
Answers

1 (a) Case 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. It is also referred to as the common law.

Central to the concept of the common law/case 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 Supreme Court (formerly the House of Lords), which, following the practice statement of that year, can 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.
- Certainty.
- Efficiency.
- Flexibility.

It is sometimes claimed that judges exceed their constitutional role by making such laws, 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 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 they become law subsequent to the formality of their 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.

Delegated legislation may come in the form of:

- *Orders in Council* permit the Government, through the Privy Council, to make law.
- *Statutory Instruments* are the means through which government ministers introduce particular regulations under powers delegated to them by Parliament in enabling legislation.
- *Bye-laws* are the means through which local authorities and other public bodies can make legally binding rules.
- *Court rule committees* are empowered to make the rules which govern procedure in the particular courts over which they have delegated authority.
- *Professional regulations* governing particular occupations may be given the force of law under provisions delegating legislative authority to certain professional bodies which are empowered to regulate the conduct of their members.

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 Scottish Parliament has legislative competence over those areas of law with respect to Scotland that have not been reserved to the UK Parliament. Unlike the UK Parliament, the Scottish Parliament is not sovereign, and its legislation is

challengeable if it goes beyond its competence as well as for incompatibility with the European Convention on Human Rights and European Community law.

The Scottish Parliament can also delegate powers to Ministers and others to legislate (delegated legislation).

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) and the Scottish case *Ayrshire Employers Mutual Insurance v IRC* (1946))
- the golden rule (see *Re Sigsworth* (1935) and the Scottish case of *K v Craig* (1997))
- the mischief rule (see *Heydon's case* (1584) and *Corkery v Carpenter* (1950) and the Scottish case of *Leadbetter v Hutcheson* (1934)).

- 2 (a)** Contractual terms are statements which form part of the contract. Parties to a contract will normally be bound to perform any promise that they have agreed to and failure to perform will lead to an action for breach of contract, although the precise nature of the remedy will depend upon the nature of the promise broken. Additionally, some terms will be automatically included in contracts by operation of statute and may not be excluded.

Some statements do not form part of a contract, even though they might have induced the other party to enter into the contract. These pre-contractual statements are called representations and the event of their being broken leads to different remedies than operate in regard to breaches of terms. It is important, therefore, to decide precisely what promises are included in the contract.

Express terms are terms that appear in a written contract or have been agreed orally. The major legal issue that arises with them is if they are ambiguous and need to be interpreted by the courts. Errors in the expression of express terms can be corrected by applying to the court under ss.8 and 9 Law Reform (Miscellaneous Provisions) (Scotland) Act 1985.

- (b)** Implied terms are terms that do not appear in the contract, but in certain contexts they are treated as if they did, and parties can rely on them in court. Some statutes such as the Sale of Goods Act 1979 contain terms that are implied into contracts for the sale of goods, particularly to consumers. In employment law, certain terms are implied into contracts of employment, such as the duty that both employer and employee have of mutual trust and confidence. Some terms may be implied into contracts from the custom of a particular trade, though the custom has to be certain, uniform, reasonable and well known. A relevant case is *The Moorcock* (1889).

- (c)** Terms may be incorporated into a contract by reference. Reference may be made to terms and conditions on a company's website, or contained in some other documents. For example, a railway ticket may contain a statement that it is issued subject to conditions. In order for terms to be validly incorporated into a contract by reference, the following points are relevant:

The document containing the reference must be a contractual document and not just a receipt or an invoice, as the contracting party must have the means of knowing about the terms before the contract has been concluded (*Taylor v Glasgow Corporation* (1952); *Thornton v Shoe Lane Parking* (1971)). The back of a hotel bedroom door was held not to be a suitable place for a notice referring to conditions, as the contract had already been made at the reception desk in *Olley v Marlborough Court* (1949).

The reference must be adequate to draw the contracting party's attention to them. This means that very small blurred print is not appropriate (*Williamson v North of Scotland and Orkney Steam Navigation Co* (1916)).

When contracting online, the system of not allowing the person to proceed to the contract until they have clicked to say they have read the terms and agreed to them is a very good way of drawing them to the person's attention.

- 3** Whilst there is a contractual relationship between an auditor and his client, the company as a legal entity, on which the client company can sue, the contentious legal area arises in respect of other people who may rely on reports made or advice given in a non-contractual capacity. Indeed, in many situations, the potential pursuer may be unknown to the accountant. Although it is apparent that the law of negligence allows individuals in non-contractual relationships to sue for damages sustained as a result of the negligent behaviour of another party, the success of any such action in relation to company auditors appears to depend upon the purpose for which reports are made or accounts prepared and on establishing a duty of care between the auditor and the person making the claim in negligence. The applicable law may be derived from a number of important cases.

In *JEB Fasteners v Marks, Bloom and Co* (1983), the defendants, a firm of accountants, negligently overstated the value of stock in preparing audited accounts for their client. At the time of preparation, the accountants were aware that their client was in financial difficulties and actively seeking financial assistance. After seeing the accounts, the claimants decided to take over the company. They then discovered the true financial position and sued the accountants for negligent misstatement. It was held that a duty of care was owed by the accountants as it was foreseeable that someone contemplating a takeover might rely on the accuracy of the accounts, but that they were not liable as their negligence had not caused the loss to the pursuers. The evidence revealed that, when they took over the company, they were not interested in the value of the stock but in acquiring the expertise of the directors, so, although they relied on the accounts, the accounts were not the cause of the loss as they would have taken over the company in any respect.

The case of *Caparo Industries plc v Dickman* (1990) served to limit the potential liability of auditors in auditing company accounts. Accounts were audited in accordance with the Companies Act 1985. The respondents, who already owned shares in the company, after seeing the accounts, decided to purchase more shares and take over the company. They then incurred a loss, which they blamed on the inaccurate and negligently audited accounts. It was held that when the accounts were prepared, a duty of care was owed collectively to members of the company, that is, the shareholders, but only so far as to allow them to exercise proper control over the company; enabling the shareholders collectively to question the past management of the company, vote for or against the appointment of directors and take other decisions affecting the company. This duty did not extend to members as individuals, even when they used the accounts as the basis for purchasing more shares in the company, and it certainly did not extend to potential outside purchasers of shares. The onus was clearly on the appellants in these circumstances to make their own independent enquiries, as it was unreasonable to rely on the auditors.

However, in *Morgan Crucible Co plc v Hill Samuel Bank Ltd* (1991), it was held that, where express representations are made about the accounts and the financial state of the company by directors or financial advisers of that company, with the intention that the person interested in the takeover will rely on them, then a duty of care is owed, and the auditor will be responsible for consequential losses. This was also the situation in *ADT v BDO Binder Hamlyn* (1995) where a partner in the defendant accountancy firm told the pursuer company that he stood by the audited accounts of BSG, the company that the ADT were in the process of taking over.

This was taken as an assumption of responsibility and as the accounts had been prepared negligently, Binder Hamlyn were held liable to repay the amount that ADT had overpaid for BSG, a total of £65 million.

Following *Caparo Industries plc v Dickman* (1990), it can be stated that a company's auditors certainly do owe a duty of care to shareholders collectively as a body to allow them to exercise proper control over the management of the company.

As regards members individually, then again following *Caparo*, normally the auditors do not owe them a duty of care, even when they use the information supplied to purchase more shares in the company.

Consequently it can be seen that auditors owe no duty of care to non-members unless they actually assume responsibility for the accuracy of information they supply (*Morgan Crucible Co plc v Hill Samuel Bank Ltd* (1991) and *ADT v BDO Binder Hamlyn* (1995)).

- 4 An agent is a person who is empowered to represent another legal party, called the principal, and to bring the principal into a legal relationship with a third party. Any contract entered into is between the principal and the third party each of whom may enforce it. In the normal course of events the agent has no personal rights or liabilities in relation to the contract. The principal/agent relationship can be created in a number of ways. It may arise as the outcome of a distinct contract, which may be made either orally or in writing, or it may be established purely gratuitously where some person simply agrees to act for another.

In establishing a relationship of principal/agent, however, the principal does not give the agent unlimited power to enter into any contract whatsoever but is likely to place strict limits on the nature of the contracts that the agent can enter into on his behalf. In other words, the authority of the agent is limited and in order to bind a principal, any contract entered into must be within the limits of the authority extended to the agent. The authority of an agent can take a number of distinct forms.

(a) Express authority

In this instance, when the principal/agency relationship is established, the agent is instructed as to what particular tasks are required to be performed and is informed of the precise powers given in order to fulfil those tasks. If the agent subsequently contracts outside of the ambit of their express authority then they will be liable to the principal and to the third party for breach of warranty of authority (see below). The consequences for the relationship between the principal and third party depends on whether the third party knew that the agent was acting outside the scope of their authority.

For example, an individual director of a company may be given the express power by the board of directors to enter into a specific contract on behalf of the company. In such circumstances the company would be bound by the subsequent contract but the director would have no power to bind the company in other contracts.

(b) Implied authority

This refers to the way in which the scope of express authority may be increased. Third parties are entitled to assume that agents holding a particular position have all the powers that are usually provided to such an agent. Without actual knowledge to the contrary they may safely assume that the agent has the usual authority that goes with their position.

In *Watteau v Fenwick* (1893) the new owners of a hotel continued to employ the previous owner as its manager. They expressly forbade him to buy certain articles including cigars. The manager, however, bought cigars from a third party who later sued the owners for payment as the manager's principal. It was held that the purchase of cigars was within the usual authority of a manager of such an establishment and that for a limitation on such usual authority to be effective it must be communicated to any third party.

Directors of companies can also bind their companies on the basis of implied authority. 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 as it was within the implied authority of a person holding such a position.

(c) Ostensible/apparent authority

This type of authority, which is an aspect of agency by personal bar, can arise in two distinct ways:

- (i) Where a person makes a representation to third parties that a particular person has the authority to act as their agent without actually appointing them as their agent. In such a case the person making the representation is bound by the actions of the ostensible/apparent agent. The principal is also liable for the actions of the agent where they are aware that the agent claims to be their agent and yet does nothing to correct that impression.
- (ii) Where a principal has previously represented to a third party that an agent has the authority to act on their behalf.

Even if the principal has subsequently revoked the agent's authority they may still be liable for the actions of the former agent unless they have informed third parties who had previously dealt with the agent about the new situation (*Willis Faber & Co Ltd v Joyce* (1911)).

In *Freeman & 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 pursuers on behalf of the company. When the pursuers 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.

- 5 (a) (i)** Under the provisions of the Companies Act (CA) 1985, the memorandum of a limited company with a share capital was required to state the amount of the share capital with which the company proposed to be registered and the nominal amount of each of its shares. This was known as the 'authorised share capital' and set a limit on the amount of capital which the company could issue, subject to increase by ordinary resolution. Section 9 CA 2006 removes the concept of 'authorised capital' and replaces it with the requirement to submit a 'statement of capital and initial shareholdings' to the registrar in the application to register the company.

The statement of capital and initial shareholdings is essentially a 'snapshot' of a company's share capital at the point of registration.

Section 10 CA 2006 requires the statement of capital and initial shareholdings to contain the following information:

- the total number of shares of the company to be taken on formation by the subscribers to the memorandum;
- the aggregate nominal value of those shares;
- for each class of shares: prescribed particulars of the rights attached to those shares, the total number of shares of that class and the aggregate nominal value of shares of that class; and
- the amount to be paid up and the amount (if any) to be unpaid on each share (whether on account of the nominal value of the shares or by way of premium).

The statement must contain such information as may be required to identify the subscribers to the memorandum of association. With regard to such subscribers it must state:

- the number, nominal value (of each share) and class of shares to be taken by them on formation, and
- the amount to be paid up and the amount (if any) to be unpaid on each share.

Where a subscriber takes shares of more than one class of share, the above information is required for each class.

- (ii)** Issued capital represents the nominal value of the shares actually issued by the company and public companies must have a minimum issued capital of £50,000 or the prescribed euro equivalent (s.763 CA 2006).

(b) Companies can issue shares of different value, and with different rights attached to them.

- **Ordinary shares**
These shares are sometimes referred to as 'equity in the company'. Of all the various types of shares, they carry the greatest risk, but in recompense receive the greatest return. The nominal value of shares is fixed and determines the shareholder's level of potential liability to the extent that they are not paid up. However, the exchange value of the shares in the stock market fluctuates in relation to the performance of the company. Ownership of ordinary shares entitles the holder to attend and vote at general meetings.
- **Preference shares**
These involve less of a risk than ordinary shares. They may have priority over ordinary shares in two respects: dividends and repayment. They carry a fixed rate of dividend, which has to be paid before any payment can be made to ordinary shareholders. Such rights are cumulative unless otherwise provided. This means that a failure to pay a dividend in any one year has to be made good in subsequent years.

As regards repayment of capital, preference shares do not have priority unless, as is usually the case, this is specifically provided for. Also, without specific provision, preference shares have the same rights as ordinary shares, but it is usual for their voting rights to be restricted. Preference shareholders are entitled to vote at class meetings convened to consider any alteration to their particular rights but, apart from that, they are usually restricted to voting in general meetings when their dividends are in arrears.

6 (a) The UK Corporate Governance Code requires that there should be a clear division of responsibilities at the head of a company between the running of the board of directors and the executive responsibility for the running of the company's business. It also requires that the roles of chairman and chief executive should not be exercised by the same individual.

(i) Article 12 of the model articles of association for public limited companies provides for the board of directors to appoint one of their members to chair their meetings. The UK Corporate Governance Code explains that the chairman is responsible for leadership of the board and ensuring its effectiveness on all aspects of its role. The chairman is responsible for setting the board's agenda and ensuring that adequate time is available for discussion of all agenda items, in particular strategic issues. The chairman should also promote a culture of openness and debate by facilitating the effective contribution of non-executive directors in particular and ensuring constructive relations between executive and non-executive directors.

The chairman is responsible for ensuring that the directors receive accurate, timely and clear information.

The chairman should ensure effective communication with shareholders. In relation to general meetings, although s.319 provides that any member may act as chair, this is subject to the provision of the articles and Model Article 31 states that if the directors have appointed a chairman, the chairman shall chair general meetings. The chairman conducts the meeting and must preserve order and ensure that it complies with the provisions of the companies legislation and the company's articles. He or she is under a general duty at all times to act *bona fide* in the interests of the company as a whole, and thus must use his or her vote appropriately.

(ii) The terms managing director and chief executive are now used interchangeably. The new model articles of association makes no reference to either title, but the UK Corporate Governance Code only refers to the title chief executive, so that appears to be the current preferred term for the person who oversees the day-to-day operation of the company (cf *Hely-Hutchinson v Brayhead Ltd* (1968)).

Under Article 5 of the model articles, the board of directors may delegate any of the powers, which are conferred on them under the articles, to such person or committee as they think fit and any such act of delegation may authorise further delegation of the directors' powers by any person to whom they are delegated. In this way, the board may appoint one or more managing directors or chief executives who will have the authority to exercise all the powers of the company and to further delegate those powers as they see fit. Article 5 also makes provision for the board of directors to revoke any delegation in whole or part, or alter the terms and conditions under which it may be operated.

In the case of a chief executive/managing director the mere fact of appointment, however, will mean that the person so appointed will have the implied authority to bind the company in the same way as the board, whose delegate they are. 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.

(b) (i) 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.

(ii) Section 250 Companies Act (CA) 2006 defines a director as including any person occupying the position of director. The concept of a shadow director is introduced in s.251 CA 2006. A shadow director is a person who, although not actually appointed to the board, instructs the directors of a company as to how to act. It is a person's function rather than their title that defines them as a director. Such individuals are subject to all the rules applicable to ordinary directors. A person is not to be treated as a shadow director if the advice is given in a purely professional capacity. Thus, a business consultant or a company doctor (another title given to someone called in to give advice to companies in trouble), would not be liable as a shadow director for the advice they might give to their client company.

7 Redundancy is defined in s.139(1) Employment Rights Act (ERA) 1996 as being: 'dismissal attributable wholly or mainly to:

- (a) the fact that his employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him, or has ceased, or intends to cease to carry on that business in the place where the employee was so employed, or
- (b) the fact that the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where they were so employed, have ceased or diminished or are expected to cease or diminish.'

In order to qualify for redundancy payments an employee must have been continuously employed by the same employer or associated company for a period of two years. At the outset of redundancy proceedings the onus is placed on the employee to show that they have been dismissed, which they do by demonstrating that they are covered by s.136 ERA 1996, which provides four types of dismissal. These are:

- (i) the contract of employment is terminated by the employer with or without notice;
- (ii) a fixed term contract has expired and has not been renewed;

- (iii) the employee terminates the contract with or without notice in circumstances which are such that he or she is entitled to terminate it without notice by reason of the employer's conduct;
- (iv) the contract is terminated by the death of the employer, or the dissolution or liquidation of the firm.

Once dismissal has been established a presumption in favour of redundancy operates and the onus shifts to the employer to show that redundancy was not the reason for the dismissal.

Employees who have been dismissed by way of redundancy are entitled to claim a redundancy payment from their former employer. Under ERA 1996 the actual figures are calculated on the basis of the person's age, length of continuous service and weekly rate of pay subject to statutory maxima. Thus employees between the ages of 18 and 21 are entitled to ½ week's pay for each year of service, those between 22 and 40 are entitled to 1 week's pay for every year of service, and those between 41 and 65 are entitled to 1½ weeks' pay for every year of service.

The maximum number of years service that can be claimed is 20 and as the maximum level of pay that can be claimed is £380, the maximum total that can be claimed is £11,400 (i.e. 1.5 x 20 x 380).

Disputes in relation to redundancy claims are heard before an Employment Tribunal and on appeal go to the Employment Appeal Tribunal. The employer must act as would be expected of a 'reasonable employer' and in determining whether the employer has acted reasonably, the Employment Tribunal will consider whether, in the circumstances 'including the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating the reason given as sufficient reason for dismissing the employee' (s.98(4) ERA 1996). Reasonable employers should follow the ACAS 'Code of Practice on Disciplinary Practice and Procedures in Employment' in relation to the way they discipline and dismiss their employees. Thus redundancy, *per se*, does not provide a justification for dismissal, unless the employer had introduced and operated a proper redundancy scheme, which included preferably objective criteria for deciding who should be made redundant, and provided for the consideration of redeployment rather than redundancy.

- 8** Amongst the essential elements of a binding agreement are offer, acceptance, and an intention to create legal relations. This question requires candidates to demonstrate their understanding of the way in which contractual agreements can be entered into, and the consequences of entering into such agreements. In particular it asks candidates to distinguish between offers and invitations to treat, and offers and counter offers. It also requires some consideration of the consequences of entering into a binding contract.

An offer is a promise to be bound on particular terms which is capable of acceptance. The offer sets out the terms upon which the offeror is willing to enter into contractual relations with the offeree, and if the latter party accepts those terms then the result is a legally enforceable contract which can be enforced through legal action.

It is important, however, to distinguish offers from other statements which do not provide the basis of an enforceable contract. For example, a mere statement of intention cannot form the basis of a contract even though the party to whom it was made acts on it (*Re Fickus* (1900)).

Nor can a mere supply of information amount to an offer (*Harvey v Facey* (1893)). The most important non-offer, however, is the invitation to treat. This is an invitation to others to make offers. The person extending the invitation is not bound to accept any offers made to them. Common examples involving invitations to treat are:

- *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.
- *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. It was held that Boots were not guilty as the display of goods on their shelves was only an invitation to treat. In law, the customer offered to buy the goods at the cash desk where the pharmacist was stationed.
- *a public advertisement*. Thus in *Partridge v Crittenden* (1968) a person was charged with 'offering' a wild bird for sale contrary to 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.

Acceptance is necessary for the formation of a contract. Once the offeree has agreed to the terms offered, a contract comes into effect. Both parties are bound, and can enforce the terms of the agreement through the courts. However, if an offeree expressly rejects an offer made to them, then such rejection has the effect of bringing the offer to an end. The effect of this is that they cannot subsequently retract their rejection and purport to accept the original offer. A similar consequence follows from a counter-offer, which is treated as an implicit rejection of the original offer. In order to form a binding agreement acceptance must correspond with the terms of the offer, so it is not open to the offeree to unilaterally alter the terms of the offer. The effect of any such alteration is to bring the original offer to an end, and once again the offeree cannot accept the original offer. The classic case is *Hyde v Wrench* (1840) in which Wrench offered to sell his farm for £1,000. Hyde counter-offered £950, which Wrench rejected. Hyde then informed Wrench that he accepted the original offer. It was held that there was no contract. Hyde's counter-offer had effectively ended the original offer and it was no longer open to him to accept it. A counter-offer must not be confused with a request for information. This does not end the offer, which can still be accepted after the new information has been elicited (*Stevenson v McLean* (1880)). A Scottish case on the counter-offer is *Wolf & Wolf v Forfar Potato Co Ltd* (1984).

Where a promisor agrees to keep an offer open for a period, such a promise may be binding in Scots law, if there is evidence that the promisor intended to be bound. If the promise is made in the course of business, as in this case, the normal rule under s.1 Requirements of Writing (Scotland) Act 1995 that writing is needed to constitute a unilateral obligation does not apply. If there is sufficient evidence of this promise, Chip may lay himself open to an action for damages for breach of the unilateral obligation.

Applying the foregoing general statement of law to the situation in the problem:

- (a) it is immediately apparent that Ade has no cause of action against the auctioneers, as their advert did not amount to an offer capable of acceptance. His situation is similar to that of the pursuer in *Harris v Nickerson* (1873) who failed in his attempt to recover damages for his costs in attending a cancelled auction. In deciding against him the court held that he was attempting 'to make a mere declaration of intention a binding contact'.
- (b) as regards his dealings with the shopkeeper, Chip, it may be that Ade has a stronger case. The original price on the ticket in the window was no more than an invitation to treat. Ade made an offer of £350, which Chip declined to accept. Chip in turn made a counter-offer of £400, which Ade could have accepted, to form a contract. Ade, however, did not accept the offer at the time it was made, and when he subsequently tried to accept it, he found out that the pottery had already been sold. As Chip made a promise to keep the offer open, this may be a binding promise in Scots law, following *Littlejohn v Hadwen* (1882), and Chip should have waited until the expiry of the time limit. Ade may therefore be able to take proceedings for damages against Chip for breach of the unilateral obligation, although this does not affect the validity of the contract made with the subsequent customer.

9 Doc faces a number of difficulties, which result from the operation of the doctrine of separate personality. When a company registers under the Companies Act 2006 it becomes a corporation, with the effect that, from then on it is treated as having its own distinct legal personality, completely separate from its members. This doctrine of separate personality applies equally to single person enterprises as it does to the largest of transnational enterprises. The doctrine of separate personality is an ancient one, although the clearest expression of it can be found in the famous case of *Salomon v Salomon* (1897). A number of important consequences flow from the fact companies are treated as having legal personality in their own right, but there are also a number of situations when the courts will ignore the separate legal personality of the company. In such situations the courts will treat the shareholders as being, or being responsible for the actions of, the company.

- (a) One consequence of the doctrine of separate personality is that companies have full contractual capacity in their own right. Equally, companies can sue and be sued in their own right, so once a company enters into a contract, it is the company, rather than its individual members, which is liable for any default. In the first situation, it is clear from the contract document that Doc has entered into an agreement, not with Ed as he thought, but with the company, Ed Ltd. He cannot, therefore, take action against Ed personally. As a member of a limited company, Ed's only liability will be to pay any amount remaining unpaid on the shares he holds in Ed Ltd. Doc will have to claim as an ordinary unsecured trade creditor of the company, and the fact that it has gone into insolvent liquidation makes it unlikely that he will recover much, if anything, from the company.
- (b) Where, however, an individual looks to misuse the doctrine of separate personality, the courts will ignore the separate personality of the company and will enforce corporate liability against the members. Thus in *Jones v Lipman* (1962), Lipman had entered into a contract to sell a house to Jones, but before completion of the contract, and in order to avoid it, he sold the house to a company that he had set up for that purpose. Thus Lipman was attempting to hide behind a company to avoid his personal contractual obligation. In that instance the court held that the company was 'the creature of the defendant' and no more than a sham and required Lipman to complete his contractual obligations.

A further example of the misuse of the corporate form in an attempt to avoid a legal obligation may be seen in *Gifford Motor Co Ltd v Horne* (1933), a case similar to the facts in the problem scenario, where a former employee tried to avoid the consequences of a restraint of trade clause by working for a newly established company. In that case the Court of Appeal held that the company was a mere sham used to conceal the defendant's breach of a contractual agreement and the individual concerned was required to abide by the agreement he had entered into.

Following the above cases, and in particular *Gifford Motor Co Ltd v Horne*, it is extremely likely that the court will ignore the separate personality of Gen Ltd and allow Doc to enforce the restraint of trade clause against Fitt.

10 Money laundering is the process by which the proceeds of crime, either money or other property, are converted into assets, which appear to have a legitimate rather than an illegal origin. The aim of the process is to disguise the source of the property, in order to allow the holder to enjoy it free from suspicion as to its source.

The process usually involves three distinct phases:

- placement is the initial disposal of the proceeds of criminal activity into apparently legitimate business activity or property.
- layering involves the transfer of money from business to business, or place to place in order to conceal its initial source.
- integration is the culmination of the previous procedures through which the money takes on the appearance of coming from a legitimate source.

Money laundering was first made a criminal offence in the United Kingdom under the Drug Trafficking Offences Act 1986 and is now regulated by the Proceeds of Crime Act 2002, and the Money Laundering Regulations 2007, together with the specifically anti-terrorist legislation, such as the Prevention of Terrorism Act 2005.

The Proceeds of Crime Act 2002 seeks to control money laundering by creating three categories of criminal offences in relation to the activity.

– laundering

The first category of principal money laundering offences relates to laundering the proceeds of crime or assisting in that process and is contained in ss.327–329.

Under s.327, it is an offence to conceal, disguise, convert, transfer or remove criminal property from England and Wales, Scotland or Northern Ireland. Concealing or disguising criminal property is widely defined to include concealing or disguising its nature, source, location, disposition, movement or ownership or any rights connected with it.

These offences are punishable on conviction by a maximum of 14 years imprisonment and/or a fine.

– failure to report

The second category of offence relates to failing to report a knowledge or suspicion of money laundering and is contained in ss.330–332.

Under s.330 it is an offence for a person who knows or suspects that another person is engaged in money laundering not to report the fact to the appropriate authority. However, the offence only relates to individuals, such as accountants, who are acting in the course of business in the regulated sector. The offences set out in these sections are punishable, on conviction, by a maximum of five years imprisonment and/or a fine.

– tipping off

The third category of offence relates to tipping off and is contained in s.333, which makes it an offence to make a disclosure, which is likely to prejudice any investigation under the Act. The offences set out in these sections are punishable on conviction by a maximum of five years imprisonment and/or a fine.

The Money Laundering Regulations 2007 implement the European Union third money laundering directive. They set out administrative requirements for the anti-money laundering regime within what is referred to as ‘the regulated sector’, which specifically includes auditors, insolvency practitioners, external accountants and tax advisers.

The regulations set out the requirements relating to the manner in which members of the regulated sector should approach their clients and outline the scope of this action on the basis of what is known as ‘customer due diligence’. The regulations create specific offences for those in the regulated sector who fail to comply with its requirements.

It is apparent from the scenario that Ian and Jet are liable to control and prosecution under the Proceeds of Crime Act 2002 as they are involved in money laundering. It is clear that the original money to purchase the football club was not the product of crime, so that transaction itself is not covered by the money laundering legislation. However, even if the club was bought with legitimate money, it is nonetheless the case that it is being used to conceal the fact that the source of much of Jet’s money is criminal activity.

Jet would therefore be guilty on the primary offence of money laundering under s.327 Proceeds of Crime Act 2002.

Ian is also guilty of an offence in relation to the Proceeds of Crime Act 2002 as he is clearly assisting Jet in his money laundering procedure. His activity is covered both by s.327, as he is actively concealing and disguising criminal property, and s.328 as his arrangement with Jet ‘facilitates the retention of criminal property’.

Ian is also liable under s.330, for failing to disclose any suspiciously high profits from the football club and is clearly in breach of the regulatory regime set out in the Money Laundering Regulations 2007.

- 1** This question requires candidates to explain the two main sources of law in the Scottish legal system: case law and legislation.
- (a)** 4–6 marks Good explanation of case law. Examples used to highlight answers.
2–3 marks Sound understanding but perhaps no examples.
0–1 mark Limited knowledge only about the topic.
 - (b)** 3–4 marks Good awareness of the meaning and effect of legislation, including legislation of the Scottish Parliament.
0–2 marks Limited knowledge only about the topic.
- 2** This question requires candidates to demonstrate their knowledge of the contents of contracts. The question is clearly divided in order to provide candidates with a prompt and as an indication of what is expected of them in terms of detail of treatment.
- (a)** 2–3 marks Thorough explanation of the meaning of express terms, with reference to relevant issues such as oral and written contracts, interpretation and correction of errors.
0–1 mark Limited knowledge only about the topic.
 - (b)** 2–3 marks Thorough explanation of the meaning of implied terms, with relevant examples.
0–1 mark Limited knowledge only about the topic.
 - (c)** 3–4 marks Very good knowledge of how terms can be incorporated by reference and the legal issues, with reference to appropriate case law.
0–2 marks Limited knowledge only about the topic.
- 3** This question requires candidates to explain the extent of a company auditor’s duty of care and to whom such a duty is owed.
- 8–10 marks A thorough understanding of how professional negligence applies to auditors demonstrated by references to cases or examples.
 - 5–7 marks A clear understanding of the topic, perhaps lacking in detail.
Alternatively an unbalanced answer showing good understanding of one part but less in the others.
 - 2–4 marks Some, but limited, understanding of the topic, or clear understanding of only one aspect.
 - 0–1 mark Little or no knowledge of the topic.
- 4** This question asks candidates to explain the various types of authority that agents can possess.
- 8–10 marks Good to complete answer which shows a knowledge of the meaning and effect of the three terms. It is likely that case authority will be provided, and they will be rewarded accordingly.
 - 5–7 marks A clear understanding of the topic, perhaps lacking in detail. Alternatively an unbalanced answer showing good understanding of one part but less in the others.
 - 2–4 marks Some, but limited, understanding of the topic, or clear understanding of only one aspect.
 - 0–1 mark Little or no knowledge of the topic.
- 5** This question requires candidates to explain two related but distinct aspects of share capital. Part (a) relates to the concepts of share capital while part (b) focuses on the distinct types of shares.
- 8–10 marks Thorough explanation of the meaning and effect of both elements of the question.
 - 5–7 marks Reasonable explanation of both aspects but perhaps lacking in detail in relation to some of the individual parts.
 - 2–4 marks Some, but limited, knowledge of both elements or only dealing with one of them.
 - 0–1 mark Little, if any, understanding of any of the concepts.

- 6** This question requires candidates to explain two related but distinct aspects of the nature and function of company directors, specifically within the context of corporate governance. Part (a) requires an explanation of the different roles of chairmen and chief executives and part (b) requires an explanation of the two distinct but related types of directors.
- 8–10 marks Thorough explanation of the meaning and effect of both elements of the question with appropriate reference to corporate governance.
- 5–7 marks Reasonable explanation of both aspects but perhaps lacking in detail in relation to some of the individual parts.
- 2–4 marks Some, but limited, knowledge of both elements or only dealing with one of them.
- 0–1 mark Little, if any, understanding of any of the terms.
- 7** This question requires candidates to explain the meaning of the term redundancy and the legal rules relating to it.
- 8–10 marks Thorough to complete answers, showing a detailed understanding of the concept of redundancy, the rules for calculating payment and probably making reference to the legislation.
- 5–7 marks A clear understanding of the topic, but perhaps lacking in detail. Alternatively an unbalanced answer showing good understanding of one part but less in the other.
- 2–4 marks Some knowledge, although perhaps not clearly expressed, or very limited in its knowledge and understanding of the topic.
- 0–1 mark Little or no knowledge of the topic.
- 8** This question requires candidates to demonstrate their understanding of the way in which contractual agreements can be entered into, and the consequences of entering into such agreements. In addition to a general understanding of the law relating to offer and acceptance, it requires specific analysis of the two distinct situations set out in the problem.
- 8–10 marks Answers will demonstrate a thorough knowledge of the law generally, together with a clear analysis of the problem situations and a deployment of the appropriate legal principles. Cases or examples will be used to support the analysis and conclusions.
- 5–7 marks Answers will be generally sound in relation to the law but may be lacking in analysis or application. Once again cases or examples will be used.
- 2–4 marks Answers will demonstrate some knowledge of the law relating to the question but not to the degree expected of the very best answers. They may be weak in analysis and/or application.
- 0–1 mark Little or no understanding of the law relating to the question. Extremely weak in terms of analysis and application.
- 9** This question requires an understanding of the way in which the doctrine of separate personality operates with respect to registered companies. There are two parts to the question, although marks are not allocated to individual elements in order to permit markers to reward particularly good, but partial, answers.
- 8–10 marks Thorough understanding of the rules relating to separate personality and the exceptions thereto.
- 5–7 marks Good but limited analysis, perhaps lacking in some or recognition of an element of the question.
- 2–4 marks Some, but limited, knowledge of what the question is about, or recognition of what it is about but lacking in any analysis.
- 0–1 mark Little, if any, understanding of what the question is about.
- 10** This question requires a general explanation of the meaning of money laundering together with a consideration of the way in which the legislation seeks to control it.
- 8–10 marks Good explanation of both the meaning of the concept and offences under the legislation together with a good analysis of the scenario with a clear explanation of the law relating to the parties.
- 5–7 marks Fair explanation of the general concept but lacking in detail in relation to the legislation. Some understanding of the situation but perhaps lacking in detailed reference to the statute.
- 2–4 marks Unbalanced answer, perhaps lacking detail, or application.
- 0–1 mark Weak answer lacking in knowledge, with little or no reference to the legal regime.