Answers

1 This question invites the candidates to demonstrate their knowledge of the common law rules adopted by the court in statutory interpretation.

It should be noted at the outset that while it is the Legislative Council which is responsible for the enactment of Ordinances, the power of statutory interpretation is responsible for by the court.

The following are the common law rules adopted by the court in statutory interpretation.

Literal rule
Under this rule, the intention of the legislature has to be ascertained according to the ordinary and natural meaning of the words used in the Ordinance. Provided that the meanings of the words are clear and unambiguous, the meanings must be adopted even though it may appear to be absurd. Under this rule, the judge may look up the definition of words in a dictionary.

Golden rule
The golden rule requires that where the interpretation of an Ordinance allows for more than one meaning, the court should adopt the meaning which avoids the most absurd or repugnant result.

Mischief rule
This rule is sometimes referred to as the rule in *Heydon's* case. The aim of this rule serves to resolve the ambiguities which render the literal rule incapable of being applied in the interpretation of a piece of legislation.

Contextual rule
The contextual rule means that the meaning of a word should be construed in its context. In the interpretation of an Ordinance, it requires that the Ordinance in question has to be read as a whole; and that every section should be read with reference to other sections of the same Ordinance.

***Ejusdem generis* rule**
The rule is an application of the contextual rule. It means that where in an Ordinance, two or more words of a particular class or kind are followed by a general word, a meaning of the class or the kind should be given to the general word.

2 The question tests the candidates' knowledge of the approach adopted by the courts in determining the employment relationship between the parties to a contract.

It should be noted at the outset that the Employment Ordinance (Cap 57) does not define what an employment contract is about.

Hence, the decisions from the court have to be considered in order to determine the nature of the contractual relationship between the parties in question.

Whether a contract is a contract of service or a contract for services is a question of fact. In *Ferguson* v *John Dawson & Partners* (1976) UK, it was held that, in relation to the actual relationship between the contracting parties, even the express intention of the parties regarding the nature of their contractual relationship could not be conclusive.

To determine the relationship, three different tests have been employed by the courts. Those are the control test, the integration test and the economic reality test.

Control test
To apply the test, the courts ask whether one party to the contract has control over the other in the carrying out of their duties, i.e. whether one party can tell or instruct the other not only what to do but also how to do it. If the answer is 'yes', then the contract is a contract of service. In such a case, the party giving instructions is the employer and the other is the employee: *Mersey Docks & Harbour Board* v *Coggins & Griffths (Liverpool) Ltd* (1947) UK.

The test is based on the fact that the employer has more knowledge and skill than the employees. As a result, it would be difficult to apply the control test when an employer is not an expert and does not have the knowledge and skill being possessed by the employees occupying the post in question.

Integration test
To overcome the difficulty, the integration test has been employed when an employee cannot be said to be under the control of the employer by reason of the employee's possession of that kind of knowledge and skill which the employer does not have.

Under the test, the courts ask whether one party has become an integral part of the business organisation of the employer, i.e. whether the party is part and parcel of the organisation as opposed to being an accessory to it. Hence, in *Cassidy* v *Ministry of Health* (1951) UK, it was held that a skilled surgeon was an employee of the Ministry of Health when the surgeon was selected and integrated into the organisation by the Ministry even though the Ministry could not have control over the surgeon.

In *O'Kelly* v *Trusthouse Forte plc* (1983) UK, the court held that, to apply the test, it was relevant to consider whether the person was restricted in his working place, whether he was under any obligation to work and whether any agreement regarding holidays and hours of work had been agreed. However, the test is difficult to apply when, for example, the worker has to provide their own working equipment.

Economic reality test

The economic reality test is the most recent test adopted by the courts in determining the issue. The test looks at the economic reality behind the relationship.

To apply the test, the courts ask whether the workers have been working on their own account. If the answer is 'yes', then the contract is one for services. The workers are then independent contractors. If the answer is 'no', then the contract is a contract of service and the workers are employees.

A list of factors will be considered by the courts in applying the test. These factors include:

- The degree of control by the employer.
- The extent of financial risk which the workers have to take.
- The ownership of the tools and equipment.
- Whether the workers employed their own helpers.
- Regularity in the method of payment of wages and the working hours.
- The existence of a mutuality of obligations, i.e. whether the employer has a duty to provide work and the employee has a duty to accept it.
- The right to delegate the performance of the contract, e.g. sub-contract the work to the others.

If it is still uncertain as regard the actual relationship between the parties after considering all those factors, the court will then take into consideration the parties' own views about the relationship. It is in this context that the label given by the parties to the relationship becomes important.

3 The question invites the candidates to show their knowledge of the meaning of tort and the meaning of the common law duty of care.

(a) It should be noted at the outset it is impossible to define a 'tort' or tortious liability with great precision.

In general, torts involve the breach of duties being owed to the whole world, and with the duties are imposed by law. The primary purposes of torts are mainly about, first, the protection of rights or interests being recognised and protected by law, and, second, the compensation for the harm being done when such rights or interest are infringed.

Hence, the commission of tort is a civil wrong. The victims suffering from the breach will have to commence a civil action in order to recover the damage they lose from the court.

(b) In an action by a plaintiff against the defendant for negligence on the part of the defendant, the defendant is said to have committed a tort if the defendant's act was in breach of the common law duty of care ('the duty of care') the defendant owed to the plaintiff.

In *Donoghue* v *Stevenson* (1932) UK, Lord Atkin laid the foundation for circumstances under which the duty of care is to be imposed on the defendant. In that case, it was decided that the defendant is required to '… take reasonable care to avoid acts or omissions which [the defendant] can reasonably foresee would be likely to injure [the defendant's] neighbour.', per Lord Atkin.

In deciding whether the defendant owes to the plaintiff a duty of care, at issue is whether the plaintiff is a neighbour of the defendant in law. In answering the question, it is the view of a reasonable man which will be considered by the court. Hence, the test adopted by the court is an objective one. As such, the fact that the defendant did not actually consider the risk of the plaintiff when the defendant performed the act in question does not affect the result of the issue of liability, i.e. whether the defendant was negligent. What matters most is what the defendant ought to have considered.

4 The question invites the candidates to show their knowledge of the power exercisable by the directors of a company as expressed in Table A of the Companies Ordinance (Cap 32) ('CO').

It should be noted at the outset that the directors may exercise their power either collectively or individually.

The Article 82 of Table A provides that subject to CO, the memorandum and articles and any directions given by special resolutions of the members in general meetings of the company, the business and affairs of the company shall be managed by the directors, who may exercise all the powers of the company. The power under this article is given to the board of directors as a whole.

Hence, such a power can only be exercisable by the directors collectively through the board. As such, the acts of an individual director are not binding on the company unless the individual director is authorised to do so by the board.

The board of directors, however, may give individual directors the power or authority to act for the company in the following ways:

First, under article 83, the directors of a company may from time to time and at any time appoint any one of them by power of attorney to be the attorney of the company for such purposes and with such powers, authorities and discretions (not exceeding those vested in or exercisable by the directors under these regulations) and for such period and subject to such conditions as they may think fit.

Hence, a company will be bound by the contracts entered into by the director who is so authorised by the board of directors of the company.

Second, pursuant to articles 109 and 111, the board may appoint one of the directors to be the managing director of the company and entrust to the person so appointed the power being exercisable by the board.

The fact that an individual director has been appointed as the managing director means that the director has all the implied authority to act in the same way as the board and binds the company on any transaction being entered into by the director so appointed.

An outsider to the company may therefore be entitled to assume that the managing director being appointed has all the implied authority, which is the authority to do all such things as fall within the usual scope of that office.

5 The question invites the candidates to show their knowledge of matters relating to the meetings of a company.

(a) The general meeting of a company is a meeting in which all the members of the company may take part and make decisions on matters binding on all the members of the company.

Under the Companies Ordinance (Cap 32) ('CO'), a company must hold an annual general meeting ('AGM') either by way of a traditional meeting or by way of a written resolution.

Every company must hold its first AGM within 18 months of the company's incorporation. All the subsequent AGMs must be held no more than 15 months after the date of the previous AGM. A company is not required to hold an AGM if all the business to be dealt with in the AGM is conducted by shareholders' written resolutions: ss.111(1) and (6) CO. However, removal of directors or auditors cannot be performed by a written resolution: s.116B CO.

The importance of an AGM is that it provides the shareholders the opportunity to question the directors of the company on any matter, including the accounts and reports, of the company.

All general meetings of a company other than the AGM are extraordinary general meetings ('EGMs').

A company is not compelled by the law to hold EGMs and there is no limit on the number of EGMs to be held during the interval between them. EGMs may be held upon the requests of directors, shareholders, auditors, liquidators, the Official Receiver or by the court.

(b) In an AGM, the business to be conducted includes the declaration of a dividend, the election of directors to replace the retiring directors and the appointment of auditors and fixing their remuneration.

Special business of a company is normally transacted at EGMs. Special business is the business other than those being transacted in the AGM which were mentioned before: article 54 Table A.

(c) A special resolution of a company is a resolution passed by a majority of not less than three-quarters of those members of a company who are entitled to vote and do vote in a general meeting with the meeting being called by a notice of not less than 21 clear days. The intention to propose the resolution as a special resolution must be stated in the notice to call the meeting. The votes may be cast by the members either in person or by their proxies: s.116(1) CO.

6 The question invites the candidates to demonstrate their knowledge of the liabilities of the members of companies limited by shares, limited by guarantee and companies with unlimited liabilities.

(a) Companies limited by shares are usually companies incorporated for trading and hence for profit making. The shares being held by the members are for measuring the amounts of the liabilities and profits of the members.

By the time the shares of the companies are issued to their members, the shares may either be fully paid or partly paid. For members who have fully paid for their shares, their liabilities are only limited to the nominal values of the shares being held by them, which those members have already paid for by the time the shares were issued to them. For those members who only partly paid for their shares, their liabilities are only limited to the amounts which they have not paid for.

Provided that the members have fulfilled their responsibilities regarding the payments for their shares, they cannot be required to make further contribution to the companies for the settlement of the debts of the companies, which remain unsettled even after the liquidation of the company.

(b) Companies limited by guarantee are companies which are usually incorporated for non-trading, charities or educational purpose. There are also professional bodies, which are companies limited by guarantee.

Companies limited by guarantee may be with or without capital. For companies without capital, the liabilities of their members are limited to the amount they agreed to contribute to the companies. Such an amount is usually nominal and specified in the memorandum of the companies.

For companies having share capital, the liabilities of their members are twofold. First, when the companies are in business, their members have to pay for the agreed issue price of the shares. Second, when the companies are wound up, they have to honour their guarantee.

(c) For unlimited liability companies, the liabilities of the members of the companies have no limit in that the members have to make use of the assets of their own for the repayment of the outstanding debts of the companies, if the companies still have outstanding debts after their liquidation.

7 The question invites the candidates to demonstrate their knowledge relating to the liquidation of a company.

(a) The liquidation, or winding up, of a company refers to the process through which the life of the company is brought to an end.

In the course of a liquidation process, the company continues to exist and all acts are still done under the name of the company.

The life of the company will come to an end only after the whole process of liquidation is completed and the company is formally dissolved either with or without a court's order.

(b) There are many differences between the two types of liquidation. The principal differences between both types of liquidation relate to the degree of external supervision of the liquidation process.

In a compulsory liquidation, there is a need for the outside involvement of the court and of creditors, whereas a voluntary liquidation may more easily be handled with little external involvement.

In a voluntary liquidation, the company itself appoints the liquidator. In an involuntary liquidation or a compulsory liquidation, the court appoints the liquidator.

In a voluntary liquidation, the creditors and contributories of a company are generally not involved in the administration of the liquidation process. In a compulsory liquidation, the liquidator is required to appoint a committee of inspectors, which consists of the company's creditors and contributories, to report to the committee regularly about the status of the liquidation and to take directions from the committee.

Nevertheless, creditors of the company will be involved in a voluntary liquidation process if the winding up is a creditors' voluntary winding up.

A compulsory liquidation is under the general supervision of the court, to whom the liquidator is required to report from time to time.

In a compulsory liquidation, the court may remove and replace the liquidator. In a voluntary liquidation, the company itself may remove and replace the liquidator (in addition to the court).

The court has the power to remove the liquidator in a compulsory liquidation. In addition, the Official Receiver has general supervisory powers over liquidators in compulsory liquidations.

The accounts of the liquidator in a compulsory liquidity must be audited regularly by the Official Receiver.

8 The question invites the candidates to demonstrate their knowledge about the formation of a contract and the revocation of an offer.

Given the problem scenario, at issue is whether Brian was in breach of any contract between Christina and him by reason of the sale of the computer when he had made the offer and the demand in question and when Eddy had informed Christina about the sale of the transaction before Christina indicated her acceptance of the offer.

In contract law, an offeror may revoke his offer at any time before an offer is accepted: *Payne* v *Cave* (1789). However, the revocation of an offer has no effect unless it is communicated to the offeree by the offeror or by a third party who is a sufficient reliable informant: *Dickinson* v *Dodds* (1876).

Where an offeror promises that their offer shall remain open for acceptance for a period of time, the offeror may still revoke the offer any time before the acceptance of the offer. However, if consideration is given by the offeree to the offeror in return for a promise from the offeror that he will keep the offer open for a period of time, there is a contract between the two parties under which the offeror is bound to keep the offer open during that period: *Routledge* v *Grant* (1828).

As can be seen from the problem scenario, there is no consideration from Christina to Brian in respect of the promise by Brian to keep the offer open until Saturday. Brian could therefore revoke the offer at any time before Christina accepted the offer.

When Eddy informed Christina about the sale of the computer, Eddy in effect told Christina that Brian had revoked the offer. The fact that it was not Brian who personally informed Christina about the revocation would not affect the validity of the revocation for, from the problem scenario, Brian, Christina and Eddy have been trusted friends for more than ten years. As such, Eddy could be regarded as a reliable informant for the purpose of the principle laid down in the *Dickinson* case. It follows that the offer had been validly revoked before the acceptance of the offer by Christina on Saturday.

Christina may well be advised that Brian did not breach any contract between him and her.

9 The question invites the candidates to demonstrate their knowledge of the circumstances under which insider dealing is committed.

The circumstances under which insider dealings are committed are governed by Securities and Futures Ordinance (Cap 571) ('SFO').

Section 270 SFO provides that, in relation to a listed corporation, a person commits insider dealing under the following circumstances:

First, when a person connected with the company ('the connected person') either deals or discloses relevant information knowing, or having reasonable cause to believe, that the recipient of the information would deal.

Second, when a person contemplating or has contemplated a take-over, either deals or counsels or procures another to deal, or discloses information knowing, or having reasonable cause to believe, that the recipient of the information would so deal.

Third, when a person receives relevant information from the connected person or the person contemplating or has completed take-over deals, or counsels or procures another person to deal.

Relevant information refers to specific information about the company, a shareholder or officer of the company, or the listed securities of the company or their derivatives, which is not generally known to the persons who are accustomed or would be likely to deal in the listed securities of the corporation but which would, if it were generally known to them, be likely to affect the price of the listed securities materially: s.245 SFO.

Connected persons include directors, employees or shareholders holding 5% or more of nominal value, which include the partners of those shareholders, and persons who may reasonably be expected to have access to relevant information by reason of their professional or business relationship with the company: s.247 SFO.

It is clear that the negotiation between the companies in question is relevant information under s.245 SFO in that had it been generally known to share investors in Hong Kong, it would likely have affected the price of Tablet Ltd.

At issue is therefore whether Jason is a person receiving relevant information from a connected person who deals with the shares of Tablet Ltd.

As the director of the company who has been responsible for negotiating with Tablet Ltd for the purpose of acquiring all the shares of Tablet Ltd, there is no doubt that Frankie is a connected person under s.247 when he had access to the relevant information in question by being the director of Phone Ltd and the one responsible for the negotiation with Tablet Ltd.

By reasons of what have been mentioned, Jason may well be advised that he has committed insider dealing under s.270 SFO.

10 The question invites the candidates to show their knowledge of charges created by a company.

It should be noted at the outset that there are two types of charges, namely, fixed and floating charges which can be created by a public company in the Hong Kong Special Administrative Region. Both of the charges are assurance from the company to its creditor for the repayment of a loan borrowed by the company.

A floating charge is created if a company offers such assets as the company's stock or book debts as security for the repayment of a loan.

There is no statutory definition for floating charge. Therefore, the case law has to be referred to in order to know the characteristic of a floating charge.

In *Re Yorkshire Woolcombers Association Bank Limited* (1979) UK, a floating charge, as identified by Romer LJ in that case, is a charge on a class of present or future assets of a company; and with the class of assets are those keep on changing in the ordinary course of business of the company. Further, by the time the charge is created, it is the contemplation of the parties that until the holder of the charge take steps to enforce the charge, as far as the class of assets is concerned, the company may carry on its business in a usual way.

A fixed charge is created if the charge is fixed on an identified and/or specified property of a company. Land or machines, etc, of a company are typical assets forming the subject matters of a fixed charge.

Once a fixed charge is created, the company cannot dispose of the property free of the charge unless the company has the consent from the charge holder, i.e. the creditor.

In *Siebe Gorman* v *Barclays* (1979) UK, it was held that the label the parties had given to the charge in question is not conclusive evidence as to the nature of the charge.

In the *Siebe Gorman* case, a charge was imposed on the future book debts of a company, and the company was prevented from disposing of the book debts without the consent from the charge holder. It was held by the court that the charge in question was a fixed charge.

Hence, the *Siebe Gorman* case decides that the label given to a charge is not conclusive as to the nature of the charge.

While the provisions, if they are read together, are similar to the charge in the *Siebe Gorman* case in that the company is not allowed to deal with the property of the company in any manner unless the company obtains prior written approval from the bank, the provisions also make it clear that the use of the trading stock of the company, as an exception, does not require the approval.

The exception does suggest that by the time the company and the bank entered into the loan agreement, they both had in their minds of creating a charge which is a floating charge by nature by reasons, first, that the trading stock in question is that class of asset which keeps on changing in the ordinary course of business of a company; and, second, that it seems to be within the contemplations of the parties that until the bank takes steps to enforce the charge, the company may carry on its business in its usual way: see *Re Yorkshire* case.

It is therefore probable that the charge created under the loan agreement is a floating charge by nature.

1 This question invites the candidates to demonstrate their knowledge of the common law rules adopted by the court in statutory interpretation.

8–10 Answers provide a thorough treatment of the question.

5–7 Answers show an understanding of the question area but with little explanation.

2–4 Answers show some knowledge.

0–1 Extremely poor answers which show either no or very little knowledge of the area.

2 The question tests the candidates' knowledge of the approach adopted by the court in determining the employment relationship between the parties to a contract.

8–10 Answers provide a thorough treatment of the question.

5–7 Answers show an understanding of the question area but with little explanation.

2–4 Answers show some knowledge.

0–1 Extremely poor answers which show either no or very little knowledge of the area.

3 The question invites the candidates to show their knowledge of the meaning of tort and the meaning of the common law duty of care. In marking part (b) of the question, consideration will be given to relevant information from the candidates even though the information is not covered by the suggested answer.

(a) 2–3 At the top of this range are those providing a clear understanding and thorough treatment of the subject area being examined.

0–1 Extremely poor answers which show either no or very little knowledge of the area.

(b) 6–7 Answers provide a clear understanding and thorough treatment of the subject areas being examined.

3–5 Less thorough treatment of the question. Towards the bottom of this range are those answers which have only a very brief explanation.

0–2 At the top of this range are those providing a clear understanding and thorough treatment of the subject area being examined.

Towards the bottom of this range will be those showing some knowledge.

4 The question invites the candidates to show their knowledge of the power exercisable by the directors of a company as expressed in Table A of the Companies Ordinance (Cap 32)

8–10 Answers provide a thorough treatment of the question.

5–7 Answers show an understanding of the question area but with little explanation.

2–4 Answers show some knowledge.

0–1 Extremely poor answers which show either no or very little knowledge of the area.

5 The question invites the candidates to show their knowledge of matters relating to the meetings of a company.

(a) 4–5 Answers provide a clear understanding and thorough treatment of the subject areas being examined.

2–3 Less thorough treatment of the question. Towards the bottom of this range are those answers which have only a very brief explanation of the subject areas being examined.

0–1 Very weak answers with inadequate information or answers show little understanding of the topic being examined.

(b) 0–2 At the top of this range are those providing a clear understanding and thorough treatment of the subject area being examined.

At the bottom of this range are those extremely poor answers which show either no or very little knowledge of the area.

(c) 2–3 At the top of this range are those providing a clear understanding and thorough treatment of the subject area being examined.

0–1 Extremely poor answers which show either no or very little knowledge of the area.

6 The question invites the candidates to demonstrate their knowledge of the liabilities of the members of companies limited by shares, limited by guarantee and companies with unlimited liabilities.

(a)–(b) 3–4 At the top of this range are those providing a clear understanding and thorough treatment of the subject area being examined.

0–2 Extremely poor answers which show either no or very little knowledge of the area.

(c) 0–2 At the top of this range are those providing a clear understanding and thorough treatment of the subject area being examined.

7 The question invites the candidates to demonstrate their knowledge relating to the liquidation of a company.

(a) 0–2 At the top of this range are those providing a clear understanding and thorough treatment of the subject area being examined.

(b) 7–8 Answers provide a clear understanding and thorough treatment of the subject areas being examined.

4–6 Less thorough treatment of the question.

0–2 Very weak answers with inadequate information or answers show little understanding of the topic being examined.

8 The question invites the candidates to demonstrate their knowledge about the formation of a contract and the revocation of an offer.

8–10 Answers provide a thorough treatment of the question.

5–7 Answers show an understanding of the question area but with little explanation.

2–4 Answers show some knowledge.

0–1 Extremely poor answers which show either no or very little knowledge of the area.

9 The question invites the candidates to demonstrate their knowledge of the circumstances under which insider dealing is committed.

8–10 Answers provide a thorough treatment of the question.

5–7 Answers show an understanding of the question area but with little explanation.

2–4 Answers show some knowledge.

0–1 Extremely poor answers which show either no or very little knowledge of the area.

10 The question invites the candidates to show their knowledge of charges created by a company.

8–10 Answers provide a thorough treatment of the question.

5–7 Answers show an understanding of the question area but with little explanation.

2–4 Answers show some knowledge.

0–1 Extremely poor answers which show either no or very little knowledge of the area.