

SOLUTION BUSINESS LAW NOVEMBER 2008

QUESTION 1

- (a) Candidates to define consideration as an act of forbearance of one party or the promise therefore is the price for which the promise of the other is bought and the promise thus given for value is enforceable.
- (b) One of the principles of consideration is that consideration should not be past otherwise it is not valid. In this case Innocent weeded the compound not expecting any pay. The promise to pay therefore is past consideration and unenforceable.
- (c) Under the law relating to consideration where one is under a duty to perform an act the performance of that act cannot operate as consideration. However Section 8 (3) of the contracts Act 1960 Act 25 has modified this situation. Thus the duty performed by Santo, though he was already legally required to perform it, can still operate as consideration and can be enforced by Santo.
- (d) This question deals with adequacy of consideration. The general rule is that consideration need not be adequate but must be sufficient. Once both parties provided sufficient consideration there is a valid contract.

QUESTION 2

- (a) Candidates expected to explain duress. This is the employment of actual threats of violence or threats of violence to the person of the contracting party or those near and dear to him. The threats must be calculated to produce fear of loss of life or bodily harm. The threat must be illegal.

There is a new concept of economic duress where a party in a stranger bargaining position uses his position to exert pressure on the weaker party to do a deal he would not ordinarily have done.

In all these instances the contract can be avoided.

Undue Influence

Duress is a common law principle whilst undue influence was developed by equity. The doctrine is designed to deal with contracts as gifts obtained without free consent by the influence of one mind over another.

Where there is special relationship, e.g. confidential or fiduciary, the person in whom the confidence is reposed must show that undue influence was not used. On the other hand where there is no relationship the onus shifts on to the party alleging undue influence.

The consequence is that the contract can be avoided.

- (b) (i) Candidates must explain the nature of relationship between Arafat and Osofo Mako.
- (ii) Candidates must state whether the relationship influenced the transaction.
- (iii) They must state whether the contract can be avoided.

QUESTION 3

- (a) Condition is a fundamental obligation which goes to the root of the contract whilst a warranty on the other hand is subsidiary obligation which is not so vital that a failure to perform it does not really affect the contract.

Candidates are expected to give at least one example each of conditions and warranty.

The differences also lie in the nature of remedy available. In the case of breach of condition, the injured party can repudiate the contract whilst breach of a warranty only gives rise to action for damages.

- (b) Candidates are to explain the nature of the transaction between Moneyswine and papa Ajasco.

They are to explain whether Moneyswine was in any way induced to select the car by the statement relating to the distance covered by the car.

They are to draw their conclusion and state the appropriate remedy if any.

QUESTION 4

- (a) The answer to the question is contained in Section 4 of the decree and it is as follows:
 - (i) An owner or seller or any person acting on his behalf who enters upon any private premises or land to take possession of goods let under a high purchase agreement is relieved from liability for such entry.
 - (ii) The right of a hirer to terminate the agreement is restricted or excluded or a liability is imposed on the hirer beyond that stipulated in Section 6.
 - (iii) The hirer is subject to liability which exceeds the liability to which he would be subject if he had terminated the agreement under the Decree.

- (iv) A person acting on behalf of the owner or seller is deemed to be the agent of the hirer.
 - (v) The owner or seller is relieved from liability for acts or defaults of any person acting on his behalf.
- (b) Protected goods are goods let under a hire purchase agreement or sold under a conditional sale agreement.

One half of the hire purchase price or total purchase price has been paid or tendered.

The hirer or buyer has not terminated the hire purchase agreement or conditional sale agreement.

- (c) The owner or seller shall not enforce any right to recover possession of protected goods from the hirer or buyer except by action.
- (d) The agreement, if not previously terminated, shall be terminated.

The hirer or buyer shall be released from all liability under the agreement.

The buyer or hirer shall be entitled to recover from the owner or seller in an action for money had and received all sums paid by the hirer or buyer or any security given.

Any guarantor shall be entitled to recover from owner or seller in an action for money had and received all sums paid by him under the contract or any security given.

QUESTION 5

- (a) A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer.
- (b)
 - (i) The drawee of a cheque is always a banker and therefore a cheque is never accepted.
 - (ii) The holder of a cheque has no rights against the bank himself if the cheque is not paid. Instead he must pursue his remedies against the drawer or any endorser.
 - (iii) Notice of dishonour is not required in order to render the drawer of the cheque liable on it. This is because non-payment usually results from the fact that the drawer has no funds or has countermanded the cheque. However notice to an endorser is necessary to make him liable.

- (iv) Crossings are instructions to a banker and do not apply to bills of exchange even though they are used on cheques. A “not negotiable” crossing affects endorsees and is not addressed to the banker.
 - (vi) Considerable protection is given to a banker in respect of payment out on a forged or unauthorised endorsement. Such protection is not given to the acceptor of a bill who is liable if he pays out on forged or unauthorised endorsement.
- (c) Under Section 78 of Act 55,
- Where a cheque is crossed specially to more than one banker, the bank on whom it is drawn shall refuse payment unless the cheque is crossed to an agent for collection which is a banker.
 - Where a banker on whom a cheque is crossed specially nevertheless pays the cheque, or if crossed generally pays to someone other than a banker, or if crossed specially otherwise to a banker to whom it is crossed or agent of that banker for collection which is itself a banker, that banker is liable to the true owner of the cheque for the loss that that bank may sustain owing to the cheque having been so paid.
 - However, where a cheque is presented for payment, but at the time of presentation did not appear to be crossed or added to, or does not appear to have a crossing which has been erased or altered otherwise than authorised by Act 55, the banker paying the cheque in good faith and without negligence is not responsible and does not incur a liability.
 - Where even there is a crossing on the cheque or addition or alteration on the cheque, otherwise than authorised by the Act, payment by the banker in good faith and without negligence could still not be questioned.
- (d) Section 81 of Act 55 stipulates that
- Where a banker in good faith and without negligence, receives payment for a customer of a cheque, whether crossed or uncrossed or having credited a customer’s account with the amount of the cheque, receives payment of the cheque for the banker, if it turns out that the customer does not have a title or has defective title to the cheque, the bank incurs no liability to the true owner of the cheque by reason only of having received payment of the cheque.

QUESTION 6

- (a) (i) The class or category of workers to which the agreement relates.
- (ii) Conditions of work, including hours of work, rest period, meal breaks, annual leave, occupational health and safety measures.

- (iii) The remuneration and the method of calculating the remuneration of the workers
 - (iv) Period of probation and conditions of probation.
 - (v) Period of notice of termination of employment, transfer and discipline.
 - (vi) The procedures for the avoidance and settlement of disputes arising out of the interpretation, application and administration of the agreement.
 - (vii) The principle for matching remuneration with productivity.
 - (viii) Essential services within the establishment.
- (b) An employer has the following rights under the law
- Employ a worker, discipline, transfer, promote and terminate the employment of the worker.
 - Formulate policies, execute plans and programmes to set targets
 - Modify, extend or cease operations; and
 - Determine the type of products to make or sell and the prices of goods and services.
- The duties of an employer include the following
- Provide work and appropriate raw materials, machinery, equipment and tools;
 - Pay the agreed remuneration at the time and place agreed upon in the contract of employment or collective bargaining agreement or by law or agreed between the employer and the worker;
 - Take all practical steps to ensure that the worker is free from risk of personal injury or damage to his health during and in the course of the workers employment or while lawfully on the employer's premises;
 - Develop the resources by way of training and retaining of the workers;
 - Provide and ensure the operation of an adequate procedure for discipline of workers;
 - Furnish the worker with a copy of the worker's contract of employment;
 - Keep open the channels of communications with the workers; and
 - Protect the interests of the workers.

QUESTION 7

- (a) Action for professional negligence on general rules duty of care, breach and resultant damage

Duty of care established on grounds of;

Foreseeability of damage

Proximity of the relationship

Reasonableness or otherwise of imposing a duty

Factors for establishing them

There must be an inquirer who consults another with special knowledge for advice for a purpose known to the advisor.

Reliance by the inquirer was likely without independent inquiry.

Such reliance is reasonable and the person of whom the enquiry was made knows reliance is likely.

The information was acted on to the recipient's detriment.

Was the statement negligent? Was the advice given by practising accountants? Duty broken only if established that the accountant fell below the standard that could be expected of a reasonably competent member of the accounting profession otherwise no liability.

(b) Contract of Service is a Master – Servant Relationship

Contract for services is an independent contractor – Own Master

Employer vicariously liable for the torts of the employee

Independent contractor – no vicarious liability

Contract of service – rights and remedies of employment legislation – social security contributions, leave etc

Independent contractor – No rights to remedies of employment legislation – social security, leave etc.