities or issues generally

## **Part 2**

1. Company creditors might agree to a company voluntary arrangement ('CVA') because:
  - the shareholders may be convinced that the company can be turned round
  - although it may be inevitable that the company is going to be wound up, a CVA may lead to a better outcome than liquidation due to a more orderly sale leading to higher values being obtained for assets, or the CVA may allow the company to avoid costs that would be precipitated by liquidation; or
  - the use of a CVA might be cheaper than the other courses available meaning that there is more money available for the creditors after professional and legal fees have been paid.
2. The main differences between an MVL and a CVL are as follows:
  - In a members' voluntary liquidation ('MVL') the company is solvent whereas in a creditors' voluntary liquidation ('CVL') the company is insolvent.
  - In an MVL the directors are required to sign a Solvency Statement which states that the company will be able to pay all its liabilities within a period not exceeding 12 months whereas in a CVL since the company is insolvent the requirement for a Solvency Statement does not apply.
  - In a CVL the creditors are much more involved and a meeting of creditors must be held within 14 days of the resolution to wind up the company. No creditors meeting is held in the case of an MVL.
  - In the case of a CVL a liquidation committee can be established to represent the creditors but no such facility exists in the case of an MVL.
  - The ultimate choice of liquidator in a CVL rests with the creditors unlike an MVL where it rests with the shareholders.

[Candidates would be required to make any 3 of the above comparisons to obtain full marks]

3. Wrongful trading, in broad terms, is where a director knew or ought to have concluded that there was no reasonable prospect of the company avoiding liquidation, but he continued to trade and incur credit. In the event of a director being found guilty of wrongful trading he can be held personally liable to make such contribution to the company's assets as the court thinks proper. Hence, wrongful trading may be considered as trading whilst knowingly insolvent.

The only defence available to a director is that he took all possible steps to minimise any potential loss to the creditors. The court will have regard to the level of skill/experience expected of someone acting in that director's capacity and also to the general knowledge, skill and experience which the particular director has. If a director can demonstrate that he acted in accordance with the advice of a licensed insolvency practitioner in the run up to an insolvency this will be strong evidence that he took "all possible steps" to minimise loss to creditors.

4. A centre of main interests ('COMI') is defined as the Member State where a debtor conducts the administration of his interests on a regular basis. In the case of a company, the registered office is presumed to be the COMI in the absence of proof to the contrary. A COMI must be established if Main Proceedings are to be commenced within a Member State.

On the other hand, an establishment is defined as any place of operations where the debtor carries out a non-transitory economic activity. For there to be an establishment there must therefore be a "place of operations" within a particular Member State. The mere presence of assets within a particular jurisdiction is in itself insufficient.

It must be established that a debtor has an establishment within a particular Member State if Secondary/Territorial Proceedings are to be opened within that Member State.

### Part 3

1. A court's jurisdiction determines which cases it is legally competent to deal with. A court will have geographical jurisdiction, jurisdiction over certain persons, and jurisdiction over certain subject matter.

In civil cases the claimant must raise his case in a court which has jurisdiction over the defendant. This means that there must be some link between the defendant and the particular court, for example the defendant may live or carry on business within the geographical jurisdiction of the court. This would mean that the court then had jurisdiction over the defendant.

2. The key provisions of the Human Rights Act 1998 in relation to new and existing legislation are as follows:
  - as far as new legislation is concerned, the Minister in charge of a Bill must either make a statement that the Bill is compatible with Convention Rights before the Bill's second reading, or make a statement that the government wishes to proceed with the bill anyway
  - in relation to existing UK legislation it must, if at all possible, be read compatibly with Convention Rights. If it is not possible to do this then Primary legislation will stand but a court can make a Declaration of Incompatibility or make a Remedial Order. A remedial order is a power that allows a Minister to amend the legislation to bring it into line with Convention Rights
  - as far as subordinate legislation is concerned it can be quashed unless it is "inevitably incompatible" which is, in practice, highly unlikely
3. If a provision of European Union law has direct effect then it means that it can be invoked by an individual in an action brought before a national court.

Before a Treaty provision can be relied on in this way it must meet certain conditions as follows:

- the wording of the provision being relied on must be clear and unambiguous,
- the provision must be unconditional, and
- its operation must not be dependent on further action being taken by the Community or national authorities or leave them any discretion.

4. The five stages that a public Bill passes through are as follows:

**First Reading** - a formal reading of the title of the Bill after which an order is made for the Bill to be printed. Thereafter, a date is fixed for the Second Reading.

**Second Reading** - at this stage the main points of the Bill are considered. After consideration, the Bill is referred to Committee by being formally given a second reading before the whole House.

**Committee Stage** - a standing committee will undertake a detailed scrutiny of the Bill and most amendments to the Bill will occur at this stage.

**Report Stage** - the committee reports to the whole House on the Bill in its amended state. There is an opportunity at this stage for further amendment.

**Third Reading** - the motion that the Bill be read for the third time is put to the House and, if carried, the Bill is sent to the other House where it goes through a similar procedure.

#### **Part 4**

1. Express authority is the authority explicitly given by the principal to the agent to make a particular contract. The extent of the agent's express authority will depend on the construction of the words used on his appointment. If the agent contracts outside the scope of his express authority he may be liable to the principal and the third party for breach of warranty of authority.

However, where there is no express authority, authority can be implied from the nature of the agent's activities or from what is usual in the circumstances. Hence, implied authority can arise in a number of ways, including:

- i) implied authority can be used to allow the agent to do anything necessarily incidental to the performance of the agency. For example, where an agent is expressly authorised to sell goods on behalf of the principal he may have implied actual authority to advertise the goods.
  - ii) what is usual or customary in a particular position or a particular business or profession.
2. Three rights which an agent has in his relationship with his principal are:
    - to be paid any agreed remuneration for his services by his principal. This may be on a commission basis, or an agreed salary or, occasionally a combination of the two. If there is no express agreement, the agent has the right to be paid for his services at the customary rate in that particular trade. In the absence of a customary rate the agent will be paid a reasonable rate calculated on a *quantum meruit* basis - what his efforts merit.
    - to recover from the principal any expenses incurred during the proper performance of his agency. In addition where the agent incurs liability in the performance of his agency, he is entitled to be indemnified by the principal.
    - a mercantile agent has a general lien over the principal's goods which are in his possession or over money held on the principal's behalf.
  3. The information which must be supplied to the Registrar of Limited Partnerships to validly create a limited partnership is as follows:
    - the name of the partnership
    - the general nature of the business

- the principal place of business
  - the names of each of the partners (specifying which are general/limited)
  - the term (ie duration), if any, of the partnership
  - the sum contributed by each limited partner
4. A partner who retires remains liable for any outstanding debts incurred while he was a partner, unless the creditors have agreed to release him from liability.

He is also liable for debts of the firm incurred after his retirement if the creditor knew him to be a partner before he retired and he had not had notice of his retirement. It is vital, therefore, that a partner who is retiring gives direct written notice to all existing creditors and customers of the firm of his retirement. As far as people who have not before dealt with the firm as concerned, to ensure no liability after he retires, it is sufficient for the partner to put a notice in the London Gazette advising of his retirement.

## Part 5

1. In the case of *Re Hellenic and General Trust Limited* Hambros and Hellenic agreed a scheme of arrangement. The aim was for Hambros to buy all the shares in Hellenic. Hambros would pay cash to the Hellenic shareholders, their shares would be cancelled, and Hellenic would allot new shares to Hambros. Hellenic called a meeting of its shareholders. The appropriate majority approved the scheme. However one of the shareholders was MIT, a wholly owned subsidiary of Hambros. It held 53% of the shares and voted for the scheme.

When Hellenic applied to the court for approval of the scheme, another shareholder in Hellenic (holding approximately 14% of the shares), opposed approval. It argued that MIT had a different interest in the scheme from the other shareholders, because it was in Hambros' camp. There should therefore have been separate meeting of (a) MIT, and (b) all the other shareholders. The court agreed and refused to approve the scheme.

2. The Competition Commission ('CC') has no right of initiative in merger cases and will only become involved in the assessment of a merger situation if the Office of Fair Trading refers a case to it. However, following a reference to it, the CC will conduct a detailed investigation that can last up to 24 weeks as to whether the merger has caused a Substantial Lessening of Competition.

Except in the limited number of cases where the Secretary of State retains the decision-making power, the CC will make the final decision whether to clear a merger, prohibit it or approve it subject to remedies.

3. Specifically, the City Code applies to:
  - offers for all public companies (whether listed or unlisted) which either have their registered office or their central management and control in the UK, the Channel Islands or the Isle of Man, and
  - private companies where the equity share capital of the company concerned has been to some degree publicly held in the previous ten years.

In addition, the City Code also applies, to a limited extent, to companies in other European Economic Area (EEA) countries.

4. Where a bidder company achieves a 90% acceptance level of its offer, it may choose not to issue a section 979 notice and acquire the shares of the dissentient minority. However, if the bidder company's total ownership of shares (or of any class of shares) in a target company reaches 90%, then it must, within one month, give notice of that fact to the holders of the remaining 10%. These shareholders then have three months in which they can require the bidder company to buy them out, on the same terms as were accepted by approving shareholders. There can be no discrimination between the offers made to the approving and the dissentient shareholders.

## **Part 6**

1. A minimum level of liability is included by a warrantor in order to avoid minor claims ie to insist that the purchaser will not bring any claims under the warranties unless they exceed a specified *de minimis* level. This provision will be incorporated into the sale and purchase agreement and the specified figure will normally be reflected by the level of consideration to be paid by the purchaser. So, for example, larger sale and purchase transactions will generally incorporate higher *de minimis* levels.

Similarly, the warrantor will usually seek a *de maximis* limit up to which sum the warrantor will be liable. This is generally fixed at the total amount of consideration paid, but is again subject to the agreement of the parties. The warrantor will wish to limit the *de maximis* level as much as possible.

2. Certain acts by the creditor that can terminate the guarantee include:
  - The creditor releasing co-guarantors who are bound jointly and severally, without the consent of the other guarantors – unless the guarantor being discharged is himself bankrupt.
  - The creditor altering the principal contract without the guarantor's consent, as this may adversely effect the guarantor's position.
  - The creditor giving up securities. A guarantor is entitled, on paying the debt, to an assignation/assignment of securities held by the creditor. If the creditor gives up these securities, the position of the guarantor is prejudiced and so the guarantor is released from his obligation to the extent of the value of the security which has been given up.

- The creditor giving time to the principal debtor ie not enforcing payment at the earliest opportunity thus postponing the time at which the guarantor may exercise his right of relief against the principal debtor.

[Candidates are required to describe and explain three of the above to obtain full marks]

3. A guarantee which is confined to a single transaction is called a 'non-continuing guarantee' whereas a guarantee which is made to cover several transactions on a running account, for example a bank overdraft is termed a 'continuing guarantee'.

The effect of the word 'continuing' is to extend the guarantee beyond the original transaction to subsequent transactions. In the case of bank guarantees especially, a continuing guarantee is intended to extend to subsequent transactions so as to avoid the operation of the rule by which credit items are treated as appropriated to the earliest debits to the account. Every continuing guarantee should contain a power enabling the guarantor to revoke it, otherwise the guarantee could continue indefinitely.

4. An indemnity is an agreement whereby one party agrees to compensate another in the event of an anticipated loss or damage. Liability under an indemnity arises because the parties have stipulated that one shall save another from loss in a specified set of circumstances. Liability under an indemnity will not go beyond that which is expressly stipulated in the indemnity. It is common, therefore, expressly to include liability for interest and costs incurred to pursue an indemnity claim. As with warranties, minimum and maximum levels of liability may be agreed between the parties.

## Marking schedule

Question	Possible
<b>A1 (a)</b>	
Commitment	1
Features of an offer	1
Compare offer v ITT	2
Particular person/world at large	1
Can accept offer not ITT	1
Advertisements	1
Goods on shop shelf/window	2
Case law	4
Total	13
<b>Restricted to</b>	<b>12</b>
<b>A1 (b)</b>	
Sam – ITT – Sam offer to Howard – no contract	3
Martha – counter-offer; rejected; no offer to accept; no contract	3
Jake – executory consideration; contract; breach if fail to pay	3
Total	9
<b>Restricted to</b>	<b>8</b>
<b>Total</b>	<b>20</b>
<b>A2 (a)</b>	
Limited by shares	1
Limited by guarantee	1
Unlimited	1
<b>Total</b>	<b>3</b>
<b>A2 (b)</b>	
Certificate of incorporation for both	1
Private company can trade	1
Public company trading certificate conditions	2
<b>Total</b>	<b>4</b>
<b>A2 (c)</b>	
Information in AoA	2
<b>A2 (d)</b>	
Special resolution to alter	1
Can't be made unalterable	1
Explain conditional entrenchment	3
Total	5
<b>Restricted to</b>	<b>4</b>
<b>Total</b>	<b>13</b>

<b>A3(a)</b>	
Non-negotiable can be transferred	1
Notice of assignment	2
New creditor – no greater rights	1
Negotiable debt - compare	1
Good title	1
	6
<b>Restricted to</b>	<b>5</b>
<b>A3 (b)</b>	
Non-payment/non-acceptance	1
Notice of dishonour	1
Protest and explain	2
	<b>4</b>
<b>A3 (c)</b>	
Describe Letter of Credit	2
Advantage	2
Disadvantage	1
	5
<b>Restricted to</b>	<b>4</b>
<b>Total</b>	<b>13</b>
<b>B1 (1)</b>	
Assess suitability	1
Advisory role	2
	3
<b>B1(2)</b>	
Identify 6 main differences – ½ mark each	3
<b>B1 (3)</b>	
One mark for each offence to a maximum of 3 marks	3
	3
<b>B1 (4)</b>	
Not made public/significant effect	1
Specific	1
Particular securities	1
	3
<b>Total</b>	<b>9</b>
<b>B2 (1)</b>	
Shareholders convinced	1
Better outcome than liquidation	1
Cheaper option	1
	3
<b>B2 (2)</b>	
Solvent v insolvent	1
Solvency statement	1

Creditor's meetings	1
Liquidation committee	1
Choice of liquidator	1
Any 3 of the above 5	3
<b>B2 (3)</b>	
Knew/ought to have concluded	1
Personal liability	1
Defence	1
	3
<b>B2(4)</b>	
COMI – administration of interests, main proceedings	1 ½
Establishment – place of operation; second/territorial proceedings	1 ½
	3
<b>Total</b>	<b>9</b>
<b>B3(1)</b>	
Legal competency and examples	2
Civil cases	1
	3
<b>B3(2)</b>	
New legislation	1
Existing legislation – primary and secondary	2
	3
<b>B3(3)</b>	
Direct effect and explain	1
Conditions	2
	3
<b>B3(4)</b>	
½ mark per stage – 3 marks for all 5 stages	3
<b>Total</b>	<b>9</b>
<b>B4(1)</b>	
Express	1
Implied	2
	3
<b>B4(2)</b>	
To be paid	1 ½
Expenses/indemnity	1
Lien	½
	3
<b>B4(3)</b>	
½ mark for each piece of information	3
<b>B4 (4)</b>	
Pre-retirement debt	1

Post-retirement debt	2
	3
<b>Total</b>	<b>9</b>
<b>B5(1)</b>	
Facts and outcome	3
<b>B5 (2)</b>	
No right to initiate	½
OFT referral/SLC/ 24 weeks	1 ½
Secretary of State role	½
	<b>3</b>
<b>B5(3)</b>	
Public companies	1 ½
Private companies	1
EEA	½
	<b>3</b>
<b>B5 (4)</b>	
Section 979 not compulsory	1
Inform dissenting shareholders	1
Rights of shareholders	1
	3
<b>Total</b>	<b>9</b>
<b>B6 (1)</b>	
<i>De minimis</i>	1 ½
<i>De maximis</i>	1 ½
	3
<b>B6 (2)</b>	
Release co-guarantor	1
Alter contract with debtor	1
Give up securities	1
No enforce payment	1
<b>Restricted to</b>	<b>3</b>
<b>B6 (3)</b>	
Non-continuing	1
Continuing	2
	3
<b>B6(4)</b>	
Describe indemnity – compensate/anticipate loss	1 ½
Express terms	1 ½
	3
<b>Total</b>	<b>9</b>

## EXAMINER'S REPORT

### Summary

61 students sat the Business Law paper in April 2010. Of these, 46 passed, giving a pass rate of 75%. The highest score was 88 % and the lowest was 9.5%. The papers of students scoring in the range 44 – 53 (7 papers) were given to the Moderator for double marking. One candidate who was a marginal fail, on moderation became a marginal pass

The breakdown of the results by overall mark is as follows:

Range	No. of candidates
0-19.5	4
20-29.5	2
30-39.5	2
40-49.5	7
50-59.5	13
60-69.5	20
70-79.5	10
80-89.5	3
90-100	0

## **SECTION A**

Section A was, overall, generally well answered by the majority of candidates although Question A2 was rather less well done.

**Question A1**, the main essay question for 20 marks, related to contract law. The question provided candidates with a scenario and required them, for 12 marks, to explain the difference between an offer and an invitation to treat. Required (b), for 8 marks, specifically referred candidates to the scenario and asked them to advise on the legal position.

Required (a) was a straightforward question where the candidates should have scored good marks. Most candidates, in answering this question, clearly demonstrated their knowledge of case law which enhanced their answer. However, many candidates failed to write sufficient detail to score the 12 marks available. Furthermore many candidates provided detail which was not required to answer this question. For example, many candidates wrote about the rules on acceptance or about bringing an offer to an end rather than focusing on the specific question asked.

Candidates, though, managed generally to gain good marks in required (b). Most candidates were able to explain the legal position correctly and so managed to pass the question overall.

Overall, 55.7% of candidates passed this question. The average mark for the question was 10.2 out of 20.

**Question A2** for 13 marks related to company law. A short scenario was provided and the question was split into four parts. In required (a), for 3 marks, candidates were asked to explain three different ways in which companies are classified. This should have been a straightforward question for easy marks but many candidates failed to answer the question correctly or failed to provide detail and simply listed the types of company. In addition, there was evidence of confusion between what is an incorporated entity and an unincorporated entity.

In required (b) for four marks, candidates were asked to explain how the rules differ between private and public companies regarding the requirements to be satisfied before trading can commence. Again, candidates tended to go off at a tangent and provide an analysis of the differences between a public company and a private company but failed to answer the question which focused on the rules regarding the commencement of trading activities. Indeed, many candidates demonstrated a fairly detailed knowledge of the differences between public and private companies but still did not score full marks because they did not answer the question asked.

In required (c), for 2 marks, candidates were asked to outline briefly the type of information in a company's Articles of Association (AoA). Overall the answers indicated a lack of knowledge/understanding of the AoA.

In required (d), for 4 marks, candidates' knowledge of the conditional entrenchment provisions were examined. Again, although some candidates provided clear and correct answers there was evidence of lack of understanding and knowledge on the part of a considerable number of candidates.

The average mark for this question was 6 out of 13 with 49% of candidates passing.

**Question A3** for 13 marks related to negotiable and non-negotiable debts. This question was well answered by most candidates. Specifically, in required (a) for 5 marks, candidates were asked to compare the features of negotiable and non-negotiable debt. Most candidates provided full and detailed answers.

In required (b), for 4 marks, candidates were examined on dishonour and protest and, again, most candidates provided full answers.

Required (c), for 4 marks, examined letters of credit and candidates, once more, demonstrated a good knowledge and often scored highly.

This was the best answered question in Section A and most candidates provided detailed and complete answers. The average mark for this question was 8.3 out of 13 with 78% of candidates passing the question.

## **SECTION B**

The answers to Section B were of a generally good standard. In particular, Part 6 on guarantees, warranties and indemnities was well answered as was Part 2 on liquidation, administration and receivership although answers were somewhat weak in Part 4 on Agency and Partnerships and Part 5 on reconstructions and takeovers.

### **Part 1**

This part covered Compliance matters. 72% of candidates passed this section of the paper with an average mark of 5.3 out of 9.

Candidates who chose to answer questions 1 and 2 tended to provide complete and sufficiently detailed answers. However, questions 3 and 4, dealing with the Proceeds of Crime Act (POCA) offences and defining 'inside information', were often less well answered. For example, in answering question 4 on inside information many candidates described an 'insider' rather than 'inside information'. Few candidates chose to answer question 3 and those that did tended to score low marks as they provided information on insider dealing and money laundering rather than the offences under POCA.

## **Part 2**

This part examined liquidation, administration and receivership and was well answered by most candidates with 83.6% of candidates scoring half marks or above and with an average mark for this part of 6.19 out of 9.

Question 1 on company voluntary arrangements was particularly well answered by candidates choosing this question. In question 2, most candidates managed to score more than half marks but few candidates scored all the marks available and there was some evidence of confusion between a creditors' voluntary liquidation and a compulsory liquidation. Both questions 3 and 4 were usually well attempted by candidates but in many cases candidates failed to note all the relevant points and so failed to gain full marks for the questions.

## **Part 3**

Part 3 questions related to the legal system. The answers to this part were, generally, weaker although 71.1% of candidates did score half marks or more. The average mark for this part was 5.19 out of 9.

Question 1, which asked candidates to explain jurisdiction, was poorly answered by almost all who attempted the question. Similarly, in question 3 many candidates failed to answer the question asked which required candidates to state the conditions to be met before a Treaty provision can have direct effect. Question 2, on the impact of the Human Rights Act on UK legislation, was reasonably well answered with most candidates distinguishing between primary and secondary legislation. Question 4, on the parliamentary stages of a Bill, was the best answered question in this part.

## **Part 4**

This part examined chapter 6 on agency and partnership. 68.3% of candidates scored half marks or more and the average mark for the section was 5 out of 9.

Overall, each question in this part was reasonably well attempted. The average mark would have been higher if candidates had provided more detail in their answers; candidates tended to answer the question asked but not fully enough.

Question 1, on agent's authority, was well attempted although some candidates strayed into discussing ostensible authority for which they did not gain marks. Answers to question 2 were the weakest in this part. In question 4 most candidates correctly identified the different notification requirements in respect of existing customers and new customers. Candidates who chose question 3 generally managed to gain half marks or more.

## **Part 5**

This part, which examined reconstructions, amalgamations and takeovers, was the least well answered in Section B. 67.8% of candidates scored half marks or above and the average mark for the question was only 4.72 out of 9.

Question 1, which examined the case of *Re Hellenic*, was generally well answered. However, although the other questions were attempted, the answers tended to lack detail or the question asked was not answered. In particular, candidates lacked knowledge to answer questions 2 and 3 fully.

## **Part 6**

This part examined guarantees, warranties and indemnities. 85% of candidates scored half marks or above and the average mark for this part was 6.5 out of 9. Part 6 was the best answered of the Section B questions.

Candidates demonstrated full and clear knowledge of all the questions. In particular, candidates often scored full marks in question 2 and were able to fully explain the types of creditor conduct which could terminate a contract of guarantee. Candidates also had little difficulty in scoring well in questions 1, 3 and 4.

## **Conclusion**

The pass rate of 75% is considerable higher than that of April 2009 (where 63% of candidates passed) and, indeed, is one of the highest pass marks in recent years.

Section A questions, overall, tended to be less well answered than Section B questions which, in this diet, were generally well answered.

At this diet, in answering Section A Question 3 candidates often showed clear and full knowledge. However, as in the past, the main narrative question for 20 marks, which in this diet related to the fundamentals of contract law, could have been better answered by candidates focusing on offer compared to invitation to treat rather than straying into other areas of contract formation. Most of the answers to Section A Question 2 were disappointing. Company law is a key chapter in the course and the knowledge and understanding that many candidates demonstrated on the basic topics examined was weak.

Around 13% of the students made a very poor attempt at the exam paper, scoring less than 40%. This, although disappointing, was an improvement on past sittings. In this diet, there were a number of well written exam papers. Around 54% of students passed convincingly scoring 60% or above and 21.3% of students scored more than 70%.

This was a paper in which a candidate was able to score a high mark if properly prepared and this is clearly illustrated by three candidates who scored above 80. These students should all be commended for this achievement.