

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

EXAMINER'S GENERAL COMMENTS

The standard compared favourably with previous examinations.

Generally the performance is about average. The problem with most of the candidates is that they come to the examination unprepared. Sometimes the level of grammar and tenses is so awful, not to mention language.

QUESTION ONE

- a) List the hierarchy of the courts of Ghana in the order of superiority. **(10 marks)**
- b) The Constitution of the Republic of Ghana, 1992 enshrines the fundamental human rights and freedoms of persons in the territorial jurisdiction of the Republic of Ghana. State **TWO** situations where the Republic may interfere with the rights and freedoms of persons. **(10 marks)**

(Total: 20 marks)

QUESTION TWO

- a) Distinguish between *invitation to treat* and an *offer*. Identify **TWO** examples of invitation to treat. **(8 marks)**
- b) Zealow & Associates is a consultancy firm of Accountants. Kingsley Gyeabour, a prospective business man has decided to establish a fuel filling station. He therefore sought the professional advice of the consultancy firm. The firm advised that based on their assessment, the turnover for a day's sale will be 1200 gallons of ordinary petrol and 1000 gallons of diesel. Relying on the statement of the firm, Gyeabour established the filling station. He later realised that the actual turnover was 100 and 200 for petrol and diesel respectively. Gyeabour intends to sue and seeks your advice.

Required:

Advise Gyeabour.

(12 marks)

(Total: 20 marks)

QUESTION THREE

- a) Bobo Company Limited puts up an advert in the 'Daily Times' newspaper inviting members of the public to purchase shares. Mr. Kobina Fosu an investor decided to purchase some of the shares. He therefore decided to consult an investment firm to advice on whether or not he should purchase the shares of the company. The investment firm accordingly advised Mr. Kobina Fosu that the company was buoyant and that its capital base was strong and attractive. As a result, Mr. Kobina Fosu bought a substantial number of shares of the company. Two months after the purchase of the shares, however, the company went bankrupt.

Mr. Kobina Fosu has approached you for advice as to whether he could take action against the investment company.

Required:

What advice, if any, will you give to Mr. Kobina Fosu?

(10 marks)

- b) Both tort and contract laws are considered part of the civil law (as opposed to criminal law). However, there are several differences between these two branches of civil law.

Required:

- i) Explain *law of contract* and *law of tort*. (6 marks)
ii) State **TWO** differences law of contract and law of tort. (4 marks)

(Total: 20 marks)

QUESTION FOUR

- a) Who is a general agent? (2 marks)
b) Who is a special agent? (2 marks)
c) Kaku had been a driver of a cargo vehicle. He loaded his vehicle with goods at Tamale for an owner resident in Takoradi. The cargo was a mix of tubers of yam, bags of charcoal, watermelon and tomatoes. In the course of the journey and while still far away from Takoradi, the vehicle broke down in the vicinity of a small town. The driver did all that he could to reach the owner of the goods by telephone and other means. He was however not successful. He therefore, disposed of all the goods by sale on the third day.

Required:

- i) Explain the effect of the sale of the watermelon, tomatoes, the yams and the bags of charcoal on the agency relationship. (10 marks)
ii) What are protected goods in the sense of hire purchase? (6 marks)

(Total: 20 marks)

QUESTION FIVE

- a) What steps should an employer take when he is introducing major changes that will entail *termination of employment* of workers in an undertaken? (10 marks)
b) Akosua returned from work to find that a young adult in the neighbor's home had pruned all the hedges of her home. Akosua pleased with what the young adult had done promised a reward of GH¢100.00. After two weeks when the reward was not forthcoming, the young adult approached Akosua with a stern warning to enforce the promise.

Required:

- Explain the chances of the young adult if he intends to seek redress in court. (4 marks)
c) What differences exist between *debenture holders* and *shareholders*? (6 marks)

(Total: 20 marks)

QUESTION SIX

- a) State the *essential rules* concerning the transfer of risk in sale of goods. (12 marks)
- b) Explain the following:
- i) Liquidated damages (4 marks)
- ii) Quantum meruit. (4 marks)

(Total: 20 marks)

QUESTION SEVEN

- a) Kwasi Mensa, aged 21 years, Patience Adibu, aged 14 years and Kojo Ntim, aged 20 years agreed to form a partnership. Available information however showed that Kojo Ntim was admitted at the psychiatric hospital for 2 year and was later discharged. In the case of Kwasi Mensa he was declared bankrupt after he could not meet his financial obligations to a company in which he had previously invested. The three, however, went ahead and formed a partnership known as KKK firm.

Required:

- Explain whether the KKK firm was formed in accordance with law. (5 marks)
- b) State the reasons for which the Courts may order for the expulsion of a partner. (10 marks)
- c) What advantages does a partnership have over a company? (5 marks)

(Total: 20 marks)

SOLUTION TO QUESTIONS

QUESTION ONE

a)

- Supreme court
- Court of Appeal
- High court/Regional tribunals
- Circuit courts
- District courts

(2 marks each in order of superiority)

b) Situations where the Republic may interfere with the rights and freedoms of persons

Article 14 of the Constitution of the Republic of Ghana, 1992:

- in execution of a sentence or order of a court in respect of a criminal offence of which he has been convicted; or
- in execution of an order of a court punishing him for contempt of court; or
- for the purpose of bringing a person before a court in execution of an order of a court; or
- in the case of a person suffering from an infectious or contagious disease, a person of unsound mind, a person addicted to drugs or alcohol or a vagrant, for the purpose of his care or treatment or the protection of the community; or
- for the purpose of the education or welfare of a person who has not attained the age of eighteen years; or
- for the purpose of preventing the unlawful entry of that person into Ghana, or of effecting the expulsion, extradition or other lawful removal of that person from Ghana or for the purpose of restricting that person while he is being lawfully conveyed through Ghana in the course of his extradition or removal from one country to another; or
- Upon reasonable suspicion of his having committed or being about to commit a criminal offence under the laws of Ghana.

(2 points @ 5 marks each= 10 marks)

(Total: 20 marks)

EXAMINER'S COMMENTS

(a) This question did not pose any problem to candidates however in some instances some candidates mixed up the order of the courts. It is very important that candidates would read the questions well and understand the requirements before writing down their answers. In some cases candidates referred to the Judicial Committees of the various traditional councils. These are specialised institutions and therefore do not form part of the traditional legal system.

(b) The question was well answered.

QUESTION TWO

a) The difference between them is as follows:

- Invitation to treat is a request from one person to another asking the other person to make a proposal for consideration by the one requesting the proposal/Invitations to treat have no binding effect and is means of seeking information and inviting a prospective offeror to make a contractual offer. They come in the nature of pre-contractual negotiations or statements. **(3 marks)**
- An offer on the other hand is a solid proposal/A contractual offer exists when an offeror makes known the terms upon which he is prepared to contract and promises to be bound by those terms if they are accepted by the offeree. **(3 marks)**
- Examples of invitation to treat are: Display of items for sale; an advertisement; catalogue; auction sale.

(2 marks)

b)

- There is a duty of care not to cause economic loss by negligent misstatement/misrepresentation, but the duty exists only where the person who makes the statement foresees that it may be relied on.
- There must therefore be a special relationship. The principle is that there must be a special relationship between the person providing the advice and the person receiving it.
- The relationship is the means of establishing to whom duty is owed.
- The provider of the advice must know the purpose for which it is to be used and that the recipient will rely on the statement and act upon it without making any other inquiries.
- In the scenario there is a special relationship between the firm and Gyeabour.
- The firm owed a duty to Gyeabour.
- Gyeabour may sue to recover damages.

(6 points @ 2 marks each = 12 marks)

(Total: 20 marks)

EXAMINER'S COMMENTS

(a)The question was well answered.

(b)There is a general trend among candidates failure to apply the law to case studies. In real life situation, one would not get a straight forward question but invariably a situation comes up when one has to apply the principles of law to solve the problem at hand. However, most candidates were not able to logically analyse the principles involved and were not able to apply some to the problem.

The case study involves professionals who give advice to clients. The professional owes a duty of care to the client especially when he knows that the client is going to rely on the

advice. Where the professional gives wrong advice and the client relies on the advice to his detriment, the professional is guilty of breach of duty and would be liable to the client for any losses suffered.

In this scenario there was contracted relationships between the firm of accountants and Gyeabour. The firm gave advice which they knew was going to be relied upon by Gyeabour. The advice has gone wrong, therefore the firm is liable to Gyeabour for the loss suffered.

QUESTION THREE

a)

- The investment company owed a duty of care to the investor Mr. Kobina Fosu
- The investment company stands in fiduciary relationship with Kobina Fosu
- The investment company ought to know that its advice will be relied upon by Mr. Kobina Fosu
- In this scenario the investment company did not exercise proper degree of duty of care, before given the said advice to the investor Mr. Kobina Fosu
- The investment company is therefore liable for professional negligence
- Kobina Fosu could be compensated in damages

(5 points @ 2 marks each = 10 marks)

b)

i)

Law of contract: An agreement creating obligations enforceable by law. The basic elements of a contract are mutual assent, consideration, capacity, and legality. In some states, the element of consideration can be satisfied by a valid substitute

(3 marks)

A tort is simply a civil wrong. There are three general types of torts that may cause injury to another person. In civil law, torts are grounds for lawsuits to compensate a grieving party for any damages or injuries suffered.

(3 marks)

ii) **Law of contract Vs Law of tort**

- There must be existing agreement between the parties to enter into legal relations with law of contract.
- When a person commits a Tort, the court will not look at the Tort but at the harm or injury suffered by the victim as a result of that Tort. The court will typically order the defendant to pay compensation or provide other relief to the injured party.

A Contract has an offer and an acceptance of that offer and the parties involved must have capacity to contract. A breach of Contract by either party may result in awarding the remedy of Damages.

- Provisions of considerations with law of contract.
- Examples of Torts include occupier's liability, nuisance, economic Torts, negligence, defamation or product liability.
- An example of a Contract is an agreement between Company A to provide a security service to Company B in return for a valuable consideration paid by Company B to Company A.
- In tort it arises out of duty of care.
- In professional settings duty is imposed by law.

(2 points @ 2 marks each = 4 marks)

(Total: 20 marks)

EXAMINER'S COMMENTS

(a) I have already mentioned that this question is the same as question 2 (b) so the same principles apply.

(b) It appears that candidates did not appreciate the issues involved in this question. Contract is an agreement creating obligations enforceable by law. The basic elements of a contract are mutual assent consideration, capacity and legality.

On the other hand tort is simply a civil wrong against another person. It may involve physical injury to the victim or injury to his reputation or injury to his business. Contract is based on a prior agreement between the parties but in the case of tort, it is the resultant injury that the courts look at. It involves the breach of duty of care towards the victim. The court will order payment of compensation but in contract, the breach will attract payment of damages. Examples of torts include occupier's liability, nuisance, negligence defamation or product liability.

QUESTION FOUR

- a) When an agent is employed to act for his principal in all matters concerning a particular trade or business, he is termed a general agent. A managing director of a company is a general agent of the company. **(2 marks)**
- b) A special agent is one who is employed to make only a particular contract or series of contracts. If a person sends a friend to bid for the sender at an auction, the friend is a special agent. **(2 marks)**

c)

i) **This comes under Agency of Necessity. The conditions applicable for this are that:**

- It must be impossible to get the principal's instructions. **(2 marks)**
- There must be actual and commercial necessity to preserve or to avoid the physical destruction of the principal's goods. **(2 marks)**
- The agent acted bona fide in the best interests of the principal. **(2 marks)**
- In the present case the items disposed of by sale are subject to physical destruction. It is worth to apply emergency reaction to preserve the goods and make profit for the principal. **(2 marks)**
- There was no need to dispose of the charcoal early which is not subject to deterioration or physical damage within that three days or immediately. **(2 marks)**

ii) Protected goods are goods:

- Which have been let under hire -purchase agreement or sold under a conditional sale agreement.
 - One-half the price or total of which has been paid whether in pursuance of a judgement or otherwise, or tendered by or on behalf of the hirer or buyer or a guarantor.
 - In relation to which the hirer or buyer has not terminated the hire-purchase agreement or conditional sale agreement, or, in the case of a hire-purchase agreement, the bailment, by virtue of a right vested in the hirer.
- (Section 8 of Hire-Purchase Act, 1974 N.R.C.D. 292)

(3 points @ 2 marks each = 6 marks)

(Total: 20 marks)

EXAMINER'S COMMENTS

(a) Candidates were able to answer this part quite well.

(b) Some candidates did not appreciate this question. Special agent is appointed for a particular purpose and once the purpose is achieved, the agency terminates.

(c) I have mentioned elsewhere that most candidates lacked the ability to analyse issues logically. In this case study candidates were expected to address the issue of agency by necessity. They were expected to outline the principles involved.

(i) That it was impossible to get the principal's instructions.

(ii) That there was actual and commercial necessity to preserve or to avoid physical destruction of the principal's goods.

(iii) The agent must have acted in good faith and in the interest of the principal.

After setting out these principles, they were expected to apply these principles to the case study. A logical analysis reveal that the sale off the tomatoes and watermelon could be pardoned but the sale of the yam and the charcoal could not be justified.

(d) This question ought to have been itemized as (d) and not (ii) as it appeared on the question paper. Whatever it is since it stood out by itself, candidates ought to have answered it. Unfortunately most of the candidates displayed lack of knowledge of the provisions of the Hire Purchase Act 1974 (NRCD 292). Protected goods under section 8 of the Act are:

- (a) Goods that have been let out under a hire purchase or conditional sale agreement.
- (b) The contract has not been terminated by the hirer.
- (c) One half of the total purchase price has been paid.
- (d) In this situation the owner is precluded from recovering the goods without an order from court.
- (e) If the owner recovers the goods without the order of the court, the hirer is relieved from any faultier liability and he can bring an action to recover monies paid under the contract.

QUESTION FIVE

a) This amounts to redundancy and it requires the Employer -

- Writing to the Chief Labour Officer and the trade union concerned not later than three (3) months before the contemplated change
- Providing them with all relevant information including the reasons for any termination
- Providing the number and categories of workers likely to be affected and the period within which any termination is to be carried out
- Consulting the trade union concerned on measures to be taken to avert or minimize the termination
- Consulting the trade union on measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment
- Negotiating with the worker or their representatives on the amount of redundancy pay and the terms and conditions of payment

(5 points at 2 marks each =10 marks)

b) Consideration is past if the promisee has already delivered the goods or rendered the services before discussions are concluded with the promisor about the benefit that the promisee will receive from the promisor for the promise having delivered the goods or rendered the service. In the current scenario the act preceded the promise.

(4 marks)

c) Debenture holders Vs Shareholders

- Debenture holders are creditors of the company not members, and they therefore have no right to attend and vote at general meetings of the company.
- Whereas shares must not generally be issued at a discount to shareholders, this prohibition does not apply to debentures.
- Whereas a company prohibited from purchasing its own shares, there is no such prohibition on a company from purchasing its own debentures.
- Interest on debentures must be paid by all means when they fall due. Thus the company may meet its obligation to pay interest either out of its capital or its profits. Dividends, however, can only be paid out of profits, not capital.
- In preparing a company's accounts, interest on debentures is charged before determining a company's profit. But dividends are paid out of corporate profits which have already been taxed or which are liable to corporate taxes.

(Any 4 points @1.5 marks =6 marks)

(Total: 20 marks)

EXAMINER'S COMMENTS

(a) This question was among the least answered and some of those who answered it did not appear to know that the question is about the procedure for declaring redundancy. Under the Act when an employer has to declare redundancy, he has to follow the following procedure:

- (i) He has to write to the Chief Labour Officer and the trade union concerned at least three months before the contemplated exercise.
- (ii) He must provide them with all relevant information including the reasons for any termination.
- (iii) He must provide the number and categories of workers likely to be affected and the period within which the termination is to be carried out.
- (iv) Consult the trade union concerned on measures to be taken to avert or minimize the termination.
- (v) Consult the trade union concerned on measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.
- (vi) Negotiating with the workers or their representatives on the amount of redundancy pay and the terms and conditions of payment.

(b) In this case, the promise to pay was made after the work had been done. It is therefore past consideration. However, most of the candidates missed this point.

(c) It appeared that most of the candidates do not understand the meaning of the shares and debentures. A shareholder has invested in company by purchasing shares and thus a member of the company. In the same vein a debenture holder has also invested in the company by granting it a loan thus he is a creditor. That being the case, debenture holders

do not attend and vote at general meetings of the company whereas shareholders attend meetings and vote at such meetings.

Shares are not issued at a discount to shareholders but debentures can be issued at a discount. The company is prohibited from purchasing its shares but the company can purchase its debentures and then be relieved of payment of interest. The interest on debentures must be paid when they fall, due either out of capital or out of profits, whereas shareholders are only paid dividends on profits and at times no dividends are paid.

In preparing company accounts, interests on debentures are charged before declaration of profits whereas dividends are paid out of profits which are liable to corporate taxes.

QUESTION SIX

a) Essential rules concerning transfer of risk in sale of goods

- The risk in the goods in a contract of sale is transferred to the buyer when the parties intend it to be transferred
- Unless a different intention appears, the goods are at the seller's risk until the property in them passes to the buyer, after which the goods are at the risk of the buyer
- Where delivery of the goods has been delayed through the fault of either buyer or seller, the goods are at the risk of the party at fault as regards any loss, damage or deterioration which might not have occurred but for the delay.
- The duties or liabilities of either seller or buyer as a bailee of the goods of the other party or any destruction or loss or deterioration of or damage to the goods which is caused by the fault of either party are not affected by anything in the law.

(4 points at 3 marks each= 12 marks)

b)

- i) **Liquidated damages** are where the parties themselves have agreed to a specific figure which is a reasonable pre-estimate of the loss brought by the breach of contract rather than penalty for breach of contract. Thus, liquidated damages have the following three features: (a) there is a specific figure; (b) this specific figure is agreed to by the parties themselves; (c) this specific figure, which is agreed to by the parties themselves, is a reasonable pre-estimate of loss occasioned by a breach of contract

(4 marks)

- ii) **Quantum meruit** means how much it is worth. It is not a claim for damages under a contract, but an award to compensate a person in some circumstances where a contract either never existed or subsequently ceased to exist or where the contract has been breached thereby preventing a party from performing under it. The claimant

may be rewarded for his work or his goods as much as they are worth in the sense of reasonable value.

(4 marks)

(Total: 20 marks)

EXAMINER'S COMMENTS

(a) This part of the question was not well answered so it is necessary to restate the rules.

(i) The risk in the goods is transferred to the buyer when the parties intend it to be transferred.

(ii) Unless a different intention appears, the goods are at the risk of the seller until the property in the goods is passed to the buyer, after which the goods are at the risk of the buyer.

(iii) Where delivery has been delayed through the fault of either party, the goods are at the risk of the party who caused the delay as regards any loss, damage or deterioration which might not have occurred but for the delay.

(iv) The duties or liabilities of either party as bailee of the good of the other party or any destruction or loss or deterioration of a damage to the goods which is caused by the fault of either party are not affected by anything in the law.

(b) This was not properly understood or explained. To put it plain language, the parties may agree on a reasonable figure as an amount of compensation to be paid by the party in breach. The amount must be a pre-estimate of the loss and must be within the terms of the contract. It must not be a penalty otherwise it is unenforceable. For instance if in the contract a party would have made a profit of say GHC500, 000.00, it would be a penalty to demand GHC1million as liquidated damage.

(c) This was fairly well answered.

QUESTION SEVEN

a)

Section 5(2) (d) of the Incorporated Private Partnership Act, 1962 Act152

- An infant (i.e. a child)
- A person of unsound mind
- Persons who within the last 5 years have been found guilty of any offence involving fraud or dishonesty, whether convicted or not
- A body corporate
- An undischarged bankrupt

(2 marks)

Kwasi Mensa was of age but declared bankrupt

Patience Adibu was an infant

Kojo Ntim was suspected of having mental problem

(2 marks)

Based on the law it is therefore obvious that they cannot form partnership.

(1 mark)

b) **Reasons Courts may order for the expulsion of a partner**

- When a partner has become permanently of unsound mind.
- When a partner is permanently incapable of performing his duty/part of the partnership.
- When a partner is guilty of conduct calculated to affect the firm's business
- When a partner willfully and persistently commits a breach of the partnership agreement making it reasonably impracticable for the other partners to carry on the business in partnership with him.
- When the Courts find it just and equitable to expel a partner.

(5 points at 2 marks each =10 marks)

c) **Advantages of a partnership over a company**

- Two or more partners provide more capital.
- Financial and operational responsibilities are spread.
- A wider pool of experience and skills is applied towards the business.
- Except the tax authorities, partners are under no obligation to show their accounts to anyone and so privacy of the business is maintained.
- Quicker and speedier decision-making.

(5 points at 1 mark each = 5 marks)

(Total: 20 marks)

EXAMINER'S COMMENTS

(a) Even though, most of the candidates answered that the formation of the partnership was against the law; they could not logically assign reasons.

The question is about the capacity of the members of the firm. Kwasi Mensah, though of age, was an undischarged bankrupt.

Patience Adibu was a minor.

Kojo Ntim was suspected of having mental problem. This implies that they all lacked capacity. Therefore the partnership they purported to form is void.

(b) A lot of the candidates tried to apply the scenario in (a) to solve this problem and thereby went off the mark. Scenario (a) deals with the formation of the firm, whilst scenario (b) deals with the circumstance under which a member of a firm could be ordered by account to cease to be a member of the firm. The reasons are as follows:

- (i) When a partner has permanently become insane.
- (ii) Where a partner is permanently incapable of performing his duties in the partnership.
- (iii) When a partner is guilty of conduct calculated to affect the firm's business.
- (iv) When a partner willfully and persistently commits breach of the partnership agreement making it reasonably impracticable for the other partners to carry on with him.
- (v) When the courts find it just and equitable to expel a partner.

(c) This question was not well answered and this is because in studying, candidates do not do any comparative analysis between companies and partnerships.

The advantages are as follows:

- (i) Two or more persons provide more capital.
- (ii) Financial and operational responsibilities are spread.
- (iii) A wider pool of experience and skills are applied towards the business.
- (iv) Partners are under no obligation to show their accounts to anybody except the tax authorities. So privacy is maintained.
- (v) Quicker and speedier decision making.