

**COUNCIL OF LEGAL EDUCATION**



**EXAMINATION FOR ADMISSION  
TO THE ROLL OF ADVOCATES**

**ATP 108: COMMERCIAL TRANSACTIONS**

**MONDAY 5<sup>TH</sup> DECEMBER, 2016**

**DURATION: 3 HOURS**

**Instructions to Candidates**

- (a) This paper contains **Five printed pages** including the cover page, with a total of **Six questions**
- (b) Candidates **MUST** answer **FIVE** questions
- (c) **Question ONE** is compulsory and carries **20 marks**
- (d) **All other questions** carry **10 marks each**
- (e) Answers **MUST** be supported by relevant case law and statutory provisions where required

**PLEASE TURN OVER**

## QUESTION ONE

Chester Transporters Limited (CTL) has been your client since you assisted its four members incorporate it in 2011. Charles the Managing Director, has approached you with the following information:

- CTL has been going through a rough patch over the last one year and is unable to raise funds from its usual financiers. Charles and some of the other directors believe that CTL can trade its way out of the quagmire if funds were sourced by means other than credit.
- Charles believes that he may have found the solution in Nobert, an old friend who runs a business similar to CTL's and who has shown an interest in equity. Nobert has made a few demands in relation to his investment in CTL, the key one being appointment to the Board.
- Ellen, one of the directors is not keen on the proposal to bring Nobert on board and insists that CTL should explore all other possible options. She and Nobert have had a long running feud over property in their rural area and do not see eye to eye. The other directors feel that she is being unreasonable.

Charles seeks your advice on the following matters:

- (a) How can Ellen be removed from her position as director and what steps might she take to resist the removal or to assert her rights? **(14 marks)**
- (b) Ellen and one other director have travelled abroad on a two week business trip leaving Charles and Timothy as the only two directors in town. Charles is considering the option of him and Timothy calling a general meeting immediately to pass an ordinary resolution appointing Nobert.

Advise on the validity of that meeting. **(6 marks)**

## QUESTION TWO

Brian is in the business of buying and selling second hand motor vehicles. The vehicles are usually displayed at a large yard located along Langata Road in Nairobi. Brian also receives and sells cars on behalf of individual owners at a commission. Such cars are also usually displayed at the same yard. At around 9.00 a.m. on 1<sup>st</sup> May 2015, Alice went to Brian's yard and saw a car which she wanted to buy. The owner of the car, Oscar had left it with Brian with instructions that Brian was to obtain "good offers" but that he (Brian) was not to accept any offers without first consulting with Oscar.

Unfortunately, Oscar had, inadvertently left the car's logbook in the car's glove compartment. Using this document, and holding himself out to be Oscar, Brian sold Oscar's car to Alice. Alice paid the full purchase price in cash. She also obtained from Brian (who was pretending to be Oscar) the car's log book together with a duly executed transfer form. Alice did not, however, drive away the car on the day as she was travelling out of town. On the same day in the afternoon, Oscar came and took away his car, telling Brian that he had changed his mind and was no longer interested in selling it. Upon her return, Alice made several unsuccessful

attempts to collect the car from Brian. She has now "unearthed the truth" but is not sure what to do.

Required:

Identify and discuss the legal issues raised by the above fact pattern. (10 marks)

### QUESTION THREE

Tom and Mary have for the last five years carried on business in the name of Style of Town Enterprises. Their business form of choice has been the General Partnership. So far, both of them have been actively engaged in the running of the business. Mary has, however, recently had a baby. She would want to dedicate more time to raising the baby. As such, she will not be able to dedicate as much time to the running of the business as she previously had. She however desires to remain an investor in the business and further to be available for consultation regarding broad and long-term strategic type decisions or matters affecting the business. Tom and Mary have therefore decided to convert their business form to a Limited Partnership. To facilitate this, the existing Partnership Agreement will have to be amended so as to make the requisite provision(s) for a Limited Partnership.

Required:

The following are excerpted clauses of the existing (general) Partnership Agreement. You are required to amend the following clauses with a view to making suitable provision for a Limited Partnership form of business association. After amending each clause, you should further, in parenthesis (brackets) appearing at the end of each amended clause, cite the relevant legal rule (including the applicable section of relevant statute) which has informed the amendment.

#### PARTNERSHIP AGREEMENT

THIS PARTNERSHIP AGREEMENT (the "Agreement") is made and entered into this..... (insert the "Execution Date")

BY AND BETWEEN

TOM TIM of Post Office Box Number 111 Nairobi and MARY MARIA of Post Office Box Number 222 Nairobi (hereafter individually referred to as the "Partner" and collectively as the "Partners").

#### BACKGROUND

- A. The Partners wish to associate themselves as partners in business.
- B. This Agreement sets out the terms and conditions of the partnership.

IN CONSIDERATION of and as a Condition of the Partners entering into this Agreement and other valuable consideration the receipt and sufficiency of which consideration is hereby acknowledged the parties to this Agreement agree as follows:

1. **Formation**

By this Agreement, the Partners enter into a General Partnership (the "Partnership") in accordance with the laws of Kenya. The rights and obligations of the Partners will be as stated in the applicable laws of Kenya, specifically, the Partnerships Act (No.16 of 2012), except as otherwise provided hereunder.

2. **Name**

The firm name of the partnership will be TOMA Enterprises.

3. **Purpose: ...**

4. **Term: ...**

5. **Place of business: ...**

6. **Capital contribution: ...**

7. **Withdrawal of Capital:**

A Partner may withdraw all or any portion of their capital contribution at any time subject to giving a seven (7) days prior Notice to the other partner.

8. **Management**

All actions and decisions respecting the management, operation and control of the partnership and its business will be decided by a unanimous vote of the partners. Each partner will have authority to bind the partnership in contract.

9. **Liability of Partners**

Except as otherwise provided in this Agreement, the liability of the Partners from the conduct of the business affairs on operations of the partnership or from the debts of the partnership is unlimited.

10. **Admission of New Partners**

A new partner may only be admitted to the partnership with unanimous vote of all partners.

11. ...

Specifically, you are required to amend the following:

- (a) Parties clause (note to explain how/why you have designated the status of each partner. (3 marks)
- (b) Withdrawal of Capital Clause. (3 marks)
- (c) Liability of Partners Clause. (3 marks)
- (d) Admission of New Partners Clause. (1 mark)

#### QUESTION FOUR

Mr. Bond is a stunt-man who earns a living from hanging onto moving helicopters. He has now ventured into gaming and has developed a mobile phone game called 'catch my ugali'. Players earn points by 'catching' ugali dropping from helicopters before it reaches the ground. He is considering approaching a mobile phone service provider to seek a partnership in running this game on a mobile platform. He however does not understand the intellectual property issues that arise and approaches you for advice on the following.

- (a) The main intellectual property aspects that arise from the mobile application. (4 marks)
- (b) The process of seeking protection of these intellectual property types. (6 marks)

#### QUESTION FIVE

Sandra has received admission to an Ivy League University for post-graduate studies and must register by September 2016 in order to secure her position. Unfortunately, her application for scholarship was unsuccessful. Sandra is keen on securing a loan from a financial institution but all have asked for some form of security. The only item that Sandra owns that may be of worth is a small wooden shed in her parent's backyard.

Advise Sandra on whether she may present the shed to a financial institution as security. (10 marks)

#### QUESTION SIX

Bill walks into a bazaar on a Sunday and sees a lawnmower that he thinks will be most suitable for his purposes. The seller who is standing by assures him that he could have the item the same day, if he is in a position to give a down payment of 15% of the sale price of Kshs. 180,000 with the balance payable the next morning. Bill does not have the 15% and the seller gives him the option of putting down 10% on the spot and the balance being payable in twelve equal instalments over a twelve month period. The price under this arrangement will be marked up by 20% of the display price. Bill is agreeable to this arrangement and hands over the 10% agreed to the seller who issues him with a receipt and a typed document to sign at the bottom. Bill carries the lawnmower home and for the next eight months pays the agreed instalments without default. Thereafter, he is unable to pay up as agreed and at the tenth month the seller visits Bill's house and carries the lawnmower away. Until that point Bill is unaware of the contents and the nature of the document he signed since he did not take a copy from the seller.

Bill approaches you in the hope that he can recover the lawnmower.

Identify the nature of the transaction entered into between the parties and assess the chances of success of any claim that Brian may bring against the seller. (10 marks)

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END

