

STRICTLY CONFIDENTIAL

THE PUBLIC ACCOUNTANTS EXAMINATION
COUNCIL OF MALAWI

2013 EXAMINATIONS

ACCOUNTING TECHNICIAN PROGRAMME

PAPER TC 8: BUSINESS LAW

THURSDAY 5 DECEMBER 2013

TIME ALLOWED : 3 HOURS
9.00 AM - 12.00 NOON

SUGGESTED SOLUTIONS

SECTION A

1. (a) Interpretation of statutes is a process whereby the courts determine the meaning of a statutory provision for the purpose of applying it to the situation before them. It is generally accepted that the object of statutory interpretation is to arrive at the intention of Parliament or the legislature. The function of the court is to declare the law as given it by the legislature and not to make it.
- (b) **Four** rules used by the courts in interpreting statutes include the following:
 - (1) **‘The literal rule’**- under this rule, which is applied in the least difficult cases, the literal meaning is applied to the statutory provision, unless this would lead to an absurdity.
 - (2) **‘The golden rule’** - this rule is an extension of the literal rule. When interpreting an Act of Parliament, the judge must as far as possible stick to the grammatical and ordinary sense of the words. However, if the ordinary sense is leading to an absurdity or inconsistency, the judge may modify the meaning of the words so as to avoid such absurdity or inconsistency and no further. In that way he will be said to have applied the golden rule.
 - (3) **‘The Eiusdem Generis Rule’**- this literally means ‘of the same kind’. Under this rule, if there is a series of particular words followed by a word of generality, then the category into which the particular words fall will not be extended by the words of generality. In *Powell v. Kempton Park Racecourse Co. (1899)* the Betting Act 1853 prohibited the keeping of a "house, office, room or any other place for betting with persons resorting thereon". The House of Lords **held** that the words "any other place" meant a place similar to a house, office or room, and would not, therefore, apply to the racecourse.
 - (4) **‘The Mischief Rule’**- This is probably the most useful of the rules in difficult cases. It allows the judiciary to see what wrong caused the Act to be passed, and then endeavour to apply the Act to overcome this defect. The rule originated in *Heydon's Case (1584)* therefore it is also referred to as the rule in *Heydon's case*.
- (c) (i) **Received laws** are the laws Malawi inherited from Britain. They comprise the common law which is judge made law; doctrines of equity that are also judge made and they pronounce fairness and equity; and statutes of general interpretation.

- (ii) **A Legal system** is a system of laws, rules and regulations in any particular jurisdiction and the way these are applied or enforced together with the institutions that do enforce or apply them.
- (iii) **Sources of law in Malawi** include the Constitution which is the supreme law. Statutory law (Acts of Parliament) which is the law made by the National Assembly. Customary law which are rules of human conduct, established by usage by communities in Malawi. Received law which is a body of laws including common law, equity and the statutes of general application.

2. (a) An offer is a statement of the terms on which the offeror is willing to be bound. For a contract to exist, usually one party must have made an offer and the other must have accepted it. A person is said to make an offer when he puts forward a proposal with the intention that upon its mere acceptance, without more, a contract should be formed.

In addition, although an offer is usually addressed to a specific individual or to a group of individuals, there is no reason why it should not be addressed to an indeterminate group or even to the public at large. In other words a contract can equally be formed when an offer is made to the world at large and is accepted by someone who performs the conditions of the offer. In **Carlill v Carbolic Smoke Ball Co Ltd** (1893), the defendants were the manufacturers of medication known as a carbolic smoke ball, which was claimed to be capable of preventing influenza, as well as a variety of other ailments. By way of an advertising stunt the defendants offered to pay £100 to any person who used the smoke ball according to the instructions and nevertheless caught influenza. In order to ‘show their sincerity’, the defendants also stated that they had deposited £1,000 with their bankers to meet any possible claims. The plaintiff used one of the smoke balls according to the directions, but still caught influenza. She then claimed payment of the £100, which the company refused to pay. They argued that their advertisement could not give rise to a contract, since it was impossible to make a contract with the whole world. The court rejected the argument and held that the advertisement did constitute an offer to the world at large, which became a contract when it was accepted by Carlill using the smoke ball in the prescribed manner and getting influenza. She was therefore entitled to the £100.

An invitation to treat is an indication that a person is willing to enter into negotiations, but not that he is yet willing to be bound by the terms mentioned. In **Fisher v Bell** (1961) the Offensive Weapons Act 1959 prohibited ‘offering for

sale' various offensive weapons including flick knives. A shopkeeper displayed some on his window and was prosecuted unsuccessfully. The court held that this display of the weapon was not offering the prohibited weapon for sale but was a mere invitation to treat, an invitation to the customer to make an offer to buy.

The distinction between an offer and an invitation to treat is that the former may be accepted, turning it into a contract whilst an invitation to treat may not. Invitations to treat are merely steps in the negotiation of a contract. A common instance of agreement arrived at by offer and acceptance occurs where tenders are called for and one is accepted.

A display of goods in a shop, in a window or on shelves even with price tags attached is an invitation to treat and not an offer. The shopkeeper does not undertake to sell the goods. They are on display merely to invite customers to come in and offer to buy at the price shown. In **Pharmaceutical Society of Great Britain v Boots Cash Chemists** (1953), Boots refurbished a shop into a self-service system which at the time was novel. By s.18 Pharmacy and Poisons Act 1933, the sale of certain drugs and poisons should not occur except 'under the supervision of a registered pharmacist'. The point at which the contract was formed was therefore critical, either when the customer removed goods from the shelves or when they were presented to the cash desk for payment. The court held that the contract was formed when goods were presented at the cash desk where a pharmacist was present, not when taken from the shelf. Mere display of goods on the shelf was an invitation to treat.

(b) The following terms may be identified in a contract:-

- (i) **Express terms** – these are the terms that the parties to a contract actually agree on either orally or in writing.
- (ii) **Implied terms** – these are the terms that are implied in a contract to give it efficacy. They may be implied by the courts, by statute, by custom and by a course of previous dealing.
- (iii) **Conditions** – these are the terms that are fundamental to any contract and they go to the root of the contract. Breach of a condition entitles the other party to treat the contract as at an end.
- (iv) **Warranties** – these are minor or less important terms of a contract, breach of which entitles the other party only to claim damages.

- (v) **Exclusion or limiting clauses** – these have the effect of limiting or excluding the liability of the party in breach of the contract.
- (c) The bargaining shall amount to a counteroffer if it shall have fallen short of a legally binding acceptance of all the terms of the offeror by reason of the introduction of new dimensions or terms to the other or by failure to accept all the terms of the offer. For example, in **Hyde v. Wrench** (1840) 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. The court 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.
3. (a) An acceptance, if it is to be valid, must be an unqualified acceptance of all the terms of the offer. In this case, it was clearly required that the acceptance must be by fax on or before Christmas day. By choosing another mode of acceptance i.e. by e-mail, Bongani did not comply with the terms of the offer. Again, the acceptance was supposed to have been done on or before Christmas day but Bongani sent his acceptance on Boxing Day. The purported acceptance by Bongani is, therefore, invalid and he cannot successfully sue Zizwani for any breach of contract. See **Hyde v. Wrench** (1840).
- (b) Two similarities between an employment contract and an agency relationship are:
- (i) Both the employee and the agent expect remuneration at the agreed rates and intervals.
 - (ii) Both the employee and the agent owe their principals similar duties like a duty of care and skill, to avoid conflict of interest and to be honest in the performance of their tasks.
 - (iii) Both can be terminated through death of the principals or the agent and employee.
 - (iv) Both can be created by express agreement.

Two differences between an employment contract and an agency relationship are:

- (i) Agency relationship can be created by necessity while an employment contract cannot.
- (ii) An agent has a right to lien, stoppage in transitu etc, while an employee generally has none of these rights.

- (iii) Benefits available to the employee such as housing, medical cover, pension etc are not available to an agent.
- (c) (i) 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/her disadvantage. Where there is a confidential or fiduciary relationship, the stronger party must show that undue influence was **not** exerted. Examples of situations where such a confidential relationship is likely to exist include parent and child, guardian and ward, solicitor and client, doctor and patient, religious adviser and the person to whom advice is given. See *Tufton v. Sporni* (1952) and *Allcard v. Skinner* (1887).
- (ii) To rebut the presumption of undue influence, the priest must adduce evidence to satisfy the court that Paul was acting independently of any influence from him and with full appreciation of what he was doing. He can do this by showing that Paul had competent and independent advice. See the case of *National Westminster Bank v Morgan* (1985).
4. (a) In relation to the law on sale of goods discuss the following terms:
- (i) **Delivery** means voluntary transfer of possession from one person to another –see section 2 of the Sale of Goods Act.
 - (ii) **Document of title to goods-** a seller must have good title in order to pass on the same to the buyer. Good title may be validated through a document of title to goods which includes any bill of lading, dock warrant, warehouse-keeper's certificate or warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented –see section 2 of the Sale of Goods Act.
 - (iii) **Future goods** means goods to be manufactured or acquired by the seller after the making of the contract of sale–see section 2 of the Sale of Goods Act.
 - (iv) **Specific goods** – means goods identified and agreed upon at the time a contract of sale is made - see section 2 of the Sale of Goods Act.
 - (v) **Acceptance** - The buyer shall be deemed to have accepted the goods when he intimates to the seller that he has accepted them or 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 when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them—see section 36 of the Sale of Goods Act.

- (b) Agency involves a contract whereby one person (the agent) is authorised and usually required by another (the principal) to contract or to negotiate a contract on the latter's behalf with a third person.

The essential characteristics inherent to the contract of agency are the following:

- (i) one person acts on behalf of another
- (ii) this act on behalf of the other is a juristic act
- (iii) the act is authorised
- (iv) the action results in a legal tie between the two parties, one of which was not involved in the original action.

The major duties of an agent are to:

- (i) perform his mandate according to the instructions of the principal;
- (ii) act honestly and in good faith;
- (iii) display care, skills and diligence and
- (iv) account to his principal.

Agency being a form of service, it is clear that agents are bound to do what they have been instructed to do, as one of the primary obligations of an agent is to act in terms of the mandate given by the principal. An agent who does not do what he has undertaken to do is not entitled to claim remuneration. For example, in *Ferrers v. Robins* (1835), an auctioneer was instructed to sell goods for cash only. Instead, he sold them, and accepted a cheque in payment. The cheque was later dishonoured. It was held that the agent was liable for the price.

In the course of time, the law has implied into every contract of agency an undertaking by the agent that he will act with the care and diligence of the ordinary prudent man when he engages upon his principal's business.

In conclusion it is clear that Karen lacks the ordinary care, skill and diligence expected of an agent. She has also failed to operate strictly within the parameters of the principal's (Ngoni) mandate. Not only has she exceeded the maximum amount of K10 million which Ngoni was prepared to pay, by paying K15 million she has disregarded the principal's

instructions, by purchasing land in Area 25 instead of the more prestigious area of South Gate Suburbs .

Ngoni can repudiate the agreement of sale, refuse to pay the agent's commission and also sue Karen for damages arising out of his acts of malfeasance.

SECTION B

5. (a) The remedy for breach of duty in tort is usually a claim for damages, though equitable remedies such as an injunction or specific performance are also available in appropriate cases. The main aim of tort is said to be compensation for harm suffered as a result of the breach of a duty fixed by law. Tort seems to place greater emphasis on wrongs of commission rather than wrongs of omission. Another important aim of tort is to deter behaviour which is likely to cause harm.

The main aim of contract on the other hand is to support and enforce contractual promises, and to deter breaches of contract. Contract, then, has no difficulty compensating for wrongs of omission. The doctrine of consideration, based on mutual promises, is all important in the law of contract, and failure by omission to keep the terms of a promise is a breach of contract which the law will seek to amend.

- (b) Although not strictly a defence for negligence, the application of the concept of **contributory negligence** can be used to reduce the amount of damages awarded in a particular case. It arises where the party making the claim is found to have contributed, through their own fault, to the injury they sustained. The onus is on the defendant to show that the claimant was at fault and contributed to their own injury. An early example of the principle may be seen in *Jones v Livox Quarries* (1952) in which a claimant was found to have contributed to their own injury by showing a lack of care for their own safety by riding on the back of a dumper truck. Another example may be found in *Sayers v Harlow* (1958) in which the damages awarded to a woman, who was injured escaping from a public toilet in which she had been trapped due to a defective lock, were reduced as her injuries had been exacerbated by the manner in which she tried to make her escape by climbing out of it. From the facts Alan contributed to his own injuries by drinking excessively and yet crossing the highway in a negligent manner, avoiding the pedestrians' crossing.

- (c) The prosecution is likely to achieve the following remedies:
- Punishment in form of a prison sentence with hard labour;
 - Punishment in form of a fine;
 - Suspended sentence with a condition not to commit another offence;

- Punishment in form of community service such as sweeping around public premises
- (d) Alan can sue Bill in a civil suit. He can successfully sue Bill in the law of tort for the injury he has suffered. The court will order Bill to pay damages to Alan. Damages are money awarded as compensation for injury or loss. The damages may however be reduced by the court depending on Alan's own contribution to his injuries.
6. (a) Any **five** advantages of forming a partnership over other business organizations:
- (i) A company must be registered under company legislation while an ordinary partnership is often created informally and need not be registered;
 - (ii) A company must have a written constitution comprising the memorandum and articles of association whereas a partnership may have none;
 - (iii) A partnership has no legal personality; a corporation has a legal personality- *Salomon v Salomon*.
 - (iv) All partners share in the management, unless it is agreed otherwise. The management of a corporation is left to a selected body of directors;
 - (v) Each partner, is liable for **all** the debts of the partnership personally, to the full extent of his/her private estate.
 - (vi) A company continues to exist even when its members change or die, because of perpetual succession. In the absence of a partnership agreement to the contrary, the firm will be dissolved when one of its partners leaves or dies, i.e. a partnership does not have perpetual succession.
 - (vii) Each partner has implied authority to contract on behalf of the others in the ordinary scope of the partnership business, and he thereby binds all the other partners, even if they are unaware of what he has done. A corporation acts through appointed agents such as directors, and an ordinary member has no power to bind the corporation.
 - (viii) A company can raise loan capital by issuing debentures (debt secured by means of a floating or fixed charge on the company's assets). A partnership cannot issue debentures secured on the firm's assets.

- (b) A partnership may be dissolved in the following circumstances:
- (i) **Dissolution by expiration or notice;** where partners have entered into a fixed term partnership the partnership dissolves at the expiration of that term and where the partnership is entered into for a single adventure or undertaking, by the termination of that adventure or undertaking; or if entered into for an undefined time, by any partner giving notice to the other or others of his intention to dissolve the partnership.
 - (ii) **Dissolution by bankruptcy, death or charge.** Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner. A partnership may, at the option of the other partners, be dissolved if any partner suffers his share of the partnership property to be charged under the Act for his separate debt.
 - (iii) **Dissolution by illegality of partnership.** A partnership is in every case dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the members of the firm to carry it on in partnership. For example, if the partnership requires a licence to conduct its business and that licence expires or is revoked then the partnership will be operating illegally, if it does.
 - (iv) **Dissolution by the Court.** On application by a partner the Court may decree a dissolution of the partnership in cases including the following:
 - when a partner is found of unsound mind;
 - when a partner becomes in any other way permanently incapable of performing his part of the partnership contract;
 - when a partner has been guilty of such conduct as, in the opinion of the Court, regard being had to the nature of the business, is calculated to affect prejudicially the carrying on of the business;
 - when a partner wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable for the other partner or partners to carry on the business in partnership with him;

- when the business of the partnership can only be carried on at a loss.

7. (a) Possible parties to a bill of exchange:-

- ✓ **Drawer-** the person who orders money to be paid on his behalf.
 - ✓ **Drawee-** the person to whom the order to make the payment is given.
 - ✓ **Payee-** the person to whom the payment will be made.
 - ✓ **Indorser-** the holder of an order bill who signs at the back of the bill when negotiating (transferring) it.
 - ✓ **Indorsee-** the person to whom an order is indorsed.
 - ✓ **Bearer-** the person in possession of a bearer bill.
 - ✓ **Holder-** the payee or indorsee in possession of an order bill or bearer bill.
 - ✓ **Holder for value-** a holder who has given value.
 - ✓ **Holder in due course-** a holder who has taken a bill complete and regular on the face of it, before it was overdue, without notice of previous dishonor by non-payment.
- (b) An inland bill of exchange is one drawn and payable within Malawi and a foreign bill is any other bill other than an inland bill of exchange i.e. one drawn outside Malawi whether payable in Malawi or not –see section 4 of the Bills of Exchange Act.
- (c) Types of indorsements that may be found on a bill of exchange
- **Conditional-** if a bill is indorsed conditionally, condition may be disregarded by the payer, and payment to the indorsee is valid whether the condition has been fulfilled or not- section 33 of the Bills of Exchange Act.
 - **Indorsement in blank-** a special signature by the indorser without specifying any indorsee. This bill becomes payable to bearer.
 - **Special** – specifies the person to whom the bill is payable. Such person may also indorse it if he wishes to transfer it. This is an order bill.
 - **Restrictive** – where the indorser prohibits further transfer e.g. pay x only.

- **Qualified** – where the indorsement has the addition of provision excluding or limiting the indorser’s own liability to the holder

(e) **Alick** is the drawer. **Balaka Bank Ltd** is the drawee. **Carol** is a holder for value. **Daniel** is a holder (without value since he has stolen the cheque). **Ellen** is a holder for value. **Febbie** is a holder in due course. Carlo is the true owner of the cheque. Ellen is simply a holder for value but not necessarily a holder in due course because she did not provide value as she received the cheque as a gift. One of the conditions for a holder in due course is that he/she must have provided value. Ellen is however a holder for value because at some point, value was given for the bill by Carlo. That is to say there was an antecedent debt in respect of Carlo and Alick, and such a debt is deemed valuable consideration.

Ellen takes the bill together with prior defect and subject to Carol claiming it back.

Febbie, because she gave value and satisfied the other conditions of a holder in due course, namely that she took the bill complete and regular on the face of it, before it was overdue and without notice of previous dishonor by non-payment. She therefore becomes the owner of the cheque and Carlo cannot legally claim it from her. Carlo’s remedy lies in pursuing the fugitive Daniel or indeed Ellen if only she knew that the cheque was stolen.

8. (a) A hire purchase agreement is:

- (i) 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.
- (ii) any contract which provides for the hiring of goods whereby the hirer has the right

- to purchase such goods after two or more instalments have been paid in respect thereof; or

- after two or more instalments have been paid in respect thereof, to continue to renew from time to time such hiring at a nominal rental, or to continue or review from time to time the right to be in possession of the goods, without any further payment or against payment of a nominal amount periodically or otherwise; whether or not the agreement may at any time be terminated by either party.

- (b) In hire purchase price, the word purchase price includes:
- (i) the sale price;
 - (ii) any deposit;
 - (iii) compensation or damages for breach of the agreement;
 - (iv) money paid for licence or registration fees;
 - (v) insurance premiums;
 - (vi) interests;
 - (vii) installation payments.
- (c) In every hire purchase agreement there shall be:
- (i) an implied warranty that the purchaser shall have and enjoy quiet possession of the goods.
 - (ii) an implied condition on the part of the seller that he is not and will not be precluded from passing the ownership of the goods to the purchaser at the time when the ownership is to pass.
 - (iii) an implied warranty that the goods shall be free from any charge or incumbrance in favour of any third party at the time when the ownership is to pass.

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