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# Answers

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Section A

- 1 C
- 2 B
- 3 C
- 4 D
- 5 C
- 6 B
- 7 C
- 8 C
- 9 C
- 10 B
- 11 A
- 12 D
- 13 A
- 14 B
- 15 D
- 16 C
- 17 A
- 18 D
- 19 B
- 20 C
- 21 D
- 22 A
- 23 C
- 24 B
- 25 C
- 26 C
- 27 C
- 28 A
- 29 C
- 30 B
- 31 D
- 32 A
- 33 C
- 34 A
- 35 A
- 36 C
- 37 A
- 38 C
- 39 C
- 40 A
- 41 B
- 42 B
- 43 C
- 44 A
- 45 B

Section B

- 1 (a) Exclusion clauses must be validly incorporated into the contract to take effect. Incorporation may take place either by the party who is not relying on the exclusion clause signing the contract containing the exclusion clause, by giving reasonable notice of the exclusion clause to that party, or by a course of dealing.
- [Tutorial note: Candidate needs state only TWO methods of incorporation.]
- (b) (i) The exclusion clause is governed by the Unfair Contract Terms Act Cap 396. Exclusion clauses which exclude liability for negligence causing personal injury are void, and therefore Peter could not escape liability for any injury to John.
- (ii) The doctrine of 'fundamental breach' is a rule of construction, according to which the more serious the breach, or the consequences of the breach, the less likely it is that the court will interpret the exclusion clause as covering the breach. Delivery of John's furniture appears to be a fundamental term of the contract and if Peter intended to exclude such a serious consequence which includes total destruction of the furniture, he would have to use clear words to such an effect. The clause did not, for example, state that damage caused by fire, or damage howsoever caused are excluded, so it is likely the clause does not cover the breach in question.

- 2 (a) Tammy may enforce article 1 against Roy and Sally. Tammy may bring the action directly against Roy and Sally, and the company does not have to be joined as a party. Pursuant to s.39 Companies Act Cap 50, the memorandum and articles of association are a statutory contract between a member and every other member. This contract is deemed to contain covenants that each member will observe all the provisions of the memorandum and articles of association. Every member has a personal right to have the terms of the memorandum and articles of association observed.
- (b) Rich Pte Ltd may wish to enforce article 2 against Blooms Pte Ltd. The memorandum and articles of association are a statutory contract only among members of the company. Since Rich Pte Ltd is an outsider (i.e. non-member) and is not privy to this statutory contract, it cannot enforce any right which article 2 purports to confer upon it.
- (c) Blooms Pte Ltd may wish to enforce article 3 against Tammy and will be able to do so. Pursuant to s.39 Companies Act Cap 50, the memorandum and articles of association are a statutory contract between the company and its members. It provides that the memorandum and articles of association bind the company and the members as if they 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 and articles of association.

- 3 (a) John owes a statutory duty under s.157(1) Companies Act Cap 50 to use reasonable diligence in the discharge of his duties. According to *Lim Weng Kee v PP* (2002), the standard of care and diligence expected of a director is objective, namely, whether they have exercised the same degree of care and diligence as a reasonable director found in their position. The standard may, however, be raised if the director held themselves out to possess, or in fact possesses, some special knowledge or experience.

John will be held to the standard of a reasonable director with 20 years' experience in the supermarket industry. As the new business involves a heavy investment by Fresh, John may be expected to carry out a feasibility study, market survey of consumer preferences, etc before recommending to the board. As he made the recommendation based on what he hears from his friends, he may have breached the duty to exercise care and diligence.

- (b) John occupies a fiduciary office. According to s.156(1) Companies Act Cap 50, he may not place himself in a position where his duty and his interest conflicts. John owes a duty to Fresh to act *bona fide* in the interests of Fresh. This duty conflicts with his personal interest in the contract with Fresh because his brothers' company is the other party to the contract. As such, he is required to provide full disclosure and obtain the informed consent of the board of Fresh (as required by s.156(4) Companies Act) and also the informed consent of the members of Fresh (as required by general law). Since John kept his relationship with Fame a secret, he would have breached his duty to avoid a conflict of interest.
- 4 (a) Under s.216A Companies Act Cap 50, Fred has to satisfy three requirements:
- (1) he must give 14 days' notice to the directors;
  - (2) he must be acting in good faith;
  - (3) it must appear *prima facie* to the court that it is in the interests of the company that the action is brought.

[Tutorial note: Candidate needs state only TWO requirements.]

- (b) (i) Fred should commence a derivative action on behalf of Bright. Misappropriation of Bright's funds is a wrong done to Bright. Since Elly has breached her duty to Bright, Bright would be the proper plaintiff to bring the action. Where Bright refuses to bring the action, Fred may apply to court under s.216A Companies Act Cap. 50 for permission to enforce Bright's rights.
- (ii) Fred should commence a personal action under s.216 Companies Act Cap 50. Elly's conduct of not answering Fred's questions and removing Fred as director are wrongs done to Fred personally, not wrongs done to Bright.
- 5 (a) According to s.227B(1) Companies Act Cap 50, the court will make a judicial management order if it is satisfied that the making of the order would be likely to achieve one or more of the following purposes:
- (i) the survival of the company, or the whole or part of its undertaking as a going concern;
  - (ii) the approval under s.210 of a compromise or arrangement between the company and any such persons as mentioned in that section;
  - (iii) a more advantageous realisation of the company's assets would be effected than on a winding up.
- (b) The moratorium will stop creditors demanding payment from the company, starting from the time an application for a judicial management order is made (s.227C Companies Act Cap 50) and continuing during the period the judicial management is in force (s.227D Companies Act Cap 50).

The moratorium is effective because it extends to all creditors, namely secured creditors and unsecured creditors. The secured creditors will not be able to take steps to enforce any charge or security over the company's property. The unsecured creditors will not be able to bring any proceedings, execution or other legal processes against the company.

**Section A**

**1–45** One or two marks per question; total 70 marks

**Section B**

- 1** (a) 1 mark for each relevant method of incorporation, up to a maximum of 2 marks.
- (b) 2 marks for stating exclusion clauses which exclude liability for negligence causing personal injury are void.
- (c) 1 mark for explaining 'fundamental breach' rule of construction. 1 mark for applying the rule to the clause.
- 2** (a) 1 mark for stating who Tammy can enforce the article against. 1 mark for explaining why the article can be enforced.
- (b) 1 mark for stating who Rich Pte Ltd may wish to enforce the article against. 1 mark for explaining why the article cannot be enforced.
- (c) 1 mark for stating who Blooms Pte Ltd can enforce the article against. 1 mark for explaining why the article can be enforced.
- 3** (a) 1 mark for stating the duty to act with care, skill and diligence. 1 mark for stating statutory duty under s.157(1) Companies Act Cap 50. 1 mark for explaining why duty is breached.
- (b) 1 mark for stating the duty to avoid conflict. 1 mark for stating statutory duty under s.156(1) Companies Act Cap 50. 1 mark for explaining why duty is breached.
- 4** (a) 1 mark for each requirement under s.216A Companies Act Cap 50, up to a maximum of 2 marks.
- (b) (i) 1 mark for stating a derivative action should be brought. 1 mark for explaining why a derivative action should be brought.
- (ii) 1 mark for stating why a personal action should be brought. 1 mark for explaining why a personal action should be brought.
- 5** (a) 1 mark for each purpose under s.227B Companies Act Cap 50, up to a maximum of 3 marks.
- (b) 1 mark for stating moratorium begins with application to court. 1 mark for stating moratorium continues during the period of judicial management order. 1 mark for stating moratorium affects both secured and unsecured creditors.