



**CHARTERED INSTITUTE OF BANKERS (GHANA)
ASSOCIATESHIP EXAMINATIONS**

**CHIEF EXAMINER'S REPORT
&
SUGGESTED SOLUTIONS**

of the

LAW & PRACTICE OF BANKING

LEVEL III – PAPER

in the

October 2016 Examinations

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The October 2016 Examination

The October 2016 Examination recorded 241 candidates (232 in April) in all the Centres, with Accra, as at all times, recording the highest number of candidates at 170 (177 In April) as shown below:

Centre	October 2016	April 2016
Accra	170	177
Kumasi	44	44
Sunyani	16	4
Takoradi	1	2
Tamale	10	5
Total	241	232

Number of Questions attempted and performance

241 candidates attempted 1,157\1,205 questions (241 times 5 questions).

198 candidates attempted 5\5 questions; 38 answered 4\5 questions; and 5 candidates attempted only 3\5 questions.

40\43 candidates answered only 1\2 questions in Section “B” on Securities for Bankers’ advances. The above notwithstanding, 2 candidates answered 4 questions and passed.

Questions attempted\Centre	Q1	Q2	Q3	Q4	Q5	Q6	Q7
Accra	135	145	81	146	163	84	59
Kumasi	36	39	22	35	43	23	20
Sunyani	15	13	8	12	14	10	8
Takoradi	-	1	1	1	1	-	1
Tamale	10	8	3	8	7	5	
Total	196	206	115	202	228	122	88

Candidates did quite well in Section “A”, but question “5” in section “B” turned out as the most popular question which saw 228\241 candidates working at it and with 78 candidates obtaining marks between 11 and 15. However, question “7” on “Agricultural Credit Charges” (a bonus question) recorded the least patronage at 88\241. Candidates couldn’t recognize the floating charge element which was examined as an accessory in question “6” about Debentures. Table below shows the patronage of questions and how candidates performed in 3 categories of marks obtained.

Questions attempted\marks	Q1	Q2	Q3	Q4	Q5	Q6	Q7
Marks>16	8	-	4	43	6	-	3
Marks 11 to 15	52	40	21	80	78	9	18
Marks 1 to 10	136	166	90	79	144	113	67
Total	196	206	115	202	228	122	88
Highest mark recorded (Centre)	18 (Ksi)	14 (Acc)	20 (Acc & Ksi)	20 (Acc) 2 candidates.	17 (Ksi)	14 (Ksi)	17 (Acc & Ksi)

Questions “2” & “4” turned out as the most favourable questions in section “A” recording 206\241 and 202\241 respectively. Question “4” saw the best performance with 43 candidates making marks between 16 and 20; and 80 candidates recording marks between 11 and 15.

Banking Students and candidates continue to show little understanding of the workings of the Cheque and the Bills of Exchange Act, and no doubt, those who attempted questions “1”, “2” & “3” recorded the highest numbers in the lowest marks category of marks “up to 10” at 136, 166 and 90 respectively, in Section “A”. The first 3 questions examined Students on the workings of the Cheque as a type of bill of exchange and performance was not encouraging.

Question 3 on Joint Accounts and the effect of a “countermand” in the Banker and Customer Relationship, recorded the least number of attempts at 115\241 candidates., even though this matter was thoroughly discussed at the “Meet the Examiner” session in both Kumasi and Accra.

Pass rates across the centres.

Results Status by Centres	Pass	Fail A	Fail B	Fail C	Total
Accra	53	17	39	61	170
Kumasi	18	11	14	1	44
Sunyani			10	6	16
Takoradi	1				1
Tamale				10	10
Total	72	28	63	78	241
	30%	12%	26%	32%	

The bigger centres made the most passes, even though Takoradi made a 100% pass. Sunyani had a peculiar way of dealing with this paper and several candidates put up the same issues, such that, if one person got it wrong all the others followed suit. Tamale candidates, seemingly, have a major challenge with tuition and should make good use of the Examiner's Report and suggested solutions to complement their efforts.

The Suggested Solutions

Much as these have been presented as suggested solutions, it was not expected that Banking Students and candidates should present same in order to pass this paper.

I expect that Banking Students and candidates will recognize the need to, first and foremost, seek sufficient knowledge and then to apply the knowledge to acquire the qualification.

I have therefore developed this Examiner's Report and suggested solutions to provide as much guidance and information to enable candidates to perform effectively in their various roles in the financial services business by applying some basic Banking knowledge to the routine Banking needs of customers.

My desire is simple - to guide and support the efforts of Banking Students; candidates and Bank workers to obtain very good understanding of the subject.

Lecturers, Students \ Candidates and the Syllabus

Lecturers should endeavour to spend some more quality time, at their lecture sessions, to encourage Students to avail themselves to their chosen profession, commit to this course of study and apply themselves to obtain sufficient understanding of the various Banking Principles and underlying authorities.

It is also necessary that Lecturers and Students alike, will work mutually to cover the entire syllabus and Students will need to equip themselves sufficiently to demonstrate understanding of the whole syllabus.

The question paper and Customer Service

As indicated in a previous examiner's Report, the scenarios in the questions represent needs of the Customer in the Banker\Customer Relationship so candidates should endeavour to prepare themselves to go into the Examination with the desire to satisfy the customer in every question so attempted.

This subject\examination seeks to provide an opportunity for candidates to demonstrate their preparedness to serve and satisfy the customer. Marks obtained in

the examination will therefore always be an indication of how a candidate would have performed in serving 5 customers on a typical Branch Banking day.

Dealing with the examination question

The questions have been dealt with by identifying the underlying principle in the various scenarios examined and these suggested solutions will be most useful to Banking Students; candidates and Bank workers, without seeking to indicate that these are exhaustive.

Students will always be required to logically state the relevant Banking “Issue”\“Principle” so I present the usual frameworks as a guide, using the mnemonics TIPS and\or PERCS, as indicated in the table below. These have always been very useful tools that have, historically, assisted Banking Students; candidates and Bank workers seeking to acquire knowledge and information, to demonstrate their understanding of the subject matter and the working\operation of the respective issues\principles.

Format I		Format II	
T	Think: Read the question carefully, THINK and proceed.	P	Principle: What Banking principle does the question pose?
I	Issue: What is the Issue (including exceptions, if any) in the question?	E	Exception: Are there any exceptions to this principle?
P	Problem: What Issue does the question seek to address\breach?	R	Relate: What principle has been addressed\breached in the question?
S	Solution: Resolve the problem with the Issue and conclude?	C	Conclude: Match the principle to the question and conclude.

It is our expectation that Lecturers will treat these as useful material to complement their efforts in passing on information to the Students, who in their bid to equip themselves sufficiently for their examinations, seem to place obtaining the “qualification” ahead of acquiring knowledge\expertise in our chosen profession.

It is my joy to help Students to acquire knowledge first and foremost, and then to use this knowledge to prepare sufficiently to enable them obtain the qualification they so earnestly seek, so join hands with me and let’s make our profession an enviable specialty.

The Question Paper

The question paper, as indicated above, is intended to test the understanding of the Banking Student and his\her ability to demonstrate same in the questions examined, where one has the opportunity to make 3\4 choices of questions in Section “A” and 2\3 questions in Section “B”, but in real situations, one would be expected to capably deal with 7\7 customer complaints coming up in the Branch on any given day.

The statistics of passes in this subject touches the very foundation of the Banking Business and as a subject which has, historically, been branded as useful training platform for Branch Managers, I expect Banking Students to put in much more effort in demonstrating understanding of the Banking business to drive Ghana’s Banking industry.

I now present the issues\principles examined in the various questions.

The questions and underlying principles\authority

Questions 1 and 2 – working of the Cheque & the role of the Paying Banker

Banking Students and candidates were required to exhibit their understanding of the workings of a cheque from point of issuance through, and among the various parties in its due course to the Paying Banker.

Candidates preferred to state the rights of a holder in a cheque rather than indicate what capacity gives the holder any such rights. Even where such capacity was made, applying the knowledge to the scenarios, especially, in the matter of “**holder in due course – (HNDC)**” indicated\showed very little demonstration of understanding in the operation of cheques.

Most Students had some difficulty with the principle of a “countermand” and the HNDC in question 1 and the effective working of a “countermand” of payment in question 2.

- In both parts “a” & “b” of question 1(ii), candidates needed to just state that “Gifty will be entitled to the cheque because she has become a **holder in due course.**”; for 5 marks each. A countermanded cheque does not take away the rights of a holder or the responsibilities of the drawer\endorser – see **s. 53 BEAct 55 of 1961.**

In question 2, candidates were required to define countermand and indicate what makes a countermand effective. Quite a number failed to recognize that a countermand is as effective as what **s. 74 BEAct 55** requires of the Banker; that is, **revocation of the duty and authority to pay a cheque**, which also means, the “countermand” must reach the Banker before the cheque is presented and must include the very most important ingredient(s) - the specific cheque number.

The role of the Paying Banker regarding **ss. 57, 58 & 79** in question 2 was poorly answered and I will suggest that Lecturers will put much more attention in this part of the syllabus and encourage Banking Students accordingly.

Question 3

Question 3 examined Students in the principle of a **Joint Account** as a **type of accounts**; and obtained the least patronage in Section “A”, at 115\241, even though, there were a few good submissions and was one of the questions which scored 20\20 marks. Indeed, this was one of the principles which Candidates at both sessions of the “Meet the Examiner” asked questions about, and I dealt with same; but seemingly, only “**those who had ears heard**”.

I wonder if Candidates realized that the principle of “countermand” was examined in questions 1, 2 & 3; and I want to use this opportunity to advise Banking Students and candidates that, principles in the Banker and Customer and Relationship may be examined in several forms, in as long as they would pose a risk in the Banking business.

Countermand has been discussed extensively below, under question “2” in “**Suggested solutions**”; to complement the efforts of Banking Students and Bank workers.

Question 4

This was the most well answered question (in all 3 categories of marks as shown above); from the authority of an Agent under a Power of Attorney and safe custody items; through the workings of a Standing Order Instruction; and the customer’s first right of Appropriation to the Bankers’ Duty of Secrecy.

- i. Candidates presented some good submissions and were adequately rewarded. Many a candidates advanced “**If**” and “**Whether**” statements without stating the reasons\authority for those submissions and **DID NOT** answer the question.
 - The question specifically indicated that the Bank was served with a copy of a Power of Attorney issued under *s. 6 of the Power of Attorney Act 548 of 1998 (Ghana’s equivalent of s. 10 of the Power of Attorney Act 1971 of the UK)*, BUT many candidates would make statements, the likes of:

- “If the PA states that Emmanuel should be given a cheque book, then the Bank will give it to him.”.
- “We will check to see **whether** the PA requires that Emmanuel should be given a cheque book, before we give him the cheque book.”

These statements do not answer the questions and it is not in the Chief Examiner’s authority\responsibility to fill in the gap\make conclusions for the candidate.

- In the case of the safe custody matter, many candidates submitted that the Bank will not release the “**safe custody items**” because Emmanuel was not the depositor of those items, even though Emmanuel requested for just “**a list of safe custody items**”; and NOT THE SAFE CUSTODY ITEMS!!!

- ii. The bit on Standing Order Instruction (SOI) regarding the customer’s responsibility to make sufficient funds available on the account on due dates was conspicuously missing in quite a number of scripts; and that the Bank:
- is not under any obligation and does not owe the customer any duty of care for insufficient funds on the account; and
 - shall not be liable to the beneficiary for non-payment under the SOI.

The accompanying piece on the Bankers’ Duty of Secrecy - another obvious bonus question - went a begging with some ridiculous statements, including that the Bank shall be liable to the beneficiary for the arrears and will have to inform the beneficiary about the reasons for non-payment.

Question 5

This was the most patronized question which saw some good marks as well and deserving scripts were so rewarded.

Candidates were expected to demonstrate understanding of the **rights of a guarantor** and the Bankers’ duties for disclosure of information and of Secrecy.

- i. Several candidates mixed the right of the guarantor for information concerning the status of the guarantee against the balance on the account with the request for transactions.
- There was a split among candidates who would disclose the balances without reservations; who would request the guarantor to make good GHs8,000.00 to the Bank to bring the balance of GHs58,000.00 at par with the guarantee of GHs50,000.00; and several scripts had it that, the Bank should not accede to the guarantor’s request for balances on both dates, irrespective of the balances on the account with respect to the security.

- The Disclosure bit was treated much the same way as was done in question 4(ii) above. It is unfortunate that Banking Students; candidates and Bank workers would suggest that a guarantor should be informed about the transactions on the account of the customer to enable the guarantor to monitor the spending habits of the bank's customer.
- ii. This question sought to examine Banking Students and candidates on the attributes of good security; (same type of security based on availability, suitability and relevance\need); and to determine the acceptable and suitable way of taking the said security.
- Candidates did not realize that suitability\acceptability of same type of security was dependent on the attributes of that property and the way of taking such property as security for Bankers' advances. In which case, Banking Students and candidates were required to compare and contrast the attributes and perfection procedures. Despite, the specific indication involving an offer of a "shareholding in John Limited, a small and prosperous private company where he is a Director", some candidates would present the attributes of **listed** shares and company resolution.
 - Deserving candidates were duly rewarded for doing justice to the question.

The typical weakness of handling Section "B" questions on Security for Bankers' advances was very obvious here.

Question 6

This question examined candidates on Company Securities, specifically, a Debenture incorporating fixed & floating charges and the operation of the law "when things go wrong"; in this case, a subsequent borrowing involving a new asset (an additional factory premises) to be charged as security to another Bank.

- Without reassessing the effectiveness of the Debenture and its capability to catch the new asset under the floating charge among others, several candidates were quick to have PREDEQ Consult proceed with executing security over the new asset, in favour of the other Bank, just as if it has been acquired already;
- Quite a number of scripts presented perfection procedures for a sub-mortgage of the yet to be acquired property, while others offered suggestions that the Standson Bank should be prevented from having access to the customer.

The second part required knowledge of the demerits of a floating charge.

Question 7

Agricultural Credit Charge was examined for the first time and the question was framed to require very simple submissions from Banking Students and candidates, yet we witnessed some “wild” guess work. Because Agricultural Credit Charge is so new in the syllabus, this paper provides some useful material under “**Suggested solutions**” for this question. Banking Students and candidates are encouraged to note the very technical principles in this type of security such as that:

- This charge is available to the Banker and may be provided by only a **farmer** in the various capacities as the individual and/or person trading as a sole proprietor; or in a partnership, including family partnerships.
- Landed and/or landed property shall not be considered as part of the farming stock, and so such security for Bankers’ advances should be treated as separate Legal Mortgages in favour of the Bank;
- Properties in Agricultural Credit Charges are placed under a broad term as “**farming stock**” which is specifically defined in the write-up under “**Suggested solutions**” referred to above.

Application of knowledge and understanding of the typical floating charge in a debenture (examined in question 6) would have been very useful here.

SUGGESTED SOLUTIONS

SECTION “A” QUESTIONS

QUESTION ONE

- i. The Bills of Exchange Act governs the use of cheques in Banking and Ghana’s Act 55 of 1961 provides for the operation and use of cheques for its banks. Sections 25 and 27, and s. 29 of the BEAct of 1961 define holders in the operation of cheques and negotiability of cheques.
- a) What constitutes a “**holder for value**”? (2 marks).
 - b) What 2 forms of transferability of a cheque constitute “**negotiability of a cheque**”? (2 Marks)
 - c) What constitutes a “**holder in due course**” of operation of a cheque? Responses should include brief notes of the requirements (6 Marks).
- ii. Your customer, Rebecca Quartey – in settlement of Clearing & Customs charges for personal effects from the UK, issued an order cheque in favour of her uncle who endorses it, in blank, to his wife – Mrs Kai Quartey. Kwame Ansah, son of Mrs Quartey’s nanny steals the cheque and persuades his girl friend, Gifty to cash the cheque at your counters and the cheque was paid.
- a) What is your bank’s position and why would Gifty have been entitled to the cheque in the workings of the BEAct of 1961? (5 Marks).
 - b) If it turned out on presentation that Rebecca had stopped the cheque, will Gifty still be entitled to the cheque in the workings of the BEAct of 1961? (5 Marks).

Suggested solution

This question on Cheques and its workings is a very important element in the Banking business, but regrettably, Banking Students, candidates and Bank workers assume it is only a payment instrument. No doubt, today’s Banking has allowed its use to assume a seemingly easy instrument to handle, thanks to IT and competition, but these elements do not take away the roles and responsibilities of the parties in the workings of a cheque. The parties in the due course of operation from the customer to the Paying Banker come into play significantly in this question. Here we go with the suggested solution.

- i. Holder for Value (**HFVal**):
- a) An **HFVal** in a cheque is one who is said to have given value, antecedent or otherwise and such a holder may be the **payee** who is in possession of it, or an **endorsee** who is in possession of it, or the bearer of it.

- By s. 28(1) of the BEAct 55; “Every party whose signature appears on a bill is prima facie deemed to have become a party thereto for value”; but an **HFVal** is not liable upon a bill unless he has endorsed it, although he may sue on the bill in his own name.
- Section 25 of the BEAct 55 of 1961 provides in sub-sections (2) & (3) that a **HFVal** is as follows:
 - ss. (2): “Where value has at any time been given for a bill the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who become parties prior to such time.”
 - ss. (3): “Where the holder of a bill has a lien on it arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien.”
- Until value is given, no party can sue upon a bill.
 - If, for example, **no value is given on a bill and this bill reaches the hands of a third endorser who had given value**, none of the parties (the first and second endorsers) before that third endorser can sue upon the bill, but the third endorser, because he has given value, can sue all the prior parties.
 - If that third endorser transfers to a fourth person, without any value being given, this fourth person cannot sue the third endorser, (not having given value to the third endorser), but s\he can sue all the parties to the bill that the third endorser had the right to sue.
 - If the title of a holder for value is defective, as where the bill was obtained by fraud, duress, or force and fear, or for an illegal consideration, he cannot recover the amount from the person defrauded or otherwise.

b) **Negotiability of a Cheque – S. 29 BEAct 55:**

A cheque is said to bear **negotiability** when such a cheque is transferred from one person to another in such manner as to make the subsequent holder a “**transferee**” and “**negotiation**” arises in one of two ways as mere “**delivery**” and “**endorsement and delivery**”.

- Mere “**delivery**” arises when, by **s. 29 (2)**, a cheque issued *payable to bearer* passes on to a subsequent holder. In which case, the holder of a bill *payable to bearer* needs not endorse it (i.e. without endorsing, to constitute a “transferor by delivery” - that is a payee or holder who seeks to effect “delivery”).
- **Endorsement and delivery** arises when the holder of a cheque *payable to order* seeking to transfer such cheque to another, **must endorse** it for negotiation purposes and **deliver** same to warrant to his immediate transferee that the cheque is what it purports to be. By ss. 29(4) ... the transferee in addition acquires the right to have the endorsement of the transferor.)

c) **Holder in due course - S. 27 & s. 28.**

Ordinarily, when a drawer issues a cheque in favour of the payee, the said drawer expects that the payee will present the cheque to the paying bank for payment, either over the counter (OTC) or through a collecting bank for the said payee’s account with a collecting bank.

In the ordinary course of business, a cheque issued in favour of the payee, may, in the due course of presentation to the paying banker for payment, get into the hands of a subsequent holder(s) before the said cheque reaches the counters of the paying bank.

Such a cheque that would have become subject to the provisions in **ss. 29(2) & (3)** through negotiation would create a new\subsequent holder before it reaches the paying bank for payment. As the said cheque gets into the hands of another person in the due course of operation of the cheque, such person becomes a **holder in due course (HNDC)**.

For such person to become a **HNDC**, the said person must, by **ss. 27(1) of the BEAct 55**, have taken the said cheque, complete and regular in the face of it:

- Before it became overdue;
- Without notice that it had been previously dishonoured
- In good faith and for value; and
- Without notice of a defect in title of the person who negotiated it, at the time the cheque was negotiated. Defective title is provided for by ss. 27 (2) as:
 - “In particular the title of a person who negotiates a bill is defective within the meaning of this Act when he obtains the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud. Forgery/theft/deceit do not convey any title.
- And ss. 27 (3) adds that, the above notwithstanding, a **HNDC** would always have all the rights of a **HNDC** in as long as, such holder was not by him\herself a party to any fraud or illegality affecting title to the said cheque, prior to that person becoming a **HNDC**;
- Such a holder will have all the rights to the cheque in accordance with s. 36 BEAct 55.
- By s. 80 BEAct 55, such cheque negotiated should not bear a “**not-negotiable**” crossing, because this crossing has the effect of “not giving a better title of the cheque;
- An “Account Payee (Only)” crossing and any “restricted endorsement” on a said cheque negotiated DOES NOT avail the holder a **HNDC**.

- ii. This questions requires the student’s understanding of an order cheque; negotiability of an order cheque and the resulting holder as a “Holder in due course”, even in the face of a “countermand” instruction.
- a) Kwame Ansah stole the cheque from Mrs Kai Quartey and persuades his girlfriend, Gifty to cash the cheque. Gifty can cash the cheque, having received it in accordance with s. 29 – delivery of a cheque **endorsed in blank** – as a holder in due course. Unless, of course not in this case, Gifty did not obtain the cheque in accordance with s. 29 and s. 27.
 - b) If Rebecca Quartey stops the cheque, Gifty, as a holder in due course, will be able to claim from Rebecca, or her Uncle (who endorsed the cheque in blank) or Mrs Kai Quartey (or even Kwame Ansah, who stole the cheque,) for what it is worth.

The provision in s 53 arises strongly here; wherein and unless, there is proof of a forged endorsement, which is not the case in this scenario. The only operative endorsement was **an endorsement in blank**.

QUESTION TWO

- i. Under section 74 Bills of Exchange Act 55 of 1961 a bank's duty to pay a cheque is determined by:
- countermand (stop) of payment and
 - notice of the customer's death
- (a) What is "countermand of payment" and what is its effect on the Banker\Customer Relationship? **(5 Marks).**
- (b) Name any 5 (five) of the requirements of an effective countermand. **(5 marks).**
- ii. Under what circumstance will a cheque, as a bill be said to have been discharged by "payment in due course" regarding payment of the said cheque by the Paying Bank? Indicate with vivid explanation to demonstrate understanding of the subject, the relevant provisions in **ss. 57; 58 and 79** s of the Bills of Exchange Act 55 of 1961. **(10 marks)**

Suggested solution

- i. **Countermand Instruction on Account.**
This question examines the operation of a countermand instruction in the Banker and Customer Relationship; its working and effectiveness.
- a) Countermand (of payment) in the Banker\Customer Relationship is the stoppage, cancellation or removal of an order of a previous instruction given by a customer, to the bank, to pay a certain amount of money.
1. Such a countermand instruction **determines\terminates the Banker's authority to pay** through a debit to that customer's account as provided for in s. 74 of the BEAct 55 of 1961.
 2. A customer can countermand the payment of a cheque at any time **before presentation for payment\an effective notice of payment** by the Paying Bank, **of such cheque;** and once has been received by the bank, such bank shall not be able to debit the customer's account, even if the said cheque is paid inadvertently or by mistake.
 3. It will be in the interest of a bank to adhere to a countermand instruction from a payee and to return any such cheque, subsequently presented, marked "Payment Countermanded: Drawer's confirmation required".
- b) An effective countermand instruction must:
1. Be in writing, of course, from a known customer, a notice given by some electronic means (telephone, fax, etc.) will suffice for postponement of payment of the said cheque; but which must, subsequently, be confirmed in writing.
 2. Be complete in all respects and, in accordance with the ruling in **Westminster Bank Ltd. v. Hilton (1926)**, an indication with a specific direction to the:
 - **account number of the drawer and customer;**
 - **cheque number;**
 - **name of payee;**

- **amount;**
 - **date of issue.**
- 2.1. A drawer customer can issue 2 or more cheques in favour of the **same payee**; for the **same amount**; on the **same date**, but **NOT with the same serial cheque number**. All such cheques will bear specific\distinct cheque numbers.
 - 2.2. In *Westminster Bank Ltd., v. Hilton*; Hilton issued cheque number 11783 and intending to countermand same, the telegram to the bank bore cheque number 11785. Cheque 11783 was presented to the bank, the bank paid it and the said payment exhausted the balance on the account and a subsequent cheque presented to the bank was dishonoured for lack of funds.
 - 2.3. The Court held that the bank was not liable because the customer failed to give the specific number of the cheque he intended to countermand. The Court stated authoritatively that the specific cheque number is the most important identification to give credence to any countermand instruction because it is the only distinguishing feature on any cheque leaf in every cheque book. This is the only information that cannot be duplicated. Two or more cheques of the same amount can be issued to the same payee on the same day and date.
 3. Be served on the branch of the Bank where the account is domiciled\kept.
 - 3.1. If it is served at the Head Office or any other branch of the bank; then the Office Branch shall inform the said Branch where the account is domiciled in accordance with the ruling in **London Provincial and South Bank v. Buzzard, 1918**.
 - 3.2. Just the same way, a cheque would have been said to have been presented for payment “**at a reasonable hour on a business day, ... at the proper place ...**”; in accordance with **s. 43 BEAct 55 of 1961**, particularly, as provided for in **ss. 2(c) and 2(d)**; it should not be out of place for a “Countermand” to be so served on a Bank at any Branch of the said Bank.
 - 3.3. In today’s Banking of IT networking, it should not be unexpected that a countermand should be served at any Branch of the Bank. Indeed, **ss. 2(d)(iv)**, “proper place” is also provided for as “**... wherever he (the drawee) can be found ...**”.
 4. Be actual and not constructive, that is, the instruction must actually come to the customer’s bank, **Curtice v. London City and Midland Bank, 1908**.
 5. Be served by the drawer of the cheque, i.e. the bank’s customer. In the case of a group of persons, the likes of a limited liability company\club (association\society, etc.), the Secretary may give a countermand, jointly, with another director\signatory:
 - A Joint Account holder may issue a countermand instruction on any cheque drawn on the account, by him\herself or other party(ies).
 - An active partner, even if such active partner is not a signatory to the account, should be able to serve a countermand instruction.
 - A principal can stop a cheque drawn by his agent; and
 - 5.1. By implication, it is deemed that a payee (who is not the drawer) may seem not to have the right to serve a countermand instruction on a a Paying Banker. But, of course:
 - 5.1.1. no Bank will pay a cheque after having received a “**countermand from a payee**”, especially so when all the necessary ingredients have been provided; simply because it is the payee who served a countermand instruction, instead of the drawer;

- 5.1.2. it will not be out of place for a Bank to dishonour any such cheque, marked with the reason “**Payment countermanded: Awaiting Drawer’s confirmation**”. Of course, it cannot be said to be in the interest of any payee to stop payment of a cheque which provides a financial benefit to him\herself.

ii. **Payment in due course & the Paying bank**

The Paying Banker (PB) is the bank which has the direct responsibility of “**honouring the customer’s instructions to pay ...**”.

1. The PB is obliged to, on presentation, pay cheques when a said cheque is drawn by the customer in legal form\according to the customer’s instruction\mandate particularly by s. 22 BEAct 55, provided that:
 - 1.1. the cheque is presented:
 - 1.1.1. during the advertised banking hours;
 - 1.1.2. within a reasonable time thereafter; at the branch where the account is domiciled;
 - 1.1.3. against sufficient cleared funds within agreed overdraft limits without a legal cause which makes such funds unavailable;
 - 1.2. there is no previous notice of a countermand instruction\notice of death; in accordance with s. 74 BEAct 55; or such legal bars\other factors (including mental incapacity; bankruptcy, receipt of a garnishee order; etc.) that affect the banker and customer relationship;
 - 1.3. the paying banker is in a position to exercise care and skill which means that, in certain circumstances:
 - 1.3.1. non-payment of the said cheque will not be an unjustified refusal to honour the customer’s mandate.

According to *Lipkin Gorman v. Karpnle&Anor*, a reasonable banker would be justified in refusing to honour his customer’s mandate if there was a serious or real possibility that his customer might be defrauded;
 - 1.3.2. the bank may justifiably refuse to honour its customer’s mandate, in such manner as to suggest that, a reasonable banker would be in breach of duty if he continued to pay cheques without inquiry.
 - 1.3.3. In *Babalola v Union Bank of Nigeria Ltd*, the court held that the defendant bank was justified in refusing to honour the cheques, pending further investigations, where there was an obvious disparity between the signatures on the cheques and the specimen signature.
 - a) Even if the disparity is not obvious, the banker will be justified in its action if it has an honest doubt as to the authenticity of the signature.
 - b) If there is no basis whatsoever for such doubt, the bank will be liable for breach of contract. If a bank pays upon a forged or unauthorized payment instruction it will not be protected.
2. Before the Paying Banker makes a decision to fulfill the above responsibilities, it must well be established that the said cheque is good for payment on demand; in good faith; without negligence and in the ordinary course of business to the holder (payee or subsequent

endorsee in accordance with the said endorsement); and in accordance with the crossing on the cheque, if that were the case, as provided for by the BEAct 55 through:

- ss. 57 for “**payment in due course**”;
- ss. 58 for “**forged endorsement**” and
- ss. 79 for “**crossed cheques**”.

2.1. **S. 57(1) of the BEAct 55.**

2.1.1. A cheque as a type of bill “payable on demand” (s. 72 BEAct 55) is said to have been discharged by *payment in due course* when the paying banker makes payment of a cheque on the **day of the stated date** on the cheque or **within six months of the said date**.

2.1.2. The Act, by s. 57, provides that “payment in due course” means payment made **at or after the maturity of the bill** to the holder thereof in good faith and without notice that his title to the bill is defective.” Indeed, that is the very reason why no Banker will pay a “post-dated” cheque, without a recourse to the drawer, if that were the case.

2.1.3. When a cheque is issued, it becomes payable in one of two ways, to the payee\endorsee:

- a) as a **payment\exchange for cash over the counters** (OTC) of the paying bank;
- b) or, when so restricted (by a crossing on the face of the cheque; **through an account for the holder** with another bank, herein called a collecting banker.
- c) Cheques payable OTC have, historically, been the plain cheque itself or one with the said restriction – a **crossing** - accompanied by a direction (**Please pay Cash**) and authentication of such direction by and only by, the drawer.
- d) The Paying Bank shall not make payment of a crossed cheque OTC; because that cannot be said to constitute “payment in the ordinary course of business”.

2.2. **S. 58 of the BEAct 55.**

By s. 58, a Paying Banker, which pays a cheque payable to order on demand to a payee or a subsequent holder as a result of an endorsement, without notice that his title to the bill is defective (s. 57 BEAct 55) will be said to have become discharged and:

2.2.1. It shall not be incumbent on the paying banker to show that the endorsement on the cheque:

- a) was\has been made by the payee or subsequent endorsee or
- b) was\has been made by or under the authority of the person whose endorsement it purports to be;

2.2.2. the banker shall be deemed to have paid the bill in due course, although such endorsement has been forged or made without authority.

2.2.3. Payment to any other person, other than the holder, shall not constitute “payment in due course”.

2.3. **S. 79 BEAct 55 for the crossed cheque.**

A “**crossing**” is provided for by:

- s 75 for “Crossings” defined);
- s. 76 for “persons having capacity to cross a cheque”;
- s. 77 for “Materiality of a crossing”;

- s. 78 for “duties of the Paying banker as regards a crossing”.
- 2.3.1. By s. 79 BEAct 55, the Paying Banker shall, in good faith and without negligence, pay a crossed cheque:
- to a banker, herein called the collecting banker and banker of the holder of the cheque, if crossed generally, and;
 - to the specific banker in accordance with the special crossing (a crossing with a named bank therein);
- 2.3.2. Payment in the ordinary course of business is also based on the usage of bankers. For instance, “*payment in the ordinary course of business*” cannot be said to have occurred when the paying banker makes payment of:
- a) a crossed cheque over the counter (OTC) to a person other than the drawer; where there is no direction to so do;
 - b) a large sum of money over the counter to person of suspicious appearance and demeanor.
- In *Auchteroni & Co. V. Midland Bank (1928)*, it was held that payment of a large amount was not in itself be outside the ordinary course of business so long as no suspicious circumstances exist; and a cheque **long after the advertised working hours** will not qualify as payment in the ordinary course of business.
 - In *Baines v. National Provincial Bank (1927)*, the court held that banks must be allowed a “*reasonable time*” in which to complete their business after the advertised working hours. The customer issued a cheque shortly before close of business in the belief that the payee would not be able to obtain clearance that day. The payee presented the cheque for payment at a sub-branch of the bank and got paid and the customer’s countermand the next morning turned out as ineffective and the customer claimed the amount of the cheque from his bank.
- 2.4. Finally, a Paying Banker which makes payment of a cheque *payable to order* and *on demand* to the true owner in accordance with its legal form; shall be said to have acted in good faith (by s. 90 BEAct 55), when on presentation of the cheque *payable to order*:
- 2.4.1. By s. 57, makes a *payment in due course*:
- a) At or after maturity;
 - b) In good faith; and
 - c) Without notice of any defect in title of the holder; and
- 2.4.2. By s. 58, makes a payment *in the ordinary course of business*:
- a) In good faith and
 - b) In accordance with the **endorsement**; and
- 2.4.3. By s. 79 and others including sections 75-78 and 80 of the BEAct 55) makes a payment *in accordance with the crossing*:
- a) In good faith;
 - b) Without negligence.

QUESTION THREE

- i. Mildred Hammond and Albert Williams have a joint account at your Koforidua Branch with the usual mandate, “**either to sign**” held on the account. The current credit balance of GHs18,500.00 on the account has been built up to this figure through a “monthly standing order” from Mildred’s account in your Branch.

Last Thursday, you received a letter from Albert Williams instructing your branch to place a “stop” on a cheque for GHs7,500.00 issued by Mildred in favour of the Precious Minerals Company Limited. The letter also indicated that the money on the account is earmarked towards the deposit of a house and cannot afford to have money spent on such expensive jewellery. The necessary precautions were taken appropriately.

This morning, your Secretary informs you that one Mildred Hammond has requested to speak to you about the said cheque and vehemently indicated that Albert had no right to stop the cheque. Your enquiries showed that, beside the 03 January, 2004 initial cheque deposit of GHs100.00 drawn on Albert William’s account with the Trustees Royal Bank, every other deposit on the account had been a monthly transfer from Mildred’s Savings Account (GHs5,500.00) with your Branch.

Mildred requests that you arrange for the cheque to be represented for payment and then to delete Albert’s name from the mandate on the account.

- a) With appropriate principle\authority, indicate, with relevant illustration, what type of account relationship\customer is and the various forms of ownership arising in the Banker\Customer Relationship. **(6 marks)**
- b) State with reasons, how will deal with Mildred’s requests, indicating the considerations you would have in mind. **(6 marks)**
- ii. Subsequently, Mildred Hammond who also had a Loan account at GHs7,500.00 in your Branch requests you, threateningly, to close the accounts by the close of business of Friday, under advice to her, and hands the Cheque book over to you. State, with reasonable prudence\authority, how you will deal with her request and what considerations you would have in mind. **(8 marks)**

Suggested solution

- i. **Joint Account Relationship defined:**

A joint account is a type of bank account\evidence of the Banker and customer relationship which allows two (2) or more persons to own the account and manage the relationship. A joint account (of spouses, friends and business partners, among others) does not impose restrictions regarding ownership and affords equal access to funds, regardless of who deposited the money.

- Joint accounts may not suit everyone. All account parties share ownership as well as risks and responsibilities in the Banker and Customer Relationship and operation of the account. It is very much important that one will agree to open a Joint Account with trustworthy persons of a common household; the likes of spouses, who share similar aspirations in financial issues and obligations.
- Common Law prescribes some ownership forms which provide rules of appropriation of funds for such instances as death particularly, even though in certain jurisdictions, such provisions may cover circumstances such as divorce.

- Banks will not usually want to get entangled with such matters.

a) **Types of Joint Accounts and Ownership**

Types of accounts determine the form of Ownership and Survivorship under the Joint Tenancy and/or Tenancy-in-common which prescribe ownership of the property, especially at death and other elements of operation of law in the table below.

1. **The Banker and Customer Relationship.**

The Banker and Customer relationship requires the Joint Account Holders to provide a mandate – a set of instructions - outlining how the Joint Account holders will manage the relationship and operate the account.

It is very necessary to state, categorically, that the elements of the Banker and Customer Relationship indicated above does not apply in the workings of “personal and individual” customers, and there will **never** be a “mandate” on an individual’s personal account.

A mandate with the Bank on a Joint Account will usually involve:

- Names of Signatories and extent of authority, if that were the case; and
- A set of Signing Instructions.

1.1. **Names of signatories & Authority**

Names of signatories will be provided amongst the joint account holders, not necessarily including all parties. It will also indicate their authority to act for and on behalf of all parties, including issuing cheques and countermand instructions.

1.2. **Signing Instructions.**

This will indicate the way(s) in which the signatories will manage\conduct the account as:

- i. All\either to sign in a 2-party joint account.
- ii. All\Any to sign with a maximum of “Any 2”, in a 3-party joint account. A 4-party joint account will involve “All to sign”; “Any 2”, and a maximum of “Any 3” to sign and increase as the number of signatories increase in that sequential order.
- iii. Signing instructions may also be indicated for **transaction** purposes; for **amount** limits and also in separate **groupings** with separate signing powers. For example, a **4-Party Joint Account** may have **2 groups** of 2 signatories each in Groups “A” and “B” to sign at various permutations with assigned monetary values. Say for the following amounts:
 - up to GHs5,000.00 - 1 “A” & 1 “B” to sign;
 - up to GHs10,00.00 - 1 “A” & 2 “Bs” to sign;
 - above GHs10,000.00 - Group “A” & 1 “B” to sign; but even though there are 3 signatories here, this option will NOT be the same as “Any 3” to sign).

1.3. **Determination of Mandate.**

A mandate in the working of the Banker and Customer Relationship in which there happens to be 2 or more on the customer side is determined:

- On notice of dispute between the account holders; particularly, on receipt\notice of a countermand instruction, from any one party, to stop payment of a cheque issued by any other party in the Joint Account relationship. Such notice returns whatever existing **signing instructions** to an “**All to sign**” arrangement; when the Bank **has cause to believe\has notice of a dispute between the parties.**

- On notice of death of a party(ies) in the Joint Account, in which case, a survivorship clause would be a very necessary part of the said mandate at the Account Opening stage.
- Notice of mental incapacity of a party(ies) among others.

2.

	Type of Joint Bank Accounts	
Ownership	Joint Tenants With Rights Of Survivorship Account (most common)	Joint Tenants-In-Common Account
User	Anyone, usually couples, married or otherwise.	Anyone, mostly partners in business and/or household.
Ownership/ Responsibility	Equal/Equal	(Un)equal/Equal
Right Of Survivorship (<i>jus accrescendi</i>)	Bank balance(s) passes to surviving owner	Deceased's share of Bank balance(s) passes to estate for distribution by personal representatives in Will\Intestate.
Subject To Probate\ Letters of Administration (upon death of an owner)	NO	Yes. If decedent has no will or trust, account passes through intestate succession (process of distributing account funds to closest relative(s))
Mandate in the Banker and customer Relationship	All\Either to “deal” in a group of 2 & All\Any to sign in groups of 3 or more, in a minimum of “Any 2”	All\Either to “deal” All\Any to sign in groups of 3 or more, in a minimum of “Any 2”
Liability for indebtedness	Joint liability	Joint & Several liability

- b) In a joint account involving 2 parties, an “either to sign” signing instruction is not uncommon as is the case involving Mildred Hammond and Albert Williams. A cheque issued by one party gives equal rights to any\either party to issue a countermand thereafter.
1. The countermand instruction from Albert Williams and the subsequent developments have provided actual notice of a dispute between the joint account holders and so the Bank will consider the mandate determined and the signing instruction “either to sign” will give way to an “All to sign” mandate.
 2. The status of funds in the account does not change with the dispute and the fact that most credit transactions have come from Mildred’s account through the Standing Order is of no effect and under the circumstances, the Bank will have to invite and inform Mildred & Albert that:
 - 2.1. The countermanded cheque remains so countermanded and no further cheques will be paid unless signed by all parties.

- 2.2. If Mildred consents and with her written authority, the bank may pay the cheque against her personal Savings Account, on presentation to the Bank, at her instance\arrangements for representation;
- 2.3. Albert's name will not\should not be removed from the account unless such instruction is issued by all parties on the account;

ii. Request to close the “ACCOUNTS” - Joint Account; her Savings & Loan.

Mildred's request to close the account and the cheque book returned would have no consequences under the circumstances.

1. The Bank cannot accede to her request to close the “Joint Account” without instructions from both parties, and until then the balance on the account shall be held to the order of both parties - Mildred Hammond and Albert Williams.
2. The Banks will need to advise and obtain Mildred's authority to cancel the Standing Order instruction on the Savings Account which serves to fund the Joint Account.
3. Her Loan Account balance of GHs7,500.00 plus accrued interest to date would be advised to her to make funds available on her Savings Account (with existing balance GHs5,500.00) to liquidate the Loan.
4. Reliance on the bank's right of Set-Off (Savings Account balance GHs5,500.00 against Loan Account balance GHs7,500.00) would result in a residual debtor balance of GHs2,000.00 pre-Interest calculation.
5. She must be informed that until such time that funds become available on the Savings Account to meet GHs7,500.00 plus chargeable Interest, the Bank will accrue Interest charge to that date.
6. The balance on the Joint account current will not be available to her and the Bank shall not have a right of set-off; so she has to provide GHs2,000.00 and the accrued Interest to date and same shall be advised to her.

QUESTION FOUR

Last week, your Assistant Manager referred a letter from Emmanuel Quartey informing you that he is a student aged 17 and the son of your Private Banking customer Peter Nii Kwartei Quartey – a Construction Engineer of very high repute, both in Ghana and abroad. Peter has a Current and Savings accounts with your Branch and you hold, in Safe Custody, quite a number of Certificates covering several Stocks and Shares in the Central Securities Depository.

Today, Emmanuel has called to see you and during discussions, informs you that his father has had to go the Far East on some very urgent business dealing and will be away for nearly 6 months and his father has appointed him as his attorney.

Emmanuel produces a copy of a Power of Attorney issued under s. 6 of the Power of Attorney Act 548 of 1998 (Ghana's equivalent of s. 10 of the Power of Attorney Act 1971 of the UK) and requests for a cheque book for the current account and a list of the items held in Safe custody.

- i. Indicating what considerations you would bear in mind and, giving reasons for your answers, state how you will deal with Emmanuel's requests below:
 - a) The Cheques book **(2 marks)**
 - b) The Safe Custody items **(2 marks)**
 - c) When all was done, and before he left your office, he also asks if he can arrange to have his mother sign on the account as he will be entering the Kwame Nkrumah University of Science & Technology and she will need to pay some regular household bills. **(4 marks)**

- ii. Your customer, Naa Deedei Tsagli has given a standing order instruction to make mortgage payments to the Ghana Home Loans Company Limited on the 18th of each month. On Tuesday, last week your bank withheld the payment because of insufficient funds on the account. Today, sufficient cash has been placed to the credit of the account which though adequately covers the transfer, no reference\notice was made to you regarding the standing order. Cheques were subsequently paid against these funds and the mortgage has fallen back for seven months, and instalments are now in arrears. Ghana Home Loans threatens to repossess the property.
 - a) What is a Standing Order Instruction and how does it operate? **(4 marks)**
 - b) What, if any, will your bank be liable for, and why? **(2 marks)**
 - c) Today, you receive a letter from the Ghana Home Loans Company Limited and signed by one Etsey Dodor Tagoe as Managing Director requesting you to advise the reason for non-receipt of monthly instalment payment in the last seven months. Giving reasons for your answer with appropriate principle\authority, indicate what responses you will make. **(6 marks)**

Suggested Solution

This question seeks to examine the candidate on the use of a Power of Attorney and effects of a General Power of Attorney and the workings of a Standing Order Instructions – roles and responsibility in the Banker and Customer Relationship.

- i. A Banker, on receipt of a general Power of Attorney, will usually obtain completion of the Bank's standard General Procuration form which will tailor the authority to the responsibilities of the Customer in the Banker and Customer Relationship.

Emmanuel Quartey has been appointed an attorney in accordance with s. 6 Power of Attorney Act 549 of 1998 (Ghana's equivalent of s 10 Power of Attorney Act 1971 of the UK) and which confers a General Power to do anything the Donor can lawfully do.

1. The Bank must request and obtain an original\certified true copy of the said PA.
 - 1.1. Examine the PA to ensure that it has been so issued\executed and is in order as intended.
 - 1.2. Examine the customer's file for a copy of the Bank's General Procuration Form (tailored for the Banker and Customer Relationship) which is expected to indicate, precisely, what the attorney will be authorized to do in the Banker and Customer Relationship to ensure that no such responsibilities of the customer would have been excluded. If no such GP form was executed, then the Bank would be compelled to accede to Emmanuel's request, despite his legal capacity as a Minor in the Power of Attorney.
2. By s. 10 of the PA Act 1971 (UK)\s. 6 of Ghana's PA Act 549 of 1998, the Bank would have to verify his identity to ensure that Emmanuel is who he says he is and:
 - a) issue a Cheque Book for Emmanuel's use;
 - b) provide a list of Safe Custody items to Emmanuel against his acknowledgment and NOT the safe custody items;
 - c) the Bank shall not accede to his request to have his mother sign on the account because as an Attorney, Emmanuel cannot delegate his powers, unless the PA expressly provides for such delegation under the doctrine (delegatus non potest delegare).

ii. **Standing Order Instruction: What it is and how it operates!!!**

a) **Standing Orders defined:**

1. A Standing Order instruction is a customer instruction to the Banker, requesting for movement of funds from the customer's account" for own\another person's benefit, irrespective of location. Such an instruction(s) should indicate the following:
 - 1.1. The **Remitter** – person\account which shall be debited to effect the fund transfer;
 - 1.2. The **Beneficiary** – person for over the counter payment; through a Bank account which need not be domiciled in ne and the same Branch\;Bank;
 - 1.3. The desired **Amount**, usually fixed, to be transferred to the said beneficiary;
 - 1.4. Effective **Date** (usually the nth day for the start\subsequent execution day of the said Order) of transfer and the **Frequency** (usually monthly) at which the transfer shall run. For example, 6th day Monthly;
 - 1.5. Expiry Date, usually in perpetuity when the purpose is for savings and investments.
 - A Standing Order can run for a set number of payments; a set period of time or **until cancelled**.
 - If otherwise, an **end\expiry date** will be stated, especially, in the case of loan\mortgage repayments.
 - 1.6. The customer in such Standing Order instruction has a major responsibility to:

- 1.6.1. ensure that the source account will provide sufficient cleared funds\agreed overdraft limit to facilitate the Banker's duty to act on this instruction on due date; without the obligation to check and act on overdue periodic payment(s) arising as a result of non-application due to insufficient funds on the respective due date(s); in accordance with the ruling in **Whitehead v. National Westminster Bank (1982)**.
- 1.6.2. There is no privity of contract between the remitting bank and the beneficiary (or beneficiary's bank) to owe any liability for disclosure and explanation for non-application of the standing order.
- 1.7. Standing Orders, besides own savings\investment needs and loan\mortgage repayments, are useful for other such movement of fund including living expenses for minors who stay away in School. Such Orders also come in handy for building up funds\savings in managing Trust Accounts for minors (usually branded as Eric Quartey in trust for (ITF) Esther Quartey).

b) **Liability in the Standing Order**

The Standing Orders arrangement imposes an obligation on the Customer to ensure availability of funds on the account on the said **effective date**, at all times, to ensure an effective management of a Standing Order Instruction. Especially, in these times of information technology stance, where some Banking software allow some grace period for execution, even though, would otherwise not be necessary.

1. The Banker is **not obliged** and will not liable for such standing orders not getting executed **as a result of insufficient funds** on the stated effective date.
2. The Bank shall neither be liable to the beneficiary in a Standing Order Instruction **for non-application of a standing order to the credit of the beneficiary**, nor shall the bank owe an explanation thereof. Indeed, a Banker shall not be obliged to execute such standing order, due to availability of funds on the account thereafter, without the authority of the Customer.
3. Any such action of appropriation of funds, without the customer's authority and resulting in unavailability of funds for payment of a cheque(s) subsequently presented for payment and which are returned unpaid shall constitute a liability for a "wrongful dishonour" of the cheque(s). The Bank will therefore become liable to the customer for **wrongful dishonor** because the Customer has a **first right of appropriation**.

c) **Letter from the Ghana Home Loans Company Ltd.**

1. Payment of all cheques on the account would have been made in the ordinary course of business, notwithstanding non-application of the standing order instructions as a result of insufficient funds on the due\effective dates.

2. The Letter

- i. The Bank shall neither be liable, under the circumstances, for non-application of the standing order for payment and therefore, non-receipt of the monthly instalments, nor owe any explanation to the Ghana Home Loans.
- ii. The Banker's duty for confidentiality and\or disclosure does not provide for such responsibility and the Bank cannot accede to their request, except under an operation of law in accordance with s. 84 f the Banking Act 673 of 2004.
- iii. The Bank will respond and indicate the Bank's inability to accede to their request, in the ordinary course of business and in accordance with regulatory obligations in **s. 84**

Banking Act 673 of 2004; and of course, the authority in *Tournier v. National Provincial Bank* (1924);

- a) Ghana Home Loans should be able to obtain any such explanation from Naa Deedei Tsagli, who is also their customer.
- b) On the other hand, the Bank would be obliged, **if the Bank would have previously, with the consent of the customer, given an undertaking to the Ghana Home Loans in some form**, so the Bank should examine the customer files for any such consent; in which case, the Bank will be obliged to accede to their request and to respond appropriately.

SECTION “B” QUESTIONS

QUESTION FIVE

- i. Mr. Emmanuel Hammond issued a guarantee to your bank for GHs50,000.00 as security for Mr. Nathaniel Hammond’s overdraft in your Branch. On 30June 2016 the overdraft was GHs50,000.00 and GHs58,000.00 on 31August 2016. Today, you have received a letter from Mr Emmanuel Hammond requesting your Branch to advise him of the extent of his liability under the guarantee and the activities on the account in the last 6 months.
- a) What most professional and legally acceptable answer will you give to Mr Emmanuel Hammond regarding his liability under the guarantee on 30June and on 31August 2016? **(4 marks).**
- b) What appropriate answer will you give to Mr. Emmanuel Hammond who also wants to know what activities have taken place on the account? **(4 marks).**
- ii. James Tagoe, your customer is seeking an overdraft facility from your Bank and can only offer his shareholding in John Limited, a small and prosperous private company where he is a Director
In what ways can you obtain a charge on his Shares, noting, if any, possible particular defects in this type of security. **(12 marks).**

Suggested Solution

The first bit of this question examined the rights of a guarantor and the Bankers’ duty for disclosure of information and the second part required knowledge of the attributes of Security for Bankers’ advances, particularly, involving shares in a private limited liability company. Question “5” recorded a highest mark at 17 and 1\3 scored 15 from the Kumasi Centre and a score of 16 by 5 candidates in Accra.

- i. A guarantee as security for bankers’ advance is not a contract *uberrimae fidei* and the Bank will not be obliged to provide information that will otherwise jeopardise the Bank’s security.

A guarantee imposes such liability which also has the tendency of giving an opportunity to a guarantor, such as Emmanuel Hammond, to seek to walk away from the security. Once the guarantee is executed, the Bank must ensure that Bank’s standard form of guarantee incorporates all the protective clauses including the “All Monies”; “Continuing Security”; and the “Conclusive Evidence” clauses, among others.

The guarantee also prescribes some rights to the guarantor and one of such rights is the right to request for information to the extent of the guarantee liability from the Bank. This right imposes a responsibility for disclosure of information on the Bank and the need to be mindful of the Bankers’ duty of secrecy.

- a) This is a very sensitive issue and the Bank will need to refer to the Guarantee document to confirm the existence of the protective clauses, particularly, as mentioned above and the amount guaranteed before making responses. The Bank may, in response to Emmanuel Hammond's request letter, inform Emmanuel Hammond as follows:

Customer's request	The Bank's responses
Balance on account @ 30th June 2016	GHS50,000.00
Balance on account @ 31st August 2016	Guarantee is fully relied upon.

1. The Bank shall not be liable under the guarantee for disclosing balance on the account as at the 30th June 2016, but the request for the balance of GHS58,000.00 as 31st August, would pose a risk for disclosure and the Bank would not be obliged to disclose at all.
2. The balance on the account exceeds the overdraft limit and so the Bank's response would be to inform Emmanuel Hammond that **the guarantee is fully relied upon**, without disclosing the said balance on the account.

- b) Emmanuel Hammond's liability is only secondary to the extent that the principal debtor is unable to make good the guarantee liability up to GHS50,000.00 at a point in time, at which the guarantee will be said to be available to be determined.

1. In which case, it is only the extent of liability under the guarantee up to GHS50,000.00 which will be advised to Emmanuel Hammond, NOT what activities makes the liability.
2. The bank will not be obliged to disclose information regarding activities on the account to Emmanuel Hammond.
3. He should be able to obtain that information from Nathaniel Hammond, the principal debtor; and it will not be out of place to suggest same to Emmanuel Hammond.
4. If Emmanuel Hammond encounters difficulties obtaining this information from Nathaniel and this comes to the notice of the Bank, then the Bank may be compelled to

ii. Attributes of Stocks and Shares and taking a charge as Security for Bankers' advances.

In the ordinary course of the banking business, banks take security for bankers' advances to cover borrowings made out to their customers, but not so much as with the intention to realize the said property(ies) in the security to repay the borrowing(s).

Such charges over property(ies) as security must, firstly be available to the banker (in terms of title\ownership) and if provided by the principal debtor customer, then that will be a **direct security**. A **third party\collateral** may be available when the security\property is provided by any person other than the principal debtor customer. If that were the case, then the bank's right against the said property would be against another\third person; for example, a guarantor. A common such collateral security is the usual "**guarantee**"; which may be available and backed by some other property. Many have used the word "collateral" to mean "security" for bankers' advances, but that may be misleading, if not wrong. "Collateral" connotes a third party matter.

Security must be available and suitable (in the form of execution) in such manner as will provide the necessary protection to the bank and the bank must ensure that the requisite procedures for executing the security documentation are completed to adequately cover the borrowing, in the event that the security has to be realized.

Where collateral security arises in a given borrowing situation, the bank must be very careful with the security documentation and to obtain some written evidence bearing the authority\signatures of the right person(s), precisely, in the case of third person(s) in accordance with the **s. 4 of the Statute of Frauds Act 1677 of the UK**.

There are specific forms of executing security documentation depending on the type of property underlying the security. Land and landed property; stocks and shares and life policies are executed as mortgages, even though the life policy is usually dubbed an “assignment” because the proceeds of the insured sum payable (usually to a named beneficiary) is assigned to the lender bank in the security. A life policy is contingent to the death of the life assured\maturity of the policy, whichever comes first.

Irrespective of the type of security available, for example in the case of land and stocks and shares, title\ownership becomes subject to a transfer\intent to transfer same from a mortgagor to a mortgagee. A typical transfer will involve a “**legal mortgage**” and intent to transfer will create an “**equitable mortgage**”.

Shares in John’s Limited:

In this scenario, the property available to the Bank is shares in John Limited – a private company) with (unlisted\unquoted shares) owned by a Director of John Limited. The issue is ways of charging stocks and shares as security for bankers’ advances and these have been tabled below, noting the possible inherent defects as follows:

Execution Process	Legal Mortgage	Equitable Mortgage
Original copy of Share Certificate and Stock Transfer form (STF)	Obtain an original copy of the Shareholding Certificate. Submission of a copy will seem to be a constructive notice that the original is charged somewhere else. Reference: <i>Spencer v. Clarke</i> (1878). Obtain a signed transfer form bearing the authorised signature of James Tagoe (<i>Sheffield Corporation v. Barclays Bank</i> (1905)).	
Signed Stock Transfer form.	Same must be dated for onward submission (with the Share Certificate) to the Registrar for a new certificate in the name of the Bank.	Same must NOT be dated. Mere deposit of the Share Certificate and undated STF will constitute an intention to create an Equitable Mortgage. Reference: <i>Harold v. Plenty</i> (1901)
Value of shares	Obtain a valuation of the shares from the company’s Registrar. It is not unexpected that the Bank will have some difficulty with John Limited shares - a private company shares.	

Director qualification shareholding.	Check for Directors' qualification holding by examining the Regulations of John Limited for likelihood of James Tagoe losing his directorship in John Limited	
Check for paid status of shares, particularly for partly-paid shares\Rights Issues; and notices for Bonuses.	Not suitable if partly-paid, because the Bank will become liable for any such unpaid amounts at liquidation. Of course, notices for bonuses and rights issues will be delivered to the Bank for their action.	Notices of rights issues and\or calls for partly-paid shares may never reach the Bank. If they don't the value of the shares may be affected greatly if the customer allows such calls to lapse.
	The bank should not take a legal mortgage.	
Prohibition of Share holding.	Not suitable, if Company Regulations of John Limited prohibits transfer of shareholding into the name of a transferee or mortgagee.	The Bank may proceed with an Equitable Mortgage if James is credit worthy enough for the borrowing.
Execution	Obtain a signed Memorandum of Deposit (MOD) charging the property as security ; and incorporating the necessary protective clauses including "all monies"; "continuing security"; "repayable on demand" among others.	The MOD should include a "Power of Attorney" clause appointing the Bank as an attorney to execute a Legal Mortgage on default. Notify the Registrar of the Bank's interest to prompt notice of prior equities, if any. Mere deposit of the MOD; share Certificate and Stock Transfer Form constitutes and equitable mortgage in accordance with Harold Notices of rights issues and\or calls for partly-paid shares, Plenty (1901).
	Submit the signed transfer form and the Share certificate to the Registrar for John Limited, indicating the bank's interest for a new share certificate in the name of the Bank.	

QUESTION SIX

- i. PREDEQ Consult Limited is borrowing GH600,000.00 from your Bank against the security of a Debenture incorporating a fixed charge over the land & buildings and floating charge over all other assets which was executed on 03 August 2013.

The company is operating very successfully and you recently agreed to provide a new loan of GHs250,000.00 to enable them acquire an additional factory premises in the Ashanti Region. But, the customer was unable to proceed with your interest rate terms and have made alternate arrangements for a loan from the Standson Bank Limited to be secured by the premises on acquisition.

Required:

State, with reasons, how and why your Bank is affected by this development and the arrangement you will need to make under the circumstances.

(12 marks)

- ii. You are the Business Manager of the Kotobabi Branch of the Standton Bank Limited and one of your customers Wivels Limited (an old established textile manufacturer) operating under an existing GHs25,000.00 unsecured overdraft facility, is experiencing some deterioration in its trading activities. Mrs Agyeman-Prempeh and 2 other Directors called to see you this morning and requested for an additional overdraft facility of GHs50,000.00 to be secured by a floating charge over the business assets.

Your Branch Manager has however, cautioned you against providing further facilities in this situation on the grounds that floating charges suffer from several major disadvantages and possible problems.

Required:

Explain, giving reasons, the disadvantages and possible problems associated with floating charges as security for bankers' advance

(8 marks)

Suggested solution

These 2 questions have to do with Company Securities and the operation of the law “when things go wrong” – in this case - the creation of a subsequent charge on a new asset – an additional factory premises and involving another Bank; and the demerits of a floating charge. This question recorded a highest mark of 14 from the Kumasi Centre.

- i. By **s. 80(2) of the Companies Code Act 179 of 1963**, “A debenture is a written acknowledgment of indebtedness by the company setting out the terms and conditions of the loan.” and by ss. (1) “A company may raise loan capital by the issue of a debenture or of a series of debentures or of debenture stock.” and ss. (3) also provides that “All debentures of the same series shall rank pari passu in all respects notwithstanding that they may have been issued on different dates.”.

1. The Debenture.

The Bank will need to establish that the Debenture incorporates all the necessary protective clauses because the Debenture is only as good as the very necessary clauses including:

- 1.1. That the Debenture has been issued and secured by a charge of the company's property; or as unsecured by any charge, if that were the case, in accordance with **s. 86(1) Companies Act 179 of 1963**.
- 1.2. That Debenture provides for the usual clauses in the standard bank security form involving the "all-monies"; "continuing security"; "repayable on demand"; "additional security"; "conclusive evidence"; "successor" clauses, among others.
- 1.3. That the Bank's Debenture has been issued to cover both fixed and floating charges in accordance with **s. 86 (2)** of the Companies Code Act 179 and the floating charge bit, by **s. 87(1)** to cover all assets at the time of execution and all subsequent assets and usually dubbed "present" and "future" assets, even including "fixed" assets.
 - 1.1.1. That charge grants a specific equitable charge over all future assets\property;
 - 1.1.2. That PREDEQ Consult undertakes to deposit title documents to future owned property with the Bank; and to execute a legal mortgage if called upon to do so;
 - 1.1.3. That PREDEQ Consult covenants not to create any fixed charge ranking in priority to or pari passu to the floating charge without the consent of the Bank.
- 1.2. The Debenture would have been registered within 28 days of creation in accordance with s. 107 (5) Companies Act 179 and s. 25(2) Borrowers; & Lenders Act 773; as notice to the world, including the Standson Bank.

2. **Additional Factory Premises.**

PREDEQ Consult seeks to acquire an additional factory premises from the Standson Bank against a fixed charge over this premises on acquisition, which would be caught up by the existing floating charge in the debenture, albeit, rank behind the Standson Bank, under the circumstances.

- 2.1. Standson Bank will therefore, need to obtain the agreement of the existing Debenture holder Bank, in the form of a "**letter of priority**". Such agreement\letter of priority will usually involve a tripartite arrangement comprising the Bank, PREDEQ Consult and the Standson Bank incorporating:
 - 2.1.1. A complete release of the new premises from the Bank's Charge or
 - 2.1.2. Priority, up to GHs250,000.00 plus interest & other charges, in the new premises to the Bank, ahead of Standson Bank, which will be unlikely.
- 2.2. Beyond the letter of priority, the Bank must seek to prevent Standson Bank from making "further advances" (usually dubbed "Tacking") in accordance with **s. 19(3) Mortgages Decree 1972** and **s. 76(1) to (3) Land Title Registration Act (PNDCL 152) of 1986**, which once again will be unlikely.
- 2.3. The bank may wish to review the basis of lending, but this will be unlikely as the customer was unprepared to proceed with the interest rate, even though the Bank was ready to provide the facility for the new premises originally.
- 2.4. The Bank may need to make good the "repayable on demand" clause should the customer refuse to be forthcoming.

ii. **Floating Charge proposed by the Wivels Limited**

The floating charge by definition covers fluctuating assets, and even though comprises both present and future assets may never be available when needed, because the charge does not prevent the Wivels Limited from utilizing these assets in the course of their business.

1. If Wivels Limited encounters insolvency (or having liquidity) challenges, it will seek to run down all its liquid assets prior to winding up. Stock and book debts, unless covered under a fixed charge would have been converted into cash and paid out to some other creditors.
2. A floating charge bears characteristics including:
 - 2.1. That it is invalid if created within 12 months before the commencement of liquidation or administration, if the company was insolvent at the time it was created, in accordance with **s. 90 Companies Act 179**.
 - 2.1.1. **S. 90** requires that: “If the winding up of the company commences within twelve months of the creation of a floating charge on the undertaking or property of the company **such charge shall** (unless it is proved that the company was solvent immediately after the creation of the charge) **be invalid** except to the amount of any cash paid to the company at the time of, or subsequently to, the creation of the charge and in consideration for the charge, together with interest on that amount at the rate of five per centum per annum”.
 - 2.1.2. The period is two years if the charge is to a “connected person”. There is an exception to the extent of new money advanced or services provided on or after the creation of the charge. *Clayton’s* case upholds this exception.
 - 2.2. That the holder of a floating charge which has not crystallized (as explained below) may lose priority to unsecured creditors if the borrower’s assets, unknown to the Bank, are included in a company voluntary arrangement containing a trust for the benefit of unsecured creditors.
 - 2.2.1. that it ranks behind:
 - a) preferential claims, if the borrower goes into liquidation or administration. Preferential creditors are now mainly certain employee claims; in particular up to four months’ unpaid remuneration. The same applies if a lender takes possession of the charged property, or appoints a receiver.
 - b) A fixed charge created after the floating charge, unless the Bank’s standard form of charge incorporates a “negative pledge”. By **s. 87(4) Companies Act 179**:
 “A fixed charge on any property shall have priority over a floating charge affecting that property unless the terms on which the floating charge was granted prohibited the company from granting any later charge having priority over the floating charge and the person in whose favour such later charge was granted had actual notice of that prohibition at the time when the charge was granted to him”; and
 - c) A negative pledge clause is a promise by the chargor not to charge its assets without an agreement with the Bank; and same has been duly registered in accordance with **s. 107 Companies Act 179**.

- In *Re Bright Life Ltd (1986)*¹.

A clause in a debenture gave a charge which provided that the chargor should not: ‘deal with its book or other debts or securities for money otherwise than in the ordinary course of getting in and realising the same which expression shall not authorise the selling, factoring or discounting, ..., of its book debts or other negotiable instruments’.

Held: Whilst purporting to create a fixed charge over present and future book debts, and imposing restrictions on the sale, factoring or discounting of book debts, the debenture did not require the chargor to pay them into an account with the chargee.

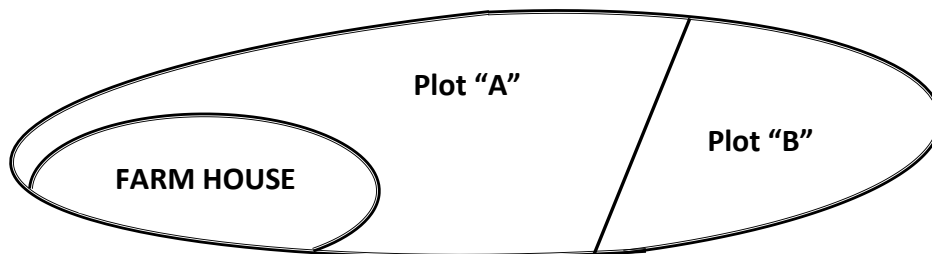
- Reference to a ‘first specific charge’ over book debts had to yield to the only conclusion from the rights in fact granted that the charge over book debts was a floating charge only.
- d) the expenses of a liquidator or administrator and the costs of realisation and expenses may be considerably high
 - e) suppliers of stock may under their terms of their contracts, retain title until paid for as was held in the **Aluminium Industries Vaasen BV v. Romalpa Aluminium Ltd. (1976)**.
5. The Branch Manager’s caution is very important and the Branch will have to be prudent in considering this security arrangement in light of the following:
 - 5.1. That as a manufacturer, the “*Romalpa*” clause rule on suppliers rights imposes a risk worth considering;
 - 5.2. That liquid assets may not be available when needed;
 - 5.3. The floating charge being discussed would be expected to cover an existing unsecured overdraft which is likely to become subject to **s. 90 Companies Act 179**. It will be expected though, that the rule in Clayton’s case will inure to the benefit of the Bank, that is, if all necessary precautions exist.
 - 5.4. Unless it is extremely necessary to proceed in light of some other risk mitigating factors, the Bank should accept a debenture incorporating both fixed and floating charges; NOT just a floating charge debenture..

¹Hoffmann J said: ‘But a floating charge is consistent with some restriction upon the company’s freedom to deal with its assets. For example, floating charges commonly contain a prohibition upon the creation of other charges ranking prior to or paripassu with the floating charge. Such dealings would otherwise be open to a company in the ordinary course of its business.’ and ‘I do not think that the bank balance falls within the term ‘book debts or other debts’ as it is used in the debenture. It is true that the relationship between banker and customer is one of debtor and creditor. It would not therefore be legally inaccurate to describe a credit balance with a banker as a debt.

QUESTION SEVEN

Ms Bridgette Dodor your Crop Science Professional farming customer is engaged in arable and cattle farming and you hold an Agricultural Floating Charge given on 17 July 2011 as security for seasonal lending of up to GHs50,000.00. Most of your customer's land (plot A in the diagram below) is rented from Joris Tagoe, her neighbour, although Ms Dodor owns 5-acres marked Plot "B". She lodged the deeds of Plot "B" as security without signing any documentation on 18 August 2011. Ms Dodor and her family live in the farm house on the tenanted land.

Ms Dodor calls to see you today and says that she has an opportunity to buy the freehold of Plot "A" for GHs80,000.00 but will have to sell Plot "B" to Joris Tagoe for GHs5,000.00 as part of the deal. Ms Dodor says, she can introduce GHs20,000.00 cash into the purchase in addition to the sale proceeds of Plot "B", and you agree to help with a loan of GHs55,000.00 repayable over 10 years provided she gives a legal charge over the unregistered land she seeks to buy.



Required:

- What are the benefits of the Agricultural Floating Charge available to you Bank as security. **(6 marks)**
- Why does your Bank seek to take a legal mortgage on Plot "A" as security for the new loan despite the Agricultural Floating Charge? **(2 marks)**.
- Set out in a tabulated form, the steps you will take to perfect the new security. **(6 marks)**.
- How will your bank manage the sale proceeds of Plot "B" and subsequent release of the Plot? **(6 marks)**.

Suggested solution

This is the first time of examining candidates on the Agricultural Credit Charge and which was put up as a bonus for candidates, but candidates seemingly did not see this "bonus" and it turned out as the least patronized question. 3 candidates scored a highest 17 marks (2 in Accra and 1 from Kumasi).

I have featured a write-up before the suggested solution and will advise Students to make good use of this opportunity.

The Agricultural Charge

An Agricultural Charge is a type of security for bankers' advances provided by only **farmers** and such charge may be fixed or floating or both fixed and floating. In some jurisdictions an Agricultural Charge may only be granted to a Bank. A Farmer may be any owner or tenant of land who cultivates it for profit individually, and who can be either a sole trader or of in association as a partnership (including family partnerships, even if some members are not involved in the day-to-day business), co-operative, etc.

1. An Agricultural Charge principally covers property owned by the farmer, **but not the land** on which farming takes place; and consists of all the several assets including the farming stock of crops; animals and machinery.
 - 1.1. "Farming stock" comprises all agricultural commodities, whether future growing or severed from the land, and after severance whether subjected to any treatment or manufacture and includes:
 - a) livestock, poultry and bees, and the produce and progeny thereof;
 - b) wild animals in captivity;
 - c) fish stocks;
 - d) timber, both standing or cut;
 - e) seeds and manures;
 - f) fertilizers and insecticides;
 - g) oils and fuels;
 - h) agricultural vehicles, trucks and truck spares;
 - i) machinery, and other plant; or
 - j) any agricultural fixture that a tenant (including agricultural tenants' fixtures), or any person legally occupying land, may by law be authorised to remove.
 - 1.2. A farmer, may, individually or in association, create in favour of any person a charge on any farming stock, additional asset or other agricultural asset security for:
 - a) inputs or other items required for cultivation;
 - b) sums advanced or to be advanced to the farmer; or
 - c) sums paid or to be paid on the farmer's behalf under any guarantee; and such security may also cover interest, commission and charges thereon.

"Additional assets" includes\means any tangible assets, excluding land, that belong to the farmer, or related business, pertaining directly or indirectly to agricultural production, processing or trade, all accounts receivable, warehouse receipts, both negotiable and non-negotiable, promissory notes and includes savings accounts on deposit with any bank, credit union, savings institution or other similar organisation;

- 1.3. The Agricultural Charge, may be executed to secure any principal sum as:
 - a) a loan\specific amount advanced in one sum or in instalments; or
 - b) a fluctuating amount\overdraft advanced on a current account not exceeding at any one time such amount\limit, if any, as may be specified in the charge:

Provided that any charge for securing a current account or any further advances shall continue to be effective against the farmer, and against the holder of any subsequent interest in the agricultural commodities charged, notwithstanding the fluctuation or temporary extinction of the indebtedness and notwithstanding that the lender may have had notice of the subsequent interest.

1.4. **Registration of Agricultural Charge:**

Every agricultural charge shall be registered within twenty-eight days after its execution at the:

- 1.4.1. Collateral Registry, in accordance with **s. 25 (1) of the Borrowers & Lenders Act 773 of 2008;**
- 1.4.2. Registrar General's Department, by **s. 25(2) of the Borrowers & Lenders Act 773 of 2008;** as provided by **s. 107(1) Companies Code Act 179 of 1963,** if such a charge is given by a limited liability company;
- 1.4.3. In certain jurisdictions, if not so registered, an agricultural charge(s) shall be void as against any person other than the farmer
- 1.4.4. The register kept and the memoranda filed shall, at all reasonable times, be open to inspection by any person on payment of the prescribed fee, and any person inspecting the register or any memorandum may, on payment of the prescribed fee, make copies or extracts therefrom;
- 1.4.5. Registration of an agricultural charge may be evidenced by the production of a certified copy of the entry in the register relating to the charge, and a copy of any such entry purporting to be certified as a true copy by the Registrar shall, in all legal proceedings, be evidence of the matters stated therein **without proof of the signature or authority** of the **person signing** it unless the contrary is proved.
- 1.4.6. The **Registrar shall not be liable to any action or proceeding** for or in respect of any act or matter done or omitted to be done, in good faith, in the exercise or purported exercise of the powers conferred on the Registrar;
- 1.4.7. **Registration of an agricultural charge shall be deemed to constitute actual notice** of the charge, from the date of registration, and of the fact of such registration to all persons and for all purposes connected with the property comprised in the charge.

2. **The Agricultural Fixed Charge.**

Agricultural fixed charge is that charge covering such property forming that part of the farming stock, additional assets, or other agricultural assets, belonging to the farmer, at the date of the charge and, as may be specified in the charge. This type of security runs the same kind with the fixed charge component of a debenture incorporating a fixed charge.

- 2.1. A fixed charge holder, having beneficial effects of a fixed charge, shall have the right.
 - 2.1.1. **upon the happening of any event specified** in the charge as being an event authorising the **seizure of property** subject to the charge, **to take possession** of any property so subject; and
 - 2.1.2. where **possession of any property has been taken**, a right, after a relevant time period, as may be specified by the charge, **to sell** the property.
 - 2.1.3. **After exercising the power of sale** as above, apply the proceeds of sale in or towards the **discharge of the moneys and liabilities secured by the fixed charge**, and the **costs of seizure and sale**, and **to pay the surplus**, if any, of the proceeds **to the farmer**.
- 2.2. A fixed charge shall impose on the farmer, or related business, the obligation such that:
 - 2.2.1. whenever the farmer, or related business **sells any of the property, or receives any money in respect of any asset**, comprised in the charge, forthwith to pay to the holder the amount of the proceeds of the sale or the **money so received**, except:
 - i. to such extent as the charge otherwise provides; or

- ii. the holder otherwise allows, and **any sum so paid shall be applied**, except so far as otherwise agreed by the holder, **in or towards the discharge of moneys and liabilities secured by the charge**;
- 2.2.2. in the event of the farmer, or related business **receiving any money under any policy of insurance on any of the property comprised in the charge**, forthwith **to pay the amount of the sum so received to the holder**, except:
 - i. to such extent as the charge otherwise provides; or
 - ii. the holder otherwise allows, and any sum so paid shall be applied, except so far as is otherwise agreed by the holder, in or towards the discharge of moneys and liabilities secured by the charge;
- 2.2.3. Where any money is due to the farmer, or related business, under an insurance policy on any of the property comprised in a fixed charge, **the insurer may**, notwithstanding anything contained in the insurance policy, **pay such money to the holder** of the charge and any such payment shall be a valid discharge of the liability of the insurer to the farmer, or related business.
- 2.2.4. Where the proceeds of a sale made is paid to any other person, the holder shall have a right to recover the proceeds from such person if the holder proves that such person knew that the proceeds were paid to him in breach of the farmer's, or related business' obligations.

3. An Agricultural Floating Charge.

An agricultural charge creating a floating charge shall have the like effect as if the charge had been created by a registered debenture (issued by a company) incorporating a floating charge component involving the fluctuating assets in the farming stock provided that:

- 3.1. the charge shall become a fixed charge on the property upon:
 - 3.1.1. a receiving order in bankruptcy being made against the farmer, trader or related business;
 - 3.1.2. the death of the farmer or trader;
 - 3.1.3. the dissolution of partnership in the case where the property charged is partnership property; or
 - 3.1.4. notice in writing to that effect being given by the holder on the happening of any event which, by virtue of the charge, confers upon the holder the right to give such notice; and
- 3.2. the farmer or related business, while the agricultural charge remains a floating charge:
 - 3.2.1. shall be subject to the like obligation as in the case of a fixed charge **to pay over to the holder** the amount received by him by way of **proceeds of sale**, in respect of other agricultural assets or additional assets under policies of insurance, or by way of compensation;
 - 3.2.2. Provided that it shall not be necessary for a farmer, or related business to comply with such obligations if and **so far as the amount so received is expended in the purchase of farming stock which**, on purchase, **becomes subject to the charge**.
- 3.3. **Beneficial characteristics:**
An agricultural charge incorporating a floating charge shall be beneficially effective provided that:

- 3.3.1. **It is so created** that a subsequent agricultural charge purporting to create a fixed charge on any of the property comprised in the agricultural floating charge shall, as respects the property subject to such floating charge, **be of no effect** so long as the floating charge remains in force.
 - 3.3.2. where a farmer, or related business mortgages interest in land, and such farmer, or related business creates an agricultural charge which includes **growing crops**, the rights of the holder under such charge shall have priority over those of the mortgagee, whether in possession or not, and irrespective of the dates of the mortgage and the charge.
 - 3.3.3. Farming stock which is subject to an agricultural charge **shall not**, for the purpose of insolvency proceedings, **be considered as deemed to be goods in the possession, order or disposition of the farmer**, or related business in his business, by the consent and permission of the true owner thereof, under such circumstances that he is the reputed owner.
 - 3.3.4. An agricultural charge shall not protect property which, but for such charge, would have been liable to distress for rent or rates.
- 3.4. A floating charge shall impose on the farmer, or related business through specific protective clauses, the obligation such that the farmer undertakes to:
- 3.4.1. Keep the farming stock in a sustainable manner; good state of maintenance; and manage the farm through cultivation of crops; rearing the livestock, etc.;
 - 3.4.2. Effect adequate insurance to cover any losses relating to the farming stock and all other agricultural assets that facilitate the farmer's business;
 - 3.4.3. Provide unhindered access to the Bank or its known agent for inspection and monitoring purposes.
4. **Execution\Realisation of the Agricultural Charge**
- 4.1. The Agricultural Charge incorporating a fixed\floating\both fixed and floating charges shall be executed\realised in much the same way a simple debenture is executed\realised.
 - 4.2. Mortgages on the land and landed property shall not be subject to an agricultural charge, even though any such mortgage shall rank behind a subsequent agricultural floating charge.

Suggested Solution

- a) An **Agricultural Floating Charge provides benefits** including:
 - 1. The charge becomes a fixed charge immediately upon the crystallization of the charge and will rank pari passu with fixed charge holders;
 - 2. Appointment of an administrative receiver, by the Bank, in case of sickness; notice of mental incapacity; receipt of bankruptcy proceedings, etc.;
 - 3. Charge over existing and futures assets.
- b) The Bank will require a **legal mortgage of the freehold in Plot "A"** because land and landed property are not subject to an agricultural charge, therefore the existing floating charge will not cover this acquisition. The bank will need a separate legal mortgage over Plot "A".

c) Perfection formalities of the freehold in Plot "A"

1. Valuation

- 1.1. Obtain a valuation of the freehold property, perhaps professionally, if preferred, in light of the offer price;
- 1.2. Ensure the GHs55,000.00 fits into the Bank's Credit Policy for margins.

2. Occupation

- 2.1. Identify all occupants\tenants in accordance with **s. 19(2)(c) of the Mortgages Decree 1972** for "rights of occupation". Bankers' usually prefer "**a vacant possession**". Of course, that is not the case with Bridgette Dodor's proposal, because she is the tenant here and will become the owner hereafter;
- 2.2. Obtain a postponement of encumbrances including spouse\husband. It is very important for the Bank to establish the source of Bridgette's GHs20,000.00 to be introduced, to avoid any new encumbrances – ref. **Williams & Glynn's Bank v. Boland (1980)**;

3. Title

- 3.1. Obtain an original copy of title deeds in accordance with **s. 10 of the Mortgages Decree 1972**. Non-submission shall be constructive notice of a prior mortgage;
- 3.2. Obtain a report of **good root of title** involving Joris Tagoe of this unregistered land, more than twenty years old in accordance with **s. 19(2)(b) of the Mortgages Decree 1972**;
- 3.3. A confirmation may be obtained from Solicitors acting for and on behalf of Bridgette Dodor, against their \undertaking to hold the title deeds to the order of the Bank and submit same on request. If Solicitors are not known to the Bank, then a status opinion will be required;
- 3.4. Diarise to obtain the title deeds noting Bridgette Dodor as the new owner. The Bank may join in to ensure this change.

4. Execution

- 4.1. Submit to Bridgette, the Bank's standard forms of mortgage charges incorporating protective clauses including:
 - 4.1.1. All Monies;
 - 4.1.2. Continuing Security;
 - 4.1.3. Repayment on Demand;
 - 4.1.4. Additional Security;
 - 4.1.5. Conclusive Evidence;
 - 4.1.6. Successor and others are;
 - 4.1.7. Power of Sale;
 - 4.1.8. Appointment of a Receiver;
 - 4.1.9. Insurance and repair;
 - 4.1.10. Agreement not to create a lease;
 - 4.1.11. Consent to create subsequent mortgages
 - 4.1.12. Right to break the account\tack on notice of a subsequent mortgage.
- 4.2. Provide an opportunity to determine how well Bridgette understands the elements of the perfection process and whether she will require independent legal advice;

- 4.3. Ensure to complete the mortgage documents in the Bank's premises, and where independent legal advice is sought, then the document would be executed incorporating an attestation to the effect that she has understood the terms\provisions in the mortgage document and has signed at her own freewill.
- 4.4. Register the mortgage with the Collateral Securities Registry within 28 days of execution in accordance with **s. 25 Borrowers' & Lenders' Act 773 of 2008**.
- 4.5. Notify the Insurance company of the Bank's interest in the respective insurance policy against their acknowledgement.

5. Search

- 5.1. Search at the Local Land Charges Register at the local authority\District Authority\Metropolitan Authority for any likely detrimental town planning arrangement;
- 5.2. Diarise to obtain, from the authority, a notification\confirmation of any further enquiry on the property by other parties.

6. Search

- 6.1. Conduct a search, through the Bank's Legal Department or accredited agents for such searches, at the Land Charges Registry\Collateral Securities Registry to find out if there are any other mortgages; and
- 6.2. Diarise to obtain, from the Registry, a notification\confirmation of any further enquiry, by other parties, on the property.

7. Fire Insurance

- 7.1. Obtain copy fire insurance and ensure the value meets the Bank's requirements; if not then, the Bank will need to request for a policy that will be suitable;
- 7.2. The Bank shall, where Bridgette fails to obtain a suitable insurance, in accordance with **s. 11 Mortgages Decree 1972**, insure and keep insured after giving on notice to Bridgette, and at her costs.
- 7.3. Obtain assurance that premium payments have been on course to date; and diarise for future premium payments or through a standing order instruction on Bridgette's account; because Bridgette will become the new owner.

- d) The Bank will release the title deeds covering Plot "B" to Bridgette's Solicitors against their undertaking to pay the proceeds up to GHs10,000.00 less costs to the Bank; or to apply the proceeds to purchase Plot "A" upon simultaneous completion.