

**JULY 2023 PROFESSIONAL EXAMINATIONS
BUSINESS & CORPORATE LAW (PAPER 1.3)
CHIEF EXAMINER'S REPORT, QUESTIONS AND MARKING SCHEME**

QUESTION ONE

- a) The hierarchical structure of the courts in Ghana make judicial precedents both binding and perhaps persuasive.

Required:

Explain *binding* and *persuasive* precedents. **(5 marks)**

- b) In interpreting statutes, the courts rely significantly on rules of interpretation.

Required:

Explain the following rules of interpretations:

- i) Golden rule **(2 marks)**
ii) Mischief rule **(2 marks)**
iii) Eiusdem generis rule **(2 marks)**

- c) Explain the **THREE (3)** main stages of money laundering. **(9 marks)**

(Total: 20 marks)

QUESTION TWO

- a) Kofi Adabla visited the showroom of Car Dealers Ltd, a company that sells used vehicles. Kofi Adabla informed Car Dealers Ltd that he needed a vehicle that could withstand the rugged terrain. Kofi Adabla had his Mechanic with him. The salesman at the Car Dealers Ltd recommended a slightly used vehicle to Kofi Adabla. Kofi Adabla's Mechanic did a thorough examination of the vehicle after which Kofi Adabla decided to buy the vehicle at a price of GH¢55,000.

Three months after Kofi Adabla bought the vehicle, it developed a mechanical fault which was promptly repaired by Car Dealers Ltd under the terms of sale, exhausting the warranty. Three months later, the vehicle developed another mechanical fault but Car Dealers Ltd refused to repair it. Kofi Adabla now threatens to sue.

Required:

- i) Explain whether Kofi Adabla will succeed on a claim that the vehicle was not fit for the purpose for which it was acquired and that there was a breach of the conditions of sale. **(5 marks)**
ii) State the fundamental obligation of the seller under the Contract for sale of Goods under the Sale of Goods Act, 1962 (Act 137). **(5 marks)**
- b) Kwei Aglote is an agent of Batis Brown the principal. Kwei Agblote has actual authority to contract for his principal Batis Brown on specific items. Kwei Agblote enters into

contractual relations with Ogyeene Baby for the supply of cassava flour (kokonte powder) worth GH¢20,000. Agblote disclosed his agency relationship with Batis Brown to Ogyeene Baby. The principal has failed to pay for the cost of the goods supplied. Despite the explanation, Ogyeene Baby says he knows no one else but Kwei Agblote who must pay for the cost of the goods.

Required:

- i) Explain *actual authority* under the agency relationship. (5 marks)
- ii) In the above scenario, who bears liability for the cost of the goods? (5 marks)

(Total: 20 marks)

QUESTION THREE

- a) Where a person is convinced that there is a breach of his/her fundamental human rights, the Constitution of the Republic of Ghana, 1992 allows that person to apply to the High Court of Ghana for remedy.

Required:

State **FOUR (4)** remedies that a High Court may issue in respect of breach of fundamental human rights. (5 marks)

- b) Atibie family owned an enterprise devoted to the supply of plumbing materials. A business adviser working with H&H Bank advised the family to convert from an enterprise to a limited liability company to qualify for a discounted interest loan facility. The head of Atibie family stated as follows: “Any member of the family can be appointed as a board member of the new company”.

The head of Atibie family reasons that the company can make use of a Substitute Director in case they have no one to appoint as a substantive Director.

Required:

- i) Explain **FIVE (5)** factors that could disqualify a member of Atibie family from being appointed a member of the board. (10 marks)
- ii) Explain why the head of Atibie family is right or wrong on the use of a Substitute Director. (5 marks)

(Total: 20 marks)

QUESTION FOUR

- a) Abaase Larbi is an accountant working in an accounting Firm. The Managing Partner was of the view that Abaase Larbi was involved in fraudulent transactions with some clients of the Firm. At a meeting, the Partners of the Firm concluded that Abaase Larbi had brought the name of the Firm into disrepute. As a result, the Firm terminated the appointment of Abaase Larbi. Abaase Larbi feels he has not been dealt with fairly.

Required:

- i) From the facts above, explain whether there is any breach of natural justice? **(3 marks)**
ii) As an administrative body, state the obligation that lies on the Firm to deal fairly with Abaase Larbi in respect of the Constitution of the Republic of Ghana, 1992. **(4 marks)**
- b) Termination of a contract of employment under the Labour Act, 2003 (Act 651) of Ghana may be fair or unfair.

Required:

State **THREE (3)** factors that will lead to fair termination of the employment of a worker/employee by the employer. **(3 marks)**

- c) Certain key persons before and after the formation of a company stand in a fiduciary relationship to the company.

Required:

Describe the promoter's fiduciary duties prior to the formation of a company. **(4 marks)**

- d) Kwami Tihosu, James Jamara, Kisifri Kodiabe decided to form a partnership for their professional business. They submitted particulars for registration. The Registrar of Companies has refused to register the partnership.

Required:

Under what **FOUR (4)** conditions may the Registrar of Companies refuse to register a partnership? **(6 marks)**

(Total: 20 marks)

QUESTION FIVE

- a) Yao Tsito has been paid his end of service benefit after retiring. He plans to invest the benefits in bonds and debentures.

Required:

Explain the following:

- Bond (2 marks)
- Debenture (2 marks)

- b) In **THREE (3)** ways distinguish between *equity shares* and *preference shares*. (6 marks)

- c) Three brothers Aba, Bawa and Caroline registered a company (ABC Ltd) to supply cocoa products. The most influential member of the Board, Caroline, died five years into the life of the business. The surviving two directors decided to pass a special resolution by private liquidation to wind-up the business.

Required:

Explain **FIVE (5)** consequences of winding-up ABC Ltd by private liquidation.

(10 marks)

(Total: 20 marks)

SOLUTION TO QUESTIONS

QUESTION ONE

- a) Precedent in law is an adjudged case or decision of a court of justice, considered as furnishing a rule or authority for the determination of an identical or similar case afterwards arising or of a similar question of law. The only theory on which it is possible for one decision to be an authority for another is that the facts are alike; or, if the facts are different, that the principle which governed the first case is applicable to the variant facts.

Additionally, precedent is a judicial decision which contains in itself a principle. The underlying principle which thus forms its authoritative element is often termed the ratio decidendi. The concrete decision is binding between the parties to it, but it is the abstract ratio decidendi which alone has the force of law as regards the world at large.

Binding Precedent: A precedent which a court must follow. For example, a lower court is bound by an applicable holding of a higher court in the same jurisdiction. It is constitutionally provided under article 129(3) of the Constitution of the Republic of Ghana that decisions of the Supreme Court based on the question of law are binding on all other courts.

Persuasive Precedent: A precedent that is not binding on a court but that is entitled to respect and careful consideration. For example if the case is decided in the neighbourhood jurisdiction, the court might evaluate the earlier court's reasoning without being bound to decide the same way.

(5 marks)

- b) Rules of interpretation

- i) **Golden Rule:** The golden rule is a moral principle which denotes that one should treat others the way he wants to be treated, namely that if you want people to treat you with respect, you should treat them with respect too. This is the positive/directive form of the rule

The negative/prohibitive form (silver rule) of the rule states that you should not treat others in ways you would not want to be treated yourself, namely that if you do not want people to say mean things to you, then you should not say mean things to them.

The empathic /responsive form of the rule provides that when you wish something upon others, you should also wish it upon yourself, namely that if you wish ill toward someone else, then you are also to wishing ill toward yourself.

- ii) **Mischief rule:** The mischief rule is used to determine the exact scope of the "mischief" that the statute in question has set out to remedy, and to guide the court in ruling in a manner which will "suppress the mischief and advance the remedy". The rule considers not only the exact wording of the statute but also the legislators' intention in enacting it. In applying the rule, the court is essentially asking whether

parliament in enacting the statute intended to rectify a particular mischief, even though it might not be covered by literal reading of the statute's wording, namely that if a law prohibits a particular behaviour "in the street" the legislators might- or might not- have intended the same behaviour on a first floor balcony overlooking the roadway to be covered.

- iii) **Eiusdem generis rule:** The *eiusdem generis* rule simply put is: where in a statute or document there are general words following particular and specific words, the general word or words must have their meaning restricted or confined to the meaning as conveyed by the specific words. Thus where the expression like, "hats, underwear, overcoat, gown, shoes shirts, tie or any other thing." The general words, "any other thing" following those specific cannot be given their natural meaning as any material or thing but must be construed as restricted to things such as clothing which is the class or genus suggested by the specific words.

(2 marks each = 6 marks)

- c) The stages of money laundering includes Placement, layering and integration.
Placement: Placement is when "dirty money" is introduced into the financial system. This is often done by breaking up large amounts of cash into less conspicuous smaller sums to deposit directly into a bank account or by purchasing monetary instruments such as cheques or money orders that are collected and deposited into accounts at other locations.

Other placement methods include:

- Adding illicit cash from a crime to legitimate takings of a business, particularly those with little or no variable costs.
- False invoicing.
- Smurfing, where amounts of money below the anti-money laundering threshold are inserted into bank accounts or credit cards and used to pay expenses among others.
- Taking small amounts of cash below the customs declaration threshold abroad and lodging it in foreign bank accounts before being re-sent.

Layering: In the layering stage, the launderer moves money through a series of financial transactions with the goal of making it difficult to trace the original source.

The funds could be channeled through the purchase and sales of investments, a holding company, or simply moved through a series of accounts at banks around the globe. Widely scattered accounts are most likely to be found in the jurisdictions that do not cooperate with Anti Money Laundering investigations. In some instances, the launderer could disguise the transfers as payments for goods or services or as private loan to another company, giving them a legitimate appearance.

Integration: The integration stage of money laundering is the final step in the laundering process. This is when the launderer attempts to integrate illicitly

obtained funds into legitimate financial system. To use the funds to buy goods and services without attracting attention from law enforcement or tax authorities, the criminal may invest in real estate, luxury assets or business ventures.

Common integration tactics include:

- Fake employees, namely a way of getting the money back out. Usually paid in cash collected.
- Loans, namely to directors or shareholders which will never be repaid.
- Dividends, namely paid to shareholders of companies controlled by criminals.

(2 points @ 3 marks each = 9 marks)

(Total: 20 marks)

QUESTION TWO

a)

- i) Under **section 13 (1)** of the Sale of Goods Act, 1962 ACT 137 there is no implied warranty or condition as to the quality or fitness for a particular purpose of goods supplied under contract of sale except:
that there is an implied condition that the goods are free from defects which are not declared or known to the buyer before or at the time when the contract is made, but that condition is not implied condition.

However where the buyer has examined the goods, in respect of defects which could have been revealed by the examination, there is implied condition that the goods are fit for the purpose -**Section 13(1)(a)(i)**.

On the strength that the mechanic did thorough examination and section 13(1) (a) (i) Kofi Adabla fails to succeed on his claim.

(5 marks)

- ii) In the sale of specific goods, the fundamental obligation of the seller is to deliver those goods to the buyer.

In a sale of unascertained goods the fundamental obligation of the seller is to deliver to the buyer goods substantially corresponding to the description or sample by which they were sold.

Any provision in a contract of sale which is inconsistent with, or repugnant to, the fundamental obligation of the seller, is void to the extent of the inconsistency or repugnance.

(5 marks)

b)

- i) Actual authority is created by words, either written or oral. It often derives from a contract between the principal and agent, although an agent may act gratuitously. This is the level of authority for which the agent is entitled to receive his remuneration or commission. The agent does not have to act in excess of his authority lest he may be liable to the principal for breach of the agency.

Actual authority may be either express or implied.

Where the agency has been created by a written contract of agency, the scope of the express authority can be determined from the construction or wording of the document. In an oral agency agreement, it will depend on what the parties agreed the agent should have the authority to do.

Implied authority is sometimes divided into Usual Authority and Customary Authority. Usual authority is a more specific form of implied authority which relates to agents of a certain type acting in the "usual" way of such agents.

Customary Authority. In this the agent's implied authority derives from the locality, market or business usage.

(5 marks)

- ii) An agent is a person who is authorized to act for another (the principal) in the making of a legal relations with third parties. If the agent act within the scope of his actual authority, the contract will be valid and binding on the principal.

In the current scenario Kwei Agbote acted within the scope of his actual authority in his contract with Ogyeene Baby. The contract is that of Batis Brown and binding on him. **(5 marks)**

(Total: 20 marks)

QUESTION THREE

a) The writs/directions/orders are:

- Habeas corpus
- Certiorari
- Mandamus
- Prohibition
- Quo warranto

(Any 4 points @ 1.25 marks each = 5 marks)

b)

i) Factors that could disqualify an Atibie family member from being a director

- An infant
- A person adjudged to be of unsound mind
- A body corporate
- A person who in the opinion of Bank of Ghana is not fit and proper cannot be appointed a director of a bank. Fit and proper includes issues of competence, honesty and insolvency.
- A person convicted of fraud or dishonesty or any offence in connection with the promotion, formation or management of a company
- A person that is said to be bankrupt

(Any 5 points @ 2 marks each = 10 marks)

ii) A substitute Director is one who is appointed to act as a deputy for another named director and as the substitute in the absence of that director. Per section 180 of the Companies Act, 2019 (Act 992), a company may appoint a substitute director and he/she shall not be counted as a director for the purpose of prescribed minimum or maximum number of directors other than a provision relating to a quorum and is not entitled to vote at a meeting of directors at which the director for whom that person is a substitute is present.

A substitute director shall be deemed to be a full director of the company for all purposes and shall be appointed and may be removed in the same way as directors are required to be appointed and removed, and shall not cease to be a director by reason of the fact that the director for whom that person is a substitute ceases to be a director.

The Head of the Atibie family is legally wrong to appoint a substitute director from the outset for reasons stated above.

(5 marks)

(Total: 20 marks)

QUESTION FOUR

a)

i) Maxims/Rules/Principles of Natural Justice

- Audi Alteram Partem, namely listen to the other side.
- Nemo Judex in Causa, namely that one cannot be a judge in his own cause or in a matter of which he has an interest.
- Fairness is the hybrid of the Audi alteram partem rule and Nemo judex in causa rules.

The rule has been that where a misconduct is committed by an employee or a partner, the regular procedure is that the affected party must be given a fair hearing. The break down in context are:

The setting up of a Committee;

Notice of hearing- giving adequate notice;

Date and time of sitting of Committee, Venue of sitting;

Legal representation;

Opportunity to cross-examine witnesses;

Opportunity to be served and comment on adverse report made against him.

It can be concluded from the above points that there is breach of natural justice since Abaase Larbi was not given a fair hearing.

(3 marks)

ii) Article 23 of the Constitution of the Republic of Ghana, 1992 provides that Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed on them by law and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a court or other tribunal.

The firm therefore must have followed administrative procedure of giving Larbi a fair hearing by establishing a committee and with the committee inviting Larbi on its day of sitting and such other procedures that are relevant for him to be heard and finally giving him a copy of the report of the committee where adverse findings were made of him for his response.

(4 marks)

b) Grounds for fair termination of contract.

- Incompetence of the employee
- Redundancy
- Mutual agreement
- Ill health

- Proven misconduct
- Death of the employee
- Legal restriction

(Any 3 points @ 1 mark each= 3 marks)

- c) The promoter shall, until the formation of a company is complete and the working capital of the company has been raised, stand in a fiduciary relationship to the company;
- Observe utmost good faith towards the company in a transaction with the company or on behalf of the company;
 - Compensate the company for any loss suffered by the company by reason of the failure of the promoter to observe utmost good faith.
 - A promoter that acquires property or information in circumstances in which it was the duty of the promoter as a fiduciary to acquire the property or information on behalf of the company, shall account to the company for the property or information and for the profit which the promoter may have made from the use of that property or information.

(4 marks)

d) Where in the opinion of the Registrar:

- The partnership is not one which is registrable under the Incorporated Private Partnerships Act, 1962, ACT 152
- Any of the businesses which the partnership has been carrying on, or is to carry on, is unlawful,
- The name of the firm is misleading or undesirable,
- Any of the partners is an infant or of unsound mind or a person who, within the preceding five years, has been charged with fraud or dishonesty, whether convicted or not, in connection with trade or business or is an undischarged bankrupt, or
- The statement is incomplete, illegible, inaccurate, irregular, or paper insufficiently durable to be suitable for registration.

(Any 4 points @ 1.5 marks each= 6 marks)

(Total: 20 marks)

QUESTION FIVE

- a) **Bond** is an obligation to pay a fixed sum of money, at a definite time, with a stated interest and it makes no difference whether a bond is designated by that name or by some other, if it possesses the characteristics of a bond.

(2 marks)

The word debenture is generally used to indicate acknowledgement of indebtedness given under seal by an incorporated company containing a charge on assets of the company and carrying an agreed rate of interest until payment

(2 marks)

b) Equity Shares vs Preference Shares

Basis of Difference	Equity Shares	Preference Shares
Definition	Equity shares represent the ownership of a company.	Preference shareholders have a preferential right or claim over the company's profits and assets.
Dividend Pay-out	Equity shareholders receive dividends only after the preference shareholders receive their dividends.	Preference shareholders have the priority to receive dividends.
Dividend Rate	Varies based on the earnings.	The rate is fixed.
Bonus Shares	Equity shareholders are eligible to receive bonus shares against their existing holdings.	Preference shareholders do not receive any bonus shares against their holdings.
Capital Repayment	Equity shareholders are paid last.	Preference shareholders are paid before the equity shareholder when the company is winding up.
Voting Rights	Equity shareholders enjoy voting rights.	Preference shareholders do not enjoy voting rights.
Participation in Management Decisions	Equity shareholders have voting rights, and as a result, they participate in the management decisions.	Preference shareholders do not participate in management operations.
Redemption	Equity shares cannot be redeemed.	Preference shares can be redeemed.
Convertibility	Equity shares cannot be converted.	Preference shares can be converted to equity shares.

(3 points @ 2 marks each = 6 marks)

- c) Private liquidation is a process designed to allow an insolvent company to close voluntarily. The decision is made by a board resolution but instigated by the directors. 75% of the company's shareholder must agree to liquidate for liquidation proceedings to advance.

Consequences of private/voluntary liquidation includes:

- **Investigations may be opened**

The greatest disadvantage to the voluntary liquidation of an insolvent company is an investigation into conduct. Upon appointment, an insolvency practitioner must open an investigation into the conduct of directors. This aims to determine why the company fell into such financial distress, and whether directors had a hand to play in it. Naturally, this investigation will be quite invasive, requiring anything relevant to your company and your actions as a director. Even if you know you have traded lawfully, it is an unpleasant experience.

If a director is found to have engaged in wrongful trading, harsh legal penalties can be applied. A director can be barred from acting for up to 15 years, barred from other management positions, and held personally liable for the debt.

- **If there is wrongdoing, the directors can be held personally liable for company debt (CVL)**

Following from the last point, directors can be compelled to pay company debts. There are two ways this can happen – through investigation, and personal guarantees. If a company director is found to have engaged in wrongful trading, they may be forced to assume liability for the debt. Similarly, if an investigation finds that a director has closed their company quickly to evade debt, they may be held personally liable. Additionally, if a director has signed a personal guarantee, their creditor can enforce it in order to receive payment.

- **All assets will be liquidated**

Once a company enters liquidation, the appointed insolvency practitioner must sell off all assets to raise funds. This means that even assets the directors may want to keep during a private liquidation will be sold to raise funds. If a director is considering liquidation and have some assets they would like to keep, they may want to consider selling them to themselves at market value prior to any liquidation. These funds will then be distributed amongst creditors, shareholders, and used to pay any other liabilities.

- **Staff will be made redundant**

Similarly, as the company is to be closed, all employees must be made redundant. As mentioned, they may be able to claim redundancy pay and other statutory benefits.

- **Retained profits are passed to the shareholders in a tax efficient way**

If a director were to simply dissolve their company, they would need to distribute the assets of the company amongst themselves in advance. Because this is done as a normal day to day transfer to the shareholder, it is taxed like any dividend would be. For those with high earnings, the tax paid on this distribution can be significant.

(5 points @ 2 marks each = 10 marks)

(Total: 20 marks)