Answers

1 This question asks candidates to explain and illustrate the literal rule.

In terms of the canons of statutory interpretation, the court will usually begin its interpretation of a statute by applying the literal rule, that is, the words of a statute must be interpreted in their ordinary, literal and grammatical meaning of the words which the legislature has used. This is so even though it produces a harsh result which appears to be contrary to what the legislature intended.

For example, the Revision of Penalties (Amendment) Order, 1988, prescribed that the minimum punishment for robbery was 10 years of imprisonment. It used to be much less before. In an unreported case, a miner was returning to his home in Leribe when a fight broke out between him and certain young boys. A few hundred Rand bills fell out of his pocket during the fight which the boys picked up and ran away. They were all apprehended after a couple of hours and the bulk of the money recovered. Not knowing that penalties had gone up enormously, they admitted their offence before the Magistrate who sentenced them to six months each saying it was their first offence. The High Court in appeal, however, enhanced their punishment to 10 years each because the ordinary, literal and plain grammatical meaning of the new 1988 legislation did not provide for any other alternative.

In a technical statute, however, words are read in their technical and not in their ordinary, literal meaning. For example, the 'waist' or 'skin' when applied to a ship have a technical meaning and if used in a statute dealing with ships, have to be given their technical meaning and not their ordinary, literal meaning. In *McDonald's* case in South Africa, the court was called upon to interpret the words 'well-known' mark. The mark McDonald was not used for several years as the company pulled out of South Africa during the *apartheid* era. It was, therefore, removed because of non-use and later allocated to another, who began using it in a fast-food shop in Gauteng. The legislation provided that a 'well-known' mark cannot be registered by another. It was argued that McDonald is not a 'well-known' mark in South Africa for most of the people. However, it was held that the expression has to be given a technical meaning in light of the law of intellectual property in which a 'well-known' mark means, in the context of the case, well-known to those who use fast-food outlets.

Moreover, not only the words of a statute should be interpreted according to their literal meaning but also in the *context* in which words have been used. Suppose parents ask a child-minder to keep their children amused by teaching them a card game while the parents are away. The child-minder teaches them to play strip-poker. There is no doubt that strip-poker is a card game but equally there is no doubt that parents never intended the child-minder to teach the children such a game. One knows this not from the words used by the parents but from the *context* relating to the proper behaviour and upbringing of the children. Context could be seen as not only the language of the statute, but includes its substantive content, its apparent aim and scope, as well as – within certain limits – the background of the statute. Context and language may be regarded as complementary right from the outset. The context may also include developments in technology or society so long as they come within the original purpose and wording. For example, the Abortion Act, 1967, permitted the termination of a pregnancy in certain circumstances by a 'registered medical practitioner'. When the Act was made, the pregnancy could only be terminated by surgical or intra-amniotic methods, both of which required the continuous presence of a doctor. However, since 1971, a new method became available in which a drug, *prostaglandin*, is administered which induces an abortion over a long period of up to 30 hours. It was held by the court that the new technology must colour the interpretation and that it was not necessary that the doctor be present continually for 30 hours. The doctor still has to approve and start the process but then a nurse could lawfully continue it, starting and regulating the supply of the drug.

2 This question requires candidates to explain the postal rule in the law of contract.

Where the offeror *authorises* the offeree to use post as a means of communication of acceptance, the rule is that once the offeree posts a letter of acceptance properly addressed and stamped to the offeror, acceptance is communicated and a contract arises as soon as the letter is posted, not when it arrives.

For example in the English case of *Household Fire Insurance Co* v *Grant* (1874–80), the defendant applied for shares from the plaintiff company by post. The plaintiff company sent to him a letter accepting his offer. The letter, though properly addressed, for unknown reasons never reached the defendant. When the plaintiff sued the defendant for breach of contract, his defence was there was no contract since he never received the letter notifying him of the acceptance.

It was held that acceptance was complete on the posting of the company's letter. The court recognised that this rule might occasionally cause hardship, but explained that a party can always make the formation of a contract dependent upon the actual communication of acceptance.

Moreover, if a person receives no answer to a written offer, it is up to him to make inquiries. If the rule were to be that a contract is not finally concluded until the letter of acceptance is actually received, the acceptor would never be entirely safe in acting on his acceptance until he, in turn, was told that *his* letter had been received. Expediency requires that the line be drawn somewhere.

This rule has been followed in South Africa in *Cape Explosives Works Ltd* v *S.A. Oil and Fat Industries* (1921). It has been finally settled by the appeal court in the case of *Kergeulen Sealing and Whaling Co Ltd* v *Commissioner for Inland Revenue* (1939). The law in Lesotho is no different.

It must, however, be emphasised that the postal rule does not apply unless the offeror authorised the offeree – expressly or impliedly – to use the post. The justification for the postal rule seems to be that the offeror by his authorisation to use post takes the risks associated with the postal system like delay or even loss of mail altogether.

Where there is no such authorisation the rule does not apply. For example in the case of *Sneiman* v *Volkersz* (1954), the defendant made a verbal offer to the plaintiff. The offer was to remain open till 15 February. On 15 February, the plaintiff posted a letter to the defendant accepting his offer. This letter was received three days later. The defendant refused to perform saying that the acceptance came after the date had expired. The plaintiff argued that according to the postal rule of communication, acceptance was effective as soon as the letter of acceptance was posted and in this case that was 15 February.

It was held since the offeror had not authorised the offeree to communicate by post, the postal rule did not apply. The authority to post acceptance may be inferred where the offer is received by post. The offeror thereby implies that the offeree may also use the same means of communication.

In South Africa the postal rule does not apply where an offer is made verbally *inter praesente*s, to be accepted later, and the parties reside at a distance. In such cases, it cannot be said that the offeror has impliedly authorised the offeree to conclude the contract by posting the letter of acceptance. Christie rightly points out that such offers are usually in the form of an option and remain open for acceptance for a fixed period. If the grantee of the option wishes to exercise the option, he has to do so to the knowledge of the offeror before the end of the fixed period. A letter posted on the last day of the fixed period may only reach the offeror after the option period has expired and that surely was not the intention of the parties.

The postal rule does not apply if the postal services are disturbed and are not operating normally. The postal rule does not apply to instantaneous means of communication like telephone, telex and fax and the acceptance is only communicated when it is actually received. In *Entores Ltd* v *Miles Far East Corporation* (1955), Denning LJ said:

> Suppose, for instance, that I shout an offer to a man across a river or a courtyard and I do not hear his reply because it is drowned by an aircraft flying overhead. There is no contract at that moment. If he wishes to make a contract, he must wait till the aircraft is gone and then shout back his acceptance, so that I can hear what he says. Not until I have his answer am I bound.

He then applied the same reasoning to telephone and telex. And we can extend it to e-mail, fax and other electronic means of communication. All these devices allow the parties to be, as pointed out in *Tel Peda case*, 'virtually in the same position as if they are *inter praesente*s.' Anything that is not clear can easily be clarified and, therefore, application of the postal rule is clearly ruled out. The Appellate Division approved in *Tel Peda case* in *S* v *Henckert* (1981). Christie points out that if the offeror's phone is fitted with an answering machine, he will be bound by an acceptance spoken to his machine, even if it records it poorly or he does not play it back.

The postal rule does apply to telegrams which are treated like posted acceptance. However, not when the offer by a letter is accepted by a telegram unless the offeror expressly authorised it. Otherwise, the contract would be concluded only when the offeror has received the telegram and read it.

Sometimes telegrams are garbled in transmission. In *Darter* & *Son* v *Dold* (1928) a dealer was offered the 'HMV' agency by letter. The dealer sent a telegram accepting 'sole agency' which was garbled to read 'hope agency' when the offeror received it. He took it to mean 'HMV agency' and wired back, 'Confirm agency await your letter.' It was held that the offeror could not possibly be held to have agreed to grant a sole agency.

The rationale for this decision is that the party who chooses to communicate by telegram takes the risk of any errors that may be caused in transmission. In *Darter's case*, the offeror was obliged to suffer for the garbling of his counter-offer because he chose to communicate by telegram. If the offeror communicates his offer through a telegram, he is bound by the words of the telegram as received by the offeree. However, if the telegram reaches the offeree correctly, and the offeree sends his acceptance by telegram which is garbled in the transmission, then any errors in the offeree's telegram do not prejudice the offeree because it was the offeror who initiated the communication by telegram and takes the risks associated with such a communication.

It has been held in South Africa that if an offeree, after posting a letter of acceptance, changes his mind and retracts his acceptance by a speedier mode of communication, say by phone or fax, such retraction would be of no effect (*A to Z Bazaars (Pty) Ltd* v *Minister of Agriculture* (1974)). This decision has been criticised by Christie who suggests, in line with the opinion of English scholars, that it should be possible to withdraw posted acceptance by a faster communication like fax or phone that reaches the offeror before or at the same time as the posted acceptance. Similarly, if the offeree posts a rejection of the offer and thereafter attempts to accept it by a speedier means of communication, which reaches the offeror before the posted rejection, the withdrawal of rejection should hold because the offeror does not suffer any prejudice thereby.

3 This question requires candidates to distinguish between express terms and implied terms in relation to the law of contract.

Express terms are statements expressed in so many words, whether in writing or orally, made by one of the parties with the intention that they be part of the contract and, thus, binding and enforceable through court action, if necessary. It is this declaration of intent that distinguishes a contractual term from mere representation, which, although it may induce the contractual agreement, never becomes a term of the contract.

The express statements must be sufficiently clear for them to be enforceable. In *Scammel* v *Ouston* (1941), Ouston had ordered a van from Scammel on the understanding that the balance of the purchase price would be paid 'on hire purchase terms over two years'. Scammel failed to deliver the van and Ouston sued for breach of contract. He did not succeed. The court found that Scammel used a range of hire purchase terms and held that since the precise terms of his proposed hire purchase agreement were not sufficiently clear, the 'understanding' was not legally binding.

Implied terms, on the other hand, are not expressed in words. They are incorporated into the contract by implication. Implied terms can be divided into two types:

(a) Terms implied by operation of law

Some statutes provide that certain terms are to be implied into the agreement unless the contractual agreement excludes them expressly. For example, under Companies Act, 1967, Table A model articles of association are considered part of the articles of association of the company unless they are specifically excluded. Other implied terms are completely prescriptive and cannot be excluded. For example, under the Hire Purchase Act, 1974, a number of terms have to be implied in every hire purchase agreement.

(b) Terms implied by trade or usage

Terms can also be implied by trade usage if it is so universally known and notorious that a party's knowledge and intention to be bound by it can be presumed. The trade usage would have to be long-established, reasonable, uniformly observed and certain. Trade usage is a hybrid type of term as it can either be inferred by the courts as a tacit term, where the trade usage is known to both parties, or be recognised as an implied term in certain circumstances if one party cannot prove that the other party knew of the trade usage. For example, in *Hutton* v *Warren* (1836), it was held that customary usage permitted a farm tenant to claim an allowance for seed and labour on quitting his tenancy. The term was implied into the contract.

4 This question requires the candidates to discuss the employer's main duties provided under the Labour Code Order, 1992.

(a) Duty to pay wages: Labour Code defines wages in s.3 to mean 'remuneration or earnings' capable of being expressed in terms of money. They can be fixed by mutual agreement or by law in the form of statutory minimum wages [ss.51, 57–58, Labour Code, 1992]

(b) Duty to provide a safe system of work: Labour Code imposes on the employers a duty, so far as is reasonably practicable,

(i) to ensure the safety and health of all their employees;
(ii) to provide and maintain a clean and safe working environment including sanitary facilities;
(iii) to provide and maintain safe plant and systems of work;
(iv) to ensure safety and absence of risk to health in connection with the use, handling, storage and transport of articles and substances;
(v) to provide information and such supervision, as is necessary, to ensure safety and health at work;
(vi) to provide and maintain safe means of access to and egress from any place of work;
(vii) to conduct his undertaking in a way which does not expose the employees to risks to their safety or health, and
(viii) to set up a safety and health committee if there are more than 15 employees to make and maintain arrangements to ensure the safety and health at work of the employees.

Schedule VI of the Labour Code, 1992, provides that the employer must not levy any charge on any of his employees in respect of any of the measures taken to ensure safety in accordance with the Code. The employer's duty is not absolute. It is qualified in most cases by the phrase 'in so far as is practicable'. These words refer to an absence of fault. For example, in *Latimer* v *AEC Ltd* (1953) a factory was flooded during a storm. When the flood waters receded, they left the premises dangerously slippery. The factory owners employed 40 men to spread a large quantity of sawdust to absorb water and grease left behind by the receding waters. However, the sawdust ran out and a small part of factory floor was left untreated. A worker on the next shift slipped on the untreated floor and suffered injuries. It was held that the factory owners had not failed in their duty to provide safe premises. They did what was reasonably practicable and could not be expected to close down the factory to have the floor thoroughly cleaned.

(c) Duty to provide a certificate of service: Labour Code, 1992, imposes a duty on an employer to provide what it calls a certificate of service on the request of an employee who has been employed continuously for a month or more. The certificate would show the period of service and the nature of the employment. The certificate is to be issued only on termination of employment [s.77, Labour Code, 1992].

(d) Duty to give notice for termination of a contract: Parties to an employment contract are free to terminate their contract by giving notice which must not be less than the statutory minimum, whatever the contract may specify. Section 63 of the Labour Code, 1992, prescribes the following periods of statutory notice:

(i) if the employee has been continuously employed for one year or more, one month's notice.
(ii) if the employee has been continuously employed for more than six months but less than one year, a fortnight's notice.
(iii) if the employee has been continuously employed for less than six months, one week's notice and,
(iv) if the employee is on probation, one week's notice.

(e) Duty to provide reason for dismissal: Contracts of employment can be terminated under the Labour Code, 1992, by agreement or a reasonable notice. Summary dismissal is also possible. Section 68 of the Labour Code, 1992, defines dismissal to include non-renewal of a fixed term or indefinite duration contract, if it provided for a possibility of renewal. Section 69 of the Code requires the employer to provide a written statement of the reason for the dismissal not later than four weeks before dismissal. If it is not done, or where the reason given is materially incorrect, the Labour Court, 1992, *inter alia*, may award two weeks' wages to the employee in addition to any other relief.

5 This question asks candidates to explain the fiduciary duties of partners.

A partnership is a contract *uberrimae fidei*, which means that the relationship of partnership is based on utmost good faith, mutual trust and confidence. The courts have compared the relationship between partners to that existing between brothers. The fiduciary duties of a partner include:

(a) Due acceptance and fulfilment of partnership obligations as provided in the agreement.

(b) Duty not to compete with the firm. A partner is not allowed to compete with the business of his firm by carrying on a business of the same nature as, and in rivalry with, that of the partnership. If he does, then the profits earned from such a business must be shared with all other partners. The duty extends not only to partners in an existing partnership; it also extends to persons negotiating for the establishment of a partnership, as well as, to the partners in a partnership which has been dissolved but not finally wound up as in *Wegner's* case. In that case, a partner renewed the partnership lease for his own benefit during the currency of the partnership, even though such lease was to come into operation upon the termination of the partnership. As a result, all benefits acquired by the partner were regarded to have been acquired in conflict of his duty of good faith. They had to be shared with, and accounted for, the partnership. Of course, had the partner waited until the partnership was formally wound up, there would have been no need to share profits as the duty of good faith does not survive the winding up: see *Wegner* v *Surgeson* (1910).

(c) Duty to guard against a conflict of interest. A partner must not place himself in a position where his private interests may conflict with his duty towards the partnership. It is essentially a question of fact whether there is such a conflict. Courts have adopted a test that a partner shall be obliged to account for a benefit he acquired personally if the benefit is 'intimately connected' with the business of the partnership.

(d) Duty of full disclosure. Each partner must render proper accounts of his dealings and this, of course, includes any secret profits as *De Jager's* and *Wegner's* cases show. Each partner is entitled to inspect the books of account [s.5(1)(n)]. The obligation to account arises from the duty to disclose full information: see *De Jaeger* v *Olifants Tin 'B' Syndicate* (1912).

6 This question requires candidates to explain the objects clause, and provide one example of its application.

The memorandum is the basic constitution of the company and must contain clauses which list the minimum legal requirements for setting up and running a company. Every memorandum must contain an objects clause stating the objects for which the company has been formed. This clause restricts the capacity of a company to matters which are within the objects of the company as expressed in the memorandum of association, or reasonably incidental thereto. Any act outside those objects is not simply beyond the authority of the directors or other corporate organ, but beyond the capacity of the company itself. It is *ultra vires* and is treated by law as a nullity having no effect whatever.

In *Ashbury Railway Carriage & Iron Company* v *Riche* (1875), the company was formed with the object to buy and sell railway carriages and to carry on the business of mechanical engineers and general contractors. It entered into a contract for the construction of a railway line. The company agreed to provide Riche with finance for the construction of a railway line in Belgium. It later repudiated the agreement and, when sued for damages, pleaded that it was *ultra vires* of the company to enter into such a contract. The House of Lords held that even ratification by unanimous agreement of shareholders could not have been effective. The contract was *ultra vires* and void and neither side could enforce it. Lord Cairns observed that even if all the shareholders had authorised the company to enter into the contract, it would have made no difference.

In Lesotho, after the amendment of the Companies Act, 1967, as from 1 March 1985, the memorandum of a company must divide the objects into main objects and other objects. The main objects must be described in 'detail and clearly'. Since the plural expression 'main objects' has been used, it would appear that a company may have more than one main object. Since a system of trading licence operates in Lesotho, the main objects, in practice, may usually be limited to those for which trading licences are available.

The 'capacity' of the company is determined by the main objects and the Act states that included in that capacity are 'unlimited objects ancillary to the main objects insofar as they are necessary or reasonably incidental to achieve the main objects'. The ancillary objects, thus, must have relevance to the main objects.

A company, therefore, will have the capacity to carry out such businesses as fall within the scope of the main objects or ancillary objects. The main objects under the Act are deemed to be the 'original purpose' for which a company has been formed. They may not be 'departed from', which probably means that the objects clause will have to be altered in accordance with the Act should the company choose to embark on other activities which are not covered by its main objects.

The amendment does not apply retrospectively. It will, therefore, cover companies that are formed after 1 March 1985 alone.

To prevent companies from having a long list of objects in the memorandum and merely stating at the end that each of them is an independent and a main object of the company, it has been provided that the main objects shall be 'deemed to be the original purpose for which the company has been formed'. It is the courts which would interpret what is meant by the 'original purpose'. Does it mean the immediate business a company embarks upon? Suppose the memorandum states at the end that 'each and every object stated above shall be deemed to be main objects and the original purpose for which the company has been formed'. Would it have legal effect? Only time would tell whether the amendment will succeed in achieving what its framers had in mind.

7 This question tests candidates' understanding regarding the duties of an auditor. The duties of an auditor are both statutory and those provided by the common law.

The statutory duties are provided in the Companies Act, 1967, in s.125. They are:

(a) to make a report to the shareholders on the accounts of their company examined by him;
(b) that he has examined, or satisfied himself with respect to the securities, and examined the books of accounts and the vouchers of the company;
(c) that he has obtained all the information and explanations which to the best of his knowledge and belief were necessary for the audit;
(d) that in his opinion proper books of accounts are kept by the company and proper returns adequate for the audit were received from branches not visited by him;
(e) that the company's balance sheet and profit and loss account are in agreement with the books of account and returns;
(f) that in his opinion to the best of his information and according to the explanations provided to him the company's accounts give the information required by the Companies Act, 1967, in the required manner and give a true and fair view of the state of affairs and profit and loss of the company as at the end of its financial year;
(g) that in his opinion, in the case of group accounts of a holding company, such group accounts have been properly prepared in accordance with the Companies Act, 1967, so as to give a true and fair view of the state of affairs and profit and loss of the company and its subsidiaries.

If an auditor is unable to make his report or unable to make it without qualification, he must include in his report a statement to that effect and set forth the facts and circumstances which prevented him from either making the report or making it without qualification. An auditor's report must, unless all the shareholders present agree to the contrary, be read at the annual general meeting [s.126(2) Companies Act, 1967].

The common law duties of an auditor include the duty:

(a) to acquaint himself with his duties under the articles of the company and the Companies Act, 1967. Under the articles, for example, directors may need the approval of the shareholders in a general meeting before borrowing more than a specified amount. An auditor has to check if this was done.
(b) to act honestly and with reasonable care and skill. It has been explained to mean that an auditor must 'bring to bear on the work he has to perform that skill, care and caution which a reasonably competent, careful and cautious auditor would use.' The standard of reasonable care and skill depends on the generally accepted auditing standards and techniques prevalent at the particular time.
(c) to satisfy himself on material matters by such auditing checks and balances as are commonly recognised.
(d) to make sure that audited balance sheets show the true financial condition of the company.
(e) to make sure that the amount of stock stated to exist is a reasonable probable figure but an auditor has no duty to take stock unless there are suspicious circumstances, and
(f) to act as a watch dog but not a blood hound: see *Re Kingston Cotton Mill Co* (1896).

8 This question invites the candidate to decide whether Joseph can claim against Security Ltd for losses sustained.

An exemption clause is a term in a contract which tries to exempt or limit the liability of a party in breach of the agreement. Exclusion clauses give rise to most concerns when they are included in 'standard form' contracts in which one party in a position of commercial dominance imposes their terms on the other party who has no alternative.

An exclusion clause can have no effect if it is not part of the contract so the first question that has to be decided is whether the exclusion clause has been incorporated into the contract or not. There are three ways in which such a term may be inserted into a contractual agreement: by signature, notice or custom. As it does not appear that Joseph had any previous dealings with the company, the last method of incorporation need not be considered.

Security Ltd would claim that the exclusion clause was contained in the order form, which was signed by Joseph and that it was a contractual document. If a person signs a contractual document containing the exemption clause he is bound by it. This is so even if he has not read the document and regardless of whether he understood it or not: See *Bhikhage* v *Southern Aviation Pty Ltd* (1949). A reasonable person is entitled to assume that anyone signing a contract intends to be bound by it even if that was not his true intention. The only exception to this rule is where the signature was induced by fraud or misrepresentation or duress, which is not the case here.

Even if an exemption clause is incorporated in the contract by signature, the courts, while interpreting it 'lean against it'. It means that courts will not allow a party to exempt itself from liability unless the exemption clause clearly covered the breach that has occurred. In short, exemption clauses are construed narrowly.

Security Ltd admits negligence in the installation of Joseph's security system but claims that the exemption clause exempted them from all liability that arose as a consequence of the wrongful installation or operation of any equipment supplied or fitted by it. These words could refer to (a) physical reasons or (b) legal reasons. Physical reasons could include non-operation of the security system due to lack of electricity, breakage, faulty installation, poor materials, eating up of wires by rats and the like. Legal reasons could include liability for non-operation on account of a breach of a contractual duty of care. In *Galloon* v *Modern Burglar Alarms* (1973), where a burglar alarm system failed to work and the company installing it claimed exemption from liability on the basis of a more or less similar exclusion clause, it was held by the court that the exemption clause only applied when the alarm system

failed to work due to physical reasons. It did not apply when the system failed to work because the defendant company was negligent in installing it. The latter was a legal reason. Similarly, in the given problem, the court is likely to interpret the exemption clause narrowly and hold that the clause exempted Security Ltd from liability only when the security system failed to work for physical reasons. It would *not* exempt Security Ltd from liability when it failed to work for legal reasons, which includes negligent installation.

9 This question asks candidates to advise Peter if he has any claim against Insurance Company in the law of agency.

Peter can succeed against Insurance Company only if he can prove that Sam had ostensible authority from Insurance Company to provide financial advice to Peter within the scope of his employment. Peter could argue that:

(i) Sam was styled and held out to the public as a 'financial adviser' by Insurance Company; he was given business cards which clearly stated so. It does not matter that, in reality, he was employed to sell insurance policies only. In this regard, Insurance Company's representation was unequivocal and unambiguous. By holding out Sam as a financial adviser, Insurance Company knew, or ought to have known, that there was a risk that a member of public may reasonably take the designation of Sam as a financial adviser at its face value and seek and rely on his financial advice. Insurance Company, therefore, assumed a risk and should bear the consequences flowing from it.

(ii) Insurance Company's conduct was such that a reasonable person in Peter's position would have been misled. It was reasonable for him to rely on Sam because many insurance companies offer financial products other than insurance.

(iii) Peter relied upon the representation made by Sam because his visiting card provided by Insurance Company designated him a financial adviser. Peter acted in good faith on Sam's representation to his detriment.

On the other hand, Peter should also consider that in *Southern Life Association Ltd* v *Beyleveld* (1989), where the insurance company provided visiting cards to one of their employees which described him as a financial adviser, the appellate court stated that the phrase 'financial adviser' was equivocal and ambiguous because financial advice may cover all sorts of things. Consequently, Lesotho Insurance Company could argue that their representation or designation of Sam as a 'financial advisor' could not be the basis of creating Sam an agent of Insurance Company by estoppel because it was neither unequivocal nor unambiguous.

Insurance Company may also argue that providing financial advice could never include promising Peter that Sam would ensure that the borrower provided adequate security for the loan. Peter should have himself checked the credit worthiness of Joe and ensured that he provided adequate security before handing over his money: see *Weedon* v *Bawa* (1959).

Peter should consider that since an unambiguous representation is the cornerstone of an agency by estoppel, the court is unlikely to hold that Insurance Company ostensibly authorised Sam to provide financial advice to members of the public. Peter, therefore, is advised not to pursue his claim against Insurance Company for a relief.

10 This question requires candidates to analyse a problem scenario from the perspective of the law of companies focusing on how companies may be fixed with liability for contracts entered into by individual directors.

An individual director is not, as such, an agent of the company. However, an individual director could be an agent in two circumstances: (a) when he has been conferred agency powers by a competent organ of the company (actual authority), or (b) when he has been allowed to represent himself to outsiders as the company's agent (ostensible authority).

Article 79 of Table A provides that the business of the company shall be managed by the directors who may exercise all such powers of the company as may be exercised by the company in a general meeting. Powers are conferred on the directors collectively as a board and, consequently, individual directors cannot bind the company without their being authorised to do so. Article 106 of Table A authorises the directors to appoint one or more of them as a managing director. It is not unusual for the board to entrust to and confer upon a managing director, under article 108 of Table A, all or some of the powers exercisable by them. In such a case, it is the managing director who runs and administers a company and the company is bound by any contract entered into by the managing director. However, in the given problem, there is nothing to indicate that John has been expressly authorised to enter into a contract with Sandeep and so the company cannot be made liable on this basis.

Authority could be conferred on John impliedly as well. In *Hely-Hutchinson* v *Brayhead Ltd* [1967], Richards was not appointed its managing director but acted as such with the acquiescence of the board. As a professional accountant, he would often make final decisions on financial matters on behalf of the company without seeking prior authority of the board of directors. He would just report them to the board in due course. The board acquiesced in this course of conduct. Brayhead wanted to take-over another company called Perdio Electronics Ltd, which was in financial trouble. Lord Suirdale, the chairman and managing director of Perdio, had personally guaranteed a loan of £50,000, which had been advanced to the company by a merchant bank. He was asked to inject more capital as a personal loan into Perdio but was unwilling to do so unless Brayhead took over the guarantee for the £50,000 loan he made earlier. Richards purported to do that on behalf of Brayhead and Lord Suirdale advanced further sums to Perdio. Perdio later went into liquidation and the bank sought to enforce the guarantee given by Richards on behalf of Brayhead. It was held that Brayhead was liable because Richards possessed that authority as its *de facto* managing director. His authority was implied from the conduct of the parties and the circumstances of the case. The court took into account that in the past he had taken final decisions which were just reported to the board which acquiesced in such conduct. Consequently it could be said that the implied authority of Richards resulted from such acquiescence.

Another way in which an individual director may bind his company is through the operation of the principle of ostensible authority. This arises where an individual director is held out by other members of the board of directors as having the authority to bind the company. The leading case on this is the *Freeman and Lockyer* v *Buckhurst Park Properties (Mangal) Ltd* (1964). In that case, Kapoor, though never appointed as such, acted as a managing director. He engaged the plaintiffs, a firm of architects, to do certain work for the company, which they did. The plaintiffs sued the company for their fees. The court held that the company was liable for their fees. The board knew that Kapoor had throughout been acting as a managing director, and by such conduct represented that he had the authority to enter into contracts of a kind which a managing director would in the normal course be authorised to enter on behalf of the company. The plaintiffs, thus, were induced to believe that Kapoor was authorised to enter into contracts on behalf of the company with them for their architectural services. Moreover, the articles did not preclude delegation of management powers to a managing director. The company was held liable to pay the plaintiffs.

The situation in the problem is very similar to that in *Hely-Hutchinson* v *Brayhead Ltd* and *Freeman and Lockyer* v *Buckhurst Park Properties (Mangal) Ltd*. John, to the knowledge of his fellow directors, refers to himself as the managing director and the chief executive of Maseru (Pty) Ltd, although he has never been officially appointed as such. Indeed, the other directors are happy at this arrangement and have never overturned any of the transactions that John made. Sandeep, thus, has been induced to believe that John is authorised to enter into contracts on behalf of Maseru (Pty) Ltd, particularly when Table A articles do not preclude delegation of management powers to a managing director. John also possessed implied authority as its *de facto* managing director. His authority could be implied from the fact that the day-to-day running of the business has been left to John, that the other directors are happy at this arrangement and have never overturned any of the transactions that John made. Consequently it could be said that the implied authority of John resulted from such acquiescence.

Under the circumstances, Maseru (Pty) Ltd are bound by the contract with Sandeep to refurbish the offices of Maseru (Pty) Ltd at a cost of R1 million. This contract was clearly within the scope of a managing director's implied and ostensible authority. Consequently, Maseru (Pty) Ltd are liable to pay Sandeep R1 million for the work done or face an action for breach of contract.

Fundamentals Level – Skills Module, Paper F4 (LSO)
Corporate and Business law (Lesotho) **June 2009 Marking Scheme**

This marking scheme is given only as a guide to markers in the context of suggested answers. Scope is given to markers to award marks for alternative approaches to a question, including relevant comment, and where well reasoned answers are provided.

1 This question asks candidates to explain and illustrate the literal rule.

6–10 Answers in this band will provide a good to complete answer demonstrating a clear understanding of the literal rule and provide one illustration showing its working.

0–5 A less complete answer, some but limited understanding of the literal rule. Lower band answers would show little or no understanding.

2 This question requires candidates to explain the postal rule in the law of contract.

6–10 A good to complete answer dealing with all the aspects of the postal rule. It is expected that cases or examples will be provided in the higher band answers and these will be rewarded.

0–5 A less detailed answer, perhaps recognising what the question relates to but lacking in detailed knowledge of the rules. Lower band answers would show little or no knowledge of the topic.

3 This question requires candidates to distinguish between express terms and implied terms in relation to the law of contract.

6–10 A good description of differences between express and implied terms.

3–5 Some awareness of the area but lacking in detailed knowledge.

0–2 Little or no knowledge of the area.

4 This question requires the candidates to discuss an employer's main duties provided under the Labour Code Order, 1992.

6–10 A complete list of employer's main duties with some details.

3–5 Some awareness of the area but lacking in detailed knowledge.

0–2 Little or no knowledge of the area.

5 This question tests candidates' understanding regarding the fiduciary duties of partners.

8–10 A thorough to complete answer explaining the fiduciary duties referring to relevant cases or examples.

5–7 Reasonable treatment of the area generally.

0–4 Very unbalanced answer, lacking in understanding of the question as a whole.

6 This question requires candidates to explain the objects clause, and provide at least one example of its application.

8–10 A thorough to complete answer explaining the objects clause with a relevant case or example. Discussion of Lesotho's special provisions regarding the objects clause.

5–7 A clear understanding of the general principles but perhaps lacking in detail or unbalanced in only dealing with some issues.

0–4 Very unbalanced answer, lacking in understanding of the question as a whole.

7 This question tests candidates' understanding regarding the duties of an auditor. The duties of an auditor are both statutory and those provided by the common law.

6–10 Thorough to good treatment of the topic, clearly setting out the duties of an auditor under the Companies Act, 1967, and the common law.

0–5 Reasonable to weak answer, perhaps showing some knowledge but incomplete understanding of the topic generally. Lower band answers will be unbalanced and will show very little or no understanding.

8 This question invites the candidate to decide whether Joseph has a claim against Security Ltd for losses sustained. This question requires candidates to analyse a problem scenario from the perspective of the law of contract and to apply that law appropriately.

8–10 A thorough analysis of the scenario focusing on the appropriate rules of law and applying them accurately. It is extremely likely that cases will be cited in support of the analysis and/or application.

5–7 A fairly accurate recognition of the problems inherent in the question, together with an attempt to apply the appropriate legal rules to the situation.

2–4 An ability to recognise some, although not all, of the key issues and suggest appropriate legal responses to them. Or, a recognition of the area of law but no attempt to apply that law.

0–1 Very weak answer showing no, or very little, understanding of the question.

9 This question asks candidates to advise Peter if he has any claim against Insurance Company in the law of agency. This question focuses on a number of issues in the law of agency. As with the other questions in this section, it requires candidates to analyse the problem scenario and to apply the law appropriately.

8–10 A complete answer, highlighting and dealing with all the relevant issues presented in the problem scenario. It is most likely that the cases will be referred to, and credited.

5–7 An accurate recognition of the problems inherent in the question, together with an attempt to apply the appropriate legal rules to the situation in the law of agency.

2–4 An ability to recognise some, although not all, of the key issues and suggest appropriate legal responses to them. A recognition of the area of law but no attempt to apply that law.

0–1 Very weak answer showing no, or very little, understanding of the question.

10 This question requires candidates to analyse a problem scenario from the perspective of the law of companies focusing on how companies may be fixed with liability for contracts entered into by individual directors.

8–10 A good analysis of the scenario focusing on the relevant rules of law and applying them accurately citing relevant case or cases.

5–7 A clear understanding of the general law but perhaps lacking in detail or application to the facts of the scenario.

0–4 Weak answer lacking in knowledge or application, with little or no reference to the legal rules.