

**STRICTLY CONFIDENTIAL**

**THE PUBLIC ACCOUNTANTS EXAMINATION**  
**COUNCIL OF MALAWI**

**2011 EXAMINATIONS**

**ACCOUNTING TECHNICIAN PROGRAMME**

**PAPER TC 8: BUSINESS LAW**

**(JUNE 2011)**

**TIME ALLOWED : 3 HOURS**

**SUGGESTED SOLUTIONS**

## SECTION A

1. (a) An artificial legal entity may come into being in the following ways:
    - (i) by registration under the Companies Act.
    - (ii) by registration under the Trustees Incorporation Act.
    - (iii) by an Act of Parliament.
  - (b) (i) **A Corporate sole** consists of an office occupied by one individual which office is declared by statute to have corporate status thus the office can sue and be sued and have all attributes of a corporation. For example, the Administrator General.
  - (ii) **A Corporate aggregate** is that which is formed when several individuals join together to form one body corporate with separate legal existence. For instance a private limited company or a public limited company.
  - (iii) **A Public Limited Company** is one that offers its shares to the public; it has no limit on its membership and does not restrict the transfer of shares by its members.
  - (c) Every partner in a firm is **jointly and severally liable** for all the debts and obligations of the firm incurred while he is a partner- section 11 and 14 of the Partnership Act. This applies equally to ‘sleeping’ partners who take no active part in the day –to-day operation of the partnership business. Outsiders have the choice of taking legal action against the firm collectively or against the individual partners.
  - (d) Although **Felix** is a sleeping partner, he is **jointly and severally liable** for all the debts and obligations of the firm incurred while he is a partner- section 11 and 14 of the Partnership Act.
- Kelious** and **Dziko** are active partners and so there is no doubt that they are **jointly and severally liable** for all the debts and obligations of the firm incurred while they are partners- section 11 and 14 of the Partnership Act.
- Chris** is said to be a mere employee. However he has made it known that he has become a partner, although he has not. The Partnership Act states in section 16 that everyone who represents himself, or knowingly suffers himself to be represented, as a partner is liable to any person who gives the partnership credit on the basis of that representation. This means that Chris will be liable to such an extent.
2. (a) Section 21 of the Sale of Goods Act permits the seller of specific goods, or of

goods which are subsequently appropriated to the contract, to **reserve the right of disposal** of the goods until specified conditions are met. Notwithstanding delivery, the property in the goods does not then pass until those conditions have been met. **Retention of title** means that the seller has the right to prevent the buyer from dealing with the goods as if they were his own, notwithstanding that he has possession of them. The usual condition is payment of the price; *Aluminium Industrie Vaassen BV v. Romalpa Aluminium Ltd (The Romalpa case.)*

- (b) The Sale of Goods Act has modified the *caveat emptor* 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'. This means that a buyer who buys goods which do not match with the description can elect to rescind the contract.

**Quality and Fitness for purpose**

Section 16- Where the buyer expressly or by implication, makes it known to the seller the particular purpose for which the goods are required the buyer will be entitled to rescind the contract if the goods bought turn out not to be fit for their 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. This means that a buyer who buys goods which do not correspond with the sample can elect to rescind the contract.

- (c) At common law a friend being taken out for a meal will be protected against injury through principles laid down in *Donoghue v Stevenson*, the snail in the ginger beer case. Lord Atkin in his dictum stated that people must take care of their neighbours. Lord Atkin stated 'there is a duty of care to take reasonable care to avoid acts or omissions which one could reasonably foresee may injure one's neighbour...' He continues by asking the question, 'who is my neighbour?' to which he replies, 'those people who are directly affected by my acts or omissions'. The fundamental principles from this case are the duty of care, the breach of the duty of care and there has to be damage or injury and it must not be too remote.

- (d) The two duties of a buyer of goods under the Sale of Goods Act are as follows:

- (i) The duty to **accept delivery** of the goods provided for in section 28 and

- (ii) The duty to **pay the price** provided for in section 28.
3. (a) (i) **An offer** sets out the terms upon which an individual is willing to enter into binding contractual relationship with another person. It is a promise to be bound on particular terms, which is capable of acceptance- **Carlill vs Carbolic Smoke Ball Company**. The essential factor to emphasize about an offer is that it may, through acceptance by the offeree, result in a legally enforceable contract. The person who makes the offer is the offeror; the person who receives the offer is the offeree.
- (ii) **A counter offer** can best be described as an expression of intention to accept an offer which falls short of a legally binding acceptance by reason of the introduction of a new dimension or term to the offer by the offeree or by the offeree's failure to accept all the terms of the offer-**Hyde v. Wrench**.
  - (iii) **A tender** arises where one party wishes to be supplied with certain services and issues a statement asking interested parties to submit the terms on which they are willing to provide the services. In the case of a tender, the person who submits the tender is the offeror and the other party is at liberty to accept or reject the offer as they please.
  - (iv) **The postal rule** for acceptance of an offer states that a postal acceptance is complete, and the contract binding, when the letter is posted or handed to the postal authorities. **2 Marks** This means that, should the letter of acceptance be lost or delayed in the post, this does not affect the validity of the contract- **Adams v. Lindsell**.
- (b) An offer, once made, does not remain open for acceptance indefinitely. It can terminate in four ways:
- (i) **If it is withdrawn**-Unless an offer specifically states that it is irrevocable, or that it will remain open for a definite stated time, it can be withdrawn at any time before it has been accepted – provided, that is, that the revocation has been communicated to the offeree.
  - (ii) **If it is rejected**-the act of rejection destroys the offer, and the offeree cannot change his mind, and later accept. Rejection does not have to be expressed: it can be implied.
  - (iii) **If it lapses**-An offer will lapse, and thereafter be incapable of acceptance, in three events: If the offer specifically stated that it would cease, or had to be accepted, by a certain date; If it stated that it was conditional upon

some circumstances other than time such as condition of goods. An offer lapses if it is not accepted within a "reasonable" time.

- (iv) **On the Death of either party** before acceptance the offer terminates unless the personal representative of the deceased party adopts it.
- (c) (i) **Anticipatory breach** of a contract is breach that occurs before the due date of performance. It occurs where one of the parties shows a clear intention not to be bound by their agreement and indicates that they will not perform their contractual obligations on the actual date of performance.
- (ii) An example is a situation where one is offered and accepts a job, but before the date of commencement she is advised that her services are no longer required. She can sue for damages.
- 4. (a) (i) **Statute law**, often called legislation, is written law enacted by the approved legislative process of the state. A statute is also called an Act of Parliament. Statute law takes precedence over case law.

Examples of statute law include the Sale of Goods Act and the Partnership Act.

- (ii) **Case law** consists of a body of legal rules that have been created by the judiciary through the decisions in the cases they have heard. It is also referred to as common law or judge-made-law. The central concept of case law is the doctrine of precedent which states that when a court has to decide an issue, it looks to previous decisions contained in earlier cases for guidance on how to deal with the present case.
- (iii) **Equity** denotes fairness or reasonableness. When common law was first developed, it was rigid and too strict thereby promoting injustice. The courts therefore resorted to what was just and equitable in particular circumstances resulting in the creation of a body of law referred to as equity.
- (iv) **Customary law** is a historical source of law. Customary law is made up of rules of human conduct, established by usage, which are adopted by the courts because they are followed by the political society as a whole or in part. General customs prevail over the country as a whole unlike

particular or local customs. For example, the custom of paying marriage dowry is particular to some areas in Malawi and not others.

- (b) A judge may use external aids to statutory interpretation such as **dictionaries** and **hansards** (records of parliamentary proceedings)
- (c) (i) There is always a danger that consumers may be persuaded into hire-purchase commitments which they cannot afford, or that some trivial failure in meeting repayments might lead to forfeiture of the goods. The Hire-Purchase Act seeks to prevent such abuses.
- (ii) (1) A hirer of goods under the Hire-Purchase Act is protected through section 6 of the Act which states *inter alia* that every hire purchase agreement must set out the amount of the purchase price of the goods; the amount paid or to be paid by the purchaser; the amount of each of the installments by which the purchase price is to be paid; the mode of payment of such installments and the date or mode of determining the date on which each installment is payable.
- (2) The hirer is further protected by section 7 of the Hire-Purchase Act which prohibits the inclusion of certain unfair terms, which if included in a hire purchase agreement would be invalid. Examples of such terms are that 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 or that the right conferred on a purchaser by the Hire-Purchase Act to determine the agreement is excluded or restricted.

## SECTION B

5. (i) **Carlill vs Carbolic Smoke Ball Company** (1893) In that case, the defendants owned a medical preparation called the carbolic smoke ball and they issued an advertisement offering to pay £100 to anyone who would succumb to flu after using the preparation in a certain manner. The Plaintiff sued after catching flu even after following the instructions. She sued for the money. The Court delivered judgment in her favour on the ground that there was an offer made to the whole world which ripened into a contract with anyone who came forward and performed the condition on the faith of the advertisement, of which the plaintiff was one.
- (ii) **Bettini vs Gye** (1876) In this case a singer, Bettini, who was engaged for the whole season both in theatres and at concerts, undertook to appear 6 days in advance for the purpose of rehearsals. He arrived only 2 days in advance and the

defendant sought on this ground to terminate the contract. It was held that the rehearsal clause was subsidiary to the main purpose of the engagement i.e. it was a warranty such that the defendant could not lawfully treat the contract as at an end.

- (iii) In *Poussard v Spiers* (1876) the plaintiff was engaged to perform at an opera. She failed to attend the final rehearsals and the first performance in which she was supposed to take the principal female part. The court held that the breach by the plaintiff went to the root of the contract i.e. it was a condition breach of which entitled the defendant to terminate the contract.
  - (iv) In *Donoghue v. Stevenson* (1932) a person bought a bottle of ginger beer in an opaque bottle for her friend. The friend opened the bottle and drank most of the contents. Only afterwards did she discover, in the residue, the decomposing remains of a snail. Not surprisingly, she became ill! The problem was that the claimant did not have a contract with the café proprietor, so no action for breach of contract was possible. The only redress was an action for the tort of negligence. The House of Lords held that as the ginger beer was sold in an opaque bottle, so that no intermediate examination was possible, the manufacturer owed a duty of care to any person who suffered injury as a result of drinking the contents.
  - (v) In *Pharmaceutical Society of Great Britain v. Boots Cash Chemists (Southern) Ltd* (1953) A customer on entering a pharmacy was given a basket and, having selected from the shelves the articles he required, took them to the cash desk. Near the cash desk was a registered pharmacist who was authorised if necessary to stop a customer from removing any drug from the pharmacy. The issue was whether the pharmacy had broken an Act of Parliament which provided that it was unlawful to sell certain drugs without registered pharmacist supervision. The question was thus at what 'time' did the sale take place? It was held that the display was only an invitation to treat and the customer would make the offer at the cash desk where the registered pharmacist would either accept or reject the customer's offer therefore the pharmacy did not breach the provisions of the Act.
6. (a) (i) Farook should pursue an action in tort against the accountant for negligence. For an action on negligence to succeed the claimant must show:
- That a duty of care was owed to him in law
  - That such a duty has been breached- i.e. negligence
  - That damage has been suffered, and
  - That such damage was principally caused by the defendant's negligence.

The case of *Hedley Byrne & Co. v Heller & Partners Ltd* (1963) established that as professional people owe a duty of care to those whom they should reasonably recognize will rely on their professional opinion, a negligent mis-statement will in such circumstances be actionable. An action will succeed for negligent mis-statement not only where a contractual relationship exists, but also when the professional person should reasonably foresee that another party will act on the basis of his professional statement.

The accountant appears to have given advice in a professional capacity. One can expect him to be reasonably competent in his profession. He owes a duty of care to Farook. There also appears to have been negligence. The accountant should have foreseen that Farook would rely on his advice and it was reasonable for Farook to do so.

- (b) (i) **Contributory negligence** arises where the plaintiff fails to use reasonable care for his own safety and so contributes to his own injury. Damages payable to the plaintiff will be reduced accordingly because of his own negligence.
- (ii) An example of a situation in which contributory negligence is present is where a pedestrian crosses the road carelessly and is hit by an over-speeding motor vehicle. The pedestrian has, through her own negligence, contributed to the injury she suffers or where a worker engages himself in welding without putting on goggles resulting in injury to his eyes.
- (c) The following are factors that can vitiate a contract:
  - (i) Mistake – For example where parties contract for a cargo of rice which is believed to be in a ship bound from Karonga to Monkey-bay. In fact, before the date of the sale, the rice has rapidly deteriorated, and the ship has put in to Nkhata-bay and sold the cargo for what it would fetch, the contract shall be void because of mistake as to the existence of the subject-matter *Re: Couturier v Hastie (1856)*.
  - (ii) Misrepresentation – For example a statement that a particular type of paint will last 5 years and in fact lasts a year only.
  - (iii) Illegality for example an agreement to sale Indian Hemp.
  - (iv) Duress for example an agreement entered into following physical or economic threats.



- (v) Undue influence for example an agreement entered into following persuasion from a person of influence such as a parent on his child or a doctor on his patient.
7. (a) **An exclusion clause** is a contractual term which purports to exclude or limit liability for the happening of certain events such as liability for damage to property, personal injury or death due to negligence.
- (b) An exclusion clauses may be incorporated into a contract in the following ways:
- (i) **By signature;** if one signs a written contract then he is bound by its terms whether the terms are read and understood or not, in the absence of misrepresentation or the defence of *non est factum*.
  - (ii) **By Notice;** if notice of the existence of an exclusion clause has been given to the other party before or at the time the contract is made- **Olley v. Marlborough Court, Ltd.**
  - (iii) **By a previous course of dealing;** in such cases, the transaction must be frequent and regular enough to constitute a course of dealing. Alternatively a trade custom or practice may imply an exclusion clause into a contract.
- (c) The courts will usually strictly construe an exclusion clause against the person who inserted it. In other words, the other party is given the benefit of any doubt. This is called the *Contra proferentem* rule.
- (d) (i) **Remoteness of damage** means that in the first place, a party in the wrong will pay the innocent party damages such as may fairly and reasonably be considered as **arising naturally**, i.e. according to the usual course of things, from such breach of contract itself. In the second place, a party in the wrong will pay the innocent party damages such as may fairly and reasonably be considered as reasonably to have been in the **contemplation** of both parties, at the time they made the contract, as the probable result of the breach of it. **The Wagon Mound (No. 1) (1961).**
- (ii) **Causation and damage** -It is essential that the loss suffered must have been caused by the breach of contract. There must be a **direct chain** of causation between the breach of contract and the loss suffered. If something or someone intervenes to break this chain, it cannot be said that the breach caused the loss.

- (iii) **Mitigation of loss-** the law demands that an injured party must minimize his loss and cannot claim damages of loss occasioned by his own negligence for failure to minimize the loss.
- (iv) **The measure of damages-** courts will measure damages by assessing the estimated loss directly and naturally resulting, in the ordinary course of events, from the other party's breach of contract. The object being to place her in the same position as she would have been in had the contract been properly performed.

8. (a) (i) The **four** elements that must be present before the courts will hold that a particular statement is a misrepresentation are as follows:
  - The statement must be one of **fact** and not opinion or mere puffs not intended to be taken seriously.
  - The statement **must induce the contract**; if a false statement is made to which the other party pays no attention, or which does not in any way influence him, then this does not affect the validity of the contract.
  - The statement must be **addressed to the party who is misled**.
  - The statement must be **untrue**. Mere silence does not constitute a misrepresentation. A positive untrue statement must have been made.
- (ii) Three types of a misrepresentation are as follows:
  - **Innocent misrepresentation** occurs where the party making it does so innocently without knowledge that it is false.
  - **Negligent misrepresentation** occurs where the representor makes the statement recklessly without caring whether it is true or not; and .
  - **Fraudulent misrepresentation** occurs where the person making it does so with a clear intent to deceive the other party.
- (b) (i) Zangazanga Paints Ltd is advancing the doctrine of **privity of contract**.

- (ii) It is a fundamental principle of law that two people cannot by a contract impose liabilities on, or bind, a third party; nor can anybody have rights or obligations imposed upon him by a contract, unless he is a party to it. This principle is called **privity of contract**. Sometimes, this rule can cause absurdities or injustice, and in appropriate cases the law has found ways around it. For example the courts may imply a collateral contract. Under the Road Traffic Act a person driving a car with the consent of the owner can enforce any provision of the owner's insurance policy even though he was not party to the insurance policy.
- (iii) The defence advanced by Zangazanga Paints Ltd will not succeed.

If the privity rule is strictly applied, Mr Phiri will have no right of action against Zangazanga Paints Ltd. Indeed, the contract for painting the mansion did not contain a warranty that it would last any particular time. Mr Phiri would have no rights against the contractors either as they have performed their side of the bargain. Even if Mr Phiri did have such a right, Zangazanga's misrepresentation was made to Mr Phiri and not the contractors. So, the contractors would have no rights against Zangazanga Paints in respect of it.

In the circumstances the court will avoid injustice by ignoring the privity of contract and hold that there must be implied a collateral contract between Mr Phiri and Zangazanga Paints: *Shanklin Pier v. Detel Products Ltd. (1951)*.

**E N D**