Answers

1 (a) Statutory interpretation

In order to apply any piece of legislation, judges have to determine its meaning. In other words, they are required to interpret the statute before them in order to give it meaning. The difficulty, however, is that the words in statutes do not speak for themselves and interpretation is an active process, and at least potentially a subjective one depending on the situation of the person who is doing the interpreting.

Judges have considerable power in deciding the actual meaning of statutes, especially when they are able to deploy a number of competing, not to say contradictory, mechanisms for deciding the meaning of the statute before them. There are, essentially, two contrasting views as to how judges should go about determining the meaning of a statute – the restrictive, literal approach and the more permissive, purposive approach.

(b) The literal approach

The literal approach is dominant in the Irish legal system, although it is not without critics, and devices do exist for circumventing it when it is seen as too restrictive. This view of judicial interpretation holds that the judge should look primarily to the words of the legislation in order to construe its meaning and, except in the very limited circumstances considered below, should not look outside of, or behind, the legislation in an attempt to find its meaning.

Within the context of the literal approach there are two distinct rules:

(i) **The literal rule**

Under this rule, the judge is required to consider what the legislation actually says rather than considering what it might mean. In order to achieve this end, the judge should give words in legislation their literal meaning, that is, their plain, ordinary, everyday meaning, even if the effect of this is to produce what might be considered an otherwise unjust or undesirable outcome (*Fisher* v *Bell* (1961) in which the court chose to follow the contract law literal interpretation of the meaning of offer in the Act in question and declined to consider the usual non-legal literal interpretation of the word (offer)). In *Whitley* v *Chapell* (1868), the legislation under consideration made it an offence to impersonate any person *entitled* to vote. The accused had actually impersonated a dead person and was found not guilty, as a dead person was not entitled to vote.

(ii) **The golden rule**

This rule is applied in circumstances where the application of the literal rule is likely to result in what appears to the court to be an obviously absurd result. It should be emphasised, however, that the court is not at liberty to ignore, or replace, legislative provisions simply on the basis that it considers them absurd; it must find genuine difficulties before it declines to use the literal rule in favour of the golden one. As examples, there may be two apparently contradictory meanings to a particular word used in the statute, or the provision may simply be ambiguous in its effect. In such situations, the golden rule operates to ensure that preference is given to the meaning that does not result in the provision being an absurdity. In *Adler* v *George* (1964), the defendant was found guilty, under the Official Secrets Act 1920, with obstruction 'in the vicinity' of a prohibited area, although she had actually carried out the obstruction 'inside' the area. Also *R* v *Allen* (1872) concerned the Offences Against the Person Act, 1861, which makes it an offence for one to marry while already married. Given that any such subsequent marriage would be void, the court interpreted the Act as prohibiting a married person from going through a form of marriage with another person.

(c) The purposive approach

The purposive approach rejects the limitation of the judges' search for meaning to a literal construction of the words of legislation itself. It suggests that the interpretative role of the judge should include, where necessary, the power to look beyond the words of statute in pursuit of the reason for its enactment, and that meaning should be construed in the light of that purpose so as to give it effect. This purposive approach is typical of civil law systems. In these jurisdictions, legislation tends to set out general principles and leaves the fine details to be filled in later by the judges who are expected to make decisions in the furtherance of those general principles.

European Union (EU) legislation tends to be drafted in the civil law manner. The need to interpret such legislation has forced a change in that approach adopted by Irish courts in relation to EU legislation and even with respect to domestic legislation designed to implement EU legislation. Thus, in *Pickstone* v *Freemans plc* (1988), the House of Lords held that it was permissible, and indeed necessary, for the court to read words into inadequate domestic legislation in order to give effect to EU law in relation to provisions relating to equal pay for work of equal value.

However, it has to recognised that the purposive rule is not particularly modern and has its precursor in a long established rule of statutory interpretation, namely the mischief rule. (For a similar approach, see also the House of Lords' decision in *Litster* v *Forth Dry Dock* (1989) and the decision in *Three Rivers DC* v *Bank of England (No 2)* (1996).)

The mischief rule

This rule permits the court to go behind the actual wording of a statute in order to consider the problem that the statute is supposed to remedy.

In its traditional expression, it is limited by being restricted to using previous common law rules in order to decide the operation of contemporary legislation. Thus in *Heydon's case* (1584), it was stated that in making use of the mischief rule, the court should consider what the mischief in the law was which the common law did not adequately deal with and which statute law had intervened to remedy. Use of the mischief rule may be seen in *Corkery* v *Carpenter* (1950), in which a man was found guilty of being drunk in charge of a carriage although he was in fact only in charge of a bicycle.

2 This question invites candidates to examine the law relating to consideration in contract law.

(a) Consideration

Irish law does not enforce every promise which is made. One way in which the courts limit the type of promise that they have to deal with is through the operation of the doctrine of consideration. Irish law does not enforce gratuitous promises, i.e. promises given for no return, unless of course such promises are given by way of a formal deed. For a simple promise to be enforceable in a court of law, it is necessary that the person to whom the promise was made, the promisee, should have done something in return for the promise from the promisor. That something done in return for a promise is consideration and can therefore be understood as the price paid for a promise. The element of bargain implicit in the idea of consideration may be seen in Sir Frederick Pollock's definition of it, subsequently adopted by the House of Lords in *Dunlop* v *Selfridge* (1915), as:

'An act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable.'

An alternative, and shorter, definition of consideration is 'some benefit to the promisor or detriment to the promisee.' It is important to note that it is not necessary for both elements in the definition to be present to support a legally enforceable agreement. Although in practice there usually is a reciprocal exchange of benefit and detriment, it is nonetheless possible for a promisee to provide consideration for a promise without their action directly benefiting the promisor. As long as the promisee acts to their detriment, it is immaterial whether that act actually benefits the promisor or not. The promisee will still have provided consideration and the promise made to elicit the promisee's action will be legally enforceable against the promisor.

(b) Consideration can be divided into the following categories:

(i) Executory consideration is the promise to perform an action at some future time. One party to a contractual agreement may pay money to another on the understanding that the latter will perform some act for them in the future. Or alternatively, they might provide an immediate benefit for the other party on the understanding that the latter will provide a reciprocal benefit in the future. Contracts may also be made solely on the basis of an exchange of promises as to future action, without the need for any present action. In such circumstances, the mere promises provide mutual/reciprocal consideration and any such agreement entered into is legally binding and enforceable in a court of law. Such a contract is known as an executory contract.

(ii) Executed consideration, as may be gathered from the term, refers to consideration which has actually been carried out, thus making the promise for which it was performed enforceable. In the case of unilateral contracts, where the offeror promises something in return for the offeree's doing something, the original promise only becomes enforceable when the offeree has actually performed the required act. The action requested does not have to be performed but once it is done the original promise then becomes legally enforceable. For example, if A offers a reward for the return of their lost dog, the reward only becomes enforceable once it has been found and returned to them.

(iii) Past consideration does not actually count as valid consideration. Consequently, no agreement resting on past consideration is legally enforceable. Normally, consideration is provided either at the time of the creation of a contract or at a later date. In the case of past consideration, however, the action done is performed before the promise. Such prior action is not deemed sufficient to support the later promise. Thus in *Re McArdle* (1951), a number of children were entitled to a house on the death of their mother. Whilst the mother was alive, a son and his wife had lived with her, and the wife made various improvements to the house. The children later promised that they would pay the wife £488 for the work she had done. It was held that as the work was completed before the promise was given, it was past consideration and the later promise could not be enforced.

There are exceptions to the rule that past consideration will not support a valid contract. For example, where the promisee performed the action at the request of the promisor and payment was expected, then any subsequent promise to pay will be enforceable. Thus in *Re Casey's Patents* (1892), the joint owners of patent rights asked Casey to find licensees to work the patents. After Casey had done as requested, they promised to reward him. When one of the patent holders died, his executors denied the enforceability of the promise made to Casey on the basis of past consideration. It was held that the promise made to Casey was enforceable on the basis that there had been an implied promise to reward him before he had performed his action. The later promise merely fixed the extent of that reward.

3 (a) 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.

The test for establishing whether a duty of care exists was initially set out in *Donoghue* v *Stevenson* (1932), the snail in the ginger beer bottle case. In putting forward the test to establish a duty of care, Lord Atkin stated that:

‘You must take reasonable care to avoid acts and omissions which you could reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? … any person so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts and omissions which are called in question.’

It can be seen that this neighbour test for deciding the existence of a duty of care is an objective, rather than a subjective, one. It is not a matter of what the respondent actually considered, but what they ought to have considered. Nor does the test require the contemplation of the resultant effect on the specific individual injured, but merely requires that identity of a class of individuals who might be injured as a consequence of the respondent’s lack of care.

The idea of the neighbour, or proximity, test was extended in *Hedley Byrne* v *Heller* (1964), which established the possibility of liability for negligent misrepresentation causing economic loss, where a party gave inaccurate advice or information to another party, within a special relationship, and that party subsequently and reasonably relied on it.

In *Caparo Industries plc* v *Dickman* (1990), a three stage test for establishing a duty of care was recommended. This requires consideration of the following questions:

– Was the harm caused reasonably foreseeable?
– Was there a relationship of proximity between the defendant and the claimant?
– In all the circumstances, is it just, fair and reasonable to impose a duty of care?

The present position appears to be that in establishing the existence of a duty of care in negligence, an incremental approach must be taken. The claimant must show that the defendant foresaw that damage would occur to the claimant, that is, that there was sufficient proximity in time, space and relationship between the claimant and the defendant. In practical terms, foreseeability of damage will determine proximity in the majority of personal injury cases. The courts will then, where appropriate, consider whether it is just and reasonable to impose a duty and whether there are any policy reasons for denying or limiting the existence of a duty, for example, under the floodgates argument. It seems that *Caparo* introduced a third element into liability for negligence in addition to reasonable foreseeability and proximity, namely reasonableness in the imposition of a duty of care. That principle has been endorsed, albeit *obiter*, by Keane C.J. in the Supreme Court in *Glencar Explorations plc* v *Mayo County Council (No. 2)* (2002). See also the subsequent Supreme Court decision in *Wildgust* v *Bank of Ireland* (2006).

(b) 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 his particular trade or activity. For example, a learner driver must drive in the manner of a driver of skill, experience and care (*Nettleship* v *Weston* (1971)). 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 the 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 his duty. It follows, therefore, that the greater the risk of injury or the more likely it is to occur, the more the defendant will have to do to fulfil his duty. 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. Likewise in *Healy* v *Bray UDC* (1962), in which the plaintiff was caused injury when she was hit by a dislodged rock which rolled down a hill and through a gap in a wall, the Council was held not to be negligent because the court considered that the combination of the unlikely events reduced the risk to minute proportions.

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

(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 (*Bolam* v *Friern Hospital Management Committee* (1957)).

4 This question requires candidates to explain the concept of limited liability and to consider three alternative categories of companies; the first unlimited in nature, whilst the second and third are limited in different ways.

(a) In this context, liability refers to the extent to which shareholders in companies are responsible for the debts of their companies and limited liability indicates that a limit has been placed on such liability. The point is that the limitation on liability is enjoyed by the member shareholders rather than the company. One of the major advantages of forming a company is that the members of the company may achieve limited liability. The great majority of registered companies are limited liability companies. This means that the maximum liability of shareholders is fixed and cannot be increased without their agreement. There are two ways of establishing limited liability in relation to a registered company.

Members of ordinary partnerships, formed under the Partnership Act 1890, do not have the advantage of limited liability and are personally liable for any partnership debts. However, non-active members of partnerships formed under the Limited Partnerships Act 1907 may benefit from limited liability, as long as they do not get involved in the operation of the business.

(b) Section 33 Companies Act 1963 sets out the various types of companies which can be registered in terms of different liabilities.

(i) Companies can be formed without limited liability. These are referred to as unlimited companies. Such companies are incorporated under the Companies Acts and receive all the benefits which flow from incorporation except limited liability. Consequently, the shareholders in such unlimited companies remain liable to the full extent of their personal wealth for any unpaid debt of the company. It should be noted that, in line with the doctrine of separate personality, even in the case of unlimited companies, any subsequent debt is owed to the company and not directly to the creditors of the company. The compensating benefit enjoyed by such companies is that they do not have to submit their accounts and make them available for public inspection.

(ii) The company limited by guarantee is restricted to private companies of a non-trading kind such as charities and professional and educational bodies. It limits the members' liability to an agreed amount which is only called on if the company cannot pay its debts on being wound up. In reality, the sum guaranteed is usually a nominal sum, so no real risk is involved on the part of the guarantor.

(iii) The more common procedure is to limit liability by reference to shares. The effect of this is to limit liability to the amount remaining unpaid on shares held. If the shareholder has paid the full nominal value of the shares to the company, then that is the end of responsibility with regard to company debts. Consequently, if the company should subsequently go into insolvent liquidation, the shareholders cannot be required to contribute to its assets in order to pay off its outstanding debts. Both private and public companies can be formed on this basis.

5 The Companies Act (CA) 1990 was introduced to control individuals who persistently abused the various privileges which accompany incorporation, most particularly the privilege of limited liability. Control is achieved by restriction and disqualification orders.

Under s.150 CA 1990, an individual, who has been a director of an insolvent company in the 12 months prior to the commencement of its liquidation, will be restricted from acting as a director or secretary for up to 5 years unless the court is satisfied that the director acted honestly and responsibly in relation to the company's affairs and that there is no other reason why it would be just and equitable that they should be subject to it (see *re La Moselle Clothing Ltd* (1998)). While subject to such an order, the director can only act as a director of a company which meets specific minimum capital requirements and that company loses certain rights which it would otherwise have under the Companies Act, e.g. it cannot avail of the exceptions in s.60 Companies Act, 1963, which permit the provision of certain financial assistance for the purpose of purchasing shares in the company. A director who breaches a restriction order may be made the subject of a disqualification order for five years (s.161 CA 1990).

Section 160 CA 1990 provides for disqualification orders. A disqualification order prohibits a person from being appointed, or acting as a company director or secretary, or from being directly or indirectly concerned with, or participating in, the management, promotion or formation of a company.

If, in breach of a restriction order made under s.150 CA 1990 or a disqualification order made under s.160 CA 1990, a person acts as a director, the company of which they are a director may recover any money paid to that person as a contract debt (s.160(2)).

In addition, if the company of which the person is a director goes into an insolvent liquidation in circumstances where that person is, or has been, a director within the preceding year, the director may be held personally liable for all or a portion of the company's debts (s.160(3)).

An application may be made to court for the making of a disqualification order where a director has been:

(i) convicted of an indictable offence in relation to the company, or fraud, dishonesty while a promoter, officer, auditor, receiver or liquidator of the company (s.160 CA 1990);

(ii) convicted of acting as such while they were subject to a restriction order (s.161 CA 1990);

(iii) found guilty of fraudulent trading (s.297 CA 1963). This arises where, in the course of a winding up, it transpires that the business of the 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 the 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;

(iv) found guilty of reckless trading (s.297A(1) CA 1963). A person may be liable for reckless trading where, in the course of a 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. Section 297A(2) gives examples of reckless trading. First, it applies to an officer who is a party to the carrying on of such business and, having regard to the general knowledge, skill and experience which may reasonably be expected of a person in their position, they ought to have known that their actions, or those of the company, would cause loss to the creditors of the company. Second, it applies to an officer of the company, who 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 its other debts;

(v) convicted of acting as a promoter, officer, auditor, receiver or liquidator while an undischarged bankrupt (s.169 CA 1990).

Under s.160, the High Court may make a disqualification order for a period of five years against a director who has been convicted of an indictable offence in relation to the company. Section 161 CA 1990 makes it a criminal offence to breach a disqualification order. This breach is punishable by a fine and/or imprisonment and the court may extend the disqualification order for a further period of up to ten years. A disqualification order was made in *Re Connelly Commissions Ltd* (1992), in which case the directors refused to compile annual accounts or hold an annual general meeting notwithstanding the fact that they had been directed by the court to do so.

6 **(a)** The Companies Act (CA) 1963 sets out the method for forming a company, which is that one or more persons must subscribe their name to a memorandum of association and comply with the requirements of the provisions of the Act as to registration. Under s.17, two documents must be delivered to the Registrar: the memorandum of association and the application for registration. In addition, the application for registration is completed by means of Form A1.

The memorandum mainly governs the company's external affairs. Amongst the clauses required to be contained in a company's memorandum of association are the following:

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

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

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

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

In addition to the memorandum and articles, Form A1 must be completed and presented to the Companies' Office. This requires a number of details, including: the company name; its registered office; the name, address and signature of its secretary; the name and address of the solicitor acting; details and signatures of the directors and a statement as to whether or not they are Irish residents; the signatures of the subscribers or the solicitor acting; a declaration that the Companies Acts have been complied with and which must be signed by a solicitor who is engaged in the company formation or a person named as a director or secretary of the company and this must be duly witnessed; a declaration to the effect that the purpose of the company's formation is to carry on an activity within the State; and the completion and signature of the capital duty statement which is contained within the form.

Whether limited by shares or guarantee, a public limited company must have a share capital. Public companies limited by guarantee are a rarity. The number of shareholders in a public company may exceed 50. With respect to its memorandum of association, the essential difference is that the words 'public limited company', 'plc', the Irish equivalent of 'cuideachta phoiblí teoranta' or its abbreviation 'cpt' be included in the name (s.4 C(A)A 1983). The memorandum must also state that the company is a plc and that the share capital of the company is at least €38,092·14 and it should also be noted that at least 25% of this figure is paid up. There must also be at least seven members in a plc (s.5 CA 1963).

Section 5 Companies (Amendment) Act 1983 requires that the Registrar of Companies must be satisfied of compliance with all the requirements of the Companies Acts in respect of registration and of matters precedent and incidental thereto. From the date of incorporation stated in the certificate of incorporation, the company is capable of exercising all the functions of an incorporated company and having perpetual succession with a common seal (s.18(2) CA 1963).

(b) The articles of association are the main element of a company's constitution and in effect they are the rules which govern a company's internal affairs. All the company's key internal rules on matters such as the appointment and dismissal of directors, the allocation of powers between the members of a company and its directors will be set out in the articles. Companies are free to make such rules about their internal affairs as they think appropriate, subject to the proviso than any such rules must not contain anything which is either contrary to:

– the general law, or
– the specific provisions of the Companies Acts.

The articles of association form a statutory contract between the company and its members and between each of the members in their capacity as members (s.25 CA 1963), and the previous common law will continue to be applied as appropriate. This document relates to the internal operation of the company and deals with matters such as the rights attached to particular shares, the calling and conduct of meetings. In fact, companies need not register their own articles, as the model articles in Table A CA 1963 will automatically apply by default.

Amongst other things, these articles relate to the rights attached to particular shares, the rules relating to the transfer of such shares, the conduct of meetings, the appointment, powers and payment of directors. Articles submitted must be dated, signed by the subscribers and witnessed in the same form as the memorandum. Companies can alter their objects clause by passing a special resolution, by virtue of s.10 CA 1963.

Section 15 CA 1963 provides for the alteration of articles of association on the passing of a special resolution, requiring a 75% vote in favour of the proposition. Any such alteration has to be made '*bona fide* in the interest of the company as a whole'. This test involves a subjective element, in that those deciding the alteration must actually believe they are acting in the interest of the company. There is additionally, however, an objective element requiring that any alteration has to be in the interest of the 'individual hypothetical member' (*Greenhalgh* v *Arderne Cinemas Ltd* (1951)). Whether any alteration meets this requirement depends on the facts of the particular case. In *Brown* v *British Abrasive Wheel Co Ltd* (1919), an alteration to a company's articles to allow the 98% majority to buy out the 2% minority shareholders was held to be invalid as not being in the interest of the company as a whole. However, in *Sidebottom* v *Kershaw Leese & Co* (1920), an alteration to the articles to give the directors the power to require any shareholder, who entered into competition with the company, to sell their shares to nominees of the directors at a fair price was held to be valid.

7 (a) Constructive dismissal

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

The Irish statutory definition contains two tests and an employee may rely on either. First, 'the contract' test whereby the employee contends that they were entitled to terminate the contract. Second, the employee may argue that they satisfy the 'reasonableness' test in the Act.

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

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

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

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

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

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

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

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

8 This question invites candidates generally to consider the incorporation of terms, and especially adverse terms, into contracts and to examine the effect of the law relating to unfair contract terms, i.e. The European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995, as amended by the European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations, 2000.

(a) An exclusion clause can have no effect if it is not part of the contract, so the first question which has to be decided is whether the exclusion clause has been incorporated into the contract or not. There are three ways in which such a term may be inserted into a contractual agreement: by signature, notice or custom.

(i) It is a well-established principle that an exclusion clause will not be incorporated into a contract unless the party affected actually knew of it, or was given sufficient notice of it. As regards the notice on the receipt, Bust Ltd will no doubt claim that it provided sufficient notice of their terms of trade to make it part of any subsequent contract. In order for notice to be adequate, however, the document bearing the exclusion clause must be an integral part of the contract, and given at the time the contract is made. Thus in *Chapleton* v *Barry UDC* (1940), notice on the back of a receipt was insufficient communication to incorporate an exclusion clause (see also *Western Meats* v *National Ice and Cold Storage Co Ltd* (1982); *Olley* v *Marlborough Court Ltd* (1949)). Given judicial hostility to exclusion clauses, it is unlikely that the notice on the receipt would be accepted as providing the actual terms of the contract entered into at a later date. And in any case Abid did not even see the notice on the receipt which raised doubts as to its clarity. As was held in *Thornton* v *Shoe Lane Parking Ltd* (1971), the greater the exemption, the greater the degree of notice required and in the circumstances the extent of the exclusion sought by Bust Ltd would require extremely clear notification.

(ii) A second equally well-established principle states that if a person signs a contractual document, then they are bound by its terms, even if they did not read it (*L'Estrange* v *Graucob* (1934)), the only exception to this being where they were misled by the other party into signing the contract (*Curtis* v *Chemical Cleaning* & *Dyeing Co* (1951)). In the problem scenario, although Abid had signed previous contracts including the exemption clause, he did not actually sign anything on this occasion. Consequently Bust Ltd cannot rely on this means of limiting their liability into the contract.

(iii) Where parties have had previous dealings on the basis of an exclusion clause, that clause may be incorporated into later contracts (*Miley R* & *J* v *McKechnie Ltd* (1949)). However, it must be shown that the party subject to the exclusion clause was actually aware of its existence, and in this instance the previous signing of a document containing the exclusion is not sufficient to incorporate it into later contracts (*Hollier* v *Rambler* (1972)). In the circumstances of the present problem, it is clear that Abid did sign contracts containing exclusion clauses previously and the exclusion clause was highlighted. It is not certain, however, whether he was actually aware of the content of the contracts he signed, but it is likely that the exclusion clause will be incorporated into the contract. The position at common law as stated above, however, is subject to the Supreme Court decision in *Clayton Love* v *B* & *I Transport* (1970). This concerned a contract for the supply of services and the exclusion clause therein was broad enough to exclude liability for negligence on the part of the supplier. The Supreme Court held that it would not uphold an exclusion clause which was wide enough to exclude liability for a breach of one party's 'core obligations' under the contract. This is also referred to as the 'fundamental breach rule' (see also *ESL Consulting Services Ltd* v *Verizon (Ireland) Ltd and Verizon (UK) Ltd* (2008)).

(b) The European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995, as amended by the European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations, 2000, is the statutory attempt to control exclusion clauses and implements the European Unfair Contract Terms Directive. The Regulations provide that an unfair term is unenforceable against a consumer. An unfair term is severable from the contract such that, if it is possible, the remainder of the contract will continue to bind the parties (Art. 6). The Regulations only apply to contracts which are not individually negotiated and employment contracts are outside its ambit. However, a seller/supplier who asserts that a particular term was individually negotiated bears the burden of proving same.

As the title indicates, the Regulations are confined to consumer contracts. A consumer is a natural person who is acting for purposes which are outside their business. A seller/supplier is a person who, acting for purposes related to their business, sells goods/services (Art. 2).

The Regulations' strength lies in their provision that a contractual term is unfair if it causes a significant imbalance in the parties' rights and obligations pursuant to the contract, to the detriment of the consumer and contrary to the requirements of good faith (Art. 3(2)). The second schedule to the Regulations lays down the test to be applied in determining what is 'in good faith'. This test requires a consideration of: the strength of the parties' respective bargaining powers; whether the consumer received an inducement to agree to the particular term; whether the goods/services were sold/supplied to the consumer's special order; and the extent to which the seller/supplier has dealt fairly with the consumer whose legitimate interest they have taken into account.

Other provisions relevant to the determination of the (un)fairness of a term include: Article 4 which provides that a term will not be deemed unfair if it is stated in plain intelligible language and this statement is the responsibility of the seller/supplier; Article 5 which places the *contra proferentum* principle on a statutory basis; and Article 7 which nullifies any attempt on the part of a seller/supplier to deprive a consumer of the Regulations' protection by applying the law of a non-EU country to the contract.

Furthermore, the Third Schedule to the Regulations contains a non-exhaustive list of terms which are automatically deemed unfair and, in consequence, unenforceable. These include a clause which excludes legal liability for death or injury or one which inappropriately excludes or limits liability on the part of the seller/supplier for total or partial non-performance of the contract. It is therefore clear that Bust Ltd cannot avoid responsibility for the injury sustained by Abid and will be liable for the injuries he suffered as a result of the negligence of their mechanic.

9 This question requires candidates to explain the implied authority of a company secretary.

Implied authority is the authority which derives from a person's position. It arises from the relationship which exists between the principal and the agent and from which it is assumed that the principal has given authority to the other person to act as their agent. Thus, it is implied from the particular position held by individuals that they have the authority to enter into contractual relations on behalf of their principal and third parties are entitled to assume that agents holding a particular position have all the powers which are usually provided to such an agent. Without actual knowledge to the contrary, they may safely assume that the agent has the usual authority which goes with their position.

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

In relation to companies, there are many layers of implied authority. For example, a person appointed as managing director usually is entitled to exercise all the powers of the company. Consequently, a managing director can bind the company in any contract within its capacity, even if their actual authority has been curtailed in some way. Equally, other agents of the company have different authority, thus shop assistants are able to bind their employers to contracts within the limited area of their authority.

This also applies in relation to company secretaries, just as much as managing directors; the only question is the extent of the secretary's implied authority. Although the old authorities such as *Houghton & Co* v *Northard Lowe & Wills* (1928) treated company secretaries as having very little authority to bind their companies, later cases have recognised the important role of the modern company secretary. Thus in *Panorama Developments Ltd* v *Fidelis Furnishing Fabrics Ltd* (1971), the Court of Appeal held that a company secretary was entitled to 'sign contracts connected with the administrative side of a company's affairs'.

Applying the *ratio* in *Panorama Developments Ltd* it is likely that the following results would ensue:

(a) The contract for the maintenance of the photocopiers may be excessively long and expensive, but there is no doubt that such a contract is within the ambit of a company secretary's implied authority and consequently the company, Do plc, will be required to honour the contract.

(b) This contract is clearly in breach of Chu's authority, but the actual contract is within a company secretary's implied powers and, as long as Ex plc are unaware of his breach of duty, Do plc will be liable on this contract as well.

(c) In this case, Chu has not only clearly exceeded his actual authority, but has equally gone beyond his implied authority. In this situation Do plc will not be liable for the contract.

10 Companies ordinarily raise the money they need to finance their operations through the issue of share capital, but it is equally common for companies to raise additional capital through borrowing. Such borrowing on the part of the company does not give the lender any interest in the company but represents a claim against the company. There are two types of security for company loans:

Fixed charge

In this situation a specific asset of the company is made subject to a charge in order to secure a debt. Once the asset is subject to the fixed charge, the company cannot dispose of it without the consent of the debenture holders. The asset most commonly subject to fixed charges is land, although any other long-term capital asset may also be charged, as may such intangible assets as book debts. It would not be appropriate, however, to give a fixed charge against stock-in-trade as the company would be prevented from freely dealing with it without the prior approval of the debenture holders. Such a situation would obviously prevent the company from carrying on its day-to-day business. If the company fails to honour the commitments set out in the document creating the debenture, such as meeting its interest payments, the debenture holders can appoint a receiver who will, if necessary, sell the asset charged to recover the money owed. If the value of the asset which is subject to the charge is greater than the debt against which it is charged, then the excess goes to pay off the rest of the company's debts. If it less than the value of the debt secured, then the debenture holders will become unsecured creditors for the amount remaining outstanding.

Floating charge

The floating charge is most commonly made in relation to the 'undertaking and assets' of a company and does not attach to any specific property whilst the company meets its requirements as stated in the loan document. The security is provided by all the property owned by the company, some of which may be continuously changing, such as stock-in-trade. Thus, in contrast to the fixed charge, the use of the floating charge permits the company to deal with its property without the need to seek the approval of the debenture holders. However, if the company commits some act of default, such as not meeting its interest payments, or going into liquidation, the floating charge is said to crystallise. This means that the floating charge becomes a fixed equitable charge over the assets detailed, and their value may be realised in order to pay the debt owed to the floating charge holder.

All charges, including both fixed and floating, have to be registered with the Companies' Office within 21 days of their creation. Failure to register the charge as required has the effect of making the charge void, i.e. ineffective, against any other creditor, or the liquidator of the company. The charge, however, remains valid against the company, which means in effect that the holder of the charge loses their priority as against other company creditors.

In relation to properly registered charges of the same type, they take priority according to their date of creation. However, as regards charges of different types, a fixed charge takes priority over a floating charge even though it was created after it. Generally, there is nothing to prevent the creation of a fixed charge after the issuing of a floating charge, and, as a legal charge against specific property, that fixed charge will still take priority over the earlier floating charge.

As all the charges in the scenario were properly registered, it follows that the fixed charge takes precedence over the floating charges. Within each category, the charges take priority depending on date of creation, rather than the date of registration. Consequently, the charges assume the following priority:

(i) Ko-Bank's loan, secured by a fixed charge created on 5 April;

(ii) Ina's loan, secured by a floating charge created on 1 April;

(iii) Jo's loan, secured by a floating charge created on 3 April.

1 This question requires candidates to consider the powers of judges to interpret legislation and the rules they apply in exercising such interpretative powers. Although the question requires answers to focus on the two main general approaches, it also requires an explanation of the various traditional rules of statutory interpretation employed by the courts.

(a) Requires an explanation of the meaning of statutory interpretation.

2 marks	Good explanation of why judges are required to interpret particular statutes.
1 mark	Some recognition of the need for statutory interpretation but lacking detail.
0 marks	No knowledge of the topic.

(b) Requires a consideration of the literal approach, including the golden rule.

3–4 marks	Full detailed explanation with supporting cases or examples.
1–2 marks	Limited knowledge of the topic; perhaps lacking detail or cases/examples.
0 marks	No knowledge of the topic under consideration.

(c) Requires a consideration of the purposive approach, including the mischief rule.

3–4 marks	Full detailed explanation with supporting cases or examples.
1–2 marks	Limited knowledge of the topic; perhaps lacking detail or cases/examples.
0 marks	No knowledge of the topic under consideration.

Candidates may simply produce a global answer considering the traditional rules and will be marked according to the content provided.

2 This question requires candidates to explain aspects of consideration in contract law.

(a)	2–3 marks	A full to definitive answer providing a clear explanation of consideration. It is likely that case authority will be cited but it is not necessary to achieve full marks.
	0–1 mark	Little, if any, understanding of the meaning or role of consideration.
(b)	6–7 marks	A full to definitive answer to all three parts of the question. It is likely that cases will be cited, but examples may be credited as well.
	3–5 marks	Some explanation of all parts, but lacking detail, or alternatively good answers to some parts but lacking in others.
	1–2 marks	Some but very limited explanations of the various types of consideration.
	0 marks	No understanding whatsoever.

3 This question requires candidates to consider the concept of duty of care in the tort of negligence. Part (a) refers to the existence of such a duty and part (b) to the standard of the duty owed.

(a)	4–5 marks	Thorough explanation of the meaning of duty of care with appropriate references to cases.
	2–3 marks	Reasonable on duty of care but perhaps lacking in detail or cases authority.
	1 mark	Unbalanced answer, lacking in detailed understanding.
	0 marks	No understanding of the concept.
(b)	4–5 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.

4 **(a)** This question requires candidates to provide an explanation of the concept of limited liability.

3–4 marks	A good to full explanation of limited liability referring to both companies and partnerships.
1–2 marks	Some but incomplete explanation, perhaps lacking in detail.
0 marks	No knowledge of the concept.

(b)

(i)	2 marks	A full explanation of unlimited liability and why it might be used.
	1 mark	Some knowledge but lacking explanation.
	0 marks	No knowledge of the topic.
(ii)	2 marks	For an explanation of limited liability on the basis of guarantee and when it might be used.
	1 mark	Some knowledge but lacking explanation.
	0 marks	No knowledge of the topic.
(iii)	2 marks	For a thorough explanation of liability limited by reference to the amount unpaid on shares and how it operates.
	1 mark	Some knowledge but lacking explanation.
	0 marks	No knowledge of the topic.

5 This question requires candidates to explain the operation of the Companies Act 1990.

8–10 marks	Thorough to complete answer, showing a detailed understanding of 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 others.
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.

6 This question requires an explanation of two compulsory documents required for the formation of a limited company.

(a)

4–5 marks	A good to full explanation of the memorandum of association and application for the registration of a company.
2–3 marks	Some but incomplete explanation, perhaps lacking in detail.
0–1 mark	Little or no knowledge of the concept.

(b)

4–5 marks	A good to full explanation of articles of association and how they can be changed.
2–3 marks	Some but incomplete explanation, perhaps lacking in detail or not dealing with the procedure for altering articles.
0–1 mark	Little or no knowledge of the topic.

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

(a) Requires candidates to explain what is meant by constructive dismissal.

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

(b)

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

8 This question is divided into two quite distinct parts, the first of which carries 7 marks and the second 3 marks.

(a)

6–7 marks	Knowledge of, and application of, the rules governing the incorporation of exclusion clauses into contracts and analyses the problem scenario in order to decide whether the particular exclusion clause has formed a part of Abid's contract.
3–5 marks	Knowledge of the rules relating to incorporation, or at least some of them, but may not analyse the facts of the situation presented. Or offer an appropriate conclusion.
1–2 marks	Recognition of what the problem entails but will not demonstrate any real knowledge of the rules relating to the question.
0 marks	No knowledge whatsoever of the topic area.

(b) Does not require extensive reference to the European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995, as amended.

3 marks	Good understanding of the effect of the European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995, as amended.
1–2 marks	Some knowledge of the relevance of the European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995, as amended, but perhaps lacking in precision or application.
0 marks	No knowledge of the European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995, as amended.

9 This question requires candidates to explain the implied authority of a company secretary and apply the law relating to that topic appropriately to the three distinct contracts.

8–10 marks	Thorough to complete answers, showing a detailed understanding of the implied authority as it applies to company secretaries and applying that law accurately.
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 others. Perhaps not applying the law accurately in the various contracts.
2–4 marks	Some knowledge, although perhaps not clearly expressed, or very limited in its knowledge and understanding of the topic. Or perhaps the knowledge is not accurately applied.
0–1 mark	Little or no knowledge of the underlying topic.

10 This question relates to specific aspects of the law relating to loans extended to companies. It requires an explanation of the different types of security and an understanding of the procedure for registering charges securing loans and the priority of any such charges.

8–10 marks	Thorough to complete answers, showing a detailed understanding of the law relating to debentures and charges securing them. The various loans will be placed in the correct order with an explanation of why that order applies.
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 others. Perhaps not applying the law accurately in the examples provided.
2–4 marks	Some knowledge, although perhaps not clearly expressed, or very limited in its knowledge and understanding of the topic. Or perhaps the knowledge is not accurately applied.
0–1 mark	Little or no knowledge of the underlying topic.