

## BUSINESS AND CORPORATE LAW NOV 2010

### SOLUTION 1

- a) Limitation of actions requires that since there must be an end to litigation, certain classes of lawsuits must be brought within a fixed period of time, after which the accrued right or the right to bring the lawsuit is lost. After the stipulated period the action is said to be barred. The Limitation Decree, 1972 (NRCD 54) regulates these time frames in Ghana. Certain actions are barred after the expiration of two years from the date on which the cause of action accrued. Examples of such actions include actions claiming damages for slander or seduction. Actions barred after three years include an action claiming damages for negligence, nuisance or breach of duty. Actions barred after six years include actions founded on simple contract. Actions barred after twelve years include an action upon a judgement after the expiration of twelve years from the date on which the judgement became enforceable.
- b) Equitable remedies like specific performance and injunctions are exempted from the application of these time limitations. This means that an action for specific performance for example will not be time barred.
- c) A victim of a breach of contract may claim either: 1. Rescission 2. Damages 3. Specific performance 4. Quantum Meruit 5. Injunction.

#### 1. **RESCISSION**

Rescission can mean the order of a court cancelling a contract and can also mean the party's act of cancellation without going to court or before going to court. Where a court orders rescission it will also order mutual restitution, 'a giving back and taking back on both sides'. The principle is to put the parties back into their former positions as though the contract had never been made.

#### 2. **DAMAGES**

Damages are the primary remedy or relief for breach of contract. The secondary obligation on the part of the contract breaker at common law is to pay monetary compensation known as damages to the other party for the loss sustained by him in consequence of the breach. In cases where the victim of the breach does not suffer any loss, i.e. non-pecuniary loss damages is said to be normal. The purpose of damage is to compensate the injured party rather than to punish the wrong doer. If the injured party has sustained loss, he is entitled to substantial damages which are calculated in accordance to rules. The injured party is to be placed in the same financial position as if the contract had been performed. The parties may agree in their contract that in case of breach the damages shall be a fixed sum or be calculated in a psecified manner. Such damages are liquidated damages.

#### 3 **SPECIFIC PERFORMANCE**

This is an equitable remedy. It will sometimes suit a party to break their contractual obligations and pay damages. However, though an order for specific performance, the party in breach may be instructed to complete their part of the contract. The following rules govern the award of such a remedy. An order of specific performance will only be granted in cases where the common law remedy of damages is inadequate. Specific performace will not be granted where the court cannot supervise its enforcement. Specific performance is an equitable remedy which the court grants at its discretion.

#### 4 **QUANTUM MERUIT**

This means that a party should be awarded as much as he had earned. It is thus a claim for remuneration as much as the claimant deserves. If the parties enter into a contractual agreement without determining the reward that is to be provided for performance, then in the event of any dispute, the court will award a reasonable sum. Payment may also be claimed on the basis of quantum meruit where a party has carried out work in respect of a void contract. This claim may also arise where the innocent party is prevented from completing the contract. Where one party starts to perform the contract but is prevented from completing it by the other party's breach, he can claim quantum meruit at the contract rate. In this sort of situation, the amount is really an apportionment of the total contract price.

#### 5 **INJUNCTIONS**

An injunction is an order of the court restraining a person from doing some act. This is also an equitable order of the court which directs a person not to break their contract. It is only granted if in all the circumstances it is just and equitable to do so. It can have the effect of indirectly enforcing contracts for personal service. An injunction will only be granted to enforce negative covenants within the agreement and cannot be used to enforce positive obligations.

### **SOLUTION 2**

- a) Negotiable Instruments are contracts in writing that are transferable by endorsement or by delivery and to which the holder takes title free from any defences or objections to their validity that might have been good against the transferor. They are substitutes for money.
- b) A holder in due course is a holder who is in possession of the instrument complete and regular on the face of it before it was overdue for value and in good faith without notice of any defect in the title of his transferor and if it has been dishonoured then without notice of dishonour.

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. Every holder of a bill was to be deemed to be a holder in due course, unless evidence was given to show that there was fraud, illegality or duress in the negotiation of the bill.

- c) 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 bearer. When a bill has been endorsed in blank, any holder may convert the blank endorsement

into a special endorsement by writing above the endorser's signature a direction 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.

### **SOLUTION 3**

The vitiating factors are mistakes, misrepresentation, duress and undue influence. They are circumstances under which consent may not have been genuinely obtained.

#### **MISTAKE**

In a limited sense a mistake means an error or some misunderstanding. In the law of contract when the mistake is operative its effect is to render a contract void ab initio. There are three types of mistakes namely common mistake, mutual mistake and unilateral mistake. In common mistake both parties share the same error about the circumstances surrounding the transaction. It may be that the contractual subject matter is extinct, i.e. perished or destroyed or no longer in existence or that unknown to both parties a buyer already possesses the legal right to that which the seller purports to transfer to him. In mutual mistake, the parties misunderstand each other and are fundamentally at cross-purposes. They believe different versions of the facts of the situation, but do not realise it. Unilateral mistake occurs where only one of the parties to the agreement is mistaken as to the circumstances of the contract and the other party is aware of that fact. This may be where there is a. mistake as to the terms of the contract or where there is mistaken identity in situations where the parties are not inter praesentes.

#### **MISREPRESENTATION**

Misrepresentation can be defined as a false statement of fact, made by one party before or at the time of the contract which induces the other party to enter the contract. A misstatement is a misrepresentation only if it induces a person to whom it is made to enter into a contract. The types of misrepresentation are fraudulent, negligent and innocent. In fraudulent misrepresentation the statement is made, knowing it to be false or believing it to be false or recklessly careless whether it is true or false. The statement must be "made (1) knowingly, or (2) without belief in its truth or (3) recklessly, careless whether it be true or false". A fraudulent misrepresentation renders a contract voidable. The injured party can sue in tort for deceit. In negligent misrepresentation the false statement is made in the belief that it is true, but without reasonable grounds for that belief. A person induced to enter a contract by negligent misrepresentation may sue for damages or may rescind the contract. Innocent misrepresentation occurs where the false statement is made by a person who not only believes it to be true, but also has reasonable grounds for that belief.

#### **DURESS**

Duress is some element of force used to override a party's freedom to choose whether or not to enter into a particular contract. The concept used to be restricted to contracts entered into as a consequence of actual physical violence or the threat of such violence to a person but has been extended to include economic duress. Duress renders a contract voidable at the instance of innocent party. In *Barton v Armstrong*.

#### **UNDUE INFLUENCE**

Where there is a special relationship between the parties there is a presumption that the transaction is the consequence of undue influence. Examples of such special relationship are parent and minor child,

guardian and ward, religious leader and follower, doctor and patient and solicitor and client. The effect of undue influence is to make a contract voidable, but delay may bar the right to avoid the agreement.

## **SOLUTION 4**

### ***Section 207 of Companies Code, 1963 (Act 179)***

A director shall be entitled to enter into a contract with the company and such contract or any other contract by the company in which any director is in way interested shall not be liable to be avoided nor shall any director be liable to account for any profit made thereby by reason of such director holding that office or of the fiduciary relationship thereby established.

Every director who is in any way, whether directly or indirectly, materially interested in any contract or proposed contract entered into or to be entered into by or on behalf of the company shall declare the nature and extent of his interest at a meeting of the directors of the company.

In the case if a proposed contract the declaration required to be made by a director shall be made at the meeting of the directors at which the question of entering into the contract is first taken into consideration or, if the director was not at the date of that meeting interested in the proposed in the proposed contract, at the next meeting after he became so interested, and in a case where the director becomes interested in a contract after it is made the said declaration shall be made at the first meeting of the directors held after the director becomes so interested.

A general notice in writing given to the directors of the company at a meeting of the directors by a director to the effect that he is a member of a specified company or firm and is to be regarded as interested in any contract which may, after the date of the notice, be made with that company or firm, shall be deemed to be a sufficient declaration of interest in relation to any contract or proposed contract so made or to be made. Such a general notice shall not be effective for more than twelve months but may from time to time be renewed.

A director of the company shall not enter into any contract on its behalf in which he or, to his knowledge, any director of the company or any associated company is in any way materially interested, whether directly or indirectly, until a resolution has been passed by the directors approving thereof.

In the case of any proposed contract in which such officer is himself interested he shall, prior to the passing of the approving resolution, declare the nature and extent of his interest therein at a meeting of directors or by written notice given to the directors.

A director shall not vote in respect of any contract or arrangement in which he is materially interested and if he shall do so his vote shall not be counted, nor shall he be counted in the quorum required for that business.

## SOLUTION 5

### Companies code, 1963 (Act 179) Sections 160, 168, 48

- a) The following persons shall be entitled to attend any general meeting of the company: every member of the company; every director of the company; the secretary of the company and every auditor for the time being of the company.

#### *Section 160*

- b) If the company's Regulations so provide a member shall not be entitled to attend unless all calls or other sums presently payable by him in respect of shares in the company have been paid;

Any member who is holder of preference share only shall not be entitled to attend if his right to do so is validly suspended in accordance with Section 49 of this Code;

#### *Section 168*

- c) A resolution shall be an ordinary resolution when it has been passed by a simple majority of votes cast by such members of the company as, being entitled so to do, vote in person or, where proxies are allowed, by proxy at a general meeting.

A resolution shall be a special resolution when it has been passed by not less than three-fourths of the votes cast by such members of the company as, being entitled so to do, vote in person or, where proxies are allowed, by proxy at a general meeting of which, notice specifying the intention to propose the resolution, as a special resolution has been duly given.

#### *Section 48*

- d) Preference shares do not entitle the holder to any right to any particular beyond a certain amount in any distribution by way of dividend, or redemption or winding up. Any other 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.

## SOLUTION 6

### Companies Code, 1963 (Act 179) Section 13, 9(1), 9 (3)

- a) Pre-incorporation contracts are contracts that the organisation enters into before incorporation is effected. The basis is that even though the company is not a legal person yet, the law permits it to enter into transactions in anticipation of incorporation. A company has to consider the propriety of contracts entered into before its incorporation and has the option to rescind or ratify the pre-incorporation contracts. Until and unless there is ratification the risks associated with pre-incorporation contracts are borne by the parties themselves. Where there is full disclosure by the promoter of all material facts known to him, or where the contract is entered into or ratified by the Board of directors if all the company's directors are independent of the promoter, or is entered into or ratified by the Board of Directors if all the company's directors

are independent of the promoter, or is entered into a ratified by all members of the company there will be non-rescission. Upon ratification the company becomes bound and entitled to the benefits and liabilities of the contract. Before ratification is effected the person who entered into the transaction shall be personally liable on it.

- b) An incorporated company may be either 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.
  
- c) A private company restricts the right to transfer its shares, 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.

## **SOLUTION 7**

### **Incorporated private partnerships Act 1962 (Act 152) 539, 44 & 48**

- a) Cessation of membership means a partner ceasing to be a member.  
A partner shall cease to be a partner in the firm in the event of his death.  
His becoming an alien enemy during time of war.  
An insolvency order being made against him.  
If the other partners so elect in writing, a partner shall cease to be a partner in the firm if he suffers his interest in the partnership to be charged for his separate debt.  
A partnership agreement may validly provide that on the occurrence of any of the specified events, any partner shall cease to be a partner automatically or at the option of the other partners.  
On application by any partner the court may order that any partner shall cease to be a partner on stated grounds.
  
- b) As a result of insolvency proceedings and under an order of the Court.  
A firm may be wound up by way of voluntary liquidation by the partners if all the partners agree and send notification in the prescribed form to the Registrar for registration.  
The winding up shall be deemed to commence at the date of the registration by the Registrar of such notification notice of which shall be published by him in the Gazette.

The authority of each partner to bind the firm and the other rights and obligations of the partners shall continue notwithstanding the winding up until the firm is dissolved or a protection order or winding up order is made by the court.

Within twenty-one days from the expiration of six months from the commencement of the winding up, the partners shall send to the Registrar a statement in the prescribed form stating whether or not all the debts of the firm have been paid in full, and the Registrar shall register such statement and cause a copy of it to be published in the Gazette

## SOLUTION 8

### Incorporated private partnership Act, 1962 (Act 152) Section 3(1), 4(2) 5(1), 9(1) & 5(2)

#### *Section 3(1) & 4(2)*

- a) A partnership is an association of two and not more than twenty individuals carrying on business jointly for the purpose of making profit.

#### *Section 5(1)*

A partnership shall lawfully carry on business only when it has been duly registered. Registration involves delivery to the Registrar a copy of the partnership agreement and a statement in a prescribed form signed by the partners.

#### *Section 9(1)*

- b) Failure to register or renew it will make every partner liable to a fine.  
The rights of the firm and of the partners are not enforceable by action or other legal proceedings

#### *Section 5(2)*

- c) The Registrar may refuse to register the partnership if in his opinion the partnership is not one registrable under the Act.  
Any of the businesses which the partnership has been carrying on or is to carry on is unlawful.

The name of the firm is misleading or undesirable.

Refusal may also be grounded on a partner being an infant or of unsound mind.

A person who within the past five years has been guilty of fraud or dishonesty whether convicted or not in connection with any trade or business.

An undischarged bankrupt.

The statement is incomplete, illegible, inaccurate, irregular or paper insufficiently durable to be suitable for registration.