Answers

1 There are two major sources of law in Singapore. They are legislation and case law, or common law. Where legislation exists, a judge must apply that law. He has a certain amount of flexibility in interpretation where the legislation is ambiguous, but by and large he has no discretion as to what rule to apply. In some cases, however, there is no legislation covering a particular area. The judge must decide, by analogy, to previous cases, if possible. Eventually, when enough cases of a certain type have been decided, it will be possible to deduce a particular rule of law from the accumulation of precedents. This type of judge-made law is referred to as common law.

Thus, if there are previous similar cases already decided by some other court, a judge may be bound to follow those cases. Generally, a judge is obliged to follow a precedent decided by a court higher up in the judicial hierarchy if the case before him cannot be distinguished from the prior case. This principle is often referred to as *vertical stare decisis*. He may also be constrained to follow decisions of courts on the same level in certain circumstances. This principle is often referred to as *horizontal stare decisis*.

Three points may be made about *stare decisis*. First, the rules of *stare decisis* are irrelevant where a precedent can be distinguished. Second, only the *ratio decidendi* is binding. Third, the rules of *stare decisis* are irrelevant where the judge agrees with a precedent. He may follow any precedent he wishes in deciding a case.

Being bound means a judge is obliged to decide the case before him in the same way as the applicable precedent, even if he disagrees with the precedent, even if he considers it to have been wrongly decided, even if to follow the precedent may lead to injustice in the present case.

There are essentially three levels of courts in Singapore. The lowest level comprises the Subordinate Courts. The Magistrates' Court and District Court are part of the Subordinate Courts. At the next level is the High Court. Generally in cases where the monetary value of the matter being disputed is about $250,000, a civil action must be commenced in the High Court. The High Court also exercises appellate jurisdiction, in that it hears appeals from lower level courts and tribunals such as the Magistrates' Courts, District Courts and Small Claims Tribunal. At the top-most level is the Court of Appeal, which is an appeal court. It hears appeals from the High Court.

2 (a) Consideration

In *Curie* v *Misa* (1875) consideration was defined as follows: 'A valuable consideration, in the sense of the law, may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.' That could be shortened into the statement that consideration is some benefit accruing to one party or some detriment suffered by the other. Often the benefit and the detriment are the same thing looked at from different points of view.

Although the benefit/detriment analysis is still present in more recent case law, there has been a shift of emphasis to the notion of exchange. Sir Frederick Pollock in *Dunlop* v *Selfridge* (1915) said that consideration consists of 'an act or forbearance of one party, or the promise thereof' which is 'the price for which the promise of the other is bought'. This statement emphasises the idea of exchange, whilst retaining the traditional elements of benefit and detriment. Such an approach may be seen in recent cases such as *Williams* v *Roffey Bros & Nicholls (Contractors) Ltd* (1990).

(b) Executory and executed consideration

Sir Frederick Pollock's definition of consideration talks in terms of both acts done or not done and promises of acts. It is thus possible that performance of the contract on both sides remains in the future. Executory consideration may thus be described as an exchange of promises; executed consideration consists of the exchange of a promise for an act. In both cases, the use of the term 'exchange' should be noted.

An example of executed consideration is the delivery of goods by the supplier for which the customer has agreed to pay on delivery. If the supplier delivers the goods, he has given consideration in the form of supply of goods. If the supplier agrees to deliver the goods in the future and the customer agrees to pay on delivery, the consideration on both sides is executory. If the supplier does not deliver the goods, the customer can sue him although he has not paid for the goods. When he sues the supplier, the customer can point to his promise to pay as being the consideration for the supplier's promise to deliver the goods. The promise to pay is a detriment to the customer and a benefit to the supplier. The customer is relieved, in the events that have happened, from having to carry out his promise. It is enough that he was ready and willing to perform it at the due time.

(c) Past consideration

Past consideration is not sufficient consideration. If A promises B $10 because B cleaned A's car last Tuesday, B cannot sue on that promise because the consideration furnished by B is past consideration. When A's promise was made B's act was already in the past. Past consideration can thus be identified by chronology. If a promise is made after the act in relation to which it is given, the act is past consideration.

A good example of the rule is *Roscorla* v *Thomas* (1842). Thomas sold a horse to Roscorla for £30. After the sale Thomas promised it was sound and free from vice. It was not. Roscorla sued for damages for breach of warranty. He failed. The only

consideration which he had given was the purchase price and clearly that was not given for the promise, since at the time of the promise that consideration was already past. Thus a guarantee given after a sale is given for a past consideration and cannot be sued on.

Past consideration must be distinguished from executed consideration. If A offers a reward to anyone who finds and returns his lost dog, Fido, and B finds Fido and returns him to A and claims the reward, B has already performed his consideration when he makes his claim. That is executed consideration and is perfectly valid. When B made his claim his act was in the past, but it was not in the past when A made his promise. In other words, in this case, the promise was followed by the act. In the case of past consideration, the act is followed by the promise.

A past act is outside the general rule if two conditions are fulfilled: (i) that the act was done at the request of the promisor; and (ii) that the parties all along contemplated that payment would be made.

3 **(a)** How an exclusion clause may become a term of the contract:

An exclusion clause may become a term of the contract by signature or by notice.

(i) Signature

If a person signs a contractual document he is bound by its terms, including any exclusion clause it may contain, even if he does not read the document. In *L'Estrange* v *Graucob* (1934), the plaintiff, who was a café proprietress, bought a cigarette vending machine. She signed, without reading it, a sales agreement which contained a number of clauses 'in regrettably small print but quite legible'. The machine did not work properly. The defendants were held to be protected by a clause which excluded their liability.

(ii) Notice

If a contractual document is not signed, the question of notice arises. The exemption clause may be printed on a document which is handed to one party by the other or is posted up in the shop or booking hall or other place where the contract is made. In such a case the clause will only be incorporated into the contract, so as to become a term of it, if:

(1) the party affected knows of the clause, or
(2) reasonable steps are taken to bring it to his notice.

(b) Unfair Contract Terms Act (Cap 396)

Most of the provisions in the Unfair Contract Terms Act (Cap 396) ('UCTA') apply only to business liability. 'Business liability' is liability arising from things done by a person in the course of a business or from the occupation of business premises: s.1(3) UCTA. A consumer has a specially favoured status under the Act. A person 'deals as consumer' (s.12 UCTA) if he does not make (or hold himself out as making) the contract in the course of a business and the other party does make the contract in the course of a business.

The main provisions of the UCTA which control the validity of exclusion clauses are as follows:

(1) Liability (i.e. business liability) for death or personal injury resulting from negligence cannot be excluded or restricted by any contract term or notice: s.2(1) UCTA.

(2) In the case of other loss or damage, a person cannot so exclude or restrict his (business) liability for negligence in so far as the term or notice satisfies the requirement of reasonableness: s.2(2) UCTA.

(3) When one party deals as a consumer or on the other's written standard terms, liability for breach of contract cannot be excluded or restricted unless the term satisfies the requirement of reasonableness.

(4) The requirement of reasonableness 'is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made': s.11(1) UCTA.

(5) Guidelines for the application of the reasonableness test are laid down in the Second Schedule to s.11(2) UCTA. They include:

- If the parties have equal bargaining strengths, it is likely that they could have negotiated the terms and so the exclusion clause is likely to be considered to be reasonable.
- Whether the customer received an inducement to agree to the term.
- Whether the customer knew or ought to know about the exclusion clause.
- If the exclusion clause states that the business will only be liable if there is compliance with some condition, then whether compliance with that condition was reasonably practicable.
- Whether the goods were manufactured, processed or adapted to the special order of the customer.

4 **Company used to evade legal obligations or to commit fraud**

The separate personality of a company has often been used as cloak to disguise a fraud or to enable a person to evade his legal obligations. For instance, in *Gilford Motor Co* v *Horne* (1933), Horne was formerly the managing director of the plaintiff company. He covenanted not to solicit customers of the company after the termination of his employment. However, when he left the plaintiff's employment he set up JM Horne & Co Ltd, through which he solicited the plaintiff's customers. The court granted an injunction against both Horne and his company, having held that he breached his covenant.

Company employed as an agent of its controllers

A company, like any other legal person, may act as an agent for another. There is nothing to prevent a company acting as an agent for its members or controllers. One factor that is relevant is the fact that the company running the business is so grossly undercapitalised that it could not run the business independently. Thus, for instance, where a company has no office, staff or assets, a court may draw an inference that it is acting as agent for its controller when it enters into a contract. The inference of an agency would be easier to draw when the negotiations leading to the contract are all conducted by the controller. The intention of the alleged principal and company is crucial since a relationship of agency can only arise out of the consent or agreement of the principal and the agent; the absence of such consent or agreement is fatal to a claim based on agency.

Company is a sham or façade

Where the company is a sham or façade designed to conceal the true state of affairs, the court may disregard its notional separateness and treat it as one with the members. For instance, a person uses a company as an extension of himself and makes no distinction between the company's business and his own. In such a case, the existence of the company is merely formal and does not reflect reality, and, therefore, the court may treat the business as his and not the company's.

Where court exercises equitable discretion

If a court is asked to exercise an equitable discretion, it may ignore the technical separate personality of a company if it is just in the circumstances to do so. For instance, where a court is asked to grant a stay of execution, it may look behind the separate entity of a company to find the person truly at interest.

Groups of companies

In certain situations, a group of companies has been treated as a single corporate entity, although the general rule is that each company within a group is a distinct entity. For instance, in *DHN Food Distributors Ltd* v *Tower Hamlets London Borough Council* (1976), there was a group of three companies running a grocery business. The business was owned by DHN itself. The premises on which the business was conducted was owned by Bronze Investments Ltd, a subsidiary of DHN Food Transport Ltd. The Council acquired the land. Under the legislation in question, compensation could be obtained both for the land and for the disruption of business. The Council refused to pay compensation to DHN or its transport subsidiary on the basis that they did not have any interest in the land. The English Court of Appeal refused to accept this and treated the whole group as one commercial entity.

Giving effect to legislative purpose behind a statute

Statutes are often drafted with individuals rather than corporations in mind. Thus, it often happens that a doubt arises as to whether a corporation is entitled to benefit from certain rights or should be subject to certain liabilities. In such situations, the court will not be blind to the reality, notwithstanding the technical separate existence of the company. It may go behind the corporate veil in order to give effect to the legislative intention. For instance, in *Re Bugle Press Ltd* (1961), Shaw and Jackson held 4,500 shares each out of a total of 10,000 shares. The remaining 1,000 shares were held by Trelby. Shaw and Jackson wanted to buy out Trelby's shares. To effect this, they incorporated a company called Jackson & Shaw Holdings Ltd ('Holdings'). Holdings made an offer to purchase all the shares of Bugle Press. Shaw and Jackson of course accepted. Trelby declined. Holdings then purported to invoke s.209 UK Companies Act 1948 to acquire Trelby's holdings. This section provided that if a company had acquired 90% or more of the shares of another company, it could compulsorily buy out the remaining 10%. The Court of Appeal declined to allow Holdings to take advantage of the section to expropriate Trelby's shares. Lord Evershed MR said that although the strict terms of the section had been complied with, nevertheless the scheme would not be approved as the section had been used 'not for the purpose of any scheme … contemplated by the section but for the quite different purpose of enabling majority shareholders to expropriate or evict the minority'.

5 Preference shares may have some features that make them appear no different from a loan. But fundamentally, the treatment of equity funding and shareholders who provide equity funding is different from debt funding and the creditors who provide debt funding. Company law regards shareholders as 'insiders' whereas creditors are regarded as 'outsiders' of the company.

Both equity and debt funding will be deployed to grow the company's business. If the business is successful, it will generate additional company assets by way of retained business profits. These profits do not form part of the company's share capital. If the business is unsuccessful and losses are incurred, the total value of the company's assets may fall below its share capital. Company law provides protection to creditors by the company's share capital through the rules on maintenance of capital.

With regards preference shares, the company will be able to pay a distribution in the form of dividends during the company's life only out of profits. Even if the preference shares carry a fixed dividend, the dividend amount will be payable only if the company has profits. With regards debt, the company is required to pay interest at an agreed rate whether or not its operations are profitable.

With regards preference shares, there is no expectation that the principal will be repaid to shareholders during the company's life, unless they are structured as redeemable preference shares. With regards debt, the company is required to repay the principal amount at the end of an agreed term.

With regards preference shares, the preference shareholders may have priority over ordinary shareholders on winding up, but they will still rank after creditors. Preference shareholders will be entitled to repayment of their investment upon winding up only after all creditor claims have been satisfied. With regards debt, creditors will have priority over preference shareholders for repayment of the principal amount on winding up of the company.

With regards preference shares, preference shareholders are regarded as members of the company. Some preference shares carry voting rights and, if they do, they may vote at the company's meetings. With regards debt, creditors are not members of the company and have no membership rights, such as voting rights.

With regards preference shares, the preference shareholders may be entitled to share in any surplus assets on winding up of the company, depending on the terms of their issue. If the terms of the preference share issue provide that the shares carry participatory rights, they may participate in the surplus in the manner set out in the terms of issue. With regards debt, creditors generally have no right to share in surplus assets on winding up of the company.

Thus, although company law gives special protection to creditors of the company, the outlook for shareholders (which include preference shareholders) is not always gloomy. If the company is successful, a preference shareholder with participatory rights may share in the company's profits. If the preference shares carry a dividend that is tied to the company's profits, they may receive dividends that increase when the company's profits increase. The creditors tend to be restricted to the scale of return defined by their contract with the company, e.g. a loan with specified rate of interest.

6 (a) Board of directors

Every company has two organs: the members collectively and the board of directors. The memorandum or articles of association of the company will divide powers of the company between the general meeting and the board, and will define their respective functions. For instance, articles 73 to 78 of Table A state the powers and duties of the directors. In addition, certain provisions of the Companies Act (Cap. 50) ('CA') specify that certain actions may be taken only by the general meeting or the directors. For instance, it is for the board of directors to appoint the company secretary (s.171(3) CA) but the appointment of the company auditor is to be made by the members in a general meeting (s.205(2) CA). The Companies Act also provides that some powers of the directors may only be exercised with the approval of the general meeting. For instance, the power to issue shares (s.161 CA) and the power to dispose of substantially the whole of the company's undertaking or property (s.160 CA). Within the board's sphere, as delimited by the memorandum and articles and the CA, the board is regarded as the company. Decisions of the board of directors are reflected in the resolutions of the board. Thus, if the board of directors, acting within its sphere of competence, passes a resolution, that resolution is the company's decision. When the board of directors acts within its sphere of competence, it is acting as the company, not just on behalf of the company. There is no question of agency. The transaction entered into by the board of directors within its sphere of competence is binding on the company.

(b) Managing director

The company is bound by the acts of its agent only if the agent acts within his actual authority. An agent is a person who has the power to affect his principal's legal relations, usually by entering into a contract binding on the principal. The company may also be bound if the transaction was within the apparent or ostensible authority of the agent. In addition, although an agent may not have had authority, provided the agent purported to act on behalf of the company, the company may ratify the agent's acts and by doing so retrospectively clothe the agent with authority.

In the case of a managing director, there would usually be a delegation of power by the board of directors to the managing director. Express authority is that which is expressly conferred on the managing director either orally or in writing. For example, the board of directors may pass a resolution to appoint one of its own as managing director and authorise him to carry out certain functions.

Express authority may not cover everything the managing director is actually authorised to do. Implied authority is not expressly stated; it is authority implied by the circumstances. Implied authority does not have to be conferred; by its very nature it comes with the actual authority given or with the job. Implied authority may take several forms. An agent may have authority to do things incidental to the fulfillment of the tasks that he is expressly authorised to do. An agent may be given implied authority by the acquiescence of his superiors. In the case of the managing director, there is implied authority to do things that a person in the position of managing director usually does. For instance, a managing director has usual authority to execute bills of exchange on the company's behalf, to receive payment of debts due to the company, to borrow money for the company and to give security in respect of the debt, to appoint persons to do work in connection with the company's business, and to give guarantees on behalf of the company. It may generally be said that the managing director has implied authority to do whatever is reasonably incidental to the management of the company's business in the ordinary way. However, his usual authority is only confined to the commercial business of the company and does not extend outside the scope of the business. A managing director's implied authority is also limited to acting for the company's purposes.

(c) Individual director

In the case of an individual director, express authority may have been conferred on him, especially if he is an executive director. For example, the sales director may have been expressly authorised by the managing director to negotiate a contract on behalf of the company. Thus, in the case of an executive director, he would usually have been expressly authorised to bind his company within the scope of his executive functions.

However, where the individual director has not been expressly authorised, an individual director generally has no implied authority as such to make contracts on behalf of his company, even if he is the chairman of the board of directors. A person dealing with a company director should normally assume that the director is non-executive until he is given satisfactory proof of the director's authority.

7 Oppression – Section 216

Section 216 Companies Act (Cap. 50) ('CA') may be invoked where there is oppression of a member or where a member's interests are 'disregarded'. It may also be invoked where there is a resolution or act that 'unfairly discriminates' against or is 'otherwise prejudicial' to a member.

The applicant must prove commercial unfairness. For example, he may prove that dominant members pursue a course of conduct designed by them to advance their own interests or the interests of others of their choice to the detriment of the other shareholders; the majority shareholders or directors abuse their voting powers by voting in bad faith or for a collateral purpose; a member has been excluded from management of a company in breach of an express or implied understanding to allow him to participate in management.

Section 216(2) CA gives the court power to make such order as it thinks fit, a wide discretion that allows the court to tailor the order to remedy the mischief complained of. The most common option is for the majority to buy out the minority's shares. The court may also order that the company be wound up.

Winding up on just and equitable ground – Section 254(1)(i)

The member may apply to wind up the company under the 'just and equitable' ground (s.254(1)(i) CA). The idea of unfairness lies at the heart of s.254 CA. Some examples include: where there has been a 'loss of the company's substratum'; where the company's business has been carried on in a fraudulent manner; where the company is incorporated with an expectation of co-operation and mutual trust and members can no longer work in association with one another; where minority members have been oppressed or treated unfairly by controlling members and have justifiably lost confidence in the management; where the applicant has been deliberately excluded from management of company in contravention of an understanding that he will be allowed to participate in managing the company.

If the applicant succeeds, the court will order the company to be wound up.

Derivative action – Section 216A

The member may apply to court for a derivative action pursuant to s.216A CA. A member may apply to court under s.216A CA for leave to commence an action on behalf of a company. If he fulfils the conditions set out in s.216A CA and the court grants him permission, then the applicant proceeds to the next stage which is to take the necessary steps to initiate action using the company's name.

The applicant should give 14 days' notice to the directors before submitting his application. At the hearing of the application, the court must be satisfied that: (a) the applicant is acting in good faith; and (b) it appears *prima facie* in the interests of the company that the action should be brought.

If the applicant succeeds, he will be able to initiate an action in the company's name and on behalf of the company.

8 In order to succeed in negligence, Speedy will have to prove that:

(1) Tan & Co owed Speedy a duty of care;
(2) Tan & Co breached his duty of care;
(3) Tan & Co's breach caused Speedy's loss; and
(4) The loss is not too remote.

With regards the first requirement, there is no doubt Tan & Co owed Speedy a duty of care as there is a close and proximate relationship between the auditor and his client.

With regards the second requirement, the precise degree of scrutiny and investigative effort which constitutes reasonable care is to be determined on the facts of each individual case.

The standard of reasonable care of an auditor has been laid down in *Re Kingston Cotton Mill Company (No.2)* (1896):

'The duties of auditors must not be rendered too onerous. Their work is responsible and laborious and the remuneration moderate. ... Auditors must not be made liable for not tracking out ingenious and carefully laid schemes of fraud when there is nothing to arouse their suspicion, and when those frauds are perpetrated by tried servants of the company and are undetected for years by the directors. So to hold would make the position of an auditor intolerable.'

This measured approach has been adopted by case law in all the principal common law jurisdictions. It has been consistently emphasised that because of the inherent limitations of an audit and the corresponding audit risk, auditors cannot be expected to detect all material misstatements or instances of fraud. Case law is replete with variegated judicial observations and metaphorical references stressing the limitations of an auditor's duty and reiterating that an auditor is neither a 'detective', 'insurer', 'paragon' nor 'prophet' (for example, see *Barings plc* v *Coopers* & *Lybrand* (2003)).

The function of an auditor was further elucidated in *Fomento (Sterling Area) Ltd* v *Selsdon Fountain Pen Co Ltd* (1958) (cited in the local case of *United Project Consultants Pte Ltd* v *Leong Kwok Onn* (2005)):

'What is the proper function of an auditor? It is said that he is bound only to verify the sum, the arithmetical conclusion, by reference to the books and all necessary vouching material and oral explanations; and that it is no part of his function to inquire whether an article is covered by patents or not. I think this is too narrow a view. An auditor is not to be confined to the mechanics of checking vouchers and making arithmetic computations. He is not to be written off as a professional 'adder-upper and subtractor'. His vital task is to take care to see that errors are not made, be they errors of computation, or errors of omission or commission, or downright untruths. To perform this task properly, he must come to it with an inquiring mind – not suspicious of dishonesty, I agree – but suspecting that someone may have made a mistake somewhere and that a check must be made to ensure that there has been none.'

Tan & Co would have breached its duty of care if the firm did not exercise the reasonable care and skill of an ordinary skilled person embarking on the same engagement. The duty is not to provide a warranty that the company's accounts are substantially accurate, but to take reasonable care to ascertain that they are so. In this case, the amount claimed is not insubstantial. In fact, it did occur to Tan & Co to check with Alex but they did not bother to pursue the matter when Alex failed to furnish the employment contract. A reasonable auditor with an enquiring mind would have likely pressed Alex for the employment contract or verified Alex's salary and benefits with Bill.

With regards to the third requirement, but for Tan & Co's breach of duty of reasonable care, Speedy would not have overpaid Alex, and thereby not suffer the loss complained of.

With regards to the last requirement, the test for determining whether the loss is too remote is whether the loss is reasonably foreseeable. Tan & Co's failure to adequately check or seek reasonable assurance regarding Alex's remuneration would be a sufficiently 'effective' cause of the losses occasioned by Alex's undiscovered receipt of excessive or unauthorised remuneration.

9 A director may not obtain for himself any property or business advantage that properly belongs to the company or for which it has been negotiating. Information is not property per se but a fiduciary who makes improper use of information about a business opportunity may contravene the conflict and profit rules, and be liable for breach of fiduciary duty. Neither may the director divert the corporate opportunity to a competing company. It is a clear breach of duty for a person to set up a competing company to take advantage of contracts that should have gone to the company of which he is a director: *Cook* v *Deeks* (1916). This obligation persists even after the director concerned has resigned, at least where the resignation can be said to have been prompted by the wish to obtain the property or business advantage for himself: *Canadian Aero Service Ltd* v *O'Malley* (1973), *Industrial Development Consultants Ltd* v *Cooley* (1972). The fact that the company could not itself have succeeded in getting the property or business opportunity is irrelevant: *Hytech Builders Pte Ltd* v *Tan Eng Leong* (1995). Where the director is an employee, it is not a breach to take preparatory steps to set up a competing business so long as he does not actually compete against the company before resignation: *Universal Westech (S) Pte Ltd* v *Ng Thiam Kiat* (1997).

Whether a director is proscribed from appropriating to himself a business opportunity may depend on whether the opportunity for profit falls within the scope of the company's business: *Island Export Finance Ltd* v *Umunna* (1986). R P Austin has propounded an 'expanded line of business' test for determining whether a director of a company may appropriate an opportunity that he spots: a director should not take up an opportunity for profit if it is within the scope of the business of the company as currently carried out and as planned to be carried out.

In *Peso Silver Mines Ltd* v *Cropper* (1966), the Supreme Court of Canada held that where the board of directors has *bona fide* rejected an opportunity on the company's behalf, a director is allowed to take that opportunity for himself without the necessity of disclosure to the company.

However, in *Regal (Hastings) Ltd* v *Gulliver* (1942), Lord Wright made it clear that a director could not avail himself of an opportunity after it had been rejected by the board of the company's behalf, unless he could obtain the assent of the shareholders to let him make the profit for himself.

In this case, the filter tubes business may not be regarded as a maturing business opportunity or something which Midas was actively pursuing. It is also not an opportunity in which the company may reasonably be expected to be interested in, given its current line of business. In fact, Midas was already taking steps to give up its filter tubes production.

Although *Regal (Hastings) Ltd* v *Gulliver* (1942) suggested a very strict liability to account for a personal benefit or gain obtained or received by the fiduciary, the limiting principle in that case was that the directors of Regal obtained the profit 'by reason and only by reason of the fact that they were directors of Regal and in the course of execution of that office'. In this case, Ho had already resigned by the time Lim called him and gave him the idea of producing filter tubes. The profit-making opportunity went to him in his non-directorial or private capacity, after termination of his fiduciary office. In addition, Ho's resignation was not prompted or influenced by a wish to acquire the business opportunity for himself. When he resigned, he was unsure what business he would venture into.

It would not be a breach of fiduciary duty for Ho to form an intention to set up business in competition with his company after his directorship had ceased and there was no maturing business opportunity in which Midas had a 'specific interest' which Ho had improperly diverted to himself. Midas would not be able to recover profits from Ho.

10 **(a)** Voluntary winding up is an act of the company which is commenced by the passing of a special resolution to wind up the company. Whether a voluntary winding up is a members' voluntary winding up or a creditors' voluntary winding up depends on whether a declaration of solvency has been made by the directors of the company. This is a written declaration by a majority of the directors that they are of the opinion that the company will be able to pay its debts within 12 months of the commencement of winding up. Since Prosperity appears to be in financial difficulties, it is likely the declaration of solvency will not be made, hence a creditors' voluntary winding up will ensue. It is to be noted that creditors' voluntary winding up is initiated by the company, not the creditors. As such, the matter of commencing the winding up is not within the control of Fox. Fox may only cajole or persuade Prosperity to pass the special resolution, but if Prosperity refuses, there is nothing Fox can do about it.

Winding up by the court is initiated by an application to court made by one of the persons listed under s.253 Companies Act (Cap. 50) ('CA'). As Fox is a creditor of Prosperity, it has the standing to apply for winding up under s.253 CA. The ground for the application would be Prosperity's inability to pay its debts: s.254(1)(e) CA. This can be proved in three ways under s.254(2) CA. Fox can serve a statutory demand on Prosperity if the debt owed is more than $10,000. If Prosperity ignores the statutory demand for three weeks, it will raise a presumption of Prosperity's insolvency. Another way is to issue proceedings and levy execution on the judgement debt. If the execution is returned unsatisfied in whole or in part, it will raise a presumption of Prosperity's insolvency. Alternatively, if Fox is unable to rely on the presumptions, as long as it is able to somehow 'prove to the satisfaction of the court' that Prosperity is unable to pay its debts, Fox will be able to get a court order to wind up Prosperity.

(b) A creditors' voluntary winding up is outside Fox's control. Jack will need time to persuade Prosperity to initiate a voluntary winding up. It would appear from the facts that there were other creditors already ahead of Fox in their debt collection. Time will therefore be of the essence. If Fox were to apply to court for winding up instead, and the court proceeds to make the winding up order, commencement of winding up will be retrospective from the date of Fox's application to court. Once winding up has commenced, all its attendant consequences follow. For instance, disposition of property after commencement of winding up is void (s.259 CA); execution against Prosperity that is not fully satisfied may be avoided (s.260 CA). These provisions that are triggered only upon commencement of winding up serve to preserve the pool of unsecured assets of the company, which is extremely important to an unsecured creditor like Fox.

From Fox's point of view, if Prosperity is persuaded to wind itself up, it may mean a cheaper winding up than a winding up by the court. This is because a creditors' voluntary winding up tends to involve less formality than a winding up by the court. A creditors' voluntary winding up will also avoid the risk of Fox's petition to wind up the company being dismissed by the court, with Fox losing the costs of its application to court.

On balance, it would be more viable for Fox to initiate a winding up by the court so that commencement of winding up kicks in and as many unsecured assets are preserved within the company as possible.

1 8 to 10 marks if candidate explains well how case law is made, what *stare decisis* means and what vertical *stare decisis* means in the context of three levels of court in Singapore.

5 to 7 marks if candidate shows some understanding of how case law is made, what *stare decisis* means and what vertical *stare decisis* means in the context of three levels of court in Singapore.

3 to 4 marks if candidate shows some understanding of what vertical stare decisis means in the context of three levels of court in Singapore.

1 to 2 marks if candidate shows some understanding of what *stare decisis* means.

2 **(a)** 3 marks if candidate explains well what consideration means.

1 to 2 marks if candidate shows some understanding of what consideration means.

(b) 2 marks each for good explanation of executory consideration and executed consideration.

1 mark each for fair explanation of executory consideration and executed consideration.

(c) 3 marks if candidate explains well what past consideration is.

1 to 2 marks if candidate shows some understanding of what past consideration is.

3 **(a)** 2 marks each for good explanation of incorporation through signature and notice.

1 mark each for fair explanation of incorporation through signature and notice.

(b) 1 mark each for explaining s.2.1 Unfair Contracts Terms Act ('UCTA'); s.2.2 UCTA; and requirement of 'reasonableness' under s.11(1) UCTA.

1 mark each for stating any three of the five guidelines laid down in Schedule 2 of s.11(2) UCTA.

4 2 to 2·5 marks for each good explanation of situation where corporate veil is lifted.

1 to 1·5 marks for stating a situation where corporate veil is lifted.

The answer guide provides for six situations but candidates are required to state any four situations.

5 2 marks for each good point that distinguishes rights of preference shareholders from rights of creditors.

1 mark for each fair point that distinguishes rights of preference shareholders from rights of creditors.

6 **(a)** Board of directors

3 marks if candidate explains well that the board of directors acting within its sphere of competence is able to bind the company and understands there is no agency issue involved.

1 to 2 marks if candidate shows some understanding that the board of directors acting within its sphere of competence is able to bind the company.

(b) Managing director

2 marks each for good explanation of managing director's express authority and implied authority.

1 mark each for fair explanation of managing director's express authority and implied authority.

(c) Individual director

3 marks if candidate explains well how an individual director may be conferred express authority but generally has no implied authority as a non-executive director.

1 to 2 marks if candidate shows some understanding that an individual director may be conferred express authority but generally has no implied authority as a non-executive director.

7 Oppression – Section 216

3 marks if candidate explains well requirements under s.216 CA and cite one remedy.

1 to 2 marks if candidate shows some understanding of requirements under s.216 CA or cite one remedy.

Winding up on just and equitable ground – Section 254

3 marks if candidate explains well requirements under s.254 CA and cite winding up order as the remedy.

1 to 2 marks if candidate shows some understanding of requirements under s.254 CA or cite winding up order as the remedy.

Derivative action – Section 216A

3 to 4 marks if candidate explains well requirements under s.216A CA and how the applicant may commence an action on behalf of the company if he is successful in his application.

1 to 2 marks if candidate show some understanding of requirements under s.216A CA or how the applicant may commence an action on behalf of the company if he is successful in his application.

8 Duty of care

2 marks if candidate states duty of care is required and why it is satisfied on the facts.

1 mark if candidate states duty of care is required or why it is satisfied on the facts.

Breach of duty of care

5 to 6 marks if candidate explains well the standard of care of an auditor and applies it to the facts.

3 to 4 marks if candidate shows some understanding of the standard of care of an auditor and applies it to the facts.

1 to 2 marks if candidate state breach of duty of care is required.

Causation

1 mark if candidate explains causation.

Remoteness

1 mark if candidate explains remoteness.

9 8 to 10 marks if candidate explains well the principles on usurping corporate opportunity and applies them to the facts.

5 to 7 marks candidate shows some understanding of the principles on usurping corporate opportunity and applies them to the facts.

3 to 4 marks if candidate is able to state one principle on usurping corporate opportunity and applies it to the facts.

1 to 2 marks if candidate is able to state one principle on usurping corporate opportunity.

10 **(a)** 3 marks each for good explanation of procedure for creditors' voluntary winding up and winding up by the court.

1 to 2 marks each for fair explanation of procedure for creditors' voluntary winding up and winding up by the court.

(b) 3 to 4 marks if candidate explains well benefits of creditors' voluntary winding up but why it may not be viable on the facts.

1 to 2 marks if candidate shows some understanding of the benefits of a creditors' voluntary winding up but why it may not be viable on the facts.