



2015 EXAMINATIONS

ACCOUNTING TECHNICIAN PROGRAMME

PAPER TC8: BUSINESS LAW

WEDNESDAY 10 JUNE 2015

TIME ALLOWED : 3 HOURS

SUGGESTED SOLUTIONS

NOT FOR SALE

SECTION A

1. (a) **The Doctrine of Precedent** means that a judge is bound to apply a decision from an earlier case to the facts of the case before him provided, among other conditions that the material facts of the two cases are similar and the previous case was decided by a superior court. Thus decisions of the Malawi Supreme Court of Appeal are binding on all courts below the Supreme Court. The judge must consider the following when examining a precedent before he/she can apply it to a case:
- (i) The material facts of each case must be comparable.
 - (ii) The preceding court must have had a superior (or in some cases, equal) status to the later court, such that its decisions are binding on the later court.
 - (iii) It must form part of the *ratio decidendi* (reason for making a decision) of the case and not *obiter dicta* which are remarks said by the way.
 - (iv) A decision must be based on a proposition of law. It may not be a decision on a question of facts.

The function of judicial precedent is to develop the law, whether common law or statute law. Precedents also help in predictability of cases. It is more flexible than legislation. Further, because of its binding nature, people can regulate their conduct with confidence in its certainty. It is more easily and quickly made than legislation, and this is particularly important where adaptation of the law to minute differences of circumstances is required.

Although in strict legal theory judges do not make law, it can be argued that they make law in the following limited ways: where there is no existing precedent; where they **overrule** an existing precedent, frequently because there are other conflicting precedents and where they **distinguish** precedents cited before them, and so limit the scope of the previous rule. This may be seen as a disadvantage i.e. that unelected judges make law instead of elected parliamentarians. Another disadvantage is that case law detail is much richer than any code of law, but against this must be set its complexity.

- (b) **Delegated legislation** refers to the exercise of a legislative power, granted ultimately by Parliament, by a subordinate body such as a local authority to make bye laws, a public corporation or a minister to make regulations e.g. exchange control regulations, the Supreme Court to make court regulations, or a university to make regulations for students etc. Many modern statutes confer authority upon persons and bodies to issue regulations which are legally binding and which, if disobeyed, may involve those disregarding them in some penalty.

Advantages

Time saving- Parliament does not have the time to give to minute details of legislation.

Expertise- Technical or scientific matters are often better dealt with by experts employed by the government departments than by Members of Parliament.

Flexibility -Greater flexibility is provided for unseen contingencies and such legislation is of great value in an emergency, such as the outbreak of war.

Experimental- It affords an opportunity for experiment. If a Minister issues an order and it is found unsatisfactory, it can be withdrawn at once.

Disadvantages

Bureaucracy - The executive tends to get beyond the control of the legislature and it intensifies the tendency towards bureaucracy.

Accountability- Delegated legislation is attacked as weakening one of the principles of the rule of law. The law-making function is removed from Parliament, which is directly answerable to the electorate, and placed in the hands of unaccountable officials.

2. (a) **An offer** is an expression of willingness to enter into a contract on certain terms with the intention of a binding contract. It is an express or implied statement of terms on which the maker is prepared to be contractually bound if it is accepted unconditionally. The rule is that an offer can be made to a particular person, a particular group of person and can even be made to the whole world. In *Carlill v Carbolic Smoke Ball Co.* [1893] 1 Q.B. 256 the company manufactured a patent "smoke ball" which, it claimed, prevented influenza. It advertised in the press that it would pay £100 to anyone who contracted influenza after taking one of its smoke balls. Mrs Carlill read the advertisement, bought a smoke ball from the chemist, and used it as directed. However, she promptly got influenza, and she sued the company for the promised sum of £100. The company claimed that it was a "mere puff", and not meant to be taken seriously. **HELD:** The promise to pay £100 was a valid offer to the world at large. Mrs Carlill had accepted by complying with the conditions, and was entitled to the money.

Invitations to Treat – it is important to distinguish an offer from an invitation to treat because an invitation to treat does not create the basis of contractual relations. There are many instances of "offers/invitations to treat". A shopkeeper (or supermarket) displaying goods marked at a certain price is inviting the public to make an offer. The price tag is merely an indication of the price that is likely to be accepted. "*He does not bind himself to sell at that price, or at all*". In *Pharmaceutical Society of Great Britain v. Boots Cash Chemists (Southern) Ltd* [1952] 2 Q.B. 795, 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? **Held:** 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. (What happens is that, in a shop or supermarket, the act of taking goods off the shelf contractually means nothing. However, putting them down in front of the shopkeeper or cashier constitutes an offer to buy (at the named price, unless otherwise stated in the offer). Ringing up the price on the till, for example, constitutes acceptance.) see also *Fisher v Bell* [1961] 1 Q.B. 394. and *Partridge v Crittenden* [1968] 2 All E.R. 421.

- (b) The classic decision on the question of how far you go in claiming damages, or "remoteness of damage", was given in *Hadley v. Baxendale* (1854) 9 Ex 341. Here a mill was brought to a standstill when a crankshaft broke. A carrier failed to deliver the broken shaft to the manufacturers when he had promised to. He was sued for loss of profit owing to the unnecessary delay. The court **held** that it was not in the contemplation of the defendant that the delay in the delivery of the broken shaft would entail loss of profit therefore the claim was dismissed. In the judgment, the following **important** statement was made.

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive should be such as may fairly and reasonably be considered either as arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed 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".

This means that the rule in *Hadley v. Baxendale* (1854) has two parts; 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; for example if a garage owner unnecessarily delays the repair of a minibus, he may be sued for loss of profit by the owner of the minibus but that may not happen with a private car.

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. For instance in *"The Wagon Mound" (No. 1)* [1961]1AC 617, a vessel took oil in Sydney Harbour. Owing to the negligence of the crew, a quantity spilled in the water. The wind carried the resulting oil slick across a creek to a ship repair yard opposite. A welder happened to be working there on a ship under repair, and a spark from the welding operation fell on to

some cotton waste floating on the water below. A serious fire resulted. It was **held** that it was not reasonably foreseeable that a spark could ignite heavy fuel oil floating on the water. Hence, although the ship owners were liable for the foreseeable damage caused by oil fouling slipways, etc., they were not liable for the damage caused by fire.

3. (a) In terms of the Partnership Act, section 4, the rules that courts use to determine the existence of a partnership are as follows:
 - (i) Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof;
 - (ii) The sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived;
 - (iii) the receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business, but receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business.
- (b) Under section 26 of the Partnership Act, partners have the following rights:
 - (i) All the partners are entitled to share equally in the capital and profits of the business;
 - (ii) The firm must indemnify every partner in respect of payments made and personal liabilities incurred by him in the ordinary and proper conduct of the business of the firm; or
 - (iii) A partner making, for the purpose of the partnership, any actual payment or advance beyond the amount of capital which he has agreed to subscribe, is entitled to interest at the rate of five per centum per annum from the date of the payment or advance;
 - (iv) Every partner may take part in the management of the partnership business.
- (c) Hypothetical scenarios where the tort of negligence is present where an over-speeding vehicle hits a pedestrian where a manufacturer of food products manufactures food which is not fit for human consumption leading to injury by a consumer.

4. (a) The Commercial Credit Act has the function of facilitating the borrowing by the proprietors of certain businesses on the security of trading assets and for purposes connected therewith and incidental thereto. The Act makes it lawful for a business proprietor by instrument in writing to create in favour of a designed institution a commercial charge on all or any of the trading assets belonging to him as security for sums due, or to become due, by him to such institution or advanced or to be advanced to him or paid or to be paid on his behalf by such institution and as security for interest, commission and charges on such sums.
- (b) 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.
- (c) Under a **contract of service** a person places his labour at the disposal of another and a relationship is constituted which in past days was called that of master and servant. In the **contract for services**, on the other hand, a person who operates an independent business agrees to carry out a task for another and the relationship is that of employer and independent contractor. X's chauffeur is her employee, but a taxi-driver is an independent contractor. If Y wants to build a garage on his land, he has two courses open: he can employ a bricklayer and other trades-people under contracts of employment or he can entrust the work to a builder as an independent contractor (independent contractor). **Contract of/for Service-** The basis of vicarious liability is the contract of employment, which in general is an agreement whereby an employee agrees to provide work or a service in return for remuneration by the employer. The contract of employment is a contract of service and not for services.

Three tests for deciding between an employee and an independent contractor

- (i) **Control Test** -Control means that the employer has the right to tell the other party to the contract not only "what" to do but "how" to do it. In other words, he controls not only the "ends" but the "means". The general rule is that wherever this type of control exists, the person thus controlled is an employee. In our present society, however, the control test has been shown to have certain deficiencies. Industrial society today is totally different from the society which existed when the control test was first formulated, since nowadays the employer very rarely has the exact skill and knowledge of his employees. It is very difficult to say that the hospital authorities may control the actions of a doctor, or a local authority the actions of a surveyor. This was shown very clearly in *Cassidy v. Minister of Health* [1951] 2 KB 343 where the claimant was due to undergo a normal operation. The operation was incompetently performed and made the claimant's condition much worse. He had come with one stiff finger and ended up with two stiff fingers. This case solved many of the problems relating to skilled people. Although the employer could not control the actions of the doctor in the strict sense, the doctors and nurses concerned were permanently employed and salaried members of the staff; also the employers were in a position to make rules concerning the organisation of the doctor's work. For these reasons, he was an employee, despite the lack of control in the old sense.
- (ii) **Integration Test**- This suggests that the individual is "part and parcel" of the employer's organisation. This idea was to some extent suggested in *Cassidy v. Minister of Health*, where, as has already been said, the medical staff were on the permanent establishment of the hospital and subject to the regulations of the hospital. The question is 'Did the alleged servant form part of the alleged master's organisation?' Under a contract of service, a man is employed as part of the business and his work is done as an integral part of the business; whereas under a contract for services, his work, although done for the business, is not integrated into it, but is only an accessory to it.
- (iii) **Multiple or Mixed Test**- in accordance with the multiple test, a contract of service exists if these three conditions are fulfilled;
- (a) The servant agrees that, in consideration of wage or other remuneration, he will provide his own work and skill in the performance of some service for his master;
 - (b) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control to a sufficient degree to make the other master;
 - (c) The other provisions of the contract are consistent with it being a contract of service.

SECTION B

5. The Malawi legal system consists of courts with criminal jurisdiction and courts with civil jurisdiction as follows:

- (a) **The Malawi Supreme Court of Appeal** - This court is at the apex of the Court System. It is established by the Constitution of the Republic of Malawi. The Supreme Court of Appeal is a superior court of record and has all the powers of such a court. By "Court of record" is meant a court in which all the acts and judicial proceedings are enrolled for perpetual memory and testimony and which has authority to fine and imprison for contempt of its authority. The court is composed of the Chief Justice, any number of Justice of Appeal may be prescribed by Parliament. When the court is hearing any matter, except in interlocutory matter, the law requires that it should be composed of an uneven number of Justices of Appeal and the number should not be less than three. By "interlocutory matter" is meant "intermediate matter". For example, an order for the inspection of documents which will help the court to arrive at a final decision in the action is an interlocutory order. For the purpose of hearing and determining appeals the court is required to be constituted of the Chief Justice or other member presiding and two other members.

The Supreme Court of Appeal has no original jurisdiction. It does not hear cases on first instance. Its jurisdiction is exclusively appellate. The Court hears appeals against final decisions in any civil or criminal proceedings in the High Court. But the determination of the High Court upon election petitions cannot be the subject of appeal to the Supreme Court.

- (b) **The High Court** -The High Court is established by the Constitution. It is, like the Supreme Court of Appeal, a superior court of record. The court consists of such number of judges, not being less than three, as may be prescribed by an Act of Parliament. All proceedings in the court are heard and disposed of by a single Judge except in **constitutional cases** where the minimum number is three judges. The High Court can also sit as a **Commercial Court** where the matter is commercial in nature.

The High Court has unlimited original jurisdiction in both civil and criminal matters and under any law. It also has such other jurisdiction as may be conferred on it by the Constitution or any other law. Without prejudicing the general nature of its original jurisdiction, the Courts Act also gives the High Court additional specific jurisdiction. For example, the court is given jurisdiction to appoint and control guardianship of minors, and the entire jurisdiction and powers which belong to any subordinate court.

Appeals lie as of right to the High Court from final decisions of subordinate courts in any case in which, if the decision were a decision of the High Court, an appeal would lie as of right to the Supreme Court.

- (c) **Magistrates' Courts** - There are four grades of the magistrates' court. These are (a) courts of Resident Magistrates, which are higher than the rest, (b) Courts of Magistrates of the First Grade magistrate (c) Courts of Magistrates of the Second Grade, and (d) Courts of Magistrates of the Third Grade. The Court of the Resident Magistrate consist of "a fit and proper person" who is appointed by the Chief Justice on the recommendation of the Judicial Service Commission. In practice, the persons appointed to be Resident Magistrates are those who qualify to be legal practitioners under the Legal Education and Legal Practitioners Act.

Civil Jurisdiction - Magistrate Courts have original jurisdiction over all civil actions where the amount in dispute does not exceed –

- (a) K2,000,000 in the case of a court of a Resident Magistrate
 - (b) K1,500,000 in the case of a court of a First Grade Magistrate
 - (c) K1,000,000 in the case of a court of a second grade Magistrate; and
 - (d) K7,500,000 in the case of a court of a third grade Magistrate.
- (d) **Child Justice Court** is established under the Child Care, Protection and Justice Act 2010 and is presided over by a professional magistrate or a magistrate of the first grade. The court has jurisdiction over child matters such as parentage disputes, guardianship, maintenance, custody and children involved in crime. Under the Act a child is a person below the age of 16.
- (e) **The Industrial Relations Court (IRC)** is established under the Constitution and has original jurisdiction over labour disputes and such other issues relating to employment and its composition and procedure are specified under the Labour Relations Act 1996. Appeals from this court lie to the High Court. Thus the IRC has civil jurisdiction only and no criminal jurisdiction at all. The court comprises of a chairman and one panelist representing employees and another representing employers.
6. (a) The question on the facts will be whether Bangwe Line Ltd by placing a wrong newspaper advertisement, is bound by it. In other words whether an offer was made and eventually accepted by John. An offer is understood as an expression of willingness to enter into a contract on certain terms with the intention of a binding contract. It is an express or implied statement of terms on which the maker is prepared to be contractually bound if it is accepted unconditionally. The rule is that an offer can be made to a particular person, a particular group of persons and can even be made to the whole world - See *Carlill v Carbolic Smoke Ball Co.* [1893] 1 Q.B. 256.

However, to this general rule are some exceptions for example it has been held in *Patridge v Crittenden* [1968] 1 WLR 1204 that newspaper adverts do not constitute

an offer but an invitation to treat. See as well *Pharmaceutical Society of Great Britain v. Boots Cash Chemists (Southern) Ltd* [1952] 2 Q.B. 795 and *Fisher v Bell* [1961] 1 Q.B. 394. This means that Bangwe Line Ltd had made an invitation to make offers by placing the advert and John was the one making the offer which was validly rejected by Bangwe Line Ltd upon noticing the mistake. John will therefore be advised that the refusal by Bangwe Line Ltd to enter into the contract with him is legally justified.

- (b) (i) Thirst Ltd will be advised that their action is likely to succeed because the law of agency is based on the principle that 'he who does an act through someone is deemed in law to have done it himself'. Thus where an agent enters into a valid contract on behalf of his principal, the agent steps out of the transaction and the contract is between the third party (Thirst Ltd) and the Principal (Hip Hop Hotels Ltd). This is so regardless of the instructions by the principal to Mr Phiri to buy the beverages only from Drink Enjoy Ltd. If anything the Hotel may have a case against Mr Phiri for breach of the instructions.
- (ii) There are numerous ways in which the principal can terminate the agent's authority. The most common ones are:
- (1) Agreement – when a legally binding agreement can be established.
 - (2) Completion – when all task agreed are completed.
 - (3) Expiration – when the all task have been undertaken or time period spent.
 - (4) Specified event – if a specific event is completed or ends.
 - (5) Death – where one or both parties dies.
 - (6) Winding up of the company – If a company becomes insolvent or is dissolved.
 - (7) Revocation – If one of the parties revokes the agreement made.

7. (a) 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 determined future time a sum certain in money to or to the order of a specified person or to the bearer.

In trade a bill of exchange is used by a debtor to settle his account with a creditor, but, it being an order to someone else to pay the sum stated (as opposed to a

promise by the drawer to pay), the creditor is not normally going to take the bill of exchange in settlement unless the drawee acknowledges that he will meet the bill (and, in addition, is a person of substance such as a commercial bank); until he does make such acknowledgement, the drawee is under no liability on the bill.

In practice, the bill is normally handed to the payee to present it to the drawee for acceptance. If the drawee agrees to pay the bill, he will sign his name across it, and by that act he accepts the liability to meet the bill when it is duly presented for payment. The person drawing the bill will have an arrangement with the drawee to reimburse the cost of any bills met.

By using a bill of exchange, the supplier can send the debtor goods on credit even if he is not sure of the latter's credit status, because before he releases the goods he receives this document, accepted by a person on whose credit he knows he can rely.

Nowadays, bills of exchange are most commonly used in international trade and are drawn on bankers. This is a useful arrangement as it allows goods to be sold on credit to someone the seller has never heard of, and against whom he would have great difficulty in bringing an action for recovery of the debt.

- (b) Duties of a banker include;
- (i) to receive a customer's money and cheques, etc for collection;
 - (ii) to repay this money on demand, during business hours, upon presentment of the customer's written order at the account holding branch or otherwise as agreed;
 - (iii) to give reasonable notice before closing a credit account so that the customer can make other arrangements and have outstanding cheques cleared without damage to reputation;
 - (iv) to maintain secrecy with regard to a customer's account and his financial affairs;
 - (v) to advise the customer immediately the forgery of the customer's signature is brought to the bank's attention.

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