Answers

1 (a) (i) Criminal law relates to conduct which the State considers with disapproval and which it seeks to control. Criminal law involves the *enforcement* of particular forms of behaviour, and the State, as the representative of society, acts positively to ensure compliance. Thus, criminal cases are brought by the State in the name of the Director of Public Prosecutions and are reported in the form of *Director of Public Prosecutions* v … (usually abbreviated to *DPP*). In criminal law the prosecutor prosecutes a defendant (or 'the accused') and is required to prove that the defendant is guilty *beyond reasonable doubt*.

(ii) Civil law on the other hand, is a form of private law and involves the relationships between individual citizens. It is the legal mechanism through which individuals can assert claims against others and have those rights adjudicated and enforced. The purpose of civil law is to settle disputes between individuals and to provide remedies; it is not concerned with punishment as such. The role of the State in relation to civil law is to establish the general framework of legal rules and to provide the legal institutions to operate those rights, but the activation of the civil law is strictly a matter for the individuals concerned. Contract, tort and property law are generally aspects of civil law. Civil cases are referred to by the names of the parties involved in the dispute, for example, *Smith* v *Jones*. In civil law, a plaintiff sues (or 'brings a claim against') a defendant and the degree of proof is *on the balance of probabilities*.

In distinguishing between criminal and civil actions, it has to be remembered that the same event may give rise to both. For example, where the driver of a car injures someone through their reckless driving, they will be liable to be prosecuted under the Road Traffic legislation, but at the same time, they will also be responsible to the injured party in the civil law relating to the tort of negligence.

(b) The essential criminal trial courts are the *District Courts* and *Circuit Criminal Courts*. In serious offences, known as *indictable offences*, the defendant is tried by a jury in the Circuit Criminal Court or, for offences such as rape or murder, in the Central Criminal Court; for *summary offences*, he is tried by a District Court judge and for scheduled indictable offences ('either way' offences) the accused can be tried in the District Court provided that the DPP consents, the judge agrees and the accused does not elect for a jury trial.

Criminal appeals from the District Court go to the Circuit Criminal Court. Alternatively, an appeal may be brought 'by way of case stated' on a point of law to the High Court. Furthermore, an application may be made to quash a District Court decision by way of judicial review on the basis, for example, that the judge exceeded his/her powers.

From the Circuit Criminal Court, an appeal against conviction and/or sentence lies to the Court of Criminal Appeal with the possibility of an appeal to the Supreme Court on a point of law of general public importance.

District Court: There is a District Court in most sizeable towns and claims for up to €6,348·69 are usually brought there. There are several matters in respect of which the District Court has no jurisdiction, most notably child abduction, divorce, probate, defamation, company and chancery matters. There is a right of appeal to the Circuit Court and significant issues of law that arise in the proceedings may be referred to the High Court under the 'case stated' procedure.

Circuit Court: The country is divided into a number of circuits; several judges sit permanently in the Dublin Circuit. There are some permanent judges in the Cork Circuit and, in the other circuits, judges hear cases in the principal towns, moving from town to town in the circuit. Where the amount of a claim is between €6,348·69 and €38,000 it is usually brought in the Circuit Court. Most of the main family law disputes are also heard by this court but it does not deal with company law or chancery matters. The Circuit Court also hears appeals from the District Court and the Employment Appeals Tribunal. There is a right of appeal to the High Court and questions of law may be referred from the Circuit Court to the Supreme Court under the 'case stated' procedure.

High Court: The High Court has jurisdiction to hear all civil disputes, although if the matter is within the jurisdiction of either of the lower courts, the case will usually be remitted to the appropriate courts. Most company law and chancery disputes can only be dealt with in the High Court; it has exclusive jurisdiction in bankruptcy. Exceptionally, the trial is with a jury – such as in defamation cases. Only the High Court can declare that an Act of the Oireachtas is unconstitutional. There is a right of appeal to the Supreme Court although in certain matters that right is confined to questions of law. There is a constitutionally guaranteed right of appeal to the Supreme Court.

The Supreme Court: The Supreme Court hears appeals from the High Court and 'case stated' applications from the Circuit Court. It is the final court of appeal in these matters.

2 This question requires candidates to consider two of the elements required for the creation of a binding contractual agreement.

(a) Privity

As a general rule contractual agreements can only affect those persons who have entered into the agreement expressed in the terms of the contract. Thus, it is normally the case that no third party can rely on, or enforce, any terms in a contractual agreement to which they are not themselves a party (*Dunlop* v *Selfridge* (1915)). *Tweddle* v *Atkinson* (1861) is another example of the rule's operation. In this case, the fathers of a married couple agreed that each would pay an annuity to the couple. When the husband tried to sue the estate of his wife's deceased father for outstanding annuities, the court held that, the contract was only between the two fathers and the son, who was not a party to the contract, could not sue on foot of the contract.

However, it is possible to formally transfer the benefit of a contract to a third party. This process, known as assignment, must be in writing. It should be noted that the burden of a contract cannot be assigned without the consent of the other party to the contract.

It is also possible for a person to create a contract specifically for the benefit of a third party. In such limited circumstances the promisee is considered as a trustee of the contractual promise for the benefit of the third party. In order to enforce the contract the third party must act through the promisee by making them a party to any action (*Les Affreteurs Reunis SA* v *Leopold Walford (London) Ltd* (1919)).

A third party may enforce a contract in the following circumstances:

(i) the beneficiary sues in some other capacity. Although not a party to the original agreement, individuals may, nonetheless, acquire the power to enforce the contract where they are legally appointed to administer the affairs of one of the original parties (*Beswick* v *Beswick* (1967)) where a widow, appointed administratrix of her late husband's estate, was able to successfully sue her nephew for specific performance of a beneficial agreement in that capacity.

(ii) the situation involves a collateral contract. This situation arises where one party promises something to another party if that other party enters into a contract with a third party: e.g. A promises to give B something if B enters into a contract with C. In such a situation B can insist on A complying with the original promise (*Shanklin Pier* v *Detel Products Ltd* (1951))

(iii) it is foreseeable that damage caused by any breach of contract will cause a loss to a third party (*Linden Gardens Trust Ltd* v *Lenesta Sludge Disposals Ltd* (1994)).

The other main common law exception to the privity rule is agency, where the whole point is for the agent to bring about contractual relations between their principal and a third party.

In Ireland, there has been only minimal legislative modification made to the common law rules regarding privity of contract. The only substantial modification that has been made pertains to motor insurance and where, pursuant to s.76 of the Road Traffic Act, 1961, third parties may claim directly against the insurers of the party against whom they have a claim.

(b) Intention to create legal relations

A contract is defined as a binding agreement, however in order to limit the number of cases that might otherwise be brought, the courts will only enforce those agreements which the parties intended to have legal effect. Although expressed in terms of the parties' intentions, the test for the presence of such intention is an objective, rather than a subjective, one. Agreements can be divided into two categories, in which different presumptions apply.

(i) Domestic and social agreements
In these agreements, there is a presumption that the parties do not intend to create legal relations (*Balfour* v *Balfour* (1919)). However, any such presumption against the intention to create legal relations in such relationships may be rebutted by the actual facts and circumstances of a particular case as may be seen in *Merritt* v *Merritt* (1970).

(ii) Commercial agreements
In these situations, the strong presumption is that the parties intend to enter into a legally binding relationship in consequence of their dealings (*Edwards* v *Skyways* (1964)). However, as with other presumptions, this one is also open to rebuttal. In commercial situations, however, the presumption is so strong that it will usually take express wording to the contrary to avoid its operation as may be seen in *Rose and Frank Co* v *Crompton Bros* (1925).

3 Even where someone has been held to owe a duty of care to another person and to have breached that duty in such a way as to cause them to sustain loss or injury it does not follow as a matter of course that the person so responsible will be liable to provide recompense for all the loss sustained. Just as in contract law, the position in negligence is that the person ultimately liable in damages is only responsible to the extent that the loss sustained was considered not to be too remote. This was not always the case as may be seen in *Re Polemis and Furness, Withy and Co* (1921), in which it was held that the defendants were liable for the loss of a ship, even though the circumstances under which it was lost were unforeseen. It was held that as the fire, which destroyed the ship, was the direct result of a breach of duty, the defendant was liable for the full extent of the damage, in spite of the fact that the manner in which it took place was unforeseen. The Court of Appeal held that as damage would result from the act of negligence, the party responsible was liable for the whole extent of the damage, even though they could not have been aware of the extent of the damage that was actually caused.

However, the *Re Polemis* test has been replaced by a less draconian test involving an assessment of the remoteness of the damage actually sustained. The current test was established in *The Wagon Mound (No 1)* (1961). As the facts will demonstrate the way in which the current doctrine operates they will be set out in more detail than is usual. The defendants negligently allowed furnace oil to spill from a ship into Sydney harbour. The oil spread and came to lie beneath a wharf, which was owned by the plaintiffs. The plaintiffs had been carrying out welding operations and, on seeing the oil, they stopped welding in order to ascertain whether it was safe. They were assured that the oil would not catch fire, and so resumed welding. Cotton waste, which had fallen into the oil, caught fire. This in turn ignited the oil and a fire spread to the plaintiff's wharf. It was held that the defendants were in breach of duty. However, they were only liable for the damage caused to the wharf and slipway through the fouling of the oil. They were not liable for the damage caused by fire because damage by fire was at that time unforeseeable. This particular oil had a high ignition point and it could not be foreseen that it would ignite on water. The Privy Council refused to apply the rule in *Re Polemis* and its formulation of the rules of causation and remoteness has prevailed since then.

The test of reasonable foresight arising out of *The Wagon Mound* clearly takes into account such things as scientific knowledge at the time of the negligent act. The question to be asked in determining the extent of liability is, 'is the damage of such a kind as the reasonable man should have foreseen?'. This does not mean that the defendant should have foreseen precisely the sequence or nature of the events. Lord Denning in *Stewart* v *West African Air Terminals* (1964) said:

> 'It is not necessary that the precise concatenation of circumstances should be envisaged. If the consequence was one which was within the general range which any reasonable person might foresee (and was not of an entirely different kind which no one would anticipate), then it is within the rule that a person who has been guilty of negligence is liable for the consequences.'

This is illustrated in the case of *Hughes* v *Lord Advocate* (1963), where employees of the Post Office, who were working down a manhole, left it without a cover but with a tent over it and lamps around it. A child picked up a lamp and went into the tent. He tripped over the lamp, knocking it into the hole. An explosion occurred and the child was burned. The risk of the child being burned by the lamp was foreseeable. However, the vapourisation of the paraffin in the lamp and its ignition were not foreseeable. It was held that the defendants were liable for the injury to the plaintiff. It was foreseeable that the child might be burned and it was immaterial that neither the extent of his injury nor the precise chain of events leading to it was foreseeable.

The test of remoteness is not easy to apply. The cases themselves highlight the uncertainty of the courts. For example, in *Doughty* v *Turner Manufacturing Co Ltd* (1964), an asbestos cover was knocked into a bath of molten metal. This led to a chemical reaction, which was at that time unforeseeable. The molten metal erupted and burned the plaintiff, who was standing nearby. It was held that only burning by splashing was foreseeable and that burning by an unforeseen chemical reaction was not a variant on this. It could be argued that the proper question in this case should have been, 'was burning foreseeable?', as this was the question asked in *Hughes*. Two Irish examples of note are *Reeves* v *Carthy and O'Kelly* (1984) and *Burke* v *John Paul & Co Ltd* (1967). In *Reeves*, the doctors' defence was that, even if they were negligent in diagnosing the patient and prescribing medication, they were not liable for the patient having had a stroke because they could not have foreseen it in circumstances where they did not know that the patient suffered from Crohn's disease. The Supreme Court considered that the damage that occurred was of a type that was foreseeable (i.e. circulatory damage and shock) such that, even if the stroke was not foreseeable, if either doctor was negligent, he would be answerable for the stroke because that was the extent of the damage caused. In *Burke*, the plaintiff suffered a hernia because he had to use a cutting implement that was blunt and which therefore required him to exert greater pressure than he would have if it was sharp. The defendants submitted that they could not reasonably foresee that the plaintiff would suffer a hernia that was due to the plaintiff's congenital disposition. The court refused to accept this argument and held it to be immaterial that the defendants could not anticipate the full extent of the damage.

4 Before incorporation, companies are required to submit a memorandum of association to the registrar of companies, which must be signed by at least two subscribers from amongst the company's first shareholders. The memorandum mainly governs the company's external affairs. Amongst the clauses required to be contained in a company's memorandum of association are the following:

(a) The registered office clause

This is the company's legal address. It is the place where legal documents such as writs or summonses can be served on the company. It is also the place where statutory documents and registers, such as the register of members, are required to be kept available for inspection. The memorandum does not state the actual address of the registered office. However, a company's registered office must be notified to the Registrar of Companies prior to its incorporation (s.113(2) Companies Act 1963). This is done in a prescribed form that is lodged with a company's articles and memorandum when an application is made for registration and incorporation. A company that changes the location of its registered office must notify this change within 14 days (s.113(3) CA 1963).

(b) The authorised share capital clause

This states the maximum amount of share capital that a company is authorised to issue. The authorised capital must be divided into shares of a fixed monetary value and it follows, therefore, that Irish company law does not recognise no-fixed-value shares as do other jurisdictions. As companies do not have to issue shares to the full extent of their authorised capital, it is imperative to distinguish authorised capital from issued capital, which is the amount of shares actually issued. The current minimum value of issued capital in relation to a public limited company is €38,092·14.

(c) The name clause

Companies are required to indicate that they are operating on the basis of limited liability (s.6 of CA 1963). However, a company may benefit from a scheme that exempts it from using the words 'limited' (or its equivalent) in certain circumstances including where its objects are charitable and its memorandum or articles prohibit the payment of dividends to its members and require its profits (and any surplus in a winding up) to be applied in the promotion of its objects. A further condition requires that a statutory declaration to the foregoing effect is delivered to the Registrar of Companies (s.24 CA 1963 as amended by s.88 of the Company Law Enforcement Act (CLEA) 2001).

Aside from the foregoing, a private company is required to end its name with 'limited', the abbreviation of 'Ltd', the Irish equivalent 'teoranta' or its abbreviation 'teo' (s.6 CA 1963). A public company is required to end its name with 'public limited company', the abbreviation of 'plc', the Irish equivalent of 'cuideachta phoiblí teoranta' or its abbreviation 'cpt' (s.4 of the Companies (Amendment) Act (C(A)A)) 1983).

The Registrar of Companies will not permit the registration of a name that it considers to be undesirable (CA 1963 s.21 as amended by s.86 of Corporate Law Enforcement Act 2001), subject to an appeal to court. Undesirable names would include those implying an association with the State or unlawfully using such terms as 'bank' or 'insurance'.

Registration will also be refused, or a company may be directed to change its name up to six months after its registration, where the Registrar considers that the company's name is identical or too similar to the name of a pre-existing company. Furthermore, a company can change its name provided that the company passes a special resolution and the Registrar approves the new name. Any rights or obligations of the company or legal proceedings to which it is party are not adversely affected by a change of name (CA 1963 s.23).

A company is required to use its full company name on any bill of exchange, business letter or notice, order, invoice or receipt. Failure to do so may result in the corporate veil being pierced (CA 1963 s.114). Notwithstanding this, a company can trade under a name other than its company name provided that all of the aforementioned documentation clearly state its company name (CA 1963 s.114) and the name under which the company in trading must be registered under the Registration of Business Names Act, 1963 (CA 1963 s.22).

Furthermore, there are common law restrictions on the choice of a company name. Passing off is a tort committed when one person, in a manner designed to deceive, passes off his goods or business as those of another (see *Muckross Park Hotel Ltd* v *Randles* (1995)). The tort may be committed by the use of a similar name. A court may issue an injunction restraining a company from using a particular name as a result of a passing off action (see *Ewing* v *Buttercup Margarine Co Ltd* (1917) and *Exxon Corporation* v *Exxon Insurance Consultant Ltd* (1981)).

5 (a) Dividends are the return received by shareholders in respect of their investment in a company. Subject to any restriction in the memorandum of association, every company has the implied power to apply its profits in the distribution of dividend payments to its shareholders. Although the directors recommend the level of dividend payment, it is for the company in a general meeting to declare the dividend. This is one of the items conducted at the annual general meeting. If the directors decline to recommend a dividend then it is not open to the general meeting to overrule that decision and declare a dividend.

The long standing common law rule is that dividends must not be paid out of capital (*Flitcroft's case* 1882). The current rules relating to the payment of dividends were introduced by the C(A)A 1983. Under the C(A)A 1983, the payment of a dividend to members is referred to as a distribution. Dividends can only be paid in accordance with Part IV of the C(A)A 1983. Section 45(1) C(A)A 1983 provides that a company may not make a distribution except out of profits available for distribution. Section 45(2) C(A)A 1983 defines 'profits available for distribution' in the following terms: '[a] company's profits available for distribution are its accumulated profits, so far as not previously utilised by distribution or capitalisation, less its accumulated realised losses so far as not previously written off in a reduction or reorganisation of capital duly made.

'Accumulated' profits means that dividends can only be declared from a revenue reserve. This means that a company cannot declare a dividend in a profitable year without making provision for previous years' losses. Furthermore, the profits must be 'realised', which means that a mere upward revaluation of a fixed asset does not constitute a realised profit. Such an upward revaluation can, however, be used to fund a bonus issue of shares to members. These rules apply to both public and private companies and both types of company must also meet the equitable test of solvency or the cash flow test i.e. each must be in a position to meet its debts as they fall due.

(b) As has been stated, the foregoing realised profits test applies to both private and public companies. Public companies, however, must also comply with s.46(1) C(A)A 1983 which provides that:

> 'A public company may only make a distribution … if … the amount of its net assets is not less than the aggregate of its called-up share capital and undistributable reserves and if, and to the extent that, the distribution does not reduce the amount of those assets to less than the aggregate.'

This means that a public company must maintain its capital by ensuring that, before a dividend is paid, its net assets are at least equal to the aggregate of its called-up share capital and undistributable reserves. A company's undistributable reserves are:

(i) the share premium account;
(ii) the capital redemption reserve;
(iii) the amount by which the accumulated unrealised profits exceed its current accumulated unrealised losses;
(iv) any other reserve which the company is prohibited from distributing by virtue of statute or by virtue of its memorandum or articles.

Thus, private companies are not required to maintain their capital to the extent that public companies are required.

(c) Under the rule in *Flitcroft's case* any directors of a company who breached the distribution rules, and knowingly paid dividends out of capital, were held jointly and severally liable to the company to replace any such payments made. Section 49 C(A)A 1983 provides that dividends must be declared by reference to 'properly prepared' accounts. Section 50 C(A)A 1983 provides that a shareholder who knows, or has reasonable grounds, for believing, that a distribution has been made in contravention of the above rules, is liable to repay the distribution to the company (see *Precision Dippings Ltd* v *Precision Dippings Marketing Ltd* (1985)). Further, the directors may be held liable to repay to the company any improper payment of dividends (*Re Flitcroft's Case* (1882)).

6 **(a)** Normally employees who resign deprive themselves of the right to make a claim for redundancy or other payments. However s.1 Unfair Dismissals Act (UDA) 1977 covers constructive dismissal which is defined as 'the termination by the employee of his contract of employment with his employer whether prior notice of the termination was or was not given to the employer in circumstances in which, because of the conduct of the employer, the employee was or would have been entitled or it was or would have been reasonable for the employee to terminate the contract of employment without giving prior notice of the termination to the employer'.

The Irish statutory definition contains two tests and an employee may rely on either. Firstly, 'the contract' test whereby the employee contends that he was entitled to terminate the contract. Secondly, the employee may argue that he satisfies the 'reasonableness' test in the Act.

The breach of contract alleged must be significant and go to the root of the contract or whereby it shows that the employer no longer intends to be bound by one or more of the essential contractual terms. In *Higgins* v *Donnelly Mirrors Ltd* (1979) an employee claiming that she had been constructively dismissed contended that an employment contract includes an implied obligation of mutual respect that could be breached by an employer's unreasonable treatment of the employee. The Employment Appeals Tribunal (EAT), however, held that the employee was not constructively dismissed in circumstances where, although she gave evidence that 'painted a harrowing picture' of certain meetings with her employer, the employer denied her account and the EAT considered that the employee was unduly sensitive and over-reacted.

As regards the reasonableness test, both employer and employee must act reasonably. While an employer must comply with disciplinary procedures before dismissing an employee, an employee must also have used any complaints/grievance procedure that is in place before s/he resigns. Thus, in *Conway* v *Ulster Bank Ltd* (1981), an employee, who did not use the grievance procedure prior to resigning, failed in her claim that she was constructively dismissed.

An employee who does not resign immediately following a breach by the employer will not be automatically deemed to have accepted the breach and to have waived his/her rights. Thus, in *Jones* v *F Sirl & Son (Furnishers) Ltd* (1997), the employee who did not resign until she was offered a new job could still claim constructive dismissal. The point is whether or not the breach was the main, rather than the sole, cause of the resignation.

(b) In relation to a successful claim for unfair dismissal, a Rights Commissioner, the Employment Appeals Tribunal and the Circuit Court (depending on the nature of the claim) may award any one of the following remedies:

(i) reinstatement,
(ii) re-engagement or
(iii) compensation.

Reinstatement is where the dismissed employee is treated as not having been dismissed in the first place.

Re-engagement means that the dismissed employee is re-employed under a new contract of employment.

If a Rights Commissioner, Employment Appeals Tribunal or the Circuit Court finds in the employee's favour, the maximum amount of compensation that may be awarded for unfair dismissal is generally limited to 104 weeks' salary. However, where an employee is unfairly dismissed for certain discriminatory reasons (marital status or gender) the Employment Equality Act, 1998, provides that the employee may go directly to the Circuit Court and it may award unlimited compensation for the discrimination.

7 This question requires candidates to consider the crucially important role of the auditor in relation to companies and the way in which the behaviour of such businesses function and are overseen. 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. Auditors have an extremely important role to play in that regard: they are appointed to ensure that the interests of the shareholders in a company are being met. Their key function is to produce independent and authoritative reports confirming, or otherwise, that the accountancy information provided to shareholders is reliable. The law relating to company auditors is to be found in s.187 Companies Act (CA) 1990. At each annual general meeting, the documents which must be laid before the meeting include the report of the auditors. The only exception to the statutory requirement of an examination of the accounts by an auditor is provided by s.32 CA (No 2)A 1999 and pertains to a small or medium sized private company (as defined by s.8 CAA 1986) whose annual turnover does not exceed €7·3 million and its balance sheet total does not exceed €3·6 million (as inserted by the Investment Funds Companies and Miscellaneous Provisions Act 2006) and the average number of persons employed by the company does not exceed 50. Other prerequisites to the applicability of the exemption include the company submitting its annual return on time in the current and previous financial year. The directors must also be of the opinion that they will also be satisfied in the current financial year and the minutes must record this opinion. Every other company must appoint an auditor who must be appropriately qualified and in other respects eligible (s.157 and s.163 CA 1963 and s.187 CA 1990).

Qualifications
The essential requirement for any person to act as a company auditor is that they are eligible under the rules, and a member of, a recognised body of accountants (s.187 CA 1990). Aside from the foregoing, the following persons may act as an auditor:

1. a person with an accountancy qualification granted by a body of accountants which is, in the Minister's opinion, of a standard not less than that required for membership of the recognised bodies and which would entitle him to be awarded a practising certificate by the recognised bodies and who is authorised by the Minister to be so appointed;

2. a person who was a member of a recognised body of accountants under s.162(1) CA 1963 on 31 December 1990;
3. a person authorised by the Minister to so act before 3 February 1983, and still so authorised;
4. during a transitional period, a person undergoing professional or practical training (s.188 CA 1990);
5. a person declared by the Minister to be so qualified who holds a qualification entitling him to act as an auditor under the law of a specified foreign country or a specified accountancy qualification recognised under the law of another country (s.190 CA 1990).

The bodies recognised by the Minister under the CA 1963 are:

(a) the Institute of Chartered Accountants in Ireland (ICAI);
(b) the Institute of Chartered Accountants in England and Wales (ICAEW);
(c) the Institute of Chartered Accountants of Scotland (ICAS);
(d) the Institute of Certified Public Accountants in Ireland (ICPAI);
(e) the Association of Chartered Certified Accountants (ACCA).

Any person who was a member of any of the aforementioned bodies on 31 December 1990, is eligible to act as an auditor.

Section 187(2) CA 1990 disqualifies certain persons from being appointed as an auditor and they are as follows:

1. the directors, secretary and servants of the company;
2. one who has been a director, secretary or servant during a period in respect of which accounts would have to be audited by him if he were an auditor;
3. one who is a partner of, or in the employment of, a director or the secretary of the company;
4. a parent, spouse, brother, sister or child of a director or secretary of the company;
5. one who is disqualified from acting as an auditor of the company's holding company or one or more of its subsidiaries;
6. a person in whose name a share in the company is registered, regardless of whether or not that person is the beneficial owner thereof.

It is a criminal offence to act while disqualified.

The Director of Corporate Enforcement (DCE) can demand a person who is acting as an auditor to provide evidence of his/her qualification and failure to produce this within 30 days constitutes an offence (s.187(2) CA 1990 as inserted by s.72 Company Law Enforcement Act (CLEA) 2001).

Furthermore, the accountancy bodies are obliged to notify the DCE if a disciplinary committee or tribunal of the body has reasonable grounds for believing that an indictable offence under the Companies Acts may have been committed by a member (s.192(6) CA 1990 as inserted by s.73 CLEA 2001).

Appointment and removal

Auditors are appointed annually (s.187(2) CA 1990), generally, at each annual general meeting. The first auditors may be appointed by the directors at any time prior to the first annual general meeting and they will hold that office until the end of that first annual general meeting. The auditors may, however, be removed during the course of such meeting and be replaced by auditors who have been nominated for appointment to that office by any member of the company in circumstances where their nomination notice has been given to the shareholders not less than 14 days prior to the date of the annual general meeting (s.187(2) CA 1990). Since the 1990 Act, the auditor can be removed and replaced at any time by the company by way of an ordinary resolution at a general meeting for which extended notice (28 days) of the resolution has been given. The auditor is given a right to be heard by the members regarding the resolution proposing his removal.

At each general meeting, a retiring auditor must be re-appointed without the passing of a resolution unless: he is not qualified for re-appointment; a resolution has been passed substituting him or expressly providing that he is not to be reappointed; or he has given written notice to the company of the fact that he is unwilling to be reappointed (s.160(2) CA 1990).

An auditor may resign at any time (s.185 CA 1990). Notice of resignation must be accompanied by a statement of any circumstances that the auditor believes ought to be brought to the attention of members and creditors, or alternatively a statement that there are no such circumstances. The auditor is required to send a copy of the notice to the Registrar within 14 days of the service by him of the notice upon the company. Where the auditor's notice states that there are circumstances which ought to be brought to the attention of members or creditors, the company is required, within 14 days, to send a copy to every person who is entitled to be sent copies of the account. In addition, a resigning auditor may requisition the holding of a general meeting of the company to consider any explanation that he may wish to give regarding his resignation (s.186 CA 1990) and to that end he may request the company to circulate the shareholders with a written statement regarding his explanation in advance of such a meeting.

Rights and duties

The auditors have the right of access at all times to the company's books and accounts, and officers of the company are required to provide such information and explanations as the auditors consider necessary (s.163 CA 1963). It is a criminal offence to make false or reckless statements to auditors (s.197 CA 1990).

The directors and secretary of a company must provide information requested by the auditors (C(A)A 1990). The auditors are 'entitled to require from the officers … such information and explanations that are within their knowledge or can be procured by them as [are] necessary for the performance of the duties of the auditors' (s.193 CA 1990). It is an offence to not to provide the required information within two days of its being required and it is also an offence to give information which, knowingly or recklessly, is false, deceptive or misleading in a material particular.

Auditors are entitled to receive notices and other documents in connection with all general meetings, to attend such meetings and to speak when the business affects their role as auditors (s.193 CA 1990). Where a company operates on the basis of written resolutions rather than meetings, then the auditor is entitled to receive copies of all such proposed resolutions as are to be sent to members (s.163 CA 1963).

Auditors are required to make a report on all annual accounts laid before the company in a general meeting during their tenure of office (s.163 and the Seventh Schedule CA 1963). They are specifically required to report on certain issues:

(i) whether they have obtained all the information and explanations which to the best of their knowledge and belief were necessary for the purposes of the audit;
(ii) their opinion, from an examination of the books of account, as to whether or not proper books have been kept by the company and proper returns received from any branches;
(iii) whether the company's balance sheet and profit and loss account dealt with by the report are consistent with the books of account and returns;
(iv) whether, in their opinion and from the best of the information and explanations given to them, the accounts give the information required by the Acts in the manner so required and give a true and fair view of the profit and loss and state of affairs of the company;
(v) in the case of a holding company which submits group accounts, an opinion as to whether the group accounts have been properly prepared in accordance with the Acts so as to give a true and fair view of the state of affairs and profit or loss of the company and its subsidiaries.

Where the auditors are not satisfied in relation to any of the above matters, their statement must be qualified. Section 15 CA 1986 also requires the auditors to consider whether the information given in the directors' report is consistent with the accounts for the relevant year and to state their opinion as to whether such information is actually consistent.

In addition, where the auditor forms the opinion that proper books of account are not being kept, s/he must serve a notice of that opinion on the company and within the next seven days, s/he must serve notice on the Registrar of Companies who will notify the DCE (s.194 CA 1990 as amended). Failure to do so is a criminal offence and, on conviction, exposes the auditor to the possibility of being made personally liable for all or part of the company's debts in a winding up. Where the auditor serves a notice on the Registrar, the DCE may require the auditor to furnish information and an explanation of the opinion (s.194(3A) CA 1990) and failure to comply is a criminal offence.

Finally, s.194(5) CA 1990 (as inserted by s.174 CLEA 2001) provides that where, in the course of carrying out an audit of a company's accounts, information comes into the possession of the company's auditors that leads them to form the opinion that 'there are reasonable grounds for believing that the company or an officer or agent of it has committed an indictable offence under the Companies Acts', the auditors are obliged to inform the DCE of that opinion and provide him with the basis of that opinion. Failure to do so is also a criminal offence.

Potential liabilities

In *Caparo Industries plc* v *Dickman* (1990) company accounts were audited in accordance with the English companies legislation. The respondents, who already owned shares in the company, decided to purchase more shares and take over the company after seeing the accounts. The accounts were inaccurate. The respondents then incurred a loss, which they blamed on the negligently audited accounts. It was held that, when the accounts were prepared, a duty of care was owed to members of the company (that is, the shareholders), but only so far as to allow them to exercise proper control over the company. This duty did not extend to members as individuals and potential purchasers of shares. The onus was clearly on the appellants in these circumstances to make their own independent inquiries, as it was unreasonable to rely on the auditors. The only recent Irish case on the issue is *Kelly* v *Haughey Boland & Co* (1989). In this case, the plaintiffs bought a small company from the widow of its former owner. The plaintiffs claimed that the company's accounts had been negligently audited, in particular with respect to the extent of the stock-in-trade. As to whether auditors might be held negligent in such circumstances, the High Court considered that this depended upon:

> 'whether the defendants knew or should have reasonably foreseen at the time the accounts were audited that a person might rely on those accounts for the purpose of deciding whether or not to take over the company and therefore could suffer loss if the accounts were inaccurate. Such an approach does not place a limitation on those entitled to contend that there has been a breach of duty owed to them. First of all, they must have relied on the accounts and, secondly, they must have done so in circumstances where the auditors knew that they would or ought to have known that they might. If the situation is one where it would not be reasonable for the accounts to be relied on, then, in the absence of express knowledge, the auditor would be under no duty. This places a limit on the circumstances in which and the period for which they can be relied on. The longer the period which elapsed prior to the accounts being relied on, from the date on which the auditor gave his certificate, the more difficult it will be to establish that the auditor ought to have foreseen that his certificate would, in those circumstances, be relied on'.

8 This question requires candidates to analyse the problem scenario from the perspective of contract law paying particular regards to the rules relating to: invitation to treat, offers, counter offers, option contracts, the postal rule of acceptance. The scenario involves three distinct cases which should be dealt with in turn in applying the following rules of contract law.

In spite of its wording the sign in the window does not constitute a legal offer, it is merely an invitation to treat. As such it is not an offer to sell but merely an invitation to others to make offers. The point of this is that the person extending the invitation is not bound to accept any offers made to them as may be seen in *Fisher* v *Bell* (1961) in which it was held that having switch-blade knives in the window of a shop was not the same as offering them for sale.

A counter-offer arises where the offeree tries to change the terms of an original offer. The counter-offer has the same effect as an express rejection of an offer (*Hyde* v *Wrench* (1840)) and as a result the offeree cannot subsequently accept the original offer.

Where acceptance is made through the postal service, it is complete as soon as the letter, properly addressed and stamped, is posted. The contract is concluded even if the letter subsequently fails to reach the offeror (*Adams* v *Lindsell* (1818)).

A contract may be entered into through the exchange of executory consideration; i.e. a promise for a promise. Although the actual exchange of concrete consideration may not take place until a later time, the agreement is none the less binding from the time of the exchange of promises.

Ali and Ben
As stated above, the sign in the window was merely an invitation to treat and the postal rule only applies to offers and does not apply to invitations to treat. Consequently as Ben was in fact making an offer to Ali when he sent his letter, it was for Ali to accept or reject the offer on receipt of the letter, providing he had not already bound himself to any alternative contractual agreement.

Ali and Chet
The first real offer is made by Chet when he says that he would give Ali €400 for the vase. Ali responded by making a counter-offer to sell the vase for €450 to which Chet restated his original offer, this time in the form of a counter-offer to Ali's new offer. As a result Chet, by insisting on his offer of €400, cannot at a later time attempt to accept Ali's offer of €450.

At first look it might appear that Chet may have taken advantage of the postal rule; however, when it is realised that it was not open to him to make any acceptance as he had rejected Ali's offer, it is apparent that the postal rule is of no avail to Chet, so he has no contract with Ali. Once again Ali might have accepted the offer on receipt of the letter, providing he had not already bound himself to any alternative contractual agreement.

Ali and Di
In line with the preceding analysis Di made an offer to Ali, which he readily accepted. The parties entered into a binding contract by their mutual exchange of promises: Di to bring the €400 on the following Monday and Ali to give her the vase. As a result although Ali might prefer to accept Ben's offer, he is nonetheless contractually bound to deliver the vase to Di if and when she brings the agreed sum of €400 to him on Monday. Of course if Di does not provide the money by the agreed time Ali would be at liberty to sell the vase to either Ben or Chet, as he chose.

9 Earl clearly finds himself in an awkward situation in that he holds a number of concurrent relationships with Flash Ltd; for he is at one and the same time, a member of the company through his shareholding, a creditor of the company through his debentures and its employee. All of these relationships involve different legal rules and result in different consequences: as an employee he has not been paid the wages due to him and consequently is looking for payment, as a creditor he is also owed money, which he will look to be repaid. However, as a member of the company, holding part paid up shares he may be liable to contribute to the company's debts. Each of these relationships will be considered in turn.

(i) Earl's unpaid wages
As an employee Earl's situation is governed by s.285 Companies Act (CA) 1963 and certain revenue legislation, which sets out what are to be treated as preferred payments and specifically relates to the wages of employees together with all accrued holiday pay and social welfare contributions. However, rates levied by local authorities and capital and income taxes levied by the Revenue rank in priority. Furthermore, the order of priority only applies to those debts which are notified or have become known to the liquidator within six months of the liquidator advertising for claims in two daily newspapers and the courts have held that this time limitation cannot be extended (*Re H William (Tallaght) Ltd* (1996)). If notification is not made during this time, Earl would then have to claim against the company as an ordinary unsecured creditor in relation to the monies owed to him.

(ii) Earl's partly paid up share-holding
The nominal value of a share normally fixes the amount which the shareholder is required to contribute to the assets of the company. Section 207(1) CA 1963 provides that members' liability is limited to the amount (if any) remaining unpaid on their shares.

Shareholders must pay at least the full nominal value of any shares issued to them (i.e. shares must not be issued at a discount s.27 C(A)A 1983). Where, however, the company issues shares at a premium, i.e. at more than the nominal value of the shares, as is quite common, then the holders of those shares will be liable to pay the amount owed, over and above the nominal value. The excess will still form part of the company's capital but will be included in a distinct share premium account (s.62(1) CA 1963) and may only be used for limited purposes.

Applying these rules, it can be seen that Earl has only paid 75 cent per €1 nominal share. Consequently he is liable to contribute the amount remaining unpaid per share, i.e. a maximum of 25 cent per share (€1,250 in total), to the assets of the company if such payment is necessary to satisfy the outstanding debts of Flash Ltd upon winding up.

(iii) Earl's debentures
In relation to a fixed charge, a specific asset of the company, in this instance the land on which the business stands, is made subject to a charge in order to secure a debt. If the company fails to honour the commitments to the secured debenture holders, they can appoint a receiver who will if necessary sell the asset charged to recover the money owed. In the case of a company liquidation, the asset charged is realised and the sum of money raised goes to pay off the outstanding debts owed

to the debenture holders. If the value of the asset that is subject to the charge is greater than the debt against which it is charged then the excess goes to pay off the rest of the company's debts. If it less than the value of the debt secured then the debenture holders will become unsecured creditors for the amount remaining outstanding. It should be emphasised that fixed charge holders take priority over any other creditors in the event of company liquidation.

Thus in this instance, Earl is secure in the knowledge that his loans to Flash Ltd will be paid before any other debts and as the security is against Flash's most valuable asset, its land, it is likely that he will receive the full amount of the loan of €5,000.

10 This question requires candidates to consider the authority of company directors and other company officers to enter into binding contracts on behalf of their companies.

Article 80 of Table A model articles of association provides that the directors of a company may exercise all the powers of the company. It is important to note that this power is given to the board as a whole and not to individual directors and consequently individual directors cannot bind the company without their being authorised in some way so to do. There are three ways in which the power of the board of directors may be extended to individual directors.

(a) The individual director may be given *express authority* to enter into a particular transaction on the company's behalf. To this end, Article 81 allows for the delegation of the board's powers to one or more directors. Where such express delegation has been made, then the company is bound by any contract entered into by the person to whom the power was delegated. However, in the present situation it does not appear that Len has been expressly given the power to enter into the contract with Mo, and so the company cannot be made liable on this basis.

(b) A second type of authority that may empower an individual director to bind his company is *implied authority*. In this situation, the person's authority flows from their position. Article 112 enables the directors to delegate their authority to the managing director. Thus, the board of directors may expressly confer any of their powers on the managing director as they see fit. If Article 112 is adopted, it is important to ensure that Article 80 is also adopted because this provides that the directors exercise all the powers of the company which are not exercised by the company in a general meeting. It seems therefore that, if these articles are adopted, and a managing director is appointed, the managing director has as much authority as the board i.e. s/he will have the implied authority to bind the company in the same way as the board, whose delegate s/he is. Outsiders, therefore, can safely assume that a person appointed as managing director has all the powers usually exercised by a person acting as a managing director.

Implied actual authority to bind a company may also arise as a consequence of the appointment of an individual to a position other than that of managing director. In *Hely-Hutchinson* v *Brayhead Ltd* (1968), although the chairman and chief executive of a company acted as its *de facto* managing director, he had never been formally appointed to that position. Nevertheless, he purported to bind the company to a particular transaction. When the other party to the agreement sought to enforce it, the company claimed that the chairman had no authority to bind it. It was held that, although the director derived no authority from his position as chairman of the board, he did acquire such authority from his position as chief executive and thus the company was bound by the contract he had entered into on its behalf.

Once again, however, it would appear that Mo cannot make use of this method of fixing Katch Ltd with liability for his contract as Len has not been appointed to any executive office in the company.

(c) The third way in which an individual director may possess the power to bind his company is through the operation of ostensible authority, which is alternatively described as apparent authority or agency by estoppel.

This arises where an individual director has neither express nor implied authority. Nonetheless, the director is held out by the other members of the board of directors as having the authority to bind the company. If a third party acts on such a representation, then the company will be estopped from denying its truth.

In *Freeman and Lockyer* v *Buckhurst Park Properties (Mangal) Ltd* (1964), although a particular director had never been appointed as managing director, he acted as such with the clear knowledge of the other directors and entered into a contract with the plaintiffs on behalf of the company. When the plaintiffs sought to recover fees due to them under that contract, it was held that the company was liable: a properly appointed managing director would have been able to enter into such a contract and the third party was entitled to rely on the representation of the other directors that the person in question had been properly appointed to that position.

The situation in the problem is very similar to that in *Freeman and Lockyer* v *Buckhurst Park Properties (Mangal) Ltd*. The board of Katch Ltd has permitted Len to act as its managing director, and he has even used that title. The board has therefore acquiesced in his representation of himself as their managing director and consequently they and Katch Ltd are bound by any contracts he might make within the scope of a managing director's implied authority. As entering into a contract to draw up plans would clearly come within that authority, Katch Ltd will be liable to pay Mo or face an action for breach of contract.

1 This question is divided into two parts, the first of which requires a consideration of the difference between criminal and civil law, with the second part requiring an explanation of the various courts which deal with these categories of law.

(a) 3–5 A thorough to comprehensive explanation of the difference between the two types of law.
0–2 Ranging from some but little knowledge down to no understanding at all of the differences.

(b) 4–5 Full explanation of both court systems.
2–3 Some explanation of the courts in both systems
0–1 Little or no knowledge of either court system or, at the higher end of this grade, some knowledge of one of the systems.

2 This question is divided into two parts, part (a) carries 6 marks and part (b) carries 4 marks.

8–10 A thorough understanding of both topics demonstrated by references to cases or examples.
5–7 A clear understanding of both topics but perhaps lacking in detail.
Alternatively, an unbalanced answer showing good understanding of one part but less in the other.
2–4 Some, but limited, understanding of both topics, or clear understanding of only one of the topics.
0–1 Little or no knowledge of either of the topics.

3 This question refers to the issue of remoteness of damage in the law of negligence.

8–10 A thorough understanding of the issues involved. It is likely that the best answers will focus on the cases, although examples might be used.
5–7 A clear understanding of the topics but perhaps lacking in detail.
2–4 Some, but limited, understanding of the issue, perhaps not referring to any cases to support the explanation.
0–1 Little or no knowledge of the topic.

4 This question requires candidates to explain three of the clauses in a company's memorandum of association.

8–10 A thorough understanding of all three clauses. It is likely that the best answers will provide examples or cite appropriate cases, although this is not necessary to acquire full marks.
5–7 A clear understanding of the clause but perhaps lacking in detail or unbalanced in only dealing with two of them.
2–4 Some, but limited, understanding of the clauses.
0–1 Little or no knowledge of the clauses.

5 This question requires candidates to explain the rules relating to the lawful distribution of company dividends and further requires the candidates to focus on the different rules that apply to public and private companies. Although divided into three parts, candidates may provide a global answer.

8–10 A thorough understanding of law relating to dividends as it applies to both public and private companies. Cases may well be cited and will be credited.
5–7 A clear understanding of the general law but perhaps lacking in detail or unbalanced in only dealing with one of the types of company.
2–4 Some, but limited, understanding of the law.
0–1 Little or no knowledge of the clauses.

6 This question, relating to issues in employment law, is divided into two parts and the marks will be allocated equally.

(a) Requires candidates to explain what is meant by constructive dismissal.
4–5 A clear concise explanation perhaps citing cases or examples.
2–3 A clear understanding, but perhaps lacking authority or examples.
0–1 Unbalanced, or may not deal with all of the required aspects of the topic. Alternatively the answer will demonstrate very little understanding of what is actually meant by constructive dismissal.

(b) 4–5 Thorough to complete answers, showing a detailed understanding of all or certainly most of the remedies available.
2–3 A clear understanding of the remedies, but perhaps lacking in detail.
0–1 Little or no knowledge of the topic.

7 This question requires candidates to consider the role of the auditor in relation to companies and the precise way in which this relationship is regulated by company law.

8–10 A thorough understanding of the role of the auditor explaining their rights and duties. Mention will also be made of their qualifications for office and the manner in which they are appointed and may be removed.
5–7 A clear understanding of the general law but perhaps lacking in detail or unbalanced in only dealing with some issues.
2–4 Some knowledge of the role of auditors but lacking in detail or unbalanced in the detail provided.
0–1 Little or no knowledge of the topic.

8 This question requires candidates to analyse a problem scenario from the perspective of the law of contract and to apply that law appropriately. Given the fact that there are only 10 marks available candidates will gain no marks for irrelevant material.

8–10 A thorough analysis of the scenario focusing on the appropriate rules of law and applying them accurately. It is extremely likely that cases will be cited in support of the analysis and/or application.
5–7 A clear understanding of the general law but perhaps lacking in detail or unbalanced in only dealing with some issues.
2–4 Some, but limited, understanding of the law or completely lacking in application.
0–1 Little or no knowledge of the relevant law.

9 This question, divided into three parts, essentially requires candidates to consider the difference between various company creditors on the winding up of a company.

(a) 2–3 A good to thorough explanation of the situation of employees as preferred creditors.
0–1 Little or no knowledge of the relevant law.

(b) 2–3 A good general knowledge of the liability of holders of unpaid shares.
0–1 Little or no knowledge of the required accounting records.

(c) 2–4 A good explanation of fixed charges together with accurate application of the law.
0–1 Some knowledge, but lacking in detail or application.

10 This question focuses on the authority of individual directors and how companies may be fixed with liability for contracts entered into by them. As with the other questions in this section, it requires candidates to analyse the problem scenario and to apply that law appropriately.

8–10 A thorough analysis of the scenario focusing on the appropriate rules of law and applying them accurately. It is extremely likely that cases will be cited in support of the analysis and/or application.
5–7 A clear understanding of the general law but perhaps lacking in detail or unbalanced in only dealing with some issues.
2–4 Some, but limited, understanding of the law or completely lacking in application.
0–1 Little or no knowledge of the relevant law.