

COUNCIL FOR VOCATIONAL LEGAL EDUCATION

ATTORNEYS' EXAMINATION SEPTEMBER 2018

PAPER III COMMERCIAL AND BUSINESS LAW

[THREE AND THREE QUARTER (3 3/4%) HOURS)]

Candidates have ten minutes to study the Examination Paper which consists of 10 pages before they start writing.

This paper contains THREE PARTS.

PART I on COMPANY LAW. There are FIVE QUESTIONS out of which THREE must be answered.

PART II on CODE DE COMMERCE. There are TWO QUESTIONS out of which ONE must be answered.

PART III on BILLS OF EXCHANGE, BANKING LAW AND FINANCIAL SERVICES. There are TWO QUESTIONS out of which ONE must be answered.

All questions carry equal marks. Marks will be granted, where appropriate, for correct reference to enactments and case law.

Each question must be answered on separate sheets with clear marking as to the question answered and the number of pages.

Make sure that you put all your answers to the different parts in the appropriate envelopes provided.

PART I - COMPANY LAW

Question 1

SME Bank Ltd, a licensed bank under the Banking Act, has provided facilities to ABC Ltd, a private company limited by shares which manufactures garments. To secure those facilities:

- (a)ABC Ltd has granted a fixed charge in favour of SME Bank over its factory; and
- (b)ABC Ltd has granted a floating charge in favour of SME Bank over its raw materials, finished garments and receivables.

Due to persistent poor economic conditions, ABC Ltd has faced difficulties meeting its liabilities for the past four quarters. ABC Ltd has defaulted over its interest and capital repayment obligations towards SME Bank for the past 9 months and SME Bank is considering enforcing its charges in order to recover its claims against ABC Ltd. However, SME Bank learns that ABC Ltd has been put into voluntary administration by its directors.

According to the latest management accounts which SME Bank has in its possession, ABC Ltd's assets and liabilities are as follows:

Assets:

- (i) Estimated value of factory: Rs 4 million
- (ii) Stock of materials and garments: Rs 1 million;
- (iii) Trade debtors (i.e. clients who are yet to pay): Rs 2 million

Liabilities:

- (i) Rs 5 million as principal and Rs 1 million as arrears of interest (Rs 6 million in all)

- (ii) Trade creditors: Rs 2 million
- (iii) Mauritius Revenue Authority: Rs 500,000

SME Bank seeks your advice on the following matters:

- (i) What is the effect of voluntary administration on its ability to enforce its charges?
- (ii) Is there any avenue available to it to enforce those charges during the administration; what procedure must it follow, what must it prove and how long might it take?
- (iii) In relation to the procedure in (ii), what SME Bank's prospect of success might be.

Question 2

You are approached by Trading Co Ltd, a company engaged in the purchase of retail goods which it then resells. One of its suppliers, Wholesale Co. Ltd, has served a statutory demand on Trading Co. Ltd in 01 September 2018 for an amount of Rs 500,000 allegedly in respect of unpaid goods. According to Trading Co Ltd's books, the amount of unpaid goods is Rs 400,000 instead of Rs 500,000.

Trading Co. Ltd also tells you that the goods to which the unpaid amount relates were defective and were returned by its customers, and it had to refund those customers a total of Rs 600,000. The statutory demand, which is stated to be a statutory demand served under the Insolvency Act 2009, contains the following:

- (i) It calls upon Trading Co. Ltd to pay Wholesale Co. Ltd the sum of Rs 500,000 and does not give Trading Co. Ltd any ~ other option to comply with the statutory demand; and
- (ii) It calls upon Trading Co. Ltd to pay that sum within three weeks.

Trading Co. Ltd asks your advice on the following matters:

- (a) What procedure must it follow to set aside the statutory demand?
- (b) What time limit must it comply with in order to be able to set aside the statutory demand?
- (b) What potential ground(s) can it rely upon to set aside the statutory demand?
- (d) What evidence must it present to be able to sustain an application to set aside the statutory demand?
- (e) What might its prospects be of successfully applying to set aside the statutory demand on each of the potential grounds?
- (f) What could the outcome be from the Court on an application to set aside the statutory demand?

Question 3

Peter, a sole trader, comes to you and informs you that for the past 10 years, he has been supplying leather to Stephen so that the latter could manufacture shoes. Peter shows you a contract of supply and invoices showing that the entity which contracted with him was Stephen Shoes Ltd, and not Stephen personally. However, Peter says that the company was wholly owned by Stephen and that Stephen was the sole director. Peter tells you that when he signed the contract, he did not really pay attention to the name 'Stephen Shoes Ltd' on the contract and only issued invoices to Stephen Shoes Ltd because that is what Stephen told him to do. In his mind, he always meant to contract with Stephen personally.

Peter informs you that he has not been paid (whether by Stephen or by Stephen Shoes Ltd) for the last six months of supply and only continued supplying because of assurances from Stephen that he would be paid.

Stephen has stopped replying to Peter's phone calls and letters demanding payment. Peter has also learnt that Stephen Shoes Ltd has been removed from the register of companies.

Peter seeks your advice on whether he may have a cause of action against Stephen personally as he firmly believes that Stephen Shoes Ltd was merely a front for transactions entered into by Stephen. What must Peter establish in order to successfully sue Stephen and what are the obstacles that he might face?

Peter also supplied leather to Raymond's company, Raymond Soles Ltd and has faced the same difficulties of non-payment for the last three months. Peter has learnt that Raymond Soles Ltd is now in liquidation because it was unable to pay its debts, and also from some friends who are other creditors of Raymond Soles Ltd that the latter had stopped paying them for about a year. Raymond Soles Ltd's directors have always been Raymond and his wife Ellen. Peter believes that they have improperly allowed Raymond Soles Ltd to trade while it was insolvent.

Peter asks you what potential actions may lie against Raymond and Ellen under the Companies Act and under the Insolvency Act.

Question 4

Michael is a director of DEF Ltd, a private company whose business is the import and resale of garments.

On 01 July 2018, DEF Ltd sold a piece of bare land, which was not being used at all, to XYZ Ltd. It turns out that XYZ Ltd's sole shareholder and director is Michael. The price of the sale was Rs 5 million and you may assume that it was not effected in the ordinary course of DEF Ltd's business.

The directors of DEF Ltd at the time of the sale (other than Michael) were Niall, Paulie and Rihanna. Those three directors had no knowledge of Michael's association with XYZ Ltd as he had not disclosed it to them.

On 01 September 2018, Niall, Paulie and Rihanna are informed by Sam, a Sworn Land Surveyor, that the land sold should have been worth at least Rs 10 million based on recent sales that have taken place in the same area.

Niall, Paulie and Rihanna seek your advice on the following matters:

- (a) Is there any basis for challenging the sale by DEF Ltd to XYZ Ltd?
- (b) If there is a potential court application to be entered, who would be the applicant?
- (c) What is the applicable time limit for making such application?
- (d) What has to be established for a successful challenge and who bears the burden of proof?

If it turns out that XYZ Ltd had sold the land to Timothy (who is not connected or associated in any way to DEF Ltd, XYZ Ltd or their respective officers and shareholders) for Rs 7 million, would there be a basis for DEF Ltd's directors to seek to challenge the sale to Timothy? Please justify your answer by reference to the Companies Act.

Question 5

Jared approaches you for legal advice. He tells you that for the past 10 years, he has been supplying stationery items to Drake Co Ltd and that the latter has not paid him for the last six months of supply.

Jared wishes to pursue a claim against Drake Co Ltd but has heard rumours that Drake Co Ltd no longer exists and that it has “amalgamated” with Evergreen Co. Ltd.

Jared seeks your advice on the following matters:

- (a) How can it be ascertained if such “amalgamation” has taken place? In particular, which document would prove such “amalgamation”?
- (b) If it indeed turns out that Drake Co Ltd has amalgamated with Evergreen Co Ltd, and that the amalgamated company is Evergreen Co Ltd, what action could he envisage to recover his claim against Drake Co. Ltd? Please justify your answer by reference to the provisions of the Companies Act.

What would the position be if, prior to the amalgamation, it is Drake Co Ltd who had a claim against Jared for delivery of non-conforming goods? In particular, would Jared be able to argue that he is not bound to satisfy that claim as a result of the amalgamation? Please justify your answer by reference to the provisions of the Companies Act.

PART II_CODE DE COMMERCE

Question I

Alfred, Boris, Connie and Dexter decide to form a “société”, as “associés”, in order to carry out a business of take-away food delivery service.

Alfred just turned 16 and is to form part of the “société” given that he is a very good cook of authentic Chinese cuisine.

Boris is the one who will be responsible for keeping the accounts and handling the orders and sales. However, Alfred does not get along with Boris, who has just been released from prison after having served a sentence of imprisonment for an offence, which he claims he is not guilty of.

Connie is the wife of Boris and will be responsible for the reconciliation of the accounts of the “société” given that her husband will be part of the “société”.

Dexter cannot say no to being part of the “société” as he is scared of Boris, who has insisted that Dexter be part of the “société”. However, Dexter knows that Alfred and Boris will not get along and he is contemplating selling his shares in the “société” as soon as it comes into being.

Discuss the legal implications for each party to form part of the “société”.

Question 2

Trevor was one of the partners of the “Société en Nom Collectif” Trevor et Cie. Article 5 of the “Statuts” of the “Société” provides that: *“in the event of the death of one or of two partners before the expiry of the partnership, the partnership shall not come to an end but shall continue between the surviving partner or partners and the heirs and representatives of the deceased partner or partners”*.

Last year, Trevor passed away, leaving as sole heirs and representatives his widow and his two legitimate minor children, who accepted his succession and received their share therein, worth some Rs. 200,000 each.

Trevor et Cie. purchased goods worth Rs. 1M on credit from Yuan Co.Ltd. However, it has no money to repay the said sum given that Trevor’s widow has flown out of the country with all the proceeds of the “Société”, leaving the minor children behind.

Advise Yuan Co. Ltd. as to any recourse it may have against the two minor children to recover the sum of Rs. 5 M.

PART III _BILLS OF EXCHANGE, BANKING LAW AND FINANCIAL SERVICES

Question 1

On 16 April 2005, Michel advanced the sum of Rs 100,000 to Pierre. However, Michel requested Pierre to guarantee the loan. Pierre then wrote and signed a note in which he stated: "I promise to pay to Michel the sum of Rs. 100,000 as principal, together with 2 per cent interests per annum, by 15 April 2010".

Pierre has been paying the interests on the loan regularly since 2005 until 2009. However, he has only made one payment of Rs. 75,000 towards the principal sum.

Please advise as to the following:

1. Michel is now in *dire* need of money and wants to know whether he can sue on the basis of the note, or on any other basis, to recover the remaining sum.
2. Would your answer, to the above, be different if there was evidence to show that Pierre had been paying interests regularly to Michel on the principal sum until 2018?
a
3. Would the note be valid if the name of Michel had been left blank in the note and Michel had written his name on the note, as the payee, at a time when Pierre had already passed away?

Question 2

Mr Robert Earl is a British national who is retiring soon. He has savings to the tune of Rs. 100 M held in a bank in England. He has always dreamt of having his own business and wishes to have your advice as to the conduct of business through a company incorporated in Mauritius and holding a Category 1 Global Business Licence. Please draft an advice to be sent in writing to Mr. Robert Earl putting particular emphasis on the following issues, which Mr. Earl would like to be enlightened about before taking his final decision:

1. the various types of activities, which the said company can undertake;
2. the conditions for benefiting from network of Mauritius tax treaties;
3. the various fiscal benefits should the company be used as a vehicle for investment in countries with which Mauritius has a tax treaty including foreign tax credits, if any;
4. the rules concerning directors;
5. the rules concerning the minimum number of shareholders;
6. whether a Company Secretary is mandatory;
7. any audit requirements;
8. any requirement to file an annual return;
9. the rules governing the accessibility of the company records to the public; and
10. the factors, which the Financial Services Commission will take into account, when determining whether the company will be “managed and controlled” from Mauritius.