

**NOVEMBER 2019 PROFESSIONAL EXAMINATIONS
BUSINESS & CORPORATE LAW (PAPER 1.3)
QUESTIONS AND MARKING SCHEME**

QUESTION ONE

- a) What is *judicial precedent*? **(2 marks)**
- b) State **TWO (2)** grounds under which the courts will depart from a judicial precedent. **(4 marks)**
- c) Ghana legal system is adversarial rather than the inquisitorial approach. In **TWO (2)** ways, explain the distinction between them. **(4 marks)**
- d) Koby Afadzie and Odartey Nelson were employed by Alfar Preparatory School to teach Mathematics and Social Science, respectively. By the terms of their employment, the two were to be on probation for eight (8) months before they could be fully appointed. Similarly, Adu Owusu and Kafui Yaw, were engaged by the school as casual workers charged with the responsibility of keeping the school compound and classrooms clean. After the period of probation, the school authorities informed Koby Afadzie and Odartey Nelson that the school was not interested in giving them permanent appointments because of unsatisfactory performance. On the other hand, Adu Owusu and Kafui Yaw had their appointment terminated without any reason. The four (4) workers intend to take legal action against the school for compensation, accusing it of unfairly terminating their respective appointments.

Required:

Explain whether the workers will succeed in their respective intended legal action.

(10 marks)

(Total: 20 marks)

QUESTION TWO

- a) Section 9 of the Companies Act, 1963 (Act 179) provides that a company limited by shares is “a company having the liability of its members limited to the amount, if any, unpaid on the shares respectively held by them”.

Required:

State and explain **TWO (2)** advantages that exist for a company limited by shares. **(2 marks)**

- b) It appears that many Ghanaians prefer to own their businesses without going through the cumbersome details of forming an incorporated company limited by shares.

Required:

State **TWO (2)** advantages and **TWO (2)** disadvantages of forming sole proprietorship.

(4 marks)

- c) List **FOUR (4)** particulars for registration with the Registrar-General by a sole proprietor.

(4 marks)

d) Kwame Akoto holds 15% share in Sikem Investment Ltd, a brokerage firm, which by the regulations of the company, entitled him to appoint a director. To avoid the strict and high standards of banking, the Regulations of Sikem Investment prohibits banking and savings and loan schemes. Kwame Akoto received a letter from Mr. Pinkrah, Managing Director and 55% shareholder that the company has merged with Sikaman Group owned 100% by Mr. Pinkrah. The merged company will upgrade into a full bank within the next three months. The shares of Kwame Akoto and all minority shareholders with Sikem Investment Ltd will be converted into a loan at 10% per annum interest with principal repayment schedule over the next five years. Mr. Pinkrah took all decisions alone without consulting the seven members on the board. All attempts to hold a board meeting to discuss the issues have been thwarted by Mr. Pinkrah.

Required:

- i) State **THREE (3)** options open to Kwame Akoto in the circumstance of this case. **(6 marks)**
ii) State **FOUR (4)** likely reliefs the court may grant. **(4 marks)**

(Total: 20 marks)

QUESTION THREE

- a) Briefly explain **TWO (2)** of the following as used in company law:
i) Liquidation; **(2 marks)**
ii) Winding-up; **(2 marks)**
iii) Dissolution. **(2 marks)**
- b) State what happens to the Board of Directors of a company limited by shares on the appointment of a Liquidator in respect of private liquidation. **(4 marks)**
- c) Explain **FOUR (4)** functions of an audit committee of the Board. **(8 marks)**
- d) On what grounds can an auditor's appointment be terminated? **(2 marks)**

(Total: 20 marks)

QUESTION FOUR

Kojo Atua, a businessman, who had a contract to supply timber logs to Okofoh Timber Co. Ltd, hired a tractor from Mary Arthur, at a rate of GH¢1,000.00 a day to enable him haul the timber logs from his timber concession in Okofoh. Under the agreement, Kojo Atua paid a deposit of GH¢10,000.00. It is the case of Kojo Atua that Mary Arthur assured him that her tractor was in good condition and could haul at least 30 logs a day.

Kojo Atua, however, found the tractor to be defective almost from the beginning, with the tractor hauling a maximum of seven (7) logs a day, and a total of 60 logs during a period of a little over one month. Kojo Atua brought an action for damages for breach of contract. The Court awarded Kojo Atua special damages of GH¢20,000.00 on the basis of total failure of consideration.

Required:

- i) Explain whether in the circumstance of the case, there was either a breach of condition of the contract or a breach of warranty. **(10 marks)**
- ii) Explain in **THREE (3)** ways whether the court was justified in the award of GH¢20,000.00 to Kojo Atua for the failure of consideration. **(10 marks)**

(Total: 20 marks)

QUESTION FIVE

Prime Company Ltd, traders in frozen fish, entered into an oral agreement for the supply and sale on credit basis, of all its frozen fish to Addae Company Ltd. The affairs and the business of Prime Company Ltd were undertaken by its Managing Director and one Maxwell Mensah. Maxwell Mensah was never appointed by the Company as a director, but he transacted business on behalf of Prime Company Ltd with Addae Company Ltd, as if he were a director and the Chief Executive Officer of the Company. Maxwell Mensah acted on behalf of the Company by signing the applications for the Company to be registered as an importer, apart from financially assisting the Company to start business. The name of Maxwell Mensah also appeared on the Company's letter-head as one of its directors.

Prime Company Ltd allowed Maxwell Mensah to share in its profits by allocating to him fifty percent (50%) of the last consignment of fish. Maxwell Mensah, entrusted the sale of the consignment allocated to him for his benefit to Addae Company Ltd and directed that the proceeds of the sale should be paid by Addae Company Ltd into the account of his private firm, Asanko Ventures Ltd. In the course of the transaction, Addae Company Ltd paid various sums of money being proceeds of sale of fish supplied to Prime Company Ltd to both the Managing Director of Prime Company Ltd and Maxwell Mensah. No valid receipts were given for those payments. At the close of business, the trading account of Prime Company Ltd showed a debit balance of over GH¢ 16,000.00 against Addae Company Ltd. Prime Company Ltd subsequently demanded that this amount be paid. Addae Company Ltd resisted settlement on the grounds that it had already accounted fully for the cost of the fish sold to it on credit.

Required:

In the light of the above facts, explain whether Prime Company Ltd would be justified in denying Maxwell Mensah as an Officer of the Company. **(20 marks)**

SOLUTION TO QUESTIONS

QUESTION ONE

a) The doctrine of *judicial 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 there is no material difference between the cases on hand and the previous case. Lower courts in adjudicating a case before it must apply a 'binding' precedent developed by a Superior Court. **(2 marks)**

b) **The grounds on which a court may decline to follow it include:**

- If facts can be distinguished.
- If the previous decision was made per incuriam i.e. without taking account of some essential points of law.
- Where the previous decision is in conflict with fundamental principles of law. If the ratio decidendi is obscure.

(2 points @ 2 marks each = 4 marks)

c) *An inquisitorial system* is a legal system in which the court, or a part of the court, is actively involved in investigating the facts of the case. This is distinct from an adversarial system, in which the role of the court is primarily that of an impartial referee between the prosecution and the defense. **(2 marks)**

This adversarial system gives the opposing side the opportunity to compete in convincing the judge and jury based on the facts they present. In this situation, the Judge or Magistrate operates independently and is expected to deliver his judgement after hearing out each of the parties. **(2 marks)**

d) The issue to be determined in the scenario is whether, by law, workers on probation and casual workers, are entitled to compensation in a situation of termination of their respective appointments.

- The first group of workers in the question are those on probation whose appointments have been terminated without they being paid compensation.
- The second categories are casual workers.
- Section 66 of the Labour Act, 2003, Act 651, of Part VIII, states that the two(2) categories of workers cannot have the intervention of the National Labour Commission, to negotiate for redundancy pay and for any mitigation in the event of a dispute. In other words, by law, the two (2) categories of workers cannot complain that their appointments have been unfairly terminated.

(2 points for 3 marks each= 6 marks)

That the workers cannot, therefore, succeed in any intended legal action because the provisions in Part VIII of the Labour Act, 2003, Act 651 do not cover them.

(4 marks)

(Total: 20 marks)

QUESTION TWO

a) The advantages include:

- **Property**-The Company can acquire / own property and dispose such property as it wishes.
- **Contractual relationship**-A company on incorporation, has the capacity to enter into contractual relationship with a natural or legal persons.
- **Suing and being sued**- A company may sue natural or legal persons for breach of contractual obligations.
- **Perpetual succession**- A company will continue in existence despite the death of their members.
- **Transferability of shares**- The shares of a company can be transferred from a member to another person by sale.
- **Legal Personality**-On incorporation, a company acquires a legal personality.
- **Figurative veil**- On incorporation, there is the figurative veil, meaning it protects their officers and staff generally from legal risks.

(2 points at 1 mark for a point= 2 marks)

b) **Advantages of forming a sole proprietorship**

- Simplicity, inexpensiveness and ability to legally commence business before the business name registered.
- The proprietor has flexible working time.
- The proprietor enjoys all the profits.
- One can purchase or sell a business including its assets such as its inventory, plant machinery and landed property.

(2 points @ 1 mark for a point = 2 marks)

Disadvantages

- Obtaining loans and credit to run the business is more difficult for sole proprietorship.
- The owner's personal liabilities are not distinct from the business liabilities.
- Sole proprietorships hardly survive the death of the proprietor.
- The health and life of sole proprietorship business is inevitably linked to that of the proprietor.

(2points @ 1 mark for a point =2 marks)

c) Under Section 2 of the Registration of Business Names Act, 1962 ACT 151 the particulars required to be registered are:

- The business name.
- The general nature of the business.
- The principal place of business.
- Any other places at which the business is carried on.

The particulars of the proprietor should include;

- The present first name and surname.
- The nationality.

- The nationality of origin of the proprietor.
- The usual residence and other business occupation of the proprietor.
- The date of the commencement of the business.

(1 mark each for a point = 4 marks)

d)

- Kwame Akoto can seek a court order as a member, or through his appointed director.
- By a petition to the Registrar to hold AGM. Importantly with 15% shareholding he can request extra-ordinary general meeting under section 271 of Act 179
- Kwame Akoto can seek a court order as a member, or through his appointed director, or by a petition to the Registrar to hold AGM. Importantly, with 15% shareholding, he can request for extra-ordinary general meeting (EGM) under sec 271 of Act 179.
- That the actions of the MD are ultra vires, depending on the allocation of powers among members at general meeting. By the BOD and the MD by the company regulations, Mr Pinkrah alone cannot decide on mergers, class rights, share conversions, business objects etc without the BOD/members at general meetings. Breach of other fiduciary duties- e.g. full disclosure and conflict of interest.
- Note that due to Mr. Pinkrah's 55% shares, AGM and EGM would not amount to much because Mr. Pinkrah cannot be removed as MD/director or his actions declared null and void, reverse the merger etc by resolutions.
- The best choice is to seek remedy against oppression under sec 218 of Act 179, which provides that:
 - ✓ Where the affairs of the company, or the powers of the MD are being exercised in a manner oppressive to one or more of the members, or in disregard to the interest to their interest as members, officers, debenture holders etc.
 - ✓ Certain acts taken or threatened, or resolutions passed, proposed unfairly discriminates against and prejudicial to one or more of members or debenture holders.

(3 points @ 2 marks each = 6 marks)

b) Likely reliefs the court may grant

- Lift the veil for Mr. Pinkrah to be held liable for any fraud
- Civil and criminal liabilities for any breach of fiduciary duties
- If convicted, prohibit him from being a director, promoter, etc of a company
- Secure injunction for illegal or irregular activity-sec 217& 218
- Cancel or vary the merger and other transactions/resolutions
- Regulate the future conduct of the company's affairs
- Maintain the rights of Kwame Akoto and other members
- Provide for the purchase of the shares of affected members.
- The court can appoint an inspector or order the Registrar to investigate the operations/affairs of the company.

(Any 4 points for 4 marks)

(Total: 20 marks)

QUESTION THREE

a)

(i) **Liquidation** includes both winding up and dissolution. Liquidation is either private/voluntary or official/compulsory. In private/voluntary liquidation which relates to solvent companies, the law applicable is the Companies Act, 1963 ACT 179. In respect of official/compulsory involving insolvent companies, the Bodies Corporate (Official Liquidation Act, 1963 ACT 180) applies. Whether private or official liquidation, a liquidator plays important role in the process of liquidation.

(3 marks)

(ii) **Winding-up** refers to the steps taken to have an operating corporate entity cease to be a corporate body. Winding-up includes the appointment of the officer (liquidator) who gathers assets, pays any debts, and distributes any surplus in accordance with law.

(3 marks)

(iii) **Dissolution** is the formal pronouncement by the Registrar of Companies that the corporate entity no longer exists and has been struck off the register of companies and the public has been so notified by publication in the Gazette.

(3 marks)

(Any 2 points to be answered @ 3 marks each = 6 marks)

b)

i) The Board is dissolved forthwith.

ii) The functions of the Board cease and transfers to the liquidator. The liquidator does not run the company as a going concern.

(2 marks for a point =4 marks)

c) Audit committees focus on rules and compliance and also to ensure accurate and transparent disclosures. In assisting the board to discharge its responsibility and act with due care, diligence and skill, key functions of the audit committee involve,

- **Financial Reporting and Disclosures** – The committee must be aware of the financial reporting risks to focus its attention appropriately. This oversight include, reporting of financial information to users of financial reports, application of accounting policies and effective financial management system
- **Oversight over System of Internal Control** - This includes business policies and practices; protection of company's assets. Providing assurance and a formal forum for communication between the board of directors and senior financial management on internal control.
- **Risk Management System Review**- Whilst the company's system of internal control is designed to help mitigate risk. The audit committee focuses on review of financial reporting, fraud, risk assessment and compliance.
- **Culture Compliance** - Compliance with applicable laws, regulations, standards and best practice guidelines. The audit committee must recognize how critical the right tone at the top is. The company is required to ensure discipline in the boardroom as well as among employees.

- **Oversight of Management and Audit-** Facilitating the maintenance of the independence of the external auditor. Facilitating communication between the board of directors and the internal and external auditors; providing a structured reporting line for internal audit and facilitating the independence of the internal auditor (if the entity has an internal audit function). Consideration of significant matters that were raised during the audit process.

(4 points @ 2 marks each = 8 marks)

d) Some of the grounds for auditor removal:

- Loss of confidence.
- Delay in completion of audit.
- Lack of infrastructure.
- Inexpertise.
- Negligence.

(Any 2 points for 2 marks)

(Total: 20 marks)

QUESTION FOUR

i) The terms of a contract are classified as conditions, warranties, or innominate terms. Parties will usually designate which classification a contract term falls. Breach of condition of a contract can constitute a breach of the contract as a whole. This may allow the non-breaching party to sue for damages as well as rescission of the contract. **(3 marks)**

- An owner who let out a chattel on hire must take reasonable care to see to it that it was in a reasonably fit for the purpose condition for which the bailee was to use it; the owner would impliedly warrant the suitability of the chattel for that purpose, and was liable to the bailee for breach of the warranty. **(3 marks)**

- In the instant case, there was indeed a breach of implied warranty, and which would not have resulted in the repudiation of the contract. Therefore, Kojo Atua rightly sued for damages. **(4 marks)**

ii)

- The issue arising in the question is whether the Court rightly awarded the special damages of GH¢ 20,000.00 to Kojo Atua for failure of consideration.

- A claim for money had and received was not maintainable if the contract had been partly performed and some benefit has been derived from the part performance. **(2 marks)**

- In the present case, the evidence clearly showed that although the tractor was defective and operational at a rate substantially below the declared capacity, it did some work, having hauled a total of 60th logs. **(2marks)**

- The Court erred in law in basing the award of the special damages on a total failure of consideration. There was part performance, and for which reason one cannot say that consideration had failed. **(6 marks)**

(Total: 20 marks)

QUESTION FIVE

The issue to be determined is whether Prime Company Ltd. is estopped from denying that Maxwell Mensah held himself out as a director of the Company, even though he was not appointed a director.

For the following reasons, Prime Company Ltd will not be justified in denying Maxwell Mensah as a director of the Company;

- i) The Company allowed Maxwell Mensah to transact the fish business with Addae Company Ltd. and third parties, on its behalf, and also received payments.
 - That means that the Company necessarily conferred an implied authority on Maxwell.
 - It further demonstrates the kind and nature of the authority exercisable by Maxwell as a director held out by the Company.

- ii) The Company allowed Maxwell Mensah to share in its profits.

- iii) Section 198(1) of the Companies Act, 1963, (Act 179) provides that, *“Every Company shall in all trade circulars and business letters on or in which the Company’s name appears state in legible characters with respect to every directors,”*
 - In compliance with this requirement, the Company printed the names of its directors on all its letter heads and among the directors was Maxwell Mensah.
 - It showed that although Maxwell Mensah was never appointed a director, the Company, however, held him out as such.

(3 points for 3 marks each= 9 marks)

From the above it is to be stated as follows:

- As between outsiders such as Addae Company Ltd. and Prime Company Ltd., the Company was bound by all the acts done by Maxwell Mensah in relation to Addae Co. Ltd., including receiving payments on behalf of the Prime Company Ltd, so far as the transaction is within the scope of his office as director.

- See the Rule in the case of Royal British Bank Vrs Turquand (1856) 6 E 1& BI. 327, where it was stated that *“ person who entered into contract with a company and dealt in good faith with that Company, had the right to assume that acts within the Constitution and powers of the Company had*

been duly and properly performed. Such persons were under no duty to enquire whether acts internal preliminaries and management has been regularly performed”.

- See also the case of *Re: County Life Assurance Co.* (1870) 22 L.T 537 at page 538-539, where Gifford L.J explains as follows.
- *“ The company is bound by what takes place in the usual course of business with a third party, provided that, the third party deals fairly and bona fide with persons who may be termed de facto directors that is to say, persons who might very possibly have been de jure directors”*
- In the circumstance of this case, the acts of Maxwell Mensah, though an improper director, were binding on Prime Company Ltd. because no steps were taken by the company to stop Maxwell Mensah removed.
- See Section 179 and Section 179(2) (a) and (b) provide as follows:
- *“ 179(2) Any person, not duly appointed director of a company:*
 - *who shall hold himself out or knowingly allow himself to be held out as a director of that company, or*
 - *on whose direction or instructions the duly appointed directors are accustomed to act, Shall be subject to the same duties and liable as if he were a duly appointed director of the company.....”*
- Maxwell Mensah, having allowed himself to be held out by the Company as a director, was in law subject to the duties and liabilities as a director. He successfully transacted the business of Prime Company Ltd with Addae Company Ltd, who acting in good faith, assumed that when the Company held him out as a director, he was in fact appointed in accordance with the Regulations of the Company. Prime Company Ltd will, therefore, not be justified in denying Maxwell Mensah as director of the Company, as the Company itself held Maxwell Mensah out as a director.

(3 points for 3 marks each= 9 marks)
(2 marks for Professional Presentation)
(Total: 20 marks)