

## Chapter 1

# BANKRUPTCY

## Introduction

Bankruptcy can simply be defined as the legal declaration of insolvency. What then is insolvency? Insolvency is the inability of a debtor to meet his obligations as they fall due.

Bankruptcy proceeding usually involves the court of competent jurisdiction appointing an officer to take over the debtor's assets, realizing them and distributing the proceeds thereof rateably among his creditors to the extent that the assets permit and subject to existing priorities. In matters pertaining to bankruptcy, the court of competent jurisdiction is the Federal High Court sitting in its bankruptcy jurisdiction.

The law relating to bankruptcy in Nigeria is the Bankruptcy Act of 1979 found in the complete laws of the Federation of Nigeria,

1990. It needs to be emphasized that an insolvent debtor is not necessarily a bankrupt. Before he can be declared bankrupt, he must have committed an act of bankruptcy. What then is an act of bankruptcy? This is an act or default on the part of a debtor which is deemed to be evidence of his insolvency (Vickery 1981). Under the Nigerian law, there are three acts of bankruptcy unlike under English law where the acts are eight.

## Acts of Bankruptcy

According to Section 1 of the Bankruptcy Act of 1979, a debtor commits an act of bankruptcy in each of the following cases:

(a) If a creditor has obtained a final judgement or final order against him for any amount and execution thereon has not been stayed has a bankruptcy notice serve on him and he does not within fourteen days comply with the notice or put forward a counter claim, set-off or cross demand which equals or exceeds the amount of the debts.

(b) If execution against him has been levied by seizure of his goods under process in an action or proceedings in the court, and the goods have either been sold or held by the bailiff for twenty-one days.

(c) If he files in the court a declaration of his inability to pay his debts or presents a bankruptcy petition against himself.

A petition in bankruptcy is expected to be presented to a court (usually by the creditors who have tried all means but were unable to recover their money) within three months after the act of bankruptcy on which the petition is based, has been committed.

However, not all creditors can present a bankruptcy petition. Before a petition can be brought, the following conditions must hold (Section 4).

1. The debt owing by the debtor to the petitioning creditor, or if two or more creditors join in the petition, the aggregate amount of debts owing to the several petitioning creditors is not less than N2,000.00.
2. The debt is a liquidated sum payable either immediately or at some certain future time.
3. The act of bankruptcy on which the petition is based has occurred within 3 months before the presentation of the petition, and
4. The debtor is ordinarily resident in Nigeria, or within a year before the date of the presentation of the petition has ordinarily resided or had a dwelling house or place of business in Nigeria personally or by means of an agent or manager, or is or within the said period has been a member of a firm or partnership in Nigeria by means of a partner or partners or an agent or manager.

Debtors that cannot be made Bankrupt

Certain classes of debtors can not be made bankrupt. For example: (i)

- (1) Infants except in respect of contracts of necessity;
- (11) Corporate bodies;
- (111) Deceased persons;
- (iv) The insane;
- (v) Aliens.

Purpose of the Bankruptcy Act

The purpose of instituting the Bankruptcy Act of 1979 is to make provisions for declaring as bankrupt any person who cannot pay his debts of a specified amount and to disqualify him from holding certain elective and other public offices or from practicing any regulated profession (except as an employee):

The objects of the bankruptcy procedures are:

- (a) To divide the debtor's available property fairly and equitably amongst his creditors.
- (b) To relieve the debtor from the excess of his liabilities over his assets (i. e. deficiency) to enable him make a fresh start after his discharge, and

(c) To carry out investigation into the reasons for his insolvency in order to discourage others from making his mistakes.

#### Disqualifications of Bankrupt [Section 126 (1)]

These can be said to be the effect of bankruptcy in that the person adjudged bankrupt under the Act is disqualified from:

- a) Being elected to the office of the President or Vice-President, Governor or Deputy Governor, being elected to or sitting or voting in, either House of National Assembly or in a State of Assembly;
- b) Being elected to or sitting or voting in, any local government council in any State in the Federation or the Federal Capital Territory, Abuja;
- c) Being appointed to, or sitting or voting in, any governing board (Whosoever known or describe) of any Statutory Corporation or any other Statutory body (whether corporate or unincorporated) or, as provided by section 253 of CAMA, of any company as defined in that Section; being appointed or acting as a justice of the peace.
- d) Being appointed or acting as a trustee of a trust estate;
- e) Being admitted to practise any profession for the time regulated by law on his own or in partnership or in any other form of association (other than as an employee) with any other person.

These disabilities suffered by the bankrupt are removed and ceased If and when:

- a) The adjudication of bankruptcy against him is annulled; or
- b) He is automatically discharged pursuant to the Act: or
- c) The obtains from the court his discharge with a certificate to the effect that his bankruptcy was caused by misfortune without any misconduct on his part.

#### Bankruptcy Proceedings

The proceedings in bankruptcy can be summarized as follows:

1. Presentation to the Court (Of competent jurisdiction) of ' bankruptcy petition against the debtor. As explained earlier, the petition may be brought by an aggrieved creditor or a group of creditors or even the debtor himself.
2. On hearing the petition, the court may dismiss it if it is not satisfied with the facts. If it is satisfied, then a receiving order will be made against the debtor.

3. On the making of the receiving order, the property or estate of the debtor is placed under the custody and control of the Official Receiver. This makes the debtor to lose possession (and not title) of his assets and all legal actions against the property or person of the debtor are automatically stayed. This does not mean that a secured creditor cannot realise or otherwise deal with his security, if he has the power. Note that, the receiving order does not make the debtor bankrupt but places his property under the protection of the court pending the outcome of the proceedings.

4. The debtor will submit a Statement of Affairs in the prescribed form supported with a sworn affidavit to the Official Receiver.

This should be done within 7 days of the receiving order if made on the debtor's own petition or within 14 days, if made on a creditor's petition.

Note that:

a) At times, the court may appoint the Official Receiver to be interim receiver pending the making of the receiving order in order to protect the estate of the debtor.

b) The court on the application of the Official Receiver or any creditor, may appoint a Special manager whose major duty is to manage the estate or the business of the debtor pending the appointment of a trustee.

c) The receiving order needs to be published in the Federal Gazette by the Official Receiver. The advertisement should state the name, address and description of the debtor, the date of the order and the date of the petition.

5. The Official Receiver then calls the general meeting of creditors (also known as the "first" meeting) to deliberate on whether:

a) To accept any proposal made by the debtor e.g. a composition or a scheme of arrangement or

b) To apply to the court to adjudicate the debtor bankrupt.

6. This is followed by a public examination of the debtor in relation to his conduct, dealings and property. This examination is held in open court and questions are put to the debtor by either the creditors or the Official Receiver.

7. Where the proposal made by the debtor in the first meeting is not accepted within 14 days after the conclusion of the public examination or where it was decided that the debtor should be adjudicated bankrupt then an adjudication order will be made.

Alternatively, where the creditors accepted the proposal of the debtor the latter would escape being made bankrupt. This is achieved by annulling the receiving order.

8. In the event of the debtor being adjudicated bankrupt, his property is now vested in a "Trustee in Bankruptcy". The Official Receiver or any other fit and proper person may be appointed as trustee by the creditor's ordinary resolution.

This appointment in some instances is made by court or the committee of inspection. The committee of inspection is a committee appointed by the creditors to oversee the realization and distribution of the debtor's property.

The adjudication order just like the receiving order needs to be advertised in the Federal Gazette and in at least two newspapers. The advertisement is to state the name, address and the description of the bankrupt, the date of the adjudication and the name of the trustee.

9) Next comes the proof of debt by creditors.

10) The trustee collects and realizes the bankrupt assets.

11) Distribution of the proceeds among those creditors whose debt have been proved.

12) The discharge of the bankrupt debtor. This is at any time after the conclusion of the public examination. Anyway there is an automatic discharge after 5 years from the date of the receiving order. An order of discharge releases the bankrupt from debts (with the exception of some) which the bankruptcy imposes on him. The certain debts which the bankrupt is not free from are:

1. Debts or liabilities incurred by means of fraud or fraudulent breach of trust to which he was a party.

11) Debts to the State.

111) Judgment debts in an action for seduction e.t.c.

Statement of Affairs (Section 16)

This is a statement that is made out and submitted to the Official Receiver and creditors by the debtor (in relation to his affairs) in the prescribed form and verified by affidavit.

The statement of affairs:

a. Shows the particulars of the debtor's assets, debts and liabilities, whether in Nigeria or else where;

b. Shows the securities held by them respectively and the dates when the securities were respectively given;

c) gives such further or other information as may be prescribed or as Official Receiver may require; and

d. Gives details of all property held by the debtor in a name or under any alias, or by his wife, or his children, or by any person in trust for him or them with full particulars as to the manner and date of its being acquired.

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1) Assets are recorded at their estimated real able value.

| Balance Sheet   | Statement of Affairs  |
|---|---|
| 1) Assets are recorded at cost or valuation                             | 1) Assets are recorded at their estimated real able value   |
| 2) Assets are divided into fixed assets and current assets.             | 2) Assets are divided into those that are specifically pledged (that' is, used as collateral securities) and those not specifically pledged |
| 3) Liabilities are classified into current and long term liabilities:   | 3) Liabilities are divided into secured, unsecured and preferential liabilities.  |
| 4) It is usually prepared for a going-concern                           | 4) This is prepared on a break-up or winding up basis.  |
| 5) There is no order of priority of claims.                             | 5) The order of priority of claims must be strictly adhered to during payment of creditors.   |
| 6) A Profit and Loss Account usually accompanies Balance Sheet.         | 6) This is usually accompanied by a Deficiency or Surplus Account.  |
| 7) Preferential creditors are included in the total of the liabilities. | 7) Preferential creditors are deduced from the assets.  |
| 8) This shows capital, profit or loss and drawings.                     | 8) These items are excluded from this statement.  |
| 9) Personal assets and liabilities are not included.                    | 9) There is no distinction between the business assets and liabilities and personal assets and liabilities                                  |

## PREPARATION OF A STATEMENT OF AFFAIRS

The following is one of the methods that can be used to prepare the Statement of Affairs as explained by Douglas Garbutt (1976: 2606)

### ILLUSTRATIVE QUESTIONS

Mark Anthony got into financial difficulties and was unable to meet his obligations.

On 31st December 1996, a Receiving Order was made against him when his financial affairs were as follows:

|                    | ₦             | ₦               |                     | ₦              |
|--------------------|---------------|-----------------|---------------------|----------------|
| Capital            |               | —               | Freehold building   | 45,000         |
| At 1 Jan: 1996     |               | 59,220          | Plant and machinery | 37,500         |
| loss for the year  | 9,600         |                 | Furniture & Fitting | 16,800         |
| Drawing            | <u>13,500</u> | <u>(23,100)</u> | Motor Vehicles      | 18,300         |
|                    |               | 36,120          | Stock               | 13,080         |
| Mortgage on        |               | 36,000          | Debtors             | 27,420         |
| freehold buildings |               | -               | Bills receivable    | 7,200          |
| Bank Overdraft     |               | 16,500          | Cash at bank        | 3,300          |
| (Secured)          |               |                 | Cash in hand        | 270            |
| Creditors          |               | 57,750          |                     |                |
| Bills payable      |               | <u>22,500</u>   |                     |                |
|                    |               | <u>168,870</u>  |                     | <u>168,870</u> |

The following additional information is given on the above financial Affairs; Creditors comprised:

|   |               |
|---|---------------|
| a) Trade creditors                      | 36,300        |
| PAYE deduction (1995 #2100; 1996 N1500) | 3,600         |
| income tax (1995 200; #*1996 #1,350)    | 2,250         |
| Rates (15 months to 31 December, 1996)  | 450'          |
| Sundry creditors                        | <u>15,150</u> |
|   | <u>57,750</u> |

Sundry creditors included six months wages due to the book-keeper at the rate of N125 per month.

a) The assets are estimated to be realized as follows

₦



|                                   |        |
|-----------------------------------|--------|
| 1) Freehold land and buildings    | 43,500 |
| 11) Plant and Machinery           | 20,700 |
| 111) Furniture and Fittings       | 10,200 |
| Motor Vehicles                    | 7,800  |
| The stock is estimated to produce | 10,350 |

The debtor is made up of:

|                |                                  |
|----------------|----------------------------------|
|                | ₦                                |
| Goods debts    | 15,000                           |
| Doubtful debts | 7,500 estimated to produce 4,800 |
| Bad debts      | 4,920 estimated to produce nil   |
|                | 27,420                           |

e) The bank overdraft was secured on the life policy of Mark, the surrender value of which is N11,700.

f) There was a contingent liability of 10,500 in respect of bills discounted of this amount, N4,200 would not be honoured on maturity.

g) The bills receivable are expected to produce N4,650.

You are required to prepare the Statement of Affairs and

Deficiency Account for presentation to a meeting of creditors:

Chapte 2-

## LIQUIDATION

Liquidation refers to the process of winding up a company or a public corporation. Winding up means bringing an end to the activities or corporate existence of an entity. Thus, when companies are wound up they are said to be liquidated and not made bankrupt as in the case of individuals and firms.

The law relating to liquidation in Nigeria is the Companies and Allied Matters (CAMA) of 1990 (the Act). The Corporate Affairs Commission (the Commission has an important role to play when companies are being wound up. This is because Section 7(1) of the Act prescribes the regulation

and supervision of the formation, incorporation, registration, management and winding up of companies as one of the cardinal functions of the commission.

#### MODES OF WINDING UP (S. 401)

The winding up of a company may be effected:

- (a) by the court (this is otherwise known as compulsory winding up);
- (b) voluntarily; or
- (c) Subject to supervision of the court.

#### WINDING UP BY THE COURT

The court that has the authority to wind up a company is the Federal High Court within the area in which the registered office or head office of the company is situated.

The following constitutes the grounds on which the winding up order can be based (S. 408):

- (a) The company has by special resolution resolved to be wound up by the court.
- (b) Default is made in delivering the statutory report to the commission or in holding the statutory meeting.
- (c) The number of members is reduced below two.
- (d) The company is unable to pay its debts.
- (e) The court is of the opinion that it is just and equitable that the company should be wound up.

Note that, the usual ground for bringing the winding up petition is the inability of the company to pay its debts. When then is a company deemed to be unable to pay its debts? The answer to this is found in S.

409:-

A company shall be deemed to be unable to pay its debts if. -

- (a) a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding #2,000 when due has been served on the company, by leaving it at the registered or head office, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; or
- (b) execution or other process issued on a judgement in favour of a creditor of the company is returned unsatisfied wholly or partly; or

(c) the court is convinced, after taking into account any contingent or prospective, of the inability of the company to pay its debts.

This implies that the assets of the company can not meet the liabilities.

#### PETITION FOR WINDING UP (S. 410)

An application of winding up a company by way of petition to the court can be brought by: (a)

(a) the company or its Directors;

(b) a creditor of creditors including a contingent or prospective creditor of a company

(c) the official receiver. This is allowed when a company is already in voluntary liquidation or subject to the supervision of the court;

(d) a contributory

(e) a trustee in bankruptcy to, or a personal representative of a creditor or contributory.

(f) the commission, under S. 323, suing through the Attorney-General

(g) a receiver if authorised by the instrument under which he was appointed;

(h) by all or any of those parties, together or separately.

Note that the term "contributory!" refers to any person liable to contribute to the assets of the company in the event of it being wound up (S. 403). Thus, contributories are present members of a company (that is, present shareholders) and certain (that is, past shareholders).

#### POWER OF COURT ON HEARING PETITION (S. 411)

On bearing a winding up petition, the court may dismiss it or adjourn the hearing or make an interim order or any other appropriate order.

However, a winding up order can not be refused because the assets of the company have been mortgaged to an amount equal to or in excess of those assets or that the company has no assets.

#### Commencement of Winding up (S. 415)

When is a winding up deemed to commence?

According to S. 415 this is: (a)

(a) When the petition for winding up is presented or

(b) Where, before the presentation of the petition, the company was in voluntary liquidation the passing of the resolution to winding up. All proceedings taken in the voluntary winding up shall be deemed to have been validly taken.

### **Consequences of a Winding up Order**

When a winding up order is made, a copy of it is to be forwarden to the commission by the company. The cormissit makes a minute thereof in its books relating to the company (S. 416)

The consequences of a winding up order is as follows:

i) Unless the court directs otherwise any disposition of the property of the company, and any transfer shares or alteration in the status of the members after the commencement of the winding up is void.

(ii) Except by leave of the court, no action can be proceeded with or commenced against the company after making the winding up order or appointing a provisional liquidator.

(iii) Any attachment, sequestration, distress or execution put in force against the estate or the effects of the company is void.

(iv) The directors lose all their powers.

(v) The servants of the company are "ipso facto" dismissed (Ola, 2001: 131).

(vi) The Official Receiver by virtue of his position becomes provisional liquidator and until another liquidator is appointed he continues to act in that capacity.

### **Appointment of Special Manager**

A special manager may be appointed by the court if the nature of the business of the company or the interests of the creditors o contributors warrant such. It is necessary for the special manager lo give security to the satisfaction of the Registrar. The court and noth company fixes the remuneration of the s manager.

### **Statement of Affairs (S 420)**

A statement as to the affairs of the company in the prescribed lo must be prepared and submitted to the Official Receiver will fourteen days from date of the winding-up order, or of b appointment of a provisional liquidator by the directors or secretary'

## Chapter 3

### EXECUTORSHIP

#### Introduction

Executorship has to do with the administration of Wills and other allied matters. Before we can understand fully this matter, there is need to look at some of the "terms" associated with Wills.

#### (1) Will

A Will according to the Wills Act of 1837 is any legal declaration of an individual's intentions as to how his property is to be distributed after his death.

#### (2) Testator / Testatrix

Any person that leaves a Will is called testator (if male) or testatrix if female. He/She is described as a testate person,

#### (3) Intestacy

Intestacy describes a situation where a person does not leave a Will. Upon the death of the person his property will accordingly devolve upon or pass to those who are entitled to receive it by law.

#### (4) Partial Intestacy

This situation arises where a deceased person leaves a Will but the Will does not dispose of all his property. This means that part of the property is left outside the Will. Partial intestacy may also arise where, although the will deals with all the property but the person who is (died before) the testator.

#### (5) Devise and Devisee

A bequest (i.e. gift) of a realty is called Devise. The person to whom the gift is given called Devisee. For example, a portion of a Will may read like this:

"I bequeath my freehold house at plot 99 Victoria Island to my first son, Oluwatobi.". Here, Oluwatobi (the first son) is a devisee.

#### (6) Legacy and Legatee

Legacy refers to a bequest of personalty. The person to whom the gift is given is called a legatee. For instance:

"I bequeath my Pajero Jeep with registration number, Ekiti 1111 EM to my daughter, Orosun",  
, Orosun, is a legatee here.

#### (7) Residue

This describes what is left in the estate after all the bequests have been paid. Note that before distributing the gifts, expenses like funeral expenses, debt of the deceased, taxes, costs of administration must have been met.

#### (8) Residuary Legatee/Devisee

The person named in the Will to receive the residue of personal property is known as the residuary legatee. If however, the residue real property the person is then called the residuary devisee.

#### (9) Disclaimer of Legacies

A legacy is said to be disclaimed when the legatee refuses to claim the benefit from a Will. Any disclaimed legacy becomes part of the residue.

#### (10) Reclaiming from legatees

This occurs when a legacy already distributed to the legatee is recovered so as to provide for the repayment of debts of the deceased of which the executor had not previously been aware.

#### (11) Lapse

A legacy is said to lapse or cease or fail when the beneficiary predeceases the testator. However, if the beneficiary is either the son or the daughter of the testator/testatrix and leaves alive at the testator/testatrix's death an issue of his own, the gift goes to the issue of the predeceased beneficiary.

#### (12) Commorienties or Presumption of Survivorship

This is the principle that is applied when several people die at the same moment in time. For the purpose of estate distribution, the oldest person is deemed to die first.

#### (13) Ademption

This describes a specific legacy that fails or adeems because it is not in the estate as at the date of death of the deceased or it is not in the estate at all.

#### (14) Settlement

This refers to an arrangement by which property is held on trust generally for several beneficiaries some of whom may be unborn at the time of making the arrangement.

#### (15) Personal Chattels

Personal chattels refers to items that are used for domestic purposes only and not for business use. Examples are motor cars, carriages, horses, stable furniture, garden effects, domestic animals, plate, linen, glass, books, pictures, prints, furniture, jeweller, articles of household use, musical instruments, wines and spirits.

## **THE WILL**

### Introduction

A Will may be described as a legal declaration in a prescribed form, of the intention of the person making it regarding the matters which he wishes to take effect on or after his death.

### Characteristics of a Valid Will

According to section 9 of the Will Act of 1837, a valid Will must possess the following characteristics namely

It must be in writing.

The word writing here includes typewriting, handwriting, printing and a combination of all these methods. A Will made in the writing of the testator is referred to as a holograph Will. The law does not specify the precise form of a Will and the language that can be used. Besides, there are no requirements as to the material on which the Will may be written. In fact, in the Goods of Barring, a Will written on an egg shell was admitted to probate as valid.

However, it is not in all cases that the writing of Wills is insisted upon. There are some circumstances that justify the recognition of oral wishes of a dead person as his Will. For instance, the case of Soldiers in actual military service, Mariners or Seamen at sea, members of the Naval or Marine forces and members of the Air force, in actual Military service where oral declaration before witnesses or written wills without any attestation are taken as valid Wills. Wills made in this way are called Nuncupative or Privileged Wills.

### Illustration

Morgan Dickson died on 2nd February, 1998. After the payment of funeral expenses and estate duty, his estate consisted of 750,000 in cash, Chattels worth ₦375,000 and a duplex at Akure valued

At ₦2,250,000.

By his Will, Morgan bequeathed the following:

1) To his wife, the Duplex at Akure and ₦300,000 cash

┌

2) To his Nephew, Jerry, his personal Chattels and ₦150,000 cash..

3) To his adopted children - Peter and Patience, the residue of his estate absolutely.

The distribution was completed on 25th August, 1998.

You are required to show the entries on the books in order to record these transactions.

SUGGESTED SOLUTION

ESTATE OF MORGAN DICKSON (DECEASED)

|                    | ₦       | Cash Book                        | ₦              |
|--------------------|---------|----------------------------------|----------------|
| Estate Capital A/c | 750,000 | Legacies A/c: :                  |                |
|                    |         | Legacy Widow                     | 300,000        |
|                    |         | Legacy Nephew – Jerry            | 150,000        |
|                    |         |                                  | <u>450,000</u> |
|                    |         | Legacy - Peter                   |                |
|                    |         | and Patience (residue) : 300,000 |                |
|                    |         |                                  | <u>750,000</u> |

|                      | ₦         | Estate Capital A/c    | ₦                |
|----------------------|-----------|-----------------------|------------------|
| Legacies and Devises |           | Cash A/c              | 750,000          |
| Alc                  | 3,375,000 | Personal chattels A/c | 3,375,000        |
|                      |           | Duplex A/c            | 2,250,000        |
|                      |           |                       | <u>3,375,000</u> |
|                      |           |                       | <u>3,375,000</u> |

|  | ₦ | Legacies and Devises A/c | ₦ |
|--|---|--------------------------|---|
|  |   |                          |   |



|                           |                  |                    |                  |
|---------------------------|------------------|--------------------|------------------|
| Duplex A/c – widow        | 2,250,000        | Estate Capital A/c | 3,375,000        |
| Cash A/c – widow          | 300000           |                    |                  |
| Personal Chattels - Jerry | 375,000          |                    |                  |
| Cash – Jerry              | 150,000          |                    |                  |
| Cash - Peter and Patience | 300,000          |                    |                  |
|                           | <u>3,375,000</u> |                    | <u>3,375,000</u> |

|                    |                  |                       |                         |                  |
|--------------------|------------------|-----------------------|-------------------------|------------------|
|                    | ₦                | Personal Chattels A/c |                         | ₦                |
| Estate Capital A/c | 3,375,000        |                       | Legacies or Devises A/c |                  |
|                    |                  |                       | Jerry (Nephew)          | 3,750,000        |
|                    | <u>3,750,000</u> |                       |                         | <u>3,750,000</u> |

|                    |                  |            |                         |                  |
|--------------------|------------------|------------|-------------------------|------------------|
|                    | ₦                | Duplex A/C |                         | ₦                |
| Estate Capital Alc | <u>2,250,000</u> |            | Legacies or Devises Alc |                  |
|                    |                  |            | Widow                   | <u>2,250,000</u> |

Reference

A.R Ayeni Agbaje (2003) Bankruptcy, liquidation, Executors & Trusteeship, Law & Accounts