# Answers

**1** This question requires the candidates to consider the various sources of Irish law.

**Legislation**
This is law produced through the Oireachtas. This is the most important source of law today. Firstly, in terms of quantity, the Oireachtas produces far more legal rules than any other source. Secondly, under Article 15 of the Constitution, the Oireachtas has 'sole and exclusive' law making power. This article also states that no statute repugnant to the constitutional shall be enacted and any repugnant statute is invalid.

The major legislative institutions of the State are the Dáil and the Seanad which, together with the President of Ireland, who signs bills of the Oireachtas thereby making them Acts of the Oireachtas, are collectively referred to as the Oireachtas.

Legislation can be categorised in a number of ways. Public Acts relate to matters affecting the general public, whereas Private Acts relate to particular individuals or institutions. Alternatively, Acts of the Oireachtas can be distinguished on the basis of their function. Some create new laws, but others are aimed at rationalising or amending existing legislative provisions. Consolidating legislation is designed to bring together provisions previously contained in a number of different Acts, without actually altering them. The Safety, Health and Welfare at Work Act 1989 was an example of a consolidation Act. Codifying legislation, on the other hand, seeks not just to bring existing statutory provisions under one Act but also looks to give statutory expression to common law rules. The Partnership Act 1890 and the Sale of Goods Act 1893, are good examples of this.

Delegated legislation is a particularly important aspect of the legislative process. It is law made by some person or body, usually a government minister or local authority, to whom the Oireachtas has delegated its general law making power. A validly enacted piece of delegated legislation has the same legal force and effect as the Act of the Oireachtas under which it is enacted. Also referred to as secondary or subordinate legislation, most delegated legislation is enacted by way of statutory instrument. Section 1 of the Statutory Instrument Act, 1947, defines a 'statutory instrument' as an 'order, regulation, rule, scheme or by-law' made pursuant to a statutory power.

(i) *Orders* are generally made in respect of a single exercise of a delegated power and are of an administrative nature. For example, a section of an Act of the Oireachtas might provide that it shall not have legal force until the relevant Minister makes a *commencement order* stating the date on which the Act shall become operative.

(ii) *Regulations* are of a legislative nature and usually flesh out the matters contained in the parent statute. For example, a huge volume of Regulations have been made under the Freedom of Information Act, 1997.

(iii) *Rules* are also legislative in nature but are usually of a procedural type. For example, the Rules of the Superior Courts, 1986, regulate the practice and procedure of the High Court and the Supreme Court.

(iv) *By-laws* are also legislative in nature but are generally confined to the area of a local authority. For example, they are used to impose charges for refuse collection.

(v) *Schemes* are like orders in that they are generally of an administrative nature. They are often used where the instrument involves figures such as details of fees or charges payable for services provided by a statutory body.

**Case Law**
This is law created by judges in the course of deciding cases. The doctrine of *stare decisis* or binding precedent refers to the fact that courts are bound by previous decisions of courts equal or above them in the court hierarchy. It is the reason for a decision, the *ratio decidendi*, that binds. Everything else is *obiter dictum* which, although of persuasive authority, is not binding and need not be followed.

The Supreme Court can now overrule its own previous decisions in certain circumstances. In *Attorney General* v *Ryan's Car Hire* (1965) and *State (Quinn)* v *Ryan* (1965), the Supreme Court held that, although normal practice would henceforth be, as previously, that decisions of the Court would continue to be binding on itself, the Court *could* now depart from an earlier decision where it appeared right to do so. By way of example, the Supreme Court in *Carron* v *McMahon* (1990) overruled the earlier Supreme Court decision in *Russell* v *Fanning* (1988).

Judges do, however, have the ability to avoid precedents that they do not wish to follow through the procedure of distinguishing the cases on their facts and, of course, they have a large volume of cases and precedents to choose from.

One of the major advantages of the system of precedent is that it provides for certainty and the saving of the time and money of all the parties concerned. This is achieved by the fact that it should be possible to predict how a case will be decided if it falls within a clear precedent without actually having to take the case to court. The system of judges making law through their decisions also allows them scope for introducing flexibility into the legal system as they extend or distinguish existing precedents. This flexibility, however, by necessity undermines the very certainty that is supposed to be one of the main benefits of the system of precedent. Finally, the role of the judges within Ireland is to interpret, and not to create, law, and perhaps his latter point explains why most judges are very wary of openly admitting that they actually do make law.

**The European Union**
Since joining the European Community, now the European Union, Ireland and its citizens have become subject to European Community (EC) law. In areas where it is applicable, European law supersedes any existing Irish law to the contrary (see *Factortame Ltd* v *Secretary of State for Transport* (1989)).

The sources of EC law are: internal treaties and protocols; international agreements; secondary legislation; and decisions of the European Court of Justice.

**Custom**

Although there is always the possibility of a specific local custom, which has been in existence since 'time immemorial', acting as a source of law, in practice the limitations which operate in relation to custom render it an extremely unlikely source of contemporary law.

With regard to the operation of the Law Commission it should be noted that its role is to make recommendations relating to changes in legal provision, but it has no power itself to make such alterations.

**2** Breach of contract occurs when one of the parties to the contract fails to perform their part of the agreement, either fully or partially i.e. they fail completely to perform what they have contracted to do, or they perform their obligation in a defective manner. As a consequence of this failure the court may award remedies against the party in breach of the contract, the most usual of which is damages.

Usually breach of contract only becomes apparent at, or after, the time set for the performance of the contract. Anticipatory breach, however, occurs before the due date of performance. It occurs where one of the parties shows a clear intention not to be bound by their agreement and indicates that they will not perform their contractual obligations on the actual due date of performance.

In the situation of anticipatory breach, the innocent party can sue for damages immediately they are made aware of the breach. However, they are not required to take immediate action. They can, if they so chose, wait until the actual time for performance before taking action. If they do elect to wait until the set time for performance, then they are entitled to make preparations for performance of their part of the contract; and claim the agreed contract price. In *White & Carter (Councils)* v *McGregor* (1961), McGregor contracted with the plaintiffs to have advertisements placed on litter bins which were supplied to local authorities. The defendant wrote to the plaintiffs asking them to cancel the contract. The plaintiffs refused to cancel, and produced, and displayed, the adverts as required under the contract. They then claimed payment. It was held that the plaintiffs were not obliged to accept the defendant's repudiation, but could perform the contract and claim the agreed price.

Anticipatory breach can take either of two specific forms: express anticipatory breach or implied anticipatory breach.

Express anticipatory breach occurs where one of the parties declares, before the due date of performance, that they have no intention of complying with the terms of the contractual agreement. An example of this may be seen in *Hochster* v *De La Tour* (1853). In April, De La Tour engaged Hochster to act as his courier on his European tour, starting on 1 June. On 11 May De La Tour wrote to Hochster stating that he would no longer be needing his services. The plaintiff started proceedings for breach of contract on 22 May, and the defendant claimed that there could be no cause of action until 1 June. It was held, however, that the plaintiff was entitled to start his action as soon as the anticipatory breach occurred, i.e. when De La Tour stated he would not need Hochster's services.

Implied anticipatory breach does not arise from any direct indication from either of the parties that they will not perform their contractual agreement, but results from the situation where one of the parties does something, which makes subsequent performance of their contractual undertaking impossible. An example of this may be seen in *Omnium D'Enterprises* v *Sutherland* (1919). In this case the defendant had agreed to let a ship to the plaintiff, but before the actual time for performance, he actually sold the ship to another party. It was held that the sale of the ship amounted to a clear repudiation of the contract and that the plaintiff could sue for breach of contract from that date, without having to wait until the actual date of performance of the contract.

**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, 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. However, since the Civil Liability Act 1961, contributory negligence has ceased to provide a complete defence under Irish law.

**(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. The position is now regulated by s.34(1)(b) of the Civil Liability Act 1961 which provides 'this subsection [which states the legal position on contributory negligence] shall not operate to defeat any defence arising under a contract or the defence that the plaintiff before the act complained of agreed to waive his legal rights in respect of it, whether or not for value; but, subject as aforesaid, the provisions of this subsection [which states the legal position on contributory negligence] shall apply notwithstanding that the defendant might, apart from this subsection, have the defence of voluntary assumption of risk'. In *O'Hanlon* v *ESB* (1971), the Supreme Court interpreted this to mean that 'what used to be called the defence of *volenti non fit injuria* ...can now be properly described in the words of that … Act … as 'the defence that the plaintiff before the act complained of agreed to waive his legal rights in respect of it''. Thus, while the defence of *volenti non fit injuria* is gone, a defendant can avoid liability where he shows that he is not liable by contract or the plaintiff agreed, before the act, to waive his legal rights in respect of it.

Consent can be given expressly 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** The word 'capital' is used in a number of different ways in relation to shares.

**(a)** This states the maximum amount of share capital that a company is authorised to issue. The authorised capital must be divided into shares of a fixed monetary value and it follows, therefore, that Irish company law does not recognise no-fixed value shares as do other jurisdictions. As companies do not have to issue shares to the full extent of their authorised capital, it is imperative to distinguish authorised capital from issued capital, which is the amount of shares actually issued.

**(b)** Issued capital represents the nominal value of the shares actually issued by the company and public companies must have a minimum issued capital of €38,092 (s.28 C(A)A 1983).

**(c)** Paid-up capital. This is the proportion of the nominal value of the issued capital actually paid by the shareholder. It may be the full nominal value, in which case it fulfils the shareholder's responsibility to outsiders; or it can be a mere part payment, in which case the company has an outstanding claim against the shareholder. Shares in public companies must be paid up to the extent of at least a quarter of their nominal value (s.6 C(A)A 1983).

**(d)** Once established, the nominal value of the share remains fixed and does not normally change. However, the value of the shares in the stock market may be subject to daily fluctuation depending on a number of interrelated factors, such as the profitability of the company, the prevailing rate of interest or prospective takeover bids. Thus the market value of a share of €1 nominal value may as much as €5 or higher, or as low as 1 cent.

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

**(a)** 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.

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).

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).

**(b)** **Written resolutions**
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).

**6** This question requires candidates to explain what is meant by the term fiduciary duties as it applies to company directors and to set out the various heads under which such duties can be considered.

**(a)** By virtue of article 80 of the Table A model articles of association, directors are given the power to manage the business of their company and 'may exercise all the powers of the company'. It is, therefore, the directors, rather than the shareholders who at least in theory are the owners of the company, who actually conduct the day-to-day business of the company. As a consequence of the extensive powers they have in operating capital that they do not actually own, the law has placed company directors in the position of fiduciaries. A fiduciary is a person who assumes a position akin to that of a trustee although not of trust as such. Certain duties follow from a person being fixed as a fiduciary, and these fiduciary duties are analogous to the duties owed by a trustee to a beneficiary under a trust.

In general terms directors must act honestly and with good faith for the benefit of the company in discharging their duties. This general duty to the company can be sub-divided into the three further heads: the duty to act *bona fide* in the best interests of the company, the duty to exercise their powers for a proper purpose, and the duty not to allow their personal interests to conflict with their duties to the company. Before considering each of these sub-heads in turn, it should be emphasised that directors owe their duty to the company and not to individual shareholders (*Percival* v *Wright* (1902)).

**(b)** Duty to act *bona fide* in the interest of the company
This places directors under the duty to act in such a way as they genuinely believe is in the best interests of their company.

However, the test is not purely subjective and, if an act or decision is one which no reasonable director could properly have come to, the court will intervene.

A particular aspect of this general requirement is that directors must use their powers for the purpose for which those powers were given to them and not for any ulterior or improper purpose.

Most of the cases on this point have related to the exercise by directors of their power to issue new shares in an attempt to thwart threatened take-overs. In *Howard Smith* v *Ampol Petroleum* (1974) directors preferred one take-over bid as opposed to another, which was supported by the majority shareholding. In order to defeat the bid they disliked, the directors issued new shares, effectively reducing the existing majority to a minority holding in the company, incapable of blocking their preferred take-over bid. This was clearly an abuse of the directors' powers and a breach of their duty to act *bona fide* in the interests of the company.

Another aspect of this general fiduciary duty is that directors must not act in such a way as will fetter the exercise of their discretion in relation to decisions that affect the operation of the company. For example, directors might enter into a contractual agreement with some outsider to use their vote in a particular way at board meetings. Once again such an agreement is a clear breach of their fiduciary duty, although it must be recognised that if directors enter into contract on behalf of the company, which they genuinely consider to be in the company's best interests, then they may bind themselves to vote in favour of any subsequent resolutions necessary to achieve the successful completion of the contract.

Duty not to permit a conflict of interest to arise
This rule is strictly enforced by the courts in the United Kingdom and it can be clearly stated that directors are forbidden from entering into any arrangement which will involve, even the possibility of, a conflict between their personal interests and the interests of their company. The simplest statement of the rule is that directors must not personally profit from their position without full disclosure and the prior approval of the company. In *Regal (Hastings)* v *Gulliver* (1942) directors were required to repay to the company profits made on the sale of shares in a subsidiary company, on the grounds that they had only been in the position to benefit because of their position as directors in the parent company. The strict nature of the rule may be seen from the fact that the parent company would not have been able to acquire the subsidiary without the financial assistance of the directors (see also *Boardman* v *Phipps* (1967) and *IDC* v *Cooley* (1972)).

It is perfectly possible for the company to approve the fact of the directors making a profit as long as the transaction in question has been declared and specifically approved (*Alis* v *R* (1995)). Section 194 CA 1963 imposes a duty on a director who is directly or indirectly interested in a contract or proposed contract with the company to declare the nature of his interest at a meeting of the directors of the company.

Although Part V of the Companies Act, 1990 specifically prohibits directors from dealing in shares on the basis of inside information gained from their positions, they would also be liable to account to their companies for any profits they made from such activity under this particular head of fiduciary duty.

**7** **(a)** Section 6(1) of the Unfair Dismissals Act, 1977, provides that the dismissal of an employee shall be deemed, for the purposes of the Act, to be unfair unless, having regard to all the circumstances, there were substantial grounds justifying the dismissal. Section 6(6) provides that, in determining whether a dismissal was unfair or not, the onus is on the employer to show that the dismissal resulted wholly or mainly from one or more of the matters specified in s.6(4) or that there were 'other substantial grounds' justifying the dismissal.

More specifically, s.6(4) provides that a dismissal shall not be unfair if it results wholly or mainly from one or more of the following:

(a) 'the capability, competence or qualifications of the employee for performing work of the kind which he was employed by the employer to do';

Although the terms have not been statutorily defined, capability has been interpreted as relating to a reduction in an employee's physical or mental capacity to do his/her job e.g. a driver losing his/her sight.

Competence is considered to relate to work performance and where there is a reduction in competence, an employee should generally be advised of the matter and given an opportunity to rectify the situation. Qualifications includes, for example, professional qualifications such as a solicitor who is struck off the roll of solicitors or a truck driver who loses his/her driving licence.

(b) 'the conduct of the employee';

This is generally confined to conduct affecting one's work e.g. an employee who holds a position of trust may be fired where (s)he is convicted of an offence. However, the courts will not uphold a standard policy of dismissal upon conviction. It should be noted that employees may be summarily dismissed for 'misconduct' (s.8 of the Minimum Notice and Terms of Employment Act, 1973). This arises where an employee acts otherwise than as a reasonable employee in the performance of the express or implied terms of his/her contract. As examples, misconduct may incorporate violence or drinking at work and, where these circumstances arise, the employer need not give the employee any notice. Whether 'on the spot' dismissal is justifiable will depend on the circumstances, e.g. drinking during working hours may justify summary dismissal of a truck driver but not an accountant.

(c) 'the redundancy of the employee';

Redundancy is defined by the Redundancy Payments Act 1967–1991. However, it will not be a fair ground where a selective redundancy is made.

(d) 'the employee being unable to work or continue to work in the position which he held without contravention (by him or by his employer) of a [statutory] duty'.

Thus, if a person is employed as a driver and is banned from driving, then they may be fairly dismissed.

Section 6(2) of the Unfair Dismissal Act, 1977, provides that a dismissal is unfair if it results, wholly or mainly, from one or more of the following:

1. the employee's membership, or proposal that he or another person become a member, of, or his engaging in activities on behalf of, a trade union,
2. the religious or political opinions of the employee,

3. civil proceedings against the employer to which the employee is, or will be, a party, or in which the employee was, or is likely to be, a witness,
4. criminal proceedings against the employer, in relation to which the employee has made, proposed or threatened to make a complaint or statement to the prosecuting authority or any authority connected with or involved in the prosecution or in which the employee was or is likely to be a witness,
5. the race or colour of the employee,
6. the pregnancy of the employee or matters connected therewith, unless
   (i) the employee was unable, by reason of the pregnancy or connected matters, to adequately do the work for which she was employed, or to continue to do such work without contravention by her or her employer of a statutory provision and
   (ii) there was not, at the time of the dismissal, any other employment with her employer that was suitable for her and in relation to which there was a vacancy, or the employee refused her employer's offer of corresponding alternative employment, being an offer made so as to enable her to be retained in the employment of her employer notwithstanding pregnancy.

Section 5 of the Unfair Dismissals (Amendment) Act, 1993, added the following unfair grounds for dismissal to s.6(2) of the Unfair Dismissals Act, 1977:

7. race, colour or sexual orientation of the employee,
8. the age of the employee,
9. the employee's membership of the travelling community.

In order to avail of the legislation, the employee must have been employed for at least one year, unless the unfair ground relates to trade union activities or pregnancy in which case there is no minimum period.

The complaint must be made within six months of the effective date of termination, although a period of twelve months will be allowed in exceptional circumstances.

**(b)** There are two major purposes behind the law relating to redundancy. The first purpose is to encourage employers to consider alternatives to dismissing their employees, and the second is to ensure that where employees have been dismissed on the grounds of redundancy that they should have at least a minimum level of payment to tide them over until hopefully they can regain employment. The determination of redundancy depends on the qualifying rules stated in the Redundancy Payments Acts 1967–1976. In order to be awarded a redundancy payment individuals must follow the procedures stated therein.

Redundancy is defined in s.7(2) of the 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.

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

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

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.

The action of the employer, however, must go to the root of the employment contract if it is to allow the employee to resign. In other words it must be a breach of some significance. In *Western Excavating Ltd* v *Sharp* (1978), Sharp was dismissed for taking time off from work without permission. On appeal to an internal disciplinary hearing, he was reinstated but was suspended for five days without pay. He agreed to accept this decision but asked his employer for an advance on his holiday pay as he was short of money: this was refused. He then asked for a loan of £40: that was also refused. Consequently Sharp decided to resign in order to get access to his holiday pay. Sharp instituted a claim for unfair dismissal on the basis that he had been forced to resign because of his employer's unreasonable conduct. The employment tribunal found in Sharp's favour on the grounds that his employer's conduct had been so unreasonable that Sharp could not be expected to continue working there. However, on appeal the Court of Appeal held that before a valid constructive dismissal can take place the employer's conduct must amount to a breach of contract which is such that it entitles the employee to resign. In Sharp's case there was no such breach and therefore there was no constructive dismissal. However, in *British Aircraft Corporation* v *Austin* (1978) a failure to investigate a health and safety complaint was held to be conduct amounting to a breach of contract on the part of the employer which was sufficient to entitle the employee to treat the contract as terminated.

If the employee does not resign in the event of a breach by the employer the employee will be deemed to have accepted the breach and waived any rights. However, they do not need to resign immediately and may, legitimately, wait until they have found another job (*Cox Toner (International) Ltd* v *Crook* (1981)).

Finally, the movement of an employer to some new distant location will normally give rise to redundancy claims for those employees who do not wish to move (*O'Brien* v *Associated Fire Alarms Ltd* (1969)). However, the compulsory move of employees may well give rise to a claim for unfair dismissal and the employee may be able to resign and claim constructive dismissal. Such a claim could not arise where the employee's contract contained an express mobility clause.

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

**Alvin and Bert**

The price notice on the car did not constitute a legal offer, it was merely an invitation to treat. As such it is not an offer to sell but merely an invitation to others to make offers. The point of this is that the person extending the invitation is not bound to accept any offers made to them as may be seen in *Fisher* v *Bell* (1961) in which it was held that having switch-blade knives in the window of a shop was not the same as offering them for sale. Consequently Bert is not in a position to sue Alvin.

**Alvin and Cat**

An offeror may withdraw their offer at any time before it has been accepted and once revoked it is no longer open to the offeree to accept the original offer. Also a promise to keep an offer open is only binding where there is a separate contract to that effect. This is known as an option contract, and the offeree must provide additional consideration for the promise to keep the offer open. If not, then the offeror can simply withdraw the offer under the normal rules relating to revocation of offers.

As Cat did not provide any consideration to form an option contract, Alvin is not bound to wait for her to return and can sell the car to anyone else if he so chooses.

**Alvin and Del**

This is a perfectly ordinary contract. The fact that Alvin had previously contracted not to sell it, does not affect Del and he is entitled to take good title to the car.

**9** Section 15 CA 1963 provides for the alteration of articles of association on the passing of a special resolution. However, at common law 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, but 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. This was in spite of the fact that the company needed additional capital and the majority shareholder was willing to provide that capital if they could gain total control of the company.

In *Dafen Tinplate Co Ltd* v *Llanelly Steel Co* (1907) a minority shareholder was acting to the detriment of the company. Nonetheless, an alteration to the articles, to allow for the compulsory purchase of any member's shares on request so to do, was also held to be too wide to be 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.

Applying the law to the facts in the problem scenario, it might seem that, as Fred is in direct competition with Glad Ltd, the alteration would be valid in line with the *Sidebottom* v *Kershaw Leese & Co* case, but it should be noted that the actual alteration to the articles goes much wider than is necessary to cover Fred's situation as it extends to all members, whether or not they are in competition with the company. Consequently it is unlikely that the alteration would be validated by the court as being in the interest of the company as a whole on the basis of *Dafen Tinplate Co Ltd* v *Llanelly Steel Co*.

**10** Sam has clearly used his powers for an unauthorised purpose. Unfortunately for the other partners they cannot repudiate his transaction with the bank, even although it was outside his actual authority. The reason being that it is within his implied authority as a partner to enter into such a transaction. As a trading partnership, all the members have the implied authority to borrow money on the credit of the firm and the bank would be under no duty to investigate the purpose to which the loan was to be put. As a result the partnership cannot repudiate the debt to the bank and each of the partners will be liable for its payment. It has to be stated, however, that Sam will be personally liable to the other partners for the €10,000 and as a further consequence of his breach of his duty not to act in any way prejudicial to the partnership business, the partnership could be wound up.

Tam's purchase of the used cars was also clearly outside of the express provision of the partnership agreement. Nonetheless the partnership would be liable as the transaction would be likely to be held to be within the implied authority of a partner in a garage business (*Mercantile Credit* v *Garrod* (1962)). Once again Tam, the partner in default of the agreement, would be liable to the other members for any loss sustained in the transaction.

As regards the payment for the petrol, that is clearly within the ambit of the partnership and the members are all liable for non-payment.

If the partnership cannot pay the outstanding debts then the individual partners will become personally liable for any outstanding debt. Although under s.9 of the Partnership Act 1890 partnership debts are said to be joint, the effect of the Civil Liability Act 1961 is that a judgement against one partner does not bar a subsequent action against the other partners. Once the debts owed to outsiders have been dealt with, then the internal financial relationships of the partners amongst themselves will be dealt with according to the partnership agreement.

**1** In order to get full marks candidates must deal well with each of the three areas and not confine themselves to an extended treatment of only one, or two of them. Also the question asks for a consideration of the main sources of contemporary law. It would be inappropriate, therefore, to present an extended treatment of the role of custom as a source of law, to the exclusion of a more detailed treatment of the other sources. The following marking scheme details the way in which marks would be allocated in relation to this question.

Each major part would be notionally allocated 3 marks, with the additional mark for a particularly good treatment of one of the sources or reference to some other source.

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| 8–10 marks: | Thorough treatment of the three major sources with perhaps reference to other sources such as custom. |
| 5–7 marks: | Thorough treatment of two of the sources, or a less complete treatment of the three. |
| 2–4 marks: | Some understanding but lacking in detail. Perhaps unbalanced answer, focusing on only one aspect of the question and ignoring the others. |
| 0–1 mark: | Shows little understanding of the subject matter of the question. |

**2** This question requires candidates to show understanding of what is meant by anticipatory breach. In demonstrating such understanding candidates should mention the consequences of such a breach of contract, but answers should not focus too much on remedies.

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|---|---|
| 8–10 marks | A thorough explanation of the concept of breach providing cases or examples by way of explanation. |
| 5–7 marks: | A clear understanding of what is meant by breach but perhaps lacking in the detail expected of the very best answers. |
| 2–4 marks | Some understanding of the breach, but confused or lacking in explanation as to meaning or effect. |
| 0–1 mark: | No real understanding of the meaning of the term. |

**3**

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|---|---|
| 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 seeks an explanation of the different types of share capital listed together with an explanation of the difference between the nominal value of shares and their market value.

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| 8–10 marks: | Thorough explanation of all of the elements in the question. |
| 5–7 marks: | Thorough treatment of some of the elements, or a less complete treatment of all of them. |
| 0–4 marks: | Unbalanced to very unbalanced answer, focusing on only one element and ignoring the others, or one which shows little understanding of the subject matter of the question. |

**5** This question requires candidates to consider the way in which resolutions are voted on in companies.

**(a)** Requires candidates to explain the rules relating to ordinary and special resolutions.

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| 3–5 marks: | A good explanation of the difference between the two types of resolution. |
| 0–2 marks: | Some awareness of the area but lacking in detailed knowledge. |

**(b)**

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|---|---|
| 3–5 marks: | Candidates must not only show an understanding of what is meant by a written resolution and the rules relating to them. |
| 0–2 marks: | 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 a written resolution. |

**6** This question requires candidates to explain the duty of directors to promote the success of the company and to whom such a duty is owed.

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| 8–10 marks: | A very good answer revealing a thorough to complete understanding of both elements of the question. |
| 4–7 marks: | A good answer but perhaps unfocused or lacking in detail as to the specific duties. |
| 0–3 marks: | Weak answer, not fully explaining the law or issues involved. |

**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 the provisions of the Unfair Dismissals Acts 1977–1993 relating to the statutory grounds covering fair dismissal.

3–5 marks: A good explanation of the grounds upon which dismissal may be fair.
0–2 marks: Some awareness of the area but lacking in detailed knowledge.

**(b)** 3–5 marks: Candidates must not only show an understanding of what is meant by constructive dismissal, perhaps citing cases or examples.
0–2 marks: 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.

**8** This question asks candidates to analyse the scenario provided in the light of the rules relating to the formation of a contract. In particular it requires an examination of the distinction between offer and invitation to treat, and the operation of option contracts.

8–10 marks: A thorough treatment of all of the rules relating to the formation of contracts together with a clear and correct application of those rules to the problem scenario. Cases will be expected to be provided at this level.
5–7 marks: Good analysis and case support, although perhaps limited in appreciation.
3–4 marks: Recognition of the areas covered by the question, but lacking in detail.
0–2 marks: Very weak answers which might recognise what the question is about but show no ability to analyse or answer the problem as set out.

**9** This question requires candidates to examine the law relating to the power of companies to change their articles of association.

8–10 marks: Candidates will exhibit a thorough knowledge of the relevant law together with the ability to analyse the problems contained in the question.
5–7 marks: Candidates will exhibit a sound knowledge of the relevant law together with the ability to recognise the issues contained in the question. Knowledge may be less detailed or analysis less focused.
3-4 marks: Identification of some of the central issues in the question and an attempt to apply the appropriate law. Towards the bottom of this range of marks there will be major shortcomings in analysis or application of law.
0–2 marks: Very weak answers which might recognise what the question is about but show no ability to analyse or answer the problem as set out.

**10** This question refers to key issues relating to the powers, authority and liability of partners.

8–10 marks: Candidates will exhibit a thorough knowledge of partnership law together with the ability to analyse the problems contained in the question.
5–7 marks: Candidates will exhibit a sound knowledge of partnership law together with the ability to recognise the issues contained in the question. Knowledge may be less detailed or analysis less focused.
3–4 marks: Identification of some of the central issues in the question and an attempt to apply the appropriate law. Towards the bottom of this range of marks there will be major shortcomings in analysis or application of law.
0–2 marks: Very weak answers which might recognise what the question is about but show no ability to analyse or answer the problem as set out.