Answers

1 This question asks candidates to explain the main rules courts use to interpret statutes.

(a) Literal rule. The first and foremost duty of a judge is to interpret a statute according to the ordinary, literal and grammatical meaning of the words which the legislature has used. This is so, even though it produces a harsh result which appears to be contrary to what the legislature intended.

For example, the Revision of Penalties (Amendment) Order, 1988, prescribed that the minimum punishment for robbery shall be imprisonment for a period of ten years. It used to be much less before. In an unreported case from Lesotho, a miner was returning to his home in Leribe when a fight broke out between him and certain young boys. A few hundred Rand bills fell out of his pocket during the fight which the boys picked up and ran away. They were all apprehended after a couple of hours and bulk of the money recovered. Not knowing that penalties had gone up enormously, they admitted their offence before the Magistrate who sentenced them for six months each saying it was their first offence. The High Court in appeal however enhanced their punishment to ten years for each of the accused saying that the ordinary, literal and plain grammatical meaning of the new 1988 legislation did not leave them with any other alternative.

(b) Golden rule. If applying the literal rule leads to some absurdity or some repugnancy or inconsistency with the rest of the statute, the golden rule permits a judge to modify the literal interpretation so as to avoid such a result.

For example, the Official Secrets Act 1920 made it an offence for any person to be 'in the vicinity of' a military base. An unauthorised person was found inside the military base. The court held that he was guilty of the offence. It would have been absurd to hold a person guilty if he was in the vicinity but not if he was inside the military base. [*Adler* v *George* (1964)]

A strict view is that the golden rule should only be applied if there is some ambiguity in the words used in the statute so that another, more just result which is in consonance with the intention of the legislature is possible. However, in some cases, the courts have used the golden rule even when the language is clear and unambiguous with a view to remove glaring absurdity that in the court's opinion could never have been the intention of the legislature.

For example, suppose a statute made it an offence to be in possession of stolen property. Interpreted literally, it would mean that even the policeman who took possession of stolen property would be guilty of an offence. That would be an absurd result. The court, therefore, used the golden rule to interpret 'possession' to mean 'unlawful possession' or 'possession without lawful authority'.

(c) Mischief rule. The literal rule cannot help a court if the words used in a statute are vague and ambiguous. In such a case, to ascertain the true intention of the legislature, the court may have regard to 'the mischief' that the statute was designed to remedy. This rule was laid down by Lord Coke in *Heydon's case*, who explained that to apply this rule a court has to consider what was the law before the statute was passed, what mischief or defect the statute intended to remedy and the reason for such remedy.

Thus another way to look at the above example where the statute made it an offence for any one to be in the vicinity of a military base is to consider the mischief the Act was designed to prevent. That mischief for which Parliament provided a remedy was to prevent unauthorised persons from being in the proximity of the military base as it was prejudicial to national security interests. Therefore by applying the mischief rule not only the unauthorised persons near the installation but also those found inside would be guilty of an offence under the Act.

In applying the mischief rule, the judges often look at the previous legislation on the subject. But speeches made in the Parliament or Parliamentary resolutions or reports of Parliamentary Commissions of Inquiry are usually ignored.

2 This question requires the candidates to discuss the concept of cession and the circumstances when the consent of the debtor is necessary to validate cession.

Cession

A cession is an agreement whereby the holder (called cedent) of certain rights under a contract transfers them to another person (called cessionary). Cession involves the substitution of a new creditor (the cessionary) for the original creditor (the cedent), the debtor remaining the same. For example, Thabo owes R100 to Peter. Peter cedes his right to recover R100 from Thabo to Edward. This is a contract of cession. Peter is a cedent and Edward a cessionary. As a result of cession, Edward becomes Thabo's creditor. This way Edward, a third party, is substituted for one of the original contracting parties (Peter). The effect of cession is to divest the cedent of the right and to vest it in the cessionary, who becomes entitled to enforce it. The debtor is generally entitled to raise against the cessionary any defence which he could have raised against the cedent.

Cession is a transfer of rights and not obligations. Accordingly, the cessionary may sue to enforce rights, but may not be sued to enforce obligations. The debtor's consent is not necessary because it makes no difference to him whether he pays the cedent or the cessionary. Cession is an exception to the doctrine of privity of contract. The defences available against a cedent are also available against the cessionary.

Cession is not regarded a form of novation, because the original contract continues and only the creditor is changed.

In the following circumstances, the consent of the debtor is required for a valid cession:

(a) Whenever the right is of so personal a nature that the debtor has a substantial interest in making performance to cedent only (*delectus personae*), cession cannot take place without debtor's consent. For example, a contract of personal service cannot be ceded without the employee's consent. In *Isaacson* v *Walsh* & *Walsh* (1903), Isaac was employed by W as a masseur at the Caledon Mineral Baths Sanatorium for three years at £45 a month. Some six months later a limited company, the Caledon Baths Ltd, took over the business and claimed the right to Issac's services. It was held that right to Isaac's services cannot be ceded without Issac's consent.

(b) The contract may expressly forbid the cession of rights under it without debtor's consent. Notwithstanding such an express prohibition, the creditor may still cede his rights unless the debtor can show that the restraint on cession serves a useful purpose to the debtor. The reason for this is that any restraint on cession is void as against public policy unless some advantage is conferred to the debtor by the restraint. In *Paiges* v *Van Ryn Gold Mines Estate Ltd* (1920), Klein, an employee of the Van Ryn company, purported to cede his right to wages to Paiges, a general dealer. Klein's employment contract did not permit Klein to cede his rights to wages without the written consent of the company, which was not obtained. The company justified the restriction on the ground that it employed many workers and it could cause difficult accounting and legal problems if the company was called upon by strangers to pay their workers' wages to them on the ground that they were ceded to them. It was held that restraint on cession was in the interest of the company and, therefore, valid. Consequently, Paiges failed in his action against the Van Ryn company.

(c) A cession of part of a debt is invalid without the consent of the debtor. The reason is that this would place a greater burden on the debtor than he would otherwise have as he may be faced with a greater number of creditors.

(d) Statutes may provide that certain rights cannot be ceded. For example, compensation under the Workmen's Compensation Act 1977 cannot be ceded.

3 Employees are people working under a contract *of* service. Those who work under a contract *for* services are self-employed or independent contractors. It is essential to distinguish the two categories clearly, because important legal consequences follow from the placing of a person in one or other of the categories.

The Labour Code Order 1992 does not lay down detailed rules to determine if a person is working as an employee or as an independent contractor. Section 3 of the Order defines an employee to mean any person who works in *any capacity* under a contract with an employer. The words 'working in any capacity' are wide enough to include at least some categories of self-employed. The Order defines a contract of employment to mean a contract 'by which an employee enters the service of another.' Such circularity and lack of clarity has forced the courts to develop tests for distinguishing the employee from the self-employed.

Control test

The earliest test applied by the courts was the control test. The test assesses whether the employer has the right to control the manner of doing the work of his employees, whether he 'cannot only order or require what is to be done, but how it shall be done'. Control of the employee by the employer was in the past regarded as the hallmark of the contract of employment. It is still appropriate with respect to domestic, agricultural or manual workers. However, the age of highly skilled employees made the test less useful. Highly skilled employees such as doctors, computer scientists, accountants and the like can hardly be controlled by their employers, exercising, as they do, independent, specialised, professional discretion. The consequence of that, at least under the control test, was that they were deemed to be self-employed rather than employees. It meant that, for example, if a patient suffered as a consequence of a doctor's negligence, he was unable to sue the hospital authority, which employed him and instead had to sue the doctor alone. Such weakness in the control test led to the courts developing a more subtle test.

Organisation test

Since the control test is not suitable for highly skilled employees, the 'organisation or integration' test was devised. The test was propounded by Lord Denning in the case of *Stevenson, Jordan* & *Harrison Ltd* v *Macdonald* & *Evans Ltd* (1952). He stated that under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business, whereas, under a contract for services, his work, although done for business, is not integrated into it but is only accessory to it. Based on this test, a doctor employed by the Ministry of Health would be an employee because he is an integral part of the machinery of the Ministry even though the Ministry does not control his work. But the organisation test does not say how much integration must exist before a person is truly part of an organisation. Consequently, it is less useful in dealing with situations where individuals are actually classified as self-employed. Once again a more subtle test was required.

Multiple test

The response on the parts of the courts was to develop the multiple test, which is also known as the economic reality test. The whole point of the multiple or economic reality test is to assess the whole arrangement in order to determine if it is a contract of service or contract for services, rather than relying on any single test such as a control or organisation test. The agreement between the parties may describe that someone is an employee but if the assessment of the whole arrangement indicates otherwise then the person will be recognised, and treated, as self-employed. In South Africa, the multiple test is used as the basis of what the courts call 'dominant impression' test: See *Smit* v *Workmen's Compensation* (1979).

The multiple test was first stated in *Ready Mixed Concrete (South East) Ltd* v *Minister of Pensions and National Insurance* (1968) in which the court held that there were three conditions which supported the existence of a contract of employment: (i) the employee agrees to provide his own work and skill in return for a wage; (ii) the employee agrees, either expressly or impliedly, that they will be subject to a degree of control exercised by the employer and (iii) the other provisions of the contract are consistent with it being a contract of service. In that particular case it was decided that, although there was a very high level of control exercised over the people concerned, but since they were able to substitute others to do their work, they were independent contractors.

In deciding whether a person is an employee, the courts will focus on issues such as: whether wages are paid on a regular basis or is payment made in a lump sum; whether the person receives holiday pay; and on who pays income tax. The list of such questions is not limited to these. Each case is determined in line with its own facts. Thus in *Nethermore (St Neots)* v *Gardiner & Taverna* (1984) a group of home workers, paid on a piecework basis, were held to be employees as a consequence of the fact that they were subject to an irreducible minimum obligation to work for their employer.

The courts are not bound to accept the parties' own definition of the situation. It is immaterial that the agreement refers to individuals as self-employed when in reality they are employees. The relevant question is: 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?' If the answer is yes – then they are self-employed; if no – then they are employees: See *Market Investigations Ltd* v *Minister of Social Security* (1969).

4 The principal/agent relationship can be created in a number of ways.

(a) Appointment by agreement:
This is the most common manner in which a principal/agent relationship comes into existence. In this situation, the agent is expressly or impliedly appointed by the principal to carry out a particular task or to undertake some general function. The agreement can be oral or in writing or partly oral and partly in writing. But where the agent is given the power to execute deeds in the principal's name, they must themselves be appointed by way of a written deed (that is, they are given a power of attorney). If the parties have not expressly agreed to become principal and agent, it may be possible to find an implied agreement based on their conduct or relationship. The assent of the principal may be implied where the circumstances clearly indicate that he has given authority to another to act on his behalf and the assent of the agent may be implied from the fact that he has acted intentionally on another's behalf.

(b) Appointment by ratification:
In certain circumstances, the relationship of principal and agent can be created or extended retrospectively under the doctrine of ratification. What this means is that if Thabo purports to act as an agent of Peter in a certain transaction – although Peter never authorised Thabo to do so – Peter may subsequently ratify or adopt what Thabo has done. In such a case, Thabo is deemed to have been acting as an authorised agent when he effected the transaction. However, ratification validates only past acts of the 'agent' and gives no authority for the future. Ratification does not require any special form and can be express, implied or even inferred from the conduct.

In order for ratification to be effective the principal must have been in existence at the time when the agent entered into the contract [*Kelner* v *Baxter* (1866)] and the principal must have had legal capacity to enter into the contract when it was made. If an agent does not reveal he is entering into a contract on behalf of a principal, the undisclosed principal cannot ratify the acts of such an agent. For example, suppose Thabo was authorised to purchase a certain quantity of maize, but he purchases wheat (for which he has no authority) because he finds it being offered very cheaply. Peter, his principal, will not be able to ratify the contract to purchase wheat since Thabo did not disclose to the wheat seller that he was purchasing it on behalf of his principal: see *Keighley, Maxsted and Co* v *Durant* (1901). The principal must adopt the whole of the contract and cannot pick and choose which parts of the contract to adopt. Finally ratification must take place within a reasonable time.

The effect of ratification is to make the transaction binding on the principal from the moment it was made by the agent. The doctrine of ratification allows a principal to choose whether to ratify a transaction or reject it. This may be potentially unfair to a third party.

(c) Appointment by holding out:
Agency by holding out is created when one person (the principal), by words or conduct, allows another to appear to the outside world as his agent, with the result that third parties deal with him as an agent, and would suffer prejudice, were the principal to repudiate this apparent agency. In such circumstances, the principal is treated as if he had in fact authorised the agent to act in the way he did. In such cases, the 'principal' is said to 'hold out' as his agent someone as having authority to act on his behalf: see *Freeman and Lockyer* v *Buckhurst Park Properties Ltd* (1964).

The effects of this kind of agency are seen in two kinds of cases: first an agency may be created by holding out. For example, suppose Thabo allows Peter to possess documents regarding title to his motorbike. Further suppose Peter is in the business of selling motorbikes. Now if Peter did sell Thabo's motorbike, the sale will be binding on Thabo even if Thabo did not intend to make Peter his agent to sell his motorbike. Peter will be regarded an agent of Thabo by virtue of the doctrine of holding out.

Another example is where Thabo authorises Peter to sell his motorbike but expressly tells him not to sell it below R1,000. Peter sells it for R800. In such a case, Thabo may be bound. When an agent exceeds his authority, the doctrine of holding out may operate to supplement the actual authority of the agent by conferring on him ostensible authority to cover the unauthorised act of the agent.

5 This question seeks an explanation of the three types of share capital listed. It also requires candidates to explain the difference between the nominal value of shares and their market value.

The word 'capital' is used in a number of different ways in relation to shares:

(a) Authorised capital. It is also called the nominal capital. This is the amount of share capital a company is authorised to issue under its memorandum. Under s.10(1)(iv) Companies Act 1967, the memorandum of association of every company limited by shares must state the amount of share capital with which a company proposes to be registered with and the division thereof into shares of a fixed amount. The fixed value in this context means the par value of a share. The capital thus stated is the *nominal* or *authorised* capital. Nominal value of a share is the face value of a share. There is no requirement that companies issue shares to the full extent of their authorised capital. Thus, the amount of nominal capital is not an indication of shares issued or paid for. The only significance of the figure is that it is used as a gauge to determine the stamp duty which has to be paid on registration.

A company may alter its memorandum to increase its nominal capital if authorised by its articles by passing an ordinary resolution [s.63 Companies Act 1967]. If articles do not authorise an increase, then they would have to be altered first. The increase enables the company to issue more shares if it has already reached the maximum allowed by the nominal capital.

(b) Issued capital represents the nominal value of the shares actually issued by the company in return for cash or some other consideration as may have been agreed by the company. It may consist partly of paid-up capital and partly of *uncalled* capital. Section 168(a) Companies Act 1967 provides that the liability of the shareholders is limited 'to the amount, if any, unpaid on the shares'. The *uncalled capital*, thus, is akin to a guarantee fund the creditors of a company can look up to. The sum total of paid-up and uncalled capital constitutes the issued capital of a company. It is more important than authorised capital as a true measure of the substance of the company. If a company is willing to pay the stamp duty it can register with an authorised capital of R1 million yet only actually issue two R1 shares.

(c) Paid-up capital. This is the proportion of the nominal value of the issued capital actually paid by the shareholder. It may be the full nominal value, in which case it fulfils the shareholder's responsibility to outsiders; or it can be a mere part payment, in which case the company has an outstanding claim against the shareholder. In practice, shares are almost always fully paid up on issue or within a short time after issue. The Companies Act requires that the authorised, paid up and issued capital must be at least R1,000 [s.10(1)(iv) Companies Act 1967]. In Lesotho, law does not require the directors to certify that the company's issued capital is adequate.

(d) Once established, the nominal value of the share remains fixed and does not normally change. However, the value of the shares in the stock market may be subject to daily fluctuation depending on a number of interrelated factors, such as the profitability of the company, the prevailing rate of interest or prospective take-over bids, among others. Thus the market value of a share of R1 nominal value may be as much as R5 or higher, or as low as 1 cent.

6 This question requires candidates to explain what is meant by the veil of incorporation of a company and when can it be lifted by the courts.

(a) The veil of incorporation of a company:
The principle of separate corporate personality is a cornerstone of the company law. *Salomon* v *Salomon & Co Ltd* (1897) cast a veil between a company and its members. Most of the time the veil is opaque through which one cannot see who the members are. But exceptionally, in some instances, both the legislature and the court disregard the corporate personality and look to the 'realities' behind it with a view to impose liability on the shareholders, rather than the company, usually in the interest of the public. This approach has come to be known as 'lifting the veil' of corporation. Whether and when the corporate veil should be lifted is a decision that is taken exceptionally; to take it lightly or liberally may destroy in the most fundamental way the very foundation on which the edifice of the company law stands.

The corporate veil does not conceal the internal affairs of the company from view. On the contrary, the legislature has always made it an essential condition of the recognition of corporate personality that it should be accompanied by the widest publicity. The third parties may not have a recourse against its members but they are nevertheless entitled to see who these members are, what shares they hold, who the directors are, what its constitution is, what its capital is and how it has been obtained, and its profit and loss account. What essentially the corporate veil does is to shield members from personal liability for the debts of their company.

(b) It is not possible to formulate a general principle covering all cases where the courts have disregarded the separate legal entity rule. The following is a list of more important cases where the courts have disregarded the rule:

(i) In *Daimler Co Ltd* v *Continental Tyre and Rubber Co* (1916) it was held during the First World War in England that the court was entitled to look at the nationality of the members to decide whether the company was an enemy alien or not.

(ii) In *Robinson* v *Randfontein Estates Gold Mining Co Ltd* (1921) the court refused to take into consideration the separate existence of a subsidiary where it was sought to use the subsidiary as a device in evading a director's fiduciary duties to the holding company.

(iii) The veil can be lifted to prevent the deliberate evasion of a contractual obligation: *Gilford Motor Co* v *Horne* (1933). Horne had covenanted in a written agreement not to solicit customers of the company after leaving its employment. After his employment was terminated, Horne set up a company and solicited the plaintiff's customers. The corporate veil was lifted and it was held that the company was set up for the deliberate evasion of a contractual obligation and that the device of a company could not be used for such a purpose.

(iv) The corporate veil may be disregarded when the company is used as a means to perpetrate a fraud. In *Cape Pacific Ltd* v *Lubner Controling Investment (Pty) Ltd and others* (1995) the court pointed out that where fraud, dishonesty or other improper conduct is found to be present, the need to preserve the separate corporate identity would, in such circumstances, have to be balanced against policy considerations that arise in favour of piercing the corporate veil. In *Gilford Motor Co* v *Horne* (1933), the court lifted the corporate veil of J M Horne & Co Ltd because the purpose of the company was to enable Horne, under a cloak or sham, to engage in business which Horne had covenanted in a written agreement not to engage in after leaving his employment with Gilford Motor Company.

(v) Corporate veil can be lifted and a company regarded an agent of its shareholders or controllers, if it can be established as a matter of fact. It may be recalled that in *Salomon's case*, the court refused to regard Salomon & Co as an agent of the Salomon merely because he controlled a large number of shares. Courts do not infer an agency from the mere fact of control; it has to be established as a matter of fact. A company can be an agent of its controlling shareholder, as well as, of anyone else, for instance, under an express agreement. In *Re F G (Films) Ltd*, (1953) the company was incorporated in England with a capital of £100, divided into 100 shares of £1 each. It made a film 'Monsoon' but the Board of Trade refused to register it as a British film because the film had in reality been made by a large American Company. The American company provided at least £80,000 for the making of the film. 90 out of 100 shares of the company were held by the American director, who was also the president of the American company, and the remaining ten were held by a British director. The British company employed no staff. It was insignificant and its participation in the undertaking was practically negligible. The British company, it was held, was merely the nominee or agent of the American company, which brought it into existence for the sole purpose of enabling the film to qualify as a British film by evading the legislation. There was, thus, clear factual evidence that the British company was only an agent of its controlling shareholder and it was because of that that the court held so.

The South African position was explained in *Lategan & another NNO* v *Boyes & another* (1980) where Le Roux J observed that he did not find any South African authority where the veil of corporate personality was lifted. But he had no doubt that the courts would do so where fraudulent use has been made of the fiction of legal personality. He doubted if the veil would be lifted on any ground other than to prevent fraud. There has not been any case in Lesotho in which the corporate veil has been lifted. Lesotho courts, however, use decisions of the South African courts, and less often the English courts, as of persuasive vale and it is likely when an occasion would rise, they would not hesitate to disregard corporate identity.

7 This question asks candidates to explain the concept of corporate governance.

The term 'corporate governance' does not have a universally accepted definition. Most scholars agree that corporate governance consists of systems by which companies are directed and controlled. The corporate governance structure specifies the distribution of rights and responsibilities among different participants in the corporation, such as the board, managers, shareholders and other stakeholders, and spells out the rules and procedures for making decisions on corporate affairs. Rules have to be in place to curb or alleviate malpractices or wrongdoings by those engaged in corporate decision-making. By doing this, it also provides the structure through which the company objectives are set, and the means of attaining those objectives and monitoring performance.

Modern corporations can be described as a link where the rights and interests of the various stakeholders are brought into play. Indeed, society now expects greater accountability from companies in regard to their non-financial affairs like the environment within which a company operates. Corporate governance requires rules and principles that accommodate the interface between the company and its operational environment. There is an ongoing debate on the role and function of stakeholders like employees, creditors, consumers and the community at large. In this wide sense, corporate governance could perhaps be defined as the process of controlling management and of balancing the interests of all internal stakeholders and other parties who can be affected by the corporation's conduct in order to ensure responsible behaviour by corporations and to achieve the maximum level of efficiency and profitability for a corporation.

Once a company totters and nears insolvency, accountability to the creditors of the company become far more important. But how about accountability to other stakeholders like the employees, the wider community and the consumers? The 'other stakeholders', it is argued, have specific entitlements in terms of their contract like wages to employees, payment of price to suppliers of goods and services to the company, delivery of goods to the consumers for the price etc. Common law and specific contracts certainly protect their interests. Shareholders, by contrast, have no contractual entitlements to dividends or capital gains. It is argued that if a company desires to encourage 'other stakeholders' to make long-term commitments to the well-being of the company, then those commitments may need protection from subsequent opportunistic behaviour of the company. Contractual mechanisms may be inadequate to offer proper protection and perhaps incorporation of such groups into a company's governance structure may be a solution. Lesotho's Companies Act 1967 is silent on such matters.

King's Reports of 1994, 2002 and 2009 in South Africa deal with this and other questions in some depth. They led to the formulation of The Code of Corporate Practices and Conduct for companies listed on Johannesburg Stock Exchange. The Code attempts to deal with questions such as: Should directors' duties be formulated on a pluralistic or an enlightened shareholder basis? Should directors be required to have regard to a range of independent sets of interests or should the directors, as in Lesotho's

Companies Act 1967, be only required to act in the best interest of shareholders, coupled with a duty to take into account the best interests of other stakeholder groups in the pursuit of their primary duty to the shareholders and the company? In simple words, a director must act to promote the success of the company for the benefit of the members as a whole and in doing so must take into account in good faith all the material factors that it is practicable to identify. These material factors may include the company's need to foster its business relationships with its employees, suppliers, customers and even wider community.

In Lesotho, Companies Act 1967, which is broadly modelled after the United Kingdom Companies Act 1948, regulates the companies. Corporate governance was given scant attention in the 1948 Act. Lesotho does not have a stock exchange either. Private, rather than public, companies dominate the corporate scene. Attempts are being made to legislate a new and improved companies legislation. Until then it is expected that companies shall voluntarily embrace wholesome rules on corporate governance. In any case, Lesotho is a member of the Southern African Customs Union and has almost all its commercial dealings with South Africa. South African King's reports and the South African Code of Corporate Practices and Conduct would have a large input as and when Lesotho chooses to have its own Code.

8 This question asks the candidates to explain the legal significance of the three matters set out in the question.

(a) Nana Laundry Ltd's advertisement: The advertisement of Nana Laundry Ltd is an invitation to the potential suppliers to submit tenders for the supply of a second-hand laundry machine. Such an advertisement is regarded as an invitation to treat. It is not an offer and its 'acceptance' does not result in a legally binding contract.

(b) Maluti Equipment Ltd's tender: A tender is an offer that is submitted in response to an advertisement or some other request. A tender, if accepted, will result into a contract that is binding on the parties. In the problem, Nana Laundry Ltd has accepted the tender submitted by Maluti Equipment Ltd and this has resulted in a contract that is binding on both the parties.

(c) Since Maluti Equipment Ltd have admitted that they are in breach of contract, they are liable to pay damages to Nana Laundry Ltd. However, they are only liable for such damages as are not remote. To determine if the damages claimed by Nana Laundry Ltd are remote, *Hadley* v *Baxendale* (1854) test may be used.

The rule in *Hadley* v *Baxendale* (1854) states that damages are not remote if:

(i) the loss arises naturally from the breach in the ordinary course of things; or
(ii) the loss, although not arising naturally from the breach, was within the contemplation of the parties making the contract.

It is reasonable to assume that when Maluti Equipment Ltd's tender was accepted by Nana Laundry Ltd and the former agreed to deliver the laundry machine on 1 April 2012, Maluti Equipment Ltd knew that Nana Laundry Ltd was likely to suffer a business loss if the delivery of the machine was delayed. Such losses fell under the first rule of *Hadley* v *Baxendale* (1854) as they can be said to arise naturally from the breach. Therefore, Maluti Equipment Ltd would be liable to compensate Nana Laundry Ltd and pay R60,000 for the loss of two months' business profits, provided they are found to be an accurate estimate of the losses suffered.

However, Maluti Equipment Ltd would not be liable for the R100,000 loss of profits on the army contract because this damage is remote. Under *Hadley* v *Baxendale*'s second rule, such loss of profits is remote because this was not foreseen by Maluti Equipment Ltd when they made the contract. In *Hadley* v *Baxendale* (1854), the miller failed to recover the loss of profit because the defendant did not know that the miller only had one crankshaft and his mill would remain closed until the new crankshaft was delivered. Similarly, in *Victoria Laundry (Windsor) Ltd* v *Newman Industries* (1949), the plaintiff failed to recover damages for the loss of special profits relating to a valuable contract of which the defendant was unaware and which he could not have foreseen. Both these cases support the conclusion that Maluti Equipment Ltd is not liable for the loss of profits on the army contract.

9 This question calls upon the candidates to discuss the legal validity of the proposed measures under the Companies Act 1967.

(a) The Companies Act 1967 does not have any provision on the payment of dividends. Table A articles provide, in effect, that while directors do have power to recommend a dividend, they cannot be paid out of the share capital. The established practice based on common law is that dividends may only be paid out of divisible profits and that such divisible profits do not include share premium amount or revaluation reserves. If the directors infringe these rules, they will be personally liable to make good the illegal distribution of company's assets.

(b) Under s.58 Companies Act 1967, a company cannot provide any direct or indirect financial assistance for the purchase of its own shares. In the problem, the assets of the company are proposed to be used to secure a loan; that loan then is to be used by an intermediary to buy the shares of the company to boost its market price. This would infringe s.58 Companies Act 1967 and the directors authorising it would be liable to criminal penalties including imprisonment. Moreover, the purpose for which the loan is to be used may be *ultra vires* the objects clause of the memorandum of association of the company. As a result, directors and other officers responsible for pursuing such a strategy would be liable in damages for breach of their fiduciary duties to the company as well.

(c) By virtue of s.154 Companies Act 1967, a director cannot, without the approval of the company in a general meeting, issue, allot or reserve any shares for himself or his nominee without offering them to all the shareholders of the company in proportion to their existing holdings on the same terms and conditions. Any resolution sanctioning a differential issue of shares to directors and their friends must be approved specifically for this purpose by the general meeting.

Therefore, the first step would be to obtain the approval of shareholders in a general meeting to allot additional shares to the directors and their friends. Once this has been done, such shares can be issued.

Weighting such shares worth ten votes each while other shares presumably have one vote each is problematic. It requires alteration of the articles by passing a special resolution. It is not known if the directors are in control of three fourths majority which is necessary for alteration of the articles [s.17 Companies Act 1967]. If they do, they may alter the articles to authorise the issue of additional shares worth ten votes each to the directors and their friends.

In addition, the alteration has to be *bona fide* for the benefit of the company as a whole. In some cases the courts have decided that it is for the shareholders to decide what is for their benefit. In other cases, they have decided that it is the courts which would finally decide if the proposed alteration was for the benefit of the company as a whole. In *Greenhalgh case*, it was held that an alteration would be invalid if its purpose was to discriminate between the majority and the minority shareholders so as to give to the former an advantage of which the latter were deprived. It is, therefore, not certain that if the alteration is challenged in the court, it would be found to be for the benefit of the company as a whole.

There is still one more hurdle. In law, the directors are given power to issue additional shares to raise fresh capital for the company, not to prevent takeovers. In *Hogg* v *Cramphorn Ltd* (1966), the directors issued unallotted shares to trustees for employees and attached ten votes to each of them. This was held to be irregular. However, the company could ratify it and make it regular. In the problem, it would appear that it is the directors, not the shareholders, who are opposed to a takeover. Under the circumstances, the proposed course of action may not be possible.

10 This question requires candidates to discuss the financial aspects of the dissolution including the distribution of the assets of the registered partnership.

Partners do not enjoy the benefit of limited liability and they may be liable to pay the debts of the partnership from their personal wealth, if need be. Partnership's assets are used first to pay the debts of the partnership business. The external creditors are paid off first, followed by advances, if any, made by any of the partners beyond their capital contribution. Any residue is divided between the partners in the same proportion as they shared the profits of the partnership business. If the assets are insufficient to meet the external debts and partners' advances, then the deficiency has to be made good by the partners individually in the proportion to which they were entitled to share in profits.

Applying these rules to the partnership in the problem scenario, the first step, under the Partnership Proclamation 1957, is for the partners to publish in a local newspaper a 30-day notice of their intention to dissolve their partnership and the date upon which such dissolution would take place [s.7(2) Partnership Proclamation 1957]. The second step would be to realise the partnership assets. As stated, the value of partnership assets is worth R20,000. The partnership owes the financial institution R7,000. As the value of the assets of the partnership are sufficient to cover the financial institution's debt in full, they would be paid in full before any other allocation. The third step is to consider Sam's advance of R3,000 to the partnership. As stated above, he is entitled to receive repayment of that sum before any distribution to the partners. In short, out of R20,000, the financial institution and Sam would receive their debts in full and that means R10,000 would be used up this way.

The amount left for distribution between the partners is only R10,000. Since the original contribution of the partners totalled R40,000, partners cannot be paid back their contribution in full. The partnership has actually suffered a loss of R20,000 on the original capital contributed by the partners. That total loss will be allocated, in accordance with the partnership deed as required by the Partnership Proclamation 1957, in proportion to the capital contribution. Sam who provided R20,000 must suffer 50% of the loss, Peter, who provided R12,000, must suffer 30% of the loss and Frank, who provided R8,000, will suffer 20% of the loss. In terms of money, the losses will be: R15,000 for Sam, R9,000 for Peter and R6,000 for Frank. In practice these losses will merely reduce the amount of capital returned to the partners. Thus Sam will receive R5,000, Peter R3,000 and Frank R2,000.

Sam, Peter and Frank must record the dissolution of their partnership including the details of the distribution of the value of the assets of their partnership (R20,000), as stated above, in a deed as required by the Partnership Proclamation 1957. Under s.7(1) Partnership Proclamation 1957, this deed has to be signed by all the partners, notarised and registered within 60 days in the office of the Registrar.

This marking scheme is given only as a guide to markers in the context of suggested answers. Scope is given to markers to award marks for alternative approaches to a question, including relevant comment, and where well reasoned answers are provided. This is particularly the case for essay type questions where there may often be more than one way to write an answer.

1 This question asks candidates to explain the main rules the courts use to interpret statutes.

6–10 marks Full detailed explanation with supporting cases or examples.

0–5 marks Limited knowledge of the topic, perhaps lacking in detail or cases/examples. Lower band answers would exhibit very limited or no knowledge of the topic under consideration.

2 This question requires the candidates to discuss the concept of cession and the circumstances when the consent of the debtor is necessary to validate cession.

6–10 marks A thorough to complete answer, defining the term cession and the circumstances when the consent of the debtor is necessary to validate cession.

0–5 marks A limited understanding, or incomplete answer.

3 This question asks candidates to explain and distinguish between contracts of service and contracts for services.

6–10 marks A thorough treatment of all of the rules, and certainly providing case support.

0–5 marks Recognition of the areas covered by the question, but lacking in detailed analysis. Lower band answers would provide little or no analysis or knowledge of the subject of the question.

4 This question requires candidates to explain three ways in which the relationship of principal and agent can be created. Parts (a) and (b) carry three marks each and part (c) four marks.

6–10 marks Thorough treatment of all three parts of the question.

0–5 marks Thorough treatment of two of the parts, or a less complete treatment of all three. Poor answers would be unbalanced, focusing on only one part of the question and ignoring the others, or one which shows little understanding of the subject matter of the question.

5 This question seeks an explanation of the three types of share capital listed and the difference between the nominal value of shares and their market value.

6–10 marks Thorough explanation of all of the elements in the question.

0–5 marks Thorough treatment of some of the elements, or a less complete treatment of all of them. Lower band answers would be unbalanced, focusing on only one element and ignoring the others, or one which shows little understanding of the subject matter of the question.

6 This question is divided into two parts, and each part is allocated marks. Each part will be marked separately on its own merits.

(a) 2–4 marks Thorough explanation of what the corporate veil is.

0–1 mark Some, but limited, knowledge of what the nature of a share is.

(b) 4–6 marks Thorough discussion of the circumstances when the courts may lift the corporate veil.

0–3 marks Reasonable effort to discuss the circumstances when corporate veil may be lifted by the courts. Poor answers would show very little understanding of the question.

7 This question requires candidates to explain the concept of corporate governance.

6–10 marks	A good explanation of the meaning of corporate governance generally and the position in Lesotho. Reference might be made to the King's Reports and the Code of Corporate Practices and Conduct.
0–5 marks	Good answers would show a sound or a reasonable understanding of the area, although perhaps lacking in detail. Poor answers would show little or no knowledge of the area.

8 This question asks the candidates to explain the legal significance of the matters (a) to (c) set out in the question.

8–10 marks	Thorough knowledge of the legal issues on all the three matters contained in the question. Reference to *Hadley* v *Baxendale* and the two rules contained therein are expected.
5–7 marks	Candidates will exhibit a sound knowledge of the legal issues on all the three matters contained in the question. Knowledge may be less detailed or analysis less focused.
3–4 marks	Identification of some of the central issues in the question and an attempt to apply the appropriate law. Towards the bottom of this range of marks there will be major shortcomings in analysis or application of law.
0–2 marks	Very weak answers that might recognise what the question is about but show no ability to analyse or answer the problem as set out.

9 This question is divided into three distinct parts carrying 2, 3 and 5 marks respectively.

8–10 marks	Thorough treatment of all the three parts of the question.
5–7 marks	Thorough treatment of two of the three parts of the question and a reasonably fair treatment of the third.
3–4 marks	Thorough treatment of at least one part of the question and reasonably fair treatment of the other two or at least one.
0–2 marks	Unbalanced answer, demonstrating no real understanding of the nature of the question.

10 This question requires candidates to explain and apply the rules governing liability for debts on the dissolution of a partnership.

8–10 marks	This should provide a clear understanding of the legal rules and apply them accurately to the facts of the situation.
5–7 marks	This may show some detailed knowledge of the Partnership Proclamation 1957 but be unable to apply it accurately.
3–4 marks	Some, but limited, understanding of the law and poor application.
0–2 marks	The poorest answers will provide nothing but the briefest reference to the Partnership Proclamation 1957 and fail to apply it to the problem scenario.