Answers

1 (a) The doctrine of binding precedent is one of the central principles of the Irish legal system. The doctrine refers to the fact that, within the hierarchical structure of the Irish courts, a decision of a higher court will be binding on a court lower than it in that hierarchy. In general terms, this means that when judges try cases, they will check to see if a similar situation has come before a court previously. If the precedent was set by a court of higher status to the court deciding the new case, then the judge in the present case should follow the rule of law established in the earlier case. Where the precedent is from a lower court in the hierarchy, the judge in the new case may not follow but will certainly consider it.

The Hierarchy of the courts

The Supreme Court stands at the summit of the Irish court structure and its decisions are binding on all courts below it in the hierarchy. As regards its own previous decisions, until 1965 the Supreme Court regarded itself as bound by its previous decisions. However, in *Attorney General* v *Ryan's Hire Car* (1965) and *State (Quinn)* v *Ryan* (1965), the Supreme Court held that, although the normal practice would henceforth be, as previously, that decisions of the Supreme Court would continue to be binding on itself, the court could now depart from an earlier decision where it appeared right to do so. However, such earlier decisions are not overruled lightly. By way of example, the Supreme Court in *Carron* v *McMahon* (1990) overruled the earlier Supreme Court decision in *Russell* v *Fanning* (1988). There is also a view that a five-judge sitting of the Supreme Court will be more inclined to reconsider a judgement of a three-judge Supreme Court (*Hamilton* v *Hamilton* (1982) and *Doyle* v *Hearne* (1987)). It has to be recognised that in the wider context the Supreme Court is no longer the highest court and its decisions are subject to decisions of the European Court of Justice in terms of European Community law and, with the implementation of the European Convention on Human Rights Act 2003, the decisions of the European Court of Human Rights in matters relating to human rights.

Decisions of the Supreme Court bind all courts lower in the hierarchy, including the Court of Criminal Appeal.

In civil cases, the High Court is generally bound by previous decisions of the Supreme Court.

The High Court is not generally bound by other previous decisions of the High Court. This principle is, however, subject to exception. The High Court generally sits as one judge. However, there are circumstances where it may sit as a Divisional Court (i.e. consisting of two or more judges). The general view is that a decision of a Divisional Court binds a subsequent Divisional Court, and also binds the High Court.

Decisions of the High Court bind courts lower in the hierarchy (i.e. the Circuit and District Courts).

The Circuit Court can create precedent and its decisions are really only of persuasive authority. District Courts do not create precedents.

(b) Binding precedent

If a precedent was set by a court of higher status to the court deciding the new case, then the judge in the present case should normally follow the rule of law established in the earlier case.

Persuasive precedent

From the foregoing it can be seen that courts higher in the hierarchy are not bound to follow the reasoning of courts of an equal or lower level in that hierarchy. However, the higher courts will consider, and indeed may adopt, the reasoning of the lower court. As a consequence of the fact that the higher court is at liberty **not** to follow the reasoning in the lower or equal court, such decisions are said to be of persuasive rather than binding authority. It should also be borne in mind that Irish courts are in no way bound to follow the reasoning of courts in different jurisdictions. However, where a court from another jurisdiction has considered a point of law that subsequently arises in an Irish case, the Irish courts will review the reasoning of the foreign courts and may follow their reasoning if they find it sufficiently persuasive.

2 (a) Invitation to treat

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

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

(i) **the display of goods in a shop window** – The classic case in this area is *Fisher* v *Bell* (1961) in which a shopkeeper was prosecuted for offering offensive weapons for sale, by having flick-knives on display in his window. It was held that the shopkeeper was not guilty as the display in the shop window was not an offer for sale but only an invitation to treat. Another example is *Minister for Industry and Commerce* v *Pim* (1966), wherein the defendant put a suit in his shop window and this displayed the credit price for the suit but not the cash price. The court held that the defendant did not breach legislation requiring the display of the cash price because the legislation only applied to offers for sale. The display amounted to an invitation to treat and the law did not extend to such an invitation.

(ii) **the display of goods on the shelf of a self-service shop** – In this instance the exemplary case is *Pharmaceutical Society of Great Britain* v *Boots Cash Chemists* (1953). The defendants were charged with breaking a law which provided that certain drugs could only be sold under the supervision of a qualified pharmacist. They had placed the drugs on open

display in their self-service store and, although a qualified person was stationed at the cash desk, it was alleged that the contract of sale had been formed when the customer removed the goods from the shelf. It was held that Boots were not guilty. The display of goods on the shelf was only an invitation to treat. In law, the customer offered to buy the goods at the cash desk where the pharmacist was stationed.

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

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

(b) A tender

This form of invitation to treat arises where one party wishes particular work to be done and issues a statement asking interested parties to submit the terms on which they are willing to carry out the work. In the case of tenders, the person who invites the tender is simply making an invitation to treat. The person who submits a tender is the offeror and the other party is at liberty to accept or reject the offer as they please.

The effect of acceptance depends upon the wording of the invitation to tender. If the invitation states that the potential purchaser will require to be supplied with a certain quantity of goods, then acceptance of a tender will form a contract and they will be in breach if they fail to order the stated quantity of goods from the person submitting the tender. If, on the other hand, the invitation states only that the potential purchaser may require goods, acceptance gives rise only to a standing offer. In this situation there is no compulsion on the purchaser to take any goods, but they must not deal with any other supplier. Each order given forms a separate contract and the supplier must deliver any goods required within the time stated in the tender. The supplier can revoke the standing offer but they must supply any goods already ordered (*Great Northern Railway* v *Witham* (1873)).

3 A tort is a wrongful act against an individual which gives rise to a non-contractual civil claim. The claim is usually for damages, although other remedies are available. Liability in tort is usually based on principle of fault, although there are exceptions. Negligence is recognised as the most important of the torts, its aim being to provide compensation for those injured through the fault of some other person. However, an individual is not automatically liable for every negligent act that he or she commits and in order to sustain an action in negligence it must be shown that the party at fault owed a duty of care to the person injured as a result of their actions. Consequently, the onus is on the claimant to establish that the respondent owed them a duty of care. Even then there are defences available for the defendant in a tort action.

(a) Although not strictly a defence for negligence, the application of the concept of contributory negligence can be used to reduce the amount of damages awarded in a particular case. It arises where the party making the claim is found to have contributed, through their own fault, to the injury they sustained. The onus is on the defendant to show that the claimant was at fault and contributed to their own injury. An early example of the principle may be seen in *Jones* v *Livox Quarries* (1952) in which a claimant was found to have contributed to their own injury by showing a lack of care for their own safety by riding on the back of a dumper truck. Another example may be found in *Sayers* v *Harlow* (1958) in which the damages awarded to a woman, who was injured escaping from a public toilet in which she had been trapped due to a defective lock, were reduced as her injuries had been exacerbated by the manner in which she tried to make her escape by climbing out of it.

The Irish Supreme Court has held that a driver or passenger in a motor vehicle who fails to use an available seat belt is guilty of contributory negligence (*Hamill* v *Oliver* (1977)). The court did acknowledge that exceptions would arise to this principle where, for example, there are excusing circumstances such as obesity, pregnancy and post-operative convalescence and where the wearing of a seat belt might be thought to do more harm than good.

If contributory negligence is demonstrated, then the level of damages awarded will be reduced in line with and will depend upon the extent to which the claimant's fault contributed to the injury sustained. Under the Civil Liability Act, 1961, however, contributory negligence ceased to be a complete defence.

(b) *Volenti non fit injuria* is a Latin tag which essentially translates as 'no injury can be done to a person who willingly accepts the risk'. Of course very serious injury can in fact be done to such a person, the point is that, as a result of their consent they lose their right to sue for damages for any injury suffered. Whilst contributory negligence operates to reduce the level of damages awarded, the position at common law was that consent acted as a complete defence and no damages would be awarded if it was shown to apply.

Consent can be given where the claimant expressly agrees to the risk of injury or it may be implied from the claimant's conduct. An example of express consent may be seen in relation to medical treatment. In such situations the patient may be required to sign a consent form which removes the right to complain about what would otherwise amount to the tort of battery. Of course the patient does not consent to the surgeon carrying out any procedure negligently and on the occasion of such negligence an action for damages would still arise.

The principle of implied consent arose in *ICI* v *Shatwell* (1964) in which two brothers employed in a quarry ignored their employer's rules relating to safety, by testing detonators without using the shelter provided. As a result, the claimant was injured and sued the employer for breach of statutory duty as a result of his brother's actions. The court held that both brothers

had impliedly consented to the risks by their actions and had participated quite willingly. Consequently the employer was not responsible to the injured brother.

In *Ryan* v *Ireland* (1969), the Supreme Court rejected the defence in an action brought by a soldier who had enlisted for UN service and was injured in the Lebanon. The court held that the soldier had not waived any right under his contract to sue for injury caused by the negligence of his superiors. The Court did note, however, that he had accepted the inherent risks in the possibility of being involved in armed conflict. Also in *Baldwin* v *Foy and others* (1997) the plaintiff, who was new to horse-riding, succeeded in her action against a horse riding school for exposing her to the danger of allowing her to ride cross-country on very marshy land, which resulted in her being thrown from a horse during an unforeseen hailstorm. The court was not satisfied that it could be inferred that the plaintiff had agreed to waive any right of action she might have had in respect of the defendants' negligence.

4 **(a)** 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 that 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, that is trading under a name that 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) that, pursuant to s.13 Companies (Amendment) Act, 1982, are permitted to have more than 20 partners.

(b) The use of the abbreviation Ltd indicates that one is dealing with a private limited company. Private limited companies are incorporated enterprises and, as corporations, have an existence completely separate from that of their shareholder members. It is necessary that such companies be given a name and such is a requirement of the memorandum of association, which is required to establish the company.

Section 6 Companies Act (CA) 1963 requires all limited companies, other than public limited companies, to have the word 'limited', the abbreviation of 'Ltd', the Irish equivalent 'teoranta' or its abbreviation 'teo' at the end of its name. However, the Minister for Enterprise and Employment may grant licences exempting certain companies from this requirement, e.g. those with charitable or religious objects (s.24 CA 1963).

The reason for requiring the word limited at the end of the name is to publicise the fact that they are indeed limited companies, the liability of their members being limited to any amount remaining unpaid on the value of the shares held. Hence if shares are fully paid up the shareholders have no further responsibility for the debts of the company. Private companies tend to be relatively small-scale enterprises and under close control of a few shareholders but, in any case, are forbidden to offer their shares to the public (s.33 CA 1963).

(c) The use of the abbreviation 'plc' indicates that one is dealing with a public limited company. As with private companies, so the plc is a separate legal entity from its members with its own name. A public company is required to end its name with 'public limited company', the abbreviation of 'plc', the Irish equivalent of 'cudieachhta phoiblí teoranta' or its abbreviation of 'cpt' (s.3 Companies (Amendment) Act 1983). Also, as with the private company, the shareholders in a public limited company enjoy limited liability determined by any amount remaining outstanding in relation to the shares they hold.

The major difference between the public limited company and the private limited company is that it is only the former that is allowed to issue shares to the general public. It is an offence for companies other than public ones to issues shares to the public (s.33 CA 1963).

Public limited companies tend to be very large and act as a mechanism for investment from outsiders. Many of them are listed on the Irish Stock Exchange, although it is important to emphasise that public limited companies are not necessarily listed on the stock market. As a result of the size and investment nature of public companies they are subject to much stricter controls, both at common law and under the companies legislation, than are private companies.

5 The concept of 'capital' refers to the financial resources raised by companies to finance their operation. The essential distinction in company law is between share capital, that is provided by the members of the company, and loan capital, which the company borrows from outsiders.

(a) Ordinary shares

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

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

The nominal value of the shares held represents the maximum liability of a shareholder in a limited liability company. However, the actual liability of a shareholder is the amount remaining unpaid on any shares held. This difference arises in

the following circumstances. When companies issue shares they may not require the full nominal value of the shares to be paid at once. This allows the company the possibility of raising further capital from its members as it becomes necessary in the future. The amount already paid to the company is referred to as called-up capital. Any uncalled capital represents the amount of potential liability. If the shares are fully paid up then the shareholder has no further liability towards meeting the company's debts. Purchasers of shares may be required to pay more than the nominal/face value of the shares, but shares cannot be issued at less than that value.

In regard to return, shares enjoy an advantage over other securities. If the company is profitable, not only will they enjoy dividend payments but the market value of their shares will go up. On the other hand if the company does not do well, they may well not receive any payment and the value of their shares will diminish.

As members of the company, ordinary shareholders are entitled to attend and vote at general meetings. One of their most important rights is to elect and dismiss the directors of the company who are involved in its day-to-day running for the general benefit of those members.

Ordinary shares usually carry rights of pre-emption, which entitles the holders to have first call on any new shares issued by the company.

Shares in public limited companies are usually freely transferable, but the transfer of shares in private companies may be restricted to existing members.

There are also strict rules governing the possibility of a company buying its own shares from its members.

(b) Preference shares represent a more secure form of investment than the ordinary share. The reason for this is that preference shares receive a fixed rate of dividend before any payment is made to the ordinary shareholders and usually they enjoy priority over ordinary shares with regard to repayment of capital. The actual rights enjoyed by the preference will be stated in the company's articles of association. Preference shareholders cannot insist on receiving a dividend payment, but as their dividend rights are usually cumulative, any failure to pay the dividend in one year has to be made good in subsequent years, subject to the company's profitability. Company law enforces the strict rule that dividends, whether on ordinary or preference shares, cannot be paid out of the company's capital.

Although, as with ordinary shares, the holders of preference shares are members of the company, their voting rights are restricted to any period when their dividends are in arrears.

(c) Debentures are documents that acknowledge a company's borrowing, although the term has been extended to cover the loan itself. As debenture holders lend money to the company they are its creditors, they are not members. As creditors they are entitled to receive interest, whether the company is profitable or not. It may even be necessary to use the company's capital to pay the debenture interest. Share dividends on the other hand must never be paid from capital. On liquidation debentures must be paid back before shareholders are paid.

It is usual for the company to provide security for the amount it has borrowed by issuing debentures. There are two methods of securing debentures: by means of a fixed charge over a specific item of property, or a floating charge over all of the company's property, some of which may be continuously changing, such as stock-in-trade. The disadvantage of floating charges is that they come after fixed charges when it comes to paying a company's debts.

As non-members, debenture holders have no right to attend or vote at company meetings, although they will be in the position to exercise more power if the company fails to pay interest on the loans, through exercising powers to secure their debts. They have no right to object to the company making further loans and securing those loans against its assets. The company may even provide fixed charges on the subsequent loans, thus reducing the security held by existing floating charge holders, unless there is an effective restriction on the company so doing.

There is no statutory restriction on debenture holders having debentures redeemed or purchased by the company.

6 Under the provisions of Irish company law legislation, there are three types of resolutions: ordinary resolutions, special resolutions and written resolutions.

The particular kind of resolution which will be used at a meeting of a company will depend on the precise nature of the business to be transacted and the articles of association of the company. The kind of resolution which is used does not relate to the kind of company meeting at which the resolution is passed.

(a) An ordinary resolution

An ordinary resolution of a company is one which is not a special resolution. It is a resolution which is passed by a simple majority of those who attend and vote at a meeting of the company. Extended notice of 28 days must be given in relation to some ordinary resolutions (i.e. an extended notice resolution).

(b) A special resolution

Section 141(1) Companies Act (CA) 1963 provides that a resolution shall be a special resolution when it has been passed by not less than three-quarters of the votes cast by such members as, being entitled so to do, vote in person, or where proxies are allowed, by proxy, at a general meeting of which not less than 21 days' notice, specifying the intention to propose the resolution as a special resolution, has been duly given. Section 141 allows short notice to be given of a special resolution if 90% of the shareholders agree.

A special resolution is required for major changes in the company such as:

- changing the company's name (s.23 CA 1963);
- altering the company's memorandum or articles (s.10 CA 1963);
- reducing the company's share capital (s.72 CA 1963);
- re-registering the private company as a public company or vice-versa (ss.9–10 CAA 1983 (private to public) and ss.14–15 CAA 1983 (public to private));
- permitting an off-market purchase of a company's own shares (s.213 CA 1990);
- winding up of the company by the court (s.213(a) CA 1963).

(c) A written resolution

Ordinarily a company passes a resolution at a meeting of its members who vote by way of a show of hands or in a poll. However, there is a mechanism through which the requirement for members to meet and vote on a proposed resolution may be avoided. Section 141(8) CA 1963 provides that the articles of association of a private company can permit a document, purporting to be a resolution of the company and signed by all the members of the company, to be a resolution of that company. The provision applies to both ordinary and special resolutions. Such a resolution is deemed to have been passed at the time on which the last member signs it. However, this procedure does not apply to: a resolution under s.182 to remove any one or more of the directors; to a resolution under s.160 on the appointment and remuneration of auditors; or to a resolution to wind up the company. Article 6, of Part II of Table A contains a provision to the effect of s.141(8).

7 (a) Compulsory winding up

Winding up, or liquidation, is the process whereby the life of the company is terminated. It is the formal and strictly regulated procedure whereby the business is brought to an end and the company's assets are realised and distributed to its creditors and members. The procedure is governed by the Companies Act (CA) 1963.

A compulsory winding up is a winding up ordered by the court under s.212 CA 1963 and must be distinguished from the voluntary winding up procedures, either a members' voluntary winding up or a creditors' voluntary winding up, neither of which require the court's involvement for initiation of the process.

The seven main grounds under which a registered company may be wound up by the court under s.213 CA, 1963, are as follows:

(i) the company has passed a special resolution that it be wound up by the court;
(ii) the company does not commence its business within a year from its incorporation or suspends its business for a whole year;
(iii) (except in the case of a private company limited by shares or by guarantee) the number of members is reduced below two in a private company, and below seven in a public company;
(iv) the company is unable to pay its debts;
(v) the court is of the opinion that it is just and equitable that the company should be wound up;
(vi) the court is satisfied that the company's affairs are being conducted, or the powers of the directors are being exercised, in a manner oppressive to any member or in disregard of his interests as a member and that, despite the existence of an alternative remedy, winding up would be justified in the general circumstances of the case;
(vii) after the end of the general transitional period, within the meaning of the Companies Amendment Act 1983, the company is an old public limited company within the meaning of that Act.

The most common of these grounds are (i), (iv)–(vi).

If, for any reason, the members of the company no longer wish to continue the business they will use (i). Outsiders may apply to have a company wound up under (iv). Section 214 provides that, if a company with a debt exceeding €1,270, fails to pay it within three weeks of receiving a written demand, then it is deemed unable to pay its debts.

Procedures (v) and (vi) may be used in private companies where there is deadlock in management (*Re Yenidje Tobacco Co Ltd* (1916)).

(b) On the presentation of a petition to wind a company up compulsorily, the court will normally appoint an official liquidator who is an officer of the court and an agent of the company and who owes fiduciary and statutory obligations to both the court and the company.

The High Court will direct the preparation of a statement of the company's affairs. This statement must reveal:

- particulars of the company's assets and liabilities;
- names and addresses of its creditors;
- any securities held by the creditors (fixed or floating charges) and the dates on which they were granted;
- any other information which the the official liquidator may require.

After his appointment, the official liquidator calls meetings of the company's members and creditors in order to select a committee of inspection if required.

Section 229(1) CA 1963 provides that an official liquidator '... shall take into his custody or under his control all the property and things in action to which the company is or appears to be entitled'. It is the official liquidator's responsibility to '[wind] up the affairs and [distribute] the assets of the company' (s.258(1) CA 1963).

The assets of a company being wound up are to be applied in the following order:

- Secured creditors holding fixed charges and mortgages;
- Expenses incurred in the winding up including the liquidator's costs
- Preferential creditors who all rank equally
  Section 285 Companies Act 1963 sets out what are to be treated as preferred payments and these are essentially: local authority rates; capital and income taxes levied by Revenue; employees' wages and holidays payments; social welfare contributions; compensation and damages for uninsured accidents to employees; sickness and pension payments in respect of employees; unfair dismissal claims; minimum notice claims; and redundancy payments.
- Creditors secured by a floating charge
- Ordinary unsecured creditors
  This category is the one that stands to lose most. It comprises the customers and trade creditors of the company. As creditors, they rank equally but, as is likely, if the company cannot fully pay its debts, they will receive an equal proportion of what is available.
- The deferred debts of the company
  These are debts owed to the members as members, for example, dividends declared but not paid.
- Members' capital
  After the debts of the company are paid, the members are entitled to the return of their capital, depending on, and in proportion to, the provisions of the articles of association.

Any remaining surplus is distributed amongst the members, subject to the rights given in the articles of association or other documents.

Once the official liquidator has performed these functions, he must call a final meeting of the creditors, at which he gives an account of the liquidation and secures his release from the creditors. Finally, the official liquidator of any insolvent company is obliged to make a report to the Director of Corporate Enforcement on the conduct of the directors of insolvent companies and, unless advised otherwise, must apply to have the directors restricted under s.150 CA 1990 (s.56 of the Company Law Enforcement Act 2001).

8 This problem, in relation to the consequences following from breach of contract, can clearly be divided into two distinct elements, each of which requires a consideration of a specific aspect of the law relating to the payment of damages for breach of contract.

(a) Az Ltd, Blud and the measure of damages

The first element to be considered relates to the 'quantum or measure (i.e. the amount) of damages' that can be claimed by the party who suffered as a result of the breach of contract, and, of course, collaterally, the amount to be paid by the party actually in breach of the contract. 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 usual aim of the award of damages is to put the injured party in the same position they would have been in had the contract been properly performed (expectation loss). To this end the duty to mitigate losses ensures that the injured party is under a duty to take all reasonable steps to minimise their loss. As a result, the seller of goods which are not accepted has not only to try to sell the goods to someone else, but is also required to get as good a price as they can when they sell them (*Payzu* v *Saunders* (1919)). A subset of this rule, referred to as the market rule, requires that if goods are not delivered under a contract, the buyer is entitled to go into the market and buy similar goods, paying the market price prevailing at the time. They can then claim the difference in price between what they paid and the original contract price as damages. Conversely, if a buyer refuses to accept goods under a contract, the seller can sell the goods in the market and accept the prevailing market price. Any difference between the price they receive and the contract price, and only any such difference, can be claimed in damages.

In England in *Omak Maritime Ltd* v *Mamola Challenger Shipping Co* (2010) it was held that any money recovered by way of mitigation, following a breach of contract, must be taken into account when assessing the claimant's loss. The fundamental principle is that the claimant's actual position after mitigation must be compared to what it would have been had the contract been performed. In making such a comparison, any benefits received must be set off against the loss incurred from the original breach.

In *Western Web Offset Printers Ltd* v *Independent Media Ltd* (1995), the parties had entered into a contract under which the plaintiff was to publish 48 issues of a weekly newspaper for the defendant. In the action, which followed the defendant's repudiation of the contract, the only issue in question was the extent of damages to be awarded. The Court of Appeal decided that as the claimant had been unable to replace the work due to the recession in the economy and, therefore, had not been able to mitigate the loss, it was entitled to receive the full amount that would have been due in order to allow it to defray the expenses it would have had to pay during the period the contract should have lasted.

In Ireland, in *Bord Iascaigh Mhar*a v *Scallan* (1973), the defendant, who hired a boat from the plaintiff, failed to return it and abandoned it in a harbour for the plaintiff's collection. The plaintiff did not collect the boat for nine months. In an action for damages, the court held that the plaintiff's failure to recover the boat and attempt to rehire it constituted a failure to mitigate its loss. However, in relation to anticipatory breach of contract the injured party can wait until the actual time for performance before taking action against the party in breach. In such a situation, they are entitled to make preparations for performance, and claim the agreed contract price, even though this apparently conflicts with the duty to mitigate losses (*White and Carter (Councils)* v *McGregor* (1961)) and *Hochster* v *De La Tour* (1853)).

Applying the foregoing to the contract between Az Ltd and Blud, it can be seen that Az Ltd managed to recoup all of the costs and potential profit it would have made on the contract with Blud, so is not in a position to claim any further damages from Blud.

(b) Az Ltd, Cam and liquidated damages

The second aspect of the problem scenario relates to the issue of 'liquidated damages' and the validity of such procedures to predetermine the extent of any damages following from a breach of the underlying agreement.

It is common in business contracts for the parties to make provisions for possible breach by stating in advance the amount of damages that will have to be paid in the event of any breach of contract. This procedure is known as liquidated damages. However, such provisions will only be recognised by the court if they represent a genuine pre-estimate of loss and are not intended to operate as a penalty against the party in breach. If the court considers the provision to be a penalty, it will not give it effect but will assess and award damages in the normal way. In *Dunlop* v *New Garage & Motor Co* (1915), the plaintiffs supplied the defendants with tyres, under a contract designed to achieve resale price maintenance. The contract provided that the defendants had to pay Dunlop £5 for every tyre they sold in breach of the resale price agreement. When the garage sold tyres at less than the agreed minimum price, they resisted Dunlop's claim for £5 per tyre, on the grounds that it represented a penalty clause. On the facts of the situation, the court decided that the provision was a genuine attempt to fix damages, and was not a penalty. It was, therefore, enforceable. This was approved in Ireland in *Irish Telephone Rentals Ltd* v *Irish Civil Service Building Society* (1972) and *Truck & Machinery Sales* v *O'Donnell & Co* (1998). In *Irish Telephone Rentals Ltd*, a telephone service contract provided that, if the defendant repudiated the contract, it would be required to pay all rentals for the balance of the contract period, subject to a 5% allowance being given on immediate payment of the balance, and a 25% discount being made because of the savings to the plaintiff on the costs of maintaining the system. The court held that to charge 70% of the total cost was excessive because the plaintiff had not endeavoured to calculate the actual loss and had failed, for example, to give a discount that would reflect the salary amounts that it would not be required to pay to its maintenance staff.

In England in *Azimut-Benetti SpA* v *Darrell Marcus Healey* (2010) the court upheld a very onerous liquidated damages clause which, as in this scenario, was triggered by termination of a ship building contract. In that case the liquidated damages clause provided that, in the event of lawful termination, Azimut would be entitled to retain and/or recover an amount equal to 20% of the contract price. When Shoreacres, a company wholly owned by the defendant, failed to pay the first instalment, Azimut terminated the contract, and sought summary judgement for €7·1 million, 20% of the contract price. The court held that, on the facts of the case, the provision was 'not even arguably' a penalty clause: and read as a whole, it represented a commercially justifiable balance between the parties' interests. Consequently the €7·1 million had to be paid.

Applying *Azimut-Benetti SpA* v *Darrell Marcus Healey* to the facts of the scenario it can be concluded that, although the damages claimed appear extremely high, especially in relation to the early date of the breach, provided that they are not punitive *per se*, they are likely to be adjudicated to be a genuine contractual pre-estimate rather than a penalty clause and so will be recognised as such and awarded by a court in any resultant court action.

9 Employees are people working under a contract of service. Those who work under a contract for services are independent contractors. They are not employees, but are self-employed. It is essential to distinguish the two categories clearly, because important legal consequences follow from the placing of a person in one or other of the categories. For example, although employees are protected by various common law and statutory rights in relation to their employment, no such wide scale protection is offered to the self-employed.

The courts have developed tests for distinguishing the employee from the self-employed.

The first test is the control test. In using this test the key element is the degree of control exercised by one party over the other. The question to be determined is the degree to which the person who is using the other's services actually controls, not only what they do, but how they do it. In *Roche* v *Kelly* (1968), Walsh J said that 'the principle and determining test is the master's right to direct servants as to what is to be done and how to do it'.

The control test looks back to and reflects previous master/servant relationships of employment, but its main shortcoming lay in its lack of any degree of subtlety. Highly skilled professionals, such as surgeons, by necessity have a high level of control over how they perform their day-to-day work, but the consequence of that, at least under the control test, was that they were deemed to be self-employed rather than employees, and patients who had suffered as a consequence of negligence would only be able to sue the doctor rather than the Health Authority which used their services. This was seen in *O'Friel* v *St Michael's Hospital* (1982) where the court held that hospital administrators could not exercise control over how a consultant surgeon did his work and the very title of consultant surgeon implied the contrary to employment. Such weakness in the control test led to the courts developing a more subtle test.

The integration test shifted the emphasis from the degree of control exercised over an individual to the extent to which the individual was integrated into the business of their putative employer. This test was first stated in *Stevenson* v *MacDonald and Evans* (1952) and was applied in *In re Sunday Tribune Ltd* (1984) in relation to three individuals. One individual wrote for the newspaper on a regular basis and wrote on subjects suggested by him and accepted by the editor or on subjects as directed by the editor. His fee was determined by reference to a collective agreement with the National Union of Journalists. Applying the integration test, the court held that he was not an employee. A second individual, who wrote a weekly column 50 weeks of the year and who received holiday pay was an employee. A third individual, described as a sub-editor who did shift-work on a part-time basis was also an

employee. However, even the integration test was not without problems, as some employers attempted to give the impression of using a self-employed workforce whilst effectively still controlling what that workforce did.

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

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

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

Finally, the 'enterprise' test was developed in *Market Investigations Ltd* v *Minister for Social Security* (1969), which is similar to the mixed test except that the question considered by the court is, 'is the person who has engaged himself to perform the services performing them as a person in business on his own account?'. Again, rather than relying on one single factor, this test uses a more general assessment of any particular case in order to decide whether someone is an employee. In so deciding, the courts will not be bound by how the parties themselves describe the relationship. Thus, it is immaterial that the agreement between the parties states that someone is to be self-employed; if the indications are otherwise, then the person will be recognised, and treated, as an employee.

Market Investigations Ltd contracted several persons for short periods to carry out surveys on several occasions. The persons contracted could specify exactly when and where they wish to work and were not given holiday pay. However, applying the enterprise test to the facts that the company specified the persons to be interviewed, the questions to be asked and how the answers were to be recorded, the court was satisfied that an interviewer was not in business on her own account and was therefore an employee.

The same test and principles were applied in *Denny Foods* v *Minister for Social Welfare* (1998). Demonstrators of merchandise products in supermarkets were deemed employees despite the fact that they worked unsupervised, were not paid a salary and received no holiday or sick pay. Instead, after each demonstration, the demonstrator would get the manager of the relevant supermarket to sign an invoice, which the demonstrator would then submit to the plaintiff company for payment.

In deciding whether or not here is a contract of employment the courts tend to focus on such issues as whether wages are paid regularly or by way of a single lump sum; whether the person receives holiday pay; and on who pays the due national insurance and income tax. However, there can be no definitive list of tests as the whole point of the multiple test is that it examines all aspects of the situation in order to reach a determination.

Looking at the circumstances it can be seen that the manner in which they paid tax might indicate that they were self-employed, but the fact that Dan provided them with their equipment suggests that they were employees. In the final analysis the most significant factor would appear the degree to which Dan controlled them. Eve had to work for Dan only and on his premises, whereas Fred not only was allowed to work for others but, most importantly, he was also allowed to use others to do his work for Dan. This suggests clearly that Fred was not employed by Dan, although Eve was.

Such a conclusion would allow Eve to make a claim for redundancy on the basis that she was dismissed on the grounds that her skills were no longer required by her employer. Fred, however, is unlikely to succeed in a claim for redundancy.

Employees who have been dismissed by way of redundancy are entitled to claim a redundancy payment from their former employer. Redundancy is defined in s.7(2) Redundancy Payments Act, 1967, 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.'

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 after the age of 18 years. Furthermore, it is necessary to establish that s/he was dismissed for reason of redundancy and s.9(1) of the 1967 Act provides that dismissal occurs if:

(a) a contract of employment is terminated by the employer (with or without notice); or
(b) a fixed term 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) above 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.

The Third Schedule to the Redundancy Payments Act, 1967, states the method in which redundancy pay is calculated as follows:

(1) Half a week's pay for each continuous year between the ages of 16 and 41;
(2) Plus one week's pay for each continuous year over the age of 41;
(3) Plus one week's pay.

A week's pay is the normal weekly remuneration.

10 (a) The first part of this question requires a consideration of the situation of the various parties, in order to determine their status in relation to Just Ltd, which in turn will decide the nature and extent of their liability under the companies legislation.

From the problem scenario, it is apparent that, although not appointed as a director, Ger is concerned in the management of Just Ltd, as the others, Ham, Ive and Kim all follow his instructions. In law, the fact that he controls the operation of the business makes him a shadow director of the company as provided for in s.27 Companies Act (CA) 1990. This means that he is subject to all the rules and liabilities that apply to properly appointed directors.

Both Ham and Ive were actually appointed as directors so their status as such is clear.

Although Kim was not appointed as a director, he effectively ran the business, subject to Ger's instructions. As a consequence it is likely that he would be treated as a *de facto* director and subject to the full panoply of rules and regulations that directors are subject to.

(b) As the question scenario clearly states that Just Ltd was set up to run a fraudulent business and that Lyn suffered as a result of the fraud, it is unnecessary to pursue the issue of establishing fraud, as it can be taken as a given. Section 297 CA 1963 creates the criminal offence of fraudulent trading, which applies to any or all of Ger, Ham, Ive and Kim in these circumstances, as it appears that they have knowingly been parties to carrying on the company's business with intent to defraud creditors. The criminal aspect of s.297 applies whether or not the company is in the course of being wound up and renders all the parties liable to a fine and/or imprisonment for up to seven years, if tried and convicted on indictment.

Section 297 CA 1963, also provides civil liability for fraudulent trading. Consequently, all four parties involved, Ger, Ham, Ive and Kim, will be liable to contribute to the company's assets to pay off creditors such as Lyn, in the event of its being wound up. It should be noted that s.297 CA does not only apply to directors, but to any person who has been party to the fraudulent trading, which clearly all four have.

A further issue in addition to the fraud, is the way in which Just Ltd has been used to avoid Ger's previous disqualification under the CA 1990.

The CA 1990 was introduced in an attempt to prevent the misuse of the company form by unscrupulous individuals looking to hide behind the corporate personality of the company to avoid personal liability for their actions. Section 160 CA refers to those who have been found guilty of the crime of fraud in the operation of companies. It also covers those who have been liable for fraudulent trading under s.297 CA 1963. In either event, the individual concerned is disqualified from acting as a company director for five years from the date of conviction, or such other period as the court, on the application of the prosecutor and having regard to all the circumstances of the case, may order. In the event, Ger was disqualified for a period of 10 years for his previous fraudulent activity (his disqualification would have prevented him from in any way, whether directly or indirectly, being concerned or taking part in the promotion, formation or management of a company). He, however, decided to circumvent the disqualification by establishing Just Ltd under the apparent control of Ham, Ive and Kim. Such a blatant attempt to avoid the effects of the banning order is, not surprisingly, covered by the provisions of the CA 1990. Thus s.161 makes it a criminal offence for anyone to act in contravention of a disqualification order. Any such person is liable for the following penalties:

– imprisonment for up to five years and/or a fine, on conviction on indictment, and
– imprisonment for up to 12 months and/or a fine not exceeding 1,904·61, on summary conviction

Furthermore, the period of disqualification is extended for a further period of ten years from the date of conviction or such further period as the court may, on the application of the prosecutor and having regard to all the circumstances of the case, may order (s.161(3) CA 1990).

Consequently, Ger will be liable to conviction and sentencing under the criminal law, but in addition he will face potential civil liability, as s.163(3) provides that if a disqualified director becomes involved in a company and that company goes into insolvent liquidation, then, on the application of a liquidator or creditor, the court can make the disqualified director personally liable without any limitation for the debts of the company incurred in the period in which the disqualified director was so acting.

If Ger is clearly liable for both criminal and civil action to be taken against him, it remains to consider the responsibility under the CA 1990 of the other three parties in the operation of Just Ltd. There may be a distinction in the formal roles of the three, with Ham and Ive being *de jure* directors and Kim a *de facto* director. Either way, s.164(1) CA 1990 makes it an offence for an 'officer' to act in accordance with the directions or instructions of a disqualified director whom the officer knows to be disqualified, and this section is deemed to apply to 'a director or other officer or a member of a committee of management or trustee of any company'. Section 165(1) CA 1990 provides that a person who is convicted of an offence under s.164 (i.e. for acting in accordance with the directions or instructions of a disqualified person shall, subject to s.165(2) be deemed personally liable for the debts of the company that were incurred during the period in which s/he was so acting.

In conclusion, Lyn can be assured that the assets of Just Ltd and the personal wealth of Ger, Ham, Ive and Kim are available to pay any debts owed by Just Ltd to her.

1 This question requires candidates to consider the doctrine of precedent and in particular to explain two particular aspects of that doctrine.

(a) 6–7 marks A thorough to complete answer, describing and explaining the effect of the court hierarchy.

4–5 marks A less than complete answer, probably unbalanced, focusing only on one aspect of the question, or lacking in explanation.

2–3 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.

(b) 3 marks Thorough treatment of the topic. Clearly explaining the meaning of the two types of precedent.

2 marks Less thorough answer, but showing a reasonable understanding of the topic of precedent.

0–1 mark Weak answer, perhaps showing some knowledge but little understanding of the topic generally.

2 This question requires candidates to explain the concept of 'invitation to treat'. Part (a) raises the concept generally while part (b) deals with the related concept of an invitation for tenders.

(a) 5–7 marks A thorough answer explaining the meaning of invitation to treat together with either examples or cases to highlight the explanation.

2–4 marks Some general knowledge of the topic, but perhaps lacking in detail or cases/examples in support of the explanation.

0–1 mark Little, if any, knowledge of the concept or rules relating to an invitation to treat.

(b) 2–3 marks Good to complete account of tenders, distinguishing between the possible types.

0–1 mark Little, if any, knowledge of the topic.

3 This questions requires candidates to explain the meaning and effect of two terms used in defences to the tort of negligence.

8–10 marks Thorough explanation of the meaning and effect of both elements of the question. Cases or examples will be expected to gain full marks.

5–7 marks Reasonable explanation of both concepts but perhaps lacking in detail or cases authority.

3–4 marks Some but limited knowledge of both elements or only dealing with one of them.

0–2 marks Very unbalanced answer, lacking in detailed understanding.

4 This question asks candidates to explain the three terms that might be found at the end of the names of different business forms.

(a) 3–4 marks Good to complete answer which shows a knowledge of the meaning and effect of the term LLP.

1–2 marks Some knowledge of the meaning of LLP, but lacking in detail or an unbalanced answer not dealing with all the parts.

0 marks No knowledge whatsoever.

(b) 2–3 marks Good to complete answer which shows a knowledge of the meaning and effect of the term Ltd.

0–1 mark Little, if any, knowledge of the meaning of Ltd, but lacking in detail or an unbalanced answer not dealing with all the parts.

(c) 2–3 marks Good to complete answer which shows a knowledge of the meaning and effect of the term plc.

0–1 mark Little, if any, knowledge of the meaning of plc, but lacking in detail or an unbalanced answer not dealing with all the parts.

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

8–10 marks Full understanding and explanation of the various forms of investment. In order to secure full marks, candidates must consider the rights attached to each form.

5–7 marks Lacking in detail in some or all aspects of the possible investment forms. Unbalanced answer that only focuses on some of the forms.

3–4 marks Some, but little, knowledge of the topic.

0–2 marks Little, if any, knowledge of the topic.

6 This question requires candidates to consider the way in which resolutions are voted on in companies. Parts (a)–(b) require candidates to explain the rules relating to ordinary and special resolutions and part (c) requires consideration of the procedure which permits private companies to operate on the written resolution procedure.

8–10 marks A good explanation of the distinct types of resolutions with a clear emphasis on written resolutions.

5–7 marks A good treatment of all of the types, but perhaps lacking in detail generally or specifically lacking in relation to one or more parts.

2–4 marks Some awareness of the area, but lacking in detailed knowledge.

0–1 mark Demonstrating very little, if any, understanding of what is actually meant by the types of resolutions.

7 This question is in two parts, each carrying 5 marks. Part (a) requires candidates to explain the meaning of the term 'compulsory winding up', while part (b) requires an explanation of the grounds under which such a procedure can be instituted.

(a) 4–5 marks A thorough explanation of compulsory winding up generally.

2–3 marks Some, if little, knowledge of compulsory winding up. Perhaps too general or lacking in focus on the compulsory procedure.

0–1 mark Very little, if any, knowledge of the topic.

(b) 4–5 marks A thorough explanation of the grounds for compulsory winding under s.212 Companies Act 1963.

2–3 marks Some knowledge of the grounds for compulsory winding up, although perhaps not clearly expressed, or very limited in its knowledge and understanding of the topic.

0–1 mark Very little, if any, knowledge of the topic.

8 (a) The first element to be considered relates to the 'quantum of damages' that can be claimed by the party who suffered as a result of the breach of contract.

4–5 marks Full treatment of the issue of measure of damages together with supporting examples or cases. The actual outcome is not required to be as in the answer, as long as the answer considers all the points.

2–3 marks Fair analysis and treatment of the legal implications of the scenario, but perhaps lacking in detail or application.

0–1 mark Little, if any, knowledge or application of the appropriate legal principles.

(b) The second aspect of the problem scenario relates to the issue of 'liquidated damages' and the validity of such procedures to predetermine the extent of any damages following from a breach of the underlying agreement.

4–5 marks Full treatment of the issue of liquidated damages together with supporting examples or cases. The actual outcome is certainly not required to be as in the answer, as long as the answer considers all the points.

2–3 marks Fair analysis and treatment of the legal implications of the scenario, but perhaps lacking in detail or application.

0–1 mark Little, if any, knowledge or application of the appropriate legal principles.

9 This question requires candidates to analyse a scenario in order to determine whether or not the parties are employees and consequently whether they can claim the benefits of employment legislation.

8–10 marks	Accurate knowledge of the legal principles involved linked to a sound application of those principles. It is highly unlikely that marks at this level could be achieved without reference to the cases, although it is possible nonetheless.
5–7 marks	Sound knowledge of the law but perhaps lacking in application or alternatively not showing a sufficiently clear understanding of the legal principles involved.
2–4 marks	Weak or unbalanced answer. Perhaps aware of the nature of the problem but lacking in clear knowledge of the law or deficient in relation to how those principles should be applied.
0–1 mark	Very weak answer demonstrating little if any knowledge of the topic.

10 This question requires candidates to analyse a scenario in order to determine the status of the parties in relation to the operation of the company. It also requires a consideration of their potential liability under the appropriate provisions of the companies legislation.

(a)

3–4 marks	A good explanation of the status of the various parties, explaining their positions as either *de facto* or *de jure* directors.
1–2 marks	Some but limited awareness of the law relating to the status of the parties as directors.
0 marks	No knowledge of the subject area.

(b)

5–6 marks	A good to full explanation of the liability of all of the parties under the Companies Acts 1963 and 1990.
3–4 marks	Some knowledge of the appropriate law, but perhaps lacking in detail or application as relates to the operation of the provisions of the Acts.
0–2 marks	Weak answer lacking detailed knowledge of the topic.