

CF03

Law And Practice Of Banking

13 OCTOBER 1999

1. Time allowed : Three (3) hours
2. Total number of questions : Six (6) questions on 4 pages
3. Number of questions to be answered : Five (5) questions [20 marks each]
4. Answers should be supported by references to cases and/or statutes.
5. Begin each answer to a new question on a fresh page.
6. Answer **all** questions in **English**.

ANSWER FIVE (5) QUESTIONS ONLY

1. (a) (i) Explain what is private law. [4]
- (ii) Write short notes on the **three** main components of private law. [6]
- (b) Answer “**True**” or “**False**” for each of the following:
- (i) Common law is **one** of the components of written law in Malaysia. [1]
- (ii) Legislation is the supreme law of Malaysia and lays down the powers of the Federal and State governments as well as the basic or fundamental rights of the individual. [1]
- (iii) Judicial precedents are proclamations, rules, regulations, orders, notifications, by-laws or other instruments made under any Ordinance, Enactment or other lawful authority and have legislative effect. [1]
- (iv) The Sessions Court is a subordinate court. [1]
- (v) The Federal Court is the highest court in Malaysia and it hears appeals from the Court of Appeal. [1]
- (c) In relation to cheques, customers owe **two** important duties towards their bankers; that is the *Macmillan* duty and the *Greenwood* duty.
- Describe these **two** duties. [5]
(Total:20 marks)
2. (a) Answer “**True**” or “**False**” for each of the following:
- (i) There are presently a total of **five** guidelines (BNM/GP1 to BNM/GP5) issued by Bank Negara Malaysia pursuant to the Banking and Financial Institutions Act 1989 (BAFIA). [1]
- (ii) A person convicted under Section 97 of the BAFIA for breach of banking secrecy may be sentenced to a maximum of **10** years’ imprisonment or a fine of up to RM10 million or both; and whipping. [1]
- (iii) The Code of Good Banking Practice was implemented by Bank Negara Malaysia on 1 October 1989. [1]
- (iv) A contract is basically an agreement enforceable by law. [1]
- (v) An invitation to treat is not an offer. [1]
- (b) Fill in the blanks with the **correct word(s)** in **all** of the following:
- (i) The basic elements of a contract are offer, _____ of the offer, intention to create legal relations, _____, certainty and _____. [3]
- (ii) Contracts may be discharged by performance, _____ or by breach. [1]
- (iii) Remedies for breach of contract are _____, specific performance and injunction. [1]
- (c) When Mary Foo wanted to apply for a current account at Bank Sedia Bhd, she was asked to fill up and sign a current account opening form and specimen cards. Mary Foo was also asked for her Identity Card and an introducer. After all the formalities were complied with, Bank Sedia Bhd opened the current account for Mary Foo. Mary Foo now wants to know the following:

- (i) Has she entered into a contract with Bank Sedia Bhd? [2]
- (ii) What is the meaning of the “express” terms and “implied” terms governing the said contract, if any? [8]
(Total:20 marks)
3. (a) What are the differences between:
- (i) a “private” caveat and a “lien-holder’s” caveat? [5]
- (ii) a “lease” over land and a “leasehold” land? [5]
- (b) Answer “Yes” or “No” for each of the following:
- (i) Mrs Tan owns a piece of land in Ipoh, Perak. Mr Tan (Mrs Tan’s husband) wants to apply for an overdraft facility to be secured by a charge over the said land.
Can Mrs Tan charge her land to secure the overdraft facility to be granted to Mr Tan? [1]
- (ii) In Peninsular Malaysia, can a Land Office title be charged to a bank for security? [1]
- (iii) Ahmad’s land is presently charged to Bank ABC Bhd. Siti wants to buy the land and has paid money as deposit for the land.
Can Siti lodge a private caveat over the said land? [1]
- (iv) Is a charge a type of restraint on dealings? [1]
- (v) Is defeasibility the effect of registration under the National Land Code 1965? [1]
- (c) Write a short note on “tenancy” in relation to the National Land Code 1965. Your answer should define or describe a tenancy and explain how a tenancy is created. [5]
(Total:20 marks)
4. (a) Choose the **incorrect** answer (A, B, C, D or E) from each of the following:
- (i) The remedies for breach of the contract of sale of goods include:
- A. right of an unpaid seller against the goods.
B. right of the buyer to sue the seller as constructive trustee.
C. right of the seller to sue for breach of the contract.
D. right of the buyer to bring an action in tort.
E. right of the buyer to bring an action for specific performance. [1]
- (ii) Types of goods mentioned in the Sale of Goods Act 1957 include:
- A. indefeasible goods.
B. existing goods.
C. specific goods.
D. unascertained goods.
E. future goods. [1]
- (iii) Under the Hire-Purchase Act 1967, the hirer has the following rights:
- A. the right to appropriate payment.
B. the right to determine the hiring.
C. the right to repudiate the hire-purchase agreement if the dealer makes a misrepresentation.
D. the right to apply for Court order for removal of goods to another place.
E. the right to assign his right, title and interest with the consent of the owner. [1]

- (iv) The Hire-Purchase Act 1967 applies to all hire-purchase agreements relating to the following goods:
- A. household furniture.
 - B. computers.
 - C. commercial printing machines.
 - D. goods vehicles.
 - E. buses. [1]

- (v) The following principles and definition in relation to insurance are correct:
- A. The loss which is being insured against is called the “insured”.
 - B. The document evidencing the contract of insurance entered into by the insurer and the insured is called the “policy”.
 - C. Insurance contracts are *uberrimae fidei*.
 - D. “Premium” is the consideration paid by the insured to the insurer.
 - E. An insurance contract is a contract whereby the insurer agrees to indemnify the insured against a loss which may arise on the occurrence of some event or to pay a certain definite sum of money on the occurrence of the particular event. [1]

- (b) Mahmud bin Omar was recently employed by Fast Finance Bhd as an officer.

List down any **five** of En Mahmud bin Omar’s duties (as laid down in the Contracts Act 1950) as an agent of Fast Finance Bhd. [5]

- (c) In relation to negligence, explain the test used by the Courts in deciding whether the defendant has breached his duty of care owed to the plaintiff. [10]

(Total:20 marks)

5. (a) Briefly state the meaning of the following terms in relation to bills of exchange:

- (i) negotiation [2]
- (ii) acceptance [2]
- (iii) indorsement [2]
- (iv) delivery [2]
- (v) dishonour [2]

- (b) Explain what an ante-dated cheque is and whether such a cheque is valid. [5]

- (c) Answer “**True**” or “**False**” for each of the following:

- (i) An “Account Payee Only” crossing is a special crossing. [1]
- (ii) Countermand of payment of cheques can be made orally or in writing. [1]
- (iii) A traveller’s cheque is a bill of exchange. [1]
- (iv) The drawee of a cheque must be a banker. [1]
- (v) A cheque is not invalid merely because it is post-dated. [1]

(Total:20 marks)

6. (a) Answer “**True**” or “**False**” for each of the following:

- (i) A legal firm may have more than **20** partners. [1]

- (ii) A search on a legal firm which is a sole-proprietor (e.g. Hillary & Company Advocates) may be made at the Registry of Companies. [1]
- (iii) A public limited company has “Berhad” or the abbreviation “Bhd” as part of and at the end of its name. [1]
- (iv) A company is a separate legal entity which means that the directors must be shareholders and directors are jointly and severally personally liable for the debts of the company. [1]
- (v) The doctrine of *ultra vires* states that a third party dealing with a company is not bound to ensure that all the internal regulations of the company have in fact been complied with as regards to the exercise and delegation of authority. [1]
- (b) Explain the meaning of the following terms in relation to companies:
- (i) separate legal entity [3]
- (ii) private company [3]
- (iii) company secretary [3]
- (c) Mr and Mrs Wong are the only directors and shareholders of Wong Holdings Sdn Bhd. Wong Holdings Sdn Bhd was granted an unsecured overdraft of RM20,000 by Bank X Bhd.
- Explain whether Mr and Mrs Wong will be personally liable for the debt if they have not signed any personal guarantee for the overdraft facility. [5]
- (d) Kassim and Ali want to enter into a partnership under the name of Syarikat Kali.
- State whether or not it is legally compulsory for Kassim and Ali to enter into a written partnership agreement. [1]
- (Total:20 marks)

OUTLINE ANSWERS

Question 1

Candidates' performance was average and some were unclear as to some of the terms in question. Some candidates thought that private law includes criminal law and there was a mix-up between the "Macmillan" and the "Greenwood" duties. One of the common errors was the misconception that customers' duties towards their bankers includes to maintain sufficient balance in their current account.

(a) (i) Private law or civil law is the law affecting the rights and duties of individuals amongst themselves (such as banker and customer). Basically, private law is the law enabling compensation to be given to injured persons, property to be recovered from wrongdoers and obligations to be enforced, as for example, under contract, tort and trust.

(ii) Thus, private law comprises contract, tort and trust. Contracts are based on agreement. The law of contract is the branch of private law which determines when a promise or a set of promises is legally enforceable. The promises which are to be enforced form the contract.

Tort is based on legal obligations. A tort is a civil wrong. It is the breach of a general duty imposed by law (as opposed to breach of contract which has been agreed on between the parties). A person whose legal right is infringed may sue the wrongdoer and may be granted legal remedies, such as unliquidated damages.

A trust is an equitable obligation binding a person (the trustee) to deal with property over which he has control (the trust property) for the benefit of persons (the beneficiaries or *cestui qui trust*) of whom he may himself be one, and any one of whom may enforce the obligation.

- (b) (i) False
 (ii) False
 (iii) False
 (iv) True
 (v) True

(c) The *Macmillan* duty, as laid down in the case *London Joint Stock Bank Ltd v Macmillan and Arthur*, is the duty of the customer to exercise reasonable care in drawing his cheques so as not to mislead his banker or to facilitate fraud or forgery.

The *Greenwood* duty, as laid down in *Greenwood v Martins Bank Ltd* is the duty of the customer to inform his banker once he discovers that cheques purporting to have been signed by him have been forged.

These two duties have been reiterated by the Malaysian Courts in *United Asian Bank Ltd v Tai Soon Heng Construction Sdn Bhd* and *Syarikat Islamiyah v BBMB*.

Question 2

Most candidates were able to answer correctly on basic legal principles governing contracts. However, the explanation of "express" and "implied" terms governing a contract was badly done.

- (a) (i) False
 (ii) False
 (iii) False
 (iv) True
 (v) True

- (b) (i) acceptance, consideration, capacity
(ii) frustration
(iii) damages
- (c) (i) Yes, a contract has been entered into by Mary Foo and Bank Sedia Bhd as there was offer and acceptance and the other elements constituting a valid contract.
- (ii) Terms governing the said contract may be express or implied. Express terms are terms which are either spoken (oral) or written. In a current account, express terms which are written would comprise the application form, specimen cards, the written Rules and Regulations governing current accounts and any other correspondence or documents executed. Express terms which are oral would comprise anything spoken which affects the banker-customer relationship with reference to the current account.

Implied terms are terms implied by customs and usage (such as banking practice), written law and regulations (such as Bank Negara Malaysia Guidelines and Code of Good Banking Practice) and the courts (based on the intention of the parties – *The Moorcock, Reigate v Union Manufacturing Co Ltd, Shirlaw v Southern Foundries (1926) Ltd* and *Yong Ung Kai v Enting*. Terms may also be implied from a previous course of dealing between the parties to the contract – *Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd*.

Question 3

It is of major concern that candidates showed very little understanding of laws on credit. Candidates gave very poor answers when required to differentiate between a “private” caveat and a “lien-holder’s” caveat and a “lease” over land and a “leasehold” land. Almost all candidates did badly when asked to define a tenancy and explain how a tenancy is created. There was a general lack of understanding on land laws in Malaysia.

- (a) (i) A private caveat does not confer upon the caveator any power of sale and is therefore not a form of security. On the other hand, the lien-holder (with lien-holder’s caveat) can obtain judgment and then apply for order for sale and therefore, there is security.

A private caveat can be entered by anyone with a caveatable interest i.e. a registrable interest on the land – Section 323(1) National Land Code whilst a lien-holder’s caveat is only lodged by a lien-holder.

A private caveat lapses after six years in West Malaysia but a lien-holder’s caveat subsists until it is withdrawn.

- (ii) A lease is a letting of land for a term exceeding three years and is a registrable interest whilst leasehold land is where state land is disposed of by the state authority for a term of years (up to 99 years – Section 76, National Land Code).

A lease is thus an interest in land granted by the lessor to the lessee for a certain period whereas leasehold land is alienated by the state authorities to persons who are proprietors (owners) of the land.

A lease is a type of dealing on land whilst leasehold land is a type of land.

- (b) (i) Yes
(ii) Yes
(iii) Yes
(iv) No
(v) No
- (c) A tenancy is defined as a letting of land for a term not exceeding three years. A tenancy is not a registrable interest and is called a “tenancy exempt from registration” in the National Land Code.

A tenancy may be granted orally or by way of a written instrument – Section 223(2), National Land Code. Although a tenancy is not capable of being registered, it may, however, be protected by way of an indorsement on the register document of title – Section 213(3) National Land Code. Once such an indorsement has been made, the tenancy binds any subsequent purchaser, that is, where the sale and purchase agreement is entered into after the indorsement – *Than Kok Leong v Low Kim Hai*.

Question 4

Candidates' knowledge on negligence was too basic and shallow as many were unable to explain, in relation to negligence the test used by the Courts in deciding whether the defendant has breached his duty of care owed to the plaintiff.

- (a) (i) B
(ii) A
(iii) C
(iv) C
(v) A
- (b) Mahmud's duties as agent of Fast Finance Bhd include:
- (i) to obey the principal's (i.e. Fast Finance Bhd's) lawful instructions.
 - (ii) to exercise care and diligence.
 - (iii) not to make secret profit.
 - (iv) to pay to his principal all sums received on his behalf.
 - (v) not to let his interest conflict with his duty.
- (c) The test for deciding whether there has been a breach of duty is laid down by Alderson B in *Blyth v Birmingham Waterworks Co*; that is, negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

The standard of what is "reasonable" and what is not is an objective one. Judges decide what, in the circumstances of each case, the reasonable man would have in contemplation, and what accordingly the party sought to be made liable ought to have foreseen – *Glasgow Corporation v Muir* and *Roe v Minister of Health*.

Where a duty of care exists, the Courts must consider the magnitude of the risk – *Bolton v Stone* and *Hilder v Associated Portland Cement Manufacturers Ltd*, the importance of the object to be obtained – *Daborn v Bath Tramways* and *Watt v Hertfordshire County Council* and the practicability of precautions – *Latimer v A.E.C.*

Question 5

The Bills of Exchange Act 1949 and the laws on cheques and negotiable instruments seem to be another weak area faced by the candidates. Most candidates were unable to define basic legal terms in relation to bills of exchange.

- (a) (i) A bill is negotiated when it is transferred from one person to another person in such manner as to constitute the transferee the holder of the bill – Section 31(1) Bills of Exchange Act 1949.
- (ii) Acceptance is the signification by the drawee of his assent to the order of the drawer – Section 17(1) Bills of Exchange Act 1949.
- (iii) An indorsement transfers the property in the bill to the transferee and involves liability on the part of

the transferor (indorser). An indorsement is essential in order to negotiate order bills.

- (iv) Delivery is defined in Section 2 of the Bills of Exchange Act 1949 as the transfer of possession, actual or constructive, from one person to another.
 - (v) A bill may be dishonoured by non-acceptance or non-payment and notice of dishonour must be given to the drawer and each indorser – Section 48 Bills of Exchange Act 1949. When a bill is presented for payment and payment is refused or cannot be obtained or when presentment is excused and the bill is overdue and unpaid, it means that the bill has been dishonoured by non-payment – Section 47(1) Bills of Exchange Act 1949.
- (b) An ante-dated cheque is one that bears a date before the date of issue.

Section 13(2) of the Bills of Exchange Act states that a cheque is not invalid by reason only that it is ante-dated. Thus an ante-dated cheque, which does not bear a date which makes the cheque stale or overdue, is still valid.

- (c) (i) False
- (ii) True
- (iii) False
- (iv) True
- (v) True

Question 6

Most candidates could not provide satisfactory explanations for some common terms in relation to companies. Some candidates did not understand the concept of “separate legal entity” and mixed up company law concepts and partnerships.

- (a) (i) True
 - (ii) False
 - (iii) True
 - (iv) False
 - (v) False
- (b) (i) A company is a separate legal entity. This means that it has an existence distinct from that of its directors and shareholders – *Salomon v Salomon*. It has a distinctive name under which it can sue and be sued because it is incorporated; and in law, a company is considered a legal person.
- (ii) A private company is restricted as to the right to transfer shares, its shareholders cannot exceed fifty in number and the company cannot invite the public to subscribe for any shares or debentures nor to deposit money with it. A private company has “Sendirian” or the abbreviation “Sdn” as part of and at the end of its name.
- (iii) A company secretary is an officer of the company. In *Panorama Development (Guildford) Ltd v Fidelis Furnishings Fabrics Ltd* the Court was of the view that the secretary was ostensibly the company’s chief administrative officer and could be held out as having authority to sign contracts with regard to a considerable portion of the administration of the company.
- (c) If Mr and Mrs Wong have not signed any personal guarantee for the overdraft facility, they will not be personally liable because of the separate legal entity principle. The debt is owed by the company itself and not the directors/shareholders personally. Moreover, Wong Holdings Sdn Bhd is a private limited company normally limited by shares, which means that the liability of its members is limited by the memorandum to the amount (if any) unpaid on the shares respectively held by them.
- (d) Kassim and Ali need not enter into a written agreement unless they choose to. A partnership firm may or may not be created by a written partnership agreement.