# Answers

**1 (a) The Common Law**

This term refers to the substantive law and procedural rules that have been created by the judiciary through the decisions in the cases they have heard, thus it is also referred to as case law.

Central to the concept of the common law is the doctrine of precedent, which means that when a court has to decide an issue, it looks to the previous decisions contained in earlier cases for guidance on how to deal with the present case. Case law operates within the hierarchical structure of the courts system; with the decisions of higher courts binding those courts lower than them in the structure. Courts at the same level are also usually bound, although since 1966 that is no longer the case with the House of Lords, which can now overrule its previous rulings.

The actual part of the previous decision that is binding is the *ratio decidendi* of the case; that is the legal rule, which led to the decision in the earlier case. The ratio is an abstraction from the facts of the case. Everything else is termed *obiter dictum* and although of persuasive authority, does not have to be followed by the later court. As the *ratio decidendi* of any case is an abstraction from, and is based upon, the material facts of the case, this opens up the possibility that a later court may regard the facts of the case before it as significantly different from the facts of a cited precedent and thus consequentially it will not find itself bound to follow that precedent. Judges use this device of distinguishing cases on their facts where, for some reason, they are unwilling to follow a particular precedent.

Various law reports contain details of cases and decisions and it is to those books and cases that lawyers go to find out what the case law is on any particular issue.

There are numerous perceived advantages of the doctrine of precedent, amongst which are:

– *Consistency*. This refers to the fact that like cases are decided on a like basis and are not apparently subject to the whim of the individual judge deciding the case in question. This aspect of formal justice is important in justifying the decisions taken in particular cases.
– *Certainty*. This follows from, and indeed is presupposed by, the previous item. Lawyers and their clients are able to predict what the likely outcome of a particular legal question is likely to be in the light of previous judicial decisions. Also, once the legal rule has been established in one case, individuals can orient their behaviour with regard to that rule relatively secure in the knowledge that it will not be changed by some later court.
– *Efficiency*. This refers to the fact that it saves the time of the judiciary, lawyers and their clients for the reason that cases do not have to be re-argued. In respect of potential litigants, it saves them money in court expenses because they can apply to their solicitor/barrister for guidance as to how their particular case is likely to be decided in the light of previous cases on the same or similar points. (It should of course be recognised that the vast bulk of cases are argued and decided on their facts rather than on principles of law, but that does not detract from the relevance of this issue).
– *Flexibility*. This refers to the fact that the various mechanisms by means of which the judges can manipulate the common law provide them with an opportunity to develop law in particular areas without waiting for Parliament to enact legislation.

In practice, flexibility is achieved through the possibility of previous decisions being either overruled, or distinguished, or the possibility of a later court extending or modifying the effective ambit of a precedent.

It is sometimes claimed that judges exceed their constitutional role by making such law, but others would counter that it is both legitimate and necessary that judges should take an active part in developing the law.

**(b) Legislation**

Legislation, on the other hand, refers to law that has been created by the legislative body within a constitution. In the United Kingdom that body is Parliament, constituted by both the House of Commons and the House of Lords and Bills have to be considered in, and approved by, both houses before it becomes law subsequent to the formality of its receiving royal approval. Since the Parliament Acts of 1911 and 1949, the blocking power of the House of Lords has been restricted as follows:

– a 'Money Bill', that is, one containing only financial provisions, can be enacted without the approval of the House of Lords after a delay of one month;
– any other Bill can be delayed by one year by the House of Lords.

Statutes take the form of Acts of Parliament or delegated legislation. Delegated legislation is of particular importance. Generally speaking, delegated legislation is law made by some person or body to whom Parliament has delegated its general law making power. A validly enacted piece of delegated legislation has the same legal force and effect as the Act of Parliament under which it is enacted but, equally, it only has effect to the extent that its enabling Act authorises it and anything done in excess of, or contrary to, that authority may be challenged in the courts as *ultra vires* through an action for judicial review.

Within countries with written constitutions there is usually a limitation placed on the power of the legislature to make law, in that it cannot make laws which are contrary to, or in conflict with, the fundamental provisions of the constitution. In the United Kingdom, due to the doctrine of Parliamentary Sovereignty, legislation is superior to the common law, and the courts cannot strike down primary legislation, although, under the Human Rights Act 1998, they can declare that such law is incompatible with the rights contained in the European Convention on Human Rights. Legislation is published in the form of individual Acts and collectively in annual volumes.

The courts exercise the essential task of interpreting statutes in such a way as to give them effect. In so doing the courts make use of the three main rules of interpretation:

– the literal rule, (see *R* v *Maginnis* (1987) and *AG's Reference (No 1 of 1988)* (1989))

– the golden rule (see *Re Sigsworth* (1935))

– the mischief rule (see *Heydon's case* (1584) and *Corkery* v *Carpenter* (1950)).

**2 (a) Offer**

An offer sets out the terms upon which an individual is willing to enter into a binding contractual relationship with another person. It is a promise to be bound on particular terms, which is capable of acceptance. The essential factor to emphasise about an offer is that it may, through acceptance by the offeree, result in a legally enforceable contract. The person who makes the offer is the offeror; the person who receives the offer is the offeree.

Offers, once accepted, may be legally enforced but not all statements will amount to an offer. It is important, therefore, to be able to distinguish what the law will treat as an offer from other statements which will not form the basis of an enforceable contract. An offer must be capable of acceptance. It must therefore not be too vague (*Scammel* v *Ouston* (1941)). In *Carlill* v *Carbolic Smoke Ball Co* (1893) it was held that an offer could be made to the whole world and could be accepted and made binding through the conduct of the offeree.

In addition an offer should be distinguished, from the following:

(i) *A mere statement of intention* – Such a statement cannot form the basis of a contract even although the party to whom it was made acts on it (*Re Fickus* (1900)).

(ii) *A mere supply of information* – As in *Harvey* v *Facey* (1893) where it was held that the defendant's telegram, in which he stated a minimum price he would accept for property, was simply a statement of information, and was not an offer capable of being accepted by the plaintiff.

**(b) Invitation to treat**

Invitations to treat are distinct from offers in that rather than being offers to others, they are in fact invitations to others to make offers. The person to whom the invitation to treat is made becomes the actual offeror, and the maker of the invitation becomes the offeree. An essential consequence of this distinction is that, in line with the ordinary rules of offer and acceptance, the person extending the invitation to treat is not bound to accept any offers subsequently made to them.

The following are examples of common situations involving invitations to treat:

(i) *the display of goods in a shop window* – The classic case in this area is *Fisher* v *Bell* (1961) in which a shopkeeper was prosecuted for offering offensive weapons for sale, by having flick-knives on display in his window. It was held that the shopkeeper was not guilty as the display in the shop window was not an offer for sale but only an invitation to treat.

(ii) *the display of goods on the shelf of a self-service shop* – In this instance the exemplary case is *Pharmaceutical Society of Great Britain* v *Boots Cash Chemists* (1953). The defendants were charged with breaking a law which provided that certain drugs could only be sold under the supervision of a qualified pharmacist. They had placed the drugs on open display in their self-service store and, although a qualified person was stationed at the cash desk, it was alleged that the contract of sale had been formed when the customer removed the goods from the shelf. It was held that Boots were not guilty. The display of goods on the shelf was only an invitation to treat. In law, the customer offered to buy the goods at the cash desk where the pharmacist was stationed.

(iii) *a public advertisement* – Once again this does not amount to an offer. This can be seen from *Partridge* v *Crittenden* (1968) in which a person was charged with 'offering' a wild bird for sale contrary to the Protection of Birds Act 1954, after he had placed an advert relating to the sale of such birds in a magazine. It was held that he could not be guilty of offering the bird for sale as the advert amounted to no more than an invitation to treat.

(iv) *a share prospectus* – Contrary to common understanding such a document is not an offer. It is merely an invitation to treat, inviting people to make offers to subscribe for shares in a company.

**3** Once a claimant has established that the defendant owes them a duty of care, they must then establish that the defendant has actually breached that duty. The test for establishing breach of duty is an objective one and was set out in *Blyth* v *Birmingham Waterworks Co* (1856). Thus a breach of duty occurs if the defendant:

> *... fails to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do; or does something which a prudent and reasonable man would not do.*

The fact that the defendant has acted less skilfully than the reasonable man would expect will usually result in breach being established. This is the case even where the defendant is inexperienced in his particular trade or activity. For example, a learner driver must drive in the manner of a driver of skill, experience and care (*Nettleship* v *Weston* (1971)). It is, however, clear from the case law that, depending on the age of the child, the standard of care expected from a child may be lower than that of an adult. Children should be judged on whether they have the 'foresight and prudence of a normal child of that age' (see *Mullin* v

*Richards* (1998)). The degree or standard of care to be exercised by such a person will vary, as there are factors, such as the age of the claimant, which can increase the standard of care to be exercised by the defendant. The test is, therefore, flexible but the following factors will be taken into consideration in determining the issue:

– *The probability of injury*
The degree of care must be balanced against the degree of risk involved if the defendant fails in his duty. It follows, therefore, that the greater the risk of injury or the more likely it is to occur, the more the defendant will have to do to fulfil his duty. Thus in *Glasgow Corporation* v *Taylor* (1992) the provision of a warning notice was not considered sufficient to absolve the corporation from liability of injury sustained by young children eating poisonous berries in its park (See also In *Bolton* v *Stone* (1951) where the likelihood of the injury occurring was small, as was the risk involved).

– *The seriousness of the risk*
The degree of care to be exercised by the defendant may be increased if the claimant is very young, old or less able bodied in some way. The rule is that 'you must take your victim as you find him' (this is known as the egg-shell skull rule).

In *Haley* v *London Electricity Board* (1965) the defendants, in order to carry out repairs, had made a hole in the pavement. The precautions taken by the Electricity Board were sufficient to safeguard a sighted person, but Haley, who was blind, fell into the hole, striking his head on the pavement, and became deaf as a consequence. It was held that the Electricity Board was in breach of its duty of care to pedestrians. It had failed to ensure that the excavation was safe for all pedestrians, not just sighted persons. It was clearly not reasonably safe for blind persons, yet it was foreseeable that they may use this pavement.

There are other cases in this field which should be referred to, for example, *Gough* v *Thorne* (1966), concerning young children; *Daly* v *Liverpool Corp* (1939), concerning old people; and *Paris* v *Stepney BC* (1951), concerning disability (see below).

– *Cost and practicability*
Any foreseeable risk has to be balanced against the measures necessary to eliminate it. If the cost of these measures far outweighs the risk, the defendant will probably not be in breach of duty for failing to carry out those measures. Thus in *Latimer* v *AEC Ltd* (1952) a factory belonging to AEC became flooded after an abnormally heavy rainstorm. The rain mixed with oily deposits on the floor, making the floor very slippery. Sawdust was spread on the floor, but it was insufficient to cover the whole area. Latimer, an employee, slipped on a part of the floor to which sawdust had not been applied. It was held that AEC Ltd was not in breach of its duty to the plaintiff. It had taken all reasonable precautions and had eliminated the risk as far as it practicably could without going so far as to close the factory. There was no evidence to suggest that the reasonably prudent employer would have closed down the factory and, as far as the court was concerned, the cost of doing that far outweighed the risk to the employees.

– *Social benefit*
The degree of risk has to be balanced against the social utility and importance of the defendant's activity. For example in *Watt* v *Hertfordshire CC* (1954), injury sustained by the plaintiff, a fireman, whilst getting to an emergency situation, was not accepted as being the result of a breach of duty of care as in the circumstances time was not available to take the measures that would have removed the risk.

– *Common practice*
Actions in line with common practice or custom, may be sufficient to meet the expected standard of care, except, of course, where the common practice is in itself negligent. Thus in *Paris* v *Stepney BC* (1951) not wearing safety glasses in a foundry was common practice but it was in itself essentially negligent and the defendant could rely on it as a defence.

– *Skilled persons*
Individuals who hold themselves out as having particular skills are not judged against the standard of the reasonable person, but the reasonable person *possessing the same professional skill* as they purport to have. In *Roe* v *Minister of Health* (1954), a patient was paralysed after being given a spinal injection. This occurred because the fluid being injected had become contaminated with the storage liquid, which had seeped through minute cracks in the phials. It was held that there was no breach of duty, since the doctor who administered the injection had no way of detecting the contamination at that time.

**4** This question asks candidates to consider the doctrine of separate personality, one of the key concepts of company law. It also requires some consideration of the occasions when the doctrine will be ignored, and the veil of incorporation pulled aside. This latter part will demand consideration of both statute and common law provisions.

**(a) Separate personality**
Whereas English law treats a partnership as simply a group of individuals trading collectively, the effect of incorporation is that a company once formed has its own distinct legal personality, completely separate from its members.

The doctrine of separate or corporate personality is an ancient one, but the case usually cited in relation to separate personality is: *Salomon* v *Salomon & Co* (1897). Salomon had been in the boot and leather business for some time. Together with other members of his family he formed a limited company and sold his previous business to it. Payment was in the form of cash, shares and debentures. When the company was eventually wound up it was argued that Salomon and the company were the same, and, as he could not be his own creditor, his debentures should have no effect. Although earlier courts had decided against Salomon, the House of Lords held that under the circumstances, in the absence of fraud, his debentures were valid. The company had been properly constituted and consequently it was, in law, a distinct legal person, completely separate from

Salomon. Prior to the Companies Act 2006 (CA 2006) true single person limited companies, with only one member, could be formed but these were exceptional and in the event of the membership of an ordinary company falling below one, the remaining member assumed liability for the debts of the company. Now under s.123 CA 2006, if the number of members of a limited company falls to one, all that is required is that the fact be entered in the company's register of members, with the name and address of the sole member.

A number of consequences flow from the fact that corporations are treated as having legal personality in their own right.

(i) *Limited liability*
No one is responsible for anyone else's debts unless they agree to accept such responsibility. Similarly, at common law, members of a corporation are not responsible for its debts without agreement. However, registered companies, i.e. those formed under the Companies Acts, are not permitted unless the shareholders agree to accept liability for their company's debts. In return for this agreement the extent of their liability is set at a fixed amount. In the case of a company limited by shares the level of liability is the amount remaining unpaid on the nominal value of the shares held. In the case of a company limited by guarantee it is the amount that shareholders have agreed to pay in the event of the company being wound up.

(ii) *Perpetual existence*
As the corporation exists in its own right changes in its membership have no effect on its status or existence. Members may die, be declared bankrupt or insane, or transfer their shares without any effect on the company. As an abstract legal person the company cannot die, although its existence can be brought to an end through the winding up procedure.

(iii) *Business property is owned by the company*
Any business assets are owned by the company itself and not the shareholders. This is normally a major advantage in that the company's assets are not subject to claims based on the ownership rights of its members. It can, however, cause unforeseen problems as may be seen in *Macaura* v *Northern Assurance* (1925). The plaintiff had owned a timber estate and later formed a one-man company and transferred the estate to it. He continued to insure the estate in his own name. When the timber was lost in a fire it was held that Macaura could not claim on the insurance as he had no personal interest in the timber, which belonged to the company.

(iv) *Legal capacity*
The company has contractual capacity in its own right and can sue and be sued in its own name. The extent of the company's liability, as opposed to the members, is unlimited and all its assets may be used to pay off debts. The company may also be liable in tort for any injuries sustained as a consequence of the negligence of its agents or employees.

(iv) *The rule in Foss* v *Harbottle*
This states that where a company suffers an injury, it is for the company, acting through the majority of the members, to take the appropriate remedial action. Perhaps of more importance is the corollary of the rule which is that an individual cannot raise an action in response to a wrong suffered by the company.

**(b) Lifting the veil of incorporation**

There are a number of occasions, both statutory and at common law, when the doctrine of separate personality will not be followed. On these occasions it is said that the veil of incorporation, which separates the company from its members, is pierced, lifted or drawn aside. Such situations arise as follows:

(i) *Under the companies legislation*
Section 399 of the Companies Act 2006 requires accounts to be prepared by a group of related companies, thus recognising the common link between them as separate corporate entities. Section 213 of the Insolvency Act 1986 provides for personal liability in relation to fraudulent trading and s.214 does the same in relation to wrongful trading.

(ii) *At common law*
As in most areas of law that are based on the application of policy decisions it is difficult to predict when the courts will ignore separate personality. What is certain is that the courts will not permit the corporate form to be used for a clearly fraudulent purpose or to evade a legal duty. Thus in *Gilford Motor Co Ltd* v *Horne* (1933) an employee had covenanted not to solicit his former employer's customers. After he left their employment he formed a company to solicit those customers and it was held that the company was a sham and the court would not permit it to be used to avoid the contract.

As would be expected the courts are prepared to ignore separate personality in times of war to defeat the activity of shareholders who might be enemy aliens. See *Daimler Co Ltd* v *Continental Tyre and Rubber Co (GB) Ltd* (1917).

Where groups of companies have been set up for particular business ends the courts will usually not ignore the separate existence of the various companies unless they are being used for fraud. There is authority for treating separate companies as a single group as in *DHN Food Distributors Ltd* v *Borough of Tower Hamlets* (1976) but later authorities have cast extreme doubt on this decision. See *Woolfson* v *Strathclyde RC* (1978) and *National Dock Labour Board* v *Pinn & Wheeler* (1989). The later cases would appear to suggest that the courts are becoming more reluctant to ignore separate personality where the company has been properly established (*Adams* v *Cape Industries plc* (1990) and *Ord* v *Belhaven Pubs Ltd* (1998)).

**5 (a) Ordinary shares**

As defined in *Borland's Trustees* v *Steel* (1901) a share:

'…is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second…'

The nominal value of the shares held represents the maximum liability of a shareholder in a limited liability company. However, the actual liability of a shareholder is the amount remaining unpaid on any shares held. This difference arises in the following circumstances. When companies issue shares they may not require the full nominal value of the shares to be paid at once. This allows the company the possibility of raising further capital from its members as it becomes necessary in the future. The amount already paid to the company is referred to as called-up capital. Any uncalled capital represents the amount of potential liability. If the shares are fully paid up then the shareholder has no further liability towards meeting the company's debts. In regard to return, shares enjoy an advantage of other securities. If the company is profitable, not only will they enjoy dividend payments but the market value of their shares will go up. On the other hand if the company does not do well, they may well not receive any payment and the value of their shares will diminish.

**(b)** Preference shares represent a more secure form of investment than the ordinary share. The reason for this is that preference shares receive a fixed rate of dividend before any payment is made to the ordinary shareholders and usually they enjoy priority over ordinary shares with regard to repayment of capital. The actual rights enjoyed by the preference will be stated in the company's articles of association. Dividend rights in relation to preference shares are usually cumulative, which means that a failure to pay the dividend in one year has to be made good in subsequent years. Although, as with ordinary shares, the holders of preference shares are members of the company, their voting rights are restricted to any period when their dividends are in arrears.

**(c)** Debentures are documents that acknowledge a company's borrowing, although the term has been extended to cover the loan itself. As debenture holders lend money to the company they are its creditors, they are not members. As creditors they are entitled to receive interest, whether the company is profitable or not. It may even be necessary to use the company's capital to pay the debenture interest. Share dividends on the other hand must never be paid from capital. It is usual for the company to provide security for the amount it has borrowed by issuing debentures. There are two methods of securing debentures: by means of a floating charge, or by means of a fixed charge, both of which have to be properly registered. In the case of a floating charge the security is provided by all of the company's property, some of which may be continuously changing, such as stock-in-trade. The charge only crystallises, i.e. fixes on the specific property, when the company commits some act of default, and until then it is free to deal with the property in its ordinary course of business. The disadvantage of floating charges are that they come after fixed charges when it comes to paying a company's debts, so if all the assets are used to pay off those prior debts, there may well be nothing left to pay the holders of the floating charges.

**6** This question raises issues relating to the important topic of corporate governance. It requires a consideration of the role of directors with an explanation of the distinction between executive or non-executive directors and shadow directors.

**(a)** Executive directors usually work on a full-time basis for the company and may be employees of the company with specific contracts of employment. Section 227 of the Companies Act 2006 defines a director's service contract as a contract under which a director of the company undertakes personally to perform services (as director or otherwise) for the company. Section 228 requires a copy of every director's service contract to be kept available for inspection and under s.229 company members have the right to inspect and request a copy of such contracts.

Additionally s.188 of the Companies Act 2006, relating to directors' long-term service contracts, requires that no such contract may be longer than two years, unless it has been approved by resolution of the members of the company.

In fact the Combined Code on Corporate Governance recommends that the maximum period for directors' employment contracts should be one year.

**(b)** Non-executive directors do not usually have a full-time relationship with the company; they are not employees and only receive directors' fees. The role of the non-executive directors, at least in theory, is to bring outside experience and expertise to the board of directors. They are also expected to exert a measure of control over the executive directors to ensure that the latter do not run the company in their, rather than the company's, best interests.

It is important to note that there is no distinction in law between executive and non-executive directors and the latter are subject to the same controls and potential liabilities as are the former.

**(c) Shadow director**

Section 250 of the Companies Act 2006, defines a director as including 'any person occupying the position of a director, by whatever name called.' The point of such a tautological definition is to emphasise the fact that it is the person's function rather than their title that defines them as a director and makes them subject to all the rules of company law that apply to directors.

It is possible that someone who in reality exercises control over a company's decision making might seek to evade their responsibilities and potential liabilities as a director. For example they could attempt to do this by appointing some other people as nominal directors without themselves being formally appointed to the board of directors. They would, nonetheless, exercise control over the business. It was in order to regulate such potential activity by those who exercise control over

companies from behind the scenes that the concept of the shadow director was introduced. Thus s.251 of the Companies Act 2006 provides that a shadow director in relation to a company, means a person in accordance with whose directions or instructions the directors of the company are accustomed to act. However it should be noted that a person is not to be regarded as a shadow director simply for the reason that the directors act on advice given by him in a professional capacity. Thus neither accountants nor lawyers are made liable on the simple basis that they provide advice which the board of directors may act on.

**7 (a)** Employees are people working under a contract of service. Those who work under a contract for services are independent contractors. They are not employees, but are self-employed. If you have a problem with your motor car you may take it to a large garage and have one of its mechanics look at the car. That mechanic would be an employee of the garage and would work under a contract of service with his employers. Your contract would not be with the mechanic but with his employer, the garage. Alternatively you might take the car to a one man garage and get that person to look at the car. In that situation the mechanic is self-employed and you and he are entering into a contract for services.

It is essential to distinguish the two categories clearly, because important legal consequences follow from the placing of a person in one or other of the categories. For example, although employees are protected by various common law and statutory rights in relation to their employment, no such wide scale protection is offered to the self-employed. Also ultimate liability for breach of contract or liability in tort depends on the person's status as an employee or self-employed. In the example above in the first instance the mechanic's employers, the garage, are responsible for the consequence of his actions whilst acting in their employment; whereas in the second case, the mechanic alone is responsible for any liabilities that arise from his work. Given the importance of the distinction and the allocation of essential statutory rights that follow from it, it is perhaps somewhat surprising that no clear statutory definition of the distinction has been provided. Section 230 of the Employment Rights Act 1996, for example defines an employee as 'an individual who has entered into or works under a contract of employment' and states that a contract of employment 'means a contract of service'.

**(b)** Such circularity and lack of clarity means that it has been left to the courts to develop tests for distinguishing the employee from the self-employed.

The first test to be applied by the courts was known as the control test. In using this test the key element is the degree of control exercised by one party over the other. The question to be determined is the degree to which the person who is using the other's services actually controls, not only what they do, but how they do it. An example of the use of the test can be seen in *Walker* v *Crystal Palace Football Club* (1910) in which it was held that a professional football player was an employee of his club, on the ground that he was subject to control in relation to his training, discipline and method of payment. Thus to revert to the example given in part (a) the first mechanic, the employee, can be told what to do and how to do it, whereas the second, the self-employed mechanic, takes all such decisions as those in his own right.

The control test looks back to and reflects previous master/servant relationships of employment, but its main shortcoming lay in its lack of any degree of subtlety. Highly skilled professionals, such as surgeons, by necessity have a high level of control over how they perform their day-to-day work, but the consequence of that, at least under the control test, was that they were deemed to be self-employed rather than employees, and patients who had suffered as a consequence of negligence would only be able to sue the doctor rather than the Health Authority which used their services. Such weakness in the control test led to the courts developing a more subtle test.

The integration test shifted the emphasis from the degree of control exercised of an individual to the extent to which the individual was integrated into the business of their putative employer. An example of the application of the integration test may be seen in *Whittaker* v *Minister of Pensions & National Insurance* (1967) in which the court found that the degree to which a circus trapeze artist was required to do other general tasks in relation to the operation of the circus in which she appeared, indicated that she was an employee rather than self-employed. As a consequence she was entitled to claim compensation for injuries sustained in the course of her employment. However, even the integration test was not without problems, as some employers attempted to give the impression of using a self-employed workforce whilst effectively still controlling what that workforce did.

The response on the parts of the courts was the development of the multiple, or economic reality, test. Rather than relying on one single factor, this test uses a more general assessment of the circumstances of any particular case in order to decide whether, or not, someone is an employee. In so deciding the courts will not be bound by how the parties themselves describe the relationship. Thus it is immaterial that the agreement between the parties states that someone is to be self-employed; if the indications are otherwise then the person will be recognised, and treated, as an employee (*Market Investigations* v *Minister of Social Security* (1969)).

The economic reality test was first established in *Ready Mixed Concrete (South East) Ltd* v *Minister of Pensions and National Insurance* (1968) in which it was held that there were three conditions supporting the existence of a contract of employment:

(i) the employee agrees to provide his own work and skill in return for a wage,
(ii) the employee agrees, either expressly or impliedly, that he will be subject to a degree of control, exercisable by the employer,
(iii) the other provisions of the contract are consistent with its being a contract of employment.

In deciding whether or not there is a contract of employment the courts tend to focus on such issues as whether wages are paid regularly or by way of a single lump sum; whether the person receives holiday pay; and on who pays the due national insurance and income tax. However, there can be no definitive list of tests as the whole point of the multiple test is that it examines all aspects of the situation in order to reach a determination. For example in *Nethermore (St Neots)* v *Gardiner & Taverna* (1984), a group of home workers, i.e. people who carried out paid work in their own homes, were held to be employees on the grounds that they were subject to an irreducible minimum obligation to work for their employer.

**8** As the scenario states, Astride entered into contracts with Bild Ltd and Chris, so there is no need to deal with the issue relating to the formation of contract, the problem clearly relates to breach of contract and the remedies available for such breach.

In relation to the first contract with Bild Ltd, the wall was not built to the agreed height and in relation to the second contract Chris has refused to carry out his contractual agreement.

**Remedies for breach of contract**

By implication of the common law, any breach of contract gives rise to the requirement that the contract-breaker should pay monetary compensation to the other party for the loss sustained in consequence of the breach. Such monetary compensation for breach of contract is damages. The estimation of what damages are to be paid by a party in breach of contract can be divided into two parts: remoteness and measure.

*Remoteness of damage* involves a consideration of causation, and the remoteness of cause from effect, but is not a relevant issue in either of these instances. What is at the heart of the matter is the *measure of damages*, which relates to the actual amount of loss sustained by the injured party. Damages in contract are intended to compensate the injured party for any financial loss sustained as a consequence of another party's breach. As the object is to compensate rather than to punish, the amount of damages awarded can never be greater than the actual loss suffered. The aim is to put the injured party in the same position they would have been in had the contract been properly performed.

Particular difficulties arise in relation to estimating the damages liable in construction contracts. Where builders either have not carried out work required, or have carried it out inadequately, they will be in breach of contract and liable for damages. The usual measure of such damages is the cost of carrying out the work or repairing the faulty work. However, this may not be the case where the costs of remedying the defects are disproportionate to the difference in value between what was supplied and what was ordered. Thus in *Ruxley Electronics and Construction Ltd* v *Forsyth* (1995) the parties had entered into a contract for the construction of a swimming pool. Although the contract stated that the pool was to be 7ft 6in deep at one end, the actual depth of the pool was only 6ft 9in. The total contract price was £70,000. Fixing the error would have required a full reconstruction and would have cost around £20,000. The House of Lords considered that, as the costs of reinstatement would have been out of all proportion to the benefit gained, the difference in value only should be awarded.

In certain circumstances, rather than merely award damages, the court can make an order for *specific performance* to require the party in breach to complete their part of the contract. However, an order for specific performance is not available in respect of contracts of employment or personal service (*Ryan* v *Mutual Tontine Westminster Chambers Association* (1893)).

It remains to apply the foregoing general statements of law to the facts of the problem as follows:

**(a)** An order of specific performance will only be granted in cases where the common law remedy of damages is inadequate and it will not be granted where the court cannot supervise its enforcement as in cases of contracts of employment or personal service (*Ryan* v *Mutual Tontine Westminster Chambers Association* (1893)). It is therefore clear that Astride will not be able to force Bild Ltd to carry out the remedial work, and that her only remedy will be in relation to damages. As regards the extent of those damages it appears that Astride's case is different from *Ruxley Electronics and Construction Ltd* v *Forsyth*, and that, as a consequence, she will be awarded damages to the extent of the cost of raising the wall to the contractual height.

**(b)** When as in this situation anticipatory breach takes place, the innocent party can sue for damages immediately on receipt of the notification of the other party's intention to repudiate the contract, without waiting for the actual contractual date of performance as in *Hochster* v *De La Tour* (1853). Alternatively, they can wait until the actual time for performance before taking action. In the latter instance, they are entitled to make preparations for performance, and claim the agreed contract price (*White and Carter (Councils)* v *McGregor* (1961)). It would appear that Chris's action is a clear instance of express anticipatory breach and that Astride has the right either to accept the repudiation immediately or affirm the contract and take action against him at the time for performance (*Vitol SA* v *Norelf Ltd* (1996)). In any event Chris is bound to complete his contractual promise or suffer the consequences of his breach of contract. Although Astride will not be able to get an order for specific performance against Chris, as the contract is one of personal service, she will be entitled to claim damages from Chris to the extent of the difference in his contractual price as against the price that Astride will have to pay someone else to get the work done: i.e. £500.

**9** This question requires candidates to consider the inter-related rules governing partnership and agency law.

**Clare**

The first thing to establish is the status of Clare. Although the question states that she is a sleeping partner, it has to be stated that the law does not recognise any such category. A dormant or sleeping partner is a person who merely invests money in a partnership enterprise but, apart from receiving a return on capital invested, takes no active part in the day-to-day running of the business.

Although a limited partner in a limited partnership formed under the Limited Partnerships Act 1907 may be seen as a dormant partner, the term is used more generally to refer to people who simply put money into partnership enterprises without taking an active part in the business and yet do not comply with the formalities required for establishing a limited partnership (as this partnership was formed 10 years ago the requirements, and benefits of the Limited Liability Partnerships Act 2000 do not apply to it). The essential point that has to be emphasised with regard to Clare is that she has placed herself at great risk. The law considers her in the same way as it does a general partner in the enterprise and consequently she will be held personally and fully liable for the debts of the partnership to the extent of her ability to pay. By remaining outside the day-to-day operation of the business, Clare has merely surrendered her personal unlimited liability into the control of the active parties in the partnership.

**Dan**
The rules relating to the residual responsibility of retired partners for partnership debts depend on when the debts were contracted and the action taken by the former partner to announce their retirement from the business.

A retired partner remains liable for any debts or obligations incurred by the partnership prior to retirement. Thus the date of any contract determines responsibility: if the person was a partner when the contract was entered into, then they are responsible, even if the contract is completed after their retirement. It is possible for the retiring partner to be discharged from existing liability as a consequence of a contract of novation. Novation is essentially a tripartite contract involving the retiring partner, the remaining members of the continuing partnership and the existing creditors. Under such an agreement any liability of the retiring partner is passed to the remaining partners. As creditors effectively give up rights against the retiring partner, their approval is required. Such approval may be express, or it may be implied from the course of dealing between the creditor and the firm.

Where someone deals with a partnership after a change in membership, they are entitled to treat all the apparent members of the old firm as still being members until they receive notice of any change in the membership. In order to avoid liability for future contracts, a retiring partner must ensure that individual notice is given to **existing customers** of the partnership; and advertise the retirement in the *London Gazette*. This serves as general notice to people who were not customers of the firm prior to the partner's retirement, but knew that that person had been a partner in the business. Such an advert is effective whether or not it comes to the attention of third parties.

As regards **new customers** a retired partner owes no responsibility to someone who had no previous dealings with the partnership nor previous knowledge of their membership (*Tower Cabinet Co Ltd* v *Ingram* (1949)).

It follows from this that Dan could be liable for any debts towards the longstanding customer Greg, unless he has taken steps to notify Greg of his retirement from the partnership, which does appear likely. However, Dan's liability as regards any partnership debts to Hugh who had never dealt with the partnership when Dan was a member depends on whether the appropriate notice was issued in the *London Gazette*. If it was, then Dan is not liable to Hugh. If it was not, he will be liable.

**Eve**
She is the last remaining active partner in the business and has full responsibility for any partnerships debts.

Under s.9 of the Partnership Act 1890 (PA), the liability of partners as regards debts or contracts is joint. The effect of joint liability used to be that, although the partners were collectively responsible, a person who took action against one of the partners could take no further action against the other partners, even if they had not recovered all that was owing to them. That situation was remedied by the Civil Liability (Contributions) Act 1978, which effectively provided that a judgment against one partner does not bar a subsequent action against the other partners. This means that as regards Greg's debt, Clare, Dan, and Eve are all personally responsible for any shortfall and he may take action against any one of them. The one against whom the action is taken will be able to claim a proportionate indemnity from the others. In the case of Hugh's debt if the appropriate notice had been issued in the *London Gazette* Dan would not be liable and hence the loss would be borne by Clare and Eve proportionally.

**10 (a)** Insider dealing is a crime under part V of the Criminal Justice Act 1993 (CJA).

Section 52 of the CJA sets out the three distinct offences of insider dealing:

(i) an individual is guilty of insider dealing if they have information as an insider and deal in price-affected securities on the basis of that information.
(ii) an individual who has information as an insider will also be guilty of insider dealing if they encourage another person to deal in price-affected securities in relation to that information.
(iii) an individual who has information as an insider will also be guilty of insider dealing if they disclose it to anyone other than in the proper performance of their employment, office or profession.

The CJA goes on to explain the meaning of some of the above terms. Thus s.54 defines what securities are covered by the legislation and these are set out in the second Schedule to the Act and specifically includes shares and debentures.

Dealing is defined in s.55, amongst other things, as acquiring or disposing of securities, whether as a principal or agent, or agreeing to acquire securities.

Section 56 defines 'inside information' as:

(i) relating to particular securities,
(ii) being specific or precise,
(iii) not having been made public and
(iv) being likely to have a significant effect on the price of the securities.

Section 57 states that a person has information as an insider only if they know it is inside information and they have it from an inside source. The section then goes on to consider what might be described as primary and secondary insiders. The first category of primary insiders covers those who get the inside information directly through either:

(i) being a director, employee or shareholder of an issuer of securities; or
(ii) having access to the information by virtue of their employment, office or profession.

On summary conviction an individual found guilty of insider dealing is liable to a fine not exceeding the statutory maximum and/or maximum of six months imprisonment. On indictment the penalty is an unlimited fine and/or a maximum of seven years imprisonment.

Applying the general law to the problem scenario, one can conclude as follows:

Sid is an 'insider' as he receives inside information from his position as a director in both Trend plc and Umber plc. The information fulfils the requirements for 'inside information' as it relates to: particular securities, the shares in both companies; is specific, in that it relates to the level of their profits; has not been made public; and is likely to have a significant effect on the price of their securities. On that basis Sid is clearly guilty of an offence under s.52 in selling his shares in Trend plc to avoid a loss and buying shares in Umber plc to make a profit.

He is also guilty of a further offence when he advised his brother to buy shares in Umber plc. However, his brother has not committed any offence as he did not receive any specific information from Sid.

**(b)** There is little that Vic can do in relation to Sid's insider dealing. There was no relationship between the two and in any case Vic sold his shares voluntarily on the stock market and consequently can take no action against Sid or his brother. However, the companies may take action against Sid for breaching his fiduciary duty.

**1** **(a)** 4–6 Good explanation of the common law. Examples used to highlight answers.
2–3 Sound understanding but perhaps no examples.
0–1 Little knowledge only about the topic.

**(b)** 3–4 Good awareness of the meaning and effect of legislation.
0–2 Limited knowledge only about the topic.

**2** This question in two parts requires candidates to explain the meaning of offer and invitation to treat within the common law.

**(a)** Carries 4 marks as follows:
3–4 Thorough to complete explanation of the meaning of offer. It is expected that cases will be cited in support, although examples will be acceptable.
1–2 Some but limited knowledge of the topic. Perhaps uncertain as to meaning or lacking in detailed explanation or authority.
0 No understanding whatsoever.

**(b)** Carries 6 marks.
4–6 Thorough to complete explanation of the meaning of offer. It is expected that cases will be cited in support, although examples will be acceptable.
2–3 Some but limited knowledge of the topic. Perhaps uncertain as to meaning or lacking in detailed explanation or authority.
0–1 Very little or no understanding whatsoever.

**3** This question requires candidates to explain the standard of care owed by one person to another in relation to the tort of negligence.

8–10 Full understanding and explanation of the topic. It is likely that cases will be cited as authority although examples will be acceptable as an alternative.
5–7 Lacking in detail in some or all aspects of the topic. Unbalanced answer that only focuses on some of particular issues.
3–4 Some, but little, knowledge of the topic.
0–2 Little if any knowledge of the topic.

**4** This question asks candidates to consider the doctrine of separate personality, one of the key concepts of company law. It also requires some consideration of the occasions when the doctrine will be ignored, and the veil of incorporation pulled aside. This latter part will demand consideration of both statute and common law provisions. The question is divided into two parts to indicate to candidates the weighting they should apply in answering the question, although the answers can be answered as a whole.

**(a)** Carries 6 marks
5–6 A thorough to complete answer explaining the meaning and effect of separate personality. It is likely that cases will be cited as authority although examples will be acceptable as an alternative.
2–4 Some but limited knowledge of the topic. Perhaps uncertain as to meaning or lacking in detailed explanation or authority.
0–1 Very little or no understanding whatsoever.

**(b)** Carries 4 marks
3–4 A thorough to full explanation detailing the situations under which separate personality will be ignored.
1–2 Some understanding perhaps lacking in explanation or examples of when the doctrine will be ignored.
0 No understanding whatsoever.

**5** This question requires candidates to consider the various investment mechanisms available to investors.

8–10 Full understanding and explanation of the various forms of investment.
5–7 Lacking in detail in some or all aspects of the possible investment forms. Unbalanced answer that only focuses on some of the forms.
3–4 Some, but little, knowledge of the topic.
0–2 Little if any knowledge of the topic.

**6** This question raises issues relating to the important topic of corporate governance. It requires a consideration of the role of directors generally together with an explanation of the distinction between executive or non-executive directors and an explanation of the meaning of the term 'shadow director'.

- 8–10 Full understanding and explanation of all three elements of the question.
- 5–7 Lacking in detail in some or all elements of the question. Unbalanced answer that only focuses on two of the elements.
- 3–4 Some, but limited knowledge of the nature of the three elements, or unbalanced in dealing with only one or two aspects of the question.
- 0–2 Little if any knowledge of the topic or very unbalanced in its treatment of the question.

**7** This question asks candidates to explain the common law rules used to distinguish contracts of service from contracts for services.

- 8–10 A thorough treatment of all of the rules, perhaps placing them in their historical context but certainly providing case support and providing a good application of the law to the scenario.
- 5–7 Good analysis and case support, although perhaps limited in appreciation.
- 2–4 Recognition of the areas covered by the question, but lacking in detailed analysis.
- 0–1 Little or no analysis or knowledge of the subject of the question.

**8** This question requires candidates to analyse a situation from the perspective of contract law. In particular it requires an understanding, explanation and application of the law relating to the remedies available for breach of contract. Marks will be allocated as follows:

- 8–10 Full and thorough explanation of the law relating to remedies for breach of contract, with case authorities or examples. Good and accurate application of the law to the particular issues raised in the problem.
- 5–7 Good treatment of the topic but perhaps not dealing with all the issues raised or lacking in some knowledge or application. Perhaps lacking balance.
- 3–4 Lacking in detail in some or all aspects or lacking in application.
- 0–2 Some but little knowledge of the topic with little appropriate application.

**9** This question requires candidates to analyse a problem scenario that raises issues relating mainly to partnerships but which also involves agency law.

- 8–10 Clear analysis of the problem scenario – recognition of the issues raised and a convincing application of the legal principles to the facts. Appropriate case authorities may be cited, but are not necessary if the principles are understood.
- 5–7 Sound analysis of the problem – recognition of the major principles involved and a fair attempt at applying them. Perhaps sound in knowledge but lacking in analysis and application.
- 3–4 Unbalanced answer perhaps showing some appropriate knowledge but weak in analysis or application.
- 0–2 Very weak answer showing little analysis, appropriate knowledge or application.

**10** This question requires candidates to consider the criminal offence of insider dealing. However, it also requires some understanding of the practical nature of the activity together with an ability to apply that knowledge to the facts contained in the problem.

- 8–10 A thorough understanding of the legislation together with an accurate application of it to the individuals in the question is to be expected for the very highest marks.
- 5–7 Good but limited analysis, or perhaps unbalanced in not dealing equally well with the application of the law.
- 3–4 Some, but limited, knowledge of what the question is about, or a recognition of what it is about but lacking in any analysis.
- 0–2 Little if any understanding of what the question is about.