

**MAY 2016 PROFESSIONAL EXAMINATION
BUSINESS & CORPORATE LAW (1.3)
EXAMINER'S REPORT, QUESTIONS AND MARKING SCHEME**

EXAMINER'S REPORT

EXAMINER'S GENERAL COMMENTS & PERFORMANCE

The standard of the paper was the same as previously admitted ones. The allocation of marks was fairly distributed to cover the syllabus. With regard to performance, there is still room for improvement. The performance was average though there were some instances of high performance which spread across board.

It has been observed that candidates did not take their time to read and appreciate the requirements of the question before they attempted answering the question. This could be attributed to the fact that it appears candidates have not prepared to read text books, cases and Acts that relate to the various subjects. Most of them appear to take past questions and try to answer them with the result that as soon as the examiner twists the requirements slightly they fall victim to the agama lizard syndrome. In other instances there were clear cases of unpreparedness on the part of the candidates could register for an examination and then refuse to prepare for it.

The instances of high performance cut across all centres and there were no indications of any collusion. Generally, the high performed candidates exhibited a lot of grip over the subject whilst the low performed candidates exhibited abject ignorance and unpreparedness. All that could be said about the performance is that future candidates should ensure that they would read the various text books and the Acts enforced in the country. The bibliography is in the syllabus.

BUSINESS & CORPORATE LAW QUESTIONS

QUESTION ONE

- a) List **FIVE** sources of the Law of the Republic of Ghana. **(5 marks)**
- b) State the Appellate structure of the court system of Ghana in civil matters. **(4 marks)**
- c) Explain the Statement; 'fundamental human rights are **inalienable** under the 1992 Constitution of the Republic of Ghana'. **(5marks)**
- d) List **SIX** of the fundamental human rights which are inalienable. **(6 marks)**

(Total: 20 marks)

QUESTION TWO

- a) Identify **FIVE** ways in which property in goods pass from a seller to a buyer? **(5 marks)**
- b) An agent has no right or obligation on a contract unless he/she enters into on behalf of his/her principal. State and explain **FIVE** exceptions to this statement. **(10 marks)**
- c) State **FIVE** ways by which an agency may be terminated. **(5 marks)**

(Total: 20 marks)

QUESTION THREE

- a) What remedies are available to a buyer when goods are:
 - i) Over- delivered; **(3marks)**
 - ii) Under delivered; **(3marks)**
 - iii) Delivered in mixed lot. **(4marks)**
- b) Explain **FIVE** rules that relate to consideration in the Law of Contract. **(10marks)**

(Total: 20 marks)

QUESTION FOUR

Kobi Jones, a porter, buys a tricycle motor to help him cart goods of his clients. The motor was purchased from Agaza Motor Company Limited on a hire purchase agreement. The hire purchase price was GH¢4,500.00 to be paid for in twenty equal instalments.

By June, 2011, Kobi Jones had paid 60% of the purchase price, but was unable to pay the instalment due in July 2011. His plea to be given more time to pay fell on deaf ears. In August, 2011 while Kobi Jones was on his way to cart goods for customers, the agents of Agaza Motor Company seized the motor. Kobi Jones thus lost a very lucrative job from which he had hoped to make GH¢2,400.00. Kobi Jones is very upset and comes to you for advice.

- a) Explain the effect that the payment of 60% of the purchase price had on the agreement. **(6marks)**
- b) What does the seizure of the motor by the agents of Agaza Motor Company amount to? **(10 marks)**
- c) What remedies, if any, are available to Kobi Jones? **(4marks)**

(Total: 20 marks)

QUESTION FIVE

- a) State **FIVE** items that are by law required in the Regulations of a Company Registered under the Companies Act. **(5 marks)**
- b) What is meant by "*pre-incorporation contract*"? **(2marks)**
- c) State **THREE** features of a pre-incorporation contract. **(3marks)**
- d) Briefly explain how a company acquires interests in pre-incorporation contracts, and the legal position of a person purporting to act on behalf of the company with respect to those contracts. **(10marks)**

(Total: 20marks)

QUESTION SIX

Kojo Mensah was employed by A&B Co. Ltd, as a Waste Management technician. Before his employment, Kojo Mensah presented a certificate to evidence the fact that he was very qualified for the job as a Waste Management technician. One and half years into his employment, Kojo Mensah's subordinates petitioned the Management of A&B Co. Ltd that Kojo Mensah was not exhibiting a high sense of professionalism in his position as a Waste Management technician, as several complaints were coming from the clients of A&B Co Ltd to

the effect that the services being rendered by the Company were unsatisfactory, adding that Kojo Mensah, as the Officer in charge of that unit, could not supervise the operations of the said unit. It later came to light after the company conducted further due diligence on Kojo Mensah's academic and professional background, that the certificate he submitted for his employment was a forged one. Prior to the submission of the Petition against him, Kojo Mensah had on several occasions been queried by Management for abandoning his duty post, and also getting very drunk during working hours. Without giving Kojo Mensah an opportunity to respond to the petition, the Management of A&B Co. Ltd did not dismiss Kojo Mensah, but terminated his appointment from the Company, on these grounds.

- a) Explain whether A&B Co. Ltd was justified in terminating the appointment of Kojo Mensah. **(10 marks)**
- b) Explain whether Kojo Mensah has any chance of success in seeking redress. **(5 marks)**
- c) Differentiate between *dismissal* of one's appointment and *termination* of one's appointment. **(5 marks)**

(Total: 20 marks)

QUESTION SEVEN

- a) What provisions should typically be contained in a Partnership Agreement? **(10 marks)**
- b) Upon the retirement of a partner in a Partnership, after that partner had given notice to that effect to the other partners, describe the steps that ought to be taken by the remaining partners pursuant to the notice, in accordance with law. **(10 marks)**

(Total: 20 marks)

BUSINESS & CORPORATE LAW SCHEME

QUESTION ONE

(a)

- ✓ The Constitution
- ✓ Enactments made by or under the authority of Parliament
- ✓ Any orders, rules, regulations made by any person or authority under a power conferred by the Constitution (delegated legislation: constitutional instruments, legislative instruments and executive instrument)
- ✓ the existing law
- ✓ The common law (doctrine of equity, and the rules of customary law, including those determined by the Superior courts)
- ✓ Judicial precedent
- ✓ Statutory interpretation

Any 5 points at 1 mark each (5marks)

(b)

- ✓ Court of Appeal to the Supreme Court
- ✓ High Court to Court of Appeal,
- ✓ Circuit Court to Court of Appeal
- ✓ District Court to High Court

Four (4) points at 1 mark each 4 marks

(c)

The statement, fundamental human rights are inalienable means that the human rights are rights that cannot be transferred or surrendered.

(5 marks)

(d)

- ✓ Right to life
- ✓ Right to personal liberty
- ✓ Right to human dignity
- ✓ Equality and freedom from discrimination
- ✓ Privacy and Protection of Property
- ✓ Fair trial
- ✓ Protection from deprivation of property

Any 6 points at 1 mark each (6marks)

EXAMINER'S COMMENT

This was fairly well answered by candidates. However, some of the candidates had problem with definition of common law of Ghana. Under the constitution common law includes rules of common law property known as applicable under English law, rules of equity and rules of customary law in Ghana that have been assimilated.

The requirement in the question was on the manner in which appeals are made but most candidates rather listed the hierarchy of the courts. For the avoidance of doubt, the appellate structure is as follows:

Appeals from the district courts goes to the high courts
Appeals from the circuit court goes to the court of appeal
Appeals from the high court goes to the court of appeal
Appeals from the court of appeal goes to the Supreme Court

In **question c** a lot of the candidates answered correctly but in a few instances some of the candidates however did not understand the meaning of the word **inalienable**.

This was well answered.

QUESTION TWO

(a).

Property in goods passes as follows:

- ✓ In a contract for the sale of unascertained goods, property passes when the goods are ascertained.
- ✓ Property in goods when the parties intend it to pass.
- ✓ Property in goods passes when the goods are delivered to the buyer
- ✓ Where goods are delivered to the buyer on approval, or on sale or return or other similar terms, the property in the goods passes to the buyer when he signifies his approval or acceptance to the seller, or any other act adopting the transaction.
- ✓ When the buyer keeps goods sold on approval, or on sale or other similar terms, the property in it then passes when the buyers retains the goods without giving notice of rejection.
- ✓ If a time has been fixed for the return of the goods, on the expiration of such time, or after a reasonable time, property passes.

Any 5 points at 1 mark each (5marks)

(b)

- ✓ Where he agrees to accept personal liability
- ✓ When the agent is not appointed by deed and he signs the Deed, he becomes personally liable thereon.
- ✓ Where the agent signs a bill of exchange in his own name but does not indicate that he is signing as a mere agent;
- ✓ Where trade custom makes the agent personally liable
- ✓ Where the supposed agent is the principal but purports to contract as an agent;
- ✓ Where an agent acts for an undisclosed principal but does not make it clear that he is acting as an agent.

Any 5 points at 2 mark each (10marks)

(c)

Any agency may be terminated in the following ways

- ✓ By mutual agreement-Here both the principal and the agent may agree to terminate the agency at any time they wish.
- ✓ By revocation of the agent's authority; the principal may at any time revoke the authority given to the agent and prevent him from making binding contracts with third parties. When this happens, the agent may have the right of action for breach of contract against the principal where the revocation is unjustified.
- ✓ By death of the principal or agent, save in some exceptional cases.
- ✓ By bankruptcy or insanity of principal or agent, save in some exceptional cases.
- ✓ By frustration
- ✓ By intervening illegality like legislation passed to nullify such types of agency.
- ✓ By agent completing the performance of the agency;
- ✓ By the expiration of time, where the agency was created for a limited time.
- ✓ By the principal becoming an alien enemy;
- ✓ By renunciation

Any 5 points at 1 mark each (5 marks)

EXAMINER'S COMMENTS

It appears from the answers that some of the candidates did not understand the technical term 'property'. Property is the abstract term used to describe the process by which a buyer becomes the owner of the goods he has contracted to buy.

Property in the goods passes when the parties intend it to pass

- In unascertained goods property passes when the goods are ascertained
- In other cases property passes when the goods are delivered
- In a sale or return contract property passes when the buyer signifies his approval or acceptance or does any act adopting the transaction
- In sales or return property passes when the buyer retains the goods without giving notice of rejection.
- Where time has been fixed for the return of the goods, and the goods are not returned at the expiration of that time or within reasonable period after that

In **question c** most of the candidates failed to read the question well and answered this section on the creation of agency. However the requirement of this question was the circumstances under which an agent would be personally attached with liability for contracts that he enters into on behalf of a principal. This sub-section was well answered.

QUESTION THREE

a) The following remedies are available as follows:

i. Over delivery

- ✓ The buyer may not reject all the goods just because there is excess in quantity
- ✓ May accept all the goods so delivered and pay for the extra goods at the contract rate.
- ✓ He may accept the goods which should have been delivered and reject the remainder and then recover damages from the seller representing the cost of separating the goods which should have been delivered from the remainder

(3 points at 1 each 3marks)

ii. Under delivery

- ✓ The buyer may reject the goods.
- ✓ In the event he accepts the goods, he must pay for same at the contract rate.

(2points at 1^{1/2} each 3marks)

iii. Delivered in mixed lot

- ✓ Accept all the goods so delivered and pay a reasonable price for the extra goods.
- ✓ Accept the goods included in the contract and reject the remainder and recover damages involving the cost of separating the remainder and for deficiency, if any, in the goods delivered.

(2points at 1^{1/2} each, 3marks)

b)

- ✓ Necessity for consideration: every simple contract must be supported by consideration, otherwise, it is void.
- ✓ Legality of consideration, the consideration must be legal. i.e not some illegal act, like paying someone to commit a crime.
- ✓ Consideration must move from the promisee, i.e a person seeking to enforce a simple contract in court must prove that he himself has given consideration in return for the promise he is seeking to enforce.
- ✓ Consideration must be something beyond the promisee's existing obligations to the promisor. The promisee must have undertaken to do something for the person whose promise he is seeking to enforce, beyond what he was already bound to do.
- ✓ Consideration must be real: it must not be vague, indefinite or illusory.
- ✓ Consideration must not be past: a promise made in return for some past service is unenforceable.
- ✓ Payment of a smaller sum will not discharge a liability to pay a larger (the rule in the Foakes vrs Beer [1884]): if A owes B \$100 and B agrees to accept \$ 50 in complete discharge of the debt, there is nothing to stop B later from changing his mind and suing for the remaining \$50)

(5 points at 2marks each-10 marks)

EXAMINER'S COMMENTS

This question, though quite straight forward, was not answered well. For the avoidance of doubt, it has been decided to outline the expected answers.

i) Over delivery

In this instance the buyer may accept all good delivered and pay for the extra goods at the contract price. He may accept the goods that should have been delivered and reject the extra and would then recover damages from the seller representing cost of separating the goods which should have been delivered from the remainder.

ii) Under delivery

The buyer may reject the goods

He may accept the goods and pay for same at the contract price

iii) Delivered in mixed lot

Accept all the goods so delivered and pay a reasonable price for the extra goods

Accept the goods included in the contract and reject the remainder and recover damages for the cost of separating the remainder of the goods.

The question was fairly well answered however most of the candidates answered along the line in standard text books without reference to the changes on the concept of consideration spelt out in the Contracts Act 1960 (Act 25). Reference should have been made to sections 5, 6, 7, 8 and 9 of the Contracts Act.

QUESTION FOUR

- (a)
- ✓ the item has become a protected item. **(4 marks)**
 - ✓ the item can be recovered only by a court order. **(4 marks)**
- (b)
- ✓ the seizure of the item breaches the hire- purchase agreement entered into between Kobi Jones and the Agaza motor company Limited. **(8 marks)**
- (c)
- ✓ Kobi Jones can go to court for an order to reclaim his motor bike. **(4 marks)**

EXAMINER'S COMMENTS

Most of the candidates were able to identify that this is a question on hire purchase. They were also able to identify the fact that the motor bike had become protected. The problem with this sub-section was the application of the law. When it is identified the motor bike is protected. Candidates were expected to explain what is meant by 'protected goods'. Having explained that the candidates were to refer to sections 9 and 10 of the Hire Purchase Decree 1974 (NRCD 292) and apply by the said provisions in answering both (b) and (c). Law generally deals with the appreciation and application of rules to case studies. It is advisable therefore that candidates learn how to apply the rules they learn to given situations.

QUESTION FIVE

(a)

- ✓ The name of the company
- ✓ “ Limited” as last name for the Limited companies.
- ✓ The nature of authorized business to be carried on by the company or, for non-profit companies, the nature of the objects for which the company is established.
- ✓ A statement that the company has all the powers of a natural person with full capacity.
- ✓ The name of the first directors. There shall be at least two foundation (or first) directors.
- ✓ A statement that the powers of the directors are limited by section 202.
- ✓ In the case of a limited liability company, the regulation must contain a statement that the liability of its members is limited.
- ✓ For companies with shares, Regulation, must state the number of shares with which the company is to be registered. This is referred to as the *authorized shares*, ie the maximum number of shares that the company is capable of issuing.

Any 5 points at 1 mark each (5marks)

(b)

- ✓ The term, **pre-incorporation contract**, is a contract that is made between persons other than the subject incorporated company, in connection with the company, before incorporation. **(2 marks)**

(c)

- ✓ Parties to the pre-incorporation contract,
- ✓ Subject- matter of the pre-incorporation contract,
- ✓ the chronology i.e every pre-incorporation contract is made before the company is formed

(3 point at 1 mark each 3marks)

(d)

- ✓ Any contract or other transaction purported to be entered into by a company prior to its formation or by any person on behalf of the company before its formation, may be ratified by the company after its formation, whereupon the company shall assume rights and liabilities under the contracts or transaction as if it had been in existence at the dated of such contract or transaction, and had been a party to it.
- ✓ Before ratification the promoter or other person purporting to act on behalf of the company remains personally liable in the absence of any express agreement to the contrary, and its entitled to any benefit accruing under the contract or transaction.

- ✓ If the promoter does not wish to incur financial or other loss under such contracts, he should ensure that the contract is so drawn up as to permit him to abrogate in the event of the company failing to ratify it after its formation.
- ✓ The reason for the promoters' inability to be regarded as an agent in respect of the pre-incorporation contract or transactions derives from the general legal principle that a person cannot derive the powers and authority of an agent of a non-existent principal (12 marks)

EXAMINER'S COMMENTS

This sub-section did not pose any problems. Most of the candidates were also able to give the definition of pre-incorporated contracts. Except in a few isolated cases most of the candidates could not explain themselves well. The explanations on the features of pre-incorporated contracts are:

- The parties to the contract which exclude the prospective company
- The subject matter of the contract
- The contract is entered into before the company acquires legal existence

Unfortunately, a lot of the candidates wrote on the duties of a promoter towards the company. However, the requirement was that after incorporation the company that has acquired a legal existence may ratify such contracts as it were a party to it. The ratification is done usually by a resolution of the board of directors. Once ratified, the company assumes rights and liabilities under the contract. If the contract is not ratified the promoter takes all benefits and liabilities under the contract (section 13 of Act 179).

QUESTION SIX

(a)

- ✓ There is a contractual relationship between Kojo Mensah and the A&C company Limited
- ✓ From the scenario, there is a case of gross misconduct on the part of Kojo Mensah.
- ✓ Therefore, notwithstanding the existing contract between Kojo Mensah and A&B company, the company, could on disciplinary grounds terminate Kojo Mensah's appointment for gross misconduct.
- ✓ The company was, therefore, justified in terminating Kojo Mansah's appointment

(10 marks)

(b)

- ✓ Kojo Mensah can seek redress in court because of the fact that the company did not give him a hearing, adding that in view of the fact that, the grounds for the termination of Kojo Mensah's appointment were disciplinary, he ought to have been given a hearing; not giving Kojo Mansah a hearing offends the principle of natural justice.
- ✓ Kojo Mensah, therefore, has a bright chance of success in the court as he can sue A&B Company for damages for wrongful termination of his appointment.
- ✓ Kojo Mensah cannot sue for re-instatement because contractual relationship is not for servitude **(5 marks)**

(c)

Dismissal

- ✓ No benefits are payable
- ✓ No notice in lieu of salary
- ✓ Dismissal necessarily implies that it is a disciplinary action **(3marks at 1^{1/2} each)**

Termination

- ✓ One is entitled to accrued benefits.
- ✓ Termination requires notice or salary in lieu of notice
- ✓ Termination may be disciplinary or non disciplinary **(3marks at 1^{1/2} each)**

EXAMINER'S COMMENTS

The case study was very simple but as mentioned earlier because candidates don't prepare adequately most candidates could not analyze the problem very well. Section 15 of the Labour Act 2003 (Act 651) outlines the grounds under which an employer can terminate the appointment of a worker. These include incompetence and proven misconduct. In the case study there is evidence of incompetence and gross misconduct. The employer was therefore right in terminating the appointment of the employee. As to whether the employee would succeed his action the employer can use his incompetence and misconduct as a ground and therefore the employee's action is likely to fail.

Candidates could not differentiate between termination of appointment and dismissal. In termination of the contract of employment is usually brought to an end by giving notice or in lieu of notice payment of salary usually three months. Additionally the employee usually takes home his end of service benefits. Dismissal however connotes some term of disciplinary action. In that case the

employer is bound to follow its own disciplinary procedures by setting up an investigation or giving the employee a hearing. If this procedure is not followed the employer is guilty of wrongful dismissal. Usually in cases of dismissal the employee loses all benefits depending on the magnitude of the offence.

QUESTION SEVEN

(a)

- ✓ The name of the firm
- ✓ The registered address of the partnership and any branch offices
- ✓ The nature of the firm's businesses
- ✓ The name and address of the foundation partners
- ✓ The amount and percentage of contribution of each partner to the capital of the firm
- ✓ Admission to partnership
- ✓ Exit from partnership
- ✓ Profit-sharing arrangements
- ✓ Monthly or other periodic drawing of funds
- ✓ Management and administration of the firm

(10 points at 1 mark each 10 marks)

(b)

- ✓ The remaining partners must, in accordance with section 7 of the Incorporated Private Partnership Act, 1962 Act 152, within 28 days of the retirement, notify the Registrar of Companies of the fact of the retirement **(5marks)**
- ✓ The Registrar in turn, is bound upon notification to amend the certificate of registration of the company, and insert a notice in the gazette signifying the change

(5marks)

EXAMINER'S COMMENT

This was fairly well answered. This sub-section was not well addressed by candidates. It appears most of them were not conversant with the procedure. The retirement of a member connotes a change in the firm's structure as submitted by the partners. Therefore under section 5 of Act 152 the remaining partners are enjoined to give notice within twenty eight days to the Registrar. The Registrar will then issue and amended certificate of registration and then insert a notice in the Gazette stating the issue of the certificate and the terms of the certificate. The existing partners are also put up an advertisement in a daily newspaper circulating in the district in which is situated. The principal place of business of the firm giving notice to persons who have not had any dealings with the firm prior to the retirement.