

STRICTLY CONFIDENTIAL

**THE PUBLIC ACCOUNTANTS EXAMINATION
COUNCIL OF MALAWI**

2010 EXAMINATIONS

ACCOUNTING TECHNICIAN PROGRAMME

PAPER TC 8: BUSINESS LAW

(DECEMBER 2010)

TIME ALLOWED : 3 HOURS

SUGGESTED SOLUTIONS

SECTION A

1. (a) Differences between bills of exchange and cheques are:
 - (i) Cheques are always drawn on a banker whilst a bill of exchange may be drawn on a person other than a banker.
 - (ii) Because of the contractual relationship between a banker and a customer, there are a number of special obligations on these parties.
 - (iii) The rules relating to acceptance do not apply to cheques; the banker on whom the cheque is drawn never "accepts" it, so that the drawer is the party primarily liable on the instrument.
 - (iv) There are special provisions for the crossing of cheques which do not apply to ordinary bills of exchange.
 - (v) Special statutory protection is given to bankers in relation to forged endorsements.
 - (vi) In practice the vast majority of cheques are presented for payment by the person to whom they are initially given, and negotiation of a cheque is comparatively rare.
- (b) The reasons for the crossing is that the cheque may be met only by payment to a banker, and cannot be cashed over the counter of the paying bank. The objective being that it is thus possible for the drawer of the cheque to trace it after it has been paid through a bank account, to a known holder. Also, it gives more time to countermand payment.
- (c) According to Section 89(1) of the Bills of Exchange Act, a promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer.
- (d) (i) A Holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely:
 - that he became the holder of it before it was overdue and without notice that it had been previously dishonoured, if such was the fact.

- that he took the bill in good faith and for value and that at the time the bill was negotiated to him, he had no notice of any defect in the title of the person who negotiated it.
- (ii) A Drawer is the person who draws a bill of exchange. He signs the bill of exchange, requiring the person to whom it is addressed to pay a sum certain in money to a specified person or to bearer.
- (iii) A Drawee is the person to whom a bill of exchange is addressed. He will accept the bill if he assents to the order of the drawer.
- (iv) Acceptance of a bill of exchange is the signification by the drawee of his assent to order of the drawer. Acceptance is valid by the drawee's signature on the bill.
2. (a) A hire-purchase agreement is any 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 installments.
- (b) (i) Where a hire purchase agreement has been breached by the debtor, the creditor may repossess the goods
or
institute an action for the price.
- (ii) Where a hire purchase agreement has been breached by the creditor, the debtor may sue the creditor for non delivery
or
commence an action for refund of installments.
- (c) **Three** advantages of a hire purchase agreement to a hirer are:
- (i) He is allowed to take possession of goods and use them even before he has paid the purchase price in full;
- (ii) He pays the purchase price by installments.
- (iii) He has the option not to purchase the hired item and may return it to the hirer after using it for his desired period.

- (d) According to section 6 of the Hire-Purchase Act, every hire purchase agreement must set out the following:
- (i) The amount of the purchase price of the goods;
 - (ii) The amount paid or to be paid by the purchaser;
 - (iii) The amount of each of the installments by which the purchase price is to be paid;
 - (iv) The mode of payment of such installments;
 - (v) The date or mode of determining the date on which each installment is payable;
 - (vi) The rate of interest;
 - (vii) A description of the goods let, sold or delivered;
 - (viii) The terms as to the reservation and passing of ownership of the goods or as to the seller's right to the return of the goods, as the case may be;
- (e) According to section 7 of the Hire-Purchase Act, the following matters, if included in a hire purchase agreement would be invalid;
- (i) The seller or his agent is authorized to enter upon any premises for the purposes of taking possession of the hired goods or is relieved from liability for any such entry;
 - (ii) The right conferred on a purchaser by the Hire-Purchase Act to determine the agreement is excluded or restricted;
 - (iii) Any liability is imposed on a purchaser by reason of the termination of the agreement by him;
 - (iv) A purchaser, after the termination of the agreement in any manner whatsoever, is subject to a liability exceeding the liability to which he would have been subject if the agreement has been terminated by him under the Act;
 - (v) Any person acting on behalf of a seller in connection with the formation or conclusion of an agreement is to be treated as or deemed to be an agent of the purchaser;

- (vi) A seller is to be relieved from liability for the acts or defaults if any from acting on his behalf in connection with the formation or conclusion of an agreement;
 - (vii) The purchaser shall pay interest on an installment in arrear at a rate which exceeds the maximum rate of interest provided for by the Act.
3. (a) The Malawi Supreme Court of Appeal stands at the summit of the Malawi court structure. Its decisions are binding on all courts below it in hierarchy. It hears constitutional, civil and criminal appeals. This court hears appeals from the High Court. It has no original jurisdiction i.e. one cannot commence an action in the Supreme Court. The court has appellate jurisdiction only. Judges of the Supreme Court are called Justices of Appeal.

The High Court of Malawi hears appeals from magistrates' courts, and various tribunals that fall under it. Such appeals may be civil or criminal in nature. The High court has both original and appellate jurisdiction i.e. apart from hearing appeals, the high court can also hear matters at first instance. The High Court can sit as a Constitutional Court where the matter under consideration is constitutional in nature. Three judges sit in the constitutional court. The High Court can also sit as a Commercial Court where the matter is commercial in nature. Most of the matters in the High court are heard by a single judge.

Magistrates Courts- are divided into Resident Magistrates and other magistrates of various grades with varying powers- first grade to fourth grade. The Resident Magistrate, for example, hears civil cases where the claim does not exceed K2,000,000 while the other grades hear cases involving smaller sums. In criminal matters the First Grade Magistrate may inflict a punishment of up to 14 years. Both civil and criminal appeals lie to the High Court.

The Industrial Relations Court - has jurisdiction to hear all employment cases and appeals from this court lie to the High Court. The Industrial Relations Court has civil jurisdiction only and no criminal jurisdiction at all.

The Ombudsman- is not a court of law however he has power to hear cases of abuse of authority by various government departments- maladministration. Most cases involve unfair dismissals by government departments. Decisions of the ombudsman are reviewable by the High Court. The Ombudsman is less formal than the courts and the constitution provides that he can only determine matters

which courts cannot hear even though it seems the ombudsman does not stick to this.

(b) (i) Advantages of the doctrine of precedent include the following:

- (1) Efficiency: this refers to the fact that the doctrine of precedent saves the time of the judiciary, lawyers and their clients for the reason that cases do not have to be re-argued. In respect of potential litigants, they will save time and money by asking for a legal opinion which will be based on previous cases on similar points.
- (2) Consistency: it is important that cases with like facts are decided in a like way, in order that the rationale for a decision may be justified and to maintain confidence in the objectivity of the legal system.
- (3) Certainty: Once a legal rule has been established in one case, individuals can act with regard to that rule relatively secure in the knowledge that it will not be changed by some later court.
- (4) Flexibility: this refers to the fact that the various mechanisms by means of which the judges can manipulate the common law provide them with an opportunity to develop the law without waiting for Parliament to enact new legislation.

(ii) Disadvantages of the doctrine of precedent include the following:

- (1) Uncertainty: much as the doctrine of precedent encourages certainty. It may be observed that uncertainty may arise where decisions of the lower courts are reversed by higher courts. This uncertainty is increased by the ability by the judiciary to select which authority to follow through use of the mechanism of distinguishing cases on their facts.
- (2) Fixity: this refers to the possibility of a wrong or unjust precedent being perpetuated. An example is the decision of the Malawi Supreme Court on the calculation of severance allowance as including both the salary and other benefits unlike the previous High Court decisions which considered salary alone.

- (3) Unconstitutionality: the judiciary is seen to overstep its constitutional role by actually making law rather than simply applying it.
 - (4) Undemocratic: judges are not voted into office but appointed by the President yet they do make law albeit in a limited way.
- (c) (i) Ratio decidendi means the reason for a decision. This includes the finding of fact by the judge from evidence presented in court as well as the principles of law applicable to the said facts which form the basis of a decision. The ratio decidendi binds lower court decisions.
- Obiter dictum* (*Obiter dicta* in the plural) is any statement that is not based on the facts of the case or which does not provide the basis for the decision. It is a remark made in passing which does not bind lower courts but can have persuasive force.
- (ii) **Reversing** is the procedure whereby as a result of an appeal, a superior court in the hierarchy reverses or overturns the decision of a lower court in the same case.
- Overruling** is the procedure whereby a court higher up in the hierarchy sets aside a legal ruling established in a previous case. The courts will overrule previous decisions which no longer represent an appropriate statement of the law.
- Distinguishing** is a device used by the judiciary where they want to avoid following an otherwise binding precedent. The judge may find that the facts before him are different from the facts of a previously decided case which would otherwise have been binding on him.
4. (i) If a person is coerced into making a contract by fear for his own physical wellbeing or that of his immediate family, or for the safety of the goods, or – on rare occasions – for his economic profits, this is called "**duress**". The coercion may be either actual or threatened. The so-called contract is void.
- Undue influence** is said to exist where one person has a special relationship with another and, as a result of this relationship, that other is induced to enter into a contract to his disadvantage. Examples of such relationship are: parent and child, lawyer and client, doctor and patient religious adviser and the person to whom advice is given; Allcard v. Skinner.

- (ii) **An offer** is an expression by one person (the "offeror") that he is willing to contract with another (the "offeree") on specified terms. An offer can be made to one or more specified people, or it can be general, made to "the world at large". In *Carlill v. Carbolic Smoke Ball Co.*, the company manufactured a patent "smoke ball" which, it claimed, prevented influenza. It advertised in the press that it would pay £100 to anyone who contracted influenza after taking one of its smoke balls. Mrs Carlill read the advertisement, bought a smoke ball from the chemist, and used it as directed. However, she promptly got influenza, and she sued the company for the promised sum of £100. The company claimed that it was a "mere puff", and not meant to be taken seriously. HELD: The promise to pay £100 was a valid offer to the world at large. Mrs Carlill had accepted by complying with the conditions, and was entitled to the money.

Acceptance is the signification by the offeree that he is ready to be bound by the terms of the offer. Acceptance of an offer must be absolute and unqualified. Offer and acceptance must correspond in every particular. If a purported acceptance alters or qualifies the offer in any way, it constitutes a rejection of the offer, followed by a counter-offer. The counter-offer is then open to acceptance or rejection in the same way as the original offer. In *Hyde v. Wrench* A offered to sell a farm for £1,000. B said he would pay £950, which A refused. B then agreed to pay £1,000. A then refused this. It was held that the original offer having been refused, B's purported acceptance to pay £1,000 amounted to a counter-offer, which was validly rejected by A.

- (iii) **A holder** of a bill of exchange is a party into whose hands a bill of exchange comes. He possesses the bill of exchange but has not provided consideration for it.

A **holder for value** of a bill of exchange is one who has given consideration or value for it.

- (iv) The difference between a breach of a condition and breach of a warranty is that breach of a **condition** entitles the innocent party to rescind/terminate the contract and file an action for damages.

A breach of **warrant**, on the other hand, merely entitles the innocent party to claim damages and cannot rescind the contract.

- (v) A **mercantile agent** is an agent who merely uses authority in the course of business to sell goods or to consign goods for the purpose of sale, or to buy goods or to raise money on the security of the goods.

A ***del credere* agent** is an agent, who, for an extra commission, called a *del credere* commission, promises to guarantee the principal that if the third party introduced by the agent fails to pay for the goods or becomes insolvent, the agent will make good the principal's loss.

SECTION B

5. (a) The Act of Parliament that protects a buyer of defective or unsuitable goods sold is the **Sale of Goods Act**.

Terms implied by the Sale of Goods Act are as follows:

Sale by description

Section 15 states that 'where there is a contract for the sale of goods by description there is an implied condition that the goods will correspond with the description'. In essence there are two types of sale by description. The first is the sale of unascertained or future goods by description such as a crop of maize, tea or coffee. In these circumstances provided the goods match up to the description there are no problems but if the goods are in some way defective then the purchaser may have cause for action. Secondly, if the goods are sold and the seller describes them clearly then the seller may be liable if there are any discrepancies. In *Beale v Taylor* where a second hand Triumph Herald Convertible 1961 was sold when in fact it was two parts of different cars welded together. It was held not to correspond with the description. Thus the goods being sold must correspond with the description in every way.

Quality and Fitness for purpose

Section 16 states that there is no implied condition or warranty about quality and fitness about the sale of goods. However, there are exceptions to this general rule. For example where the buyer expressly or by implication, makes it known to the seller the particular purpose for which the goods are required. 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.

Sale by sample

Section 17 states that in the case of a contract for sale by sample there shall be an implied condition that the bulk shall correspond with the sample in quality. That

the buyer shall have a reasonable opportunity of comparing the bulk with the sample and that the goods shall be free from defects.

- (b) (i) Steve bought the car in good faith presumably from a dealer or a person whose business was the selling of cars i.e. Car Market Ltd. Steve may be able to use the **Sale of Goods Act section 16** where the car should be **of merchantable quality and be fit for purpose**. The car is relatively new being two years old and having been driven some 50,000 km. It would be expected that the car should be in good condition and the engine and brakes should be in good working order.

The oil leak in a car of two years may be regarded as unusual. There is an implied condition when a vehicle is bought that the brakes are in good working order and should not seize up after only a few days especially if they have been serviced recently. Again the Sale of Goods Act section 16 fitness for purpose should apply.

Another significant point is the mileage issue. The Company said it was merely 50,000 kilometers but in fact it was 150,000 kilometers, thus there was a difference in **description; Sale of Goods Act 1979 section 15**. The company would be liable for returning the purchase price and an award may be made for damages; *Beale v Taylor*.

- (ii) The Latin expression *caveat emptor* means '**let the buyer beware.**' It is a common law principle that the buyer is responsible for examining merchandise and judging its quality before buying it. This harsh position has since been modified by the Sale of Goods Act.
- (iii) The buyer of goods has the following duties under the Sale of Goods Act:
- To accept the goods- section 28
 - To pay for the goods- section 28
6. (a) Capacity in the formation of a contract refers to legal competence in respect of age and the state of the mind in order to understand the consequences of one's actions and to make rational decisions.

The following groups may lack capacity in one way or another:

Companies not yet formed

A company which is not yet incorporated cannot go into a contract as it is not yet in existence.

Minors

Minors are persons below the age of 21 and have limited capacity to contract. Minors are however bound by contracts for "necessaries." Necessaries are those things a person immediately needs, such as food; drink; clothing; accommodation and medicines. Necessaries are not confined to those things which are absolutely required to keep him alive but they extend to all such things as are reasonably necessary for him in the station in life to which he belongs. They exclude luxuries, and also a surplus of necessary items. In *Nash v. Inman*, the claimant was a tailor and the defendant was a minor undergraduate. The claimant sued the minor for the price of various items of clothing, including eleven fancy waistcoats. It was proved that the defendant was well supplied with such clothes when the claimant delivered the clothing in question. Accordingly, the claimant's action failed because he had not established that the clothes supplied were necessities.

Mentally-disordered Persons

Except for contracts for necessities, contracts are not binding on such persons, unless they specifically ratify them during a **lucid period**.

Drunken Persons

Exactly the same applies to a drunken person. To be bound, he must ratify the contract when sober.

- (b) James is a minor i.e. under 21 years of age. Whereas John is an adult and he has to accept full responsibility in contract law and tort for all his actions. As a minor James is entitled to have the protection of the law. He is bound by contracts for necessities and for his own benefit such as education and apprenticeship, any other contracts are voidable at his option. James has booked the hotel for a holiday and has paid a deposit. The booking of a holiday may be regarded as a necessity, *Clyde Cycle v Hargreaves*, provided it is within his socio-economic grouping. In this case it is a necessary as we are told that both James and John have enough funds to pay the debt and they usually go to the lake.

By contrast John's booking would be that of an adult whereby he would be liable to pay for his booking. Since the holiday is a necessity, then James would have to pay the full price of the holiday if it was deemed to be a reasonable price. However, if it was not a reasonable price the court would fix what it deemed to be

a reasonable price, Nash v Inman (the 11 waistcoat case). In respect of the liability by John it is likely that if he ordered the drink he would have to pay for it. John's drunkenness would not be a defence. In respect of the damage caused by John to the hotel, he would have to pay as he caused it and James would not be liable.

7. (a) There is an agency agreement between the Zomba Insurance Brokers and the Expensive Insurance Co. The agreement implies that the agent has to follow all lawful instructions and this would include all terms and conditions laid down by the insurance company. Thus if they had said that they would not insure anyone under the age of 25 years, then this would be a condition of the contract. Thus if the broker insured a person under the age of 25 years, as they did with Patricia, then the broker would be in breach of the terms of the contract.

The law of agency states that once the agent has completed their work the agent '**drops out**' and leaves the principal and the third party to fulfil their parts of the bargain. In this case the Zomba Insurance Brokers have completed their part of the bargain, albeit incorrectly, and have left the principal liable to Patricia. Thus Patricia would be able to have the full protection from the insurance company. The principal would pay Patricia and then be able to recover their losses from the broker under the terms of the agency agreement between the principal and agent.

- (b) (i) **Consideration** is defined as 'the right, interest, profit or benefit accruing to one party, or some forbearance, determent, loss or responsibility given, or undertaken by the other' - Currie v Misa or 'the price at which the promise of the other is bought.'

Consideration may either be executory, executed or past consideration - Re McArdle and Roscorla v. Thomas.

- (i) Amos has a good contract with the employer. In respect of the bonus payments there does not appear to have been an agreement in the basic contract. Thus it would appear that Amos is **not entitled** to the continuance of the bonus payment. If there had been a variation in the contract and Amos had done extra work then he would be entitled to extra pay by way of the bonus; Stilk v. Myrick and Hartley v. Ponsonby. The payment seems to have been gratuitous. In fact it was Amos' job to prevent the occurrence of the criminal incidences, then no extra payment would be awarded.

8. (a) Chiku saw the newspaper advertisement and acted upon it. It may be construed that the advertisement was an invitation to treat Partridge v Crittenden. There

was an offer by Chiku for the machine and it had been accepted. Consideration was shown by Chiku when he sent the payment. This would be executory consideration by Chiku, and by the seller it would be executory consideration.

In respect of the delivery, this was certainly part of the advertisement and as such may be part of the offer or merely regarded as part of the invitation to treat – ***Partridge v Crittenden, Fisher v Bell***. Since the seller had not delivered the machine then he would be liable for the non-delivery. If Chiku lived outside the 15 kilometers radius then he would have to pay delivery for the machine.

It has now been established that there was a good contract and there was a breach of contract for non-delivery. The alternatives for Chiku are firstly to recover his money and secondly sue for damages for loss of bargain. He may not force the seller to sell to him by an order for specific performance since the machine has already been sold to Sam. However, he may also be able to claim for the difference in price between the machine he should have had and a similar one.

- (b) A Director is someone who is appointed to direct and administer the affairs of a company. He may or may not be a shareholder. A Shareholder is someone who owns some shares in a company.
- (c) Four duties of a Director are:
 - (i) The duty not to make secret profits.
 - (ii) To avoid a conflict of interest and declare it when it arises.
 - (iii) To exercise due care and diligence.
 - (iv) To always work for the best interests of the company.
- (d) Articles of Association are subsidiary to the memorandum and they set out the rules and regulations on how the company shall be run and how the members shall relate to the company and to each other. They are rules for internal management of the company.

A **memorandum of association** is the set of objectives of the company and what it intends to do and achieve. It regulates the relationship between the company and outsiders.

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