Answers

1 This question requires candidates to consider the ways in which judges interpret legislation and requires some consideration of the three rules of interpretation together with some knowledge of the presumptions that normally will be applied in such procedure.

There are, essentially, two contrasting views as to how judges should go about determining the meaning of a statute; the restrictive, literal approach and the more permissive, purposive one. The literal approach is dominant in the Botswana legal system. It holds that the judge should look primarily to the words of the legislation in order to construe its meaning. The purposive approach, on the other hand, rejects the limitation of the judge's search for meaning to a literal construction of the words of legislation itself. It suggests that the interpretative role of the judge should include, where necessary, the power to look beyond the words of the statute in pursuit of the reason for its enactment; and that meaning should be construed in light of that purpose and so as to give it effect.

There are three primary rules of statutory interpretation:

The literal rule

Under this rule, the judge is required to consider what the legislation actually says rather than considering what it might mean. In order to achieve this end, the judge should give words in legislation their literal meaning, that is, their plain, ordinary, everyday meaning, even if the effect of this is to produce what might be considered an otherwise unjust or undesirable outcome (*Fisher* v *Bell* (1961)) in which the court chose to follow the contract law literal interpretation of the meaning of offer in the Act in question and declined to consider the usual non-legal interpretation of the word offer.

The golden rule

This rule is applied in circumstances where the application of the literal rule is likely to result in what appears to the court to be an obviously absurd result. It should be emphasised, however, that the court is not at liberty to ignore, or replace, legislative provisions simply on the basis that it considers them absurd; it must find genuine difficulties before it declines to use the literal rule in favour of the golden one. As examples, there may be two apparently contradictory meanings to a particular word used in the statute, or the provision may simply be ambiguous in its effect. In such situations, the golden rule operates to ensure that preference is given to the meaning that does not result in the provision being an absurdity. Thus in *Adler* v *George* (1964) the defendant was found guilty, under the English Official Secrets Act 1920, of obstruction 'in the vicinity' of a prohibited area, although she had actually carried out the obstruction 'inside' the area.

The mischief rule

This rule permits the court to go behind the actual wording of a statute in order to consider the problem that the statute is supposed to remedy.

In its traditional expression it is limited by being restricted to using previous common law rules in order to decide the operation of contemporary legislation. Thus in *Heydon's* case (1584) it was stated that in making use of the mischief rule the court should consider the following four things:

(i) what was the common law before the passing of the statute?

(ii) what was the mischief in the way which the common law did not adequately deal with?

(iii) what remedy for that mischief had Parliament intended to provide?

(iv) what was the reason for Parliament adopting that remedy?

Use of the mischief rule may be seen in *Corkery* v *Carpenter* (1950), in which a man was found guilty of being drunk in charge of a carriage although he was in fact only in charge of a bicycle.

In addition to the rules of interpretation, the courts may also make use of certain presumptions. As with all presumptions they are rebuttable and may be expressly overridden by the clear expression of such an intention in the statute under consideration. The presumptions operate:

(i) against the alteration of the common law;

(ii) in favour of the requirement that *mens rea* be a requirement in any criminal offence (*Sweet* v *Parsley* (1969));

(iii) against retrospective application;

(iv) against the deprivation of an individual's liberty, property or rights;

(v) against application to the Government;

(vi) against breaking international law;

(vii) in favour of words taking their meaning from the context in which they are used. This general presumption appears as three distinct sub-rules. The *noscitur a sociis* rule is applied where statutory provisions include a list of examples of what is covered by the legislation. It is presumed that the words used have a related meaning and are to be interpreted in relation to each other (see *IRC* v *Freere* (1969)). The *ejusdem generis* rule applies in situations where general words are appended to the end of a list of specific examples. The presumption is that the general words have to be interpreted in line with the prior restrictive examples (*Powell* v *Kempton Park Racecourse* (1899)). The *expressio unius exclusio alterius* rule simply means that where a statute seeks to establish a list of what is covered by its provisions, then anything not expressly included in that list is specifically excluded (see *R* v *Inhabitants of Sedgley* (1831)).

2 **Offer**

An offer sets out the terms upon which an individual is willing to enter into a binding contractual relationship with another person. It is a promise to be bound on particular terms, which is capable of acceptance. The essential factor to emphasise about an offer is that it may, through acceptance by the offeree, result in a legally enforceable contract. The person who makes the offer is the offeror; the person who receives the offer is the offeree.

Offers, once accepted, may be legally enforced but not all statements will amount to an offer. It is important, therefore, to be able to distinguish what the law will treat as an offer from other statements which will not form the basis of an enforceable contract. An offer must be capable of acceptance. It must therefore not be too vague (*Scammel* v *Ouston* (1941)). In *Carlill* v *Carbolic Smoke Ball Co* (1893) it was held that an offer could be made to the whole world and could be accepted and made binding through the conduct of the offeree.

In addition an offer should be distinguished from the following:

(a) A mere statement of intention. Such a statement cannot form the basis of a contract even if the party to whom it was made acts on it (*Re Fickus* (1900)).

(b) A mere supply of information as in *Harvey* v *Facey* (1893) where it was held that the defendant's telegram, in which he stated a minimum price he would accept for property, was simply a statement of information, and was not an offer capable of being accepted by the plaintiff.

Invitation to treat

It is important to distinguish offers from invitations to treat. The latter are distinct from offers in that rather than being offers to others, they are in fact invitations to others to make offers. The person to whom the invitation to treat is made becomes the actual offeror, and the maker of the invitation becomes the offeree. An essential consequence of this distinction is that, in line with the ordinary rules of offer and acceptance, the person extending the invitation to treat is not bound to accept any offers subsequently made to them.

The following are examples of common situations involving invitations to treat:

(a) **the display of goods in a shop window**. The classic case in this area is *Fisher* v *Bell* (1961) in which a shopkeeper was prosecuted for offering offensive weapons for sale, by having flick-knives on display in his window. It was held that the shopkeeper was not guilty as the display in the shop window was not an offer for sale but only an invitation to treat.

(b) **the display of goods on the shelf of a self-service shop**. In this instance the exemplary case is *Pharmaceutical Society of Great Britain* v *Boots Cash Chemists* (1953). The defendants were charged with breaking a law which provided that certain drugs could only be sold under the supervision of a qualified pharmacist. They had placed the drugs on open display in their self-service store and, although a qualified person was stationed at the cash desk, it was alleged that the contract of sale had been formed when the customer removed the goods from the shelf. It was held that Boots were not guilty. The display of goods on the shelf was only an invitation to treat. In law, the customer offered to buy the goods at the cash desk where the pharmacist was stationed.

(c) **a public advertisement**. Once again this does not amount to an offer. This can be seen from *Partridge* v *Crittenden* (1968) in which a person was charged with 'offering' a wild bird for sale contrary to the English Protection of Birds Act 1954, after he had placed an advert relating to the sale of such birds in a magazine. It was held that he could not be guilty of offering the bird for sale as the advert amounted to no more than an invitation to treat.

(d) **a share prospectus.** Contrary to common understanding, such a document is not an offer. It is merely an invitation to treat, inviting people to make offers to subscribe for shares in a company.

3 This question asks candidates to detail the ways in which the courts distinguish between contracts of service and contracts for services and to explain why such a distinction is important.

(a) The courts have used a number of tests in order to distinguish between contracts of service and contracts for services or, in other words, to distinguish between employees and the self-employed.

The control test was the first attempt to establish a means of distinguishing between the two relationships. In this test the key question is whether the person making use of the other's services controls not only what is done but also how it is done. Thus in *Yemens* v *Noakes* (1880) Bramwell L.J. stated that 'A servant is a person subject to the control of his master as to the manner in which he shall do his work'. An example of the test in operation may be seen in *Walker* v *Crystal Palace Football Club* (1910) in which it was decided that a professional football player was an employee of his club on the basis that he was subject to control in relation to his training, discipline and method of play.

The control test is, however, not appropriate in the case, for example, of skilled surgeons who exercise a degree of professional skill and judgment beyond the control of those who might be considered their employers. The application of the control test would have the effect that such people would be classified as self-employed with the consequence that they, rather than their employers, would be responsible for liability in any claims in negligence. As a consequence of this lack of fit between the control test and the reality of the employment situation the courts developed a more subtle and complex test which recognised that highly skilled professionals could still be employees.

The integration test was the result. Under this test the focus of attention is on the degree to which the individual in question is integrated into the employer's business. As Lord Denning put it in *Stevenson, Jordan* & *Harrison* v *MacDonald* & *Evans* (1952):

'One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas under a contract for services, his work, although done for the business, is not integrated into it, but is only accessory to it.'

An example of the integration test in operation may be seen in *Whittaker* v *Minister of Pensions* & *National Insurance* (1967) where the court had to decide whether a trapeze artist in a circus was an employee and thus entitled to claim compensation for injuries sustained in the course of her employment. The court found that, apart from her trapeze act, she also carried out other general tasks in the running of the circus which meant that she was integrated into the business and therefore that she was an employee.

The integration test could determine the employment status of highly skilled employees such as doctors (see *Cassidy* v *Ministry of Health* (1951)), but it was less useful in dealing with situations where individuals were actually classified as self-employed. The difficulty with the integration test was in clearly defining what integration involved. Once again a more subtle test was required.

The multiple or economic reality test was the outcome of the perceived shortcomings in the integration test. The new test involved a more general consideration of the circumstances of the particular case rather than the application of any single criterion. It was first stated in *Ready Mixed Concrete (South East) Ltd* v *Minister of Pensions and National Insurance* (1968) in which the court held that there were three conditions which supported the existence of a contract of employment:

(i) the employee agrees to provide his own work and skill in return for a wage;

(ii) the employee agrees, either expressly or impliedly, that they will be subject to a degree of control exercised by the employer;

(iii) the other provisions of the contract are consistent with its being a contract of service.

In that particular case it was decided that, although there was a very high level of control exercised over the people concerned, because they were able to substitute others to do their work, they were independent contractors.

In deciding whether a person is an employee or not, the courts will focus on such issues as: whether wages are paid on a regular basis or is payment made in a lump sum; whether the person receives holiday pay; and on who pays national insurance and income tax. It is important to realise that the list of such questions is not limited and each case will be determined in line with its own facts. Thus in *Nethermore (St Neots)* v *Gardiner* & *Taverna* (1984) a group of home workers, paid on a piecework basis, were held to be employees as a consequence of the fact that they were subject to an irreducible minimum obligation to work for their employer.

The courts will not be bound to accept the parties' own definition of the situation. Thus it is immaterial that agreements refer to individuals as self-employed if in reality they are employees. In deciding the issue, the courts will apply the test set out in *Market Investigations Ltd* v *Minister of Social Security* (1969): 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?' If the answer is yes – then they are self-employed: if no – then they are employees.

(b) People employed under a contract of service are employees. Those who work under a contract for services are independent contractors; they are not employees, they are self-employed. The distinction between the two is crucial for a number of reasons. Firstly, employees, those with service contracts, qualify for the protection of their employment rights under such statutory provisions as the Employment Act (Cap 47:01), whereas the self-employed have no such protection.

A second consequence relates to the way in which the individuals pay their tax. Employees are taxed under the P.A.Y.E. (Pay As You Earn) scheme, whereas the self-employed pay income tax in their own individual capacity like any other taxpayer.

A further distinction relates to breaches of contract or responsibility in delict. Whereas employers may be vicariously liable for the defaults of their employees, a self-employed person incurs liability and responsibility cannot be passed on to the person making use of their services.

4 This question requires the candidates to discuss the main duties of an agent towards his principal. Agency is a contract whereby one person (the agent) is authorised and required by another (the principal) to contract or to negotiate a contract on the latter's behalf with a third person.

The duties of an agent are (a) to perform his mandate (b) honestly and (c) carefully, (d) in accordance with his principal's instructions, and (e) to account to his principal.

(a) Performance

The agent is under a duty to perform his mandate fully and faithfully. Where he fails to do so, he forfeits his commission and becomes liable in damages to his principal: *Le Clus (Pty) Ltd* v *Kearney* (1946).

(b) **Honesty**

A contract of agency creates a fiduciary relationship between an agent and his principal (*Robinson* v *Randfontein Estates Gold Mining Co Ltd* (1921)) and the utmost good faith is required from an agent in his dealings with his principal: *Transvaal Cold Storage Co Ltd* v *Palmer* (1904). It is the duty of all agents to conduct the affairs of their principals in the interests of their principals and not for their own benefit: *R* v *Milne* & *Erleigh* (7) (1951).

No Secret Profits

An agent cannot retain any profit acquired by him in transactions within the scope of the agency, unless the consent of his principal has been given with the full knowledge of the material facts and under circumstances which rebut any presumption of undue influence. The principal can always in such a case treat the profit as acquired on his own behalf and insist on its being accounted for to him: (*Robinson* v *Randfontein Estates Gold Mining Co Ltd* (1921); *Mallinson* v *Tanner* (1947)).

No conflict of interest

An agent may not place himself in any position where his interest and duty may conflict, no matter how honestly he may have acted: *Davies* v *Donald* (1923). Where the agent is authorised by his principal to buy, the agent cannot sell his own property to him. Where he is authorised to sell his principal's property, he cannot buy it on his own behalf. Where the agent makes a complete disclosure to the principal of his interest and the principal consents, the agent is not in breach of his duty of good faith: *Mallinson* v *Tanner* (1947).

No delegation of authority

As a general rule, an agent must perform his duties personally and he may not delegate his authority to a sub-agent: *Belonje* v *African Electric Co (Pty) Ltd* (1949). However where the principal has expressly or impliedly authorised the delegation or where the performance of the mandate necessitates the appointment of such agent, such delegation will be allowed: *Turkstra* v *Kaplan* (1953).

No disclosure of information

An agent must not disclose any information of his principal's affairs, acquired in the course of the agency, to the detriment of his principal: *Robinson* v *Van Hulsteyn, Feetham* & *Ford* (1925).

(c) **Care, skill and diligence**

An agent must use such care, skill and diligence as is reasonably necessary for the due performance of his mandate. He must act with such care as a 'prudent man' would show: *Weber* & *Pretorius* v *Gavronsky Bros* (1920).

(d) **Obedience**

An agent must perform his mandate exactly in accordance with the authority, express or implied, given to him by his principal.

(e) **Duty to account to the principal**

An agent must give his principal full and accurate information of what he has done in carrying out the mandate, and of any contract concluded by him on his principal's behalf: *Martin* v *Scorgie* (1950). Accordingly, he must:

(i) render a full and true account of his dealings in his capacity as agent; and

(ii) permit his principal to make an inspection of all books and records relating to the agent's transactions on his behalf: *Hansa* v *Dinbro Trust (Pty) Ltd* (1949). An account as between agent and principal should show all moneys received and all disbursements made for and on behalf of the principal and also all fees chargeable: *Krige* v *Van Dyk's Executors* (1918).

5 This question tests the candidates' appreciation of the legal characteristics of a limited company thereby appreciating advantages and disadvantages of the limited company vis-à-vis the other forms of business association in Botswana. The candidates should identify and define the various forms of business association in Botswana: the sole proprietorship; the partnership; the registered company, the co-operative; and the parastatal. The sole proprietorship, the partnership, and the company are the most popular and the candidates' answers should focus on these three in their analysis of the characteristics.

(a) **Formation:** it is easy to set up a sole proprietorship and the partnership. There are no legal formalities involved. The formation of the company on the other hand is strictly regulated by the Companies Act 2003. It involves the registration of documents such as the constitution with the Registrar of Companies. It also involves the payment of fees. It is therefore relatively more involved and expensive.

(b) **Limited liability:** the liability of the sole proprietor and that of the partners is unlimited. When the company is registered, it becomes an artificial person (Companies Act 2003, s.24) and the members acquire limited liability. Their liability is limited to the amount of money unpaid on their shares.

(c) **Corporate personality:** the sole proprietorship and the partnership have no separate legal existence. On incorporation, the company becomes a body corporate: Companies Act 2003, s.24. It acquires a separate legal existence. It is an artificial legal entity: *Salomon* v *Salomon* & *Co* (1897); *Dadoo Ltd* v *Krugersdorp Municipal Council* (1920).

(d) **Perpetual Succession:** the sole proprietorship and the partnership enjoy no perpetual existence. The company on the other hand enjoys perpetual existence since it is an artificial person: See Companies Act 2003, s.24.

(e) **Tax liability:** the sole proprietor pays income tax. The individual partners also pay income tax on their share of the partnership income. The company as a separate entity pays corporation tax on the gross profits and any dividends paid to shareholders are subject to a withholding tax: Income Tax Act 1995, ss.12 and 58.

(f) **Privacy:** the sole proprietorship and the partnership enjoy a great degree of privacy. There are no disclosure requirements except perhaps in connection with the filing of tax returns. Company law on the other hand is based on the doctrine of disclosure. Most companies have got to publish their accounts and file annual returns. Furthermore, most of their documents and records are available for inspection at their registered offices or at the Registrar of Companies.

(g) **Capacity:** the sole proprietorship and the partnership have unlimited capacity. Before the Companies Act 2003 came into force, a company's capacity on the other hand was limited to those activities which were expressly or impliedly stated in the objects clause in the memorandum of association. Any transaction outside the capacity of the company was *ultra vires* and void *ab initio*: *Ashbury Rly Carriage* & *Iron Co* v *Riche* (1875). The Companies Act 2003 has abolished the need for a memorandum and articles of association and introduced a new document known as the constitution, which is not compulsory (Companies Act 2003, s.37). The Act has also abolished the need to state objects (Companies Act 2003, ss.25 and 26). Most importantly the Act abolished the doctrine of *ultra vires* at the **external level** by giving companies **full** capacity to carry on or undertake any business or activity (Companies Act 2003, s.25). *Ultra vires* is retained at the **internal level** only.

(h) **Raising capital for growth:** sole proprietorships and partnerships have a limited supply of capital. In the case of a partnership, its main source of funds are the contributions of the partners but these are limited to 20 in number. Banks are not very keen to lend to partnerships. The company has greater access to capital for growth and expansion. Banks are more inclined to lend to companies because they enjoy the characteristics of liability and corporate personality. A private company wishing to raise a large sum of money can be floated as a public company and thus be able to offer its shares and debentures to the public.

It can be seen from the above that the company has several characteristics that distinguish it from other business associations. The most important ones are limited liability and corporate personality.

6 The first part of this question requires candidates to discuss the meaning of promoter in company law. The second part of the question involves a discussion of pre-incorporation contracts.

(a) There is no general statutory definition of a promoter in company law. The courts have not given a comprehensive judicial definition. In *Twycross* v *Grant* (1877) Cockburn C J defined a promoter as '. . . one who undertakes to form a company with reference to a given project and to set it going, and who takes the necessary steps to accomplish that purpose'. In *Whaley Bridge Calico Printing Co* v *Green* (1880) Bowen LJ described the term promoter as 'a term not in law but of business, usefully summing up in a single word a number of business operations, familiar to the commercial world, by which a company is generally brought into existence'. The consequence of the above two statements is that the answer to the question of whether a person is a promoter or not is a question of fact and the determining factor is whether the individual in question will be a person who exercises some control over the affairs of the company both before and after it is formed up until the process of formation is completed. The following are typical acts which promoters perform – taking the procedural steps necessary to form a company, inviting other persons to become directors and issuing a prospectus. A person is not to be treated as a promoter of a company simply on the basis that they act in a professional capacity with respect to the establishment of a company. Thus attorneys and accountants employed purely in their professional capacity in order to establish a company will not be considered to be promoters.

As with directors, promoters are said to be in a fiduciary relationship with the company they are establishing. This is a position akin to that of a trustee and the most important consequence that flows from it is that the promoter is not entitled to make a profit from establishing the company, without full disclosure of that profit to either an independent board of directors, or to the existing and prospective shareholders in the company. Such a situation usually arises in situations where the promoters sell assets to the company they are in the process of forming. Failure to make such a disclosure will enable the company to: rescind the contract; claim damages or hold the promoter liable to account for any profit made (*Erlanger* v *New Sombrero Phosphate Co* (1878), *Gluckstein* v *Barnes* (1990); *Re Leeds* & *Hanley Theatres of Varieties* (1902)).

(b) A pre-incorporation contract is one entered into for and on behalf of the company before it is incorporated. The law governing pre-incorporation contracts in Botswana is found in three sources: the common law; Roman–Dutch common law; and the Companies Act.

General principles at common law

Before a company is incorporated, it has no legal existence. Accordingly, it has no legal capacity to enter into a contract. When the company comes into existence on incorporation, it is a new creature of the law with no old rights and obligations. The company cannot therefore sue or be sued on a pre-incorporation contract. However, the person who purports to contract on behalf of the unborn company may be held personally liable and may be able to sue on the contract depending on the nature of the contract: *Kelner* v *Baxter* (1866). Just as the company cannot be sued on the contract, it cannot ratify or adopt the contract: *Natal Land* & *Colonisation Co* v *Pauline Colliery Syndicate* (1904).

If the company wants to take benefit of the contract, it must enter into a new contract on the same terms as the pre-incorporation contract. This process is known as novation. Novation could be express (*Trevor Price* v *Kelsall* (1957)) or implied: *Howard* v *Patent Ivory Mfg Co Ltd* (1888). The question whether there is a new contract or not is one of fact and each case must depend on its own facts.

Roman–Dutch common law

The problems associated with *Kelner* v *Baxter* can be avoided under Roman–Dutch common law. The promoter may sign the contract with the other party (the *promittens*) as principal. He does not act as an agent. He acts as principal (the *stipulans*) but the contract is for the benefit of a third party (the *stipulatio alteri*) not yet in existence. When the company comes into existence, it may adopt the contract. This way the promoter avoids personal liability. In *McCullough* v *Fernwood Estate Ltd* (1920) the plaintiff entered into a contract of sale of certain property with Apsey, who was acting on behalf of a company he was in the process of incorporating. After its incorporation, the defendant company declined to proceed with the contract. The plaintiff sued the company for the purchase price. It was held that Apsey contracted as principal on behalf of the unborn company and that when the defendant company came into existence, it accepted the offer and was therefore bound by the contract.

The Companies Act 2003

Section 179 of the Companies Act 2003 provides that, where a person purporting to contract as agent or trustee for the unborn company enters into a contract with a third party, the company can after its incorporation adopt or ratify the contract. The company will only be bound if certain requirements are satisfied:

(i) the contract must be in writing;

(ii) it must have been entered into by a person who professed to act as agent or trustee for the unborn company;

(iii) the contract or a certified copy of it must be delivered to the Registrar simultaneously with the delivery of the application for incorporation under s.21 of the Act.

(iv) the company must actually ratify or adopt the contract after its incorporation.

Section 179 is a statutory exception to the rule in *Kelner* v *Baxter*. A party wishing to rely on it must show that there was strict compliance with its provisions. Where any of the above conditions is not satisfied, the section does not apply: *T. L. Investments (Pty) Ltd* v *Molefe* (1985). Sections 180 and 181 of the Companies Act 2003 have introduced radical reforms in the statutory law governing pre-incorporation contracts.

Notwithstanding any enactment or rule of law, there is an implied warranty in a pre-incorporation contract by the person who purports to contract on behalf of the unborn company [the promoters] that the company will be incorporated within a period specified in the contract, or where no period specified, within a reasonable time, and that the company will ratify the contract within a specified time or within a reasonable time. These do not apply where there is an express intention to the contrary in the contract: s.180 (1) Companies Act 2003.

The Remedies

– where there is a breach of any of the above warranties, the injured party may sue the promoter for damages: s.180 (2) Companies Act 2003;

– where the company enters into a new contract in the same terms, or in the substitution for, the pre-incorporation contract, the liability of the promoter is discharged: s.180 (3) Companies Act 2003;

– The Companies Act 2003 sets out other remedies available to the injured party in a pre-incorporation contract:

  (i) Where the pre-incorporation contract is not ratified by the company, the injured party may apply to court for an order directing the company to restore to that party property acquired under the contract (s.181 (1) (a), Companies Act 2003) or for any other relief in favour of that party relating to that property (s.181 (1) (b) Companies Act 2003);

  (ii) The injured party may request the court to declare the contract valid in whole or in part: s.181 (1) (c);

  (iii) The court is given wide power to make any order or to grant any relief it thinks fit where it considers this to be just and equitable: s.181 (2) Companies Act 2003.

7 This question requires the candidates to explain and illustrate the characteristics of preference shares.

The essential characteristic of any preference share is that it carries a prior right to receive an annual dividend of fixed amount, say a 7% dividend. There are no other implied differences between preference and ordinary shares though there are often express differences between them.

As regards the priority dividend entitlement, four points should be noted:

(a) The right is merely to receive a dividend at the specified rate before any other dividend may be paid or declared. It is not a right to compel the company to pay the dividend if it declines to do so. This issue is likely to arise if the company decides to transfer available profits to reserves or makes a provision in its accounts for a liability or loss instead of using the profits to pay the preference dividend. In *Bond* v *Barrow Haematite Steel Co* (1902), the company did not pay its preference dividend. Bond and other preference shareholders contended that the company had available reserves of £240,000 from which it could have declared the dividend on their shares. The company replied that it had suffered realised losses of £200,000 on the disposal or demolition of current assets and in addition its retained fixed assets had diminished in value generally by £50,000. It therefore decided to retain the funds in question to make good the losses. It was held that the court would not overrule the directors in their decision that the 'state of the accounts did not admit the payment of a preference dividend'.

(b) The right to receive a preference dividend is deemed to be cumulative unless the contrary is stated. If, therefore, a 7% dividend is not paid in Year 1, the priority entitlement is normally carried forward to Year 2, increasing the priority right for that year to 14% – and so on. When arrears of a cumulative dividend are paid, the holders of the shares at the time when the dividend is declared, are entitled to the whole of it even though they did not hold the shares in the year to which the arrears relate. An intention that preference shares should not carry forward an entitlement to arrears is usually expressed by the word 'non-cumulative'. However, words such as 'a dividend of x% payable out of the net profits of each year' sufficiently indicate that arrears may not be paid in a later year. If nothing is expressed (though cumulative preference shares are usually described as 'cumulative' to remove all possible doubt) they are deemed to be cumulative.

(c) If a company which has arrears of unpaid cumulative preference dividends goes into liquidation, the preference shareholders cease to be entitled to the arrears unless:

 (i) a dividend has been declared though not yet paid when liquidation commences; or

 (ii) the constitution (or other terms of issue) expressly provide that in a liquidation arrears are to be paid in priority to return of capital to members.

(d) Holders of preference shares have no entitlement to participate in any additional dividend over and above their specified rate. If, for example, a 7% dividend is paid on 7% preference shares, the entire balance of available profit may then be distributed to the holders of ordinary shares. However this rule also may be expressly overridden by the terms of issue. For example, the constitution may provide that the preference shares are to receive a priority 7% dividend and are also to participate equally in any dividends payable after the ordinary shares have received a 7% dividend. The company might then distribute, say, 9% to its ordinary shareholders and an extra 2% (making 9% in all) to its preference shareholders. Preference shares with these rights are called '*participating preference shares*'. Since there is no maximum limit on the amount of dividend which may be paid on them they are a form of 'equity share capital' even if their entitlement to capital is restricted.

In all other respects preference shares carry the same rights as ordinary shares unless otherwise stated. If they do rank equally they carry the same rights, no more no less, to return of capital, distribution of surplus assets and voting. In practice, it is unusual to issue preference shares on this basis. More usually, it is expressly provided that:

(a) the preference shares are to carry a priority right to return of capital; and

(b) they are not to carry a right to vote or only in specified circumstances such as failure to pay the preference dividend, variation of their rights or resolution to wind up.

Where preference shares carry a priority right to return of capital the result is that:

(a) the amount paid up on the preference shares, say P1 on each P1 share is to be repaid in liquidation or reduction of capital before anything is repaid to ordinary shareholders; but

(b) unless otherwise stated the holders of the preference shares are not entitled to share in surplus assets when the ordinary share capital has been repaid.

On a reduction of share capital (where the preference shares carry an entitlement to priority in repayment) it is in accordance with the rights of preference shareholders to pay them off first. They cannot object that this is a variation of their rights: it is strict observance of them (unless their rights are so expressed as to prevent it). See *Scottish Insurance Corporation Ltd* v *Wilson and Clyde Coal Co Ltd* (1949).

Even if preference shares carry no right to attend and vote at general meetings, the preference shareholders are still entitled to receive a copy of the annual accounts since these must be sent to 'every member' and they are members. As the notice of the Annual General Meeting for a public company is often bound in the same booklet as the accounts, it is usual to send it all but to append an explanatory note to the notice of meeting to the effect that the preference shareholders may not attend.

Conclusion

The advantages obtained by holders of preference shares are greater security of income and (if they carry priority in repayment of capital) greater security of capital. However, in a period of persistent inflation, the entitlement to fixed income and to capital fixed in money terms is an illusion. A number of other drawbacks and pitfalls, such as loss of arrears, winding up and enforced payment, have been indicated above. It is often felt that preference shares fall between the two stools of risk and reward (as seen in ordinary shares) and security (debentures).

8 Dudu and Jabulani entered into a contractual agreement, and Jabulani has clearly failed to comply with its terms. Although he built a tower, his performance in fulfilling the contract has been defective in that he has failed to comply with the fundamental term that it had to be built to the height required, i.e., 12 metres. There is therefore no doubt that Jabulani is in breach of contract. The only question relates to the remedies that are available, and likely to be awarded to Dudu.

(a) Specific performance

The first issue to deal with is the matter of specific performance. The aim of a claim for specific performance is to force the defaulting party, by an order of court, to render performance in the very terms agreed upon by the parties. In terms of such an order the party who commits breach of contract is forced to deliver or manufacture an object of a specific quality and to pay damages as surrogate for performance. However, after the decision in *Isep Structural Engineering and Planting (Pty) Ltd* v *Inland Exploration Co (Pty) Ltd* (1981) there is a great amount of uncertainty whether damages can always be claimed as surrogate for performance as an alternative to a claim for specific performance.

In the past the courts in certain instances refused an order for specific performance. After the decision in *Benson* v *SA Life Assurance Society* (1986) the position seems to be that the courts will only use their discretion not to make such an order if the order would cause an unjust result or would be contrary to public policy. Each individual case will have to be adjudicated on its own merit and own set of circumstances. Where the obligation is to perform a relatively simple act, such as to sign a particular contract, the courts will readily grant an order for specific performance.

As a general rule, however, the courts will not grant an order where it could work great hardship on the defaulting party or the public at large. A local authority who refuses to supply a farmer with more than a certain quantity of water during a severe drought will, for example, not be forced to deliver more water to this farmer when to do so would cause hardship to the other members of the farming community (*Hayes* v *Kingwilliamstown Municipality* (1951)). Considerable uncertainty surrounds orders of specific performance of obligations arising from contracts which involve the rendering of services. There is earlier authority for the vew that an employee was not entitled to claim specific performance against his or her employer. Ordering an employer to pay his employee wages, it was felt, would indirectly compel the employer to reinstate his erstwhile employee. It might be that the employer would then be compelled to employ someone he no longer trusts in a position involving a close relationship. In *National Union of Textile Workers* v *Stag Packings (Pty) Ltd* (1982), however, it was held that in principle an employee is entitled to specific performance.

The courts in the past have also been reluctant to grant specific performance in respect of obligations arising from *location conduction operas* (the putting out of work on contract) such as where a builder has undertaken to do alterations to a house or where a lessor is bound to repair the leased property. This approach stemmed from the consideration that it would be difficult for a court to supervise the execution of its order for specific performance. It has, however, been suggested that this approach will have to be reconsidered in the light of the decision in *Benson* v *SA Life Assurance Society*. Under the principle that a court will not grant a decree which it cannot enforce, a decree has in the past been refused for the incorporation of a company (*Lucerne Asbestos Co Ltd* v *Becker* (1928)) and the appointment of someone as director of a company (*Dey* v *Goldfields Building Finance and Trust Corporation Ltd* (1927)). It would thus seem very unlikely that the court will grant an order for specific performance in the circumstances of the question.

(b) Claim for damages

The next aspect deals with the potential claim for damages. In deciding what damages are to be paid for breach of contract, the courts employ a number of rules and principles to guide their action. These rules influence the recoverability of damages as well as the extent of the claim that could make it difficult and sometimes even impossible for the injured party to succeed with such a claim. These various rules may be considered under two headings: the rules relating to remoteness of damage and the rules relating to the measure of damages.

(i) Remoteness of damage

It would be unfair if the party in breach of contract were held liable for every consequence of his action no matter how far down the chain of causation it appeared. In order to limit potential liability, the courts have established clear rules about consequential liability in such a way as to deny the award of damages for consequences that are deemed to be too remote from the original breach.

The damages must be the direct result of the breach of contract. The debtor is not liable for damages incurred independently from the breach of contract and which were not caused by such breach (*Svorinic* v *Biggs* (1985)). Even if the damages were caused by the breach of contract, only such damages may be claimed which were actually foreseen or should reasonably have been foreseen by the parties at the time that they made the contract. A distinction is made between general and special damage. General damage flows naturally and generally from the breach. A typical example of such damage is *mora* interest that the debtor owes to the creditor because of late payment. The plaintiff needs only to prove the extent of his damages since it is already presumed to have been foreseen.

Special damage is not a natural or probable result of the breach of contract. The plaintiff must prove that the parties did actually foresee the damage at the time of the conclusion of the contract and that an express or tacit agreement exists that such damage would be recoverable. Such an agreement is based on real or presumed consensus. As far as the related contract with Diskom Ltd is concerned, it would appear that Jabulani was not aware of the contract and that he could not be liable for the loss sustained by Dudu.

(ii) The measure of damages

The courts use a number of rules and principles to determine the actual extent of the monetary damages owed. The general rule is that damages in contract are intended to be compensatory rather than punitive. The aim is to put the injured party in the hypothetical position he would have been in had the breach of contract not taken place. It is said that the party is entitled to his positive interest or interest in the performance of the contract. The position in which the prejudiced party finds himself now (after breach of contract) must be compared with the position he would have been in had the breach not taken place (the position he would have been in had the contract been fulfilled properly). No comparison must be made with the position he had been in before the conclusion of the contract (*Lillicrap, Wassenaar and Partners* v *Pilkington Brothers* (1985)).

It would appear that Dudu would only be entitled to the difference between the value of the tower provided and the value of the tower that she had contracted for, i.e., P2,000·00.

9 This question seeks to test the student's understanding of the directors' fiduciary duties, and in particular, the duty not to make a profit at the expense of the company.

The general principle as stated by Innes CJ in *Robinson* v *Randfontein Estates Gold Mining Co* (1921) is that where one person stands to another in a position of confidence involving a duty of trust, they are not allowed to place themselves in a position where their interests conflict with their duty. The classic example of a conflict of interests between a director and the company is where the director enters into a contract with the company, or where the director, instead of contracting with himself, contracts with another company in which they had an interest. In all these cases the relevant contract is voidable at the option of the director's company (*Cohen* v *Directors of Rand Collieries Ltd* (1906)). In Robinson, the chairman of the board purchased a farm in his own name after his company, which was anxious to acquire the farm, could not reach finality with the sellers. He purchased the farm through an agent and thereafter sold it to the company at a substantial profit. The then Appellate Division held that the chairman was not justified in making a profit from his office nor placing himself in a position where his personal interests conflicted with the duties arising out of his fiduciary position. He was consequently ordered to repay to the company the profit that he had made.

A director may not, for personal gain, make use of information that they acquired in their capacity as director. In *Industrial Development Consultants Ltd* v *Cooley* (1972) the managing director of a company negotiated with a third party with a view to concluding a contract on behalf of the company. The third party was dissatisfied with the organisation of the company, but was prepared to conclude the contract with the managing director in his personal capacity. The managing director consequently resigned his office without disclosing the true state of affairs, and thereafter concluded the contract with the third party in his personal capacity. The court decided that the managing director was liable to the company for all the profit he had made as a result of having allowed his interests and his duty to conflict. A director may thus be in breach of the fiduciary duty owed by him to his company, despite the termination of his office. See also *Regal (Hastings) Ltd* v *Gulliver* (1942) and *Canadian Aero Service Ltd* v *O'Malley* (1974). *Atlas Organic Fertilizers (Pty) Ltd* v *Pikkewyn Ghwano* (1981) is authority for the position that a director could be in breach of the fiduciary duty owed by him to his company despite the fact that he has ceased to be a director or despite the termination of his period of office. In this regard the English decision in *Island Export Finance Ltd* v *Umunna* (1986) followed the approach in *Canadian Aero Service Ltd* v *O'Malley*. In *Umunna* Hutchison J held that a director's fiduciary duty did not cease upon resignation. On the facts, however, the court distinguished a deliberate effort to divert a mature business venture from the company to the person owing the fiduciary duty to such company from the situation which arises when directors use information, which forms part of their general fund of knowledge and of their stock-in-trade for themselves or for a new employer after their resignation. Directors, no less than employees, were held to acquire a general fund of knowledge and expertise in the course of their work. The court maintained that the business information which the director had acquired in his previous dealings with the client formed part of his skill and knowledge. He was therefore entitled to use it for his own benefit. The court found it plainly in the public interest that they should be free to exploit this knowledge in a new position. This decision stresses that a policy which draws the principles of a continuing fiduciary so wide as to categorise as a breach of duty any use by a former director of business knowledge and skill acquired in the course of work for that company, would operate in restraint of trade: 'Directors, no less than employees, acquire a general fund of knowledge and expertise in the course of their work, and it is plainly in the public interest that they should be free to exploit it in a new position.'

One could conclude, however, that in the light of *Sibex Construction (SA) (Pty) Ltd* v *Injectaseal CC* (1988) there can be no doubt that Boitumelo is in breach of her fiduciary duties. The court in *Sibex* expressed the view that a director should be disqualified from usurping for himself or diverting to another person or company with whom or with which he is associated a maturing business opportunity which his company is pursuing. He should also be precluded from so acting even after his resignation, where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself the opportunity sought by the company, or where it was his position with the company rather than a fresh initiative that led him to the opportunity which he later acquired. It is thus submitted that Molapo Ltd would be entitled to claim the benefits that accrued to Boitumelo under her contract with Savuti (Pty) Ltd.

10 This question tests the candidates' understanding of the rules that govern the auditor's liability towards the company, shareholders and especially third parties.

Since *Hedley Byrne & Co* v *Heller & Partners* (1964) the auditor has owed a duty of care to third parties with whom he has no contractual relationship, if as a reasonable man he is aware that his skill and judgment are being relied upon. Therefore, it has been suggested that the auditor could be liable to a stranger who acquires the company's shares in reliance upon an unqualified audit report on the company's accounts, in circumstances where they ought to have foreseen that a takeover was possible and that the bidder would rely on the accounts. In *JEB Fasteners Ltd* v *Marks Bloom & Co* (1981), the auditors were in this position and were negligent. However, since the plaintiffs would have gone ahead even if they knew the full story, the auditors were not liable.

The position was clarified in the case of a public company by *Caparo Industries plc* v *Dickman* (1990), which rejected a duty to potential investors, but upheld the duty to the general body of shareholders. A shareholder who purchased additional shares in reliance on the auditor's report, however, was said to be in no different a position from any other investing member of the public, to whom the auditor owed no duty.

The general effect of the modern authorities was comprehensively reviewed by the Court of Appeal in *James McNaughton Paper Group Ltd* v *Hicks Anderson & Co* (1990). Having considered the judgments in *Caparo*, Neil L.J. stated three propositions:

(i) It is now clear that a restrictive approach would be taken to extending the scope of the duty of care beyond the person directly intended by the maker of the statement to act upon it.

(ii) All the circumstances must be taken into account in deciding whether a duty of care existed in a particular case.

(iii) Despite the caveat in (ii), it was possible to define six issues which would usually be relevant in deciding whether such a duty of care existed. These were as follows:

(1) *The purpose for which the statement was made*. Where the statement was made for the express purpose of being communicated to the advisee, it might be right to conclude that a duty of care existed. However, statements primarily prepared and made for a different purpose and for the benefit of someone other than the advisee would have to be examined with great care.

(2) *The purpose for which the statement was communicated*. Had it been made for information only, or was it intended to be acted upon? If action was intended, what action, and by whom?

(3) *The relationship between advisor, advisee and any relevant third party*. If the statement was made for the benefit of a third party, it would be necessary to consider the relationship between the parties.

(4) *The size of any class to which the advisee belonged*. A duty of care could sometimes be inferred easily to a single advisee, or member of a small class. The larger the class, however, the more difficult the inference.

(5) *The state of knowledge of the advisor*. This was considered to be very important. What was his knowledge of the purpose for which the statement had been made, and of the purpose for which the statement was communicated? Did he know that the advisee would rely on the statement without obtaining independent advice? Knowledge in these contexts included both actual knowledge and knowledge that can reasonably be imputed to the advisor.

(6) *Reliance by the advisee*. Had the advisee relied on the statement? If so, to what extent was he entitled to do so without taking independent advice? Such entitlement would be difficult to show in a business transaction at arm's length, as would the advisor's knowledge that the advisee would act on the advice.

Applying these principles to the facts of this problem, the following conclusions can be drawn.

As long as a causal connection can be established between the auditor's negligence and the liquidation of the company (which may not be possible), the liquidator can take action against Tiro. In *Re London and General Bank (No.2)* (1895), it was established that an auditor, though not an officer of the company in any general circumstances, could be treated as such for the purpose of misfeasance proceedings.

Ayanda is a shareholder, but the *Caparo* case *prima facie* rules out an action from her against Tiro. It is possible, however, that a close relationship between auditor and shareholder in a private company may form the basis of a duty of care. This is, however, doubtful on these facts.

The position of Whizz Ltd is clear. *Caparo's* case clearly rejects a duty to potential investors, so Whizz Ltd has no claim against Tiro.

1 This question requires candidates to consider the ways in which judges interpret legislation and requires some consideration of the three rules of interpretation together with some knowledge of the presumption that will normally be applied in such procedure.

6–10 A thorough, to complete answer, detailing the three rules of interpretation and most to all of the presumptions. Case examples will be expected and rewarded.

0–5 A less than complete answer, probably unbalanced, focusing only on some of the rules of interpretation, and even then not dealing with them in sufficient detail.

2 This question is a straightforward question with little room for ambiguity.

6–10 A thorough, to complete answer detailing what is meant by the two terms and distinguishing them clearly. It is most likely that case examples will be provided.

0–5 A limited understanding, or a lack of clarity as to the distinction between the two concepts.

3 6–10 A clear understanding of the difference between contracts of service and contracts for services together with an appreciation of why this distinction is important.

0–5 Unbalanced answer that might be aware of the tests but unable to provide details or alternatively be aware of the differences without being able to explain the tests.

4 6–10 Full and accurate account of the duties of an agent towards his principal. Good statement of the governing legal principles and accurate reference to relevant case law.

0–5 Incomplete and inaccurate. Major errors.

5 6–10 Full and accurate definition of the various legal terms and appropriate reference to statutory provisions.
Answers in this band will identify the major forms of business organisation in Botswana and define them. They will then focus on the three main ones and fully and accurately explore the major characteristics that distinguish a company from the other forms of business organisation.

0–5 Weak with no identification and definition of the different forms of business organisation in Botswana. Incomplete and inaccurate discussion of the characteristics. Inaccurate or inadequate definition of terms. Brief reference to relevant statutory provisions.

6 The first part of this question requires candidates to discuss the meaning of promoter and a pre-incorporation contract in company law. The second part of the question involves a discussion of the liability, of a promoter on pre-incorporation contract.

(a) 3–5 Good to thorough explanation of the nature and function of a company promoter. The very best answers should have some reference to the fiduciary nature of the promoter's position with respect to the company with perhaps reference cases.

0–2 Some but not very clear understanding of the role of the promoter, perhaps lacking in true legal knowledge of the subject.

(b) 3–5 Thorough explanation of the common law and statutory provisions, perhaps with cases and some suggestion as to how to avoid the problems inherent in pre-incorporation contracts.

0–2 Some but limited understanding.

7 6–10 A clear and accurate articulation of the characteristics of preference shares. Full reference to relevant authorities and an accurate use of relevant examples.

0–5 Very weak answer, major gaps, omissions and inaccuracies.

8 This question requires an understanding of the rules relating to breach of contract generally, and specifically to the award of specific performance and damages.

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

5–7 An accurate recognition of the problems inherent in the question, together with an honest attempt to apply 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. Recognition of the area of law but not attempt to apply the law.

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

9 This question requires candidates to demonstrate their knowledge of the fiduciary duties of company directors.

8–10 Answers will demonstrate a thorough knowledge of the law generally together with a clear analysis of the problem situation and a deployment of the appropriate legal principles. Cases and examples will be used to support the analysis and conclusions.

5–7 Answers will be generally sound in relation to the law but may be lacking in analysis or application. Once again examples will be used.

2–4 Answers will demonstrate some knowledge of the law relating to the question but not to the degree expected of the very best answers. They may be weak in analysis and/or application.

0–1 Little or no understanding of the law relating to the question. Extremely weak in terms of analysis or application.

10 This question requires candidates to discuss the auditor's liability towards the company, shareholders and third parties with particular emphasis on his liability in delict for negligence.

8–10 A complete answer identifying and resolving all the issues raised in the question. A full explanation and application of the *Caparo* case.

5–7 Correct identification of the major issues in the problem and a sound attempt to apply legal principles to those issues. A fair understanding of the impact of the *Caparo* case.

2–4 Identification of some of the issues in the problem and an attempt to apply legal principles to these issues. Perhaps major gaps, omissions or inaccuracies and little or no attempt to apply cases or examples.

0–1 Very weak answer with little understanding of the issues. No application of relevant case law or examples.