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 (DPP) and cases are reported in the form of *Director of Public Prosecutions* v … . In criminal law the prosecutor prosecutes a defendant (or 'the accused') and is required to prove that the defendant is guilty beyond reasonable doubt. The companies legislation sets out many potential criminal offences, which may be committed by either the company itself, or its officers or other individuals. An example of this which may be cited is s.297 Companies Act (CA) 1963, which relates to the criminal offence of fraudulent trading and applies to any person, not just directors or members, who is knowingly a party to the carrying on of a business with the intent to defraud creditors. The potential penalty on conviction is imprisonment for a maximum period of seven years, or a fine or both.

(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 claimant sues (or 'brings a claim against') a defendant and the degree of proof is on the balance of probabilities. In relation to the common law, duties owed to companies by directors may be cited as examples of civil liability, and directors in breach are liable to recompense the company for the consequences of their failure to comply with those duties.

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. Similarly, a director may fall foul of both the criminal regulation of fraudulent trading (s.297 CA 1963) as well as breaching one or more of their common law duties to the company.

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

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 conviction by means of judicial review on the basis, for example, that the District judge exceeded their powers. Appeals against a conviction and/or sentence from the Circuit Criminal Court and the Central Criminal Court may be brought to the Court of Criminal Appeal, with the possibility of an appeal to the Supreme Court on a point of law of exceptional public importance.

2 This question requires an explanation of the rules relating to the acceptance and revocation of offers in contract law.

(a) Acceptance is necessary for the formation of a contract. Once the offeree has accepted the terms offered, a contract comes into effect. Both parties are bound: the offeror can no longer withdraw their offer, nor can the offeree withdraw their acceptance. The rules relating to acceptance are:

(i) Acceptance must correspond with the terms of the offer. Thus, the offeree must not seek to introduce new contractual terms into their acceptance (*Neale* v *Merrett* (1930)).

(ii) A counter-offer does not constitute acceptance (*Hyde* v *Wrench* (1840)). Analogously, a conditional acceptance cannot create a contractual relationship (*Winn* v *Bull* (1877)).

(iii) Acceptance may be in the form of express words, either oral or written. Alternatively, acceptance may be implied from conduct (*Brogden* v *Metropolitan Railway Co* (1877)).

(iv) Generally, acceptance must be communicated to the offeror. Consequently, silence cannot amount to acceptance (*Felthouse* v *Bindley* (1863)).

(v) Communication of acceptance is not necessary, however, where the offeror has waived the right to receive communication. Thus in unilateral contracts, such as *Carlill* v *Carbolic Smoke Ball Co* (1893), acceptance occurred when the offeree performed the required act. Thus, in the *Carlill* case, Mrs Carlill did not have to inform the Smoke Ball Co that she had used their treatment.

(vi) Where acceptance is communicated through the postal service, then 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)). However, the postal rule will only apply where it is in the contemplation of the parties that the post will be used as the means of acceptance. If the parties have negotiated either face to face, in a shop, for example, or over the telephone, then it might not be reasonable for the offeree to use the post as a means of communicating their acceptance and they would not gain the benefit of the postal rule.

The postal rule applies equally to telegrams (*Byrne* v *Van Tienhoven* (1880)). It does not apply when means of instantaneous communication are used (*Entores* v *Miles Far East Corp* (1955) and approved by the House of Lords in *Brinkibon* v *Stahag Stahl und Stahlwarenhandelgesellschaft* (1983)). In Ireland, it seems that the *Entores* principle applies to telexes (*Unidare* v *Scott* (1991)) and its applicability to facsimiles was suggested in *Hanley* v *Someport-Walon* (1985).

In order to expressly exclude the operation of the postal rule, the offeror can insist that acceptance is only to be effective on receipt (*Holwell Securities* v *Hughes* (1974)). The offeror can also require that acceptance be communicated in a particular manner. Where the offeror does not insist that acceptance can only be made in the stated manner, then acceptance is effective if it is communicated in a way no less advantageous to the offeror (*Yates Building Co* v J *Pulleyn* & *Sons* (1975)).

It should be noted that legislation provides that acceptance of an offer or any related communication (including any subsequent amendment, cancellation or revocation) may, unless otherwise agreed by the parties, be communicated by means of an electronic communication.

(b) Revocation is the technical term for the cancellation of an offer and occurs when the offeror withdraws their offer. The rules relating to revocation are:

(i) An offer may be revoked at any time before acceptance. However, once revocation has occurred, it is no longer open to the offeree to accept the original offer (*Routledge* v *Grant* (1828)).

(ii) Revocation is not effective until it is actually received by the offeree. This means that the offeror must make sure that the offeree is made aware of the withdrawal of the offer, otherwise it might still be open to the offeree to accept the offer (*Byrne* v *Tienhoven* (1880)).

(iii) Communication of revocation may be made through a reliable third party. Where the offeree finds out about the withdrawal of the offer from a reliable third party, the revocation is effective and the offeree can no longer seek to accept the original offer (*Dickinson* v *Dodds* (1876)).

(iv) A promise to keep an offer open is only binding where there is a separate contract to that effect. Such an agreement is known as an option contract, and it must be supported by separate consideration for the promise to keep the offer open. If the offeree does not provide any consideration for the offer to be kept open, then the original offeror is at liberty to withdraw the offer at any time (*Routledge* v *Grant* above).

(v) In relation to unilateral contracts, i.e. a contract where one party promises something in return for some action on the part of another party, revocation is not permissible once the offeree has started performing the task requested (*Errington* v *Errington* & *Wood*s (1952)).

3 **(a)** The law does not require unreasonable steps to be taken to avoid breaching a duty of care. In legal terms, a breach of duty of care occurs if the defendant fails:

'… to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do; or doing something which a prudent and reasonable man would not do.' (*Blyth* v *Birmingham Waterworks Co* (1856))

Thus the fact that the defendant has acted less skilfully than the reasonable person would expect will usually result in a breach being established. This is the case even where the defendant is inexperienced in their particular trade or activity. For example, a learner driver must drive in the manner of a driver of skill, experience and care (*Nettleship* v *Weston* (1971)). However, the standard of care expected from a child may be lower than that of an adult (*Mullin* v *Richards* (1998)).

Clearly the degree, or standard, of care to be exercised by such a reasonable person will vary depending on circumstances, but the following factors will be taken into consideration in determining the issue:

(i) The seriousness of the risk
The degree of care must be balanced against the degree of risk involved if the defendant fails in their duty. It follows, therefore, that the greater the risk of injury or the more likely it is to occur, the more the defendant will have to do to fulfil their duty. The degree of care to be exercised by the defendant may be increased if the claimant is very young, old or less able bodied in some way. The rule is that 'you must take your victim as you find him' (this is known as the egg-shell skull rule).

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

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

(ii) **Cost and practicability**
Any foreseeable risk has to be balanced against the measures necessary to eliminate it. If the cost of these measures far outweighs the risk, the defendant will probably not be in breach of duty for failing to carry out those measures (*Latimer* v *AEC Ltd* (1952)). In *Whooley* v *Dublin Corporation* (1961), the plaintiff was injured when she put her foot into an open fire hydrant box on a footpath in circumstances where the lid on it had been removed by someone other than fire services personnel. The box was designed so that the lid could be easily removed by the fire services in the event of a fire nearby. The court dismissed the plaintiff's claim on the grounds that no other type of hydrant which could be devised, consistent with its necessary purpose, would be safe from malicious interference (see also *Gaffey* v *Dundalk Town Council* (2006)).

(iii) **Skilled persons**
Individuals who hold themselves out as having particular skills are not judged against the standard of the reasonable person, but the reasonable person possessing the same professional skill as they purport to have (*Roe* v *Minister of Health* (1954)).

(b) 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. The test for remoteness was established in *The Wagon Mound (No 1)* (1961). The defendants negligently allowed furnace oil to spill from a ship into Sydney harbour, which subsequently caused a fire, which spread to, and damaged, the plaintiff's wharf. Although the defendants were held to be in breach of their duty of care, 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 (the oil had a high ignition point and it could not be foreseen that it would ignite on water).

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 [person] should have foreseen?' This does not mean that the defendant should have foreseen precisely the sequence or nature of the events.

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 vaporisation 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.

4 (a) Shareholders in limited liability companies enjoy the benefit of limited liability and usually cannot be required to pay more than the value of the shares they take in their company. However, that privilege is only extended to them on the basis that they fully subscribe to the company's capital. In turn, that capital is seen as a fund against which creditors can claim in the event of a dispute. Capital maintenance refers to the way in which the capital fund of limited liability companies can be used and, most essentially, reduced. The fundamental rule is that payments may not be improperly made out of capital to the detriment of the company's creditors. To that end, company law lays out rules as to what may be considered proper payment from capital and, in particular, establishes clear rules relating to the payment of dividends and the ways in which capital can be reduced.

(b) It is possible, and not at all uncommon, for a company to require prospective subscribers to pay more than the nominal value of the shares they subscribe for. This is especially the case when the market value of the existing shares are trading at above the nominal value. In such circumstances the shares are said to be issued at a premium, the premium being the value received over and above the nominal value of the shares. Section 62 Companies Act (CA) 1963 provides that any such premium received must be placed in a share premium account. The premium obtained is regarded as equivalent to capital and, as such, there are limitations on how the fund can be used. Section 62 CA 1963 provides that the share premium account can be used for the following limited purposes:

(i) to pay up bonus shares to be allotted as fully paid to members;
(ii) to write off preliminary expenses of the company;
(iii) to write off the expenses, commission or discount incurred in any issue of shares or debentures of the company;
(iv) to pay for the premium payable on redemption of debentures.

Applying the rules relating to capital maintenance, it follows that what the share premium account cannot be used for is to pay dividends to the shareholders. The rules relating to share premiums apply whether the issue is for cash or otherwise and so a share premium account can arise where shares are issued in exchange for property which is worth more than the par value of the shares (*Shearer* v *Bercain Ltd* (1980)).

(c) It is a long-established rule that companies are not permitted to issue shares for a consideration which is less than the nominal value of the shares together with any premium due. The strictness of this rule may be seen in *Ooregum Gold Mining Co of India* v *Roper* (1892). In that case the shares in the company, although nominally £1, were trading at 12·5p. In an honest attempt to refinance the company, new £1 preference shares were issued and credited with 75p already paid (note the purchasers of the shares were actually paying twice the market value of the ordinary shares). When, however, the company subsequently went into insolvent liquidation, the holders of the new shares were required to pay a further 75p.

This common law rule is now given statutory effect in s.27(1) Companies Amendment Act (C(A)A) 1983. If a company does enter into a contract to issue shares at a discount, it will not be able to enforce this against the proposed allottee. However, anyone who takes shares without paying the full value, plus any premium due, is liable to pay the amount of the discount as unpaid share capital, together with interest at 5% (s.27(2) C(A)A 1983).

5 This question requires candidates to explain the operation and potential liability of members of two distinct types of partnerships and also explain the use of the expression '& Co'.

(a) The ordinary partnership

This is the most common form of partnership. Ordinary partnerships involve potential unlimited liability for their members, should the business run into financial difficulties. It is possible to attempt to limit individual liability within the partnership by setting specific limits on the liability of the individual partners. This, however, has no effect on the external liability of the various members of the partnership who will remain liable for the full extent of the partnership debts. As a result, any partner who has to pay more than the amount agreed internally will be in the position to raise an action to recover any amount paid out in addition to their agreed limit from the other members of the partnership.

(b) The limited partnership

The Limited Partnerships Act (LPA) 1907 allows for the formation of limited partnerships. For members of a partnership to gain the benefit of limited liability under this legislation, the following rules apply:

– limited partners are not liable for partnership debts beyond the extent of their capital contribution, but in the ordinary course of events they are not permitted to remove their capital;
– at least one of the partners must retain full, that is unlimited, liability for the debts of the partnership;
– a partner with limited liability is not permitted to take part in the management of the business enterprise and cannot usually bind the partnership in any transaction. If a partner acts in contravention of this rule, they will lose the right to limited liability;
– the partnership must be registered with the Companies Registration Office.

Very few limited partnerships were ever registered as partnerships could access the advantages available under the LPA 1907, and more, by simply registering their business as a private limited company.

(c) '& Co'

The use of the term '& Co' in a name indicates that one is dealing with a partnership rather than a registered company.

Partnerships have no separate existence from their members and usually trade in their members' names. There is no requirement, however, for all of the names of the partners to appear and the term '& Co' simply indicates that the names of all of the partners are not included in the firm's name. For example, an established firm which has built up a substantial name under one name may not wish to jeopardise that by changing the name to include new partners.

Partnerships, therefore, may trade under the names of individual partners or under a collective name as the partners see fit.

However, a partnership, which trades under a name which is different from the names of its partners, must register its business name with the Registrar of Business Names (s.4 Registration of Business Names Act (RBNA) 1963). The RBNA 1963 requires a partnership which is trading under a name which is different from the name of its partners to publish the names of its partners on its stationery. This publication requirement is equally applicable to those professional partnerships (namely solicitors and accountants firms) which, pursuant to s.13 Companies (Amendment) Act, 1982, are permitted to have more than 20 partners. The foregoing may be compared with the use of 'limited' or 'Ltd' which indicates that one is dealing with a private limited company which, as a corporation, has an existence completely separate from that of its shareholder members.

6 **(a)** This question requires candidates to explain the meaning and procedures involved in the course of a voluntary liquidation in company law. One of the many consequences of incorporation is that a registered company becomes a legal entity in its own right having existence apart from its member shareholders. One of the attributes of this legal personality is that the company has not only separate, but also perpetual, existence, in that it continues irrespective of changes in its membership. Indeed, the company can continue to exist where it has no members at all. Winding up, or liquidation, is the process whereby the life of the company is brought to an end and its assets realised and distributed to its members and/or creditors. The rules governing winding up are detailed in the provisions of the Insolvency Act (IA) 1986 and the exact nature of the procedure depends on the type of winding up involved and depends upon the solvency of the company at the time when liquidation commences. Winding up can be conducted on a voluntary basis, in which case the members of the company themselves determine that the time has come for it to come to an end, or alternatively, the court may make an order that the company's life should come to an end. This question refers to the first of these alternatives, voluntary winding up.

Section 251 Companies Act (CA) 1963 states that a company may be wound up voluntarily:

(i) when any period fixed for the duration of the company by the articles expires or any event occurs which shall, according to the articles, lead to its dissolution. Under such circumstances the winding up has to be approved by an ordinary resolution.

(ii) for any other reason whatsoever. Under these circumstances a special resolution is required to approve the winding up.

(iii) where its liabilities make it advisable for it to be wound up. In this last case an ordinary resolution is required to approve the winding up.

In any case, the winding up is deemed to have started on the date on which the appropriate resolution was passed.

(b) There are two distinct forms of voluntary liquidation:

(i) members' voluntary liquidation
This takes place when the directors of the company are of the opinion that the company is solvent and is capable of paying off its creditors. The directors are required to make a formal declaration to the effect that they have investigated the affairs of the company and that in their opinion it will be able to pay its debts within 12 months of the start of liquidation. It is a criminal offence for directors to make a false declaration without reasonable grounds. On appointment, by an ordinary resolution of the company, the job of the liquidator is to wind up the affairs of the company, to realise the assets and distribute the proceeds to its creditors. On completion of this task, the liquidator must present a report of the process to a final meeting of the shareholders. The liquidator then informs the Registrar of the holding of the final meeting and submits a copy of their report to it. The Registrar formally registers these reports and the company is deemed to be dissolved three months after that registration.

(ii) creditors' voluntary liquidation
This takes place when the company is insolvent when it is decided to wind it up. The essential difference between this and the former type of winding up is that, as the name implies, the creditors have an active role to play in overseeing the liquidation of the company. First, a meeting of the creditors must be called within 14 days of the resolution to liquidate the company at which the directors must submit a statement of the company's affairs. The creditors have the final say in who should be appointed as liquidator and may, if they elect, appoint a liquidation committee to work with the liquidator. On completion of the winding up, the liquidator calls and submits their report to meetings of the members and creditors. The liquidator then informs the Companies Registration Office of the holding of these final meetings and submits a copy of their report to it. The Registrar formally registers these reports and the company is deemed to be dissolved three months after that registration.

7 Redundancy is defined in s.7(2) Redundancy Payments Act (RPA) 1967 (as amended by the RPA 1971 and 2003) 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 in the place where they were so employed have ceased or diminished or are expected to cease or diminish, or

(c) the fact that his employer has decided to carry on the business with fewer or no employees, whether by requiring the work for which the employee had been employed (or had been doing before his dismissal) to be done by other employees or otherwise, or

(d) the fact that his employer has decided that the work for which the employee had been employed (or had been doing before his dismissal) should henceforward be done in a different manner for which the employee is not sufficiently qualified or trained, or

(e) the fact that his employer has decided that the work for which the employee had been employed (or had been doing before his dismissal) should henceforward be done by a person who is also capable of doing other work for which the employee is not sufficiently qualified or trained.'

Section 7(2) RPA 1967 was amended by s.5 RPA 2003 to provide that none of the reasons for the redundancy must relate to the employee concerned.

Not all employees are entitled to claim redundancy. To successfully claim statutory redundancy, a claimant must prove that s/he was employed under a contract of service and was employed for two years continuously. Any period of employment with the employer before the employee was 16 years of age is ignored. Furthermore, it is necessary to establish that s/he was dismissed for reason of redundancy and s.9(1) 1967 Act (as amended by RPA 2003) provides that dismissal occurs if:

(a) a contract of employment is terminated by the employer (with or without notice); or
(b) a fixed term or purpose contract expires without being renewed; or

(c) the employee terminated the contract, with or without notice, in circumstances where s/he is entitled to terminate without notice by reason of the conduct of the employer (i.e. constructive dismissal).

Normally, employees who resign are not entitled to claim redundancy but type (c) provides for what is known as constructive dismissal in recognition of the situation where the unreasonable action of the employer has been tantamount to forcing the employee to resign.

It is to be noted, however, that employers may offer 'suitable alternative employment' to an employee who would otherwise be made redundant. An employee who unreasonably refuses to avail of suitable alternative employment cannot claim redundancy. There has been much litigation regarding what constitutes 'suitable alternative employment'.

The Unfair Dismissal Act, 1977 provides an employee, who proves dismissal, is presumed to have been dismissed for reason of redundancy (see *Gaffney* v *Bohemian FC* (1969)).

The Third Schedule to the 1967 Act (as amended by RPA 2003) states the method in which redundancy pay is calculated as follows:

(1) Two weeks' pay for each continuous year from the age of 16;
(2) Plus one week's pay.

However, all earnings of an employee in excess of €600 per week are ignored for the purpose of calculating the redundancy pay payable.

Disputes in relation to such claims must be brought within six months of the dismissal (or 12 months in exceptional cases). Claims may be referred to a Rights Commissioner for a non-binding recommendation and from which an appeal lies to the Employment Appeals Tribunal (EAT). Claims may be brought directly to the EAT.

8 The essential issues to be disentangled from the problem scenario relate to breach of contract and the remedies available for such breach.

There is clearly a binding contractual agreement between Art Ltd and Bel, which Bel has stated she intends to break. Normally breach of a contract occurs where one of the parties to the agreement fails to comply, either completely or satisfactorily, with their obligations under it. However, such a definition does not appear to apply in this case as the time has not yet come when Bel has to produce the manuscript. She has merely indicated that she has no intention of doing so. This is an example of the operation of the doctrine of anticipatory breach. This arises precisely where one party, prior to the actual due date of performance, demonstrates an intention not to perform their contractual obligations. The intention not to fulfil the contract can be either express or implied.

Express anticipatory breach occurs where a party actually states that they will not perform their contractual obligations (*Hochster* v *De La Tour* (1853)). Implied anticipatory breach occurs where a party carries out some act which makes performance impossible (*Omnium Enterprises* v *Sutherland* (1919)).

When anticipatory breach takes place, the innocent party can sue for damages immediately on receipt of the notification of the other party's intention to repudiate the contract, without waiting for the actual contractual date of performance as in *Hochster* v *De La Tour*. Alternatively, they can wait until the actual time for performance before taking action. In the latter instance, they are entitled to make preparations for performance, and claim the agreed contract price (*White and Carter (Councils)* v *McGregor* (1961)).

It would appear that Bel's action is clearly an instance of express anticipatory breach and that Art Ltd has the right either to accept the repudiation immediately, or affirm the contract and take action against Bel at the time for performance (*Vitol SA* v *Norelf Ltd* (1996)). In any event, Bel is bound to complete her contractual promise or suffer the consequences of her breach of contract.

Remedies for breach of contract

(i) Specific performance
It will sometimes suit a party to break their contractual obligations, even if they have to pay damages. In such circumstances, the court can make an order for specific performance to require the party in breach to complete their part of the contract. However, as specific performance is not available in respect of contracts of employment or personal service, Bel cannot be legally required to provide the manuscript to Apt Ltd (*Ryan* v *Mutual Tontine Westminster Chambers Association* (1893)). This means that the only remedy against Bel lies in the award of damages.

(ii) Damages
A breach of contract will result in the innocent party being able to sue for damages. Apt Ltd, therefore, can sue Bel for damages, but the important issue relates to the extent of such damages.

Damages in contract are intended to compensate an injured party for any financial loss sustained as a consequence of another party's breach. The object is not to punish the party in breach, so the amount of damages awarded can never be greater than the actual loss suffered. The aim is to put the injured party in the same position they would have been in had the contract been properly performed.

The rule in *Hadley* v *Baxendale* (1845) states that damages will only be awarded in respect of losses which arise naturally, or which both parties may reasonably be supposed to have contemplated when the contract was made, as a probable result of its breach.

The effect of the first part of the rule in *Hadley* v *Baxendale* is that the party in breach is deemed to expect the normal consequences of the breach, whether they actually expected them or not. Under the second part of the rule, however, the party in breach can only be held liable for abnormal consequences where they have actual knowledge that the abnormal consequences might follow (*Victoria Laundry Ltd* v *Newham Industries Ltd* (1949)).

Applying these rules to the scenario, it is evident that Bel has effected an anticipatory breach of her contract with Apt Ltd and will be liable to it for damages suffered as a consequence.

As for the extensive preliminary expenses, Bel would certainly be liable for them, as long as they were in the ordinary course of Apt Ltd's business and were not excessive (*Anglia Television* v *Reed* (1972)).

As regards the profits from the contract to supply the book club, the issue would be as to whether this was normal profit or amounted to an unexpected gain, as it was not part of Apt Ltd's normal market when the contract was signed. If *Victoria Laundry Ltd* v *Newham Industries Ltd* were to be applied, it is unlikely that Apt Ltd would be able to claim that loss of profit from Bel. However, it is equally plausible that the contract was an ordinary commercial one and that Bel would have to recompense Apt Ltd for any losses suffered from its failure to complete contractual performance.

9 This question requires candidates to analyse a problem scenario and explain and apply the law relating to directors' duties generally and specifically the rules applying when a director has a personal interest in a contract entered into by their company.

In Ireland, the rules relating to directors' duties are governed by the common law. In this regard, a director is in a fiduciary relationship with the company of which they are a director. These duties may be described as follows:

(a) **Duty to act *bona fide* in the best interests of the company**
In effect, this means that directors are under an obligation to act in what they genuinely believe to be the best interests of the company. Thus in *Dawson International plc* v *Coats Paton plc* (1990), it was held that the agreement of a board of directors to support a particular take-over bid was subject to an implied fiduciary duty of that board to act in the best interests of the company, even if this meant going back on their previous agreement (see also *John Crowther Group Carpets* v *Carpets Internationale plc* (1990)). Further in *Re Frederick Inns (in liquidation)* (1994), the proceeds of the sale of the assets of four companies were used to discharge the debts owed to the Revenue Commissioners by the ten companies in the group. This payment left the four companies insolvent and the Supreme Court held that the payments were made in breach of the directors' fiduciary duty to act in the best interests of the four companies.

(b) **Duty not to act for any collateral purpose**
This may be seen as a corollary of the preceding duty in that directors cannot be said to be acting *bona fide* if they use their powers for some ulterior or collateral purpose. Directors are given their powers to use in the best interests of the company, and those powers must not be used for any other purpose. For example, directors should not issue shares to particular individuals in order merely to facilitate, or indeed prevent, a prospective take-over bid (*Howard Smith* v *Ampol Petroleum* (1974) and *Hogg* v *Craphorn* (1967)) or allot new shares for the purpose of ensuring that a particular shareholder acquires majority control (*Nash* v *Lancegaye Safety Glass* (1916)).

(c) **Duty to avoid conflicts of interest**
This equitable rule is strictly applied by the courts and the effect of its operation may be seen in *Regal (Hastings)* v *Gulliver* (1942). In that case, the directors of a company owning one cinema provided money for the creation of a subsidiary company to purchase two other cinemas. After the parent and subsidiary companies had been sold at a later date, the directors were required to repay the profit that they had made on the sale of the shares in the subsidiary company on the ground that they had only been in the situation to make that profit because of their position as directors of the parent company. The principle propounded in this case is very strict and applies even where it is established that the company could not have availed of the particular opportunity. This was seen in *Industrial Development Consultants Ltd* v *Cooley* (1972) wherein, after the company was unsuccessful in its bid for a particular contract, one of its directors feigned illness to avoid his employment contract with the company so that he could accept the contract which was offered to him in his personal capacity. The court held that Cooley acted in conflict with his interest in the company and he was required to compensate it (see also *Cook* v *Deeks* (1916)). Any money that a director makes out of a conflict of interest is held on account or on constructive trust for the company and is therefore repayable.

Applying the above to the problem scenario, it appears that Cy did not declare his interest in either Fox Ltd generally, or the particular contract in question. Dix plc could have avoided the contract had they found out earlier and acted sooner, but in any case Cy can be held liable to account to Dix plc for any profit he made on the deal, or, more significantly, he will be liable to account to Dix plc for its significant loss on the contract.

10 This question requires candidates to consider and explain a problem scenario which raises issues relating to directors' statutory duties under ss.297 and 297A Companies Act (CA) 1963 as they apply to fraudulent and reckless trading.

At common law, the duties owed by directors to their company and the shareholders, employees and creditors of that company were notoriously lax. Statute has, by necessity, been forced to intervene to increase such duties in order to provide a measure of protection for those concerned.

Common law did not place any great burden on directors in regard to liability for company losses. Damages could be recovered against directors for losses caused by their negligence but the level of such negligence was high. As was stated in *Lagunas Nitrate Co* v *Lagunas Syndicate* (1899), it must, in a business sense, be culpable or gross. The laxity of the situation at common law has been much tightened by statute, particularly by the development of civil liability for reckless trading, which was introduced by s.297A CA 1963 as inserted by s.138 Companies Act (CA) 1990.

Fraudulent trading

There has long been civil liability for any activity amounting to fraudulent trading. Thus, s.297 CA 1963 (as replaced by by s.137 CA 1990) governs situations where, in the course of a winding up, it appears that the business of a company has been carried on with intent to defraud creditors, or for any fraudulent purpose. In such cases, the court, on the application of the liquidator, may declare that any persons who were knowingly parties to such carrying on of the business are liable to make such contributions (if any) to the company's assets as the court thinks proper. The major problem in making use of s.297, however, lies in meeting the very high burden of proof involved in proving dishonesty on the part of the person against whom it is alleged. It should be noted that there is also a criminal offence of fraudulent trading under s.297 CA 1963, which applies to anyone who has been party to the carrying on of the business of a company with intent to defraud creditors or any other person, or for any other fraudulent purpose.

Reckless trading

Reckless trading does not involve dishonesty but, nonetheless, it still makes particular individuals potentially liable for the debts of their companies. Section 297A(1) CA 1963 (as inserted by s.138 CA 1990) provides that a person may be liable for reckless trading where in the course of winding up of a company it appears that any person was, while an officer of the company, 'knowingly a party' to the carrying on of any business of the company in a reckless manner.

In these circumstances, the court may, on the application of the receiver, examiner, liquidator or any other creditor or contributory of the company, if it thinks proper to do so, declare that person responsible, without any limitation of liability, for all or any part of the debts or other liabilities of the company as the court may direct.

Section 297A(2) states the following as examples of reckless trading:

(a) an officer who is a party to the carrying on of such business and, having regard to the general knowledge, skill and experience that may reasonably be expected of a person in his position, he ought to have known that his actions or those of the company would cause loss to the creditors of the company or

(b) an officer was a party to the contracting of a debt by the company and did not honestly believe on reasonable grounds that the company would be able to pay the debt when it fell due for payment as well as all its other debts.

Re Hefferon Kearns Ltd (No. 2) (1993) held that the use of the word 'knowingly' in s.297A(1) suggests that the test is a subjective test. However, it further held that recklessness, in terms of s.297A(2), is extended to circumstances where the officer ought to have known that his/her actions would cause loss to the creditors or where (s)he did not honestly believe on reasonable grounds that the company would be able to pay a particular debt when it fell due. The court further noted that this objective test gained support from the nature of the defence that may be raised by an officer under s.297A(6) which provides that, where an officer can show that (s)he acted honestly and responsibly in relation to the conduct of the affairs of the company, the court may, having regard to all the circumstances of the case, relieve him either wholly or in part, from personal liability on such terms as it may think fit.

The manner in which incompetent directors will become liable to contribute to the assets of their companies was shown in *Re Produce Marketing Consortium Ltd* (1989), in which two directors were held liable to pay compensation from the time that they ought to have known that their company could not avoid insolvent liquidation, rather than the later time when they actually realised that fact.

Section 160 CA 1990 provides for automatic disqualification from acting as a director, auditor, other officer, receiver, liquidator or examiner, for a period of five years or such other period as the court may order where the person has been convicted of an offence involving fraud or dishonesty or an offence involving a company. Such application may be made by a prosecutor in criminal proceedings. Initially, s.160 was only applicable where convicted of an indictable offence but the Office of the Director of Corporate Enforcement can now also bring proceedings for the disqualification of a director (s.160 CA 1990 as amended by s.42 Company Law Enforcement Act, 2001 and s.11 Investment Funds, Companies and Miscellaneous Provisions Act, 2006).

Applying the foregoing law to the problem scenario, it is unlikely that there is sufficient evidence to substantiate a claim against Gim or Hom for fraudulent trading, as apparently they genuinely thought they could trade their way out of difficulty. Although it has to be recognised that Gim and Hom did actually disguise the debts of the company, they did not do so in order to benefit themselves.

It would appear, however, that the two of them are certainly liable for an action for reckless trading, as they carried on trading after it was clear that they ought to have known that there was no reasonable chance of the company avoiding insolvent liquidation. Nor can it be claimed that they took every reasonable step to minimise the potential loss to the company's creditors. Indeed, it was their continued trading which caused the creditors to suffer an additional loss beyond what they would have suffered had IMP Ltd been wound up at an earlier date.

It remains to determine from which date Gim and Hom should be held responsible for the debts of the company and it is immediately apparent that there was no real prospect of the company avoiding insolvent liquidation as early as October 2012. Consequently, they will be personally liable for any debts accrued by the company after that date.

They will also be liable to be disqualified from acting as company directors under s.160 CA 1990.

1 **(a)** The first part of this question requires candidates to explain the meaning of criminal and civil law.

(i)	2–3 marks	A detailed answer explaining criminal law and perhaps citing appropriate examples.
	1 mark	A less detailed answer; perhaps too general and lacking examples.
	0 marks	No understanding of the concept.
(ii)	2–3 marks	A detailed answer explaining civil law and perhaps citing appropriate examples.
	1 mark	A less detailed answer; perhaps too general and lacking examples.
	0 marks	No understanding of the concept.

(b)	3–4 marks	Full explanation of the criminal courts.
	1–2 marks	Good explanation, but perhaps lacking in some detail or missing out some important court.
	0 marks	Very weak, if any, understanding of the courts concerned.

2 This question requires an explanation of the rules relating to the acceptance and revocation of offers in contract law.

(a)	4–6 marks	A good to complete answer dealing with most, if not all, of the issues relating to acceptance of offers.
	2–3 marks	A less detailed answer, perhaps recognising what the question relates to but lacking in detailed knowledge of the rules.
	0–1 mark	Little or no understanding of the concept.
(b)	3–4 marks	A good to complete answer dealing with most, if not all, of the issues relating to revocation of offers.
	1–2 marks	A less detailed answer, perhaps recognising what the question relates to but lacking in detailed knowledge of the rules.
	0 marks	No understanding of the concept.

3

(a)	4–6 marks	Full understanding and explanation of the topic. It is likely that cases will be cited as authority, although examples will be acceptable as an alternative.
	2–3 marks	Some knowledge of the topic but lacking in detail.
	1 mark	Unbalanced answer, lacking in detailed understanding
	0 marks	No understanding of the concept.

(b) This part of the question refers to the issue of remoteness of damage in the law of negligence.

3–4 marks	A thorough understanding of the issues involved. It is likely that the best answers will focus on the cases, although examples might be used.
1–2 marks	Some, but limited, understanding of the issue, perhaps not referring to any cases to support the explanation.
0 marks	No knowledge of the topic.

4 This question requires candidates to consider the linked concepts of capital maintenance and the payment for shares.

(a) Requires an explanation of the overall concept of capital maintenance.

2 marks	Clear answer providing explanation of the creditor fund and the way in which a company's capital may be used and may not be used. Reference may be made to limited liability and examples of the operation of the doctrine may be provided.
1 mark	Some knowledge of the concept but lacking any depth or explanation. Perhaps merely a reference to the idea of the creditor fund.
0 marks	No knowledge of the topic.

Part (b) relating to payment at a premium carries 4 marks, as does part (c) which relates to payments at a discount.

(b)	3–4 marks	A good to complete explanation of what is meant by share premiums and how they are to be treated in law. Reference must be made to the provisions of the Companies Act 1963.
	1–2 marks	Some idea about the issues but lacking in detail.
	0 marks	No understanding of the issues.
(c)	3–4 marks	Full understanding and explanation of the topic. It is likely that cases will be cited as authority, although examples will be acceptable as an alternative.
	1–2 marks	Some knowledge of the topic but lacking in detail.
	0 marks	No knowledge of the topic.

5 This question requires candidates to explain the operation of two types of partnerships, and also explain the use of the expression '& Co'.

(a)	2 marks	Full understanding of unlimited liability of ordinary partners.
	1 mark	Some understanding of the liability of such partners.
	0 marks	No knowledge whatsoever.
(b)	2–3 marks	A thorough answer explaining fully the rules relating to the limited partnership.
	1 mark	Little, if any, explanation. Perhaps lacking reference to the rules relating to this form.
	0 marks	No knowledge of the topic whatsoever.
(c)	4–5 marks	A thorough answer explaining fully the rules relating to the term '& Co', its consequences and the necessity to register a name under the Registration of Business Names Act 1963 in certain circumstances.
	2–3 marks	Some knowledge of the term but lacking in detail.
	1 mark	Little knowledge or understanding.
	0 marks	No knowledge of the topic whatsoever.

6 **(a)** Requires a general explanation of the concept of voluntary liquidation and carries 6 marks.

4–6 marks Thorough to full answer explaining the meaning and effect of voluntary liquidation.

1–3 marks Some knowledge but perhaps lacking in detail or structure.

0 marks No knowledge of the topic.

(b) Requires candidates to explain what is meant by the two specific forms of voluntary liquidation.

(i) 2 marks Available for explaining what is meant by a members' voluntary liquidation. To gain full marks, a clear explanation of the meaning and procedures relating to a members' voluntary liquidation must be provided. Both aspects must be considered to get all 2 marks.

1 mark Fair knowledge of the topic, but perhaps lacking in detail or not dealing with both aspects of the question.

0 marks No knowledge of the topic.

(ii) 2 marks are available for explaining what is meant by a creditors' voluntary liquidation.

2 marks Good knowledge clearly explained with reference to the companies legislation. To gain full marks, a clear explanation of the meaning and procedures relating to a creditors' voluntary liquidation must be provided.

1 mark Clear understanding, but perhaps lacking in detail or not dealing with both aspects of the question.

0 marks No knowledge of the topic.

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 analyse a problem scenario from the perspective of contract law and apply the appropriate legal rules.

8–10 marks Full explanation of the meaning and effect of anticipatory breach of contract in the context of the scenario provided, together with appropriate application of those rules and legal remedies.

5–7 marks Some explanation and application but perhaps lacking in detail or application or remedies.

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.

9 This question requires candidates to analyse a problem scenario and explain and apply the law relating to directors' contracts with their companies.

8–10 marks A good analysis of the scenario with a clear explanation of the law relating to contracts between directors and their companies at common law. Cases will be provided.

5–7 marks Some understanding of the situation but perhaps lacking in detail or reference to the statute.

3–4 marks Weak answer lacking in knowledge or application.

1–2 marks Little, if any, knowledge of the appropriate legal principles.

0 marks No knowledge whatsoever of the substance of the question.

10 This question requires candidates to consider fraudulent trading under s.297 Companies Act 1963 and reckless trading under s.297A Companies Act 1963 (as amended by the Companies Act 1990).

8–10 marks	A good analysis of the scenario with a clear explanation of the law relating to fraudulent and wrongful trading, together with an accurate application of that law.
5–7 marks	Fair to good understanding of the situation but perhaps lacking in detail or reference to the statute.
3–4 marks	Weak answer lacking in knowledge or application, with little or no reference to the provisions of the Companies Act 1963 as amended by the Companies Act 1990.
1–2 marks	Little knowledge of the appropriate legal principles.
0 marks	No knowledge whatsoever of the substance of the question.