Answers

1 This question on the Malaysian Legal System, tests the candidates' knowledge on the definition of law and some aspects of written and unwritten law.

(a) There is no all-encompassing definition of law. Different scholars and philosophers have defined law in various ways. The Oxford English Dictionary defines law as 'the body of enacted or customary rules recognised by a community as binding'. Basically, law refers to the rules and regulations which govern human conduct. Failure to adhere to such rules may result in adverse consequences upon the person who is in breach.

(b) (i) Unwritten law refers to that part of law which is not enacted through a legislative process. It is found mainly in case law and local customs. In Malaysia an important source of unwritten law is English law, to the extent permitted under the Civil Law Act 1956.

(ii) The sources of written law comprise the following:

(1) The Federal Constitution.
The Federal Constitution is the supreme law of Malaysia. It is a written constitution. It stipulates the powers of the Federal and State Governments and provides for a democratic system of government. It also establishes a constitutional monarchy and entrenches fundamental liberties of the individual. To ensure that the Federal Constitution is not easily amended, a special majority of two-thirds of the total number of members of the legislature is required for an amendment.

(2) The State Constitutions.
Each of the 13 states of Malaysia has its own State Constitution. They contain provisions pertaining to state matters as provided under the Federal Constitution. They deal mainly with the organisation and the operation of the respective State legislature and the State government.

(3) Legislation.
This comprises the laws passed by Parliament as well as the State Legislative Assemblies. The laws passed by Parliament since 1957 (i.e. after Malaya's independence) are called 'Acts' while those passed by the State Legislative Assemblies (except Sabah and Sarawak) are called 'Enactments'. The laws passed in Sabah and Sarawak are called 'Ordinances'.

(4) Delegated legislation.
This refers to the rules, regulations, bye-laws, orders and other instruments made by a person or body in accordance with the powers delegated to them/it under an enabling legislation. Delegated (or subsidiary) legislation is an increasingly important source of law because Parliament and the State Legislatures lack the time and expertise to deal with specific technical details.

(Note: Candidates are required to explain only THREE written sources.)

2 This question tests the candidate on the remedies available to an employee who has been unjustifiably dismissed.

The following are the remedies available to an employee who has been unjustifiably dismissed.

(a) Reinstatement and backpay.

This is the remedy which the Industrial Court is likely to award in normal cases of unfair or unjustified dismissal. Section 20 Industrial Relations Act 1967 provides for the remedy of reinstatement. Reinstatement basically means that the employee, who has been unjustifiably dismissed, is put back into the position he would have occupied prior to his dismissal. In the words of Tucker J. in *Hodge* v *Ultra Electric Ltd* (1943), '… reinstatement involves putting the specified person back, in law and in fact, in the same position as he occupied in the undertaking before the employer terminated his employment.' The Malaysian case of *Han Chiang High School* & *Anor* v *National Union of Teachers in Independent Schools*, Award 30 of 1990 is also illustrative of this.

Thus, when an employee is reinstated he would be entitled to occupy the same position which he occupied before, and would be entitled to receive arrears of salary from the time he was dismissed until the time of his reinstatement. His status and other privileges are restored.

(b) Compensation in lieu of reinstatement and backpay.

Sometimes it is not possible or even advisable to order reinstatement. This may happen where the court finds that reinstatement may produce negative results to the employer. For example, the retention of the employee may lead to an apprehension of breach of industrial peace. As was stated in the case of *KFC Holdings Sdn Bhd and Lim Seng Yang* (Award 348 of 1987), the relief of reinstatement may be refused in exceptional circumstances like the employer losing confidence in the workman, or the fact that the retention of the workman may lead to an apprehension of breach of industrial peace. Reinstatement will also be impossible where the claimant has died after the proceedings in respect of his claim had begun.

When this happens the court is likely to order compensation in lieu of reinstatement. The compensation payable is normally at the rate of one month's pay for each year of service subject to a maximum of 24 months. However, this is subject to other considerations.

The court is free to take into account various factors such as the duty of the employee to mitigate his loss by seeking alternative employment and the conduct of the employee contributing to the dismissal, before making an order for compensation in lieu of reinstatement.

(c) Re-engagement/Re-employment

Sometimes the employee is merely re-employed. This means that the employee is merely given an opportunity to work again. His past services are erased and no arrears of salary or other allowances are payable. The case of *Restu Motor Sdn Bhd and Nazaruddin bin Abdul Samad* (Award 267 of 1985) may be cited as an example. In this case following conciliation efforts by the Industrial Relations Department, the company agreed to employ the claimant anew in the same post with the same salary but his past service was lost and he was also not given any arrears of wages.

3 This question tests the candidates' knowledge on the main elements of the tort of negligence.

Negligence may be said to be the failure to do something which a reasonable man would do or the doing of something which a reasonable man would not do. The three main elements of the tort of negligence are as follows:

(a) Duty of care.

(b) Breach of the duty of care

(c) Resultant damage

(a) Duty of care

This means that the plaintiff must show that the defendant owed the plaintiff a duty to avoid an act or omission, which the defendant could reasonably have foreseen would be likely to injure the plaintiff. This duty is best described in the words of Lord Atkin in the case of *Donoghue* v *Stevenson* (1932) where he said, 'you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.' Neighbour refers to anyone who you can reasonably foresee will be likely to be affected by your act or omission. Thus, for example, one road user can be said to owe a duty of care to another road user because it can be reasonably foreseen that if a road user fails to exercise due care while driving his vehicle, he is likely to cause injury to another road user. In the case of *Donoghue* v *Stevenson*, the facts were that the plaintiff fell ill after drinking a bottle of ginger beer manufactured by the defendant and which contained the decomposed remains of a snail. The plaintiff had not herself bought the bottle of ginger beer. It was bought by her friend and given to her. When the plaintiff sued the manufacturer for damages, he claimed that he did not owe a duty of care to the plaintiff as the plaintiff had not bought the bottled drink from him. However, the court held that the manufacturer did owe a duty of care to the plaintiff because it was foreseeable that anyone who drank the contaminated ginger beer would fall ill.

(b) Breach of duty of care

It must be further shown that the defendant breached the duty of care. The question is basically whether the defendant exercised the degree of care which a reasonable man would have exercised. In ordinary circumstances the degree of care and skill required is that of a reasonable man. Where the defendant is a professional, the degree of care and skill required is that of a reasonably competent professional in that field. Whether the degree of care which has been taken is reasonable or not depends on the facts of the case. Among the factors that the court would take into consideration are (1) the magnitude of the risk; (2) the importance of the object to be obtained and (3) the practicability of precautions.

This area of the law is rich in case law. However, for the purposes of illustration, only the following two cases are mentioned.

In *Bolton* v *Stone* (1951), the plaintiff, who was standing on a road adjoining a cricket ground, was injured when a cricket ball flew out of the cricket ground and hit her. The cricket ground had a seven-foot fence surrounding it. The court held that in the circumstances the defendant had taken sufficient precautionary measures by erecting the fence around the cricket ground. Hence the defendant had not breached the duty of care towards the plaintiff.

The second case is *Hilder* v *Associated Portland Cement Manufacturers Ltd* (1961). In this case the plaintiff's husband was injured when he was hit by a ball kicked onto a road by some children playing football on the defendant's open land. The court held that the defendants had breached their duty of care towards the plaintiff's husband as they had permitted children to play football on their land without taking any action to prevent the likely injury to passers-by.

(c) Resultant damage

The third main element is the requirement that the plaintiff must have suffered damages as a result of the plaintiff's breach of the duty of care. It must be shown that the damage was caused to a substantial extent by the defendant's conduct. Further, the damages must not be too remote. The type of damage must be foreseeable: *Bradford* v *Robinson Rentals Ltd* (1967). Damages would be considered as too remote if a reasonable man would not have foreseen them. *In Government of Malaysia* v *Jumaat* (1997) it was held that it was foreseeable that a snapped cable carrying electricity left lying on the ground for three days could cause the damage suffered by the plaintiff. See also: *The Wagon Mound* (1961); *Arab Malaysian Finance Bhd* v *Steven Phoa Cheng Loon Ors* (2003).

4 This question tests the candidates' knowledge of the grounds under the Partnership Act 1961 under which a court may order a dissolution of a partnership.

By s.37 Partnership Act 1961, a partner may apply to the court for dissolution of the partnership in six different situations. The power of the court under this section is entirely discretionary as the section states that the court may decree a dissolution. The various situations are as explained below:

(a) **Insanity of a partner**
Section 37(a) provides that when a partner is found to be a lunatic or is shown to be of permanently unsound mind, an application may be made to the court for a dissolution of the partnership. The application can be made not only by the other partners but also on behalf of the partner who is of unsound mind, by his committee, next friend or any person having title to intervene.

(b) **Permanent incapacity**
Section 37(b) provides that the court may also order a dissolution where one partner becomes, in any other way, permanently incapable of performing his part of the partnership contract. The application in such a case can only be made by the other partner. Thus, if A and B are partners in a hairdressing business and A suffers from permanent paralysis of his arms, B may apply to the court for a dissolution on this ground.

(c) **Prejudicial conduct**
Section 37(c) provides that a partner may apply to the court for a dissolution of the partnership when another partner has been guilty of such misconduct as, in the opinion of the court, is calculated to prejudicially affect the carrying on of the business, regard being had to the nature of the business.

This may be illustrated by the case of *Carmichael* v *Evans* (1904). In this case, C and E were partners. C was convicted of travelling on the railway without a ticket with intent to defraud. It was held by the court that as the conviction was for dishonesty, it was calculated to be detrimental to the partnership business.

(d) **Wilful or persistent breach**
Section 37(d) provides that where one partner wilfully or persistently commits a breach of the partnership agreement or otherwise conducts himself in matters relating to the partnership business such that it is not reasonably practicable for the other partner or partners to carry on business in partnership with them, then they (the other partners) may apply to the court for a dissolution.

This may be illustrated by the case of *Cheeseman* v *Price* (1865). In this case, the offending partner had failed to enter small sums of money received from customers into the accounts as he was required to do under the agreement. This had happened 17 times. The court held that there was persistent breach and ordered a dissolution.

(e) **Carrying on the business at a loss**
Section 37(e) provides that the court may order a dissolution if the business of the partnership can only be carried on at a loss. It must be shown that there is no longer any possibility of making a profit. Where there is still some possibility that the business could be made profitable if more attention is given to it in the future, the court will not order a dissolution.

(f) **Just and equitable ground**
Section 37(f) provides that the court may order a dissolution of the partnership when the circumstances of the case are such that, in the opinion of the court, it is just and equitable to do so. An example of a situation where the court would consider it just and equitable to dissolve the partnership is where the partners can no longer work together and have reached a deadlock. See: *Re Yenidge Tobacco Co Ltd* (1916) *and Ebrahimi* v *Westbourne Galleries Ltd* (1973).

(Note: Candidates are required to explain only FIVE of the above grounds.)

5 This question is in three parts. Part (a) requires the candidate to explain and distinguish between a private company and a public company. In part (b) candidates are asked to state two advantages of a private company compared to a public company. Part (c) deals with the documents required for the registration of a company.

(a) A private company is a company limited by shares and whose memorandum or articles contain the restriction, limitation and prohibitions stated in s.15 Companies Act (CA) 1965. To be a private company the memorandum or articles of the company must

(i) restrict the right to transfer its shares;
(ii) limit to not more than 50 the number of its members (counting joint holders of shares as one person and not counting any person in the employment of the company or its subsidiary or any person who while previously in the employment of the company or its subsidiary was and thereafter continued to be a member of the company);
(iii) prohibit any invitation to the public to subscribe for any shares in or debentures of the company; and
(iv) prohibit any invitation to the public to deposit money with the company for fixed periods or payable at call whether bearing interest or not.

A public company is a company which does not satisfy any one of the attributes of a private company stated in s.15. The statutory definition of a public company in s.4 merely states that a public company means a company other than a private company.

(b) Some of the advantages of a private company compared to a public company are listed below.

(i) A private company can commence business and exercise its borrowing powers immediately on incorporation. A public company cannot commence business or exercise its borrowing powers until it has obtained a certificate of entitlement to commence business by complying with s.52 CA 1965.

(ii) There are no restrictions on the allotment of shares by a private company. A public company is subject to the restrictions on allotment stated in s.48 and s.50 CA 1965.

(iii) It is compulsory for a public company to prepare a statutory report and hold a statutory meeting in accordance with the requirements stated in s.142 CA 1965. There is no similar requirement for a private company.

(iv) There is no age limit for the directors of a private company. There is an age limit of 70 years for directors of a public company subject to the provisions of s.129 CA 1965.

(Note: Candidates are required to state only TWO of the above advantages.)

(c) To register a company the following documents together with the prescribed fee must be lodged with the Registrar of Companies:

(i) memorandum of association (s.16 CA 1965);

(ii) articles of association (s.16 CA 1965);

(iii) statutory declaration of compliance with the Companies Act 1965 by the secretary of the company (s.16(2) CA 1965);

(iv) statutory declaration by the promoters that they will not be acting in contravention of s.125 and s.130 CA 1965 (s.16(3A)); and

(v) statutory declaration by directors that they will not be acting in contravention of s.125 and s.130 CA 1965 and that they consent to act as director (s.123(4) CA 1965).

(Note: Candidates are required to state only FOUR of the aforesaid documents.)

6 This question on company law tests the candidates' knowledge on insider trading under the Capital Markets and Services Act 2007 ('CMSA').

(a) By s.188(1) CMSA an insider is a person who:

(i) possesses information which is not 'generally available', which on becoming 'generally available' a reasonable person would expect it to have a 'material effect on the price or value of the securities'; and
(ii) knows, or ought reasonably to know, that the information is not generally available.

Section 184(1) states when information may be considered as 'generally available' to investors. It may be noted that information would not be considered as generally available unless a reasonable period had elapsed for its dissemination and assimilation.

Under s.185 information which would have a 'material effect on the price or value of securities' is such information which when it becomes generally available would influence a reasonable investor to acquire or to dispose of the relevant securities.

(b) By s.188(2) CMSA, the insider is prohibited, in respect of any securities to which information in part (a) above relates, from:

(i) acquiring or disposing of, or entering into an agreement for or with a view to the acquisition or disposal of such securities; or
(ii) procuring, directly or indirectly, an acquisition or disposal of, or the entering into an agreement for or with a view to the acquisition or disposal of such securities.

Further, by s.188(3), where trading in the securities is permitted on a stock market of a stock exchange, the insider is also prohibited from, directly or indirectly,

(i) communicating the information (referred to in part (a) above) to another person; or
(ii) causing such information to be communicated to another person,

if he (the insider) knows or ought reasonably to know that the other person is likely to:

(i) acquire or dispose of, or enter into an agreement for or with a view to the acquisition or disposal of such securities; or
(ii) procure a third person to acquire, dispose of, or enter into an agreement with a view to the acquisition or disposal of such securities.

Section 188(4) provides that a person who contravenes s.188(2) or 188(3) stated above commits a criminal offence punishable with imprisonment not exceeding ten years and also to a fine of not less than RM1 million.

In addition, a civil remedy is available to a person who has suffered loss or damage as a consequence of a breach of the insider trading provisions of the CMSA 2007 by another person. Section 201 which refers to this remedy states that civil proceedings may be instituted against the person who contravened the provisions, whether or not that person has been charged with an offence in respect of the contravention or whether or not a contravention has been proved in criminal proceedings.

7 This question tests the candidates' knowledge on the power of the company to alter its articles and to vary class rights.

(a) The rights which may be given to preference shareholders may be stated and explained as follows:

(i) Right to a fixed preferential dividend.
Preference shareholders are usually given a fixed rate of dividend which will be paid to them before any dividend is paid to the ordinary shareholders. However, this right is subject to the overriding principle that dividends can only be paid out of profits. See s.365 Companies Act 1965.

(ii) Right to cumulative dividends.
This refers to the right of a preference shareholder who has not been paid his dividend in a particular year to have that dividend paid in a subsequent year from profits made in that year. Thus, if a company was unable to pay the preference shareholders their fixed dividend in 2012 it would have to pay that dividend from profits made in 2013 or any subsequent year. Preference shares are deemed to be cumulative unless the articles state otherwise (*Staples* v *Eastman Photographic Materials Co* (1896)).

(iii) Priority as to return of capital in a winding up.
Preference shareholders may be given the right to have their capital returned to them in priority to ordinary shareholders. There is no presumption regarding this right and it can only apply if the articles or memorandum of association expressly states so.

(iv) Right to participate in surplus profits.
A company may have undistributed profits after preference shareholders and ordinary shareholders have been paid their dividends. The question may arise whether preference shareholders may participate in such surplus profits. In *Will* v *United Lankat Plantations Co Ltd* (1914), it was held that the rights given to preference shareholders in the articles or memorandum are exhaustive. Thus, if the right to participate in surplus profits is not expressly stated, they do not have such a right.

(v) Right to vote.
Preference shares do not ordinarily carry voting rights and this is recognised by the Companies Act 1965. However, preference shares have a statutory right to vote in three circumstances mentioned in s.148(2). They are entitled to vote (1) where the preferential dividends are in arrears, (2) in a resolution which varies their class rights and (3) in a resolution for the winding up of the company.

(Note: Candidates are required to state and explain only THREE rights of preference shareholders.)

(b) **(i)** Where a company has adopted Table A of the Fourth Schedule to the Companies Act 1965, article 4 will apply in relation to a variation of class rights. By this article, the class rights attached to any class of shares may be varied by one of the following ways:

(1) by the written consent of the holders of three-fourths of the issued shares of that class; or
(2) by a special resolution passed at a separate meeting of that class of shareholders.

(ii) The answer will differ if the class rights are set out in the memorandum of association instead of the articles of association.

Section 21(1) provides that the memorandum of association may only be altered in the manner and to the extent provided by the Companies Act 1965 but not otherwise. However, the effect of ss.21(1A) and 21(1B) is that if class rights are set out in the memorandum of association they become unalterable.

8 In this question candidates are tested on the extent to which the *ultra vires* doctrine applicable to companies operates in Malaysia and the remedies available to the company and its members if the directors of a company embark on activities outside its objects clause.

At common law where a company's act or transaction is outside the object clause in its memorandum of association, the company is said to act *ultra vires*. An *ultra vires* act or transaction is void under common law. Neither the company nor the other contracting party can enforce it. Further, members cannot validate an *ultra vires* act or transaction by passing a resolution, even though the resolution was passed unanimously: *Ashbury Railway Co Ltd* v *Riche* (1875).

In Malaysia the common law doctrine of *ultra vires* has been modified by s.20 Companies Act 1965.

The effect of s.20(1) is that no act or purported act of a company and no conveyance or transfer of property (whether movable or immovable) to or from the company shall be invalid by reason only of the fact that the company was without capacity or power to do the act or to execute or take the conveyance or transfer. As a result of s.20(1), the company and the other contracting party to the transaction are bound to an act, conveyance or transfer even though it falls outside the objects clause in the memorandum. In short neither party to a transaction may raise *ultra vires* to escape that party's legal obligation or obligations under the transaction (*Public Bank* v *Metro Const. Sdn Bhd* (1991). Thus, in the given problem the directors may be advised that both Bisco Bhd ('Bisco') and Otel Bhd ('Otel') are bound by the sale and purchase of the hotel. As will be seen below no member of the company can invalidate the purchase of the hotel as the purchase has been completed.

The directors may be advised that s.20(1) has not removed completely the relevance of *ultra vires* in Malaysia. Under s.20(2)(a) where a company is engaged in, or is about to engage in, an activity which is outside its objects as stated in the memorandum, any member of the company or, where the company has issued debentures secured by a floating charge, by the holder of any of the debentures or by the trustee for the holders of such debentures, to apply to court for an injunction to restrain 'the doing' of such activity. The use of the words 'the doing' in s.20(2)(a) indicates that the power to restrain only applies if the alleged *ultra vires* activity has not been completed. In the case of the acquisition of the hotel from Otel, the transaction has been completed and the directors may be advised that Oppo will not be able to restrain or invalidate the transaction. Oppo will be able to restrain by injunction the proposed contract with Renova Sdn Bhd to renovate the hotel under s.20(2)(a). This is because the *ultra vires* activity remains executory as the contract will only be signed next week.

The attention of the directors must also be drawn to s.20(2)(b). By this provision the company's lack of capacity or power may be asserted in any proceedings for damages by the company or by any member of the company against the present or former officers of the company. Thus, in the case of the purchase of the hotel either Bisco or Oppo may sue the directors for any damage suffered by the company arising from the purchase.

9 This problem-based question on company law contains two parts. Part (a) tests the candidates' knowledge and ability to apply the law on share qualification of directors. Part (b) tests the candidates' knowledge and ability to apply the law relating to a director's duty to disclose his interest in contracts with the company.

(a) This question concerns the issue of share qualification of directors. A share qualification is a requirement that a director must acquire, and hold, a certain minimum number of shares in order to qualify to continue to hold office as director.

The Companies Act 1965 does not impose any share qualification upon directors. However, by virtue of s.124(1), where the articles of a company require a director to hold a specified share qualification, any director who is not already qualified must obtain his share qualification within two months of appointment or such shorter period as is fixed by the articles.

In the given problem, the articles of association of Goodbiz Sdn Bhd states that all directors must acquire and hold at least 5,000 shares in the company within 6 months of appointment. The effect of s.124(1) is that the maximum period which can be allowed under the articles for a director to acquire his share qualification is two months. As Chong was appointed three months ago, he should have obtained his share qualification one month ago. Therefore, he is not qualified to continue to be a director of Goodbiz Sdn Bhd. By s.124(3), a director must vacate their office if they fail to obtain their share qualification within the stipulated period.

Ali may be advised that Chong should vacate his office.

(b) The issue in this problem concerns the duty of a director to avoid a conflict of duty and their personal interest. One of the aspects of this duty is that a director must not be interested in a contract with the company. Where they do have an interest, they must disclose their interest. If they fail to do so, the contract is voidable at the option of the company. This can be illustrated by the case of *Aberdeen Rly Co* v *Blaikie Bros* (1854), where the railway company had entered into a contract with Blaikie Brothers only to discover later that one of the directors of the railway company was also a partner in Blaikie Bros. The court held that the company was entitled to avoid the contract.

Further, by s.131 Companies Act 1965, a director who is in any way, whether directly or indirectly, interested in a contract with the company, is required to disclose the nature of their interest to the company or at a meeting of the directors of the company. Failure to do so will result in them committing an offence. They need not make such disclosure if their interest can be regarded as not being a material interest.

Applying the law to the given problem, Suria Bhd may be advised that as Chandran was a partner in Nila Furniture & Co, he had a material interest in the contract in question, and he should have disclosed his interest. As he had failed to do so, Suria Bhd would be entitled to avoid the contract with Nila Furniture & Co.

The fact that Chandran did not participate in the discussion, or vote at the board meeting, does not affect the duty to disclose his interest in the contract.

10 Part (a) of this question concerns the legal effect of an agreement entered into by a minor.

Part (b) deals with the legal position where a promisee accepts a part payment of a debt in satisfaction of the whole debt which is due from the promisor.

(a) By virtue of s.10 Contracts Act 1950, one of the essential elements of a contract is that the parties to the contract must be competent to contract. The effect of s.11 is that a person is competent to contract if he is of the age of majority, is of sound mind and is not disqualified from contracting by any law to which he is subject. A person attains majority when he attains the age of 18 years (Age of Majority Act 1971).

A contract entered into by a person who is not competent to contract is void (*Mohori Bibee* v *Dharmodas Ghose* (1903)). Thus, *prima facie*, the contract entered into by Girlie is void as she is only 15 years of age.

It is now pertinent to refer to s.69, which allows a claim against a person not competent to contract if the requirements of the section are satisfied. It reads,

'If a person, incapable of entering into a contract, or anyone whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.'

If the section is to apply to Girlie's case, the boutique owner must show that Girlie was supplied with 'necessaries' and that they were suited to her condition in life. There is no statutory definition of 'necessaries'. At common law the term applies to things 'without which an individual cannot reasonably exist' (Alderson B in *Chapple* v *Cooper* (1844)). They include food, clothing and lodging. Education, apprenticeship and training, are also considered 'necessaries' (*Government of Malaysia* v *Gurcharan Singh* (1971)). A dress supplied to Girlie may be considered to fall under the term necessaries but for s.69 to apply the dress must be suited to Girlie's condition in life. It is submitted that s.69 does not apply in Girlie's case because a dress which cost RM3,000 is not suited to a 15-year-old girl, who is the daughter of a school headmaster. The consequence is that the agreement between Girlie and the boutique owner is void and the boutique owner will fail if she sued for the purchase price of the dress.

(b) Under English law the general rule is that an obligation to repay a debt cannot be discharged by partial performance of that obligation (*Pinnel's Case* (1602) and *Foakes* v *Beer* (1884)). Betty may be advised that in Malaysia the legal position regarding her case is regulated by s.64 Contracts Act 1950 which provides as follows:

'Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit.'

Where the section applies, a part payment of a debt accepted in satisfaction of a whole debt operates as a discharge of the whole debt. The section provides a number of illustrations to explain the legal position. Illustration (c) is particularly relevant to Betty's case. It reads:

'A owes B RM5,000. C pays to B RM1,000 and B accepts them, in satisfaction of his claim on A. The payment is a discharge of the whole claim.'

From the illustration it can be seen that it is immaterial that the relevant part payment is made by a third party. It may also be noted that dispensation by the promisee under the section requires no consideration from the promisor.

The section was applied in the Malaysian case of *Kerpa Singh* v *Barian Singh* (1966). In this case D owed P a sum of money under a judgement debt. A third party made a part payment to P in satisfaction of the full sum due under the judgement debt. It was held that the acceptance of the part payment by P discharged the debt.

Applying the above law to Betty's case, she may be advised that she is not bound to pay the balance of the loan. The payment of RM10,000 by her father, Boss, has fully settled her obligation to Duit.

This marking scheme is given as a guide to markers in the context of the suggested answer. Scope is given to markers to award marks for alternative approaches to a question, including relevant comment, and where well reasoned conclusions are provided. This is particularly the case for analysis based questions where there will often be more than one definitive solution.

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

(b) **(i)** 0–2 An accurate answer will fall into the upper part of this band while an inaccurate one will fall into the lower part.

(ii) 0–6 Two marks for each source of written law correctly explained.

2 8–10 Excellent answer clearly explaining the three remedies for unjustifiable dismissal.

5–7 Average to good answer explaining the remedies for unjustifiable dismissal.

0–4 Incomplete or inaccurate answer.

3 8–10 Excellent answer clearly explaining the three elements of the tort of negligence.

5–7 Average to good answer explaining the elements of the tort of negligence.

0–4 Incomplete or inaccurate answer.

4 0–10 Two marks for each correctly explained situation under the Partnership Act 1961 in which the court may order a dissolution of a partnership.

5 **(a)** 0–4 An accurate answer explaining and distinguishing a private company compared to a public company will fall into the upper part of this band while an inaccurate one will fall into the lower part.

(b) 0–2 One mark for each correctly stated advantage of a private company compared to a public company.

(c) 0–4 One mark for each correctly stated document which must be lodged with the Registrar of Companies for the registration of a company.

6 **(a)** 0–3 An accurate answer defining an 'insider' with reference to the Capital Markets and Services Act 2007 will fall into the upper part of this band while an inaccurate one will fall into the lower part.

(b) 6–7 Excellent answer stating fully the matters which the insider is prohibited from doing and the consequences if he does so.

4–5 Average answer reasonably stating the matters which the insider is prohibited from doing and the consequences if he does so.

0–3 Incomplete or inaccurate answer.

7 **(a)** 0–6 Two marks for each correctly stated and explained right which may be given to preference shareholders.

(b) **(i)** 0–2 An accurate answer stating how a company may vary the rights attached to a class of shares will fall into the upper part of this band while an inaccurate one will fall into the lower part.

(ii) 0–2 An accurate answer stating and explaining whether and why the answer to (b) (i) may differ will fall into the upper part of this band while an inaccurate one will fall into the lower part.

8 8–10 Excellent answer, identifying the issue of *ultra vires*, with correct explanation and application to the given problem and appropriate advice to the directors.

5–7 Average to good answer identifying the issue of *ultra vires* with appropriate explanation and advice to the directors.

0–4 Incomplete or inaccurate answer.

9 **(a)** 3–5 Average to good answer identifying the issue of share qualification of directors with correct explanation and application of the law to the given problem and accurate advice to Ali.

0–2 Incomplete or inaccurate answer.

(b) 3–5 Average to good answer identifying the issue of directors' interest in contracts with the company and the need to disclose such interest, with correct explanation and application of the law to the given problem and accurate advice to Suria Bhd.

0–2 Incomplete or inaccurate answer.

10 **(a)** 3–5 Average to good answer correctly identifying the issue of contracts with minors with correct explanation of the law and application of the law to the given problem with accurate advice to the owner of the boutique.

0–2 Incomplete or inaccurate answer.

(b) 3–5 Average to good answer correctly identifying the issue of whether payment of a lesser sum is sufficient to discharge a debt of a larger sum, with correct explanation of the law and application to the given problem as well as accurate advice to Betty.

0–2 Incomplete or inaccurate answer.