Answers

1 Judicial power in Singapore is vested in the Supreme Court and Subordinate Courts: article 93 Constitution.

The Supreme Court comprises the High Court and the Court of Appeal: s.3 Supreme Court of Judicature Act (SCJA). Both the High Court and the Court of Appeal have jurisdiction over civil and criminal matters: s.3 SCJA. Since 1994, the Court of Appeal is Singapore's highest judicial tribunal. Pursuant to a Practice Statement issued in July 1994, the Court of Appeal does not hold itself strictly bound by any previous decisions of its own or of the Privy Council.

Judges of the Supreme Court can be further divided into Judges of the High Court and Judges of Appeal. The Judges of the High Court together with the Chief Justice comprise the High Court: s.94 SCJA. Proceedings in the High Court are heard before a single judge: s.10(1) SCJA. The Judges of Appeal together with the Chief Justice comprise the Court of Appeal: s.29(1) SCJA. Proceedings in the Court of Appeal are usually heard before three judges: s.30 SCJA.

Pursuant to article 94(4) of the Constitution, the President may appoint judicial commissioners to exercise the powers and perform the functions of a Judge of the High Court in ways specified by the Chief Justice. Judicial commissioners have the same powers and enjoy the same immunities as a Judge of the High Court, except that their term of office is limited. In contrast, Supreme Court judges enjoy tenure until they reach 65 years of age: article 98(1) Constitution.

Within the Supreme Court, the High Court and the Court of Appeal have different jurisdictions. The Court of Appeal exercises an appellate jurisdiction, hearing appeals from the High Court: s.29A SCJA. The High Court has jurisdiction to hear both civil and criminal cases at first instance: s.15–17 SCJA. Generally, a civil claim must be initiated in the High Court if the claim involves more than $250,000. It also tries criminal offences which are punishable by death, or jail for a period exceeding 10 years. The High Court also has an appellate jurisdiction to hear civil and criminal appeals from the Subordinate Courts: s.19–21 SCJA. In February 2002, the Admiralty Court was established as the first of the specialist commercial courts within the Supreme Court. This was followed by the establishment of the Intellectual Property Court and Arbitration Court.

The Subordinate Courts consist of lower level courts, including District Courts, Magistrates' Courts, Juvenile Courts, Coroners' Courts and Small Claims Tribunals: s.3 Subordinate Courts Act (SCA).

Within the Subordinate Courts, the District Court has the widest jurisdiction. A District Court hearing proceeds before a District Court Judge. A District Court has both civil and criminal jurisdiction: s.19, 50 SCA. Its civil jurisdiction entitles it to hear cases involving up to $250,000 in dispute, while in probate matters, the limit is $3m: s.2 SCA. If the dispute involves amounts exceeding $250,000, the District Court may still exercise jurisdiction if the parties agree to it: s.23 SCA. In criminal matters, the District Court tries cases where the maximum punishment does not exceed 10 years' jail or is a fine only: s.8 Criminal Procedure Code (CPC).

The Magistrates' Court also has civil and criminal jurisdictions. Its criminal jurisdiction is to try cases where the maximum punishment does not exceed five years' jail or is a fine only: s.7 CPC. Its civil jurisdiction is similar to that of the District Court but its monetary limit is $60,000: s.2 SCA.

The Small Claims Tribunal deals with claims for up to $10,000 in relation to contracts for sale of goods or provision of services as well as certain property damage claims.

The Juvenile Court has jurisdiction over cases involving juveniles.

The Coroners' Court determines the cause and circumstances of death in cases where a person dies suddenly, in an unnatural manner, by violence or from unknown causes.

The Family Court hears applications concerning divorce, adoptions, maintenance and other family matters.

In addition to the courts which form the judiciary, there is a separate court system to hear cases on specific matters involving Muslims, that is, the Syariah Court.

[**Tutorial note:** *The candidates are expected to explain only the Supreme Court (comprising Court of Appeal and High Court) and Subordinate Courts (comprising District Courts and Magistrate Courts). The candidates are not expected to explain the specialist commercial courts, Small Claims Tribunal, Juvenile Court, Coroners' Court, Family Court and Syariah Court.*]

2 The four elements of a contract are: offer, acceptance, consideration and intention to create legal relations.

1. **Offer**

An offer is an expression made by one party (offeror) to another party (offeree) communicating the offeror's willingness to perform a promise. The intention is that, if the offer is accepted by the offeree, there will be a binding agreement between them.

Offers can be made in writing, orally or by conduct. A simple oral offer is where a person says, 'I would like to sell this book to you for $40. Would you like to buy it?' In this case, the offeror is the seller. Equally, the offeror can be the buyer if they say, 'I would like to buy your book for $40. Would you sell it to me?' Notice that there is no requirement that the word 'offer' be used. Moreover, for an offer to be effective, it must be communicated to the offeree. If an offeror sends the offer letter on Monday and it reaches the offeree on Wednesday, the offer is deemed to be made on Wednesday.

Offers should be distinguished from invitations to treat. An invitation to treat is an invitation to commence negotiations. It is an invitation to make an offer. Accordingly, acceptance of an invitation to treat does not lead to a contract. Most of the time,

an advertisement is not considered an offer. Catalogues and price lists are usually regarded as invitations to treat. In the same way, a display of goods and prices in a shop is usually considered to be an invitation to treat and not an offer. The offer is made when a customer selects the item they want and bring it to the cashier to pay for it.

2. Acceptance

Assuming that an offer exists, the next question is whether there is acceptance. Like an offer, an acceptance may be made in writing, orally or by conduct. Whatever its form, a communication constitutes an acceptance only if it is an unconditional expression of assent to the terms of the offer: *Compaq Computer Asia Pte Ltd* v *Computer Interface (S) Pte Ltd* (2004). Therefore, if the offeree communicates to the offeror stating that they wish to accept the offer subject to a change in one of the proposed terms, there can be no acceptance because it is not unconditional. In other words, conditional acceptance is treated as no acceptance: *Stuttgart Auto Pte Ltd* v *Ng Shwu Yong* (2005). For this reason, a counter-offer – where the offeree seeks to accept the offer but on slightly different terms – does not amount to an acceptance.

3. Consideration

Consideration can be viewed as the price or compensation for the promise given by one party to the other. If Ann agrees to sell her book to Bob for $30, the consideration for selling the book is $30. Consideration is something which is given in exchange for another thing.

In respect of each act, forbearance or promise, the person who makes, or performs, it is the promisor and the person to whom it is made, or performed, is the promisee. In a typical contract, there will be at least two promises. On the one hand, Ann promises to sell her book to Bob. On the other hand, Bob promises to pay Ann $30. The consideration for Ann's promise is Bob's promise and *vice versa*. In each contract, there are at least two promisors and two promises. In the case of Ann and Bob, each is a promisor and a promisee, depending on which promise is being considered. Thus, if Ann breaks her promise to sell the book to Bob, Bob can sue her for breach of that promise, but only if Bob has given consideration in exchange for that promise. In this situation, Ann is the promisor (who broke her promise) and Bob is the promisee (who is required to furnish consideration in order to sue Ann for breach of contract). In order for a promise to be enforced in court, consideration must first be given.

4. Intention to create legal relations

The last element is the intention to create legal relations. If this intention is absent, then the promise may not create any binding obligation at all. For example, a person could not enforce a promise by his friend to have dinner with him if the friend should cancel the appointment.

In determining whether the promisor has an intention to create legal relations, the law applies an objective test: *Chwee Kin Keong* v *Digilandmall.com Pte Ltd* (2005). The question is not whether the promisor intended his promise to have legal consequences. Rather, the test is whether a reasonable person, viewing all the circumstances of the case, would consider that the promisor intended his promise to have legal consequences. Cases where the intention to create legal relations is an issue are usually grouped under two categories: social and domestic agreements and commercial agreements.

Social and domestic agreements cover situations where the agreement is made between friends or between family members. There is a general presumption that such agreements lack the necessary intention to form a contract.

In the case of commercial agreement, there is a general presumption that there is the necessary intention to create legal relations. This presumption flows partly from the desire of the law to give efficacy to agreements made in a commercial context.

3 The three requirements for a restraint of trade clause to be valid are:

1. It must protect a legitimate interest of the covenantee (the person benefiting from the restraint);
2. It must be reasonable in scope; and
3. It must not be contrary to public interest.

1. Legitimate interest

The restraint must protect some proprietary or legitimate interest of the covenantee. In the case of the sale of a business, the main proprietary interest is goodwill. In the case of employment contracts, an employer may restrain a former employee from exploiting trade secrets or trade contacts obtained from his employment: *Asia Business Forum Pte Ltd* v *Long Ai Sin* (2003). Trade secrets and trade contacts may constitute legitimate interests which can be protected by a restraint of trade clause. In this regard, the Singapore Court of Appeal has stated that the maintenance of a stable, trained workforce could constitute a legitimate proprietary interest which merits protection by a non-solicitation clause which may otherwise be seen as an unreasonable restraint of trade: *Man Financial (S) Pte Ltd* v *Wong Bak Chuan David* (2008). However, if the restraint is intended merely to minimise competition or to prevent an employee from using the personal skills or knowledge acquired during his previous employment, then it is likely to be void: *Buckman Laboratories (Asia) Pte Ltd* v *Lee Wei Hoong* (1999).

2. Reasonable scope

The restraint must be reasonable in terms of its period, geographical scope and subject matter. If the restraint is for a period which is too long, it may be held to be void. Similarly, a restraint of trade clause where an Islington canvasser whose employment agreement restrained him from entering into a similar business 25 miles from London was held to be void because the area of restraint was 1,000 times larger than the area in which he was employed: *Mason* v *Provident Clothing*

& *Supply Co Ltd* (1913). Void for being far too wide with respect to the area covered was a clause which restrained the covenantor from giving advice to a competitor 'anywhere in the world'. Thus, even where a legitimate proprietary interest is shown, the court will ensure that the covenant in restraint 'goes no further than what is necessary to protect the interest concerned': *Man Financial (S) Pte Ltd* v *Wong Bak Chuan David*.

3. Public interest

The restraint must not be contrary to public interest: *Asia Polyurethane Mfg Pte Ltd* v *Woon Sow Liong* (1990). For example, if the restraint has significant impact on trading arrangements such that it reduces competition generally, the court may declare the clause to be void: *Esso Petroleum Co Ltd* v *Harper's Garage Ltd* (1968).

4 Legal identity

A sole trader in Singapore is not an incorporated entity and therefore has no separate legal identity. In the eyes of the law and the public, the owner and the sole trader business are one and the same. As a result, the sole trader has complete control over the business and its operations but they are personally responsible for all debts and legal actions against the business.

A limited liability partnership (LLP) and limited liability company (LLC) each have its own legal identity, separate from its partners (who own the LLP) and from its shareholders (who own the LLC). What this essentially implies is that:

(i) The entity can incur and receive obligations and hold property in its own name and enter into contracts.
(ii) The entity can sue and be sued in its own name.
(iii) The entity continues unchanged, even if the identity of its participants changes.

Business liability

Since a sole trader is not a separate legal entity, the owner has unlimited liability. In other words, creditors may sue them for debts incurred and can also obtain a court order to claim against their personal assets. There is no protection offered for their personal assets.

Since LLPs and LLCs in Singapore are set up as limited liability legal entities, their business obligations remain within the entity itself and thus shield their members (partners and shareholders respectively) via the provision of limited liability. Essentially it means that their exposure is limited to the amount they have invested in the entity and their personal assets are protected.

Perpetuity and succession

For a sole trader, they and their business are inseparable. The business has no perpetuity and comes to a standstill with their retirement or demise. LLPs and LLCs, on the other hand, have a continued existence irrespective of the status of their partners or directors and shareholders. Partners' or shareholders' resignation or death do not normally affect the continued existence of the LLP or LLC.

Ease of expansion

As a sole trader, it may be quite difficult to raise external capital through loans or investment in the business. Capital is limited to the trader's personal finances and the profits generated by the business. To secure loans from banks and lending institutions, they must be prepared to put up personal assets as collateral. Thus, business expansion is difficult and many sole traders never really take off. Also, as a sole trader, there can only be one owner which means they have no way of adding another partner to their business setup.

Generally, LLPs also face the difficulty of raising external capital, which is often limited to their partners' contributions.

An LLC may take advantage of the ability to raise capital by means of adding equity partners, venture funds, business financing, etc. Investors are more likely to invest in a company where there is a formal separation between personal and business assets. In general, banks prefer to lend money to companies rather than to sole traders or LLPs.

Tax

Sole traders and LLPs in Singapore are not taxed at the business level but at the personal income level of the owners. For sole traders, all business profits are considered as personal income for the owner and therefore taxed as part of the personal income at the personal income tax rate. Similarly for LLPs, profits are distributed among partners as per the partnership agreement and treated as part of each partner's personal income and are taxed at personal income tax rates.

LLCs in Singapore are taxed at the corporate tax rate and get to enjoy various tax exemptions available for companies. Singapore follows a single-tier tax policy which means once the income has been taxed at the corporate level, dividends can be distributed to shareholders tax free.

Transfer of ownership

A sole trader or LLP cannot be sold as a whole. Instead, each of the assets, licences and permits will have to be transferred individually.

On the other hand, full or partial ownership of an LLC can be easily transferred without disrupting operations through the sale of shares.

Maintenance

Sole traders are the easiest and least expensive form of business to set up and maintain in Singapore. There is only a registration fee and the paper work is minimal. There are no ongoing filing requirements except the annual renewal of the sole trader.

LLP registration is more complex than a sole trader but less complex than an LLC. There is a higher registration fee compared to a sole trader and the parties are likely to need professional help in drafting a partnership agreement. In terms of annual compliance requirements, an LLP must submit an annual declaration of solvency or insolvency to the authorities. There are no other documents to be filed.

LLC registration is a little more complex than the sole trader and LLP, and the registration fee is the highest of the three. Also, annual filing requirements are more complex, such as the need to file annual accounts, tax return, hold annual general meetings, etc. It is common to hire a professional firm (corporate secretarial, accounting or law firm) to handle the initial LLC setup as well as ongoing compliance requirements of the LLC. In other words, the advantages of an LLC come at a certain price.

Dissolution

Terminating a sole trader is easier than terminating an LLP or LLC. For a sole trader, the procedure calls for issuing a notice of termination followed by a notice of cessation to the registration authorities. However, terminating an LLP or LLC is more complex. It can either choose to strike off or wind up its operations. Although striking off is less complex, there are certain statutory requirements which need to be fulfilled before it can follow the strike-off route. The termination process, in either case, can take anywhere between 3-12 months, depending on the complexities involved.

[**Tutorial note:** *The candidates may approach this question in different ways: they may state an attribute and compare the three business organisations in terms of that attribute; or they may explain all attributes of each business organisation. Either approach is acceptable, so long as the key attributes of the three business organisations are explained and distinguished. It is sufficient for candidates to discuss any* ***four*** *attributes stated above.*]

5 *Prima facie* all shares rank equally. Thus if nothing is stated in the terms of issue or the articles, then the shares will have equal rights to a dividend, return of capital in a liquidation, and voting. Thus, an ordinary share is a default share in the sense that the rights attached to ordinary shares are those which attach to all shares, unless contrary provision is made when particular shares are issued or by subsequent variation of the rights attached to particular shares. A company which wants to issue shares with different rights must have power to that effect in its memorandum and articles of association so as to displace the presumption that all shareholders are to be treated equally. In commercial terms, ordinary shares are equity or risk capital, with which is associated the greatest opportunity for capital growth but also the most financial exposure if the business is unsuccessful.

A key distinctive feature of the financial rights attaching to an ordinary share is that, in respect of both income and capital, the return to the holder is not fixed: dividends may vary depending on the profitability of the company, and the ultimate capital return may be greater than the amount which was originally invested. The open-ended nature of the investment expectations serves to distinguish ordinary from non-participating preference shares, which in respect of dividends and capital enjoy a priority to ordinary shares, but only for a fixed amount. Another key feature of ordinary shares is that the holders' claims on the company assets are last in the queue so that if the company has insufficient funds to meet all of the claims against it, the ordinary shareholders will thus be the first to absorb the loss.

A preference share is a share which, in respect of dividends and/or capital, enjoys priority, for a limited amount, over the company's ordinary shares. The precise extent of the priority is a matter of construction of the rights attached to the shares. It is not sufficient to designate shares as preference shares because that expression has no precise meaning. The preferential rights which are to be attached to the shares must be spelt out precisely as they will not be implied.

Most preference shares carry stated preferential rights to a fixed dividend while the company is a going concern and priority to return of capital in a liquidation. They are thus a comparatively safe form of investment and when issued by the larger listed companies, they often bear some resemblance to debenture stock or government bonds in that the capital is expected to be mainly secure and the rate of preference dividend is fixed and will bear a close relationship to the interest rates prevailing at the time of issue.

Often preference shares may have other stated rights. They may be issued as redeemable preference shares, redeemable either at the option of the company or sometimes the shareholder, or, as is more usual, 'convertible' preference shares, giving the holder the right to convert them into ordinary shares in certain circumstances. Preference shares are usually expressed to have no voting rights, or to have voting rights which are restricted to certain circumstances such as a right to vote on whether the company goes into liquidation or not.

Not all preference shares follow the usual pattern of giving a preference as to fixed dividend and return of capital in a liquidation. Hybrid versions are encountered, which perhaps give a right to a fixed preference dividend and then an entitlement to share profits rateably with the ordinary shareholders, with similar provisions on liquidation. Such shares are usually known as 'participating' preference shares. Such 'participating' rights will need to be spelt out very clearly in the articles or terms of issue, for if the terms provide for a fixed dividend and priority to return of capital on liquidation, it will not be open for the shareholders to argue that they are also entitled to share in profits, rateably with the ordinary shareholders, nor will it be possible for them to contend that, if the terms give them a right to prior return of capital on a liquidation, they can also share in surplus assets. Nor will it help them, when seeking to imply participating rights as to capital, to point to their express rights to participating dividend rights.

6 (a) Appointment

Every Singapore-incorporated company must have at least one director who is ordinarily resident in Singapore: s.145(1) Companies Act (CA). The CA does not prescribe the manner in which directors are to be appointed. That is left generally to the company's articles of association. Typically, directors are elected by the members at the annual general meeting of the company. In the case of a public company, it is impermissible to elect two or more persons as directors in a single resolution: s.150(1) CA.

Although election by the members is the commonest way of appointing directors, it is by no means the only way. For instance, the articles may provide that a certain person or body will have the power to appoint the directors of a company. However, such an article will not be enforceable by a person who is not a member of the company unless there is a contract outside the articles embodying that right.

Most companies' articles of association allow the board to fill casual vacancies or to appoint additional directors. This is a fiduciary power and a director must act in the company's interests when he attempts to procure the appointment of a co-director: *Goh Kim Hai Edward* v *Pacific Can Investment Holdings Ltd* (1996).

It may sometimes be provided in the articles or in a separate contract that a director may assign his office to another person. In the case of a public company, a director may assign his office to another person. In the case of a public company, any such assignment must be approved by a special resolution of the company: s.170 CA.

(b) Removal

The mode of removing directors before the expiration of their term of office will be provided for in the articles. For instance, Table A article 69 provides that the company may by ordinary resolution remove any director before the expiration of his period of office. This is not mandated by law, however; it is possible to omit such an article from a company's articles of association. In that case, the directors will be irremovable unless the articles are suitably amended.

Commonly, a managing director will serve under a contract of service. If such a contract exists, sacking him before his term expires will be a breach of contract for which damages may be obtained. This will be so, even if he is removed as a director in accordance with the articles.

It is possible to terminate a managing director's employment as managing director without removing him from the board. This is a matter of interpretation of the articles. For instance, Table A article 91 provides that a managing director may be appointed by the board, which may also revoke his appointment. Where such an article exists, revocation of the managing director's appointment does not remove him from the board.

Other directors may also have contracts of service, either in their capacity as executive directors or as employees of the company. It is theoretically possible (subject to the terms of the contract) to remove such a person as director while leaving them still an employee. In such a case, termination of directorship may not necessarily amount to a breach of the contract of service.

Directors who do not serve under a contract of service may be removed in accordance with the articles without the necessity of paying them damages. The power of removal is usually vested in the general meeting: Table A article 69. Even if the articles provide that the board shall have power to remove a director, such an article is ineffective in the case of a public company: s.152(8) CA. In the case of a private company, a power granted to the board to remove directors is a fiduciary power which must be exercised in the interests of the company.

Since the mode of removing directors is left to the articles, it is possible to entrench directors by including suitably drafted articles. For example, it may be provided that a director may not be removed without a special resolution or that on a resolution for removal, a director's shares shall carry more votes or that a particular director will hold office for life. Such articles are enforceable in the normal way. The effect of entrenching provisions may be to make a director irremovable. However, in the case of a public company, it is not possible to have irremovable directors: s.152 CA.

7 Section 340 Companies Act (CA) provides that: 'If, in the course of the winding up of a company or in any proceedings against a company, it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the court, on the application of the liquidator or any creditor or 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.'

Section 339(3) CA provides that: 'If, 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, if any, of the company at the time of the company being able to pay the debt, the officer shall be guilty of an offence…' Section 340(2) CA goes on to provide that: 'Where a person has been convicted of an offence under s.339(3) in relation to the contracting of such a debt as is referred to in that subsection, the court, on the application of the liquidator or any creditor or contributory of the company, may, if it thinks proper to do so, 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.'

Both fraudulent trading and wrongful trading provisions are similar in that the wrongdoing would have surfaced in the course of liquidation of the company or in a proceeding against the company. In addition, both sections impose criminal sanctions as well as make provision for the wrongdoer to be personally liable for the debts or liabilities of the company.

The fraudulent trading provision catches any person who was knowingly a party to the wrongdoing, whereas the wrongful trading catches only the officer of the company. In addition, the bases of liability in both sections are different. In s.340 CA, proof of dishonesty in a personal, subjective sense is needed to establish fraudulent trading. It is not easy to discharge the burden of proving fraudulent intent. It is also necessary to show that the creditor was deceived or misled in order to advantage the fraudster or cause loss to the creditor. In contrast, the basis of liability under s.339(3) CA is focused on the expectation of repayment, and this is assessed objectively on the facts which were known to the defendant officer.

[**Tutorial note:** *The candidates are not expected to state the entire ss.339(3) and 340 (CA). It is sufficient to just state the key elements of the two sections.*]

8 TS had breached the express terms of the contract by failing to provide the transfer to the airport. In claiming damages, the objective of the law is to put the innocent party in the same position as if the contract had been properly performed by TS.

Using the 'but-for' test, the losses are arguably caused by TS's breach.

The next issue then is whether Wong can claim damages under the rule for remoteness of damage in *Hadley* v *Baxendale* (1854). The first limb allows for recovery of damages which may fairly and reasonably be considered as arising naturally from the breach. The second limb allows for recovery of damages which may reasonably be supposed to have been in the contemplation of the parties, as liable to result from the breach, at the time of the contract.

The cost of the additional air tickets and the hotel accommodation arose naturally from the breach. In order for Wong and his family to return to Singapore, extra costs had to be incurred. The loss thus falls within the first limb of *Hadley* v *Baxendale*.

As for the sum of $5,000 as compensation for the loss of a contract deal, it is arguably not a usual loss, thus it falls within the second limb of *Hadley* v *Baxendale*. As such, Wong can claim this loss only if it was within the contemplation of the parties. If TS did not know and cannot be expected to know about the potential contract negotiation meeting at the time of the package tour contract, the loss is not recoverable because it is too remote in law.

There is also the issue of mitigation of loss. Wong is under a duty to take reasonable steps to minimise his loss and cannot claim for unmitigated losses, so it would be important that the costs of the air tickets and hotel accommodation are reasonable and not exceptionally high.

As for the damages for unhappiness and stress, the issue is whether they can be claimed as non-pecuniary loss, which, as a general rule, is not recoverable at common law. However, in *Jarvis* v *SwanTours* (1972), the court decided that in a proper case, damages for mental distress can be recovered in contract (just as damages for shock can be recovered in tort). One such case is a contract for a holiday, or any other contract to provide entertainment and enjoyment. If the contracting party breaches his contract, damages can be given for the disappointment, the distress, the upset and frustration caused by the breach. Hence, Wong can recover damages for unhappiness and stress to compensate him for the loss of entertainment and enjoyment which he was promised, and which he did not get.

9 Carol may take out a derivative action at common law or under s.216 A Companies Act (CA) (Cap 50) as well as an oppression action under s.216 CA or winding up action under s.254 CA.

Derivative action at common law

Carol has to prove 'fraud on the minority' and wrongdoer control preventing a lawsuit being brought against the wrongdoer. It is clear that Alex and Ben had breached their fiduciary duty to the company and caused loss to the company. The proper plaintiff rule provides that the company shall be the plaintiff but a minority shareholder may sue in the name of the company under the exception to the rule in *Foss* v *Harbottle* (1843).

Common law cases have established that the majority misappropriating the company's property or obtaining a benefit to themselves at the company's expense amounted to 'fraud on the minority'. Furthermore, Alex and Ben are in control of the board and they are unlikely to bring an action against themselves. Carol should be able to succeed in showing there was a fraud on the minority.

Section 216A action

Carol 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 they fulfil the conditions set out in s.216A CA and the court grants them 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.

There is nothing to indicate that Carol was not acting in good faith and *prima facie* it should be in the interests of the company to bring an action against the two directors who breached their fiduciary duties. Carol should succeed in her application under s.216A CA.

Section 216 action

Section 216 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, they 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.

It would appear that Alex and Ben had advanced their interests at the expense of Carol's interest. The removal of Carol was in breach of their mutual understanding to allow her to participate in management. Carol should succeed in this action.

Section 254 action

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(1)(i) 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 the company in contravention of an understanding that they will be allowed to participate in managing the company.

It is likely the three friends had incorporated the company on the basis of mutual trust and confidence but that confidence and trust had broken down. In addition, Carol had been removed as a director in breach of the understanding that each of them was to participate in management of the company. Carol should succeed in this action.

10 Pursuant to s.227B Companies Act (CA) (Cap 50), PF will need to show to the court's satisfaction that the company is:

(1) unable to pay its debts; and
(2) that the making of the judicial management order will be likely to achieve one or more of the purposes set out in s.227B(1)(b) CA, namely:

    (i) the survival of the company, or the whole or part of its undertaking as a going concern;
    (ii) the approval under s.210 of a compromise or arrangement between the company and any such persons as are mentioned in that section;
    (iii) a more advantageous realisation of the company's assets would be effected than on a winding up.

The company being unable to pay its debts is relatively easy to prove – by the cash flow or the balance sheet test. Under the cash flow test, the directors need to show that they are unable to repay their debts as they fall due within the next 12 months. The company may fail this test if they are asset rich but illiquid. Alternatively, if their liabilities exceed their assets, the balance sheet test would be satisfied, and they can prove that they are unable to pay their debts. The statutory demand and execution of judgement tests are irrelevant.

Section 227B(b)(i) CA appears to be the more appropriate purpose, i.e. the order would be likely to achieve the survival of the company, or the whole or part of its undertaking as a going concern.

PF will need to cite evidence to show that its current problems are due solely to the supply disruption and give evidence of its plans, the likelihood of success of those plans and strategies to look for alternative suppliers. PF could also adduce evidence, if any, of when the supplier factory will be up and running in Japan. From the facts, it appears that PF may face difficulties as there are very few alternative sources of supply.

PF should also prove that there is a real prospect that the making of the order will lead to the rehabilitation and, ultimately, the survival of the company. In this respect, it would have to adduce evidence to show the court that once its supplies are back on track, client confidence will bounce back and the company would be able to get back on its feet. Market surveys, client feedback, etc could be useful ways in which PF may be able to prove this. Mere confidence on the part of PF's directors would not suffice in this respect.

PF's case for a judicial management order may be strengthened, for example, where the candidate states the assumption that PF is concurrently seeking any business opportunities in Singapore or in the region.

[**Tutorial note:** *The question requires the candidate to state assumptions in their discussion of whether the judicial management is likely to succeed. Marks will be given for any relevant assumptions which the candidate states.*]

1 If candidate is aware judicial power is vested in the Supreme Court and Subordinate Courts, a total of 2 marks should be awarded, being 1 mark each for stating the Supreme Court and Subordinate Courts.

If candidate states the Supreme Court comprises the Court of Appeal and High Court, a total of 2 marks should be awarded, being 1 mark each for stating the Court of Appeal and the High Court.

If candidate states High Court exercises civil, criminal and appellate jurisdiction to hear civil and criminal appeals from the Subordinate Courts, 1 mark should be awarded. If candidate states High Court exercises civil and criminal jurisdiction, 1 mark should be awarded.

[If candidate is aware there are now specialist courts within the Supreme Court, 1 bonus mark should be awarded.]

If candidate states Subordinate Courts comprise the District Court and Magistrates' Court, a total of 2 marks should be awarded, being 1 mark each for stating the District Court and Magistrates' Court.

[If candidate states any of the following courts, namely, Juvenile Court, Coroners' Court and Small Claims Tribunal, 1 bonus mark should be awarded in total.]

If candidate can state and compare the jurisdiction of the District Court and Magistrates' Court, 2 marks should be awarded. If the candidate merely states the Magistrates' Court's civil and criminal jurisdiction is narrower than that of the District Court, 1 mark should be awarded.

2 3 marks should be awarded if candidate explains clearly an offer and distinguishes it from an invitation to treat. 2 marks should be awarded if candidate explains clearly an offer. 1 mark should be awarded if candidate indicates some understanding of an offer.

2 marks should be awarded if candidate explains clearly an acceptance and distinguishes it from a counter-offer. 1 mark should be awarded if candidate indicates some understanding of an acceptance.

3 marks should be awarded if candidate explains clearly consideration. 1 to 2 marks should be awarded if candidate indicates some understanding of consideration.

2 marks should be awarded if candidate explains clearly intention to create legal relations and distinguishes between social and domestic agreements on the one hand and commercial agreements on the other. 1 mark should be awarded if candidate indicates some understanding of intention to create legal relations.

3 4 marks should be awarded if candidate explains clearly the concept of legitimate interest and provides examples in the contexts of sale of business and employment contracts. 2 to 3 marks should be awarded if candidate explains clearly the concept of legitimate interest. 1 mark should be awarded if candidate indicates some understanding of the concept of legitimate interest.

3 marks should be awarded if candidate explains clearly the concept of reasonable scope and provides an example. 2 marks should be awarded if candidate explains clearly the concept of reasonable scope. 1 mark should be awarded if candidate indicates some understanding of the concept of reasonable scope.

3 marks should be awarded if candidate explains clearly the concept of public interest and provides an example. 2 marks should be awarded if candidate explains clearly the concept of public interest. 1 mark should be awarded if candidate indicates some understanding of the concept of public interest.

4 It is sufficient for a candidate to state any FOUR features set out in the answer guide. If candidate explains clearly any feature, 2 to 2·5 marks should be awarded. 1 mark should be awarded if candidate indicates some understanding of any feature.

5 2 marks should be awarded if candidate explains clearly an ordinary share. 1 mark should be awarded if candidate indicates some understanding of an ordinary share.

2 marks should be awarded if candidate explains clearly a preference share. 1 mark should be awarded if candidate indicates some understanding of a preference share.

2 to 3 marks should be awarded if candidate distinguishes clearly the right to income of an ordinary share and a preference share. 1 mark should be awarded if candidate indicates some understanding that the right to income of an ordinary share and a preference share is different.

2 to 3 marks should be awarded if candidate distinguishes clearly the right to return of capital of an ordinary share and a preference share. 1 mark should be awarded if candidate indicates some understanding that the right to return of capital of an ordinary share and a preference share is different.

[1 bonus mark if candidate states the importance of having the rights of preference shares spelt out in the articles or terms of issue. 1 bonus mark if candidate gives example of 'hybrid' version of preference share.]

6 A total of 4 marks for discussion of appointment of a director. 4 marks if candidate states clearly the typical manner of appointment through members' election at a general meeting and explains clearly how company's articles or contract may provide for other ways in which a director may be appointed. 2 to 3 marks if candidate indicates some understanding that typically members elect directors at a general meeting but is aware that company's articles or contract may provide for other ways. 1 mark if candidate indicates some understanding that typically members elect directors at a general meeting.

A total of 6 marks for discussion of removal. 5 to 6 marks if candidate states clearly the typical manner of removal through members' ordinary resolution at a general meeting and explains clearly how company's articles or contract may make it difficult for a director to be removed. 3 to 4 marks if candidate indicates some understanding that typically members remove directors at a general meeting but is aware that company's articles or contract may make it difficult for company to do so. 1 to 2 mark(s) if candidate indicates some understanding that typically members remove directors at a general meeting.

7 1 mark if candidate states when fraudulent and wrongful trading provisions kick in.

2 marks if candidate states fraudulent and wrongful trading provisions impose criminal sanctions as well as make wrongdoer personally liable for debts of the company. 1 mark if candidate states fraudulent and wrongful trading provisions make wrongdoer personally liable for debts of the company.

1 mark if candidate states fraudulent trading provision applies to 'any person' who was knowingly a party to the wrongdoing.

1 mark if candidate states wrongful trading provision applies to 'an officer' of the company.

2 to 2·5 marks if candidate explains clearly the basis for liability under fraudulent trading provision. 1 mark if candidate indicates some understanding of basis for liability under fraudulent trading provision.

2 to 2·5 marks if candidate explains clearly the basis for liability under wrongful trading provision. 1 mark if candidate indicates some understanding of basis for liability under wrongful trading provision.

8 1 mark if candidate states objective of granting damages is to put the innocent party in the same position as if the contract had been properly performed.

1 mark if candidate states and applies correctly the 'but-for' test.

1·5 marks if candidate states clearly first limb of *Hadley* v *Baxendale*. 1 mark if candidate indicates some understanding of first limb of *Hadley* v *Baxendale*.

1·5 marks if candidate states clearly second limb of *Hadley* v *Baxendale*. 2 marks if candidate indicates some understanding of second limb of *Hadley* v *Baxendale*.

1 mark if candidate applies the first limb of *Hadley* v *Baxendale* correctly.

1 mark if candidate applies the second limb of *Hadley* v *Baxendale* correctly.

1 mark if candidate states and applies correctly the mitigation rule.

2 marks if candidate states and applies correctly the rule on recovery of non-pecuniary damages. 1 mark if candidate states or applies correctly the rule on recovery of non-pecuniary damages.

9 If candidate explains clearly any action, 2 to 2·5 marks should be awarded. 1 mark should be awarded if candidate indicates some understanding of any action.

10 Total of 2 marks (1 mark for each requirement) if candidate states court will make judicial management order if:

(1) company is unable to pay its debts; and
(2) the making of the judicial management order will be likely to achieve one or more of the purposes set out in s.227B(1)(b) CA.

1 mark if candidate states one of the three purposes enumerated in s.227B(1)(b) CA is the survival of the whole or part of the company.

2 marks if candidate is able to show how company is unable to pay its debts. 1 mark if candidate suggests that the company is unable to pay its debts.

2 to 3 marks if candidate is able to show how making the judicial management order is likely to achieve survival of the company. 1 mark if candidate suggests making the judicial management order is likely to achieve survival of the company.

Total of 2 marks (1 mark for each assumption) for assumptions made to strengthen PF's case.