Answers

1 This question tests the candidates' knowledge on three specific rules of statutory interpretation, *viz*, the literal rule, the golden rule and the *ejusdem generis* rule.

(a) The literal rule

This is a rule by which a word or phrase is given its literal or ordinary grammatical meaning. According to this rule, if the words of the statute are in themselves precise and unambiguous, they must be expounded in their natural and ordinary sense. This rule is very commonly used and it sometimes appears to give a result contrary to the intention of Parliament. The case of *Fisher* v *Bell* (1961) is a good illustration of the application of this rule. In this case, a shopkeeper was charged under the Restriction of Offensive Weapons Act 1959 for offering for sale certain weapons, including 'flick knives', by displaying these knives in a shop window. The court held, applying the literal rule, that the display was not an offer for sale but merely an invitation to treat. Thus, the court found that the shopkeeper had not committed an offence under the Act. The courts in Malaysia have also adopted this rule. This may be illustrated by the case of *Kon Fatt Kiew* v *PP* (1935), where the court held, applying the literal rule, that 'rubber' includes 'scrap rubber'.

(b) The golden rule

The golden rule is used where the application of the literal rule will lead to an absurdity, repugnance or inconsistency. This rule operates on the assumption that the legislature had made a mistake in the wording of the provision which is to be construed by the court. An example may be seen in the case of *Re An Advocate* (1964). This case involved the interpretation of s.12(g) Advocates Ordinance, which stated that any advocate may be suspended from practising in Sarawak, or his name may be struck off the roll of advocates by order of a judge for a number of causes, one of which was clause (g) which stated, 'if he does any act which if done in England, would render him liable to be disbarred or struck off the roll of the court, suspended from practice, if a barrister or solicitor in England.'

The issue was with the interpretation of the word 'or' in the phrase, 'if a barrister or solicitor in England'. In the case of England where the legal profession is divided into solicitors and barristers, a person could either be struck off the roll of the court or suspended from practice depending on whether he was a barrister or a solicitor. However, in Malaysia where the legal profession is fused, the word 'or' is inappropriate and its literal interpretation would lead to an absurdity. Thus the court, applying the golden rule, held that the word 'or' should be read as 'and'. See also: *Kesultanan Pahang* v *Sathask Realty* (1998).

(c) The *ejusdem generis* rule

Under this rule where a general word follows a class of specific words, the general word is interpreted to refer to words of that class only. For example, where a statute refers to tigers, lions, leopards and other animals, the phrase 'other animals' would be confined to the same class of wild animals and would not include tame pets such as cats and dogs.

This rule was adopted by the High Court in the case of *Public Prosecutor* v *Pengurus Hong Trading & Co* (1985), where the relevant part of the statute referred to a prohibition on tea containing any 'Prussian blue, or lead or any compounds of lead or other matter … '. The question was as to the interpretation of 'other matter'. The court applied the *ejusdem generis* rule and held that 'other matter' referred to things of the same category as 'Prussian blue, lead or compounds of lead'.

2 This question on employment law contains two parts. Part (a) tests the candidates' knowledge on the ways or circumstances in which contracts of employment may be terminated under the Employment Act 1955. Part (b) tests the candidates' knowledge on the period of notice prescribed under that Act when an employee wishes to terminate his contract of service.

(a) Under the Employment Act 1955 a contract of service may be terminated in the following ways:

(i) By s.11(1) a contract of service for a specified period of time or for the performance of a specified piece of work will terminate automatically when the specified period of time has elapsed or the specified piece of work has been completed.

(ii) By s.12(1) a contract of service may also be terminated by one party giving to the other notice of his intention to terminate it. Section 12(4) requires the notice to be in writing. The notice may be given at any time but it must comply with the period of notice stated in s.12(2).

(iii) By s.13 either party to a contract of service may terminate it without notice (or if notice has already been given in accordance with s.12, without waiting for the expiry of the notice) by paying an indemnity to the other. The indemnity must be a sum equal to the amount of wages that would have accrued to the employee during the period of notice required under s.12 or during the unexpired term of such notice.

(iv) By s.13(2) either party to a contract of service may terminate it without notice in the event of a wilful breach by the other party of a condition of the contract of service.

(v) By s.14(3) an employer may terminate the contract of service, without notice, on grounds of misconduct of the employee, after due inquiry.

(vi) Section 14 also allows an employee to terminate his contract of service without notice, where he or his dependants are immediately threatened by danger of violence or disease which was not undertaken by the employee in his contract of service.

(b) Section 12(1) Employment Act 1955 states that either party to a contract of service may terminate it by giving to the other notice of his intention to do so. By s.12(2) the length of notice, which must be the same for the employer and the employee, shall be determined by any provision in writing for such notice in the terms of the contract of service. In the absence of such provision in writing, the notice shall not be less than:

(i) four weeks' notice if the employee has been employed for less than two years;
(ii) six weeks' notice if the employee has been employed for two years or more but less than five years;
(iii) eight weeks' notice if he has been employed for five years or more.

However, it must be noted that s.12(2) does not prevent either party from waiving his right to a notice under the subsection.

3 This question on partnership law tests the candidates' knowledge of the definition and the main characteristics of a partnership.

(a) A partnership is defined as the relation that subsists between persons carrying on business in common with a view of profit. See: s.3(1) Partnership Act 1961.

(b) By virtue of this definition, the following are the characteristics of a partnership:

(i) There must be an association of persons.

Persons include not only natural persons, but artificial persons (companies) as well. But s.3(2) Partnership Act 1961 specifically provides that the relationship between members of any company or association registered as a co-operative society will not constitute a partnership. A partnership must have more than one person. However, by s.47(2) Partnership Act 1961 and s.14(3)(b) Companies Act 1965, the number of persons cannot exceed 20 in the case of ordinary partnerships. Professional partnerships are not subject to this limit. See: s.14(3)(a) Companies Act 1965.

(ii) The persons must be carrying on a business.

Section 2 Partnership Act 1961 defines business to include every trade, occupation or profession. Therefore, clubs, societies and other voluntary organisations formed for charitable or religious purposes will not be considered as partnerships. This point may be illustrated by the case of *Soh Hood Beng* v *Khoo Chye Neo* (1897). In this case, several persons had set up a loan association, the object of which was to grant loans among themselves. Each member would get his turn to receive the loans. The court held that this did not amount to the carrying on of a business and could not constitute a partnership. Additionally, it must be shown that the business is presently carried on. The ordering of goods in anticipation of carrying on a business in the future will not satisfy this requirement. The case of *Keith Spicer Ltd* v *Mansell* (1970) provides an illustration. In this case, one of the promoters of a proposed company ordered goods from the plaintiff company intending them to be used by the proposed company. The goods were delivered to the other promoter's address. The issue was whether there existed a partnership between the promoters. The court held there was no partnership, as they were not currently carrying on a business, though they had the intention of carrying on a business in the future in the form of a company.

(iii) The business must be carried on in common.

This is the third requirement. What this means is that the partners must possess a common intention to carry on the business. It is not necessary that all partners be actively involved. Even if some partners simply leave the running of the business to others, on the understanding that they would benefit from the business, there would still be a partnership. A relevant case is *Sithambaram Chetty* & *Others* v *Hop Hing* & *Others* (1928). In this case, two persons established a business in Penang, but their connection with it was not made public. Although they took no part in carrying it on, and had left the running of the day-to-day business to two managers, it was held that they were liable as partners to third parties, who had lent money to the firm.

(iv) The business must be carried on with a view of profit.

This is the fourth characteristic of a partnership. What this means is that the business must be carried on with a profit motive. Non-profit oriented businesses such as social, recreational and charitable organisations will not be considered as partnerships.

4 This question tests the candidates' knowledge on three elements of a contract, *viz*, proposal, acceptance and consideration.

(a) Proposal (offer)

A proposal (offer) is defined in s.2(a) Contracts Act 1950. It states that a proposal is made, 'when one person signifies to another his willingness to do or abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence.' Thus a proposal (offer) can either be in the nature of a willingness on the part of one party to do something positive or in the nature of a willingness to refrain from doing something. A proposal (offer) must, however, be distinguished from an invitation to treat. Although the Contracts Act does not contain any reference to this, English law is applicable. An

invitation to treat is sometimes said to be an offer to receive an offer. While an offer can be accepted and become an agreement, an invitation to treat cannot be accepted and be turned into a binding agreement. Examples of invitation to treat are shop window displays with price tags, advertisements and auctioneers' invitation for bids from prospective purchasers. A case in point is *Pharmaceutical Society of Great Britain* v *Boots Cash Chemist Ltd* (1953).

(b) Acceptance

In order for an agreement to arise, the proposal (offer) must be unconditionally accepted by the person to whom the proposal (offer) was made. By s.2(b) Contracts Act 1950, an acceptance is said to occur, 'when the person to whom the proposal is made signifies his assent thereto …'

Acceptance therefore has obviously to be communicated to the offeror. An acceptance must be distinguished from a counter-offer. A counter-offer occurs when the person to whom the offer is made does not make an unconditional acceptance. For example, in the case of *Hyde* v *Wrench* (1840), the defendant made an offer to sell his land to the plaintiff at a price of £1,000. The plaintiff replied indicating he was willing to purchase at a price of £950. When this was not accepted by the defendant, the plaintiff wrote to the defendant accepting the original offer.

The court held that there was no binding agreement. The plaintiff's first reply amounted to a counter-offer, which the defendant had rejected and that had the effect of extinguishing the original offer.

The general rule is that an acceptance must be communicated to the offeror in some usual and reasonable manner. When the proposal has been properly accepted, an agreement is said to have come into existence. But the agreement itself is not a binding contract unless the other elements are also present.

(c) Consideration

This is also an essential element of a valid contract.

Consideration may be said to be the price paid by one party to the contract to the other party, in return for that other party's promise. The price need not be in money. It could be in the form of a positive act of doing something, or even a forbearance, i.e. abstinence, from doing something.

Section 2(d) Contracts Act 1950 defines consideration as, 'when at the desire of the promisor, the promisee, or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or abstain from doing, something, such act or abstinence or promise is called a consideration of the promise.'

Consideration may be categorised as executory, executed or past. Past consideration, though not valid in English law, is nevertheless valid under Malaysian law. See: *Kepong Prospecting Ltd* & *S.K. Jagatheesan* & *others* v *A.E. Schmidt* & *Marjorie Schmidt* (1968).

Agreements without consideration will be void. However, there are exceptions to this general rule, as stated s.26 Contracts Act 1950.

5 This question tests the candidates' knowledge of the duties of company promoters and the remedies available to the company against them for a breach of their duties.

(a) A company promoter is a person who undertakes the responsibility of setting up a company. Promoters are in a fiduciary relationship with the company they promote and, as such, they owe fiduciary duties towards it. This means that though they are not trustees as such, they are nevertheless in a position of trust towards the company. Therefore the law requires that at all times they must act honestly and in good faith for the benefit of the company. They must not use their position as promoters to make a profit for themselves. Promoters owe a duty not to make a secret profit in connection with the promotion of the company. Where they do make any profit or acquire any other benefit from the promotion, they have a duty to make adequate disclosure to the company. The disclosure must be made by them either to an independent board of directors or to all the members of the company. Usually the board of directors will not be an independent one as the promoters themselves are likely to have nominated the directors and be directors themselves. See *Erlanger* v *New Sombrero Phosphate Co* (1878).

(b) In the event of breach of duty by the promoters, the company may have recourse to the remedies stated below.

(i) Rescission

Upon discovery of the breach by the promoters, the company is entitled to rescind any contract that it had entered into with them. A case in point is *Erlanger* v *New Sombrero Phosphate Co* (1878). In this case, Erlanger headed a syndicate, which bought an island containing phosphate for £55,000. Later, Erlanger promoted a company and sold the property to it for £110,000. There had been no disclosure of the circumstances of the sale to the members of the company. All the directors of that company were nominees of Erlanger and two of them were under his control. Later, the board of directors was replaced by a new board which brought an action to rescind the contract with Erlanger. The court held that as there had been no adequate disclosure of the circumstances of the sale, the company was entitled to rescind the contract.

However, rescission is an equitable remedy and courts may not grant such a remedy if it is inequitable so to do. Thus the remedy of rescission may be lost, for example, where there has been undue delay in initiating the action, where third

parties have acquired rights *bona fide* and for value and where the parties cannot be restored to their original position. See: *Lagunas Nitrate* v *Lagunas Syndicate* (1899).

(ii) Recovery of the secret profit

The company may also be entitled to recover any secret profit made by the promoter. The case of *Gluckstein* v *Barnes* (1900) may be used to illustrate this point. In this case, the defendants first bought debentures cheaply in a company at a time when the company was faring very badly. Then, they took over the company for £140,000. The debentures were redeemed at full value and they made a good profit. Subsequently, they formed another company and sold the first company to the new company at a profit of £40,000. This profit was disclosed in the prospectus but not the profit they made on the redemption of the debentures. The court held that they were in breach of their duties as promoters and the company was entitled to recover the undisclosed profit from them.

(iii) Damages for breach of fiduciary duties

The company may also be entitled to claim damages from the promoters for breach of their fiduciary duties as illustrated in the case of *Re Leeds and Hanley Theatres of Varieties Ltd* (1902).

6 This question, on company law, tests the candidates' knowledge on the rationale for the rule that a company cannot purchase its own shares and the exceptions to that rule.

(a) One of the cardinal principles in company law is that the share capital of the company must always be maintained. One of the rules which were developed by the courts to ensure that a company maintains its capital is the rule that a company cannot purchase its own shares. This was established in the case of *Trevor* v *Whitworth* (1887). This rule is also found in s.67 Companies Act 1965. The rationale behind the rule is to prevent the company's capital from being reduced by returning capital to the members. Such reduction will be to the detriment of creditors whom the law seeks to protect. This rationale is reflected in the words of Jessel MR in *Re Exchange Banking Co (Flitcroft's Case)* (1882), where he said, 'The creditor has no debtor but that impalpable thing the corporation, which has no property except the assets of the business. The creditor, therefore, I may say, gives credit to that capital, gives credit to the company on the representation that the capital shall be applied only for the purposes of the business and he has therefore a right to say that the corporation shall keep its capital and not return it to the shareholders.'

(b) The rule that a company cannot purchase its own shares as reflected in the case of *Trevor* v *Whitworth* (1887) and in s.67 Companies Act 1965 is subject to the following exceptions:

(i) Section 67A

This section, which was introduced following the Asian financial crisis in 1997, allows companies to purchase their own shares subject to the following conditions:

(1) It must be a public company with a share capital.

(2) The articles of association of the company must permit such purchase.

(3) The company must be solvent at the date of the purchase and must not become insolvent as a result of the purchase.

(4) The purchase must be made through the Stock Exchange on which the shares are quoted and must be in accordance with the relevant rules of the Stock Exchange.

(5) The purchase must be made in good faith and in the interests of the company.

The company is permitted to utilise the share premium account to fund the purchase of the shares.

(ii) Section 181(2)(c) Companies Act 1965

Section 181 deals with the remedies for oppression, disregard, unfair discrimination and prejudice. Under this section, members may petition the court for an appropriate remedy. One of the remedies that the court is empowered to make is stated in s.181(2)(c). This allows the court to make an order that the company buys the shares of the petitioner. When such an order is made the company must necessarily purchase its own shares in accordance with the court order.

(iii) Redemption of redeemable preference shares under s.61 Companies Act 1965

Section 61 permits a company to issue preference shares which may be later redeemed by the company. This is sometimes thought to be an indirect purchase by a company of its own shares, although such shares cannot be redeemed except out of profits or out of the proceeds of a fresh issue of shares made for the purpose of redemption.

7 This question on company law tests the candidates' knowledge on some aspects of company charges.

(a) A fixed charge is a charge on a specific asset or assets of a company. The fixed charge attaches immediately to the asset concerned. After the creation of a fixed charge, the company cannot dispose of the said asset free of the charge. Fixed charges are most commonly given over land.

The floating charge, on the other hand, is one which does not immediately attach to the assets concerned and gives the chargor freedom to continue to deal with the assets in the ordinary course of business. In *Re Yorkshire Woolcombers' Association* (1903), it was stated that a charge will be a floating charge if it has the three characteristics mentioned below.

(i) It is a charge on a class of assets present and future.
(ii) The class of assets fluctuates in the ordinary course of business.
(iii) Until such time that the lender takes steps to enforce his security, the company is free to deal with the assets in the ordinary course of business.

(b) Section 108(3) Companies Act 1965 lists the charges that require registration. Among them are the following:

(i) a charge to secure any issue of debentures;
(ii) a charge on uncalled share capital of the company;
(iii) a charge on the shares of a subsidiary of a company which are owned by the company;
(iv) a charge on land wherever situate or any interest therein;
(v) a charge on book debts of the company;
(vi) a floating charge on the undertaking or property of a company; and
(vii) a charge on calls made but not paid.

(Candidates are only required to state any THREE of the charges stated under s.108(3).)

(c) The consequences of the failure to register a registrable charge are stated in s.108. By s.108(1), the charge will, in so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company. Section 108(2) further provides that when a charge becomes void under the section, the money secured thereby becomes immediately repayable.

8 This problem-based question on company law, which contains two parts, tests the candidates' ability to identify and apply the law relating to wrongful trading and fraudulent trading as well as lifting the veil of incorporation.

(a) (i) Atan, Bella and Chan are likely to have committed an offence under s.303(3) Companies Act 1965, which is generally regarded as the section on wrongful trading. This section applies where, in the course of the winding up of a company or in any proceedings against a company, it appears that an officer of the company, who was knowingly a party to the contracting of a debt, had at the time the debt was contracted, no reasonable or probable ground of expectation after taking into consideration the other liabilities of the company at the time, of the company being able to pay the debt. In such a case the officer concerned shall be guilty of an offence. The penalty is imprisonment for one year or a fine of RM5,000. The section applies even if the persons concerned did not have any intention to defraud creditors.

Applying this law to the given problem, it can be seen that at the time the stationery was ordered on credit, ABC Bhd was hopelessly insolvent and Atan, Bella and Chan could not have had reasonable or probable ground of expectation of the company being able to pay the debt. Thus, they have committed an offence under s.303(3) for which they could be imprisoned for one year or fined RM5,000.

(ii) Atan, Bella and Chan could be made personally liable for the debt due to JKL Bhd. Although the general principle, as established in the case of *Salomon* v *Salomon & Co Ltd* (1897), is that a company is a separate legal entity and should be liable for its own debts, the courts may lift the veil of incorporation and make the members or others liable for its debts and liabilities. Under s.304(2), where a person has been convicted of an offence under s.303(3), the court may, on the application of the liquidator, creditor or contributory of the company, declare that the person shall be personally responsible without any limitation of liability for the payment of the whole or any part of that debt. Thus, if Atan, Bella and Chan have been charged and found guilty of an offence under s.303(3), they may also be made personally liable for the debt in question.

(b) (i) In this situation, Atan, Bella and Chan have committed the offence of fraudulent trading under s.304(1) and (5) Companies Act 1965. Fraudulent trading occurs when the business of the company is carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose. It is necessary to prove a dishonest intention for the section to apply (*Re Patrick & Lyon Ltd* (1933), *H Rosen Engineering BV* v *Siow Yoon Keong* (1997)).

By s.304(5) where there has been such fraudulent trading, every person who was knowingly a party to the carrying on of the business with that intent or purpose shall be guilty of an offence. The penalty is three years imprisonment or a fine of RM10,000.

Applying the law to the given problem, it is clear from the given facts that Atan, Bella and Chan had the intention of defrauding the creditors when they ordered the office stationery. Thus, they would be guilty of the offence of fraudulent trading, the penalty for which is three years imprisonment or fine of RM10,000.

(ii) In this situation, Atan, Bella and Chan could also be made personally liable for the debts due to JKL Bhd. By s.304(1) where it appears that any business of the company has been carried on with intent to defraud creditors or for any fraudulent purpose, the court on the application of the liquidator or any creditor or any contributory of the company may, if it thinks proper to do so, declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court directs. In doing so, the court would in fact be lifting the veil of incorporation of the company to impose personal liability for what would ordinarily be the liability of the company.

9 This question tests candidates on the fiduciary duty of directors to avoid a conflict of duty and personal interest and, in particular, the duty not to usurp a corporate opportunity.

Directors are in a fiduciary position in relation to the company. They must therefore act in utmost good faith for the benefit of their company. They must not make use of their position as directors to obtain a benefit for themselves. If they do so, they will be accountable to the company for the profit. This will be so, even if the company itself could not have obtained the profit. This is illustrated in several cases.

In *Regal (Hastings) Ltd* v *Gulliver* (1942), a company, R Ltd, owned a cinema. Its directors were desirous of purchasing two more cinemas and to sell off the property of the company as a going concern. A subsidiary company, A Ltd, with a capital of £5,000 was formed to purchase the two cinemas. R Ltd was only able to take 2,000 shares in A Ltd. The directors and the solicitor of R Ltd each took £500 of the balance of 3,000 shares in A Ltd because R Ltd was unable to do so. Ultimately, it was decided not to sell the property of the company but to sell the shares in both the companies. Significantly, the shares in A Ltd were sold at a profit. Subsequently, a new board of directors of R Ltd sought to recover from the directors the profit that they had made on the sale of A Ltd's shares.

The court held that they were accountable as they had been able to make such profit only by virtue of their position as the directors of the company.

In the case of *Industrial Development Consultants Ltd* v *Cooley* (1972), Cooley was the managing director and architect of the plaintiff company. He was asked to negotiate a contract with the Eastern Gas Board on behalf of the company. The Gas Board was not prepared to contract with the company, but instead indicated that they were willing to deal with him personally. The fact that the Gas Board was prepared to deal with Cooley was not disclosed to the company. Soon after, Cooley resigned from his employment with the company feigning ill-health and then took the contract offered by the Gas Board. He was subsequently sued by the company for the profit he had made from the said contract. The court held that he was accountable to the company for the profit that he had made. It was argued that as the company could not possibly have obtained the contract, Cooley should not be accountable as it would result in an unjust enrichment for the company. However, the court held that a person in a fiduciary position should not put himself in a position of conflict between his personal interest and his duty to the company. Further, Cooley had used information which he had received in his capacity as a director to make a profit for himself. Therefore Cooley was accountable.

A Malaysian case which illustrates the application of principles similar to that discussed above is *The Board of Trustees of the Sabah Foundation* & *Ors* v *Datuk Syed Kechik bin Syed Mohamed* (1999).

This fiduciary duty is today also stipulated in s.132(2) Companies Act 1965. It states, among others, that a director must not, without the consent or ratification of a general meeting, use any information or opportunity of the company which he became aware of in the performance of his functions as the director or officer of the company, to gain directly or indirectly a benefit for himself or any other person or cause detriment to the company.

In the given problem, Ah Kow, a director of SEB, has put himself in a position of conflict and made a profit by making use of information and opportunity which belonged to SEB, without the consent or ratification of the general meeting of SEB. Although Ah Kow had informed the managing director, Tan Sri Kayah, and obtained his approval, such approval is not valid as the law requires the approval to be given by the general meeting.

Datuk Wang Wang may therefore be advised that Ah Kow has breached his fiduciary duties under the common law as well as under the Companies Act 1965. Based on the law as discussed above, SEB may successfully sue Ah Kow for the profit of RM50 million that he has made through AKESB.

10 This problem-based question on contract law contains two parts. Part (a) tests the candidates' ability to identify and apply the law relating to the terms of a contract, in particular conditions and warranties. Part (b) tests their ability to apply the law on exclusion clauses.

(a) The issue in this problem is whether the terms of the contract which have been breached are conditions or warranties. If the terms in question are conditions, then Amarjit will be entitled to rescind the contract. However, if the terms are only warranties, then he will only be entitled to damages.

A condition may be said to be a term of a contract which is so important to the main purpose of the contract that the breach of it by one party will entitle the other to terminate it altogether. Although the Contracts Act 1950 does not define a condition, the Sale of Goods Act 1957 states that, 'a condition is a stipulation essential to the main purpose of the contract, the breach of which gives rise to the right to treat the contract as repudiated.'

A warranty, on the other hand, is a term of a contract which is not important to the main purpose of the contract. It is defined in the Sale of Goods Act 1957 as 'a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not a right to reject the goods and treat the contract as repudiated.' A breach of warranty will entitle the innocent party to claim damages only.

In the given problem, Amarjit had stipulated that he wanted the car to be fitted with a green sun tint and an Anaconda alarm system. However, the car was in fact fitted with a grey sun tint and a Python alarm system. This breach on the part of Bescars Bhd is not one that defeats the main purpose of the contract. The breach can easily be remedied. Thus it may be concluded that the breach is only a breach of a warranty and not a condition.

Therefore, Amarjit will not be entitled to rescind the contract. He may only claim for damages for breach of warranty.

(b) The issue here is whether Upay Bhd may rely on the exclusion clause to avoid liability for breach of contract. The facts show that the lorry that was delivered to Sunil was clearly different from the one contracted for. Therefore there has been a breach of a condition by Upay Bhd and Sunil should be entitled to rescind the contract. However, there is an exclusion clause in the contract which states that, 'Upay Bhd gives no warranty express or implied as to the state or description or any matter regarding vehicles purchased from it.'

The general rule is that, where the exclusion clause is clear and unambiguous, the courts will hold that it is valid. For example, in *Playing Cards (M) Sdn Bhd* v *China Navigation Ltd* (1980), the appellants ordered goods from New York. It was arranged that the goods would be shipped to Malaysia on the respondent's ship. The bill of lading provided that, 'the carrier shall not be liable for any loss or damage arising or resulting from delayed or early arrival of the goods and that any under or over carriage shall not be considered a deviation or vitiate any term of the bill of lading.'

The goods in question which were supposed to be put on board a ship, which was due to arrive on 25 December 1973, were in fact loaded on to another ship which arrived in June 1974. The court held that the exclusion clause was effective to protect the party in breach.

However, if there is some ambiguity in the exclusion clause, it may be interpreted in favour of the weaker party by applying a rule known as the *contra proferentem* rule. The *contra proferentem* rule seeks to assist the weaker party where the exclusion clause is ambiguous or capable of more than one meaning. In such cases the courts would construe the clause against the party for whose benefit it was inserted. The case of *Wallis Son* & *Wells* v *Pratt* & *Haynes* (1911) serves as an example. In this case, there was a contract for the sale of seeds referred to in the contract as 'common English Sanfoin'. The exclusion clause in question provided that the seller gave 'no warranty express or implied as to growth, description or any other matters'. The seeds supplied were of an inferior quality. The seller sought to avoid liability relying on the exclusion clause. The court, applying the *contra proferentem* rule, interpreted the clause against the seller, stating that the clause only referred to warranties and not to conditions. The promise to supply 'common English Sanfoin' was a condition, which was not excluded by the clause in question.

Applying this rule to the facts in question, it can be argued that Upay Bhd only excluded warranties and not conditions. As the lorry that was delivered was not the one contracted for, there was a breach of a condition. Upay Bhd therefore cannot rely on the exclusion clause to avoid liability.

Thus, Sunil may successfully rescind the contract.

1 **(a)** 0–3 An accurate answer clearly explaining the literal rule of interpretation will fall into the upper part of this band while an incomplete or inaccurate one will fall into the lower part.

(b) 0–4 An accurate answer clearly explaining the golden rule of interpretation will fall into the upper part of this band while an incomplete or inaccurate one will fall into the lower part.

(c) 0–3 An accurate answer clearly explaining the *ejusdem generis* rule of interpretation will fall into the upper part of this band while an incomplete or inaccurate one will fall into the lower part.

2 **(a)** 0–6 One and a half marks for each correctly stated way in which a contract of service may be terminated under the Employment Act 1955.

(b) 0–4 An accurate answer correctly stating the period of notice required will fall into the upper part of this band while an incomplete or an inaccurate one will fall into the lower part.

3 **(a)** 0–2 An accurate answer defining a partnership will fall into the upper part of this band while an incomplete or an inaccurate one will fall into the lower part.

(b) 0–8 2 marks for each main characteristic of a partnership correctly explained.

4 **(a)** 0–3 An accurate answer correctly explaining proposal (offer) as an essential element of a valid contract will fall into the upper part of this band while an incomplete or inaccurate one will fall into the lower part.

(b) 0–3 An accurate answer correctly explaining acceptance as an essential element of a valid contract will fall into the upper part of this band while an incomplete or inaccurate one will fall into the lower part.

(c) 0–4 An accurate answer correctly explaining consideration as an essential element of a valid contract will fall into the upper part of this band while an incomplete or inaccurate one will fall into the lower part.

5 **(a)** 2–4 Average to excellent answer, correctly explaining the duties of a company promoter.

0–1 Incomplete or inaccurate answer.

(b) 5–6 Good to excellent answer, correctly explaining the remedies to a company for a breach of a promoter's fiduciary duties.

3–4 Average answer explaining the remedies to a company for a breach of a promoter's fiduciary duties.

0–2 Incomplete or inaccurate answer.

6 **(a)** 0–3 An accurate answer correctly explaining the rationale for the rule that a company cannot purchase its own shares will fall into the upper part of this band while an incomplete or inaccurate one will fall into the lower part.

(b) 6–7 Good to excellent answer, fully explaining the exceptions to the rule that a company cannot purchase its own shares.

4–5 Average answer satisfactorily explaining the exceptions.

0–3 Incomplete or inaccurate answer.

7 **(a)** 2–4 Average to excellent answer, correctly distinguishing a fixed charge from a floating charge. The better answers will refer to appropriate examples.

0–1 Incomplete or inaccurate answer.

(b) 0–3 One mark for each type of company charge that requires registration.

(c) 0–3 An accurate answer correctly explaining the consequences of a failure to register a registrable charge will fall into the upper part of this band while an incomplete or inaccurate one will fall into the lower part.

8 **(a)** **(i)** 0–2 An accurate answer correctly identifying the offence of wrongful trading and stating the penalty for it will fall into the upper part of this band while an inaccurate or incomplete one will fall into the lower part.

(ii) 0–3 An accurate answer correctly identifying the offence of wrongful trading and explaining the personal liability arising from it, with correct application to the given problem, will fall into the upper part of this band while an inaccurate or incomplete one will fall into the lower part.

(b) **(i)** 0–2 An accurate answer correctly identifying the issue of fraudulent trading and stating the penalty for it will fall into the upper part of this band while an inaccurate or incomplete one will fall into the lower part.

(ii) 0–3 An accurate answer correctly identifying the issue of fraudulent trading and explaining the personal liability arising from it, with correct application to the given problem, will fall into the upper part of this band while an inaccurate or incomplete one will fall into the lower part.

9 8–10 Excellent answer, clearly identifying the issue of breach of directors' fiduciary duty to avoid conflict of duty and personal interest and in particular the duty not to usurp a corporate opportunity, with correct application to the given problem and appropriate advice to Datuk Wang Wang.

5–7 Average to good answer, identifying the issue of breach of directors fiduciary duty with reasonable explanation of the law and advice to Datuk Wang Wang.

0–4 A weak answer, indicating little or no knowledge of what the question requires.

10 **(a)** 3–5 An accurate answer, correctly identifying the issue of breach of warranty as opposed to a breach of a condition, with correct application to the given problem and accurate advice to Amarjit.

0–2 Incomplete or inaccurate answer.

(b) 3–5 An accurate answer, correctly identifying the issue of effect of exclusion clauses and the application of the *contra proferentem* rule, with correct application to the given problem and accurate advice to Sunil.

0–2 Incomplete or inaccurate answer.