

Fundamentals Pilot Paper – Skills module

Corporate and Business Law (Malaysia)

Time allowed

Reading and planning: 15 minutes

Writing: 3 hours

ALL TEN questions are compulsory and MUST be attempted.

Do NOT open this paper until instructed by the supervisor.

During reading and planning time only the question paper may be annotated. You must NOT write in your answer booklet until instructed by the supervisor.

This question paper must not be removed from the examination hall.

The Association of Chartered Certified Accountants

Paper F4 (MYS)

The ACCA logo consists of the letters 'ACCA' in a bold, white, sans-serif font, centered within a solid black square.

ACCA

ALL TEN questions are compulsory and MUST be attempted

- 1 In relation to the Malaysian legal system:**
- (a) Explain what is meant by 'human rights'. (3 marks)
 - (b) Discuss any three provisions in the Federal Constitution which you consider protect human rights. (7 marks)
- (10 marks)**
- 2 With reference to the Contracts Act 1950, define consideration and explain the exceptions to the rule that contracts without consideration are void.**
- (10 marks)**
- 3 In relation to employment law:**
- (a) Distinguish a contract of service from a contract for services. (5 marks)
 - (b) Explain the remedies available to an employee for unlawful dismissal. (5 marks)
- (10 marks)**
- 4 In relation to company law explain the doctrine of ultra vires at common law and the extent to which the doctrine is applicable in Malaysia in light of section 20 of the Companies Act 1965.**
- (10 marks)**
- 5 In the context of the law of partnership, explain the situations in which the courts may order a dissolution of the firm upon the application of a partner.**
- (10 marks)**
- 6 State the main duties of a company auditor under the Companies Act 1965 in relation to reports on accounts.**
- (10 marks)**
- 7 (a) Define corporate governance. (3 marks)**
- (b) The Malaysian Code on Corporate Governance recommends certain best practices. In this context, state the principal responsibilities of the board of directors recommended in the Code. (7 marks)
- (10 marks)**

- 8 The articles of association of ABC Sdn Bhd provide, among other things, that preference shareholders shall have the right to a fixed dividend of 10% per annum and a voting right of one vote per share on all matters at general meetings of the company. In other respects its articles are in the form of Table A of the Fourth Schedule of the Companies Act 1965. The company has previously issued 2 million preference shares. It now proposes to make a second issue of 1 million preference shares carrying the same dividend and voting rights.

The present holders of preference shares are unhappy with this proposed issue of preference shares and wish to challenge it on the ground that it amounts to a variation of their class rights. They also wish to know the procedure for variation of class rights.

Required:

- (a) Advise the preference shareholders on the procedure for variation of class rights and whether the proposed issue of preference shares would amount to a variation of their class rights. (8 marks)
- (b) If the proposed second issue of preference shares was to rank *pari passu* with the first, explain whether this would amount to a variation of the preference shareholders' class rights. (2 marks)

(10 marks)

- 9 Al Froddo Sdn Bhd, a company dealing in the manufacture of aluminium, has three directors, Ali, Fred and Rodney. Fred is the managing director. The general manager of the company is Chin Chai. The company has been facing losses in the past two years and is hopelessly insolvent. The company's financial advisers have advised the general manager and the directors that they should consider winding up the company to prevent prejudice to creditors. Despite this advice, last month Fred and Chin Chai, without the knowledge of the other directors, Ali and Rodney, ordered, on credit, RM2 million worth of raw materials from Lumin Sdn Bhd for the production of aluminium. Last week the company went into insolvent liquidation. The liquidator seeks your advice as to whether all or any of the directors and the managing director can be charged with committing any offence under the Companies Act 1965, in respect of the above mentioned debt of RM2 million. Further, he wishes to know whether he could successfully sue all or any of them to make them personally liable for all or any part of that debt.

Required:

Advise the liquidator.

(10 marks)

- 10 Samy and his wife, Jenny, approach you with the following problems:

On 1 August 2006 Samy received a written offer from Chong for the purchase of Samy's antique gramophone for the sum of RM15,000. The letter expressly stated that if Samy did not reply within two weeks Chong would presume that Samy had accepted the offer. Samy did not reply. Chong now claims that there is a binding contract between him and Samy.

Samy wishes to know the legal position.

As for Jenny, she was out shopping when she saw a display of a well known brand of T-shirt in a shop window. Beside the display was a large card with the words, 'Special offer. RM10. For today only'.

Jenny immediately went into the shop and chose a T-shirt. However, when she wanted to pay at the payment counter, she was told that the T-shirt was not for sale.

Jenny wishes to know whether she could legally insist on purchasing the T-shirt at the price of RM10.

Required:

Analyse the problems from the perspective of contract law, and advise Samy and Jenny on the legal position.

(10 marks)

End of Question Paper

Answers

1 This question on human rights tests the candidates' knowledge of the meaning of human rights as well as the provisions in the Federal Constitution which protect human rights.

(a) Human rights may be said to be the basic rights that all human beings are entitled to enjoy.

According to Kofi Annan, the Secretary General of the United Nations, human rights are the foundation of human existence and coexistence. Human rights are universal, indivisible and interdependent. Human rights are what make us human. They are the principles by which we create the sacred home for human dignity.

By section 2 of the Human Rights Commission of Malaysia Act 1999, "human rights" refers to fundamental liberties as enshrined in Part II of the Federal Constitution.

(b) The Federal Constitution provides for several fundamental liberties of the individual. These may be said to be provisions pertaining to 'human rights'. These are listed and explained below:

(i) No person may be deprived of his life or personal liberty except in accordance with the law.

This provision protects the individual from being unlawfully imprisoned or put to death. Where the individual is unlawfully detained, he may obtain an order of the court through a writ of 'habeas corpus'. This is an order of the court requiring that he be lawfully charged in court or be released. However, this right is not absolute. A person may still be deprived of his life or liberty in accordance with the law. Thus the Internal Security Act 1960, which was passed under powers conferred by Article 149 of the Constitution permits, among other things, preventive detention.

(ii) No person may be subject to slavery or forced labour.

The constitution recognises that individuals should not be regarded as the property of others and thus bans all forms of slavery and forced labour. However, this right of the individual is given subject to the paramount interest of the nation. Thus, Parliament may make laws providing for compulsory national service.

(iii) No person can be punished under a law which was not in force when the alleged crime was committed. This protects the individual from being charged with a crime that was not recognised as a crime at the time the alleged wrongful act was done. Thus, for example, a person professing the hindu religion cannot be charged with bigamy if his purported second marriage was entered into prior to the implementation of the Law Reform (Marriages and Divorce) Act 1976, which made non muslim marriages monogamous. This effectively means that laws against crimes cannot be passed with retrospective effect.

(iv) A person cannot be tried more than once for the same crime, where he has already been acquitted or convicted earlier. This right recognises that an individual should not be placed in a position of double jeopardy, where he is made to undergo more than one trial for the same offence if he has already previously been tried and either acquitted or convicted. If the law were otherwise, there might be no end to the punishments meted out to the individual who has committed an offence, even if it is a minor one. However, this does not apply in cases where a higher court has quashed an earlier trial and ordered a re-trial.

(v) All persons are equal before the law and entitled to its protection. However, this right is subject to some exceptions. These include, among other things:

(1) any provision regulating personal law.

(2) any provisions or practice restricting matters connected with religion to persons professing that religion only.

(3) any provision for protection, well being or advancement of the aboriginal peoples of the Federation.

(4) any provision restricting enlistment in the malay regiment to malays. In addition, State laws may provide for reservation of land for malays. See: Article 89 and 90.

(vi) Citizens cannot be discriminated against in relation to appointment to any office or employment under a public authority, or in relation to acquisition of property, establishing or carrying on of any trade, business, profession, vocation or employment, merely on grounds of religion, race, descent or place of birth. However, this right is subject to Article 153 of the Federal Constitution which permits the granting of special privileges to bumiputras.

(vii) Citizens cannot be discriminated against in relation to the providing of education, merely on grounds of religion, race, descent or place of birth. This again is subject to Article 153 as stated above. (Article 153 is further discussed below)

(viii) Freedom of religion

The constitution also entrenches the right of the individual to profess, practice and propagate his own religion. However, as Islam is the religion of the country, restrictions may be placed upon the propagation of other religions among Muslims.

(ix) No citizen may be banished from the country. However, this right is subject to exceptions whereby the Federal Government is permitted to deprive a person of his citizenship under certain circumstances.

(x) Every citizen has the right to freedom of speech, peaceful assembly and association. However, in the interests of security, public order or morality, Parliament may impose certain restrictions. For example, the Sedition Act 1948 provides that it is an offence to question the sovereignty, powers and prerogatives of the rulers and the special position of the Malays.

Further, the freedom of speech does not entitle a person to defame another. This will entitle the person defamed to sue the other under the law of defamation.

It must be noted that a number of these liberties may be overridden by Art 149 and 150 of the Constitution. Among other things, Article 149 empowers Parliament to make laws against subversion, whether or not an emergency is proclaimed. Such laws may be inconsistent with a number of the entrenched fundamental liberties such as liberty of the person, free movement and freedom of speech, assembly and association. The Internal Security Act 1960 is an example. (Candidates are only expected to explain any three of the above rights.)

- 2** This question tests the candidates' knowledge of the meaning of consideration in relation to the law of contract and the exceptions to the rule that contracts without consideration are void.

Consideration is defined in s 2(d) of the Contracts Act 1950 as follows:

'When at the desire of the promisor, the promisee or any other person has done or abstained from doing or promises to do or abstain from doing, something, such act or abstinence or promise is called consideration of the promise.' Basically, consideration refers to the price paid by one party to another in order to obtain the other's consent to the agreement.

Consideration need not be in the form of money. It may be in the form of an act done or even an abstinence or forbearance from doing something.

See: *Osmain bin Abdul Ghani & Others v United Asian Bank* (1987) 1 MLJ 27.

Section 26 of the Contracts Act 1950 states that an agreement without consideration is void. However, there are several exceptions to this rule provided for by s.26 itself as follows:

- (a)** Agreements made on account of natural love and affection between parties standing in near relation to each other. Such agreements must be made in writing and must be registered under the law (if any) for the time being in force for the registration of such documents.

The following example is provided in s.26 as an illustration of this exception:

'A, for natural love and affection, promises to give his son, B, \$1,000. A puts his promise to B in writing and registers it under a law for the time being in force for the registration of such documents. This is a contract.'

However, the phrase 'near relation' is not defined. Thus, it would be left to the courts to decide on the facts of a particular case whether the parties were in near relation. In *Re Tan Soh Sim* (1951) 1 MLJ 21, it was held by the Court of Appeal that Chinese adopted children could not be regarded as being in 'near relation' to the uncles and aunts of their adoptive mother.

- (b)** An agreement to compensate wholly or in part a person who has already voluntarily done something for the promisor. The following illustration is provided by the section:

'A finds B's purse and gives it to her.
B promises to give A \$50. This is a contract'.

- (c)** An agreement to compensate wholly or in part a person who has done something which the promisor was legally compellable to do. The following illustration is provided by the section;

'A supports B's infant son. B promises to pay A's expenses in so doing. This is a contract'.

- (d)** An agreement to pay wholly or in part a statute-barred debt. The agreement must be in writing and signed by the person to be charged therewith or his lawfully authorised agent. The following illustration is provided by the section:

'A owes B \$1,000 but the debt is barred by limitation. A signs a written promise to pay B \$500 on account of the debt. This is a contract'.

- 3** This question on employment law contains two parts. Part (a) tests the candidates' knowledge on the difference between a contract of service and a contract for services. Part (b) tests their knowledge on the remedies of an employee for unlawful dismissal.

- (a)** Essentially, a contract of service is a contract between an employer and an employee under which the employee agrees to work for the employer. Under the Employment Act 1955 a contract of service is defined as, 'any agreement whether oral or in writing and whether express or implied, whereby one person agrees to employ another as his employee and that other agrees to serve his employer as employee and includes an apprenticeship contract.'

Under the Industrial Relations Act 1967, such a contract is referred to as a 'contract of employment' which is defined as, 'any agreement whether oral or in writing and whether express or implied whereby one person agrees to employ another as a workman and that other agrees to serve his employer as a workman.'

It has generally been accepted that there is no distinction between the two phrases.

See: *American International Assurance Co Ltd and Dato Lam Peng Chong & Others* (Award 275 of 1988).

It is important to distinguish between a contract of service and a contract for services. Only a contract of service/employment will give rise to an employer/employee relationship, which is regulated by the Employment Act 1955 and the Industrial Act 1967. Further such employer/employee relationship must exist before an employer can be made vicariously liable for the negligent acts of his employee done in the course of his employment.

The contract for services, on the other hand, is very different from that of the contract of service/employment. It does not create an employer/employee relationship and does not therefore come within the purview of the Employment Act and the Industrial Relations Act. Instead it creates only a contractual relationship between an employer and an independent contractor.

- (b) There are three remedies available to an employee who has been unjustly dismissed. These are:
- (i) reinstatement
 - (ii) compensation in lieu of reinstatement and
 - (iii) re-engagement.

These remedies may be explained as follows:

- (i) Reinstatement.

This is a remedy by which an employee who has been unjustifiably dismissed is put back into the position that he would have been in if he had not been so dismissed. Thus, when an employee is reinstated he would be entitled to occupy the same position that he occupied before and would be entitled to receive arrears of salary from the time he was dismissed until the time of reinstatement. His status and other privileges are absolutely restored.

- (ii) Compensation in lieu of reinstatement.

Sometimes, the court may award the employee compensation in lieu of reinstatement. This means that instead of reinstating the employee, the court orders that he be given compensation. This may be necessary where the court finds that reinstatement is likely to produce negative results to the employer. Usually the compensation that is so payable will be at the rate of one month's pay for each year of service subject to a maximum of 24 months.

- (iii) Re-engagement.

Re-engagement or re-employment means that the employee is given an opportunity to come back and work. He may not be given the same position and he will not be entitled to any arrears of salary. He will lose his past service. Upon re-engagement his service starts afresh.

- 4 This question tests the candidates' knowledge on the ultra vires doctrine as it applies to companies in light of the provisions of s.20 of the Companies Act 1965.

The doctrine of *ultra vires* at common law refers to the rule that a company must act within the scope of its objects clause in the memorandum of association and that any activity of the company outside its capacity is void. Neither the company nor the third party could enforce such a transaction. See: *Ashbury Railway Company v Riche* (1875); *Re Jon Beauforte* (1953).

The doctrine was developed to protect the investors of the company ie its members as well as its creditors, who could rest assured that their money would be applied only for the purposes stipulated in the objects clause.

The operation of the *ultra vires* doctrine has been modified in Malaysia as a result of s.20 of the Companies Act 1965.

By s.20(1), no act or purported act of a company, and no conveyance or transfer of property to or by a company shall be invalid by reason only that it is *ultra vires*. Thus, by virtue of this section, *ultra vires* transactions are valid and binding upon the company. However, it cannot be said that the ultra vires doctrine is not applicable altogether in Malaysia. Companies are still expected to act within the scope of the objects clause as can be seen from s.20(2).

By s.20(2)(a), any member of the company or debenture holder secured by a floating charge on the company's property or the trustees for such debenture holders may take proceedings against the company to restrain the company from doing any *ultra vires* act, or conveyance or transfer of any property to or by the company. Section 20(3) provides that the court may allow compensation to the company or other party for loss suffered as a result of granting the injunction.

By s.20(2)(b), the issue of *ultra vires* may be relied upon by the company or any member in proceedings against the present or former officers of the company.

By s.20(2)(c), the issue of *ultra vires* may be relied upon in any petition by the minister to wind up the company.

It may therefore be concluded that in Malaysia, completed transactions remain valid as between the company and the third party and either party may sue the other upon it. The doctrine of *ultra vires* is no longer applicable against third parties only in respect of completed transactions. However, as mentioned above, uncompleted transactions may be stopped on grounds of *ultra vires*. Further, the present and former officers of the company may be made liable to the company for the *ultra vires* transactions. In addition, the company may also be wound up by the minister. This serves to protect the investors of the company, ie the members and the creditors. Thus, the rationale behind the *ultra vires* doctrine still remains intact, and, while the doctrine may have lost some of its importance it is still applicable in Malaysia to the extent discussed above.

5 This question tests the candidates on the situations in which the court may, on the application of a partner, order a dissolution of the firm.

By section 37 of the Partnership Act 1961 the court may order a dissolution of the firm in the following circumstances:

- (a) When a partner is found to be lunatic or is shown to the satisfaction of the court to be of permanently unsound mind. The application can be made to the court either by the partner who has become lunatic or of unsound mind (through his next friend or person having title to intervene) or through the other partner.
- (b) When a partner, other than the partner suing, becomes in any other way, permanently incapable of performing his part of the partnership contract. Where there is a reasonable possibility that the incapacity is only of a temporary nature, the court will refuse to order dissolution. See: *Whitwell v Arthur* (1865).
- (c) When a partner, other than the partner suing, has been guilty of conduct which, in the opinion of the court is calculated to affect prejudicially the carrying on of the business. See: *Clifford v Timms* (1908), where one of the partners was a director of an association which was a party to self puffing advertisements. The court held that the other partner was entitled to an order of dissolution of the firm.
- (d) When a partner, other than the partner suing, willfully or persistently commits a breach of the partnership agreement or conducts himself in relation to the partnership business, in such a way that it is not reasonably practicable for the other partner or partners to carry on the business in partnership with him. See: *Cheeseman v Price* (1865), where a partner failed to enter small sums of money into the partnership accounts. This happened 17 times. The court held that this amounted to persistent breach.
- (e) When the business of the company can only be carried on at a loss. Cases have held that the loss must not be of a temporary nature. See: *Handyside v Campbell* (1901).
- (f) When circumstances have arisen which, in the opinion of the court, render it just and equitable that the partnership be dissolved. See: *Ebrahimi v Westbourne Galleries Ltd* (1973); *Ting Tien Kwang & others v Kong Sung Seng and others* (1964).

6 This question tests the candidates' knowledge on the duties of an auditor under the Companies Act 1965.

The main duties of an auditor as to reports on accounts are stated in s.174 and s.175.

By s.174(1), an auditor has the duty to report to the members on the accounts which are required to be laid before the company in the annual general meeting and on the company's accounting and other records. In the case of a holding company the auditor is also required to report on the consolidated accounts. In the case of a borrowing corporation, the auditor is required to send a copy of the report to the trustee for the debenture holders: s.175(1). The auditor is required to state in this report whether, in his opinion, the accounts and consolidated accounts if any, have been properly drawn up:

- (i) so as to give a true and fair view of the matters required to be dealt with in the accounts and consolidated accounts if any -s.172(4)(a)(i);
- (ii) in accordance with the provisions of the Acts so as to give a true and fair view of the company's affairs – s.172(2)(a)(ii) and
- (iii) in accordance with the applicable accounting standards.

By s.174(3) it is also the duty of an auditor to form an opinion as to each of the following matters:

- (a) whether he has obtained all the information and explanations that he required.
- (b) whether proper accounting and other records have been kept by the company as required by this Act.
- (c) whether the returns received from branch offices of the company are adequate and
- (d) whether the procedures and methods used by a holding company or a subsidiary in arriving at the amount taken into any consolidated accounts were appropriate to the circumstances of the consolidation.

If there was any failure or shortcoming in respect of any of these matters the auditor must state particulars of it in his report. In relation to other breaches of the provisions of the Companies Act the auditor has the duty to report to the Registrar if he is satisfied that the matter will not be adequately dealt with the comment in his report or by bringing it to the notice of the directors s.174(8).

7 This question tests the candidates' knowledge of the meaning of corporate governance as well the principal responsibilities of the board of directors as recommended in the Malaysian Code on Corporate Governance.

- (a) Corporate governance has been defined in several ways. According to the Wikipedia encyclopaedia, corporate governance is the set of processes, customs, policies, laws and institutions affecting the way a corporation is directed, administered or controlled. Corporate governance also includes the relationships among the many players involved (the stakeholders) and the goals for which the corporation is governed. The principal players are the shareholders, management and the board of directors. Other stakeholders include employees, suppliers, customers, banks and other lenders, regulators, the environment and the community at large.

In Malaysia, The High Level Finance Committee on Corporate Governance defined corporate governance as ‘the process and structure used to direct and manage the business and affairs of the company towards enhancing business prosperity and corporate accountability with the ultimate objective of realising long term shareholder value, whilst taking into account the interests of other stakeholders’.

- (b) According to the Malaysian Code on Corporate Governance, the best practices in corporate governance in relation to the principal responsibilities of the board of directors are that the board should explicitly assume the following six specific responsibilities, which facilitate the discharge of the board’s stewardship responsibilities:
- (i) Reviewing and adopting a strategic plan for the company;
 - (ii) Overseeing the conduct of the company’s business to evaluate whether the business is being properly managed;
 - (iii) Identifying principal risks and ensure the implementation of appropriate systems to manage these risks;
 - (iv) Succession planning, including appointing, training, fixing the compensation of and where appropriate, replacing senior management;
 - (v) Developing and implementing an investor relations programme or shareholder communications policy for the company; and
 - (vi) Reviewing the adequacy and the integrity of the company’s internal control systems and management information systems, including systems for compliance with applicable laws, regulations, rules, directives and guidelines.

8 This problem question on company law tests the candidates’ knowledge and application of the law on variation of class rights.

- (a) Class rights are rights attached to a class of shares. The usual classes of shares are ordinary shares and preference shares. A variation of class rights means an alteration or abrogation of the rights attached to a class of shares. It is important to distinguish between a variation of class rights and a mere variation of the enjoyment of class rights. Such a distinction can be seen in the cases of *White v Bristol Aeroplane Co Ltd* [1953] Ch 65 and *Greenhalgh v Arderne Cinemas* [1946] 1 All E R 512.

In the *White v Bristol Aeroplane* case, the company proposed to make a bonus issue of preference and ordinary shares to the existing ordinary shareholders. The articles contained a modification of rights clause, which stated that the approval of the shareholders of a particular class had to be obtained if their rights were, ‘varied, dealt with or abrogated in any manner’. The plaintiff, a preference shareholder, felt that his rights as a preference shareholder were affected by the proposal and demanded a class meeting. The court held that there was no variation of the rights of the preference shareholders. They would have exactly the same rights after the proposed issue as before. At the most it only affected the enjoyment of the class rights.

Where there is indeed a variation of class rights, the proper procedure for variation has to be followed. The procedure is usually provided for in the articles of association. In the case of companies whose articles are in the form of Table A of the Fourth Schedule of the Companies Act 1965, Article 4 would apply. By this article the variation of class rights may be effected either by obtaining the written consent of the holders of three fourths of the issued shares of that class or by a special resolution passed at a separate meeting of that class of shareholders.

Applying the law to the given problem it may be concluded that the second issue of preference shares carrying the same dividend and voting rights as the first will not amount to a variation of the class rights of the holders of the first issue of preference shares.

- (b) If the proposed second issue of preference shares were to rank *pari passu* with the first issue, it would amount to a variation of the class rights attached to the first issue. This is stipulated in s.65(5) of the Companies Act 1965 which states that the issue of preference shares ranking *pari passu* with existing preference shares shall be deemed to be a variation of the rights of the existing preference shareholders, unless the terms of the first issue expressly authorised future issues ranking *pari passu* with the earlier issue.

9 This question tests the candidates’ knowledge and application of the criminal as well civil liability of directors for fraudulent and wrongful trading.

Fred, the managing director of the company, and Chin Chai, the general manager may be charged with committing an offence under sections 304(1) for fraudulent trading, and under section 303(3) for making the company incur a debt at a time when there was no reasonable prospect of the company being able to pay the debt (the equivalent of wrongful trading under the English Companies Act 1985). They may also incur personal liability.

By section 304(1) of the Companies Act 1965, if in the course of the winding up of the company or in any proceedings against a company it appears that any business of the company had been carried on with intent to defraud creditors of the company or creditors of any other person, the court may, on the application of the liquidator or any creditor or contributory, order any person who was knowingly a party to the carrying on of the business in that manner to be personally liable for all or any of the debts or other liabilities of the company as the court directs. Further, by s 304(5), 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 against this act. This section is intended to curb fraudulent trading. However, fraud is very difficult to prove as it involves a state of mind. See: *Re William C Leitch Brothers Ltd* [1932] 2 Ch 71. In the given problem, Only Fred and Chin Chai were involved in the transaction concerned. The facts do not indicate whether they actually had the intention to defraud. If it could be proved that they had the intention of defrauding the creditor, they would be guilty of an offence. Under the section the penalty would be imprisonment for three years or a fine of RM10,000. Further they could be held personally liable for all the debts or other liabilities of the company as the court directs.

In the event the section does not apply, they could also be held to be guilty of an offence under s. 303(3) as stated earlier. This section provides that if in the course of the winding up of the company or in any proceedings against the company it appears that an officer 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 of the company being able to pay the debt, the officer shall be guilty of an offence. The penalty is imprisonment for one year or a fine of RM5,000. Both Fred as the managing director, and Chin Chai as the general manager of the company, being officers of the company, have been parties to the contracting of the debt knowing that there was no reasonable prospect at the time of the company being able to pay that debt as the company was hopelessly insolvent. Thus they are guilty of an offence under this section. Further, by section 304(2), where a person has been convicted under s 303(3), the court may, on the application of the liquidator, or creditor or contributory, declare that person to be personally liable for the payment of all or any part of that debt. Thus, the liquidator may be advised that in addition to the possibility of applying section 304(1) and(5) in respect of fraudulent trading, he may, after securing a conviction of Fred and Chin Chai under s 303(3), proceed to apply to the court under s 304(2) to make them personally liable for that debt.

- 10** This problem question on contract law tests the candidates' knowledge and ability to identify and apply the law relating to certain basic elements of a contract relating to offer and acceptance.

Samy and his wife, Jenny may be advised as follows:

The general rule is that an agreement will only come into existence where one party has made a proposal (offer) to another and that other has accepted the proposal. The acceptance must be communicated to the proposer. By s.7(b) of the Contracts Act 1950 the acceptance may 'be expressed in some usual and reasonable manner, unless the proposal prescribes a manner in which it is to be accepted.'

While the offeror (proposer) may waive the need for communication of acceptance, the offeree must do something positive to accept, for example, by performing the conditions of the proposal. Section 2(b) of the Contracts Act 1950 requires the offeree to signify his assent to the proposal. Thus, silence on the part of the offeree cannot amount to an acceptance. Neither can a proposer state in the proposal that if the offeree does not reply within a stipulated time, the offer is deemed to be accepted. This may be highlighted by the case of *Felthouse v Bindley* (1862). In this case the plaintiff wrote to his nephew offering to buy his horse at a certain price. The letter also stated, "If I hear no more about him, I consider the horse mine at that price". The nephew did not reply the letter. The court held that there was no valid acceptance. The silence on the part of the nephew did not amount to consent. Thus, there is no binding contract between Samy and Chong.

In relation to Jenny's problem, there is also no binding contract. as the words on the card beside the display did not amount to an offer. As explained earlier, for a valid agreement to arise there must be an offer and a valid acceptance of that offer. However, it is important to distinguish between an offer and an invitation to treat. While an offer may be accepted giving rise to an agreement, an invitation to treat is only an offer to receive an offer, ie it is an invitation to others to make an offer. Examples of invitations to treat are advertisements and displays in shop windows.

A case in point is *Pharmaceutical Society of Great Britain v Boots Cash Chemist Ltd* (1953) 1 QB 401. In this case the defendants were charged with selling certain poisons in contravention of the Pharmacy and Poisons Act 1933. The question was whether a sale had occurred when a customer in a self-service shop selected certain items which he desired to purchase and placed them in a wire basket. The court held that the display in the shop only amounted to an invitation to treat. A proposal to purchase was made when the customer selected the items he wanted to purchase. A sale would occur only when the cashier accepted the customers money.

Applying the above law to the given facts, Samy and Jenny may be advised that there is no binding agreement for the purchase of the T-shirt. The display in the shop was only an invitation to treat and not an offer. When Jenny chose the T-shirt and brought it to the cashier's counter to pay she was in law making a proposal (offer) to purchase the shoes which the shop assistant was free not to accept. Thus, Jenny cannot legally insist on purchasing the T-shirt at the price of RM10.

- 1** (a) 0–3 An accurate answer explaining what is meant by human rights will fall into the upper part of this band while an incomplete or an inaccurate one will fall into the lower part.
- (b) 4–7 Good to average answer explaining any three provisions on human rights (fundamental liberties) under the Federal Constitution.
- 0–3 Incomplete or inaccurate answer.
- 2** 7–10 Very good answer clearly defining consideration in the context of contract law with explanation of the exceptions to the rule that contracts without consideration are void.
- 5–6 Reasonable answer defining consideration with explanation of some of the exceptions to the rule that contracts without consideration are void.
- 0–4 Incomplete or inaccurate answer.
- 3** (a) 3–5 Good to average answer accurately distinguishing a contract of service from a contract for services.
- 0–2 Incomplete or inaccurate answer.
- (b) 3–5 Good to average answer explaining the remedies for an employee who has been unjustly dismissed.
- 0–2 Incomplete or inaccurate answer.
- 4** 7–10 Very good answer explaining the common law doctrine of ultra vires in relation to company law and the extent to which s.20 has modified the common law position.
- 5–6 Average answer indicating a reasonable understanding of the doctrine of ultra vires and the position under s.20 of the Companies Act 1965.
- 0–4 Incomplete or inaccurate answer.
- 5** 7–10 Very good answer displaying sound knowledge of the situations in which the courts may order a dissolution of the firm with reference to the Partnership Act 1961.
- 5–6 Average answer, sufficiently explaining some of the more important situations in which the courts may order a dissolution of the firm.
- 0–4 Incomplete or inaccurate answer.
- 6** 7–10 Very good answer clearly explaining the various duties of an auditor under the Companies Act 1965, in relation to reports on accounts.
- 5–6 Average answer sufficiently explaining the main duties of an auditor in relation to reports on accounts.
- 0–4 Incomplete or inaccurate answer.
- 7** (a) 0–3 An accurate answer defining corporate governance will fall into the upper part of this band while an incomplete or an inaccurate one will fall into the lower part.
- (b) 4–7 Good to average answer explaining the principal responsibilities of the board of directors as recommended in the Malaysian Code on Corporate Governance.
- 0–3 Incomplete or inaccurate answer.

- 8 (a)** 6–8 A very good answer accurately identifying the issue of variation of class rights with correct explanation of the law with reference to the Companies Act and relevant cases as well as accurate application to the given problem.
4–6 Average answer identifying the issue of variation of class rights with a reasonable explanation of the law.
0–3 Incomplete or inaccurate answer.
- (b)** 0–2 An accurate answer will fall into the upper part of this band while an inaccurate one will fall into the lower part.
- 9** 7–10 A very good answer identifying the issues of fraudulent trading and wrongful trading with reference to the Companies Act 1965, with proper explanation and application to the given problem.
5–6 Average answer identifying the issues with a reasonable explanation of the law and application to the given problem.
0–4 Incomplete or inaccurate answer.
- 10** 7–10 Very good answer accurately identifying the legal issues with respect to the problems of both Samy and his wife, Jenny, (ie the issues of whether silence may amount to consent and whether there was an offer as opposed to a mere invitation to treat, in relation to the law of contract) with correct explanation and application of the law to the given problem.
5–6 Average answer identifying the issues, with some explanation and correct advice to Samy and Jenny.
0–4 Incomplete or inaccurate answer.