

**MAY 2020 PROFESSIONAL EXAMINATIONS
BUSINESS AND CORPORATE LAW (PAPER 1.3)
CHIEF EXAMINER'S REPORT, QUESTIONS AND MARKING SCHEME**

EXAMINER'S GENERAL COMMENTS

Being the second diet after the change in syllabus and given that the learning material for the Institute was available, the Examiner was expecting candidates to perform better in this examination.

STANDARD OF THE PAPER

The standard of the paper was slightly higher than the previous diet in terms of the depth of answers required. The questions were well spread across the syllabus and each question had weights equivalent to the requirements of the syllabus.

The sub-questions under question three were straight forward but in all quite loaded as several topics were covered within the same question and this required a display of candidates' broad understanding of the nature of business law.

The marks allocated to Question 5 b) was a bit lenient as the candidates were merely to state the transactions for which Directors of Limited Liability Companies require an ordinary resolution approval.

PERFORMANCE OF CANDIDATES

The general performance of candidates was not encouraging. Out of 195 candidates who registered, only 77 passed the paper and the pass rate was 39.49% as compared to the last diet in November 2019 of 34.33%. The likely reason for the poor performance was the unpreparedness of candidates.

Some candidates were probably learning only some topics for the examination and this paper was well spread across the entire syllabus. As a result most candidates answered about three out of the five questions. They did not attempt all questions as per the instructions of the examinations.

Many candidates were also not conversant with the company law requirements in questions two and five. Most of those who attempted question five had very high marks because the mark allocation for that question was favorable but this question was not answered by quite a number of candidates.

Even though question three was the most answered question, some candidates confused the law on human rights with the employment law and spent time discussing condition of service against conditions for service. Many candidates missed the point on 'volenti non fit injuria' but were able to explain their thoughts on whether the victims of alleged sexual harassment had a case or not.

NOTABLE STRENGTHS AND WEAKNESS OF CANDIDATES

Strengths

The strengths of most candidates were in attempting questions requiring short answers than in those questions where explanations were required. This means should the Institute consider objective questions in future, candidates will perform well. Most candidates had a fair understanding of fundamental human rights, the

legal system and the law of tort. Candidates had the opportunity to display their legal acumen in the analysis of scenario questions and some did very well.

Weaknesses

The tenses and grammatical errors of candidates were many and it leaves much to be desired. Many candidates could not fully comprehend the issues raised in the companies' law and it was a reflection of their low appreciation of the new law. The fact that some questions were not attempted was not good enough. The implication of this on the overall performance is to have low average mark which was the case in this diet.

Candidate should be encouraged to practice time management in examinations and for them to try and attempt all the questions to the best of their ability instead of answering one question very well and leaving the rest unanswered.

QUESTION ONE

- a) Equity is a term which applies to a specific set of legal principles which were developed to supplement the common law and to ensure fairness in the adjudication of matters.

Required:

Identify **FOUR (4)** maxims of equity. **(4 marks)**

- b) Equitable remedies are not granted as of right but at the discretion of the court. Explain **THREE (3)** discretionary remedies that could be granted by the court. **(6 marks)**

- c) Following flood damage as a result of three (3) continuous day of rainfall, the Management of Adusa Confectionery Ltd, carefully sprinkled sawdust over the factory floor to prevent employees' slippage until the floor could be properly cleared. A small patch remained uncovered and Mary Ansah, a pregnant employee slipped and got injured. She sued the company.

Required:

Explain whether the employee can claim any damages against the management of Adusa Confectionery Ltd. **(10 marks)**

(Total: 20 marks)

QUESTION TWO

- a) Jabi is a partner of an Accounting Firm. The firm's office is located in Accra. In May 2019 Jabi was assigned an approved accounting duty outside Accra with the use of the Firm's car. In the course of the journey the car had a burst tyre. The driver of the car for unexplained reasons had no spare tyre on the car. He therefore, recommended the purchase of a brand new tyre which Jabi did with his personal money. He obtained a receipt in the name of the Firm.

Jabi sought for refund of his money amounting to GH¢1,280 for the tyres bought. The Managing Partner refused the refund saying it was the sole responsibility for Jabi to bear the expenditure.

Required:

- i) Advise the Manager as to why the Firm should bear the full or part of the cost and not only Jabi. **(4 marks)**
ii) Advise Jabi why it is not the sole responsibility of the firm to bear the cost. **(6 marks)**

- b) A group of young members of Nob Company Limited petitioned the Board of Directors of the Company over dividends payments at the close of the company's annual general meeting. They claimed that they were preferential shareholders and that after dividends were declared for them, they had the privilege for fair participation in the distribution of the remaining shares.

Required:

- i) From the above scenario, are the preferential shareholders entitled to any further dividend? **(6 marks)**

- ii) State **TWO (2)** principles relating to minimum capital for a company limited by shares pursuant to provisions of the law. **(4 marks)**

(Total: 20 marks)

QUESTION THREE

- a) On 26th February 2018, Gold Link Limited, a public limited liability company trading on the Ghana Stock Exchange sent a notice to its shareholders inviting them to an Annual General Meeting (AGM) on 2nd March 2019. The notice simply states that the 'purpose is to transact the ordinary business'. Namoale is a shareholder of Gold Link Limited and is very disturbed about the vagueness of the notice. He is also not satisfied with performance of the company and is seeking to requisition for a special resolution to liquidate the company.

Required:

- i) Explain to Namoale, what constitute *'the ordinary business of an annual general meeting'* and state **TWO (2)** other information, Namoale must see in the notice for an AGM. **(5 marks)**
- ii) Advise Namoale on the procedure for private liquidation **(5 marks)**
- b) 'Las Panas' is a successful chain of restaurants and bars that features female waitresses in white spaghetti tops and very short red skirts. Five former waitresses filed a class action lawsuit, alleging that the atmosphere 'Las Panas' created in its restaurants allowed them to be sexually harassed by customers, cooks and managers. Ama Smith, one of the waitresses noted on a radio super morning show programme that the 'Las Panas' mandatory uniforms caused them to be sexually harassed. Meanwhile, 'Las Panas' continues to enjoy great success, and it recently received an award as the Best Marketing Company.

Required:

- i) Identify the *key stakeholders* in this case. **(2 marks)**
- ii) Supposing the women knew of the problems when they agreed to work at 'Las Panas, what bearing should such knowledge have on their right to the alleged harassment? **(2 marks)**
- c) List **THREE (3)** fundamental human rights that must be protected and enforced as provided for in the 1992 Constitution in the Republic of Ghana. **(3 marks)**
- d) Code of Ethics are drawn up to be followed by all the company's structures and professionals. It serves as a guide to professional conduct and guarantees concerns about efficiency, competitiveness and profitability.

Required:

Identify **THREE (3)** codes of ethics for Accountants in Ghana. **(3 marks)**

(Total: 20 marks)

QUESTION FOUR

Asantewaa lives in a quiet residential area. Next door, Kwickbuild Ltd, is carrying out extensive building works to a dilapidated old house. The builders who are working from dawn to dusk, seven (7) days a week, used a crane which passes over Asantewaa's house. Asantewaa and his family are annoyed by the dust, dirt, and noise caused by the building works.

Required:

- a) Identify the types of *tort of nuisance*. (4 marks)
- b) What **TWO (2) conditions** must be present for a conduct to constitute nuisance. (6 marks)
- c) Advise Asantewaa as to her legal position. (6 marks)
- d) State **TWO (2)** legal remedies available to her. (4 marks)

(Total: 20 marks)

QUESTION FIVE

- a) Distinguish between an *Ordinary Resolution* and a *Special Resolution*. (4 marks)
- b) State **FOUR (4)** transactions for which Directors of Limited Liability Companies require an Ordinary resolution approval. (16 marks)

(Total: 20 marks)

SOLUTION TO QUESTIONS

QUESTION ONE

- a) Equity is a term which applies to a specific set of legal principles which were developed to supplement the common law and to ensure fair dealings between the parties. Maxims of Equity include:
- Equity will not suffer a wrong to be without a remedy
 - Equity follows the law
 - He who seeks equity must do equity
 - He who comes to equity must come with clean hands
 - Delay defeats equity
 - Equality is Equity
 - Equity looks to the intent rather than the form
 - Equity acts in personam

(Any 4 points for 4 marks)

- b) Discretionary remedies
- **Injunctions are equitable remedies.** It is an equitable remedy and will only be granted at the discretion or will of the court. Injunctions being a matter of court discretion, will not be given if damages are adequate. They come in two main forms – prohibitory, in which a claimant is prohibited from doing something and mandatory, in which the defendant must do something. As well as being either prohibitory or mandatory, injunctions can be *quia timet*, final, or interim.
 - **Specific performance** is a judicial order to the promisor that he undertake the performance to which he obligated himself in a contract. Specific performance is an alternative remedy to damages and may be issued at the discretion of the court, subject to a number of exceptions.
 - **Restitution:** The third type of equitable relief is restitution. . As the word implies, *restitution* is a restoring to one party of what he gave to the other. Therefore, only to the extent that the injured party conferred a benefit on the other party may the injured party be awarded restitution. The point is, a person who breaches a contract should not suffer a punishment, and the nonbreaching party should not be unjustly enriched.

(3 points well explained @ 2 marks each = 6 marks)

- c) **Section 9 of the Labour Act, 2003, Act 651** states the duties of the employer, **Section 9(c)** states as follows:
- “..... take all practicable steps to ensure that the workers is free from risk of personal injury or damage to his/her health during and in the course of the worker’s employment or while lawfully on the employer’s premises”*
- In the instant case, the issue was whether the employer was reasonable or negligent in not providing a safe environment for the employees.

- The situation that resulted in the slip of Mary Ansah, and for which reason she sustained injury was unexpected. The floor of the factory got flooded as a result of three (3) days of down pour.
- The Management of Adusa Confectionery Ltd, as an interim measure sprinkled sawdust on the floor to prevent any slippage, even though a small portion was not covered by the sawdust.
- The point is that there is no evidence that prior to the downpour the floor of the factory had been unsafe for the employees as a result of the negligence of the Management of Adusa Confectionery Ltd.
- It is, therefore, not arguable that the Management in the instant case breached Section 9 (c) of Act 651 and, therefore, liable for negligence under the common law. In the circumstance of this case, the employer did not act unreasonably or negligently in breach of Section 9(c) of Act 651.
- Mary Ansah is not likely to succeed in any action against the Management.

(4 points for 2.5 marks each = 10 marks)
(Total: 20 marks)

EXAMINER'S COMMENT

The maxims of equity in 1 a) were well understood and fairly answered. Some candidates could not identify the equitable discretionary remedies in 1 b) which include injunctions are equitable remedies, specific performance, restitution etc. In the sub-question 1 c), the relevant law was not cited by many candidates but explained in one way or the other. Candidates were not penalized for not citing Section 9 of the Labour Act, 2003, Act 651 but those who made reference to it had higher marks. This provision states the duties of the employer, as follows:

“..... take all practicable steps to ensure that the workers is free from risk of personal injury or damage to his/her health during and in the course of the worker's employment or while lawfully on the employer's premises”

QUESTION TWO

a)

i) Advise on why the firm should bear full cost

- Sections 4, 10, and 14 of the Incorporated Private Partnerships Act, 1962 ACT 152 provide the source references to the question.
- Section 4 of the Act provides that on registration of a firm, the Registrar of Companies shall certify under seal that the firm has been registered and incorporated and the certificate shall state the names of the partners and that their liability is not limited.

(1 mark)

- Section 10 affirms the corporate nature of a registered firm having the capability to exercise the powers of a natural person and of full capacity. **(1 mark)**
- The section states further that although the firm is a body corporate, each partner in the firm is liable without limitation for the debts and obligations but is entitled to an indemnity from the firm to contributions from co-partners in accordance with the rights of that partner under the partnership agreement. **(1 mark)**
- Section 14 states that a partner of a firm is jointly and severally liable with the firm and the other partners for the debts and obligations of the firm incurred while the partner remains a partner. **(1 mark)**

ii) On the principle of the firm having a corporate nature and full capacity, under section 10 the firm is fully responsible for the refund of expenditure on the tires. However from the same section there is a shared responsibility among the firm, partners; Jabi and other co-partners of which the manager is part.

(3 Marks)

On the strength of sections 4 and 14 Jabi has a liability towards being a part bearer of the cost. The other partners and co-partners of which the manager is one is also responsible to contribute to the payment.

(3 Marks)

b)

Section 48 of the Companies Act, 1963 ACT 179 applies:

i) A preference share is a share by whatever name designated in the Regulations of a company limited by shares which does not entitle the holder of the share to a right to participate beyond a specified amount in a distribution whether by way of dividend or redemption in a winding up or otherwise, and any other share shall be referred to as an equity share.

The young preferential shareholders are therefore, not entitled to further participation in the equity share or ordinary share remaining.

(6 Marks)

ii)

Section 28 of ACT 179 provides that before a company limited shares can transact business, exercise any borrowing power, or incur indebtedness;

There shall have been paid to it for issue of its shares, consideration to the value of at least a prescribed amount.

Of the consideration paid, at least a prescribed lesser amount shall have been paid in cash.

The company has delivered to the Registrar of Companies for registration a declaration in the prescribed form, signed by all the directors and secretary of the company verifying that payments have been received.

(Any 2 points for 2 marks each= 4 marks)

(Total: 20 marks)

EXAMINER'S COMMENT

Some candidates followed an impressive order where before giving their advice to both the Manager of the firm and Jabi, they identified the applicable area of law, and clearly laid out the issues before discussing the principles applicable to question 2 a). Some also repeated themselves in 2a)i) and 2a)ii). They missed some marks for not stating the strength of sections 4 and 14 and indicating that Jabi has a liability as a partner towards being a part bearer of the cost. Candidates were not conversant with principles relating to minimum capital for a company limited by shares and must read more to gain understanding on the subject matter. The sub-question on the preference share was clearly articulated by some candidate who indicated that a preference share holder does not have rights to participate beyond a specified amount in a distribution by way of dividend or redemption in a winding up.

QUESTION THREE

a)

i) Sec 153 of Act 179

Notice of general meeting must contain sufficient details to enable persons entitled to attend decide whether to attend or not and prepare their minds on how to vote. No business may be transacted at any general meeting unless notice of it has been duly given.

'To transact the ordinary business is sufficient AGM purpose statement for the following items:

- Declaration of dividend
- Election of directors in place of those retiring
- Consideration of the accounts and reports of auditors and directors
- Fixing the remuneration of auditors
- Removal and election of auditors and directors in accordance with sections 135 and 185 respectively. 6 marks.
- Date, time/hour, place of the meeting, and statement that a member has a right to appoint a proxy to attend on his behalf.

(5 marks)

ii) Private liquidation / voluntary liquidation

Private liquidation is a process designed to allow a company to close down voluntarily. In accordance with Section 275, 276 & 278 of the Companies Act, 2019 (Act 992),

- Directors at a meeting of directors to make an affidavit of solvency. Here they attest that they have made full enquiry into the affairs of the company and have the opinion that the company will be able to pay its debts and liabilities in full within a period of 12 months from the commencement of the winding up.
- The affidavit must be made within five weeks to the passage of a resolution for winding up by way of private liquidation and must include statements of assets and liabilities of the company at the least practicable date prior to the affidavit.
- A special resolution must be passed (i.e. vote by at least 75% of the company's shareholder).
- The resolution shall include the appointment of a liquidator.
- The resolution is not valid unless the person named as liquidator has previously consented in writing to the appointment.
- Within fourteen days after the passage of the resolution, the company must send a copy of the resolution for private liquidation to the Registrar
- The Registrar shall publish the resolution in the Companies Bulletin.
- The powers of the board of directors shall vest in the liquidator and the powers and authority of every director shall cease with some allowed exceptional situations.

(5 marks)

b)

i) **Key Stakeholders**

- Las Panas
- Unethical mandatory uniforms
- Reputational risk with the legal suit on exposure to sexual harassment
- Five former waitresses and Ama Smith
- Harassment
- violation of human rights with specific emphasis on dignity, working under satisfactory, safe and healthy conditions
- the atmosphere 'Las Panas' created in its restaurants allowed them to be sexually harassed by customers, cooks and managers

(Any 2 points for 2 marks)

ii) *Volenti Non Fit Injuria*

Volenti is sometimes described as the plaintiff "consenting to run a risk". The Legal principle is that one who knowingly and voluntarily consents to and takes on a risk cannot ask for compensation for the damage or injury resulting from it.

For instance, if someone willingly places themselves in a position where harm might result, knowing that some degree of harm might result, they are not able to

bring a claim against the other party in tort or delict. Therefore, a boxer consents to being hit, and to the injuries that might be expected from being hit, but does not consent to (for example) his opponent striking him with an iron bar, or punching him outside the usual terms of boxing.

(2 marks)

c) **Relevant Fundamental Human Right**

Article 12 - Protection of Fundamental Human Rights and Freedoms

Article 13 - Protection of Right to Life

Article 14 - Protection of Personal Liberty

Article 15 - Respect for Human Dignity

Article 16 - Protection from Slavery and Forced Labour

Article 17 - Equality and Freedom from Discrimination

Article 18 - Protection of Privacy of Home and Other Property

Article 20 - Protection from Deprivation of Property

Article 23 - Administrative Justice

Article 24 - Economic Rights

Article 25 - Educational Rights

Some specific provisions

- Every person has the right to work under satisfactory, safe and healthy conditions, and shall receive equal pay for equal work without distinction of any kind.
- Every worker has a right to form or join a trade union of his choice for the promotion and protection of his economic and social interests.
- No person shall be convicted of a criminal offence unless the crime is defined and the penalty for it is prescribed in a written law.
- A person shall not be charged with or held to be guilty of a criminal offence which is founded on an act or omission that did not at the time it took place constitute an offence.
- A person charged with a criminal offence shall be given a fair hearing within a reasonable time by a court.
- The trial of a person charged with a criminal offence shall take place in his presence unless-
 - ✓ he refuses to appear before the court for the trial to be conducted in his presence after he has been duly notified of the trial or
 - ✓ He conducts himself in such a manner as to render the continuation of the proceedings in his presence impracticable and the court orders him to be removed for the trial to proceed in his absence.
- No person who is tried for a criminal offence shall be compelled to give evidence at the trial.

- No property of any description, or interest in or right over any property shall be compulsorily taken possession of or acquired by the State unless the following conditions are satisfied-
- The taking of possession or acquisition is necessary in the interest of defence, public safety, public order, public morality, public health, town and country planning.
- The necessity for the acquisition is clearly stated and is such as to provide reasonable justification for causing any hardship that may result to any person who has interest in or right over the property.

(Any 3 points for 3 marks)

d) Code of Ethics

- Integrity
- Confidentiality
- Objective
- Professional Behaviour
- Professional Due Care and Competence

(Any 3 points for 3 marks)

(Total: 20 marks)

EXAMINER'S COMMENT

Almost all candidates attempted this question and it was the best answered with an above average score. The sub-questions cut across several topics but required short answers and the analysis required for 3 b) was straight forward. The part missed most is the legal principle on 'volenti non fit injuria' where one who knowingly and voluntarily consents to and takes on a risk cannot ask for compensation for the damage or injury resulting from it.

Candidates were able to correctly list out several fundamental human rights under Articles 19, 20, 23, 24 and so on of the 1992 Constitution. In subsequent examination, candidates should be tested on how those rights in scenarios can affect the health and reputation of directors or key officers and the business as a whole.

Many of the candidates failed to specifically identify the ethical codes but rather explained with examples. A few candidates confused this requirement with duties of a director and did not mention Integrity, Confidentiality, Objectivity, Professional Behaviour and Professional Due Care and Competence.

QUESTION FOUR

a) This question is on the tort of nuisance. There are **two (2)** kinds of nuisance; Public Nuisance and Private Nuisance;

- Public Nuisance, is an act of omission which causes discomfort or inconvenience to a class of people. Essentially this is a crime. However, individuals who have been particularly affected by the nuisance may bring action in Court.
- Private nuisance, on the other hand, consists of unreasonable interference with a person's use or enjoyment of land.

Identification that the question is on private nuisance **(4 marks)**

b) For an act to constitute private nuisance, the following must be present to establish liability for a private nuisance:

- an indirect interference with the use or enjoyment of land; eg, smoke, smells and noise.
- either physical damage to land or interference with the land causing loss of enjoyment or discomfort.
- interference which is unreasonable

(Any 2 points for 3 marks each = 6 marks)

c) The instant case is one of private nuisance, and, therefore, Asantewaa has a cause of action against Kwickbuild Ltd. Her action needed to be mounted on the following:

- That the question of the interference which is daily and from dawn to dusk meant that Asantewaa and the family are to endure the dust, dirt and noise continuously.
- That the interference has become very unreasonable.

(2points for 3 marks each = 6 marks)

d) **LEGAL REMEDIES**

- Asantewaa can sue Kwickbuild Ltd for compensation caused by the nuisance.
- Asantewaa can seek an order of injunction from court to prevent any continuance of the nuisance.

(2 points for 2 marks each = 4 marks)

(Total: 20 marks)

EXAMINER'S COMMENT

This question was not very popular but the performance of candidates was average. The distinction between private nuisance and public nuisance was not clearly made by some candidates. Largely, candidates did not mention that private nuisance consists of unreasonable interference with a person's use or enjoyment of

land/property whilst public nuisance comes up when an act of omission causes discomfort or inconvenience to a class of people. It will be useful for candidates in subsequent examinations to learn the implication (financial or otherwise) of a business causing nuisance in an environment.

Most candidates had the remedies correctly but some missed the conditions that must be present to constitute nuisance in answering question 4 b). These conditions include, an indirect interference with the use or enjoyment of land e.g. smoke, smells and noise; physical damage to land or interference with the land causing loss of enjoyment or discomfort and unreasonable interference.

QUESTION FIVE

- a) The two(2) types of Resolutions are defined in **Section 168 of the Companies Act, 1963, Act 179:**

Ordinary Resolution is one passed by a simple majority of votes cast by entitled members of the company voting in person or by proxy, where allowed, at a general meeting.

(2 marks)

Special Resolution Is one passed by not less than three-fourths (3/4) of the votes cast by entitled members of the company voting in person or by proxy, where allowed, at a general meeting, provided notice specifying the intention to propose the resolution as a special resolution had been dully given.

(2 marks)

b)

- where the company proposes to dispose of the whole or substantial portions of its undertaking or assets (Section 202 (1a)) of Act 179.
- where the company proposes to issue new or unused shares (other than treasury shares) in the company (Section 202(1b)).
- where the company proposes to make voluntary contributions to charitable or other funds in excess of the greater of prescribed amount or 2% of the income surplus of the preceding financial year (Section 202(1c)).
- where the company proposes to exercise its powers to borrow money or charge any of its assets where the monies to be borrowed or secured will exceed the stated capital for the time being of the company..... Section 202(5).

(4points for 4 marks each = 16 marks)

(Total: 20 marks)

EXAMINER'S COMMENT

This question was the most unpopular. Most candidates who tried performed well because the question required short straight forward answers but some were not confident in their explanations. It will be useful for the question itself to make reference to the Companies Act in future so that candidates are able to situate the answers easily.

The distinction between ordinary resolution and special resolution was confused by some candidates with ordinary business of an annual general meeting. Few candidates were able to relate the transactions for ordinary resolution properly. They outlined the following transactions in line with the solutions required: disposal of the whole or substantial portions of its undertaking or assets; issue new or unused shares (other than treasury shares) in the company; to exercise its powers to borrow money or charge any of its assets where the monies to be borrowed or secured will exceed the stated capital etc.

Candidates must deepen their knowledge and understanding on the new Companies Act to perform better in this part of the syllabus next time.

CONCLUSION

Some remedies for observations made and look ahead to future examinations are as follows:

- Candidates should be tested on employment law as this is a major risk in businesses amidst COVID-19 pandemic.
- With the rise of corporate governance incidents, a lot of ethics in business scenarios should be brought in questions to test the candidates.
- Companies Act constitutes a significant part of the entire examination and candidates should be encouraged to learn that area thoroughly. This law is very related and applicable to Accountant's field of work and should be taken serious. If possible an intervention on this area of law should be carried out for candidates.
- The learning material released by the Institute should be part of the study materials of business and corporate law students as this provides an overview and details of the entire syllabus.