

STRICTLY CONFIDENTIAL

THE PUBLIC ACCOUNTANTS EXAMINATION
COUNCIL OF MALAWI

2011 EXAMINATIONS

ACCOUNTING TECHNICIAN PROGRAMME

PAPER TC 8: BUSINESS LAW

THURSDAY 8 DECEMBER 2011

TIME ALLOWED : 3 HOURS
2.00 PM - 5.00 PM

SUGGESTED SOLUTIONS

SECTION A

1. (a) Law is a system of rules created by a society to regulate behavior and punish crimes.
- (b) **A legal system** is a system of rules of law that govern society as well as the various bodies and tribunals in that society that administer the laws.
- (c) The following are the three types of laws that Malawi received from the United Kingdom on 11th August 1902.
 - (i) common law
 - (ii) equity
 - (iii) statutes of general application in force in England as at 11th August 1902.
- (d) Differences between criminal and civil law are as follows:
 - (i) a crime is a wrong against the state, while a civil wrong is one against an individual;
 - (ii) 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;
 - (iii) the standard of proof in criminal law is higher (beyond reasonable doubt) than in civil law (on the balance of probabilities);
 - (iv) 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;
 - (v) a criminal action can be withdrawn only with the leave of the State, whereas the claimant in a civil action can settle out of court or withdraw his/her claim at any time.
- (e) Jurisdiction of various courts:
 - (i) **The Malawi Supreme Court of Appeal** is the most authoritative court in Malawi. Its decisions are final. It hears both 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.

- (ii) The High Court of Malawi hears appeals from magistrate's 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 also sit as a **Commercial Court** where the matter is commercial in nature (i.e. claims of above K1 million) A single judge sits in the commercial court.
- (iii) The High Court can sit as a **Constitutional Court** where the matter under consideration is constitutional in nature. Three judges of the High Court sit in the constitutional court.
- (iv) **Magistrate's Courts** are divided into various posts and grades with varying powers – Chief Resident Magistrate to fourth grade magistrate. The Chief Resident Magistrate, for example, can hear civil cases where the claim does not exceed K2 million while the other magistrates hear cases involving even smaller sums. In criminal matters the Chief Resident Magistrate may inflict a punishment of up to 14 years imprisonment. Both civil and criminal appeals from the magistrate courts lie to the High Court.
- (v) **The Industrial Relations Court (IRC)**- has jurisdiction to hear all employment cases and appeals from this court lie to the High Court. Thus the IRC has civil jurisdiction only and no criminal jurisdiction at all.

2. (a) Three ways through which an offer may lapse are as follows:-

- (i) If the offer specifically stated that it would cease, or had to be accepted, by a certain date.
 - (ii) If it stated that it was conditional upon some circumstances other than time. For example, an offer of a sound vehicle may lapse once it is damaged in an accident-*Financings Ltd v. Stimson (1962)*
 - (iii) An offer also lapses if it is not accepted within a "reasonable" time. This depends on the type of transaction. An offer to buy perishable fruit or vegetables will lapse after quite a short period while one to sell a house or a motor car will remain open much longer.
- (b) (i) **Joint liability** arises where two or more people together promise to do the same thing. In this event, there is only one obligation, and the discharge of it discharges all the joint promisors.

- (ii) **Several liability** is present where two or more people make separate promises to another person. These separate promises can be made by the same instrument or by different instruments. The promises are, thus, different – and, if one is discharged or breached, this has no effect on the others.
 - (iii) **Joint and several liability** occurs where two or more persons in the same instrument make a joint promise to do a certain thing and, at the same time, each of them makes a separate promise with the promisee to do the same thing. So, one joint obligation arises, and also as many several obligations as to the same thing as there are promisors.
- (c) Some domestic agreements between members of a family are intended to have legal consequences whilst others are not. In *Balfour v. Balfour (1919)* The wife of a man working in Ceylon had to remain in England for medical reasons. Her husband promised to pay her an allowance of £30 a month. The court held that their agreement was not intended to have legal force (also, the wife had not provided any consideration for the promise). This case must be distinguished from *Merritt v Merritt [1970]* where Mr. Merritt and his wife jointly owned a house. Mr. Merritt left to live with another woman. They signed an agreement that Mr. Merritt would pay Mrs. Merritt a £40 monthly sum, and eventually transfer the house to her, if Mrs. Merritt kept up the monthly mortgage payments. When the mortgage was paid Mr. Merritt refused to transfer the house. It was held that the nature of the dealings, and the fact that the Merritts were separated when they signed their contract, allowed the court to assume that their agreement was more than a domestic arrangement. A similar situation arises in the "pools syndicate" type of agreement. It is quite a widespread practice for members of a household, a group of friends, or employees in a business to participate on a regular basis in a football pools scheme or some other form of prize competition. If they happen to win a prize, their agreement will be binding i.e. they have to share the prize according to their contributions- *Simpkins v. Pays (1955)*.
- Rarely, if ever, do social agreements give rise to the implication that legal consequences were intended. 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 *Lens v. Devonshire Club (1914)*.
- (d) **The Doctrine of Privity of contract** states that it is a fundamental principle of contract 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/her by a contract, unless he/she is a party to it. In *Price v. Easton (1833)* A man owed Price a sum of money. He agreed with Easton that he would work for him, if Easton would pay off his debt to Price. The work was duly done but Easton failed to pay Price. Consequently, Price sued Easton. The court held that Price could not recover the money, because he was not a party to the contract for work.

3. (a) According to section 36 of the Sale of Goods Act, a buyer is deemed to have accepted the goods:
 - (i) when he intimates to the seller that he has accepted them; or
 - (ii) when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller; or
 - (iii) when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them
- (b) According to section 20 of the Sale of Goods Act, when goods are delivered to the buyer on approval or on sale or return basis, the property therein shall pass to the buyer:
 - (i) when he signifies his approval or acceptance to the seller or does any other act adopting the transaction;
 - (ii) when he does not signify his approval or acceptance but retains the goods without giving notice of rejection, he will be said to have accepted the goods on the expiration of the period for return or on the expiration of reasonable time.
- (c) Four exceptions to the *nemo dat quod non habet* rule:
 - (i) **Estoppel:** section 23 of the Sale of Goods Act recognizes the *nemo dat* rule but goes further to provide that where the owner of the goods is by his conduct precluded from denying the seller's authority to sell, the buyer shall acquire a better title;
 - (ii) **Sale under a Voidable Title:** a "voidable title" is one whereby a person who is in possession of goods and is the apparent owner of them in fact does not possess a good title. The true owner can assert his better right to the goods, and "avoid" the possessor's title otherwise a buyer who buys the goods in good faith and without notice of the seller's defect of title shall acquire good title- section 24 of the Sale of Goods Act.
 - (iii) **Seller in Possession of Goods:** section 26 (1) of the Sale of Goods Act provides another exception to the "nemo dat" rule. This section reads as follows: "Where a person having sold goods continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same".

- (iv) **Buyer in Possession of Goods:** exactly the same result obtains if a buyer has possession of goods with the seller's consent, and before the property has passed the buyer sells or disposes of them, or of documents of title, to a sub-buyer. Provided the sub-buyer acts in good faith without knowledge of any lien of the original seller, or lack of title of the buyer, then he acquires a good title if the goods, or documents of title to them, are actually transferred to him – Section 26(2) of the Sale of Goods Act.
- (d) The following warranties are implied in a sale of goods contract under section 14 of the Sale of Goods Act:
 - (i) Implied warranty that the buyer shall have and enjoy quiet possession of the goods;
 - (ii) An implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time the contract is made.
- 4. (a) Three similarities between an employment contract and an agency relationship are:
 - (1) Both the employee and the agent expect remuneration at the agreed times.
 - (2) Both the employee and the agent owe their principals similar duties like a duty of care, to exercise due care and skill, to avoid conflict of interest, to be honest in the performance of their tasks.
 - (3) Both can be terminated through death of the principals or the agent and employee.
 - (4) Both can be created by express agreement.
- (ii) Three differences between an employment contract and an agency relationship are:
 - (1) Agency relationship can be created by necessity while an employment contract cannot be.
 - (2) An agent has a right to lien, stoppage in transit etc, while an employee generally has none of these rights.
 - (3) Benefits available to the employee such as housing, medical cover etc are not available to an agent.

- (4) Taxes applicable to an agency relationship are different from those applicable to an employment relationship.

- (b)
 - (i) The presumption that may exist from the fact of cohabitation in a domestic set up is that the wife has authority to order necessities suitable to her husband's style of living, for such departments of their household as the wife usually controls, and to pledge the husband's credit for those purposes.
 - (ii) A husband sued in circumstances arising from this presumption can negate his liability by proving any of the following:
 - (1) By showing that he had expressly warned the plaintiff not to supply the wife with any goods on credit;
 - (2) By showing that he had expressly forbidden his wife from pledging his credit;
 - (3) By showing that she already had a sufficient supply of the goods in question.
 - (4) By showing that the order was excessive in point of quality or extravagant in quantity.
 - (5) By showing that the wife was provided with sufficient allowances or sufficient means of obtaining the goods in question without pledging her husband's credit.

- (c) The agent's obligations to the principal are as follows:
 - (i) Duty to perform the agency contract according to its terms;
 - (ii) Duty to obey all reasonable and lawful instructions;
 - (iii) Duty to follow trade or professional customs;
 - (iv) Duty to perform the contract with diligence;
 - (v) Duty to exercise care and skill;
 - (vi) Fiduciary duties such as a duty not to make any secret commission or let his personal interest conflict with that of his principal.

Remedies available to the principal if these obligations are not fulfilled are as follows:

 - (i) The principal can refuse to pay commission to the agent;
 - (ii) The Principal can claim a refund;
 - (iii) The principal can claim damages;

- (iv) The principal can obtain an injunction against certain unlawful acts by the agent;
- (v) The principal can terminate the agency relationship.

SECTION B

5. (a) The term "**negotiable instrument**" encompasses a wide variety of documents such as bills of exchange, cheques, bank notes, promissory notes, debentures and treasury bills. A document is capable of being called a "negotiable instrument" as long as the following conditions are met:

- (i) The holder of the instrument may sue in his/her own name;
- (ii) Title to the instrument must pass on delivery, or on delivery and endorsement;
- (iii) A "holder in due course" takes the instrument free from the defects in title of his/her predecessors.

Negotiable instruments are an essential part of a business-orientated society because of the ease with which they can be transferred from one person to another. However they are an easy target of fraud.

A **bill of exchange** is defined in section 3 of the Bills of Exchange Act 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 to or to the order of a specified person, or to bearer."

A **promissory note** is defined in section 89 of the Bills of Exchange Act as "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."

- (b) (i) Where a bank pays a valid cheque to a person who has no title to it, the bank is prima facie liable to the true owner for conversion of the cheque.

However, the bank enjoys statutory protection under the Bills of Exchange Act. (Section 60) provides that where a banker pays a bill of exchange (cheque) in good faith and in the ordinary course of business, he is deemed

to have paid it in due course, although the endorsement thereon has been forged or made without authority. The facts show that the bank acted in good faith and in the ordinary course of business and so Mrs Banda's suit against the bank will not succeed. The only option for her is to trace Mr Phiri, if at all he can be traced and be sued and charged with a criminal offence of forgery.

- (ii) The Bills of Exchange Act makes provision for the "crossing" of cheques. The effect of a 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 Act provides that a banker who pays a crossed cheque otherwise than in accordance with the crossing will be liable to the true owner of the cheque for any loss the latter may incur by reason of the banker's default.
- (iii) A customer owes the bank a duty of care in the way a cheque is drawn. If the alteration was not apparent and was made possible through the careless way in which the customer drew the cheque, then the loss will fall on the customer. In *London Joint Stock Bank v. Macmillan & Arthur (1918)*, a bearer cheque was drawn for £2 in figures, but with sufficient space for this to be changed to £120 without the alteration being apparent, and without the amount being written in words at all, so that a fraudulent clerk was able to write in "one hundred and twenty pounds". It was held that the customer had to accept the full charge of £120 when the cheque was met.

6. Definitions:

- (a) A **holder in due course** is defined under section 29 of the Bills of Exchange Act as a holder who has taken a bill, complete and regular on the face of it, under the following conditions:

Firstly 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;
Secondly 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.

- (b) A **Hire Purchase Agreement** is defined under section 2 of the Hire Purchase Act as "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 instalments..."

- (c) A **Partnership** is defined under section 3 of the Partnership Act as “the relationship which subsists between persons carrying on business in common with a view to profit.” The section further provides that a company incorporated under any laws of Malawi is not a partnership.
 - (d) A **contract of sale of goods** is defined in section 3 of the Sale of Goods Act as “a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for money consideration, called the price”.
- 7.
- (a) A tort is a civil wrong that results into injury to the plaintiff.
 - (b) Explaining the meaning and effect defences to an action in tort:
 - (i) The defence of **consent** (also known as *volenti non fit injuria*) means that the defendant claims that the plaintiff was aware of the risk and consented to that risk. The consent must be freely given, in full appreciation of the nature of the risk of injury. An example is a contract to involve oneself in hazardous sport such as motor racing or boxing.
 - (ii) In a defence of **Contributory negligence**, the defendant alleges that the plaintiff failed to take reasonable care for his own safety for example failure to wear a seatbelt. Where such a defence succeeds, the plaintiff's damages are reduced according to his contribution.
 - (iii) **Statutory authority** is legal authorization of an act which had it not been for the statute would have constituted a tort. The person alleging the defence of statutory authority must have acted in a reasonable manner. For example Water Board officers are allowed entry into private properties, to record meter readings, without being liable to a tort of trespass because of statutory authority.
 - (c) Examples of tortuous action include:
 - (i) trespass
 - (ii) negligence
 - (iii) conversion
 - (iv) defamation
 - (v) Nuisance
 - (d) Remedies that might follow a successful tort action include:

- (i) an award of **damages** representing compensation in monetary terms aimed at putting the plaintiff in a position he would have been in if the tort had not taken place.
 - (ii) a prohibitory **injunction** prohibiting the doing of something or a mandatory injunction ordering the doing of something.
- (a) Certain restrictions in agreements are normally accepted as part of the modern pattern of trade and will not usually be nullified by the courts. For example, a restraint by a brewer in a lease of a tavern tying it to the brewer. Other contracts involving a restriction on the freedom of an individual to trade are prima facie void, and will not be upheld by the courts unless they are shown to be reasonable in the interest of both parties and the public. A reasonable restraint is one that is no wider than reasonably necessary to protect an interest of the one who proposes the restraint. An example of reasonable restraints is one imposed on an ex-employee by the employer in order to protect trade secrets and business connections.
- (b) If a restraint on an ex-employee is to be upheld by the courts, the duration and area covered must be reasonable. A reasonable restraint is one that is no wider than reasonably necessary to protect an interest of the one who proposes the restraint. In each case the outcome would be as follows:
- (i) Both the duration and area covered are unreasonable. 5 years is unreasonably long considering the type of business involved and the area of 100 kilometers of Lilongwe City is also unreasonable. 100 kilometers would cover an area even outside the city itself as the city is less than 100 kilometers in radius. In *Greer v Sketcheley (1978)* a nationwide restraint imposed by a company which operated in London and Midlands was held to be unreasonably wide and unenforceable by the court.
 - (ii) Old Town Estate Agents may be able to prevent Temwa from canvassing present customers, for example using the company's mailing list, but they could not prevent canvassing of 'future customers' since this would be an attempt to prevent competition.
 - (iii) This could not be enforced it is far too wide and it specifically seeks to prevent completion.
- (c) (i) An **injunction** (prohibitory) restraining breach of contract will be granted by the court where parties have agreed that one of them should not do a certain thing (negative covenant). For example where an actress agreed to act for the plaintiffs for a period of time, and promised that during that time she would not act for anyone else without the plaintiff's written

consent, she was restrained by an injunction from breaking this promise-
Warner Bros v Nelson (1936).

- (ii) **Specific performance** is an equitable remedy ordering a party in breach of contract to perform the contract as specified by the court order. Such an order is discretionary and where damages will be an adequate remedy, the courts will not grant it.
- (iii) A sale of goods contract has arisen between Rex and Sam. Rex is in breach of the contract for refusing to give the vuvuzela to Sam. Sam's possible remedies are damages and specific performance. Specific performance is a discretionary remedy and so the court may or may not grant it. The ultimate remedy for Sam will be damages being compensation in monetary terms.
- (iv) Where Sam is a minor the enforceability of the contract would depend on whether the vuvuzela constituted necessities or not. Necessaries are those things a person immediately needs, such as food; drink; clothing; accommodation; 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-
Nash v. Inman (1908). A vuvuzela is probably a luxury and therefore the contract between Rex and Sam would be unenforceable.

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