ATSWA

ACCOUNTING TECHNICIANS SCHEME WEST AFRICA

STUDY TEXT

PART I

BUSINESS LAW

PUBLICATION OF ASSOCIATION OF ACCOUNTANCY BODIES IN WEST AFRICA (ABWA)

ASSOCIATION OF ACCOUNTANCY BODIES IN WEST AFIRCA (ABWA)

ACCOUNTING TECHNICIANS SCHEME

WEST AFRICA (ATSWA)

STUDY TEXT FOR

BUSINESS LAW

THIRD EDITION

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DISCLAIMER

This book is published by ABWA; however, the views are entirely those of the writers.

PREFACE

INTRODUCTION

The Council of the Association of Accountancy Bodies in West Africa (ABWA) recognised the difficulty of students when preparing for the Accounting Technicians Scheme West Africa examinations. One of the major difficulties has been the non-availability of study materials purposely written for the scheme. Consequently, students relied on text books written in economic and socio-cultural environments quite different from the West African environment.

AIM OF THE STUDY TEXT

In view of the above, the quest for good study materials for the subjects of the examinations and the commitment of the ABWA Council to bridge the gap in technical accounting training in West Africa led to the production of this Study Text.

The Study Text assumes a minimum prior knowledge and every chapter reappraises basic methods and ideas in line with the syllabus.

READERSHIP

The Study Text is primarily intended to provide comprehensive study materials for students preparing to write the ATSWA examinations.

Other beneficiaries of the Study Text include candidates of other Professional Institutes, students of Universities and Polytechnics pursuing undergraduate and post graduate studies in Accounting, advanced degrees in Accounting as well as Professional Accountants who may use the Study Text as reference material.

APPROACH

The Study Text has been designed for independent study by students and as such concepts have been developed methodically or as a text to be used in conjunction with tuition at schools and colleges. The Study Text can be effectively used as a course text and for revision. It is recommended that readers have their own copies.

FORWARD

The ABWA Council, in order to actualize its desire and ensure the success of students at the examinations of the Accounting Technicians Scheme West Africa (ATSWA), put in place a Harmonisation Committee, to among other things, facilitate the production of Study Texts for students. Hitherto, the major obstacle faced by students was the dearth of study texts which they needed to prepare for the examinations.

The Committee took up the challenge and commenced the task in earnest. To start off the process, the existing syllabus in use by some member Institutes were harmonized and reviewed. Renowned professionals in private and public sectors, the academia, as well as eminent scholars who had previously written books on the relevant subjects and distinguished themselves in the profession, were commissioned to produce Study Texts for the twelve subjects of the examination.

A minimum of two Writers and a Reviewer were tasked with the preparation of Study Text for each subject. Their output was subjected to a comprehensive review by experienced imprimaturs. The Study Texts cover the following subjects:

PART I

1 Basic Accounting Processes and Systems
2 Economics
3 Business Law
4 Communication Skills

PART II

1 Principles and Practice of Financial Accounting
2 Public Sector Accounting
3 Quantitative Analysis
4 Information Technology

PART III

1 Principles of Auditing
2 Cost Accounting
3 Preparation of Tax Computation and Returns
4 Management

Although, these Study Texts have been specially designed to assist candidates preparing for the technicians examinations of ABWA, they should be used in conjunction with other materials listed in the bibliography and recommended text.

PRESIDENT, ABWA

STRUCTURE OF THE STUDY TEXT

The layout of the chapters has been standardized so as to present information in a simple form that is easy to assimilate.

The Study Text is organised into chapters. Each chapter deals with a particular area of the subject, starting with learning objective and a summary of sections contained therein.

The introduction also gives specific guidance to the reader based on the contents of the current syllabus and the current trends in examinations. The main body of the chapter is subdivided into sections to make for easy and coherent reading. However, in some chapters, the emphasis is on the principles or applications while others emphasise method and procedures.

At the end of each chapter is found the following:

- Summary
- Points to note (these are used for purposes of emphasis or clarification);
- Examination type questions; and
- Suggested answers.

HOW TO USE THE STUDY TEXT

Students are advised to read the Study Text, attempt the questions before checking the suggested answers.

ACKNOWLEDGMENTS

The ATSWA Harmonisation and Implementation Committee, on the occasion of the publication of the first edition of the ATSWA Study Texts acknowledges the contributions of the following groups of people. The ABWA Council, for their inspiration which gave birth to the whole idea of having a West African Technicians Programme. Their support and encouragement as well as financial support cannot be overemphasized. We are eternally grateful.

To The Councils of the Institute of Chartered Accountants of Nigeria (ICAN), and the Institute of Chartered Accountants, Ghana (ICAG), and the Liberia Institute of Certified Public Accountants (LICPA) for their financial commitment and the release of staff at various points to work on the programme and for hosting the several meetings of the Committee, we say kudos.

We are grateful to the following copyright holders for permission to use their intellectual properties:

- The Institute of Chartered Accountants of Nigeria (ICAN) for the use of the Institute's examination materials;
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- Owners of Trademarks and Trade names referred to or mentioned in this Study Text.

We have made every effort to obtain permission for use of intellectual materials in this Study Texts from the appropriate sources.

We wish to acknowledge the immense contributions of the writers and reviewers of this manual;

Our sincere appreciation also goes to various imprimaturs and workshop facilitators. Without their input, we would not have had these Study Texts. We salute them.

Chairman
ATSWA Harmonization & Implementation Committee

A new syllabus for the ATSWA Examinations has been approved by ABWA Council and the various PAOs. Following the approval of the new syllabus which becomes effective from the September 2017 diet a team was constitutes to undertake a comprehensive review of the Study Texts in line with the syllabus under the supervision of an editorial board.

The Reviewers and Editorial board members are:

REVIEWERS

This Study text was reviewed by:

- Professor O.O Oladele — Osun State University, Ifetedo Campus Osogbo
- Mr. Babatunde Kuti — Legal Practitioner
- Mr. Leigh Oluwaseyi Augustine — Crescent University, Abeokuta

EDITORIAL BOARD

The editorial Board Members are:

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TABLE OFCONTENTS

CHAPTER 3
LAW OF CONTRACT I

CHAPTER 4
LAW OF CONTRACT II

CHAPTER 5
AGENCY

CHAPTER 6
SALES OF GOODS

CHAPTER 7
HIRE PURCHASE AND EQUIPMENT LEASING

CHAPTER 8

CONTRACT OF EMPLOYMENT

CHAPTER 9
LAW OF INSURANCE

CHAPTER 10
LAW OF BUSINESS ASSOCIATIONS 1- COMPANIES

CHAPTER 11
LAW OF BUSINESS ASSOCIATIONS: COMPANIES

CHAPTER 12
BANKING AND NEGOTIABLE INSTRUMENTS

CHAPTER 13
LAW OF TRUSTS

SYLLABUS AND EXAMINATION QUESTIONS OUTLINE

PAPER 3:

COURSE TITLE: BUSINESS LAW

AIMS

To examine candidates' knowledge and understanding of

- the legal environment in which organisations in general and the accountancy profession in particular operate; and
- the legal implications of business relationships and the relevance of legal rules to business sector, commerce and industry.

OBJECTIVES:

On completion of this paper, candidates should:

a. know the structure, jurisdiction and functions of the legal systems and the rules applicable to them;
b. have a working knowledge of the general principles of contract to aid their daily accounting activities;
c. be familiar with the legal rules governing specific contracts;
d. be able to distinguish between the various forms of business associations and be conversant with the main rules governing their operations;
e. be able to identify and appreciate the respective duties of bankers and customers and recognise the nature of negotiable instruments as may be suitable for use as appropriate in their daily activities as Accounting Technicians; and
f. be able to apply the principles of law to simple case studies.

STRUCTURE OF THE PAPER

The paper will be a three-hour paper divided into two sections:

Section A (40 Marks): This shall consist of 50 compulsory questions made up of 30 multiple-choice questions and 20 short answer questions covering the entire syllabus.

Section B (60 Marks): Six questions, out of which, candidates are expected to answer any four, at $12^1/_2$ marks each.

1. **The Legal System and Courts System** **15%**

   (a) **Sources of Law:** Constitution –supremacy, characteristics, separation of powers and fundamental rights, meaning of application of Common Law, Equity (Emphasis on Maxims) and Statutes of General Application; Judicial Precedent, Legislation, Customary Law and Treaties.

   (b) **The Legal and Court System:** An outline of the structure and hierarchy of courts; composition and jurisdiction of the various Courts. Special courts.

   (c) **Forms of Legal Liability:** Distinction between criminal and civil liability

   Professional Ethics: Meaning of tort. Vicarious liability. Negligent misstatements and consequences

2. **Law of Contract** **20%**

   Nature and essential elements of a valid contract: offer, acceptance, consideration, intention to create legal relations, capacity and consent. Privity of contract and its exceptions.

   Conditions, warranties and exemption clauses.
   Illegal contracts and contracts in restraint of trade, vitiating factors.
   Discharge of contracts and remedies for breach of contract.

3. Special Contracts 25%

   (a) **Agency:**
   Creation and types; authority of agents; rights and duties of principals and agents; and termination of agency

(b) **Sale of Goods**

Meaning and types of goods. Implied terms. The *Caveat Emptor* Doctrine. Transfer of title, passing of risk and the *Nemo Dat Quod Non Habet* rule. Breach of contract for sale of goods and remedies of the parties, rights of buyers and sellers.

(c) **Hire- Purchase and Equipment Leasing**

Meaning and Formalities under the Common Law and the Hire Purchase Act. Implied and void terms. Rights and Obligations of the parties. Termination of Hire Purchase contract. Operating and Finance Leasing.

(d) **Contract of Employment**

Nature and formation. Rights and Duties of the parties. Termination and Dismissal. Remedies for breach of contract. Redundancy.

(e) **Insurance:**

Meaning and Classification. Share capital of Insurer, Meaning and features of the following concepts and principles – insurable interest, premium, indemnity, materiality of information, utmost good faith, conditions and warranties, subrogation and contribution.

4. **Law of Business Associations** **20%**

(a) **Partnership**

Formation types and determination of existence. Authority of partners. Rights and duties of partners *inter se*. Partners and third parties. Dissolution of partnership.

(b) **Companies:**

Nature and functions of the Corporate Affairs Commission/Companies Registry. Types of companies. Process and consequences of incorporation. Company securities (shares and debentures), directors,(power and duties) Company Secretary-qualifications status an duties. Company meetings. Majority Rule and Minority protection.. Duties of Promoters and Auditors Winding-up or liquidation

(c) **Others:**

Requirements for registration of Business Names, Incorporated Trustees, and Unit trusts.

5. **Banking and Negotiable Instruments** **15%**

(a) The legal relationship between banker and customer and their respective duties.
(b) Meaning and characteristics of Negotiable Instruments. Bills of exchange, Cheques and Promissory notes. Crossing of cheques.
(c) Holder, Holder for value and holder-in- due-course.
(d) Rights and Duties of the parties.

6. **Law of Trusts**

(a) Introduction to law of trusts - Meaning and parties **5%**

(b) Distinction between Private Trust and Public Trust.

(c) Types and uses Public Trusts

(d) Duties, powers and rights of Trustees (Including Investment Powers under Trustee Investment Act

RECOMMENDED TEXTS

1. ATSWA Study Pack on Business Law

- George Etomi - *An Introduction to commercial Law in Nigeris: Texts cases* and materials, MIJ Professional Publishers, Lagos

2. Obilade, A.O. - *The Nigerian Legal System*, Spectrum Books.

3. Bondzi-Simpson, P.E. - *Company Law in Ghana*, Methodist Book Depot, Accra

4. Adesanya M.O & Oloyede, E.O – *Business Law in Nigeria*, Evans Brother (Nigeria Publishers), 2008

5. Atiyah, P. S. - *Sale of Goods*, Pitman, London

6. Alabi, Bolaji - *Business Law in Nigeria*, 2nd ed; 2006

7. Fabunmi, J.O - *Equity and Trusts in Nigeria*, 2nd ed, Ile-Ife, O.A.U press

8. *Omojola's General Principles of Business and Co-operative Law in Nigeria*, Lagos Darkol press and publishers

9. Ogboghro, V.I and Emiaso, Miakpo *Banking Laws and Regulations in Nigeria*, Agbor, Krisbee publications, 2001

- Afolabi, Layi - *Law and practice of Banking, Lagos*, Heinennann Educational Books, Lagos

- Andrew, Hicks - *Nigeria Law of Hire Purchase*, Zaria, Ahmadu Bello University press, 1977

10. Emiola, Akintunde - *Partnership law in Nigeria*

11. Ezojiofor, Okomkwo & Ilegbune - *Nigeria Business Law*, London, sweet and Maxwell

12. Tugbiyele, T.O - *Banking Law and Practice*, 2012

TABLE OF CASES

O

Orthodox School of Peki v Tawlma Abels [1974]GLR 421

P

Partridge v Crittenden [1968] WLR 204
Payne v Cave (1789) 3 Term Rep. 148
Pharmaceutical Society v Boots Cash Chemists Ltd [1953]QB40
Pinnel's case (1602)5 Co Rep 117
Pioneer Construction Products Ltd v Faddool [1974]1 GLR 76

R

Rose and Frank Co. v Crompton Brothers [1925] AC 445 HL

S

Salomon v Salomon [1897] AC 22
Spencer v Harding (1870) L.R.5.C.P. 561

CHAPTER 1

SOURCES OF LAW

1.0 LEARNING OBJECTIVES

Upon completion of this chapter, readers should be able to:

- Define law
- explain the purpose of law
- identify the laws of Nigeria as Nigerian candidates and the laws of Ghana as Ghanaian candidates
- discuss the scope of each of the laws of Nigeria and Ghana
- state and explain the forms of legislation in Nigeria and Ghana
- differentiate the approaches to law interpretation

1.1 INTRODUCTION

Legal issues confront us all the time. Some legal knowledge is therefore important for everyday living. Laws ensure orderliness in society, and every human activity is regulated by law. In order to become functional persons in the community, we need to appreciate the laws that regulate the various activities we are engaged in. The purpose of this chapter is to explain law and its role in society. The chapter is also to identify all the laws of Ghana and Nigeria and where they are derived from. To avoid chaos and ensure orderliness, every human grouping must have rules and regulations that guide behaviour. The development of the law and how the laws are applied discussed in this chapter. Finally, the chapter examines the various ways by which laws are interpreted to give meaning to them.

1.2 LAW AND ITS SOURCES

1.2.1 Meaning of Law

Law basically consists of a body of rules and regulations. These rules and regulations are usually designed to regulate human conduct in the society. All human behaviour is shaped in one way or the other by various laws. Law, once made is meant to be obeyed, but it is discovered that people may not voluntarily want to meet the expectations of the law. As a result, there may be the need to introduce some elements of sanctions against acts of

violation or defiance so as to ensure compliance with the law. (T. O. Dada, *General Principles of Law* 3rd ed. 2008 Lagos, p. 1).

1.3 Sources of Laws

The term "source of law" is used in various senses but we shall restrict ourselves to just three senses: the formal, the literary and the legal sources of law. The formal source means the origin of the whole body of legal system – the source from which the system derives its validity, be it the electorate, a special body, the general will or the will of a dictator. The literary source of law refers to materials containing the rules of law. Statute books, law reports and textbooks are sources of law in this sense. The legal source of law means the fountain of authority of a rule of law, that is, the origin from which a legal rule derives its authority. It is the means through which through which a rule forms part of the body of law. Examples of legal sources are legislation and judicial precedents. It is in this third sense that the term is used both in Ghana and Nigeria.

Article 11 of the Constitutionof the Republic of Ghana, 1992 enumerates the laws of Ghana. **Article 11 (1) States: "**The laws of Ghana shall comprise-(a) this Constitution; (b)enactments made by or under the authority of the Parliament established by this Constitution; (c) any Orders, Rules and Regulations made by any person or authority under a power conferred by this Constitution; (d) the existing law; and (e) the common law."

The sources of Nigerian law are: (a) Nigerian Constitution; (b) Nigerian legislation; (c) the Received English law which consists of: (i) the common law; the doctrines of equity; statutes of general application in force in England on January 1, 1900 and (ii) English law made before October 1, 1960 and extending into Nigeria; (d) Customary law and (e) Judicial precedents.

The application of the sources involves, in varying degrees, interpretation of statutes. Therefore, it could be helpful to study the principles and rules applied by court in interpreting statutes, in order to understand the sources clearly. (Obilade, A. O. *The Nigerian Legal System* (2005) Spectrum Books (Ibadan) pp. 55-56).

1.3.1 **Constitution**

A Constitution is a document containing the rules and regulations including the norms and ethics concerning the ways and manner in which a country is to be governed. The Constitution regulates the activity of the government as well as safeguards and protects the interests of the governed. (T. O. Dada, *General Principles of Law* 3rd ed. 2008 Lagos, p. 466).

According to Wade and Bradley:

> A Constitution is a document having a special legal sanctity, which sets out the framework and the principal functions of the organs of government of state and declares the principles governing the operation of these organs. (A. Toriola Oyewo, *Constitutional Law and Procedure in Nigeria* 2009 Ibadan p. 1.

The Constitution of the Federal Republic of Nigeria 1999 has the following features or characteristics:

(a) Supremacy of the Constitution

The provisions of the Constitution are binding on all authorities and persons throughout Nigeria. Being the basic law of the land, its provisions are supreme over all other laws and any law inconsistent with its provisions shall be null and void. In addition, no part of the country shall be governed except in accordance with the Constitution. See *Obaba v. Governor of Kwara State* (1994) 4 NWLR (Pt. 294); *Olu of Warri v. Kperegbeyi* (1994) 4 NWLR (Pt. 294) p. 416; *Anoh v. Hirnyam* (1997) 2 NWLR (Pt. 486) p. 174, 187.

(b) Written form: The Constitution of the Federal Republic of Nigeria is a written Constitution. It is written not merely in the sense that it is a document, but essentially because it is one in which fundamental principles concerning the organisation of government, the powers of its various agencies and the rights of the subjects are written in one document. (A. Toriola Oyewo, *Constitutional Law and Procedure in Nigeria* 2009 Ibadan p. 4.

(c) Rigidity

The Constitution of Nigeria is rigid. A rigid constitution cannot be changed or amended easily because it requires special process which is not only difficult but is also complicated and the special process is actually laid down in the Constitutions themselves. It should be noted that a rigid constitution is necessarily written, but we should also note that not all written constitutions are rigid, that is, a constitution may be written and still remain flexible,

as in the case of Ghana in her first Republic Constitution and that of New Zealand (A. Toriola Oyewo, *Constitutional Law and Procedure in Nigeria* 2009 Ibadan p. 5).The basic objective of the makers of the Nigerian Constitution being its supremacy and overriding authority over all persons or authorities, it has been made rigid and unalterable by the ordinary law.

(d) Federal System

The Constitution creates a federal system of government. This is true not only in Nigeria but Ghana. In a federal system of governance, the powers of government have been distributed between one level of government and another. Each state is autonomous to the extent of the powers and duties conferred on it by the constitution. Under the 1999 Federal Constitution, Nigeria remains a federation consisting of thirty-six States and the Federal Capital Territory. See sections 2(2) and 3 of the CFRN, 1999. The Federal structure recognises three tiers of government namely: The Federal, State and Local government

In addition to the federal system, Ghana has a unitary system. Unitarismis the national or the central government that is supreme over other levels (tiers) of government that might exist in the state and in this context, other levels of government referred to the Local Authorities. In short, the powers of the Local Authorities have not been derived from the Constitution but as a result of the wishes of the national government.

(e) Separation of powers

The Constitution separates the powers of government into Executive, Legislative and Judicial branches. Separation of powers implies that the various organs of government should function separately and independently of one another. That way, they constitute checks and balances. Under the Constitution of the Federal Republic of Nigeria 1999, the various functions to be performed by each organ of government are clearly stated in such a way and manner that each organ was made to know the extent and limits of its functions and jurisdictions. No arm of government is entitled to infringe on the functions of the other.

(f) Fundamental rights

These are basic rights to which every citizen is entitled within the polity as entrenched in the Constitution of the Federal Republic of Nigeria, 1999. They are often referred to as inalienable rights. Any attempt by any person, group or the government to tamper with the rights may be subject of court action. (T. O. Dada, *General Principles of Law* 3rd ed. 2008 Lagos, p. 481). Fundamental rights are preserved and protected under the Constitution.

The fundamental rights are as follows:

i. rights are right to life;
ii. right to dignity of human person;
iii. right to personal liberty;
iv. right to fair hearing;
v. right to private and family life;
vi. right to freedom of thoughts, conscience and religion;
vii. right to freedom of expression and the press;
viii. right to peaceful assembly and association;
ix. right to freedom of movement;
x. right to freedom from discrimination;
xi. right to acquire immovable property anywhere in Nigeria; and
xii. right to compensation upon compulsory acquisition.

1.3.2 The Common Law

1.3.2.1 Meaning of Common Law

Article 11 (2) of the 1992 Constitution of Ghana defines the common law of Ghana as the rules of law generally referred to as the common law, the rules generally known as the doctrines of equity and the rules of customary law. The general concept of common law therefore has three components, namely; the rules of common law, the principles of equity and customary law. Sometimes common law refers to both the rules of common law and the principles of equity which were received from England and other times only to the rules of common law developed in England.

The term "Common Law" as a part of the Received English Law in Nigeria means the law developed by the old common law courts of England, namely, the King's Bench, the Court of Common Pleas and the Court of Exchequer. There were originally several systems of local customs in England. But under the guise of enforcing the customs of the realm, the common law judges developed a system of law known as the common law of England. Rules of the common law are, therefore, found in judicial decisions. The rules cover criminal law and civil law. But with the exception of the law on contempt of court the common law of crime is not part of Nigerian law. (Obilade, A. O. *The Nigerian Legal System* (2005) Spectrum Books (Ibadan) p. 10).

1.3.2.2 Doctrines of Equity

Equity is the law developed by the old English Court of Chancery as a result of the rigidity of the common law. Whenever the rules of the common law worked hardship or injustice, the litigant sent a petition to the sovereign as the fountain of justice and the Royal Council. The Lord Chancellor granted relief on behalf of the sovereign and the Council as the thought fit. He followed no established principles in dealing with such matters. Accordingly, whenever there was a conflict between a rule of equity and a rule of common law on the same matter, the rule of equity was to prevail. Finally, it should be mentioned that because equity was developed by a court, its rules are found only in judicial decisions, except that there are many equitable rules that have been incorporated into statutes. (Obilade, A. O. *The Nigerian Legal System* (2005) Spectrum Books (Ibadan) pp. 10-11).

Maxims of Equity

Maxims of equity are legal maxims that serve as a set of general principles or rules which are said to govern the way in which equity operates.

The twelve equitable maxims are:

1. Equity will not suffer a wrong without a remedy;
2. Equity follows the law;
3. Where there is equal equity, the law shall prevail;
4. Where the equities are equal, the first in time shall prevail;
5. He who seeks equity must do equity;
6. He who comes into equity must come with clean hands;
7. Delay defeats equity;

8. Equality is equity;
9. Equity looks to the intent rather than the form;
10. Equity looks on that as done which ought to be done;
11. Equity imputes an intention to fulfil an obligation; and,
12. Equity acts *in personam*.

1.3.3 Statutes of General Application

Statutes of general application that were in force in England on the 1st day of January, 1900, form the third group of Received English Law in Nigeria. The courts are entrusted with the responsibility of ascertaining and applying those statutes that meet the laid down criteria for application under the general provision. Statutes of General Application do not apply in States of the Federation of Nigeria that have their local laws or statutes. As a matter of fact, they have never applied in the States of the defunct Western Region. (Asein, J.O. *Introduction to Nigerian Legal System* 2 ed. 2005, (Lagos) pp. 107-108.)

1.3.4 Judicial Precedents

Judicial precedent or case law consists of laws found in judicial decisions. A judicial precedent is the principle of law on which a judicial decision is based. It is the *ratio decidendi* (literally, the reason for the decision). It follows that it is not everything said by a judge in the course of his judgment that constitutes a precedent. Only the pronouncement on law in relation to the material facts before the judge constitutes a precedent. Any other pronouncement on law made in the course of a judgment is an *obiter dictum* (a statement by the way) and it does not form part of the *ratio decidendi.* (Obilade, A. O. *The Nigerian Legal System* (2005) Spectrum Books (Ibadan) pp. 111).

1.3.5 Legislation

Legislation are laws passed by Parliament or the legislative branch of government, that is the State House of Assembly or the National Assembly. They are called Acts at the federal level and Laws at the state level. Legislation may also be exemplified by the Constitution and Subsidiary legislation.

Since the coming into force of the 1992 Constitution in Ghana, many Acts of Parliament have been passed. These are the enactments made by or under the authority of the

Parliament established by the Constitution. Their numbers are growing by the day and it is expected that the dire need for law reforms in many areas will continue to increase their scope.

The situation in Ghana is almost the same with that of Nigeria. However, while both countries have federal constitutions, Ghana has a unitary constitution.

1.3.6 CUSTOMARY LAW

1.3.6.1 The Meaning and development of customary law

Customary law means the rules of law which by custom are applicable to particular communities in Ghana and Nigeria. They are therefore the customs accepted by members of a particular community as binding upon them. In Nigeria, customary law consists of two classes, namely, ethnic customary law and Islamic customary law (Sharia'h). Ethnic customary law in Nigeria is indigenous. Each system of such customary law applies to members of a particular ethnic group. Moslem law is religious law based on the Moslem faith and applicable to members of the faith. In Nigeria, it is not indigenous law; it is received customary law introduced into the country as part of Islam. Ethnic customary law is unwritten. There are several systems of customary law in the country, each ethnic group having its own separate system. Unlike ethnic customary law, Islamic customary law is principally in written form. The sources of Moslem law are the Holy Koran, the practice of the Prophet (the *sunna*), the consensus of scholars, and analogical deductions from the Holy Koran and from the practice of the prophet. (Obilade, A. O. *The Nigerian Legal System* (2005) Spectrum Books (Ibadan) p. 83).

1.3.6.2 The Characteristics of Customary Law

Ethnic customary law has the following characteristics:

(a) It is largely unwritten;

(b) Members of the community or group to which it relates generally consider it as binding. As such, it is often described as "a mirror of accepted usage";

(c) It is established by proof through assessors or authoritative books if it has not been so used by the courts to be judicially noticed. In the Gold Coast case of *Angu v Atta* (1916) PC thus: "As is the case of all customary law, it has to be proved in the first instance by calling witnesses acquainted with the native customs until the particular

customs have, by frequent proof in the Courts, become so notorious that the Courts take judicial notice of them; and

(d) It is largely flexible.

1.3.6.3 Establishing Customary Law

Before a custom becomes law and is recognised by the court, the custom must passed the following validity tests:

(a) The repugnancy test: It must not be repugnant to natural justice, equity (fairness) and good conscience. In *Edet v. Essien* the court held that a rule of customary law which gives the custody of a child fathered by a husband to another, merely because the bride price paid by that other had not been returned, was repugnant to natural justice, equity and good conscience;

(b) It must not be incompatible with any existing law; and

(c) It must not be contrary to public policy.

1.3.7 Treaties

A treaty is a formally concluded and ratified agreement between sovereign states. It is an agreement under international law entered into by actors in international law, namely sovereign states and international organisations. A treaty may also be known as an international agreement, protocol, covenant, convention, pact, or exchange of letters, among other terms.

1.4 SUMMARYAND CONCLUSIONS

The chapter surveyed legal systems, particularly, law and its role in society. It also explains the sources of law.

1.5 REVISION QUESTIONS

Essay Questions

Question 1

What are the sources of the laws of Ghana?

Solution

According to Article 11(1) of the Constitution of the Republic of Ghana, the sources of the laws of Ghana shall comprise basically five components as follows:

(a) the Ghanaian Constitution;

(b) enactments made by or under the authority of Parliament established under the constitution;

(c) any Orders, Rules, and Regulations made by any person or authority under a power conferred by the Ghanaian constitution;

(d) existing laws; and

(e) the Common law.

Question 2

Enumerate the sources of Nigerian Law

Solution

The sources of Nigerian law are as follows:

(a) Nigerian Constitution;

(b) Nigerian Legislation;

(c) English law which consists of

- The Received English law comprising the common law, the doctrines of equity and statute of general application in force in England on Jan. 1, 1900
- English law made before October 1, 1960, extending into Nigeria

(d) Customary law; and

(e) Judicial precedent

Question 3

Define Constitution and differentiate between a rigid and a flexible constitution.

Solution

(a) A Constitution is a document containing the rules and regulations including the norms and ethics concerning the ways and manner in which a country is to be administered.

(b) The difference between a rigid and a flexible constitution is based on the terms of the procedure for their amendments. A rigid constitution cannot be changed or amended easily because it requires special process which is not only difficult but is also complicated and the special process is actually laid down in the Constitutions themselves. An example of a rigid constitution is that of the U.S. and that of the Federal Republic of Nigeria. It should be noted that a rigid constitution is necessarily written, but we should also note that not all written constitutions are rigid, that is, a constitution may be written and still remain flexible, as in the case of Ghana in her first Republic Constitution and that of New Zealand.

On the other hand, a flexible constitution is one that can be easily amended as the

procedure for its amendment is not cumbersome. Example of a flexible constitution is that of Ghana.

Multiple Choice Questions

1. In a country with a written constitution, the doctrine of "supremacy of the constitution" means one of the following:

   (a) The constitution is flexible.

   (b) The constitution contains rules and regulations by which the country is administered.

   (c) The constitution is rigid.

   *****(d) The provisions of the constitution are binding on all authorities and persons throughout the country where the constitution applies

   (e) The appointments of public officers by head of government of the country, requires the approval of Senate.

2. Which of the following is not a characteristic of a constitution?

   (a) Separation of powers

   (b) Supremacy

   (c) Fundamental Human Rights

   (d) Federalism

   *****(e) Informality

3. 'Judicial precedent' is also known as _____

   (a) President of the judiciary in Ghana

   *(b) Case law

   (c) Statute law

   (d) Statute of General Application

(e) Laws of the Federation of Nigeria

Short Answer Questions

1. Basic rights to which every citizen is entitled within a polity is referred to as _____ *****Fundamental rights.

2. The third part of Received English Law in addition to Doctrines of Equity and Statutes of General Application is the _____ ***** Common Law

3. The repugnancy test of validity of customary law requires that for customary law to be valid, it must not be repugnant to natural justice, _____, and _____ *****equity and good conscience

CHAPTER TWO
THE COURT SYSTEM

2.0 LEARNING OBJECTIVES

Upon completion of this chapter, readers should be able to:

- explain the role of courts in the administration of justice
- identify the two broad groups of Courts – Superior and Inferior
- state the hierarchy and composition of the courts
- discuss the scope of the jurisdiction of each of the courts
- distinguish between criminal and civil liabilities
- explain the torts of vicarious liability and negligent misstatements

2.1 ROLE OF COURTS IN THE ADMINISTRATION OF JUSTICE

The administration of justice is usually the function of the judiciary or the judicature comprising the court system and the judicial personnel that administer justice in these courts. The courts are often viewed as the last resort of the citizen. According to Muntaka-Coomassie, JCA in *Zekeri v. Alhassan* [2002] 52 W.R.N. 119 (CA) at 141, "The court plays an important role in the interpretation of the constitution, protects the right of citizens from encroachment by any organ of the government, and generally has the inherent jurisdiction to determine cases between persons and persons and government." (Asein, J.O. *Introduction to Nigerian Legal System* 2 ed. 2005, (Lagos) p. 169.) The courts are major fora for conflict resolution and the interpretation of laws. Courts are institutions designed for settling disputes. They are concerned with the administration of justice. The processes within these courts and the ease or difficulty with which justice may be obtained have a strong impact on business.

2.2 CLASSIFICATION INTO SUPERIOR AND INFERIOR COURTS

Courts may be classified in several ways. But the most important forms of classification are, first, classification into superior courts and inferior courts, and, second, classification into courts of record and courts other than courts of record.

The Courts for a long time have been divided into two main groups namely the superior and inferior/lower courts. The superior courts consist of the Supreme Court, the Court of Appeal and the High Court or Regional Tribunal (in Ghana). The inferior courts are made up of the

Magistrate Courts (Nigeria), Circuit Court, the District Court, the Juvenile Court, the National House of Chiefs, the Regional House of Chiefs and every Traditional Council in respect of the jurisdiction of any such House or Council to adjudicate over any cause or matter affecting chieftaincy (all in Ghana); Customary/Area Courts (Nigeria); and such other lower courts as legislature may by law establish.

2.3 HIERARCHY OF COURTS

2.3.1 Superior Courts

(a) **The Supreme Court**

The Supreme Court is the highest court of the land. It consists of the Chief Justice as the head and not less than nine (not more than 21 in Nigeria – section 230 CFRN, 1999) other Justices of the Supreme Court. In both Ghana and Nigeria, the Supreme Court is duly constituted (quorum wise) for its business by not less than five Justices of the Supreme Court and for the purpose of reviewing its own decision by not less than seven Justices of the Court. The qualification for appointment as a Justice of the Supreme Court is high moral character, proven integrity and not less than fifteen years standing as a qualified legal practitioner.

The Supreme Court in Nigeria has the same status with the Supreme Court of Ghana in terms of composition, powers and requirement for appointment. The Supreme Court in Nigeria is created under S.230 of the 1999 Constitution of the Federal Republic, as amended.

The Supreme Court has original jurisdiction in

i. Any matter between the Federal Government and the States, or between any two or more States, or the National Assembly and the Federation, or State Houses of Assembly and the Federation;

ii. All matters relating to the enforcement or interpretation of the Constitution and all matters arising as to whether an enactment was made in excess of the powers conferred on Parliament or any other authority or person bylaw or under the Constitution.

However, by S.233 of the Constitution, the Supreme Court shall not have original jurisdiction in respect of criminal matters.

The Supreme Court is the final appellate court. In Ghana, the Supreme Court shall have appellate jurisdiction to the exclusion of the Court of Appeal to determine matters relating to the conviction or otherwise of a person for high treason or treason by the High Court. An appeal from a decision of the Judicial Committee of the National House of Chiefs shall lie to the Supreme Court with the leave of that Judicial Committee or the Supreme Court.

The Supreme Court has supervisory jurisdiction over all courts and over any adjudicating authority and may in the exercise of that supervisory jurisdiction, issue orders and directions including orders in the nature of *habeas corpus, certiorari, mandamus,* prohibition and *quo warrant o*f or the purpose of enforcing or securing the enforcement of its supervisory power. The Supreme Court may also review any decision made or given by it.

In Ghana, the Supreme Court has the jurisdiction to entertain a petition challenging the validity of the election of a person as President of Ghana. It also has the jurisdiction for the removal of the President on stated grounds. In both countries, only the Supreme Court can entertain appeals from the Court of Appeal.

(b) The Court of Appeal

The Court of Appeal is the next in hierarchy to the Supreme Court.

In Ghana, it has only appellate jurisdiction and no original jurisdiction; and consists of the Chief Justice and not less than ten Justices of the Court of Appeal. The Chief Justice is however empowered to request other Judges of the Superior Courts of Judicature to sit in the Court of Appeal to hear and determine a particular cause or matter. The Court of Appeal is duly constituted by any three of its Judges and when so constituted the most senior of the Judges presides.

In Nigeria however, the Court of Appeal is presided over by the President of the Court of Appeal. Its jurisdiction is as follows:

i. It is anappellatecourt,byvirtueofS,239of the1999Constitution,and
ii. It has original jurisdiction to hear and determine any question as to whether any

person has been validly elected into the office of the President or Vice President; or whether their terms of office have ceased, or their offices have become vacant. The qualification for appointment to the Court of Appeal is high moral character, proven integrity and not less than twelve years standing as a lawyer.

A single Judge of the Court of Appeal is empowered to sit alone to deal with applications to the Court which do not involve the decision of a cause or matter before the Court of Appeal.

(c) Federal High Court

The Constitution of the Federal Republic of Nigeria provides for the creation of the Federal High Court. The court has the following criminal and civil jurisdiction by virtue of section 250:

i. The revenue of the government of the federation;
ii. The taxation of companies and other persons subject to federal taxation;
iii. Customs, excise, and export duties;
iv. Banking, banks and other financial institutions, including any action between one bank and another;
v. Any action by or against the Central Bank of Nigeria;
vi. Admiralty matters;
vii. Diplomatic, consular and trade representations matters;
viii. Citizenship, naturalisation, extradition, passport and visa matters;
ix. Bankruptcy and insolvency issues;
x. Aviation and safety of aircrafts;
xi. Arms, ammunitions and explosives;
xii. Drugs and poisons;
xiii. Weights and measures;
xiv. Administration, management and control of the Federal government and any of its agencies; and
xv. Treason

(d) The High Court

Section 225 of the Constitution establishes a High Court for the Federal Capital Territory, and section 270 provides for each State of the Federation a High Court. The High Court has unlimited original jurisdiction in both civil and criminal matters, and may exercise appellate

jurisdiction on decisions of inferior courts such as Magistrates Court, district Court, etc.

A High is constituted basically by one judge, and for a legal practitioner to be a judge of the court, he must be at least ten years at the Bar.

In Ghana, the Chief Justice may in writing signed by him request other Justices of the Superior Court of Judicature to sit as High Court Justices.

(d) Sharia Court of Appeal

The Nigerian constitution provided that a State may have a Sharia Court of Appeal if it so desires.

The court exercises appellate and supervisory jurisdiction in civil proceeding touching on Islamic person law coming on appeal from the Area Court.

(e) Customary Court of Appeal

The Nigerian Constitution provides that "there shall be for any State that requires it, a Customary Court of Appeal for that State".

The court has appellate and supervisory jurisdiction over proceedings coming on appeal from customary courts on question of customary law.

(f) National Industrial Court

The Constitution of Nigerian establishes the National Industrial Court. The Court comprises the President and 4 ordinary members. All the members must be persons of good standing and who are well acquainted with employment matters in Nigeria, at least one of them being a person who shall have competent knowledge of economics, industry or trade.

Jurisdiction

The court has original jurisdiction to the exclusion of any other court in civil causes or matters relating to or connected with any labour, employment, trade union, industrial relations and matters arising from workplace, the conditions of service including health, safety, welfare of labour, employee, worker and matters incidental thereto.

(f) Regional Tribunal

This is applicable only in Ghana. Each region in Ghana is expected to have a Regional Tribunal established in it. A Regional Tribunal consists of the Chief Justice, one Chairman and such members who may not be lawyers as shall be designated by the Chief Justice to sit as panel members. A Regional Tribunal shall have concurrent original jurisdiction with the High Court in all criminal matters and shall in particular try the special offences of causing loss, damage or injury to public property; import of explosives and using public office for profit.

In addition, it tries offences arising under Customs, Excise and Preventive Services Management Law, Income Tax Decree, Narcotic Drugs (Control, Enforcement and Sanctions) Law and any other offence involving serious economic fraud and loss of state funds or property. A Regional Tribunal shall have appellate jurisdiction to hear and determine appeals from the judgment or order of a Circuit Court or District Court in any criminal trial.

2.3.2 Inferior Courts

The establishment, jurisdiction and composition of inferior courts are generally at the discretion of the individual States that so desire them. For example, each of the 36 states in Nigeria and the Federal Capital Territory, Abuja has its own hierarchy of inferior courts made up of different grades as the appropriate state legislature may deem necessary to create.

(a) The Circuit Court

In Ghana, the civil jurisdiction of a Circuit Court consists of original jurisdiction in civil matters in personal actions arising under contractor tortwhere the amount involved is not more than100million cedis. It includes cases or matters involving the ownership, possession and occupation or title to land. The Circuit Court may grant injunctions or orders in any action to stay waste or alienation or for the detention or preservation of any property which is the subject matter of that action or restrain breaches of contractor the commission of any tort. There is jurisdiction for the Circuit Court in claims for relief by way of interpleader for land or property attached by order of a Circuit Court.

There is no equivalent of Circuit Court in Nigeria.

(b) The District / Magistrate Courts

In Ghana, the District Court has jurisdiction in virtually all the areas identified for the Circuit Courts with the exception that the value must not exceed 50million cedis. In Nigeria, there are also District Courts.

In Nigeria, Magistrates Courts are the equivalent of the District Court in Ghana; they are not stated in the Constitution, but are the creation of various States and governed by the various States Magistrates Courts ‟Laws. Magistrates Courts, like the High Courts, have jurisdiction in civil and criminal matters in most southern states. They also administer both common law and equity, with powers to grant virtually all legal and equitable remedies, up to certain prescribed limits specified by the law setting them up in each instance.

In addition, both the Magistrate and District Courts act as Juvenile Court by hearing and determining matters affecting juveniles and also function as family tribunal.

(c) Other Lower Courts

In Ghana, these include the National House of Chiefs, the Regional Houses of Chiefs and every Traditional Council in respect of the jurisdiction of any such House or Council to adjudicate over any cause or matter affecting chieftaincy and such other lower courts as Parliament may by law establish. In Nigeria, the lower courts include Customary Courts, Sharia Court, Area Courts in the Northern States. The Customary Court is presided over by a President, while the Alkali presides over Area Court.

2.3.3 Special Courts

(a) Juvenile Courts

Juvenile courts are special courts established for the trial of young offenders and for the welfare of the young. The courts exist in different states by virtue of their respective but similar *Children and Young Persons Laws*. The courts are in fact Magistrates' or District courts specially designated and constituted for the purpose of trying juveniles. A child is defined as any person under the age of 14 years, while a young person is any person who gas attained the age of 14 years but is less than 17 years (in the southern states) or 18 years (in the northern states). Unless a juvenile is

charged jointly with a non-juvenile, the court generally sits either in a different building or room from that in which it ordinarily sits, or on different days or at different times from those at which it ordinary sittings are held. This is intended to protect the interest of the juvenile and guarantee the requisite special treatment.

(b) Coroners Court

A coroner is a person empowered to hold inquest on the body of a deceased person who appears to have died a violent or an unnatural death, or on the body of a deceased person belonging to any other class specified by the appropriate Coroners Law. There is provision in the law of each State of the federation for coroners' inquests. Every Magistrate is a coroner. In addition, other fit persons may be appointed coroners. A coroner's inquest must normally be held where it appears that a deceased person has died a violent or unnatural death, where the deceased has died a sudden death of which the cause is unknown, where the deceased has died while confined in a lunatic asylum or in any place or circumstances which in the coroner's opinion makes the holding of an inquest necessary or desirable, and where a prisoner or any person in police custody has died.

(c) Military Courts

There are military courts in the country. Normally, only members of the Armed Forces – the Nigerian Army, the Nigerian Navy and the Nigerian Air Force – are subject to the jurisdiction of the military courts. The Armed Forces Act provides for various offences, the punishment thereof and the mode of trial for erring members of the armed forces. One of the special courts for the trial of persons for more serious offences in the armed forces is the court martial. The system of courts martial was introduced along with military law in Nigeria. The composition, jurisdiction and powers of court martials in the three armed forces are provided for jointly in the Armed Forces Act.

A court martial is duly constituted if it consists of the President of the court martial, not less than two other officers and a waiting member.

(d) **Tribunals**

Tribunals are an integral part of the entire adjudicatory system. Created by states, they serve to complement the traditional court system by exercising judicial or quasi-judicial functions. They are often referred to as administrative tribunals although in truth, many of them are better described as judicial since they handle more than mere administrative matters. Statutory or special tribunals may be a more generic description. There is a subtle difference between judicial tribunals and mere administrative inquiries. The latter are fact finding bodies whose assignment may either precede a policy decision by government of be subsequent to a local dispute or disturbance, for instance, a public inquiry to ascertain the immediate and remote causes of a religious disturbance in a particular locality. Unlike a tribunal, such administrative inquiry does not usually extend to the determination of guilt or the imposition of sanctions.

2.4 DISTINCTION BETWEEN CRIMINAL AND CIVIL LIABILITY

The distinctions between criminal law and civil law are as follows:

(a) Criminal law creates offences, that is, acts and omissions that are punishable. Civil law, on the other hand, protects the rights and interests of citizens in their interpersonal relationships;

(b) The aim of criminal law is to punish offenders by way of imprisonment, fine or both. Conversely, civil law aims at compensating an injured or aggrieved person;

(c) The standard of proof in criminal law is proof beyond reasonable doubt, but the standard of proof in civil law is preponderance of evidence or balance of probabilities;

(d) In criminal cases, there is no limitation of time to prosecute the offender, but in civil cases, the limitation time to institute an action ranges from six to twelve years, otherwise, the case is statute-barred;

(e) Prosecution in criminal matters in by the State or government, whereas it is a decision for the aggrieved person to sue the defendant in a civil case;

(f) In criminal law, once the case against the accused person is proved, the court pronounces him guilty and convicts him. Conversely, in civil cases, once a plaintiff proves his case against the defendant, the court pronounces the defendant liable and

makes him to pay damages/compensation to the plaintiff or subjects him to equitable orders such as injunction or specific performance; and

(g) The parties to a criminal case are the State and the Accused, but the parties to a civil case are the Plaintiff and the Defendant.

2.5 PROFESSIONAL ETHICS

2.5.1 Meaning of Tort

A tort is a civil wrong. It is an offence without criminal consequences. It is a breach of personal duties fixed by law and. Such duty is owed to persons generally and when it is breached, an action lies in damages, for its remedy with the aim of deterring future breaches.

While it is possible for an action to constitute both a crime and a tort, the remedies available from the legal proceedings on both sides are quite different. A person accused of a crime is prosecuted by the state with the aim of punishing the offender with a conviction and sentence including possible rehabilitation, a civil action seeks to restore to the aggrieved person some compensation for the wrong done him.

A wrong cannot usually be redressed in tort unless it amounts to a legal injury and the aggrieved person can prove that he has suffered some wrong. There are a few torts where actual damage need not be proved and all that an aggrieved person need prove is an infringement of his legal right.

2.5.2 Vicarious Liability

This is liability which falls upon an individual without his fault. It is liability imposed upon a person by the actions of another person who is under his control. A good example is a Master/Servant relationship. There are some tests used as criteria in determining whether the relationship is a master/servant relationship where vicarious liability applies or a Master and independent contractor. These include

(i) Whether the employer is a master who shows the employee how to do his work which would distinguish the servant from an independent worker who is trained in his trade or profession and works without supervision.

(ii) Where one person pays the other wages and salaries.

(iii) Where one person has power to hire and fire another.

(iv) Whether the employee is an integral part of the organisation or not.

(v) Whether the employee was acting within the scope of his employment.

The master is not liable for the tort of his servant unless the tort is committed in the course or the scope of the servant's employment. The act must be lawful and incidental to the servant's employment. The master may be vicariously liable if the act is either expressly or impliedly authorised by the master or if the servant performs a duty which is authorised by the master in a wrongful and unauthorised manner.

There are cases where a master gives the servant instructions and the servant fails to comply with the instructions. Failure of the servant to comply with his master's instructions may sometimes exonerate the master from liability. Thus, in *Twine v. Bean's Express Limited*, a master forbade a servant from giving lifts to passengers in its vehicles. The court held that the master was not liable for the death of a passenger carried by the driver against his master's instructions.

Where a servant however perpetrates fraud in the course of the master's business, the master could be held liable whether or not the fraud was for his benefit.

2.5.3 Liability for negligent mis-statements

The courts have always imposed a duty of care on individuals to avoid making careless statements which result in harm to other persons, yet it has drawn a distinction between a careless statement that causes physical injury to a person and that which causes financial and economic loss. In cases of physical injury, it has long been settled that a duty of care exists. In cases of statements causing financial and economic loss, the position had hitherto been that unless there is a fiduciary or contractual obligation involved, no liability would accrue.

It was in ***Hedley Byrne & Co. Ltd.* v *Heller & Partners Ltd.* (1963) 3 W.L.R. 101** that the English House of Lords laid down an authoritative rule creating a duty of care regarding negligent mis-statements even where no fiduciary or contractual relationship exists. In the said case, the plaintiffs who were advertising agents wanted to know whether they could give credit to a company and thereafter sought banker's reference through their bankers. On

two occasions, the defendants gave favourable references for the company who shortly after went into liquidation. The court held that except there is an express and effective disclaimer of liability, a negligent mis-statement without fraud may give rise to an action for damages for financial loss suffered by a person who acted on the mis-statements.

2.6 SUMMARYAND CONCLUSIONS

Courts are important institutions within the legal environment. A general study of the courts, in terms of the hierarchy and their general jurisdictions, is required for a proper appreciation of their role. Introduction to the basic judicial processes by which an action may be initiated and the various forms of enforcement will further expose the candidate to other aspects of the legal system. Attention was also been given to the critical distinction between criminal and civil liability. The chapter also introduced candidates to torts, which in no small measure will contribute to their understanding of the law.

2.7 REVISION QUESTIONS

Essay Questions

Question 1

Describe the jurisdiction of the District court (Ghana) and the Magistrate court (Nigeria).

Solution

In Ghana, the District Court has jurisdiction in virtually all the areas identified for the Circuit Courts with the exception that the value must not exceed 50million *cedis*.

In Nigeria, the Magistrate Courts are the equivalent of the District Court in Ghana; they are not stated in the Constitution, but are the creation of various states and governed by the various States Magistrate Courts "Laws. Magistrate Courts, like the High Courts, have jurisdiction in civil and criminal matters in most southern states. They also administer both common law and equity, with powers to grant virtually all legal and equitable remedies, up to certain prescribed limits specified by the law setting them up in each instance.

In addition, both the Magistrate and District Courts act as Juvenile Court by hearing and determining matters affecting juveniles and also function as family tribunal.

Question 2

What is the jurisdiction of the Regional Tribunal?

Solution

This is applicable only in Ghana. Each region in Ghana is expected to have a Regional Tribunal established in it. A Regional Tribunal consists of the Chief Justice, one Chairman and such members who may not be lawyers as shall be designated by the Chief Justice to sit as panel members. A Regional Tribunal shall have concurrent original jurisdiction with the High Court in all criminal matters and shall in particular try the special offences of causing loss, damage or injury to public property; import of explosives and using public office for profit. In addition, it tries offences arising under Customs, Excise and Preventive Services Management Law, Income Tax Decree, Narcotic Drugs (Control, Enforcement and Sanctions) Law and any other offence involving serious economic fraud and loss of state funds or property. A Regional Tribunal shall have appellate jurisdiction to hear and determine appeals from the judgment or order of a Circuit Court or District Court in any criminal trial.

Question 3

What is negligent misstatement and what are the effects it may have on a person who rely on it?

Solution

Negligent misstatement is a careless or reckless or inadvertent false statement in circumstances where care should have been taken. A negligent misstatement may have either of the following effects;

- it may cause physical damage to the person who relies on it; or
- it may cause purely financial (or economic) loss to such person.

MULTIPLE CHOICE QUESTIONS

1. The highest court in Nigeria or Ghana is

   A. Court of Appeal.
   B. Federal High Court.
   C. National Industrial Court.
   *****D. The Supreme Court.
   E. Customary Court of Appeal.

2. The Supreme Court in Nigeria or Ghana is headed by

   A. The Deputy Chairman National Judicial Council.

*B. The Chief Justice of Nigeria.
C. The President Court of Appeal (PCA)
D. The Minister of Justice and Attorney General of the Federation.
E. The President of the Nigerian Bar Association.

3. Civil law is associated with one of the following

A. Punishment to the litigants.
*B. Award of damages to the claimants.
C. Imprisonment.
D. Death sentence
E. Arraignment.

4. The Customary Court of Appeal has appellate and Supervisory Jurisdiction over proceedings coming on appeal from……..

A. Magistrate Court
*B. Customary Court
C. Industrial Court
D. National Judicial Council (NJC)
E. Rent Tribunal

5. A master is not liable for the tort of his servant EXCEPT

*A. The tort is committed in the course of the servant's employment
B. The master knows the servant overtime
C. The servant is loyal to the master
D. The tort is unavoidable
E. The parties have an agreement

SHORT ANSWER QUESTIONS

1. The Justice of the Supreme Court of Nigeria or Ghana including the Chief Justice are to be appointed by the President on the recommendation of_____

2. The system of law that is indigenous to Nigeria or Ghana is_____*****Customary Law

3. A person is not qualified for appointment as a Justice of the Court of Appeal except he has been qualified to practice as a legal practitioner in Nigeria or Ghana for at least ……years. *****12 years

CHAPTER THREE
LAW OF CONTRACT

3.0 LEARNING OBJECTIVES

Upon completion of this chapter, readers should be able to:

- explain the legal meaning of a contract.
- identify the essential elements of contract
- distinguish offer from invitation to treat.
- explain acceptance
- discuss the scope of consideration.
- demonstrate an understanding of the intention to create legal relations.
- explain the concept of capacity
- discuss the scope of the forms and contents of a contract

3.1 INTRODUCTION

The law of contract is at the centre of most human activities. All of us, within a day, make several contracts without sometimes even realizing that. When you engage somebody to weed around your house for pay, you have established a contractual relationship. When you enter a bus going to a particular place along a particular route and you pay the fare, you have made a contract with the party running the service. When you put an item on sale at a particular price and another person agrees to buy it at that rate you have both entered into a contract. Since contracts regulate a lot of our activities it isnecessary to have an appreciation of it. This will make it easy for parties to know the obligations they have imposed on themselves. Parties will then be in no doubt about what their liabilities are on failure to fulfil their part of the contract and what will be their remedies if the other party is in breach.

3.2 DEFINITION AND ELEMENTS OF CONTRACT

3.2.1 Definition of contract

Whenever two or more people undertake to engage in an activity for which either of them may resort to the law for it to been forced if a party fails to perform, a contract is said to have been formed. A contract has therefore been simply referred to as a promise or set of promises which the law will enforce.

3.2.2 The essential elements of contract

For a valid contract to be in place there must be some essential elements. These are agreement, consideration, intention to create legal relations, form, capacity and legality. There is the requirement that there must be two or more parties to the contract who have agreed to it. Such agreement must have been entered into freely. The parties must also give promises which are supported by consideration. It means each party must give or do something for the other. The intention to create legal relations means that each party is ready to have his or her promise enforced by the law. Some contracts must also meet a certain form; they will only be valid when they are in writing. Again only persons who are legally competent or have capacity can enter into a contract. Finally the agreement must not be for an illegal purpose and also not contrary to public policy.

3.3 OFFER AND ACCEPTANCE

3.3.1 Offer

Whenever a person proposes terms to another person and shows willingness that if that person accepts those terms he is ready to contract with him, then those terms constitute an offer. For example if Kofi tells Adenuga that the will sell his house to him at a certain price, that constitutes an offer which will bind him should Adenuga agree to buy the house on the same terms. An offer is thus a definite promise made by one party with the intention that it shall be binding on him once it is accepted by the party to whom it is addressed. Generally an offer may be made expressly by words, but may also be implied from the conduct of the person making the offer (the offeror). An offer may be directed to an individual, a group of persons

or the world at large. It means an offer has to be communicated to the

Person it is intended for (the offeree).It is said that if one is ignorant of an offer he cannot accept it. There are a number of ways by which an offer may be terminated. These include non-acceptance of the offeror withdrawing the offer before it is accepted which amounts to a revocation and the offeree not accepting the terms of the offer which is a rejection. Where an offer is made and it is to be accepted at a particular time, failure to do so terminate the offer by lapse of times. The death of the offeror or offeree before acceptance terminates the offer. Even death after acceptance, where personal service is involved terminates the contract.

3.3.2 Invitation to treat

This precedes an offer. It is thus a preliminary communication which indicates a willingness to enter into negotiations. It is an invitation to the person to whom it is directed (the recipient) to make an offer. It is therefore described as an offer to negotiate or an offer to receive an offer. An invitation to treat cannot be accepted to bring a contract into being. Circumstances which amount to invitation to treat include advertisements, display of goods for sale, auctions and tenders. When there is an advertisement it is only intended to be an invitation to treat i.e.to negotiate. In **Partridge v Crittenden [1968](WLR) 204** where an advertisement was put in the periodical 'Case and Aviary Birds' which stated' Bramble finch cocks, bramble finch hens, 25shillings each, a reader wrote in for a hen which Partridge sent to him.Theappellantwaschargedwithunlawfullyofferingforsaleawildlivebird contrary to the Protection of Birds Act. His conviction was quashed by the Divisional Court on the ground that he had made no offer for sale, merely an invitation to treat.

Goods on display with price tickets attached in a self services to re exemplify an invitation to treat. Any potential customer who enters the shop is invited to make an offer. The picking of the goods by the customer and the presentation to the cashier constitute the offer. The cashier then has an option to either accept the offeror reject it. If he accepts the offer a contract comes into being but if he rejects it no contractual obligation would be imposed. In **Pharmaceutical Society v Boots Cash Chemists**

Ltd [1953] (QB 40), the defendants, Boots, operated a self-

Service supermarket with a Pharmacist on hand, to supervise the sale of specified drugs which could only be lawfully sold under him. Two customers selected such drugs from the shelves and put them in a wire basket provided by the defendants. The Pharmaceutical Society brought an action alleging an infringement of the Act. The Court of Appeal held that the display was merely an invitation to treat. The customer, by presenting the goods at the cash desk, made an offer to buy, which the cashier, under the pharmacists supervision could accept or reject.

When an auctioneer makes a request forbids it amounts to an invitation to treat. The bids that are made in response to the request constitute offers. It is when a bid is accepted that a contract is made. In **Payne v Cave (1789) 3Term Rep.148, KB**, Cave withdrew his bid at an auction before the fall of the auctioneer's hammer. It was held that the bid was the offer, the auctioneer only made an invitation to bid. As Cave's offer had been withdrawn before the auctioneer had accepted it, there was no contract.

Invitations for tender are also invitations to treat. The tender is the offer and it may be accepted or rejected. In **Spencer v Harding (1870) L.R.5.C.P. 561**, the defendants sent out a circular inviting tenders for the purchase of certain stock-in- trade. The plaintiff's tender proved to be the highest submitted, but the defendants refused to sell to them. Judgment was given to the defendants because a tender itself is an offer, which the party who invited it, may or may not accept. The defendants could only have been bound if they had promised to sell to the highest bidder.

3.3.3 Acceptance

It is the expression of as sent to the terms of the offer made by the person to whom the offer was made (the offeree). In the example where John offered his house to Adenuga at a certain price, the agreement by Adenuga to buy the house on those terms constituted acceptance. An offer is not accepted by mere silence on the part of the offeree. Acceptance has to be communicated to the offeror. It is not deemed

to be communicated until it is actually brought to the notice of the offeror. When acceptance is by a return promise its performance leads to a unilateral contract. In instances where the offeror authorizes acceptance by post, postage of a

properly addressed letter of acceptance indicates proper communication of acceptance. The offeree may revoke his acceptance at any time before it is communicated to the offeror. Since an acceptance cannot be made in ignorance of an offer, where two parties each simultaneously make identical offers to each other they amount to cross offer which do not conclude a contract.

It is important at this stage to make a distinction between acceptance and a counter offer. As indicated earlier, on acceptance connotes assent to the terms of theo ffer. In a counter offer, the offeree's reply indicates a willingness to be bound on terms different from those contained in the offer. In **Hyde v Wrench (1840) 3 Bea v 334**, Wrench offered to sell his farm to Hyde for £1000. Hyde offered to buy it for £950. Wrench wrote to reject the counter-offer. Hyde then purported to accept Wrench's original offer of £1000 and sued the farm. The Court held that the counter offer of £950 destroyed the original offer which could not then be revived by Hyde. A counter-offer thus puts an end to the previous offer and is infact a new offer which the original offeror (now the offeree) may accept to bring a contract into being or reject and terminate the negotiations.

3.4 CONSIDERATION

3.4.1 Definition

Consideration is something of value in the eye of the law. It is also seen as the price, which need not be monetary, paid by each party for the promise of the other. In **Curie v Misa (1875) LR10Ex153**, it was stated that "…valuable consideration in the sense of the law, may consist either in some right, interest, profit or some forbearance, detriment, lossor responsibility given, suffered or undertaken by the other".

It is also important to know that a contract is generally not binding unless it is supported by consideration, but a contract under seal binds the parties without the requirement of consideration. In other words, a contract under seal may dispense with

consideration. A contract under seal exists where the parties sign, seal, and deliver the contract document. Such a document is known as a deed, or specialty contracts, or a formal contract. The law takes these kinds of contracts very seriously. In the olden days, red wax and signets were used to seal documents, but nowadays little round redstick or seals are used.

The contracts required by law to be under seal include conveyances, gratuitous grants of property, leases for more than three years, power of attorney and transfer of Nigerian ships or shares in them.

It must be noted that unless the law requires a contract to be under seal, it may be in writing or oral form (by parol). In both cases, it is mandatory to support it with consideration.

The Nigerian Law requires hat, for certain contracts to be enforceable, they must be in writing. These include bills of exchange, promissory notes, hire purchase agreements, contracts for the transfer of shares in a public company, marine insurance contracts, bills of sale, and acknowledgments of debts which have been barred by the Limitation Laws.

Contracts for the sale or other disposition of land or of interests in land and contracts of guarantee must also be in writing, supported by consideration. Such written evidence must acknowledge the existence of the contract, contain all the material terms, and be signed by at least the person to be held liable on it.

3.4.2 Types of Consideration

Consideration may be executory or executed. Under executory consideration, valuable consideration may be provided by mutual promises which will give rise to a bilateral contract. It is a promise to do or forbear from doing some act in the future. The whole transaction remains to be performed in the future.

Executed consideration is an act by one party in exchange for a promise made or an act done by the other. A promise for an act gives rise to a unilateral contract as in **Carlill vs. Carbolic Smoke Ball Company [1893] 1 QB 256**. An advertisement by the company promised to pay one hundred pounds to anyone who caught influenza after using the

carbolic smokeball as directed. MrsCarlill purchased the ball and used it as directed but contracted influenza. She therefore sued for the one hundred pounds. The Court of Appeal decided that the Company had made an offer to the whole world which would ripen into a contract with anybody who bought and used the ball in the specified way.

3.4.3 General rules

Past consideration is no consideration. It is a promise which follows a completed act. Such a promise is independent of the act or service performed. It is therefore not enforceable. **In Re McArdle [1951] Ch 669**, on the death of McArdle his widow under his will obtained a bungalow for her lifetime and their children were to become owners after that. Monty McArdle and his wife, Majorie who lived there, made extensive repairs to the bungalow after which all the children wrote to Majorie promising to pay her 'in consideration of your carrying out certain alterations and improvements'. The money was not paid and the widow died. The Court of Appeal held that, as all the work had been finished before the promise was made, the work was past consideration and so there was no obligation to pay. A promise to perform an existing obligation is not good consideration but a promise to do something different is good consideration. Thus if a creditor agrees to take a smaller sum of money in full satisfaction, its payment is not a satisfaction of an agreement to pay a larger sum. **In Pinnel's Case (1602) 5 Co Rep 117** it was stated that 'payment of a lesser sum on the day it is due in satisfaction of a greater cannot be any satisfaction for the whole. The payment and acceptance before the day in satisfaction of the whole would be good satisfaction'.

The doctrine of promissory estoppels adds a new dimension to consideration. It applies only to a promise made between parties who are already in a contractual relationship. Where one of the parties makes a promise which is intended to be binding and is relied on and acted upon, the promissory would be prevented from enforcinghisoriginalrightssinceitwillamounttohisgoingbackonhispromise. In **Hughes v Metropolitan Railway Co. (1877) 2App. Cas. 439 H.L**., the appellant landlord gave the respondents six months in which to repair some houses as they were expected to do under their lease. They later started negotiations to purchase the freehold and based on that did nothing about the repairs. The negotiations, however, failed two months after

commencement and the appellant when the original six months were up brought an action to eject the respondents for their failure to repair. The House of Lord sheld that the appellant must fail since the respondents had relied on the negotiations as being in effect, a promise that the appellant landlord would not enforce his demands while the negotiations continued. The six months notice must run from the failure of the negotiations. Consideration must move from the promisee. Its import is that the promise must provide the consideration. It is based on the principle that a stranger to a contract cannot sue on it. This is the doctrine of privity of contract. In **Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd [1915] AC 847, HL**, the appellants sold some of their tyres to Dew & Co. Under a contract whereby they undertook not to sell the tyres below Dunlop 'shit prices and agreed, as Dunlop's agent to obtain a similar undertaking from other traders. Dew & Co sold some of the tyres to the respondents who agreed not to sell below Dunlop's list prices. They broke this contract and Dunlop sued for its breach. They failed. Dunlop could not enforce the contract because no consideration moved from them. The appellants were not a party to the contract between Dew & Co and the respondents and only a person who is a party to a contract can sue on it.

3.4.4 Modifications

This rule is however subject to several exceptions. Under the common law, exceptions cover the trust device, land, agency, assignment and insurance matters. Some statutory provisions have reinforced these exceptions. In Ghana, the ContractsAct,1960 (Act25) has provisions that modify the scope of consideration in contract.

The Contracts Act, 1960 (Act25) S.5 shows that a provision can be made in a contract for the benefit of a third party. **In Kessiev Charmant [1973] 2GLR194** it was argued that the law of Ghana no longer requires proof of consideration in any contract. The judge however ruled that the Contracts Act has not changed the common law position but that cases for the absence of consideration must be brought within any one of sections 8, 9 and 10oftheContractsAct,1960 (Act25). Section 8 (1) indicates that a promise to keep an offer open for acceptance for a specified time is not invalid as a contract due to the absence of consideration. Under section 8(2) absence of

consideration shall not render a promise to waive the payment of a debt or part of it or the performance of some legal obligation invalid as a contract. As indicated in section 9, the performance of an act or the promise to perform an act may be consideration for another promise not withstanding that the performance of that act may been joined by some legal duty. The Act shows in section 10 that "consideration need not move from the promisee" which is a counter to the general premise of privity. Thus no promise shall be invalid as a contract by reason only that consideration was supplied by someone other than the promisee.

3.5 INTENTION TO CREATE LEGAL RELATIONS

Parties intend to create legal rights and duties out of their agreement and thus to invoke the assistance of the ordinary courts on breach of the contract. The law determines whether or not there is an intention to create legal relations through the aid of presumptions. In a given set of circumstances, the law presumes a certain intent. In a domestic or social setting or act of friendship there is are but table presumption that the parties do not intend to create legal relations. In a commercial setting there is are but table presumption that the parties intend to create legal relations. Both presumptions are rebuttable, that is the assumption stands until the contrary can be proved.

3.5.1 Domestic and Social Agreements

Domestic arrangements are made between husband and wife, parent and child and among relatives. Within this class the rule is that there is are but table presumption that the parties do not intend to create legal relations. Those arrangements or many of them do not result in contracts at all because the parties did not intend that they should be attended by legal consequences. In **Jones v Padavatton [1969] 1WLR 328**, Mrs Padavatton was working as a secretary in the United States. Her mother, Mrs Jones, offered to provide her daughter's up keep if she would return to England and read for the Bar. Her, daughter accepted. A little later, Mrs.Jones offered in addition to provide a house for her daughter, some of the rooms to be left to tenants. Mrs Padavatton accepted this, too, but later she became so unco- operative that two

years later, Mrs Jones claimed possession of the house. Her daughter resisted this on the ground that her mother was contractually bound to this arrangement. It was held that Mrs Jones was entitled to possession. The original agreement was motivated by the mother's desire for her daughter to succeed at the Bar. They were originally on good terms and they had no intention to enter a “stiff contractual operation.”

The presumption that domestic arrangements are not intended to be legally binding is displaced where the spouses are not living together inamity at the time of the agreement. It does not apply where the spouses are about to separate or are separated or are contemplating a divorce or are divorced. Whether there is contractual intention or not may be ascertained from the words used in the agreement or the surrounding circumstances of the case. **In Merritt v Merritt [1970] 1 WLR 1121**, CA the defendant left his wife to live with another woman. The matrimonial home which was in their joint names was subject to an outstanding mortgage. Mr Merritt, at his wife's insistence, signed a document which stated: 'In consideration of the fact that you (the wife) will pay all charges in connection with the house…until such time as the mortgage repayment has been completed...I will agree to transfer the property into your sole ownership.' Mrs Merritt paid off the mortgage, but her husband refused to transfer the house to her. The Court of Appeal held that the usual presumption as to agreements between spouses living happily together did not apply when they were unhappy and separated, or about to separate and the written document was therefore a binding contract which Mr, Merritt must comply with.

Social agreements are those between parties who are not relatives. They are largely acts of friendship. Many social arrangements do not amount to contracts because they are not intended to be legally binding.

3.5.2 Commercial Agreements

In commercial transactions, there is a strong presumption that the parties intend to create legal relations. The parties intend legal consequences to follow. In **Edwards v Skyways Ltd [1964] 1WLR 349** the defendants declared the plaintiff, one of their

pilots, to be redundant, and ultimately agreed to pay all pilots who were made redundant an exgratia sum. The defendants then refused to make any such payments (mainly because of the large number of redundancies). The plaintiff brought an action for breach of contract. The Court held that in business relations, the presumption is that the parties intend to create legal relations by their agreements.

The strong presumption may be displaced either expressly or impliedly. To oust expressly the presumption, clear words must be used. The burden of rebutting contractual intention in commercial transactions is an extremely difficult one and is not lightly taken. In **Rose and FrankCo. v Crompton Brothers [1925] AC 445 HL**, the appellants, dealers in carbon paper and the respondents signed a document by which the appellants, were appointed sole agents of the respondents to sell their products in the United States. The document concluded 'This arrangement is not entered into, nor is this memorandum written, as a formal or legal agreement… but…is only a definite expression and record of the purpose and intention of the…parties concerned, to which they each honourably pledge themselves…' The respondents later ended the agreement, and the appellants sued for its enforcement. It was held that the usual presumption that commercial agreements constitute enforceable contracts was rebutted by the clear words used, although individuals "orders given and accepted were enforceable contracts.

3.6 CAPACITY TO ENTER INTO CONTRACT

Capacity is the ability to incur legal rights and obligations. The law presumes that everyone is competent to bind himself to any contract he chooses to make provided that it is not illegal or void on public policy grounds. A few classes of people are under a disability. These are infants or minors, mentally disordered persons or lunatics, drunken persons and corporations or companies.

As a general rule contracts made by a minor with an adult are binding on the adult and not the minor. There is a protective principle in a minor's contractual capacity. Valid contracts for minors are divisible into contracts for necessaries and beneficial contracts of service or contracts for employment.

Necessaries are articles, which are reasonably necessary to the minor in terms of his status in life. A minor is only liable when the goods are suitable to his condition in life, necessary to his requirements at the time of delivery. Goods will not be necessaries if them in or was already well supplied with such goods.

A minor must pay a reasonable price for necessities supplied to him. In **Nash v Inman [1908] 2KB1**, the defendant, an undergraduate at Cambridge, bought eleven fancy waist coats from the plaintiff tailor. At the time he was adequately provided with clothes. It was held that the waist coats were not necessaries and the defendant was not liable to pay for any of them.

Not every contract for the benefit of a minor is binding on him. However, contracts for his education, service or apprenticeship or for enabling him to earn his living are binding unless they are detrimental to the interests of the minor. In **Doylev White City Stadium Ltd [1935] 1 KB 110 CA**, the plaintiff was an infant professional boxer. He entered into a contract with the defendants to box at the White City. The contract was made subject to the Rules of the British Boxing Board of Control, one of which provided that if a boxer were disqualified he would lose his purse. Doyle was disqualified for hitting below the belt, and the purse was with held. The plaintiff sued for it. The Court of Appeal held that, taken as a whole, his contract was advantageous to him, a sit allowed him to get a licence to Box which allowed him to become proficient in his chosen career. The contract was therefore binding and his action failed.

In **De Francesco v Barnum [1890] 45 Ch.D. 430,** an infant and her mother executed a deed by which the infant was to be apprenticed to the plaintiff or seven years in order to learn stage dancing. They further agreed that the infant would not marry; would not accept any professional engagements during the apprenticeship without the plaintiff's consent, and would get no pay unless the plaintiff actually employed her (which he was not bound to do). After a fair trial, the plaintiff could end the contract if the infant was unsuitable. The infant broke the agreement by accepting a contract to dance for the defendant. The

plaintiff sued. He failed. The deed was unreasonably harsh and could not been forced against the infant or her mother.

Certain contracts are voidable in that they are binding on a minor unless he repudiates them during his minority or within a reasonable time after he comes of age. They cannot been forced against him during his minority but after he attains full age, he will be bound, unless he repudiates them within reasonable time. Such contracts include leases, partnerships and shareholding in a company.

Companies or corporations which act beyond their powers are said to have acted 'ultravires'. Ultravires contracts are void with the result that no legal action would be permitted on them. Ratification may sometimes give relief. In **Ashbury Railway Carriage Co v Riche (1875) LR 7 HL 653** the objects of the appellant company, which had been established by statute, were "to make and sell, or lend, or hire, railway carriages and wagons, and all kinds of railway plant, fittings, machinery and rolling stock; to carry on the business of mechanical engineers and general contractors; to purchase, lease and sell mines, minerals, land and buildings; to purchase and sell as merchants, timber, coal, metals and other materials; and to buy and sell any such materials on commission, or as agents. "The company purchased a concession for building a railway in Belgium and contracted the respondent, Riche, that he should construct the railway track. The appellants subsequently repudiated the contract on the ground that it was ultravires. The respondent sued. The House of Lords held, that the contract for the construction of a railway was indeed ultravires and void as it was not a type envisaged in the objects of the company. In Ghana, however, an *ultravires* act, conveyance or transfer is not necessarily invalid simply because it is ultravires. The Code shows that no act of a company and no conveyance or transfer of property o or by a company shall be invalid by reason of the fact that such act, conveyance or transfer was done ultravires. This modification reduces the harsh effects of the doctrine on third parties. This means that a third party is not without a remedy. However, if the third party had knowledge of the absence of power or the irregularity of it then the company shall not incur any liability.

3.7 PRIVITY OF CONTRACT

The principle of privity of contract is that a person who is not a party to a contract cannot bring action on it. Except expressly stated in the contract, a person who is not a party to a contract cannot enjoy the benefit or suffer the burdens of the contract, because it is a relationship that exists between parties to the contract.

There are however exemptions to this rule, and they are as follows:

a. Insurance contract

Under third party motor vehicle insurance contract, a third party can sue the insurance company for loss or injury sustained in vehicle accident caused by the insured;

b. Trust

A trustee that holds property in trust for another can sue in respect of the trust property;

c. Inheritance under will

Although a legatee or beneficiary under a will is not a party to the will, he may sue on the legacy or bequeath;

d. Agency

Under the law of agency, a principal may sue or be sued in respect of transactions entered into on his behalf by his agent;

e. Negotiable Instruments

In a situation where a person stands as a guarantor to another in deals with negotiable instruments, the guarantor can be sued in substitution of the person involved in the contract;

f. Chose in action

Under legal assignment, the assignee of chose in action on a debt or financial liability may sue the original debtor; and

g. Restrictive Covenants

This occurs in land law and relates to restriction as to the purpose the land is to be used for as agreed between the original owner and the first purchaser. This will be binding on the subsequent purchaser.

3.8 SUMMARY AND CONCLUSION

Since contracts constitute an integral part of human existence, it is worthwhile to have a fair understanding of them. It was therefore necessary to introduce candidates to the essential elements of contract as well as capacity to enter into contract and privity of contract so as to let them have a full appreciation of them. The issues of enforceability of contracts and the obligations imposed on parties have to be well appreciated to avoid liabilities.

CHAPTER 4

LAW OF CONTRACTS - II

4.0 LEARNING OBJECTIVE

On completion of this chapter, readers should be able to:

- understand the form and contents of a contract
- identify the vitiating elements of a contract
- state and explain the remedies for breach of a contract
- understand the consequences of illegality in contracts
- explain the various methods by which a contract may be discharged

4.1 INTRODUCTION

In law, parties are to make their contracts. The Courts will not make the contracts but will only interpret them as discernible from the terms the parties have put in their contracts. The terms of a contract maybe express or implied. They are express when the parties state clearly what they want in their contract. Otherwise, they are implied when, though not expressly stated, they are read into the contract to give business efficacy to it. For instance, certain terms are implied into a sale of goods contract.

4.1.1 Conditions and Warranties

The actual terms of a contract may be conditions or warranties. Of the two terms, conditions are more fundamental than warranties. In other words, a very important term in a contract is called a "condition". A term of lesser importance is called a "warranty". For a breach of condition, the buyer can cancel or repudiate the contract. For a breach of warranty, he cannot, but may sue for damages.

A Condition is an essential term which goes to the root of the contract, the breach of which entitles the affected party to repudiate the contract. It is thus an undertaking that a certain state of affairs exists or will exist or a promise that a certain thing shall or shall not be done, the fulfilment of which undertaking is very fundamental to the contract.

A Warranty, on the other hand, is an agreement on goods, which are the subject of a contract, but is not the main purpose of the contract. Its breach, gives rise to a claim for damages only, but not a right to reject the goods or treat the contract as repudiated.

4.2 Exemption and Limiting Terms

These are terms inserted into a contract by parties to limit or exclude the obligations that the undertaking would have attracted. They are mostly found in the so-called standard form contracts, i.e. contracts where terms are contained in printed forms and are used for all contracts of the same kind. Examples are contracts for laundry and dry cleaning services, hotel accommodation, journeys by land, rail, air or sea. They exempt the supplier or provider from his contractual liability, and their purpose is to deprive the consumer of compensation ordinarily due to him for loss or injury arising from the contract. The courts do not like exemption clauses because they go against the spirit and intent of a contract. They enforce them only if the party for whose benefit it was made can satisfy them about the following:

(1) **That it was a term of the Contract:** There are two ways by which an exclusion clause can enter a contract and become a term of the contract, and these are:

(a) By Signature: The general rule is that a man is bound by what he signs whether or not he has read it, and if he has read it whether or not he understands it, except when the injured party successful plead *non est factum* (it is not my act) **L'estrange v Graucob (1934)**

(b) By Notice: The need here arises, where the clause is not on a document to be signed, but in some other form such as a poster or sign on a wall or a ticket. Such notice given must be "effective" notice. For example, in the ticket case, was the ticket a contractual document or just a ticket? Was it folded? In addition, it must be given pre-contractually, i.e. before the contract is formed, and the other party must have had the opportunity to see and recognise it as a term of the contract. (See **Chapelton v Barry U.D.C. 2 (1940) Olley v Marlborough Court (1949); Thornton v Shoe Lane Parking (1971).**

It is also important to note that a notice of a clause is effectively given if both parties are in the same trade and such clauses are widely known and in common use in that trade; and

(2) **That it covered the damage complained of by the plaintiff**. (**Baldry v Marshall (1925)).**

4.3 Illegal Contracts

A contract that is illegal is absolutely void. It may be illegal because it is forbidden by law, or because the Courts will not enforce it because of the overriding consideration of public policy. Thus, some contracts are prohibited by statute, some are prohibited at common law. These are properly called "illegal contracts". Some contracts are not completely prohibited, but they are denied full validity, either by statute or at common law. These, we call "Void Contracts".

(1) Illegal Contracts are of two broad types, namely:

(a) **Contracts prohibited by statute:** By the old Exchange Control Act of 1962 the buying and selling of gold by unauthorised persons was prohibited.

(b) **Contracts prohibited at common law:** These set of contracts are basically prohibited under the concept called "Public policy". Although no new categories are created there are however seven settled categories:

(i) Contracts to commit a crime, tort or fraud: In **Beresford v Royal Insurance Co**. Ltd., 'R' shot himself a few minutes before his life insurance policy expired. The court held that it is against public policy to allow a man benefit his estate by committing a crime. Hence, the sum assured was not recoverable. Likewise in **Allen Vs Rescous (1676)** the Plaintiff paid the Defendant 20shillings to assault and evict another person, which the defendant failed to do. The Court held that the Plaintiff could not recover his money.

Contracts involving maintenance or champerty fall into this class i.e.

contracts where by a person promises to support another improperly in bringing an action at law;

(ii) Contracts prejudicial to the safety of the country (e.g. trading with the enemy in wartime);

(iii) Contracts prejudicial to the Country's foreign relations, e.g. to trade with South Africa during the apartheid regime was contrary to Nigeria's foreign policy;

(iv) Contracts prejudicial to the administration of justice: A Contract not to prosecute, or to compromise criminal proceedings is illegal unless the proceedings could have been initiated in civil law for torts.

In addition, a contract where an accused person indemnifies a person who has got bail for him is illegal.

(v) Contracts prejudicial to honesty in public life, (e.g. trying to buy a merit award or offer a bribe for it). In **Parkinson v College of Ambulance (1925)**, Parkins on gave the secretary of a charitable organization $3000 on the understanding that he would secure a knight hood for him. The title was not forthcoming and he sought to recover his money. It was held that the agreement was illegal, and Parkins on could not recover.

(vi) Contracts designed to defraud the revenue: In **Miller Vs Karlinski (1945),** an agreement between employer and employees to hide part of their salary as expenses in order to avoid paying tax was held illegal, thus the employee could not reclaim salary arrears from the employer.

(vii) Contracts to promote sexual immorality: In **Alake v Oderinlo (1975)**, the defendant, a woman who was married under customary law, promised to marry the plaintiff and received ₦100 from him to enable her divorce her husband. It was held that since the agreement tended to break up the existing marriage and encourage immorality it was void.

Likewise, in **Pearce v Brooks (1866),** a prostitute made a form of hire purchase contract for a carriage to assist her in her trade. The seller knew what she wanted it for. The court held that he could not enforce the contract against her.

4.3.1 Consequences of illegality

The general rule is that no action could be successfully broughtbyapartytoanillegalcontract,i.e.ex*turpicausanonorituractio.* Thus:

(a) No action will lie, for the recovery of the money paid or property transferred under an illegal contract as in Parkinson's case above.

(b) No action will lie for a breach of an illegal contract – **Pearce v Brooks, Beresford v Royal Insurance Co. Ltd, Allen v Rescous;**

(c) Where part of an illegal contract would have been lawful by itself, the court will not sever the good from the bad; and

(d) Any contract which is collateral to the illegal contract is also tainted with illegality and is treated as being illegal even though it would have been lawful by itself.

There are, however, exceptions to this general rule of non-recovery: A party to an illegal contract may sue to recover money paid or property transferred as follows:

(a) Where the parties are not *in pari delicto*, i.e.are equally at fault:
Where a party is innocent of the illegality as may be where he does not know the purpose for which the other party is entering the contract, as where the owner of the coach in the **Pearce v Brooks** case could have recovered where he did not know the purpose for which he was hired by the defendant;

(b) Where a substantial part of the illegal act has not been performed, a truly repentant party may recover; and

(c) Where it is possible to sue without relying on the contract itself; i.e. suing in tort for conversion.

4.3.2 Void Contracts

A contract, which is void, does not give rise to rights and obligations, but the full consequences of illegality are not present.

(1) **Contracts declared void by statute**: A good example is wagering contracts. The attitude of the legislature to these contracts can be seen in the Gaming Act 1845 Section 18 "All contracts or agreements, whether by parol or in writing, by way of gaming or wagering shall be null and void; and no suit shall be brought or maintained in any court of law and equity for recovering any sum of money or valuable thing alleged to be won upon any wager or which shall have been deposited in the hands of any person to bid the event to which any wager shall have been made". i.e. that the loser cannot be made to pay and a stakeholder cannot be forced to handover money left with him. The Act also prevents agents recovering money or commission paid out or earned by them on behalf of a principal.

(2) **Contracts void at common law**:

(a) **Contracts in restraint of trade:** The common law by tradition declares all contracts in restraint of trade as being contrary to public policy. This tradition protects the right to trade freely with goods, money and labour. Any restriction or limitation is prima facie void. It is a contract in restraint of trade. However, if the restrictions are regarded as being reasonable then it may be upheld in spite of being void.

Thus, obviously, if the restraint is unreasonable, the contract or atleast the offending part of it remains void. In assessing reasonableness there, the courts study the equality of the bargaining power between the parties, the extent of the interest being restricted and the extent of possible injury to the public interest.

These restraint clauses appear in 3 main kinds of contract:

(i) Contract between the seller of a business and the buyer where the buyer will

seek to prevent the seller from setting up a business again, nearby, that will compete with the business he bought from him (or else he might be able to woo back all his old customers). **Nordenfelt v Maxim Nordenfelt**

(ii) Contracts between employers and their employees in order to prevent their servants working for competitors and taking trade secrets to them, or setting up business to compete with his employer and otherwise acting to the employer's disadvantage generally. The issues of the duration of the restraint and the area to be affected in terms of distance are relevant and material, but more important is the nature of work the employee concerned was doing. For example if he was a chemist who knows the secret formula responsible for the large sales of the company's beverage, the court may uphold a restraint which prevents him from taking such to a rival company, however if he was an accounting technician the courts maybe unwilling to uphold such restraint except where it would be prejudicial to the financial wellbeing of the company as during the times of mergers, amalgamations e.t.c See **Pearce v. Cullen (1912) 26** where the Courts held a covenant restraining a grocery store counter-hand from working for competing firms within a radius of 2 miles of any of the employer's shops for a year as an unreasonable restraint.

(iii) Soul ties - Agarage, a public house, or a food canteen will agree that, in return for financial advantages of one kind or another, it will sell only the product of one petrol company, or brewery, or soft drinks or beverage company “tied” to it.

These agreements are in restraint of trade and are, *prima facie*, void. However, the Courts are willing to allow them, provided they are reasonable. **Esso Petroleum Vs. Harper's Garage (1968).** The Defendant owned 2 garages. In return for lower prices for petroleum supplied and also for mortgage facilities, they were both tied to the company. One tie was for 4years 5months, the other was for 21years.The former was held to be reasonable and the latter unreasonable.

(b) Contracts to oust the jurisdiction of the courts: If an agreement seeks to prevent access to court, the agreement is void to that extent. If however, access

is not prevented but only made subject to an arbitration procedure first, this will usually be permitted, but the courts will not allow themselves to be excluded altogether.

(c) Contracts prejudicial to the sanctity of marriage: These include agreements restraining the liberty to marry, procuring a marriage for a fee, encouraging immorality or infidelity in an existing marriage, and promising marriage after a future separation. They are all against public policy and therefore void.

(d) Contracts impeding parental duties: A contract by which a party deprives himself of the custody of his child is void. However a court order to the same effect is binding.

4.3.3 Consequences of void contract

Generally, only the part that offends against the various rules is affected. This is severed from the rest of the contract. What remains is then enforced.

4.4 VITIATING ELEMENTS OF CONTRACT

The parties to a contract must have agreed to the terms of their contract. It must indeed be very clear that they have agreed freely, without some form of compulsion or some other defect which may make the apparently valid contract defective. Where there is such an element which may spoil or make such contract defective, such an element is known as a vitiating element. The vitiating elements we shall consider are mistake, misrepresentation, duress, undue influence and illegality. The nature of the vitiating element determines the kind of defect the contract may have, the contract may not be enforceable at all, it may be enforceable in certain ways or manners, or there may be no contract at all. It is thus apposite to explain the nature of the defects first to better appreciate the effect of the vitiating elements before considering the elements themselves.

Unenforceable Contracts: These are contracts where the contract truly exists but neither party can sue the other. Examples abound from our earlier consideration of types of contracts which must be in writing or be evidenced in writing. Such contracts, if entered into contrary to the requirements of the law are binding between the parties, but neither

party can sue for a breach in the absence of written evidence. Goods or money which are passed under such a contract are validly transferred and cannot be reclaimed, but the Courts will not give effect to the contract if one of the parties fail to abide with the terms.

Voidable Contracts:

These types of contracts are generally recognisable in law and even given effect which is however subject to certain conditions. The law allows one of the parties to such contracts to withdraw from them if he wants to. These contracts include contracts entered into by minors, or other contractual persons affected by lack of capacity such as illiterates, drunks or insane persons. Contracts vitiated by misrepresentation, undue influence and duress also come under these kind of contracts.

Void Contracts:

These are contracts which have no legal effect. The parties have only attempted to contract as the Courts will not give effect to their agreements at all. The effect of mistake as avitiating element is to make a contract void, i.e. destitute of all legal rights. The distinction between void and void able contracts is better appreciated when third party rights are considered. Where a contract of a sale of goods is void, the buyer does not become owner of the goods, so he cannot sell them to anyone else, the original owner can recover them from whoever he sells them to. Whereas if it was voidable, for example as one affected by duress, it is still a valid contract until the aggrieved party decides to cancel it, thus if the buyer resells it before the aggrieved party takes steps to cancel the contract, the third party who buys from him will have a good title where he is not aware of his seller's (i.e. the original buyer) defective title.

4.4.1 Mistake: The general rule is that mistake does not affect a contract. If a man makes a mistake as to the value or the type of thing she buys, it is his ill luck, as there is no remedy for him unless the other party has given him a wrong impression. Likewise, mistake of law never affects the validity of a contract since ignorance of the law never avails a party, otherwise every party will plead that he was mistaken as to the law. However, in some circumstances, mistake of fact may affect a contract, and if sufficiently serious may spoil the contact, render it void. Let us now examine such instances where a mistake of fact may

vitiate a contract.

Mistake could also be common mistake i.e. when the mistake is made by both parties. Here the parties are labouring under the same mistake. They are simply both wrong. An example of this arises when both of them make a mistake as to the existence of the subject matter, which is considered hereunder. The subject matter has been destroyed last night in a distant warehouse unknown to both parties.

A mutual mistake could also arise as when the parties misunderstand each other and thus work at cross purposes. Ben may have three BMW cars of the same model, Danie may want to buy the blue model while Ben intends to sell the white one, this is an example of a mutual mistake and it is also further explained in relation to the subject matter later on.

A unilateral mistake occurs where only one party is mistaken, for example as to the identity of the other party he is contracting with or as to the nature of document she is signing.

(a) **Mistake as to the nature of the instrument i.e. as to signed documents**.

This mistake rarely avails a party, for any party to successfully raise it, however he must show that:

(i) the document signed was radically different from the one he thought he signed.

(ii) the signing had not been done negligently (carelessly)

(iii) had the true contents of the documents been made known to him he would not have signed.

See **Foster v. McKinnon (1869) 6** Here the Defendant, an old man with failing eyesight was induced to sign a document which he thought was a guarantee, whereas he was indorsing a bill of exchange for 3000 pounds for which he would be personally liable. He was able to succeed because he satisfied the Court as to the three elements above particularly that he was not negligent.

This plea is also known as *Non est factum* (i.e. It is not my deed.)

(b) Mistake by one party as to the identity of the other party. It is avitiating fact or if

identity is a material factor. In case of ordinary shopping, it is not avitiating factor, as you intend to contract with the person in front of you. The test is, did the mistaken party intend to contract with one person and with him only? It makes no difference that the contracting parties met face to face. The pertinent question is did the mistaken party intend to contract with the person in front of him irrespective of his identity? If this is so, he cannot successfully plead mistake. However if he wants to contract with A, and he believes that B who he is contracting with is A, he may be able to successfully plead mistake. See **Lewis v. Averay (1972)7**. Herein the Plaintiffs old and parted with his car to a person (C) who pretended to be Richard Greene, the actor. C paid by a cheque which was not honoured, and then sold the car to Averay. The Court held that the contract between Lewis and C was not vitiated by mistake as Lewis could not prove that he wanted only to sell to Richard Greene and to nobody else. **See Cundy Vs. Lindsay (1878) 8 Phillips vs Brooks (1919) 9.**

(c) Mistake as to Subject Matter.

(i) i.e. mistake as to identity. **Raffless v. Wichelhaus (1864) 10**A cargo of cotton was described as being on a ship, the SS Peerless from Bombay. Another ship also sailing from Bombay had the same name with 3 months interval between them. The buyer assumed the seller would put the cargo on the first ship, where as the seller intended to put it on the second. The Court held that the contract was vitiated by the mutual mistake of the parties.; or

(ii) as to existence **Corturier v. Hastie(1856)11** This contract concerned a cargo of wheat which unknown to seller and buyer had been sold by the captain of the ship even before they contracted. The Court held that the contract was vitiated by the common mistake of both parties.

Equity's attitude to mistake:

Where a mistake is operative at common law, the contract is void, otherwise it binds both parties and this can be punitive on the parties. Equity, however, assists where common law is unjust. It could admit that the contract is not void but valid (because the mistake is in operative) but take it apart, in order to be fair to both parties and

this is called Rescission on Terms".

Also, equity could alter a written contract made pursuant to an oral one where it does not represent the intention of the parties and it is a mistake of expression only since at common law parties were bound by what they had written. Equity allows the document to be altered to represent what was agreed. i.e."Rectification".

4.4.2 **Misrepresentation**: This is a false statement of fact (not law) made by one party which induces the other (innocent) party into making a contract. The Statement must have been intended to be acted up on and must have actually induced the other party to make the contract. For it to avail a party he must show that:

(a) the statement is a statement of fact as opposed to an expression of an opinion e.g. "doctors have recommended that this product is good" as opposed to "this is the best caviar in the World". The first is a statement of fact which may induce a party to buy a particular drug which if it turns out was not what it is stated to do may amount to a misrepresentation. The second statement is only an expression of opinion by the Seller as to his wares and does not amount to a representation where it turns out to be false. It is important to note that there are instances where even silence could amount to a misrepresentation as where a party has a positive duty to speak and nothing is said as may arise in the following instances:

(i) Contracts uberrimaefidei (or of the utmost good faith i.e. contracts where one party alone has full knowledge of the material facts and the law imposes on him a duty to disclose)

(ii) Fiduciary Relationships e.g. Solicitor and Client, Doctor and Patient etc.

(iii) Changed circumstances etc.

(iv) Where a past truth amounts to a falsehood.

(c) The statement must also induce the contract i.e. one party must have been taken seriously by the other party so that here lied on it and not upon his own judgment. It is immaterial whether the means of verifying a statement was made available to

him. **Redgrave v. Hurd (1881)**.

Remedies available to an innocent party: This depends on the type of misrepresentation which could be either innocent or fraudulent. Fraudulent Misrepresentation: arises where any statement is made fraudulently i.e. deliberately or without belief in its truth or being careless whether it is true, or false.

Remedies

(i) The innocent party can sue for damages in tort for deceit.

(ii) He can affirm the contract and go on with it.

(iii) He can disaffirm the contract and refuse further performance and under here he may either:

(a) take no legal action and plead fraud as a defence and sue for damages.

(b) bring an action for rescission of the contract.

Innocent Misrepresentation: any statement made with an honest belief in its truth is innocent.

Remedies:

(i) He may affirm the contract and treat it as binding. (ii) He may claim for rescission in the Courts.

It is important to note however that there is no general right to damages. It should also be noted that rescission means taking the contract apart and it is usually accompanied by an order for restitution i.e. each party will have his property returned but since it is an equitable right it may be lost as where an innocent third party has acquired title to goods under the contracts, as the effect of misrepresentation is that the contract is only voidable. Also where restitution is impossible the right to sue for rescission is lost.

4.4.3 Duress: is pressure brought to bear upon one of the contracting parties to induce him to enter into the contract. It consists in the actual or threatened personal violence, imprisonment or restraint of personal liberty either to him, wife, child or parent. It has been

held in decided cases that threat to goods are not enough

See **Cummings v. Ince (1887) .13** It should also be noted that the effect of misrepresentation is to render the contract voidable and not void.

4.4.4 Undue Influence: Undue Influence is the use of any influence by which the exercise of freewill and deliberate judgment is excluded i.e. it relies upon the wrongful use of influence that one party may have over the other although influence by itself is not unlawful. It may arise anyhow but the substance is that the parties to a contract are not on equal footing. It is for the party benefiting from the contract to show that the other party contracted freely using his own freewill or had other independent advice. The actual relations may show that one has exerted overbearing influence on the other e.g. Parent & Child, Lawyer & Client, Doctor & Patient, Spiritual Advisor & Devotee, Accountant & Client, Trustee & Beneficiary and other fiduciary relationships. The effect is to allow the weaker party rescind the contract promptly after the withdrawal of the overbearing influence; otherwise it will be termed as consent. It also renders a contract voidable and not void. See **Williams Vs. Bayley (1866) 14** A father gave security for his son's debts because of the lender's threat to prosecute his son. The Courts held this contract to be vitiated by undue influence.

4.5 TERMINATION OR DISCHARGE OF CONTRACT

A contract is discharged when the obligation created by it ceases to be binding on the promisor who is no longer under a duty to perform his side of it. The implication of discharge is that the parties are released and freed from their mutual obligations. This may arise in the following ways:-

- Express agreement
- Performance
- Breach
- Frustration, or
- Death

(1) Since contracts come into being by agreements, they can also come to an end where the parties bound by it, agree to end the contract. For the discharge to be operative, this agreement to terminate must be supported by consideration. Where neither party

has performed there is a full release as consideration is easily furnished by their agreement to be released from their obligations under the contract. This is known as waiver. But where a party has already performed his obligation under the contract, the other party has to provide some fresh consideration. This kind of discharge is known as accord and satisfaction, i.e. apart from the agreement of the parties (accord), the party to be released from his original obligation is providing some consideration for the other party (satisfaction). An agreement to terminate a contract may also take the form of replacing the old contract with a new one and which may be made between the same parties with fresh terms or made by one of the old parties with a third party, and this is known as **novation.**

On the other hand, the parties, by the contract itself, may have provided for the circumstances under which the contract will be discharged (i.e. come to an end). This could be on the occurrence of a certain event, or on the expiration of a specified period of time mutually agreed, or at the option of one or other of the parties, or on the fulfilment of a condition precedent.

(2) **Performance**: Where the parties have done that which they contracted to do the contract becomes discharged by performance. However, if performance is to be an absolute discharge of a contract nothing must remain to be done there under by either party i.e. they must have fulfilled both their promises. **Cutter v. Powell (1795)**

(3) **Breach**: A breach occurs where one party fails to do that which he has promised under the contract, either wholly or partly. Such failure destroys the contract. Truly speaking, a breach does not discharge a contract but the injured party may rescind the contract and sue for damages. It also relieves him from further obligations under the contract. Every breach of a contract entitles the injured party to claim damages. It is not every breach however, that entitles the injured party to rescind the contract and say he is no longer going on with it. He can only treat the contract as discharged where the breach is total as where it affects a vital part of the contract that makes the contract incapable of performance. It is also total where it is discernible that the party

guilty of the breach has no intention to go on with the contract. It is important to also note that where the party guilty of the breach has informed the injured party before he is to perform his own part of the contract that he does not so intend, such will be known as anticipatory breach. Here the injured party can either sue on the breach immediately or wait until the due date, but if he must wait he must continue to perform his own side of the contract.

Generally, a party to a contract may commit a breach of contract in the following ways:

(a) by repudiating his liability under the contract before the time for performance is due(i.e. anticipatory breach)

(b) by failing to fulfil his obligations when purporting to perform the contract.

(c) by his self incapacitating act of performance of the contract

Remedies for Breach of Contract

(a) A right of action for damages in respect of the breach of the contractor some term of it. An innocent party has the right to get damages for the losses occasioned him from the breach.

(b) A right of action on *quantummeruit* i.e. a right to sue in respect of what he had already done before the breach occurred. This remedy avails a party when one party abandons or refuses to perform the contract, when work has been done and accepted under a void contract and when there is no provision for remuneration. Thus in the event of a breach of contract, the injured party may not claim damages, but claim payment for that he has done under the contract. His right to payment is not based on the original contract, but on an implied promise by the other party arising from the acceptance of an executed consideration.

(c) A decree of specific performance compelling the other party to carry out his obligations. This is an equity based remedy. Thus, it is based on the discretion of the Court and cannot be insisted upon by the party. A party is not entitled to specific performance

- where damages would be adequate;

- in contracts for personal services;
- where it cannot be awarded to the other party (e.g. a minor)
- where the court cannot supervise the execution of the contract, e.g. a building contract ;or
- in contracts to lend money.

(d) An injunction restraining him from violating them. An injunction like specific performance is also a discretionary remedy and is not available to a party where damages would be adequate compensation. It is generally given to prevent a party from acting in breach of a contract.

(e) Rescission. The effect of this remedy is to put the parties where they were before they entered the contract.

(f) Rectification. This equitable remedy allows the parties to rectify their documents in order to give effect to the true intent of their contract. To obtain rectification it must however be proved that:

- there was complete agreement between the parties on all important terms;
- the agreement continued unchanged until it was reduced into writing; and
- the writing did not express what the parties had already agreed.

(g) Action to account for profits from breach. In exceptional circumstances, the court may allow an injured party to get an account of the profits which may have accrued from that breach to the party in breach. **A-Gv. Blake (2001).** The equitable remedy is available and allowed only where remedies of damages, specific performance and injunction would be inadequate remedy.

(h) Action for price or some other sum. This is appropriate where property has passed, and the breach consists of a party`s failure to pay the agreed price, remuneration or debt due under the contract.

(4) Death: Ordinarily, the death of a party to a contract will not operate to vitiate the contract. However, a contract may be discharged upon the death of one of the parties where the contract is for personal service, and he dies before the personal service could be performed.

(5) Frustration: Occurs when a contract has become incapable of performance.

It generally, does not discharge a contract and the defaulting party is liable

In damages, inspite of the fact that his inability to perform is due to circumstances beyond his control.

However it will discharge a contract:-

(a) Where the impossibility is caused by a change in the law or supervening circumstance. For example, where A agrees to import an item for sale to B and Government bans the importation of such an item, such contract of sale becomes discharged by frustration.

(b) Where the accidental destruction of a specific thing upon which the contract depends renders performance impossible **Taylor v. Caldwell (1863) 28.** A, hired a music hall from B, and an accidental fire destroyed the hall. It was held that the contract was discharged.

(c) Where the contract depends upon the happening of a specific event which does not occur. **Krell v. Henry (1903) 29.** The Defendant hired a room to view a coronation procession that will pass along there, but the procession was however cancelled. It was decided by the Court that the contract had become discharged upon the procession being called off.

(d) Where, through vital change of circumstances, the contract as a commercial venture is frustrated-war. For example a carrier who has agreed to haul goods through a shorter route may be availed by frustration where such route is destroyed and he has to go through a longer and costlier route such that the contract is no longer commercially viable.

(e) The death of either party to a personal contract terminates it generally. Likewise bankruptcy or illness which goes to the root of the contract will also terminate the contract.

The effect of frustration on a contract is to automatically bring the contract to an end and render it void, thus all sums paid before the discharge by frustration in respect of the contract could be recovered while those sums not yet paid need not be paid. In the old Western Region of Nigeria, this general rule was rested in its Contracts Law, but with two exceptions, which now forms part of the laws of the States who are heirs to the laws made

by the Region in 1958/59 (i.e. the states of Ogun, Oyo, Osun, Ekiti, Ondo, Edo and Delta) An example of such applicable provisions are found in the Contracts Law of Ogun State, Cap.25, VolI, Laws of Ogun State 1978. The whole of Part 3 containing Sections 6 - 12 deal with frustrated contracts.

The relevant Sections show the following:

1. All sums paid to any party in pursuance of the contract before it is discharged are in principle, recoverable. Sums payable but yet to be paid, cease to be payable.
2. Where one party has, by reason of anything done by the other party to the contract, obtained a valuable benefit (other than the payment of money) that other party may recover from him such sum as the Court considers just.

   Payments under contracts of insurance are to be discountenanced when considering sums due for retention or recovery in the instances mentioned above.

   The Law also allows severance of a wholly performed contract from frustratedcontractsifseveranceispossibleandthelawshallonlyapplyto the part affected by frustration.

   It should be noted however that the Law does not apply to the following:

   a. Contracts containing a provision to meet the case of frustration.
   b. Contracts for the sale of specific goods, which have perished before the risk has passed to the buyer, and any contract of sale where the contract is frustrated because of the fact that the goods have perished.
3. Where the frustrating event was brought about by his own fault or deliberate conduct, that party cannot rely on the doctrine of frustration. **Maritime National Fish Ltd v. Ocean Trawlers Ltd. (1935)**

4.6 SUMMARY & CONCLUSIONS

This chapter dealt extensively with the law of contract, terms of a contract, exemption clauses, illegal contracts, void and voidable contracts, especially contracts in restraint of trade. Furthermore, it discusses the vitiating elements of contract, pointing out the effects of mistake, misrepresentation, duress, and undue influence on a contract.

Lastly, it contains an explanation of termination or discharge of contract, showing the different means of discharging a contract, the remedies for the breach of contract and

frustration of contract.

Remember that a contract is basically on agreement between the parties, which is binding on them and would been forced by the Courts, as long as it is not illegal or void, or vitiated by elements.

4.7 REVISION QUESTIONS

MULTIPLE CHOICE QUESTIONS

1. The following are essential elements of a valid contract EXCEPT
A. Consideration
B. Acceptance
C. Authority *
D. Offer
E. Intention to create legal relations

2. Which one of the following is NOT an invitation to treat?
A. Tenders
B. Auctions Negotiation
C. Display of goods for sale
D. Price Bargain *
E. Advertisement

3. Where an offeror dies before acceptance,
A. The offeree files new documents.
B. The offeror's family takes over
C. The offer continues undisturbed
D. The offer lapses *
E. The offeree sues for damages

4. When a promise is made after the performance of an act that prompted the promise, it is called
A. Existing consideration
B. Past consideration *
C. Acceptable consideration
D. Sufficient consideration
E. Considered consideration

5. A contract may be discharged in any of the following ways EXCEPT :
A. Agreement
B. Breach
C. By a third party *

D. By lapse of time
E. By performance

SHORT-ANSWER QUESTIONS

1. A new condition introduced by the offeree in the acceptance of an offer is called _____*****_**counter-offer.**_

2. Articles which are reasonably necessary to a minor having regard to his status in life are called _____*****_**nessesaries.**_

3. Under the law of contract, when an obligation is to be performed in the future, the consideration is said to be _____***** ***executory.***

4. What defence could be pleaded by a person who is induced by fraud to sign a Document ? ***** ***Non est factum (not my deed)***

5. The principle of law which states that a person who is not a party to a contract cannot bring action on it is called_____ *****_**Privity of Contract**_

ESSAY QUESTIONS

1. Under the law of contract, mistake is a factor which may invalidate a contract.

You are required to state and explain briefly 2 (two) other types of mistakes under the law of Contract. **(6 Marks)**

Answer

Two types of mistake under the law of contract are as follows:

a. Common mistake.

Common mistake occurs where both parties to a contract are mistaken on the same subject-matter of the contract. Example is if, unknown to both parties, the subject-matter of the contract is non-existent. This mistake makes the contract void absolutely. **(3 Marks)**

b. Mutual Mistake:

In mutual mistake, the parties are mistaken about different things. For example, each Party to the contract may be mistaken as to the other party's intention or undertaken, but neither party knows he has been misunderstood. This mistake makes the contract

voidable. **(3 Marks)**

2. Abba met car dealer to buy a brand new Honda Accord saloon car. He paid the price and arranged that it should be delivered to his house. However, when the car was delivered, he discovered that the engine was not new. Abba intends sue the car dealer.

Required:

Advise Abba, stating the legal issues involved. **(6 Marks)**

Answer

The legal issue involved in this case relates to condition in a contract, which is fundamental and goes to the root of a contract.

Abba negotiated and paid for a brand new car, but was supplied a car with used engine, which is a breach of the condition of the contract by the dealer. A breach of condition entitles the wronged party to repudiate the contract and bring it to an end.

Thus Abba is advised to repudiate the contract, return the car to the dealer and collect money he paid for the car.

3. Under the law of contract, a minor is not bound by any contract made during his minority.

   You are required to explain briefly contract for necessaries as an exception to this rule. **(6 Marks)**

Answer

Necessaries are articles which are reasonably necessary to the minor in terms of his status in life. A minor is only liable when the goods are suitable to his condition in life, necessary to his requirements at the time of delivery. Goodswill not be necessaries if the minor was already well supplied with such goods. A minor must pay a reasonable price for necessaries supplied to him.

However contracts for his education, service or apprenticeship or for enabling him to earn his living are binding unless they are detrimental to the interests of the minor.

CHAPTER FIVE
AGENCY

5.0 LEARNING OBJECTIVES

At the end of this chapter, readers should be able to:

- explain what is meant by agency
- identify types of agency
- explain consent as basis of agency and distinguish between express and implied consent.
- explain generally what is meant by agency due to operation of law
- discuss agency of necessity and agency of cohabitation
- describe ratification
- describe the rights of the principal and that of the agent
- distinguish between the obligations of the principal and those of the agent
- discuss the modes of termination of agency

5.1 INTRODUCTION

Anytime we ask somebody to do something for us, which will create a legal relationship between us and third parties, we create an agency relationship. We are the principals and the persons we ask to act on our behalf are the agents. The various ways through which agency relationship could be created as well as the rights and obligations of agency and ways of terminating agency are treated in this chapter

5.2 DEFINITION, CREATION AND TYPES

5.2.1 Definition of Agency

Agency is a relationship arising out of the use of one person by another for the performance of certain tasks on his behalf. It is a situation where one person called the agent has an authority or capacity to create legal relations between a person called the principal and third parties. The relationship exists between the two persons because one of them has expressly or impliedly consented that the other should represent him or act on his behalf, and the other has similarly

consented to represent the former as directed.

Agency has been described as a triangular relationship. These are Principal/Agent relationship, Agent/Third Party relationship and Principal/Third Party relationship.

The three features of agency are service, representation and power to affect the legal position of the principal. An agent can acquire rights for his principal and subject his principal to liabilities. In the case of *Montgomerie v. United Kingdom Mutual Steamship Association,* **(1891) 1 QB 3704, *Wright J***opined that "where a person contracts as an agent for a principal, the contract is that of the principal and not that of the agent; and, prima facie, at common law the only person who may sue is the principal.". See also *Okwejiminor v. Gbakeji* **(2005) 5 NWLR (pt. 1079) 223.**

5.3 Creation of Agency

Agency relationship may be created or may arise in any of the following ways:

(a) **Express Appointment**

A principal may appoint an agent expressly either orally or in writing. The expectation is that both the principal and the agent must be competent to act. Agency may be created through a power of attorney. The power of attorney, then, is the instrument which confers the agency and the production of a copy of it would be conclusive evidence of the existence of such agency. Contrarily, where there is an express prohibition precluding the existence of an agency relationship, any act done by the purported agent will be invalid. In *White v. Lucas* (1887) 3 TLR 516, A firm of estate agents acted contrary to an express statement of the owner of a property prohibiting them from acting as his agents, the court decided that the estate agents could not claim remuneration for acting as agents of the property.

(b) Implied Agency

This is agency that arises by implication. Parties are taken as having agreed or consented to an agency relationship due to the way they have conducted themselves towards each other.

Implied agency may arise through usual, customary and apparent or ostensible authority. Usual authority relates to the kind of authority that an agent in a trade, business and profession or at his place of employment is vested with, to enable him discharge his commission. In terms of customary authority, the agent must act impliedly according to the customs and usages of the place, market or business. Such customary authority must either be known to the principal or must be so notorious that the principal cannot deny knowledge of it. With apparent or ostensible authority, a person is allowed to appear as if he is the principal's agent when in fact he is not. The principal has led other parties to believe that a person has the authority to represent him.

In the Ghanaian case of ***Buama* v *Oppong*,** [1992] 2 GLR 213 the defendant was the owner/driver of a commercial vehicle. The plaintiff who paid a fare to travel on the vehicle could not find his bag on reaching his destination. He had paid freight for the bag to a bookman who took the bag from him and kept it in the booth of the vehicle. The plaintiff sued for the value of the bag and the items in it, consequential loss and damages. In his defence the defendant contended inter alia that the bookman was not his agent. It was found that the bookman gave the money he had received as freight from the plaintiff to the defendant and that even though the bookmen were employees of the Ghana Private Road Transport Union they were the ones who dealt with the passengers by collecting the fares and freight from them. The defendant was vicariously liable for the loss of the plaintiff's bag by the bookman because if a person is represented or permitted himself to be represented, that representative had authority to act on his behalf, and he would be bound in the same way a she would be if that other had infact authority to act. Since the defendant was present when the fee was charged and also clear that the defendant had given authority to him, it was an apparent authority to the bookman to act on his behalf. Accordingly, there was an agent and principal relationship between the bookman and the driver. Again, in law, the usage of the trade or business in which an agent was employed would in the absence of express direction, frequently determine the liability of the principal.

(c) Agency of Necessity

This agency may arise in emergency situations where a person is obliged to act to prevent irreparable loss to another. Such an agency may be implied where the following conditions exist:

i. It must be impossible or impracticable to communicate with owner of the goods so as to get his instructions;
ii. There must be real or imminent commercial necessity; and
iii. The agent must have acted in the best interest of the principal.

(d) Agency by Ratification

This is a situation whereby a person acts without authorisation but the person on whose behalf the act was purported to have been carried out subsequently adopts the act. It is a retrospective constitution of agency. The contract is not binding on the principal until ratification. An action which is void *ab initio* cannot be ratified. In *Brook v. Hook* (1870) LR 6 Ex 89 where Jones forged the signature of Hook on a Promissory Note, the court decided that the purported ratification by Hook was ineffective as this amounted to a nullity. A contract can be ratified only under certain circumstances. These include the following:

(i) The agent must expressly have been contracted as an agent. The contract can only be ratified by the principal who was named or can be ascertained when the contract was made. An undisclosed principal cannot ratify a contract. See *Keighley Maxsted& Co. v. Durrant* (1901) AC 240;

(ii) The principal must have been in existence at the time the agent entered into the contract. See *Kelner v. Baxter & Others* (1866-67) LR 2 GP 174.;

(iii) The principal must have had legal capacity to enter into the contract at the time when it was made and at the date of ratification. *See Boston Deep Sea Fishing & Ice co Ltd* v *Farnham (Inspector of Taxes)* (1957)1 WLR 1051.

(iv) The principal must at the time of ratification have full knowledge of all the material facts. See *Suncorp Insurance & Finance* v *Milano Assicurazioni SpA* [1993] 2 Lloyds Rep 225 (QB);

(v) The principal must adopt the whole contract;

(vi) The principal must ratify within the time set or within a reasonable time. See *Metropolitan Asylums Board v Kingham & Sons* (1890) 6 TLR 217 (QB)

(e) Agency by Estoppel

It is a general principle of law that a person is not bound by the actions of another person who acts without his written or oral authority. However, when the natural consequence of the party's conduct it to portray someone as his agent, and as a result of the portrayal, an innocent third party enters into a contract with the agent, the principal would be prevented or stopped from denying the existence of the agency.

(f) Apparent Agency

This occurs when a principal has not taken due precaution to prevent a situation in which somebody portrays himself as having authority to act as his agent.

5.4 General Agents and Special Agents

A general agent is an agent with authority to perform a series of transactions in the ordinary course of business, trade or profession usually of continuous nature. Where the appointment of a general agent is unrestricted, such an agent is a universal agent.

On the contrary, an agent that is appointed for a special purpose or a specific occasion is called a special agent which are of four types as follows:

(a) Factor

A factor is a merchantile agent who, in the course of his business, has the authority to sell goods or to consign goods or raise money on security for goods.

(b) Broker

A broker has no possession of goods but is only involved in the negotiation of contracts on behalf of another for a commission known as brokerage.

(c) Auctioneer

An auctioneer is a person licensed by law and authorised to sell the goods or

property of another person at a public sale. He may or may not have possession of the goods to be sold. An auctioneer is a double agent because he acts for both the seller and the agent.

(d) *Del Credere* Agent

A *del credere* agent is an agent who in return for a higher rate of commission promises to indemnify the principal if the third party with whom he contracts in respect of goods fails to pay or deliver under the contract. He is a surety of the buyer.

5.5 Authority of Agents

Agency relationships are dependent on the nature of authority invested on the agent. The scope of the agent's authority is very important in determining the types of agency which exists between the principal and agent and accordingly, agency relationships have been classified as: Actual or Express authority; Implied Authority; Apparent authority; Ostensible authority; and usual authority. These forms of authority will be considered seriatim below.

5.5.1 Actual or Express authority

This type of authority is invested on the agent in writing and sometimes by deed under seal.

5.5.2 Implied authority

This form of authority of the agent is usually inferred from the conduct of the parties especially the principal. An agent may also have the implied authority to acts that are incidental to the acts for which he has actual authority.

5.5.3 Apparent authority

An agent may by his conduct show to third parties that he has authority to contract for the principal and thereby make the principal liable.

5.5.4 Ostensible authority

This authority is inferred or observed from the words of the principal and the agent would also act within the confines of such authority.

5.5.5 Usual authority

This authority would normally derive from the agent's normal business for his principal. Such authority would not be ambiguous.

An agent's scope of authority must not exceed that of the principal to act on his own behalf. Where an agent acts outside the scope of his authority in good faith, the principal would be bound by the acts. An agent will however be personally liable if he has no authority at all to act on behalf of another and would indemnify the third parties in damages. An agent who is employed to act in the course of his work or profession or business has implied authority to do whatever is usual in such profession or business or trade. An agent's illegal act will not bind his principal; neither can he be remunerated for, or indemnified against an illegal act committed by him.

5.6 Rights and Obligations of Principal and Agent

Agency imposes rights and duties on both the agent and the Principal.

5.6.1 Rights of an Agent

Every agent has some rights, which include the following:

(a) As a general rule, an agent is to be indemnified by the principal in the course of the performance of his duties;

(b) An agent is to be paid the reward or commission for work done;

(c) An agent is entitled to have his lawful actions ratified by his principal;

(d) A disclosed principal must also assume responsibility and liability for the authorised act of an agent;

(e) An agent has the right to enforce a contract against a third party; and

(f) An agent has a right of lien over the goods of his principal for his commission and other moneys due to him.

5.6.2 Duties of an Agent

The duties of an agent include the following:

(a) An agent is bound to follow the principal's instructions;

(b) An agent must not delegate his authority unless he is expressly authorised by his principal;

(c) An agent must act in good faith and avoid conflict of interests;

(d) An agent must exercise due care and skill professed by him;

(e) An agent must not make secret profit;

(f) An agent must not disclose confidential information; and

(g) An agent must render an account to the principal as at when due

5.6.3 Duties of the Principal

The duties of the principal depend on the nature and type of the agency. Some of these duties include the following:

(a) Duty to pay the agent's fee or commission;

(b) Duty to indemnify the agent for all lawful acts carried out by the agent on the principal's behalf;

(c) Duty to ratify the act of the agent as the case may be;

(d) A disclosed principal must assume responsibility and liability of the authorised act of the agent; and

(e) The principal is liable to third parties under all contracts entered into by the agent within the agency whether the principal is disclosed or not.

5.7 Termination of Agency

An agency relationship may be terminated in the following ways:

(a) Act of the Parties

The parties can bring the contract of agency to an end by mutual agreement of the parties. This is when the termination is from both of them. In other instances, the termination comes from only one of the parties. It may either originate from the principal or from the agent. The termination may be through revocation by the principal by notice or summarily. It may also be through renunciation of the agency by the agent;

(b) **Operation of Law**

An agency may be terminated by operation of law under the following circumstances:

i. Through the death of either party;

ii. On the insanity of either party. In *Gordonv. Essien*,[1992]1GLR232 where the principal had died and the daughter of the agent she had earlier appointed continued to collect rents on her behalf it was stated that "It was trite law that death was one of the events which automatically determined an agency; the conception of authority demanded a continuing consent of the principal to the agent's act on his behalf and with the death of the principal the consent would not continue because the mind from which it issued had ceased to exist";

iii. Upon the bankruptcy of either party;

iv. By frustration

v. If the subject matter of the agency is found to be illegal *ab initio;*

vi. Where the subject matter is no longer in existence;

vii. By expiration or effuxion of time;

viii. By subsequent illegality of either the transaction or of the status or capacity of either party.

5.8 Summary and Conclusion

Agency is one kind of relationship that runs through several human endeavours. In almost every activity, we sometimes find ourselves acting on behalf of other people or asking other people to act on our behalf. The proper understanding of agency is therefore essential for a true appreciation of its practical significance. The whole realm of what constitutes agency in terms of what agency is, the types, its creation, the obligations of the agency as it touch the duties of the principal and the agent, and how the relationship (of agency) is terminated, were highlighted to ensure a good grasp of the area of study.

5.9 REVISION QUESTIONS

Multiple Choice Questions

1. A person appointed by another person to act on his behalf generally is Known as ……

A. Envoy
B. Representative
*C. Agent
D. Proxy
E. Delegate

2. An agent is entitled to claim from his principal…….

A. Remuneration
*B. Commission
C. Reimbursement
D. Interest
E. Set off

3. Agency can be created by the following ways **EXCEPT**

A. Agency by conduct/estoppel
B. Agency by ratification
*C. Agency by auction
D. Agency by cohabitation
E. Agency by necessity

4. Duties of an agent include the following **EXCEPT**

A. Duty of loyalty
B. Duty to exercise skill
*C. Duty to assist the wife of the principal to recruit staff whenever the principal travels
D. Duty not to make undisclosed profit/commission
E. None of the above

5. Agency relationship may be terminated by the following **EXCEPT**

A. Death of either party
B. Bankruptcy of either party
C. Effluxion of time
*D. Advice of the principal's banker
E. Insanity of either party.

SHORT ANSWER QUESTIONS

1. An agent appointed for a specific occasion is called a _____agent.***** Special

2. Agency relationship can be terminated in two main ways, which are, express acts of the parties and _____***** by operation of law

3. An agent's authority which is expressed in writing and sometimes by deed under seal is known as _____ ***** actual or express authority.

ESSAY QUESTIONS

1. List the conditions under which an agency of necessity can be created.

Answer

The conditions which must be satisfied before and agency can be created by necessity are 3 and they are:

(a) The impossibility of getting the principal's instructions.

(b) The happening of an actual and definite commercial necessity for the creation of the agency.

(c) the agent of necessity acting *bona fide* in the interest of the principal.

2. State the ways through an agency situation may arise.

Answer

An agency relationship may arise in any of the following ways:

(a) By agreement, whether contractual or not, express or implied.

(b) By subsequent ratification by the principal of acts done on his behalf
by the agent.

(c) By operation of law under the doctrine of necessity.

3. List and briefly discuss the forms of authority in an agency relationship

Answer

(a) Actual or Express Authority

(b) Implied authority

(c) Apparent authority

(d) Ostensible authority

(e) Usual authority

II Brief discussion

(a) Actual or Express authority

This type of authority is invested on the agent in writing and sometimes by deed under seal.

(b) Implied authority

This form of authority of the agent is usually inferred from the conduct of the parties especially the principal. An agent may also have the implied authority to acts that are incidental to the acts for which he has actual authority.

(c) Apparent authority

An agent may by his conduct show to third parties that he has authority to contract for the principal and thereby make the principal liable.

(d) Ostensible authority

This authority is inferred or observed from the words of the principal and the agent would also act within the confines of such authority.

(e) Usual authority

This authority would normally derive from the agent's normal business for his principal. Such authority would not be ambiguous.

CHAPTER SIX

SALE OF GOODS

6.0 LEARNING OBJECTIVES

Upon completion of this chapter, readers should be able to:

- define contract for sales of goods
- understand the general principles of a contract for sales of goods
- describe a contract for sales of goods
- state and explain the terms of a contract for sales of goods
- differentiate between a contract for sales of goods and other transactions.

6.1 Introduction

The contract of sale of goods is perhaps the most common of all commercial contracts. The basic principles which govern this specialised contract are still found within the general principles of law of contract.

The contract of sales of goods is basically governed by common law, the Sales of Goods Act of 1893 (by virtue of the fact that it is a Statute of General Application which applies to most parts of Nigeria other than the states which make up the Old Western Region of Nigeria who have their own Sales of Goods Law) still retained as the Sales of Goods Act in the Laws of the Federation of Nigeria 1990 and the 2004 Laws of the Federation of Nigeria, and the Sales of Goods Law 1978 in Ogun State.

By section 1 (1) of the *Sale of Goods Act 1893*, it is a contract whereby the seller transfers, or agrees to transfer, the property in goods to the buyer for a money consideration called the price. The essence of a sale of goods contract is that the parties intend to transfer ownership of property in the goods from the seller to the buyer. Where the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property is to take place at a future time subject to some condition thereafter to be fulfilled, it is called an agreement.

6.2 Classification of Goods

Many of the rules of the applicable statute depend largely upon the type of goods which are the subject matter of the contract which we have seen, basically, is the transfer of ownership. The common classification of goods under a contract for sale of goods is as follows:

(a) **Specific Goods**: by section 62 of the Act these are goods which are identified and agreed on at the time a contract of sale is made. It must thus be perfectly clear which goods are being sold, e.g. "that blue car there, "in the car sales room or "those baking items there" on the shelf in the Supermarket. See ***Underwood* v *Burgh Castle1 Brick & Cement Syndicate* (1922)**;

(b) **Unascertained goods:** If goods are "identified and agreed on "at the time of sale, they are specific goods. However, if they are not "identified and agreed on "they are unascertained goods, for example, "500 bags of rice out of the bags kept in my warehouse".

(c) **Existing goods:** By section 5(1), these are goods which the seller owns or possesses at the time of the contract and they may be either specific or unascertained; and

(d) **Future goods:** These are goods which the seller is to manufacture or acquire after the contract of sale is made, and they are generally unascertained goods.

6.3 Sale of Goods Distinguished from Other Forms of Contract

(a) Contract of sale and Hire Purchase: A contract of sale and hire purchase are similar but only to the extent that the end result is transfer of goods. However, while property is transferred upon sale of goods, in hire purchase, there is no transfer of property until the last instalment is paid and the hirer exercises the option to purchase;

(b) Contract of Sale and Pledge: A pledge is the delivery of goods by a person to another to secure the repayment of a debt. Unlike sale of goods, there is no absolute transfer of property in a pledge;

(c) Contract of sale and Bailment: bailment is a mere transfer of possession while sale is a transfer of possession and property (ownership). Bailment is a

transaction under which possession of goods is delivered by a bail or to a bailee on the terms requesting the bailee to hold on to the goods and later redeliver them as the bailor may direct; and

(d) Contract of sale and Mortgage: A mortgage is transfer of property from the mortgagor to the mortgagee to secure the repayment of a loan. The subject matter of the mortgage is redeemable upon the repayment of the debt unlike a sale of goods contract which permanently transfers the property.

6.4 Form of the Contract

A Contract of Sale of goods may be in writing (with or without seal) or by word of mouth or partly in writing and partly by word of mouth or maybe implied by the conduct of the parties. It is worthy of note that there are no special rules about the contractual capacity of the parties, thus the basic law of contract applies.

6.5 Implied Terms of Contract of Sale of Goods

The following terms are implied in a contract for sale of goods:

(a) **Title**

There is an implied condition on the part of the seller that he has the right to sell the goods and pass property at the time of sale. There is also the implied warranty the goods sold are free from any charge or encumbrance not disclosed or known to the buyer before the contract is known and that the will enjoy quiet possession of the goods;

(b) **Description**

Where goods are sold by description, there is an implied condition that the goods supplied correspond with the description. If goods are sold by sample and description, they must correspond with both the sample and the description;

(c) **Sample**

Where the sale is by sample, there is an implied condition that:

i. The bulk of the goods will correspond with the sample and the buyer would have

reasonable opportunity to compare the sample with the bulk; and

ii. The goods are free from any defect which would not be apparent on reasonable examination of the sample

(d) **Quality of Goods**

Where a seller sells goods in the course of business, there is an implied condition that the goods are of satisfactory quality and are fit for the purpose for which they are intended. Under this, there are two sub-heads, which are:

i. Merchantable Quality: This requires that the goods must be of good quality, but this implied condition would not apply if the defect could have been revealed by examination of the goods by the buyer; and

ii. Fitness for Purpose: This is an implied condition that where a buyer makes known to the seller the purpose for which he requires the goods and that he trusts the seller's skill and judgment, the seller is obliged to ensure that the goods the purpose for which they were bought.

(e) **Existence of Title of the Seller**

Section 12 (1) provides as follows: An implied condition on the part of the seller is that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell, he will have a right to sell the goods when the property is to pass. There is thus an implied condition on the part of the seller that he shall have a right to sell the goods. If therefore the seller has no title, as where the goods are stolen for example, he is liable to the buyer, See ***Rowland* v *Divall***, the buyer of a car used it for three months, but then found that it was stolen and had to return it to the true owner. The Court held that the buyer was entitled to recover the full purchase price even though he had used it for sometime.

In *Akoshile v Ogidan*, the plaintiff bought a car from the defendant which turned out to be a stolen car, which was later taken away by the police. He recovered his full purchase price from the Defendant. The decisions in these cases show that the

purchaser in both cases bought in order to become owners, but did not become owners because the sellers breached this implied condition of title, hence they were entitled to their full purchase price. These cases also help to bring out the distinction between conditions and warranties. They show that right to sell a good or title is a condition that goes to the root of the contract and the innocent party can truly cancel the contract and get his full money back as well as ask for damages.

Section 12 also implies certain warranties into a sale of goods contract. For the breach of a warranty we should remember that the injured party can only ask for damages and cannot cancel the contract but go on with it;

(ii) Section12 (2); An implied warranty that the buyer shall have and enjoy quiet possession of the goods i.e. the seller will be liable in damages if the buyer is disturbed in the enjoyment of the goods in consequence of the seller's defective title;

(iii) Section12 (3); An implied warranty that the goods shall be free from any charge or encumbrance in favour of a third party, not declared or known to the buyer before or at the time when the contract is made. A failure to disclose that are pair man's fees (which entitle him to alien to retain the car) are still outstanding in respect of a sale concerning a second-handcar amounts to a charge or an encumbrance which entitles the buyer to seek damage for this breach of warranty.

6.3. The *Caveat Emptor* Doctrine

The Act also implies various terms into the contract which the parties in the exercise of their freedom to bargain and contract may exclude from their contract. A consideration of these implied terms which we are about to undertake shows that these terms are implied by statute to mitigate the harshness of the common law principles of *caveatemptor* ("Let the buyer beware"). Under this principle, it was for the parties to make their own bargain i.e. it was up to the buyer to decide whether the goods were merchantable and fit, before he agreed to buy them. If he finds they were

not fit for purpose, after the sale, there was nothing he could do, thus he becomes saddled with useless goods, hence the intervention by statute to avoid the supply of useless goods by the seller to the buyer.

6.4 Transfer of property between seller and buyer

The object of a sale of goods contract is to transfer property in goods from the seller to the buyer. It is thus important to know the precise moment of time at which the property in the goods passes from the seller to the buyer because in case of the destruction of the goods by fire or other accidental cause, it is necessary to know which party has to bear the loss since risk is an incidence of where property lies (See section 20). It is however important to appreciate the difference which we had drawn earlier between specific goods and unascertained goods and to properly understands when property (i.e. ownership in the goods) passes to the buyer from the seller.

(a) Specific Goods

In a sale of specific or ascertained goods, the property passes to the buyer at the time when the parties intend it to pass. Thus, intention can be gathered from the terms of the contract, the conduct of the parties and the circumstances of the case (section17). Unless a contrary intention appears, however the following rules are applicable for ascertaining the parties 'intention (section18).

Rule1: Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property passes to the buyer when the contract is made and it is immaterial whether the time of payment or the time of delivery, or both be postponed.

The Rule provided above is self-explanatory, how bet it is to the effect that unless the contract states otherwise, the buyer becomes the owner of the goods of a sale of goods contract when the contract is made as long as the goods are ready for delivery even where the seller agrees to deliver the goods later and the buyer agrees to pay later. Thus, if anything happens to such goods,

generally it is the buyer that will bear the risk.

Rule2: Where there is a contract for the sale of specific goods not in a deliverable state, i.e. the seller has to do something to the goods to put them in a deliverable state, the property does not pass until that thing is done and the buyer has notice of it.

The only difference between this Rule and Rule1 above lies in the fact that the goods in Rule1 are ready for delivery while those under this Rule are not yet ready for delivery. Once they become ready for delivery however the seller must inform the buyer, it is upon such notice that ownership in the goods passes to the buyer.

Rule3: Where there is a contract for the sale of specific goods in a deliverable state but the seller is bound to weigh, measure, test or do something with reference to the goods for the purpose of ascertaining the price, the property does not pass until that thing is done and the buyer has notice of it. See *Turley v. Bates;* 'S' sold to 'B' a heap of clay at a price of $x per ton, and it was agreed that the buyer would load the clay and weigh it to ascertain the price. The Court held that property passed to the buyer when the contract was made.

Rule4: When goods are delivered to the buyer on approval or "on sale or return basis" the property therein passes to the buyer: -

(a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction. In *Kirkham v. Attenborough*, K delivered jewellery to W on sale or return. W pledged it with A. It was held that the pledge was an act by W adopting the transaction, and therefore, the property in the jewellery passed to him so that K could not recover from A.

Another example is where someone delivers a pair of shoes to you, and

you are undecided whether to buy them but promise to return them within two weeks. If you put them on and wear them on the third day, this rule comes into play to show that you become the owner of them when you wear them.

(b) If he retains the goods without giving notice of rejection, beyond the time fixed for the return of goods, or if no time is fixed beyond a reasonable time.

This is self-explanatory as what this subsection simply says that when you hold on to goods for an agreed period or for a long time you become the owner of it.

(b) Unascertained Goods

Section16- Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained. This section states the obvious as one cannot become the owner of 50 bags of rice in a warehouse containing 1000 bags without my 50 bags being ascertained. By the provisions of Rule 5, ascertainment does not make them one's until certain acts listed under the Rule are carried out.

Rule5: Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods then passes to the buyer; and the assent maybe express or implied and maybe given either before or after the appropriation is made. The understated are some of the ways in which unascertained goods maybe come ascertained

(a) if the seller separates the sold goods from the consignment and informs the buyer.

(b) by measuring the sold portion from the whole and informing the buyer.

(c) by a process of exhaustion. An example is where Linda wants to buy 5

bowls (bongos) of gari from a seller who has about 30 bowls in her basin. The process of continual and continuous selling of relatively small bowls of gari until 5 bowls is left is an illustration of exhaustion.

6.8 Passing of Risk

Risk covers a wide range of misfortunes that may befall goods from slight damage through theft to loss or total destruction. Who bears such loss is thus the basic question that arises for consideration herein. The applicable Section 20 which helps in determining this issue provides thus:

"Unless otherwise agreed, the goods remain at the seller's risk until the property in them is transferred to the buyer, but when the property in them is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not: Provided that where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault: Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as bailee of the goods of the other party."

Loss may arise in these possible ways

(a) **Loss occurring before the contract is made**:

A reading of the applicable section 20 shows that the seller bears this loss. He is however protected from liability to the buyer by section 6 of the Act where the contract concerns specific goods. Section 6 provides as follows: "Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void. The seller of course still bears the loss but it should be noted that he has no liability to the buyer as the contract is void."- ***Barrow, Lane & Ballard Ltd.* v *Phillips & Co. Ltd*.** where 109 bags out of 700 bags of specific goods which formed the subject matter of the contract of a sale of goods had been stolen before the contract was made, and this was unknown to the sellers. The Court held that the specific 700 bags had perished thus

rendering the contract void.

(b) **Loss occurring between the contract and the passing of property:**

This will also be borne by the seller since property has not passed by the provisions of section 20. The buyer may also recover damages for non-delivery where the seller fails to find other supplies. Section 7 however protects the seller from liability to the buyer although he still bears the loss. It provides thus: "Where there is an agreement to sell specific goods and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is avoided."

(c) Loss occurring after the passing of property:

By the provisions of section 20 this is borne by the buyer even where the goods are still in the custody of the seller. In *Tarling v. Baxter* (1827) 18, S sold to B a hay stack which was to remain on the seller's premises until the following May. Before May arrived, the hay stack was destroyed in an accidental fire. It was held that property and risk had passed to the buyer who remained liable to pay the price. It is important to note here that if the fire that destroyed hay stack had not been caused by accident but by the negligence of the seller he could well have been liable for the loss, although not as seller but as bailee of the good having regard to the second proviso of section 20 relating to duties and liabilities of either of the parties as such.

Where a party also delays delivery as provided under the first proviso to section 20 he bears the risk. In *Demb y Hamilton & Co Ltd. v. Barden*, the contract concerned the supply of 30 tons of apple juice by weekly consignments to the buyer. The buyer delayed in taking delivery of some of the juice which went bad. The Court held him responsible to pay for the loss occasioned by his delay.

The provisions of the Act can however be varied by agreement or by trade custom. In some cases, the parties may agree that the risk passes before

property; see *Sterns Ltd. v. Vickers Ltd.* Sale of 120,000 gallons of white spirit out of 200,000 gallons in a tank on wharf. No appropriation to the contract is made, but a delivery warrant is issued to the buyer. The warrant is not acted on for sometime and the spirit deteriorates. The loss falls on the buyer.

At other times the property may pass before the risk as where the seller agrees to send specific goods to the buyer at the seller's risk. If the seller does agree to deliver goods at his risk, his liability is governed by section
33 which provides as follows:

"Where the seller of goods agrees to deliver them at his own risk at a place other than that, where they are when sold, the buyer must nevertheless, unless otherwise agreed, take any risk, of deterioration in the goods necessarily incidental to the course of transit".
The seller must, however, take the risk of extraordinary or unusual deterioration of loss.

6.8.1 Transfer of Title by a Non-Owner (The *nemo dat non habet* rule)

Generally, only the owner of goods can validly transfer property or ownership in them to a third party. The law however allows his agent to do so too. But there are other instances where property in goods is transferred to a third party by a person who is not the owner or his agent. It is this troublesome area that we will consider now, for a buyer may not be getting what he bargained for or indeed anything at all. In this area of the law there is a simple basic rule which, however, has so many exceptions. The basic rule favours the original owner while the exceptions favour the innocent purchaser from a seller who had no right to sell or title to transfer to him. This basic rule is expressed in the Latin phrase *nemodat quod non habet* and it literally means "nobody can give what he has not got. "The courts have tried to explain why this basic rule must have so many legally recognised exceptions. The best and finest expression of this rationale is found in the under-mentioned dictum of Denning L.J (as he then was) in *Bishopsgate Motor Finance Corporation v. Transport Brakes*

Ltd”.

It goes thus: “In the development of our law, two principles have striven for mastery. The first is for the protection of property: no one can give a better title than he himself possesses. The second is for the protection of commercial transactions: The person who takes in good faith and for value without notice should get a better title. The first principle has held sway for a long time, but it has been modified by the common law itself and by statute so as to meet the needs of our times”

The said basic rule is also the basis of section 21 (1) of the *Sale of Goods Act* which reads thus: “... where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.”

6.8.2 The Exceptions are as follows:

a) Estoppel

If the true owner stands by and allows an innocent buyer to pay over money to a third party, who professes to have the right to sell an article in the belief that he is becoming the owner of it, the true owner will be estopped from denying the third party's right to sell. This exception is provided by the underlined part of section 21 quoted above.

(b) Sales by Mercantile Agent or (Factor)

A mercantile agent is a person who sells or otherwise deals with goods as business and on behalf of other people. He deals in his own name, independently of his employer, (his Principal). Anyone dealing with a mercantile agent obtains good title even if the agent was not authorised to sell. A mercantile agent is also known as a factor.

(c) Sale in Market Overt

This is provided for under Section 22 which provides as follows: “Where

goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods provided he buys them in good faith and without notice of any defect or want of title on the part of the seller. This is the most ancient of the exceptions and was incorporated in the Act upon its enactment. If a person's property was stolen, and such person was reasonably diligent, such property could be found if it went on display at the local market. The concept is one of an open public market selling openly to customers who buy in good faith. The doctrine covers any open, public, legally constituted market. The sale must take place on the customary market day, during the usual hours of business. The goods must be on open, public display. In *Bishopsgate Motor Finance Corporation v. Transport Brakes Ltd*., A car was sold in Maidstone Market, the seller was not the owner, and the car was the subject of a Hire-Purchase agreement. Nevertheless, Maidstone was held to be a legally constituted market for the purpose of the market overt rules. Cars were commonly sold there and the buyer took in good faith and obtained a good title.

It is important to however note that if the goods are stolen goods and the thief is afterwards convicted, property in the goods reverts to the true owner of them not withstanding any intermediate dealing with them either by sale in market overt or otherwise (See Section 24 of the Act), this means that if “A ”steals “B's” watch and sells it in market overt to “C”, “C” acquires a good title to it. But if “A” is thereafter convicted of theft “C's” title ceases and “B's ”title revives.

(c) Sale under Voidable Title

If the seller has avoidable title to goods and his title has not been voided at the time of the sale, the buyer acquires a good title to the goods, provided that he did not know of the seller's defect of title and bought in good faith. This exception is provided by Section 23. e.g . If A by duress obtains goods from B, A has only a voidable title to the goods, and B can rescind the contract. If

A, before B rescinds the contract sells to C, who buys in good faith and in ignorance of the vitiating element of duress, C will get a good title.

(d) Sale by Seller in Possession

Section 25 (1) of the Act provides this exception. It states: "Where a person having sold goods continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, has the same effect as if the person taking the delivery or transfer were expressly authorised by the owner of the goods to make the same.

If Alex sells to Bob but retains physical possession of the goods or documents of the title, then Alex can sell them again to Chris as long as Chris does not know of the previous transaction, Bob will however be able to recover his money back from Alex.

(e) Sale by Buyer in Possession

This exception is provided by Section 25(2) "Where a person having bought or agreed to buy goods obtains with the consent of the seller possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or disposition.

There of, or under any agreement for sale pledge or disposition hereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods shall have the same effect as if the person making the delivery or transfer were mercantile agent in possession of the goods or documents of title with the consent of the owner. This is the converse position of Section 25(1) and it generally arises where the buyer has possession but does not have title in the goods. e.g. where Bob

agrees to buy goods from a seller who gives possession of the goods to him, where he sells to an innocent third party of his defective title such third party acquires title.

(g) **Disposition of goods under common law and statutory powers**

Examples are:-

i. The right of a pawnbroker to sell unredeemed goods pledged with him.

ii. The right of a hotel to sell the property of guests to satisfy debts.

iii. The right of landlords in certain circumstances to sell tenant's goods for arrears of rent

iv. The rights of repairers such as watch repairers, cobblers, or those of electronic items to sell uncollected goods.

The exercises of the power of sale by these categories of non-owners are subject to restrictions such as the need to give notice and time. The Courts also of course can exercise the rights to dispose perishable goods or unperishable goods in execution of a judgment debt.

6.9 BREACH OF CONTRACT AND REMEDIES OF THE PARTIES

WhereeitherofthepartiestothecontractofaSaleofGoodscontractbreachesits terms, the following are the remedies which the law provides.

6.9.1 Buyer's Rights

(a) The right to reject the goods-

The buyer can reject the goods if the seller is in breach of condition, e.g. one of the implied conditions noted above. If he does so, he needs not pay the price and if he has paid it, he can recover it. The right to reject is lost, if the goods have been accepted.

(b) Action for damages-

He can sue for damages for non-delivery of the goods.

(c) Action for specific performance.

The buyer can only exercise this right compelling the seller to deliver the

goods when the goods are specific or ascertained. This remedy is only also exercisable where damages will not be an adequate remedy.

(d) Recovery of purchase price.

In this situation, where seller fails to deliver the goods, the subject matter of the contract, the buyer can sue to recover his purchase price already paid by him.

6.9.2 Seller's Rights

They are of two kinds. He has right over the goods which are called real rights as against his rights against the buyer himself which are regarded as personal rights.

Real Rights: An unpaid seller of goods, even though the property in the goods has passed to the buyer has the following rights.

(a) A Lien: A lien is the right to retain possession of the goods, until payment of the price. It arises by the provision of section 41 of the Act as follows:

i. when the goods have been sold without any stipulation as to credit;

ii. when the goods have been sold on credit but the term of credit has expired; and

iii. when the buyer becomes insolvent.

By the provisions of section 43 this right is lost:

a. when the goods are delivered to a carrier for the purpose of transmission to the buyer, without reserving the right of disposal;

b. when the buyer or his agent lawfully obtains his possession of the goods; and

c. by waiver.

(b) Right of stoppage in transit, i.e. the right of stopping the goods while they are in transit and resuming possession of them until payment of the price. This is provided by section 44 of the Act. It is available when:-

i. the buyer becomes insolvent; and ii.

the goods are in transit.

(c) Right of Resale. There is no general right to resell. The right of alien or that of stoppage in transit does not also entitle the seller to resell. The

seller, even though unpaid, who resells is generally in breach. He must deliver the goods in return. However, in the following instances he has a right to resell:

i. where the goods are of a perishable nature;

ii. where he gives notice to the buyer of his intention to resell, and the buyer does not within a reasonable time pay or tender the price; and

iii. where the seller expressly reserves a right of resale in case the buyer should default.

If the seller however suffers loss from the resale he can claim such from the buyer as damages.

(d) Right of withholding delivery: This right arises where property in the goods has not passed to the buyer and possession is also with the seller.

Personal Rights: A seller is also entitled to these personal rights against the buyer where the buyer breaches the contract:

(a) To sue for the Price by section 49 of the Act, this right avails the seller, when the property in the goods have passed to the buyer and the buyer wrong fully neglects or refuses to pay for the goods.

(b) To sue for Non-Acceptance. This action for damages lies when the buyer refuses or neglects to accept the goods.

6.10 Summary and Conclusion

This chapter has explained what a contract for sale of goods means and the laws that govern such contract. Also, it shows the classifications of goods, differentiating between specific goods and unascertained goods and the difference between a contract for sale of goods and other transactions that seem similar to it. Further, it shows the form and terms of the contract, differentiating between a condition and a warranty; and explains the implied terms in a contract such as title, description, merchantable quality etc. It discusses and explains other terms like time and price. It further explains transfer of title by non-owner, passing of risks, and breach of the contract and remedies available to the parties.

It is important to remember that a contract for sale of goods is in its basic form, a contract, which is an agreement between the two parties, which is binding on them,

and enforceable by the Courts.

6.11 REVISION QUESTIONS

MULTIPLE CHOICE QUESTIONS

1. The following essential elements are required for the contract of sale of goods **EXCEPT ONE**

   A. Offer and acceptance.
   B. Consideration
   C. Intention to create legal relationship
   D. Capacity
   *E. Insurance policy

2. Contract of sale of good is basically governed by

   *A. The Sales of goods Act 1893
   B. The 1999 Constitution of the Federal Republic of Nigeria as amended.
   C. The Companies and Allied Matters Act CAMALFN 2004.
   D. The Banks and other Financial Institution Act (BOFIA)LFN 2004. E. The Land use Act of 1978 now codified in LFN 2004.

3. The following are the exceptions to the *nemo dat quod non habet* rule **EXCEPT**

   A. Estoppel
   B. Sales by Mercantile Agent or factor
   C. Sale in market overt
   D. Sale by seller in possession
   E. Sale by owner of the supermarket on behalf of any licensed agent

4. A buyer's right in sale of goods contract include the following **EXCEPT**

   A. The right to reject the goods
   B. Action for damages
   *C. Pre action notice
   D. Recovery of purchase price E. Recovery of damages

5. Sellers rights in the sale of goods contract include the following **EXCEPT ONE.**

   A. Right of lien
   B. Right of stoppage in transit

C. Right of resale
D. Right of withholding delivery
*E. Right of preliminary objection

SHORT ANSWER QUESTIONS

1. Where goods are to be manufactured or acquired by the seller after the contract for sale has been concluded, the goods are _____***** future goods.

2. Goods owned and in possession of seller at the time of the contract of sale of goods are known as _____***** existing goods.

3. Goods not identified and agreed upon at the time of the contract of sale of goods are called _____***** unascertained goods.

ESSAY QUESTIONS

1(a) Define 'goods' under section 62 of the Sale of Goods Act.

Answer

Goods is defined under section 62 of the Sale of Goods Act as all chattels personal other than choses in action and money, and goods also include things attached to land or forming part of the land but which it has been agreed will be severed before sale or under contract of sale.

(c) State the classes of goods under Sale of Goods Act.

Answer

The classes of goods available under the Sale of Goods Act are as follows:

(a) Existing goods;

(b) Future goods;

(c) Ascertained/Specific goods; and

(d) Unascertained goods.

2. How does a contract for sale of goods differ from

(a) Hire purchase agreement; and

(b) Sale and bailment

Answer

(a) A contract of sale and hire purchase resemble each other only to the extent that the end result is the transfer of goods. However, while property is transferred upon the sale of

goods, in a hire purchase relationship, there is no transfer of property until the last instalment is paid and the hirer exercises his option to purchase. Also, where there is default in any instalmental payment by the purchaser in a hire purchase transaction, the whole property reverts to the seller.

(b) Bailment is a mere transfer of possession whilst sale is a transfer of possession and property (ownership). A bailment is a transaction under which possession of goods is delivered by a bailor to a bailee on terms requesting the bailee to hold on to the goods and later redelivers them as the bailor may direct.

3. State and explain the rights of a buyer in a breach of sale of goods contract.

Where there is a breach by the seller of goods in a sale of goods contract, the following are the rights of the buyer:

(a) The right to reject the goods: The buyer can reject the goods if the seller is in breach of condition. If he does so, he needs not pay the price and if he has paid it, he can recover it. The right to reject is lost if the goods have been accepted;

(b) Action for damages; He can sue for damages for non-delivery of the goods;

(c) Action for specific performance: The buyer can only exercise his right to compel the seller to deliver the goods when the goods are specific and ascertained. This remedy is only also exercisable where the damages will not be an adequate remedy;

(d) Recovery of purchase price: In this situation, where seller fails to deliver the goods, the subject matter of the contract, the buyer can sue to recover his purchase already paid by him.

CHAPTER SEVEN

HIRE PURCHASE AND EQUIPMENT LEASING

7.0 LEARNING OBJECTIVES

At the end of this chapter, readers should be able to:

- Define a hire purchase contract
- Differentiate hire purchase agreement from other secured credit transactions.
- Understand the obligations and rights of the parties at common law and under the Hire Purchase Act
- Have an understanding of the purpose and contents of the Hire Purchase Act
- Explain termination of hire purchase contract
- Understand the basic principles of operating and finance leasing

7.1 INTRODUCTION

Simply put, a hire-purchase contract is an agreement whereby the possession of goods is delivered to a person, who agrees to make payments periodically, and with an option of buying the goods after the agreed instalments have all been paid. The chapter also introduces readers to the distinction between operating and finance leases.

7.2 Definition of Hire Purchase

A hire-purchase agreement is an agreement under which the owner of good shires them to another person called the hirer, the agreement also providing that the hirer shall have the option to buy the goods if and when the number of instalments specified in the agreement had been paid.

The above definition clearly shows:

a. There is no obligation on the hirer to pay all the instalments;

b. Until the option is exercised there is no agreement to buy the goods. We can then safely say that a hire-purchase contract consists of 3 parts:

   i. a contract of bailment under which the hirer obtains possession of the goods while ownership remains in the owner and so uses them before they are fully paid up;

   ii. an option in favour of the hirer entitling him after payment of the periodical instalments and usually for a nominal consideration to purchase the goods; and

   iii. if the hirer exercises the option, a contract of sale making him the owner of the goods already in his possession.

We are thus very clear as to the nature of a hire purchase agreement as that which is a contract of hire and not sale, although there is a general misconception that since the hirer has possession of the goods he has ownership in them. It can be seen clearly that a hire purchase contract does not come within the purview of the *Sale of Goods Act*s in ce property (or ownership) which is the essence of a sale of goods contract may not pass to the hirer if he fails to pay all the stipulated instalments.

7.3 Distinction between Hire Purchase and Other Secured Credit Transactions

7.3.1 Credit sale agreement

This is an agreement by which the seller sells and transfers ownership in goods (i.e. property) to the buyer and agrees to accept payment by instalments. The buyer is the owner of the goods and not merely a hirer of them. If he defaults in paying the instalments, the seller's remedy is an action for the accrued instalments but not for recovery of possession of the goods.

7.3.2 Conditional sale agreement

This is an agreement for the sale of goods under which the purchase price is

payable by instalments, until the last instalment is paid and the property in the goods is to remain in the seller (not withstanding that the buyer is to be in possession of the goods) until such conditions as to the payment of instalments or otherwise as may be specified in the agreement are fulfilled. The difference between a hire purchase contract and a conditional sale agreement this is that there is an obligation, in the latter and not merely an option to purchase the goods as it obtains in the former.

7.4 Parties to Hire Purchase Agreement.

There are usually two parties to a hire purchase agreement, that is, the Owner-who undertakes to let out the goods on hire with an option to purchase when all payments have been made, and the hirer-who undertakes to pay the hire purchase charges that are involved.

7.5 Duties of parties to Hire Purchase Contract

The parties to a hire purchase contract have duties and rights as follows:

7.5.1 Duties of Owner

The duties of the owner under hire purchase contract are:

(a) Duty to disclose the cash price of the goods to the hirer at the inception of the contract;

(b) That he has valid title in the goods, subject matter of the contract;

(c) Duty to give the hirer quiet possession of the goods;

(d) Duty to deliver the goods to the hirer

(e) Duty to accept instalment payment from the hirer;

(f) Duty to deliver exact quantity of the goods agreed upon; and

(g) Duty not to repossess the goods, subject matter of the contract, except a motor vehicle.

7.5.2 Rights of the Owner

The owner has the following rights under a contract of hire purchase:

(a) The right to information from the hirer about the goods;

(b) The right to re-possess the goods where the agreement is determined by the hirer or the court; and

(c) The right to repossess the goods if it is a motor vehicle, for safety, even when a relevant portion of the instalments has been paid, without recourse to the court.

7.5.3 Duties of the Hirer

The hirer has the following duties to:

(a) Accept the goods subject to the contract;

(b) Pay the instalments as and when due; and

(c) Disclose information about the goods to the owner as and when required by the owner.

7.5.4 Rights of the Hirer

The hirer has the right to:

(a) Use the goods;

(b) Quiet possession and enjoyment of the goods;

(c) Know the exact instalments to be paid and the cash price of the goods; and

(d) Choose the insurer and garage to maintain the goods or motor vehicle.

7.6 Termination of Hire Purchase Agreement

A hire purchase agreement may be terminated by any of the following circumstances:

(a) Mutual agreement of the parties to rescind the agreement;

(b) Performance of all the obligations under the agreement;

(c) Provisions in the agreement which allows the hirer to terminate the contract at any stage of the agreement without prejudice his option to purchase the goods;

(d) Supervening circumstances such as fire, destruction, act of God, and other events beyond the control of the parties;

(e) Repudiation by the aggrieved party who may sue for a breach of terms of the contract; and

(f) An order or judgment of court for conversion or detinue.

7.7 Operating and Finance Leasing

The acquisition of assets - particularly expensive capital equipment - is a major commitment for many businesses. How that acquisition is funded requires careful planning. Hire-Purchase and Leasing represent the most common sources for financing the acquisition of assets. Both leasing and hire-purchase are similar in that they are means through which an individual may use an asset over a fixed period, in return for regular payment. The customer chooses the equipment and the finance company buys it on behalf of the customer. A lease is an agreement between two parties, the "lessor" and the "lessee". In a lease arrangement, ownership never passes to the customer, but as with hire purchase, the hirer shall have the option to buy the goods if and when the number of instalments specified in the agreement had been paid.

The common types of equipment leasing arrangements are operating leasing, financial leasing, sales and lease-back, and leveraged leasing. However, it is with the first and second types of leasing that we are concerned.

7.7.1 Operating Lease

Under this type of lease the lessee acquires the right to use the asset for a short period, e.g., a week or month. The lease may be renewed after the expiry of the period. This arrangement is adopted in case of assets which are subject to rapid technological advancements, e.g., computers. Operating lease is relatively more expensive.

7.7.2 Finance Lease:

This lease is for a basic term during which the agreement cannot be cancelled. The length of this basic term depends on the economic life of the asset and is usually shorter than the expected life of the asset. This arrangement enables the lessee to use the asset after the expiry of the basic period, or alternatively the lessee may buy the asset at a negotiated price on the termination of the lease. Financial lease is commonly used in

case of land and buildings and very expensive equipment. The lessor generally is able to recover his investment in the asset during the lease period.

7.7.3 Features of Operating Leasing

Operating leases are rental agreements between the lessor and the lessee whereby:

a) The lessor supplies the equipment to the lessee

b) The lessor is responsible for servicing and maintaining the leased equipment

c) The period of the lease is fairly short, less than the economic life of the asset, so that at
the end of the lease agreement, the lessor can either

i) Lease the equipment to someone else, and obtain a good rent for it, or
ii) sell the equipment second hand.

If a customer needs a piece of equipment for a shorter time, then operating leasing may be the answer. The leasing company will lease the equipment, expecting to sell it second-hand at the end of the lease, or to lease it again to someone else. It will, therefore, not need to recover the full cost of the equipment through the lease rentals.

This type of leasing is common for equipment where there is a well-established second hand market (e.g. cars and construction equipment). The lease period will usually be for two to three years, although it may be much longer, but is always less than the working life of the machine.

7.7.4 Finance Leasing

The finance lease or 'full payout lease' is closest to the hire purchase alternative. The leasing company recovers the full cost of the equipment, plus charges, over the period of the lease. Although the business customer does not own the equipment, they have most of the 'risks and rewards' associated with ownership. They are responsible for maintaining and insuring the asset. When the lease period ends, the leasing company will usually agree to a secondary lease period at significantly reduced payments. Alternatively, if the business wishes to stop using the equipment, it may be sold second-

hand to an unrelated third party. The business arranges the sale on behalf of the leasing company and obtains the bulk of the sale proceeds.

7.7.5 Features of Finance Leasing

(a) Finance leases are lease agreements between the user of the leased asset (the lessee) and a provider of finance (the lessor) for most, or all, of the assets expected useful life;

(b) The lessee is responsible for the upkeep, servicing and maintenance of the asset; the lessor is not involved in this at all;

(c) The lease has a primary period, which covers all or most of the economic life of the asset. At the end of the lease, the lessor would not be able to lease the asset to someone else, as the asset would be worn out. The lessor must, therefore, ensure that the lease payments during the primary period pay for the full cost of the asset as well as providing the lessor with a suitable return on his investment; and

(d) It is usual at the end of the primary lease period to allow the lessee to continue to lease the asset for an indefinite secondary period, in return for a very low nominal rent. Alternatively, the lessee might be allowed to sell the asset on the lessor's behalf (since the lessor is the owner) and to keep most of the sale proceeds, paying only a small percentage (perhaps 10%) to the lessor.

7.8 Summary and Conclusions

This chapter has given a detailed explanation of the hire-purchase agreement, showing the difference between the hire-purchase agreement and other secured credit transactions. It further shows the obligations of the parties under the hire purchase agreement; stating the obligations and rights of the parties at common law, as well as the rights and obligations of the parties under the *Hire Purchase Act*. A further study would reveal the rationale behind the adoption of the hire-purchase agreement. The *Hire Purchase Act*, its contents and purposes have also been discussed. The general requirements of the Act such as notification of cash

price, written agreement and so on, provisions and implied terms under the Hire Purchase Act e.g. quiet possession, right to sell the goods and so on, including exclusion of term simplied by the Act, the hirer's right to terminate the agreement and recovery of goods have been extensively discussed.

The *Hire Purchase Act* has radically altered the common law principles, as it has been discussed in this chapter. The hire-purchase agreement is distinctive in its nature, as it is a contract of hire, and not of sale, thereby making it different from a contract for sales of goods.

7.9 REVISION QUESTIONS

1. The *Hire Purchase Act* has radically altered the common law principles of hire-purchase. How true is this assertion?
2. What are the reasons for the adoption of the hire-purchase system?
3. A hire purchase agreement consists of three parts. Name them.
4. Distinguish between a hire purchase contract and a conditional sale agreement.
5. State the duties of an owner in hire purchase agreement at common law.
6. State the duties of the hirer at common law.
7. State three injustices or malpractices that the *Hire Purchase Act* was enacted to check.
8. State four terms that must be contained in a hire-purchase agreement as stipulated by statute.
9. What is the effect of non-compliance with the general requirements of the *Hire Purchase Act*?
10. When may a hire-purchase agreement which does not conform with the general requirements of the *Hire Purchase Act* been forceable?
11. State three provisions, which if, contained in a Hire purchase agreement are void.
12. When may a hirer exercise his right to terminate a hire-purchase agreement under the relevant statute?

13. State four terms which are implied in a hire-purchase agreement.

14. Is it in all instances that the terms implied in a hire-purchase agreement by statute may not be excluded?

15. Explain the term "relevant proportion" in a hire-purchase agreement and explain its relevance.

16. What is the effect of the exclusion of the terms implied by the *Hire Purchase Act* by a party to the hire-purchase contract?

MULTIPLE CHOICE QUESTIONS

1. The hire purchase contract is basically governed by

*(a) The Hire Purchase Act, 1965

(b) The Hire Purchase Act, 1900

(c) The Companies and Allied Matters Act, 1990

(d) The Constitution of the Federal Republic of Nigeria,

(e) The Third Party Act, 1978

2. The rights of the hirer under a hire purchase contract include the following EXCEPT

(a) Right to use the goods

(b) Right to quiet possession and enjoyment of the goods

(c) Right to know the exact instalments to be paid and the cash price of the goods

*(d) Right to take reasonable care of the hire purchase goods.

(e) Right to choose the insurance and to the garage to maintain the goods or motor vehicle

3. The rights of the owner under a contract of hire purchase include the following EXCEPT

*(a) The right to choose the insurance and to stipulate the premium to be paid

(b) Right to information about the goods from the hirer

(c) Right to re-possess the goods where the agreement is determined by the hirer by court action

(d) Right to re-possess the goods if it is a motor vehicle, for safety even when a relevant portion has been paid without recourse to a court of law

SHORT ANSWER QUESTIONS

1. The Hire Purchase Act was enacted in _____***** 1965
2. By section 3 of the Act, any term of the hire purchase agreement that entitles the owner to enter the premises of the hirer to repossess the goods is _____ ***** void.
3. The *Hire Purchase Act* seeks to correct the inadequacies in the _____ *****Factors Act/Sale of Goods Act ***** concerning contracts of hire.

ESSAY QUESTIONS

1. List the duties of the owner under the *Hire Purchase Act.*

Answer

The duties of the owner under the Hire Purchase Act are as follows:

(a) The owner owes the duty to disclose the cash price (value) of the goods to the hirer at the inception of the contract;

(b) She must have valid title in the goods.

(c) She must give the hirer quiet possession of the goods;

(d) The owner must deliver the goods to the hirer;

(e) She must accept instalmental payment;

(f) She must deliver the exact quantity of goods stipulated; and

(g) She cannot reposses goods subject of hire purchase except a Motor vehicle.

2. List the duties of the hirer under the Hire Purchase Act.

Answer

The duties of the hirer under the hire purchase contract include the following:

(a) Accepting the goods subject of the contract;

(b) Taking reasonable care of the hire purchase goods;

(c) Paying the instalments as and when due; and

(d) Disclosing information about the goods to the owner as and when required by the owner.

3. What are the remedies available to the owner where there is a breach of the hire purchase contract?

Answer

The following are some of the remedies available to an owner for breach of the hire purchase contract:

(a) Where the hirer determines the contract after taking delivery of the goods, the owner can sue for damages. Section 8 of the Hire Purchase Act provides that the hirer will be liable to pay what will bring his total payment to one half of the price;

(b) The owner shall be entitled to the true arrears of rental if he retakes the goods due to the breach of the agreement by the hirer; and

(c) Where the hirer fails to take possession of goods after the agreement, the owner can sue and get remedy under common law for damages.

CHAPTER EIGHT

CONTRACT OF EMPLOYMENT

8.0 LEARNING OBJECTIVES

Upon completion of this chapter, readers should be able to:

- Explain the nature and formation of a contract of employment;
- Discuss the rights of the employers and the employees;
- Describe the duties of the employers and the employees;
- Distinguish between termination and dismissal;
- Explain the remedies available for breach of the contract; and
- Understand redundancy

8.1 Introduction

The right to work is one of the fundamental rights to which a human being is entitled. It is the main means of sustenance for man. This is especially so in economies like ours where unemployment benefits are non-existent. Whatever form the employment takes, it is important to have an understanding of how it is contracted. The legal basis of employment remains the contract of employment between the employer and the employee. In most employment situations, both the employer and the employee (worker) have rights and also obligations imposed on the mand it is essential to know them. Since whatever has a beginning must necessarily have an end, then the various ways by which a contract of employment is brought are considered, and this leads us to consider the terminologies of termination, dismissal and redundancy. The remedies that are available for breach of the contract of employment are also discussed.

8.2 Nature and Formation of Contract of Employment

8.2.1 Nature of contract of employment

The contract of employment is the focus of attention of labour law. At common law, it is assumed that the terms of the contract are freely established by parties who are equal. This is the concept of the so-called freedom of contract, which is said to exist between the employer and the employee. However, this is not always the situation and is not always so. Except for the rare employees who can match the bargaining power of the employer, for the majority of employees, the major terms of the contract are fixed by the employer and are offered to the employee on the basis of "take it or leave it." For such employees, the employment relationship implies a relation of undefined authority on the side of the employer, and undefined subordination on the side of the workman. It is a relationship that inevitably gives rise to the needs for guarantees against abuse, and a relationship which the trade union constantly seek to improve.

8.2.2 Formation of contract of employment

The capacity to enter into contract of employment applies generally in all contracts. However, the Labour Act provided that infants and young persons may be engaged on daily basis for wages but not at night or on public holidays, or in underground operations, or on machines or shipping vessels, or against the wishes of their parents or guardians communicated to the employer.

Although women have capacity to enter into employment contract, they have some protection under the Labour Act by which the following are implied in their favour:

(a) They are entitled to maternity leave of six weeks before and six weeks after delivery;

(b) They shall not be given notice of dismissal during their absence on maternity leave, even if they remain longer than necessary due to illness;

(c) They shall not be employed on night duty nor shall they be employed on underground work in a mine, except they are holding positions of management and do not perform manual labour and women employed in health and welfare services

8.3 THE RIGHTS OF THE EMPLOYER AND WORKER

8.3.1 Rights of the Employer

The rights of an employer under a contract of employment include the right to employ a worker, discipline, transfer, promote and terminate the employment of the worker. The employer's discretion in the exercise of his right under a contract of employment is likened to the discretion of an entrepreneur to set target for his business, takes decision to modify, extend or cease operations. He also determines the type of products to make or sell and the prices of its goods and services.

8.3.2 Rights of the Worker

The rights of the worker include the right to work under satisfactory, safe and healthy conditions. The right not to be discriminated against at the workplace and this right translates secures for the worker, receipt of equal pay for equal work without distinction of any kind. The worker is also entitled to have rest, leisure and reasonable limitation of working hours and period of holidays. He can also form or join a trade union of his choice. He is to be trained and retrained for the development of his or her skills and receive information relevant to his or her work.

8.4 Duties of the Employer and Worker

There are duties imposed on the employer and the employee (worker) by virtue of their contractual relationship.

8.4.1 Duties of the Employer

(a) An employer is duty bound to provide work for his employee, especially the opportunity for work is contained in the contract of service;

(b) An employer must pay wages and remuneration regularly weekly, forth-nightly, or monthly, but not longer than monthly;

(c) Duty to provide a written statement of the terms of employment within three months after the employee has assumed duty;

(d) The duty to provide a safe system of work, which include proper appliances and plants, supportive competent staff; proper work system and effective

supervision, payment of expenses reasonably incurred by the employee in the course of his duties as well as compensation to injured employee or the relatives of deceased employees who have suffered mishap in the course of duty, as well as grant agreed leaves and one work-free day per week, and pay redundancy.

8.4.2 Duties of the Employee

Under a contract of employment the duties of an employee to his employer include the following:

(a) Duty to exercise his professed skill and diligence. Note however, that an employee is not expected to demonstrate more commitment than he has disclosed to his employer;

(b) He is obliged to perform the duty for which he is employed and other related duties;

(c) The employee has a duty to obey lawful and reasonable orders of his employer where those orders are with the terms of the contract and are not illegal nor contrary to public policy;

(d) The employee must render his services personally and not delegate his duties without the consent of the employer;

(e) An employee must keep secret his employer's confidential information And trade secret; and

(f) An employee is bound to serve his employer faithfully and not put himself in a situation where his interest will conflict with that of his employer.

8.5 Termination of Contract of Employment

Contract of employment may be terminated for the following reasons:

(a) Natural events such as death and frustration as well as operation of law;

(b) Compulsory winding up of the employer's company;

(c) Dissolution of partnership in a case of personal service;

(d) Compulsory conscription of the employee during hostility or war;

(e) Prolonged illness of the employee;

(f) Mutual agreement as when ad-hoc job is completed and on happening of some event, or contingency, or by effluxion of a term certain; and

(g) Termination of the employment by the employer or employee after due notice.

8.6 Remedies

Damages are the normal remedy available for breach of a contract of employment. This is usually monetary compensation to the injured party. Reinstatement may be another option. It means appointing the employee back to the position he occupied before and therefore the enjoyment of all the benefits that go with the position. Reinstatement is often impracticable and the courts are reluctant to make such orders since positions may have been filled already and may also create a hostile working environment. However, in situations where a public officer may have been removed without just cause then the remedy of reinstatement may be granted. Re-employment of the worker either in the work for which he was employed before the termination or in other reasonably suitable work on the same terms and conditions enjoyed by the worker before the termination is the other alternative.

8.7 Redundancy

When an employer contemplates that the introduction of major changes in production programme, organisation, structure or technology of an undertaking are likely to entail terminations of employment of workers in the undertaking, the employer will be expected to provide in writing to the Chief Labour Officer and the trade union concerned, not later than three months before the contemplated changes all relevant information including the reasons for the termination, the number and categories of workers likely to be affected and the period within which any termination is to be carried out. He is also to consult the trade union concerned on measures to be taken to avert or minimize the termination as well as measures to mitigate the adverse effects of any termination on the workers concerned such as finding alternative employment. Redundancy implies the severance of the legal

relationship of worker and employer due to the close down, arrangement or amalgamation and the worker becoming unemployed or suffering a diminution in

the terms and conditions of employment. This situation called for the payment of redundancy pay. Payment to the worker by the undertaking at which he was immediately employed before the close down, arrangement or amalgamation as a form of compensation is what is known as redundancy pay. The amount of redundancy pay and the terms and conditions of payment are subject to negotiations between the employer and the worker or their representatives.

8.8 Summary and Conclusion

Employment plays a critical role in human survival. It is the main source of sustenance. The very essence of the contract of employment relates to the rights and duties of the employer and the employee. Contracts of employment may come to an end one way or the other. It may be through termination with or without loss of benefits or through redundancy. Termination with loss of benefits (dismissal) maybe the other way. Any wrongful termination will amount to a breach of the contract of employment for which there are remedies.

8.9 REVISION QUESTIONS

MULTIPLE CHOICE QUESTIONS

1. The duties of an employer under a contract of employment include the following EXCEPT
   - (a) To provide work
   - (b) To pay wages or salaries
   - (c) To provide a safe system of work
   - (d) To treat employee with respect
   - *(e) To obey the employee whenever duty demands

2. The duty of the employer to provide a safe system of work means ALL BUT ONE of the following:

(a) To provide competent supportive staff

(b) To provide proper tools and plants for the use of the employee

(c) To grant at least one work-free day per week

(d) To indemnify the employee for losses lawfully and reasonably incurred

*(e) To sue the servant in order to enforce reasonable restraint of trade

3. The technical term for the period of trial of a new employee during which the employer takes the opportunity to study the employee, test his skill and suitability, is known as

(a) Duration period

(b) Testing period

(c) Assessment period

*(d) Probation period

(e) Observation period

SHORT ANSWER QUESTIONS

1. _____**** interdiction**** is the suspension of the employee from the workplace pending the determination of a criminal charge against him.
2. When the employer removes an employee without formalities, the employee is said to be _____*****dismissed.
3. Where servants have to be discharged for reasons owing to excess manpower, employer is liable to pay _____****redundancy**** allowance to the employee.

ESSAY QUESTIONS

1. What are the duties of the employer under a contract of employment?

Answer

The duties of an employer under a contract of employment include the following:

(a) Duty to pay wages or salaries;

(b) Duty to provide work;

(c) Duty to provide a safe system of work;

(d) Duty to provide written statement of the terms of employment within three months after the servant has assumed duties.

2. Distinguish between a contract of service and a contract for services and list the tests that the courts have applied to distinguish between the two.

Answer

(a) Even though in both case of contract of service and contract for services, the contract to do work is present, yet the incidents attaching to the two contracts are different. For instance, a person engaged in a contract of service is called an and the employer may be vicariously liable for the tort of the employee, whereas a person engaged in a contract for services is known as an independent contractor and the employer may not be liable for the tort committed by the independent contractor unless the act is expressly authorised.

(b) The courts, in distinguishing between a contract of service and a contract for services have, over time, applied certain tests, some of which are:

(i) Control test;

(ii) Organisation test; and

(iii) Circumstances of the case test.

3. Highlight the peculiar provisions relating to the employment of young persons and women under the Labour Act.

Answer

Young persons: Even though the Labour Act provides in section 9 that a person below the age of sixteen years cannot validly enter into a contract of employment but that of apprenticeship, however, the Act provides that whereas a young person may be engaged on daily basis for wages, this engagement shall not be in the night, or on public holidays, or in underground operations or on

machines or shipping vessels or against the wishes of their parents or guardian notified orally or in writing to the employer.

Women: There are also some protection for women under the Act. Among the terms in their favour are the following:

(a) Women are entitled to maternity leave of six weeks before and six weeks after their condiment on the production of a medical certificate, given by a qualified medical practitioner.

(b) They shall not be given notice of dismissal during their absence on maternity leave even if they remain longer than necessary due to illness.

(c) They shall not be employed on night work nor shall they be employed on underground work in a mine except those women holding position of management who do not perform manual labour and women employed on health and welfare services and those who are not otherwise engaged in manual labour.

CHAPTER NINE

CONTRACT OF INSURANCE

9.0 LEARNING OBJECTIVES

At the end of this chapter, readers should be able to know:

- The meaning of insurance
- The classification of the contract of insurance, into life and non-life;
- The share capital required by an insurer for registration of insurance business;
- The meaning of some concepts and principles of insurance such as insurable interest, premium, indemnity, etc.

9.1 Introduction

The many changes that human existence on earth is subject to has made everything unsure, uncertain and unsafe. These vagaries of life have often resulted in severe damage or loss to mankind and therefore has led mankind to devise means of alleviate the damage.

Thus, a contract of Insurance is one whereby a person or company (the insurer) agrees in consideration of a single or periodical payment (called the premium) to pay a sum of money to another person or company (the insured) on the happening of a certain event or to indemnify against loss caused by the risk insured against. It is important to note that the benefits accruing to the insured must be of a monetary nature.

The share capital requirement that an entrepreneur or a company desiring to set up an insurance business will be expected to meet and finally, it is also necessary for us to get familiar with various meaning and features of certain concepts and principles that are peculiar to the contract of insurance. Concepts and principles such as insurable interest, premium, indemnity, materiality of information, utmost good faith, conditions and warranties and subrogation and contribution.

9.2 Meaning and Classification of Insurance

9.2.1 Meaning of Insurance

The Black's Law dictionary, ninth edition, defines insurance as: "A contract by which one party (the insurer) undertakes to indemnify another party (the insured) against risk of loss, damage, or liability arising from the occurrence of some specified contingency, and usually to defend the insured or to pay for a defence regardless of whether the insured is ultimately found liable.

In Nigeria, the contract of insurance is one that is regulated by statute and the main statute which regulate the insurance industry in the country, is the *Insurance Act, 2003 contained in the* Laws of the Federation of Nigeria, 2004.

9.2.2 Classification of Insurance

According to the *Insurance Act,* there shall be two main classes of insurance business namely,

(a) Life insurance: These are individual life insurance business; group life insurance business and pension business; and health insurance business.

(b) General or non-life insurance: The Insurance Act provides for 8 categories which are: fire insurance business; general accident insurance business; motor vehicle insurance business; marine and aviation insurance business; oil and gas insurance business; engineering insurance business; bonds credit guarantee and suretyship insurance business; and miscellaneous insurance business.

9.3 Share Capital of Insurer

The Act makes specific provisions in respect of the business of insurance in Nigeria which an intending insurer must comply with. The provisions relate *inter alia* to the share capital which an insurer is expected to register with the Corporate Affairs Commission – CAC – in respect of the insurance business.

Section 9 of the Act prescribes the following amounts as the case may require for the following categories of insurance business:

a. Life Insurance Business, not less than ₦150,000,000 (One Hundred and Fifty Million Naira);
b. General Insurance, not less than ₦200,000,000 (Two Hundred Million Naira; and
c. Reinsurance Business, not less than ₦350,000 (Three Hundred and Fifty Million Naira)

The provisions of the Act in respect of the new share capital stipulations is expected to have come into force on the expiration of a period of 9 months from the date of commencement of the Act.

Section 10 of the Act further required the share capital stipulated in section 9 of the Act to be deposited with the Central Bank of Nigeria, before such an insurer can commence insurance business.

9.4 Meaning and Features of Certain Concepts and Principles of Insurance

9.4.1 Insurable Interest:

This is a prerequisite for any contract of insurance. The precondition nature of insurable interest for every kind of insurance has been given judicial stamp in the case of *C.C.B. Ltd. v. Nwokocha*, where Nsofor JCA said: "…. It is in my opinion, rather settled principle that in the law of insurance, be it marine or fire etc., the insured ought to have an insurable interest, in the subject matter of the insurance.

In *Lucena v. Craufurd*, insurable interest is defined as an interest that a man has in a thing in respect of which an advantage may arise or prejudice happen from the circumstances which may attend it, and the man is therefore interested in the preservation of that thing in order to derive benefit from its existence, and to avoid loss or damage from its destruction.

Features/Examples of insurable interest:

1. A creditor has an insurable interest in the life of his debtor to the extent of the debt and the policy money is recovered even though the debt is paid before the maturity of the policy. However, he generally, has no insurable interest in the property of his debtor.
2. A surety has an insurable interest in the principal debtor's life.
3. An employee engaged for a term of years has an insurable interest in his employer's life.

9.4.2 Premium

As with every other contract, a contract of insurance is not valid unless consideration is furnished, and premium is the consideration upon which the validity of insurance contract is based. It may be paid in bulk or instalmentally according to the policy or the agreement for the contract of insurance. The payment of the first premium is an indication that a binding contract has been formed.

Where premium is not paid, the insurer has a right of action against the assured. The insurer may also waive the rules or conditions relating to the payment of premium if they like, but cannot waive the actual payment of premium as section 50 of the *Insurance Act* has made payment of premium mandatory in Nigeria when it provides that: "The receipt of an insurance premium shall be a condition precedent to a valid contract of insurance and there shall be no cover in respect of an insurance risk, unless the premium is paid in advance." Hence, the position of the law in Nigeria as regards premium is the "no premium, no cover" rule.

9.4.3 Indemnity

Indemnity is one of the most fundamental principles underlying the contract of insurance. The principle of indemnity operates to prevent an insured from taking a gain from insurance like a lucky gambler would have done. It means that if the loss for which protection had been sought ultimately comes, the

insurer undertakes to indemnify or restore the insured to the normal position he was before the incident and loss.

The insured is not allowed to recover more than his actual financial loss. If insured persons were allowed to recover more than an indemnity, this would be against the national interest as persons would then be tempted to take out insurances, and stage loss in order to claim on their insurers."

9.4.4 Utmost Good Faith

The principle of utmost good faith lies at the root of the contract of insurance. Contracts of insurance are an example of contracts in which by their nature, only one party possesses knowledge of all the material facts. In such a situation, the law expects such a one to disclose all such material facts in utmost good faith. The principle of utmost good faith stipulates that due to the peculiar nature of the contract of insurance by which the special circumstance upon which the contingency of the transaction can be computed lay peculiarly in the knowledge of the insured only, the need for him to be honest and truthful about those circumstances becomes substantial to the validity of the contract.

9.4.5 Materiality of information (The Principle of Disclosure)

Both parties to the contract of insurance are under a duty not to conceal any fact which may influence the decision of the other to conclude the contract. Although this duty is placed on both parties to the contract, the demand for compliance with it is greater on the insured than the insurer. A proposer for insurance is bound to disclose only those material facts which he knows. In determining whether or not a fact is material to the contract of insurance, the courts have often employed several tests. Under the Common Law, the most common of these tests are:

(a) test of the reasonable insurer (what a reasonable insurer would consider to be material to such a contract of insurance);

(b) test of the reasonable insured (what a reasonable insured acting honestly would consider important to disclose, given the circumstances of the case);

(c) test of the particular insurer (what the particular insurer in question considers to be material); and

(d) test of the particular insured (what the particular insured considers to be material)

9.4.6 Conditions and warranties

Under law of general contract, conditions are terms that are fundamental to or go to the roots of a contract. Any breach of condition renders the transaction void and rescission can follow. Warranties, on the other hand, are terms that are not fundamental as such but are only supplementary to the main terms of the contract. A breach of warranties merely entitles the claimant to payment of damages only and cannot out-rightly avoid the contract. However, under the contract of insurance, the application of these terms is quite different as both words are used simultaneously and interchangeably. Any breach of either term by one of the parties, entitles the other party to repudiate the contract.

9.4.7 Subrogation

Subrogation is a fundamental doctrine of insurance whereby no one is allowed to profit from his loss. The principle enables the insurer to receive the benefits of all the rights of the insured against third parties, which if satisfied, will extinguish or diminish the ultimate loss sustained. In *Castellain v. Preston,* it was the view of the judge that, "Any person who wishes to recover for and is paid by the insurers as for a total loss cannot take with both hands. If he has a means of diminishing the loss, the result of the use of those means belongs to the underwriters. Generally, subrogation guides against a situation where the insured would renounce or compromise his right of action against a third party especially where the exercise of such right will likely reduce his loss. Subrogation is applicable to marine insurance, fire insurance and

property insurance. It does not apply, however, to personal accident insurance.

9.4.8 Contribution

This is the right of the insurer who has paid under a policy to call upon other insurers equally or otherwise liable for the same loss to contribute to the payment. It occurs where there has been a double insurance and in addition, the following conditions must be satisfied:

(a) The policies in issue must cover the same peril that caused the loss;

(b) The policies in issue must insure the same subject matter and the same interest;

(c) The insurance policies concerned must be contracts of indemnity; and

(d) There may be more than one insurance policy enforceable at the date of the loss.

9.5 Summary and Conclusion

This chapter has given a comprehensive study of the law of insurance. It contains a detailed explanation of the meaning and classification of contract of insurance, as well as a consideration of the share capital stipulation which an insurer is expected to meet before it can carry on the business of insurance. Providing different examples of insurance. The chapter ends by explaining certain basic concepts and principles of insurance such as insurable interest, premium, indemnity, materiality of information, utmost good faith, conditions and warranties, subrogation and contribution.

9.6 REVISION QUESTIONS

MULTIPLE CHOICE QUESTIONS

1. The statutory provision for the doctrine of subrogation in Marine Insurance is contained in:

   A. The proposal form

   B. Section 80 *Marine Insurance Act*

   C. Section 158 Constitution of the Federal Republic of Nigeria, 1999 (as

ammended)

D. Section 60 *Insurance Act*

E. Section 58 *Insurance Act*

2. What section of the Insurance Act places the burden on the insurer of requesting all information he considers material in the proposal form?

A. Section 55, *Insurance Act*

B. Section 80, *Marine Insurance Act*

C. Section 158, Constitution of the Federal Republic of Nigeria, 1999 (as amended).

D. Section 60, *Insurance Act*.

*E. Section 58, *Insurance Act*

3. When an insured contracts for more than one insurance policy in respect of the same subject matter of risk, he is said to have made

A. Compound Insurance

B. Complex Insurance

C. Complete Insurance

*D. Double Insurance

E. Invalid Insurance

SHORT ANSWER QUESTIONS

1. The principle whereby the insured is to be compensated to the actual extent of his loss and not more, is known as principle of _____***** indemnity.

2. Whenever any person will be prejudiced by the loss of a thing, or will benefit by the continued existence of it, he is said to have _____****insurable interest**** in the thing.

3. The means through which an insurer elicits all material information from the insured is the _____**** proposal form.

ESSAY QUESTIONS

1. Define the doctrine of subrogation in a contract of insurance and illustrate it.

Answer

Subrogation is a fundamental doctrine of insurance whereby no one is allowed to profit from his loss. Illustration: For example, where there is an insured who suffers loss as result of the negligent acts of a third party from whom the insured receives compensation for the loss against which he has an insurance policy. If the insurer pays him for the loss, the law will not permit him to retain both the compensation from the negligent third party and the payment by the insurer because to do so will mean that the insured has been put in a stronger position than he was before the loss occurred.

2. Examine briefly the meaning of the following insurance terms:

(a) Utmost good faith; and

(b) Indemnity.

Answer

(a) Utmost good faith is a fundamental principle of insurance contracts which require that by the nature of insurance contracts which depend on information within the peculiar or special knowledge of only one of the parties, the law requires that party to disclose all such material facts to the other party so as to enable that other party to make informed decisions as to whether he should enter into the contract or not.

The requirement of utmost good faith in contracts of insurance stipulates that because of the peculiar nature of the contract whereby the special circumstances upon which the contingency of the transaction can be computed lay peculiarly in the knowledge of the insured only, the need for him to be honest and truthful about those circumstances becomes material to the validity of the contract.

It is a common law position requiring that all material facts which would guide a prudent insurer whether he will take the risk and, if so, at what premium and on what conditions. The Insurance Act requires that where a proposal form is employed by the insurer in the processes leading to the formation of the insurance contract, the form must contain and elicit

every piece of information which the insurer considers to be material and that any information not sought in the form is deemed not to be material.

(b) The doctrine of indemnity in the law of insurance contract is that upon the risk insured against occurring, the insured is to be financially compensated by the insurer to the actual extent of the loss so that the insured is restored to his actual financial position before the occurrence of the loss. The doctrine applies to policies where actual compensation can take the place but does not apply to contingency insurance contracts like life insurance policies or personal accident insurance policies since no amount of money can compensate for the loss of life or the loss of a limb.

3. Distinguish between conditions and warranties and the effect of their breach under a contract of insurance.

Answer

Under law of general contract, **conditions are fundamental** terms to the validity of the contract. Any breach of condition renders the transaction void and rescission follows. **Warranties** on the other hand, are terms that are not fundamental as such but merely supplementary to the main terms of the contract. A breach of warranties under general contract does not entitle claimant to avoid the contract but merely to claim damages. However, under the contract of insurance, the application of these terms is quite different as both words are used interchangeably and any breach of either term by one of the parties, entitles the other party to repudiate the contract.

CHAPTER 10

LAW OF BUSINESS ASSOCIATIONS: PARTNERSHIP

10.0 LEARNING OBJECTIVES

After studying this chapter, readers should be able to know and understand the following:

- What a partnership is and how it is formed;
- Types of partnership and other rules which determine its existence;
- Authority of partners and rights and duties of partners among the members;
- Relationship of partners with third parties; and
- Dissolution of partnership.

10.1 Introduction

The Partnership Act 1890 defines partnership as the relationship which subsists between persons carrying on business in common with a view to profit. A partnership is usually referred to as a "firm" and it gives two or more people the means of joining together in business. It is a kind of unincorporated association with no separate existence form its members.

10.2 Formation of Partnership

Partnership Agreements may be made with or without formality. They may be oral or written and may or may not be under seal. Where a partnership agreement is in writing, the document is called the articles of partnership, and this maybe varied by subsequent agreements, express or implied, between the parties. Two other formalities which follow the commencement of partnership operations are as follows:

(a) Registration of the partnership name under part B of the Companies and Allied Matters Act Cap C20 Laws of the Federation 2004. Every firm having a place of business in Nigeria is required to register with the Corporate Affairs Commission not later than 28days after it begins

operation if the name of the partnership is different from the real surnames of the partners (without any additions). It is an offence if this is not done and each partner shall be liable on conviction to a fine of ₦50 for everyday that the default continues.

(b) Each partnership is required to register upon request a copy of their Articles of Partnership (if any) or a written summary of their agreement to be supplied with the local tax laws in accordance with the Income Tax Laws. Capacity to enter into a partnership is governed by the ordinary law of contract. Thus, a minor can enter into a partnership and the contract is binding on him unless he repudiates it before or within a reasonable time of his attaining full age. If he repudiates it, he is not liable for partnership debts contracted while he was a minor.

10.3 Types of Partnership

(a) General Partnership

A partnership is said to be a general partnership if all the partners are involved in the management of the partnership business. In this situation, there is no distinction between the partners and the business. The partners are liable for all the debts and other obligations of the partnership without any limit to their liability.

(b) Limited Partnership

Where one or more of the partners opt for limitation of liability to the quantum of their investment and non-participation in management of the firm, the partnership is a limited partnership. However, if the limited partners take part in managing the business, they become general partners without any limit to their liability.

A limited partnership must be created formally by drawing up a partnership deed and registering the firm.

Features of Limited Partnership

(i) The limited partner in a limited partnership is liable only to the extent of his contribution;

(ii) The limited partner cannot bind the firm; and

(iii) The limited partner in a limited partnership cannot contribute to the management of the partnership, although he can advise and inspect the books. If he does he turns himself into a general partner with unlimited liability;

(iv) The limited partner's death, bankruptcy or insanity will not dissolve the limited partnership as that of a general partner would a general partnership;

(v) the limiter partner can assign his share in the limited partnership with the other partners' consent; and

(vi) A limited partner cannot dissolve the limited partnership by notice.

(c) Dormant or Sleeping Partner:

There is a distinction between active and dormant partners. A dormant partner takes no part in management although his name must be included in the firm's name and be registered under the Registration of Business Names Act. He is at most times often concealed. If he is not concealed and enters into a contract with a third party who knows him to be a partner in the firm, the firm will be bound.

10.4 Determination of Existence of Partnership

A partnership must have the following elements:

(a) There must be a business; and business include 'trade, vocation and profession';

(b) The business must be carried on by or on behalf of the partners;

(c) There must be profit making and profit sharing

10.5 Rights and Duties of Partners *inter se*

The Partnership Act contains rules which will apply subject to any agreement, express or implied, between the partners (Section 24) as follows:

(a) Equal Share: All partners are entitled to share equally in the capital and

profits of the business and must contribute equally towards the losses whether of capital or otherwise sustained by the firm;

(b) Management: Every partner may take part in the management of the partnership business;

(c) Remuneration: No partner shall be entitled to remuneration for acting in the partnership business;

(d) Introduction of Partners: No person shall be introduced as a partner without the consent of all existing partners;

(e) Internal disputes: Any difference arising out of the ordinary matters connected with the partnership business may be decided by a majority of the partners but no change may be made in the nature of the partnership business without the consent of all existing partners;

(f) Indemnity: The firm must indemnify every partner in respect of payments made and personal liabilities incurred by him in the ordinary and proper conduct of the business of the firm;

(g) Interest on Capital: A partner is not entitled, before the ascertainment of profit, to interest on capital subscribed by him;

(h) Books: The Partnership books are to be kept at the place of business of the partnership and every partner may when he thinks fit, have access to and inspect any copy of them;

(i) Assignment of a Share in a Partnership: An assignment by any partner of his share in the partnership either absolutely or by way of mortgage or redeemable charge does not entitle the assignee to interfere in the management, require accounts or inspect the partnership books. He is only entitled to receive a share of the profits which the assigning partner would otherwise be entitled to; and

(j) Transmission of Shares in the Partnership: When a partner dies or becomes bankrupt, his property vests by operation of law in his personal representatives or trustee in bankruptcy as the case maybe. They do not become partners in the firm, indeed the firm will have been dissolved by the

death or bankruptcy unless the partnership agreement otherwise provides.

10.6 Relations of Partners and Third Parties

Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership and every partner's act done for carrying on the business in the usual way will bind the firm and his partners. However, the firm and the co-partners will not be bound;

(i) Where the partner who acts has no authority to bind the firm in the particular matter, and;

(ii) Where the person who deals with him knows that he has no authority or does not believe him to be partner (Section 5).

10.6.1 Extent of Power:

Decided cases indicate that the implied authority of a partner envisaged above is as follows:

(a) In all partnerships except limited partnership, partners have implied authority to

- Buy, pledge and sell goods of the type in which the firm deals;
- Give valid receipts;
- Sign Cheques;
- Engage and dismiss employees; and
- Sue on behalf of firm or defend an action against it.

(b) In trading Partnerships, partnerships where business consists in the buying and selling of goods, the partners have additional powers to

- Borrow money and give security over the firm's land or chattels; and
- draw, accept or in dose bills of exchange and promissory notes

(c) In non-trading partnerships such as firms of solicitors, quarry workers, auctioneers, accountants, cinema proprietors, a partner cannot

- accept, make or issue negotiable instruments other than ordinary cheques;

and

- borrow or pledge the partnership property.

There are however certain acts that are not within the usual authority of a partner whether it is a trading partnership or a non-trading partnership, thus a partner does not have the usual authority to:

(a) execute a deed, unless his authority is expressly conferred by deed;

(b) give a guarantee in the firm's name unless a trade custom in that regard is proved;

(c) submit a dispute to arbitration;

(d) accept property in lieu of money to satisfy a debt owed to the firm;

(e) make his partners into partners with other persons in another firm; and

(f) authorise a third person to make use of the firm's name in legal proceedings

10.7 Dissolution of Partnership

A partnership may be dissolved by order of the court but there are many cases when dissolution occurs without any court order. Dissolution occurs without any order of the court by:

(1) Expiration or Notice: Subject to any agreement between the partners, a partnership is dissolved:

  (a) If entered into for a fixed term, by the expiration of that term.

  (b) If entered into for a single adventure or undertaking by the termination of that adventure or undertaking.

  (c) If entered into for an undefined term, by any partner giving notice of dissolution to the others.

(2) Bankruptcy or Death: Subject to any contrary agreement between the partners, a partnership is dissolved by the death or bankruptcy of any partner.

(3) Charge: If one partner suffers his shares to be charged for his separate debt, the others have the option of dissolving the partnership.

(4) Illegality: If an event which makes it unlawful for the business of the firm to be carried on by the members occurs, the partnership is dissolved.

10.7.1 Dissolution by Court

On application by a partner, the court may decree dissolution in the following circumstances:

(1) When a partner becomes a lunatic by inquisition;

(2) When a partner other than the partner suing becomes in any other way permanently in capable of performing his duties under the contract of partnership;

(3) When a partner other than the partner suing has been guilty of conduct calculated to prejudicially affect the carrying on of business;

(4) When a partner, other than the partner suing, wilfully or persistently commits a breach of the partnership agreement or otherwise so conducts himself that it is no treasonably practicable for the other partners to carry on the business in partnership with him;

(5) When the partnership business can only be carried on at a loss;

(6) Whenever the court thinks it just and equitable to dissolve the partnership.

10.7.2 Effect of Dissolution: Dissolution basically revokes the power of each partner to bind the firm, except to complete transactions began, but not finished at the time of dissolution and to do what may be necessary to wind up the partnership affairs.

10.7.3 Application of Partnership Property on Dissolution

On dissolution, each partner is entitled to have the partnership property including the goodwill, sold and the proceeds applied in payment of the debts and liabilities of the firm. The Act provides that in settling accounts, if the partnership assets are insufficient to discharge the debts and liabilities of the firm, subject to agreement, the partners must bear the deficiency in the proportion in which they were entitled to share profits in this order:

(i) Out of profit;

(ii) Out of capital;

(iii) By the partner individually in the proportion in which they were entitled to share profits.

Apart from this, the assets, including any sums contributed by the partners to make up the losses or deficiencies of capital are applied in the following manner:

(i) In paying the debts and liabilities of the firms to persons who are not partners;

(ii) In paying the debts and liabilities of the firm to persons who are partners;

(iii) In paying each partner rate ably what is due to him in respect of capital;

(iv) The ultimate residue if any is to be divided among the partners in the proportion in which profits are divisible.

10.8 SUMMARYAND CONCLUSION

This chapter has attempted to give an in-depth study of the formation of partnership, and how to determine the existence of partnership. The relation between partners and third parties exemplifying the authority of partners to bind the firm. The rights and duties of partners among themselves was also considered and in the end, the dissolution of partnership in its full ramification embracing the modes of dissolution, the legal effects thereof and the application of partnership property on dissolution.

10.9 REVISION QUESTIONS

MULTIPLE CHOICE QUESTIONS

1. The Partnership legislation applicable in States that have not enacted their own Partnership Law is

   A. Partnership Law, 1959

   B. Limited Liability Partnership Act (UK), 2000

   C. *Partnership Act, 1890

   D. Companies and Partnership Law, 1990

   E. Registration of Partnership Law, LFN, 2004

2. Which of the following statement is TRUE in respect of a limited partnership?

A. There is a limited partner whose liability for the partnership debt in unlimited.

*B. The limited partner cannot participate in the management of the partnership business.

C. The limited partner's death will bring an end to the partnership business.

D. The limited partner can bind the firm.

E. The limited partner is the Managing Director of the partnership business

3. Which of the following is FALSE in respect of a general partner?

A. She can decide to take part in the management of the partnership business.

B. She has implied authority to buy, pledge and sell goods the type in which the firm deals.

C. She can sue on behalf of the firm or defend an action against it.

*D She can accept property in lieu of money to satisfy a debt owed to the firm.

E. She can engage and dismiss employees.

SHORT ANSWER QUESTION

1. Another name for the limited partner is a _____***** dormant partner.

In the event of a winding up of a partnership, the limited partner is liable only to the extent of his _____***** contribution.

2. Where a partnership agreement is in writing, the document is referred to as_____ ****articles of partnership.

ESSAY QUESTION

1(a) When does a situation of partnership by estoppel arise?

(b) Ade is a friend to Bola and Wale, partners in the Firm of Goldsmiths operating in Iyanfoworogi. Ade is fond of visiting his two friends in their place of work and will stay with them till close of work. On a certain day, Abike visited the Firm with the intention of patronising the Firm whereby she met Ade who pretended to be one of the partners and discussed with Abike on how to fix the very expensive gold choker which Abike brought for repairs. None of the partners was around except Ade, who informed the Abike that he was one of the partners and took the choker from Abike and issued her a receipt which he from the firm's receipt booklet which he signed. Ade informed Abike that he will personally deliver the choker to Abike in her house and that Abike should not bother to come back to the Firm for her repaired choker. Ade fulfilled her promise and took the choker to Abike whereby Abike discovered that the choker had been badly handled and demanded a replacement from the Firm. It was then that Ade told her he was not a member of the Firm. Advise the parties.

Answer

(a) A partnership by estoppel will arise in all situations where a person will be prevented from denying his membership of a partnership after he has held himself out as a partner and thereby induces another person to act upon that representation. Even though he is not a partner, but yet he will be liable to a third party as if he really were a partner.

(b) The issue here is the liability of Ade for holding himself out as a partner in the Firm of Goldsmiths. If he had disclosed that he was not one of the partners, Abike might not have given the choker to him to repair. Ade, issuing and signing a receipt for Abike would have also represented by conduct to Abike that he was one of the partners. Ade will be liable to Abike to the extent of being responsible to replace the choker or compensate Abike to the full extent of a replacement.

2. Who is a dormant or sleeping partner?

Answer

A dormant or sleeping partner is the exact opposite of an active partner in a partnership business. A dormant partner takes no part in management although his name must be included in the firm's name and be registered under Registration of Business Name provisions under Part B of the CAMA. She is at most times often concealed. If she is not concealed and enters into a contract with a third party who knows him to be a partner in the firm, the firm will be bound.

3. Examine a Partner's rights in a general partnership in relation to (a) Management; (b) Indemnity; and (c) Remuneration.

Answer

Where there are no partnership agreements in existence or where they exist, and do not contain enough provisions, the Partnership Act/Law will apply to make provisions to fill any vacuum thus created. The Act contain provisions in respect of the following in lieu of partnership agreement:

(a) **Management**: Every partner may take part in the management of the partnership business except, a limited partner, who turns himself into a general partner who will have unlimited liability for the partnership debts.

(b) **Indemnity:** The firm must indemnify every partner in respect of payments made and personal liabilities incurred by him in the ordinary and proper conduct of the business of the firm.

(c) **Remuneration:** No partner shall be entitled to remuneration for acting in the partnership business, except partners have provided for it in their agreement.

CHAPTER ELEVEN

LAW OF BUSINESS ASSOCIATIONS: COMPANIES

11.0 LEARNING OBJECTIVES

Upon completion of this chapter, readers should be able to:

- Discuss the establishment and functions of the Corporate Affairs Commission/ Companies Registry;
- Classify companies;
- Explain the duties of promoters and auditors; and
- Describe the process and consequences of incorporation;
- Explain what company securities are;
- Appraise the powers and duties of directors;
- Explain the qualifications, status and duties of companies' secretaries;
- Have an understanding of company meetings;
- Explain majority rule and minority protection; and
- winding-up and liquidation of companies.

11.1 Introduction

Companies today constitute one of the major forms of business associations. There are companies involved in every aspect of human endeavour. Every person's life is touched in one way or the other by companies. A study of companies is therefore a prerequisite to understanding business associations. First of all, there is the need to know what a company is and the various types. The duties of promoters, the process of incorporation and the effects of it cannot be overemphasized. Company securities relate to their sustenance and operation, and so understanding them is a requirement. In Ghana and Nigeria, corporate governance is unfolding, so it is important to have a good understanding of the powers and duties of directors as well as the qualifications, status and duties of the company secretary. The way meetings are organised and how decisions are taken at meetings, coupled with majority rule and the issue of minority protection, the role of auditors and the winding up or liquidation of companies are explained in this chapter. So also are

registration of Business Names under Part B of the Companies and Allied Matters Act (CAMA), Incorporation of Trustees under Part C of the same, and Unit Trust Scheme.

11.2 Establishment, Nature and Functions of Corporate Affairs Commission

The Corporate Affairs Commission – CAC - is established under S. 1 of the Companies and Allied Matters Act (CAMA). It is established as a body corporate with perpetual succession and a common seal, capable of suing and being sued in its corporate name and of acquiring, holding or disposing of all types of property for the purpose of its functions. The headquarters of the Commission is situated in Abuja, the Federal Capital Territory. A branch office is expected to be established in each State of the Federation.

In Ghana, companies are regulated by the Companies Code 1963, (Act 179), whereas companies in Liberia are regulated by Associations Laws, 1976 Liberia Codes of Laws, Revised.

11.3 Functions of the Corporate Affairs Commission/Companies Registry

The functions of the Commission are set out in Section 7 of the CAMA as follows:

(a) to administer the Act including the regulation and supervision of the formation, incorporation, registration, management and winding-up of companies under or pursuant to the Act;

(b) to establish and maintain a companies' registry, and offices in all the states of the Federation, suitably and adequately equipped to discharge its functions under the Act or any other law in respect of which it is charged with responsibility;

(c) to arrange or conduct an investigation into the affairs of any company where the interest of the shareholders and the public so demand;

(d) to perform such other functions as may be specified by any Act or enactment; and

(e) to undertake such other activities as are necessary or expedient for giving full effect to the provision of the Act.

11.4 Types of companies

An company may be **a company limited by shares** where the liability of its members is limited to the amount, if any, unpaid on the shares respectively held by them; or **a company limited by guarantee** where the liability of its members is limited to the amount the members may respectively undertake to contribute to the assets of the company in the event of it being wound up; or **an unlimited company** where there is no limit on the liability of its members. **Any of the three types of Companies may either be a private company or a public company.**

(f) **A private company** restricts the right to transfer its share, limits the total number of Its members and debenture holders to fifty, prohibits the company from making an invitation to the public to acquire any shares or debentures of the company and prohibits the company from making any invitation to the public to deposit money for fixed periods or payable at call.

11.5 Status and Duties of Promoters

11.5.1 Status of Promoters

A promoter is "any person who undertakes to take part in forming a company with reference to a given project and set it going and who takes the necessary steps to accomplish that purpose, or who, with regard to proposed or newly formed company, undertakes a part in raising capital for it…" (S. 61, CAMA)

The term, however, excludes those acting in a professional capacity for the persons engaged in procuring the formation of the company. Examples of such people are lawyers, accountants and chartered secretaries. Until registration, the promoter has certain duties.

11.5.2 Duties of Promoters

A promoter has a fiduciary relationship with the company. He has to place the interest of the company above his personal interest. Specifically, the duties of a promoter are as follows:

(a) A promoter is a fiduciary to the proposed or newly formed company and must observe utmost good faith towards the company in all the transactions entered into with the company or undertaken for and on behalf of the company;

(b) A promoter must not make any secret profit in any transaction with or on behalf of the company;

(c) A promoter may freely sell his property to the proposed company. However, he must disclose his interest in the property to the company after incorporation;

(d) Any transaction between a promoter and the company may be rescinded by the company unless, after full disclosure of all the material facts known to the promoter, such transaction is entered into by the company. The disclosure may be made to the company's board of directors, independent of the promoter, or all the members of the company, or a general meeting at which the promoter shall not vote.

When a promoter has breached any of his duties, the company may rescind the contract, recover the secret profit made, or recover compensation or damages from the promoter and adopt the contract.

11.6 Appointment, Qualification and Duties of Auditors

11.6.1 Appointment and qualification

(a) Every company shall appoint an auditor or auditors at each annual general meeting to audit its financial statement (s. 357(1));

(b) The provisions of the Institute of Chartered Accountants of Nigeria Act shall apply to any investigation or audit of companies (s. 358(1));

(c) No person shall audit a public company unless the SEC has registered the person on such terms and conditions as it may prescribe from time to time (s. 62, ISA);

(d) Non-registration of the person immediately above subjects the company investigated to a penal fine of N1, 000, 000 as well as a further penalty of

₦5, 000 for every day of violation (s. 65, ISA);

(e) The officers, servants or agents of the company who connived in violating the provisions of the ISA above shall be liable to the same extent as the corporate body (s. 66(1), ISA);

(f) The SEC may administratively enforce the above penalties (s. 66(2), ISA);

(g) Subsections (2) & (3) of section 385 of CAMA disqualify from appointment as auditor an officer or servant of the company under investigation (other than its auditor) and a partner or employee of both as well as a disqualified auditor of a subsidiary to the holding company to be investigated.

11.6.2 Duties of Auditors

The auditor shall make a report to the members of the company on the accounts, balance sheet as well as profit and loss accounts to be laid before the general meeting.

In the case of a public company, the auditors shall also make a report to an audit committee of an equal number of directors and representatives of the shareholders (not exceeding six).

The audit committee shall examine the auditors' report and make recommendations on it to the general meeting. Specifically, the duties of the auditor are to investigate and form an opinion on whether or not:

(a) the company has kept proper accounting records and the auditors have received proper returns for their audit from the branches not visited by them;

(b) the company's balance sheets and its profit and loss account agree with the accounting records and returns (s. 360(1), CAMA); and

(c) the information in the directors' report for the accounting year is consistent with those accounts (s. 360 (5), CAMA);

(d) an auditor shall exercise reasonable care, diligence and skill in the performance of her duties (s. 368(1), CAMA).

Any other company shall be a public company.

11.7 Process and Consequences of incorporation

11.7.1 Procedure for formation of Company

The following is the procedure contained in the Companies and Allied Matters Act, 1990 for the formation of companies under the Act:

(a) Any two or more persons may form a company by complying with the provisions of the CAMA (section 18, CAMA);

(b) Section 20, CAMA disqualifies a person under 18 years of age, a person of unsound mind, an undischarged bankrupt, a corporate body in liquidation and a person who has acted fraudulently in managing a company from joining in the formation of a company;

(c) The promoters have to engage the services of a certified professional to incorporate the company;

(d) The professional must first file with the CAC in the appropriate form (CAC 1) two alternative proposed names of the proposed company for availability approval and reservation;

(e) If available and approved, the CAC reserves a proposed name for 60 days;

(f) The professional engaged for the incorporation then prepares the memorandum and articles of association, together with the other documents of incorporation by way of prescribed forms purchased at CAC's office;

(g) The professional must present two copies of the memorandum and articles of association as well as two copies of the proposed company's statement of nominal share capital and return on allotment of shares to the Commissioner of Stamp Duties (a Federal official) so that she may assess the stamp duties payable on the share capital. The professional pays the duties as assessed and the Commissioner stamps the documents; and

(h) The professional files the documents of incorporation with the CAC on payment of the prescribed filing fees.

11.7.1.1 Documents of Incorporation

The documents of incorporation are:

(a) The memorandum and articles of association, stamped by the Commissioner of Stamp Duties;

(b) Return on allotment of shares form stamped by the Commissioner of Stamp Duties;

(c) The particulars of the directors with their consent to serve in the prescribed form signed by all the directors and countersigned by at least one director;

(d) A statement of the authorised capital of the company (minimum of ₦10, 000 for a private company and ₦500, 000 for a public company) signed by at least one director;

(e) A statutory declaration by the lawyer, engaged in the incorporation, of compliance with the requirements of the CAMA; and

(f) Any other document that the CAC may require pursuant to any law relating to formation of a company (section 35, CAMA).

11.7.1.2 The Memorandum of Association

The Memorandum and Articles of Association are the Constitution of the company. They are major documents of incorporation. The memorandum of association regulates the company's external relations. It contains the following:

(a) The name of the company;

(b) The registered office of the company;

(c) The businesses or objects for which the company is registered;

(d) The nature of the company, that is, "private" or "public";

(e) The nature of the liability of the company;

(f) The statement of the authorised share (or guaranteed) capital of the company; and

(g) The subscription clause and table.

11.7.1.3 The Articles of Association

The Articles regulate the company's internal relations. That is to say, they are internal rules that govern the management of the company. The articles constitute a contract between the members inter se (amongst themselves), the members on one side and the company on the other side, and the members, company and its officers

(directors, secretary, internal auditor, etc.).

11.7.2 Consequences of incorporation

The following are the consequences of incorporation from the date on the certificate of incorporation of a company:

(a) **Corporate Personality**

On incorporation, a company becomes a legal entity or person that is distinct from its members. Corporate personality is essentially a device to protect the investors, creditors and other persons dealing with the company by predetermining the limit of the investors' liability and pre-determining who to hold responsible for the company's obligations.

(b) **Limitation of Liability**

When obligations are incurred on behalf of a company, the company is directly liable. The members of the company may limit their liability by shares, in which situation, they are liable to pay what remains unpaid of the nominal value of their shares. In the case of a company limited by guarantee, the members of the company are called upon the sum of money they have undertaken to contribute to the capital of the company in the event of the winding up of the company.

(c) **Ownership of Property**

The property of the company belongs to it and not the members, and it is available for the satisfaction of the company's debts and obligations.

(d) **Capacity to Sue and be Sued**

As a legal person, a company may sue and be sued in its corporate name on its legal obligations.

(e) **Perpetual Succession**

A company may continue in existence and may exist perpetually even in spite of change in its membership. For instance, during the Second World War, all the

members of one private company were killed in a general meeting by a bomb, but the company continued in existence. Usually, the personal representatives of the deceased members replace them.

(f) **Borrowing**

A company may borrow money in its own name and use its property as collateral security for the loan. This enables the company for borrow more than a natural person to finance its operations.

(g) **Transfer of Shares**

Membership of a company often depends on ownership of shares in it. The shares are generally transferrable in the absence of any express provision or regulation to the contrary such as it is in the case of a private company where the members could only transfer their shares to themselves and not members of the public. Once shares are transferred, the transferor is released from further liability on the shares.

11.8 Company securities (shares and debentures)

After a company has been incorporated it must raise capital to enable it operate. Funding is required to carry on business or purchase an existing business and pay employees. Private companies cannot raise funds from the members of public at all and must raise funds from their promoters, members and by borrowing, if authorised. Shares and debentures are instruments by which business companies raise funds. They are referred to as securities.

11.8.1 Shares

Shares mean the interests of members of a body corporate who are entitled to share in the capital or income of such body corporate. The shares of any member in a company shall be personal estate and shall not be in the nature of real estate or immovable property. Shares are purchased to attain membership or shareholder status. A share is the interest of the member in the company measured by a sum of money for the purposes of liability in the first place and of interest in the second place and may include other mutual covenants. There are two main types of shares,

namely, preference shares and equity shares. Preference shares do not entitle the holder to any right to participate beyond a certain amount in any distribution by way of dividend, or redemption or winding up. Another type of share is equity share. Preference shares have a right to a fixed dividend before any dividend is paid on the other shares. Preference shares may be cumulative or non-cumulative. Preferential shareholders do not have the right to speak and vote in a general meeting on every item on the agenda except resolutions that affect them or resolutions to remove the Auditor or wind up the company. Equity shares rank for dividend after the preference shares. Nothing may be left for them after preference shareholders have taken their share of the profits. They receive fluctuating dividend and therefore carry most risk.

However, they have most of the voting rights in general meetings and therefore control the company. Issued shares require corresponding valuable consideration which has to be paid or be payable to the company. The payment invariably has to be in cash. Shareholders have to be issued with share certificates.

11.8.2 Debentures

Debentures are written acknowledgement of the indebtedness of a company setting out the terms and conditions of a loan. A single debenture evidences a loan from a person where the lender is in privity of contract with the company and is a creditor of it. Debenture stock may be created for which debenture stock certificates may be issued to separate holders. A debenture holder is not a member of the company. Debentures may either be unsecured by any charge or may be secured by a charge over the company's property. Debentures without security are simple or naked. Holders of such debentures are always at a disadvantage for in the event of winding up they rank with unsecured creditors. They cannot have any redress in court since a receiver or manager shall not be appointed as a means of enforcing debentures not secured by any charge. Debentures may be secured by a fixed charge on certain property of the company or a floating charge over the whole or a specified part of the company's undertaking and assets or by both a fixed charge on certain property

and a floating charge.

A fixed charge is created on one or more specific assets of the company. The assets must be clearly identifiable. The company cannot freely deal with the property so charged. A fixed charge on any property has priority over a floating charge affecting that property unless the earlier floating charge prohibited a further charge and the person granted the latter charge had actual knowledge of such prohibition.

A floating charge is an equitable charge over the whole or a specified part of the company's undertaking and assets both present and future. The charge shall not preclude a company from dealing with such assets. The charge is deemed to crystallise on the appointment of a receiver or manager or when the company goes into liquidation. All charges both fixed and floating have to be registered with the Registrar-General of the CAC. In *Cohen (WA) Ltd v. Comet Construction Co Ltd*; *Ghana Commercial Bank (Claimants)* [1966] GLR777, it was held that if the charge was valid, it prevailed over the claim of an execution creditor. In that case Cohen obtained judgment against Comet Construction for a certain sum of money. A writ of *fi fa* was subsequently issued against two vehicles of the judgment debtors.

11.9 Power, Status and Duties of Directors

A company is an artificial person, which must, of necessity act through human agents who manage the affairs of the company. Thus, a director is "an officer of a company who is responsible for its management."

By S.244 (1) of CAMA, a director of a company so registered under the Act, is defined as anybody who has been duly appointed by the company to direct and manage the business of the company. It does not matter by whatever name he is called. Anyone who holds himself out as a director, not being one, is guilty of an offence and is liable to pay a penalty of ₦100 per each day of default.

11.9.1 Power of Directors

A director is a trustee for the company but not for individual members. The board of directors is appointed under the articles of the company, and thus has power to bind the company. The board's power to bind the company is also deemed free of any restriction in the company`s memorandum and articles, in favour of a person who deals with the company in good faith.

11.9.2 Status of Directors

The directors are agents of the company with powers to bind the company in all matters of management. As agents, they are fiduciaries towards the company. The position is the same even when they are acting as agents of a particular shareholder, or without being an agent of the shareholder; the latter or other person is dealing with the company's securities (contra Allen v. Hyatt (1914)). Fiduciaries are persons that occupy positions of trust particularly in financial matters.

11.9.3 Duties of Directors

As fiduciaries, the directors owe the company the duty to:

(a) observe utmost good faith towards the company in any transaction with or on its behalf (s. 279(1), CAMA);

(b) act at all times in what she believes to be in the best interests of the company as a whole so as to preserve its assets, improve its business, and promote the purpose for which the company is formed, and in such manner as a faithful, diligent, careful and ordinarily skilful director would act in the circumstances (s. 279(3), CAMA, ***Re: Smith and Fawcett Ltd.*** (1942) Ch. 304, 306);

(c) have regards to the interests of the company's employees and members in the performance of her duties (s. 279(4, CAMA);

(d) exercise her powers for the purpose for which the company gave them and, not for any collateral purpose (Piercy v. Mills and Co, Ltd. (1920) 1 Ch. 77 – Power to issue shares is to raise capital and not merely to destabilise an existing majority). If the director exercises her power for the proper purpose, it is immaterial that the interest of the members is adversely affected 9 s. 279

(5), CAMA)

(e) not fetter her discretion to vote in a particular way (s. 27996), CAMA);

(f) not delegate her powers in such a way that she abdicates them (s. 279(7), CAMA);

(g) not accept a bribe, gift or commission from outsiders in any transaction that involves the company (s. 287, CAMA0;

(h) not allow her personal interest to conflict with her duties. Therefore, she shall not make any secret profit or achieve any unnecessary benefits in managing the business of the company or in utilising the company's assets (including information) (s. 280(1) & (2), CAMA);

(i) account to the company for any secret profit, or disclose a possible profit before she makes it so that the general meeting may approve it (s. 280(3) & (6) CAMA);

(j) exercise the powers and discharge the duties of her office honestly, in good faith and the best interest of the company as well as to exercise that degree of care, diligence and skill that a reasonably prudent director would exercise in comparable circumstance (s. 282(1) CAMA);

(k) pay attention to the affairs of the company and be responsible for the actions of the board in which she participated so that only justifiable absence from the board's deliberations shall relieve her from such responsibility (s. 282(3), CAMA);

(l) exercise care towards the company. The CAMA prescribes the same standard of care for both executive and non-executive directors (s. 282(4), CAMA).

It is important to keep the following in mind in relation to the duties of directors:

(a) Executive directors may by virtue of contract of employment have additional

liability and benefit under the master and servant law;

(b) The inability or unwillingness of a company to do any business shall not afford a director a defence for breach of duties (s. 280(4), CAMA); In ***Canadian Aero Service Ltd.* v *O' Malley*** (1973), the directors that negotiated a large aerial surveying and mapping contract that their company could not execute subsequently resigned and formed a new company that executed the contract. The court held that they must account to their former company for the profit made);

(c) The duty not to misuse corporate information and opportunities does not cease with a director's resignation from office (s. 280(5), CAMA);

(d) A director is responsible for the actions of the board in which she participated, and only justifiable absence from the board's deliberations shall relieve her from such responsibility (s. 282(3), CAMA);

(e) There are other ancillary duties of disclosure under the CAMA relating to property interest of directors, age, interest in a contract or proposed contract with the company;

(f) Where a person holds more than one directorship, she shall perform her fiduciary duties to all of them (s. 281, CAMA).

11.10 Company Secretary – Qualification, Status and Duties

Every company registered under the CAMA must have a secretary, but a person shall not occupy the offices of a company secretary and director at the same time (S. 292, CAMA).

11.10.1 Qualifications of Company Secretary

The secretary must have the requisite knowledge and experience to perform the functions of her office in addition, the secretary of a public company must be any of the following qualifications:

(a) a Chartered Accountant; or

(b) a Legal Practitioner; or

(c) a Chartered Secretary and Administrator; or

(d) a body corporate or firm consisting of the professionals listed herein; or

(e) any person who has held the office of the secretary of a public company for at least three years of the five years immediately preceding his appointment in a public company (s. 295, CAMA).

11.10.2 Status of Company Secretary

The status and authority of the secretary has developed with company law and practice. Before 1971, the attitude of the English courts was to regard the secretary as a mere servant whose functions were *prima facie* "clerical and ministerial only." In *Barnett, Hoares and Co. v. South London Tramways Co*., Lord Esher said, *inter alia*, that – "A secretary is a mere servant; his position is that he is to do what he is told, and no person can assume that he has any authority to represent anything at all."

In 1971, the modern and current status of the secretary was laid down in ***Panorama Developments (Guildford) Ltd* v *Fidelis Furnishing Fabrics Ltd.,*** where the court improved the status of the company secretary and held him to be a "much more important person nowadays, than he was in 1887." Nigerian courts have followed the same approach. Thus, in *Okeowo v. Migliore*, the Supreme Court held that the company secretary is "a principal officer of the company." Likewise, the CAMA provides that officers of the company include the secretary.

11.10.3 Duties of a Secretary

The secretary shall owe fiduciary duties to the company only when she is acting as its agent. In fiduciary capacity, she shall be liable to the company for making secret profits; conflict of duties with personal interest and; use of confidential information for her own benefit (s. 297, CAMA). The specific duties of the company secretary are:

(a) providing secretarial support at all meetings of the company;

(b) advising the company on regulatory compliance;

(c) maintaining the registers and other records of the company;

(d) rendering proper returns and giving notifications to the CAC as well as attending to other administrative responsibilities (s. 298(1), CAMA);

(e) not without the authority of the board, exercising any powers vested in the directors (s. 298(2), CAMA).

11.11 Company Meetings

The highest organ of the company is the general meeting of members.

The meetings of the company are of three types as follows:

1. Statutory Meeting

(a) **A public company** must hold this meeting within six months from the date of incorporation;

(b) The court may wind the company up for failing to hold the meeting as stipulated or extend the period for holding it at on the application of the company; the company and its officers may also be fined for not holding the meeting;

(c) The directors of the company must send to the members at least 21 days before the meeting a **statutory report that contains pre-incorporation issues;**

(d) An auditor must certify the report as it relates to share allotment;

(e) The directors must promptly file the statutory report with the Corporate affairs Commission/Company Registry

(f) Members may give 21-day notice to propose any matter at the meeting.

2. Annual General Meeting

(a) Annual General meeting (A.G.M.) is to hold once a year in addition to nay to any other meeting in that year;

(b) Not more than fifteen months shall elapse between the date of one A.G.M. and the next;

(c) Except for the first meeting, the Corporate affairs Commission may extend

the time for holding an A.G.M by three months;

(d) The company must hold its first A.G.M. within 18 months of incorporation, and it need not be in the year of incorporation or the next;

(e) All the businesses transacted at an A.G.M. shall be deemed **Special Businesses,** and the **Ordinary Businesses** are declaration of dividends, presentation of financial statements as well as the reports of the directors and auditors, election of directors, the appointment and fixing of the remuneration of the auditors as well as the appointment of the audit committee;

(f) There are penalties on the company and every officer that default in holding an A.G.M

3. Extraordinary General Meeting

(a) The board of directors may convene an extraordinary general meeting when they believe that it is appropriate to do so. However, any director may convene the meeting if there are not sufficient directors in the country to form a quorum;

(b) This meeting may also be requisitioned by the member(s) of the company that hold at the date of requisition not less than one-tenth of the paid-up capital of the company or representing not less than one-tenth of the voting rights of the members of the company at the date of requisition;

(c) The members that have the power to requisition the meeting may also convene the meeting not later than three months if the directors fail to convene the meeting after requisition;

(d) The requisitionists may then recover from the company any reasonable expenses incurred by them due to the directors' inaction;

(e) Members of the company must be given a 21-day notice of an extraordinary general meeting;

(f) All statutory and general meetings shall be held in the country.

A company meeting shall not proceed unless there is a quorum. Proxy is allowed at

company meetings so any member of a company entitled to attend and vote at the company's meeting shall be entitled to appoint a proxy. Proxy refers to the agent of the member duly appointed by that member to attend, speak and vote on his behalf at company meetings on the strength of the document or instrument by which a proxy is appointed. Voting by members or their proxies could be done by show of hands at meetings, by polling at meetings and by postal ballot in lieu of meeting. This method is applicable in all the jurisdictions of Nigeria, Ghana and Liberia.

11.11.1 Resolutions

The decisions of a company taken at general meetings are described as resolutions. There are two types of resolutions namely; ordinary and special. An ordinary resolution is one passed by simple majority of votes of members present in person or by proxy at a general meeting. A special resolution is passed by not less than three fourths of votes cast by the members of the company in person or by proxy at a general meeting of which notice specifying the intention to propose the special resolutionhasbeengiven.Resolutionshavetheeffectofbindingdecisionsonthe company and its members.

11.12 Majority Rule and Minority Protection (Protection of membership rights)

Companies constitute one of the major economic institutions in a democratic society and therefore, it is not surprising that it is run on a democratic basis. For example, the administration and control of the company is vested in the shareholders' majority vote duly exercised in accordance with the memorandum and articles of association of the company. Decisions whether affecting the company, the members or outsiders, are generally taken by majority votes of members. Thus, where a wrong is done, even to the corporate right of a member, for instance, where the wrong is done to the company, it is for the company, acting through majority of members to decide whether it should be treated as a wrong which should be redressed or one which will be condoned or one which should be ignored. Whatever decision the company takes, it is the prerogative of the majority (in shareholding structure), to take the decision. This is the principle laid down in the case of *Foss v. Harbottle*. The rule has now

received statutory approval as contained in section 299 of CAMA which provides: ***"Subject to the provision of this Act, where irregularity has been committed in the course of a company's affairs or any wrong has been done to the company, only the company can sue to remedy the wrong and only the company, can rectify the irregular conduct."***

When therefore, a shareholder brings an action on behalf of the company, any judgment obtained by him subsists not for the benefit of the shareholders personally, but for the benefit of the company. The procedural obstacle which the rule creates for an injured shareholder is immense.

The rule (in Foss v. Harbottle) has been held not only to incorporated bodies, but also to unincorporated associations on the ground that they are bodies possessing a constitution or a set of rules and regulations and can sue and be sued as a legal entity.

11.13 Exceptions to the rule in Foss v. Harbottle (Protection of minority shareholder)

In spite of the wide powers of the controlling shareholders, the majority rule in *Foss v. Harbottle* even at common law was not an inflexible rule and it was relaxed whenever necessary in the interest of justice. At common law, various devices were adopted to reduce the harsh effects of the rule in Foss v. Harbottle through the creation of various exceptions by the courts in the interest of justice. These exceptions have now been enacted under section 300, CAMA. The section provides that without prejudice to the rights of members under sections 303 to 308 and sections 310 to 312 of the Act, or any other provisions of the Act, the court on the application of any member, may, by injunction or declaration, restrain the company from doing any of the acts listed in paragraphs (a) to (f) of the section. These acts are as follows:

(a) Entering into any transaction which is illegal or ultra vires for example where the shareholders at a general meeting resolved to spend part of the purchase money after sale of a company in compensating employees and part as remuneration for past services of directors, when a company being wound

up has no power to make such a payment;

(b) Purporting to do by ordinary resolution, an act which by its constitution or the Act requires to be done by special resolution; this is directed towards preventing the majority from ratifying by a wrong procedure an act which itself is wrong;

(c) Where any act or omission affects the applicant's individual rights as a member;

(d) Committing fraud on either the company or the minority shareholders as where the directors fail to take appropriate action to redress the wrong done; this will arise, for example where there is an expropriation of the company's property, where the majority obtained certain advantages by dealing with the company's property, where the directors diverts to themselves a contract which should have gone to the company and later purported to ratify their act at a general meeting, where the directors and controlling shareholders made an ill-motivated gift of company's property to others, even where the directors have negligently benefitted themselves at the expense of the company, and where there was an abuse of power by the majority;

(e) Where a company meeting cannot be called in time to be of practical use in redressing a wrong done to the company or to minority shareholders; this may arise because the machinery for convening the meeting is not readily in place, or where urgent action is needed and it will be too late to wait for a formal meeting requiring notice; and

(f) Where the directors are likely to derive a profit or benefit, or have profited or benefitted from their negligence or from their breach of duty; in such a case, a member may apply to the court for redress. The provisions of section 301(2) to (4) and section 302, apply to the action as they do to actions of a personal nature under section 300 (c).

In addition, other provisions for redress are made in the Act, for example:

(a) by petition for winding up under the just and equitable rule;

(b) by use of the provisions for relief on the grounds of illegal or unfairly

prejudicial and oppressive conduct; and

(c) by inspection and investigation.

There had been judicial interpretation of the statutory exceptions to the rule in *Foss v. Harbottle* as contained in section 300 (a) to (f) of CAMA. In *Yalaju-Amaye v. AREC Ltd*. the Supreme Court held inter alia, that any act which may amount to an infraction of fair dealing or abuse of confidence, or unconscionable conduct, or abuse of power as between a trustee and his shareholders in the management of a company, is fraud which may take the issue outside of the rule in *Foss v. Harbottle.*

11.14 Winding-up or Liquidation

The process by which a company is dissolved or liquidated is called winding up. The Liquidator is the person who carries out the winding up process. The Liquidator has the obligation to administer the assets of the company being wound up for the benefit of creditors and members. There are two ways of winding up of a company. These are private liquidation under the Companies Code and official liquidation under the Bodies Corporate Official Liquidation Act.

11.14.1 Private Liquidation

Private liquidation commences with the company resolving by a special resolution for a private winding up. The liquidation starts from the date of resolution. Within fourteen days, a copy of the resolution has to be sent to the Registrar for registration and publication in the Gazette. Five weeks prior to the passing of the resolution an affidavit must have been made or sworn by the directors or the majority of them that upon full enquiry into the affairs of the company they have formed the opinion that the company will be able to pay its debts in full within twelve months from the start of the winding up. The affidavit has to be delivered to the Registrar for registration. The affidavit shall embody the assets and liabilities of the company at the latest day before making the application.

A resolution for a private winding up shall include the appointment of a liquidator.

The liquidator who is appointed shall indicate his consent in writing. An infant, person of unsound mind adjudged so by a court of competent jurisdiction and a corporate body shall not be competent to be appointed as liquidators. In addition, any person convicted of an offence involving fraud or dishonesty within Ghana and Nigeria or elsewhere, any offence in connection with the promotion, formation or management of a corporate body; an undischarged bankrupt; a director or auditor of the company are also not competent to be appointed as liquidators.

A liquidator stands in a fiduciary relationship to the company in the same way as if he were a director. All rights due to and responsibilities of a director are applicable to him. This is because all the powers of directors cease on winding up and become vested in the liquidator. The liquidator, is thus, an agent and trustee of the company. He has to exercise his powers for the smooth running of the winding up of the company. His powers among others include the bringing or defending of any legal action in the name of or on behalf of the company. He invites creditors to prove their debts and to pay any class of creditors in full. He invites debtors to pay their debts. He can sell the real and personal assets of the company by public auction or by private contract. He can apply to the courts for assistance. He has to open a liquidation account with regards to receipts and payments and keep proper accounts of them and render it. He pays off creditors when he finishes with his work. He prepares a final account which is audited and then put before the members. When these have been done, he informs the Registrar, who when satisfiedthatthewindingupiscompletestrikesoffthenameofthecompanyfrom the register. The company is then deemed to be dissolved but at the date of publication of the Gazette.

11.14.2 Official Liquidation

Official liquidation is carried out by the Official liquidator under the Bodies Corporate (Official Liquidation Act). An official liquidation may be commenced by a special resolution of the company, a petition addressed to the Registrar, a petition addressed to the court or by a conversion of a private liquidation. If within twelve months of private liquidation the company is found to be unable to pay its debts, then it will be

converted to public liquidation on informing the Registrar. When a special resolution is passed by the company for winding up and if it is official liquidation there solution shall state that it is for official winding up. The Registrar shall publish a copy in the Gazette. Any creditor or member of the company may present a petition to the Registrar for official winding up of the company. The Registrar may order official winding up if he is satisfied that the company is unable to pay its debts.

A petition to the court for the official winding up of a company may be brought by a creditor of the company, a member or contributory of the company or the Attorney General on specified grounds. The court may order an official winding up of a company on a petition if the company does not within a year from its incorporation commence to carry on all the businesses which it is authorised by its Regulations to carry on or suspends any of such businesses for a whole year. It may also be that the company has no members or that the business or objects of the company are unlawful or the business that the company is carrying out are not authorised by its regulations. Other grounds may be where the company is unable to pay its debts or the court is of the opinion that it is just and equitable that the company be wound up.

On the commencement of official liquidation, the powers of directors cease and they are vested in the liquidator. The company shall not carry on any business except those relating to the beneficial winding up of the company. The corporate status of the company remains until the company is dissolved so the property of the company remains vested in the company. The liquidator has to continue any on- going business to its completion but shall not start any new business. No action or civil proceeding shall be started against the company except with the leave of court and subject to such terms as the court may impose. In *Pioneer Construction Products, Ltd v Faddool* [1974] 1GLR 76, the plaintiff, a creditor of the defendant company took out summons against the company at the High Court. Before the summons was heard the company passed a special resolution for winding up. Notice of the liquidation was given in a Gazette by the Registrar. Notwithstanding the liquidation, the proceedings continued in the court and judgment was given for the plaintiff. A director of the company

brought an application moving the court for an order to set aside the judgment. It was held that under 17 of Act 180, no action or civil proceedings except an action by a secured creditor should have been proceeded with or commenced since the directors had passed the special resolution winding up the company.

11.15 Requirements for Registration of Business Names, Incorporated Trustees and Unit Trusts

There are other types of business association which are regulated by the Corporate Affairs Commission through the application of the CAMA. Having considered registered company which is administered and regulated by the CAMA and incorporated under part A thereof, it is also necessary to spare some attention for other types of business associations, such as the Business name, registered under Part B and the Incorporated Trustees, registered under Part C of the CAMA, and the Unit Trust registered under the Investment and Securities Act.

11.15.1 Registration of Business Names

Oftentimes, individuals and partners carry on business under business names which is different from their own actual names. in order to provide such individual or partners some measure of protection of their business names and also protect the public from the misleading or fraudulent use of such names, certain business names are required to be registered under Part B of the CAMA. The CAMA replaced the former *Registration of Business Names Act, 1961*.

11.15.2 Business names that must be registered (Compulsory registration)

By virtue of section 573(1) of CAMA, the following business names must be registered:

- In the case of a firm (partnership), if the business name does not consist only of the true surnames of all partners without any addition other than the true forenames of the individual partners or the initials of such forenames;
- In the case of an individual, if the name does not consist of his true surname without any addition other than his true forenames or their initials;

- In the case of a corporation (registered company) if the name does not consist (only) of its corporate name without any addition.

11.15.3 Non-mandatory Registration of Business Names

There is however no requirement of registration of a business name under section 573(2) CAMA, where the addition to such name merely indicates the following:

- that the business is carried on in succession to a former owner;
- where two or more individual partners have the same surname and the only addition is "s" at the end of the surname; or
- where the business is carried on by a receiver or manager appointed by the court.

11.15.4 Restricted names

The Registrar of Business Names, (who is also the Registrar-General of CAC), has power to refuse to register the use of certain business names, or cancel the registration, where such names have been (mistakenly) registered. This she can do where she is of the opinion that registration of such business name will mislead the public, unless the consent of the Commission (CAC) has been first obtained. Section 579(1) CAMA gives such names as:

(a) names which contain the word the word "National," "Government," "Municipal,"
"State," "Federal," or any other word which signifies or suggests that the business enjoys the patronage of the Federal, State or local government; or

(b) a name which contains the word "co-operative" or its equivalent in any other language or any abbreviation thereof; or

(c) a name which contain the words "Chamber of Commerce," "Building Society," "Guarantee," "Trustee," "Investment," "Bank," "Insurance," or any word of similar connotation; or

(d) a name which is identical with or similar to a name by which any firm, company or individual is registered under Part B of the Act or any company is registered under Part A of the Act; or

(e) a name which is similar to any registered trademark registered in Nigeria.

11.15.5 Prohibited names

While some names are restricted as mentioned above, some other names are out-rightly prohibited. Section 579(2) CAMA provides that the Registrar shall refuse to register a business name, or cancel its registration where a registered business name:

- contains any word which in the Registrar's opinion is likely to mislead the public as to the nationality, race or religion of the persons by whom the business is wholly or mainly owned or controlled; or
- is, in the opinion of the Registrar, deceptive or objectionable because it contains a reference direct or otherwise to any personage, practice or institution, or is otherwise unsuitable as a business name.

11.15.6 Procedure for registration

Section 574(1) provides that every firm, individual or corporation required to register to take steps NOT LATER than 28 after commencing business in respect of which registration is required, or within three months of coming into operation of the Act, to furnish to the Registrar General, a statement in the prescribed form. The statement must contain the following particulars:

- the business name, or, if the business is carried on under two or more business names, each of these business names;
- the general nature of the business;
- full postal address of the principal place of business;
- full postal address of every other place of business;
- if registration is that of a FIRM:
- present forenames and surname, any former forenames or surnames,

nationality, and if that nationality is not the nationality of origin, the nationality of origin, age, sex (gender) usual residence and any other business occupation of each of the individuals who are partners;

- if a corporation is a partner in the firm, the corporate name and registered office of such corporation must be contained in the statement.
- if registration is that of an INDIVIDUAL:
- present forenames and surname, any former forenames or surnames, nationality, and if that nationality is not the nationality of origin, the nationality of origin, age, sex (gender) usual residence and any other business occupation of the individuals who are partners;
- if registration is that of a COMPANY:
- the name and registered office of the company: and
- the date of commencement of business whether, before or after the coming into operation of the Act.

11.15.7 Registration

On receipt of the statement of particulars, and the Registrar is satisfied that the provisions of the law have been complied with will enter the business name in the register of business names and a certificate in the prescribed format, containing the business will be issued to the applicant in respect of which registration is effected.

11.15.8 Post-registration issues

(a) Changes in particulars submitted for registration:

Subsequent to registration, the applicant makes any changes in the particulars submitted to the Registrar for the registration, she must notify the Registrar of these changes within 28 days of their occurrence UNLESS the changes are merely in respect the age of an individual whose name appears in the statement of particulars. The Registrar has the discretion to either amend the certificate previously issued or issue a fresh certificate;

(b) Publicity: sequel to issuance of certificate of registration, the certificate must be exhibited and maintained in a conspicuous position at the principal place of business and where the firm or company or individual has more than one place of business, certified copy of the certificate must be exhibited and maintained in a conspicuous position in each of the other places of business;

- Publication of true names: true names of the true operators registered under the business name must publish in legible characters, in all trade catalogues, trade circulars, show cards, and business letters:
- in the case of an individual, his present forenames or the initials and the present surname and any former forenames or surname and nationality; and
- in the case of a firm, the present forenames or the initials and the present surname and any former forenames or surname and nationality of all the partners in the firm or in the case of a corporation being a member, the corporate name; and
- the registration number of the business name.
- Removal of name from register: The Registrar has power to remove a business name from the register if the firm, individual or company is no longer carrying on business;
- Annual returns: Section 570 provides that every firm, company or individual carrying on business name shall not later than the 30thday of June in each year, except the calendar year in which the business is registered, delivered to the Commission, a return in the prescribed form showing the following-
- Particulars of the firm, company or individuals;
- The nature of the business carried on in the business name, and
- The state of the financial affairs of the business carried on in the business name during the preceding period of January 1 to December 31.

11.16 Incorporated Trustees

These are non-business and non-profit making organisation. They are formed under section 590 CAMA, to facilitate acquisition of corporate person by a community of person bound together by custom, religion, nationality or any association of person established for religious, educational, literary, scientific, social developments, sporting or charitable purpose. The organisation is registrable under Part C CAMA and can operate without registration but cannot take advantage of corporate identity of the trustees, without registration.

11.16.1 Features of incorporated trustees

- One or more persons can register as an incorporated trustee "where one or more persons are appointed by any community of persons bound together by custom, religion, kinship or nationality…." (s. 590(1));
- The trustees are the only persons who obtain legal personality and not all the members;
- Name starts with the words "Incorporated Trustees of…." It has to have incorporated trustees in the name;
- It does not do business and does not distribute profits;
- It receives income as grants, levies;
- The income must be applied solely towards the promotion of its objects;
- Income not distributable but (out of pockets) expenses can be paid to members e.g. a member going to Lagos to promote the organisation;
- Ownership of landed property or undertaking in lieu
- It may be dissolved by the Federal High Court upon petition by the governing council; or one or more members of the body of trustee; or not less than 50% of total members of the association; or the CAC.

11.16.2 Contents of the Constitution of Incorporated Trustees - Section 593

(a) State the name or title of the association which shall not conflict with that of a company, or with a business name or trade mark registered in Nigeria;

(b) The aims and objects of the association; and

(c) Make provisions, in respect of the following:

(i) Appointment, powers, duties, tenure of office and replacement of the trustees;

(ii) The use and custody of the common seal;

(iii) The meetings of the association;

(iv) The number of members of the governing body, if any, the procedure for their appointment and removal, and their powers; and

(v) Where subscriptions and other contributions are to be collected, the procedure for disbursement of the funds of the association, the keeping of accounts and the auditing of such accounts.

11.16.3 Registration Procedure

If the Commission is satisfied that the application is in order, it will cause it to be published in a prescribed form in two daily newspapers circulating in the area where the corporation is to be situated. The advertisement will invite objection and if any objections are made, the Commission will consider them and may require the objectors and applicants to furnish further information or explanation and will resolve the objection one way or the other. Where, after the publication, no objection is received within the specified time, or where one is received, considered and resolved in favour of the applicant, the Commission may approve the application and register it.

11.16.4 Effect of registration and the Certificate of incorporation

From the date of registration, the trustees shall become a body corporate, and will have perpetual succession and a common seal, with power to sue and be sued in its corporate name. a certificate of incorporation will be issued and it will vest in the corporation all property and interests of whatever nature or tenure held by any person in trust for the community, body or association of persons. The certificate is also prima facie evidence of compliance with all the preliminary requirements for incorporation and the date stated on the certificate is deemed to be the date on which incorporation has taken place.

11.17 Unit Trusts

Under the Companies Code of Ghana, a unit trust means any arrangement whereby securities or any other property other than a charge to secure debentures are vested in trustees. The beneficial interests in them are then divided into units or sub-units or other interests with a view that they would be acquired through invitations to the public.

The Registrar in her absolute discretion and subject to such conditions and restrictions that he shall think fit, may declare any unit trust established in Ghana or elsewhere to be an authorised unit trust by a legislative instrument. The instrument shall be made only when the manager and the trustees deliver to the Registrar, particulars of an address in Ghana for service of notices and documents.

In Nigeria, the Investment and Securities Act in section 153, deals with three types of collective investment schemes, one of which is the unit trust scheme and by far the most important of the three types. A collective investment scheme is an investment scheme whereby persons pool their subscriptions usually under a trust deed. The scheme involves a managing company or manager and a trustee which will normally be another company, very often, a bank.

With reference to unit trusts, the managing company acquires some securities, e.g., shares or debentures quoted on the Stock Exchange, and transfers them to the trustees who become sole custodian of the securities. These blocks of securities are then divided into units and offered to the public for investment and these may in turn be quoted on the exchange. The investors become the beneficiaries under the trust deed and are entitled to the securities according to their holdings.

11.18 Summary and Conclusion

The company is a very important business organisation which has to be properly understood in order to really appreciate its numerous activities. The processes entailed in its formation and the legal consequences of its incorporation are of much relevance. The doctrine of separate personality by which a company exists in its own rights as a legal person distinct from its members is especially noteworthy

for such understanding. Apart from how a company is generally run the way of raising capitals also of much importance. Useful insights were given in respect of the types of Shares and of debentures. The rules which are peculiar to the nature and essence of business association mentioned in Parts B and C of CAMA were considered. Finally, the nature of the Unit Trust Scheme was also examined.

11.9 REVISION QUESTIONS

SHORT ANSWER QUESTIONS

1. Which of the following is not a feature of Incorporated Trustees?

   A. Doing of business and distribution of profits

   B. Receipt of income through grants and levies in order to meet its expenses

   C. Application of income received solely to the promotion of its objects

   *D. Legal personality

   E. Income not distributable but out-of-pocket expenses payable to members

2. The Articles of Association of a company:

   A. Regulate the company's external relations

   *B. Regulate the company's internal relations

   C. Contain the businesses or objects for which the company is registered

   D. Contain the registered office of the company

   E. Constitute a contract between the members of the company on the one hand and members of the public on the other hand

3. Upon incorporation, the company as a corporate entity becomes an artificial personality. A consequence of this, is that:

   A. The company becomes a private person in the community

   B. The company becomes an important person in the society

   C. All companies are capable of restricting the rights to transfer their shares

*E. The company becomes a separate and distinct identity from its members, directors and promoters

F. The company can only be sued, but it cannot sue in return

SHORT ANSWER QUESTIONS

1. What is required if a proposed business name is not the true name of the proprietor? *****Registration

2. The person who carries out official liquidation in Ghana, under the *Bodies Corporate Official Liquidation Act*, is called _____***** Official liquidator.

3. The _____ and _____, are the Constitution of the company in Nigeria *****Memorandum and Articles of Association.

ESSAY QUESTIONS

1. State the functions of the Corporate Affairs Commission/Companies Registry

Answer

The functions of the Corporate Affairs Commission are set out on section 7, Companies and Allied Matters Act, 2004 as follows:

(a) To administer the Act including the regulation and supervision of the formation, incorporation, registration, management and winding-up of companies under or pursuant to the Act;

(b) To establish and maintain a companies' registry, and offices in all the states of the Federation, suitably and adequately equipped to discharge its functions under the Act or any other law in respect of which it is charged with responsibility;

(c) To arrange or conduct an investigation into the affairs of any company where the interest of the shareholders and the public so demand;

(d) To perform such other functions as may be specified by any Act or enactment; and

(e) To undertake such other activities as are necessary or expedient for giving full effect to the provision of the Act.

2. State the circumstances in which registration of business names is NOT compulsory.

Answer

There is no requirement of registration of a business name under section 573(2), CAMA, where the addition to real name of the proprietor merely indicates the following:

(a)When the business is carried on in succession to a former owner;

(b) When two or more individual partners have the same surname and the only addition is "s" at the end of the surname; and

(c) Where the business is carried on by a receiver or manager appointed by the court.

3. Describe the registration procedure of the Incorporated Trustees organisation under Part C of the Companies and Allied Matters act.

Answer

Upon a satisfactory application made to the Commission, the Commission will cause it to be published in a prescribed form in two daily newspapers circulating in the area where the corporation is to be situated. The advertisement will invite objection and if any objections are made, the Commission will consider them and may require the objectors and applicants to furnish further information or explanation and will resolve the objection one way or the other. Where, after the publication, no objection is received within the specified time, or where one is received, considered and resolved in favour of the applicant, the Commission may approve the application and register it, and a certificate of registration will be issued.

CHAPTER TWELVE

BANKING AND NEGOTIABLE INSTRUMENTS

12.0 LEARNING OBJECTIVES

Upon completion of this chapter, readers should be able to explain the core principles of the law of banking and negotiable instruments covering the following areas:

- the meaning and functions of bank
- the implication of banker/customer relationship and the duties of parties
- the definition and characteristics of negotiable instruments
- bills of exchange, cheques and promissory notes
- holder, holder for value and holder-in-due-course
- rights and duties of parties to bills of exchange

12.1 Meaning of a Bank

A bank is any "person", being incorporated as a financial institution and in possession of a valid banking licence, who carries on banking business. Such an institution can receive money deposits, collect, transfer and pay moneys, exchange, lend, invest or safeguard money for its customers, and is generally involved in the flow of money in the economy of the nation.

12.2 Functions of Banks

The basic functions of a bank are to provide financial and advisory services known as banking business to its customers. Section 43 of the Banking Act of Nigeria defines "banking business" as the business of:

(a) Receiving moneys from outside sources as deposits irrespective of the payment of interest;

(b) Granting of money loans;

(c) Acceptance of credit;

(d) Purchase of bills and cheques;

(e) Purchase and sale of securities for accounts of others;

(f) Incurring of the obligation to acquire claims in respect of loans prior to the assumption of guarantees and other warranties for others;

(g) Effecting of transfer and clearing of funds; and

(h) Such other transaction as the Minister of Finance may, on the recommendation of the Central Bank, by order in the Federal Gazzette designate as banking business.

12.3 Banker and Customer Relationship

A banker is in the business of banking, and a person becomes its customer either when the banker opens an account in the person's name or when the banker accepts his instruction to open an account, and the bank receives a deposit from the person to be credited to the account. When a banker opens an account for the customer, the relationship established is that of debtor and creditor. When the account is in credit, the customer is the creditor and the banker the debtor. The position is reversed when the account is overdrawn. Customer's deposit of money in a bank under the banker's control but not held in the form of a trust although he has obligations in connection with it. The banker has an obligation to repay. When the banker accepts the custody of documents or goods, he acts a bailee, and when he agrees to hold moneys on trust, he becomes a trustee.

A bank customer is any person that has an account in his name with the bank. Therefore, only the person whose name appears in the books of the bank as holding an account is a customer of the bank.

12.4 Duties of a Banker

(a) A bank has a duty to collect customers' cheques, cash and other pay∆able instrument by the customer;

(b) A bank owes the duty to strictly abide by the mandate of the customer, including the

duty to honour the customer's cheque and other written demands to pay, provided always that

(i) the customer's account is in fund;
(ii) the customer has credit agreement with the bank;
(iii) the customer's mandate, eg cheque, is regularly drawn; and
(iv) there is no legal impediment against the payment

(c) The banker has the duty to operate the customer's account with requisite confidentiality and secrecy, subject only established legal exceptions, which include
   (e) disclosure under the compulsion of law;
   (ii) public duty to disclose;
   (iii) disclosure in the interest of the bank; and
   (iv) customer's consent.

(d) The banker must give reasonable notice to the customer before closing his account;

(e) The banker must bring to the customer's immediate notice any suspicious dealings with the account likely to lead to fraud or other unauthorised dealings with the customer's account;

(f) The banker must provide the customer with regular updates and statements of account;

(g) The bank owes the customer the duty to keep his account separate, except there is an agreement to the contrary;

(h) The banker owes a duty not to pay out the customer's money upon a validly countermanded cheque;

(i) The bank has an implied duty not to charge the customer unreasonable interest on loans and other credit facilities; and

(j) The bank has a duty to take reasonable care in opening accounts for new customers.

12.5 Duties of Customer to the Banker

(a) Duty to draw his cheque with care and diligence with a view to protecting his account from fraudulent dealings;

(b) Duty to give instructions in writing to the bank when withdrawing his money;

(c) Duty to notify the bank promptly of any knowledge of suspicious dealings on his account as he becomes aware of it, e.g., a missing cheque book or leaf as well as forgery of his signature; and

(d) Duty to pay appropriate bank charges and interest on loans

12.5.1 Termination of Banker's Duty to Pay

The banker is not obliged to honour a cheque if the customer has countermanded or stopped it. Anoral countermand may be alright initially but has to be followed up with a written one. Notice of the customer's death, notice of the customer's mental disorder and notice of bankruptcy or receiving order are all circumstances under which the banker should not honour a cheque. Service of a garnishee order stops the banker from making payments to the customer and to show cause why payment should not rather be made to the judgment creditor.

Forged and altered cheques are obviously not genuine and cannot be honoured.

NEGOTIABLE INSTRUMENTS

12.6 INTRODUCTION

Negotiable instruments have become the most acceptable way of monetary transactions today. The meaning, types and characteristics of negotiable instruments are therefore necessary to look at to ensure a proper understanding of them. It is equally important to be able to make a distinction among bills of exchange, cheques and promissory notes. Again the rights and duties of bankers and customers are also relevant and receive attention.

12.7 MEANING, TYPES AND CHARACTERISTICS OF NEGOTIABLE INSTRUMENTS

12.7.1 NEGOTIABLE INSTRUMENTS

A Negotiable Instrument can be defined as a chose in action relating to financial or commercial documents which must be in writing. It is transferable with full legal title by mere delivery of the instrument (but with endorsement by the transferor, if it is an order bill). They are substitutes for money and as such, the holder takes title free from any defences or objections to their validity that might have been good against the transferors. There are two types of Negotiable Instruments, namely, Bills of Exchange and Promissory Notes.

12.8 BILLS OF EXCHANGE

A bill of exchange is an unconditional order in writing, signed and addressed by one person (the drawer) to another (the drawee), requiring the drawee to pay on demand, or at a determinable or fixed future date, a specified sum of money to a third person (the payee). The payee is frequently the same person as the drawer of the bill. The term bill of exchange usually refers to foreign exchange transactions, rather than domestic transactions. On accepting a bill of exchange, the drawee becomes the party primarily responsible for paying it. The main known example is cheque.

a. Cheque.

A cheque is a financial instrument made payable upon demand on date stated and drawn on a bank. The issuer of the cheque is the drawer who orders the bank at which he has an account, referred to as the drawee, to pay a named individual or entity or the bearer of the cheque, called the payee, a specified sum of money upon presentation of the cheque. A cheque includes a money order

There are four (4) different types of cheques; Bearer Cheque, Order Cheque, Crossed Cheques and Banker's Draft.

i. Bearer Cheque

This is a cheque made payable to bearer, e.g, a cheque made payable to "cash" is payable to the holder of the cheque.

A bearer cheque is transferable by mere delivery without any endorsement.

ii. Order Cheque

A cheque drawn in favour of a named person or endorsed by the payee to another person is an order cheque. The endorsement is by signature of the payee at the back of the cheque.

iii. Crossed Cheque

A crossed cheque has two parallel transverse lines drawn across the face of the cheque by the drawer. Crossed cheques cannot be paid over the counter, but through the drawer's bank to the payee's bank account.

There are two different types of crossing, which are General Crossing and Special Crossing

- **General Crossing –** This makes the cheque not negotiable and non transferable. The crossing is with the words "& company" or " & co" or "a/c payee only" or " not negotiable" written between the two parallel transverse lines. Any of these statements on the face of the cheque precludes the banker from paying the cheque over the counter or to any other person's bank account.
- **Special Crossing –** This crossing has same features of general crossing, but also with a specified banker written between the two parallel transverse lines, as the drawee to pay the payee by interbank transfer of funds.

d. Banker's Draft

i. Banker's Draft is a written order for the payment of money drawn by one person, through a bank, directing the bank to pay a third person

through the payee's bank account a sum of money on date specified.

ii. Travellers Cheque is a written order to its foreign branch for the payment of money drawn by a local bank on that foreign branch, directing the foreign branch to pay the holder of the instrument, specified amount stated on specified date.

12.9 PROMISORY NOTES

A promissory note is a written instrument containing an unconditional promise by a party, called the maker, who signs the instrument, to pay to another, called the payee, a definite sum of money either on demand or at a specified or ascertainable future date. The note maybe made payable to the bearer, to a party named in the note, or to the order of the party named in the note. A promissory note differs from an IOU in that the former is a promise to pay and the latter is a mere acknowledgment of a debt. A promissory note is negotiable by endorsement if it is specifically made payable to the order of a person. A promissory note must contain an undertaking to pay. In **Orthodox School of Peki v Tawlma Abels [1974] GLR 421**, it was shown that Exhibit A was not a promissory note within the meaning of the Bills of Exchange Act, 1961(Act 55) because neither the commencement date for the monthly instalments nor the quantum of the monthly instalments payable had been fixed.

a. Order Paper and Bearer Paper

Order Paper and Bearer Paper may look similar, but there is a very important difference between the two, which is NEGOTIABILITY. An order paper is made payable to a specified individual or entity, while a bearer paper is payable to bearer or cash. An order paper is negotiated by endorsing it to another person, which entails signing the back of the instrument and transferring it to another. An order paper, "to order of John"is negotiated by John endorsing the back of the instrument, transferring it to another person. John in addition to his endorsement may write "Pay to the order of Jeff". To effect negotiation and therefore transferability of a bearer paper, all that is

required is delivery of possession of the instrument to the one to whom it is being transferred.

b. Certificate of Deposit (Treasury Bill)

Certificate of deposit (Treasury bill) is a financial instrument which a banker uses to acknowledge the receipt of a deposit from the depositor and promises to repay the deposited sum to the deposit or upon demand.

12.10 NEGOTIABILITY

In order to be negotiable, (capable of being transferred, or "transferability"), the instrument must be in writing, contain an unconditional promise to pay a certain sum in money, on demand or at a fixed and determinable future time; It must be made payable to bearer or order and be signed by the maker of a promissory note or the drawer of a bill of exchange.

12.11 ENDORSEMENT

A valid endorsement must be written on the bill itself and signed by the endorser. It must be an endorsement of the entire bill, and where it is payable to the order of two or more payees or endorsees who are not partners, all must endorse. An endorsement may be special, blank or restrictive.

A special endorsement specifies the person to whom or to whose order the bill is to be payable. An endorsement in blank specifies no endorsee and a bill so endorsed becomes payable to the bearer. When a bill has been indorsed in blank, any holder may convert the blank endorsement into a special endorsement by writing above the endorser's signature directing to pay the bill to, or to the order of, himself or some other person. A restrictive endorsement prohibits the further negotiation of the bill or expresses that it is a mere authority to deal with the bill as directed and not a transfer of property. The endorsement may be "for deposit only", "pay to Charles, in trust for Linda", "for deposit to my account with Standard Chartered Bank".

12.12 PARTIES TO A BILL OF EXCHANGE

There are three (3) main parties to a bill of exchange, which are the Drawer, Drawee and Payee.

a. The Drawer

The drawer of a bill of exchange is the person that makes the order to pay, by signing the bill personally or through his authorised representative. The order is an undertaking by the drawer to pay the payee personally, the sum stated on the bill if the drawee refuses to do pay the payee. However, the drawer of the bill may be discharged if the payee neglects or refuses to present the bill before it lapses, or to duly inform the drawer of its dishonour or to note and protest within a reasonable time

b. The Drawee

The drawee is the person on whom the bill is drawn to pay the payee. If there are several drawees, the liability to pay the payee is joint and several. Where the drawee is unknown or fictitious, or lacks capacity, the bill becomes a promissory note deemed to have been made by the drawer.

c. The Payee

The payee is the beneficiary of the bill, whose name must be stated on the bill if the It is an order bill. But if it is a bearer bill, there is no need to name the payee.

d. Other ancillary parties

There are other ancillary parties to a bill of exchange, but of less importance, which include an Endorser and an Acceptor.

i. Endorser and Endorsee

An endorser is a payee who endorses or countersigns a bill to make it negotiable or deliverable to another person. The person to whom such bill is endorsed is the endorsee.

ii. Acceptor

An acceptor of a bill is the drawee who accepts to take over the obligation and gives more security to the payee. Acceptance is usually done in writing by stating "Accepted" on the face of the bill.

12.13 HOLDER OF A BILL OF EXCHANGE

A holder of a bill of exchange is the payee or endorsee who is in possession of the bill. A holder for value is the person who has given value of the bill for which value had earlier been given by a previous holder. A holder in due course is a person who has possession of the bill, or a person to whom a bill has been negotiated, which is complete and regular on the face it. A bill is said to be complete and regular on its face when there is no apparent irregularity either in the drawing or in its endorsement.

A bill payable on demand must be presented within a reasonable length of times, else it lapses. But if a bill is payable on a fixed date or at sight, it does not lapse until the last statutory three days of grace has expired.

12.14. NOTING AND PROTESTING

Noting and protesting are only applicable to foreign bills of exchange. Noting is the process by which a dishonoured foreign bill is delivered to the court through a legal practitioner or a Notary Public. Protest is the formal certification of the dishonour of a bill and must be lodged at the place where the bill was dishonoured.

12.15 TYPE OF BILLS OF EXCHANGE

a. Inland Bill

Inland bill is a local bill either drawn or payable in the country, or drawn on a person resident in the country.

b. Foreign Bill

A foreign bill is any other than an inland bill. A foreign bill must be noted and

protested if it is dishonoured , either by non-acceptance or non-payment, otherwise the bill becomes discharged and the drawer and the endorsers will be free from liabilities.

c. Inchoate or Incomplete Bill

A bill, which is defective or lacking in some material particular is referred to as Inchoate or Incomplete bill. e.g, if amount in figure is different from amount written in words on the bill. The defect must be rectified within a reasonable time to make it valid.

d. Accommodation Bill

A bill signed by a person who has not received value for the bill, but merely signs it for the purpose of fixing his name on the bill, is referred to as accommodation bill. That person who signed the bill is called accommodation party.

12.16 RIGHTS AND DUTIES OF PARTIES TO A BILL OF EXCHANGE

a. Holders

The rights and powers of the holder of a bill include **suing on the bill** in his own name. The holder in due course as a transferee generally takes free of claims and defences between the original parties to the instrument and may **enforce payment** against all parties liable on the bill. Claims relating to ownership, lien on the instrument or **right of rescission** of endorsement can be sustained against the holder in due course if they arise subsequent to taking but not claims arising before taking.

b. Dishonour

A bill is dishonoured by non-acceptance when it is duly presented for acceptance and such acceptance is refused or cannot be obtained or when presentment for acceptance is excused and the bill is not accepted. Also, a bill is dishonoured by

non-payment when it is duly presented for payment and payment is refused or cannot be obtained and when presentment is excused and the bill is overdue and unpaid. When a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer and each endorser, and any drawer or endorser to whom such notice is not given is discharged.

12.17 Discharge

A negotiable instrument may be discharged in the following ways:

a. Full Payment of the Instrument

Full payment of the instrument in due course by the drawee or acceptor in good faith and without notice of any defect discharges liability on it.

b. Express Waiver or Renunciation

Where the holder absolutely and unconditionally renounces his rights against the acceptor, the instrument stands discharged. The waiver must be in writing unless the bill is delivered up to the acceptor.

c. Alteration

Any material alteration on the instrument discharges any party whose obligation is affected by the alteration.

d. Cancellation

An instrument is discharged by intentional and apparent cancellation of the instrument by the holder or his agent.

e. Acceptance

When an instrument which was previously dishonoured by a person who was not originally liable is subsequently honoured, it becomes discharged.

f. Negotiation.

Negotiation is when the acceptor returns a statute instrument to the drawer, or

when an acceptor becomes the holder of the bill or at maturity. These situations also discharge obligations on the instrument.

g. Lost and Replaced Instrument

When an instrument with the holder is lost, and is replaced by the drawer, obligations on the lost instrument is discharged. In such a case, the holder must indemnify the drawer, if the instrument is later found and its proceeds claimed by another person.

12.18 REVISION QUESTIONS

MULTIPLE CHOICE QUESTIONS

1. Where consideration has previously been given for a bill, a person in possession of that bill is _____

   A. A holder for another party
   B. A holder in default
   C. A holder in due course
   D. A holder in due process
   E. A holder for value ****

2. Which of the following is NOT a Negotiable Instrument ?

   A. Bill of Exchange
   B. Cheque
   C. Credit card ****
   D. Debentures
   E. Promissory Note.

3. A special crossing of a cheque makes its value recoverable through

   A. The counter
   B. Foreign bank
   C. A particular cashier
   D. The payees account ****
   E. The Central Bank

4. Which ONE of the following is NOT the duty of a banker to its customer?

   A. Duty to honour cheques
   B. Duty of secrecy
   C. Duty to give financial grants to its customer *****
   D. Duty to pay only on its customer's instruction
   E. Duty not to make unauthorized withdrawals

5. When a bill of exchange is drawn on a bank which is payable on demand, it is called ----------

A. Promissory note
B. Share warrant
C. Treasury bill
D. Cheque *******
E. Bank note

SHORT ANSWER QUESTIONS

1. A holder of a bill of exchange for which consideration has been given is called_____*********a holder for value

2. When a bill which has been accepted by the drawer , he becomes the _____******Acceptor

3. What length of period must a cheque be in circulation before it becomes stale? _____****** 6 months

4. In cheques, the two types of crossing on cheques are special crossing and_____******general crossing

5. The legal term used to describe the stoppage by a customer of his own cheque is _____*****countermand

ESSAY QUESTIONS

1. Negotiable Instruments are of different types.

Required:

State four (4) types of negotiable instruments **(4 Marks)**

Solution

The following are negotiable instruments:

i. Dividend warrants;

ii. Promissory Notes; and

iii. Bills of exchange.

iv. Debentures

v. Share

vi. Cheques.

2. Bills of Exchange are used for financial transactions.

You are required to state and explain briefly 3 (three) features of a Bill of Exchange.

Solution

The features of a Bill of Exchange are as follows:

i. Unconditional order.

It must be an unconditional order or instruction or command to the drawee to pay the payee, and not a request. An example is cheque.

ii. Must be in writing.

It is a document and must therefore be in writing, which could be hand- written, typed, printed or in pencil.

iii. A**ddressed by one person to another**.

It must be signed by the person giving it, that is, by the drawer or his duly authorised agent. A bill is invalid if the signature on it is forged or placed thereon without the drawer's consent.

iv. The order must be in amount specified in figures and words. Where there is discrepancy between the figure and the words, the sum denoted by the words is the amount payable.

3. A negotiable instrument may be discharged in many ways.

Required:

State four (4) ways by which a bill of exchange may be discharged.

(4 Marks)

Solution

A bill may be discharged in any of the following ways:

i. By payment in due course;

ii. By an acceptor becoming the holder of the bill;

iii. By waiver;

iv. By alteration;

v. By renunciation.

4. A banker has a duty to honour the cheque of its customer when the cheque is presented for payment.

You are required to state 4 (four) circumstances under which a banker may dishonour a customer's cheque.

Solution

A banker may not honour the cheque of its customer under the following circumstances:

i. If there is a countermand by the customer;

ii. If the banker receives prior notice of the death of the customer;

iii. If the banker is informed of the customer becoming insane;

iv. If the bank receives a garnishee order placed on the customer's account

v. If the banker receives notice of commencement of winding-up proceedings being commenced against a corporate customer.

5. Sese maintains two accounts with Excel Bank; one is in his own name and the other, his business account where he is the sole signatory. His personal account was in debit of ₦100,000 while the business account was in credit of ₦500,000. The bank on its own removed ₦100,000 from the business account to offset the debit in the personal account. Sese is aggrieved and intends to sue the bank.

You are required to advise Sese.

Solution

The legal position is that a banker owes its customer a duty not to make withdrawals from the customer's account without the consent of the customer or reasonable notice to the customer of the intention to do so.

In the case under review, Excel bank breached this provision by transferring funds between the two separate accounts and is liable in damages for breach of this duty.

Sese is thus advised to sue Excel bank for reversal of the transfers made between the two accounts and also claim damages for breach of fiduciary duty.

CHAPTER 13

LAW OF TRUSTS

13.0 LEARNING OBJECTIVES

At the end of this chapter, readers should have an understanding of the basic law relating to the following:

- Concept and meaning of Trusts
- Parties to a Trust
- Essential Elements of a Trusts
- Uses of Trusts
- Classifications of Trusts : Private Trust and Public Trust
- Types of Public Trusts
- Duties and Powers of Trustees
- Rights of Beneficiaries under a Trust
- Termination of Trust.

13.1 CONCEPT OF TRUST

The concept of Trusts emanated with the intention of equity to avoid the hardship presented by common law particularly on incidents relating to land ownership. Trust is part of English doctrine of equity now adopted universally.

13.2 MEANING OF AND PARTIES TO A TRUST

Trust is a contractual relationship created when a person, referred to as trustee is appointed either by the owner of a property or compelled by law to hold the property for the benefit of some other persons, referred to as the beneficiaries, or other object of trust . The trustee may also be a beneficiary under the trust , which property could be real or personal. The parties to a Trust are the Owner of the property, the Trustee and the Beneficiary.

13.3 ESSENTIAL ELEMENTS OF TRUSTS

13.3.1 Trust has three (3) essential elements, called " the 3 certainties of Trust" which are; Certainty of Intention in Written Words, Certainty of Subject Matter, and

Certainty of Object.

a. **Certainty of Intention in Written Words**

Certainty of intention is when the creator of the Trust, who is called the 'settlor' shows his clear intention by words in writing to create a Trust. The settlor's words must be clear and unambiguous that something specific shall be done to create the Trust.

b. Certainty of Subject-Matter

This refers to the specific property of the Trust and the interests to be recognised by beneficiaries under the Trust. The exact subject-matter to be enjoyed by the beneficiaries must be clearly stated and identifiable.

c. Certainty of Object

This means that the settler must clearly identify the beneficiaries of the trust properties Such beneficiaries must be ascertainable or capable of being ascertained.

13.4 USES OF TRUSTS

The uses of Trusts include the following:

a. It protects the property of the legal owner from undue interference or conversion and rancour from intruders.

b. It gives the beneficiaries who are the legal owners of the Trust properties, but who lack legal capacity to hold titles to such properties themselves.

c. It makes it possible for more than one person to own land

d. It facilitates the purposes of charitable purposes

e. It enables property to be used to the benefit of persons in succession

f. It helps in avoiding or minimising property tax liabilities.

13.5 CLASSIFICATION OF TRUSTS

Trusts can be classified into three types ; Private Trust, Public Trust, Judicial Trust,

Trust Corporation and Custodian Trust.

13.5.1. PRIVATE TRUST

Private Trust is created by the settlor to take care of his personal and private interests, to become effective during his lifetime or by will after his death, which is said to be done *inter vivos*. There are two types of Private Trust; Express Trust and Implied Trust.

a. Express Trust

Express Trust is created STRICTLY by the settlor in writing deliberately and with full intention to take care of his personal and private interests, to become effective during his lifetime or after his death or as contained in his will.

b. Implied Trust

Implied Trust is created through the implicit or explicit actions of the settlor to presume his intention to create a Trust which may take effect in his lifetime or after his death or through his will.

13.5.2. PUBLIC TRUST

Public Trust is a creation of Government MAINLY for charitable purposes, which are to benefit the general public or a significant part of it. There are four types of Public Trust which are Judicial or Constructive Trust, Trust Corporation, Custodian Trust.

Public Trust must have three essential elements which are explained below:

a. For Benefit of the Public

Public Trusts involves charitable trusts, which must be in the interest of the general public for the alleviation of poverty and other humanitarian services.

b. Must be wholly or exclusively for Charitable purpose

A Public Trust must be legal and wholly and exclusively created for charitable

purposes; It cannot be created for both the general public and partly for other purposes. Thus, a charitable trust must be one created to include advancement of education, relief of poverty, encouragement of sports, promotion of the armed forces, community development, maintenance of museums, propagation of religion and welfare of animals

Although there is no statutory definition of charity, a charitable trust must be one which is created for the following purposes:

i. The relief of poverty;
ii. The advancement of education;
iii. The advancement of religion; and
iv. Other purposes beneficial to the community.

13.5.3. JUDICIAL OR CONSTRUCTIVE TRUST

This is a Trust imposed on the parties by equity, notwithstanding their intentions. A judicial trustee is a person appointed by the court who is in a fiduciary position and must not make gain or benefit from trust property. The general rule is that, when a person has fiduciary duty with respect to a trust property, and he derives personal gains there from, such person would be deemed to be a trustee of such gains and must be to the benefit of the beneficiaries of the trust property.

13.5.4 TRUST CORPORATION

A Trust Corporation is created by a corporate body which is expressly authorised by its Memorandum of Association to so act. Where it is a government agency, it must be empowered by an enabling Act or by-law.

13.5.5. CUSTODIAN TRUST

Custodian Trust is created when a person is appointed to hold the property or documents in respect of a trust property. The appointed trustee is does not

participate in the day-today administration of the trust property.

13.6 DUTIES AND POWERS OF TRUSTEES.

a. Duties of Trustees.

The trustee owes fiduciary duties to the trust and is obligated to perform the following duties in respect of the trust properties :

i. The trustee has the duty ensure that the trust instrument and his appointment as trustee are regular and validly made, as any defect may affect the powers of the trustee to act under the trust instrument.

ii. The trustee has a duty not to delegate his duties under the trust to other persons, as trustees are usually appointed by the confidence the settlor has in the personal skill of the trustee.

iii. The trustee has the duty not to be partial in his dealings with beneficiaries of the trust, and must therefore act without favouritism or bias.

iv. The trustee has a duty to act in accordance with the terms of the trust, and must not allow personal prejudices to affect his duties under the trust.

v. The trustee has a duty of loyalty to the terms of the trust. Thus, he must not allow his personal interest conflict with his duties under the trust, and must not be interested in the trust property.

vi. The trustee must render account and information of his management of trust properties to the beneficiaries. He thus has a duty to keep accurate records and accounts of dealings under the trust.

vii. The trustee must be gratuitous as he not paid for his services, except the trust instrument expressly authorise payment of stated fees to the trustee. A trustee is however entitled to be reimbursed for expenses reasonable incurred in the discharge of his duties.

viii. The trustee has the ultimate duty to distribute trust property to beneficiaries in accordance with the trust terms.

b. Powers of Trustees.

In order to enable the trustee efficiently administer the trust, he enjoys statutory and implied powers in the performance of his duties under the trust. These powers include the following:

i. The trustee has power to invest trust funds to enhance the value of the trust or prevent depreciation of the value of the fund. There are, however, securities in which trustees can invest under the statute. These are, securities of the government (Federal and States as well as government corporations), shares and
debentures of companies listed on the stock exchange.

ii. The trustee has power to insure the trust property and shall be free to pay the premium from the trust fund, or profit from the insured property, or income from any other property within the trust.

13.7 RIGHTS OF BENEFICIARIES UNDER A TRUST.

Beneficiaries of trust properties are equitable owners of the trust property, while the trustee is the legal owner of the trust by power of attorney conveyed to him by the owner of the property. The rights of a beneficiary of a trust include the following:

i. A beneficiary has the basic right to ensure that the trust is duly administered in accordance with the terms of the trust, such that the trustee does not dissipate trust funds or commit fraud on the trust property.

ii. A beneficiary has the right to take legal action against the trustee to account for

trust funds and also to compel tracing of trust property, where such property has been fraudulently transferred from the trust.

iii. A beneficiary can sue for injunction to restrain the trustee from endangering the trust; e.g where the trustee is undergoing bankruptcy proceedings, or that he is exhibiting signs of dishonesty in the management of trust funds.

13.8 TERMINATION OF TRUSTS.

A trust may be terminated through four ways ; disclaimer by the trustee, removal by the owner, retirement of the trustee and death of the trustee.

a. Disclaimer.

A person appointed trustee may decline the appointment and disclaim the trust, which may be done expressly in writing, or by oral pronouncement, or by conduct (refusing to act).

b. Removal.

A trustee may be removed by the owner of the trust property. This could happen if the trustee refuses to act, or found to be unfit, or stays outside the country for a period of 12 months in a stretch.

c. Retirement.

A trustee may wish to be discontinue in office and therefore may formally retire to discharge him from office. The retirement process may be as provided in the trust instrument, or by application to the court for other granting him retirement, or by consent of the beneficiaries.

d. Death.

The death of an appointed trustee automatically terminates his appointment.

13.9 REVISION QUESTIONS

MULTIPLE CHOICE QUESTIONS

1. Which of the following is **NOT** a type of Trust?

A. Custodian Trust

B. Implied Trust

C. Judicial Trust

D. Organizational Trust *****

E. Express Trust

2. The following are the duties of a Trustee **EXCEPT**

A. Investment of Trust Funds in listed Companies Stock

B. Impartiality towards trust beneficiaries

C. Take unilateral decisions on the distribution of Trust Properties *****

D. Loyalty to the terms of the Trust

E. Non-delegation of his duties

SHORT ANSWER QUESTIONS

1. The two main classes of Trusts are Private trust and _____****Public Trust

2. The parties to a trust are the owner of the trust property, _____ and _____ ****Trustee and Beneficiary.

ESSAY QUESTIONS

1. State **FOUR** purposes of Public Trust.

Answer

2. The following are the purposes of Public Trust:

a. Relief of public poverty;

b. Advancement of Education;

c. Advancement of Religion; and

d. Other purposes that are beneficial to the community

3. State and Explain **TWO** ways by which a Trust may be terminated.

Answer

A trust may be terminated through:

a. **Disclaimer**

b. A person appointed trustee may decline the appointment and disclaim the trust, which may be done expressly in writing, or by oral pronouncement, or by conduct (refusing to act).

c. Removal

A trustee may be removed by the owner of the trust property. This could happen if the trustee refuses to act, or found to be unfit, or stays outside the country for a period of 12 months in a stretch.

d. Retirement

A trustee may wish to discontinue in office and therefore may formally retire to discharge him from office. The retirement process may be as provided in the trust instrument, or by application to the court for order granting him retirement, or by consent of the beneficiaries.

e. Death

The death of an appointed trustee automatically terminates his appointment.

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