

**MAY 2017 PROFESSIONAL EXAMINATIONS
BUSINESS & CORPORATE LAW (PAPER 1.3)
CHIEF EXAMINER'S REPORT, QUESTIONS & MARKING SCHEME**

STANDARD OF PAPER

The standard compared favourably with previous ones. However, this time around there were a little problem with the arrangement of the questions. In order to keep within weightings, it would be better if the questions are comparted into sections to prevent deviations from the weighting grid of the syllabus.

PERFORMANCE OF CANDIDATES

The performance of candidates was generally bad. The probable cause is that, it appears a lot of candidates walk into the examinations unprepared. Law is logical analysis of problems. However you get a lot of candidates failing to argue logically and applying the law. Most candidates show that they do not even know of cases but a good answer in a law paper relates to how a candidate applies cases or statutes to questions.

In the past, we were of the view that once candidates were able to answer questions logically, there would be no need for them to cite cases but the way things are going, it appears we may have to revise our stand and allocate some marks for illustration of answers with cases or reference to sections of the various Acts. This does not mean that a candidate would fail if he does not cite cases or refer to sections of Acts but it only means that for a candidate to score very high marks, he must exhibit high scholarlistic aptitude.

QUESTION ONE

- a) The common law is one of the sources of law of Ghana under the 1992 constitution of the Republic of Ghana.

Required:

State the components of the common law. **(5 marks)**

- b) Ama Grace acquired a plot of land at Kasoa on which she put up a three bedroom house. Ama Grace lived in that house with her three children. One morning two young men entered the house and threw out her belongings. The belongings were left outside for several hours before the police intervened. Without giving Ama Grace the opportunity to state her side of the incident, the police also removed the belongings of Ama Grace from the compound onto the street. The police never took action to look for the two young men who entered the compound of Ama Grace.

Required:

State **TWO** fundamental human rights of Ama Grace that have been violated.

(5 marks)

c)

i) Define a 'condition' as in the law of contract. **(3 marks)**

ii) Define 'warranty' as in the law of contract. **(3 marks)**

iii) Keita books for a hotel facility and pays in advance. The hotelier tells him nothing more than the issue of a receipt. Keita takes occupancy of the room only to read a list of DONTs posted at the back of the door of his room. The following day he returned from breakfast in the hotel to find that his wrist watch which he left on the table of the room was missing. He spoke to the receptionist at the reception desk on the loss but they referred him to an exclusion clause on the door. He seeks your advice. Advise Keita.

(4 marks)

(Total: 20 marks)

QUESTION TWO

- a) On 20 November 2015, the 'Daily Graphic Newspaper' advertised a promotion sale for Dabenda Company Limited stating that the Company's "Miracle Balm" was capable of treating boils and foot-rot and that whoever bought the product and used it per the prescription without the boils and foot-rot disappearing would be entitled to GH¢200.00. Pursuant to that promise, the Company gave a standing order to its bankers on that pledge. The promotion sale was due to end on 19 November 2016.

Madam Akua Mansah, heard of the advertisement and bought one of the balms. She used it according to the prescription and also applied some of the cream to her 14 year old daughter who had similar problems but their boils and foot-rot still persisted. She intends to sue the Company.

Required:

- i) Explain whether Madam Akua Mansah is likely to succeed with her intended action. **(10 marks)**
- ii) Madam Akua Mansah's daughter also intends to take action against the company. Explain her chances, if any. **(10 marks)**

(Total: 20 marks)

QUESTION THREE

a)

Asanka Pharmaceutical Company Limited manufactures several types of drug, and which drugs are supplied to many chemical stores in Kojokrom. The company is located very close to a gutter which is also used by the residents as a refuse dump. This gutter is never desilted resulting in the fact that a strong odour hangs around the premises of the company.

The equipment used in manufacturing the drugs are not only obsolete but also expose the workers of the company to injuries. The workers of the company have complained about the conditions under which they work, but the management of the company pays deaf ears to these complaints. Apart from the fact that the equipment used to manufacture the drugs created a problem for the workers, the company did not provide the necessary safety working gears to the workers.

When the complaints of the workers were not heeded for necessary remedies to be provided, they embarked on a sit-down strike. The management, therefore, summarily dismissed the leadership of the workers, saying that the leaders could not tell the management what to do in the running of the affairs of the company.

Required:

Explain whether the workers of the Asanka Pharmaceutical Company Limited were justified in embarking on the sit-down strike action. **(10 marks)**

b) Explain delivery of goods in relation to:

- i) Cost of putting the goods into deliverable state. **(2 marks)**
- ii) Means of delivery. **(6 marks)**
- iii) Place of delivery. **(2 marks)**

(Total: 20 marks)

QUESTION FOUR

- a) Explain the types of companies known to you under the Companies Act, 1963 (Act 179) **(12 marks)**
- b) 'A promise to keep an offer open for a specified period can be withdrawn by the promisor before expiration of the period'

Required:

Explain whether this is a true position of the law in Ghana now **(8 marks)**
(Total: 20 marks)

QUESTION FIVE

- a) The liquidator under private or solvent liquidation performs certain duties. **State THREE** of these duties. **(10 marks)**
- b) List the stages involved in official or compulsory liquidation. **(4 marks)**
- c) Distinguish between a contract for the sale of goods and an agreement to sell. **(6 marks)**

(Total: 20 marks)

QUESTION SIX

- a) A partner in a firm in the course of an authorised duty incurred liability of which he/she made personal payment. The partner later made claims of re-imburement of expenses incurred. At a meeting of the partners of the firm, the re-imburement was declined.

Required:

Explain whether the partner has any rights to claim re-imburement. **(7 marks)**

- b) Three friends pooled their resources to form a company. After some time and while the company was running, differences arose among them. Each claimed ownership of the company.

Required:

Explain the concept of legal personality of a Company in the light of the above facts **(7 marks)**

- c) State the circumstances under which the Registrar of Companies shall refuse to register the proposed Regulations of a company. **(6 marks)**

(Total: 20 marks)

QUESTION SEVEN

a) What is the difference between 'specific goods' and 'unascertained goods' in the terms of definition? **(6 marks)**

b) Juba is a sales representative of K&K Company Limited. He visited the premises of XBF Company Limited. XBF Company Limited were interested in providing its core staff with protective clothing consisting of masks, gloves and boots. After describing the types of protective clothing to the sales representative, Juba showed the XBF Company Limited samples of the masks, gloves and the boots that his Company intended to sell. The Company accepted the samples. On the day of the delivery, the auditors of XBF found that the goods delivered did not match with the samples.

Required:

Explain the transaction between K&K Company Limited and XBF Company Limited in terms of the provisions of the Sale of Goods Act, 1963 Act 137

(7 marks)

c) Define Bill of Exchange under the Bills of Exchange Act, 1961 ACT 55.

(2 marks)

d) Kofi Mensa presented a cheque made out in his name to the BBB Bank. The drawer intended that the drawee withdraws an amount of GH¢2,000.00 which was written in words. The amount written in figures however showed GH¢200.00

Required:

Explain the chances of Kofi Mensa in any legal action against the BBB Bank.

(5 marks)

(Total: 20 marks)

MARKING SCHEME

QUESTION ONE

a) The common law includes:

- The common law popularly so called is the laws that were received from the English Law - **1 Mark**
- Rules of equity, good conscience - **2 Marks**
- Customary law that have been assimilated - **2 Marks**

(5 marks)

b)

- Right to own property
- Interference with the privacy of her home
- Interference with possession of Property

2 ½ marks for

1 point stated

(Any 2 points for 5 marks)

c) i)

A condition creates the fundamental obligations of the contracting parties. Breach of a fundamental obligation-ie, a condition-by one party entitles the other party to repudiate. Or a condition is vital term of a contract, going to the root of the contract, a breach of which entitles the injured party either to treat the contract as repudiated and terminate performance of the contract and claim damages for the termination or to affirm the contract and claim damages.

(3 marks)

Fundamental obligation/root of the contract attracts- 1 ½ Marks

Repudiate/terminate performance and claim damages - 1 ½ Marks

ii) A warranty is a minor term. A breach of warranty entitles the other party to damages only. A warranty is not a vital term in a contract, but one which is subsidiary, a breach of which gives no right to treat the contract as terminated but only an action for damages.

(3 marks)

Minor term /not a vital term/subsidiary -

(1 ½ Marks)

No right treat contract as terminated but only an action for damages-

(1 ½ Marks)

iii) **In order to be valid the exclusion clause must pass the following tests:**

- ✓ It must be incorporated into the contract and not added after the contract is complete. **1 Mark**
- ✓ The customer must have adequate knowledge of the clause.- **1 Mark**

- ✓ In the present scenario the contract was concluded before the exclusion clause was brought to Kofi's notice.-

2 Marks

(2 marks for any two points = 4 marks)

(Total: 20 marks)

EXAMINER'S COMMENTS

a) Common Law

It appears that a lot of candidates do not bother to look at the constitution. Common law as known in Ghana includes the law imparted from the colonial masters which include judge made law, rules of equity and good conscience and customary law that have been assimilated.

- b) It appears that candidates have not adverted their minds to the provisions of the constitution that deal with fundamental human rights. From the scenario, fundamental human rights that were violated were mainly

- ✓ The right to own property
- ✓ Interference with privacy
- ✓ Interference with possession of property.

- c) Question (i) and (ii) were fairly answered.

Question (iii) was poorly answered. The question is on exclusion clauses. For exclusion clauses to be effective, they must be brought to the notice of the party at the time of making the contract. These days hotels put up notices at the reception to admonish customers. But in this particular case, the clause was brought to the notice of the customer after he had entered into the contract thus making the exclusion clause inoperative.

QUESTION TWO

- (a) For there to be a binding contract there must be :

- an offer ,acceptance, consideration and intention to create a legal relation
- From the scenario, the advert in the newspaper amounted to an offer-
- The purchase of the balm and its applications amounted to acceptance.
- The response to the adverts itself is the consideration that has been provided-
- The deposit of the money at the bank constitute an intention to create legal relation.-
- The company is therefore liable to Madam Akua Mansah-

(2 Marks for each of the element of the contract stated)

(10 marks)

(b)

- ✓ In every contract the parties must have capacity in the sense that they must be adults and of sound mind.-
- ✓ In the scenario above Madam Akua Mansah's daughter is said to be 14 years of age.
- ✓ By law she is a minor and can therefore not sue or be sued -
- ✓ She therefore lacks capacity to sue the company.-
- ✓ **There is no privity of contract**

(2 Marks for each of the element of the contract stated)

(10 marks)

(Total: 20 marks)

EXAMINER'S COMMENTS

- a) Although those who answered this were able to say that Madam Akua Mansah could sue, they could not logically argue why she would succeed. The advert in the papers amounted to an offer. Akua Mansah accepted the offer by purchasing the balm and applying same. Since she did not get the result, she had a right to sue. Examiners expected the candidates to mention *Carlill vs Carbolic Smoke Ball* but most of the candidates could not mention the case in support of their answers.
- b) With regard to this part, most candidates failed to identify the issues involved and stated that Madam Akua Mansah's daughter could also have a course of action against the company. The issue involved is the capacity of the child to enter into a contract. Apart from the age, there is the corollary issue of privity. Since she did not buy the balm, she had no contract with the company.

QUESTION THREE

a)

Under the Labour Act 2003 Act 651, it is the duty of employer to provide satisfactory safe and healthy conditions.

- Location of company very close to a big gutter/ undesilted gutter that emitted bad odour.
- The equipment was obsolete exposing the workers to injuries.
- The workers were not provided with protect clothing.
- Their complaints were ignored.

Not more than 2 Marks to be allotted for total of this area

Whether the workers were justified refer to section 159 below

- For strike to be legal, the Law under Section 159 stipulates two circumstances under which legal strike can occur.
- The first is where the parties fail to agree to refer the dispute to voluntary arbitration, and where the dispute remains unresolved at the end of the arbitration process, either party intending to take strike action or institute lockout, shall give written notice of this to the other party and the commission, within seven days after failure to agree to refer the dispute to voluntary arbitration or the termination of the proceedings.
- This means that the parties would have gone through negotiation and mediation, yet they failed to resolve the dispute and one party to the dispute does not want the matter to be referred to voluntary arbitration, or the parties are at voluntary arbitration, but the conduct of one party is stalling the process.
- It is under such a circumstance that a party intending to strike or institute lockout must give a written notice to the other party and the National Labour Commission. However, what has become the norm by some workers, workers organisations and associations is for them to issue press releases or press statements of their intention to embark on strike. In other instances, the NLC is only copied notice of strike. Such acts contravene the provisions for embarking on strike under the law.
- Again, such act prevents the commission to pro-actively intervene to have the issue resolved. Very often also, the strike action started before the commission was informed. Furthermore, the practice where workers write to state that if no action is taken within a specific period “we would advise ourselves” is not appropriate because advising “oneself is not a notice “to the commission. Where a party is aggrieved and intends to take action, that party should state clearly the reasons for dissatisfaction and officially report to the commission for redress.
- A notice of strike, therefore, must be properly served as required by the law. It is important to note that today’s practice of the industrial relations must be based on transparency, good faith and adherence to the Labour Act 2003, (Act 651)
- **The parties failed to agree- refer the dispute to voluntary arbitration**

(8 marks)

2 Marks for bullet 2 otherwise 1 ½ Marks for each point. AND total of 8 Marks here.

b)

i) The expenses of and incidental to putting the goods into a deliverable state are to be borne by the seller unless the contract for the sale states otherwise. (2 marks)

Unless otherwise agreed, the seller may deliver the goods to the buyer by:

- Transferring to the buyer the actual physical control over the goods; or
- Transferring to the buyer the means of obtaining actual physical control of the goods; or
- Transferring to the buyer documents of title to the goods;

- Delivery of the goods to the authorized agent of the buyer is a delivery to the buyer unless otherwise intended.
- Delivery is also occasioned when the contract specifies a delivery of the goods to be given to a carrier to be delivered to the buyer.
- Where the goods are to be delivered to a third party on behalf of the buyer and the third party acknowledges possession of the goods.

(6 marks)

iii) Place of delivery is the seller's place of business, if there is one, place of residence unless the contract specifies the intention to deliver at a particular place.

(2 marks)

(Total: 20 marks)

EXAMINER'S COMMENTS

- a) The main issue in this question was missed by the candidates. From the scenario, most of the candidates jumped to the conclusion that the workers were justified in declaring the sit down strike. But when one looks at the question critically, one would realise that there was a standoff between the workers on the one part and management on the other part. In a situation of this nature, what steps should be taken by the workers in order to get management to back down. Section 159 of the Labour Act 2003, Act 651 provides the answer.
- b) This posed a problem for some of the candidates.

QUESTION FOUR

a)

✓ **Private company limited by shares**

A company having the liability of its members limited to the amount, if any unpaid on the shares respectively held by them. Section 9 sub section 1. The number of its members must not exceed 20.

✓ **Private company limited by guarantee**

A company having the liability of its members limited to such amount as the members may undertake to contribute to the assets of the company in the events of its being wound up.

Refers to charitable organizations who are not supposed to make profit

✓ **Private unlimited company**

One not having any limits on the liability of its members as the name suggest.

- ✓ **Public company limited by shares** A company having the liability of its members limited to the amount, if any unpaid on the shares respectively held by them. The number of members does not have any limits.

(4 points at 3 mark each=12 marks)

ADDENDUM-

Four Companies- The traditional types of Three Companies under Section 9 of the Companies Act 1963, ACT 179 when mentioned should attract 3 Marks each for One Company.

Where either PUBLIC OR PRIVATE COMPANY can be mentioned by the candidate, that should attract additional total mark of Three (3).

b)

- ✓ It was a common law principle that “a promise to keep an offer open for a specified period could be withdrawn before the expiration of the time”.
1 Mark
- ✓ This was especially true, if no consideration was provided by the promisee, for the promise.
1 Mark
- ✓ The courts sought to make changes to this principle especially in situations where through some forbearance on the part of the promisee, sought to accept the promise.
1 Mark
- ✓ But the statement is no longer true in Ghana. Section 8 (I) of the Contract Act, Act (25) 1960 states that “a promise to keep an offer open for acceptance for a specified time shall not be invalid as a contract by reason only of the absence of any consideration therefor”.
4 Marks
- ✓ In situations where the promisee may have relied on the offer to keep the offer open and has made efforts to accept the offer, it would not be fair to withdraw the offer or promise midstream only for the reason that no consideration has been offered.
2 Marks

(8 marks)

(Total: 20 marks)

EXAMINER’S COMMENTS

- a) This part of the question was well answered.
- b) This question is premised on the provision of consideration as the basis of any binding contract. The common law position is that once a party has not provided any consideration, he cannot take any benefit on the promise. However this position of the law has been changed by Section 8 of the Contracts Act 1960 (Act 25) thus a promise to keep an offer open for a period cannot be withdrawn before the expiration of that period. Unfortunately, most candidates could not refer to the Contracts Act.

QUESTION FIVE

a)

- The liquidator must keep proper records and books of account for all transactions in respecting the winding up. Should the liquidator carry on the business of the company, she should keep a distinct account of the trading.
- Should winding up proceed beyond 12 months she should shortly thereafter, and no later than 3 months following unless the Registrar extends this period, summon a general meeting of the company and lay before the meeting an account of the liquidator's acts and dealings and of any trading the business may have conducted while winding up was pending.
- Within 28 days after the said general meeting, the liquidator shall send a copy of the accounts to the company Registrar for Registration.
- As soon as the affairs of the company are fully wound up, the liquidator shall prepare and send to every member of the company the final audited accounts of the winding up showing how the winding up was conducted, the results of trading, and how the property of the company was disposed of.
- After dispatching these final audited accounts, the liquidator shall convene a general meeting of the company to lay before the meeting her accounts and offer any explanations.
- Within 28 days of that general meeting, the liquidator shall send to the Registrar copies of the accounts and a statement of the holding of the meeting and the meeting date for registration.
- The liquidator must settle the accounts of the Company
- The liquidator will invite the creditors and debtors to present their statements to him.
- The liquidator will rank the debts and pay creditors
- The liquidator will serve notice to creditors and debtors
- The liquidator stands in fiduciary relations with the liquidated company.
- Realise the assets of the Company.
- The liquidator is required to preserve the books and papers of the company and of the liquidator for 5 years from the company's dissolution.

Section 256 of the Companies Act, 1963 ACT 179

(Any 3 points for 10 marks)

b) The stages involved in official or compulsory liquidation.

- ✓ Conversion from a private liquidation
- ✓ Special resolution
- ✓ Petition addressed to the Registrar
- ✓ Petition to the Court

(4 points for 4 marks)

c)

- ✓ A contract for the sale of goods is where the seller transfers or agrees to transfer the property in goods to the buyer for a consideration. Here the property in goods passes immediately upon conclusion of the contract.
- ✓ An agreement to sell is a situation where the parties agree now that property in the goods would be transferred to the buyer at a later date subject to some condition that has to be fulfilled.
- ✓ An agreement to sell becomes a sale upon fulfillment of the condition subject to which property in the good is to be transferred.

(3 points for 6 marks)

(Total: 20 marks)

EXAMINER'S COMMENTS

- a) This question was not well answered. It is important for candidates to note that as future accountants, there may be the need to appoint your accounting firm as an official liquidator thus the necessity to know both the procedure and the duties of the liquidator. This question could be well answered by reference to section 256 of the Companies Act 1963 and the provisions of Bodies Corporate Official Liquidation Act 1963 (Act 180).
- b) This was fairly answered.
- c) Most of the candidates were able to answer this part.

QUESTION SIX

- a) Under the Incorporated Private Partnerships Act, 1962 ACT 152 from the date of registration and incorporation, a firm is a body corporate under the firm name, distinct from the partners of whom it is composed and capable of a natural person of full capacity in so far as those powers can be exercised by a body corporate.

2 Marks

Although the firm is a body corporate, each partner in the firm is liable, without limitation for the debts and obligations of the firm. A partner is entitled to an indemnity from the firm and to contribute from the co-partners in accordance with the rights of that partner under the partnership agreement. **Section 10 of ACT 152.**

5 Marks

- b) Upon incorporation a company becomes a body corporate, separate and distinct legal identity from those who formed it. The company has the powers of a natural person and of full capacity. Those who pulled their resources to form the company become members of the company if they subscribe to the Regulations of the company. A member has the right to attend a general meeting of the company and to speak and vote on a resolution.

5 Marks

None therefore, can claim ownership-

2 Marks

Salomon Versus Salomon; Sections 24 and 30 of Companies Act, 1963 applicable.

(7 marks)

- c) State the circumstances under which the Registrar of Companies shall refuse to register the proposed Regulations of a company.

The Registrar of Companies shall refuse to register the proposed Regulations where in his opinion:

- ✓ The Regulations do not comply with the Companies Act
- ✓ The objects for which the company is being formed or the business which it is to carry on or any of them are unlawful
- ✓ Any of the subscribers to the Regulations is an infant or of unsound mind.
- ✓ Any of the Directors are incompetent.

(3 points for 6 marks)

(Total: 20 marks)

EXAMINER'S COMMENTS

- a) This question brought out the corporate nature of a Partnership and the liabilities of the members of the firm. Even the partnership is a body corporate unlike a limited liability company the members are liable to the debt incurred by the partner in line with the Partnership Agreement.
- b) The question deals with the corporate personality of a company vis a vis its members. Once incorporated, the company acquired a separate legal personality distinct from its members. Thus none of the members could claim ownership of the company. If the differences are so acute, the members may apply for dissolution.
- c) This did not pose a problem to candidates.

QUESTION SEVEN

a) The difference between specific goods and unascertained goods in terms of definition

Specific goods are goods identified and agreed on before or at the time the contract of sale is made. This requires that the actual goods that the buyer is to receive under the contract can be identified at the time that the contract is agreed. Thus, goods bought at the supermarket picked from the shelf or second hand car chosen off a garage forecourt and sold by reference to its registration number. In each case the actual goods can be identified. **(3 marks)**

Unascertained goods on the other hand are goods which are not identified and agreed on at the time that the contract is made. Thus goods yet to be manufactured or grown or acquired after making of the contract qualified to be specific goods.

Unascertained goods never become specific, they only become ascertained.

(3 marks)

b)

✓ In a contract of sale of goods by description, whether or not the sale is by sample as well as by description, there is implied condition that the goods shall correspond exactly with the description. **(3 marks)**

✓ In a contract of sale of goods by sample, whether or not the sale is by description as well as by sample there is an implied condition that the goods shall correspond exactly with the sample. **(3 marks)**

✓ Thus the goods did not correspond to the description or the sample. **(1 mark)**

c) Bill of exchange under the Bill of Exchange Act, 1961 ACT 55

A bill of exchange is 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 of money to or to the order of a specified person or to the bearer. **(2 marks)**

d) Under the Bill of Exchange Act where the sum of money payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by words is the amount payable. For this reason BBB Bank will be justified to pay GH¢2, 000.00 to Kofi Mensa. **(5 marks)**

(Total: 20 marks)

EXAMINER'S COMMENTS

- a) The question was well answered.
- b) This was also well answered.
- c) In a few isolated cases, candidates were not able to explain the meaning of a bill of exchange.
- d) Under the Bill of Exchange Act, where there is discrepancy between figures and words, the words prevail. However, in practice most banks will insist that the drawer rectifies the mistakes thus strictly speaking, the bank has not erred.