

## HINTS ON HOW TO ANSWER LAW QUESTIONS

- First and foremost, you should determine the aspect of Business Law to which the question relates. Does it, for example, relate to Law of Contract, Sale of Goods or Company law? Do not assume that the first or last question is always on a particular aspect. The examiners reserve the right to change the arrangement of the questions without notice.
- Determine the aspect(s) of the branch of law to which the question relates. For instance, if the question is on Law of Contract, does it relate to formation of contract, capacity or discharge?
- Identify the legal issues arising from the question. The legal issues are the main legal questions that will guide you in determining the rights and liabilities of the parties and advise them appropriately. In identifying the legal issues you should watch out for facts relating to certain provisions of law, facts of a case or court decisions. For instance, if the facts of a case disclose that the letter of acceptance was posted, this might require the discussion of the Posting Rule under the Law of Contract.<sup>1</sup>

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<sup>1</sup> See Adams v Lindsell [1818] 1 B & A 681.

- In identifying the legal issues, you should limit yourself to the issues relating to the particular subject. Different facts raise different legal issues in the context of different law subjects. For example, in the Law of Contract, age might raise an issue on the capacity of a party to enter into contract whereas, in Criminal Law, it might raise question on criminal responsibility.<sup>2</sup>If the elements of other branches of law such as Land Law or Environmental Law are disclosed in a question, the issues should be discussed mainly in the light of Business Law principles. Matters relating to other subjects or disciplines should only be addressed if they help to clarify or explain the Business Law issues.
- Introduce your work. The legal issues will provide the major "raw materials" for your introduction. Your introduction demonstrates the extent of your understanding of the question and how you intend to approach it. Endeavour to make a good impression with your introduction by carefully selecting your words, phrases and sentences. Remember the saying "first impression lasts longest".
- The legal principles applicable to the issues should then be discussed in sequential order with appropriate authorities. Do not use only common sense or morality to analyse the issues. The court is mainly interested in the law, most especially binding authorities. It is not mandatory to discuss the issues in the order in which they arise from the facts. This is a matter of style. Ensure that whatever approach is adopted helps to clearly bring out the logic of your argument and conclusion.
- In citing authorities, note that you do not have to cite all the cases on the issue or state the full facts. It may be sufficient to cite the case where the principle was established in a few lines and mention a few others where the principle was subsequently applied. The extent to which you have to present the facts of a case depends on how relevant the case is to your answer. Hence, some cases may be summarised in few lines, say two or three, while the full facts of some may have to be given. For instance, where the facts of the question is on all fours (identical) with that of a decided case, you will be expected to state the full facts of the case and also distinguish them, that is, differentiate them.
- Relate the principles that you have discussed to the facts of the case. By this, I mean you should use the principles to solve the legal problems before you. This is where a lot of students flounder. If you fail to relate how the principles apply to the question, then you cannot solve your client's problem in a real life situation. This is where the examiner knows students who have crammed and those who can reason and apply the principles.
- Avoid being theoretical. You must be able to show how the principles apply in practice. If there is a divergence between the law and practice, you should state so in your answer and explain the implications for your answer.

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<sup>2</sup> The principle of criminal responsibility is otherwise known as the principle of "no liability without fault". Hence, there are exemptions from liability in cases of insanity, immaturity and so on. See section 24 Criminal Code Cap 77, Laws of Federation, 1990. See also, Okonkwo & Naish, Criminal Law in Nigeria, Spectrum, 1992, 2nd ed., p.80.

- Argue your points well. The examiner cannot assume that you know something if you do not make it clear. Assume that the examiner will disagree with your point of view and set out to win him over by flawless argument and authorities.
- Employ the appropriate legal terms. Do not use "gutter" language or the language of the unlearned. For instance, say, "A is liable" not "A is guilty", "A is in breach" not "A is wrong." The appropriateness of your legal language delineates your competence to deliver your message.
- Do not waste too much time by labouring one issue while you leave others untouched. Just like the secondary school debate, it is not the volume of your answers that matters but the number of issues that you have discussed and how well you have addressed them.
- Answer the required number of questions and make a good attempt on all of them. Be time conscious and allocate your time well. If you were asked to answer for instance, three questions in two hours, endeavour not to spend more than the average time, say one hour, on a question while you "rush" the other two questions within the remaining one hour. If a question is "loaded" the examiner will not expect a great deal of details on certain areas of the answer.
- You should think before rushing into an answer. Not only that, your thinking faculties must be coordinated and utilized throughout the examination. Do not spend 2 or 3 hours writing non-stop. Pause to reflect on certain difficult questions when necessary.
- Conclude your work. When you are asked to advise either or both parties, you are required to tell them what to do in the circumstance and whether the course of action they have adopted, if any, is lawful or legally expedient.
- Finally, make real attempt to write neatly and legibly. The examiners may have the obligation to read your writing no matter how bad and indecipherable, writing clearly however makes it easy to read and appreciate your points. Writing slovenly is like speaking inaudibly in the courtroom. Hence, make deliberate effort to combine speed with neat and legible writing.

## INTRODUCTION

### **What is business law?**

Business activities are not conducted in *vacuo*. Rather, they are carried on within certain established principles and rules of law, which are binding on the parties and enforced by the law courts in cases of dispute. Business law is the body of enforceable principles, rules, regulations and practices governing the various interactions between parties to a commercial transaction. In other words, business law is the legal framework through which economic and business activities are conducted and regulated.

### **Scope of business law**

Business law pervades different aspects of law including the following:

- i) **Law of contract:** This is the branch of business law regulating the formation, terms, performance, discharge and remedies for breach of an enforceable agreement (contract) between parties;

- ii) **Law of agency:** It may not be possible or even expedient for a party to a contract to undertake or discharge all the actions or obligations required of him either in the formation or performance of a contract. Hence, he (the Principal) may appoint somebody (an Agent) and authorise the Agent to do certain things on the Principal's behalf in his dealings with the other party to the contract. The relationship between the Agent and the Principal on one hand and the relationship of both the agent and the Principal with the other party on the other hand are regulated by the Law of Agency.
- iii) **Sale of goods:** Most commercial transactions are in form of sale or purchase of a particular item, such as pen or pencil, food, car, computer, cloths, everyday needs, aero plane, ship and other multifarious items which are capable of being sold or purchased.  
While some people may never be involved in sale of a landed property, virtually everyone is daily involved in sale of goods, either as a Principal or Agent. This branch of law comes into play when the subject matter of a contract comes within the definition of "goods" under section 2 of Sale of Goods Act,
- iv) **Hire purchase:** A person may choose to acquire certain goods (usually of a capital nature) by first hiring it with an option to purchase it later instead of purchasing it either on credit or "cash and carry" basis. The Hire Purchase Law is the branch of business law that regulates the formation of a hire purchase contract and the respective rights and liabilities of the parties to the transaction;
- v) **Law of partnership:** Two or more persons may decide to come together and form a business with a view to making profit. The Law of Partnership is the branch of business law that regulates the rights and liabilities of the partners among themselves and their rights and liabilities in their dealings with third parties;
- vi) **Company law:** Two or more persons may decide to run their business as a separate legal entity by registering the business. A registered company has some advantages over a partnership. Here, Company Law comes to play in the regulation of the process of incorporation, management and financing of the company, the extent of the powers of the company and its officials, among other things, etc.;
- vii) **Industrial law:** This branch of business law governs the relationship between employer and employees and the regulation of their rights and liabilities. Industrial Law also covers the formation and regulation of the activities of trade and employers unions and their members in order to achieve industrial peace and harmony;
- viii) **Insurance:** Every business venture entails various degrees of risks or contingencies. For instance, a shop containing the entire stock of a businessman may be gutted by fire or a ship carrying a large consignment of goods may sink at sea. A businessman or entity may choose to insure against certain risks while the law mandates that certain risks shall be insured against. The Insurance Law regulates the establishment and the conduct of insurance business and the contract between the insured and the insurer and their rights and liabilities, among other things;
- ix) **Banking and negotiable instruments:** The importance of banks to business operations is self-evident. Payment for goods and services, among other things, are usually done through banks. This is the aspect of business law regulating the establishment,

management and control of banks and the different modes of effecting payment for goods and services in form of cheques and other types of bill of exchange.

Apart from the foregoing, the scope of business law also includes Law of Taxation, Intellectual Property, Shipping and Admiralty, etc.

### **Primacy of the law of contract**

The law of contract is the foundation or "mother" of business law. This is because a contract lies at the root of any business or commercial relationship, be it in the sphere of agency, sale of goods, insurance, hire purchase, industrial law, etc. As a matter of fact, all other branches of business law represent the application or adaptation of the general rules and principles of law of contract to the peculiarities of these relationships. For instance, instead of "offeror" and "offeree" in a typical contractual relationship, we employ the terms "buyer and seller" in a contract of Sale of Goods and "agent and principal" in a contract of Agency. Whilst special rules have been developed in some of these aspects, the general principles of Law of Contract will apply where no special rule exists.

### **Functions of business law**

The principles and rules of business law have been developed over the years to achieve certain objectives including the following:

- (a) **Law and order:** The primary aim of business law is not different from that of law in general - maintenance of order. Business law therefore aims at ensuring orderliness in the various interactions and dealings between parties to commercial contracts. Hence, rules have been developed on how commercial relationships are created and the respective rights and obligations of parties are protected and enforced.
- (b) **Justice:** The primary aim of law is or ought to be the attainment of justice. Hence, the aim of business law is not only to maintain order but also promote justice in commercial transactions. Justice in this context involves the balancing of the interests of all the parties to commercial contracts. There are cases where the courts have refused to adhere to the strict principles of law and applied the doctrines of equity.<sup>3</sup>
- (c) **Remedies:** Business law seeks to provide appropriate remedies where a party has suffered injury due to the action or inaction of the other. For instance, the law provides a civilized method of obtaining remedy where there is a breach of obligation in any aspect of business law.<sup>4</sup> The remedies for a breach of contract may be damages, specific performance, injunction rescission, indemnity etc. depending on the facts of each case.
- (d) **Legal protection:** Certain rules of contract have been developed basically to ensure that a group of people are not exploited or defrauded in a contractual relationship because of their

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<sup>3</sup>See, for instance, *Central London Property Trust Ltd v High Tree House Ltd* [1947] K.B.130.

<sup>4</sup>It is crude and criminal for a party to contract to hire assassins to kill the other party.

circumstances. This protected group includes companies, illiterates, infants, drunkards, etc. Therefore, agreements involving any of such persons may not be enforceable even when they contain all the elements of a contract.

- (e) **Promotion of trade and commerce:** Ultimately, business law aims or should aim at promoting trade and commerce within a particular society. For instance, without the development of Company Law, the undertaking of commercial transactions on a wide or international dimension may have been impossible. Since the development of this important branch of Law, new rules have been developed from time to time to promote efficiency in the management of the affairs of companies. Also, when a court is faced with different options in the application of a principle or rule of law, it may choose to apply the one that will best promote trade and commerce.

### **Why study business law?**

Increasing number of companies and firms now have their own legal staff or legal department or external solicitors to whom they refer their legal matters. Against this backdrop, it may be tempting to conclude that a businessman does not need to study business law in this age of specialization since their legal matters can be expertly handled by their solicitors. This belief is erroneous and misleading. According to a writer,<sup>5</sup> knowledge of business law is imperative for a businessman for the following reasons, among others:

- a) Things often happen so quickly in practice that a businessman cannot consult his solicitors before taking a snap decision;
- b) A knowledge of business law will enable a businessman discuss matters intelligently with his solicitors and properly appreciate any legal advice proffered;
- c) Sometimes, the solicitor cannot give practical advice because he does not know the business as thoroughly as the business man; hence, a business man must bridge the gap between the rule of law and the knowledge of the business by his own experience. For instance, there may be circumstances when a businessman may find it less costly to breach a contract and pay damages to the aggrieved party rather than dogmatically abide by the contract to his detriment;
- d) A knowledge of business law will enable the businessman to run the business as much as possible, in a litigation-proof manner and avoid the cost, inconvenience and sometimes the embarrassment of litigation;
- e) When a case inevitably goes to court, the businessman is still involved. He must co-operate with the legal practitioners and give all the necessary assistance. The more the businessman knows about the law, the more he will be helpful to the lawyer in the conduct of the case. For example, a good businessman would have made a careful record of all the facts related to the transaction.

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<sup>5</sup>R.A. Anderson, Social Forces and the Law, A Guide for Businessman and the Citizen, (1969), South-Western Publishing Cincinnati pp. 1-3

From the foregoing, it is clear that it is imperative for a businessman to have a fairly good knowledge of the principles of business law notwithstanding that he may have legal staff, department or external solicitors.

### **Sources of business law**

It is often said that a good lawyer is not the one who knows all the law, but where to find the law. The question then is where do we turn to, if we want to determine the applicable legal principles and rules to a particular commercial problem? For instance, if Mr. A wants to go into a business of sale and purchase of petroleum or gun, he might contact a lawyer to advise him on whether the business is lawful and the necessary steps to be taken in order to get it going. This brings us to the discussion of the sources of business law in Nigeria.

To a layman, all the rules of law are contained in a big book called "the Constitution". This is however erroneous. Rather, law

Introduction to Nigerian Business Law consists of multifarious rules, which can be found in several primary and secondary sources discussed below. The word 'source' is used in this context as the fountain where legal rules and principles of business law are derived. These could be in form of materials, documents or books usually consulted for information by lawyers and judges or providing initial inspiration on the applicable rules of law.

The *primary sources* of business law in Nigeria are four:

- i) The received English Law;
- ii) Nigerian legislation or statutes;
- iii) Case laws or Judicial Precedents; and
- iv) Delegated legislations.

*The secondary sources include:*

- a) Customary law;
- b) International law;
- c) Books, legal dictionaries, periodicals, newspaper reports, essays, etc.

The sources will be briefly considered one after the other.

#### *(i) The Received English Law*

English law as a source of Nigerian business law was an offshoot of Nigeria's historical colonial link with Britain. When the British colonists came to Nigeria, they came with their own commercial practices and laws, which were relatively more sophisticated than the indigenous system. For instance, the concepts of modern company law or wage earning employments were virtually unknown in Nigeria at that time. The received English laws governed the new



commercial concepts and relationships, which developed in Nigeria after that. Some of these English laws have survived up till today.

The implication of this for our discussion is that references will be made to English authorities from time to time in this book, as the need arises. We must hasten to point out, however, that since Nigerian's independence from Britain in 1960, any English authority(or that of any other country) is at best persuasive and not binding in Nigeria

The Received English Law can be divided into three parts, viz:

- a) Common Law
  - b) Doctrine of Equity; and
  - c) Statutes of General Application (SOGA)
- (a) **Common Law:** Common law originally refers to principles and rules of law which were applicable in the "whole of the realm" in England as distinguished from "local customs" which applied to a particular area. The distinctive feature of common law is that they are judge-made laws which are to be found in prior decided cases. For instance, the principle that an offer may be made to the whole world is not written in a statute. Rather, it was established in the case of *Carlill v. Carbolic Smoke Bail Co.*<sup>6</sup>
- (b) **Equity:** "Equity" simply means "fairness" or "justice". Equity was developed to mitigate the harshness of the rules of common by disallowing a party to insist on mere letters of the law where it will lead to injustice. The common law during its early developmental stage was very strict and full of legalism. Once the claim of a litigant cannot fit into the scope of any of the then existing enforceable rights, he will be left without any remedy. Even where a remedy was available, it may be inadequate or ineffective. For instance, the common law can only award damages and had no power to grant injunction or specific performance in cases of breach of contract. Due to the obvious inadequacies of common law, rules of equity were developed. Also, if there is a written agreement between A and B for the sale of A's land for W500, 000, A may not be able to enforce the contract at common law if he is not able to produce the written agreement. However, the contract may be enforced in equity if A is able to produce other credible evidence of payment such as receipt or memorandum. Hence, where a strict application of a rule of law will lead to injustice, the court has a discretionary power, in certain circumstances, to apply doctrines of equity.

Some of the doctrines of equity are:

- equity looks at the substance and not the form;
- equity does nothing in vain;
- equity considers as done that which ought to be done;
- where there is a wrong; there must be a remedy;

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<sup>6</sup> [1893] 1 QB 256

- equity aids the vigilant not the indolent.

(c) **Statutes of General Application (SOGA):** These are statutes applicable throughout England before the first day of January Nineteen Hundred (1/1/1900) and extended to Nigeria. Such statutes continue to apply in Nigeria, except where they have been replaced by Nigerian statutes. Examples of such statutes include the *Sales of Goods Act, 1893*, *Factors Act, 1889*.

### (ii) Nigerian Legislations

Legislations are laws made by the organ of government whose primary duty is to make laws; that is the legislature. Legislations are enacted in form of statutes. Nigerian statutes are variously known as Ordinances, Acts, Decrees, Laws, and Edicts depending on when they were enacted.

"Ordinances" are laws passed by the Nigerian Central Legislature before October 1, 1954 when federalism was introduced in Nigeria. A statute enacted by the National Assembly comprising of the Senate and the House of Representatives during a civilian regime is called an "Act" while that of the House of Assembly at the State level is called "Law". However, in a military regime, a statute made by the Federal Military Government is known as a "Decree", while the one made by a State's Military Government is known as "Edict". Hence, one can easily say when a statute was enacted depending on whether it is an Ordinance, Act, Law, Decree or Edict. For instance, the Companies and Allied Matters Decree, 1990 (CAMD) was made in 1990 during the military era. The Decree has however been redesignated as Companies and Allied Matters Act (CAMA) since the commencement of civil rule under the 1999 Constitution.

Legislation is the most important source of law in Nigeria today. Where a rule of law from another source of law is in conflict with the provisions of a legislation, the rule of law will be null and void to the extent of its inconsistency with the provisions of the legislation.<sup>7</sup> Some of the legislations relating to business law include Companies and *Allied Matters Act (CAMA)*, *Sale of Goods Act*, *Partnership Act*, *Hire Purchase Act*, *Labour Act*, *Trade Union Act*, *Insurance Act*, etc.

### (iii) Delegated legislations

These are laws made by other government agencies and officials to whom the legislature has delegated its law-making powers. Delegated legislations usually come under titles such as Regulations, Rules, Instruments, Orders and Bye laws. A delegate must act within the powers conferred on him otherwise his action will be declared null and void to the extent of its inconsistency with the provisions of the enabling statute.<sup>8</sup>

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<sup>7</sup>For instance, section 1(3) of the Constitution of the Federal Republic of Nigeria, 1999 establishes the supremacy of the Constitution by providing "If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall be null and void to the extent of the inconsistency be void".

<sup>8</sup>*Doherty v Balewa* [1961] All N.L.R. 604, *Williams v. Majekodunmi*(No.3) [1962] 1 All NLR413.

#### *(iv) Judicial precedents*

Judicial precedents are judgements or decisions of a court cited as authorities for the purpose of persuading a court to decide a similar case on the same principle as the previous one. It is the practice of following past decisions because they provide a ready solution to the case at hand. The practice of judicial precedent makes it possible for litigants, businessmen and members of the public to determine the applicable rules for a particular transaction and, to some extent, anticipate the outcome of litigation. If courts are not going to follow their previous decisions, a lawyer will not be able to advise his client on what to expect when a commercial dispute arises and goes to court. Some of the important judicial precedents in the various branches of business law are cited in this book.

#### *(v) Customary law*

Before the advent of the British colonists in the territory that is today known as Nigeria; the various existing communities at that time had already developed their own system of customary law governing the various commercial transactions. For instance, if a person buys a ram or goat, it is a rule of Customary Commercial Law that, the buyer will, in addition to the cost of the goat, pay the costs of the rope and ground which are respectively called *owookun* and *owoile* among the Yorubas.

Rules of customary law are subject to tests of validity before the court applies them. The tests are that the rules must not be:

- a) Repugnant to natural justice, equity and good conscience; and
- b) Contrary to public policy; and
- c) Incompatible directly or implication with any law for the time being in force.

#### *(vi) International Law*

International rules of business law are applicable to many transactions involving, for instance, shipping, aviation, sale of goods, banking etc. There are usually bilateral and multilateral agreements on the framework for such international transactions inform of Conventions, Treaties and Protocols of International Institutions such as the United Nations (UN), International Labour Organisation (ILO), African Union (AU), Economic Community of West African States (ECOWAS) and their agencies. However, it is important to note that international rules and principles embodied

Introduction to Nigerian Business Law in a Treaty or Convention are applicable in Nigeria if they have been ratified and enacted into a local statute pursuant to section 12 (1) of the 1999 Constitution.<sup>9</sup>

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<sup>9</sup> See section 12 (I) of the Constitution of the Federal Republic of Nigeria, 1999.

### *(vii) Books*

Books and treatises of distinguished authors or jurists in the field of business law are generally of persuasive authorities and not binding.

This is because they often contain the personal interpretation or opinion of the author. Also, opinions of two distinguished authors may differ substantially on the same issue. Resorts are usually made to this source where there are no primary authorities on the issue.

### *(viii) Newspapers, journals, interviews, etc.*

Some newspapers usually feature write-ups on business law and practice and interviews of some notable jurists, for instance, in Business Times, This Day and Guardian on Tuesdays. Statement of the law contained in such journals or newspapers generally cannot be cited as authorities. Even where they are allowed, they are of mere persuasive authorities.

"The aims of business law like that of Law in general is not only to achieve order but also justice." Discuss.

## **Review questions**

### **Question 1**

“The aims of business law like that of Law in general is not only to achieve order but also justice. “Discuss.

### **Answer plan**

The question requires a general treatment of the aims and functions of business law. A good answer will be expected to contain:

- A definition of business law
- A highlight of the scope of the subject.
- A detailed explanation of the objectives of order, justice and the provision of remedies according to due process.
- Conclusion - The attainment of orderliness and justice are primary functions of business law. However, the functions of business law also include the provision of appropriate remedies when there is breach of contract.

### **Question 2**

Mr. Enterprise was awarded a contract to supply a particular XYZ Limited with computers within one month. Mr. Enterprise succeeded in obtaining a loan of ₦1m from his bank, Alaba International Bank, to finance the contract. The computers were delivered to XYZ Limited

within one month as agreed. However, a new manager, Mr. Kalokalo, had just resumed at XYZ Limited. Mr. Kalokalo refused to take delivery of the computers because he preferred to re-award the contract to another computer company owned by his friend. Mr. Enterprise has threatened to "teach Mr. Kalokalo a lesson of his life" if he fails to accept delivery and pay him his money.

Briefly discuss the aspects of business law raised in this question.

### **Answer plan**

This question revolves round two major issues, first, the scope of business law and second, the functions of business law. The question does not require the discussion of the different aspects of business law or a particular aspect. It does not require us to solve the practical problems posed in the question but highlight the aspects of business we are likely to turn to for legal solution. A good answer plan will include:

- a definition and a highlight of the scope of business law;
- The following facts disclose the aspects of business law written against them;
- There was a "contract" between Mr. Enterprise and XYZ Limited - Law of Contract. The question does not disclose whether Mr Kalokalo, the new Manager, has any reason for refusing to take delivery of the computers except that he wanted to reaward the contract to his friend. Hence, his action, if carried out, may amount to a breach of contract;
- Mr. Enterprise contracted with a company - XYZ Limited discloses an aspect of Company Law. For instance, what is the effect of the contract entered into by the former Manager of XYZ Limited on Mr. Kalokalo and XYZ Limited? Can Mr. Kalokalo repudiate a contract entered into by the former manager in his official capacity without incurring liability for his company?
- The contract was for the sale of computers. Computers fall within the definition of goods under the Sale of Goods Act-Sale of Goods. Questions may be raised on whether the computers supplied meet the specification or are merchantable;
- The contract was financed through a bank loan - Law of Banking. If Mr. Enterprise wants to claim damages, the question of how much interest he paid on the loan from Alaba International Bank and the prevailing interest rate might be relevant;
- The second aspect relates to what should be the appropriate remedy in case of a breach of commercial contract for sale of goods. The threat by Mr. Enterprise to "deal with Mr. Kalokalo" suggests that Mr. Enterprise intends to take law into his own hands. This will be ill advised and against the principle of business law. Mr. Enterprise may seek appropriate remedies in the law court. However, since litigation may take a long time with adverse effect on Mr. Enterprise business, it may be better for him to explore all the available opportunities to settle the matter amicably.

### Question 3

The law of contract forms the plank or foundation of the modern business law. Like an "incoming tide, it flows into the estuaries (other branches of business law) and up the rivers. It cannot be held back. Discuss

#### Answer plan

This question centres on the scope of business law, but more particularly, the centrality and significance of the Law of Contract to business law. A good answer should cover the following points:

- Definition of business law;
- Discussion of each of the branch of the course such as Law of Contract, Agency, Company Law, Partnership, Sale of Goods, Employment Law, Hire Purchase, Insurance, Law of Banking and Negotiable Instruments;
- Conclusion: The above statement correctly espouses the preeminence of the Law of Contract among other business law subjects. This is because the Law of Contract lies at the root of all business transactions or relationships. Other branches of business law are still governed by the general rules of contract where no special rules have been developed. Even, the special rules in these other areas are adaptations of the general rules of contract to suit the demands and realities of different aspect of commercial life. Hence, it is truism that Law of Contract is the "mother of all business law subjects."

### Question 4

A good lawyer is not the one who knows all the law but where to find the law." To what extent is the above statement applicable to business law.

#### Answer plan

This is a straightforward question requiring the discussion of the different sources of law.

- Explain what is meant by "sources" of law. They are materials from which the applicable rules and principles of business law can be found.
- Explain the following sources of business law:

1) Received English law. This can be sub-divided into three parts, viz:

- a) Common law
- b) Doctrine of equity
- c) Statute of General Application (SOGA)

- 2) Nigerian legislations: This is the most important source of business law. They are enacted in form of statutes. Statutes can be called Ordinances, Acts, Laws, Decrees, Edicts etc. depending on when they are made and by which type of government, that is whether colonial, military or civilian.
- 3) Delegated legislation - these are made by bodies other than legislature and are subject to judicial and legislative review.
- 4) Judicial precedents: These are the decisions of higher courts which are binding on lower courts within the same court system.
- 5) Customary law: these apply if they pass certain tests of validity.
- 6) International law
- 7) Books

*Conclusion:* A lawyer who is confronted with a legal problem on business law may contact any or a combination of all the sources. It is important to note that the most useful and authoritative sources are the primary sources. The secondary sources are not binding; rather, they are merely persuasive.

## **LAW OF CONTRACT**

### **Definition and purposes**

The central purpose of the Law of Contract is to impose a duty on parties to carry out their respective promises under it, failing which a party who fails to discharge his obligations under the contract will be liable for a breach of contract. A contract can simply be defined as an agreement made between two or more competent parties, which the law will enforce. What distinguishes a contract from a mere 'agreement' is the fact that if one of the parties fails to honour or discharge his promise, the other party may take legal action. A contract is therefore an agreement and something more. Hence, the saying "all contracts are agreements, but not all agreements are contracts."

### **Principles and nature of law of contract**

There are certain principles which pervade the law of contract and the growth of the subject. The knowledge of such principle is crucial to a proper understanding of how the rules of law of contract are developed. Some of the principles are briefly discussed below:

- (a) *Contract is consensual in nature*: Unlike certain branches of law such as criminal law and law of torts where duties are imposed by law, a contract arises through the voluntary agreement of parties. If parties do not agree, no contract will exist. Hence, contract is consensual in nature.
- (b) *Freedom to contract*: To a large extent, a party is also free to decide the acceptable terms on which is prepared to enter into a contract with the other party. This is the principle of freedom of contract. For instance, a party may choose to sell his property worth ₦ 1 million for ₦1. In the absence of fraud, mistake, misrepresentation or undue influence, the law will enforce such contract although it may favour one party more than the other. The law is therefore not concerned with the quality or fairness of the deal struck once a party has given something in exchange for the promise of the other
- (c) *Objective standard*: The determination of whether or not there is a contract and the terms of the contract are determined by what the parties have manifested physically in writing, orally or by conduct and not their subjective intention. Therefore, what goes on in the mind of the parties is irrelevant if it is not expressed. The court will not take cognizance of such unexpressed intention if a reasonable man observing and interpreting what the parties have manifested would not have understood such intention.

By nature the law of contract has a common law origin. Most of the principles were developed centuries ago by judges in prior decided cases. Hence, the study of the law of contract is replete with old and new cases. There are however certain aspects of the law of contract that are regulated by statutes such as *Sale of Goods Act*,<sup>10</sup> *Illiterates Protection Laws*,<sup>11</sup> *Money Lenders Law*,<sup>12</sup> *Land Instrument Registration Law (West)*,<sup>13</sup> *Hire Purchase Act*<sup>14</sup> etc.

### **Scope of law of contract**

It is important to know in advance the length and width of Law of Contract. The Law of Contract can be broadly divided into seven aspects, viz:

#### *(i) Contract formation*

This is the preliminary aspect of the course. It involves the study of certain rules and principles on the elements of contract such as offer, acceptance, consideration and intention to create legal

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<sup>10</sup>See Sale of Goods Act 1893, Sale of Goods Law, Cap 174, Laws of Lagos State, 1994.

<sup>11</sup>See Illiterates Protection Act, Cap 83, Laws of Federation of Nigeria, 1958, Illiterates Protection Law, Cap 67, Laws of Lagos State, 1994.

<sup>12</sup>Money Lenders Act, Cap 124, Laws of Federation, 1958.

<sup>13</sup>*Land Instrument Registration Law, Cap 56 Law of Western Nigeria, 1959.*

<sup>14</sup>*Hire Purchase Act, Cap 169, Laws of Federation of Nigeria, 1990.*



Law of contract relations. If any of these elements is absent in a transaction, there is no contract. Hence, the principles of the Law of Contract will not apply to that transaction.

*ii) Contract form*

A contract, depending on its nature, may be oral, written, under seal or even be implied from the conduct of the parties. Due to reason of public policy, certain types of contracts are however required by law to be evidenced in writing or take a special form before they can be enforced. This aspect of the Law of Contract deals with the legal requirements of contracts relating to land and contracts of guarantee.

*iii) Contractual terms*

A contract usually contains a set of promises. The promises will contain the terms on which the parties have contracted. Where all the terms are not expressed by the parties, certain rules have been developed to define the obligations of the parties. For instance, sections 12 - 15 of the Sale of Goods Act contain certain terms implied in every contract of sale of goods, unless the parties have agreed otherwise. Furthermore, not all the terms of a contract are of the same importance. Breach of certain terms will give the innocent party to repudiate the contract, while breach of certain other terms will only entitle him to claim damages. This aspect of the Law of Contract, therefore, focuses on the obligations, which the parties have undertaken, and the consequences of their breach.

*vi) Exclusion of liabilities*

Sometimes a party may try to evade or limit the duties or liabilities imposed on him under a contract. This is usual in standard forms contracts where a party is faced with an option to "take it or leave it". For instance, the management of a hotel may denounce liability for "any item that may be lost in the room of the guest" or the operator of a car park may contract on the basis that "cars are parked at owners' risk". This aspect of the Law of Contract focuses on the rules for determining the legal effect of such exclusion or limiting terms.

*v) Vitiating elements*

Certain factors such as mistake, misrepresentation, duress, undue influence, incapacity, illegality, privity may vitiate the existence and enforcement of an agreement that has all the elements of contract. This aspect deals with the consideration of such vitiating elements and their effects on a contract.

*vi) Discharge*

No contract is meant to last forever. The longest span of even a marriage contract is "till death" parts the parties. A contract is discharged when one or both of the parties is (are) free from the obligations assumed under it. A contract may be discharged by performance, agreement, breach

or frustration. Principles and rules have been developed to govern the different types of discharge and their consequences.

### *vii) Remedies*

The law will not allow a promisor to break his promise at his whims and caprices to the detriment of the other party. Rules have been developed to give appropriate remedies to an aggrieved party depending on the circumstances of each case. This aspect is therefore devoted to when remedies such as damages, specific performance and injunction will be granted or denied.

## **Classification of contracts**

There are different ways of classifying contracts with each classification focusing on different aspect.

### *a) Formal and simple contracts*

A formal contract is a written contract made by deed. A deed is a special legal parchment commonly known as agreement paper, Law of contract which is signed, sealed and delivered. A unique significance of a formal contract is that it is enforceable by the party in whose favour it is executed, even if he has not furnished consideration. Formal contracts are rare in practice. They are usually employed in land agreements, "such as conveyance, mortgage and gifts.

All other contracts other than formal contract are classified as simple or informal contract. They are simple contracts because they are not in any solemn or special form that is, "signed, sealed and delivered". They may be in writing, or may be oral (parole). The major distinction between a formal contract and a simple contract is that unlike the former, the validity of a simple contract depends on the presence of consideration.<sup>15</sup>

### *b) Express and implied contracts*

Another way of analysing contracts is in considering them as either express, when the terms are clearly stated and implied when the terms are not. In an express contract, the extent of the respective obligations of both the offeror and the offeree are clearly stated either orally or in writing. The unique advantage of an express contract particularly, when it is written, is that parties can always refer to it in case of controversy for interpretation. A good example is where tenders are invited for a construction work. Each tenderer, who responds, will clearly state all the material terms such as the type of materials to be used, duration, price, guarantee, term or mode of payment etc.

An implied contract is one where the terms are not so stated either orally or in written form. For example, a customer enters a shop, sees a shirt with a price tag, picks it up, takes it to the cashier, who collects money from the customer, packs the shirt and hands it to the customer.<sup>16</sup> Although no word has been spoken during the entire transaction, no one can seriously deny that the parties have concluded a contract by conduct. Similarly, there is a contract, where a person enters a

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<sup>15</sup>See Sagay, op. cit., pp. 2-3.

<sup>16</sup>B. D. op. cit., p. 18.

restaurant to eat and he is served with a plate of pounded yam and chilled water, which he consumed. The risk in an implied contract is that, in case of a dispute, it is the terms that the court considers to be reasonable that will prevail and not what either of the parties is asserting to be the basis of the contract.

#### *c) Bilateral and unilateral contracts*

There is a bilateral contract when there is an exchange of promises, that is, "a promise for a promise".<sup>17</sup> In a bilateral contract, both parties have outstanding obligations, which they must perform under the contract. For instance, in a contract of sale of goods, the buyer is obliged to pay and the seller is obliged to give the buyer the goods. The buyer is a promisor (he promises to pay) and a promisee (the seller has promised him the goods). The seller on his part is also a promisor (he promises to part with the goods) and a promisee (the buyer has promised to pay the contract price at the same time). However, some contracts are unilateral. That is to say, only one party is obliged from the outset while the other party is completely free to decide whether or not to act. A unilateral contract can simply be defined as where one party promises to do something in return for the act of the other party. It is like saying "I will do this, if anyone does a particular act." Unilateral contracts are well illustrated by the reward cases, for instance where a reward is offered to anyone who finds and returns a lost or stolen object such as a dog, money, or information leading to the arrest of a criminal.<sup>18</sup> The famous case of *Carlill v. Carbolic Smoke Ball Co.*<sup>19</sup> is a good example of a unilateral contract.

#### *d) Executed and executory contracts*

Formation of a contract must be distinguished from performance of that contract. Both could coincide, as when a purchaser of a book at a store pays for it and takes it with him. However, performance and formation could occur at different times as when one buys a television set on credit and the seller agrees to deliver it after a week.<sup>20</sup> Contracts which have been fully performed, are referred to as "executed", while those partially performed or totally unperformed are known as "executory." It is possible in one sense, for a contract to be both executed and executory if one of the parties has fully performed his part of the bargain while the other party has not performed his. Essentially, when speaking of executed and executory, reference is being made to performance or non-performance of both parties' contractual duties.

#### *e) Valid, void, voidable and unenforceable contracts*

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<sup>17</sup> Ibid

<sup>18</sup> Op. cit., p. 7

<sup>19</sup> [1895] 1 Q.B. 256

<sup>20</sup> B.D. Fisher, op. cit. p. 409

This classification of contracts focuses on the binding character of the contract. A valid contract contains all the elements of a contract and free from any legal defect or infirmity, which could render it unenforceable. Hence, a valid contract is enforceable in all respects.

If a contract is void, it means there is no contract at all in law although there may be tangible evidence of an attempt to form an agreement. Factors which render an attempted agreement void include illegality of the subject matter," for instance, agreement between A & B that A should assassinate C, B's political rival.

A contract is voidable when it has some legal defects, which entitles the innocent party to set aside the contract or in the alternative overlook if it wishes. Ordinarily, voidable contract is binding, but it gives one of the parties the right to set it aside. It remains binding until it is set aside.

Factors such as fraud, mistake, misrepresentation and incapacity will generally render a bargain voidable.

Finally, a contract is unenforceable if it fails to meet a formal requirement (such as being in writing or by deed). Here, although a contract exists, it is destitute of any legal effect. Equity may however intervene in certain cases to ameliorate the harshness of the common law.

## **Review question**

### **Question 1**

- (a) What is a contract and what are its essential elements?
- (b) Magic Paint Limited, a manufacturer of Magic Paint advertised thus: "One bucket of Magic Paint will do more than two bucket of others. *Awuf - don jam correct*"! Mr. Builder bought 1000 buckets of the paint on the strength of the advertisement and discovered that the claim Magic Paint Limited was false.

Can Mr. Builder enforce the statement against Magic Paint Limited?

### **Answer**

- (a) A contract is an agreement made between two or more persons, which the law will enforce. In other words, a contract is a set of promises between two or more persons, which the law will enforce. What distinguishes a contract from other forms of agreement is the element of enforceability. This means that if a party fails to honour or discharge his promise, the other party may take action to enforce it in the law court.

The elements of a contract are offer, acceptance, consideration and the intention to create legal relations. Unless all the elements are present, there is no contract in law. The elements will be considered one after the other.

**Offer:** An offer is a proposition made by one party (offeror) to another (offeree) indicating his willingness to be contractually bound on certain terms provided that those terms are accepted by that other party. An offer may be made expressly or implied from the conduct of a party. It may also be made to a particular person or to the public at large. An offer was made to the public at large in *Carlill v. Carbolic Smoke Ball Co.*<sup>21</sup> In that case, the Defendant company who was the manufacturer of a product named Carbolic smoke ball advertised in a newspaper to the effect that it would pay J100 to any person who used its product in a specific manner for a minimum period of two weeks, and still catches influenza. The Defendant further stated in the advertisement that it had deposited a sum of J1, 000 at the Alliance Bank, Regency Street "to show our sincerity in the matter." The Plaintiff bought one of the products and used it as specified and still caught influenza. The Plaintiff brought an action to compel the Defendant to pay her the J100. The Defendant contended in its defence that the advertisement was a mere puff, a mere statement of confidence in their product and a promise in honour" which was not intended to create legal relations. That the advertisement was not an offer as it was impossible to contract with the whole world. The Defendant was held liable to pay the Plaintiff. The court held that the advertisement was not a contract with the whole world but a unilateral offer and that anyone who performs the terms of the offer brings himself into a contractual relationship with the Defendant.

**Acceptance:** For a contract to exist, the offeree must accept all the terms of the offer without equivocation, qualification or addition. An acceptance is the final expression of assent to the terms of an offer. Any qualification, modification or addition to the terms of the offer will amount to a counter offer, which destroys the original offer. In *Hyde v. Wrench*,<sup>22</sup> the Defendant offered to sell an estate to the Plaintiff for J1000 and the Plaintiff "accepted" to pay 1950. It was held that the Plaintiff had rejected the original offer and that there was no longer any offer for him to accept.

**Consideration:** For a party to enforce an agreement, he must show that he has furnished consideration for it, hence the dictum that "consideration must move from the promisee." Consideration is an act or forbearance of one party for the act or forbearance of the other. Simply put, consideration is the price which is paid for the promise of another. It is the contribution of a party to the contract. It may be in form of an act, a promise, forbearance, detriment or benefit. Consideration may be executory or executed. Consideration is executory where the parties exchange promises to perform acts in the future, for instance, where goods bought on credit are to be delivered in future. Consideration is executed where one party promises to do something in return for the act of another, rather for the mere promise of future performance of an act. In *Carlill v. Carbolic Smoke Ball Co.*<sup>23</sup> the company was not liable until the Plaintiff had bought and used the drug in the specified manner and still caught influenza.

**Intention to create relations:** Not every agreement which contains an offer, acceptance and consideration can be regarded as a contract. For an agreement to give rise to a contract both parties must have intended to hold themselves bound by the agreement. The general presumption

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<sup>21</sup> [1893] 1 QB 256.

<sup>22</sup> [1840] Beav. 334

<sup>23</sup> Supra

regarding social and domestic agreements is that parties do not intend to be bound legally. In *Balfour v. Balfour*,<sup>24</sup> a husband promised to give the wife J30 monthly until he is able to take her to his new station. It was held that the wife could not enforce the promise.

However, in case of commercial contract, the presumption is that there is an intention to create legal relations. The presumption may however be rebutted in certain situations, for instance, where it is obvious that reasonable men cannot take the statement serious. Hence, an advertisement that men who use a particular toothpaste become successful is so wild and incredible and unlikely to have a contractual force.

We can see from the foregoing that a contract is an agreement and "something more". It is a combination of offer, acceptance, consideration and intention to create legal relations. If any of the above elements is lacking, there is no contract in law. Hence, the dictum "all contracts are agreements but not all agreements are contract."

(b) The main legal issue in this question is whether the statement by Magic Paint that "one bucket of Magic Paint will do more than two buckets of others. *Awuf- don jam correct!*" is intended to create legal relations or is a mere puff or promotional gimmick.

The determination of the question whether an agreement is meant to have legal relations depends on the overall facts of each case. The first consideration is whether the agreement relates to a social or commercial setting. The second consideration is whether the statement is definite enough to be taken seriously by a reasonable man. The fact that the statement here was made in a commercial setting is not conclusive. The presumption that business or commercial dealings are intended to be binding on the parties can be easily rebutted because of its vagueness. For instance, the comparison between Magic Paint was not made with reference to any particular paint. There must be multifarious brands of paints. Whilst it may be possible that one bucket of Magic Paint may do more than twice of some paints, it will be outrageous for anyone to believe that the paint would do more than twice of every other paints. The basis of such an exaggerated claim has not been provided. In *Weekes v. Tybald*,<sup>25</sup> the Defendant in a conversation stated that he would pay J100 to anyone who married his daughter. The Plaintiff married his daughter and claimed the money. It was held that such generally spoken words meant to merely excite or entice suitors and therefore, could clearly not be regarded as binding on the Defendant.

Also, the language employed by the advertisement "*Awuf- don jam correct!*" is a clear indication that the advertisement must have been meant to simply excite the interest of prospective buyers. The position might have been different if the advertisement had simply read, "if you buy Magic Paint to paint your house, we guarantee that it will last for seven years". Furthermore, it is illogical for Mr. Builder to buy 1000 buckets of the paints without any prior trial of its quality.

Based on the foregoing, it is doubtful if Mr. Builder can successfully enforce the statement against Magic Paint Limited.

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<sup>24</sup> [1919] 2 K.B. 571

<sup>25</sup> [1605] Noy 11.

## Question 2

- (a) What are the elements of a valid offer in the law of contract?
- (b) GG Ltd. was planning to relocate its head office to a new large parcel of land in a prime location in Kaduna City, which it recently acquired. GG Ltd invited Archvite Designs, a firm of architects to a meeting and briefed the firm about its plan. Without any further instruction, Archvite Designs forwarded what it described as "a suitable design" to GG Ltd. and a bill of N250, 000.00 for its professional fee. GG Ltd. has refused to honour the bill. Archvite Designs is planning to sue GG Ltd. Advise the parties.

## Answer

(a) An offer is a proposition made by one party (offeror) to another (offeree) indicating his willingness to be contractually bound on certain terms provided that those terms are accepted by that other party. It may be made expressly or implied from conduct, and upon being accepted, is capable of leading to a contract. An offer may be made to a particular person or to the public at large.

For a proposition to amount to an offer, it must have the following elements:

1. It must be definite, certain and unequivocal otherwise the proposition will be regarded as an invitation to treat. For instance, if A asks B "will you buy one of my cars?" and B answers, "Yes", there is no offer capable of being accepted. This is because A has not disclosed the price and which of his cars. At best, A, at this stage is only trying to see whether he can get someone to buy one of his cars in case he decides to sell.
2. The offeror must be willing to be committed to the offeree as soon as the latter accepts the proposition; otherwise, there is no offer but an invitation to treat. In *Payne v. Cave*,<sup>26</sup> it was held that an advertisement stating that an auction will be held is not an offer but an invitation to treat. When the auctioneer commences and asks for bids from those attending, the bids are the offers. A contract comes into existence when the auctioneer knocks down his hammer. Until that time any bidder who has not made up his mind to be bound may withdraw his bid.
3. The offer must be made by a capable person. In *Ajayi Obe v Executive Secretary; Family Planning Council of Nigeria*,<sup>27</sup> the Plaintiff was interviewed for a post in the Defendant's Introduction to Nigerian Business Law establishment. The Chairman of the interview panel (instead of the Secretary) told the plaintiff that he had been offered the job, but no letter of offer came from the Secretary. It was held that there was no valid offer because the offer was not made by a capable person.

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<sup>26</sup>(1789) 3 Term. Rep. 148

<sup>27</sup>Supra

4. The offer must be communicated to the other party. This is quite logical, since the offeree must have knowledge of the offer before he could accept or reject it. The rule is that there is no acceptance in ignorance of offer.<sup>28</sup>

(b) The legal issues disclosed in this fact pattern are (i) whether GG Ltd. has made an offer to Archvite Designs capable of acceptance and (ii) whether GG Ltd. is bound to accept the design and pay the bill.

For a proposition to amount to an offer in law, it must fulfil certain basic conditions. The proposition, among other things, must be certain and definite and the offeror must have intended to be bound once those terms are accepted by the offeree. If these basic elements are absent, there is yet no offer, which is capable of acceptance. At best, the person making the proposition can be said to be exploring the possibility of either making an offer or getting the other party to make one. At this stage, there is an invitation to treat, or invitation to make offer or invitation to chaffer.

In *Olaopa v Obafemi Awolowo University*<sup>29</sup> with a view to erecting commercial building on their concession area in the education zone Ibadan, the Respondent invited the Appellant to a meeting where he was briefed to design how best to develop their acres of land in the concession area. Before a formal contract could be reached between the parties, the Appellant made design and delivered same together with the quantity survey to the Respondent. He forwarded his claim for his fees and for the first stage of the work. The Respondent refused to pay. The Appellant then commenced action at the High court to recover this said sum. The Respondents denied that there was a contract between them. The Court held that there was no contract between the Respondent and Appellant.

Based on the authority of the above case, GG Ltd. has not made any definite offer to Archvite Designs. The acts of calling Archvite Designs to a meeting and briefing it only amounted to an invitation to treat. At this stage, GG Ltd has not bound itself to make a particular design or even engage the services of the firm. The firm should have waited to get the approval of GG Ltd for the proposed design and even discuss their fee before going ahead to do the drawing. The case would have been different if GG Ltd had requested for a particular design and instructed Archvite Designs go ahead with the drawing. Archvite Designs is advised not to sue, as there was no contract between it and GG Ltd. Archvite Designs was the one making an offer to GG LTD., which GG LTD could either accept or reject.

### Question 3

(a) Distinguish between an offer and an invitation to treat.

(b) SIA Motors advertised the sales price of a brand of its vehicle SIA Deluxe in the newspaper as ₦1.5m. Chief Aromire went to the showroom at Victoria Island to pick the car. He offered the Manager of SIA Motors ₦1.5 m and requested for the key of the car. The Manager courteously

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<sup>28</sup>*Fitch v Snedaker* 38 N.Y 248 (1868)

<sup>29</sup> [1997] 7 N.W.L.R (Pt.354) 204.



told Chief Aromire that the price in the newspapers advertisement was a "printer's devil" and that the actual price was ₦2.5m. Chief Aromire who had intended to present the car to his wife as a wedding anniversary present was disappointed.

Explain the contractual implications of the situation to Chief Aromire.

### **Answer**

(a) An offer is a proposition made by one party (offeror) to another (offeree) indicating his willingness to be contractually bound on certain terms. An offer must be certain, definite and the offeror must have firmly resolved to be bound by the terms of the proposition. If there is no such firm resolve, then the parties are still in the negotiating stage. At this stage, we have what is called an invitation to treat or an invitation to make offer.

It is not always easy to distinguish between an offer and an invitation to treat. However, one important distinction between them is that while the acceptance of an offer crystallizes into a contract, in the case of an invitation to treat there is no offer capable of being accepted. This distinction between offer and invitation to treat has been made in some decided cases.

In *Fisher v. Bell*,<sup>30</sup> a shopkeeper displayed a flick-knife in his shop window together with a price tag. He was charged with an offence of "offering a flick-knife for sale" contrary to a particular statute which aimed at controlling sale of offensive weapons. The charge was dismissed on the basis that a display of an article with a price on it in a shop window is merely an invitation to treat and not an offer. Also, in *Pharmaceutical Society of Great Britain v. Boots Cash Chemists*<sup>31</sup> it was held that goods are displayed in a shop to enable customers to choose what they want and offer to buy them. In other words, the buyer is the one making the offer by selecting particular goods, and the seller accepts by receiving payment.

The same principle has been applied in to an auction. In *Harris v. Nickerson*, the Defendant, an auctioneer advertised in London that a sale of office furniture would be held at Bury St. Edmunds. The Plaintiff travelled to London to attend the auction. The particular furniture which the Plaintiff was interested in buying were not put up for sale but were withdrawn, though the auction was held. The Plaintiff sued for loss of time in attending the auction. It was held that he could not recover from the auctioneer. The advertisement was simply an invitation to treat.

A distinction between offer and invitation has also been drawn where communication was through telegraph. In *Harvey v. Facey*,<sup>32</sup> the Plaintiffs sent the following telegram to the Defendants: 'Will you sell us Bumper Hall Pen? Telegraph lowest cash price'. The Defendant replied: 'Lowest price for Bumper Hall Pen 900 pounds'. The Plaintiff then telegraphed: "We agree to buy Bumper Hall Pen for 900 pounds asked by you". The Supreme Court of Jamaica held that there was a contract. However, the decision was reversed by the Privy Council. It was held that the second telegraph was not an offer but a mere price indication in the nature of an invitation to treat. The third telegram could not therefore be an acceptance resulting in a contract.

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<sup>30</sup> [1961] 1. Q.B. 364.

<sup>31</sup> [1893] L.R 8 Q.B. 286

<sup>32</sup> [1893] A.C. 552

From the foregoing discussion, we can see that a fundamental distinction exists between an offer and an invitation to treat. In case of an offer, acceptance of the offer results in a contract. However, in case of an invitation to treat, there is yet no offer that is capable of acceptance.

(b) This question revolves round the legal implication of the advertisement in the newspaper. That is, whether, KIA Motors had by the advertisement offered to sell KIA Deluxe at a price of N1.5m.

The advertisement including the advertised price was no more than an invitation to treat, an indication by KIA Motors to see whether people will be willing to offer to buy the car. When people

Law of contract respond to the advertisement, like Chief Aromire did, they will be the ones making offers to KIA Motors to buy the car. In real life situations, they may even try to see whether they can get a price lower than the advertised price. In this case, Chief Aromire was the offeror when he offered ₦1.5m. As it turned out that the real price at which KIA Motors was prepared to sell is ₦2.5m, the company has rejected the offer of ₦1.5M by Chief Aromire.

In *Pharmaceutical Society of Great Britain v. Boots Cash Chemists*<sup>33</sup> it was held that goods are displayed to enable customers to choose what they want and that the contract is not completed until the prospective buyer, having indicated the articles, which he needs, pays the shopkeeper who accepts the offer by accepting payment. In other words, the buyer is the one making the offer by selecting particular goods, and the seller accepts by receiving payment.

Based on the authority of the Boot's case, KIA Motors can reject Chief Aromire's offer of ₦1.5m without liability. The choices open to Chief Aromire are to either look for the extra ₦1m naira to make up the price of the car or look for another car of ₦1.5m.

#### **Question 4**

Kayode has a dog, which keeps guard over his large mansion in Abeokuta. Kayode is ordinarily resident in Lagos, but goes to Abeokuta every weekend. On one of his trips to Abeokuta, he discovered that the dog had disappeared. He placed an advertisement in a national newspaper as follows: "My dog, XXX disappeared from my house in Abeokuta. Anyone who finds it and returns it to my house at No.7, Kayode Street, Abeokuta will receive a reward of ₦5,000." Ade found the dog and returned it to Kayode's house in Abeokuta. However, Kayode refused to pay Ade the ₦5000 while Ade is threatening to sue Kayode.

Advise Ade.

Would your response be different if Ade had not read the advertisement but got to know of the reward after he had found and returned the dog?

#### **Answer**

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<sup>33</sup> Supra

This question raises the issues of unilateral contracts (offer made to the whole world) and the legal consequences of "accepting" an offer in ignorance of the offer.

The advertisement placed by Kayode is an offer to the whole world. Where an offer is made to the public at large, a contract comes into existence between the offeror and the person(s) responding to the offer and accepting it. This principle was laid down in the famous case of *Carlill v. Carbolic Smoke Ball Company*.<sup>34</sup> In that case, the Defendants who were manufacturers of a product called "The Carbolic Smoke ball" issued an advertisement in which they offered to pay J100 to any person who succumbed to influenza after using their product in a specified manner. The Plaintiff, on the faith of the advertisement, bought and used the product as prescribed but still caught influenza and sued for the J 1 00. The court held that the Plaintiff was entitled to the money.

Thus by responding to Kayode's advertisement (by taking the dog to the latter's house in Abeokuta) Ade has furnished consideration for Kayode's promise of ₦5000 reward and is therefore entitled to the money.

The second leg of the question entails the consideration of the principle of consensus ad idem (the meeting of minds) in the making of a contract. The terms of offer must be communicated to the offeree who can validly accept. An act which merely coincides with the requirements contained in an offer, is not an acceptance if the person performing the act was not aware of the existence of the offer at the time of the performance. Someone who is unaware of an offer cannot validly accept it.

In the case of *Gibbons v. Proctor*<sup>35</sup> the Defendant published a handbill offering a reward of J35 to anyone who gave information to the police that would lead to the arrest of a rapist. The Plaintiff supplied the information before the handbill was published, and was therefore in ignorance of the offer of reward. Nevertheless, he was held entitled to the reward.

It must be noted however that the decision in this case is a departure from the general principle and it is generally agreed that it was wrong. The correct statement of the law was made in the American case of *Fitch v Snedarker* where it was held that someone who did not know that a reward had been offered could not claim it.

Applying the principle in *Fitch v Snedarker*<sup>36</sup> to the second leg of the question, Ade would not have been entitled to the reward if he had not seen the advertisement. He would have simply acted gratuitously.

## Question 5

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<sup>34</sup> Supra

<sup>35</sup>[1891] L.T. 594.

<sup>36</sup>38 N.Y. 248[1886].

- (a) With the aid of decided cases, discuss the rules, which apply to the acceptance of an offer.
- (b) X Ltd. writes to appoint Usman as a manager of the company on a salary of ₦1m. per annum. Usman replies accepting the offer and requests additionally that he should be provided with a chauffeur-driven car. X Ltd. later offered the position to another candidate on the waiting list after the interview. When Usman heard about the development, he quickly informs the company that he was willing to take the employment without an official car. In the meantime, the other candidate had accepted the offer of X Ltd. Usman is planning to sue X Ltd. for breach of contract. Advise Usman.

### Answer

(a) An acceptance is a final expression by the offeree that he agrees to the terms of the offer as conveyed to him by the offeror. An acceptance of the offer brings a contract into existence. It is the element of acceptance that underscores the bilateral nature of a contract.<sup>37</sup>

For an acceptance to be valid, it must be unqualified and correspond to all the terms of the offer. This is the 'mirror-image rule' that the offeree must accept the exact terms of the offer without any intention to bargain further. Any qualification or amendment of the offer will constitute a counter-offer, which destroys or nullifies the original offer.

In *Innih & Ors v. Ferado Agro and Consortium Ltd*,<sup>38</sup> the Appellants wrote a letter to the respondent company offering to sell certain assets for ₦3,550,000. The Respondent thanked the offeror for the offer and requested the period of payment to be extended to three weeks. The Appellants immediately sold the assets to a third party. The Respondent sued for specific performance of the contract. It was held that there was no contract. The purported acceptance was not operative due to its failure to fulfil all the essential components of an acceptance.

In *Orient Bank v. Bilante Intl*,<sup>39</sup> the Respondent, a customer of the Appellant bank applied for a loan of 18 million naira. The Appellant made a formal offer of the loan in a letter containing all the terms. The letter was concluded with a statement: "kindly confirm the above agreement reached at today's meeting by signing and returning the duplicate of the letter". Rather, the Respondent wrote another letter containing additional terms outside the terms contained in the Appellant's letter. The Court of Appeal held that the Respondent's letter constituted a counter offer.

For any acceptance to be valid, it must not be conditional. If an acceptance is made subject to a condition, a contract is not created until that condition has been met or fulfilled. In *Maja v. UAO*<sup>40</sup> the Plaintiff offered to buy the Defendant's port of Burutu. The Defendant accepted the offer "subject to contract" and later refused to go ahead with the transaction. It was held that the

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<sup>37</sup> Orient Bank (Nig) Plc v. Bilante International Ltd. [1997] 8 NWLR (Pt 515) p. 37.

<sup>38</sup> [1990] 5 NWLR (Pt 152) 694

<sup>39</sup> [1997] 7 NWLR (Pt.1 515) 37

<sup>40</sup>(Unreported) High Court of Lagos State Odesanya J., Suit No. LD/1426/1970 delivered on September 3, 1973.

Defendant could validly do so despite the fact that the Plaintiff had paid the full purchase price of 350,000 pounds for the port.

Also, in *UBA v. Tejumola & Sons Ltd*,<sup>41</sup> the Defendants offered to take a lease of the Plaintiffs building for a period of fifteen years at a rent of ₦215 per square metre. The letter was boldly headed "subject to contract." The Plaintiff "accepted" this offer and specifically stated that the lease would commence on the 1st of May 1982. The Defendant thereafter requested for several expensive renovation to the building, which were carried out by the Plaintiff. The Defendant later refused to go on with the transaction and contended that there was no contract. The Supreme Court held that there was no contract between the parties.

Where a phrase other than the hallowed phrase "subject to contract" is used, the legal effect of the term used will depend on whether the parties contemplates further negotiation, agreement or document before they are willing to bind themselves. In *Branca v. Cobarro*,<sup>42</sup> the Defendant agreed to sell a farm to the Plaintiff. The agreement contained the following clause: "This is a provisional agreement until a fully legalised agreement, drawn by a solicitor and embodying all the conditions herewith stated is signed". The parties and their witnesses executed the agreement and a deposit was made for the farm. It was held that the parties contemplated that the agreement should be binding from the beginning notwithstanding the phrase.

This can be contrasted with *Odunfunade v. Ososami*<sup>43</sup> where the Plaintiff offered to find a buyer for the property of the Defendant on the term that the Defendant would allow him to claim any amount paid by the buyer in excess of ]12,000. The Defendant replied and confirmed in writing his "tentative agreement without engagement". The Defendant thereafter decided to deal directly with the buyer. It was held that the words used by the Defendant postponed any legal relationship between the parties and that the defendant could revoke the agreement without liability.

Another rule of acceptance is that silence does not constitute acceptance. The offeree must indicate his assent either in words, in writing or by conduct. As a general rule, a mere intention to accept does not constitute an acceptance. This rule prevents aggressive businessmen from forcing others into contractual relation against their will by sending offers which state, "if I do not hear from you in five days your silence will constitute acceptance and the goods will be shipped to you".<sup>44</sup> In *Felthouse v. Bindley*<sup>45</sup> the Plaintiff made a written offer to buy his nephew's horse for J30.1Ss, adding that if he did not receive a reply from the nephew, he would assume that his nephew had accepted the offer. The nephew intended to accept and thus requested the auctioneer of his farm to reserve the horse in question during the auction; the auctioneer forgot to carry out this instruction and auctioned the horse. The Plaintiff sued the auctioneer for

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<sup>41</sup>[1988]2 NWLR (Pt. 79) p. 662.

<sup>42</sup> [1947] KB 854, [1947]2 ALL ER 101.

<sup>43</sup>[1972] U.I.L.R. 101.

<sup>44</sup> B.D. Fisher, op. cit. p. 439.

<sup>45</sup> (1862) 7 LT 835, 142 ER 1037.

conversion. It was held that at the time the horse was sold, there had been no valid acceptance by the nephew to the Plaintiff's offer. Although the nephew intended to accept, he had not communicated his intention to the Plaintiff.

Where the mode of acceptance is not prescribed, the mode of acceptance will depend on the nature of the offer and the surrounding circumstances. Thus, an oral offer implies an oral acceptance. If the offer is by telegram, fax or e-mail then a prompt reply is implied and it is safer to reply by the same means. However, where the offeror has prescribed the mode of acceptance but does not insist on only that mode the rule at common law is that the offeree can accept by any mode that is either as fast or faster than the mode prescribed. Where the offeree adopts another mode of acceptance, he must be prepared to bear the risk of his acceptance not arriving as fast as it would have been if he had followed the mode prescribed. In *Afolabi v. Polymera Industries*,<sup>46</sup> the plaintiff who was appointed as an agent of the Defendant was requested to:

... please read, study carefully and sign the duplicate copy attached, signifying your agreement to all points as listed above and return at your earliest convenience for records.

There was no evidence that the Plaintiff ever returned the signed duplicate. It was held that there was no acceptance.

Also, in *Eliason v Henshaw*,<sup>47</sup> the offeree replied by post instead of by wagon as requested by the offeror. The letter was delayed and it arrived late. It was held that the offeror was entitled to reject the acceptance.

Where acceptance is by post, a contract comes into existence, the moment a letter of acceptance is posted and not when it is received by the offeror. This rule known as the "posting rule" was established in the famous case of *Adams v. Lindsell*.<sup>48</sup> In that case, the Defendants who were wool merchants offered to sell a quantity of wool to the Plaintiffs by a letter dated September 2, 1817. However, because the letter was misdirected, it was delivered late to the Plaintiff on the evening of September 5. The Plaintiffs posted a letter of acceptance that same night which reached the Defendants on September 9. If the letter containing the offer had been properly directed, an answer ought to have been received by September 7. Meanwhile, on September 8, not having received a reply from the Plaintiffs, the Defendants sold the wool to another person. The Plaintiffs sued for breach of contract. The Defendants on their part argued that there was no contract until the letter of acceptance was actually received. It was held that the contract came into existence on September 5 and that the Defendant committed a breach of the contract by selling the wool to a third party.

An offer must be communicated to the offeree before there can be a valid acceptance. Hence, the offeree must have knowledge of the offer before he can validly accept the offer. If somebody does an act, which coincides with the act required in an offer, there is no valid acceptance if he

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<sup>46</sup> (1967) 1 All NLR 144.

<sup>47</sup> Wheaton 225 (1819), US Supreme Court.

<sup>48</sup>(1818) 1 B & A 681.

has no knowledge of the offer. Hence, the rule, "there is no acceptance in ignorance of offer". In the 1968 United States case of *Fitch v. Snedaker*<sup>49</sup> Woodruff, J., rhetorically asked "how can there be consent to that of which the party has never asked?" By necessary implication, if the party was ignorant of the offer then it means that his mind was not at one with that of the offeror.

However, once a person has knowledge of the offer, the motive for doing the required act is immaterial. In *Williams v. Carwardine*<sup>50</sup> the Defendant offered a reward of 30 pounds to anyone who gave information leading to the conviction of the murderers of Walter Carwardine. The Plaintiff knew of the offer and thinking that she had not long to live made a voluntary statement to ease her conscience and obtain forgiveness in heaven. It was held that she was entitled to the reward. Her motive was irrelevant.

(b) This question relates to the discussion of elements of a valid acceptance. The main legal issue here is whether Usman's reply amounts to acceptance or not.

Acceptance is the unequivocal and unqualified final expression of assent to the terms of the offer. Acceptance must be unqualified and must correspond to all the terms of the offer. Any qualification or amendment of the offer will constitute a counter-offer, which nullifies the original offer. In *Hyde v. Wrench*,<sup>51</sup> the Defendant offered to sell a farm to the Plaintiff for J1,000. The Plaintiff replied to the effect that he would pay J950. The Defendant refused, and the Plaintiff then said he would pay the original J1,000 asked by the Defendant. The Defendant refused. It was held that the Plaintiff's offer to pay J950 amounted to a counter offer.

Applying the above principle to the present case, one can see that Usman has added something else; a chauffeur driven car to the terms of the offer made by X Ltd. This operates as a counter offer which destroys or cancels the original offer. X Ltd can therefore rightly give the job to someone else. Any action by Usman for breach of contract against X Ltd. is bound to fail. Usman is therefore advised to reconsider his proposed action to sue the company.

### **Question 6**

Do you agree with the view that the posting rule established in the case of *Adam v Lindsell* should be jettisoned in Nigeria?

### **Answer**

An acceptance is a final expression by the offeree that he agrees to the terms of the offer as conveyed to him by the offeror. An acceptance of the offer brings a contract into existence.

Silence does not constitute acceptance. The offeree must indicate his assent either in words, in writing or by conduct. As a general rule, a mere intention to accept or silence cannot constitute

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<sup>49</sup> 38 N.Y. 248 (1868)

<sup>50</sup> (1833) 5 C & P 566; (1833) 4B Ad. 621.

<sup>51</sup> *Supra*

an acceptance. In *Felthouse v. Bindley*<sup>52</sup> an uncle intended to accept an offer of his nephew but did not communicate his intention. It was held that there was no acceptance. "

The rule that acceptance must be communicated is subject to certain qualifications one of which is the posting rule as laid down in *Adams v Lindsell*.<sup>53</sup>

Where acceptance is by post, acceptance takes place the moment a letter of acceptance is posted and not when it is received by the offeror. In *Adams v Lindsell*, the defendants who were wool merchants offered to sell a quantity of wool to the Plaintiffs by a letter dated September 2, 1817. However, because the letter was misdirected, it was delivered late to the Plaintiff on the evening of September 5. The Plaintiffs posted a letter of acceptance that same night which reached the Defendants on September 9. If the letter containing the offer had been properly directed, an answer ought to have been received by September 7. Meanwhile, on September 8, not having received a reply from the Plaintiffs, the Defendants sold the wool to another person. The Plaintiffs sued for breach of contract. The Defendants on their part argued that there was no contract until the letter of acceptance was actually received. It was held that the contract came into existence on September 5 and that the Defendant committed a breach of the contract by selling the wool to a third party.

The contract is formed when the letter of acceptance is posted. It does not matter whether or not the letter itself is delivered or actually received. In *Household Fire Insurance Co. v. Grand*,<sup>54</sup> the Defendant applied for shares in the Plaintiffs Company. The plaintiff later posted a reply accepting the offer and a statement of the number of shares allotted to him. This letter was lost in the post. The company subsequently went into liquidation and the Defendant who was not aware that his offer had been accepted and that he was already a shareholder of the Plaintiffs Company was called upon to pay for his shares in the company. The court held that he was liable to pay for the shares.

The following justifications have been advanced for the posting rule:

- (a) The post office is the common agent of both parties and any letter put in the post is technically communicated to the offeror;
- (b) By posting the letter, the offeree is not requested to do any further act. There is no reason why a contract should not come into existence once he has assented unequivocally to the terms of the offer.
- (c) An offeror is free to exclude the operation of the posting rule by stating in his offer that there shall be no valid acceptance until the letter of acceptance is received. In *Holwell Securities Ltd. v. Hughes*,<sup>55</sup> the Defendant granted the Plaintiff a six-month option to purchase certain

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<sup>52</sup>(1862) 7 L.T. 835, 142 ER 1037

<sup>53</sup>(1818) 1 B & A 681.

<sup>54</sup>(1879) 4 Ex.D. 216, [1874-1888] All ER 919

<sup>55</sup>[1974] 1 W.L.R. 155, [1974] 1 All ER 161.



property, and requested acceptance by "notice in writing". The Plaintiff sent a written acceptance by ordinary post but this was never received by the Defendant. It was held that there was no valid acceptance.

Also, in *Afolabi v. Polymera Industries*,<sup>56</sup> the Plaintiff who was appointed as an agent of the Defendant was requested to:

... please read, study carefully and sign the duplicate copy attached, signifying your agreement to all points as listed above and return at your earliest convenience for records.

There was no evidence that the plaintiff ever returned the signed duplicate. It was held that there was no acceptance.

(d) Trade and commerce will be impeded if the offeree has to wait for the reply of the offeror that he has received the letter of acceptance.

Notwithstanding the above justifications, the posting rule is arbitrary and can produce unjust results as seen in the case of *Household Fire Insurance Co. v. Grant*.<sup>57</sup> Why should a person be bound by a contract when he was never notified of the offeree's acceptance? It is also incorrect to regard the post office as a common agent of the parties when it does not know anything about the bargain between the parties. At best, the post office is an independent agency providing services for the members of the public.

In the United States, postal regulations now permit persons to recover postal letters before they are delivered. In view of the development, the United State's courts have departed from the posting rule by holding that acceptance is no longer complete on posting. In *Rhode Island Co. v. U.S.*,<sup>58</sup> the Plaintiff offered to supply bolts to the Defendants. The Defendants posted an acceptance. The Plaintiff then discovered that owing to a miscalculation they had quoted too low a price and sent a telegram withdrawing their offer which reached the Defendants before the letter of acceptance was delivered. It was held that the offer had been validly withdrawn before acceptance. Acceptance by post was only effective when delivered.

Also in *Dick v. US*,<sup>59</sup> the Defendants offered to sell certain goods to the Plaintiffs at a certain price which was accepted" by post. After posting the letter of acceptance, the Plaintiff discovered that it has mistakenly accepted a price far below what it should have been and quickly sent a telegram withdrawing the acceptance. It was held that the acceptance was successfully withdrawn since the telegram had reached the Defendants before the letter of acceptance.

The case of *Household Fire Insurance Co. v. Grant* is a classic illustration of the injustice that may be occasioned by the posting rule while the rule does not offer any overwhelming

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<sup>56</sup>(1967) I All N.L.R. 144.

<sup>57</sup>Supra.

<sup>58</sup>F. Supp. 417 (1955).

<sup>59</sup>F. Supp. 326 (1949)

advantage. Although parties can oust the rule by express agreements, our concern is that not many may be aware. If the posting rule could be relaxed in the United States where the postal system is well developed, time is ripe, in our view, for the posting rule to be jettisoned in Nigeria.

### **Question 7**

Discuss fully, the rules governing consideration.

### **Answer**

Consideration is the "price" which one party pays for the promise or act of another. It has been judicially defined in the case of *Currie v. Misa*<sup>60</sup> as "consisting of some rights, interests, profits or benefits accruing to one party, or some forbearance, detriment loss or responsibility given, suffered or undertaken by the other."

The basic rule of consideration is that it must move from the promisee. By this, it means that before a party can enforce a contract, he must show that he has furnished consideration for the contract. If A purchases a pair of shoes he will pay the purchase price and in return will receive the shoes. Here, each party has provided consideration, A the money and B the shoes. Contrast this with the situation where A promises B that he will give B his Car. Has B any remedy if A fails to carry out his promise? The answer is in the negative since B has not furnished any consideration for A's promise.

Consideration must be of real value in the eyes of the law. It must be reasonably ascertainable and definite. In *White v Bluet*,<sup>61</sup> a son who was dissatisfied with the way his father distributed his property among his children promised his father that he would stop complaining if his father would discharge him from a past obligation to pay a debt he owed the father. The question was whether the son furnished valuable consideration for the father's promise. It was held that the father had the right to distribute his property in any manner he liked. Hence, the son had furnished no consideration by abstaining from doing what he had no right to do.

However, in *Dunton v Dunton*,<sup>62</sup> a man promised his wife from whom he had just been divorced, an allowance of J6 every month, if "she would conduct herself with sobriety and in a respectable, orderly and virtuous manner'. It was held that the wife had furnished consideration for his promise because she no longer owed him any duty to observe those stipulations.

However, once the acts or promises exchanged by the parties are something of value to them, the court will generally not interfere even though the economic value of the acts or promises exchanged seem unequal. Hence, as it is commonly said "consideration need not be adequate". This means that the court will not measure the comparative value of the respective considerations

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<sup>60</sup>[1875] L.R. 10 Exch. 153 at p.162.

<sup>61</sup> [1853]23 L.J. Ex. 36

<sup>62</sup> [1892]18 V.L.R. 114 (Sup. Ct. of Victoria).

of the parties, nor will it declare a contract to be invalid simply because one party has got a much better bargain than the other.

In *Thomas v Thomas*,<sup>63</sup> the executor of the estate of Thomas entered into an agreement with Mrs Thomas that she could live in a particular house for the rest of her life on payment of J1 a year. It was held that [I was a good consideration; hence the executor could not breach the agreement.

While consideration need not be adequate, it must however be sufficient. By sufficiency, it is meant that whatever is furnished as consideration must, at least, contain some elements of a bargain, which can be regarded as the price for the other party's promise. For instance, where the thing, which the Plaintiff does, or promises to do is no more than something which he is already bound by contract or law to do for the Defendant. In such circumstance, the mere doing of the thing or a promise to do it, will cost the Plaintiff nothing more. It will however be different if the Plaintiff does more than he is already bound to do.

Another general rule of consideration is that consideration must not be past. That is, an act or promise cannot constitute consideration if it took place before the promise, which it is sought to enforce was made. In *Akenzua II Oba of Benin v. Benin Divisional Council*,<sup>64</sup> The Defendant requested the Plaintiff to use his influence to persuade a Timber Company to release some timber forest area to the Defendant as a gesture of goodwill. The Plaintiff succeeded in persuading the Timber Company to release four forest areas to the Defendant. Subsequently, the Plaintiff requested that one of these areas should be released to him for his exclusive exploitation. The Defendant readily acceded to this request. Subsequently, the Defendant withdrew its consent. It was held that since the plaintiff had performed the services before the Defendant agreed to grant him the exploitation of the forest, his consideration was past. The action was therefore dismissed.

Lastly, consideration must not be illegal, immoral or contrary to public policy. In *Pearce v. Brooks*,<sup>65</sup> the plaintiff let a carriage on hire to a prostitute for the purpose of "plying her trade". It was held that the Plaintiff's action for his rent must fail for the consideration in support of the promise was contrary to public policy. If A promises to pay J10,000 to B if B should kill C (A's enemy). If B kills C and A refuses to pay B cannot sue for the money because the consideration he furnished was illegal.

### **Question 8**

With the aid of decided cases, discuss the rule that "consideration need not be adequate, but must be sufficient".

### **Answer**

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<sup>63</sup> [1842] 2 Q.B. 851

<sup>64</sup> [1959] WRNLR I

<sup>65</sup> [1866] L.R. 1 Ex.213

Consideration is the "price" which one party pays for the promise or act of another. It has been judicially defined in the case of *Currie v. Misa*<sup>66</sup> as "consisting of some rights, interests, profits or benefits accruing to one party, or some forbearance, detriment loss or responsibility given, suffered or undertaken by the other."

The basic rule of consideration is that it must move from the promisee. In other words, before a person can enforce a contract, he must show that he has furnished consideration for the contract.

Once, the acts or promises exchanged by the parties are something of value to them, the court will generally not interfere even if their economic value seems unequal. Hence, the rule "consideration need not be adequate". This means that the court will not measure the comparative value of the respective considerations of the parties, nor will it declare a contract to be invalid simply because one party has got a much better bargain than the other.

In *Thomas v Thomas*,<sup>67</sup> the executor of the estate of Thomas entered into an agreement with Mrs Thomas that she could live in a particular house left by her husband for the rest of her life on payment of J1 a year. It was held that J1 was a good consideration. Hence, the executor could not evict her from the house.

While consideration need not be adequate, it must however be sufficient. By sufficiency, it is meant that whatever is furnished as consideration must, at least, contain some elements of a bargain, which can be regarded as the price for the other party's promise. For instance, where the thing which the Plaintiff does or promises to do in consideration for the Defendant's promise is no more than something which he is already bound by contract or law to do for the Defendant. In such circumstance, the mere doing of the thing or a promise to do it, will cost the Plaintiff nothing more and will therefore not constitute a valid consideration.

In *Stilk v. Myrick*,<sup>68</sup> two seamen deserted a ship in the course of a voyage. The ship's captain, who could not find substitutes, promised the rest of the crew extra wages if they would sail the ship back home. The members of the crew instituted an action to enforce the promise. Their claim failed on the ground that they had not furnished any consideration. This was because they were obliged under the seamen's contract to sail the ship home under such circumstances.

It will however be different if a person does more than he is already bound to do. Thus in *Hatley v. Ponsomby*,<sup>69</sup> a case whose facts are similar to those of *Stilk v. Myrick*,<sup>70</sup> but the ship was so short-handed that it was extremely dangerous to have sailed without additional crew. Under such circumstances, the crew were entitled to abandon the ship. However, they agreed to risk sailing the ship for extra remuneration. It was held that they were entitled to recover the extra wages since they had done more than they were obliged to do under the contract.

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<sup>66</sup>[1875] L.R. 10 Exch. 153 at p.162.

<sup>67</sup> [1842] 2 Q.B. 851.

<sup>68</sup> (1809) 2 Camp. 317

<sup>69</sup> (1857) 7 E & B. 872

<sup>70</sup> (1809) 2 Camp. 317

Also, in *Glassbrook Brothers Ltd v Glamorgan County Council*,<sup>71</sup> the Defendants, who were owners of a factory, applied to the local police for protection in order to prevent a proposed strike by the workers from escalating. The Defendant requested that a Police team should be stationed at the factory contrary to Police proposal that a mobile patrol team was sufficient for the required purpose. The Defendants refused to bear the agreed expenses of stationing a police team on the ground that the police has not furnished any consideration and that they were merely doing their job. It was held that the police had furnished sufficient consideration since they had gone beyond what duty demanded by stationing men at the factory.

From the foregoing, we can see that the statement "consideration need not be adequate but must be sufficient" encapsulates two rules relating to consideration: adequacy and sufficiency. The former underscores the requirement of consideration for a valid contract while the latter relates to what act or promise amounts to a consideration in circumstances where a party is already bound by law or contract to do the particular act or promise offered as consideration.

### Question 9

- (a) In what circumstance will payment of a smaller sum discharge a debt owed to a creditor?
- (b) James lent a sum of ₦800 to John, which was to be repaid by 1<sup>st</sup> May. On 1<sup>st</sup> March, James who was in desperate need of money asked John to pay him the money. However, John had only a sum of ₦650, which he agreed to give to James if James will forgo the balance of ₦150.

Can James still sue for the balance of ₦ 150 after collecting the sum of ₦650 in discharge of the whole debt of ₦800?

### Answer

(a) Consideration has been defined in *Curie v Misa*<sup>72</sup> as consisting either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment loss or responsibility given, suffered or undertaken by the other. Consideration can also be viewed as the price for which a promise is bought. Hence, all simple contracts, whether oral or written, need to be supported by consideration.

The question whether payment of a lesser sum will discharge the obligation to pay a greater sum is related to the doctrine of sufficiency of consideration. It is trite that consideration must contain some elements of a bargain, which can be regarded as the price of the other party's promise. For instance, where a person is already bound by law or obliged under a contract to do something, he cannot use the performance of that duty as consideration for the promise of another. This is because the performance of that duty or a promise to perform in such circumstance would have cost the Plaintiff nothing new.

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<sup>71</sup> (1925) A.C. 270.

<sup>72</sup> *Supra*.

The principle that payment or promise of payment, of a smaller sum will not discharge a debt owed to a creditor was established in *Pinnel's case* (1602).<sup>73</sup> In that case, Pinnel sued Cole to recover a debt of J8:10 shillings due on 11<sup>th</sup> November 1600. Cole pleaded that he had paid Pinnel a sum of J5:2 shillings and 6 pence, at Pinnel's request, in full satisfaction of the whole debt. However, due to certain technical flaws in Cole's pleading, it was held that Pinnel could claim the balance.

The Pinnel's decision was reaffirmed in *Foakes v Beer*.<sup>74</sup> Mrs Beer obtained judgement against Dr. Foakes in the sum of J2,090.

She later agreed to accept J500 in cash and the balance by six months instalments 00150 each until the whole debt was fully paid.

Mrs Beer undertook under the arrangement not to take any proceedings whatsoever on the judgement. After Dr. Foakes had completed payment, Mrs. Beer now demanded interest on J2,090 covering the period of repayment. It was held that Mrs Beer could still claim the interest. No consideration had been given for her to forgo the interest.

However, there are exceptions to the rule that payment of a smaller sum will not discharge a debt owed a creditor in the following circumstances:

- (i) *Introduction of a new term*. When the smaller sum is paid in a form or manner different from that originally agreed upon e.g. where the smaller sum is paid earlier than due date or the settlement for the debt is made in kind. It is remarkable that the Pinnel's action to recover the balance would have failed under this exception were it not for the technical defect in the pleadings of Cole, since the payment was made before the due date.
- (ii) *Promissory estoppel* *Promissory estoppel* will apply where the creditor has made a representation not to insist on his full right and the debtor has altered his position in reliance on the promise. In such circumstance, the creditor will be estopped from going back on his promise notwithstanding that it was not supported by consideration. In *Central London Property Trust Ltd v High Tree House Ltd*<sup>75</sup> the Plaintiff leased flats to the defendants for 9 years in 1937 on an annual rent of J2,500. Because of the depression caused by the Second World War, the Plaintiff agreed in 1940 to reduce the rent to J1,250 per annum. The Defendant duly paid the new rents between 1940 and 1945. By 1945, when the war was over, the Plaintiff wrote to the Defendant demanding that rent must be paid at full rate and also claimed to recover the rent waived between 1940 and 1945.

Applying the principle, of equitable estoppel, it was held that the Plaintiff was bound by his promise to reduce the rent up till 1945 on the ground that it will be inequitable for him to renege on his promise at that stage. However, he could resume the collection of full rents upon the giving of appropriate notice.

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<sup>73</sup> (1602) 5 Co. Rep. 117a

<sup>74</sup> [1884] 9 App Cas. 605

<sup>75</sup> [1947] K.B. 130

- (iii) Composition. When the debtor makes a composition agreement with all his creditors (i.e. agrees to pay each creditor an equal proportion of what he owed them). A creditor who accepts such a payment cannot later sue for the balance of his debt.
- (iv) When there is accord and satisfaction. Accord and satisfaction usually take the form of compromise. Where a party is making a claim, which is disputed by the other, they may reach a compromise on mutually agreeable terms. Once this happens, the parties are deemed to have abandoned their original positions and can only bring claims within the compromise or new agreement. Such a new agreement is the accord while the respective concession made is the satisfaction. In *Adekunle v. A.G.B.*,<sup>76</sup> the Appellant was the Respondent's former solicitor. Dispute arose between the parties over fee. The Appellant claimed that he was entitled to 10 per cent of the cost awarded in favour of the Respondent while the Respondent claimed that he was entitled to 10 percent of the cost actually collected. While the parties were still in dispute, the respondent offered the Appellant J150 in full satisfaction of the disputed claim of about J349. The Appellant accepted the money and later sued for Law of contract the balance. The claim failed. It was held that the agreement under which the Appellant accepted the J150 from the Respondent constituted an accord and satisfaction.
- (b) It is a trite law that payment on the day that a debt is due of less than the full amount of debt is not consideration for a promise to forgo the balance. The Pinnel's case however laid down some exceptions to this rule. It was held in Pinnel's case that payment of a smaller sum could fully and finally discharge the obligation to pay a higher sum if the request is made by the creditor and there is an introduction of some new elements to the contract such as payment at an earlier date or payment by bill of exchange instead of cash. The logical basis of this exception is that the introduction of a new term has introduced some element of genuine bargain into the transaction. Applying this principle to the question, it is clear that James can no longer sue for the outstanding balance of N150 in view of the fact that payment of N650 was made to him on a date earlier than when it was due. Not only that, the payment was made when he was in desperate need of money. A lesser amount of N650 to fulfil in a time of need could be more valuable than a higher sum of N750 when more damage could have been done. Hence, John had clearly furnished "fresh" consideration for James's promise to forgo the balance of N150. Hence, James could not sue to recover the balance.

### Question 10

With the aid of decided cases consider whether or not there is an intention to create legal relations in the following situations:

- (i) Mr. Dadani a divorcee orally promised to be paying his former wife a monthly allowance of 10,000 for her maintenance.

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<sup>76</sup>(Unreported) Court of Appeal, Western State of Nigeria, Ibadan, KayodeEso, I.A., suit No. CAW/32170 delivered on December 10, 1970. Reported in Sagay's Casebook, p. 90.

(ii) Miss Bintu, a part two law students was in dire financial need. She was asked by her friend Titi to sell her bed space and promised to squat her in her own room. Two weeks after she obliged, Titi threatened to send Miss Bintu out of her room after a quarrel.

### Answer

(i) The general presumption regarding a social and domestic agreement is that parties do not intend to be bound by the agreement. Hence in *Balfour v. Balfour*<sup>77</sup> a husband promised to

Introduction to Nigerian Business Law give the wife J30 monthly until he is able to take her to his net station. It was held that the wife could not enforce the promise.

However, there are situations when the court will enforce, contract between a husband and wife, for instance, where the husband and wife are not in amity, instance, where they are separated. In such circumstance the presumption of lack of intention to enter into legal relation will be rebutted. Thus in *Merrit v. Merrit*,<sup>78</sup> the husband who had left the matrimonial house had a discussion with the wife in his car about the matrimonial house. The wife refused to leave the husband's car until he signed a written agreement where he undertook to transfer the house to her. Held that the hostile relationship existing between husband and wife rebutted the presumption against contractual intention.

Based on the principle in *Merrit v Merrit*,<sup>79</sup> from the circumstances of the case the court will most likely imply an intention to create legal relations in the agreement between Mr. Dadani and his former wife. Hence, Mr. Dadani is bound to pay the monthly allowance; otherwise, he would be liable for breach of contract.

(ii) The agreement between Bintu and Titi is a social agreement.

The general rule is that such agreements are binding only in honour. A good illustration in this regard is where A and B agree to lunch together and A promises to pay for the food if B will pay for the drink. Notwithstanding the presence of consideration, the presumption of the law is that there is no intention to create legal relations in such circumstance. Such agreements are merely binding in honour. To offer a friend a meal is not to invite litigation.

However, where the performance of a social agreement involves great sacrifices on the part of one or both parties, the presumption of lack of intention to create legal relations may be rebutted. In *Parker v. Clark*,<sup>80</sup> on the invitation of Defendant (who is the Plaintiffs uncle), the Plaintiff and

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<sup>77</sup> Supra

<sup>78</sup>73 Supra.

<sup>79</sup>74 Ibid.

<sup>80</sup>Supra.



his wife sold their house and moved into the Defendant's house. It was agreed that the Defendants would share the living expenses with the Plaintiff and that the Defendant would leave the house to the Plaintiffs in his will. It was held that the agreement was binding because the Plaintiff had taken drastic and irrevocable steps based on the agreement. To hold otherwise would wreak untold hardship on the plaintiff.

The fact of the present case can however be distinguished from that of *Parker v. Clark*<sup>81</sup> on the ground that there was no agreement between Bintu and Titi to jointly maintain the room. Here, unlike the case of *Parker v. Clark*,<sup>82</sup> Bintu had not furnished any consideration for Titi's promise. At best, Titi had acted benevolently and she is totally free to resile from her promise to accommodate Bintu without any liability. The case would have been different if Bintu had been paying Titi any amount, no matter how little.

### Question 11

With the aid of decided cases, discuss whether or not a contract exists in each of the following cases:

- (i) The Niagara Bottling Company advertised that that the first prize in a particular promotions attracts N5million. Mr. Lucky won the first prize at a raffle drawn at Abuja. However, the organisers failed to honour their promise.
- (ii) Company A and Company B who are neighbours agreed to jointly contribute towards the cost of fuelling company A's 10,000kv industrial generator for their joint use. Company B who has now bought its own generator refused to pay company A the outstanding sum of N1million from the cost of fuelling the generator.
- (iii) The staff of First Banking System embarked on a strike to protest against one of the new policies of the bank. The management reached a collective agreement with the workers union to reverse the policy if the strike is called off. However, the management refused to implement the collective agreement after the strike was called off.

### Answer

- (i) The issue to be considered here is whether the advertisement by Niagara Bottling Company creates a binding contract between the company and Mr. Lucky. Or was the advertisement a promotional gimmick?

The test of a reasonable man is applied in determining whether a statement is a mere puff or a serious and deliberate commercial statement. In *Carlill v. Carbolic Smoke Ball Co*,<sup>83</sup> the Defendant contended that a reward of promise to anyone who used carbolic smoke ball product and still caught influenza was "a mere puff, a mere statement of confidence in their product and

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<sup>81</sup>Supra.

<sup>82</sup>Supra.

<sup>83</sup>Supra.

a promise in honour". The court rejected this plea and held that the fact that the Defendant had deposited some money in the bank for that purpose was cogent evidence that it intended to be bound by the statement.

Applying the above principle to the fact of this case, the advertisement by Viagra Bottling Company would be held to be binding. Although, the offer was made to the whole world, by undertaking the action required by the advertisement, Mr. Lucky had brought himself into a contractual relationship with the company. Although the advertisement did not state that any money had been deposited in a bank as in the case of *Carlill v. Carbolic Smoke Ball Co.*<sup>84</sup> such promotions are common these days and generally taken seriously by the members of the public and honoured by the advertisers. Hence, the Viagra Bottling Company will be liable to pay Mr. Lucky the ₦5m won by him.

(ii) There is a strong presumption that business or commercial dealings are intended to have legal effect. This is so whether the dealings involves members of the same family or not. In this regard, company A and company B are primarily into business to make profits. The agreement reached between the two parties was for the mutual benefit of their businesses since power generation is vital to effective business. Hence, they both agreed to bear obligations in furtherance of their joint interests. The fact that the two companies are neighbours is immaterial since the arrangement between them is purely commercial in nature. Based on the foregoing, company B is liable to pay company A the ₦1, 00,000.

(iii) This question raises the issue whether a collective agreement is enforceable. Collective agreement is an agreement between a Trade Union and an Employer regulating conditions of service. At common law, there is a presumption that the parties to a collective agreement do not intend to enter into legal relations unless the contrary is clearly established.

However, Section 2(3) of the *Trade Dispute Act*,<sup>85</sup> provides that where a collective agreement is deposited with the Minister of Labour, it becomes binding on the employers and workers whom they relate once the Minister makes the appropriate order.

In this question, we are only told that the First Bank reached a collective agreement with the workers union to reverse the policy.

There was no indication that the agreement was signed by the parties and deposited with the Minister of Labour. Even if all these

Law of contract had been done, the Minister is still required to make an appropriate order in respect of the agreement. Since all the foregoing provisions of the Trade Dispute Act have not been complied with, the collective agreement between First Bank Systems Ltd. and its workers has no binding force.

## Question 11a

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<sup>84</sup>79 Supra.

<sup>85</sup>Cap 432, Laws of Federation of Nigeria, 1990.

Discuss fully if a contract does or does not exist in the following situations:

- (a) Ajayi lost his cat. He put this advertisement in the newspaper: "I will give ₦1,000 to anyone who finds my cat and returns it to " me.

Tunde, Ajayi's best friend, found the cat and returned it to him. However, Ajayi refused to pay Tunde on the basis that they were friends.

Chief Lawal told his neighbor Olu: "I will give ₦1m to anyone who marries my daughter, Lola." Olu persuaded Lola to "marry" him for the sake of collecting the ₦1m promised by Chief Lawal. Olu promised to give Lola ₦500,000 out of the money after which they can go their separate ways. Chief Lawal has refused to give Olu the ₦1m after the marriage.

- (c) Sule told Femi "I will sell my Mercedes Benz car at a cheap price. Femi replied at once "I accept your offer. Here is ₦50,000

We have a contract". Sule protested: "No! No! I need to think about it". Femi snatched the car key from Sule, put the ₦50,000 in Sule's hand and drove off shouting "It is my car! We have a binding contract!"

- (d) Funke said to Joke: "I will sell 100 baskets of tomatoes to you at ₦2,000 each". Joke replied: "I accept. But I can only pay ₦1,000 for a basket." Funke declared: "You heard my offer, and you said that you accept it, that is enough for me!" Funke sent the 100 baskets of tomatoes and demanded payment of ₦2,000 per basket. Joke refused to pay anything.

### Answer

(a) The advertisement by Ajayi is an offer to the whole world. Whoever performs the stipulated act brings himself into a contractual relationship with Ajayi. The consideration for the reward would be the finding and returning of the cat to Ajayi. In the case of *Carlill v. Carbolic SmokeBall Co.*<sup>86</sup> the Defendant advertised in a newspaper that it would pay J100 to any person who used its product as specified for a minimum period of two weeks, and nevertheless succumbed to influenza. The Defendant further stated in the advertisement that it had deposited a sum of J1,000 at the Alliance Bank, Regency Street "to show our sincerity in the matter."

The Plaintiff bought one of the products and used it as specified and still caught influenza. The Plaintiff brought an action to compel the Defendant to pay her the J100. The Defendant contended in its defence that the advertisement was "a mere puff, a mere statement of confidence in their product and a promise in honour" which was not intended to create legal relations. That the advertisement was not an offer as it was impossible to contract with the whole world.

The Defendant was held liable to pay the Plaintiff the J100. The court held that the advertisement was not a contract with the whole world but a unilateral offer and that anyone who performs the terms of the offer brings himself into a contractual relationship with the Defendant.

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<sup>86</sup> [1893] 1 QB 256.

Based on the authority of *Carlili v. Carbolic*; there is a binding contract between Ajayi and Ade. It does not matter that Ade and Ajayi are friends. The advertisement put up by Ajayi did not exclude his friends from responding to it. Hence, Ajayi is presumed to have intended to be bound by his promise. This is more so when the agreement is not social or domestic in nature.

81 [1893]1 QB 256.

(b) Before a contract can be said to exist, the parties must have intended to be bound by the agreement. Generally, boastful claims or statements made as mere puff to excite the other party are presumed not to be binding. In *Weekes v. Tybald*, the Defendant in a conversation stated that he would pay T100 to anyone who married his daughter. The Plaintiff married his daughter and claimed the money. It was held that such generally spoken words meant to merely excite or entice suitors could clearly not be regarded as binding on the defendant. Based on the foregoing, Olu cannot validly claim the ₦1m. from Alhaji Lawal since no valid contract existed between them.

(c) For there to be a valid offer capable of acceptance, the terms of the offer must be certain and unequivocal and the party must have said his last word on the terms on which he is prepared to be bound. If not, the parties are still at the negotiating stage i.e. invitation to treat.

The proposition made by Sule is not definite. Sule did not say the specific price at which he wanted to sell the car. Hence, he was

82 *Supra*.

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The proposition made by Sule is not definite. Sule did not say the specific price at which he wanted to sell the car. Hence, he was only making an invitation to treat to Femi. There was, therefore, no valid offer, which Femi could accept. Rather, Femi's proposal to pay ₦50,000 was the offer, which Sule is free to accept or reject. Therefore, there is no contract.

(d) For a valid contract to exist, the offeree must accept the terms of offer without any qualification or modification. Any modification will operate as a counter-offer, which destroys

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<sup>87</sup> *Supra*

the original offer. In *Hyde v. Wrench*,<sup>88</sup> the Defendant offered to sell an estate to the Plaintiff for 11,000 and the Plaintiff "accepted" to pay J9S0, it was held that the Plaintiff had rejected the offer, and had made a counter offer. In *Innib & Ors v. Ferado Agro and Consortium Ltd*,<sup>89</sup> the Appellants wrote a letter to the Respondent company offering to sell certain assets for ₦3,550,000. The Respondent thanked the offeror for the offer and requested the period of payment to be extended to three weeks. The Appellants immediately sold the assets to a third party. The Respondent sued for specific performance of the contract. It was held that there was no contract. The purported acceptance was not operative due to its failure to fulfil all the essential components of an acceptance.

Hence, by "accepting" to pay ₦1,500 instead of ₦2,000 per basket of tomato Joke has rejected Funke's offer. The initial offer of ₦2,000 per basket has therefore been extinguished. Rather, Joke's proposal of ₦1,500 per basket now becomes the existing valid offer, which Funke could accept or reject. There is therefore no contract between Joke and Funke. Joke can rightly reject the tomatoes as she did.

## Question 12

On 1<sup>st</sup> February, Malcolm wrote to Yaro offering to buy Yaro's Honda Motor Cycle for N600. Yaro received the letter on 2nd February. At 9.00 a.m. on 3rd February, Malcolm posted a letter revoking his offer and at 9.30 a.m. Yaro posted a letter accepting Malcolm's offer. At 4.30 p.m. 3rd February, Yaro accepted an offer of N750 for his motor cycle from Zulu. Discuss.

## Answer

Malcolm's letter of 1st February is an offer. For a contract to exist the offeree (in this case Yaro) must signify his final assent to the terms of offer. Acceptance must be communicated to the offeror if the offeror is to be bound by the terms of offer. However, where acceptance is by post, the applicable rule differs from the general rule governing acceptance. The rule with regards to acceptance by post is that acceptance takes effect the moment a letter of acceptance is posted. This rule was laid down in the famous case of *Adam v. Lindsell*.<sup>90</sup> In that case, by a letter dated September 2, the Defendants offered to sell a quantity of wool to the Plaintiff and required a reply by post. The Defendant misdirected his letter and it did not reach the Plaintiffs until the evening of September 5. That same night, the Plaintiff posted a letter of acceptance, which reached the Defendants on September 9. If the letter containing the offer had been properly addressed, an answer ought to have been received by September 7. Meanwhile on September 8, not having received a reply from the Plaintiffs, the Defendants sold the wool to another person. The Plaintiff sued for breach of contract. It was argued on behalf of the Defendant that there was no contract until the letter of acceptance was actually received and that by that time; the wool had already been sold to a third party. It was held that in a contract concluded by post, the

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<sup>88</sup> Supra

<sup>89</sup>[1990] 5 NWLR (Pt 152) 694.

<sup>90</sup> Supra

contract comes into existence the moment the letter of acceptance is posted. In this case, therefore, the contract came into existence on September 5 and that the Defendants committed a breach of it by selling the wool to a third party on September 8. Applying the above principle to the facts of this case one can say that Malcolm's offer was effectively accepted by Yaro at 9.30 a.m on February 3rd when he posted his letter of acceptance. Regarding the purported revocation of the offer by Malcolm, the rule is that an offer could be revoked any time before acceptance without liability. However, in order to be valid, revocation must be communicated to the offeree, i.e. notice of revocation must be delivered to the offeree before he accepts. Once acceptance has occurred any purported revocation would be invalid.

In *Byrne v Van Tien Hoven*,<sup>91</sup> the Defendants offered to sell tin plates to the Plaintiff vide a letter posted on October 1. On October 8, the Defendants posted another letter revoking the offer. On October 11, the Plaintiffs telegraphed their acceptance and followed this by a letter of acceptance posted on October 15. The letter of revocation did not reach the Plaintiff until October 20. It was held that the revocation was invalid since acceptance had taken place on October 11.

Applying the above principles to the facts of this case, it can be safely said that Malcolm's letter of revocation was invalid since Yaro did not receive it before Yaro accepted the offer by post 30 minutes later. The sale of the motorcycle to Zulu at 4.30 p.m. was therefore a breach of a binding agreement between Malcolm and Yaro.

### **Question 13**

"Whether the law will presume an intention to enter into legal relations in any contract depends on the circumstances of each case."

In what situations will there be a rebuttal of the legal presumption in this area of law?

### **Answer**

It is now beyond controversy that the element of an intention to create legal relations is a separate and distinct element of a binding contract.

In some contracts or agreements, the intention to enter into legal relations are apparent and obvious, however, there are others where this is not so. Therefore, the duty of the court is to ascertain the intention of the parties by using the objective test. Where both parties by their conduct do not exhibit any intention to create legal relation, the court will refuse to decree an enforceable contract.

For the purpose of considering the presence or absence of contractual intention in agreements, agreements may be divided into three classes viz (i) social and domestic agreements; (ii) commercial agreements; and (iii) intermediate situations.

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<sup>91</sup>[1880]5 CPD 344

The general presumption regarding a social and domestic agreement is that parties do not intend to be bound by the agreement. Hence in *Balfour v. Balfour*<sup>92</sup> a husband promised to give the wife J30 per month until he is able to take her to his new station. It was held that the wife could not enforce the promise.

The above principle however does not mean that there cannot be a binding contract between a husband and wife. For instance, where the husband and wife are bitter enemies and do not live in amity, the presumption of absence of an intention to enter legal relation will be rebutted.

In *Merrit v. Merrit*,<sup>93</sup> the husband who had left the matrimonial house had a discussion with the wife in his car about the matrimonial house. The wife refused to leave the husband's car until he signed a written agreement where he undertook to transfer the house to her. It was held that the hostile relationship existing between husband and wife rebutted the presumption against contractual intention.

In commercial agreements, the law presumes that the parties intend to create legal relations and make a contract. But the presumption may be rebutted. For instance/where the promise is a mere puff or promotional gimmick, the said presumption is rebutted. Another good example is an advertisement that men who use particular toothpaste become successful and important.

The presumption will also be rebutted where the agreement itself contains a clause expressly excluding the intention to enter into legal relations such as in football pool agreements. In *Amadi v Pool House Group & Nigerian Pools Co*,<sup>94</sup> the plaintiff who was a staker claimed to have won lump sum. The Defendant successfully denied any liability by relying on an "honours clause" that the contract was not intended to be binding.

In intermediate situations, which can neither be described as domestic and social engagements nor as commercial agreements, the presumption is that the parties do not intend to be bound. However, the presumption is rebuttable in certain situations. For instance, in relation to collective agreements, Section 2(3) of the *Trade Dispute Act, 1976* provides that where a collective agreement is deposited with the Minister of Labour, it becomes binding on the employers and workers whom they relate once the Minister makes the appropriate order.

Based on the foregoing, it is clear that there is no hard and fact rule on when the court will imply an intention to create legal relations. Everything depends on the circumstances of each case. There were domestic settings where the courts had implied the intention to create legal relations while there were also commercial settings where the presumption had been rebutted. Therefore, in order to ensure certainty, parties may expressly state their intention to create legal relations and even the manner of adjudication such as reference to arbitration.

## Question 14

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<sup>92</sup> Supra.

<sup>93</sup> (1970) 1 WLR 1211

<sup>94</sup>[1966] 2 All N .L.R. 254

Usman, a 19 year-old poor boy goes into Murtala's shop to buy a radio cassette, two shirts, milk, sugar and bread. He promised to pay half of the money instalmentally over a period of six months. Usman could not fulfil his obligation to Murtala. A week before the transaction, Usman had received 5 shirts as gifts from an Islamic Organization beside his house. Advise Murtala on what to do.

### **Answer**

The 19 year-old Usman is an infant at law. In *Labinjoh v. Abake*,<sup>95</sup> the court rejected the argument of counsel that the age of majority in Nigeria is puberty and held that the age of majority in Nigeria is 21. The contractual transactions by Usman are therefore subject to the special rules governing contractual transactions by infants.

If necessary goods are supplied to an infant under a contract, that contract is binding on the infant and he is liable to pay a reasonable price for the goods.<sup>96</sup> On the other hand, contracts for non-necessary goods are void and cannot be enforced against the infant.

Necessary goods are goods suitable to the condition in life of an infant and to his actual requirement at the time of sale and delivery. They are goods without which an individual cannot reasonably exist. What is necessary is however relative to the status of the infant. Therefore, what is a necessary for a rich and well-to-do infant may not be a necessary to an infant from a poor home.

Food, clothing, lodging among other things have been held to be necessities. However, where an infant is already sufficiently provided with these goods, then the goods will not be regarded as a necessary in the circumstances of the case. In *Nash v. Inman*,<sup>97</sup> the Defendant, an infant, was sued for the cost of sewing 11 fancy coats. It was proved that the Defendant had an adequate supply of coats suitable for his condition in life. It was held that the clothes were not necessities.

In order to determine Usman's liability, we have to consider the nature of goods purchased by him and which of them are necessities. It is important to take into account the status of Usman who is a poor infant.

In this regard, bread and sugar will most likely be regarded as necessities. Usman needed to eat and keep his body and soul together. Usman will therefore be liable to pay reasonable prices for these two items. The two shirts bought by Usman, though capable of being regarded as necessary goods will not be so regarded because Usman already had 5 or more shirts, which I consider enough for a poor infant. This is based on the principle in *Nash v Inman* above.

The contract for the sale and purchase of radio, shirts and milk are void. Murtala therefore cannot recover the prices of these items. Neither can he enforce Usman's promise to repay

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<sup>95</sup>[1924] 5 LR 33.

<sup>96</sup>Section 2 Sale of Goods Act.

<sup>97</sup> [1908]2 K.B.1.



instalmentally. It is better for Murtala to be patient with Usman until he could pay voluntarily or be persuaded to do so on moral ground otherwise Murtala will lose all the money.

### **Question 15**

Miss Aminat, a Nigerian girl of 19 years old approached Alhaja Bintu a prominent trader in Alaba Market, Lagos and persuaded the Alhaja to supply to her on credit goods worth N5,000. The goods were meant for trading purposes. She promised to pay Alhaja Bintu as soon as she was able to sell the goods and make a little profit. A few days later, robbers attacked Aminat and took away all the money realised from her trade as a result of which she could not repay Alhaja Bintu as promised. Advise Aminat. Would your answer have been different if Aminat had fraudulently told Alhaja Bintu that she is 22 years old?

### **Answer**

The contractual transactions by infants are governed by special rules. If necessary goods are supplied to an infant, the contract is binding on the infant and he is liable to pay reasonable price for the goods. On the other hand, contracts for non-necessary goods are void and thus cannot be enforced against the infant.

The age of majority in Nigeria is 21 years. In *Labinjoh v. Abake*,<sup>98</sup> the Plaintiff, a Nigerian adult and a trader, sued to recover from the Defendant a Nigerian girl of 18 years about JSO being the balance of the goods sold and delivered to the Defendant. It was proved that the goods were supplied for trading purpose. The Defendant claimed that she was an infant and therefore the contract was void. The Plaintiff on her part argued that the age of majority in Nigeria is the age of puberty and not 21 years. It was held that the age of majority in Nigeria is 21, hence the trader cannot recover her money.

Applying the principle in *Labinjoh v. Abake*,<sup>99</sup> Aminat is not liable to pay Alhaja back for the goods supplied. The goods being for trading purposes were non-necessaries. The transaction is therefore void.

We now turn to the other leg of the question. If an infant fraudulently misrepresents his age by deceiving the other party that he is over 21 years, and if on the basis of that, the other party contracts with the infant, the plea of infancy and all the privileges associated with it are still open to the dishonest infant.

Equity has however developed a principle to prevent infants from using a statute meant to protect them from fraud. The fraudulent infant can therefore be disgorged of the benefits if the goods are still with him. This is the doctrine of restitution.

Consequently, Alhaja Bintu would have been entitled to repossess some of the goods supplied to Bintu that are still unsold in case Aminat had fraudulently told Alhaja Bintu that she was 22 years old.

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<sup>98</sup>[1924]5 N.L.R. 33. 94

<sup>99</sup>Ibid.

95 [1876]1. Q.B.D. 410.

96 [1876]IQ.B. D. 183.

97 Supra.

### Question 16

Write short notes on the following:

- (i) Conditions and warranties
- (ii) Innominate or intermediate terms and
- (iii) Fundamental terms ‘

### Answer

(i) **Conditions and warranties:** Conditions are vital terms of a contract while warranties are relatively minor terms of a contract. In other words, whilst conditions are the very important and fundamental obligations, warranties are less important or subsidiary promises. The difference between the two is that a breach of conditions entitles the innocent party to repudiate the contract while a breach of warranties merely entitles the innocent party to claim damages. If there is a breach of contract, the innocent party may treat the contract as terminated or cancelled so that he is discharged from further performing his own obligations while he can only claim damages for breach of warranties.

The remedy for breach of warranty is limited to damages because breach of a minor term of a contract will usually have only trivial consequences on the substance of the contract. Hence, it was felt that it would be harsh to allow the innocent party to terminate a substantial contract midstream with massive loss to the other party, even though the breach is of a relatively trivial character.

The distinction between conditions and warranties is well illustrated by the two cases of *Poussard v. Spier and Pond*<sup>100</sup> and *Bettini v. Gye*.<sup>101</sup> In *Poussard v. Spier and Pond*<sup>102</sup> an actress arrived six days late into a concert performance in which she was a star performer. It was held that her delay amounted to a breach of condition. The promoter was entitled to hire a replacement. She could not succeed in her action for breach of contract. In *Bettini v. Gye*,<sup>103</sup> an actress hired to perform for three months promised to report for rehearsal six days prior to the commencement of performance. She arrived four days late for the rehearsal. Her lateness was held to amount to breach of warranty, which only entitled the promoter to claim damages. In the past, 'conditions' and 'warranties' were employed more or less as synonyms without any distinction in the two words. Hence, there were cases where important terms were classified as

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<sup>100</sup> [1876] 1. Q.B.D. 410.

<sup>101</sup> [1876] 1 Q.B.D. 183.

<sup>102</sup> Supra.

<sup>103</sup> Supra.

warranties and vice versa. However, the confusion was firmly resolved by section 11 of the Sale of Goods Act 1893 which defined "condition" as a stipulation in a contract of sale, the breach of which may give rise to treat the contract as repudiated (and right to damages) and a warranty as a stipulation, the breach of which may give rise to a claim for damages but not a right to reject the goods and treat the contract as repudiated as provided for in section 11 (1)(b) of the Sale of Goods Act

(ii) **Innominate or intermediate:** There may be other contractual undertakings of complex character where it may not be easy to classify the terms simply as either conditions or warranties. For such complex transactions the court has evolved another category of terms known as "Innominate or intermediate term" as a hybrid between a condition and warranty. The approach of the court here is to categorise a term based on the effect its breach has on the substance of the contract. Hence, if an intermediate term is breached, the remedy available to the innocent party would depend on the effect of that breach on the enjoyment of the benefits which the contract is meant to confer on the innocent party. If the breach were so devastating as to deprive the injured party of substantially the whole benefit, which he was expected to enjoy under the contract, then he would be entitled to repudiate otherwise he will only be allowed to claim damages. Here, what is called a "substantial benefit test" is applied and the party can only repudiate the contract if the whole benefit under it is defeated. The test had been applied in the case of *Hong Kong Fir Shipping Co v. Kawasaki Kisen Kaisha*.<sup>104</sup>

(iii) **Fundamental terms:** During the 1950s and 1960s the courts created another species of term called a fundamental term. A fundamental term is a term of even greater importance than a condition. It is a term, which underlies the main purpose of the contract and failure to perform it will amount not to a mis-performance, but non-performance of the contract. An example is where a tailor is asked to sew a male suit but he sews an agbada or bebenrige or does something, which negates the whole purpose of the contract. The doctrine was developed by the court to protect consumers from unreasonably wide exclusion and limiting clauses.

### Question 17

Discuss the Parol Evidence rule and the exceptions.

### Answer

Disputes often arise between parties to a contract on the terms of the contract, for instance, on the meaning and effect of certain words or phrases. If the contract is wholly by words, it is simply a question of fact and matter of evidence for the parties to establish what they have agreed upon. The words used will be interpreted objectively. A party will not be allowed to say that he understood a word in the sense in which a reasonable person would not have understood it.

If the contract is wholly in writing, the general rule is that the parties are to be confined to the four corners of the document containing the terms and will not be allowed to adduce evidence to show that his intention has been wrongly stated in the document. All that the court will do is to

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<sup>104</sup>1962 All E.R. 474.

interpret the express terms of the agreement and give effect to them. This rule is called the parol evidence rule. Thus, evidence of the negotiation before the contract or post-contractual promises is not admissible to vary the express terms of a written contract.

The parol evidence rule however admits of the following exceptions, among others:

(i) The rule only relates to evidence as to contents of a contract.

It does not apply where evidence is introduced to show that the contract is vitiated on the grounds of illegality, duress, mistake, misrepresentation or lack of consideration. The rule also does not prevent a party from showing that the contract is subject to a condition precedent, which is not stated in the contract. In *Pym v. Campbell*,<sup>105</sup> a written contract was made for the sale of a patent. The buyer was allowed to rely on oral evidence to show that the agreement was not to take effect until a third party had approved the patent.

(ii) Oral evidence may be allowed for the purpose of establishing equitable defence.

(iii) Oral evidence may be allowed to show that the written contract has been subsequently varied or rescinded.

(iv) The mere fact that a contract is reduced to writing does not mean that all the terms of the contract are contained in that document. Oral or documentary evidence will be admitted where it is shown that other terms of the contract are contained elsewhere, in the case of the former to give a fair picture of the whole agreement.

### Question 18

What are contracts in restraint of trade? In what circumstances are they binding on the parties?

#### Answer

A contract in restraint of trade is one by which a party restrains his future liberty to carry on his trade, business or profession. Such restraint may arise where an employee agrees not to compete against his employer after leaving his employment either by setting up his own business or by entering the service of their competitor.

A contract in restraint of trade is prima facie void. This principle is based on public policy. In the earliest times, all restraints of trade were discouraged because of their tendencies to create monopolies.

This position later changed. It has now been realised that a restriction of trading activities is justifiable, in certain circumstances, in the interests both of the public and of the parties involved. The modern law on the subject of restraint of trade is founded on *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*<sup>106</sup> popularly called the Nordenfelt's case. In that case, Nordenfelt was a manufacturer of machine guns and other military weapons. He sold the

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<sup>105</sup>[1856] 6 E. & B. 370; 25 UQB 277.

<sup>106</sup>[1894] A.C. 535

business to a company, given certain undertakings, which restricted his business activities. This company was amalgamated with another company and Nordenfelt was employed by the new concern as Managing Director. In his contract, Nordenfelt agreed that he would not manufacture guns or ammunitions in any part of the world and would not compete with the company in any way for 25 years. It was held that the contract regarding the business sold was valid and enforceable, even though show that the agreement was not to take effect until a third party had approved the patent.

- (ii) Oral evidence may be allowed for the purpose of establishing equitable defence.
- (iii) Oral evidence may be allowed to show that the written contract has been subsequently varied or rescinded.
- (iv) The mere fact that a contract is reduced to writing does not mean that all the terms of the contract are contained in that document. Oral or documentary evidence will be admitted where it is shown that other terms of the contract are contained elsewhere, in the case of the former to give a face picture of the whole agreement.

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However, the further undertaking not to compete, in any way, with the company was unreasonable and void. The court therefore severs the first undertaking from the second and gave effect to the first and invalidated the second.

Hence, in the modern time, a contract in restraint of trade will be valid if:

- (i) It is reasonably necessary to protect the interest of the person in whose favour it is imposed;
- (ii) It is not unreasonable as regards the person restrained;
- (iii) It is not injurious to the public.

In *Leontaritis v. Nigerian Textile Mills Ltd*,<sup>107</sup> the applicant was formerly in the employment of the Respondent as their sales manager. The applicant, contrary to the covenant in restraint of trade withdrew his services from the Respondent and joined Midwest Textile Mills, a rival company, which had a thriving market throughout Nigeria. It was proved that the applicant as the sales manager of the Respondent had access to confidential information or trade secrets as regards the marketing and manufacturing process of the Respondent's company. The court consequently restrained the applicant from working in the Midwest Textile Mills.

## Question 19

Discuss the rules governing the Discharge of a contract.

### Answer

A contract is discharged when the contract is brought to an end and the parties are freed from their mutual obligations. A contract may be discharged in four ways: (a) by performance; (b) by agreement;

(c) by frustration; and (d) by breach.

(a) **Discharge by performance:** A party who performs all his obligations under a contract is discharged (that is, free) from any liability under the contract. If both parties fully perform their obligations under the contract, then they are both discharged from the contract and the contract, therefore, comes to an end.

Performance must be total and exact before the obligation to perform can be discharged. Initially, a party who has only partially performed his contract is not entitled to recover any remuneration

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<sup>107</sup>[1967] N.C.L.R. 114

or payment. Thus in *Cutter v. Powell*,<sup>108</sup> the Defendant agreed to pay Cutter 30 guineas provided that he proceeded, continued and did his duty as second mate in a ship sailing from Jamaica to Liverpool. Cutter did the job for 50 days and died 19 days before the ship was due to land at Liverpool. Cutter's widow sued for a proportion of the agreed sum. It was held that she could not receive anything. Performance was not complete.

We can see from the above that the rule in *Cutter v. Powell*<sup>109</sup> may, sometimes, produce harsh and unjust results. There are however some qualifications to the rule whereby a party who has only partially performed will be allowed to recover.

- (i) *Substantial performance*. If the contract had been substantially performed, though some small part of the obligation had been done badly then the party is entitled to payment for what he has done. This will be the contract price minus the cost to remedy the minor defect or lapses.
- (ii) *Severable contracts*: Where the contract is severable (divisible), payment can be claimed to the extent of the proportion performed.
- (iii) *Prevention of performance*: If one party has partly performed, and the other party prevents his complete performance, then he is entitled to be paid for what he has done.

(b) *Discharge by agreement*: As a contract is created by agreement, so too can it be terminated by agreement. Where, neither of the parties has performed his obligation, each party simply agrees to forgo his rights under the contract. The discharge is in such a case bilateral. This agreement is binding. Neither party can come back later and sue the other for non-performance of the original contract.

The consideration required to make it a contract is that each of the parties waives his right to sue the other for non-performance.

Where one party has performed his obligations under the contract, either in whole or in part, the other party must prove that he has either been released by an agreement under seal or that he has furnished consideration for the promise by the other party to waive his right. This is called a unilateral discharge. Where the other party cannot prove this, the party making the release can always go back on his words.

The requirement of a new consideration is met by an arrangement called "Accord and Satisfaction". This is an arrangement under which the party making the release, A and the party to whom the release is made, B agree that in return for B furnishing a new consideration, A will release B from his obligations under the original contract.

(c) **Discharge by breach**: A breach of contract occurs when one party fails to perform his obligation, either totally by refusing to perform at all, or partially where his performance is defective in some ways.

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<sup>108</sup>[1795]6 T.R. 320.

<sup>109</sup> Supra.

Not all breaches will discharge a contract. An innocent party can rescind the contract and be discharged where there has been a breach of conditions. The innocent party can only sue for damages where the breach is of warranties.

(d) **Discharge by frustration:** Parties to a contract are discharged (excused) from further performance of their obligations if some unexpected events occur, during the currency of the contract, without the fault of either party, which make further performance impossible or illegal. Contracts have been held to be frustrated in the following instances:

- a) Where performance of a contract becomes illegal;
- b) Where the subject matter of the contract is destroyed;
- c) Where the whole basis of a contract is the occurrence of an event which does not occur.

### Question 20

- i) Explain the concept of "anticipatory breach".
- ii) What are the dangers of not suing for anticipatory breach immediately?
- iii) X Limited had a contract with Chidinma Night Bus Travels to transport some raw materials to Owerri on 24th December at an agreed fare of ₦300,000. On 20th of December, Chidinma Night Bus Travels sent a note to X Limited that it would not be able to transport the goods as agreed and returned the fare already paid in advance. X Limited approached another transporter who demanded for ₦500,000.

Advice X Limited on what to do.

### Answer

(a) Anticipatory breach occurs when there is a contract between two parties to be performed at a future date, and one party has shown either by words or action that he has no intention of performing his own side when the time arrives. In such circumstance, it is open to the innocent party to sue the other party for breach of contract notwithstanding that the time agreed upon for performance has not yet arrived.

In *Udom v Michelette & Sons Ltd*,<sup>110</sup> the court stated that when there is anticipatory breach, an innocent party is not bound to treat the contract as discharged. He may choose to treat the contract as binding and wait until the contract date to see whether the other will truly fail to discharge his liability. If he chooses the former course, he can still sue for damages for any loss sustained as a result of the breach. But the contract, with all its terms and conditions remains alive for the benefits of the wrong doer as well as himself. Each party is entitled to hold the other to his bargain and to continue tender due performance on his part.

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<sup>110</sup> [1997]8 N.W.L.R (Pt. 516)



(b) Where the innocent party fails to sue immediately, the guilty party can take advantage of any supervening circumstance or event to justify his non-performance. Hence, the innocent party runs the risk of not getting any remedy where a subsequent event occurs which could provide a lawful excuse for the guilty party. In *Avery v. Bowden*<sup>111</sup> the Defendant contracted to load the Plaintiffs ship at a Russian port within 45 days. Before the date, he advised the Plaintiff to go away for his inability to provide him with cargo. Instead of the Plaintiff to sue for anticipatory breach immediately he waited in the harbour for the Defendant and before the forty-five days elapsed, war broke out and frustrated the contract to the advantage of the Defendant. If the Plaintiff had treated the original refusal to load as a repudiation, he would have had a remedy for breach of contract.

(c) The issue at hand is a clear case of anticipatory breach. In *Hasham v. Zenab*,<sup>112</sup> by a written contract signed on February 19, the defendant agreed to sell a plot of land to the plaintiff, completion to be on August 19. Minutes after signing the contract, the defendant repudiated the contract. The Plaintiff elected to affirm it and on August 2, brought an action for specific performance. The court gave judgment in favour of the Plaintiff, but the Defendant was not ordered to perform it until the time fixed for performance, which was August 19.

Applying the rules above to X Ltd.'s case, X Ltd. has two options:

(i) to apply to court to enforce the contract immediately or wait till after 24th of December. However, since the consignments are raw materials which may be urgently required at Owerri, it was reasonable that X Ltd to find other means of transporting the consignments at a higher cost of ₦200,000 and later sue Chidinma Night Bus Travels for the additional cost of ₦200,000 he had been made to incur and also claim general damages.

## Question 21

(i) When is a contract discharged?

(ii) Explain the concept of "Accord and Satisfaction".

(iii) Mr. Aba had supplied Mrs. Owerri 20 consignments of Grade A reagents for industrial use at an agreed price of ₦20 million.

Mrs. Owerri protested that the quality of the reagent was grade B and wanted to reject the consignments. Mrs. Owerri however agreed to manage the reagents because of the pleading of Mr.

Aba and the intervention of people of goodwill. Meanwhile, Mr. Aba is afraid that Mrs. Owerri might change her mind. Advice him on what to do to allay his fear.

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<sup>111</sup>[1855]5 E& B. 714.

<sup>112</sup> [1960] AC 316.

## Answer

(i) When parties enter into a contract, the contract does not last forever. It must at one point come to an end. The discharge of a contract means in general that the contractual relationship (bond) between the parties has come to an end (broken) and the parties are freed from their obligations to each other under the contract.

Essentially, the question whether or not a contract is discharged must be considered in relation to the terms of the contract. That is, one must first consider the obligations that the parties have mutually undertaken before determining whether there is a discharge. A contract may be discharged in many ways including, by performance, by agreement, by breach or by frustration.

(ii) A contract can be discharged by agreement. Where the contract is executory, that is, both parties have not performed their obligations under the contract, then the discharge is bilateral. Consideration raises no difficulty in a bilateral discharge, for each party agrees to release under the contract. Thus each party in law surrenders something of value.

Where one party has performed his obligations under the contract, either in whole or in part, the other party must prove that he has either been released by an agreement under seal or that he has furnished consideration for the promise by the other party to waive his right. This is called a unilateral discharge. Where the other party cannot prove this, the party making the release can always go back on his words.

The requirement of a new consideration is met by an arrangement called "Accord and Satisfaction". Accord and satisfaction usually take the form of compromise. Where a party is making a claim, which is disputed by the other, they may reach a compromise on mutually agreeable terms. Once this happens, the parties are deemed to have abandoned their original positions and can only bring claims within the compromise or agreement. Such a new agreement is the accord, while the respective concession made is the satisfaction.

In *Adekunle v. A.C.B.*,<sup>113</sup> the Appellant was the Respondent's former solicitor. Dispute arose between the parties over fee. The Appellant claimed that he was entitled to 10 per cent of the cost awarded in favour of the Respondent, while the Respondent claimed that he was entitled to 50 percent of the cost actually collected. While the parties were still in dispute, the Respondent offered the Appellant 150 pounds in full satisfaction of the disputed claim of about J349. The Appellant accepted the money and later sued for the balance. The claim failed. It was held that the agreement under which the Appellant accepted the J150 from the Respondent constituted an accord and satisfaction.

For an accord and satisfaction to be valid, the agreement between the parties to vary the term must be genuine and must have not been induced by undue pressure or fraud. In *D & C Builders v Rees*,<sup>114</sup> The Defendant owed the Plaintiffs an agreed fee of J482. Fully aware that the

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<sup>113</sup> (Unreported) Court of Appeal, Western State of Nigeria, Ibadan, KayodeEso, J.A., suit No. AW/32170 delivered on December 10, 1970. Reported in Sagay's Casebook, p.90.

<sup>114</sup> (1882) Q.B.D. 37.

Plaintiffs were desperate for fund, the Defendant offered to pay J300 in full and final discharge of the debt, or nothing. The Plaintiffs accepted the J300 and later sued to recover the balance of 2. It was held that the compromise was obtained by duress. Hence, the Plaintiffs were entitled to recover the balance.

(iii) It is clear from the facts of this case that Mr. Aba has breached the contract between him and Mrs. Owerri by supplying a grade B regent instead of grade A. Normally, a breach of a condition discharges a contract and gives the innocent party the right to repudiate it and sue for damages. However, the innocent party has a choice. He can affirm the contract and sue for damages. Another alternative is for the parties to reach a compromise on mutually agreeable terms of settlements in form of accord and satisfaction.

Under this last arrangement, the contract breaker, in this case, Mr. Aba will furnish consideration for the promise of the innocent party, in this case, Mrs Owerri not to sue to enforce her right; otherwise, the discharge would be unilateral and ineffective. The applicable case is *Adekunle v. A.CB* whose facts were given above.

Against this background, the mere pleading by Mr. Aba and so-called "people of goodwill" would not amount to a valuable consideration. Hence, Mr. Aba may pay certain amount of money to Mrs. Owerri as consideration to get Mrs. Owerri to sign a compromise agreement, then she would be bound by 'accord and satisfaction'.

## Question 22

- i) Haruna & Co. Ltd. promised to supply Ladylak & Co. Ltd. 20tons of cement at a fixed price within one month. However, before the expiration of the one-month, the managing director of Haruna & Co informed Ladylak & Co Ltd. that he did not intend to keep his promise anymore. Advise Ladylak & Co Ltd.
- ii) Chief Bankole, the owner/manager of Pleasure Hotel agreed to let the conference hall of his hotel to the Institute of Chartered Accountants of Nigeria (ICAN) for one week for the purposes of holding the Institute's marking exercise. The hotel was destroyed by fire before the date. Meanwhile, ICAN has fully paid for the hall.

Advise the parties.

## Answer

a) There is a valid contract between Haruna & Co. Ltd. and Ladylak & Co. Ltd. Because all the ingredients of contract (offer, acceptance, consideration and intention to create a legal relations) are present in the transaction. Mallam Haruna, by his declaration, is attempting to breach the contract.

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A breach of contract occurs when one party fails to perform his obligation under a contract. Where, on the other hand, a party before the date fixed for performance indicates his intention not to perform, the breach is called "anticipatory breach."

In the case of an anticipatory breach, the innocent party has a choice. He has an option to treat the contract as either discharged or to treat it as subsisting. If he chooses to treat the contract as discharged, he can sue for damages at once. In *Frost v. Knight*,<sup>115</sup> Mr. Knight promised Miss Frost that when his father dies he would marry her. While his father was still alive, Mr. Knight broke off the engagement. Miss Frost sued him and her action succeeded, even though the time fixed for the actual fulfilment of the promise had not come.

But if the innocent party elects to treat the contract as subsisting, he can apply for injunction to restrain the other party.

Accordingly, Ladylak & Co. Ltd. can either apply to court either to restrain Haruna & Co. Ltd. from breaching the agreement or sue immediately for breach of contract. It may however be better for Ladylak to sue immediately to avoid the problem in *Avery v. Bowden*.<sup>116</sup> The risk inherent in not suing for anticipatory breach immediately is that the guilty party could take advantage of any supervening circumstance or event which could provide a lawful excuse while the contract was not performed. In *Avery v. Bowden*<sup>117</sup> the defendant contracted to load the Plaintiff's ship at a Russian port within 45 days. Before the date, he advised the Plaintiff to go away for his inability to provide him with cargo. Instead of the Plaintiff to sue for anticipatory breach immediately he waited in the harbor for the Defendant and before the forty-five days elapsed, war broke out and frustrated the contract to the advantage of the Defendant. If the Plaintiff had treated the original refusal to load as repudiation, he would have had a remedy for breach of contract.

b) If some unexpected events occurred during the currency of a contract, without the fault of either party, which make further performance impossible or illegal, the contract is said to be frustrated and the parties to the contract are discharged from further performance of their obligations.

A contract is discharged by frustration if the subject matter of the contract is destroyed by fire. In *Taylor v. Caldwell*<sup>118</sup> the contract was for the hire of garden and Music Hall in which concerts were to be held. Without the fault of either party and before the dates for the concerts, the hall was destroyed by fire. It was held that the contract was frustrated.

At common law, the occurrence of a frustrating event brings a contract to an end forthwith and automatically. The contract is however terminated as to the future only. Frustration does not make the contract bad ab initio. Therefore, money which has become due or payable at the time

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<sup>115</sup> [1872] L.R.7 Exch. 111

<sup>116</sup> [1855] 5 E& B.714.

<sup>117</sup> [1855] 5 E& B.714.

<sup>118</sup> [1863] 3 B&S. 826; [186-731 All E.R. 24, 122 E.R. 309.

of the frustration are enforceable. And money payable in advance ceases to be payable if the frustrating event occurs before it is due for payment.

In *Chandler v. Webster*<sup>119</sup> the plaintiff agreed to hire a room to the defendant for the purpose of viewing the coronation procession of King Edward VII. The rent was J141.15s payable immediately.

The Plaintiff paid T100 but still owed J41.15s. Before the D-day, the procession was cancelled due to the sudden illness of the King. The Plaintiff sued to recover his T100. It was held that the T100 deposit was irrecoverable, but the Plaintiff was also liable to pay the balance.

The rule in *Chandler v. Webster* is harsh and sometimes lead to injustice. The rule has been modified in *Fibrosa Spolka Akcyjna v. Fairbairn, Lawson, Combe, Babour Ltd.*<sup>120</sup> popularly called *Fibrosa's case*. The Fibrosa's case has laid it down that a party can recover money paid towards a frustrated contract where there is a total failure of consideration i.e. where the party has not enjoyed any benefit. In the *Fibrosa's case*, the contract price was J4,800 of which J1,200 was payable in advance. The purchaser paid J1,000 toward the advance payment. The contract then got frustrated owing to war. It was held that purchaser was entitled to recover his money.

Based on the principle in the *Fibrosa's case*, ICAN is entitled to recover the entire money paid to Chief Bankole since ICAN had not derived any benefit from contract.

### Question 23

(a) Discuss the doctrine of privity of contract.

(b) Afrikan Ltd. was indebted to KDB Bank to the tune of ₦50m. Madam Saro who was the managing director/chief executive officer of the Bank entered into an agreement with Afrikan Ltd. to use all the rents from her personal house situated at Lekki Peninsula for the liquidation of the debt. When Mrs. Saro died, the executors of her estate refused to honour her previous agreement with the bank.

Advise whether the bank can successfully sue Mrs. Saro's estate for breach of contract.

### Answer

(a) This question relates to privity of contract. The doctrine of privity of contract simply means that only parties to a contract can sue on it. A person who is not a party to a contract cannot sue to enjoy any benefit nor be subject to any burden under the contract. For example, if X promises Y, for a consideration, to render services to Z. Z cannot sue X if he (X) fails to carry out the promise. Z is not a party to the contract. He is only a beneficiary of the contract. Only Y can sue to enforce it.

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<sup>119</sup> [1904]1 K.B. 493.

<sup>120</sup>[1942) 2 All E.R. 122.

This principle was firmly established in *Dunlop Pneumatic Tyre Co v. Selfridge Ltd.*<sup>121</sup> The plaintiffs who were tyre manufacturers, sold a number of tyres to Dew and Co, on the terms that Dew and Co. will not resell them below certain listed prices and that, Dew and Co. would extract the same promise from their own customers when selling to them. Dew and Co. sold tyres to Selfridge who agreed to observe the restrictions and to pay Dunlop JS for each tyre sold below the listed prices. When Selfridge supplied tyres to some of its customers below the listed price, Dunlop instituted an action to enforce the promise to pay JS per tyre for the breach. It was held that while Selfridge had committed a breach of the contract between it and Dew and Co., Dunlop Company could not sue on the contract because it was a stranger to it. Dew and Co. instead of Dunlop was the proper Plaintiff.

The above principle has been applied in *Shuwa v. Chad Basin Authority*.<sup>122</sup> The Respondent had awarded a construction contract to a company named AKAM on the condition that the company would forfeit its equipment brought into the Respondents' premises if the company abandons the contract. AKAM indeed abandoned the contract and the Respondent gave notice of the forfeiture to AKAM. AKAM however went ahead to sell the equipments to the Appellant. The Appellant now instituted this action to recover the equipments from the Respondent on the ground that the process under which the equipments were forfeited to the Respondent was defective. It was held that the Appellant could not challenge the validity of the forfeiture since it was not a party to the contract between AKAD and the respondent.

Although the principle of privity is now well established, some exceptions have been developed to it.

(b) The facts of this case raise the issue of privity of contract.

First and foremost it is important to determine the parties to the contract to use the rent from the house to liquidate the debt to the bank. Clearly, the contract was between Mrs Saro and Afrikan Ltd. KDB Bank was a mere beneficiary, hence the mutual promises can only be enforced by either the estate of Mrs Saro and Afrikan Ltd. In *Ikpeazu v. A.CB.*<sup>123</sup> one Emodi owed the Respondent bank. The Appellant, who at that time was one of the external solicitors of the respondent bank, entered into an agreement with Emodi to run Emodi's business on the condition that all the proceeds from the business would be paid into Emodi's account with the Respondent's bank until the loan was liquidated. The Respondent bank sued the Appellant to enforce the agreement between Emodi and the Appellant. It was held that the Respondent couldn't sue under the agreement, as it was never a party to the agreement.

On the authority of the above principle, KDB Bank may not be able to successfully sue the estate of Mrs Saro for refusing to honour the agreement between Mrs Saro and Afrikan Ltd. It would have made a difference if the contract had been a tripartite agreement between Mrs. Saro, African Ltd and KDB Bank or it is made under seal.

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<sup>121</sup> [1915] A.c. 79, 847 at p. 853.

<sup>122</sup> [1991] 7 NWLR (Pt.205) p. 550

<sup>123</sup> [1965] N.M.L.R. 374.

## Question 24

- (a) Discuss four of the exceptions to the rule of privity of contract.
- (b) Mr. Solomon died in a fatal accident between Ondo and Benin

Expressway. In his lifetime, he had taken a life insurance policy of N2 million in which he named his wife and two children as beneficiaries. The insurance company has challenged the claim of the wife and children to the assured sum after the death of Mr. Solomon on the ground that they were strangers to the policy.

Advise the parties

### Answer

(a) The general rule of privity of contract is that only parties to a contract who have furnished consideration towards the formation of the contract can bring an action on it. This principle was firmly established in *Dunlop Pneumatic Tyre Co v. Selfridge Ltd.*<sup>124</sup> The Plaintiffs who were tyre manufacturers, sold a number of tyres to Dew and Co, on the terms that Dew and Co. will not resell them below certain listed prices and that, Dew and Co. would extract the same promise from their own customers when selling to them. Dew and Co. sold tyres to Selfridge who agreed to observe the restrictions and to pay Dunlop J5 for each tyre it sold below the listed prices. When Selfridge supplied tyres to some of its customers below the listed price, Dunlop instituted an action to enforce the promise to pay J5 per tyre for the breach. It was held that while Selfridge had committed a breach of the contract between it and Dew and Co., Dunlop Company could not sue on the contract because it was a stranger to it. Dew and Co. instead of Dunlop was the proper Plaintiff.

In *Ikpeazu v. A.CB.*,<sup>125</sup> one Emodi owed the respondent bank. The Appellant, who at that time was one of the external solicitors of the respondent bank, entered into an agreement with Emodi to run Emodi's business on the condition that all the proceeds from the business would be paid into Emodi's account with the respondent bank until the loan was liquidated. The Respondent bank sued the Appellant to enforce the agreement between Emodi and the Appellant. It was held that the Respondent cannot sue under the agreement because it was never a party to it.

Although the principle is now well established the following exceptions, among others, have been developed to it.

### ***b) Benefits accruing under an insurance contracts***

The law of insurance provides a good example of a statutory exception to the doctrine of privity. Section 11 of the Married Women's Property Act, provides that a life insurance taken by a wife or husband can be enforced by the surviving spouse or children, where the insurance is in their favour. Based on this provision, the spouse and children of an assured person can sue to enforce

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<sup>124</sup>Supra.

<sup>125</sup>[1965] NMLR 374.

a life policy despite the fact that they are not parties to it. It is noteworthy that this exception is restricted to spouses and children and does not apply in favour of other dependants.

Also, s.3 of the *Motor Vehicles (Third Party) Insurance Act*, requires a car owner to take out, a minimum of a third party insurance policy, so that third parties injured through his negligence can be compensated even though they are not parties to insurance contract.

### ***iii) Restrictive covenants on leases***

In certain circumstances, an owner of a land could restrict the possible use of the land by the purchase and subsequent purchaser by inserting a clause called restrictive covenant in the contract. A restrictive covenant is designed to protect the value of an adjoining piece of land or certain rights or privileges of its owner. A restrictive covenant voluntarily accepted by a purchaser, will, in certain circumstances, bind persons who subsequently acquire the land, with notice of such covenant. In *Tulk v. Moxhay*,<sup>126</sup> the plaintiff, who owned several plots of land, sold the garden in the centre to one Elius, who agreed not to build upon it, but to preserve it in its existing condition. After a number of conveyances, the garden was sold to the Defendant, Moxhay, who though was aware of the restriction imposed on the use of the land, proposed to build on it.

The Plaintiff successfully restrained Moxhay from erecting the proposed buildings.

### ***(iv) Assignment of choses in action***

A chose in action is a legal expression used to describe all personal intangible proprietary rights, which can only be enforced by means of a court action rather than by taking physical possession. In certain circumstances, a chose in action can be transferred, through an assignment, to a third party without the consent of the debtor, thereby enabling the third party to enforce the right against the debtor or obligor. For instance, negotiable instruments, such as cheques, promissory notes, bill of exchange, letters of credit etc. are generally assignable.

### ***(v) Agency***

A principal, even where undisclosed, can step into the shoes of an agent and sue and be sued on a contract between the agent and a third party. For instance, by virtue of a power of attorney, a person owning a property or entitled to some right could appoint another as his representative (attorney) to enforce those rights in his name.

(b) The legal issue raised here is related to the principle of privity of contracts, which states that only parties to a contract can sue on it and that only those who have furnished consideration towards the formation of the contract can bring an action on it.

The contract of insurance here was between Solomon and the Insurance Company; hence the contract would have been enforceable against the company by Solomon and no one else. But to reach this conclusion would have defeated the main purpose of the policy, which is to provide for the beneficiaries after Solomon's death. It would have been illogical to require Solomon who

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<sup>126</sup>[1848]2 Ch. 774; 18 LJ. Ch. 83.



is now dead to be the one to enforce the contract. Hence, the Law of Insurance provides a good statutory exception to the doctrine of privity. Pursuant to section 11 of the *Married Women's Property Act*, a spouse and children of an assured can enforce a life policy even though they are not parties to it.

In *Sule v. Norwich Fire Insurance Society Ltd*,<sup>127</sup> the court allowed a third party Plaintiff who was a driver with the Action Group to recover from an insurance company even though he was not a party to it. Also, in *Akene v. British American Insurance Co. Ltd*.<sup>128</sup> where this issue arose directly for consideration, it was held that the insurance company was liable to pay the beneficiaries who were named in the policy.

Based on the foregoing, the argument of the insurance company that the spouse and children of Solomon are strangers to the policy is untenable and bound to fail. This exception is so well established today that no serious insurer will refuse to recognise such claims in practice.

### **Question 25**

(a) Discuss the rule in *Hadleyv. Baxendale*.

(b) Aribs Ltd. had contracted to buy 20 boxes of tin tomatoes from Mrs Santos. Mrs. Santos promised to deliver the consignment at 10.00am prompt the following day. Unknown to Mrs Santos, Aribs Ltd. had already contracted to supply a popular five-star hotel the 20 boxes of tomatoes at 10.30 the following day after taking delivery from her. Unfortunately, Mrs Santos failed to supply the 20 boxes of tomatoes, which made Aribs Ltd. unable to fulfil its obligation to the hotel. In consequence, the hotel blacklisted Aribs Ltd. and struck its name off the list of their suppliers. The hotel, which is the biggest customer of Aribs Ltd. Aribs Ltd is planning to sue Mrs. Santos.

Advise the parties.

### **Answer**

(a) When a contract is breached, the innocent party has varieties of remedies, which he can seek from the court, one of which is damages. Damages are the commonest and the most readily granted type of remedy in case of breach of a contract. The object of awarding damages is not to punish the party in breach of contract, but to put the injured party in the position that he would have been if the contract had been properly performed. Hence, the amount of damages can (should) not be greater than the loss suffered or the potential profit lost.

The process of calculating damages has been reduced to two central questions thus: (i) for what kind of damage is the innocent party entitled to recover compensation? (ii) How much is he

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<sup>127</sup>(Unreported) High Court Western State, Ibadan, Suit No. W/74/701/1971.

<sup>128</sup>(Unreported) High Court Western State, Ibadan, Suit 0.11205/691 1969.

entitled to claim? The first question relates to the principle of remoteness of damages while the second relates to measure of damages.

The initial rule was to place the innocent party in the situation he would have been if the contract had been performed, so far as money can do it.<sup>129</sup> Under this rule, an injured party would have been able to claim for virtually all kinds of injuries suffered by him as a result of the breach of the contract, no matter how unforeseeable and remote some of them may be.

The harshness of the rule has been mitigated in the case of *Hadley v. Baxendale*<sup>130</sup> where the modern principle of damages was enunciated. In that case, the Plaintiffs were millers while the defendants were common carriers of goods. The crankshaft of the Plaintiffs' steam engine was broken which made them to close their mill. Prior to this time, they had ordered a new shaft from an Engineer in another town. The Plaintiffs contracted with the Defendants to carry the broken shaft to the Engineer so that the Engineer can use it as a model for the new shaft. The Defendants delayed the delivery of the broken shaft to the Engineer for several days as a result of which the Plaintiffs' mill was closed during the period of delay.

However, the Defendants did not know that the Plaintiffs had no spare shaft and that the mill could not operate until the new shaft was installed. The Plaintiffs sued for the loss of profit during the period that the mill was closed down. The main question before the court was whether the Plaintiff can claim damages for the loss of profit for the period of delay.

The court seized the opportunity to formulate the modern rule of damages thus: while the 'contract breaker' will normally be liable for the normal damage', he will not be liable for the special damage except if he knew of the special circumstances at the time of the contract. The first aspect of the rule deals with the normal damage that occurs in the usual course of things, while the second deals with abnormal damage that arises because of special or exceptional circumstances.

Applying the above rule, it was held that the defendants were not liable for the loss of profit during the period of delay because the plaintiffs did not inform them that the mill would remain closed for as long as the shaft was not delivered. The Defendants could have thought that the Plaintiffs had a spare shaft. Although the Plaintiffs were liable for breach of contract, they were not liable for the loss of profit caused by the delay.

The rule in *Hadley v Baxendale*<sup>131</sup> had been applied in *Victoria Laundry v. Newman Industries*.<sup>132</sup>

(b) The facts of this case between Aribis Ltd. and Mrs Santos are very similar to that of in *Victoria Laundry v. Newman Industries*.<sup>133</sup> In that case, the Plaintiffs were launders and drier In their bid to expand their business, the Plaintiffs purchased a large boiler from the

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<sup>129</sup>Robinson v. Harman [1884] 1 Ex. 850 at p.855, [1843-60] All E.R. 383.

<sup>130</sup>[1854]9 Ex. 341, [1843-60] All E.R. 461

<sup>131</sup>Supra.

<sup>132</sup>[1949] 2 KB 528.

<sup>133</sup>[1949] 2 KB 528

defendants and informed the Defendants that the boiler was required for immediate use to accommodate the great demands from their customers. However, the Defendants did not deliver the boiler until after five months. The Plaintiffs then sued claiming loss of profit as follows:

- (i) J16 a week for the extra number of customers they could have been able to accommodate;
- (ii) J262 a week, which they would have earned under a lucrative dyeing, contract with the Ministry of Supply.

It was held that the first claim was reasonably foreseeable and therefore recoverable. However, the Plaintiffs could not recover for the special dyeing contract since they did not bring it to the notice of the Defendants.

In resolving the issue in the above fact pattern, it was clear that Aribis Ltd. requested the delivery of the tomatoes at a particular time - 10 o'clock prompt, which makes time to be of essence. Aribis Ltd, however, did not inform Mrs Santos that the tomatoes were required to satisfy another contract between Aribis Ltd. and the hotel or anyone and that failure to supply the tomatoes as agreed would cause special injury. Hence, AribisLtd. can only claim for normal damage that could occur in the usual course of things. In this circumstance, Aribis Ltd could claim what it would have cost it to get another consignment in an emergency situation. Aribis Ltd. cannot claim damages for the loss of the profit, which he could have made from the popular Hotel and most importantly their patronage, since this special circumstances were not communicated to Mrs. Santos.

## **SALE OF GOODS**

### **Question 1**

- (a) Distinguish a 'contract of sale of goods' from 'agreement to sell goods'.
- (b) Ade Ltd. is an importer of millets. In January, Ade Ltd. agreed to sell 1,000 tons of millet to Olu Ltd. to be delivered in June 1987. Olu Ltd. paid half of the price and promised to pay the balance in July after delivery. In April, the ship bringing the millets sank at sea. What is the legal position of the transaction? Does any of the party have a legal claim against the other?

### **Answer**

- (a) A contract of sale of goods is defined in section 2(1) of Sale of Goods Act (SOGA) as a contract whereby the seller transfers or agrees to transfer the property (ownership) in goods to

the buyer for a money consideration called the price. This definition covers: (i) a contract of sale and (ii) an agreement to sell.

If, under the contract, property (ownership) in the goods is transferred from the seller to the buyer there is 'contract of sale', but if the transfer of property is to take place at a future time or after the fulfilment of certain conditions, it is called "an agreement to sell".

In general, the contract of sale of goods can be made in any form. It can be made in writing (either with or without seal), or by word of mouth, or may be implied from the conduct of the parties.

A notable distinction between a sale and a contract to sell goods is that under a sale, the good immediately becomes that of the buyer, that is, property passes to the buyer, whereas under an agreement to sell, the buyer merely acquires personal rights.

(b) The two central issues involved in this question are:

(i) Whether millet can be a subject matter of a contract of sale of goods or not, and

(ii) The consideration of the legal effect of the destruction of unascertained goods.

It is not a sale of every item that falls within the scope of SOGA. For a particular sale to be governed by SOGA, the subject matter of the sale must qualify as "good" within SOGA. Section 62 SOGA provides that goods include, among other things, "emblemments, industrial growing crops, and things attach to or forming part of the land which are agreed to be severed before sale or under the contract of sale".

The term "emblemments" comprises crops and vegetables (such as corn and potatoes) produced by the labour of man. Millet, which is the subject matter of the transaction between Ade Ltd. and Olu Ltd., falls within the scope of "goods" under SOGA. Hence, the transaction between Ade Ltd. and Olu would be governed by the SOGA.

The application of many of the rules of SOGA depends on the nature of the goods, which form the subject matter of sale. For instance, whether they are "specific" or "unascertained" goods. The millet, which is the subject matter of the transaction between Ade and Olu, is unascertained future goods since they were yet to be imported.

Where there is an agreement to sell specific goods, and subsequently the goods, without any fault of either party, perish before the risk passes to the buyer, the agreement is thereby voided under section 7 SOGA. However, if the goods are purely generic (i.e. unascertained) the fact that the source from which the seller had intended to obtain the goods has perished or ceased to exist will not affect the seller's obligation under the contract.. The seller must obtain the goods from somewhere else or pay damages for non- delivery.

If, however, the contract specifies the source from which the goods are to come, the position is different. If the source is destroyed after the making of the contract but before the risk has passed to the buyer, the contract will be avoided by reason of frustration in which case an adjustment

could be made between the parties if money has been paid or other consideration furnished b) one or both of the parties.

It is noteworthy in this case that the agreement between Olu Ltd and Ade Ltd. is that Ade Ltd. would sell 1,000 tons of millet to Olu Ltd did not specify from which ship he would bring the millets in June. Ade Ltd is therefore bound to look for the agreed 1,000 tons of millet elsewhere otherwise; it would be liable for damages for non- delivery. Olu Ltd. on his part will be liable to pay the balance of his deposit. However, if Ade Ltd. cannot supply the 1000 tons of millet, it will be liable for breach of contract to Olu Ltd. and Olu Ltd will be entitled to claim recover the part payment and sue for damages.

## Question 2

- (i) Bello wishes to buy a brand new Suzuki Motorcycle from Eze at a cost of ₦20,000. Eze agreed to accept Bello's second hand Honda motorcycle valued at ₦12,000 and a cash of ₦8,000 as consideration for the Suzuki Motorcycle.
- (ii) Alhaja Ganiat is a cocoa farmer in Ondo State. She agreed to sell all the cocoa harvested on her farm for 10 years exclusively to Express Cocoa Exporting Company at the price of ₦20,000 per bag.
- (iii) Harry is a trader selling spare parts. Tom went to Harry's shop, to buy a gearbox. Harry was busy attending to other customers he simply gave the gearbox to Tom without telling him the price. Tom came back to Harry a week later and tendered ₦4,000. Harry insisted on collecting a minimum of ₦10,000. Tom had bought a similar gearbox from Harry about six months ago at ₦4,000. Examine whether each of the above transactions qualifies as a contract of sale and advise the parties.

## Answer

- (i) The question here is whether consideration in a contract of sale of goods can be partly in money and partly in goods.

Section 2(1) SOGA requires that the consideration in a sale of goods must be in money. This is what distinguishes a contract of sale from pure exchange or trade by barter. Difficulties however arise where payment is made partly in money and partly other goods as in this case. The rule is that payment can be made partly in money and partly in goods so long as the substantial part of the consideration is in money. In *Aldridge v. Johnson*,<sup>134</sup> I a contract for the sale of 52 bullocks valued at J2 per quarter was paid with 100 quarters of barley; the difference in value to be paid in cash was treated as a contract of sale of goods. It was held that the contract was a sale of goods.

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<sup>134</sup> (1857) 7 E & B 885, See also *G./ Dawson (Clapham) Ltd. v. HG. Duffield* [1836] 2 AU E.R. 232, *Bull v. Parker* (1842) 2 Dowl N.S. 345.

The transaction between Bello and Eze is however different from the case of Aldridge because the substantial part of the payment is in not in cash. The ₦12,000 that is the cost of the old Honda Motorcycle, represents 60 per cent of the purchase price while the cash payment of ₦8,000 represents 40 per cent of the price. Hence, the transaction between Bello and Eze better qualifies as an exchange rather than a contract of sale.

(ii) The legal issue raised by this fact pattern between Alhaja Ganiat and Express Cocoa Exporting Company is whether cocoa can be a subject matter of contract of sale of goods or not.

Section 62 SOGA provides that goods include, among other things, "emblemments, industrial growing crops, and things attach to or forming part of the land which are agreed to be severed before sale or under the contract of sale." The term "emblemments" comprises crops and vegetables (such as corn and potatoes) produced by the labour of man. Cocoa, which is the subject matter of the transaction between Alhaja Ganiat and Express Cocoa Exporting Company, is a cash crop, which require the labour of man to grow. Hence, cocoa will qualify as good within section 62 SOGA. Hence, the provisions of SOGA will govern the rights and liabilities of Alhaja Ganiat and Express Cocoa Exporting Company unless where they have expressly agreed to the contrary.

(iii) A contract of sale of goods is performed when the seller transfers the property in the goods to the buyer and the buyer pays the price. Section 8 provides that the price may be:

- (a) fixed by the contract; or
- (b) left to be fixed in a manner provided by the contract, e.g. by a valuation or an arbitration; or
- (c) determined by the course of dealing between the parties or any relevant custom of the trade.

If the price is not so determined, there is a presumption that the buyer has agreed to pay a reasonable price. What is a reasonable price will depend on the fact of each case. A reasonable price could be the average price of the good elsewhere and not necessarily what the seller is requesting or what the buyer is tendering. Thus a contract of sale of goods is therefore not inchoate simply because the parties have not agreed on any price.

In this case, Tom is bound to pay a reasonable price for the gearbox. A reasonable price in this circumstance is not necessarily ₦4,000 or ₦10,000 but the average price of the gear box elsewhere in the same market. We are told in the question that Tom bought a similar gearbox from Harry about six months ago. While it is unreasonable for Tom to have expected the price to be static in view Sale of goods of the rate of inflation in Nigeria, the question is whether he could reasonably have expected the price to climb to ₦10,000? It is for the court to determine what a reasonable price of the gearbox is between the ₦4,000 being tendered and the ₦10,000 being demanded. Harry should have told Tom the last price before allowing Tom to take it away. Alternatively, Tom should have also asked for the current price.

### Question 3

Discuss the implied terms of a contract of sale of goods.

### **Answer**

A contract of sale of goods can be made in any form. It can be made in writing or by word of mouth or may be implied from the conduct of the parties. Apart from the express terms of a contract, some additional terms may be implied into the contract by Statute, the Court and Customs. It is noteworthy that terms may be implied into a contract of sale only where the parties have not expressly provided for the matter. Hence, the implied terms will apply subject to the express agreement of the parties.

The terms of a contract, depending on their relative importance, may be "conditions" or "warranties". Conditions are important terms which form the basis of the whole contract, a breach of which gives the aggrieved party a right to repudiate the contract.

Warranties, on the other hand, are terms of minor importance, a breach of which gives the aggrieved party a right to claim only damages.

The terms implied in a contract of sale of goods are contained in Sections 12-15 SOGA. They are:

#### ***(a) Title***

By virtue of S.12 there is:

- (i) An implied condition that the seller has a right to sell the good;
- (ii) An implied warranty that the buyer shall enjoy quiet possession of the goods;
- (iii) An implied warranty that the good is free from any charge or encumbrance.

The implied condition that the seller has the right to sell will be broken if the buyer is dispossessed of the goods by anybody with a better title. In *Akoshile v. Ogidan*,<sup>135</sup> the Defendant sold a car to the Plaintiff. It turned out that the car was stolen by the Defendant. The car was subsequently recovered from the Plaintiff by the Police. It was held that there had been a total failure of consideration and that the Plaintiff could recover the money which he had paid for the car.

The implied warranty of quiet possession will be broken if, for instance, the possession of the buyer is temporarily dispossessed by a competing claimant which the seller had defeated in the court. The implied warranty relating to encumbrance will be broken where, for instance, the seller had pledged the good as security for a loan and has arranged to pay the pledge from the price received. In both circumstances, the buyer cannot repudiate the contract, he would have to put up with the inconvenience and later claim damages.

#### ***b) Sale by description***

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<sup>135</sup> [1950] 19 NLR 87.

A sale is said to be by description when words are used to identify the goods sold, for example, "a brand new 505 SR" or "a white lace satin". Sale could be simply by description or by sample and description.

When goods are sold by description, there is an implied condition under section 13 SOGA that they shall correspond with the description. And if the sale is by sample as well as by description, there is also an implied condition that they must correspond with the description and sample. Usually, this condition applies where the buyer has not seen the goods and relies on the seller's description. The condition still applies where the purchaser has seen the goods and examined them, or even where the goods are selected by the purchaser from the seller's stock. In a sale by description, every statement which forms part of the description is treated as a condition which gives the buyer the right to reject the goods, even though the misdescription is of a minor nature. There is no such thing as a slight breach of condition. Thus in *Beal v. Taylor*,<sup>136</sup> a car sold by the Defendant to the Plaintiff which was described as a 1961 Herald turned out in fact to be the front of a 1948 Herald welded to a rear of a 1961 model. Although the Plaintiff saw the car before the sale, he was allowed to rescind.

### *c) Quality and fitness for purpose*

Generally, there is no implied condition or warranty that a good bought has a particular quality or is fit for a particular purpose.

However, where the seller sells in the course of business (normally sells the kind of goods in question), and the buyer expressly or impliedly makes known to the seller that the goods are required for a particular purpose and relies on the skill of the seller, then there is an implied condition that the good must be fit for that particular purpose.

If the good can only be used for one purpose such as pants, shoes, etc. then it is not necessary for the buyer to tell the seller the purpose for which he requires the good. In such a circumstance the condition as to fitness for purpose will be implied. In *Priest v. Last*,<sup>137</sup> the Plaintiff bought a hot-water bottle from the Defendant who was a chemist. The bottle was filled with hot water and used by the Plaintiff's wife for bodily application to relieve cramp. On the fifth time of using it, the bottle burst and the wife was severely injured.

Evidence showed that the bottle was not fit for use as a hot-water bottle. It was held that the plaintiff was entitled to recover the cost he has incurred for treating his wife.

Also, in *Grant v. Australian Knitting Mills Ltd*,<sup>138</sup> the Plaintiff bought a pair of long woollen underpants from a retailer. The underpants contained an excess of sulphite which was a chemical

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<sup>136</sup>[1967] 3 All E.R. 253

<sup>137</sup>[1903] 2 K.B. 148

<sup>138</sup>[1936] A.C. 85.



used in the manufacture. After wearing the pants for two days, the Plaintiff contacted a disease called dermatitis. The Plaintiff brought this action against the manufacturer. It was held that the Defendants were liable because the pants were not fit for purpose.

***d) Merchantable quality***

If goods are bought by description from a seller who deals in those goods there is an implied condition under section 14(2) SOGA that the goods must be of merchantable quality. Goods are said to be of merchantable quality if they are fit for the purpose or purposes to which goods of that kind are commonly put.

However, there is no implied condition that goods are of merchantable quality in the following circumstances:

- (i) if any defect in the good is specifically drawn to the attention of the buyer before the sale; and
- (ii) if the buyer examined the goods before the contract is made, and the defects are of the nature which the examination ought to reveal.

***e) Sale by sample***

Finally, section 15 SOGA provides that where there is a contract of sale by sample, there is an implied condition that:

- (i) the bulk shall correspond with the sample in quality;
- (ii) the buyer shall be given the opportunity to compare the bulk with the sample;
- (iii) that the good shall be free from any defect which would not be apparent on reasonable examination of the sample.

The various implied conditions are meant to protect consumers because parties often do not take time to define their obligations when entering into most contracts of sale of goods. Therefore, the implied terms will apply to contracts of sales of goods unless the parties have expressly excluded them.

**Question 4**

Alhaja Sule sold a car to Madam Kofo for ₦80,000 and effected a change of ownership of the car in favour of Madam Kofo. Madam Kofo sent her driver on errand to Lagos. The police at the Toll Gate stopped the driver and the car's particulars were checked. The police discovered that the car really belonged to Mr. Sekoni and that Mr. Sekoni had earlier reported to the Police the theft of his car at their station. Madam Kofo was furious and disappointed.

Advise the parties.

**Answer**

Apart from the express terms agreed upon by the parties to a contract of sale, the parties' responsibilities may be further amplified by other term known as implied terms. Such terms may be implied by the court, statute or custom in order to give the contract business efficacy.

The facts of this case raise a legal issue relating to the implied condition of a seller as to title.

There is an implied condition in any contract of sale of goods that the seller has a right to sell under section 12(1) SOGA. The seller is also deemed to give an implied warranty that the buyer shall enjoy quiet possession of the goods and that the goods are free from any charge or encumbrance in favour of a third party. Thus, a seller who has no title will obviously be in breach of a condition implied as to title.

A condition is an important term which forms the basis of the whole contract. The breach of a condition normally gives the aggrieved party a right to repudiate the contract. However, the buyer's right to repudiate the contract is narrowed down by section 1(1) (c) SOGA. According to the section, a buyer will lose his right to repudiate the contract once he has accepted the goods. In that circumstance, the buyer can only sue for damages.

However, section 11 (1) (c) SOGA does not apply where the seller is in breach of an implied condition as to title. When a seller does not have title, then, he cannot confer any good title on the buyer. Hence, the buyer can recover the price paid for the goods for total failure of consideration. It is immaterial that the buyer has accepted the good and used it for some time. In *Akoshile v Ogidan*,<sup>139</sup> the Defendant sold a stolen car to Plaintiff. The Police subsequently recovered the car from the Plaintiff. The Plaintiff instituted an action to recover the purchase price. It was held that there had been a failure of consideration; hence, the Plaintiff was entitled to recover the purchase price.

We now turn to the application of the above principles to the fact of the case at hand. The question reveals that Mr. Sekoni was the true owner of the vehicle. It is not clear how Alhaja Sule came to be in possession of the car (i.e. whether through purchase or theft). Since she is not the true owner she cannot confer a valid title on Madam Kofo. AlhajaSule is therefore in breach of an implied condition as to title in section 12(1) (a). It follows that Madam Kofo can successfully sue Alhaja Sule for the purchase price of W80,000and also claim damages.

### **Question 5**

- (a) Explain what is meant by "property" and "passing of property" in a contract of sale of goods.
- (b) What are the consequences of passing of property?

### **Answer**

(a) The word "property" is used in a technical sense in the Sale of Goods Act. It is not used in the Act as a synonym for goods. Rather the word "property" means "general ownership."

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<sup>139</sup> Supra

Property is defined in section 62(1) SOGA as the general property in goods and not merely a special property. An example of special property is the right of a bailee (someone who has possession without being the owner), for instance, a mechanic who is in possession of a car entrusted to him for repair, is not the general owner of the car. Hence, "property" and possession do not mean the same thing. It is possible for "possession" of certain goods to be vested in one person whilst the property is vested in another.

Passing of property is the transfer of ownership or title of the good from the seller to the buyer. As a matter of fact, the main objective of the contract of sale of goods is to pass property from seller to buyer. This is obvious from the definition of contract of sale of goods - an agreement whereby the seller transfers or agrees to transfer the property in the goods to the buyer for a money consideration called the price.

(b) Many consequences flow from the passing of property from the seller to the buyer. These are as follows:

- (i) The passing of property divests the seller of ownership and vests ownership in the buyer who consequently becomes the new owner;
- (ii) Unless otherwise agreed, the risk of any accidental loss or damage to the good passes to the buyer when property passes. For instance, if the good is stolen or destroyed after property has passed, then it is only logical that the owner should bear the loss;
- (iii) If the price has not been paid, the seller can sue for the price;
- (iv) If the good has not been delivered, the buyer can claim delivery. However, where the buyer has neither paid nor tendered the price, he will not be entitled to delivery unless the seller has agreed to give him credit.<sup>140</sup>

## **Question 6**

Explain briefly the rules governing the passing of property in a contract of sale of goods.

### **Answer**

The Sale of Goods Act lays down the rules for determining the exact time at which property in the goods passes in sections 16-18. The provisions are important because the parties do not usually express their intentions as to the passing of the property.

The time when property passes depends mainly on whether the good is unascertained or specific.

### ***Unascertained goods***

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<sup>140</sup>See s. 28 SOGA.

The first rule concerns unascertained goods. By section 16 SOGA, where there is a contract for the sale of unascertained goods, no property in the good is transferred to the buyer, unless and until, the goods are ascertained. Thus, in a contract for the sale of "20 crates of

cement from a store", the property in the cements does not pass until the 20 bags are brought out and set apart for the buyer, that is until they are ascertained i.e. earmarked for the contract.

### ***Specific goods***

If the contract is for the sale of specific or ascertained goods, property passes to the buyer when the parties intend it to pass.

Where the parties do not express their intention as to the time when property passes, as it is usual in practice, section 18 lays down five rules for ascertaining the intention of the parties as follows:

**Rule 1:** Where there is a contract for the sale of specific good in a deliverable state, the property in the good passes to the buyer when the contract is made. It is immaterial whether the time of payment or the time of delivery or both are postponed. The effect of rule 1 may be illustrated as follows: If B enters S's shop and buys a radio-set for ₦2,000 on the term that B will come and take delivery the next day and pay S. If S's shop is burgled that night and the radio-set is stolen, S can sue B for the price of the radio because property has passed to him when the contract was made and risk had also passed to him notwithstanding that B had not paid and S has not delivered the radio-set to X. In *Tarling v Baxter*,<sup>141</sup> there was a sale of haystack. Before the buyer took it away, it was burnt down. It was held that the loss fell on the buyer and he still had to pay the price because the property.

**Rule 2:** Where the seller has to do something to the goods for the purpose of putting them in a deliverable state, the property does not pass until the thing is done and the buyer is notified. Goods are in a "deliverable state" when they are in such a state that the buyer would be bound to take delivery of them. If a seller sells a second-hand car and agrees that he will respray it and fix new tyres on it, the property does not pass until buyer has notice that these had been done. In *Underwood Ltd v. Burgh Castle Brick and Cement Syndicate*<sup>142</sup> the plaintiff sold an engine to the defendants. At the time the contract was made, the engine was on the Plaintiffs premises and was fixed to a bed of concrete by bolts. It was necessary to detach the engine before it could be delivered. The engine was broken while being loaded on a railroad truck. It was held that the engine was not in a deliverable state. Hence, property had not passed to the defendant.

**Rule 3:** Where the seller is bound to weigh, measure, test or do some other things to the good the property does not pass until such acts or things have been done.

**Rule 4:** When goods are delivered to the buyer "on approval or return" the property passes when:

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<sup>141</sup> (1827) 6 B&C 360.

<sup>142</sup>[1922]1 K.B. 343

- i) the buyer signifies his approval/acceptance, or
- ii) when the buyer retains the good without giving notice of rejection until the expiration of a fixed time or reasonable time, where no time is fixed.

However, if the person taking the goods does any act in relation to the goods, which signifies that he is the owner, such as selling or pledging them, then he will be deemed to have adopted the transaction and the property in the goods will pass to him.

**Rule 5:** Where there is a contract for the sale of unascertained goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, the property in the goods passes to the buyer. The term "unconditional appropriation" means that some acts have been done by either the seller or by the buyer, whereby the goods are irrevocably earmarked or committed to the contract so that those goods and no others have been earmarked as the subject of the sale. One example of such appropriation is given in rule 5(2) "where in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer, he is deemed to have unconditionally appropriated the goods to the contract." Accordingly, it was held in *Badische Anilin und Soda Fabrik v Johnson & Co. Basle Chemical Works Bindschedler*<sup>143</sup> that if a buyer orders goods of a certain description by post from the seller, the dispatch of goods corresponding with description by the seller amounts to appropriation by 5 with B's consent.

### Question 7

Judas went to the Manager of Pilate Motor Company Ltd. and told him that he was looking for a strong car that can move on "rugged terrain". Judas further explained to the Manager that he required such a car because his job, as an engineer, involved travelling to the rural areas where roads are bad. The Manager advised Judas to buy a very small and fragile "Toyota Starlet" and told him further "You will never regret buying it. Anyway, you cannot get a better car anywhere". On the strength of that statement, Judas bought the car at a price of W200, 000. Judas discovered, after only 2 weeks, that the Toyota Starlet was a pleasure car and unsuitable for the purpose for which he wanted it. Judas is bitter, frustrated and angry.

Advise him.

### Answer

The central issues for determination in this case are (i) whether there is a breach of an implied condition of fitness for purpose; (ii) the legal effect of the statement made by the Manager to Judas and the determination of the remedy available to Judas, if any. According to section 14(1)

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<sup>143</sup>[1919J 1 K.B. 459.

SOGA, there is no implied condition or warranty that a good supplied is fit for any particular purpose.

However, where the buyer makes it known to a seller who normally sells that kind of goods, that he requires it for a particular purpose, then there is an implied condition that the goods will be fit for that purpose. However, the seller can escape liability if the court is satisfied that:

- (i) the buyer did not rely on the seller's skill or knowledge; or
- (ii) it was not reasonable for him to do so.

We now turn to the consideration of the second issue which is the legal effect of the statement made by the Manager to Judas. Statements made by parties during the negotiations can broadly be classified into (i) mere puff; (ii) condition; or (iii) warranty. It is usual for traders to describe their goods in glowing terms. Such praise (mere puff) in general, does not give rise to any legal liability.

It must however be noted that the words must be construed in their context. Therefore, statements describing the subject matter of contract of sale may not form terms of the contract.

Applying the above principles to the question, it is arguable that the statement of the manager of Pilate Motor Company amounted to a condition. This is because Judas made it clear the type of vehicle he wanted to buy and the facts revealed that Judas bought the vehicle on the strength of the statement.

In *Harling v. Eddy*,<sup>144</sup> the owner of a cow said to the buyer "I guarantee the cow. I promise to take it back if she is not good". It was held that a statement that an animal is sound in every respect would generally be regarded as a warranty but since the seller had further promised to take the animal back if she was not good then he must have intended the statement to be a condition.

The question whether it was reasonable for Judas to have relied on the statement of the Manger will be considered later. If a term is classified as a condition, the innocent party usually has different options. According to s.11(1)(a) SOGA he can repudiate the contract in which case:

- i. he can reject the goods;
- ii. he is not bound to pay the price;
- iii. if he has paid the price he can recover it because the consideration for it has failed;
- iv. he can also sue for damages.

The innocent party may also elect to treat the breach of condition as a breach of warranty, in which case he could either retain the goods or claim damages. It must however be pointed out that the buyer's right to reject the goods for breach of condition is restricted by s. 11(1)(c).

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<sup>144</sup>[1951]2 K.B. 739

According to the section, if the contract is indivisible, the buyer will lose his right to reject the goods once he accepts the good or any part of it. In that circumstance, the buyer can only sue for damages.

This brings us to the question of the reasonableness or otherwise of Judas' reliance on the statement of the manager. In this regard, Judas saw the Toyota Starlet and inspected. It was curious how he believed the manager's statement. As an engineer, Judas ought to have known that "a very small, and fragile Toyota Starlet" can hardly meet his requirement for a car that can travel on "rugged" roads. It does not even require any erudition or learning for a reasonable man to come to this conclusion from the facts of the case. Therefore, in the circumstances of the case Judas' reliance on the manager's statement could be said to be unreasonable.

Even if the statement were to be regarded as a condition, Judas right to repudiate the contract and reject the car is narrowed down by S.11(1)(c) since he had already accepted the car and used it for 2 weeks, he can no longer reject the goods. Rather the possible cause opened to him will be to sue for damages. And as said earlier, his chances of success are very dim.

### **Question 8**

(a) What constitute an acceptance under the *Sale of Goods Act*?

(b) Taiye sold 100 bags of beans to Lere at the price of N10,000 a bag. The 100 bags of beans were delivered at Lere's warehouse but Lere without examining them sold and delivered them to Thomas. Thomas examined the beans and discovered that 50 bags were bad. He therefore rejected the entire consignment. Lere also informed Taiye that he was also rejecting the 100 bags of beans.

Advise Lere and Thomas.

### **Answer**

(a) It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them. Section 34(1) SOGA provides that the buyer is not deemed to have accepted the goods unless and until he has a reasonable opportunity of examining of the goods. By s.35 acceptance is deemed to take place when the buyer:

- i) intimates to the seller that he has accepted the goods; or
- ii) after the goods have been delivered to him he does any act to them which is inconsistent with the ownership of the seller (e.g. where the buyer uses the goods or sells them to another person);
- iii) when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he rejects them.

Hence, a buyer is not deemed to have accepted goods until he has examined them or at least had reasonable opportunity to examine them. Thus, delay in rejection will not defeat the claim of the buyer unless the delay is unreasonable. The effect of the provision therefore is that persons who buy goods such as pressing iron, air conditioner etc. will be able to examine and test them in their own houses. If the goods turn out to be faulty, they will be able to return them and repudiate the contract.

(b) The central issue here are (i) whether there is acceptance where goods have been delivered to a buyer who resells them to a sub-buyer without examination and (ii) whether a buyer can reject an entire consignment of 100 bags of beans when only 50 bags were bad.

What constitutes acceptance has been examined in question (a) above. The second mode of acceptance in section 35 raises a problem of conflict between section 34 and section 35 arising from the fact that the buyer may carry out an act that is inconsistent with the seller's ownership before he has inspected the goods. For instance, if the buyer, after delivery, but before having had a reasonable opportunity of examining the goods, resold the goods to another person, does the buyer's act constitute acceptance under S.35 or is there no acceptance under S.34'?

It was held in *Hardy and Co. v. Hillerns and Fowler*<sup>145</sup> that there was an acceptance. In the case, B bought wheat from S. The wheat was delivered to B on March 21. On the same day, B sold and delivered part of it to T. Two days later, B discovered that the wheat did not conform to the contract and he purported to reject. It was held that by sub-selling the wheat to T, B had accepted the goods under s.35. B can therefore no longer reject it for breach of condition and that only damages could be claimed.

Now turning to the facts of the case at hand, it is clear that the sale of 50 bad bags of beans by Taiye to Lere entitles Lere to reject the goods. However, since Lere has resold the goods to Thomas he is deemed to have accepted delivery although he had not examined the goods. Lere has therefore lost his right to reject the goods pursuant to section 11(1)(c). The option opened to him is to sue Taiye for damages.

Thomas on his own part can rightly reject all the 100 bags as he did. This is because he had not accepted the goods. It does not matter that Lere had delivered the goods to Thomas. By Section, 34(2) where the seller tenders the delivery of goods to the buyer, he is bound to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining that they are in conformity with the contract. And since what was supplied did not conform to what was contracted for, Thomas can rightly reject the entire 100 bags. In the alternative he could keep the good 50 bags, reject the bad ones and sue Lere for damages.

## Question 9

- (a) What do you understand by the maxim *Nemo dat quod non habet*?
- (b) Briefly discuss four of the exceptions to this rule.

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<sup>145</sup>[1923]2 K.B. 490.



## Answer

As a general rule, only the owner of goods (or his agent) can give a good title to the buyer. If a seller of goods has no title to the goods or has a defective title, he cannot transfer a good title to the buyer. This general rule is expressed in the Latin maxim *nemo dat quod non habet* meaning that no one can give what he does not have. This rule is stated in section 21(1) SOGA.

The effect of the rule can be illustrated thus: If A steals B's car and sells it to C, C acquires no title or a defective title since A is not the owner. In short, C cannot have a better title than A has.

In some circumstances however, goods may be effectively transferred to a purchaser by one who himself has no title or only a defective title:

- i) *Sale under order of a court*: Section 21(2)(b) SOGA provides that a court of a competent jurisdiction can order the sale of any goods if they are of perishable in nature, or likely to deteriorate if kept, or if for any other good reason it is desirable to sell them. This power is wide and can be used, for example, where a person wishes to enforce the security he has over goods in his possession.
- ii) *Agency by estoppel*: An estoppel usually operates to prevent a person from denying the truth of a fact, which he has caused another to act upon. A sale of goods by a person who is neither the real owner of the goods nor a person authorised to sell them, may nevertheless, confer a valid title to a bona fide buyer, if the true owner, either by words, or conduct, misleads the buyer into thinking that the seller is the owner or that he has the owner's authority to sell.
- iii) *Sale by a mercantile agent*: A mercantile agent is a person who in the ordinary course of his business has authority either to sell goods or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods.<sup>146</sup> The reason for this exception is that if a person leaves his goods or the document of title to the goods in the possession of an agent who normally sells such goods, anyone buying the goods from the agent would assume that the agent has authority to dispose of them. For example, if A gives B his car and instructs B not to sell it below ₦5000 but B sells the car for ₦40,000 to C and absconds. If B is a private person, no title passes, but if he is a mercantile agent, C will have a good title, if he had bought the car in good faith and without notice that B had acted in excess of his authority.
- iv) *Sale in market overt*: A market overt is an open, public and legally constituted market. It may be constituted by statute, prescription or custom and in addition every shop is a market overt as regards any goods usually sold there. By virtue of s. 22 SOGA, a sale of good by a non-owner in a market overt if it is sold during the usual hour of business and in accordance with the usage of the market confers a good title on the buyer, provided, the buyer buys in good faith and without notice of defects in the seller's title. The good must be such as are usually sold in the market and must be openly exhibited.

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<sup>146</sup>See Factors Act 1889.

Therefore, a stolen good bought in a market overt, under the stipulated conditions, will pass a valid title to a bona fide purchaser.

*In Bishopsgate Motor Finance Corp. v Transport Brakes Ltd.*<sup>147</sup>

B had a car on hire purchase from the Plaintiff and took it to Maidstone Market where he handed it to an Auctioneer for sale. When the Auctioneer could not obtain the reserved price specified by B, he arranged to sell it by private treaty in the market to C who bought the car in good faith without notice. C sold the car to the Defendant. It was held that sale by private treaty was in accordance with the usage of the market which itself was constituted by Royal Charter. In consequence, the defendant obtained a good title to the car under section 22.

### **Question 10**

Who is an unpaid seller of goods? Discuss his real remedies.

### **Answer**

It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them. By section 38, a seller of goods is deemed to be an "unpaid seller" under the following circumstances:

- a) when the whole of the price has not been paid or tendered; or
- b) when a bill of exchange, cheque, promissory note or other negotiable instrument has been received as conditional payment, and the condition has not been fulfilled by reason of the dishonour of the instrument or otherwise.

An unpaid seller has the following six remedies to compel performance of the buyer's duties: (i) A lien; (ii) A right of stoppage in transitu; (iii) A right of retention; (iv) A right of resale; (v) An action for the price; (vi) An action for breach of contract. Nos. (i) - (iv) are remedies over goods themselves while (v) - (vi) are personal remedies against the buyer. Such remedies over the goods themselves are of greater value (i.e. more useful) to the seller in practice they are called "real" remedies.

These remedies shall be considered one after the other.

(i) Alien By s. 41, a lien is the right of an unpaid seller to retain possession of the goods until the price is paid. An unpaid seller can exercise this right in the following cases:

- a. where the goods have been sold without any stipulation as to credit;
- b. where the goods have been sold on credit; but the term of credit has expired;
- c. where the buyer becomes insolvent.

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<sup>147</sup> [1949] 1 K.B. 322, 1 All E.R. 37, C.A.

Under section 43 SOGA, the right of lien is lost in the following circumstances:

- (a) when the goods are delivered to a carrier for onward transmission to the buyer, without a reservation of the right of disposal of the goods; or
  - (b) when the buyer or his agent lawfully obtains possession of the goods; or
  - (c) by waiver of his right.
- (ii) *A right of stoppage*: Delivery to carrier destroys the lien but not the right of stoppage in transitu. Under s.44, an unpaid seller who has parted with possession of the goods may, while the goods are still in transit and before they have been actually received by the buyer, retake and retain possession of them on hearing of the buyer's insolvency until such time as the price is paid or tendered.

The essential feature of this remedy is that the goods should be in the possession of a middleman who is neither the agent of the buyer nor the seller. The unpaid seller may exercise his right of stoppage either by taking actual possession of the goods or by giving notice of his claims to the carrier or his principal.<sup>148</sup> On receipt of notice of stoppage the carrier is bound to redeliver the goods to the seller who must bear the expenses of such re-delivery.<sup>149</sup>

- (iii) *Retention*: Where neither the ownership nor possession of the goods has passed to the buyer, the unpaid seller in addition to his other remedies, may withhold delivery of the goods. This right is similar to, and as effective as, a right of lien where ownership has passed to the buyer.<sup>150</sup>
- (iv) *Right of resale*: The foregoing rights are frequently exercised in practice with the ultimate view of reselling the goods. By s. 48(3) the unpaid seller may resell the goods where:
- a) the goods are physically or commercially of perishable nature; or
  - b) he exercises his right of lien or stoppage in transitu and notifies the buyer of his intention to resell and the buyer fails within a reasonable time to pay or tender the price; or
  - c) he has expressly reserved a right of re-sale in case the buyer should make default.<sup>151</sup>

The exercise of the right of re-sale does not prevent the unpaid seller from recovering damages from the original buyer for any loss occasioned by his breach of contract.

## Question 11

- (a) Discuss an unpaid seller's right of stoppage-in-transitu. In what circumstances is the right exercisable and what are the consequences of its exercise?

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<sup>148</sup>Section 46(1) SOGA.

<sup>149</sup>Section 46(2) SO GA.

<sup>150</sup>Section 39(2) SOGA.

<sup>151</sup>Section 48(4) SOGA.

- (b) S agrees to sell to B 100 boxes of oranges; delivery and payment to be postponed till a fortnight to give or allow enough time for payment to be made. At the end of the fortnight, S gives the boxes to a haulage contractor to carry to B but on hearing that B is in financial difficulties, S telephones the lorry driver ordering him not to deliver the goods but to return them to him. The next day, he resells the oranges at a price higher than that agreed with B.

Advise the parties.

### **Answer**

a) Right of stoppage in transitu is the right of an unpaid seller under sections 44-46 of SOGA to stop goods in transit and retain possession until the price is paid.<sup>152</sup> The right is exercisable upon the following conditions:

- (i) the seller must be unpaid;
- (ii) the buyer must be insolvent;
- (iii) the goods are still in transit, i.e. in the possession of a middleman who is neither the agent of the buyer or seller.

A seller is unpaid where, in a non-credit sale, the price for the good had not been paid or tendered. Under section 62(3), a person is deemed to be insolvent if he has ceased to pay his debt in the ordinary course of business or unable to pay his debt as they fall due, regardless of whether he is bankrupt or not.

Under section 45 SOGA, goods are deemed to be in the course of transit when it is delivered to a carrier for transmission to the buyer until the buyer or his agent takes delivery of them. If the carrier is the seller's agent, it seems the seller is still in possession and he may exercise his right of lien. But if he is the buyer's agent, then, the buyer has possession and the right of stoppage Intransitu cannot be exercised.

Transit is at end:

- (c) if the buyer or his agent obtains delivery of the goods before they arrive at their designated destination;
- (d) if after arrival of the goods at their destination, the carrier attends to the buyer;
- (e) if the carrier wrongfully refuses to deliver the goods to the buyer or his agent.

The unpaid seller may exercise his right of stoppage either by taking actual possession of the goods or by giving notice of his claim to the carrier. The practical consequences of the exercise of this right are two folds. First, upon the receipt of notice of stoppage, the carrier is bound to re-deliver the goods to the seller who must bear the expenses of such re-delivery. Second, the

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<sup>152</sup>Section 44 SOGA.

unpaid seller's right of stoppage in transitu is not affected by any sale or other disposition of the goods, such as a charge or a pledge which the buyer may have made, unless the seller has assented to such.<sup>153</sup>

b) Payment and delivery are concurrent conditions unless the parties agree otherwise. A seller of goods is deemed to be an unpaid seller, *inter alia*) when the whole of the price has not been paid or tendered. In this case, S is an unpaid seller since payment of the contract price by B has been postponed for a fortnight.

One of the remedies of an unpaid seller is a right of stoppage in transitu.

The Scope and extent of the remedy have been discussed above, It is not clear what is meant by "financial difficulties". If what is meant by the word is that B has become insolvent i.e. unable to pay his debts as they fall due then S can exercise an unpaid seller's right of stoppage in transit provided the goods (boxes) are still in transit.

The haulage driver, here, seems to be a middleman since it is not indicated that he is either the agent of S or B. This being so, it means that S can exercise his right of stoppage either by taking actual possession of the goods or by giving notice of his claim to the carrier. S was, therefore, entitled to telephone the carrier and order him not to deliver the boxes to B.

Although the right of stoppage in transitu is frequently exercised with the ultimate view of reselling the good, the unpaid seller can only resell the good lawfully where the following conditions obtain:

- (i) the goods are physically or commercially of perishable nature;
- (ii) he has notified the buyer of his intention to resell and the buyer fails within a reasonable time to pay;
- (iii) he has expressly reserved a right of re-sale in case the buyer should make default.

Since none of these situations exist in this fact pattern, it was wrong for S to have resold the boxes without notifying B and awaiting his response within a reasonable time. S will therefore be liable to B for a breach of contract.

## **LAW OF AGENCY**

### **Question 1**

- (a) Who is an agent?
- (b) Discuss the various types of agency and how they may be created

### **Answer**

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<sup>153</sup> This rule is however subject to the exception provided in the proviso to Section 47 SOGA.

(a) In commerce, the word "agent" is used in liberal sense. For example, a "sole agent" may simply mean a person who is given sole selling rights by a particular manufacturer. The sole agent, here, is an independent contractor. When he contracts with third parties he does so as a principal in his own right.

The word "agent" however has a different meaning in law. An agent is a person who acts on behalf of another, called "the principal," in his dealings with third parties. The function of an agent is principally to create a contractual relationship between the principal and a third party. In practice, the two most important functions of an agent are: (a) making of contracts on his principal's behalf and (b) disposing of his property.

There are different types of agency, viz *general agency*, *special agency*, *mercantile agency* and *brokerage*.

### ***General agency***

Here, the agent has a broad or general authority to represent his principal in a particular matter in the ordinary course of his business, trade or profession. For example, a managing director of a company has general authority to act on behalf of the company on management matters. Similarly, a legal practitioner has broad authority to conduct the case of his clients and do all such things that are incidental to the case without the need to seek the authority of the client at every stage.

### ***Special agency***

Here, the agent's authority does not arise in the ordinary course of his business, trade or profession. Rather he is authorised to act outside the normal scope of his business, trade or profession. Hence, his authority is limited to a particular transaction or event. An example is where the Board of Directors delegates certain Board's powers to the General Manager.

### ***Mercantile agency***

Here, the agent in the customary course of his business has authority to sell or buy good or to raise money on the security of goods.

### ***Brokerage***

Here, the agent is authorised by his principal to negotiate and conclude a contract for the sale of goods but without being entrusted with possession of the goods. Other types of agency are *Del credere* agency, auctioning, factoring, etc.

The relationship of principal and agent may arise in any of the following ways:

- (i) by agreement, express or implied;
- (ii) by the doctrine of estoppel, where for instance, the principal, by word or conduct, allows another person, A, to appear to the outside world that A is the principal's agent;
- (iii) by ratification, where an initially unauthorised act is, subsequently affirmed (or ratified) by the principal and thereupon becomes binding on the principal;

(iv) by necessity in cases where it is deemed urgently necessary by law that one person should act on behalf of another.

## **Question 2**

"An agent's authority to bind his principal by his acts is derived from an express agreement between the principal and agent that the agent should act on the principal's behalf. Without such an agreement an agent cannot bind his principal by his acts".

Discuss the circumstances in which the acts of an agent can bind his principal without prior authority.

## **Answer**

Agency is a relationship, which exists between two persons when one, called the agent, is considered in law to represent the other called the principal in such a way that the agent is able to affect the principal's legal position with third parties. In practice, the most important functions of an agent are the making of contracts and disposition of properties on behalf of the principal.

The central feature of the agency relationship is the authority of the agent to affect his principal's relationship with third parties.

How does the agent acquire his authority? The authority may arise in any of the following ways:

### ***a) Express authority***

This is the simplest and commonest way of creating an agency relationship. The principal authorises an agent to perform an act and he does it. It is not necessary for the authority to be in writing or for the parties to be expressly described as "principal" and "agent." The law will give effect to the relationship if agency is the essence of what the relationship between the parties.

### ***b) Implied authority***

The agent's authority is not confined to those things, which he is expressly instructed to do by the principal. In addition, the agent has authority to do everything necessary or incidental to the execution of his express instruction. For example, an agent employed to sell a house has an implied authority to open the house and conduct prospective buyers round it.

### ***c) Usual authority***

If an agent acts, in the course of his business or profession, such as company managing director, estate agent, a legal practitioner, etc. he has an implied authority to perform such acts that are usually performed by agents in that trade, profession or business. For instance, if it is usual for an estate agent to sign a contract on behalf of his principal, then, a particular estate agent appointed by principal has usual authority to sign a contract on principal's behalf.

It is pertinent to point out however, that a principal can restrict the usual authority of his agent, provided, such restriction is known to the third party.

#### ***d) Apparent authority***

If a person, P, without expressly appointing A as his agent, creates a state of affairs which makes A to appear as his agent, then, the law may imply an agency relationship from the conduct of the parties.

Before the principal can be liable for the acts of the agent on the basis of apparent authority, the following four conditions must be present:

- (i) the principal must have made a representation either by words or conduct that the agent is acting on his (Principal's) behalf;
- (ii) the third party must have relied on the representation;
- (iii) the third party must have altered his position based on the reliance; "
- (v) the third party must not be aware that the agent does not have real authority to act on e Principal's behalf.

#### ***e) Authority by ratification***

This occurs where the principal adopts (ratifies) an unauthorised act of another person and makes it binding on him (the Principal).

Here, authority is given retrospectively after the event has taken place. For ratification to be effective, a number of conditions must be satisfied:

- (a) the person on whose behalf the agent purported to act must have been in existence when the act was done;
- (b) the principal must have been named or been ascertainable by the agent;
- (c) the principal must have had capacity to act at the time the agent did the act;
- (d) the act must have been capable of ratification. For instance, an illegal act cannot be ratified;
- (e) the principal must be aware of all the facts.

From the foregoing, one cannot but disagree with the statement that agency relationship can only arise by agreement. Although most agency relationships are products of agreement, it is not unusual for the relationship to arise through usual, implied, apparent authority or by ratification.

#### **Question 3**

"The position of an agent is that of confidence. It gives nse to fiduciary duties". Discuss.

#### **Answer**

An agency relationship can be defined as a relationship which arises whenever one person (the agent) acts on behalf of another person (the principal) and has power to affect the principal's



legal position with regard to a third party. In practice, the two most important functions of an agent are: (a) making contracts on his principal's behalf and (b) disposing of his property.

An agent stands in a fiduciary position to his principal and like other persons in such a position, (e.g. employees, trustees, company directors and promoters), he must act in good faith and he must not allow his interest to conflict with his duty. That is, an agent must not subordinate his principal's interest to his own personal interest in the performance of his duties. Thus, in the absence of full disclosure, an agent employed to sell cannot sell to himself or act for the purchaser. And conversely, an agent employed to buy cannot, without full disclosure, buy from himself.

However, an agent can sell his own property to the principal or buy his principal's property, provided, he makes a full disclosure of that fact. If this occurs, the relationship ceases to be that of principal and agent and becomes that of vendor and purchaser and vice versa.

Another important aspect of the fiduciary nature of the relationship between principal and agent is that the agent must not make or receive secret profits. In the absence of full disclosure, he must account for all the profits. Secret profit in this context means any illicit benefit, information or opportunity received by an agent in the course of his agency.

The law enforces the fiduciary duties of an agent strictly. It is not a defence that the principal suffered no loss as a result of the agent's act. If an agent receives a bribe or secret profit, he will forfeit all his rights to remuneration (which if paid is recoverable) and indemnity.

He is also liable to instant dismissal.

#### **Question 4**

Discuss the duties, which an agent owes to his principal.

#### **Answer**

The duties, which an agent owes to his principal are derived from two main sources. The primary source is the agency contract itself.

Also, certain duties are imposed on an agent in equity because of the fiduciary nature of the agency relationship. The duties imposed on the agents from these two sources are:

#### ***i) Obedience***

If the agency is contractual, an agent, who agrees to act is bound to obey the lawful instructions of his principal and will be liable in damages if he fails to do so. The agent will not, of course be liable, if he fails to obey an instruction, which is illegal. If the agency is a purely gratuitous one, the agent incurs no liability for not embarking on the agency at all, but if he does embark on it, he will be in the same position as a paid agent.

***(ii) Duty of care and skill***

An agent must exhibit such care and skill in the performance of his duty as might reasonably be expected of an agent of his status. If the agent claims to have a special skill, he must show the degree of skill appropriate thereto. The agent is however not expected to exhibit more skill than he has held himself out to possess.

***(iii) Personal performance***

Since the relationship of principal and agent is essentially one where the personal quality and skill of the agent are of the essence, the general rule is that the agent must perform personally and cannot delegate. This is expressed in the Latin maxim, *delegates non potest delegare*. If the agent violates this rule, the principal is not bound by any contract purportedly effected on his behalf by the sub-agent. Rather, the sub-agent becomes the agent of the initial agent.

***(iv) Duty of good faith***

An agent stands in a fiduciary position towards his principal. Therefore, he must act in good faith and must not allow his personal interest to come into conflict with his duty. In the absence of full disclosure, an agent employed to sell cannot sell to himself and conversely, an agent employed to buy cannot buy from himself.

***(v) Duty to account***

An agent is bound to pay over to his principal all sums received by him on behalf of the principal. An agent must keep proper account of all transactions undertaken on behalf of the principal and produce them, on request.

***(vi) Estoppel***

An agent is not allowed to deny the title of his principal to any property or money which is the subject-matter of the agency.

**Question 5**

P employed A as his agent to travel to London to buy him some Mercedes Benz cars. He gave A £100,000 and told him to purchase as many cars as he could in London with the money. In London, A found that he could buy 10 cars with the money. However, he discovered that in Germany he could buy 15 Mercedes cars with the same amount of money. He flew over to Germany at his own expense and purchased 15 Mercedes cars with P's money. He shipped 10 of the cars to Lagos in P's name from London and 5 in a false name direct from Germany. A cleared the 15 cars and delivered 10 to P's showroom. P was delighted with A and gave him a bonus for a job well done.

Two months later, P discovered the truth. Advise P.

**Answer**

This question raises the issues of relating to at least three duties of an agent, viz, duty of obedience, duty of good faith and duty to account.

An agent must obey the lawful instructions of his principal. He must keep within the express and implied authority of the principal. An agent must not disregard his principal's instructions even if this might be for his principal's benefit. In *Bertram Armstrong & Co. v. Godfrey*,<sup>154</sup> an agent was instructed to sell stock when it stood at J85. The price did come up to J85 but the agent failed to sell. It was held that the agent had no general discretion for a higher price. Another important duty of an agent is that he must act in good faith and must not allow his interest to conflict with his duties. An agent is therefore not allowed to make secret profit or receive secret commission from a third party. Hence in the absence of full disclosure, the agent must account for such profit. In *Hippisley v. Knee Brothers*<sup>155</sup> a principal appointed an auctioneer to sell some goods. The auctioneer charged the full expenses incurred items to his principal, without disclosing that he (the auctioneer) had received certain trade discounts. It was held that he must account for the difference.

An agent is bound to pay over to his principal all sums received by him on behalf of his principal. He must keep proper account of all transactions undertaken on behalf of the principal and produce them on request.

Relating the above principles to the facts at hand, one could see clearly that A was in breach of the duty of obedience when he left London for Germany. A's instruction was to go to London and buy cars. He had no discretion to go to Germany or other place. What A should have done is to inform P of the development and get his permission. He is obliged to do this even if he has no motive to defraud P. Also, A is in breach of duties of good faith because he kept the development secret and rather used the information for his own personal benefit. In this regard he has allowed his own selfish interest to override his duties to P. A's act of keeping the 5 cars amounted to keeping secret profit. Finally, A has not kept a true and accurate account of his transactions. Here, A has used P's money to fatten his own nest and therefore must account P.

Now that P is aware of the truth, I will advise him to ratify A's trip to Germany and recover the ill gotten 5 cars from A. P is entitled to recover the bonus he has given to A and also dismiss him.

## Question 6

a) "The doctrine of undisclosed principal is anomalous, unjust and inconsistent with elementary principles of contract". Discuss.

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<sup>154</sup>Supra

<sup>155</sup>[1905] 1 KB 1,92 LT 20.

b) David Ltd. appoints Elere as its (David's) agent to buy a certain equipment from Dawodu Ltd. The manager of David Ltd. instructs Elere not to disclose to Dawodu Ltd. that he is acting for them because he knows that Dawodu Ltd will not want to sell the equipment to them as they are competitors. Elere succeeded in purchasing the equipment from Dawodu Ltd. and subsequently transferred it to David Ltd. Dawodu Ltd. got to know the actual position. Advise David Ltd.

### Answer

a) Where an agent makes a contract on behalf of a principal within the scope of his authority without disclosing the existence of the principal to the third party, the principal is said to be undisclosed. In derogation from the principle that only parties to a contract can sue and be sued on it, the undisclosed is allowed to sue and be sued on the contract with the third party. The principle of undisclosed principal has been justified on practical ground that it is a usual commercial practice for middlemen to be involved in the negotiation and conclusion of business transactions. It is therefore felt that the undisclosed principal should be able to sue the third party or be sued by the latter in circumstances where it would not lead to injustice to either party.

However, there are three exceptional cases where the undisclosed principal cannot sue or be sued by the third party.

The first is where the contract between the agent and the third party expressly provides that the agent is the sole principal.

The second is where the terms of contract are inconsistent with agency. In *Humble v. Hunter*,<sup>156</sup> an agent signed a charter party in his own name and described himself as "owner" of the ship. Held, his undisclosed principal could not sue.

The third is where the contract made between the agent and the third party is too personal to permit an undisclosed principal to intervene. In *Said v. Butt*,<sup>157</sup> P wanted a ticket for the first night of a new play. Owing to personal differences with the managing director of the company who owned the theatre he was unable to get one. He therefore persuaded a friend, A, to buy a ticket for him. A bought a ticket in his own name and gave it to P. On arrival at the theatre, P. was not allowed to occupy his seat, and he left and brought an action. Held that the personal identity of the ticket holder was of great importance to the theatre. Since, the ticket holder was a person with whom the theatre would not have contracted directly, he could not contract with them indirectly by acting through an agent.

Based on the foregoing exceptions, it can be said in conclusion that the doctrine of undisclosed principal is not unjust. The principle has been allowed based on commercial expediency.

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<sup>156</sup>(1848) 12QB319, [1843]

<sup>157</sup>[1920] 3 K.B. 497, [1920] All E.R. 232, 124 L.T. 413.

Obviously, the principle will be disregarded where it will lead to injustice as demonstrated in *Said v. Butt*.<sup>158</sup>

(b) When Elere made the contract for the sale of the plot of land with Dawodu Ltd., Elere did not disclose the existence of David Ltd. its principal. David is, therefore, an undisclosed principal.

The general rule is that an undisclosed principal can sue and be sued on the contract made by the agent with the party. However, one of the exceptions to this rule is where the identity of the principal is material to the third party. The question, here, is whether the identity of the buyer of the equipment matters to Dawodu Ltd. Here, it is said that David Ltd. and Dawodu Ltd are competitors. This alone may not be sufficient to conclude that the identity of the purchaser in this case was material. However, the further instruction of the Manager of David Ltd. that Elere should hide the identity of the real buyer might tend to show that the identity of the buyer may be material. If Dawodu Ltd would not have contracted with David Ltd. personally; Dawodu Ltd. may bring an action to revoke the contract of sale of the equipment. If David Ltd could not contract with Dawodu Ltd directly; Dawodu Ltd. cannot achieve this indirectly by acting through Elere.

### **Question 7**

Kayode was the owner of an old ship called MV Tina. Kayode planned to replace the ship and buy a new one. Kayode appointed Ayo as his agent for these purposes. Kayode instructed Ayo to sell MV Tina for J10,000. Ayo's commission was fixed at 10% of the purchase price of the new ship. Because MV Tina sails from port to port, Ayo engaged Lade to sell Tina at Port Ioko at the price for J12,000. Lade succeeded in selling the ship for J15,000 but accounted for only J12,000 to Ayo. Ayo travelled to Hamburg and successfully negotiated for the purchase of a new ship at J20,000 with CDC Company. The managing director of the company gave Ayo a brand new Mercedes Benz car in appreciation of his patronage. Ayo did not disclose this to Kayode.

Assuming that all the parties eventually know the truth of the transactions, advise the parties as to their legal rights.

### **Answer**

The facts of this case essentially raise the issues of the legal implication of an agent sub-delegating and the duty of an agent not to make secret profit.

An agency relationship exists whenever one person (the agent) acts on behalf of another person (the principal) and has power to affect the principal's legal position with a third party. In practice, the most important functions of an agent are:

(a) making contracts on principal's behalf; and

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<sup>158</sup>Supra.

(b) disposing his property.

It is clear from the facts of this case that an agency relationship existed between Kayode and Ayo notwithstanding that the parties have not expressly described themselves as principal and agents. The functions of Ayo here were to sell MV Tina and buy a new ship from Hamburg. Therefore the law of agency governs the relationship. ,

Since the relationship of principal and agent is essentially one where the personal quality and skill of the agent is of essence, the general rule is that the agent must perform personally and cannot delegate. The rule is *delegates non potest delegare*.

There are however exceptions to this rule. The first arises where the principal expressly authorises the agent to delegate his powers. The second is where a power to delegate can be implied from the circumstances of the case and thirdly where the act is only ministerial in nature.

It will be noted here that Ayo had delegated his duty to sell Tina to Lade. This according to the above general principle is unlawful unless Ayo can show that the facts of the case fall into one of the exceptions. The exception that will probably avail Ayo is the second one where a power to delegate can be implied. This is because Tina sails from port to port and Ayo cannot practically be chasing the ship from port to port. Hence, it is arguable that Ayo was constrained to delegate the function to Lade.

We now turn to the effect of delegation. Where an agent appoints a delegate, the delegate becomes the agent of the first agent and not of the principal unless the principal has given the agent authority to appoint a particular person. Therefore, there is no privity of contract between the principal and the sub-delegate. The principal cannot sue the sub-delegate for breach of duty. His right is only against the agent. It was held in *Calico Printers Association Ltd v. Barclay's Bank Ltd*<sup>159</sup> that where the sub-agent is negligent, the principal's remedy is against the agent and not the sub-agent.<sup>160</sup>

Also, an agent stands in a fiduciary relationship to his principal and like other persons in such a position; he must act in good faith and must not allow his interest to conflict with his duty. The agent must not make or receive secret profit. A secret profit means any benefit, information or opportunity received by an agent in the course of his agency. In the absence of full disclosure, the agent must account for the profit. It is not a defence that the principal suffered no loss as a result of the agent's act.

Here, both Ayo and Lade are in breach of their respective duty of utmost good faith as agents - Ayo, as Kayode's agent and Lade, as Ayo's agent. Ayo is liable to return the Mercedes Benz car to Kayode, while Lade is liable to return the J3,000 made in the course of selling Tina to Ayo, while Ayo will also be obliged to account to Kayode.

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<sup>159</sup>(1931) 145 L.T. 51, 36 Com Cas 1793.

<sup>160</sup>Note however that the absence of a contract between the principal and the sub-agent would not prevent the principal from suing the sub-agent directly in respect of negligent misstatement. See *Hedley Byrne & Co. Ltd v. Heller & Partners Ltd* [1964] A.C. 465,

## Question 8

a) "An agency coupled with an interest cannot be revoked." Discuss.

b) Lade is indebted to Iide to the tune of ₦200,000. Lade then appointed Jide as an agent to sell Lade's house in Abeokuta for ₦100,000 and collect the purchase price. Lade further instructed Jide to collect rents of ₦2m in respect of his five houses in Lagos and deduct his 10% commission. Lade also instructed Jide to obtain advertisements for his (Lade's) newspapers, the Daily Stars, at a commission of 10% on the advertisements obtained by Jide, Jide has obtained 10 different advertisements for the Daily Stars costing ₦50,000.

Lade has now abruptly terminated his agency contract with Jide.

Advise Jide.

## Answer

a) The relationship of principal and agent can be brought to an end (terminated) either by the act of the parties or by operation of the law. One of the instances where it can be terminated by the act of the parties is where either the principal or agent terminates the relationship unilaterally by notice. Where it is the principal who does this, he is said to have revoked the agency and where it is the agent he is said to have renounced it.

There are, however, some circumstances in which an agency is considered to be irrevocable. The most important of these is where the agent is said to have "authority coupled with an interest". An agency is coupled with an interest where, for instance, a debt due from the principal to the agent and the authority has been given by the principal for the agent to act on the principal's behalf as security for that debt. Until the debt is discharged, the principal will be unable to revoke the agency. An agency coupled with an interest is not only secured from termination by notice, it is also not affected by the principal's bankruptcy, death or unsoundness of mind which in ordinary cases terminate a contract of agency.

In *Raleigh v. Atkinson*,<sup>161</sup> P entrusted goods to A for sale. From time to time, A made advances to P and received authority to dispose of the goods at the market value and to repay himself the advances out of the proceeds. It was held that A's authority was coupled with an interest and was irrevocable.

However, in *Smartv. Sanders*,<sup>162</sup> where P appointed A to sell goods on his behalf and A subsequently made advances to P. P thereafter withdrew A's authority. It was held that A's authority was revocable on the ground that at the time A was given the authority, he did not have any accrued interest. Therefore, A had no power to sell the goods in order to recoup his money.

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<sup>161</sup>(1840) 6 M &W 670.

<sup>162</sup>Supra

(b) Lade had authorized Jide to act on his (Lade's) behalf in order to secure the debt of ₦200,000 owed by Lade. Thus the agency created is coupled with an interest and therefore irrevocable. The termination by Lade is therefore ineffective.

Apart from this, Jide had obtained 10 advertisements costing ₦50,000 for Lade. It is one of the rights of an agent to receive remuneration or compensation for his services unless the agency is a gratuitous one. In this case, Lade had expressly agreed to pay Jide a 10% commission on advertisements secured.

If the principal is liable to pay the agent his remuneration or commission and the agent still has possession of some of the principal's property (including money) the agent can retain that property as security for the due satisfaction of his outstanding claims. This right is known as a lien.

From the foregoing discussion, Tide can deduct the ₦200,000 owed him by Lade and 10% of the ₦50,000 as his commission from the ₦500,000 collected by him for advertisement.

### Question 8

"That an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him, is a well established principle of law. In that case the principal is bound by the act, whether it be to his detriment or his advantage and whether it be founded in a tort or contract to the same effect as by and with all the consequences which follow from the same act done by his previous authority." - Per Tindal C. J. in *Wilson v. Tunman*.<sup>163</sup>

In the light of the above statement, discuss the requirements for a valid ratification.

### Answer

Ratification is one of the modes of creating an agency relationship. Ratification occurs where the principal adopts (ratifies) a prior unauthorised act of another person and makes it binding on him (the principal). Here, real authority is given after the event has taken place. The principle of ratification can be illustrated by a simple hypothetical case. An agent, A, without authority, insures goods with X company on behalf of P, his principal. The goods perish at sea. A informs P of his action. P is pleased and adopts the insurance taken by A in respect of the goods.

Ratification is retroactive in its effect. Thus, it relates back to the commencement of transaction as if the agent has been authorised by the principal ab initio. In *Bolton Partners Ltd v. Lambert*,<sup>164</sup> T made an offer to sell goods, which A accepted on P's behalf but without P's authority. Thereafter, T purported to revoke his offer. P then ratified A's acceptance thereof. It

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<sup>163</sup>(1843) 6 Man & G, 236.

<sup>164</sup> (1889) 41 Ch. D 295.



was held that the ratification dated back to the time of the original contract so that T's withdrawal was inoperative.

The rule that ratification is retrospective may produce unjust result if it is not restricted. It therefore becomes necessary to clearly delimit the circumstances when the rule will apply. To have a valid ratification the following conditions must be present:

- (i) The agent must have made the contract on behalf of a principal whether named or unnamed. Where the principal is not named, it is sufficient if he is identifiable e.g. where the agent contracts on behalf of "his Uncle".
- (ii) The principal must be in existence at the time the agent made the contract. A contract cannot be ratified by a non-existent principal. In *Kelner v. Bester*,<sup>165</sup> some company promoters borrowed J1,600 on behalf of a company prior to its incorporation. After incorporation, the company purported to ratify the loan. It was held that it could not do so;
- (iii) At both the time the contract was entered into and the time of its ratification, the principal must have had legal capacity to enter into the contract, which was concluded by his agent;
- (iv) The act must be capable of ratification. For instance, it is impossible to ratify an illegal act;
- (v) The principal cannot validly ratify unless he is aware of all the material facts or can be shown to have adopted A's act whatever they were.

Although a valid ratification is generally retrospective to the date of the original act, this is subject to the important qualification that vested rights cannot be divested. In *Bird v Brown*,<sup>166</sup> P sent goods to T. On hearing of T's insolvency, P's agent, A gave an unauthorized notice to the carrier to stop the goods in transit. T's trustee in bankruptcy seized the goods. Then, P purported to ratify A's notice, it was held that it was too late for him to do so since the goods had been seized by T's trustee in bankruptcy.

With this exception, it is clear that it is not in all circumstances that ratification will be valid, It will not be valid if a vested interest has been acquired by a third party.

## HIRE-PURCHASE

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<sup>165</sup>(1866) L.R. 2 L.R. 174.

<sup>166</sup>13 (1850) 4 Ex. ch. 786

## Question 1

What is hire purchase? Distinguish a contract of hire purchase from a credit sale agreement.

### Answer

If a person wants to have goods for which he cannot buy on "cash and carry basis", there are a number of ways in which he can legally obtain possession of them. Hire purchase and credit sales are forms of consumer credit transactions by which such a person may have the goods.

A contract of hire-purchase is one under which an owner of goods lets them out on hire to another person called the "hirer" in consideration of periodic or instalmental payments called hire-rent and on condition that the hirer may, at any time return the goods and terminate the hiring, or continue the hiring until the hire-rent reaches a stated sum; in which event, either the property in the goods passes to him, or he will exercise an option to purchase the goods. Therefore, a Hire-purchase is, as the name suggests, a contract of hire plus purchase. The hirer therefore has possession of the goods plus an option to purchase when all the instalments have been paid.

The essential features of a hire-purchase contract are:

- (i) It is a form of bailment, that is, a situation where an owner of goods (the bailor) delivers possession or custody (not ownership) of the goods to another (the bailee) for the accomplishment of certain purposes after which the goods are to be returned to the bailor. However, in a contract of hire purchase, the bailor is called the "owner" while the bailee is called the "hirer".
- (ii) The hirer receives possession of the goods and the right to use them. The ownership in the goods remains in the owner until the hirer has paid the final instalment and exercised his option to purchase the goods. Hence, a hirer cannot lawfully sell the goods to a third party.
- (iii) It confers on the hirer the option, and no obligation to buy the goods. A hire purchase is not a contract of sale; the hirer does not bind himself to buy the goods. He can terminate the hiring contract prematurely and discontinue paying instalments. This is what distinguishes hire purchase from other forms of consumer credit transactions including a credit sale agreement.

A credit sale is not a contract of hire but a contract of sale. It is an agreement under which the owner of goods sells and delivers goods to the buyer on the condition that payment of the whole or part of the price would be made in future. The property (ownership) in the goods is transferred from the buyer to the seller notwithstanding that the whole or part of the price is still outstanding. Hence, a credit sale agreement should not be confused for a hire purchase agreement even where there is agreement to liquidate the credit instalmentally. Whereas, in a contract of hire purchase, the hirer does not become the owner until the last instalment is paid and he exercises the option

to purchase. If the hirer sells the good before this stage is reached, the sale is void and the buyer gets no title.

In *Lee v. Butler*<sup>167</sup>, S by a written contract, 'agreed to sell' certain furniture on hire to B. B bound herself to pay [I rent immediately, and a further J96 in three months' time. It was further agreed that property in the furniture should pass to her as soon as the total of J97 is paid, but not before. However, if B defaulted in payment or removed the furniture from her home address, S could recover possession of the furniture without notice. B sold and delivered the furniture to X before the second instalment was paid. S sued X to recover the goods. It was held that the contract was not that of hire purchase but a credit sale since B had bound herself to pay the total sum of J97. Consequently, B could therefore validly pass a good title in the furniture to X.

However, in *Helby v. Matthews*,<sup>168</sup> Helby agreed to let a piano on hire to B at a monthly rent of 10 s. 6d. B had an option to return the piano at any time subject to payment of all instalments due up to the date of return. If and when the instalments paid by B totaled certain amount, the piano would become his property. However, B pledged the piano with a pawnbroker before he had paid the total amount stipulated. The court held that the agreement was a hire purchase. Unlike in *Lee v. Burtler*, B was not bound to purchase the piano. Hence, the piano belonged to who could recover it from the pawnbroker.

Other distinctions between a hire purchase transaction and credit sale agreement are as follows:

- (i) The buyer in a credit sale agreement is not a bailee of the goods but the owner;
- (ii) The rights and liabilities of parties under the two types of transaction vary widely. For instance, in a credit sale agreement, the seller can generally sue for breach of contract if the buyer refuses to pay while in a hire purchase agreement the owner can repossess the goods in certain circumstances;
- (iii) The buyer in a credit sale agreement can validly sell the goods and confer good title on third parties while a hirer cannot.

From the foregoing, one can see that credit sale and hire purchase agreement do not have much in common apart from the fact that payment of the outstanding price in a credit sale can also be made instalmentally.

## Question 2

- (a) What are the justifications for introducing the hire-purchase system?
- (b) "Majority of hire-purchase transactions in Nigeria involve only two parties." Comment.

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## Answer

(a) A contract of hire-purchase is one under which an owner of goods lets them out on hire to another person called the "hirer" in consideration of periodic or instalmental payments called hire-rent and on condition that the hirer may, at any time return the goods and terminate the hiring, or continue the hiring until the hire-rent reaches a stated sum; in which event, either the property in the goods passes to him, or he will exercise an option to purchase the goods. Therefore, a Hire-purchase is, as the name suggests, a contract of hire plus purchase. The hirer therefore has possession of the goods plus an option to purchase when all the instalments have been paid.

There are three broad reasons for the introduction of the hire- purchase system:

- (i) The system allows a bailor of goods to protect himself against loss of his goods through a wrongful sale by the hirer to an innocent third party. In *Helbyv. Matthew*<sup>169</sup> the hirer of a piano pledged it to a third party. It was held that the hirer could not pass a valid title to the third party since he was not the owner. Hence, the court held that the owner could recover the piano from the third party.
- (ii) The system allows credit to people who are unable to pay cash for the goods they want and who would be glad to pay some deposit and thereafter pay the balance instalmentally at a stipulated rate of interest. Since this encourages people to demand more goods, the system has become an instrument of economic policy for restricting or stimulating public demand for goods through controls on the amount of initial deposits, rates of interest and period of repayment.
- (iii) The third reason is the possible avoidance of the Money-lenders Act. If a moneylender does not obtain a license under the Act he cannot recover money lent or enforce any security. A finance company, usually the third party, to a contract of hire purchase performs an economic function similar to that of a money- lender. However, a genuine hire-purchase business carried on by the finance company is not a money-lending business. Hence, a finance company need not obtain a license under the Act.

(b) Generally, a contract of hire-purchase is a contract of bailment between two parties, a bailor (the owner) and bailee (the hirer). This is so in every case where a dealer in goods, as owner of the goods, releases them on hire-purchase terms to a hirer. But sometimes where very expensive goods are concerned, the dealer may seek the assistance of a finance company with a view to financing the transaction. The dealer then sells the goods on cash basis to the finance company, which, as the new owner, lets the goods out on hire-purchase to the hirer. In this circumstance, we have three principal actors in the transaction: the dealer, the owner and the hirer.

It must however be stressed that the dealer is not normally a party to the hire-purchase agreement between the owner and the hirer, (except where he is also the owner) but he performs important roles in the formation or conclusion of the agreement.

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<sup>169</sup>Supra.

Most of the preliminary negotiations, which promote the transaction, are carried on between the dealer and prospective hirer and not with the finance company.

### Question 3

The Hire-Purchase Act<sup>170</sup> was promulgated to protect the hirer and shield him from abuses hitherto common in hire-purchase transactions. How true is this assessment of the Act? transaction, are carried on between the dealer and prospective hirer and not with the finance company.

Apart from the dealer, there may be the need for a guarantor where the owner considers it essential to secure the performance of the hirer's obligations. A guarantor agrees to discharge any outstanding obligations of the hire in case of default. Where there is a guarantor, the liability of a guarantor is secondary. It does not commence until after the hirer has defaulted.

Hence, although, a contract of hire purchase is essentially between two parties, other persons such as dealers and guarantors may be involved to facilitate the contract depending on the means of financing it and the overall nature of the transaction.

### Answer

Prior to the enactment of the Hire Purchase Act, hire-purchase transactions in Nigeria were governed by the principles of law of contract at common law. As a result, the rules were scattered in various decided case and inaccessible. This, among other reasons, made most owners to exploit the ignorance of the people to enforce oppressive agreements on them. The Hire Purchase Act<sup>171</sup> was enacted to check malpractices, which flourished under the common law system. Among the malpractices and injustices are the following:

- (i) unscrupulous dealers often trick customers into concluding an agreement without explaining in details the terms and the obligations of the hirer. For instance, the real cash sales price of the good and how much the aggregate instalments and the deposit exceed the cash sales price;
- (ii) in many cases, the owner supplied poor quality goods to the hirer and relied on exclusion clauses;
- (iii) the owner could retake possession of the goods at any time and sell them even though the hirer had almost paid the whole price.

In *Atere v. Amao*<sup>172</sup> and *Sanyaolu v. Benthworth Finance*<sup>173</sup> the seizure of a motor vehicle by the owner was held to be lawful notwithstanding that in Atere's case only ₦10 out of ₦1,332, and in Sanyaolu's case only ₦100 out of ₦5,486 remained unpaid.

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<sup>170</sup>Hire Purchase Act of 1965, as amended by Hire Purchase Act Cap 169, Laws of Federation of Nigeria, 1990.

<sup>171</sup>5 The Act was enacted in 1965 and consolidated in Cap 169 Laws of Federation of Nigeria, 1990.

<sup>172</sup>[1957] WRNLR 176.

<sup>173</sup> [1972] 2 U.I.L.R. 431.

- (iv) goods were often recovered through crude and dangerous self help means, for instance, by using thugs to snatch the goods;
- (v) the hirer was usually denied the right to redeem the goods even where he is able to;
- (vi) in a resale of the goods after seizure, the owner may realise more than the instalments due, yet he is not bound to account. But where the amount realised is less than the hire-purchase price due, the owner could claim the balance as damages;
- (vii) owners usually charged high and prohibitive interest rates;
- (viii) the hirers were usually subjected to heavy penalties if they terminate the agreement. For instance, they may be required to pay a fixed large sum of money to the owner (Minimum Payment Clause), which is so prohibitive to make the exercise of such right unattractive. The penalty usually exceeded one half of the hire-purchase price.

The Hire Purchase Act seeks to remove the above defects among others by enacting some mandatory requirements to be complied with in a contract of hire purchase. These are some of the improvements introduced by the Act:

- (i) Before any contract is concluded, the owner must clearly state the price of the goods and other terms of the transaction. Failure to comply with this requirement will render the contract void and unenforceable unless the court is satisfied that the hirer has not been prejudiced by such failure;
- (ii) The owner can no longer supply poor quality goods and rely on exclusion clauses;
- (iii) The Act provides for the usual conditions and warranties implied in contract of sale of goods. For instance, there is an implied condition that the good is fit for the purpose for which it is hired;
- (iv) The Act empowers the Minister of Finance to regulate the terms of hire-purchase by prescribing the size of the initial cash payment, rate of interest and the period over which instalments are payable. Hence, the owner can no longer insert terms in the agreement, which expose the hirer to exploitation or impose undue burden on him;
- (v) The hirer is protected against immediate re-possession and harsh minimum payment clause if he defaults or wishes to terminate the agreement. According to section 10 of the Hire Purchase Act, if the hirer defaults after he has paid what is called the "relevant proportion" of the hire-purchase price, then the owner can only recover the balance by an action in the court of law;
- (vi) Section 3 of the Hire Purchase Act renders void any of the following provisions in any hire purchase agreement, inter alia:
  - (a) any authorization of the owner to enter upon any premises for the purpose of taking possession of the goods;
  - (b) any restriction or denial of the rights of the hirer to determine the contract;

- (c) imposing punitive penalty on the hirer for determining the contract;
- (d) treatment of the agent of the owner as an agent of the hirer;
- (e) exclusion or restriction of the liability of the owner for his act and defaults and those of his agents;
- (f) imposition of an insurer or repairer on the hirer other than the one freely chosen by him.

The above provisions were considered to be necessary to protect the hirer who rarely deals on equal footing with the owner. It must, however, be pointed out that it is not all the provisions of the Act that are in favour of the hirer. For instance, section 6 of the Hire Purchase Act imposes an obligation upon the hirer to furnish the owner with necessary information on where the good is kept, state and condition of the goods. If the hirer fails to give this information without reasonable excuse, he will be guilty of an offence.

It is therefore reasonable to conclude that the Hire Purchase Act was enacted to ensure fairness and justice in hire-purchase transactions and to realise the objective of hire-purchase system as an instrument of economic policy and not to unduly favour any of the parties to the contract. However, the Act has substantially lib rated many hirers from the oppressive clutches of most unscrupulous owners.

#### **Question 4**

Briefly highlight the obligations of both the owner and hirer in a hire purchase transaction.

#### **Answer**

A contract of hire-purchase is one under which an owner of goods lets them out on hire to another person called the "hirer" in consideration of periodic or instalmental payments called hire-rent and on condition that the hirer may, at any time return the goods and terminate the hiring, or continue the hiring until the hire-rent reaches a stated sum; in which event, either the property in the goods passes to him, or he will exercise an option to purchase the goods. Therefore, a hire-purchase is, as the name suggests, a contract of hire plus purchase. The hirer, therefore, has possession of the goods plus an option to purchase when all the instalments have been paid.

The obligations of the parties to a hire-purchase transaction are primarily contained in the hire-purchase agreement. Apart from the express terms of the agreement certain terms are also implied under the Hire Purchase Act.

The obligations of the owner are the following:

- (i) The first obligation is to deliver the goods to the hirer. The hiring commences only when the goods are delivered to the hirer.

- (ii) Except for reasonable reasons, the owner is under obligation not to refuse instalment of hired rent validly tendered. Where the owner is in breach of this obligation and uses it as an excuse to repossess the good, his action will be declared null and void.
- (iii) There is an implied condition that the owner possesses title to the goods. If the title of the owner is defective and successfully impeached by a third party, the hirer can claim all his money back including damages for total failure of consideration;
- (iv) There is an implied warranty that the hirer will enjoy quiet possession of the goods during the period of the agreement. There will be a breach of this warranty if, for instance, the owner unlawfully interferes with the possession by the hirer through wrongful repossession.
- (v) There is an implied condition that the good supplied is fit for the purpose for which, in the contemplation of the parties they are intended. This condition applies to second hand and new goods alike. However, the obligation created by the implied condition is not absolute. For instance, where a hirer has inspected goods with apparent defects but nevertheless decided to hire the goods, this will not amount to a breach of condition for fitness for purpose. In *Amusan v. Benthworth Finance (Nig.)*,<sup>174</sup> the Appellants hired five second-hand lorries from the Respondents. The Appellant inspected and saw the condition. She was fully aware that the three of the lorries needed repairs before they could work and were never self-propelling. In fact, they were pushed out of the premises of the respondents at the time that the Appellant took delivery. It was held that the Appellant contracted to hire the vehicles in the condition in which she saw them.
- (vi) The owner must deliver the exact goods stipulated in the agreement. There is an implied condition that the goods must correspond with their description in the agreement. This condition cannot be excluded by an exemption clause. In *Ogwu v. Leventis Motors Ltd*,<sup>175</sup> the Appellant bought a lorry No. BYA 648 from the respondent on hire purchase. The lorry delivered was not the originally registered as such but an older lorry to which the plate bearing BYA 648 was switched. The hirer later discovered that the lorry delivered to him was not the one-year old lorry for which he had negotiated. The contract contained a clause exempting the owner from liability for mis-performance. The court held that the clause could not avail the respondent/owner.

The duties of the hirer are as follows:

- 1) It is the duty of the hirer to accept delivery of the goods. If the hirer unreasonably refuses to accept delivery of the goods, the owner can claim damages.
- 2) The hirer is obliged to take reasonable care of the goods failing which he will be liable for any loss or damage to the goods. However, he is not liable for the loss or damage not caused by his own negligence. Hence, he is not an insurer against risks. In *Tijani (Nig.) Mg. Ltd v. Avre*<sup>176</sup> a hire purchased car was stolen by a friend of the driver to whom the

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<sup>174</sup>165 ALR Comm. 601, [1966] NMLR276

<sup>175</sup>[1963] NMLR 115

<sup>176</sup>1977 (I) ALR Comm 206



hirer entrusted the car. The hirer had expressly warned his driver not to allow any other person to have anything to do with the car. It was held that the hirer was not in breach of his duty of care and that he had exercised due diligence.

- 3) The hirer is under obligation to pay the instalments as at when due. If the hirer fails to discharge this obligation, the owner may put an end to the hire and retake possession of the goods even if 90 - 95% of the instalments had been paid. However, under s. 9 of the Hire Purchase Act, the owner cannot exercise his right to recover the goods from the hirer except by an action in court if the goods being motor vehicles, the hirer has paid up to 3/5 of the hire purchase price, or the goods not being motor vehicles, he had paid up to half thereof.
- (4) The hirer is bound to re-deliver the goods to the owner upon the termination of the hiring. A failure to redeliver will entitle the owner to recover possession either by re-taking the goods or by action.
- (5) The Hire Purchase Act imposes an obligation on the hirer to give information of where the goods are kept to the owner. If the hirer fails to furnish this information without reasonable cause within 14 days of the receipt of the request, he will be guilty of an offence.

The foregoing duties of hirer and owner in a hire purchase contract are generic in nature. The exact duties imposed on the parties will depend on the circumstances of each case and the content of each hire purchase agreement.

### **Question 5**

Olu entered into a hire-purchase agreement with Bala in respect of a KIA Series car at a price of ₦20m. The insurance premium of ₦1m was added to the price making a total of ₦21m. Bala was to pay a deposit of ₦5m and the balance by monthly instalment of ₦1m. After paying 9 monthly instalments, Bala ran into financial crisis and was unable to pay further instalments. Olu entered into Bala's garage and towed the car away.

Advise Bala.

### **Answer**

Prior to the enactment of the Hire Purchase Act, hire purchase agreements in Nigeria were regulated by common law. The Hire Purchase Act<sup>177</sup> was enacted to regulate and control hire-purchase transactions. However, the provisions of the Act do not apply to all hire-purchase transactions. By section 1, the provisions of the Act will apply where the goods are motor vehicles or where the value of the goods is not more than ₦2,000. Since the subject matter of the

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<sup>177</sup>Cap 169 LFN 1990.

agreement between Olu and Bala is a motor vehicle, the provisions of the Act will apply to their transaction.

Under section 2 of the Act, the owner is obliged to state clearly the price of the goods, the rate of interest and other terms of the transaction. Failure to comply with these requirements will render the contract void and unenforceable, unless, the court is satisfied that the hirer has not been prejudiced by such failure. Section 3 of the Act, however, makes void any provision in the hire-purchase agreement, which requires the hirer to use the services of any particular person such as insurer or repairer other than a person freely chosen by the hirer.

The hirer is under a duty to pay the instalments when due. Before the commencement of the Hire Purchase Act, if the hirer failed to discharge this obligation, the owner might retake possession of the goods even if 90 - 95% of the hire-purchase price had been paid. In *Atere v. Dada*<sup>178</sup> and *Sanyaolu v. Benthworth Finance*,<sup>179</sup> the seizure of a motor vehicle by the owner was held to be lawful notwithstanding that in Atere's case only ₦10 out of ₦1,332 and in Sanyaolu case only ₦100 out of ₦5,486 remained unpaid.

The owner not only had power to repossess, he could do so without any recourse to the court through "snatch-back tactic". However, if the hirer has paid up to 3/5 of the hire-purchase price where the good is a motor vehicle, and 5/6 of the hired price in the case of other goods, the owner cannot repossess the goods from the hirer except by an action in court.

The analysis of the fact pattern before us requires a determination of the contract price. We have to determine whether the insurance premium is part of the contract or not. This is necessary to determine whether Bala has met the 'relevant proportion requirement' under section 9(1) of the Hire Purchase Act. The section imposes restrictions on the right of the owner to recover the possession of the hired goods from the hirer and thereby protect the hirer from harsh and unfair repossession tactics. The section prevents repossession by the owner without a court order where the hirer has paid "relevant proportion of the hired price". The relevant proportion for this purpose is 3/5<sup>th</sup> of the hired price.

We are told that Bala had already paid a deposit of ₦5m, ₦1m insurance policy and 9 instalments of ₦1m making a total payment. ₦15m. However, since the 3/5<sup>th</sup> of ₦20m is ₦15.23 million, Bala has not paid the relevant proportion of the hired price. Hence, it is arguable that Olu is entitled to repossess the car from Bala without resorting to the court. The argument however ignores the fact that Olu (the owner) added the insurance premium to the purchase price in contravention of section 2 of the Act, which requires him to state the purchase price separately from the insurance premium. The implication of this was that Olu has "forced" Bala to use a particular insurer contrary to the provision of section 3 of the Hire Purchase Act. This singular factor renders the entire hire purchase contract void. Hence, Olu cannot lawfully exercise the owner's right to recover the car under a void agreement.

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<sup>178</sup>Supra.

<sup>179</sup>Supra.

