SUGGESTED SOLUTIONS

SECTION A

QUESTION 1

a. A contract is terminated if the things that the parties agreed to do is impossible to perform. It can either be at the time the contract was made or when the obligation became impossible to perform after the conclusion of the contract.

Section 57(1) – an agreement to do an act impossible in itself is void.

Section 57(2) – a contract becomes impossible.

When a contract becomes impossible to perform, it becomes automatically void.

Effect of a void contract – Section 66, Contracts Act, 1950.

Obligation of person who has received advantage under void agreement, or contract becomes void.

(8 marks)

b. Examples of invitation to treat with the support of corresponding cases are:

(i) Goods on Display: a display of goods in a shop is an invitation to customers to *make* an offer to buy the goods. A customer who wants to buy the goods may make an offer at the counter; when the shop accepts his offer, a contract comes into existence.
Pharmaceutical Society of Great Britain v Boots Cash Chemist (1952).

(ii) Auction: An auction is held to attract bids. The auctioneer's request for bids is an invitation to treat. The customer's bid is an offer and acceptance takes place at the fall of the hammer by the auctioneer.
M&J Frozen Food Sdn Bhd v Siland Sdn Bhd (1994)

(iii) Supply of information: Sometimes, information is exchanged between the supplier and a prospective customer. Whether there is an offer depends on the circumstances of the case.
Harvey v Facey (1893).

(iv) Advertisement of notices: Generally, advertisements listing the price of goods (*Partridge v Crittenden 1968*) or for job applications (*Coelho v The Public Services Commission 1964*) are not offers but are invitations to treat. They are merely inviting offers from potential customers or job applicants.
However, if the advertisement amounts to an offer made to the world at large, it may be classified as an offer instead of an invitation to treat. *Carlill v Carbolic Smoke Ball Co. (1893).*

(Any 3 examples = 6 marks)

c. Three (3) elements with the support of either statutory provisions or case laws are:

(i) Transfer of property: The seller must intend to transfer the property in the goods sold to the buyer.
Section 19(1): Property in the goods in transferred from the seller to the buyer at the time it is intended by the parties to be transferred.

(ii) Goods: The sale must involve "goods" as defined in section 2.
Section 2: All moveable property are goods; actionable claims and money are excluded.
Moss v Hancock 1899: Land and things attached to land are not goods but growing crops and things attached to and forming part of the land are goods if they are agreed to be severed before sale or under the contract of sale.

(iii) Price: The money consideration for a sale of goods (section 2, SOGA)
The sale must be for a price in money terms. An exchange of items or barter is not a sale of goods.

(6 marks)

QUESTION 2

a. Conditions which must be fulfilled before an agency by necessity may arise:

(i) There must be an existing contractual relationship between the two parties. However, no authority, whether express or implied is given to the agent to do the act in question;
(ii) The agent is unable to obtain further instruction from the principal;
(iii) The said act is necessary to prevent loss or preserve the goods of the principal or to prevent further loss to the principal; and
(iv) The agent acted in good faith as if it is his own case.

Cases illustrating agency by necessity:

Great Northern Ry Co v Swaffield (1874), Springer v Great Western Ry Co (1921).

(5 marks)

b. Advising Mello:

The law:

Section 175 requires the principal to indemnify the agent against the consequences of all lawful acts done by the agent in the exercise of the authority conferred upon him.

Section 176 provides that the principal is to indemnify the agent against the consequences of an act authorised by the principal even though the act causes an injury to the rights of third persons provided that the agent acts in good faith.

Assuming that an agent whilst lawfully carrying out his duties inadvertently damages a third person's property. If the agent is compelled to pay damages to the third person, he may seek an indemnity from the principal.

However, the principal is not liable to indemnify the agent for an act which is criminal even though such criminal act was authorised by the principal and the principal had agreed to indemnify him.

Illustration (a) to section 177 reads:

"A employs B to beat C, and agrees to indemnify him against all consequences of the act. B thereupon beats C and has to pay damages to C for so doing. A is not liable to indemnify B for those damages."

Application:

In this situation, Mello clearly understands that the deal with Idin is against the law. Therefore, although he is carrying out his duties as Ijan's agent, the criminal nature of the act falls within the ambit of section 177. This entitles Ijan to not indemnify Mello for whatever cost and losses he had incurred in the transaction.

(9 marks)

c.

i. Ostensible or apparent authority is that which is not given by the principal but which the law regards the agent as possessing although the principal has not consented o the exercise of such authority. It may arise in two situations:

- Holding out by the principal: the principal has appointed the agent, and the agent has exceeded his authority. Section 190 provides that the principal is bound by the act of the agent if the principal has by his act or words induced a third person to believe that the act was within the scope of the agent's authority.
- Termination without notice to third person: Section 161 provides that termination is effective against the agent only if it becomes known to him. Similarly, the termination is effective against the third person only when it becomes known to him. Thus if the agent continues to deal with the third person despite the termination of his agency, the principal is bound by the transaction unless the third person has notice of the termination.

(3 marks)

ii. By virtue of section 142, an agency may be deemed to arise in a situation of urgent necessity.

The following conditions must be fulfilled before an agency by necessity may arise:

- There must be an existing contractual relationship between the two parties. However, no authority whether express or implied, is given to the agent to do that particular act;
- The agent is unable to obtain further instructions from the principal;
- The said act is necessary to prevent loss or preserve the goods of the principal or to prevent further loss to the principal; and
- The agent acts in good faith as if it is his own case.

(3 marks)

QUESTION 3

a. Section 22(1): All property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise because of the firm or for the purposes and in the course of the partnership business and must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement.

Although cars were registered under personal names, it was the clear intention of the partners that the cars were meant for the firm's business. Therefore, the car should rightfully be returned to the firm. In this case, Ed's son is claiming under his estate and may rightfully claim thereof. Therefore, Zane must return the car to the partnership.

Case: Gian Singh v. Devraj Nahar & Anor

(6 marks)

b. Section 3(1): Partnership is the relation which subsists between persons carrying on business in common with a view of profit.

A partnership need not have to be created by a formal written agreement. It may be created orally or in writing. Although the word 'partnership' does not appear in the agreement, a partnership may still exist if the relationship between the individuals has the business character of a partnership within the scope of the Act: Ratna Ammal & Anor v. Tan Chow Soo.

(4 marks)

c. An auditor may not be liable to third parties if there is no contractual relationship between them on the matter in question. However, if the auditor knows that the party

receiving the information is relying on them, or it is reasonable for them to know or such trust have been expressly put on them to exercise due care skill and diligence, then the auditors may be made liable, according to the ruling in the case of ***Hedley Byrne v Heller & Partners.***

However, in a subsequent landmark case, of ***Caparo Industries PLC v Dickman & Ors.***, the court has set further rules on the subject matter of liability of auditors. It was held in this case, that an auditor does not owe a duty to a member of the public. A duty of care is imposed only if certain requirements are fulfilled, namely, that the loss or damage suffered was foreseeable or there was an existing relationship of proximity between the parties and it is reasonable to impose a duty of care towards the plaintiff.

The court further held that the statutory audit and the audited accounts were for the company and its shareholders as a body.

Therefore, in our situation, Ronkown & Associates should not be made liable for the losses suffered by Durh Bank Bhd. since they could not have foreseen that their audited accounts report will be used by the bank as an assessment reference. They also did not know of Durh Bank's reliance on the report, neither did they have any contractual relationship with Durh Bank Bhd.

(10 marks)

SECTION B

QUESTION 4

a. This question on company law tests the candidates' knowledge on promoters of a company.

i. A promoter is essentially the person who forms a company by carrying out the steps leading to the registration of the company. A promoter may be an individual, a firm, an association of persons or even a company. The person defined as a promoter has particular implied duties which must be fulfilled; otherwise, they may suffer implications for non-compliance.

(2 marks)

ii. Once a person is deemed a promoter, they have various duties. They stand in a fiduciary relationship with the company and must act in the *bona fide* interests of the company and not their own personal interest (*Erlanger v New Sombrero Phosphate* (1878) 3 App Case 1218). The promoter's fiduciary duties include:

1. not making a profit at the expense of the company
2. not to exercise undue influence over the company
3. making full disclosure of any interest in any contract entered into by the company
4. acting honestly and with reasonable skill, care, and diligence

(3 marks)

iii. Remedies available for a company if a promoter breaches their duties:

1. Rescission : the company may rescind the contract made by the promoter when the promoter has a personal interest in the contract and when the parties can still be returned to their pre-contractual position (Erlanger v New Sombrero Phosphate [1878] damages may also be recoverable.
2. Recovery of secret profit: a secret profit may be recovered by the use of a constructive trust whereby the court holds that any profit or benefit obtained by the promoter was obtained in their position as a constructive trustee on behalf of the company.

(3 marks)

b. This question on company law tests the candidates' knowledge on resolutions of a company

i. Section 292(1) of the Companies Act 2016 clarifies that a special resolution of the members or class of members of a company is a resolution of which a notice of not less than 21 days has been given and is passed by a majority of not less than 21 days has been given and is passed by a majority of not less than 75% of such members:

a. who are entitled to vote and do vote in person, or where proxies are allowed, by proxy at a meeting of members; or
b. who are entitled to vote on a written resolution. (It removes the formality of convening a general meeting to pass resolutions for private companies)

Under the Companies Act 2016, there are number of instances in which a special resolution is required. Among them are the following;

a. for the alteration of the name of the company (section 28)
b. alteration of the status of an unlimited company to limited (section 40)
c. conversion from public company to private company and vice versa (section 41)
d. alteration of the constitution (section 36)
e. reduction of capital (section 116)

(6 marks)

ii. The requirements to affect the resolution requiring special notice are:

Section 321(1) of the Companies Act 2016 deals with resolutions requiring special notice. In the case where special notice is required, the Companies Act 2016 ensures that the members will be notified either through the prescribed mode (laid down below) or notified through newspaper. (Section 322(4)).

According to this section, where special notice is required of resolution, the resolution will not be effective unless notice of the intention to move it has been given to the company not less than 28 days before the meeting at which it is moved. Where in certain situation where it is done through advertising in the newspaper, it is practicable to give its members notice of the proposed

resolution at least 14 days before the meeting, by advertising in widely circulated newspaper in national language or English language.

(4 marks)

iii. The instances provided under the Act that would require the giving of a special notice before a resolution can be passed are:

a. to remove a director or to appoint another person instead of the director at the same meeting (Section 206(3)) and

b. to remove an auditor from office at a general meeting of a company (Section 277(1))

(2 marks)

QUESTION 5

a. This question on company law tests the candidates' knowledge on statutory provisions dealing with directors' conflict of interest.

i. Funmarine Sdn Bhd may be advised as follows:

1. It is clear from the facts given, Justine already knew that Seaship is looking for outboard engines to purchase and rather than ensuring Seaship to purchase the outboard engines from Funmarine, Seaship bought from another company where Justine later received secret commission.

2. By virtue of Section 218(1) of the Companies Act 2016, Directors are prohibited from making secret profits; using corporate information; using his position as director and taking/ using corporate opportunity which is in competition with the company, to gain directly or indirectly a benefit for himself or any other person, or cause detriment to the company.

3. Directors may breach his duties if he becomes directors of rival companies. Companies Act 2016 states that a director shall not engage in business which is in competition with the company. Further, Companies Act 2016 requires directors of the company to disclose any office where duties or interest might be created that conflict with duties and interest as directors. However, despite of the above provisions, Companies Act allows the directors to gain directly or indirectly for himself benefit if consented or ratified by general meeting.

4. In the case of *Kea Holdings Pte Ltd v Gan Boon Hock* (2000) the Court held that although the defendant was not precluded to hold directorship in another company, he owed a duty not to place himself in a position where his duty to the plaintiff and his own interests are in conflict. There are two principles of conduct of relevance to the present case. First, that a director must act in what he honestly considers to be the company's interest, and not in the interests of some other person or body. Secondly, the equitable rule that a

fiduciary must not place himself in a position where his duty to the company and his personal interests may conflict.'

(8 marks)

ii Advise Funmarine Sdn Bhd whether they could claim damages from Justine for the secret commission that he obtained assuming they have cause of action against Justine.

1. Justine stands in a fiduciary position to his company. He must act honestly and in the best interest of his company. He must use his rights and powers for the benefit of Funmarine Sdn Bhd and not for some other purpose. He must not make a personal profit from his position or put himself in a position where his duties as a fiduciary and his personal interest come into conflict. (when he received commission)

2. Justine had received the secret commission, he would have been in a situation whereby his interests and Funmarine would clash. In the case of ***In Industrial Development Consultants v Cooley*** ,the defendant, Cooley was the managing director of the plaintiff company. The company was interested in obtaining certain contracts from the Eastern Gas Board but the Board was not satisfied with its set-up and refused to award the contract to it. The Gas Board then approached Cooley personally and invited him to be their project manager. Cooley resigned from the company and accepted the Gas Board`s position. The company brought an action against Cooley for account of profits.

3. Applying ***Industrial Development Consultants v Cooley*** , Justine would be liable to Funmarine for damages arising out of his breach of duty. Hence, Justine makes a profit from his position, he must account to the company for the profit that he has made.

(4 marks)

b. This question on company law tests the candidates' knowledge on the features of an exempt private company.

An exempt private company is defined in section 2(1) of the Companies Act 2016. (4 marks)

1. The features of an exempt private company are as follows:
   - It is a private company limited by shares
   - It has not more than 20 members
   - all members of the exempt private company are individuals
   - none of the members hold shares in the company on behalf of any corporation

2. An exempt private company enjoys certain benefits which are not given to other companies; where it is allowed to lend money or give financial assistance to directors and persons connected to directors (Sections 224(2) and 225(1))

3. It is exempted from filing audited financial statements and reports to the Registrar of Companies (Sections 260 and 261))

(4 marks)

c. This question on company law tests the candidates' knowledge on the director's "business judgement" rule.

4 instances provided by Section 213(2) Companies Act 2016 are:

1. If the director makes the business judgment in good faith for a proper purpose;
2. if the director does not have a material personal interest in the subject matter of the business judgment.
3. if the director is informed about the subject matter of the business judgment to the extent the director reasonably believes to be appropriate under the circumstances.
4. If the director reasonably believes that the business judgment is in the best interest of the company.

(4 marks)

QUESTION 6

a. This question on company law tests the candidates' knowledge on prohibition against financial assistance in a form of guarantee to purchase shares.

i. Advise Safi whether he could successfully challenge the validity of the guarantee given by the company to Cash Bank Bhd.

1. As a general rule, a limited company may not return its capital to its members. This is to protect persons who give credits to the company on the understanding that the company's capital will not be returned to the members but used for the purpose of the company's business.

Section 123(1) Companies Act 2016 prohibits a company from:

1. purchasing its own shares;
2. giving loan for the purchase of shares or its holding company's shares; and
3. giving a guarantee for the purchase of its shares or its holding company's shares

2. As for the contemplated guarantee to Manimani Bank Bhd, in respect of the loan to enable Meily to purchase the shares, Safi may be advised that by virtue of section 123 of the Companies Act 2016, a company is prohibited from providing any form of financial assistance

(which includes guarantees) to anyone to enable that person to purchase its shares.

3. From the facts given, Meily is an employee, being a senior operation manager (and not a director) the guarantee may be valid under the third exception mentioned above. Therefore, Safi may not be able to challenge the validity of the guarantee given by the company to Cash Bank Bhd.

(5 marks)

ii. Section 125 lists of exceptions to the prohibition against financial assistance by a company for the purchase of its own, or its holding company's shares :

1. A foreign company is not prohibited from giving financial assistance in Malaysia.
2. Where the company's ordinary business includes the lending of money and the money is lent in the ordinary course of its business.
3. Where the loan/financial assistance is given to trustees under an employee share scheme for the benefit of the employees.
4. Where the loan/financial assistance is given to persons bona fide in the employment of the company (other than directors) to enable them to purchase the company's shares.
5. Where companies regulated by law relating to banking, insurance or Takaful.
6. Where financial assistance not exceeding 10 percent of shareholder funds by non-listed companies. (private companies and non-listed public companies).

(6 marks)

b. This question on company law tests the candidates' knowledge on a company's auditor.

State any five of these circumstances that an approved company auditor is disqualified from acting as auditor for a company:

1. he is not an approved company auditor
2. he is indebted to the company or its related company for an amount exceeding RM25,000
3. he or his spouse is an officer of the company
4. he is a partner, employer or employee of an officer of the company
5. he is a partner or employee of an employee of an officer of the company
6. he is a shareholder or his spouse is a shareholder of a corporation whose employee is an officer of the company; or
7. he is responsible for, or if he is the partner, employer or employee of a person responsible for, the keeping of the register of members or the register of holders of debentures of the company
8. he is an undischarged bankrupt, except with the leave of the court; or
9. he is convicted of any offence involving fraud or dishonesty punishable with imprisonment for three months or more.

(5 marks)

c. This question on company law tests the candidates' knowledge on corporate rescue mechanism.

A Corporate Voluntary Arrangement (CVA) is essentially a scheme of arrangement under which a company can restructure its debts voluntarily under an agreement with its members or creditors. This is done under the supervision of an insolvency practitioner (an approved liquidator)

Judicial Management is essentially a process that gives prime consideration to rescuing distressed companies as a going concern through the formulation and implementation of a reconstruction plan. It is a temporary court supervised rescue plan to give viable companies which are in financial trouble a better chance to rehabilitate themselves and be restored to profitability.

(4 marks)

QUESTION 7

a. This question on company law tests the candidates' knowledge on statutory provisions dealing with alteration of the constitution.

i. Method effecting the alteration made by Manyco Bhd is:

1. Under section 37 of the Companies Act 2016, a company may amend its constitution by passing a special resolution unless the constitution itself prohibits an amendment to any of its provision.

2. The company may notify the Registrar of the alteration and a copy of the amended constitution must be lodged with the Registrar within thirty days of the resolution being passed.

3. The alteration takes effect on the date the resolution was passed or at a later date as may be specified in the resolution.

(3 marks)

ii. The minority shareholders in Manyco Bhd could succeed in their action to have the alteration made by Manyco declared invalid when:

1. Case law has shown that a shareholder who is prejudiced by the alteration may apply to court to cancel the alteration if the alteration is not made for the bona fide benefit of the company as a whole. In the case of *Allen v Gold Reefs of West Africa Ltd (1900)* the court held that even though the alteration prejudicial to one shareholder, it was done bona fide for the benefit of the company as a whole.

2. The constitution should not be altered to oppress or discriminate the minority or to take away their rights or their property or the property of the company. Thus, the resolution to compel the minority to sell their shares to the majority will generally be void (*Brown v British Abrasive Wheel Co (1919*)).

3. From the facts given the alteration was made to allow the compulsory transfer to the directors of the shares of any member competing with the company's business. The question is this held to be an oppression to the minorities and not for the benefit of the company as a whole? In the case of *Sidebottom v Kershaw, Leese and Co (1920)*, an alteration to allow directors to compulsory acquire the shares of members who are in competition with the company may be considered to be for the benefit of the company. Such an alteration was held to be valid as it was for the company's benefit not to have competing members.

4. Therefore, it can be concluded that the alteration made by Manyco Bhd is valid because it is passed bona fide for the best interests of the company as a whole. The alteration is not a fraud on the minority and the shareholders voting on an alteration of the articles must vote in the best interests of the company (*Greenhalgh v Ardene Cinemas (1946)).*

(7 marks)

b. This question on company law tests the candidates' knowledge on company's receivership.

i The duties of the receiver appointed by Build Bank Bhd with regard to the payment of Ranskop Bhd debts are:

1. Section 392(1) Companies Act 2016, applies where a receiver is appointed on behalf of a holders of debentures secured by a floating charge and the company is not in the course of winding up. Certain debts of the company as specified in this section shall be paid out from the assets coming into the hands of the receiver in priority to the claim of the debenture holders.

2. The debts mentioned in this section are firstly the costs, expenses and remuneration of receiver or receiver manager, followed by wages or salaries of employees for a maximum period of four months, subject further to a ceiling of fifteen thousand ringgit, remuneration payable to employees in respect of vacation leave and all amounts due in respect of contributions payable to Employees Provident Fund or SOCSO.

3. By section 392(3) if any payment has been made to any employee on account of salary, wages or vacation leave out of money advanced by a person for that purpose, that person will have a right of priority in respect of the money so advanced.

4. Further, section 392(4) concerns any sums of money received by a company from an insurer under a third party liability policy where the company had incurred liability to a third party. In such a case the amount (after deducting expenses) must be paid to the third party.

(7 marks)

ii. The position of the receiver assuming that Ranskop Bhd going into compulsory or voluntary winding up will be:

1. There is nothing to stop the company from going into compulsory or voluntary winding up even after a receiver or receiver manager has been appointed. In the case of *Kimlin Housing Development Sdn Bhd v Bank Bumiputra Malaysia Bhd (1997)*, it was decided by the Federal court that liquidation terminated the agency of a receiver appointed as an agent of the charger by a secured creditor and that he must deliver up to the liquidator all movable or immovable property of the charger that came under his custody or control.

2. Kimlin case was distinguished by *Balasbramaniam v MBF Finance Bhd (2005)* case where the court held that the rights of a receiver and receiver manager appointed by a secured creditor under powers given in a debenture must be considered in the light of contents of that debenture and the provisions of the Companies Act. The liquidator was only entitled to the property to which the company was entitled. The company's right when a receiver was appointed was a right of redemption over the property charged and, consequently, the liquidator's right was also a right of redemption. The receiver and manager was entitled to possession of the assets charged unless redeemed by the liquidator.

(3 marks)

END OF SOLUTION