Answers

1 (a) Case Law

This term refers to the substantive law and procedural rules that have been created by the judiciary through the decisions in the cases they have heard. It is also referred to as the common law.

Central to the concept of the common law/case law is the doctrine of precedent, which means that when a court has to decide an issue, it looks to the previous decisions contained in earlier cases for guidance on how to deal with the present case. Case law operates within the hierarchical structure of the courts system; with the decisions of higher courts binding those courts lower than them in the structure.

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

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

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

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

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

The actual part of the previous decision that is binding is the *ratio decidendi* of the case; that is the legal rule, which led to the decision in the earlier case. The *ratio* is an abstraction from the facts of the case. Everything else is termed *obiter dictum* and, although of persuasive authority, does not have to be followed by the later court. As the *ratio decidendi* of any case is an abstraction from, and is based upon, the material facts of the case, this opens up the possibility that a later court may regard the facts of the case before it as significantly different from the facts of a cited precedent and thus, consequentially, it will not find itself bound to follow that precedent. Judges use this device of distinguishing cases on their facts where, for some reason, they are unwilling to follow a particular precedent.

Various law reports contain details of cases and decisions and it is to those books and cases that lawyers go to find out what the case law is on any particular issue.

There are numerous perceived advantages of the doctrine of precedent, amongst which are:

– Consistency.
– Certainty.
– Efficiency.
– Flexibility.

It is sometimes claimed that judges exceed their constitutional role by making such laws, but others would counter that it is both legitimate and necessary that judges should take an active part in developing the law.

(b) Legislation

Legislation refers to law that has been created by the legislative body within a constitution. Under Article 15 of the Constitution, the Oireachtas has 'sole and exclusive' law making power. 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.

Statutes take the form of Acts of the Oireachtas or delegated legislation.

Delegated or secondary legislation is a particularly important aspect of the legislative process. It is made by some person or body, often 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 Statute or Act pursuant to which it is enacted. Also referred to as subordinate legislation, most delegated or secondary legislation is enacted by means of statutory instrument. Section 1 Statutory Instrument Act, 1947, defines a 'statutory instrument' as 'an order, regulation, rule, scheme or bye-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, i.e. makes an order stating the date upon 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, 19856, regulate the practice and procedure of the Supreme Court and High Court.

(iv) *Bye-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.

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 but, equally, it only has effect to the extent that its enabling Act authorises it and anything done in excess of, or contrary to, that authority may be challenged in the courts as *ultra vires* through an action for judicial review.

Within countries with written constitutions there is usually a limitation placed on the power of the legislature to make law, in that it cannot make laws which are contrary to, or in conflict with, the fundamental provisions of the constitution. This is the position in Ireland. Furthermore, pursuant to the European Convention on Human Rights Act, 2003, the High Court (and on appeal the Supreme Court) can make a declaration that a provision of an Act of the Oireachtas is incompatible with the State's obligations under the European Convention on Human Rights.

The courts exercise the essential task of interpreting statutes in such a way as to give them effect. In so doing the courts make use of the three main rules of interpretation:

– the literal rule (see *Fisher* v *Bell* (1961) and *Whitely* v *Chappell* (1868))
– the golden rule (see *Adler* v *George* (1964) and *R* v *Allen* (1872))
– the mischief rule (see *Heydon's case* (1584) and *Corkery* v *Carpenter* (1950)).

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

Some statements do not form part of a contract, even though they might have induced the other party to enter into the contract. These pre-contractual statements are called representations and the event of their being broken leads to different remedies than operate in regard to breaches of terms. It is important, therefore, to decide precisely what promises are included in the contract. Once it is decided that a statement is a term, rather than merely a pre-contractual representation, it is further necessary to decide which type of term it is, in order to determine what remedies are available for its breach.

Terms can be classified as one of three types.

(b) Conditions

A condition is a fundamental part of the agreement – it is something which goes to the root of the contract. Breach of a condition gives the injured party the right either to terminate the contract and refuse to perform their part of it, or to go through with the agreement and sue for damages. The classic case in relation to breach of condition is *Poussard* v *Spiers* & *Pond* (1876), in which the plaintiff had contracted with the defendants to sing in an opera they were producing. Due to illness she was unable to appear on the first night, or for some nights thereafter. When Mme Poussard recovered, the defendants refused her services as they had hired a replacement for the whole run of the opera. It was held that her failure to appear on the opening night had been a breach of a condition, and the defendants were at liberty to treat the contract as discharged.

(c) Warranties

A warranty is a subsidiary obligation which is not vital to the overall agreement, and in relation to which failure to perform does not totally destroy the whole purpose of the contract. Breach of a warranty does not give the right to terminate the agreement. The injured party has to complete their part of the agreement, and can only sue for damages. As regards warranties, the classic case is *Bettini* v *Gye* (1876) in which the plaintiff had contracted with the defendants to complete a number of engagements. He had also agreed to be in London for rehearsals six days before his opening performance. Due to illness, however, he only arrived three days before the opening night, and the defendants refused his services. On this occasion it was held that there was only a breach of warranty. The defendants were entitled to damages, but could not treat the contract as discharged.

The distinction between the effects of a breach of condition as against the effects of a breach of warranty was enshrined in s.11 Sale of Goods Act 1893. For some time it was thought that these were the only two types of term possible, the nature of the remedy available being prescribed by the particular type of term concerned. This simple classification has subsequently been rejected by the courts as too restrictive, and a third type of term has emerged: the innominate term.

(d) Innominate terms

The possibility of a third type of term was introduced in *Hong Kong Fir Shipping Co Ltd* v *Kawasaki Kisen Kaisha Ltd* (1962). In this situation, the remedy is not prescribed in advance simply by whether the term breached is a condition or a warranty, but depends on the consequence of the breach. If the breach deprives the innocent party of 'substantially the whole benefit of the contract', then the right to repudiate will be permitted; even if the term might otherwise appear to be a mere warranty.

If, however, the innocent party does not lose 'substantially the whole benefit of the contract', then they will not be permitted to repudiate but must settle for damages, even if the term might otherwise appear to be a condition. The way in which the courts approach such terms may be seen in *Cehave* v *Bremer (The Hansa Nord)* (1976). In this case a contract for the sale of a cargo of citrus pulp pellets, to be used as animal feed, provided that they were to be delivered in good condition. On delivery, the buyers rejected the cargo as not complying with that provision, and claimed back the money they had paid to the sellers. Subsequently the same buyers obtained the pellets, when the cargo was sold off, and used them for their original purpose. It was held that since the breach had not been serious, the buyers had not been free to reject the cargo, and the sellers had acted lawfully in retaining the money paid.

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

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

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

However, in *Morgan Crucible Co plc* v *Hill Samuel Bank Ltd* (1991), it was held that, where express representations are made about the accounts and the financial state of the company by directors or financial advisers of that company, with the intention that the person interested in the takeover will rely on them, then a duty of care is owed, and the auditor will be responsible for consequential losses. This was also the situation in *ADT* v *BDO Binder Hamlyn* (1995) where a partner in the defendant accountancy firm told the plaintiff company that he stood by the audited accounts of BSG, the company that the ADT were in the process of taking over. This was taken as an assumption of responsibility and, as the accounts had been prepared negligently, Binder Hamlyn were held liable to repay the amount that ADT had overpaid for BSG, a total of £65 million.

The only recent Irish case on the issue is *Kelly* v *Haughey Boland & Co* (1989). In this case, the plaintiffs bought a small company from the widow of its former owner. The plaintiffs claimed that the company's accounts had been negligently audited, in particular with respect to the extent of the stock-in-trade. As to whether auditors might be held negligent in such circumstances, the High Court considered that this depended upon:

'whether the defendants knew or should have reasonably foreseen at the time the accounts were audited that a person might rely on those accounts for the purpose of deciding whether or not to take over the company and therefore could suffer loss if the accounts were inaccurate. Such an approach does not place a limitation on those entitled to contend that there has been a breach of duty owed to them. First of all, they must have relied on the accounts and, secondly, they must have done so in circumstances where the auditors knew that they would or ought to have known that they might. If the situation is one where it would not be reasonable for the accounts to be relied on, then, in the absence of express knowledge, the auditor would be under no duty. This places a limit on the circumstances in which and the period for which they can be relied on. The longer the period which elapsed prior to the accounts being relied on, from the date on which the auditor gave his certificate, the more difficult it will be to establish that the auditor ought to have foreseen that his certificate would, in those circumstances, be relied on.'

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

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

(a) Express authority

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

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

(b) Implied authority

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

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

Directors of companies can also bind their companies on the basis of implied authority. In *Hely-Hutchinson* v *Brayhead Ltd* (1968), although the chairman and chief executive of a company acted as its *de facto* managing director, he had never been formally appointed to that position. Nevertheless, he purported to bind the company to a particular transaction. When the other party to the agreement sought to enforce it, the company claimed that the chairman had no authority to bind it. It was held that, although the director derived no authority from his position as chairman of the board, he did acquire such authority from his position as chief executive and thus the company was bound by the contract he had entered into on its behalf as it was within the implied authority of a person holding such a position.

(c) Ostensible/apparent authority

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

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

In *Freeman & Lockyer* v *Buckhurst Park Properties (Mangal) Ltd* (1964), although a particular director had never been appointed as managing director, he acted as such with the clear knowledge of the other directors and entered into a contract with the plaintiffs on behalf of the company. When the plaintiffs sought to recover fees due to them under that contract it was held that the company was liable: a properly appointed managing director would have been able to enter into such a contract and the third party was entitled to rely on the representation of the other directors that the person in question had been properly appointed to that position.

Sometimes it may be difficult to distinguish between implied authority and ostensible/apparent authority. This was seen in *Kilgobbin Mink and Stud Farms Ltd* v *National Credit Company Ltd* (1980). In this case, the chairman owned all except one share in the company. The company expressly authorised the chairman to surrender its lease of a premises to the defendant. The chairman did this and directed the defendant to pay the money owing to the company into the bank account of a second company of which the director was the controlling shareholder. The court held that the chairman's actual authority to surrender the lease gave rise to a usual/implied authority, or at the very least an apparent/ostensible authority, as to how and to whom the money should be paid. The court said that the direction to pay the money into the second company's bank account was not unusual enough to require the defendant to inquire about the precise extent of the chairman's authority, particularly when it was the second company that was trading in the leased premises.

(ii) Where a principal has previously represented to a third party that an agent has the authority to act on their behalf.

Even if the principal has subsequently revoked the agent's authority they may still be liable for the actions of the former agent unless they have informed third parties who had previously dealt with the agent about the new situation (*Willis Faber & Co Ltd* v *Joyce* (1911)). Thus, companies should inform their previous clients where a director has had his/her authority, either express or implied, removed or reduced.

5 **(a)** **(i)** Under the provisions of the Companies Act (CA) 1963, the memorandum of a limited company with a share capital is required to state the amount of the share capital with which the company proposed to be registered and the nominal amount of each of its shares. Such a company is required to have a memorandum of association (s.5 CA 1963) and s.16 CA 1963 provides that the form of memorandum of association shall be in accordance with prescribed forms set out in the schedule to the CA 1963. The prescribed form contains a capital clause which, s.6(4) CA 1963 requires must state the total amount of the company's authorised share capital. This sets a limit on the amount of capital which the company can issue, subject to increase by ordinary resolution.

The authorised share capital is essentially a 'snapshot' of a company's share capital at the point of registration.

(ii) Issued capital represents the nominal value of the shares actually issued by the company and public companies must have a minimum issued capital of €38,092·14, and of which at least 25% must be paid up (s.19 Companies (Amendment) Act, 1983).

(iii) Paid up capital. This is the proportion of the nominal value of the issued share capital that has actually been paid by the shareholders. 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 one-quarter of their nominal value (s.19 C(A)A 1983).

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

– Ordinary shares
These shares are sometimes referred to as 'equity in the company'. Of all the various types of shares, they carry the greatest risk, but in recompense receive the greatest return. The nominal value of shares is fixed and determines the shareholder's level of potential liability to the extent that they are not paid up. However, the exchange value of the shares in the stock market fluctuates in relation to the performance of the company. Ownership of ordinary shares entitles the holder to attend and vote at general meetings.

– Preference shares
These involve less of a risk than ordinary shares. They may have priority over ordinary shares in two respects: dividends and repayment. They carry a fixed rate of dividend, which has to be paid before any payment can be made to ordinary shareholders. Such rights are cumulative unless otherwise provided. This means that a failure to pay a dividend in any one year has to be made good in subsequent years.

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

6 **(a)** The formal decision-making power of the company is generally exercised by the directors at their board meetings. It is the board of directors acting as a body, rather than individual directors, that is the agent of the company. However as the board only meets periodically it is necessary for authority to deal with day-to-day matters to be delegated to individual officers and employees of the company. In most companies, this is done by the appointment of one or more managing directors or executive directors.

There is no strict legal definition of a managing director. As Lord Reid stated in *Harold Holdsworth and Co (Wakefield) Ltd* v *Caddies* (1955), 'the law does not specify the duties of a managing director'. Consequently the terms upon which a managing director is appointed are a matter of negotiation.

Under Table A of the Companies Act (CA), 1963 (the model articles of association), Article 112, the directors can delegate their authority to the managing director. If Article 112 is adopted, it is important to ensure that Article 80 is also adopted because this provides that the directors exercise all powers of the company which are not exercised by the company in a general meeting. It seems therefore that, if these articles are adopted, and a managing director is appointed, the managing director has as much authority as the board, i.e. (s)he will have the implied authority to bind the company in the same way as the board, whose delegate (s)he is. Outsiders, therefore, can safely assume that a person appointed as managing director has all the powers usually exercised by a person acting as managing director.

Consequently it may be seen that a managing director has a dual role: he is a member of the board of directors with all the usual powers and responsibilities of a director, but he is also an executive officer of the company, in which role he is usually employed on a full-time basis and paid a salary.

The mere fact of appointment, however, will mean that the person appointed as managing director will have the implied authority to bind the company in the same way as the board, whose delegate they are. Outsiders, therefore, can safely assume that a person appointed as managing director has all the powers usually exercised by a person acting as a managing director (see s.8 CA 1963 and Article 6 of the EEC (Companies) Regulations, 1973 for the effect of the *ultra vires* doctrine in relation to the powers of directors).

(b) Non-executive directors do not usually have a full-time relationship with the company; they are not employees and only receive directors' fees. The role of the non-executive directors, at least in theory, is to bring outside experience and expertise to the board of directors. They are also expected to exert a measure of control over the executive directors to ensure that the latter do not run the company in their, rather than the company's, best interests.

It is important to note that there is no distinction in law between executive and non-executive directors and the latter are subject to the same controls and potential liabilities as are the former.

On the other hand, executive directors usually work on a full-time basis for the company and may be employees of the company with specific contracts of employment. Section 28 CA 1990 requires that the terms of any such contract must be approved by the company and cannot be more than five years in length. Further, the terms of a second or subsequent service contract cannot be negotiated more than six months prior to the end of the preceding service contract.

It is generally accepted that effective non-executive directors are essential for good corporate governance. It is important, however, to note that there is no distinction in law between executive and non-executive directors and the latter are subject to the same controls and potential liabilities as are the former.

(c) Section 27 CA 1990 defines a shadow director as 'a person in accordance with whose directions or instructions the directors of a company are accustomed to act unless the directors are accustomed to so act by reason only that they do so on advice given by him in a professional capacity'.

It is possible that someone who, in reality, exercises control over a company's decision making might seek to evade their responsibilities and potential liabilities as a director. For example, they could attempt to do this by appointing some other people as nominal directors without themselves being formally appointed to the board of directors. They would, nonetheless, exercise control over the business. It was in order to regulate such potential activity by those who exercise control over companies from behind the scenes that the concept of shadow director was introduced. Thus, s.27 CA 1990 provides that a shadow director, in relation to a company, means a person in accordance with whose directions or instructions the directors of the company are accustomed to act. However, it should be noted that a person is not to be regarded as a shadow director simply for the reason that the directors act on advice given by him/her in a professional capacity. Thus, neither accountants nor lawyers are made liable on the simple basis that they provide advice which the board of directors may act on.

Examples of the legislation that applies to shadow directors include that which provides for the restriction of directors in the event of an insolvent liquidation (s.150 CA 1990), the prohibitions and restrictions on loans to directors (s.31 CA 1990) and the exposure to personal liability in circumstances of fraudulent and reckless trading (s.297 and s.297A CA 1963).

The important question remains as to who actually is covered by the definition.

In *Re a Company* (1988) 4 BCC 424, Knox J refused to hold, on a preliminary point of law, that a company's bank was incapable of being deemed to be a shadow director. The allegation that the bank was a shadow director, however, was not pursued at trial: *Re M C Bacon Ltd* (1990). Nevertheless, a bank, which gave instructions or advice to a company client, might run the risk of being held liable as a shadow director. In *Re Tasbian Ltd (No. 3)* (1992) a chartered accountant, who had been appointed as a consultant or 'company doctor', was held to be a shadow director.

A holding company or substantial shareholder obviously may fall within the category of a shadow director. However, they will not be so treated unless all of the company's directors are accustomed to act on that company's or person's instructions (*Kuwait Asia Bank EC* v *National Mutual Life Nominees Ltd* (1990)). The degree to which the actual directors must bow to the instructions of the shadow director was emphasised in *Secretary of State for Trade & Industry* v *Deverell* (2002), in which the Court of Appeal held that it would be sufficient for the appointed directors to 'cast themselves in a subservient role' in relation to the non-appointed person for the latter to be considered as a shadow director.

7 Redundancy is defined in s.7(2) Redundancy Payments Act (RPA) 1967 (as amended by the RPA 1971 and 2003) as being: 'dismissal attributable wholly or mainly to:

(a) the fact that his employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him, or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business for employees to carry out work of a particular kind in the place where they were so employed have ceased or diminished or are expected to cease or diminish, or

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

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

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

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

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

(a) a contract of employment is terminated by the employer (with or without notice); or
(b) a fixed term or purpose contract expires without being renewed; or
(c) the employee terminated the contract, with or without notice, in circumstances where s/he is entitled to terminate without notice by reason of the conduct of the employer (i.e. constructive dismissal).

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

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

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

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

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

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

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

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

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

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

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

– *the display of goods in a shop window*. The classic case in this area is *Fisher* v *Bell* (1961), in which a shopkeeper was prosecuted for offering offensive weapons for sale, by having flick-knives on display in his window. It was held that the shopkeeper was not guilty as the display in the shop window was not an offer for sale but only an invitation to treat.

– *the display of goods on the shelf of a self-service shop*. In this instance the exemplary case is *Pharmaceutical Society of Great Britain* v *Boots Cash Chemists* (1953). The defendants were charged with breaking a law which provided that certain drugs could only be sold under the supervision of a qualified pharmacist. It was held that Boots were not guilty as the display of goods on their shelves was only an invitation to treat. In law, the customer offered to buy the goods at the cash desk where the pharmacist was stationed.

– *a public advertisement*. Thus in *Partridge* v *Crittenden* (1968) a person was charged with 'offering' a wild bird for sale contrary to Protection of Birds Act 1954, after he had placed an advert relating to the sale of such birds in a magazine. It was held that he could not be guilty of offering the bird for sale as the advert amounted to no more than an invitation to treat. Another example is *Minister for Industry and Commerce* v *Pim* (1966) wherein the defendant put a suit in his shop window that displayed the credit price for the suit. The court held that the defendant did not breach legislation requiring the display of the cash price (as well as the credit price) because the legislation only applied to offers for sale. The window display amounted to an invitation to treat and the law did not extend to such an invitation.

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

Where a promise agrees to keep an offer open for a period, such a promise is only binding where there is a separate contract to that effect, supported by independent consideration. Without such an option contract the promisor is at liberty to withdraw the offer at any time before the promisee actually accepts the offer.

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

(a) it is immediately apparent that Ade has no cause of action against the auctioneers, as their advert did not amount to an offer capable of acceptance. His situation is similar to that of the plaintiff in *Harris* v *Nickerson* (1873) who failed in his attempt to recover damages for his costs in attending a cancelled auction. In deciding against him the court held that he was attempting 'to make a mere declaration of intention a binding contact'.

(b) as regards his dealings with the shopkeeper, Chip, it is equally unlikely that Ade would have any action against him. The original price on the ticket in the window was no more than an invitation to treat. Ade made an offer of £350, which Chip declined to accept. Chip in turn made a counter-offer of £400, which Ade could have accepted, to form a contract. Ade, however, did not accept the offer at the time it was made, and when he subsequently tried to accept it, he found out that the pottery had already been sold. As Ade had not provided any consideration for Chip to keep the offer open, he has no grounds for complaint against the shopkeeper.

9 Doc faces a number of difficulties, which result from the operation of the doctrine of separate personality. When a company registers under the Companies Act 1963 it becomes a corporation, with the effect that, from then on it is treated as having its own distinct legal personality, completely separate from its members. This doctrine of separate personality applies equally to single person enterprises as it does to the largest of transnational enterprises. The doctrine of separate personality is an ancient one, although the clearest expression of it can be found in the famous case of *Salomon* v *Salomon* (1897). A number of important consequences flow from the fact companies are treated as having a legal personality in their own right, but there are also a number of situations when the courts will ignore the separate legal personality of the company. In such situations the courts will treat the shareholders as being, or being responsible for the actions of, the company.

(a) One consequence of the doctrine of separate personality is that companies have full contractual capacity in their own right. Equally, companies can sue and be sued in their own right, so once a company enters into a contract, it is the company, rather than its individual members, which is liable for any default. In the first situation, it is clear from the contract document that Doc has entered into an agreement, not with Ed as he thought, but with the company, Ed Ltd. He cannot, therefore, take action against Ed personally. As a member of a limited company, Ed's only liability will be to pay any amount remaining unpaid on the shares he holds in Ed Ltd. Doc will have to claim as an ordinary unsecured trade creditor of the company, and the fact that it has gone into insolvent liquidation makes it unlikely that he will recover much, if anything, from the company.

(b) Where, however, an individual looks to misuse the doctrine of separate personality, the courts will ignore the separate personality of the company and will enforce corporate liability against the members. Thus in *Jones* v *Lipman* (1962), Lipman had entered into a contract to sell a house to Jones, but before completion of the contract, and in order to avoid it, he sold the house to a company that he had set up for that purpose. Thus Lipman was attempting to hide behind a company to avoid his personal contractual obligation. In that instance the court held that the company was 'the creature of the defendant' and no more than a sham and required Lipman to complete his contractual obligations.

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

A court will also exercise its discretion to raise the corporate veil where it considers that an examination of the economic reality of a group of companies requires that this be done. This was done in *Power Supermarkets* v *Crumlin Investments Ltd* & *Dunnes Stores (Crumlin) Ltd* (1981), in which the court held that where the justice of the case requires, it may treat two or more related companies as a single entity, 'so that the business notionally covered by one will be regarded as the business of the group, if this conforms to the economic and commercial realities of the situation'. Subsequently, *Lac Minerals* v *Chevron Minerals Corporation of Ireland Ltd* (1995) held that, before the corporate veil is lifted, the acts of one company must be factually identified with those of another and the circumstances must be such that justice would only be achieved if the separate legal personalities were ignored.

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

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

The process usually involves three distinct phases:

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

Money laundering was first made a criminal offence in the Criminal Justice Act (CJA), 1994. The Criminal Assets Bureau (under the Proceeds of Crime Act, 1996) and the Director of Public Prosecutions were given responsibilities in respect of seeking orders freezing, forfeiting and confiscating assets. Certain relevant provisions of CJA 1994 have now been repealed and replaced by the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010.

The CJA, 1994, seeks to control money laundering by creating three categories of criminal offences in relation to the activity.

– laundering
The first category of principal money laundering offences relates to laundering the proceeds of crime in the State. This is contained in s.7(1) CJ(ML&TF)A 2010. A person who aids or abets the commission of such an offence is liable to prosecution under s.7 Criminal Law Act 1997.

Under s.7 CJ(ML&TF)A 2010, it is an offence to conceal, disguise, convert, transfer or remove criminal property from the State. These offences are punishable on conviction by a maximum of 14 years imprisonment and/or a fine.

The handling of such property is also an offence under s.7. Furthermore, a person is deemed to handle property if s/he receives or arranges to receive the property or s/he retains, removes, disposes of or realises the property, or arranges to do any of the foregoing, for the benefit of another person (s.7(6)).

Section 33 CJ(ML&TF)A 2010 requires that a body that is designated by the Act must take reasonable measures to establish the identity of any person for whom it proposes to provide particular services in a variety of circumstances that include where it suspects that a service is connected with the commission of an offence under s.7. A body that identifies such a person is required to retain documents for evidence in any money laundering investigation. An offence under s.33 carries a maximum penalty of five years imprisonment and/or a fine.

– failure to report
The second category of offence relates to failing to report a suspicion of money laundering and is contained in s.42(9) CJ(ML&TF)A 2010. Section 42(1) CJ(ML&TF)A 2010 requires that certain designated bodies must report to An Garda Síochána and the Revenue Commissioners where they know, suspect or have reasonable grounds to suspect, on the basis of information obtained in the course of carrying on business as a designated person, that another person has been or is engaged in an offence of money laundering.

Failure to so report is an offence under s.42 and punishable by a maximum of five years imprisonment and/or a fine.

– tipping off
The third category of offence relates to tipping and is contained in s.49 CJ(ML&TF)A 2010, which makes it an offence to make a disclosure which is likely to prejudice any investigation under the Act. The s.49 offences are punishable by a maximum penalty of five years and/or a fine.

It is apparent from the scenario that Ian and Jet are liable to control and prosecution under the CJ(ML&TF)A 2010 as they are involved in money laundering. It is clear that the original money to purchase the football club was not the product of crime, so that transaction itself is not covered by the money laundering legislation. However, even if the club was bought with legitimate money, it is nonetheless the case that it is being used to conceal the fact that the source of much of Jet's money is criminal activity.

Jet would therefore be guilty on the primary offence of money laundering under s.7 CJ(ML&TF)A 2010.

Ian is also guilty of an offence and can be prosecuted under s.7 Criminal Law Act 1997, as he is clearly assisting Jet in his money laundering procedure. His activity is covered both by s.7(1)(a)(i) CJ(ML&TF)A 2010, as he is actively concealing and disguising criminal property.

Ian is also liable under s.42, for failing to disclose any suspiciously high profits from the football club.

1 This question requires candidates to explain the two main sources of law in the Irish legal system: case law and legislation.

(a) 4–6 marks Good explanation of case law. Examples used to highlight answers.

2–3 marks Sound understanding but perhaps no examples.

0–1 mark Limited knowledge only about the topic.

(b) 3–4 marks Good awareness of the meaning and effect of legislation.

0–2 marks Limited knowledge only about the topic.

2 This question requires candidates to demonstrate their knowledge of the contents of contracts. In particular, it requires an examination of the way in which contractual terms can be classified and invites candidates to consider the effect of this classification in relation to a breach of any such term. The question is clearly divided in order to provide candidates with a prompt and as an indication of what is expected of them in terms of detail of treatment.

8–10 marks Thorough explanation of the meaning of terms generally together with an explanation of the four categories of terms with reference to appropriate cases or examples.

5–7 marks Reasonable treatment of terms generally and two or even three of the types of terms, or a less complete treatment of all the elements.

2–4 marks Very unbalanced answer, focusing on only one aspect of the question and ignoring the others, or one which shows little understanding of the subject matter of the question.

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

3 This question requires candidates to explain the extent of a company auditor's duty of care and to whom such a duty is owed.

8–10 marks A thorough understanding of how professional negligence applies to auditors demonstrated by references to cases or examples.

5–7 marks A clear understanding of the topic, perhaps lacking in detail.
Alternatively an unbalanced answer showing good understanding of one part but less in the others.

2–4 marks Some, but limited, understanding of the topic, or clear understanding of only one aspect.

0–1 mark Little or no knowledge of the topic.

4 This question asks candidates to explain the various types of authority that agents can possess.

8–10 marks Good to complete answer which shows a knowledge of the meaning and effect of the three terms. It is likely that case authority will be provided, and they will be rewarded accordingly.

5–7 marks A clear understanding of the topic, perhaps lacking in detail. Alternatively an unbalanced answer showing good understanding of one part but less in the others.

2–4 marks Some, but limited, understanding of the topic, or clear understanding of only one aspect.

0–1 mark Little or no knowledge of the topic.

5 This question requires candidates to explain two related but distinct aspects of share capital. Part (a) relates to the concepts of share capital; part (b) focuses on the distinct types of shares.

8–10 marks Thorough explanation of the meaning and effect of both elements of the question.

5–7 marks Reasonable explanation of both aspects but perhaps lacking in detail in relation to some of the individual parts.

2–4 marks Some, but limited, knowledge of both elements or only dealing with one of them.

0–1 mark Little, if any, understanding of any of the concepts.

6 This question requires candidates to explain three related but distinct aspects of the nature and function of company directors, specifically within the context of corporate governance. Part (a) requires an explanation of the role of managing director, part (b) requires an explanation of non-executive directors and part (c) requires an explanation of shadow directors.

8–10 marks	Thorough explanation of the meaning and effect of all elements of the question with appropriate reference to corporate governance.
5–7 marks	Reasonable explanation of all aspects but perhaps lacking in detail in relation to some of the individual parts.
2–4 marks	Some, but limited, knowledge of both elements or only dealing with one of them.
0–1 mark	Little, if any, understanding of any of the terms.

7 This question requires candidates to explain the meaning of the term redundancy and the legal rules relating to it.

8–10 marks	Thorough to complete answers, showing a detailed understanding of the concept of redundancy, the rules for calculating payment and probably making reference to the legislation.
5–7 marks	A clear understanding of the topic, but perhaps lacking in detail. Alternatively an unbalanced answer showing good understanding of one part but less in the other.
2–4 marks	Some knowledge, although perhaps not clearly expressed, or very limited in its knowledge and understanding of the topic.
0–1 mark	Little or no knowledge of the topic.

8 This question requires candidates to demonstrate their understanding of the way in which contractual agreements can be entered into, and the consequences of entering into such agreements. In addition to a general understanding of the law relating to offer and acceptance, it requires specific analysis of the two distinct situations set out in the problem.

8–10 marks	Answers will demonstrate a thorough knowledge of the law generally, together with a clear analysis of the problem situations and a deployment of the appropriate legal principles. Cases or examples will be used to support the analysis and conclusions.
5–7 marks	Answers will be generally sound in relation to the law but may be lacking in analysis or application. Once again cases or examples will be used.
2–4 marks	Answers will demonstrate some knowledge of the law relating to the question but not to the degree expected of the very best answers. They may be weak in analysis and/or application.
0–1 mark	Little or no understanding of the law relating to the question. Extremely weak in terms of analysis and application.

9 This question requires an understanding of the way in which the doctrine of separate personality operates with respect to registered companies. There are two parts to the question, although marks are not allocated to individual elements in order to permit markers to reward particularly good, but partial, answers.

8–10 marks	Thorough understanding of the rules relating to separate personality and the exceptions thereto.
5–7 marks	Good but limited analysis, perhaps lacking in some or recognition of an element of the question.
2–4 marks	Some, but limited, knowledge of what the question is about, or recognition of what it is about but lacking in any analysis.
0–1 mark	Little, if any, understanding of what the question is about.

10 This question requires a general explanation of the meaning of money laundering together with a consideration of the way in which the legislation seeks to control it.

8–10 marks	Good explanation of both the meaning of the concept and offences under the legislation together with a good analysis of the scenario with a clear explanation of the law relating to the parties.
5–7 marks	Fair explanation of the general concept but lacking in detail in relation to the legislation. Some understanding of the situation but perhaps lacking in detailed reference to the statute.
2–4 marks	Unbalanced answer, perhaps lacking detail, or application.
0–1 mark	Weak answer lacking in knowledge, with little or no reference to the legal regime.