CHARTERED INSTITUTE OF BANKERS (GHANA)
ASSOCIATESHIP EXAMINATIONS

CHIEF EXAMINER'S REPORT
&
SUGGESTED SOLUTIONS

of

LEVEL III -

LAW AND PRACTICE OF BANKING
PAPER of APRIL 2016

The April Exam 2016

The April 2016 Examination recorded 275 candidates in all the Centres, with Accra, as at all times, recording the greater number of candidates.

As has usually been the case, Candidates did much better work in Section "A" than in Section "B", which is not good enough. The Banker\Customer Relationship covers a significant portion of the Banking Business, and even though more of it sits at the Branch, the coverage of Section "B" cannot be ignored.

Knowledge of the entire syllabus is what makes one a Professional Banker and Students will need to equip themselves sufficiently to demonstrate understanding of the entire syllabus. Indeed, 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 seek to satisfy the customer in every question attempted.

This 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.

This Examiner's Report of suggested solutions has been provided to assist Students acquire sufficient information in the various scenarios in the question paper.

Quite a number of Candidates produced attempted answers which would have solved questions other than what they sought to attempted\answer. For example, a question on "**countermand**" is basically an issue\decision for the Paying Bank to deal with\make, but candidates would present the a process for paying a cheque, instead of what a "countermand" is and how it affects the Banker and Customer Relationship – a total deviation from the cause.

The principle underlying the various scenarios have been stated (question by question) and dealt with sufficiently, without suggesting that this paper is exhaustive.

Students will be required to begin by stating the relevant Banking "Issue"\"Principle" so I present some simple arrangements to guide students, using the mnemonics TIPS and\or PERCS, as indicated in the table above below as they seek to acquire knowledge and information, demonstrate their understanding of the subject matter and the working\operation of the respective issue\principle and apply same in the examinations to obtain the qualification.

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.

Our expectations are that Lecturers will find 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 acquire knowledge in the subject.

It is my greatest desire therefore to help Students to acquire knowledge first and foremost and then to use this knowledge to prepare sufficiently to enable them obtain the qualification.

SECTION "A" QUESTIONS

QUESTION ONE

i. The Banking Act 673 of 2004 under section 3 provides that "**No person other than a body corporate incorporated in Ghana shall carry on the business of banking in Ghana.**" And **s.90** also provides that "Banking business" means:
   (a) accepting deposits of money from the public, repayable on demand or otherwise and withdrawable by cheque, draft, orders or by any other means;
   (b) financing, whether in whole or in part or by way of short, medium or long term loans or advances, of trade, industry, commerce or agriculture and
   (c) any other business activities that the Bank of Ghana may prescribe or recognise as being part of banking business.

   The Banking Act does not define a "customer". Explain what makes a person a bank's customer in banking law terms. (**10 marks**)

ii. The opening of an account by a customer with a bank involves a contractual relationship with rights and obligations both for the bank and the customer. What are 5 (five) of the duties that a bank owes its customer.
(**10 marks**)

Suggested Solution:

i. Banking Law has, internationally, not defined a "customer", but many a Banking Scholars have made useful submissions. Sir John Paget has suggested that: "*to constitute a customer, there must be some recognizable course or habit of dealing in the nature of regular banking business….. it is difficult to reconcile the idea of a single transaction with that of a customer*".

   It was also held in *Mathews v. William Brown & Co* (1894) that to constitute a customer, such prospective customer should have some sort of an account with the bank. The initial transaction in opening an account does not set up a banker and customer relationship, and there had to be some measure of continuity and custom.
   In *General Western Railway C. vs. London and County Banking Co. Ltd*., it was stated that: *"A customer is a person who has some sort of account, either deposit or current or some similar relation with a bank and from this it follows that any person may become a customer by opening a deposit or current account or having some similar relation with a bank."*

So the position at law is that a person becomes a customer and a contract is created when an account is opened. *Commissioner for Taxes v English, Scottish and Australian Bank* [1920] AC 683 PC and also *Woods v Matins Bank* [1959] 1 QB 55

One may deduce from the above that **a customer is one who is in an account relationship, or one in contemplation, with a banker**. Other useful considerations include that:

1) a single transaction may not constitute a customer;
2) the customer should have an account;
3) some frequency in transactions is expected;
4) the dealing must be of a banking nature;
5) the customer need not be only an individual human being as a person, but may also be:
   a) a group of individual persons in a "Joint" or "Joint and several "capacity;
   b) a sole proprietorship;
   c) a partnership comprising a number of individual persons termed as "partners";
   d) a limited liability company of owners in a shareholding or guarantee capacity;
   e) a club\society\association of persons or
   f) any other such legal entity.

ii. Once an account is opened, a banker and customer contract arises and several other forms contractual relationships come up depending on what transaction or forms of transactions come up. Others are:

1) the **Debtor and Creditor** relationship;
2) Principal and Agent in an agency arrangement;
3) Bailor\Bailee relationship in a Contract of Bailment and
4) Trustee and beneficiary relationship.
   a) Debtor\Creditor relationship:
   When a customer pays money into his account, the bank becomes a debtor and the customer becomes a creditor. The case in *Foley v Hill* (1848) 2 HL Cas 28, is a historical breakthrough when the House of Lords held that the banker-customer relationship was essentially a **debtor-creditor** relationship. This crucial characteristic enabled banks to treat money deposited with them as their own; with an obligation to return an equivalent amount on demand.
   In other words, the relationship of debtor/creditor will depend on whether the bank has lent money or accepted deposits.
   b) Principal\Agent relationship:
   Some transactions governed by the Law of Agency and make the bank an agent for the customer, e.g., the case of collection of proceeds of cheques.

c) **Contract of Bailment: - Bailor\Bailee relationship**
The Bailor\Bailee relationship arises when the bank is rendering Safe Custody Services.
A contract of bailment involves an arrangement whenever one person is put voluntarily and knowingly in possession of goods which belong to another. Bailment signifies a distribution of ***ownership*** and ***possession*** between the bailor and the bailee respectively. The bailee (in this case the bank) will obtain possession and the bailor (the customer) will retain ownership of the said property. The banker will be a bailee when the customer deposits valuables, bonds or other documents with the bank. As the custodian of the customer's assets, the banker may incur a liability for any form of negligence resulting in a loss suffered by the customer.

d) **Trust creating a Trustee\Beneficiary relationship:**

- A Trust is a **relationship** created at the direction of one party (individual or body of persons as the **settlor(s) who settle(s) the property**), in which one or more persons (the **trustee(s) who hold(s) the property on trust**) hold that party's (settlor's) **property, subject to certain duties**, to **use** and **protect** it for the **benefit** of others (the **beneficiary(ies**) who enjoy(s) the benefits of the trust).
- A banker is usually in the place of liability as a constructive trustee for issues arising in any or all of the following:
  (i) receives trust funds with actual or constructive notice that they are trust funds and that the transfer of the funds to the bank is a breach of trust, or
  (ii) knowingly assists a trustee of the trust to dishonestly misapply trust funds. "Knowingly" includes: **actual knowledge**, **wilfully shutting one's eyes** to the obvious, **wilfully failing to make inquiries**, **knowledge of circumstances** would indicate the facts to an honest and reasonable person or would put such person on inquiry. *Belmont Finance Corporation v Williams Furniture Ltd (no.2)* (1980) CA There are several degrees of knowledge, classified by Gibson J *in Baden v Societe Generale* [1983] BCLC 325 :
- Banks have obligations towards its customers who also assume responsibility for such obligations that go to complement the banker's responsibilities in the Banker and Customer Relationship.

Atkin LJ in ***N Joachimson v Swiss Bank Corp.*** **[1921] 3 KB 110 at 127**, provided further guidance to the terms that the courts have been prepared to imply in a contractual relationship between a banker and customer:

The terms of that contract involve obligations on both sides, and require careful statement. They appear upon consideration to include the following provisions.

1) The **bank** undertakes to:
   a) receive money and
   b) collect proceeds of cheques\bills for the credit of the customer's account, NOT to be held in **trust** for the customer, but that, the bank borrows the proceeds and undertakes to repay them.\;
   c) repay **at the branch of the bank** where the account is kept, and **during banking hours**. This includes a promise to repay any part of the amount due against the written order of the customer, addressed to the bank at the branch, and as such written orders may be outstanding in the ordinary course of business for two or three days. It is not unexpected that, one may advance the situation where Ghana's banks operate with "wide area networks (WAN)" systems and seek to suggest that, the principle "at the branch of the bank" has become outmoded. That will not be entirely true because, it is not all banks which will pay such cheques across the WAN to everybody. The facility is usually reserved for "customers" only. Indeed, there are other considerations including 'Cash Management, to mention but a few.
   d) unceasingly, do business with the customer except upon reasonable notice. What constitutes reasonable notice was decided in ***Lloyds Bank v. Prosperity Ltd.***
   e) maintain a duty of secrecy\confidentiality of the customer's affairs; which even though not absolute, imposes a huge responsibility on the Banker to the extent of "interest" of the bank, and of the public; compulsion of law and "consent" of the customer. This duty is however not absolute to the extent of 4 typical exceptions as was provided for in the famous Tournier's case of 1924 and **s.** 84 of the Banking Act 673 of 2004 and its Amendment Act 738 of 2007

   f) Others are:
      - Duty not to pay a cheque without authority e.g., customer's countermand instructions not to pay a cheque; on notice of death in accordance with s. 74 BEA 1961.
      - Duty to tell customer of forgeries;
      - Duty to inform customers of the state of the account and provide documentary evidence of the state of the account at some relevant periods of time; although this does not pose an obligation for the customer to read\take note of what is provided in any such documentary statement of the account. This position, however, may pose serious issues for further discussions anytime soon.

- Duty to give reasonable notice before closing a customer's account; such reasonable notice will depend on the type of customer – individual or natural person against some form of "grouping" of body or legal persons. Reference: Prosperity Ltd., v. Lloyds Bank.

2) The **customer** on his part undertakes to:
   a) take reasonable care in executing his written orders so as not to mislead the bank or to facilitate forgery among others including to:
      - pay reasonable charges to the bank for services rendered;
      - inform the banker immediately, on notice of any form of\attempt to perpetrate fraud on or with the accountfa;
      - think it is necessarily a term of such contract that the bank is not liable to pay the customer the full amount of his balance until he demands payment from the bank at the branch where the current account is kept."

QUESTION TWO

i. In banking, a customer, as a donor, may give a third party, to the banking contract, a power of attorney to operate a said bank account. The power of attorney may be special or specific (to operate the bank account or other specific powers like the sale of property) or general (which may give the holder authority to act on the customer's behalf for many activities including banking). A power of attorney arrangement creates some duties on the part of the attorney. List 5 (five) of the duties that are imposed by law on the holder of a power of attorney. (**10 marks**)

ii. Just as a customer can give a power of attorney, the donor can also cancel it by revocation. Besides a cancellation order, revocation may also result automatically from various events. List 5 (five) instances in which a power of attorney can be revoked. (**10 marks**)

Suggested Solution

i. Most of the general principles concerning the duties of an attorney are still to be found in the common law of Agency. as the attorney starts to act under the power he takes on a number of duties including:

   a) Act in accordance with the terms of his authority. See *Turpin v. Bilton* (1843)
   b) Act in the name of the donor. See *Jones and Saldanha v. Gurney* [1913] WN 72; *White v Cuyler* (1795) 6 Term Rep 176; *Wilks v Back* (1802) 2 East 142;
   c) Not exceed his authority. See *Fray v. Voules* (1859) 1 E & E 839.

d) Act with due care and skill. See *Hart and Hodge v. John Frame, Son & Co*(1839) 6 Cl & Fin 193, HL;
e) Not delegate his office. See *De Bussche v. Alt* (1878) 8 Ch D 286, CA; *Speight v. Gaunt* (1883) 9 App Cas 1, HL;
f) Not put himself in a position where his duties as attorney conflict with his own personal interests or the interests of any third party. See *Keech v. Sandford* (1726) Cas *temp* King 61; *Boardman v Phipps* [1967] 2 AC 46, [1966] 3 All ER 721, HL; *Aberdeen Rly Co v. Blaikie Bros* (1854) 2 Eq Rep 1281, HL; *Parker v. McKenna* (1874) 10 Ch App 96.;
g) Not take advantage of his position to obtain a benefit for himself. See *Parker v. McKenna* (1874) 10 Ch App 96. See also *Powell v. Thompson* [1991] 1 NZLR 597;
h) Not accept secret commissions. See *Industries and General Mortgage Co Ltd v. Lewis* [1949] 2 All ER 573;
i) Keep the donor's money separate from his own. See *Lupton v. White* (1808) 15 Ves 432; *Gray v. Haig* (1855) 20 Beav 219;
j) Account to the donor. See *Foley v. Hill (1848)* 2 HL Cas 28.; and
k) Permit the donor to inspect and take copies of records kept by the attorney relating to acts done in the name of the donor, even after the termination of the attorney's authority. See *Yasuda Fire & Marine Insurance Co of Europe Ltd v. Orion Marine Insurance Underwriting Agency Ltd* [1995] QB 174.

ii. A power of attorney can be revoked automatically in any one of the following instances:
a) the donor's death;
b) the donor's bankruptcy;
c) the donor's supervening mental incapacity;
d) the winding up or dissolution of a corporate donor;
e) the attorney's death, if he was the sole attorney or had been appointed to act jointly (rather than jointly and severally) with others;
f) the attorney's bankruptcy, if he was the sole attorney or had been appointed to act jointly with others;
g) the attorney's supervening mental incapacity, if he was the sole attorney or had been appointed to act jointly with others;
h) the winding up or dissolution of a corporate attorney;
i) effluxion of time;
j) fulfillment of purpose;
k) frustration of purpose; or any event which renders the agency or its objects illegal.

QUESTION THREE

i. With illustrations, discuss circumstances under which money mistakenly paid into the customer's account by the bank can be rightfully claimed by the said customer and under which the bank may be estopped from asserting its claim to recover the said money. (**10 marks**)

ii. Frank Gardner, your customer issued a cheque of GHs2,000 to Paul Oliver in settlement his indebtedness. Paul went to the Operations Manager, who is his friend and who assisted him, because he was in a hurry to enable him catch a flight to Kumasi. The Operations Manager went to the Teller, who decided to attend to his boss and dispensed cash to the Operations Manager without debiting the customer's account, neither did the Teller see Paul Oliver. Indeed, this happened at a time when he the teller had a long queue of customers to serve that morning.

   Later in the day the Teller sought to debit Frank Gardner's account only to realize that the balance on account was insufficient for the transaction. What is the bank's position? Can the bank ask Paul to bring the money back? (**10 marks**)

Suggested Solution:

i. In Banking, there is the risk of a "wrongful credit" finding its way to the credit of another account other than the intended. Many a times, such risk will go undetected, even in circumstance of sophisticated\expert software systems. Every Banking transaction will have a source account to be debited and a destination account to be credited and because human beings make mistakes, it is usually not unexpected that another account number may be picked to effect a credit transaction wrongfully. Of course, banks are expected to have such effective "internal control checks" for such mistakes.

   "Call-Over, the age long and MOST effective internal control arrangement which has historically being an important tool for detecting such mistakes, has been thrown to the "back", even in the face of today's "**electronic transaction alerts**" to customers. All thanks to information technology – a very under utilised business strategy in Ghana's Banking industry.

1) In 2 very important Banking cases, *United Overseas Bank Ltd v. Jiwani (1976)* and *Lloyds Bank Ltd v. Brooks (1950)*; the circumstance under which a customer can avoid a repayment of such payments under a mistake of fact were established to include that:
   a) One was led to believe that he or she is entitled to a benefit, i.e., the bank had misrepresented the state of the account;
   b) One relies on this, i.e., the customer had been thereby misled; and
   c) as a result circumstances have changed so that restitution would be inequitable because the said customer had so altered his\her\their position in such a way that, in equity, he\she\they should not be required to repay.

2) In *Lloyds Bank v. Brooks (1950)*, Lloyds Bank Ltd. failed to claim from the Honourable Cecily Kate Brooks the sum of £1,108 as money had and received by her, the money having been paid to her under a mistake of fact; because Brooks was misled and she had changed her position to her detriment.
   Denning, L.J who delivered the judgement said "It seems to me in this case there was a duty on the bank …:
   - to keep the defendant correctly informed as to the position of her account, and
   - not to over-credit her statement of account, and
   - also, for that matter, not to authorise her or induce her by faithful representations contained in her statement of account to draw money from her account to which she was not entitled.

3) In ***United Overseas Bank v Jiwani 1976***, the above positions stood tall against Jiwani, the customer, and could not establish the above. The bank erroneously credited the customer's account twice with proceeds of an incoming international transfer. The customer made investments into a hotel which they could still have done with or without the duplicated and wrongful credit. They had to repay.

ii. The issue here is the responsibility of a Paying Banker (PB) where a PB owes a duty to his customer to honour the cheques according to the customer's mandate or written orders provided that:
   1) It is drawn in proper form;
   2) It is presented during the advertised banking hours or within a reasonable time thereafter at the branch at which the account is kept;
   3) The account on which it is drawn is in credit sufficient to pay the cheque or the amount on the cheque is within the limit of an agreed overdraft, and

4) There is no legal cause which makes the credit balance or the agreed overdraft limit, though sufficient, not available for the payment.

   - Honouring a cheque constitutes a debit to the customer's account and passing on the credit either in "Cash" or to the "Clearing". In this case, payment was intended to be made over the counter (OTC) in "cash".
   - The problem here is that the "credit to Cash" was made ahead of the debit against the Bankers' duty and basic Banking Principle. In which case, payment had been made and that the PB was discharged in its duty to the customer. Such money had and received was complete when the payment was made and the beneficiary had possession of the said monies, and which cannot be so recovered.

   - In *Chambers v. Miller (1862)* Canada (Nova Scotia); customer of the bank writes out a cheque to be cashed. The account, however, is NSF. The teller, looking at the wrong account believes there to be sufficient funds and cashes the cheque.
     - Before the guy can leave the bank, the teller finds the mistake and demands the monies back.
     - Guy refuses and guards were called in to wrestle back the money.

     Customer sued the bank and the Court concluded that money had and received would not have laid here since the mistake is not between the parties (client and the bank), but was entirely on the head of the teller who looked at the wrong account. The mistake was exclusively that of the bank and not between the parties. The teller's mistake did not prevent the passage of property to the plaintiff, and so the bank officials had no right to imprison the plaintiff.

- The bank should:
  - Admonish the Teller;
  - Note the learning points and review its internal rules if necessary;
  - Emphasise such learning points at subsequent Training arrangements.
- If the bank has envisaged the "Chambers v. Miller" risk and insured same, then the risk would be passed on to the Insurance company.

QUESTION FOUR

Yesterday, as the Director of the Retail Banking Division of your bank, your Secretary informed you that, two gentlemen from the KYC Restaurant called to have an appointment and you agreed a meeting at 10:00hours today.

At 09:45 hours Mr Eric Tagoe and Mr Bright Quartey introduced themselves as KFC's Legal Advisor and Director of Compliance & Anti-Money Laundering Reporting Officer respectively.
Discussions indicated that, the KFC Restaurant presented a Cash Deposit transaction for GHS150 000.00 to the East Legon Branch yesterday, but their account has been credited with GHS100,000.00 only.
You excused these gentlemen and called the East Legon Branch Manager who notified you of the following:

- That a KFC Teller presented Cash of GHS150,000.00 and a Cash Deposit slip for same to the bank's Teller and that this transaction was one of the lot which were affected by the armed robbery attack on the Branch;
- That Genevieve, your bank's Teller received the lot and the Cash Deposit subject to check and subsequent credit to the KFC Restaurant account;
- That just after checking the GHS50.00 and GHS20.00 denominations making a total of GHs100,000.00 and indicating same on the cash deposit slip, 3 armed men attacked the Branch and made away with nearly all the cash at the BCO.
- The Teller referred the matter to the Branch Manager, who directed that because the Teller had checked only GHS100,000.00 will require a credit of GHS100,000.00 only to the account.

  a) What is the bank's position in this matter? (**10 Marks**)
  b) Will this position change if the Teller had not checked the cash at all? (**10 marks**)

Suggested Solution:

a) The issue at stake is the "acceptance of deposit" duty of the bank in the Banker and Customer Relationship which involves the Debtor and Creditor relationship for moneys had and received. In this relationship, the banker becomes a debtor for all moneys received from the customer, but until then, the said customer remains the owner of such monies.
   - This relationship was established in *Foley v. Hill (1848)*. When the bank is in possession of the customer's money, it is the debtor for the amount and the customer is the creditor. When the customer is in possession of the bank's money he is the debtor for the amount and the bank is the creditor.

- This matter notwithstanding, brings up an issue of "when" to draw the line between who owns the money and who has possession at one time or the other. It has historically, been established that the banker's indebtedness is established when the banker:

    1) Receives such monies;
    2) Checks to determine how much has been received in the name of the customer and
    3) Records into the bankers' books how much is owed to the customer and
    4) Has established the extent of the debtor and creditor relationship to that value.

- In *Balmoral Supermarket Ltd v. Bank of New Zealand (1974)*, the timing of the ownership of money passing to the bank was considered. The facts are as follows:
    - An employee of the plaintiff was depositing substantial sum of cash with the defendant bank and had emptied his bag midway between him and the Teller.
    - When the Teller had picked up one bundle of notes and counted them, robbers entered the bank and stole the uncounted money.
    - The Court held that the money was still the property of the customer and that the bank would not have indicated its acceptance of the said monies, until the Teller:
        - received the cash,
        - checks to determine the value, and
        - acknowledges such monies on the deposit slip and records same.
    - The customer's claim failed.

- By the above, therefore, the bank is right in passing a credit of GHs100,000.00 as monies had and received from the customer, value of which had been determined through a cash count for the records. The banker is a debtor for GHs100,000.00 only.

- The difference of GHs50,000.00, even though was in the possession of the Bank's Teller, remains\was the property of the customer. It had not passed on to the banker because its value has not been ascertained and so the Bank cannot\would not have indicated its acceptance to warrant a debtor\creditor relationship, that will require a record of a credit transaction.

- If the bank had envisaged the "Balmoral" issue and sought to manage same by way of insurance, then for a good customer, the bank may against such insurance, refund GHs50,000.00 to such a customer.

b) The position will not change and there WILL NOT BE ANY CREDIT TO THE CUSTOMER ACCOUNT AT ALL because the said monies were still in the possession of the "customer" at the time of the robbery, and same HAS NOT PASSED ON TO THE BANKER.

SECTION "B" QUESTIONS

QUESTION FIVE

The PREDEQ bank gives a mortgage of land for a customer and, as an additional security, took an assignment of a 30-year Term Life Policy (a non-endowment situation) over the customer's life - the policy monies being payable to the customer's wife, at maturity on his death. Discuss this bank's position in the following circumstances:

a. How the Legal Assignment of the Policy was taken by the PREDEQ Bank. Supposing that someone else, at a later date, also takes an assignment of the Policy, which of the 2 assignments would have priority over the other? (**10 marks**)
b. What would happen to the PREDEQ Bank's security if the customer stopped paying the premiums? (4 **marks**)
c. Would the Policy monies be payable if the customer committed suicide? (**2 marks**)
d. Will the position be any different if the Policy was an Endowment Life Policy? If yes, indicate with reasons. (**4 marks**)

Suggested Solution:

a) Term life Policies have a guaranteed death benefit, but no cash value, and the premiums usually increase at pre-determined intervals such as after 1 year, 5 years, 10 years, or 20 years, depending on the kind of policy.
   - PREDEQ Bank should be interested in the remaining years to "maturity", because this would be a very critical matter should premium payments cease, unknown to PREDEQ Bank.
   - Legal Assignment of a life policy as security for bankers' advances is one of the suitable types of securities available to banks. A Legal Assignment, to be effective, must:
     1) Be in writing;
     2) Be signed by the beneficiary of the Policy and
     3) Be lodged with an original copy of the Policy, with the Bank. Non-production of the Policy is constructive notice of prior equitable interests in the Policy, which is usually not notified to the assurance company;
     4) Be notified to the assurance company against their acknowledgement, usually for a small fee.
     5) Provide priority over other assignees, if any, which dates from the receipt of notice by the assurance company.
     6) Make a diary for monitoring future premium payments and ensure that payments do not lapse.

b) It is in the interest of the PREDEQ bank to examine the Policy to:
   1) Ensure that premium payments had been up to date at the time of execution and what will happen if premium payments run into arrears. Bank could pay any arrears and place the debit to the customer's account, to avoid the usual practice where the assurance company may lapse the Policy after a grace period.
   2) If the customer stopped paying the premium, then the customer would have breached a covenant to pay premiums and PREDEQ Bank can do any of the following:
      i. Call in the borrowing because of the breach of the covenant to pay premiums;
      ii. PREDEQ Bank may pay up premiums on the side to keep the Policy running to the full term to obtain the maximum benefit. This may be done usually, where the Policy value is near maturity and well in excess of the borrowing.

c) Usually, the Policy will well state the position, otherwise, the assurance company will not payout if the life assured whilst sane, committed suicide as was ruled in *Beresford v. Royal Insurance.* Insurance companies have, historically, been known to honour obligations to bona fide assignee for value, but not to the beneficiary unless the terms of the Policy expressly states so. Suicide is not a criminal offence under the Suicide Act of the UK.

d) The above position will be entirely different if the Policy was an "Endowment" Policy.
   - An **endowment policy** is a life insurance contract designed to pay a lump sum after a specific term (on its 'maturity') or on death; up to a certain age limit.
   - Policies are typically traditional with-profits or unit-linked, where premium is invested in units of a unitised insurance fund.
   - Endowment Policies can be cashed in early (or surrendered) and the holder then receives the surrender value which is determined by the insurance company depending on how long the policy has been running and how much premium has been paid into it.
   - If the customer stopped paying premiums, PREDEQ Bank can surrender the Policy (usually called "surrender value") at its value at that point in time, especially so when this value exceeds the indebtedness.
   - On the other hand, PREDEQ Bank could continue premium payments to boost the surrender value or keep the Policy alive based on the most effective cost-benefit analysis at the said time. This surrender value feature is not available in "Term" Policies.

QUESTION SIX

As the Branch Manager of your High Street Branch in Accra, your Securities Clerk asks you the following questions:

a. We submitted an application to the Director\Credits showing the following details of Account X Ltd
   - Proposed Limit: GHS500,000.00;
   - Proposed Security: Fixed Charge over the factory, minimum forced sale value (FSV) GHs1,500,000.00 on a professional valuation.

   The Director\Credits' office has agreed to lend, but have expressed dissatisfaction with the security and have requested us to take a Debenture rather.

   Explain the following to your Clerk:

   i. What is a Debenture? (**2 marks**)

   ii. Why is the Director\Credits' office requesting for a debenture over the company's fixed and floating assets? (**8 marks**)

b. I have read some correspondence about the appointment of an "Administrative Receiver" for Z Limited. Can you explain what "Administrative Receiver "means, how the administrative receiver is appointed and what the administrative receiver does? (**10 marks**)

Suggested Solution: - **What is a "Debenture"? & Director\Credit request**

a. This question has to do with Company Securities and the operation of the law of insolvency vis-à-vis "when things go wrong" and the appointments of an Administrator and\or Administrative Receiver in liquidation.

   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

      1) 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."

      2) ss. (3) also provides that "All debentures of the same series shall rank pari passu in all respects notwithstanding that they may be issued on different dates."

      3) By these provisions therefore, a debenture is available to only limited liability companies to issue as charges for bankers advances.

4) Debentures may be issued and secured in one of 3 ways in accordance with s. 86 (2) of the Companies Code Act 179, by:
   - a "fixed" charge on certain company assets; or
   - a "floating" charge over the whole or a specified part of the company's undertaking and assets (present and future); or by
   - both "fixed" charge on a certain property and "floating" charge over other assets owned by the company.

5) Floating charge is defined in 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.

ii. The Director\Credits is requesting a debenture incorporating both "fixed" and "floating" charges even though the security provided more than covers the indebtedness. Laws of Insolvency do affect debentures in various ways.
   1) In Ghana, s. 88 of the Companies Code Act 179, regarding the "Powers of the Court" provides reliefs for all forms of debentures indicated above. Ss.88 (3) provides that:
      "The ***security of the debenture holder shall be deemed to be in jeopardy*** *if the Court is satisfied that events have occurred or are about to occur* ***which render it unreasonable in the interests of the debenture holder*** *that* ***the company should retain power to dispose of its assets****."*
      a. In the case of "fixed" charges, Shareholders; Directors and Creditors; usually through the Shareholders, may obtain a Judicial order for the appointment of a "**receiver**" (equivalent to the "Administrator" in other Banking texts) in accordance with s. 88(1) and
      b. In "Floating" charges, by s. 88(1), a "**receiver and manager**" (the equivalent of "Administrative Receiver" in other Banking Texts). But by ss. 88(2) the position is provided for the "floating" charge holder who may obtain a Judicial order for the appointment of a "Receiver", even if the charge has not become enforceable.
   2) The Director\Credit's request is a very prudent and compliance conscious measure because of the above features of the fixed charge involving the rights of other stakeholders of the issuing corporate body.
   3) An ordinary "fixed" charge debenture sits on the back of ss. 88(3) and 88(1) which has the tendency of affecting the effectiveness of the debenture incorporating a "fixed" charge which is available now.
   4) Obtaining a debenture incorporating a "fixed" and "floating" charge the provision in ss. 88(2) in the interest of the PREDEQ Bank and such request should be accepted in good faith to the mutual benefit of the Bank and its customer.

b. **Appointment of an Administrative Receiver?**
A floating charge necessarily allows the directors of the issuing company to have use of the charged assets in the ordinary course of business until the said floating charge crystallizes, whereupon, the directors powers to utilise such assets ceases.

1) By ss.87(1) of Ghana's Companies Code Act 179, "A floating charge is an equitable charge over the whole or a specified part of the company's undertaking and assets both present and future, so however that the charge shall not preclude the company from dealing with such assets until:
   i. Ss. 87(1)(a): the security becomes enforceable and the holder … appoints a receiver or manager or enters into possession of such assets; or
   ii. Ss. 87(1)(b): the Court appoints a receiver or manager of such assets on the application of the holder; or
   iii. Ss. 87(1)(c): the company goes into liquidation – compulsory or voluntary; Others include:
      - If the terms of the debenture have been breached: *Shamji and Others v. Johnson Matthey Bankers Ltd (1986)*
      - If the company ceases to carry on trading: *Hubbock v. Helms (1887)*
   iv. Notice of the said "Administrative Receiver" appointed under ss. 87(1)(a), shall be made to the Registrar within 10 days from the date of the order, appointment or entry into possession, in accordance with ss 116(1).
   v. The "Administrative Receiver", although appointed by the debenture holder will be an agent of the company who issued the debenture under expressed terms in debenture document.
   vi. These reliefs are also provided for by the Borrowers' & Lenders' Act 773 of 2008, in ss. 29-35.

2) What the Administrative Receiver does.
   i. The main purpose of the Administrative Receiver is to manage the company's affairs to obtain repayment for the debenture holder. This appointment is made under s ss. 87(1)(a) and (s. 29(2) Insolvency Act 1986 of the UK.
   ii. The receiver can continue the business if the terms of the debenture states so, but usually it is to relies sufficient assets to repay the debenture holder.
   iii. Monies raised is first and foremost applied in discharge of creditors secured by fixed charges, then preferential creditors ahead of floating charge holders in accordance with ss. 89 of the Companies Code Act 179.

3) How an appointment is made
    i. The appointment must be made in writing to be
    ii. Acknowledge\accepted before end of next business day after receipt. A confirmation must be made writing within a reasonable time – in the UK, this relevant time is 7 days.
    iii. Appointment shall be advised under ss. 87(1)(a), and shall be made to the Registrar within 10 days from the date of the order, appointment or entry into possession, in accordance with ss 116(1).
    iv. It is prudent to serve notice to all known creditors.

QUESTION SEVEN

Your Private Banking customer, Reginald Tagoe's account is overdrawn GHs40,000.00 and you have called on him to provide security. He telephoned last Friday and told you he can only provide a guarantee from his friend and business associate Kofi Darko who is a customer known to you, will visit your branch to meet with you in this regard. Kofi Darko is a Director in the KoDarko Building & Civil Engineering Works Ltd which has an account with your Koforidua Branch.

This afternoon, Kofi Darko indeed called to seek an appointment to enable him visit your office to discuss the guarantee, and indicated that when Reginald Tagoe requested him to sign a guarantee as security for his indebtedness, he had some reservations, but has come to learn that it is a formality and he is happy to sign for the sake of their friendship.

He added that he owes Reginald Tagoe GHs5,000,000.00 in respect of some sub-contracted works he has recently completed.

a) How will you handle this situation and what action will you take during your meeting with him? (**15 marks**)
b) Would your answer be the same if Kofi Darko had not been a Director in a limited liability company? (**5 marks**)

Suggested Solution:

a) How will you handle the situation?
   Your bank has a guarantee as security for bankers' advances to secure the account of a private banking customer who your bank will want to assist. The guarantor, is also your customer who is known to you; and a friend and business associate of your customer Reginald Tagoe, the principal debtor.

i. Kofi Darko, a director of a limited liability company must be a financially sophisticated person expected to have some understanding in such matters. His assertion at the meeting, however, is indicative that there must be some misapprehension which must be handled with utmost care, to prevent avoidance of the guarantee when most needed. Ref. *Royal Bank of Scotland v. Greenshields (1914)*

ii. A guarantee is NOT a contract "uberimae fidei", i.e., of utmost good faith, and so non-disclosure, by the banker, of a material fact does not vitiate the contract. *Cooper v. National Provincial Bank (1946)* and *Hamilton v. Watson (1845).*

iii. On the other hand any questions coming up from the guarantor would be answered clearly and unequivocally. The issue of seeking to execute a guarantee "for the sake of friendship" will not speak in law. That notwithstanding, both principal debtor and prospective guarantor are both customers and the bank owes both of them the same duty of care.

iv. Of course, Kofi Darko's indebtedness to Reginald Tagoe which more than covers the debt should he pay today, provides some comfort ultimately, so we will tread with caution to assist our customers.

v. The guarantee is to cover an existing debt, not a new debt so this needs to be cleared between both customers. The bank will be guided by the duty of confidentiality required by s. 84 of the Banking Act 673 of 2004 and Tournier's case of 1924 and the ruling in *Lloyds Bank v. Bundy (1974),* even though Kofi Darko's standing does not indicate likely reliance on the bank for financial advice.

vi. Bank will conduct a tripartite meeting with Reginald and Kofi Darko to deal appropriately.

vii. It may be expected that their friendship should facilitate delivery, however, should any significant line of questioning arise, the bank may be compelled to provide brief explanation of the circumstances; the seriousness of the implications of the guarantee liability on the guarantor; the nature of the guarantee and its principal clauses including:
    1) Continuing liability;
    2) All monies;
    3) Repayable on demand, etc

viii. If Kofi Darko accepts to proceed, then the guarantee document will be executed and signed in the bank's premises against their witnesses. Should any form of dissension\misapprehension arise, the bank will suggest that Kofi Darko seeks independent legal advice from an independent legal advisor, preferably, one known to the bank, who will attest to the fact that the guarantor has read or had read to him and explained, all the necessary provision in the standard Guarantee document and that the said guarantor has signed at his own freewill.

ix. There is a high unlikely situation that the bank will not obtain this security, the above misapprehension, notwithstanding.

b) The position will not be very different, even if Kofi Darko was not a director in a limited liability company. But the bank will be guided by the ruling in the *Lloyds Bank v. Bundy (1974)* case and proceed with a high level of care. Another good element of success in this matter is the extent of the contract value of GHs5,000,000.00 between these customers.