Answers

1 The question asks candidates to demonstrate their knowledge on the interpretation of laws by the local courts. It has been stated that interpretation refers to the examination of a particular principle or provision of law with the purpose of ascertaining its meaning and/or applicability in regard to a given set of facts.

A member of the judiciary may not refuse to give a decision on the merits before him on the pretext that the relevant provisions of law are obscure, unlike the situation in Roman times when a judge could deliver judgement by returning a *Non liquet* verdict.

Interpretation is said to be either doctrinal or authentic. Authentic interpretation is made in the law itself while doctrinal interpretation is that which is made by the judiciary, lawyers, text book writers and the like.

Doctrinal interpretation refers to the search for the spirit of the law through its provisions and hence an in-depth understanding of the provisions. The functions of interpretation are the result of many factors but principally the stage of development at which a given legal system has reached. In legal systems, which are still in the period of formation, interpretation has mainly a creative function and one of the most extensive sources of the law itself. As soon as a codification is made there is a period in which the interpretation role is rigid and restricted. This stage is followed by a third stage of comparative freedom where a balance is reached between the wording of the law and the underlying spirit of the law.

There have been several theories put forward on the interpretation of law which are based on two extremes, namely the will of the legislator and the social requirements at a given moment. The various theories put forward can be divided into four groups: (a) the traditional theory; (b) the historical school; (c) the German school of Frei Recht and (d) the eclectic theory.

(a) The traditional theory aims at the discovery of the presumed will of the legislator. It is the role of the legislator to draft the law and therefore the interpreter must aim to discover the legislator's will. This theory is based on an objective examination of the law itself and of its sources and is based on the following main rules:

(i) the first duty of the interpreter is to ascertain the grammatical and logical meaning of the law;
(ii) if a text is obscure, the interpreter must endeavour to discover the legislator's intention at the time of the enactment of the particular law;
(iii) if the law has omitted to deal with a particular case, it is still possible to find the legislator's intention by analogy with other provisions.

The main fault found with this theory is that the followers of this school of thought presume that the legislator had in mind all possible scenarios, which is not the case. There is therefore the risk that an artificial interpretation be adopted.

(b) The historical school of thought came about as a reaction to the rigidity of the traditional school. This theory dictates that law is continuously evolving in accordance with the needs of society. One of the main proponents of this theory is von Savigny who analysed the four elements which he held lie at the basis of interpretation, namely (i) the grammatical element; (ii) the logical element; (iii) the historical element and (iv) the systematic element. While the first two elements help in the initial discovery of the meaning of the law, the third element presents the law in its proper perspective while the last element correlates all the provisions together.

(c) The German school of Frei Recht, the theory of 'free law', of which one of the main early proponents was von Ihering. This theory is based on utilitarian grounds where the text of the law is given a secondary position, where the judge or interpreter is authorised to interpret law in the way in which he thinks best to meet the justice of the case. However, on such a basis certainty of law could be wiped out and the theory is therefore deemed impracticable.

(d) Finally, the eclectic theory reconciles the various theories by deeming them complimentary to one another. While adhering to the text of the law, the interpreter must also be receptive to change in finding solutions to the case before him.

In dealing with the theories mention has been made to different types of interpretation. From the point of view of origin, interpretation may be either authentic or doctrinal. On the other hand, doctrinal interpretation may be either grammatical or logical. As noted above, grammatical interpretation merely indicates the direct meaning of the words used. Therefore, words are to be understood according to their normal meaning, unless they are technical, in which case the technical meaning would prevail. Logical interpretation aims at discovering the legislator's will through the logical nexus of the ideas contained in the law and through its political and juridical reasons as well as through the examination of all the circumstances connected with the law.

Doctrinal interpretation may also be declarative, widening and restrictive. Declarative interpretation refers to the case when the wording of the law does not correctly express the intention of the legislator. Through this interpretation the real meaning of the law is ascertained and declared. When the law is expressed more or less widely than that which is really meant, the need arises for restrictive or widening interpretation. However, before the latter may be employed, the interpreter must ascertain the existence of a divergence between the wording and real meaning intended by the legislator. With this in mind, he must examine the *ratio* of the law and if he determines that this is wider than the words actually employed, the interpreter must employ widening interpretation by applying the provision to cases which come within the *ratio* though perhaps not strictly adhering to the wording. On the other hand, when the wording of the law renders it applicable also to cases which do not fall within its *ratio*, the legal provisions should not be applied to those cases by reason of restrictive interpretation, which narrows down the field of application of the law. Restrictive interpretation must however be applied with caution as otherwise the will of the interpreter will be substituted for that of the law.

It is also worth noting that there are several traditional maxims on doctrinal interpretation, some of which are detailed below. It is noted that many maxims are reflected in the provisions of the law.

(i) 'All the clauses of a contract shall be interpreted with reference to one another giving to such clause the meaning resulting from the whole instrument' (Article 1008 of the Civil Code)–therefore before attempting to interpret one particular provision the interpreter must be cognisant of the main aim of the particular piece of legislation or branch of law;
(ii) 'When a clause is susceptible to two meanings, it must be construed in the meaning in which it can have some effect rather than in that which it can produce some' (Article 1004 of the Civil Code)–it cannot therefore be presumed that the law contains provisions which are redundant and therefore if one interpretation renders a particular provision superfluous, that interpretation must be discarded;
(iii) The existence of defects in law cannot be presumed and therefore that interpretation must be chosen which excludes *vitia* in legal provisions;
(iv) Exceptions should not be presumed unless clearly stated or implied in the law and if any exception is to be recognised, it must be interpreted and applied restrictively.

2 This question seeks to test the candidates knowledge in the basic requisites which must be satisfied in order for any type of contract to be deemed valid. Thus, for a contract to be valid, certain requisites must be fulfilled.

Contractual requisites can be classified into essential requisites, namely those which are so intimately connected with the contract that in their absence the contract is null; natural requisites, which include those requisites which are so intimately connected with the contract that they subsist until they are excluded by the parties, but without which the contract would not be rendered null; and accidental requisites, which include those requisites which exist only if they are agreed upon by the parties. From the above, therefore it is clear that only the essential requisites should be called requisites as they are required for the essence and validity of a contract. The other so-called requisites are, in actual fact, the effects rather the requisites of a contract.

Another distinction often made in relation to the requisites of a contract is between common requisites, which all contracts require, and particular requisites, which are proper to certain contracts only.

The common essential requisites may be internal and external. While the external requisites refer to the form of a contract, the internal requisites result from the very notion of a contract, namely agreement between the parties.

Internal requisites
1. Capacity to contract; and
2. Consent; and
3. Subject-matter (or object); and
4. Lawful consideration (or cause).

External requisites
1. Public deed; or
2. Private writing.

The object of a contract is that which is given rise to by means of the contract, and since the contract aims at creating, regulating or dissolving an obligation or at transferring a real right, it is this which should constitute the subject-matter of contracts. In positive law, by object or subject matter of contracts one means that which one of the parties gives or promises to give or to do or not to do in favour of the other party; and in bilateral contracts that which each of the parties gives or promises to give, to do or not to do in favour of the other.

Anything may form the object of contracts, including the act of man whether positive or negative. All things may therefore form the object, whether movable or immovable, corporeal or incorporeal, present or future, and even the use and the possession of a thing may be the object of a contract just as the thing itself. Even future things, such as future produce may form the object of a contract, and in this regard, we must distinguish according to whether the object which the parties have in mind is the future thing itself or merely an expectancy of the future thing.

As a rule the object of contracts may be anything which is chosen by the parties, because just as the law protects and sanctions the liberty of the citizen in general, it also protects and sanctions this liberty in contracts. Any limitation therefore to the liberty of the contracting parties with regards to the object of the contract is only justified by the necessity of preventing an abuse of such liberty.

The requisites of the object of contracts are the same as those of the object of obligations in general. The object of contracts, therefore, must be possible, lawful, *in commercio*, specified or such that it may be specified, and useful to the creditor.

Possible means physically possible, so that a thing or an act which is physically impossible cannot form the object of a contract.

Lawful means morally, juridically and politically possible, that is, it must not be something which is prohibited by law, or contrary to morality, or to public policy. The latter include agreements and stipulations with regard to future successions, in that, they have for their object the future inheritance of a living person. The law has always regarded such agreements as immoral and it has therefore always prohibited them because it perceives in them the danger that they might kindle the desire of seeing the death of the person concerned accelerated. Any contract containing such an object is therefore void, whether it is the *decujus* who binds himself to leave his property to a certain person or it is entered into by two or more persons different from the *decujus*, with or without his consent, such as if a legitimate heir or one who hopes to be a testamentary heir, renounces his inheritance in favour of a third party. However there are exceptions to this prohibition such as renunciations to future successions and certain contracts containing a promise of future succession made in contemplation of marriage and a renunciation to future succession made by a person joining monastic life.

The object of a contract must be *in commercio*, it must be apt to form part of the estate of an individual. Things *extra commercium* are those which are destined to be used in a way incompatible with trade; but as soon as such a destination ceases they become again *in commercio* and they may therefore form the object of a contract.

The objects of contracts must be specified because otherwise the debtor could easily evade his obligations by making an illusory performance. Such specification may refer either to a particular thing or to the class to which the object belongs. In the first case the object is said to be certain and determinate, in the second case the object is generic.

Finally, the object of the contract must be useful to the creditor as it is obvious that a person is never interested in the performance of an obligation, which is not useful to him. This utility need not be material: a thing which is not useful in itself may have a sentimental value, but it must have at least an indirect influence on the estate of the person and be such that it may be valued in money. However, there is a tendency in foreign doctrine and case law to regard a moral interest in the thing which is the object of the contract as sufficient even if it cannot be valued in money.

3 In terms of article 35 of the Companies Act, 1995, a partnership *en nom collectif* is dissolved:

(a) where the period, if any, fixed for its duration expires;
(b) if, subject to the provisions of s.21 of the Act (which deals with the reduction of contribution of the partners), all the partners so agree;
(c) if the partnership is adjudged bankrupt;
(d) if, subject to the provisions of s.21 of the Act, in the opinion of the court, there exist grounds of sufficient gravity to warrant dissolution;
(e) if the number of partners is reduced below two and remains so reduced for more than six months; and
(f) in such other cases for which provision is made in the deed of partnership.

On the dissolution of a partnership *en nom collectif* and in no case later than 15 days after such dissolution, the partners having the administration or the representation thereof are to deliver to the Registrar of Companies for registration and publication a notice of dissolution. Where however the partnership is dissolved by order of the court the said notice is to be given by the Registrar of the Superior Courts.

An ordinary partnership *en commandite*, besides being determinable for any of the causes which bring about the dissolution of a partnership *en nom collectif*, is dissolved if no general partners or limited partner remains unless within six months the partner who has ceased to be a partner is substituted.

Where no general partner remains, the limited partners may, in the said period of six months, appoint one of their number for the performance of acts of administration. A limited partner appointed as aforesaid shall not be deemed to have acted in contravention of the provision of law whereby limited partners are precluded from performing any act of administration or from transacting business on behalf of the partnership except by virtue of a power of attorney given for specific acts or transactions.

On the dissolution of an ordinary partnership *en commandite* the partners having the administration or representation thereof are to deliver to the Registrar of Companies for registration and publication a notice of dissolution. Where however the partnership is dissolved by the court the said notice is given by the Registrar of the Superior Courts.

There are rules common to both types of partnerships as to the manner in which such partnerships shall be wound up and eventually struck off the register.

Where the manner in which the partnership is to be wound up is not provided for in the deed of partnership or is not determined by agreement between the partners, the partnership shall be wound up by one or more liquidators. If the partners do not agree as to the person who is to be appointed liquidator, the appointment shall be made by the court, on the application of any partner, creditor of the partnership or the Registrar. The liquidator shall, within 14 days after his appointment, deliver to the Registrar for registration a notice of his appointment stating his name and residence. A liquidator, whether appointed by the partners or by the court, may be removed from office either by the partners, if they so agree, or by order of the court, on a demand by writ of summons made by any of the partners, if the court is satisfied that there exist sufficient grounds to warrant his removal.

Until such time as provision is made for the winding up of the partnership, only such acts as are of ordinary administration may be performed.

The liquidator shall represent the partnership and shall have power to perform all acts conducive and ancillary to the winding up of the affairs of the partnership: provided that he shall not refer any matter to arbitration or make any compromise unless so authorised in writing by the partners. The liquidator shall not undertake any new transaction.

The liquidator shall not distribute any assets of the partnership among the partners unless either the debts and liabilities of the partnership have been paid or sufficient funds have been set aside for the payment thereof. Where the assets of the partnership are insufficient to meet its liabilities, the liquidator may demand from the partners payment of the contribution, if any, due by them, irrespective of the date when it falls due, and, if necessary, the sums required for the payment of the aforesaid liabilities in the proportion in which the liabilities of the partnership are to be borne by the partners. The liquidator may furthermore demand from the partners payment of the contribution, if any, due by them or any part of it, irrespective of the date when it falls due, for the purpose of adjusting the rights of the partners among themselves.

As soon as the affairs of the partnership are wound up, the liquidator shall render an account of the winding up and of his receipts and payments and draw up a scheme of distribution. On the approval of the accounts, the liquidator shall deliver to the Registrar for registration a notice of such approval and the Registrar shall thereupon register it and strike the name of the partnership off the register. The Registrar shall forthwith publish a notice of the completion of the winding up and of such striking off.

4 The purpose of this question is to test the candidates knowledge of persons who hold a post within a company, as a company officer and as the auditor of the company.

(a) In terms of the definition section under the Companies Act, 1995, an officer of a company is said to include a director, manager, or company secretary, but does not include an auditor.

In turn, the law does offer a definition of a director which is said to include any person occupying the position of director of a company by whatever name he may be called, carrying out substantially the same functions in relation to the direction of the company as those carried out by a director. Therefore, one may be considered to shoulder the same responsibilities as a company director without actually being appointed as such. A company secretary is defined as a person being an individual who holds the office of a company secretary in terms of article 138 of the Companies Act. One notes however that the law does not offer a definition of a manager. By way of exclusion from the definition of an officer, one notes that an auditor is defined as a person who is an individual who holds a warrant to act as auditor issued under the Accountancy Profession Act or is a partnership of auditors duly registered under the said Act.

(b) An auditor may be removed from office at any time by means of a resolution taken at the general meeting consented to by more than 50% of the issued shares having voting rights. It should be noted that this is the same procedure which is adopted by a company which wishes to remove one or more of its directors.

Where a resolution removing an auditor is passed, the company is bound to inform the Registrar of Companies within 14 days thereof. Every officer in default shall be liable to a penalty and for every day during which such default continues, to a further penalty.

If removed, an auditor has every right to request compensation for damages in respect of the termination of appointment as auditor or for any other appointment terminating with that of the auditor.

Furthermore, an auditor who has been removed shall have, notwithstanding his removal, the right to receive notice, attend and speak at any general meeting:

(i) at which his term of office would otherwise have expired; or
(ii) at which it is proposed to fill the vacancy caused by his removal.

An auditor who is being removed or not being re-appointed is entitled to receive notice of the text of and reasons for the proposed resolution of the general meeting whereby it is intended to remove him. The auditor proposed to be removed may, with respect to the intended resolution, make representations, in writing to the company, not exceeding a reasonable length and request their notification to members of the company. On receipt of such the company, unless received too late, may include the fact that such representations have been received in the notice or may send a copy of such representations to every member to which notice has been sent. If the representations are not sent out the auditors being removed may request that the representations be heard orally during the meeting.

Where an auditor ceases for any reason to hold office, he shall deposit at the company's registered office a statement of any circumstances connected with his ceasing to hold office which he considers should be brought to the attention of the members or creditors of the company or, if he considers that there are no such circumstances, a statement that there are none. The statement shall be deposited not later than 14 days beginning with the date on which the auditor ceases to hold office.

Where the statement is of circumstances which the auditor requests to be brought to the attention of the members or creditors of the company, the company shall within 14 days of the deposit of the statement either:

(i) send a copy of it to every person entitled to receive copies of the annual accounts; or
(ii) submit an application to the court for an order that there are grounds of sufficient gravity to warrant that the statement should not be circulated and the court shall decide upon the matter accordingly.

Where the company submits an application to court, the court must notify the auditor of this application and must hear both parties before deciding on the matter. Unless the auditor receives such notice of the application before the end of the 21 day period beginning with the day on which the notice is deposited, he shall within a further seven days send a copy of the statement to the Registrar of Companies.

If the court deems that the auditor is using the statement to secure needless publicity for defamatory matter, costs for the application may be awarded to be paid by the auditor and the company shall be obliged to send a statement setting out the effects of the court order to every person entitled to receive copies of the annual accounts of the company. In any other case, on reaching a decision the company shall notify the auditor of the court's decision and send a copy of the auditor's statement to every person entitled to receive the annual accounts of the company. The auditor must also send a copy of the statement to the Registrar of Companies.

5 Except where the Companies Act, 1995 expressly requires powers to be exercised by the company in a general meeting, the division of such powers depends on the provisions of the company's memorandum and articles. Usually, however, the articles authorise the board of directors to exercise all the powers of the company which neither the said Act nor the express provisions of the memorandum or articles require to be exercised by the company in a general meeting.

A general meeting is one at which, if properly convened and duly constituted, resolutions binding the company and all its members may be passed. A general meeting is, therefore, distinguished from meetings of classes of members, which may only pass resolutions binding on the particular class concerned.

Decisions at general meetings are taken by way of resolutions. Resolutions may be of two kinds, ordinary and extraordinary resolutions. In terms of article 135 of the Companies Act, which deals principally with resolutions taken in public companies, a resolution is an extraordinary resolution where two conditions are complied with. The said conditions are, namely that:

(a) the resolution has been taken at a general meeting of which notice specifying the intention to propose the text of the resolution as an extraordinary resolution and the principal purpose thereof has been duly given; and

(b) it has been passed by a member or members having the right to attend and vote at the meeting holding in the aggregate not less than 75% in nominal value of the shares represented and entitled to vote at the meeting and at least 51% or such other higher percentage as the memorandum or articles may prescribe, in nominal value of all the shares entitled to vote at the meeting.

If one of the aforesaid majorities is obtained, but not both, another meeting shall have to be convened within 30 days in accordance with the provisions for the calling of meetings to take a fresh vote on the proposed resolution.

At the second meeting the resolution may be passed by a member or members having the right to attend and vote at the meeting holding in the aggregate not less than 75% in nominal value of the shares represented and entitled to vote at the meeting. However, if more than half in nominal value of all the shares having the right to vote at the meeting is represented at that meeting, a simple majority in nominal value of such shares so represented shall suffice.

However, in the case of a private company a resolution shall nonetheless be deemed an extraordinary resolution where the following two conditions are complied with, namely that:

(a) the resolution has been taken at a general meeting of which notice specifying the intention to propose the text of the resolution as an extraordinary resolution and the principal purpose thereof has been duly given; and

(b) it has been passed by a number of members having the right to attend and vote at any such meeting holding in the aggregate not less than 51% in nominal value of the shares conferring that right or such other higher percentage as the memorandum or articles may prescribe.

As a rule one may state that any question, whether it comes within the meaning of ordinary or special business, may be determined by an ordinary resolution except where an extraordinary resolution is required. Decisions which by law require extraordinary resolutions include decisions to alter the memorandum and articles of association of a company except in the case of alterations excluded under article 79; decisions whereby a company acquires its own shares; decisions whereby class rights are varied; decisions to change the currency in which the share capital is designated; decisions to voluntarily wind up a company or to have the company wound up by the court; decisions to nominate and remove a liquidator; decisions to convert a commercial partnership; and decisions relating to the amalgamation and division of companies.

On the other hand, an ordinary resolution is one which is passed by a member or members having the right to attend and vote and holding in the aggregate shares entitling the holder or holders thereof to more than 50% of the voting rights attached to shares represented and entitled to vote at the meeting, or such other higher percentage as the memorandum or articles may prescribe.

It is also pertinent to note that where decisions are consented to by all the shareholders of a company and such consent is expressed by all in writing, the percentages required for the passing of ordinary and extraordinary resolutions, as detailed above, and the need to hold a meeting are of no relevance. Thus, a resolution signed by all the shareholders for the time being entitled to receive notice of and attend and vote at general meetings shall be considered as valid and effective as if the same had been passed at a general meeting duly convened and held.

6 The Employment and Industrial Relations Act (EIRA), 2002 dedicates a whole chapter to the protection of wages. The reason for this protection being afforded to employees is obvious, in that, receipt of wages is a fundamental right of every worker. The relative provisions contain rules which are intended to ensure that an employee receives his wages personally and in full. Below are the rules upon which such protection is afforded under the EIRA.

1. An employee has the right to receive the full wages in legal tender. In this regard, the law provides that except where otherwise expressly permitted by the provisions of this Act, the entire amount of the wages earned by, or payable to, any employee shall be paid to him in money being legal tender in Malta, and every payment of, or on account of, any such wages made in any other form and any covenant in any contract providing for other form of payment shall be null and void. However payment by cheque or by means of a transfer to one's account is customary where this is acceptable, necessary or agreed upon by the employee;

2. An employee is to receive his wages personally. The general rule is that wages are to be paid directly to the employees to whom they are due. Exceptions however do exist, namely (i) as may otherwise be provided by any law or (ii) in virtue of an order made by a competent court or (iii) where the employee or employer concerned agree to the contrary. Thus, the law permits payments to be made to dependants of the employee in virtue of a court order or payments out of one's wages to be made to charities as agreed upon with the employee;

3. No condition may be imposed as to the place in which, the manner in which or the person/s with whom, any wages are to be paid or spent. In the event that any such term be included in a contract of service, such provision shall be deemed null and void;

4. Wages may not be attached or assigned. Garnishee orders against salaries may not be issued unless the creditor is suing for maintenance. In such case, a garnishee order may be issued against part or the balance of one's wages which exceeds Lm300 a month unless the employee proves to the court that the wages which are attached are needed for his, or for the maintenance of his family.

However, the law goes on to provide that wages may be attached to ensure payment of maintenance due to the wife, minor, incapacitated child or ascendant of the employee, without providing a limit which the employee must receive notwithstanding the maintenance order;

5. An employee is entitled to receive full wages without any deductions. No deductions can be made by way of interest, charge or discount because wages are paid in advance. There are however three exceptions in this regard namely where deductions are permitted by (i) provisions in the EIRA or any other law eg tax, NI, fines, schemes, deductions where an employee does not work full hours (ii) lawful court order (seen above) and (iii) trade union agreements (usually relate to union membership fees).

   A deduction allowed by law relates to fines. Where the contract or written statement specify in detail the fines to which the employee may become liable in respect of an act or omission and the terms of such have been previously approved by the Director of Labour, fines may be deducted from wages.

   Where an employee works less than he should, a fine shall not be imposed but a deduction may be made from his wage. Where an employee is suspended and during such period an employer does not pay him or pays him less, then such deduction is deemed to be a fine, that is the above rules should apply;

6. An employee is to receive minimum wages. However, an employer may provide an employee with food, a house or other allowances (provided they do not take the form of intoxicating liquor or noxious drugs) in addition to the minimum wages due to him, or to a higher wage or higher rates for overtime;

7. Wages are privileged debts. Any claim by an employee equal to a maximum of three months of the current wage payable and compensation for leave, together with any compensation for termination to which the employee is entitled or any notice thereof, shall constitute a privileged claim over the assets of the employer and are to be paid before any other claims, whether privileged or hypothecary. Provided that the maximum shall never exceed six months minimum wage;

8. Wages are to be paid at regular intervals. Wages are to be paid at regular intervals but which cannot exceed four weeks in arrears. Where employees are paid commissions or share of profits a settlement of accounts must be made at least once a year;

9. An employee also has the right to receive four payments a year by way of statutory bonuses. In addition to his salary, the employee is currently also entitled to receive four payments a year payable in March, June, September and December of each year by way of bonuses and payments to compensate workers for cost of living increases as declared by the government in its annual budget;

10. One of the innovative features of the EIRA was the setting up of a guarantee fund. The purpose of the fund is to guarantee the payment of unpaid wages due to employees where the employer has terminated their employment due to the employer's proved insolvency;

11. Specific provision is made in the law for whole time employees with reduced hours. These employees shall be paid *pro rata* of what full time employees receive and also *pro rata* all other leave and other entitlements.

7 The Companies Act, 1995 provides for two principal offences for which directors can be held liable in the case where the company continues to trade when in financial difficulties and such company is subsequently dissolved, namely fraudulent and wrongful trading. The main differing feature between the two offences is the intention to defraud, which must be found to exist in order to hold a person liable for fraudulent trading.

Where it appears that a person who was a director (including a shadow director) and who knew or ought to have known prior to the dissolution that there was no reasonable prospect that the company would avoid being dissolved due to its insolvency, such person shall be held liable for wrongful trading. This provision can be said to concern in principal two persons, namely the liquidator who has to bring forward the application before the court, and the director or directors against whom the action is brought.

On the other hand, if in the course of winding up, it appears that any business of the company has been carried on with the intent to defraud creditors of the company or any other person or for any fraudulent purpose, the court may declare that any persons who were knowingly parties to the carrying on of the business, be held liable for fraudulent trading.

While in the case of fraudulent trading an application can be made by the official receiver, the liquidator or any creditor or contributory of the company, in the case of wrongful trading action can only be taken by the liquidator.

Liability for Wrongful Trading

The principal issue that a liquidator must assess in considering a wrongful trading action are, first, whether and precisely when the directors should have concluded that there was no reasonable chance of the company avoiding insolvent liquidation. UK cases seem to suggest that the courts take a broad approach to predict insolvency. On the assumption that the directors have the financial information that would be available to them if the statutory accounting requirements are complied with, the directors should be able to predict insolvent liquidation. Pinpointing the precise date at which the prediction should have been made is probably more difficult to establish. While a cashflow crisis on top of mounting losses and liabilities will lead to an inevitable conclusion as are withdrawals of credit by major suppliers, loss of a major customer or contract or the date on which disastrous accounting figures should have been available to the board indicating soaring debt and losses are close indications. However, insolvency is probably predictable long before a cash-flow crisis leads to an actual failure to pay current debts. In an English case, the court held that the company was probably likely to fail from the very beginning as it was not objectively a viable business proposition. However, to

conclude that the directors should have predicted insolvent liquidation from the very beginning would impose too strict a test. The courts thus tend to give directors the benefit of the doubt in such circumstances and not choose too early a time for liability to run.

Having verified that the company went into insolvent liquidation and the directors should have known that there was no reasonable prospect that the company would avoid dissolution due to insolvency, the liquidator need prove no more, for the burden of proof shifts on to the directors to prove that there was no wrongful trading or that, knowing that the company could not avoid dissolution due to insolvency, they took every step to minimise the loss of the creditors.

For a director to know and be able to predict financial difficulties he should always have adequate financial information at his disposal, as for example, having monthly management accounts. However having adequate information is of no use if no proper formal structure for decision-making exists within the company, which therefore requires regular board meetings and these being properly minuted. If financial difficulty is identified, then urgent professional advice should be sought from the company's auditors or independent accountants. In addition, a specialist report from an insolvency practitioner may be necessary to consider the alternative courses of action.

The course of action which the directors may take in encountering financial difficulties would probably be commenced with trying to reach agreements with the major creditors and obtain supplies on credit from the small unsecured creditors. Those providing finance may request floating securities over the assets of the company together with high rates of interest, which would assist the company in continuing to do business.

An alternative would be to cease trading, even though this may not necessarily be the best way to protect the creditors' interests. This would necessitate implementation of formal insolvency proceedings which should be done as soon as possible to prevent enforcement of debts by creditors starting proceedings for settlement, to minimise trading losses and to bring trading expenses, like wages, rent, purchases, to a minimum.

A further step which could be contemplated by a director on realising the manner in which the company of which he forms part of the board is being administered is to resign as director. However, in considering this step one must consider that liability is fixed if the person was a director at the time he ought to have concluded that the company would go into insolvent liquidation. Therefore, resignation in no way terminates the accrual of liability but on the contrary it probably will preclude the director from taking any steps to minimise the potential loss of the creditors.

When dealing with the liability of a director, in the case of wrongful trading, their conduct (that is, the facts which he ought to know or ascertain insofar as the insolvency is concerned, the conclusions which he ought to reach and the steps he ought to take to minimise the loss of the creditors) is made subject to two tests: the general knowledge, skill and experience a person carrying out his functions should objectively have and the general knowledge, skill and experience that he actually has. According to these standards he ought to keep himself informed, reach conclusions as to the company's prospects, and take steps to minimise the loss of the company's creditors. The implications of this provision should not be underestimated, in that, it imposes an objective test, with a subjective element, on all directors especially when compared to the subjective criteria usually adopted in determining the level of skill and care expected of directors.

Liability for wrongful trading shall however not be imposed where the director, knowing that there was no reasonable prospect that the company would avoid being dissolved due to insolvency, took every step he ought to minimise the potential loss of the creditors of the company.

Liability for Fraudulent Trading

As held by a UK text-writer, the central requirement for the offence of fraudulent trading is 'the carrying on of business with the intent to defraud creditors' where, as held in *Re Patrick & Lyon Ltd* (1933), the test of the intent will only be satisfied where there is actual dishonesty, involving, according to current notions of fair trading among commercial men, real moral blame. Although this is held to be a strict standard, the test will be satisfied where directors allow a company to incur credit when they have no reason to think that the creditors will ever be paid. Furthermore, 'any persons who were knowingly parties to the carrying on of the business' may be held liable for fraudulent trading. It has been held that this involves taking at least some active part in the management of the company. Thus, the company secretary who merely carries out the administrative functions of such an office would probably be excluded as he has no part in the management; nor can creditors, who press for payment, be held so liable merely because they know that the company will have no money to remain in business if it is honest. However, creditors may be held so liable if they accept money knowing it has been procured by carrying on business with intent to defraud creditors and for the very purpose of paying their debts.

In relation to payments made to creditors, in *Re Sarflax Ltd*, the court concluded that although distributing the proceeds of the realisation of assets could constitute the carrying on of business, the mere preference of one creditor over another did not constitute intent to defraud for the purpose of fraudulent trading.

8 Consent is the will between the contracting parties to create, regulate or dissolve an obligation. For consent to exist two acts of volition must exist, namely the promise of one party and the acceptance of the other. If only one exists then there is no consent. One must also distinguish promise and acceptance from proposal and answer. The latter are two moments of consent, of which proposal is that part of consent which precedes the answer. On the contrary, promise need not precede acceptance nor need acceptance precede the promise. Thus, consent is the concourse of the identical wills of the parties, duly formed and made known.

(a) An offer or proposal is a unilateral act as it is made by the proposer to one or more contracting parties or to the public at large. It is the manifestation of the will and intention of one of the contracting parties to enter into an obligation with one or

more parties. It is the first step in the creation of an obligation from which certain legal effects will ensue depending on whether or not the contract is ever concluded. Other than being unilateral, an offer is also indivisible, in that, it must be considered as a whole and therefore on the basis of the terms and conditions on which it is made. The offer made by Michael was unilateral and was also to be deemed indivisible by Jason, in that, the offer to sell him the equipment was to be considered on the basis of the terms and conditions made known in the offer made (that is, the price and terms of delivery).

An offer has to be distinguished from an invitation to offer where a person is not considered to have made an offer but merely expresses himself to be ready to consider any offers that may be made to him.

An offer is deemed to be of a transitory nature, in that, once the offer is accepted the offer loses its individuality in the unity of the contract. On the other hand, if the contract is not concluded the offer loses its significance and ceases to have juridical existence.

In order for an offer to produce juridical effects it must also be (i) externally manifested; (ii) made with the intention of binding the offeror; (iii) complete; and (iv) made to a particular individual, his agent or to the public.

An offer must be externally manifested and must be addressed to and made known to the person to whom the proposal is being made. In order to be externally manifested the manifestation shall be either express or tacit. It is however held that where a contract has to be formalised by means of a public deed or by means of a private writing, then even the offer must be made in writing.

Once a proposer makes an offer he must make such offer with the intention not only to create a legal relationship with the person to whom the offer is made but the offeror also undertakes to hold himself to the contract if this is accepted by the other party. An offer must also be complete and therefore contain all the elements essential for the conclusion of the contract or the contents must be such to render possible their determination.

Finally, an offer must be made to a particular person, his agent or to the public. In the case of an offer made to the public, the other contracting party is not determinable when the offer is made but will become such when a member of the public expresses his acceptance.

In the case under consideration, it can be said that the offer made by Michael to Jason does contain all the afore-mentioned essential requisites in order to render the offer valid.

(b) This question deals with whether the contract between Michael and Jason, for the purchase of the television, can be deemed concluded.

A contract is said to be concluded when there is unison of wills of the contracting parties, in that, it is at that moment that an agreement acquires juridical existence. The importance of the determination of the moment in which a contract is concluded lies in the fact that until the moment of conclusion, the consent which binds the parties may be withdrawn. Until a contract is concluded the offer and existence remain two separate moments; when the contract is concluded there is unison of the offer and acceptance.

There has been debate whether, in order for the unison of wills to be perfect, the reciprocal knowledge of the other party is necessary. The debate is therefore about whether each of the parties must come to know of the intention of the other to the extent that until this takes place the consent which binds the parties is not irrevocable. It is on this basis that the question posed may be answered, in that, while Michael made Jason an offer, the latter did not inform Michael of his intention to purchase the television; therefore of his acceptance.

The fact that the will of the proposer must be known to the person to whom the proposal is made is obvious. The question therefore centers around whether it was necessary for Jason to inform Michael of his intention to purchase the television or otherwise.

According to the prevailing opinion in order for consent to be perfect, knowledge of the other party is necessary. A declaration that the proposal is accepted made by the person to whom the proposal is made is not enough, in that, the proposer must be informed of the acceptance. There are various theories on this matter and the latter reflects the theory of information on which our law appears to be based.

It is considered that the system of information be the most correct because in order for the wills of the parties to be united it is not enough that they have been externally manifested but it is also necessary that the manifestations themselves be united implying that they must exist externally *vis-à-vis* the other party, which is not possible unless the acceptance is made known to the other party.

In the case under consideration, on the basis of the system of information, Michael could not deem the contract with Jason to be concluded, in that, Jason never informed him of his intention to purchase the television.

9 When preferential or other special rights are attached to a class of shares, it is important to ascertain whether and in accordance with which procedure these rights can be varied.

As a rule the articles of association provide for the variation of class rights. Regulation 3 of Part 1 of the First Schedule to the Companies Act, 1995 provides that if at any time the share capital is divided into different classes of shares, the change of any shares from one class into another or the variation of the rights attached to any class (unless otherwise provided by the terms of issue of the shares) may be made with the consent in writing of the holders of three-quarters of the issued shares of that class,

and the holders of three-quarters of the issued shares of any other class affected thereby, or by an extraordinary resolution passed at a separate general meeting of the holders of the issued shares of that class and of any other class affected thereby. This regulation is usually incorporated in the articles of most companies. However, any such similar provision in the memorandum or articles is subject to the rules provided for under article 116 of the Companies Act.

Article 116 of the Companies Act provides that if the memorandum or articles contain a provision authorising either the change of any shares in the company from one class into another, or the variation of the rights attached to any class of shares in the company, such change or variation shall be subject to the consent of a specified proportion of the holders of the issued shares of that class and of any other class affected thereby, or to the sanction of a resolution passed at a separate meeting of the holders of those shares and of the holders of any other shares affected thereby.

However, if in pursuance of the said provision the shares are changed from one class into another or the rights attached to any such class of shares are at any time varied, the holders of not less in the aggregate than 15% either of the issued shares of that class or of any other class affected thereby, being persons who did not consent to or vote in favour of the resolution for the change or variation, may by writ of summons filed within 21 days of the consent or the resolution, demand that the change or variation shall not have effect. If the court is satisfied that the change or variation would unfairly prejudice the holders of those shares, the class of which is being changed or the rights of which are being varied, or the holders of any other class of shares affected thereby, it shall disallow the change or variation.

Thus the provisions of article 116 of the Act are rendered applicable through the adoption of the regulation referred to above, as detailed in the First Schedule or as adopted. Should this Regulation be excluded and no provision to the same effect be inserted in the articles, then it appears that class rights can only be varied after the memorandum or articles are amended to provide for the variation of class rights.

Therefore, unless the memorandum or articles of QU Limited provide for the variation of class rights and the procedure detailed above be followed, the class rights of the holders of the class B shares cannot be varied or in any way altered.

10 Where the directors of a company become aware that the company is unable to pay its debts or is imminently likely to become unable to pay its debts, they shall, within 30 days from when the fact became known to them, duly convene a general meeting of the company by means of a notice to that effect for a date not later than 40 days from the date of the notice for the purpose of reviewing the company's position and of determining what steps should be taken to deal with the situation, including consideration as to whether the company should be dissolved or, where applicable, whether the company should make a company recovery application.

A company recovery application may be made to the court requesting it to place the company under the company recovery procedure and to appoint a special controller to take over, manage and administer the business of the company for a period to be specified by the court. The appointment shall be for a period of not more than 12 months but may be extended for a further 12 month period.

A company recovery application is made by means of an application which may be made by the company by means of an extraordinary resolution, by the directors following a decision of the board, or by creditors of the company representing more than half in value of the company's creditors.

On the hearing of an application, the court may, after examining all the circumstances and the options that are available, either dismiss the application or issue a company recovery order, acceding thereto and placing the company under the company recovery procedure. In the order, the court shall (i) appoint an individual to act as a special controller and to carry out such functions and powers as the court may entrust to him in the administration and management of the property and business of the company; (ii) fix such reasonable remuneration of the special controller, as the court may consider appropriate; (iii) determine the period, not exceeding ten working days from the making of the company recovery order, within which the company shall deposit a sum of money in court or offer other suitable guarantee or other appropriate arrangement, which, in the opinion of the court, is sufficient to cover the remuneration, and charges of the special controller.

The court shall appoint as the special controller an individual who it has ascertained enjoys proven competence and experience in the management of business enterprises, is qualified and willing to accept the appointment, and has no conflict of interest in relation to his appointment. For so long as the special controller holds office, the fact of his appointment to such office and his full name together with his residential or business address shall be clearly indicated in all the business letters, order forms, invoices and any other documents of the company.

During the period that an order is in force, the company shall continue to carry on its normal activities under the management of the special controller. The special controller shall take into his custody or under his control all the property of the company and he shall from then onwards be responsible to manage and supervise its activities, business and property. The special controller must examine the assets, affairs and business performance of the company and shall ascertain and verify whether there is a reasonable expectation of the company's recovery and continuation as a viable going concern, in whole or in part, and he shall submit an initial report thereon to the court not later than two months from the date of his appointment.

On the appointment of the special controller, any power conferred on the company, its directors or its officers, whether by the Companies Act, 1995, by any other law, or by the memorandum or articles of association of the company, shall be suspended and shall be assumed and exercised by the special controller unless the consent of the special controller to exercise such power has been obtained, which consent may be given either generally or in relation to a particular case or cases, and no meeting of the company may be summoned except with leave of the court and subject to such terms as the court may deem fit to impose.

In addition and without prejudice to any other duty assigned to him the special controller shall be obliged to perform his functions fairly and equitably taking into account the best interests of the company, its shareholders and creditors together with the interests of any other interested party.

In addition to the functions and powers entrusted to him by the court, the special controller shall have the power: (i) after informing the court, by means of a vote, to remove any director of the company and to appoint any individual to serve as a manager; (ii) to engage persons for the provision of professional or administrative services, and commit the company to the payment of their respective fees or charges; or (iii) to call any meeting of the members or creditors of the company.

Within one month from his appointment, the special controller shall convene a meeting/s of creditors and shareholders for the purpose of laying before them for information and review a comprehensive statement of the company's affairs, together with preliminary proposals on the future prospects and management of the company; and appointing a joint creditors' and members' committee, to advise and assist the special controller in the management of the affairs, business and property of the company and its recovery as a viable going concern.

If a vacancy occurs by reason of death, resignation or otherwise in the office of the special controller, the court may appoint another individual to fill the vacancy on an application made for this purpose by the outgoing special controller, by a creditor, by a member, by a director, or by the court of its own motion, as the case may be. The court may, of its own motion or on the application of any member or creditor, review, confirm, modify or reverse any act or decision of the special controller and give him such directions or orders as it deems fit, or remove a special controller if it is satisfied that there exists sufficient grounds to warrant his removal and appoint another special controller.

The controller may also bring about the termination of the procedure, Thus, if, at any time during which a company recovery procedure is in force, the special controller concludes that it would serve no useful purpose for the company to continue with the said procedure, the controller shall make an application to the court for the termination of the company recovery procedure. Following the receipt thereof, the court shall order that the company be wound up by the court. Furthermore, if, at any time during which a company recovery procedure is in force, the special controller concludes that the affairs of the company have improved to the extent that it is in a position to pay its debts, he shall submit an application to the court, requesting the court to issue an order for the termination of the company recovery procedure.

At the end of the period of his appointment, the special controller shall submit a written final report to the court containing his detailed and comprehensive opinions and reasons as to whether or not the company has a reasonable prospect of continuing as a viable going concern in whole or in part and will be in a position to pay its debts regularly in the future.

Fundamentals Level–Skills Module, Paper F4 (MLA)
Corporate and Business Law (Malta) **December 2007 Marking Scheme**

This marking scheme is given as a guide to markers in the context of the suggested answer. Scope is given to markers to award marks for alternative approaches to a question, including relevant comment, and where well reasoned conclusions are provided. This is particularly the case for essay based questions where there will often be more than one definitive solution.

1 The question seeks to test the candidates' knowledge on the modes of interpretation of legislation adopted.

6–10 Answers will provide a detailed explanation of the modes of interpretation applied.

3–5 Answers in this band will provide less detail that those awarded marks falling in the upper band.

0–2 Extremely poor answers that show either no or very little knowledge of the subject area.

2 This question requires candidates to explain the requisite of subject matter essential for a valid contract.

6–10 Thorough explanation of the meaning of the requisite.

0–5 Weaker answers showing little or a brief explanation of the requisite.

3 The question deals with the dissolution of two types of commercial partnerships and candidates are also required to bring out any differences which may exist between the different types of dissolution.

7–10 Candidates earning these marks will clearly explain what the dissolution procedure is and any differences between the procedures for the dissolution of the different types of partnerships.

4–6 Good treatment of the information required.

0–3 Poor answers given with no differences mentioned.

4 The purpose of this question is to test the candidates' knowledge on two basic features of the Companies Act, namely the role of a company officer and that of the auditor. Marks will be awarded depending on the level of detail given.

5 The question deals with the types of decisions taken at meetings of the shareholders of limited liability companies.

6–10 Thorough explanation of the nature of the different decisions which can be taken, the procedure to be followed to take such decisions and the percentage voting required in each case.

0–5 Weaker answers showing little or a brief explanation of the procedures and steps to be followed.

6 This question seeks to test the candidates' knowledge on the protection afforded under employment legislation to employees to ensure that all receive the wages due to them.

7–10 Answers will give a detailed overview of the measures provided for in law to ensure due receipt of wages.

4–6 A sound understanding of the area, although perhaps lacking in detail.

0–3 No or very little knowledge of the subject area.

7 This question deals with the two offences of wrongful trading and fraudulent trading under the Companies Act, 1995.

6–10 A clear explanation of the two types of offences, who can commit them and the consequences thereof.

5–0 Little to less detail than will be provided in answers falling in the upper band.

8 This question tests the candidates' knowledge on contract law, in particular on the requisites for a valid offer and the requisites for a valid conclusion of a contract.

7–10 Candidates awarded such marks will have a sound knowledge of these two aspects of contract law.

4–6 Candidates show that they are aware of both aspects but providing very little detail on the scope of both.

0–3 Candidates demonstrate poor knowledge of the requisites for a valid offer and conclusion of a contract.

9 The question deals with the variation of class rights of the shareholders of limited liability companies and the procedure to be followed to vary such rights. Marks will vary depending on the level of detail given.

10 The Companies Act, 1995 was recently amended to provide for corporate recovery. The question deals with this procedure and how this may be set into motion. Candidates are also expected to explain the role of the special controller.

6–10 Candidates demonstrate a good understanding of the corporate recovery procedure and are also able to detail the manner in which such a procedure is to be commenced, and the role of the controller in such a procedure.

0–5 Little to reasonable detail given in answering the question.