Answers

1 The question invites the candidates to demonstrate their knowledge of relationship between statutory law and common law in the Hong Kong Special Administrative Region ('the HKSAR').

It should be noted at the outset that under Articles 8 and 18 of the Basic Law of the HKSAR of the People's Republic of China (Cap 2101) ('the Basic Law'), the main sources of law of the HKSAR are the case law, i.e. the common law and rules of equity, statutory law, i.e. ordinances, subordinate legislations and the Basic Law itself.

Of all the sources, statutory law forms the major part of the law in the HKSAR. Briefly, ordinances are those laws being formally passed or enacted by the Legislative Council ('the LC') for the purposes mainly of, first, codifying existing case laws, second, consolidating the existing law, and, finally creating new law.

The ordinances being made then are interpreted by the court before judgements to be granted by the judges.

However, in giving meaning to the words used by the LC in an ordinance, the court will first consider the Basic Law, which is the highest form of law in the HKSAR and such legislation as the Hong Kong Bill of Rights Ordinance (Cap 383) and the Interpretation and General Clause Ordinance (Cap 1) ('IGCO'). In relationship to the interpretation of a piece of legislation, IGCO serves to consolidate and amend the law relating to the construction, application and interpretation of laws: see long title of IGCO. In addition, the court will also make reference to s.2 of the Ordinance in question in determining the meaning of the words of the ordinance. So in the interpretation of statutory law, the starting point of the court is to make reference to statutory law.

The question arise as to what the court will do if the procedures being mentioned in the foregoing paragraph cannot give a clear meaning of the words in question. In such a case, the court will, then, ascertain the intention of the LC by making use of the common law rules of interpretation. The following are those rules in brief.

Literal Rule

The rule serves to give the ordinary meaning of the words used in the ordinance. Where the meanings of the words are clear and unambiguous, those meanings must be adopted even though the result of the interpretation may be absurd. Dictionaries may be resorted to by the court. However, one must bear in mind the dictionaries are not authoritative in that the meanings in them are not binding on the court.

Golden Rule

The rule requires that where the interpretation of an ordinance allows for more than one meaning, the court should adopt the meaning which avoids the most absurd or repugnant result.

Mischief Rule

The rule may also be referred to as the rule in *Heydon's* case. Under the rule, the court will consider the following in order to give meaning to the words in question:

- The common law position prior to the enactment of the ordinance in question.
- The mischief or defect which the ordinance was trying to deal with.
- The remedy provided for by the Legislative Council, the body responsible for law making.
- The true reason of the remedy.

Having considered those factors, the courts will then give meaning to those words in order to suppress the mischief and enhance the remedy.

Whenever appropriate, the court will also apply the contextual rule, which gives meaning to words in the context of the related ordinance. A particular instance of the contextual rule is the *ejusdem generis* rule. Under the *ejusdem generis* rule, where two or more words of a particular class or kind are followed by a general word, the meaning of the class or the kind will be given to the general word by the court.

The statement does reflect the main function of the LC in that most laws in the HKSAR, which are statutory law, are being made by the LC. However, by reason of the approach of the court in interpreting legislations being mentioned before, it goes too far to say that it is the case law which gives meaning to the words of statutory law. In fact, when the LC is not satisfied with the interpretation by the court of the words of a piece of legislation, the LC will pass a new ordinance to override the decision of the court. To that end, the LC still retain the ultimate power to interpret statutory law.

2 The question invites the candidates to show their knowledge of the postal rule and the doctrine of the privity of contract.

(a) It should be noted at the outset that for the acceptance of an offer to take legal effect, the general rule is that the acceptance must be communicated to the offeror. In this context communication means that the offeror must have the knowledge of the acceptance of the offer either from the offeree or the offeree's agent.

In addition, at law, as the one who makes the initial proposal for the formation of a contract, i.e. an offer, the offeror always has the right to choose the way of communication for the acceptance of the offer, the way being specified in the offer then becomes part of the offer. This principle also applies to electronic transactions: s.17(3) Electronic Transactions Ordinance (Cap 553) ('ETO').

The postal rule refers to the acceptance of an offer by post. Under the rule, acceptance of the offer is completed by the time the letter is posted. However, for the rule to apply, the letter must be properly addressed and stamped. Hence, a contract is formed once the letter is delivered at the post office even though the letter never reaches the offeror. As such, the postal rule is an exception to the general rule: *Adams* v *Lindsell* (1818) UK. It should be noted that postal rule also applies to electronic transactions: s.17 ETO.

However, the offeree is not at will to accept an offer by post. For the postal rule to apply, it must be a chosen, an obvious or a reasonable method of communication in light of the particular circumstances of the case. So, the rule applies when it is in the contemplation of the parties that post will be used as the means of acceptance.

In addition, the postal rule may not apply when means of instantaneous communication are used: *Entores* v *Far East Corp* (1955) UK. For example, where the parties have negotiated either face-to-face, e.g. in a shop or over the phone, it might not be reasonable for the offeree to make use of the rule to indicate the acceptance of an offer.

(b) It should be noted at the outset that the doctrine of the privity of contract has two aspects. The first aspect is that a person cannot acquire and enforce rights under a contract to which he is not a party. The second aspect is that a person who is not a contracting party cannot be liable under it.

Hence in *Dunlop* v *Selfridge* (1915) UK, D, a tyre manufacturer, supplied tyres to X, a distributor, on condition that X could not re-sell the tyres at less than a prescribed retail price. In addition, if X sold the tyres wholesale to trade customers, X must impose a similar condition on those buyers, to observe minimum retail prices. X resold tyres on these conditions to S. Under the contract between S and X, S was to pay D a sum of £5 per tyre if S sold tyres to customers at a price below the minimum retail price. S sold two tyres to customers at a price below the minimum price. D sued S to recover £5 per tyre. It was held that D could not do so under the contract between X and S because D was not a party to that contract.

The following are some of the exceptions to the doctrine:

First, the doctrine does not apply where the beneficiary under a contract sues in some other capacity when the beneficiary is not a party to the contract. Hence, a person can sue for breach of a contract as the administrator of the estate of a deceased who is a party to the contract: *Beswick* v *Beswick* (1967) UK.

Second, the doctrine does not apply when there is a valid assignment of the benefit of a contract. In general, a party to a contract can transfer the benefit of the contract to a third party through the formal process of assignment. The assignment must be in writing and with the consent from the other party to the contract.

The other exception to the rule is when one of the contracting parties has entered into a contract as trustee for the beneficiary. In such a case, if the beneficiary wants the other parties to the contract to fulfil their contractual promises, the beneficiary may initiate a legal action by adding the trustee as a party to the action: *Les Affreteurs Reunis SA* v *Leopold Walford (London) Ltd* (1919) UK.

3 The question invites the candidates to show their knowledge of the law of tort, the law of contract and criminal law.

(a) The law of contract aims at enforcing promises or obligations which are generally the result of agreements between the parties involved. Such promises or obligations are usually not fixed or imposed by law but by the consent of the contracting parties.

A contracting party is in breach of a contract if the party fails to perform any duties created under the contract. A breach of contract is a civil wrong and results in civil proceedings. When there is a breach of contract, the purpose of awarding damages is to put the injured party, in money terms, in that same position as the injured party would have been in had the contract not been breached.

(b) The commission of torts is a civil wrong. The duties forming the subject matter of torts are imposed by law. The primary purposes of torts are mainly about, firstly, the protection of rights or interests being recognised and protected by law, and, secondly, the compensation for the harm being done when such rights or interests are infringed.

It is the victim of the tort who commences a civil action against the wrongdoer for compensation. The object of an award of damages for the breach of tortious duties is to place the victim in the position that the victim would have been in had the tort not been committed.

Criminal law is similar to the law of tort in that it also involves the breach of duties being imposed by law and owed to the whole world. It follows that a person committing an offence may also commit a tort at the same time. However, the aim of criminal law, being different from the law of tort, is to protect the interest of the public at large. Hence, the commission of an offence attracts criminal liabilities.

Most of the criminal actions are initiated by the government against the offenders through criminal proceedings. The offenders, upon conviction, will usually be punished by imprisonment or fine. The offenders will usually have a criminal record at the same time.

4 The question invites the candidates to demonstrate their knowledge of the authority of an agent and the formation of agency relationship by ratification.

(a) It should be noted at the outset that when an agent acquires authority under an agency contract, the agent is said to have actual authority to perform the act on behalf of the principal in question. The actual authority comprises both express and usual or implied authority.

Express authority refers to the authority given by the principal to the agent under the contract between them. In other words, express authority is that is which being explicitly given to the agent by the principal.

An agent's implied authority is determined by the service or the acts which are usually or necessarily done by the agent in light of the trade, business or profession to which the agency contract relates. The scope of implied authority includes those acts of the agent which are 'reasonable and incidental to and necessary' for the performance of the agent's duties effectively. For this reason, implied authority is also referred to as usual authority and usual authority is to be regarded as the expansion of express authority. Hence, an agent having express authority also has usual authority.

In addition, when the express terms relating to an agent's authority are ambiguous or when the agent is given discretion to act for the principal, the law also gives authority to the agent by implication so that the agent's obligation under the contract can be fulfilled.

(b) Where an agent's act is beyond the scope of actual authority or the agent simply does not have the authority to perform the act, the principal is not liable for the agent's act unless the principal chooses to ratify it.

The creation of an agency relationship by ratification refers to the conferment of authority by a principle to the agent after the creation of, for example, the contract by the agent when the agent did not have such authority or acted outside the scope of authority originally given by the principle.

For ratification to be validly made, the principle ratifying the contract must have the appropriate capacity to enter into the contract. Hence, if the memorandum of a company provides that the company shall not enter into a contract of, for example, money lending, the ratification purportedly made by the company regarding a money lending contract by a director on behalf of the company shall have no legal effect.

Further, for ratification to be effective, the principal must have already been in existence by the time the contract in question was concluded. At law, a company cannot ratify a pre-incorporated contract entered into by the promoter of the company: *Kelner* v *Baxter* (1866) UK

5 The question invites the candidates to demonstrate their knowledge of the duties owed by an auditor to a company and the scope of those duties.

It should be noted at the outset that while an auditor of a company owes duties to the company as a whole, the auditor may also be liable to those third parties who, in reliance of the auditor's statements, act upon the statements and suffer damages as a result: *Hedley, Byrne & Co Ltd* v *Heller & Partners Ltd* (1964) UK. The latter one is an auditor's duty in common law, i.e. the common law duty of care.

An auditor of a company is required to make a report to the members of the company on the accounts examined by the auditor, and on every balance sheet, every profit and loss account and all group accounts laid before the company in a general meeting during the auditor's office: s.141(1) Companies Ordinance ('CO'). Further, there is a statutory duty to report whether the report is the true and fair view of the auditor: s.141(3) CO.

In preparing the report, the auditor is under the duty to carry out such investigations as enable the forming of an opinion as to, first, whether proper books of account have been kept by the company and proper returns adequate for the audit have been received from branches of the company not visited by the auditor; and, second, whether the company's balance sheet and (unless it is framed as a consolidated profit and loss account) profit and loss account are in agreement with the books of account and returns.

Where the auditor is of opinion that proper books of account have not been kept by the company or that proper returns adequate for the audit have not been received from branches not visited by the auditor, or if the balance sheet and (unless it is framed as a consolidated profit and loss account) profit and loss account are not in agreement with the books of account and returns, the auditor must state that fact in his report: s.141(4) CO.

To discharge the duties properly, the auditor must use that kind of care, skill and caution which a reasonably competent, careful and cautious auditor would adopt. The test is an objective one. In determining the issue, the courts will take into account the accepted and recommended practice of auditors generally. Whether the auditor has attained that standard is a question of fact and depends on the particular circumstances of the case: *Re London & General Bank (No 2)* (1895) UK.

In performing the duties, the auditor should carry out sample checks in order to check the accuracy of the information obtained and take appropriate professional advice if he sees fit: *Gomento (Sterling Area) Ltd* v *Selsdon Fountain Pen Co Ltd* (1958) UK.

An auditor should not certify unless he believes what he certifies is true: *Re London & General Bank (No 2)* (1895) UK. Nevertheless, the auditor is not expected to act as a detective. Unless the auditor has reason to suspect, the auditor is entitled to rely on the honesty of the responsible officers and employees of the company: *Re Kingston Cotton Mill (No 2)* (1896) UK. Where there exist grounds arousing the suspicion of the auditor, the auditor is then under a duty to clarify by checking the related documents and report the matter to the board of directors of the company: *Re Thomas Gerard & Sons Ltd* (1968) UK.

6 The question invites the candidates to show their knowledge of a prospectus.

(a) It should be noted at the outset that, in the Hong Kong Special Administrative Region ('HKSAR'), a company is not allowed to invite the public to subscribe for shares and or debentures of the company unless the invitation is accompanied by a prospectus. Further, a private company cannot make such an invitation for a private company is prohibited by its articles to do: s.29 Companies Ordinance (Cap 32) ('the CO').

Under s.2 CO, a prospectus means any prospectus, notice, circular, brochure, advertisement, or other document offering any shares in or debentures of a company to the public for subscription or purchase for cash or other consideration.

A prospectus also comprises any document which is calculated to invite offers by the public to subscribe or purchase for cash or other consideration any shares in or debentures of a company.

A company, in this context, includes any company incorporate outside Hong Kong, and whether or not it has established a place of business in Hong Kong.

(b) The prospectus must comply with the provisions of the CO. The required contents are designed to ensure that the investing public is given certain minimum levels of information about the company's financial position, its management and its business prospects.

The required contents of a prospectus are set out the Third Schedule to the CO. The requirements by the CO relating to the content of a prospectus are extremely wide-ranging. The content must include various reports as stipulated in the Third Schedule. These matters include details of the company's share capital, options over shares, recent transactions involving the company, details of material contracts involving the company, directors' interests, accounts for the last five years, and general information about the company and its prospects to enable a reasonable person to form a justifiable opinion of the shares and profitability of the company. An accountant's report, an auditor's report and a valuation report must also be included as supporting documents for the prospectus.

A prospectus must be approved by the Securities & Futures Commission: s.38 D(3) CO. Upon approval, the prospectus must be registered with the Companies Registry before an invitation is made to the public to subscribe for the company's shares or debentures.

A prospectus must be issued in either the English or Chinese languages, but must contain a translation in the other language.

7 The question invites the candidates to show their knowledge of the nature of money laundering and the legal control over money laundering activities.

(a) According to the Guideline On Prevention of Money Laundering issued by the Hong Kong Monetary Authority on 9 July 2010, 'money laundering' covers all procedures to change the identity of illegally obtained money so that it appears to have originated from a legitimate source. Most money laundering activities involve criminals' need to conceal the true ownership and origin of the money in question, to control the money and to change the form of the money.

The money may be from drug dealings or other organised crimes. The proceeds may also relate to terrorism.

In general, money laundering covers the following three stages:

First, the stage of placement. This stage links to the physical disposal of cash proceeds derived from illegal activity.

Second, the stage of layering. This relates to the separation of illicit proceeds from their source by creating complex layers of financial transactions designed to disguise the audit trail and provide anonymity.

Third, the stage of integration. This stage involves the provision of apparent legitimacy to criminally derived wealth. If the layering process has succeeded, integration schemes place the laundered proceeds back into the economy in such a way that they re-enter the financial system appearing to be normal business funds.

(b) The Drug Trafficking (Recovery of Proceeds) Ordinance (Cap 405) ('DTROP') provides for the tracing, freezing and confiscation of the proceeds of drug trafficking and creates a criminal offence of money laundering in relation to such proceeds.

Under s.25(1) of DTROP, subject to s.25A of DTROP, a person commits an offence if, knowing or having reasonable grounds to believe that any property in whole or in part directly or indirectly represents any person's proceeds of drug trafficking, he deals with that property.

Under s.25(3)(a), a person who is convicted upon indictment of having committed the offence is liable to a fine of HKG $5,000,000 and to imprisonment for 14 years. Where a person is on summary conviction, the person is liable to a fine of HKG $500,000 and to imprisonment for three years

Section 25A (I) of DTROP imposes a statutory duty on a person, who knows or suspects that any property in whole or in part directly or indirectly represents the proceeds of drug trafficking or of an indictable offence, or was or is intended to be used in that connection, to make a disclosure to an authorised officer. It is an offence for a person who fails to make such disclosure. A person convicted of the offence may have to face a maximum fine of HKG $50,000 and a maximum imprisonment term of three months: s.25A(7) DTROP.

Nevertheless, under s.25(2) of DTROP, a person is not guilty of the offence if the person proves that he intended to disclose as soon as is reasonable such knowledge, suspicion or matter to an authorised officer; or has a reasonable excuse for his failure to make a disclosure in accordance with s.25A(2) of DTROP.

8 The question invites the candidates to show their knowledge of the tests adopted by the courts in determining whether a contract is a contract of service or a contract for services.

It should be noted at the outset that the Employment Ordinance (Cap 57) does not define what an employment contract is about. As a result, the decisions from the courts have to be considered for the purpose of determining the nature of the contractual relationship between the parties in question. At issue is whether the contractual relationship between David and Eddy is one of a contract of service, i.e. employment relationship or contract for services.

Whether a contract is a contract of service or a contract for services is a question of fact. In *Ferguson* v *John Dawson & Partners* (1976) UK, it was held that, in relation to the actual relationship between the contracting parties, even the express intention of the parties regarding the nature of their contractual relationship could not be conclusive.

To determine the relationship, three different tests have been employed by the courts. These are the control test, the integration test and the multiple or economic test.

Control test

To apply the test, the courts ask whether one party to the contract has control over the other in the carrying out of their duties, i.e. whether one party can tell or instruct the other not only what to do but also how to do it. If the answer is 'yes', then the contract is a contract of service. In such a case, the party giving instructions is the employer and the other is the employee: *Mersey Docks & Harbour Board* v *Coggins & Griffths (Liverpool) Ltd* (1947) UK.

The test is based on the fact that the employer has more knowledge and skill than the employees. Hence, it would be difficult to apply the control test when an employer is not an expert and does not have the knowledge and skill being possessed by the employees occupying the post in question.

Integration test

To overcome the difficulty, the integration test has been employed when an employee cannot be said to be under the control of the employer by reason of the employee's possession of that kind of degree and skill that the employer does not have.

Under the test, the courts ask whether one party has become an integral part of the business organisation of the employer, i.e. whether the party is part and parcel of the organisation as opposed to being an accessory to it. Hence, in *Cassidy* v *Ministry of Health* (1951) UK, it was held that a skilled surgeon was an employee of the Ministry of Health when the surgeon was selected and integrated into the organisation by the Ministry even though the Ministry could not have control over the surgeon.

In *O'Kelly* v *Trusthouse Forte plc* (1983) UK, the court held that, to apply the test, it was relevant to consider whether the person was restricted in his working place, whether he was under any obligation to work and whether any agreement regarding holidays and hours of work had been agreed. However, the test is difficult to apply when, for example, the worker has to provide their own working equipment.

The economic reality test

The economic reality test is the most recent test adopted by the courts in determining the issue. The test looks at the economic reality behind the relationship.

To apply the test, the courts ask whether the workers have been working on their own account. If the answer is 'yes', then the contract is one of for services. The workers are then independent contractors. If the answer is 'no', then the contract is a contract of service and the workers are employees.

A list of factors will be considered by the courts in applying the test. These factors include:

- The degree of control by the employer.
- The extent of financial risk that the workers have to take.
- The ownership of the tools and equipment.
- Whether the workers employed their own helpers.
- Regularity in the method of payment of wages and the working hours.
- The existence of a mutuality of obligations, i.e. whether the employer has a duty to provide work and the employee has a duty to accept it.
- The right to delegate the performance of the contract, e.g. sub-contract the work to the others.

If it is still uncertain as regard the actual relationship between the parties after considering all those factors, the court will then take into consideration the parties' own views about the relationship.

The problem scenario is silent as to whether it was David who gave instruction to Eddy to perform the construction work. However, the facts that they were friends when they worked together may indicate that they were of equal status during the performance. This piece of fact alone therefore cannot determine the relationship between them.

As regards the tools used by Eddy, it was David who supplied and arranged for tools. This suggests the exercise of a certain degree of control by David over Eddy. In addition, the fact may indicate that it was David who ran the business and Eddy was just an accessory to the business. As such, Eddy cannot be said to be part and parcel of David's business. It follows that Eddy might be an employee of David by applying the integration test.

As far as the payment of remuneration is concerned, from the facts of the problem scenario, it appears that the payment of remuneration by David to Eddy was irregular in that whether there was any payment depended very much on the existence of construction contracts. Hence, Eddy might not be David's employee for the payment by an employer to employee for services from the employee is usually regular in point of time.

The fact that David would pay Eddy his part of remuneration before David received the whole contract sum from the other contracting party is very significant in that it appears that Eddy would not be required to bear the financial risk that David had to face if the other contracting parties failed to pay David the contractual price.

Given the above analysis, it is probable that Eddy was an employee of David. As such, David would need to pay Eddy his employee compensation.

9 The question invites the candidates to show their knowledge of the liabilities of a retired partner towards the debts of a partnership.

At issue is whether Carol is liable for the act of Aaron and Bill when the Loan Agreement was entered into by Aaron and Bill after Carol's retirement from the partnership.

In general, a retired partner is only liable for the liability of the partnership incurred before his retirement: s.19 Partnership Ordinance (Cap 38) ('PO'). Nevertheless, a retired partner may be liable for acts done by the partnership after his retirement by the doctrine of holding out as stated in s.16 PO.

Under s.16 PO, if any person knowingly allows himself to be represented as a partner in a particular firm, he is liable as a partner to anyone who has, on the faith of any such representation, given credit to the firm.

For a person to be liable under s.16 PO, the claimant has to prove, firstly, that there must be a holding out, i.e. a representation, secondly, that there is reliance on the representation, and, thirdly, that credit has been given to the partnership in question: see *Nationwide Building Society* v *Lewis* (1998) UK.

To be liable under the doctrine, the representation must be sufficiently clear and unambiguous: *Hudgell Yeates & Co* v *Watson* (1978) UK.

For a person to be liable under s.16 PO, he must have knowledge of the representation and allowed the continuation of the representation: *Lee Yan-wo* v *Sang Lee & Co* (1935) HK. However, a person who allows himself to be held out as a partner negligently is insufficient to make himself liable: *Tower Cabinet Co Ltd* v *Ingram* (1949) UK.

In the *Ingram* case, I was a partner of a partnership to which C was another partner. Subsequent to the dissolution of the partnership, C ordered furniture from TC. C, by mistake and without knowledge and authorisation from I, confirmed the order by a notepaper of the partnership on which I's name appeared. TC sued I for payment of the price of the furniture. TC never dealt with the partnership and came to know I only from the notepaper. It was held that I had not knowingly suffered him to be held out as partner though he might have been negligent or careless in not ensuring that all the notepaper had been destroyed when the partnership was dissolved.

For the purpose of s.16, a third party must show that he was aware of the holding out, that he relied on it: *Nationwide Building Society* v *Lewis* (1998) UK; and that, as a result of the reliance, credit was given to the partnership: *Dao Heng Bank Ltd* v *Hui Kwai-wing* (1977) HK.

In *Dao Heng Bank* case, the bank had been in business with H as a sole proprietor before H changed his business registration to one of partnership with three of his brothers who were named as the other partners. Having discovered the existence of the partnership, the bank continued to deal exclusively with the defendant.

All three brothers of the defendant were nominal partners in that they took no part in the conduct of the business of the firm, paid no money into the business and nor received any profits from it. There was no formal partnership agreement. The three brothers retired from the partnership subsequently; the bank had not been informed of their retirement.

It was held that the three brothers were not liable for the debt as the plaintiff had elected to continue to deal exclusively with the defendant and to treat the partnership as of no significance in its dealings with the firm.

Since both Aaron and Bill had not consulted or informed of the use of the name of the partnership for the purpose of entering into the Loan Agreement, therefore, Carol cannot be said to hold herself out for the purpose of the Loan Agreement deliberately.

While the Bank may argue that the name of Carol as appears in the partnership name by itself has already been a representation, given that Carol has already retired by the time the Loan Agreement was formed, at most, Carol was just negligent in allowing her name to remain in the partnership name. As such, Carol is probably not liable under the doctrine: see the *Ingram* case.

In addition, Carol may also raise the argument that the Bank had not relied on the name of the partnership before the Bank decided to enter into the Loan Agreement when it was only Aaron and Bill who entered into the Agreement. Hence, the Bank cannot establish reliance on the representation by Carol, if any, for the purpose of the Loan Agreement.

By reason of what have been said it is probable that Carol will not be liable for the repayment of the Loan.

Tutorial note: *The candidates should note that, in practice, it is normal for retired partners to allow their name to remain in the name of a partnership by agreement with those partners who have not retried at the same time.*

10 The question invites the candidates to show their knowledge in the duties of a director to account to a company the profits that he earns from his office.

It should be noted at the outset that in exercising their powers, directors owe to the company fiduciary duties, a common law duty of care and skill as well as statutory duties.

The fiduciary duties being owed by the directors are the following:

- In exercising their powers, the directors must act *bona fide* for the benefit of the company: *Re Smith and Fawcett Ltd* (1942) UK.
- The powers being exercised by the directors must be exercised for their proper purpose: *Howard Smith Ltd* v *Ampol Petroleum Ltd* (1974) UK.
- In performing their duties, the directors must not allow any conflict between their personal interests and their duties as directors. The liability of the directors to the company does not depend on whether any loss has been caused to the company: *Regal (Hastings) Ltd* v *Gulliver* (1942) UK.

In relation to the issue of conflict of interest, the following three aspects have to be considered:

- Contract between the company and a member of the board of directors
- Declaration of interest
- Use of company's property or information.

The problem scenario raises issues as regard the use of company's property or information by the previous director of a company.

It is the law that a director must not without the consent from the company use corporate property or information for his own profit. Otherwise, he is liable to account for any profit made. The principle holds true even if a director has ceased to be one but the opportunity came to him when he was a director: *Industrial Development Consultants Ltd* v *Cooley* (1972) UK. In addition, the liability does not depend on whether any loss has been caused to the company. Nor does it depend on any fraud or lack of good faith on the director. *Regal (Hastings) Ltd* v *Gulliver* (1942) UK.

In *Island Export Finance* v *Umunna* (1986) UK, U was a managing director IEF. In 1976, he secured a contract for the company from the Cameroon postal authorities. In 1977, he resigned from IEF due to general dissatisfaction with the company and subsequently obtained orders from the authorities for his own company. IEF sued him for breach of fiduciary duty. It was held that U was not liable for having breached the duty. In relation to the orders, it was the court's view that neither when U resigned nor when he obtained the orders was IEF actively pursuing further business with the Cameroon authorities. At most, IEF had a hope of obtaining further orders but that could not in any realistic sense be said to be a maturing business opportunity of IEF. Hence, a person who has been a director of a company may not be in breach of fiduciary duties if he earns profits from business which, when he was still a director of the company, was not a mature business opportunity of the company.

At issue is therefore whether the contract in question was a mature business opportunity of CS Ltd when John was still a director of CS Ltd. The facts relevant to this issue are that the services provided for by John's company are similar to those of CS Ltd and that John was still a director of CS Ltd when Software Ltd was still an important client of CS Ltd. These two pieces of facts suggest that John may have set up his company for the purpose of obtaining the contract. As such, then John would be required to account for the profit to CS Ltd when the opportunity of having the contract came to him while he was a director: the *Cooley* case.

However, given that the breaking down of the business relationship between CS Ltd and Software Ltd had nothing to do with John by reason that the dispute was between the chairman of the board of CS Ltd and the majority shareholders of Software Ltd. In addition, it is Software Ltd that took the initiative and that the opportunity of having the contract came to John almost one year after John resigned from CS Ltd.

As such, it is difficult, first, to say that John left CS Ltd deliberately for the purpose of gaining the contract, and, second, to connect the opportunity, which was available to John, of having the contract with John's directorship with CS Ltd. As such, it is hard to say that the opportunity about the contract was a mature opportunity of CS Ltd when John left the company.

It follows that, probably, John will not be required to account for the profits to CS Ltd.

1 The question invites the candidates to demonstrate their knowledge of the relationship between statutory law and common law in the Hong Kong Special Administrative Region ('the HKSAR').

8–10 Answers provide a thorough treatment of the question.

5–7 Answers show an understanding of the question area but with little explanation.

2–4 Answers show some knowledge.

0–1 Extremely poor answers that show either no or very little knowledge of the area.

2 The question invites the candidates to show their knowledge of the postal rule and the doctrine of the privity of contract.

(a) and **(b)** 4–5 Answers provide a clear understanding and thorough treatment of the subject areas being examined.

2–3 Less thorough treatment of the question. Towards the bottom of this range are those answers which have only very brief explanation of the subject areas being examined.

0–1 Very weak answers with inadequate information or answers show little understanding of the topic being examined.

3 The question invites the candidates to show their knowledge of the law of tort, the law of contract and criminal law.

(a) 2–3 At the top of this range are those providing a clear understanding and thorough treatment of the subject area being examined.

Towards the bottom of this range will be those showing some knowledge but with little detail.

0–1 Extremely poor answers that show either no or very little knowledge of the area.

(b) 6–7 Answers provide a clear understanding and thorough treatment of the subject areas being examined.

3–5 Less thorough treatment of the question.

0–2 Very weak answers with inadequate information or answers show little understanding of the topic being examined.

4 The question invites the candidates to demonstrate their knowledge of authority of an agent and the formation of agency relationship by ratification.

(a) and **(b)** 4–5 Answers provide a clear understanding and thorough treatment of the subject areas being examined.

2–3 Less thorough treatment of the question. Towards the bottom of this range are those answers which have only very brief explanation of the subject areas being examined.

0–1 Very weak answers with inadequate information or answers show little understanding of the topic being examined.

5 The question invites the candidates to demonstrate their knowledge of the duties owed by an auditor to a company and the scope of the duties.

8–10 Answers provide a thorough treatment of the question.

5–7 Answers show an understanding of the question area but with little explanation.

2–4 Answers show some knowledge.

0–1 Extremely poor answers that show either no or very little knowledge of the area.

6 The question invites the candidates to show their knowledge of a prospectus.

(a) 2–3 At the top of this range are those providing a clear understanding and thorough treatment of the subject area being examined.

Towards the bottom of this range will be those showing some knowledge but with little detail.

0–1 Extremely poor answers that show either no or very little knowledge of the area.

(b) 6–7 Answers provide a clear understanding and thorough treatment of the subject areas being examined.

3–5 Less thorough treatment of the question.

0–2 Very weak answers with inadequate information or answers show little understanding of the topic being examined.

7 The question invites the candidates to show their knowledge of the nature of money laundering and the legal control over money laundering activities.

(a) 3–4 At the top of this range are those providing a clear understanding and thorough treatment of the subject area being examined.

Towards the bottom of this range will be those showing some knowledge but with little detail.

0–2 Extremely poor answers that show either no or very little knowledge of the area.

(b) 5–6 Answers provide a clear understanding and thorough treatment of the subject areas being examined.

3–4 Less thorough treatment of the question. Towards the bottom of this range are those answers which have only very brief explanation.

0–2 Very weak answers with inadequate information or answers show little understanding of the topic being examined.

8 The question invites the candidates to show their knowledge of the tests adopted by the courts in determining whether a contract is a contract of service or a contract for services.

8–10 Answers provide a thorough treatment of the question.

5–7 Answers show an understanding of the question area but with little explanation.

2–4 Answers show some knowledge.

0–1 Extremely poor answers that show either no or very little knowledge of the area.

9 The question invites the candidates to show their knowledge of the liabilities of a retired partner towards the debts of a partnership.

8–10 Answers provide a thorough treatment of the question.

5–7 Answers show an understanding of the question area but with little explanation.

2–4 Answers show some knowledge.

0–1 Extremely poor answers that show either no or very little knowledge of the area.

10 The question invites the candidates to show their knowledge of the duties of a director to the company.

8–10 Answers provide a thorough treatment of the question.

5–7 Answers show an understanding of the question area but with little explanation.

2–4 Answers show some knowledge.

0–1 Extremely poor answers that show either no or very little knowledge of the area.