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THE INSTITUTE OF CHARTERED ACCOUNTANTS IN MALAWI

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ACCOUNTING TECHNICIAN PROGRAMME

PAPER TC12: COMPANY LAW

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SUGGESTED SOLUTIONS

1. (a) (i) Corporate personality is when, upon incorporation, a company assumes a legal personality whereby the company becomes distinct from its members, and has perpetual succession until it is wound up.

(ii) Corporate democracy is when in a corporate setting the majority of the members rule and make decisions by way of voting and management of the company is in accordance with the free and fair principles of democracy.

(iii) Corporate status is the form in which a company is established or exists e.g. a company limited by shares. Corporate status imposes particular obligations and rights to the company.

(b) The differences between a company limited by shares and an association are as follows:

(i) A company has a separate legal entity from its members whereas an association does not.

(ii) Limited liability is only available to the company.

(iii) A company owns property in its own corporate name.

(iv) A company can sue or be sued in its own name.

(v) There is perpetual succession in a company.

(vi) Transfer of membership is only available in a company.

(vii) There is no requirement for common interest in a company.

(viii) A company is allowed to issue shares to raise capital.

(c) In terms of **Section 21(1) of the Companies Act**, a registered company is deemed to have the capacity of a natural person of full capacity and any act done on behalf of the company will be regarded as the company's act. There are, however, circumstances under which the law departs from the rule and will go behind the corporate façade to expose the real actors, and hold the members or officers responsible liable for what would have been the company's act. This is what is known as 'lifting the veil of incorporation. ***Lennard's Carrying Company Ltd v Asiatic Petroleum Co. Ltd. Jones v Lipman (1915) AC 205***.

(d) The circumstances under which the veil of incorporation may be lifted under the provisions of the Companies Act are as follows:

(i) In terms of **Section 42(1) of the Companies Act**, if the number of members of the company falls below the statutory minimum of two and the company carries on business for more than six months, every member or director who is aware that the company is carrying on business through that period will be severally and jointly liable for the company's debts and liabilities incurred during that period.

(ii) In terms of **Section 337(1) of the Companies Act**, if, in the course of winding up, it appears that the business was carried to defraud creditors, any person who knowingly was part of the fraud is personally liable without limitation.

(iii) In terms of **Section 130(3) of the Companies Act**, if an officer signs a cheque or bill of exchange where in the company's name is not accurately endorsed on the negotiable instrument or order for goods or services, the officer will be personally liable.

(iv) Any criminal liability will fall on an individual officer of the company. Thus, under **Section 335 of the Companies Act**, any officer who wilfully makes a false statement, report, account or other document will be personally liable to imprisonment.

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2. (a) **Five** functions of the Registrar of companies are:

(i) To issue certificates of incorporation and change of name.

(ii) To register and keep, for safe custody documents required by statute to be filed with him and to pursue companies which fail to comply with such requirements.

(iii) To issue certificates of registration of mortgages and charges.

(iv) To provide facilities for the examination of filed documents by members of the public and give copies of documents or certificates on payment of a fee.

(v) To complete final dissolution of a company on winding up by striking the company off the companies register.

(b) The register of members of a company limited by shares must show:

(i) The full name, address and occupation of each member.

(ii) The date when each member was entered in the register as a member.

(iii) The date on which any member ceased to be a member.

(iv) A statement of shares held by each member.

(v) The amount paid or agreed to be considered as paid on each share.

(c) Section 16 of the Companies Act provides that the certificate of incorporation is conclusive evidence that all the requirements of the Act in respect of registration and of matters precedent and incidental and there to have been complied with. This means that even if it is subsequently discovered that the formalities of registration were not, in fact, complied with, the registration will not be held invalid. The reason for this is that once a company has commenced business and

entered into contracts, it would be unreasonable for either side to avoid the contract because of the procedural defect in the registration of the company. A company can at anytime or at the request of the Registrar remedy the defect in its registration. The certificate of incorporation is enough proof of the lawful existence of the company.

3. (a) A company is entitled to alter its Articles of Association subject to the following conditions:

(i) The alteration can only be done by special resolution.

(ii) The alteration must not be in conflict with the Companies Act, or any other laws.

(iii) The alteration must not be in conflict with the company's Memorandum of Association.

(iv) A member is not bound by an alteration which requires him to take up more shares and pay for them unless he agrees in writing.

(v) The power to alter Articles of Association does not extend to the power to alter the Articles contracting out of the power since is entrenched under Section 13.

(vi) An alteration that is ill-founded or not *bonafide* will be rendered void at common law.

(vii) The powers to alter the Articles of Association must not be exercised by the majority to infringe the rights of the minority shareholders. The power, like all other powers, is subject to the general principles of law and equity. *Allen v Gold Receipts of West Africa Ltd (1900) 1 Ch 656*.

(ix) An alteration does not affect the company's obligation under a pre-existing contract with a third party – although the alteration may put the company in breach of the contract.

(b) Where a company has entered into a contract with a third person, the subsequent alteration of the Articles may put the company in breach of the contract. This is exactly the sort of situation prevailing in the present case. It was held in *Punt v Symons and Company (1903) 2 Ch 506* that the statutory right of a company to alter its articles would normally be sufficient to prevent the granting of an injunction to restrain an alteration: *Southern Foundres (1926) Ltd v Shirlaw (1940) AC 701*.

This then means that, Joseph cannot obtain an injunction restraining Poultry Feeds Limited (PFL) from affecting an alteration of its articles of association. What he can do, however, is to sue PFL for damages for breach of the contract.

(c) **Section 8(3) of the Companies Act** provides that no member of the company shall be bound by alteration in the Memorandum made after the date on which he became a member in so far as the alteration requires him to take more shares than the number held by him on the date on which the alteration is made or in any way increases his liability as at that date to pay money to the company, unless he

agrees in writing, either before or after the alteration is made, to be bound thereby.

This therefore means that section 8(3) made the alteration of the memorandum ineffective as far as Miriam is concerned. She should not take up the shares allotted to her as a result of the alteration in the Memorandum.

4. (a) Defining the following:

(i) Ordinary shares

Ordinary shares are the types of shares which a company limited by shares can issue. Thus, if a company has one class of shares, these will necessarily be ordinary shares. In fact, even where the company has more than one type of shares, it must have at least the ordinary share. Consequently, unless a company issues deferred shares, ordinary shares will form the residuary class in which is vested everything after the special rights of other classes have been satisfied. As they carry the residual rights they have no right to a fixed dividend. They carry the risks but stand to gain the most in a prosperous company.

(ii) Deferred shares

A company will occasionally issue deferred shares to founders of its business. No dividends are paid to deferred shareholders unless ordinary shareholders are paid a certain amount of dividend in the financial year. In other words, the deferred shareholder is entitled to participate in the distribution of the company's profits only after a declared dividend has been paid on ordinary shares. However, deferred shares are hardly in use any longer.

(iii) Preferred shares

The essential characteristic of a preference share is that its holder has priority in the return of capital on the company's winding up. However, this will have to be expressly stated in the articles as it does not automatically follow that merely because one is a preference shareholder, then he is entitled to priority in the distribution of assets on winding up: *Re : Syston and Thurmaston Gas Light and Coke Co. Ltd*.

In the case of dividends, a preference shareholder is entitled to priority if the company decides to pay a dividend to its members. If it does not make that decision he cannot compel it to do so: *Bond v Barrow Hematite Steel and Co. Ltd (1902)1 Ch 353*. Preference shares usually carry a dividend at a fixed rate. They are there like debentures than ordinary shares.

(b) Transfer of shares is the voluntary conveyance of rights and duties of a member as represented in a share from a shareholder to a person who desires to be a member. Shares of any member of a company limited by shares are part of his personal estate and moveable property **Section 43(1) of the Companies Act**. As such he can transfer them to any person. The transfer of shares in a company will be ineffective unless the shares are not fully paid up. **Section 50(3) of the Companies Act**.

(c) Shares can be transferred by a written instrument in the prescribed form or in any other form approved by the company's directors **Section 43(1) of the Companies Act**. Thereafter, it must be registered by the company because until the registration and the entry of the transferee's name in the company's membership register in respect of the shares are done, the transferor remains their holder (Article 10 Table A). The instrument may be lodged for registration by the transferor or the transferee **Section 49(3) of the Companies Act**.

(d) Apart from transfer, shares may change hands through the operation of law. Section 54(2) of the Companies Act provides that on the death of a shareholder where he was a joint shareholder, his legal representative can be registered as shareholder in his place. Similarly where a receiving order is made against an individual under the Bankruptcy Act, ownership of his shares will devolve on his trustee in bankruptcy. Again, in the case of a company which is in receivership, ownership of the shares which it held in another company will be transmitted to its receiver.

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5. (a) Explaining the following:

(i) <u>Annual General Meeting</u>

This is a forum in which members contribute to their company's decision-making. According to **Section 104(1) of the Companies Act**, every registered company must hold at least one general meeting for the year so that 15 months should not pass between one meeting and the next. This is called an annual general meeting **Section 1 of the Companies Act**.

(ii) <u>An Extra-ordinary General Meeting and how it is convened</u>

Article 2 of Table A defines an extraordinary general meeting as any meeting of the company other than an annual general meeting. Generally, the position is that directors will convene this type of meeting whenever they think it fit to do so **Section 105 of the Companies Act**. However, members can call the meeting as long as they hold at least 5% of the total voting rights of all the members who have the right to vote at the company's general meetings.

If the directors do not, within 21 days of the deposit of the requisition, convene the meeting, the requisitionists may convene it themselves. They

must do so within three months of depositing the requisition at the company's registered office **Section 106(1) of the Companies Act**.

(iii) Class meeting and difference from general meeting

Section 47 of the Companies Act allows a registered company to create different classes of shares by attaching certain rights or restrictions to some of its shares. To vary these rights the company may have to convene a meeting of holders of the class of shares concerned. Class meetings are, therefore, meetings attended by members of a particular class of shares only, convened to discuss rights relating to that class of shares only.

Section 124(1) of the Companies Act provides that provisions of the Act relating to general meeting will apply to such a meeting. The major difference, however, between these two types of meetings is that where a class of shareholders comprises one member, that member will be deemed to constitute a meeting. On the other hand, the quorum for company general meetings is usually two members.

(b) A class meeting must only be attended by holders of the class of shares concerned. If holders of other types of shares are also present, that may affect the validity of the meeting. However, if these members come in after deliberations are over and voting is about to start and the legitimate participants do not object to their presence, the meeting will still be valid *Carruth v Imperial Chemical Industries Ltd (1937) 2 Aller 422*.

In the present case, the preference shareholders could not have objected to the presence of other shareholders because they were not aware that members of another class of shares were also in attendance. What they should therefore do is to make an application for the quashing of the resolution passed as the validity of the same is affected by the other members who should not have attended the meeting.

6. (a) The rule in *Royal British Bank v Turquand's Case (1856) 6 E & B 327*

The rule in the *Turquand's Case* is that a company will still be liable for the acts of its director even if the appointment of the said director or his authority is questionable or did not exist. The rule states that the absence of appointment or authority will not affect an outsider who deals with the director in good faith unless the person actually knew that the person was not a director or that he did not have the authority to bind the company. The person dealing with the company is not bound to enquire into the rules governing the company's internal management before he enters into any transaction with a person purporting to act on its behalf.

(b) The doctrine of *ultra vires* relates to a company's lack of capacity to do something or enter into a particular transaction e.g. where the transaction is outside the company's objectives or is within restrictions imposed on the business

it can carry on. *Ultra vires* may also arise if even where the act is within the company's powers but it is done for a purpose outside its powers. Lack of capacity may also arise where directors enter into a transaction which is within its powers but in contravention of a limitation on their powers or in contravention of certain procedures laid down by either the Memorandum or Articles. At common law, an *ultra vires* transaction could not be ratified although members could restrain it by injunction.

(c) The Companies Act has affected the application of the doctrine of *ultra vires* in that:

(i) **Section 22(1) of the Companies Act** provides that a company shall not carry on any business or pursue any object or exercise any power that is restricted by its Memorandum or Articles although an act or transfer of property to or by the company is not invalid merely because it contravenes those prohibitions.

(i) **Section 22(2) of the Companies Act** allows a member of the company or holder of debenture secured by a floating charge over its property to apply for an injunction prohibiting the act, conveyance or transfer.

(ii) **Section 203 of the Companies Act** which provides remedy to any aggrieved member against a company's oppressive manner of conducting its business.

(iii) By allowing alteration of a company's objects in its Memorandum under **Section 10**, the Act also relaxes the application of the doctrine of *ultra vires*.

7. (a) A company may incur liability through the acts of its directors in two ways.

(i) First, because of the directors' control of the company's affairs, the acts are sometimes treated as those of the company itself. In *Tesco Supermarkets v Nattras (1971) 2 Aller 127*, it was held that a corporation must act through living persons. The person who acts is not speaking or acting for the company. He is acting as the company. There is no question of the company being vicariously label. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company.

In Lennard's Carrying Company Limited v Asiatic Petroleum Company (1915) AC 205 Limited, a company owed a ship which sank, causing her cargo to be lost. The Managers of that company were another limited company whose Managing Director, Mr Lennard, managed the ship on behalf of the owners. Evidence showed that the loss was the result of default by Lennard in that although he knew or ought to have known of the ship's unseaworthiness, he did nothing to prevent the ship from putting

to sea. In an action for the purchasers of the cargo for compensation, the company sought to the advantage of a shipping status which excused the owner of a sea-going ship from liability for "any loss or damage happening without his fault." It was held that the company was liable for the loss on the ground that Mr Lennard was the directing mind of the company and his action therefore was the action of the company.

Similarly, in *Bolton & Co. Limited v Graham & Sons Limited (1956) 3 Aller 624*, the plaintiffs who were tenants of certain business premises were entitled to have the tenancy renewed unless the landlord intended to occupy the premises themselves. The question was whether the defendant company which was the landlord, had effectively formed that intention. No formal general or board meeting had been held to consider the question but the directors who managed the company caused notice to vacate the premises to be given to the plaintiffs. It was held that this was sufficient indication of the defendant company's intention to occupy the premises.

(ii) Secondly, a company may be liable for the acts of its directors because for certain purposes, directors are regarded as agents of their company. As far as those purposes are concerned, the company will be bound by their acts in accordance with the principles of agency law as applied to companies.

Generally, a company, as the principal, would be bound by the acts of its agents which are within his actual authority, whether that authority is express or implied. In *Hely – Hutchnson v Brayhead Limited R (1967) 3 Aller 98* who was chairman of the company A negotiated with H as representative of company B in a certain financial transaction. R acted as the Chief Executive and Managing Director of Company A. Although no such appointment had been made, the company's board was aware of an acquiesced in his activities on behalf of the company. Subsequently, R signed documents whereby company A agreed to indemnify H against liabilities which the latter had incurred as part of the transaction. Since R had no authority from his board to sign those documents, when H claimed under them, company A denied that liability on the ground that the documents, although the company had, by its acquiescence, in his previous activities on its behalf, implied that he had authority to bind it.

A registered company may also be bound by the acts of its directors, as its agents, because they have ostensible authority under its memorandum to bind it in certain transactions e.g. the issuing of shares, borrowing of money etc. This was the view of *Justice Slade in Rolled Steel Products Holding Limited v British Steel Corporation* where he said that a company can hold out its directors as having ostensible authority to bind the company to any transaction which is within their express or implied powers. Of course, it is a third party who deals with directors knows that they do not have powers to enter into that transaction on behalf of the company, he cannot rely on this authority to hold the company liable for that transaction **Section 140(4) of the Companies Act**.

(b) The procedure to follow in the removal of a director is outlined under Section 146 of the Companies Act.

A company may by ordinary resolution, at any general meeting, remove from office all or any of its directors notwithstanding anything in its Articles or in any agreement with any director **Section 146(1) of the Companies Act**. This is however, subject to the right to compensation open to the director under such agreement on the termination of his directorship or of any right to damages of his removal from his directorship constitutes a breach of such service agreement **Section 146(7) of the Companies Act**.

A resolution to remove a director shall not be moved at any general meeting unless notice of the intention to move it has been given to the company not less than thirty five days before the meeting **Section 142(2) of the Companies Act**. On receipt of such notice, the company shall forthwith send a copy thereof to the director concerned who shall be entitled (a) to be heard on the resolution at the meeting and (b) to send to the company a written statement, copies of which the company shall send with every notice of the general meeting or, if the statement is received too late, shall forthwith circulate to every person entitled to notice of the meeting in the same manner as notices of the meetings are required to be given **Section 146(3)(a) and (b) of the Companies Act**.

Apart from being heard orally, the Director may (unless the court otherwise orders) also require that the written statement by him be read to the meeting **Section 146(4) of the Companies Act**.

On a resolution to remove a director, no share shall, on a poll, carry a greater number of votes than it would carry in relation to the generality of matters to be voted on at a general meeting of the company **Section 146(5) of the Companies Act**.

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