Answers

1 *Stare decisis* is a common law tradition that literally means 'to stand by decisions'. This means that a court will look to previous decisions when faced with a new case before it.

It also refers to the principle of binding precedent by virtue of court hierarchy. According to this principle, previous decisions of superior (higher) courts are binding on future cases being decided by lower courts.

The *ratio decidendi* of a case binds all lower courts in the same jurisdiction. If the precedent was set by a court of equal or higher status to the court deciding the new case, then the court in the present case should follow the rule of law established in the earlier case. Where the precedent is from a lower court in the hierarchy, the judge in the new case need not follow but will consider it. However, a court is not bound by its own previous decisions, although a court will usually follow the precedent unless there are good reasons not to do so. The Singapore Court of Appeal, (the highest court in the hierarchy) is not bound by its previous decisions.

The doctrine of *stare decisis* and binding precedent applies to the *ratio decidendi* and not the *obiter dicta* in a case. The contents of a judgment can be divided into the *ratio decidendi* and *obiter dictum*. The *ratio decidendi* is the rule of law on which a decision is founded and is the statement of the law applied in deciding the legal problem raised by the facts of the case. Any statement of law that is not an essential part of the *ratio decidendi* is referred to as *obiter dictum*. Although *obiter dicta* statements do not form part of the binding precedent, they are persuasive authority and are taken into consideration in later cases, where the court considers appropriate to do so.

The second part of the question relates to the situations in which the courts do not have to follow the ruling in a precedent. A superior court hearing a case on appeal can reverse the decision of a lower court in the same case. It is possible for the higher court to approve the *ratio* yet not agree with its application by the lower court and consequently reverse that court's decision.

Sometimes, a court can choose not to follow a precedent, but to overrule it instead. Overruling is the procedure whereby a court higher up in the hierarchy sets aside a legal ruling established in a precedent of a lower court. Courts do not overrule long-standing authorities unless they no longer represent an appropriate statement of law. Overruling operates retrospectively with the effect that the principle of law overruled is held never to have been law.

The other situation where the court will not have to follow a precedent is where the precedent can be distinguished. Distinguishing is the method used by the court where the material facts of the case before it are significantly different from the facts of the cited precedent, and thus consequentially the court will not find itself bound to follow that precedent and can choose to set its own precedent.

2 The first part of this question requires a discussion of the legal requirements for misrepresentation. To prove a case for actionable misrepresentation, there must have been a false statement of fact made by one contracting party (representor) to the other contracting party (innocent party), which induced the other party to enter into the contract.

The first point to note is that there has to be a statement. Silence does not normally amount to a misrepresentation. Secondly, the statement must be one of fact, not opinion or law. A false statement of intention will not normally result in a misrepresentation but it can be an actionable misrepresentation if the representor had no such intention when he made the statement. The false statement must have induced the innocent party to enter into the contract, that is, the innocent party must have relied on the statement.

The next part of the question requires a discussion of the remedies, which depends on a classification of the misrepresentation. There are three types of misrepresentation, fraudulent, negligent and innocent misrepresentation. A fraudulent misrepresentation is a false statement which is made knowingly, without belief in its truth or recklessly, that is, not caring whether it is true or false – *Derry* v *Peek* (1889). In contrast, a negligent misrepresentation is a false statement made without reasonable grounds for believing that the statement is true – s.2(1) Misrepresentation Act (Cap 390). In general, a fraudulent misrepresentation may be said to be made deliberately or intentionally whereas a negligent misrepresentation is one which is made carelessly.

The remedies for both fraudulent and negligent misrepresentation are similar. The innocent party's remedies are in the form of damages and rescission of the contract. There is a difference, though. For a fraudulent misrepresentation, the innocent party is entitled to rescission (subject to the usual bars to rescission) whereas in the case of a negligent misrepresentation, the innocent party's right to rescind is at the court's discretion to award damages in lieu of rescission under s.2(2) of the Misrepresentation Act.

Another difference lies in the party who has the burden of proof. Where a fraudulent misrepresentation is alleged, the onus is on the plaintiff to prove fraud whereas for negligent misrepresentation, the burden is on the defendant to prove that he had reasonable grounds for believing that his statement was true (in other words, the burden is on the representor to show that he had not been negligent in making the statement). In *Howard Marine Engineering* v *Ogden*, the barge owners were liable for negligent misrepresentation because they failed in proving that the manager, who had made the false statement, had reasonable grounds to believe that his statement was true.

The third type of misrepresentation is an innocent misrepresentation, the person who made the statement reasonably believes that it was true – *Oscar Chess Ltd* v *Williams* (1957). The innocent party may rescind the contract or be awarded damages at the discretion of the court under the Misrepresentation Act.

3 In order for auditors to be liable for negligent misstatements, there must be a 'special relationship' between the plaintiff and the auditor (defendant). According to *Hedley Byrne* v *Heller & Partners* (1964), this relationship exists

- if the maker of the statement possesses skill, knowledge or information;
- the maker knows or ought to have known that the recipient would rely on the statement; and
- it is reasonable for the recipient to rely on the statement.

In *Caparo Industries PLC* v *Dickman* (1990), the House of Lords had the opportunity to review the case law relating to the duty of auditors for statements made in a company's annual audited reports. Caparo, a shareholder who purchased additional shares and took over a company in reliance on the company's audited reports, brought action against the auditors, alleging that the auditors owed them a duty of care. It was argued that the auditors had breached this duty of care in preparing accounts that were inaccurate and misleading. The House of Lords decided that no duty of care was owed by the auditors to Caparo, either as a shareholder or potential investor.

While damages in the form of pure economic losses was reasonably foreseeable in cases involving statements in audited reports, the issue is whether there was a proximate relationship between the auditor and the shareholder. In determining proximity, the court will look at the purpose for which the statement or audited reports was made. In particular, the court will consider the following factors (*Ikumeme Singapore* v *Leong Chee Leng* (1993)):

- Whether the purpose of the statement was known or made known to the auditor
- Whether the auditor knows that the statement would be given to the particular plaintiff or the class to which the plaintiff belongs
- Whether the auditor knows or should have known that the statement will be relied upon by the particular plaintiff or the class to which the plaintiff belongs.

It is arguable that on the principles set out in the *Caparo* case, the court could have found that the auditors owed a duty to Caparo. However, the House of Lords held that the auditor's liability was confined to the purpose of the audit, which is to satisfy statutory requirements of the Companies Act (Cap 50), essentially to provide existing shareholders with reliable information to enable them to exercise their class rights at the company's general meeting. As such the auditors owed no duty of care to the takeover shareholder. Nor was there a duty of care owed to Caparo as an existing shareholder because the audited accounts had not been prepared to assist shareholders in deciding whether or not to acquire additional shares in the company.

The *Caparo* approach has been applied in relation to third parties, such as creditors, who rely on a company's audited reports. In *Al-Saudi Banque* v *Clarke Pixley* (1989) it was decided that there was no duty of care by auditors to existing or potential bank creditors of a company even though it may be foreseeable that banks might give credit in reliance of the company's audited reports.

4 This question requires a discussion of the doctrine of separate or corporate personality. The effect of incorporation is that a company, when incorporated, acquires its own distinct legal personality, separate from that of its members. The doctrine of separate personality is illustrated in *Salomon* v *Salomon & Co* (1897). Salomon formed a limited company together with some members of his family to takeover his previous business. Salomon's business was sold to the company and payment was made to Salomon in the form of cash, shares and debentures, resulting in Salomon being the major shareholder and secured creditor. When the company was wound up, it was argued that the debentures were of no legal effect because Salomon and the company was one and the same person, and that being the case, he could not be his own creditor. The House of Lords disagreed and held instead that the debentures were valid because the company was, in law, a distinct legal person, completely separate from Salomon, the shareholder and creditor of the company. A number of consequences flow from the fact that a company is regarded as having its own legal personality.

Legal capacity to sue and be sued
The first consequence is that a company has the right to sue and be sued in its own name – s.19(5) Companies Act (Cap 50). This means that a company is liable for its own debts and can sue for debts owing to it. The gives rise to the rule in *Foss* v *Harbottle* (1843) which states that in a situation where a company suffers an injury, it is for the company (and not the shareholders), acting through the majority of the members, to take remedial action.

Perpetual succession
Section 19(5) also states that a company has a right to perpetual succession. This means that any changes in its membership will not have any effect on its status or existence. As such, the members' death, bankruptcy or insanity, or any change in the membership does not affect the company. A company does not die, and it comes to an end only when liquidated in a winding-up or when it is de-registered as a company.

Right to own property
Section 19(5) also declares that a company has the power to hold land. This means that the assets of a company are owned by the company itself and not the shareholders. This is illustrated in *Macaura* v *Northern Assurance* (1925). Timber was owned by a company but the shareholder took out fire insurance of the timber in his own name. When the timber was lost in a fire it was held that the shareholder could not claim the insurance as he had no insurable interest in the timber, which belonged to the company.

Limited liability
Another important consequence of incorporation is the shareholders' limited liability. In the case of a company limited by shares, the liability of the shareholders is limited to the unpaid value of the shares held. In the case of a company limited by guarantee, the shareholders' liability is limited to the amount that they have agreed to pay in the event of the company being wound up.

5 This question requires a discussion of the ways in which company directors can be appointed and the ways in which they can be removed from office.

Appointment of directors

The first directors are usually named in the articles or memorandum. Where the company has adopted Table A of the Fourth Schedule of the Companies Act (Cap 50) as its articles of association, the first directors are required to retire at the first annual general meeting (AGM) after incorporation and stand for re-election. Subsequent directors are appointed under the procedure stated in the articles. The usual procedure is for the company in the AGM to elect the directors by an ordinary resolution. However, casual vacancies are usually filled by the board of directors co-opting someone to act as director. That director then serves until the next annual general meeting.

Removal of directors

There are a number of ways in which a person may be obliged to give up their position as a director:

Retirement

Directors of public companies are required to retire at the first AGM after they have reached the age of 70 – s.153(2). They maybe re-appointed by ordinary resolution at the next annual general meeting.

Removal

A public company may by ordinary resolution remove a director before the expiration of his period of office, notwithstanding anything in its memorandum or articles or in any agreement between it and him but where any director so removed was appointed to represent the interests of any particular class of shareholders or debenture holders the resolution to remove him shall not take effect until his successor has been appointed – s.152(1) Companies Act.

Rotation

Table A provides that one-third of the directors shall retire at each AGM, being those with longest service. They are, however, eligible for re-election and, in practice, are usually re-elected.

Disqualification

The Companies Act and articles of association provide for the disqualification of directors on the occurrence of certain circumstances. For example, Table A provides that the office of director shall become vacant if the director –

(a) ceases to be a director by virtue of the Act;
(b) becomes bankrupt or makes any arrangement or composition with his creditors generally;
(c) becomes prohibited from being a director by reason of any order made under the Act;
(d) becomes disqualified from being a director by virtue of ss.148, 149, 154 or 155;
(e) becomes of unsound mind or a person whose person or estate is liable to be dealt with in any way under the law relating to mental disorder;
(f) subject to s.145, resigns his office by notice in writing to the company;
(g) for more than six months is absent without permission of the directors from meetings of the directors held during that period;
(h) without the consent of the company in a general meeting, holds any other office of profit under the company except that of managing director or manager; or
(i) is directly or indirectly interested in any contract or proposed contract with the company and fails to declare the nature of his interest in any manner required by the Act.

6 This question requires a discussion of the issues of corporate governance in relation to the interests of shareholders and directors. While the shareholders are the owners of a company, it is the directors who have the power to run and manage the company. Hence in this sense ownership and management of a company reside in different parties.

Corporate governance refers to the way in which companies are run and operated. According to the Organisation for Economic Co-operation and Development:

'Corporate governance is the system by which business corporations are directed and controlled. The corporate governance structure specifies the distribution of rights and responsibilities among different participants in the corporation, such as, the board, managers, shareholders and other stakeholders, and spells out the rules and procedures for making decisions on corporate affairs. By doing this, it also provides the structure through which the company objectives are set, and the means of attaining those objectives and monitoring performance.'

In short, corporate governance deals with how corporations are run and managed. The main issue, as far as shareholders are concerned, is that management should be accountable for its stewardship of the company's resources and specifically, should not be guilty of abuse. The concern for corporate governance is exacerbated especially in situations where there is or will be a potential, or actual conflict of interest or abuse of power. The risk is that management will pursue its own goals for personal gain. The resolution of the conflicts between management and shareholders is one of the key objectives of corporate governance.

The interests of shareholders need to be protected by putting in place systems and mechanisms to facilitate responsible business management and transparency in the control of the company. These would include rules on directors' duties, auditors' responsibilities, disclosure requirements, accounting and reporting. This system of checks and balances will help ensure fairness, transparency, accountability so that management will be motivated to act in a competent manner, and in the interests of the company.

7 This question requires an explanation of the concept of 'unfair preference' and the relevant law. An unfair preference in the context of an insolvent company refers to a situation where a company facing insolvency decides, on an unfair basis, to pay a particular creditor rather than another. In so paying the creditor, the company has given him preference over the other creditor or creditors who, in proving their debts in the company's insolvency, would be able to recover only a portion of the debt or even none at all.

The law on unfair preference in corporate insolvency is found in s.329 of the Companies Act, ss.92–102 of the Bankruptcy Act and the Company (Application of Bankruptcy Act Provisions) Regulations 1995.

The general principle is that if a company being wound up has given an unfair preference to any person, the liquidator of the company may apply to the court for an order to restore the position.

The elements of unfair preference are:

– the company does something which has the effect of putting the creditor in a better position in the event of the company's winding-up;
– the decision to do the act was influenced by the company's desire to put that creditor in the better position;
– the company was insolvent at the time of, or as a result of, the act; and
– the act was done within six months before the commencement of the winding up of the company or, if done in relation to a person 'connected' with the company, within two years.

8 This question requires a discussion of specific performance and discharge of contract. If Suzi Wong wants to get back her job as lead actress, she would be seeking specific performance of the contract. Specific performance is an equitable remedy. As a general rule, specific performance is not available if damages would be an adequate remedy. In particular, the court will not order the specific performance of a contract for personal service, where the court cannot supervise its enforcement (*Ryan* v *Mutual Tonitone Westminster Chambers Association* (1893)). It may be noted that an injunction, directing Flametree not to break their contract is irrelevant as an injunction will only be granted to enforce negative covenants within the agreement, and cannot be used to enforce positive obligations (*Whitwood Chemical Co* v *Hardman* (1891)).

The second issue is whether Suzi Wong can claim $30,000 for work done. If a contract is an entire contract, the general rule in *Cutter* v *Powell* (1795) requires precise and exact performance of the contract (subject to the *de minimis* rule) before one is entitled to claim the contract sum. In any case, Suzi Wong is not claiming the entire contract sum as the filming work has not been completed.

There are however, exceptions to the rule in *Cutter* v *Powell*, that allow a contracting party to claim payment for work done even though it falls short of full completion. These exceptions include payment for divisible obligations in a contract, substantial performance, acceptance of partial performance and prevented performance.

In deciding whether a contract is divisible, the court will look at the terms of the contract, business practices in the industry or any common understanding between the parties arising from their previous course of dealings. In this case, it is arguable that the contract is divisible into weekly obligations as the contract provides for payments to be made in weekly instalments. As Suzi has performed her contractual obligations for the first week, she should be entitled to claim $30,000.

9 This question requires a discussion of directors' duties. A director is a fiduciary and has a duty to act in the company's interests (*re W* & *M Roith Ltd* (1967)) and to avoid a conflict of interests. If Lim's overseas trips were not made to promote the company's business but for his own personal purposes, then he would have breached his fiduciary duties as director, by benefiting personally at the company's expense. He would have a duty to account for profits made. It is not clear that Lim has made any transactions in respect of his new start-up and so, there may not be profits to disgorge.

Lim may also be in breach of his duty by not disclosing his interest in the transaction with Fast Build Pte Ltd under s.156(1) of the Companies Act (Cap 50). That section requires every director of a company, who is in any way, whether directly or indirectly, interested in a transaction or proposed transaction with a company to declare the nature of his interest at a directors' meeting as soon as practicable after the relevant facts have come to his knowledge. Although Lim himself does not hold any shares in Fast Build Pte Ltd, his brother, Henry, is a major shareholder.

Section 156(8) of the Companies Act states that an interest of a member of a director's family shall be treated as an interest of the director and the words, 'member of a director's family' shall include his spouse, son, adopted son, step-son, daughter, adopted daughter and step-daughter'. Although a brother of a director is not specifically mentioned in s.156(8), the list is not meant to be exhaustive and it can be argued that a brother should be regarded as 'a member of a director's family'.

Another question that arises is whether Fast Build Pte Ltd was the best candidate for the project. If not, in voting to award the contract to Fast Build Pte Ltd, Lim would not have been acting in the best interests of the company and that would result in a breach of his duty as director under s.157 which requires a director to act honestly and use reasonable diligence in the discharge of the duties of his office. Lim could be liable for any damages suffered by the company s157(3).

Failure to comply with ss.156 and 157 results in a criminal offence and Lim could be liable to a fine not exceeding $5,000 or to imprisonment not exceeding one year – s.157(10).

10 This question requires a discussion of insider dealing. For advising Boo to buy Water UnLimited shares, Ang would be liable under s.218(2)(b) Securities & Futures Act (Cap 289) for procuring another person to buy shares. The requirements are:

- he is a connected person (defined in s.218(5) & (6)). Ang is a connected person as he is a director of the company.
- he is in possession of information not generally available and the information is likely to have a material effect on the price of securities (s.218(1)(b)). Ang was in possession of information as to the new water treatment process that was not yet made known to the public.
- he has the requisite knowledge regarding the information (presumed under s.218(4))
- he has procured Boo to buy the shares, which would attract liability under s.218(2)(b).

In addition, Ang is also criminally liable for disclosure of information that is not generally available and likely to have a material effect on the price of securities. He did not make specific mention of the new water treatment process, but he informed Boo to buy shares in Water UnLimited.

Ang's liability under the Securities & Futures Act includes criminal liability under s.221 or a civil penalty under s.232. The court may order a civil penalty of a sum not exceeding three times the amount of profit earned or $50,000, whichever is greater. He may also be liable under s.234 to persons who, contemporaneously with his contravention, had dealt with the shares and suffered loss.

The final question is whether Boo may also be liable under the Securities & Futures Act. His liability depends on whether the requirements of s.219(2) are satisfied. The section requires that he be in possession of information not generally available and which is likely to have a material effect on the price of securities (s.219(1)(a)). All Boo was told was that the price of Water UnLimited's shares was likely to go up and he should quickly buy some. It is arguable whether he is in possession of information that is not generally available. If liable, Boo faces criminal liability under s.221, civil penalty under s.232 and civil liability under s.234.

1 8–10 A thorough answer which explains the doctrine of *stare decisis* and the situations when a court may be bound by a prior decision and when it is not.
4–7 A less complete answer, lacking in detail or unbalanced in that it does not deal with some aspects of the question.
0–3 Very unbalanced answer, lacking in detailed understanding.

2 6–10 A thorough answer which explains the requirements of misrepresentation and the types of misrepresentation and the remedies available.
0–5 A less complete answer, lacking in detail or unbalanced in that it does not deal with some aspects of the question.

3 8–10 A thorough answer which explains of the meaning of duty of care for negligent statements by auditors in audited reports, with appropriate references to cases.
4–7 Reasonable explanation of the duty of care but lacking in detail or case authority.
0–3 Very unbalanced answer, lacking in detailed understanding.

4 6–10 A thorough answer which explains the corporate personality doctrine and the consequences.
0–5 A less complete answer, lacking in detail or unbalanced in that it does not deal with some aspects of the question.

5 8–10 A thorough explanation of the different rules for appointment and removal of directors.
4–7 A sound explanation of the topic, although lacking in detail.
0–3 Little or no knowledge of the topic.

6 8–10 A thorough explanation of the interests of shareholders *vis-à-vis* directors and how the corporate governance serves to protect the interests of the shareholders.
4–7 A sound explanation of corporate governance, but lacking in detail.
0–3 Little or no knowledge of the topic

7 8–10 A thorough explanation of undue preference and the law relating to it.
4–7 A sound explanation of the law of undue preference, although lacking in detail.
0–3 Little or no knowledge of the topic.

8 7–10 A thorough explanation of specific performance and discharge of contract.
4-6 A sound explanation of specific performance and discharge of contract although lacking in detail.
0–3 Little or no knowledge of the topic.

9 7–10 A thorough explanation of directors duties in relation to the facts.
4–7 A less complete answer, lacking in detail or unbalanced in that it does not deal with some aspects of the question.
0–3 Very unbalanced answer, lacking in detailed understanding.

10 7–10 A thorough explanation of insider dealing especially procuring another to buy shares, disclosing information that is likely to have a material effect on the price of securities and possessing such information.
4–7 A less complete answer, lacking in detail or unbalanced in that it does not deal with some aspects of the question.
0–3 Very unbalanced answer, lacking in detailed understanding.