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Centre for Open and Lifelong Learning

FEEDBACK TUTORIAL LETTER

2ND SEMESTER 2020

ASSIGNMENT 2

COMMERCIAL LAW 1B

(CML112S)



Course Name: COMMERCIAL LAW 1B
Course Code: CML 112S
Department: SOCIAL SCIENCES
Course Duration: SEMESTER 2 MODULE
NQF Level and Credit: NQF LEVEL 5, 12 CREDITS
Moodle Enrollment Key: CML 112S

Marker-tutor Details

Your marker-tutors for COMMERCIAL LAW 1B

The Namibia University of Science and Technology has appointed **the following tutors** as marker-tutors for **COMMERCIAL LAW 1B**

Your marker-tutors for COMMERCIAL LAW 1B

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Dear student

FEEDBACK FOR ASSIGNMENT 2

This tutorial letter contains reading skills, suggested way of answering questions, responses to problems identified during the tutor-marking, clarification of misinterpreted/not clearly understood concepts or questions relating to assignment 2 and other aspects that reinforces learning to improve performance.

The essence of assignment 2

The questions in this assignment are based on learning outcomes formulated for this course. Several components of Commercial law 1B were tested in your responses (units 13-19 of the Prescribed Study Guide). In your answers we looked for evidence inter alia, critical reading, application of understanding, reflexive responses, coherence and correctness, grammaticality and spelling. You need to focus on the length of your responses.

Understanding the question: task/process words

It is important to analyse the task/process words before you begin to answer any question. The 'process words' or instruction words identify what you are supposed to do.

Reading strategies

Before you embark on an assignment, you will need to engage and to interact with the prescribed materials (in this regard your study guide) by applying effective reading skills. These skills will help you to become familiar with the prescribed reading materials.



QUESTION 2

This question was based on the so-called duty of disclosure in the context of insurance law. You will all know by now that an insurance contract is based on utmost good faith. Some students merely copied passages from the study guide on the duty of disclosure without any application of the law to the facts. The directors of Kavango River (Pty) Ltd were ignored. There are some students who focused on Kativa as opposed to what the question directly required. We found students who answered this question in a paragraph of less than five lines. That was too brief for 10 marks.

We awarded marks as follows:

- **An insurance contract is a contract of utmost good faith between an insurer and an insured,**
- **Because of this, there is a duty of disclosure**
- **This entails is a duty on both insured and insurer to disclose to each other prior to conclusion of the contract of insurance**
- **every fact relative and material to the risk or the assessment of the premium**
- **This duty of disclosure relates to material facts**
- **of which the parties have actual knowledge or**
- **constructive knowledge prior to conclusion of the contract of insurance.**
- **therefore, withholding of information and failure to disclose relevant information amounts to misrepresentation**
- **and renders the contract voidable at the option of the insurer.**
- **They are not under a duty to disclose facts about Kativa, which they do not know.**

The duty of disclosure is important in the context of insurance contracts. This is an examinable area. Students are urged to study this duty as they prepare for examinations in 2021.



QUESTION 2

This question had various sub-questions. But the sub-questions were all based on intellectual property law. It dealt with aspects of copyright and trademarks. This part of the law is important even for examination in 2021.

2.1.

(a) This question was based on the requirements for copyright. Because photographs essentially fall under copyright.

We awarded marks as follows:

- **Public morality**
- **Originality**
- **Qualified persons**
- **Publication**
- **Ownership**

Some students went at great length to discuss the requirements above for subsistence of copyright in photographs. This was not required.

(b)

This question was premised on a distinction between the author and copyright owner in regard to the photographs. Some students were of the view that Glitz Magazine was the author. This was an oversight.

The correct answer to this question was as follows:

- **Author will be Mr. Say Cheese**
- **Napenda will be copyright owner**

You will remember from the facts that Mr. Say Cheese took the photographs hence the author and Napenda commissioned the taking of the photographs hence the copyright owner.



(c) There were students who assumed that the Glitz magazine had exclusive rights to publication of the photographs. This was not the case on the set of given facts. The answer was as follows for which we awarded marks.

- **Yes**
- **because The Glitz do not have the exclusive right of publishing the work**
- **without permission of the copyright owner**

2.2

(a) This question tested the students' ability to determine whether a trade mark can be registered if there is already a registered one which closely resembles the one to be registered. We awarded marks as follows:

- **No,**
- **the mark SKIN-DIP is incapable of distinguishing the goods or services of Anna from that of Mary**

(b) The answer to this question was relatively straightforward. But for some reasons some students referred to 10 months, some referred to 11 months. We are not sure what the confusion was. The study guide is very clear on this. We awarded a mark to students that stated the following.

- **10 years**

(c) The essence of this question was to test students' ability to demonstrate when a registered trademark of another can be used by another person. We awarded marks as follows:

- **Yes**
- **under a license**



QUESTION 3

This question was clear that students were required to discuss the duty of the lessor to ensure the lessee's undisturbed use and enjoyment of a lease thing. Some students went at length and discuss all the duties of the lessor. This was not required. The duty of the lessor to ensure the lessee's undisturbed use and enjoyment of a lease thing is discussed on pages 133-134 of the Prescribed study guide. Most students just merely "copied and pasted" without discussion. We also found students who consulted foreign textbooks and answered this question. The result was that they omitted essential aspects of the discussion.

We awarded marks as follows:

- **The lessor has a duty to ensure the lessee's undisturbed use and enjoyment.**
- **the lessee must not be disturbed in his/her use and enjoyment of the thing.**
- **The lessor undertakes that he/she will not do (or allow to be done) anything which unlawfully interferes, directly or indirectly, with the lessee's use and enjoyment;**
- **and impliedly warrants that no person with a superior title will disturb or evict the lessee's use and enjoyment.**
- **The lessor will not, however, unlawfully disturb the lessee's use and enjoyment if he/she enters the property for the purpose of inspecting it or if he/she carries out necessary repairs to it.**
- **Should the lessor interfere with the lessee's use and enjoyment of the property, or deprive him/her thereof, the lessee is entitled to an interdict against the lessor to have the use and enjoyment restored.**
- **lessee may, however, also accept such deprivation as a repudiation of the lease and**
- **cancel the contract.**
- **In addition, the lessee may recover damages**
- **for any loss sustained as a result of the deprivation from the lessor.**



QUESTION 4

4.1.

This question was based on the requirement that a contract must be lawful. Some students were of view that as long as the parties reached consensus that was enough. Keep in mind that a contract of insurance is first a contract, hence it must still comply with the general requirements of a valid contract. See page 126 of the Prescribed Study Guide.

We graded students positively for stating the following.

- **No**
- **Contract is illegal**

4.2.

(a) The *essentialia* of a contract are those that are necessary to place a contract in a specific category. In other words, to enable a contract to be distinguished from another. The *essentialia* of a lease contract are as follows.

- **that the lessor is to give and the lessee to receive the use and enjoyment of a specified thing (property);**
- **that the use and enjoyment of the thing (property) is temporary;**
- **the rent for its use and enjoyment.**

For those that got this wrong, see page 126 of the Prescribed Study Guide.

(b) This question did not present difficulties to a lot of students. The *essentialia* of a contract if insurance are as follows for which marks were awarded.

- **Insurable interest;**
- **risk;**
- **premium;**
- **cover.**

The answer is found on page 150 to 152 of the Prescribed Study Guide.



- 4.3. This question was a bit challenging for most students. Students were not able to determine whether a lease contract can be for an indefinite period. However, the prescribed study guide is clear on this. See prescribed Commercial Law 1B Study Guide, on page 128 paragraph 4 on temporary use and enjoyment, line six *"It is not however, a requirement for the validity of a lease that it be entered into for a definite time. The length of the period may be for indefinite in the sense that it may be at the will of either of the parties."*

Therefore, it follows that the answer to this question was

- **Yes**

Students were not required to motivate their answer.



GENERAL OBSERVATIONS/COMMON MISTAKES

As we were marking your scripts, we identified the following **weaknesses** from some of the students:

- Lack of understanding of the questions. You should make sure that you analyse the key words/task words of the question and your answer should give the required response.
- Incorrect spelling of words. You should ensure correct spelling of words as they appear in the study guide. If you type your work this can generally be avoided as the computer will spot this.
- Use of foreign materials (such as English law books) thereby referring to requirements for the formation of a valid contract such as specifics, consideration and proper form. (BE CAREFUL WHEN USING MATERIALS OF OTHER JURISDICTIONS-LAWS ARE DIFFERENT). Your study guide in most cases is enough to answer questions in an assignment. Stick to that. Use sources that you are sure they are applicable to Namibian law.
- Some students' answers were unnecessarily too long. Always consider marks allocation and that should be a factor to help you determine how long your response to each question should be. It is hard to contemplate a student answering 3 marks for example for a full page or half page or answering a 10 Marks question in 2 to 3 pages.
- On the converse students should be guided by marks allocation. If the question is for 2 marks or 3 marks for example, it does not require detailed discussion.
- Some students did not attempt all the questions. Some questions were left blank. This behavior is discouraged. Students are encouraged to attempt to answer all questions where this is the instruction. Students **should phone us on numbers** provided in tutorial letters or make arrangements for face to face consultation if this possible to discuss challenges faced when answering questions (especially if a question or questions are not clear to them. WE ARE HERE TO HELP.
- There were instances of verbatim copying from the study guide. You should always paraphrase and put explanations in your own words. Only then we can be sure you understand the work.

END OF FEEDBACK TUTORIAL LETTER