
Answers

- 1 (a) According to the literal rule, the literal meaning of words in a statute is to be given effect to. The literal rule of statutory interpretation should be the first rule applied by judges. Under the literal rule, the words of the statute are given their natural or ordinary meaning and applied without the judge seeking to put a gloss on the words or seek to make sense of the statute. In *R v Harris* [1836], the defendant bit off his victim's nose. The statute made it an offence 'to stab, cut or wound'. The court held that under the literal rule, the act of biting did not come within the meaning of 'stab, cut or wound' as these words implied an instrument had to be used. Therefore the defendant's conviction was quashed.
- (b) The *ejusdem generis* rule applies so that general words following specific words should be read as being in the same group as the specific words. In *Knott v Blackburn* [1944], the statute provided that a person found in or upon 'any dwelling house, warehouse, coach-house, stable or outhouse, or in any enclosed yard, garden or area' for any unlawful purpose shall be deemed to be a rogue and vagabond. The court held that 'area' must be construed *ejusdem generis* with, and was a space akin to a yard or garden. Railway sidings were not included in the word 'area'.
- (c) The golden rule requires a provision in a statute to be construed in accordance with the plain meaning of the words unless it gives rise to an absurd result. The golden rule qualifies the literal rule in that the literal rule is not to be applied where doing so will lead to absurdity or injustice. In *R v Allen* [1872] the statute stated that 'whosoever being married shall marry any other person during the lifetime of the former husband or wife is guilty of an offence'. Under a literal interpretation of this section the offence would be impossible to commit since civil law will not recognise a second marriage. Thus any attempt to marry in such circumstances would not be recognised as a valid marriage. The court applied the golden rule and held that the word 'marry' should be interpreted as 'to go through a marriage ceremony'. The defendant's conviction was upheld.
- (d) The mischief rule is applied in situations where there is an ambiguity in the meaning of the words in a statute. When using the mischief rule, the court interprets the statute by considering the common law position prior to the passing of the statute, the mischief or defect for which the common law did not provide, and the remedy Parliament resolved to cure the defect.

- 2 Limited liability partnerships (LLPs) are governed by the Limited Liability Partnership Act (Cap 163B). Companies are governed by the Companies Act (Cap 50).

A LLP gives owners the flexibility of operating as a partnership while having a separate legal identity, like a company. This means that the LLP and company are each a body corporate, which has a legal personality separate from its partners/members and directors (s.4 LLP Act and s.19(5) Companies Act respectively). A LLP and a company have these attributes:

- A LLP and a company enjoy perpetual succession, which means any change in the partners of a LLP/members and directors of a company will not affect its existence, rights or liabilities;
- A LLP and a company can sue and be sued in its name;
- A LLP and a company may acquire and hold property in its name;
- A LLP and a company may contract using a common seal in its name; and
- A LLP and a company may do such other acts and things in its name, as bodies corporate may lawfully do.

Like shareholders and directors in a company who will not be held personally liable for business debts incurred by the company, the partners of the LLP will not be held personally liable for any business debts incurred by the LLP (*Salomon v A Salomon & Co* [1897] and s.8 LLP Act respectively).

However, a LLP is similar to a partnership in that every partner of a limited liability partnership is the agent of the limited liability partnership (s.9(1) LLP Act). The act of a partner in the ordinary course of business binds the LLP. For a company, a director does not have authority to bind the company unless he is authorised by the board to do so (*Panorama Developments Ltd v Fidelis Furnishing Fabrics Ltd* [1971]). In terms of internal management, an LLP is run like a partnership (s.10 of LLP Act). The business of the company will be managed by the directors (s.157A of Companies Act).

A LLP and a company are required to keep accounting records, profit and loss accounts and balance sheets that will sufficiently explain the transactions and financial position of the LLP and company (s.25 LLP Act and s.201 Companies Act respectively).

- 3 (a) (i) A misrepresentation is fraudulent if the maker of the statement knew it was false or did not believe in the truth of the statement or was recklessly careless about whether the statement was true or false. In *Derry v Peek* [1889], the defendant stated in a prospectus that the company had the right to use steam-powered trams as opposed to horse-powered trams. However, at the time the right to use steam-powered trams was subject to approval by the Board of Trade, which was subsequently refused. The claimant purchased shares in the company in reliance of the statement made and brought a claim based on the alleged fraudulent representation of the defendant. The claimant failed because the statement was not fraudulent but made in the honest belief that approval was forthcoming.
- (ii) A misrepresentation is negligent if the maker made the statement without having reasonable grounds for his/her belief. In *Howard Marine v Ogden* [1978] the claimant, Ogden, hired two dredging barges from the defendant, Howard Marine (HM), for £1,800 per week to carry out certain excavation works for Northumbrian Water Authority. In order to make an accurate estimate for tender of the work to be completed, Ogden asked HM for the capacity of the barge. HM checked

the Lloyds Register and stated its capacity to be 850 cubic metres. In fact the entry in the Lloyds Register was wrong. The capacity was in fact much lower. Consequently the work carried out by Ogden took much longer and cost a great deal more to perform. The claimant brought an action for negligent misrepresentation. HM argued that they had reasonable grounds for believing the statement to be true as they had checked the Lloyds Register. The court held that the defendant had not discharged the burden of proof by demonstrating they had reasonable grounds for believing it to be true, as they had the registration document which contained the correct capacity and there was no reason why they should have chosen the Lloyds Register over the registration document.

(iii) A misrepresentation is innocent if the maker made the statement with reasonable grounds for his/her belief. In *Leaf v International Galleries* [1950], the claimant purchased a painting from the defendant. Both parties believed that the painting was by the artist Constable. In fact, five years later the claimant discovered the painting was not a Constable. The court ruled that there was innocent misrepresentation in this case.

(b) The four bars to rescission are:

- affirmation of the contract in that the representee, with full knowledge of the facts, decides nonetheless by words or action to keep the contract alive (*Long v Lloyd* [1958]);
- lapse of reasonable time (*Leaf v International Galleries* [1950]);
- restitution in *integrum* is impossible in that it is impossible to return the parties to their original position before the contract (*Erlanger v New Sombrero Phosphate Co* [1878]);
- third party rights are involved in that a third party has acquired for value an interest in the subject matter of the contract (*Car & Universal Credit v Caldwell* [1964]).

(Candidates may discuss any two of the four above bars.)

4 (a) Damages may be liquidated or unliquidated. Liquidated damages refer to damages that have been pre-agreed to by the parties in the contract; such damages may be recovered if they reflect a genuine pre-estimate of the possible losses. In order for a liquidated damages clause to be upheld, two conditions must be met. First, the amount of the damages identified must roughly approximate the damages likely to fall upon the party seeking the benefit of the term. Second, the damages must be sufficiently uncertain at the time the contract is made that such a clause will likely save both parties the future difficulty of estimating damages.

Unliquidated damages refer to damages that have not been pre-agreed to by the parties in the contract and are thus damages that are awarded or determined by the court.

(b) A party in breach of contract is not liable for losses that are too remote. *Hadley v Baxendale* [1854] laid down the test on remoteness of damage. In that case, a shaft in Hadley's mill broke rendering the mill inoperable. Hadley hired Baxendale to transport the broken mill shaft to an engineer in Greenwich so that he could make a duplicate. Hadley told Baxendale that the shaft must be sent immediately and Baxendale promised to deliver it the next day. Baxendale did not know that the mill would be inoperable until the new shaft arrived. Baxendale was negligent and did not transport the shaft as promised, causing the mill to remain shut down for an additional five days. Hadley had paid £2 four shillings to ship the shaft and sued for £300 in damages due to lost profits and wages. The jury awarded Hadley £25 beyond the amount already paid to the court and Baxendale appealed. The court laid down the following principles:

1. Damages would not be too remote if they may fairly and reasonably be considered as arising naturally. Damages would be considered to have arisen naturally if, in the usual course of things, such damages would have been incurred.
2. If the loss were such that it would not normally have arisen, it would be exceptional loss. Such exceptional loss can be claimed if it was within the contemplation of the parties at the time of the contract.

Hadley was entitled to recover lost profits from the five extra days the mill was inoperable pursuant to limb 1. Hadley was not entitled to recover special profits pursuant to limb 2 because Baxendale did not know that the mill was shut down and would remain closed until the new shaft arrived. Loss of profits could not fairly or reasonably have been contemplated by both parties in case of a breach of this contract without Hadley having communicated the special circumstances to Baxendale.

5 (a) The memorandum and articles constitute a contract between the company and its members and among the members *inter se*. It binds even new members entering the company after incorporation of the company. This contract is deemed to contain covenants on the part of each member to observe all the provisions of the memorandum and articles. Therefore every member has a personal right to have the terms of the memorandum and articles observed. The legal effect of a memorandum is in s.39 Companies Act (Cap 50) which states that a company's memorandum, when registered, shall bind the company and its members to the same extent as if they respectively had been signed and sealed by each member and contained covenants on the part of each member to observe all the provisions of the memorandum. Non-compliance with the articles amounts to procedural irregularity. If a provision of a company's memorandum or articles of association is not observed then:

1. in case of non-compliance by a company, a member may be able to obtain a declaration or injunction requiring the company to comply; and
2. in case of non-compliance by a member, another member of the company may be able to obtain declaratory or injunctory relief or damages.

- (b) Provisions in the memorandum may be altered by a special resolution (s.26 Companies Act (Cap 50)), which is a resolution that is passed by at least three-fourths of the votes cast and where the requisite notice period has been given (s.184 Companies Act). The notice period is 14 days for a private company (s.184(1)(a) Companies Act) and 21 days for a public company (s.184(1)(b) Companies Act). This is subject to two exceptions. First, a provision which could not be altered before the Companies (Amendment) Act 2004 came into effect may be altered only if all the members of the company agree. Second, the memorandum may contain an entrenching provision, in which case it may be included, altered or removed only if all the members of the company agree (s.26A Companies Act).

Provisions in the articles may be altered by a special resolution (s.37 Companies Act). When voting to alter an article, a member must vote '*bona fide* for the benefit of the company as a whole' (*Allen v Cold Reefs of West Africa Ltd* [1900]). The power to alter articles may be subject to s.26A Companies Act and any conditions in the company's memorandum and articles of association (s.37 Companies Act). Where the company has different classes of shares, and there is a provision in the memorandum or articles authorising the alteration of class rights only upon the consent of some specified proportion of holders of the shares of that class (a Modification of Rights Clause (MOR)), the procedure set out in the MOR has to be complied with.

- 6 (a) Prior to the introduction of judicial management in Singapore, a company that could not pay its debts when they fell due could not prevent its creditors appointing a receiver or applying for its liquidation. Often, such creditor action caused the premature demise of a company which could otherwise have been nursed back to financial health. Placing a company in receivership in many cases amounted to signing its death warrant as creditors scrambled to enforce their securities. The company may be liquidated, even though at the end of the day, the company's assets may have exceeded its liabilities.

When the court makes a judicial management order, a moratorium is put in place while the judicial management order is in force, during which period the company is given a temporary respite from the pressure of its creditors and liabilities. This period is to be used by the judicial manager to seek to achieve one or more objectives of the judicial management order, namely, the survival of the company or its business, the approval of s.210 Companies Act (Cap 50) scheme of arrangement or compromise, or a more advantageous realisation of the going concern value of the company's assets.

- (b) In theory, judicial management benefits the company and its members by protecting them from a forced liquidation at the behest of its creditors. If the objectives of judicial management were achieved (for instance, the company or its business survived or a s.210 scheme of arrangement or compromise were entered into between the company and its creditors which helped to turn the company around), the members benefit because, whereas the company could have been wound up as an insolvent company, the rescued company may even start to be profitable.

Unsecured creditors of a company also benefit if the company's assets are insufficient to pay off its debts. If the company were to be liquidated, the unsecured creditors, who rank after secured creditors, often end up unpaid. However, should the company be rehabilitated, or should the judicial manager achieve his objective of better realisation of the company's assets than at winding up (for instance, in exercising his powers under s.227H Companies Act, he managed to avoid a piecemeal fire-sale of the assets), the probability of an unsecured creditor's chance of eventually getting paid or being paid more than what he otherwise may obtain in liquidation, may increase.

- 7 Section 340(1) Companies Act (Cap 50) 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 340(5) Companies Act goes on to provide 'Where any business of a company is carried on with the intent or for the purpose mentioned in subsection (1), every person who was knowingly a party to the carrying on of the business with that intent or purpose shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$15,000 or to imprisonment for a term not exceeding seven years or to both.'

Section 339(3) Companies Act 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.' The same section goes on to state that 'the officer shall be liable on conviction to a fine not exceeding \$2,000 or to imprisonment for a term not exceeding three months'.

The bases of liability in both sections are different – the former deals with fraud whilst the latter deals with recklessness or unreasonableness. In s.340 Companies Act, 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. In contrast, the basis of liability under s.339(3) Companies Act is focused on the expectation of repayment, and this is assessed objectively on the facts known to the defendant officer.

- 8 An understanding of offer and acceptance is needed to determine whether an agreement exists between two parties in the scenario. Agreement consists of an offer which is an indication of one person (the 'offeror') to another (the 'offeree') of the offeror's willingness to enter into a contract on certain terms without further negotiations. A contract is said to come into existence when acceptance of an offer (agreement to the terms in it) has been communicated to the offeror by the offeree and there is consideration given by the offeror and offeree.

The posting placed by John on Straits Times is *prima facie* an invitation to treat: *Partridge v Crittenden* [1968]. The posting, however, can arguably become an enforceable offer – if it can be shown that John had the requisite intent. That is, he is willing to be bound to his statement on the posting, to sell on the response by anyone who was willing to offer him \$45,000. Unfortunately, when Mary called in response to the advertisement, it was not to accept the offer but only to check for the best price.

The telephone conversations between John and Mary are therefore exchanges in negotiation of a contract. The statement made by John on Mary's request for the highest current offer however is unlikely to be treated as an offer, following the case of *Harvey v Facey* [1893]. There it was held that a response to an inquiry for price did not constitute an offer but merely an invitation to the addressee to make an offer. The Privy Council held that indication of lowest acceptable price does not constitute an offer to sell. Rather, it is considered an offer to treat (i.e. to enter into negotiations).

No contract existed between the two parties. The first phone call was simply a request for information, so at no stage did John make a definite offer that could be accepted.

Accordingly, when Mary left her message on the voicemail machine, she was not making an acceptance but merely communicating her offer to John. John has the option to accept or reject the offer. Accordingly, John will not be bound by a contract to sell the car to Mary for \$43,500.

- 9 Section 157(1) Companies Act (Cap 50) requires the application of honesty and discharge of reasonable diligence by directors. Yong Pung How CJ observed in *Lim Weng Kee v PP* [2002] that:

'... [T]he civil standard of care and diligence expected of a director is objective, namely, whether he has exercised the same degree of care and diligence as a reasonable director found in his position. The standard is not fixed but a continuum depending on various factors such as the individual's role in the company, the type of decision being made, the size and the business of the company. ...'

The Singapore High Court in *Vita Health Laboratories Pte Ltd and others v Pang Seng Meng* [2004] has approved the principles laid down by Jonathan Parker J in *Re Barings plc (No 5)* [1999] that:

- (i) Directors have, both collectively and individually, a continuing duty to acquire and maintain a sufficient knowledge and understanding of the company's business to enable them properly to discharge their duties as directors.
- (ii) Whilst directors are entitled (subject to the articles of association of the company) to delegate particular functions to those below them in the management chain, and to trust their competence and integrity to a reasonable extent, the exercise of the power of delegation does not absolve a director from the duty to supervise the discharge of the delegated functions.
- (iii) No rule of universal application can be formulated as to the duty referred to in (ii) above. The extent of the duty, and the question whether it has been discharged, must depend on the facts of each particular case, including the director's role in the management of the company.'

Since Mrs Lim was appointed the managing director, she undertook the responsibility of ensuring that she understood the nature of the duty she was called upon to perform. According to *Lim Weng Kee v PP* [2002], the civil and criminal standards of care and diligence expected of a director are the same, that is, whether he exercised the same degree of care and diligence that a reasonable director in his position would have. The subjective lack of experience and knowledge of the individual director is irrelevant to his conviction. As managing director, she would be expected to oversee and monitor closely the operations of the company. She would be measured against the standard of a reasonable managing director in her position.

According to s.157C(1) Companies Act:

'Subject to subsection (2), a director of a company may, when exercising powers or performing duties as a director, rely on reports, statements, financial data and other information prepared or supplied, and on professional or expert advice given, by any of the following persons:

- (a) an employee of the company whom the director believes on reasonable grounds to be reliable and competent in relation to the matters concerned;
- (b) a professional adviser or an expert in relation to matters which the director believes on reasonable grounds to be within the person's professional or expert competence;
- (c) any other director or any committee of directors upon which the director did not serve in relation to matters within that other director's or committee's designated authority.'

Section 157C (2) of Companies Act goes on to provide:

'Subsection (1) shall apply to a director only if the director –

- (a) acts in good faith;
- (b) makes proper inquiry where the need for inquiry is indicated by the circumstances; and
- (c) has no knowledge that such reliance is unwarranted.'

Although Mrs Lim could delegate her powers, she is not allowed to abdicate her responsibilities. On the facts, she appeared to have lost control completely and left Luke to his own devices without any form of supervision or oversight. In order for her to rely on s.157C as a defence, she would, among other things, have to make proper inquiry where the need for inquiry is indicated by the circumstances. If she did not even apply her mind to consider the matters placed before her, it is difficult to see how she could have made any proper inquiry in situations where inquiry is needed.

Mrs Lim is in breach of her duty to act with care and diligence, which is a duty set out under s.157(1) Companies Act and a duty under general law. Breach of the statutory provision s.157(1) Companies Act would result in Mrs Lim being:

- (a) liable to the company for any profit made by her or for any damage suffered by the company as a result of the breach of any of s.157(1) Companies Act; and
- (b) guilty of an offence and shall be liable on conviction to a fine not exceeding \$5,000 or to imprisonment for a term not exceeding 12 months.

Breach of the duty to act with care and diligence would result in Mrs Lim having to compensate the company in damages for any loss or damage suffered by the company.

The liquidator may bring a civil action on behalf of the company against Mrs Lim for breach of her duty to act with care and diligence.

- 10** This question is about the avenue provided by Companies Act to a member to bring an action on behalf of the company in situations where the board of the company refuses to bring an action. A member who feels that a wrong has been done to the company may request the board of directors to take whatever action is necessary against the person. If the director refuses to take action, the member may apply to court under s.216A Companies Act for leave to bring an action in the company's name.

Carol should apply to the court under s.216A Companies Act (Cap 50) to seek permission to bring an action against Jack on behalf of Win. If the court gives leave, Carol may take the necessary steps to initiate the action using the company's name.

Carol will have to satisfy these requirements under s.216A Companies Act before the court will grant her permission to bring the action on behalf of the company, namely:

- (1) she is a member;
- (2) she has given 14 days' notice to the directors of the company that she intends to apply to the court under s.216A Companies Act;
- (3) she is acting in good faith; and
- (4) it appears *prima facie* in the interests of the company that the action be brought.

Carol holds 2% of the shares in Win. She would be a member of the company.

It should not be difficult for Carol to give notice to the board of directors of Win. Notice to directors is required in order to give them the opportunity to commence the action themselves. The notice should state what it is that Carol wishes the directors to do.

With regards to the requirement of good faith, it was decided in *Teo Gek Luang v Ng Ai Tong* [1999] that the fact that the applicant was asked to resign and did leave the company on unhappy terms does not necessarily lead to the conclusion that she was not acting in good faith in seeking to bring the action.

The requirement that the action must be *prima facie* in the interests of the company is a key consideration. If there is a reasonable basis for the complaint, and a legitimate or arguable case against Jack in relation to failure of the information technology system and his failure to recover debts for the company, it would appear to be *prima facie* in the interest of the company to pursue an action against Jack. Once the court is satisfied that there is an arguable case against Jack, the onus shifts to the directors of Win to explain why it would not be in the interests of the company to pursue the action.

Carol is likely to succeed in her application under s.216A Companies Act. Under the section, the court can award her an indemnity for the costs of the action.

- 1** (a) 2 marks if candidate explains rule clearly; 1 mark if candidate states key words 'literal meaning'.
(b) 2 marks if candidate explains rule clearly; 1 mark if candidate states key words 'words in same group'.
(c) 3 marks if candidate explains rule clearly; 1 to 2 marks if candidate states key words 'literal meaning inapplicable if it leads to absurdity'.
(d) 3 marks if candidate explains rule clearly; 1 to 2 marks if candidate states key words 'cure the mischief'.
- 2** 2 marks for explaining each attribute of LLP and company. Candidates may compare and contrast up to five attributes.
- 3** (a) 2 marks for explaining each type of misrepresentation.
(b) 2 marks for every bar of rescission the candidate states.
- 4** (a) 2 marks for explaining unliquidated damages and 2 marks for explaining liquidated damages.
(b) 3 marks for explaining each limb of *Hadley v Baxendale*.
- 5** (a) 4 to 5 marks for explaining the nature of the statutory contract as binding company and members, binding members *inter se*.
3 marks if candidate does not explain but knows that the statutory contract binds the company and members, members *inter se*.
1 to 2 marks if candidate has some idea that memorandum and articles is a statutory contract.
(b) 4 to 5 marks for explaining procedure for alteration clearly, including what a special resolution is, and exceptions to special resolution rule.
3 marks if candidate knows that memorandum and articles can be altered by special resolution.
1 to 2 marks if candidate knows memorandum and articles may be altered in a general meeting.
- 6** (a) 2 marks if candidate states moratorium and 1 mark each for every objective of judicial management.
(b) 1 mark if candidate distinguishes between the company and creditor as an application. 2 marks if candidate explains how judicial management may benefit company. 2 marks if candidate explains how judicial management may benefit creditors.
- 7** 8 to 10 marks if candidate states accurately all requirements in ss.340 and 339(3) Companies Act and explains the bases of liability for both sections.
5 to 7 marks if candidate states one or two requirements in ss.340 and 339(3) Companies Act and explains the bases of liability for both sections.
3 to 4 marks if candidate states one or two requirements in one section and explains the basis of liability for one section.
1 to 2 marks if candidate either states one or two requirements in one section or explains the basis of liability for one section.
- 8** 8 to 10 marks if candidate discusses accurately the following issues: legal nature of John's advertisement, legal nature of John's and Mary's conversation, legal nature of Mary's message in voicemail machine.
5 to 7 marks if candidate discusses accurately one or two of the three issues listed above or discusses all three issues but with some inaccuracies.
3 to 4 marks if candidate discusses one or two of the three issues listed above but with some inaccuracies.
1 to 2 marks if candidate discusses one of the three issues listed above but with some inaccuracies.

- 9** 8 to 10 marks if candidate states accurately law relating to director's duty of care and diligence and applies the principles to the facts.
- 5 to 7 marks if candidate states some of the principles relating to director's duty of care and diligence and applies the principles to the facts.
- 3 to 4 marks if candidate states the director owes duty of care and diligence to the company and knows the managing director is in breach of her duty.
- 1 to 2 marks if candidate identifies director's duty of care and diligence as the issue.
- 10** 8 to 10 marks if candidate identifies s.216A, states all requirements of s.216A and discusses the requirements in relation to the facts of the case.
- 5 to 7 marks if candidate identifies s.216A, states some requirements of s.216A and discusses the requirements in relation to the facts of the case.
- 3 to 4 marks if candidate identifies s.216A and states one or two requirements of s.216A and discusses the requirements.
- 1 to 2 marks if candidate identifies s.216A and knows Carol has the standing to apply under the section.