

WRITTEN QUESTIONS (TOTAL: 100 marks)

Answer **ALL** of the following questions. Marks are indicated at the end of each question. Together they are worth 100% of the total marks for this examination.

Question 1 (20 marks – approximately 36 minutes)

Calvin and David both work for a transportation company as drivers. Both of them are working part-time. Calvin is studying a degree in accounting on a part-time basis and is required to work six days a week. David loves travelling around the world and only works when he is in Hong Kong. David has total control of his working times and hours.

Calvin and David are paid HK\$100 per hour and are required to wear company uniforms. Calvin works eight hours per day and six days a week. His salary includes a contribution to his Mandatory Provident Fund account, and he is entitled to holiday and sick pay.

Calvin is also allowed to use the company car with the company's logo, and the car is maintained by the company. One day, when Calvin drove his car back home after work, he knocked down a pedestrian while he was busily talking on his mobile phone. Legal action has been taken by the pedestrian against Calvin and Calvin's employer.

David is working on an hourly basis, and he is paid on this basis for the hours he actually works. David does not have holiday, sick pay, or a Mandatory Provident Fund account. David does not work for the company when he is travelling in other countries. David cannot use the company's car for private purpose and must park the car at the company's car park after work.

Required:

In relation to employment law (for part (a)) and tort of negligence (for part (b)):

(a) Analyse the employment status of Calvin and David and the protections offered to them respectively.

(10 marks)

(b) Analyse the elements required to prove that Calvin is liable for the car accident.

(10 marks)

Question 2 (15 marks – approximately 27 minutes)

Sam is a sole proprietor of a taxi company with several taxis for leasing to taxi drivers and May, his girlfriend, is his secretary and accountant.

The taxi drivers have been paying the daily rental for the taxis for a long while to May without objection from Sam.

May has allowed her youngest brother, Tommy, to use a taxi which has not been let to other taxi drivers, and Tommy has provided some monetary advantages to May for the use of the taxi. May has kept the monetary advantages from Tommy for herself without the permission of Sam.

Recently, Sam and May broke up. May resigned from her position with the taxi company. Without the knowledge of their break-up and May's resignation, the taxi drivers continued to pay the daily rental for the taxis to May for two weeks.

After two weeks of the taxi drivers still paying the daily rental for the taxis to May, Sam told the taxi drivers that May resigned and was not his agent and she had no authority to receive the rental from them. Sam would like to collect the rental which had been paid to May from the taxi drivers during the said two weeks. The taxi drivers refused to pay the rental to Sam.

Required:

In relation to agency (for part (a)) and anti-corruption laws (for part (b)):

(a) Analyse whether May is an agent for Sam, and whether she has any authority to receive the rental from the taxi drivers.
(10 marks)

(b) Analyse whether May has committed any offence in respect of the monetary advantages paid by Tommy to her.
(5 marks)

Question 3 (20 marks – approximately 36 minutes)

Jimmy is a collector of special antique watches. He has several unique and precious watches in the world.

Recently, Jimmy has acquired a very special antique watch from an auction. This special antique watch had to be kept in a special box with temperature-control. Jimmy went to a well-known watch box shop to look for this special antique watch box.

Jimmy asked the shop owner Tom whether they had a watch box for his special antique watch. Tom showed Jimmy a sample of a watch box which was made in Switzerland. Jimmy told Tom that his watch had to be kept under special temperature-control in a special antique watch box. Tom told Jimmy that Tom needed to check for it. Tom then asked his staff to check with the manufacturer. Tom's staff just quickly checked the function of the special antique watch box from the internet. The staff found an online forum which stated that the watch box had the temperature-control function but he did not verify the function with the manufacturer. The staff told Tom about the information that he obtained from the online forum.

Based on the information from the staff, Tom made a representation to Jimmy that the watch box had the temperature-control function. By relying on the representation of Tom, Jimmy purchased the watch box. Jimmy put his special antique watch into the watch box and after about a week the special antique watch could not be used anymore.

On further investigation, Jimmy found that the watch box did not have a temperature-control function.

Required:

In relation to laws of contract and misrepresentation and sale of goods law:

(a) Analyse whether Jimmy is entitled to lodge a claim against Tom for Tom's representation.

(10 marks)

(b) Analyse Jimmy's legal rights under the sale of goods contract.

(10 marks)

Question 4 (20 marks – approximately 36 minutes)

Friendship Company Limited ("FCL") is a private company incorporated in Hong Kong. It was formed by three good friends, Amy, Betty and Catherine. FCL adopted the Model Articles for Private Companies Limited by Shares as its articles.

It was agreed that Betty and Catherine would work full-time and manage the daily operations of FCL while Amy would only contribute capital to FCL. Betty and Catherine are the two directors of FCL, and each owns 2,000 issued shares in FCL. Amy only owns 1,000 issued shares in FCL.

Recently, Amy discovered that FCL had entered into a transaction in which Betty's and Catherine's families might have interests. As a result, Amy, Betty and Catherine had been in a serious dispute. Amy, as a minority shareholder of FCL, is concerned that the above transaction had not been entered into for the benefit of FCL and would like to bring an action against Betty and Catherine on behalf of FCL in order to stop the above transaction.

However, Amy has been advised that she is not allowed to sue on behalf of FCL and that only in very exceptional circumstances may she take action for FCL under company law.

Required:

In relation to company law:

- (a) **Analyse what are the exceptional circumstances under the common law in which Amy can take action for FCL against Betty and Catherine and what action is available to her as a minority shareholder under common law.**
(10 marks)
- (b) **Analyse what action for FCL against Betty and Catherine would be available to Amy as a minority shareholder under the Companies Ordinance (Cap.622).**
(10 marks)

Question 5 (15 marks – approximately 27 minutes)

Albert is a retired civil servant, and he makes use of his retirement pension to invest in the stock market. Albert has acquired a substantial amount of shares of over 5% of a public company listed on the Main Board of the Stock Exchange of Hong Kong.

Albert has been advised that there is a disclosure obligation to the public if he becomes a substantial shareholder of a company listed on the Main Board of the Stock Exchange of Hong Kong under the laws relating to securities and futures.

Required:

In relation to securities and futures law:

(a) Analyse whether Albert would be obligated to disclose his interest in the shares as a substantial shareholder and under what circumstances a shareholder must make such disclosure.

(10 marks)

(b) Explain which regulatory authority is responsible for enforcing the disclosure obligation under securities and futures law and what are the regulatory objectives of this authority.

(5 marks)

Question 6 (10 marks – approximately 18 minutes)

Nelson and Peter are good friends and former colleagues. They both recently resigned and left their employers and would like to set up a business on their own.

Nelson and Peter want to form and run a partnership in relation to the business and are uncertain of the rights and obligations as partners of a partnership under the partnership law.

Nelson and Peter have come to you because they would like to understand the liabilities and duties owed by a partner to the other partners of a partnership.

Required:

In relation to partnership law:

Explain to Nelson and Peter the liabilities and duties owed by a partner to the other partners of a partnership under common law and the Partnership Ordinance (Cap.38).

(10 marks)

* * * END OF EXAMINATION PAPER * * *

WRITTEN QUESTIONS (Total: 100 marks)

Answer 1

The question required candidates to discuss the distinctions between employees and independent contractors (in part (a)); and the elements of tort of negligence (in part (b)).

Answer 1(a)

An employee is governed by the employment law under common law and the Employment Ordinance (Cap.57) ("EO"). An independent contractor is governed by law of contract.

The distinction between an employee and an independent contractor is based on the following three common law tests:

- (i) Control Test: This is based on the control exercisable over the service-provider;
- (ii) Integration Test: This is based on whether the service-provider is part and parcel of the organisation; and
- (iii) Multi-factor Test: This is based on multiple factors of the relationships in order to determine their employment status.

The Multi-factor Test is a mixed test which refers to the entire situation and is much wider than the control and integration tests. The test is based on the perspective of mutuality of obligations. The Multi-factor Test is preferable as it looks into various factors of the relationships between the parties, including the elements of control, the title of the post, the benefit and the remuneration packages, among other factors.

In *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968]*, a lorry driver who delivered cement for RMC Ltd signed a contract as a self-employed contractor. He wore an RMC uniform and bought a lorry with the RMC logo from RMC Ltd on hire-purchase. He drove the lorry on RMC's business only for a certain number of hours per week and was paid based on the amount of cement delivered per mile and had to hire a replacement if he could not work. It was held that the lorry driver was not an employee but an independent contractor engaged on a contract for services.

In view of the above tests, it is likely that Calvin is considered as an employee as he has the holiday or sick pay and Mandatory Provident Fund, which are paid by the transportation company. As David has no holiday or sick pay nor Mandatory Provident Fund and has total control of his working times and hours, David is likely to be an independent contractor.

Only an employee is entitled to the protections under the EO, the Mandatory Provident Fund Schemes Ordinance, and the common law including Mandatory Provident Fund, wages, holidays, sick leave, termination, severance pay, long service pay, maternity protection, year-end payment, redundancy and vicarious liability etc. An independent contractor is not entitled to the above protections and his/ her rights are governed by law of contract.

Answer 1(b)

The tort liability of a defendant to a plaintiff is based on the defendant's failure to fulfill an obligation imposed by law and not imposed by contract. It is a civil wrong that one party suffers at the hands of another and the wrongdoer is known as a "tortfeasor".

Negligence is governed by law of tort which is an act or omission which fails to reach the reasonable standard of care imposed by law in order to avoid causing injury or loss to another person. The purposes of tort and negligence are to protect the rights or interests of persons being recognised and protected by law and compensate the victims for harm done when such rights or interest are infringed.

In this case, Calvin will be liable for negligence if the pedestrian can successfully establish the following:

- (i) Duty of care: Calvin as a driver owed the pedestrian a duty of care;
- (ii) Breach of duty: Calvin was in breach of the duty of care without proper care and attention while he was busily talking over the mobile phone while driving;
- (iii) Causation: The pedestrian suffered injury or damage as a result of the breach of duty; and
- (iv) Remoteness of damage: The injury and damage suffered by the pedestrian were not too remote.

In *Donoghue v Stevenson [1932]*, Lord Atkin laid the foundation for circumstances under which the duty of care is to be imposed on the defendant. Lord Atkin established that everyone owes a duty of care to his neighbour. The duty of care is "to take reasonable care to avoid acts or omissions which you would reasonably be likely to injure your neighbour". Calvin as a driver owes a duty of care to other road users such as the pedestrian.

Based on this fact, it is likely that Calvin as a driver owes a duty of care to the pedestrian and is liable for the car accident. The pedestrian may recover the loss and damage he may suffer as a result of the car accident and take a civil action against Calvin for negligence.

Answer 2(a)

The question required candidates to discuss the agency by estoppel.

In an agency contract, an agent is a middle man between the other contracting party and the principal. The issue is whether May is an agent for Sam as the principal, and whether May has the authority to receive the rental from the taxi drivers.

In agency by estoppel, it is not necessary to appoint the agent by any formal procedure. This is an equitable principle. When (i) a principal has given certain representation (ii) which has the effect of misleading any third party into the belief that (iii) the agent has the principal's authority, the law would regard the agent as having apparent authority.

Apparent or ostensible authority arises when an outsider reasonably believes that a person has the authority to act for another person to enter into contracts. This belief stems from the person's acts leading to the belief that he/ she has been given authority to act and the principal has failed to deny his/ her authority. The issue of apparent authority is often relevant in agency and corporate law.

In *Lloyd v Grace, Smith & Co. [1912]*, a law clerk fraudulently induced a client to sign a deed to transfer the title to him. It was irrelevant that the clerk acted with a dishonest purpose for his own benefit. The law firm failed to deny his authority which fell within the ordinary business of solicitors. It was held that the clerk had an apparent authority and was an agent by estoppel of the law firm and the law firm was liable to the client as the principal of the clerk.

May is an agent by estoppel. Sam allowed May to receive the rental from the taxi drivers for a long while and Sam failed to deny May's authority. It is reasonable for the taxi drivers to believe that May was an agent with the apparent authority to receive the rental.

In this case, since the taxi drivers had no knowledge that May had resigned from the taxi company and Sam failed to inform the taxi drivers that May ceased to have the authority to receive the rental from the taxi drivers, Sam was unable to collect the rental already paid to May from the taxi drivers again. Sam shall give proper notice to the taxi drivers about the termination of agency relationship with May.

Answer 2(b)

The key provision is s.9 which addresses the bribery of "agents". The principal is regarded as the employer and the agent is regarded as the employee. S.9 is intended to prohibit conduct that may undermine the integrity of the principal and agent/ fiduciary relationship, in particular any receipt by an agent of advantages from third parties without the principal's permission and secret attempts by third parties to corrupt or influence an agent.

It is an offence that, anyone who, without lawful authority or reasonable excuse, offers an advantage to an agent (or, as an agent, soliciting or accepting an advantage) as an inducement or reward or otherwise on account of the agent (not) performing an act or (dis) favouring any person in relation to his/ her principal's affairs or business.

An advantage is defined by s.2 as including but not being limited to any gift, loan, fee, reward or commission consisting of money or of any valuable security or of other property or interest in property of any description; any office, employment or contract etc. In this case, the monetary advantages kept by May as an agent without the approval from Sam (i.e., May's employer) is within this definition.

Note: Unless otherwise stated, the reference to the above provision(s) are made to the Prevention of Bribery Ordinance (Cap.201).

Answer 3

The question required candidates to discuss the misrepresentation under common law and that under the Misrepresentation Ordinance (Cap.284) ("MO") (in part (a)) as well as the concept of implied terms under the Sale of Goods Ordinance (Cap.26) ("SOGO") (in part (b)).

Answer 3(a)

The issues are the types of misrepresentation and its remedies. Misrepresentation is not defined by the MO but by common law. It is an untrue statement made before a contract is concluded by one party with an intention to induce the other party to enter into the contract. The representation made by the shop owner (i.e., Tom) to the buyer (i.e., Jimmy) before the contract induced the buyer to buy the product (i.e., the watch box), and that the representation was untrue. It is a misrepresentation.

There are three types of misrepresentation:

- (i) Innocent misrepresentation is where a party of a contract has made the statement honestly and had reasonable grounds for believing it was true at the time the statement was made which induced the other party to enter that contract;
- (ii) Negligent misrepresentation is where a party of a contract has made the statement carelessly and did not have reasonable grounds for believing it was true at the time the statement was made which induced the other party to enter that contract; and
- (iii) Fraudulent misrepresentation is where a party of a contract has made the statement while knowing it was untrue which induced the other party to enter that contract.

The representation made by the shop owner Tom to Jimmy was based on an online forum with no verification from the manufacturer that the watch box had the temperature-control function. It is a negligent misrepresentation.

The common law burden of proof is modified by the MO. Negligent misrepresentation is presumed under s.3(1), and the representor will be liable to the representee as if it were a fraudulent misrepresentation, unless the representor can prove that he/ she made the misrepresentation innocently. In other words, the representor must prove that he/ she had reasonable grounds to believe and did believe that the facts represented by him/ her were true. It is for the defendant to rebut the presumption under s.3(1).

The common law remedies for misrepresentation are rescission and damages. The common law remedies are modified by the MO by providing a discretionary power that the court may award damages to the innocent party in lieu of rescission for non-fraudulent misrepresentation under s.3(2).

In this case, Jimmy may claim against Tom for negligent misrepresentation and ask for rescission and/ or damages.

Note: Unless otherwise stated, the reference to the above provision(s) are made to the Misrepresentation Ordinance (Cap.284).

Answer 3(b)

Jimmy is a consumer and is able to rely on the protection of the implied terms in the Sales of Goods Ordinance ("SOGO"). The relevant implied terms protecting a consumer under the SOGO are ss.15, 16 and 17.

It is an implied condition that the goods shall correspond with the sample of the goods under s.15 (sale by description). It is irrelevant if Jimmy as a buyer selected the goods himself unless the defect is clearly apparent.

The implied term of merchantable quality under s.16(2) should apply as this is a sale in the course of a business:

- (i) It is clear from the fact that the shop owner Tom is in "the course of business" and Tom's shop qualifies as a business.
- (ii) Merchantable quality is defined by s.2(5). The goods are of merchantable quality if they are:
 - as fit for the purpose or purposes for which goods of that kind are commonly bought;
 - of such standard of appearance and finish;
 - as free from defects (including minor defects);
 - as safe; and
 - as durable.

The effect of s.16(2) replaces the common law *caveat emptor* principle and puts the burden on the seller. Although Jimmy inspected and examined the products, this does not affect the legal position as there was no defect apparent on his reasonable examination in the shop.

S.16(3) (fitness for purpose and reliance on seller's judgment) is also relevant here as Jimmy mentioned to the shop owner Tom that Jimmy required a watch box with temperature-control function. The implied terms as to fitness for purpose should apply as Tom was fully aware of Jimmy's requirements and Jimmy relied on Tom's judgment in regard to Tom's knowledge of "fitness for purpose".

S.17(2) (sale by sample) is a contract for sale by sample where there is a term in the contract, express or implied, to that effect. S.17(3) provides that there is an implied condition that the goods shall be free from any defects, rendering them unmerchantable, which would not be apparent on a reasonable examination of the sample. The sale to Jimmy was based on the sample provided by the shop owner Tom.

In *Godley v Perry [1960]* involving a sale of a defective catapult, the sale was a sale by sample and the defect was not apparent on a reasonable examination. It was held that there was a breach of the implied condition and the product was of unsatisfactory quality. The plaintiffs were able to claim compensation for the loss caused by the product under the implied condition.

Based on the facts, it is likely that the shop owner Tom is liable to Jimmy due to the implied terms protecting a consumer under ss.15, 16 and 17.

Note: Unless otherwise stated, the reference to the above provision(s) are made to the Sales of Goods Ordinance (Cap.26).

Answer 4(a)

The question required candidates to discuss the derivative action under common law.

The basic company law rule is that a shareholder has no right to bring an action for the company. There are also some exceptions to the basic company law rule. The rule is based on a case known as *Foss v Harbottle [1843]*.

In *Foss v Harbottle [1843]*, two minority shareholders brought an action against five directors alleging that they had misapplied the company's property and given mortgages improperly over the company's property. The two minority shareholders asked for a declaration from the court that the directors were responsible for the loss to the company and also asked the court to appoint a receiver. It was held that the company was governed by directors who were appointed by majority shareholders in the general meeting and two minority shareholders could not as two individuals bring this claim. Only the company itself could bring it.

The result of the case is that either the shareholders with majority vote in a general meeting can bring a case in the name of the company or the board of directors can bring it, but not one or two shareholders alone. The two important principles referring to the case are: "the majority rule" and "the proper plaintiff rule".

In *Foss v Harbottle [1843]*, it also set out the four exceptions where the minority shareholders may bring a derivative action on behalf of the company:

- (i) Fraud on a minority: Where the management or majority shareholders improper exercise of voting power by the majority of members of a company to defraud a minority, the individual shareholder may bring an action for the company.
- (ii) *Ultra vires* and illegality: Where the act of the company is *ultra vires* or illegal by statute, the individual shareholder may bring an action for the company.
- (iii) Special majorities: Where the constitution of the company requires, say, a special resolution, as necessary to do some act but the company only did it by ordinary resolution, the individual shareholder can litigate it.
- (iv) Personal rights: Where the articles of association give the shareholders rights which they can enforce against the company, the rights cannot be taken away by ordinary resolution.

In this case, as Betty and Catherine are the directors of Friendship Company Limited ("FCL") and they have interests in the FCL's transaction without proper approval at a general meeting of the shareholders, Amy may rely on the ground of fraud on a minority and bring a derivative action against them. For common law derivative action, no particular step is required. Amy as a minority shareholder may bring an action in the name of FCL and prove the exceptions under the rule of *Foss v Harbottle [1843]*. Amy needs to finance the proceedings first until she is able to prove her case in court of law, where an order of costs may be made in her favour. The remedies are provided to FCL and not to Amy.

Answer 4(b)

The question required candidates to discuss the statutory derivative action under s.732.

S.732(1) provides that if misconduct is committed against a company, a member of the company or of an associated company of the company may, with the leave of the court granted under s.733, bring proceedings in respect of the misconduct before the court on behalf of the company.

Misconduct is defined by s.731 and means fraud, negligence, breach of duty or default in compliance with any Ordinance or rule of law.

S.733(1) provides that on application by a member of a company or of an associated company of a company, the court may grant leave for the purposes of this section if it is satisfied that:

- (i) On the face of the application, it appears to be in the company's interests that leave be granted to the member;
- (ii) In the case of (i), there is a serious question to be tried and the company has not itself brought the proceedings.

Ss.733(3) and (4) provide that the written notice must be served on the company's registered office at least 14 days before the member applies for leave; and the notice must state his/ her intention to apply to the court for leave to bring or intervene in proceedings and the reason for this intention.

In *Ferrari S.P.A. v F&S Express Ltd [2005]*, the court explained that a leave is granted if "an arguable case be shown to subsist" and the applicant has the same relatively low threshold as per an application for an interlocutory injunction. The court will not normally enter into the merits of the proposed derivative action to any great degree.

In *Li Chung Sing Tong Holdings Ltd [2011]*, the court took the view that where there is a serious issue to be tried, it is very likely that it would be in the *prima facie* interests of the company to bring the proposed legal action.

As far as the statutory derivative action is concerned, the shareholders' ratification is not an absolute bar but may be a relevant consideration for the leave application under s.734. No settlement can be made in respect of the proceedings brought by s.732 without the leave of the court under s.735. If both common law and statutory derivative actions are taken, the court may dismiss the common law derivative action under s.736. The court has wide discretion to award various remedies and costs under ss.737 and 738 respectively.

In this case, as Betty and Catherine are the directors of Friendship Company Limited ("FCL"), Amy may serve a written notice on FCL and obtain a leave from court to take a statutory derivative action under s.732 if Amy can prove that the action is in the interests of FCL, and that there was misconduct and a serious question to be tried.

Note: Unless otherwise stated, the reference to the above provision(s) are made to the Companies Ordinance (Cap.622).

Answer 5(a)

The question required candidates to discuss the obligation to disclose the interest in shares as a substantial shareholder of a public listed company under ss.310 to 328 (Divisions 2 to 4).

A person is under a duty to disclose to the Stock Exchange of Hong Kong and the public listed company concerned when he/ she acquires, or ceases to have, a notifiable percentage interest in shares and when there are changes in his/ her percentage interest under s.310. The obligation to disclose the interest in shares as a director and chief executive is under ss.341 to 351 (Divisions 7 to 9).

S.313(1) provides four circumstances in which a duty of disclosure arises:

- (i) The person has a notifiable interest immediately after the relevant time, but did not have a notifiable interest immediately before the relevant time;
- (ii) The person had a notifiable interest immediately before the relevant time, but does not have a notifiable interest immediately after the relevant time;
- (iii) The person had a notifiable interest immediately before the relevant time, and has a notifiable interest immediately after the relevant time, but the percentage levels of his/ her interest immediately before and immediately after the relevant time is not the same; or
- (iv) The person had a notifiable interest immediately before the relevant time, and has a notifiable interest immediately after the relevant time, but the nature of his/ her interest (or part thereof) immediately before and immediately after the relevant time is not the same.

"Relevant time" is defined by s.308 and means the time of the occurrence of the relevant event. "Relevant event" is widely defined by s.308.

A reference to notifiable percentage level for substantial shareholders shall be construed as a reference to 5% under s.315(1). A reference to specified percentage level for substantial shareholders shall be construed as a reference to 1% under s.315(2).

S.314 prescribes the manner in which the percentage level is to be calculated for the purpose of determining whether there is a notifiable interest.

In this case, if Albert acquires 5% shares or more of the public listed company and has any change in the percentage interest in shares for 1% or more, he has a duty to disclose to the Stock Exchange of Hong Kong and the public listed company concerned under the Securities and Futures Ordinance (Cap.571).

Note: Unless otherwise stated, the reference to the above provision(s) are made to the Securities and Futures Ordinance (Cap.571).

Answer 5(b)

The regulatory authority responsible for enforcing the Securities and Futures Ordinance (Cap.571) is the Securities and Futures Commission ("SFC").

The SFC is established under s.3.

S.4 provides that the regulatory objectives of the SFC are:

- (i) to maintain and promote the fairness, efficiency, competitiveness, transparency and orderliness of the securities and futures industry;
- (ii) to promote understanding by the public of financial services including the operation and functioning of the securities and futures industry;
- (iii) to provide protection for members of the public investing in or holding financial products;
- (iv) to minimise crime and misconduct in the securities and futures industry;
- (v) to reduce systemic risks in the securities and futures industry; and
- (vi) to assist the Financial Secretary in maintaining the financial stability of Hong Kong by taking appropriate steps in relation to the securities and futures industry.

Note: Unless otherwise stated, the reference to the above provision(s) are made to the Securities and Futures Ordinance (Cap.571).

Answer 6

The question required candidates to explain the partners' liabilities and duties under common law and the Partnership Ordinance (Cap.38) ("PO").

A partnership is defined as the relation which subsists between persons carrying on business in common with a view of profit under s.3(1). The restriction of number of partners up to 20 under s.345(2)(a) of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap.32) has been repealed.

A partner owes fiduciary duty under the common law and equity as well as statutory duties to other partners under the PO. A partner is an agent for the partnership and his/ her other partners for the purpose of the business of the partnership under s.7.

Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his/ her legal representatives under s.30. Every partner must account to the firm for any benefit derived by him/ her, without the consent of the other partners, from any transaction concerning the partnership or from any use by him/ her of the partnership property, name, or business connection under s.31. A partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, must account for and pay over to the firm all the profits made by him/ her in that business under s.32.

A partnership is not a legal entity and all partners are liable to the debts of the partnership on an unlimited amount basis.

The partners are liable both jointly and severally for the debts and obligations of the partnership under s.11 and under tort under s.12.

In *Kao Lee & Yip v Koo Hoi Yan Donald and others [2003]*, the defendant was a partner of a law firm. The partner resigned from the law firm and took up the business of a bank who was a client of the law firm during the notice of termination period. It was held that it was a breach of a fiduciary relationship.

In this case, Nelson and Peter should observe the duties under rules for common law and equity and statutory duties to other partners under the PO.

Note: Unless otherwise stated, the reference to the above provision(s) are made to the Partnership Ordinance (Cap.38).

* * * END OF EXAMINATION PAPER * * *



Qualification Programme Examination Panelist's Report

Module 10 – Business and Company Law (December 2021 Session)

(The main purpose of the following report is to summarise candidates' common weaknesses and make recommendations to help future candidates improve their performance in the examination.)

(I) Written Questions

General Comments

The paper was three hours in duration and consisted of six questions. The marks allocation among the nine major topics of this paper is as follows:

1. Company Law	30%
2. Law of Employment	10%
3. Law of Tort and Negligence	10%
4. Law of Agency	10%
5. Law of Contract	10%
6. Law of Consumer Protection	10%
7. Law for Public Companies	10%
8. Law of Bribery and Corruption	5%
9. The Hong Kong Legal System and Regulatory Authorities	5%

This paper was set on the entire topics prescribed for the syllabus of Module 10. The syllabus covers many important business and company law topics. The wide range of examinable topics could be one of the reasons for poor performance in the examination. Good candidates showed adequate preparation for all topics in the syllabus.

Candidates performed well on straightforward questions. This can be seen in Question 1(a) on the laws of employment, Question 2(b) on the laws of anti-corruption, Question 5(a) on the disclosure of interests under the Securities and Futures Ordinance ("SFO") as well as Question 5(b) on the regulatory objectives of the Securities and Futures Commission ("SFC").

Candidates were not well prepared for non-straightforward questions where they were required to identify the legal issues based on the case scenario and question requirements. This can be seen from Question 3(b) on the implied terms in the contract of sale and Question 4 on the topic of derivative actions.



Candidates were weak in understanding the question requirements and applying them to the case scenario specifically. Some candidates failed to discuss how implied terms may provide protection to the consumer in Question 3(b) while others were unable to identify the topic of derivative actions as required in Questions 4(a) and (b), but wrongly discussed the unfair prejudice remedy in the answer. Similarly, a few candidates failed to identify the issue of negligence and discussed negligent misstatement and/or vicarious liability in Question 1(b).

Specific Comments

Question 1 - 20 Marks

Part (a) of this question was straightforward and required candidates to determine if the two individuals are an employee or an independent contractor, and what are the protections available to them respectively. Candidates' performance was good in general. They were able to identify and discuss the three common law tests.

Part (b) of this question required candidates to discuss the issue of negligence. Yet, some candidates wrongly discussed negligent misstatement and/or vicarious liability, which were irrelevant to the question.

Question 2 – 15 Marks

Part (a) of this question required candidates to discuss the authority under the agency of estoppel. Candidates' performance was fair. Candidates were only able to discuss the types of agents but were unable to explain the apparent authority and the agency by estoppel.

Part (b) of this question require candidates to discuss the laws of anti-corruption. Candidates' performance was good. Many candidates were able to give relevant answers to this question but it was found that some of them simply copied their answers from the past examination papers and did not give relevant analysis in the answers.

Question 3 – 20 Marks

Part (a) of this question required candidates to discuss the issue of misrepresentation. Candidates' performance was satisfactory. Yet, some candidates were unable to identify the issue of question and discussed negligent misstatement based on the past examination papers.

Part (b) of this question required candidates to discuss the implied terms in the contract of sale. Candidates' performance was poor. Many candidates were unable to identify the topic of the implied terms of the Sale of Goods Ordinance as this topic first appeared in the examination. It appears that candidates did not have sufficient understanding on this topic.



Question 4 – 20 Marks

Part (a) of this question required candidates to discuss common law derivative action. Candidates' performance was poor. Many candidates were unable to identify and discuss the issue of common law derivative action, and wrongly answered the unfair prejudice remedy and the just and equitable winding-up based on the past examination papers.

Part (b) of this question required candidates to discuss statutory derivative action. Candidates' performance was less than satisfactory. Many candidates were unable to address the requirement and discuss the issue of statutory derivative action under section 732 of the Companies Ordinance (Cap.622). Unlike the unfair prejudice remedy, the remedy of statutory derivative action is available to the company and not to the shareholders personally.

Question 5 – 15 Marks

Part (a) of this question required candidates to discuss the disclosure of interests under the SFO. Candidates' performance was good. Candidates were able to identify and discuss the disclosure obligations in their answers.

Part (b) of this question required candidates to discuss the regulatory objectives of the SFC. Candidates performed well and were able to discuss the objectives of the SFC in their answers.

Question 6 – 10 Marks

This question required candidates to discuss the partners' duties to the partnership. Candidates' performance was average. Many candidates were able to identify and discuss the partners' duties in their answers.

(II) Conclusion and Recommendation

Some candidates neither read the question requirements carefully nor had sufficient understanding of the major business and company law topics in the syllabus. As can be seen in Questions 2(b) and 4, some candidates simply copied their answers from the past examination papers and did not give relevant answers in the analysis. It appears that they relied too much on the past examination papers.

One of the major purposes of the examination is to test the candidates' ability to apply their legal knowledge to address the question requirements. Candidates are expected to discuss the legal issues based on the case scenario and question requirements in a reasonable and logical manner. This reveals that candidates lacked sufficient preparation and understanding of all topics in the syllabus. Candidates are advised to prepare themselves well as there are always new topics tested in the examination.