

STRICTLY CONFIDENTIAL

THE PUBLIC ACCOUNTANTS EXAMINATION
COUNCIL OF MALAWI

2009 EXAMINATIONS

ACCOUNTING TECHNICIAN PROGRAMME

PAPER TC 8: BUSINESS LAW

(DECEMBER 2009)

TIME ALLOWED : 3 HOURS

SUGGESTED SOLUTIONS

SECTION A

1. (a) A contract of sale of goods is defined in Section 3(1) of the Sale of Goods Act **1 Mark** as a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price.
- (b) The buyer of goods has the following duties under the Sale of Goods Act;
 - (i) to accept the goods – Section 28.
 - (ii) to pay for the goods – Section 28.
- (c) ‘Title’ to goods is often used as being synonymous with ‘property’ in goods. It means ownership of goods or the means whereby the right has accrued to someone, and by which it is evidenced. For example, ownership of a motor vehicle is proved through the Motor Vehicle Registration Certificate popularly known as the Blue Book.

 ‘Possession’ means the physical control of goods. It has no necessary connection with the property in them. If I steal something, I have possession of it, but I do not have the property in it, nor any title to it. Indeed I do not even have a right to possess, and the right to possess may be vested in X, neither in me nor in the owner.

 The ‘risk’ in goods is the responsibility for loss, damage or destruction of those goods. It is not necessarily coincident with either property in or possession of those goods.
- (d) Section 17(2) – In the case of a contract of sale by sample there shall be:
 - (i) an implied condition that the bulk shall correspond with the sample in quality.
 - (ii) an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample.
 - (iii) an implied condition that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of sample.
- (e) According to Section 40 of the Sale of Goods Act, an unpaid seller has the following remedies against the goods:
 - (i) Section 40(1)(a) A **lien** on the goods or right to retain the goods for the price while he is in possession of them.

- (ii) Section 40(1)(b) Stoppage in Transitu which only arises where the buyer is insolvent and the seller has parted with possession of the goods.
- (iii) Section 40(1)(c) Resale – on a resale after exercise of lien or stoppage in transitu, a sub-buyer acquires a good title as against the original buyer.

2. (a) (i) ‘Subsidiary legislation’ also called ‘delegated legislation’ arises where Parliament delegates its authority to make laws to another body. Such body could be a local authority to make bye-laws or the Chief Justice to issue directions in court procedures or a cabinet minister to issue regulations.
- (ii) The reasons for increased use of subsidiary legislation are that Parliament has not got the time to examine every piece of legislation in detail nor may it have the expertise to deal with scientific or technical matters. Delegated legislation gives greater flexibility to accommodate unforeseen circumstances. Finally it gives the government the opportunity to experiment before passing primary legislation.
- (b) ‘The literal rule’ – under this rule, which is applied in the least difficult cases, the literal meaning is applied to the statutory provision, unless this would lead to an absurdity or inconsistency.

‘The golden rule’ – this rule is an extension of the literal rule. When interpreting an Act of Parliament, the judge must as far as possible stick to the grammatical and ordinary sense of the words (literal rule). However, if the ordinary sense is leading to an absurdity or inconsistency, the judge is permitted to modify the words to avoid the inconsistency and no further. In that way he will be said to have applied the golden rule.

‘The ejusden generis rule’ – this literally means of the same kind. Under this rule, if there is a series of particular words followed by a word of generality, then the category into which the particular words fall will not be extended by the words of generality. For example, if a statute covered a house, bungalow, chalet or any other place it would not, for example, affect open spaces, because the particular words all relate to covered buildings.

‘The mischief rule’ this is probably the most useful of the rules in difficult cases. It allows the judiciary to see what wrong caused the Act to be passed, and then endeavour to apply the Act to overcome this defect. The rule originated in Heydon’s Case (1584) therefore it is also referred to as the rule in Heydon’s Case.

- (c)
 - (i) The 'Doctrine of Precedent' states that a judge is obliged to decide the case before him or her by reference to a previous decision when the conditions for the operation of the doctrine of precedent are satisfied. These are that the previous decision is, as far as its *ratio decidendi* (reason for the decision) is concerned, relevant to the determination of an issue of law in the case in question, and that the prior court's decisions are authoritative for his or her court.
 - (ii) In Malawi the decisions of the Malawi Supreme Court of Appeal are binding on the High Court and courts subordinate thereto as far as the *ratio decidendi* is concerned.
 - (d) Common law was originally based on the integration of the various local customary laws of England as a result of the decisions of the royal judges. It is also referred to as judge-made law.² **Marks** Common law was seen to be rigid. This prompted the development of a different set of laws called equity which means 'fairness'. Where there is conflict between common law and equity, equity prevails.
- 3. (a) One of the basic principles of company law is that a company once incorporated becomes a separate legal entity with its own rights and liabilities. The moment Peter and Mark registered their company it became a separate legal entity such that when it failed to settle its debts the Bank could not look beyond the company to have the debt repaid as long as Peter and Mark had paid for their shares in full. The distinction between the personality of a corporation and the personality of the individuals making up the corporation was clearly laid down in the case of *Salomon v Salomon and Co. (1897)*.

 In that case, Salomon incorporated his business as a limited company, which consisted of seven members of his family and himself. He held all the shares except seven, and also debentures to the value of £10,000, representing a loan which the company borrowed from him. The debentures entitled him to a first charge on the assets of the company. Thus, when the company went into liquidation, Salomon claimed that, as a debenture-holder, he was a 'secured' creditor. The other creditors claimed that Salomon and the company were the same person, and that a man could not owe money to himself. The House of Lords, however, held that a company, once incorporated has a legal existence of its own, which was quite independent of the existence of any individual member. In the same way Peter has a genuine defence against the bank's demand over the money won in the casino.
- (b) Main advantages of operating a business as a partnership are:
 - (i) Under the Partnership Act, a partnership may be formed informally, even by word of mouth or it may be implied from the conduct of the parties;

- (ii) Under the Partnership Act, every partner may participate in the management of the business therefore promoting trust amongst the partners;
- (iii) Under the Partnership Act, no new partner may be introduced without the consent of all existing partners;
- (iv) A partnership is not subjected to complex rules of management as a company is;
- (iv) There is usually no limit on the nature of the business the partnership may venture into;

Main disadvantages of operating a business as a partnership are:

- (i) Partners do not enjoy limited liability i.e. they are liable for the debts of the partnership to the full extent of their personal estate;
- (ii) A partnership is not a separate legal entity in law and so the acts of the partnership are regarded as the acts of the partners;
- (iii) A partnership has limited ways of raising capital. It cannot raise capital by issuing shares to the public nor by issuing debentures to its creditors.
- (iv) The fact that every partner may participate in the management of the business does not promote specialization and division of labour;
- (v) Under the Partnership Act, death of a partner automatically determines the partnership unless agreed otherwise.

(c) Differences between civil and criminal law include:

- (i) In the case of a crime the prosecution will normally be brought by the state. In a civil wrong, such as breach of contract, the injured party sues in his own name.
- (ii) Criminal law is concerned with offences against the state or the public such as murder, burglary and theft. Civil suits are private as between the concerned individuals.
- (iii) The purpose of a civil action is to redress a wrong, whereas the aim of a criminal prosecution is to punish the wrongdoer, to prevent him from repeating the crime and to discourage others from committing similar crimes.
- (iv) A criminal action can be withdrawn only with the leave of the state, whereas the claimant in a civil action can settle out of court or withdraw his claim at any time.

(d) (i) A tort is a civil wrong that results into injury to the plaintiff.

- (ii) Examples of torts are negligence, defamation and trespass.
 - (e) (i) 'The preamble' – this consists of the introductory paragraphs, setting out in brief the purpose of the statute.
 - (ii) 'The Interpretative' – one or more interpretation sections are often found within a statute. These have the purpose of explaining the meaning of words or phrases within the statute.
 - (iii) 'The section headings' – beside a section in an Act, there may be found a short heading which may clear up any difficulties within the section.
4. (a) 'Express terms' are those terms which the parties have expressly agreed to either in writing or orally or both, before or at the time of making the contract. Such terms may either be conditions or warranties. A condition is a term of contract which goes to the root of the contract, breach of which entitles the innocent party to rescind the contract. A warranty, on the other hand, is a less important term of the contract, breach of which entitles the innocent party to seek damages only.
- (b) 'Implied terms' are those terms that are not expressed at the time of the making of a contract but they are nevertheless part of the contract. The terms will be implied by custom in a particular place or profession, by statute such as the Sale of Goods Act or Partnership Act or by the parties' course of previous dealing.
- (c) Contracts *Uberrimae Fidei* are contracts of utmost good faith. This means that there must be a complete and honest exchange of information of all material factors between the parties. An example of this is contracts of insurance. In this context the insured must give full and complete facts in respect of the risk that is to be undertaken by the insurer. Other contracts of utmost good faith are those in respect of title to land, contracts of family arrangement, suretyship and partnership contracts.
- (d) Not all agreements are deemed to be legally binding contracts. Social and domestic agreements are deemed not to be legally binding in general terms as they may not be deemed legally enforceable. In *Lens v Devonshire Club* it was held that the winner of a golf competition had no legal right to the prize because no one connected with the competition intended such results to flow from the entry of competitors.

In domestic agreements the law is equally clear in that unless there is a specific agreement then household agreements are deemed not to be legally enforceable. In *Balfour v balfour*, the husband went to work in Ceylon and promised to send his wife £30 a month. When no money was sent, it was held that this was a domestic agreement and as such unenforceable as the parties did not intend to create legal relations. In contrast see *Simpkins v Pays*.

- (d) A mutual mistake occurs when the parties misunderstand each other and are at cross-purposes. X, for example, intends to offer his Toyota Corolla 16 valve, for sale, but Y believes that the offer relates to a Toyota Corolla 12 valve also owned by X. The contract will be void. In *Raffles v Wichelhaus* the partners contracted to buy a cargo of cotton to arrive 'ex Peerless from Bombay'. Two ships, named 'Peerless' sailed from Bombay – one arriving in October and the other in December. The parties each intended that the contract should be in respect of the different ships. The court held that the contract was avoided.

SECTION B

5. (a) According to Section 2(1) of the Hire Purchase Act, a hire purchase agreement means a contract whereby goods are sold subject to the condition that notwithstanding delivery of the goods the ownership in such goods shall not pass except in terms of the contract and the purchase price is to be paid in two or more instalments.
- (b) A hire purchase agreement is governed by the Hire Purchase Act which defines a hire purchase agreement as a contract whereby goods are sold subject to the condition that notwithstanding delivery of the goods the ownership in such goods shall not pass except in terms of the contract and the purchase price is to be paid in two or more instalments. A bill of sale agreement, on the other hand, is governed by the Bills of Sale Act. A bill of sale is considered as security for a loan whereby a borrower agrees in writing to transfer ownership of his personal property to the lender in the event of default.
- (c) The facts disclose that this is a sale by description that is to say one in which words are used to identify the goods sold. It is therefore governed by Section 15 of the Sale of Goods Act which states that 'where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description'. The bicycle that was sold to Mr Phiri did not correspond with the description. The shop owner has thus breached a condition entitling Mr Phiri to rescind the contract i.e. return the bicycle and claim his money back and damages. In *Beale v Taylor* a car was advertised for sale as a 'Herald convertible 1961'. Actually the car consisted of two parts welded together, only one of which was from a 1961 model. It was held that the description '1961' was a contractual condition.
- Section 16(b) of the Sale of Goods Act provides that where goods are bought by description, there is an implied condition that the goods shall be of merchantable quality. Merchantable quality means that the goods must be fit for their purpose. The bicycle in question was not fit for its purpose due to poor assembling. Mr Phiri was relying on the seller's knowledge and experience. In *Priest v last* a customer in a shop asked for 'a hot water bottle'. When it burst it was held to be unfit for the purpose. See also *Griffiths v Peter Conway Ltd.*
- (d) (i) A bill of exchange must be in writing under the Bills of Exchange Act.

- (ii) A promissory note must be in writing under the Bills of Exchange Act.
 - (iii) A cheque must be made in writing under the Bills of Exchange Act.
 - (iv) A bill of sale must not only be in writing but also in a certain form; otherwise it is void under the Bills of Sale Act.
 - (v) Contracts for sale of land must be in writing under the Land Act and Registered Land Act.
 - (vi) Hire purchase agreements must be in writing under the Hire Purchase Act.
6. (a) (i) A bill of exchange is defined by the Bills of Exchange Act – Section 3 – as ‘An unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money or to the order of a specified person, or to bearer’.
- (ii) An order has to be ‘unconditional’, in other words there are no conditions placed upon the face of the bill. It is an ‘order’ telling one person to pay a sum of money to another. It is unequivocal. It is not a request. The directions are ‘in writing’ and ‘signed’ by the drawer. The instrument is an order ‘to pay’ a sum ‘certain in money’. This means that the figures and the words must agree and the amount must be stated clearly. There is an explicit point that the money must be paid ‘on demand’. Thus when the bill is presented the bank must pay the money there and then. If the bill says that it has to be paid at a ‘fixed’ or ‘determinable future time’, this means that the bill may be presented on that date and the money will be paid to the presenter of the bill. The ‘bearer’ is the person presenting the bill and the acceptor must pay the bearer of the bill. If the bill is made payable to or to the order of a named payee, such a person may draw on the bill or pass the bill to another person for value, provided he endorses it.
- (b) (i) A bill of exchange may be discharged by payment in due course. This means that payment must be made to the holder of the bill, a bona fide presenter, without notice of any defect in the title and on or after the date of its maturity. (**Section 59 of the Bills of Exchange Act**).
- (ii) A bill may be discharged by waiver. This means that the holder waives his rights against the acceptor except where such a waiver is absolute and unconditional and is made on or after the date of maturity and made in writing. No consideration needs to be given for such a waiver **Section 62 of the Bills of Exchange Act**).

- (iii) Another way in which a bill may be discharged is that the bill may be canceled by the holder. The cancellation must be intentional. ***Section 63 of the Bills of Exchange Act***).
 - (c) An inland bill is a bill which is or on the face of it purports to be both drawn and payable in Malawi, or drawn within Malawi upon some person resident therein. Any other bill is a foreign bill (***Section 4 of the Bills of Exchange Act***).
 - (d) According to Section 73 of the Bills of Exchange Act, a cheque is a bill of exchange drawn on a banker, payable on demand.
 - (e) The effect of the words 'not negotiable' on a cheque is to take away the attributes of negotiability from the cheque, so that no person taking a cheque bearing such a crossing can obtain a better title than that of the transferor.
7. (a) (i) Agency is a relationship which arises whenever one person, called an agent, acts on behalf of another, called the principal, and has power to affect the principal's legal position with regard to a third party.
- (ii) Examples of an agency relationship include 'stockbrokers' who buy and sell 'things in action', such as shares; estate agents' who are employed by the seller of a house or land to effect a sale on his behalf or find a house or land on behalf of the principal; 'auctioneers' who sell goods on behalf of the principal at an auction; 'lawyers' who appear in court on behalf of their clients; 'travel agents' who purchase travel tickets and make travel arrangements on behalf of their clients or 'insurance brokers' who effect an insurance contract on behalf of their principals.
- (b) (i) An agent has the right to receive remuneration where the agency is contractual, and the agent is in the course of a business as such, then remuneration will be payable to him but a non-contractual agent has no entitlement to be paid, and is truly a 'gratuitous agent'.
- Indemnity; an agent is entitled to be reimbursed all expenses properly incurred on the principals's behalf, and to be indemnified against all losses and liabilities incurred in the execution of the agency.
- Lien; an agent has a lien on the goods or chattels of his principal in respect of lawful claims he may have against the principal for remuneration, charges, loss, or liabilities incurred in the course of the agency.
- (ii) An agent has a duty to personally perform the agreed task as laid down in the contract.
- He has a duty to exercise care and skill of a person in his profession. If an accountant is the agent, the accountant must show the same diligence and expertise as the qualified and competent accountant.

The agent has to account for his transactions to the principal and account for all money arising from such transactions.

The agent has a duty of obedience. An agent is under duty to obey all lawful instructions from the principal.

An agent has a duty to act in good faith and not to make a secret profit.

- (c) Kabula Products Ltd can terminate the agreement with Klerani on one or more of the following grounds:
- (i) Agreement; like any other contract, an agency can be terminated by agreement between the principal and the agent.
 - (ii) Frustration; the frustration of the contract of agency will serve to terminate the authority of the agent. This is likely to occur if the subject-matter of the agency is destroyed, for example if an estate agent is commissioned to sell a house and, before sale, it is burnt down.
 - (iii) Death/insanity/winding up; The authority of an agent is normally terminated by the death or insanity of either the principal or the agent, or the bankruptcy of either. In the case where either party is a limited company, the winding up of the company has the same effect.
 - (iv) Revocation; if either the principal or the agent revokes the agency or renounces it, whether or not the act of so doing is in breach of the contract, the agent's authority will be revoked. If it is done in breach of contract, then the innocent party – principal or agent – will have the right to seek damages for breach of contract. However, this will not affect the fact that the authority of the agent is terminated.
- (d) Before holding that a particular agency relationship is one of necessity, the courts will examine the following conditions:
- (i) a genuine emergency must have arisen and the action taken must be necessary in the circumstances.
 - (ii) it must be practically impossible – or, at least, impracticable – for the agent of necessity to contract the principal.
 - (iii) The action taken must be necessary and for the benefit of the principal and not merely for the convenience of the agent.
 - (iv) The agent must have acted in good faith (bona fide) in the interest of the principal.

8. (a) (i) The definition of consideration was given in the case of *Currie v Misa* as 'the right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, or undertaken by the other' or more simply; 'the price for which the promise of the other is bought'.
- (ii) Consideration may be executory, executed or past. Executory and executed consideration are good consideration whilst past consideration is bad consideration. In executory consideration, the parties have simply made promises. This may occur when a person telephones a shop and orders a piece of furniture. The result is that there is a promise to pay for the furniture when it arrives and in return the shop agrees to supply the piece of furniture according to the type specified by the customer. In executed consideration one party has done everything in order to complete their part of the bargain. For instance an employee who is paid in arrears. Consideration must support the promise. Therefore, if the consideration is given before any promise has been made, it cannot be said to support it. This is called past consideration. In *Re: McArdle* the modernization of a kitchen by a tenant and a promise to pay by the landlord after the job had been done was held to be past consideration and therefore was unenforceable.
- (b) An offer may be defined as a promise which when accepted constitutes a legally binding agreement. An offer may be made verbally, in writing or by conduct. An offer may be made to an individual, to a group, or to the world at large – *Carlil v Carbolic Smoke Ball Co.*

An invitation to treat is merely the giving of information out of which one can make an offer, for example display of goods in a super-market – *Pharmaceutical Society of GB v Boots*, *Fisher v Bell* and *Partridge v Crittenden*.

An acceptance is where a party assents unequivocally to an offer in respect of all the terms and wishes the assent to be legally binding. An acceptance may be made orally or in writing. Where acceptance is by post, once the letter is posted, the acceptance is deemed to have taken place even if the letter is lost in the post. *Adams v Lindsell*.

- (c) The question asks about the status of the contract between Government and Titus. It would appear that government is in breach of contract and that Titus may sue and recover damages from the government.

It would appear that there may be an anticipatory breach of contract where government has agreed a contract but is now repudiating the contract before commencement of it. This would appear to be the case in *Holchester v de la Tour* where the claimant agreed a contract only to be told before the commencement of it that the defendant no longer required his services. The Government may try to claim that there was a frustrating situation as they were experiencing a financial crisis: *Taylor v Caldwell*. This may be construed as

being a frustrating factor but it would be considered highly unlikely that the court would agree with this allegation: *Davis Contractors Ltd v Ferchem UDC*. It is likely that the court would order the government to pay damages if Titus won the case.

(d) The outbreak of war may well alter the situation in respect of Titus and the government, as the government would argue that this factor would frustrate the contract: *Fibrosa v Fairbairn*.

END

NOT FOR SALE