Answers

1 This question requires the candidate to consider the various sources of law in the Irish legal system.

Legislation
This is law produced through the Oireachtas. This is the most important source of law today. First, in terms of quantity, the Oireachtas produces far more legal rules than any other source.

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 constitution 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 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, 2005 is 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 of 1890 is an example of this. Amending legislation is designed to alter the existing legal position.

Delegated legislation is a particularly important aspect of the legislative process. It is 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 Statute pursuant to which it is enacted. Also referred to as secondary or subordinate legislation, most delegated legislation is enacted by way of statutory instrument. Section 1 Statutory Instrument Act, 1947 defines a 'statutory instrument' as an 'order, regulation, rule, scheme or byelaw' made pursuant to a statutory power.

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*, which binds. Everything else is *obiter dictum* and need not to 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 the normal practice would henceforth be, as previously, that decisions of the Supreme Court would continue to be binding on itself, the Supreme 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).

One of the major advantages of the system of precedent is that it provides for certainty and the saving of 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 the UK constitution is to interpret, and not to create, law, and perhaps this latter point explains why most judges are very wary of openly admitting that they actually do make law.

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

The European Union
Since joining the European Community, now the European Union, the United Kingdom and its citizens have become subject to European Union (EU) 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 EU law are: internal treaties and protocols; international agreements; secondary legislation; and decisions of the Court of Justice of the European Union.

Tutorial note: *Full marks can be obtained without mention of custom and the European Union. These are not specifically examinable but are important sources of law and therefore have been added to the answer.*

2 This question asks candidates to consider the rules relating to the award of damages for breach of contract. Damages are the common law remedy for breach of contract and, unlike discretionary equitable awards, are available as a right where a pecuniary loss has been sustained by the innocent party. In deciding what damages are to be paid, the courts deploy a number of rules and principles to determine their decision. These various rules may be considered under two headings: the rules relating to remoteness of damage and rules relating to the measure of damages.

(a) Remoteness of damage

It would be unfair if the party in breach of contract were held to be liable for every consequence of their action, no matter how far down the chain of causation it appeared. In order to limit potential liabilities, the courts have established clear rules about consequential liability in such a way as to deny the award of damages for consequences that are deemed to be too remote from the original breach. The rule relating to remoteness of damages was clearly stated for the first time in *Hadley* v *Baxendale* (1854), to the effect that damages will only be awarded in respect of losses which:

(i) arise naturally, i.e. in the usual course of events; or which

(ii) both parties may reasonably be supposed to have contemplated as a probable result of its breach when the contract was made.

As a consequence of the first part of the rule in *Hadley* v *Baxendale*, the party in breach is deemed to expect the normal consequences of the breach, whether they actually expected them or not. It does not matter that they did not actually think of the consequences, if those consequences were the natural outcome of their breach.

Under the second part of the rule, however, the party in breach can only be held liable for abnormal consequences where they have actual knowledge that the abnormal consequences might follow. In *Victoria Laundry Ltd* v *Newman Industries Ltd* (1949) it was decided that the plaintiff could claim damages in relation to the loss of normal profits due to the defendant's delay, as that loss was a natural consequence of the delay. A second claim for damages in relation to an especially lucrative contract failed, however, on the grounds that the loss was not a normal one, but was a consequence of an abnormal contract, about which the defendant knew nothing. The decision in the *Victoria Laundry* case was confirmed by the House of Lords in *The Heron II* (1969), although the actual test for remoteness was reformulated in terms of whether the consequence should have been 'within the reasonable contemplation of the parties' at the time of the contract.

(b) The measure of damages

The courts use a number of rules and principles to determine the actual extent of monetary damages owed. The general rule is that damages in contract are intended to be compensatory rather than punitive. The aim is to put the injured party in the same position they would have been in had the contract been properly performed. As the object is not to punish the party in breach but to compensate the injured party for any financial loss sustained as a consequence of the other party's breach, so the amount of damages awarded can never be greater than the actual loss suffered. It should be noted that the exact amount of the loss may differ, depending on whether the innocent party's reliance interest or expectation interest is used as the criterion against which damages are measured. In practice, it is usually the expectation loss that is compensated except where this permits the innocent party to escape responsibility for any loss they would have made in the contract in the absence of breach (see *CCC Films (London) Ltd* v *Imperial Quadrant Films Ltd* (1985)).

Where the breach relates to a contract for the sale of goods, damages are usually assessed in line with the market rule. This means that if goods are not delivered under a contract, the buyer is entitled to go into the market and buy similar goods, and pay the market price prevailing at the time. They can then claim the difference in price between what they paid and the original contract price as damages. Conversely, if a buyer refuses to accept goods under a contract, the seller can sell the goods in the market, and accept the prevailing market price. Any difference between the price they receive and the contract price can be claimed in damages.

The injured party is under a duty to take all reasonable steps to mitigate their loss. So in the above examples, the buyer of goods which are not delivered has to buy the replacements as cheaply as possible; and the seller of goods which are not accepted has to try to get as good a price as they can when they sell them. In such a way they are expected to minimise the actual loss they sustain, as may be seen in *Payzu* v *Saunders* (1919).

At one time, damages could not be recovered where the loss sustained through breach of contract was of a non-financial nature. The modern position is that such non-pecuniary damages can be recovered (*Jarvis* v *Swan Tours Ltd* (1973)).

The job of estimating damages may be made much simpler where the parties to an agreement make provisions for possible breach by stating in advance the amount of damages that will have to be paid in the event of any breach occurring. Damages under such a provision are known as liquidated damages. They will be recognised by the court as long as they represent a genuine pre-estimate of loss, and are not intended to operate as a penalty against the party in breach (*Dunlop* v *New Garage & Motor Co* (1915)).

3 **(a)** A tort is a civil wrong inflicted on one party by another. The right to seek a remedy is independent of contractual relations and indeed there is no need for there to have been any previous relationship between the parties.

The basis of a claim in tort is that the claimant suffered a loss as a result of the defendant's actions and, consequently, the claimant should be entitled to compensation in the form of damages. The loss suffered may be physical, mental or economic and the action giving rise to the action in tort may be intentional or unintentional.

There are numerous instances of tortious actions, for example, trespass to land or to the person, nuisance or defamation, but the most important is probably the tort of negligence.

(b) **(i)** The term negligence is used to describe carelessly carrying out an act and breaking a legal duty of care. In other words, liability under the tort of negligence arises where someone causes loss to someone else, through their failure to take reasonable care when there is a duty to do so.

In order to justify an action in the tort of negligence, the claimant has to demonstrate the following requirements:

– that the defendant owed them a duty of care. In *Donoghue* v *Stevenson* (1932), which effectively established the tort of negligence, the House of Lords established a general duty of care that all individuals are understood to owe to their neighbours.
– that the defendant breached that duty of care. The standard of care is that expected of the reasonable man, although it is dependent on particular circumstances and competencies expected of the actual person involved in the negligent action.
– that they suffered loss or damage *as a direct consequence* of the breach of duty of care. However, even where causation is proved, a negligence claim may still fail if the damage caused is held to be *too remote*. The test for remoteness is *reasonable foresight* as stated in *The Wagon Mound* (1961).

Even if negligence is proved, the defendant may have a defence that protects them from liability, such as *volenti non fit injuria*, or reduces the amount of damages they are liable for, such as contributory negligence.

(ii) The tort of passing off was developed to prevent one person from using any name which is likely to divert business their way by suggesting that the business is actually that of some other person, or is connected in any way with that other business. An action for passing off thus enables people to protect the goodwill they have built up in relation to their business activity. To this end, the claimant may be granted a court injunction to prevent the use of a particular name. Thus in *Ewing* v *Buttercup Margarine Co Ltd* (1917), the plaintiff successfully prevented the defendants from using a name that suggested a link with his existing dairy company. Likewise, *C & A Modes and C & A Ireland* v *C & A (Waterford) Ltd* (1975) concerned an Irish defendant company which was registered in 1972, used the name 'C & A' and operated a drapery business. The English plaintiff had used the symbol 'C & A' since 1953 and it succeeded in its application for an injunction restraining the defendant from using the name and the High Court held that it had been the defendant's intention to deceive the public.

Registration of a company name will be refused, or a company may be directed to change its name up to six months after its registration, where the Registrar considers that the company's name is identical or too similar to the name of a pre-existing company (s.23(2) Companies Act 1963). If the Registrar directs a change of name, the company must change its name within a period of six weeks from the date of the direction and failure to comply with the direction is a criminal offence (s.23(3)).

4 The Companies Act (CA) 1963 sets out the method for forming a company, which is that one or more persons must subscribe their name to a memorandum of association and comply with the requirements of the provisions of the Act as to registration. Under s.9, two documents must be delivered to the registrar: the memorandum of association and the application for registration.

(a) **Memorandum of Association**

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

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

– The authorised share capital clause: 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. The current minimum value of issued capital in relation to a public limited company is €38,092·14.

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

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

(b) Application for registration

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

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

There must also be at least seven members (s.5 CA 1963).

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

(c) Articles of Association

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

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

As previously, the articles of association form a statutory contract between the company and its members and between each of the members in their capacity as members (s.25 CA 1963), and the previous common law will continue to be applied as appropriate.

This document relates to the internal operation of the company and deals with matters such as the rights attached to particular shares, the calling and conduct of meetings. In fact, companies need not register their own articles, as the model articles in Table A CA 1963 will automatically apply by default. Amongst other things, these articles relate to the rights attached to particular shares, the rules relating to the transfer of such shares, the conduct of meetings, the appointment, powers and payment of directors. Articles submitted must be dated, signed by the subscribers and witnessed in the same form as the memorandum. Companies can alter their objects clause by passing a special resolution, by virtue of s.10 CA 1963.

5 (a) As shareholders in limited companies, by definition, have the significant protection of limited liability, the courts have always seen it as the duty of the law to ensure that this privilege is not abused at the expense of the company's creditors. To that end, they developed the doctrine of capital maintenance, the specific rules of which are now given expression in the Companies Act (CA) 1963 and Companies (Amendment) Act 1983 (C(A)A 1983). The rules, such as that stated in s.27 C(A)A 1983 against shares being issued at a discount, ensure that companies receive at least the full nominal value of their share capital. The rules relating to the doctrine of capital maintenance operate in conjunction to those rules to ensure that the capital can only be used in limited ways. Whilst this may be seen essentially as a means of protecting the company's creditors, it also protects the shareholders themselves from the depredation of the company's capital.

There are two key aspects of the doctrine of capital maintenance: first that creditors have a right to see that the capital is not dissipated unlawfully; and second that the members must not have the capital returned to them surreptitiously. There are a number of specific controls over how companies can use their capital, but perhaps the two most important are the rules relating to capital reduction and company distributions.

(b) The procedures through which a company can reduce its capital are laid down by CA 1963, ss.72–76:

The CA 1963 states that a company, which is authorised by its articles of association to reduce its share capital, may do so by passing a special resolution to that effect. To be effective, the reduction of share capital must be confirmed by the High Court (s.72(2) CA 1963). Thus, while s.73 provides that a company which has passed a resolution to reduce its share capital 'may' apply to the High Court for an order confirming the reduction, the resolution is ineffective without High Court approval.

Section 72(2) CA 1963 sets out three particular ways in which the capital can be reduced by:

(i) removing or reducing liability for any capital remaining as yet unpaid. In effect the company is deciding that it will not need to call on that unpaid capital in the future.

(ii) cancelling any paid-up capital which has been lost through trading or is unrepresented by its current assets. This effectively brings the statement of financial position into balance at a lower level by reducing the capital liabilities in recognition of a loss of assets.

(iii) repayment to members of some part of the paid value of their shares in excess of the company's requirements. This means that the company actually returns some of its capital to its members on the basis that it does not actually need that level of capitalisation to carry on its business.

It can be seen that procedure (i) reduces the potential creditor fund for the company gives up the right to make future calls against its shares and procedure (iii) reduces the actual creditor fund by returning some of its capital to the members. In recognition of this fact, creditors are given the right to object to any such reduction. However, procedure (ii) does not actually reduce the creditor fund, it merely recognises the fact that capital has been lost. Consequently, creditors are not given the right to object to this type of alteration unless the court so directs (s.73(2) CA 1963).

Under s.74(1), the court may make an order confirming the reduction of capital on such terms as it thinks fit. In reaching its decision, the court is required to consider the position of creditors of the company in cases (i) and (iii) above and may do so in any other case. In any case the court has a general discretion as to what should be done. If the company has more than one class of shares, the court will also consider whether the reduction is fair between classes. In this, it will have regard to the rights of the different classes in a liquidation of the company since a reduction of capital is, by its nature, similar to a partial liquidation.

Section 75 CA 1963 states that the Registrar of Companies, when shown the court order, a copy of the order and a 'minute' of the changed capital, must register the order and minute.

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

- Members' voluntary winding up,
- Creditors' voluntary winding up,
- Compulsory winding up.

Examinership, on the other hand, is a means of safeguarding the continued existence of business enterprises in financial difficulties, rather than merely ensuring the payment of creditors. Examinership was first introduced in the Companies (Amendment) Act (C(A)A) 1990 but this legislation was significantly amended by the Companies (Amendment) (No. 2) Act (C(A)(No.2)A) 1999. The aim of examinership is to save the company, or at least the business, as a going concern by taking the control of the company out of the hands of its directors and placing it in the hands of an examiner. Alternatively, the procedure is aimed at maximising the realised value of the business assets.

Once a company has been placed in examinership, it is no longer possible to commence winding up proceedings against the company or enforce charges, retention of title clauses or even hire-purchase agreements against the company. The presentation of a petition to have an examiner appointed can be made within three days of the appointment of a receiver to the company.

Section 2(1) C(A)A 1990, as amended, provides that 'where it appears to the court that:

(a) a company is or is likely to be unable to pay its debts, and
(b) no resolution subsists for the winding up of the company, and
(c) no order has been made for the winding up of the company

[the court] may, on application by petition presented, appoint an examiner to the company for the purpose of examining the state of the company's affairs and performing such duties in relation to the company as may be imposed by or under this Act.'

Since the C(A)(No.2)A 1999, the court cannot make an order under s.2(1) 'unless there is a reasonable prospect of the survival of the company and the whole or any part of its undertaking as a going concern.'

A petition to have an examiner appointed to a company and the company placed under the protection of the court may be made by the company, the directors of the company or any of its creditors (including contingent or prospective creditors) and a member (or members collectively holding) no less than one-tenth of the paid-up share capital of the company that has the right to vote at general meetings.

Since the C(A)(No.2)A 1999, a petition must be accompanied by a pre-petition report prepared by an independent accountant. This must be either the company's auditor or a person who is qualified to be appointed as an examiner of the company. This report must comprise, *inter alia*, a statement of the affairs of the company, showing, in so far as it is reasonably possible to do so, particulars of the company's assets and liabilities as at the latest practicable date, particulars of its creditors and the securities held by them. It must also include the independent accountant's opinion as to whether the company has a reasonable prospect of survival in terms of s.2(1).

In exceptional circumstances, the court may grant a company interim protection pending the presentation of a pre-petition report (s.3A(1) C(A)A 1990).

During the period of the examinership, the examiner may have the directors' powers transferred to him/her by the court. The examiner may apply to the court for directions in relation to their powers and the exercise of those powers. S/he is entitled to such information as s/he requires and the officers of the company are bound to co-operate with the examiner and, with the sanction of the court, the examiner may deal with certain company property. This also applies to property which has been made the subject of a floating charge by the company. The examiner can also certify certain expenses incurred during the examinership as being expenses of the examinership and which may then acquire a certain priority in their discharge.

The main duty of the examiner is to conduct an examination of the affairs of the company and to report to the court thereon. The prescribed time limit is 70 days but an extension of up to 30 days may be granted, although the court is careful in relation to the granting of extensions, especially when the company's creditors object to such an extension. The fundamental point of the examinership is for the examiner to 'formulate proposals for a compromise or scheme of arrangement in relation to the company concerned' (s.18(1) C(A)A 1990). If the examiner cannot reach any agreement with interested parties or formulate any proposals, s/he can apply to the court for directions under s.18. The purpose of the report is to inform the court of the examiner's proposals for a compromise or scheme or arrangement and to show whether or not the creditors have accepted them. The proposals are not binding unless approved by the court. If the court confirms the proposals, they become binding on all the members affected. The same applies to creditors.

Where the examiner concludes that survival is not possible, the court generally directs a prompt hearing. While the court is not obliged to accept the examiner's report to the effect that survival is not possible, it will order a liquidation of the company if it accepts such a report.

7 This question requires candidates to explain the provisions of the Unfair Dismissals Act (UDA) 1977 and the Unfair Dismissals (Amendment) Act (UD(A)A), 1993.

(a) Unfair dismissal is a statutory term. Under the UDA 1977, employees have a right not to be unfairly dismissed. Once an employee has shown that s/he has been dismissed, the onus is on the employer to prove that the dismissal was fair. The grounds on which dismissal is capable of being fair are set out in s.6(4) UDA 1977.

Section 6(4) UDA 1977 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';
(b) 'the conduct of the employee';
(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 an unfair selection is made for redundancy);
(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'.

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

(i) the employee's membership, or proposal that s/he or another person become a member of, or is engaging in activities on behalf of, a trade union;
(ii) the religious or political opinions of the employee;
(iii) 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;
(iv) 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;
(v) the race or colour of the employee;
(vi) the pregnancy of the employee or matters connected therewith, unless
  (1) 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
  (2) there was not, at the time of 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 UD(A)A 1993 added the following unfair grounds for dismissal to s.6(2) UDA 1977:

(vii) sexual orientation of the employee;
(viii) the age of the employee;
(ix) the employee's membership of the travelling community.

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 various ways in which an offer can be accepted.

(a) The first issue to determine is whether Ali's advertisement was an offer or whether it was merely an invitation to treat. An offer is a promise to be bound on particular terms. The offer may, through acceptance by the offeree, result in a legally enforceable contract. It is important to distinguish an offer from other statements, which will not form the basis of an enforceable contract. In particular, an offer must be distinguished from an invitation to treat, which is an invitation to others to make offers. The person extending the invitation is not bound to accept any offers made to them. Examples of invitations to treat are: displays of goods in a shop window (*Fisher* v *Bell* (1961)); displays of goods on the shelves of a self-service shop (*Pharmaceutical Society of Great Britain* v *Boots Cash Chemists* (1953)). Another example is *Minister for Industry and Commerce* v *Pim* (1966), wherein the defendant put a suit in his shop window and this displayed the credit price for the suit but not the cash price. The court held that the defendant did not breach legislation requiring the display of the cash price because the legislation only applied to offers for sale. The display was an invitation to treat and the law did not extend to such an invitation.

Usually, newspaper or other public advertisements only amount to an invitation to treat and cannot be accepted to form a binding contract (*Partridge* v *Crittenden* (1968)). There are occasions, however, when an advert can amount to a genuine offer capable of acceptance by anyone to whom the offer is addressed. Thus, for example, in *Carlill* v *Carbolic Smoke Ball Co* (1893), the court held that in the particular circumstances of the case, the defendant's advertisement was an offer to all the world, capable of acceptance, and accepted by the plaintiff. Applying the foregoing to the situation in the question, it might appear at first sight that Ali's advertisement in the paper was no more than an invitation to treat and therefore not capable of being accepted by any of the other parties. However, the wording of the advert was in such categorical terms that it might be seen to have been an offer to the whole world, stating his unreserved commitment to enter into a contract with the first person who accepted it.

(b) Bud

Acceptance is necessary for the formation of a contract. Once the offeree accepts the terms offered, a contract comes into effect and both parties are bound. Acceptance may be in the form of express words, either spoken or written; or it may be implied from conduct. The general rule requires that acceptance must be communicated to the offeror, although there are exceptions. These arise either where the offeror has waived the right to receive communication, as in unilateral contracts such as that in the *Carlill* case, or alternatively where acceptance is through the postal service. In the latter circumstances acceptance is complete as soon as the letter, properly addressed and stamped, is posted (*Adams* v *Lindsell* (1818)). The postal rule will only apply, however, where it is in the contemplation of the parties that the post will be used as the means of acceptance.

Bud has clearly tried to accept the offer and would rely upon the postal rule of acceptance to press his case for getting either the rug or damages from Ali. His reliance on the postal rule would be to no avail, however, as the use of the post was clearly an inappropriate mode of acceptance. There was only one rug on offer: it was implicit in the advert that to get it, you had to turn up at Ali's showroom. Therefore Bud has not entered into a binding contract with Ali.

(c) Cil

In order to form a binding agreement, acceptance must correspond with the terms of the offer. Thus the offeree must not seek to introduce new contractual terms into their acceptance (*Neale* v *Merritt* (1830)). Any attempt to do so amounts to a counter-offer and leaves the original offeror at liberty to accept or reject the new offer as they choose (*Hyde* v *Wrench* (1840)).

Ali's advertisement clearly stated that he wanted cash for the rug and, therefore, Cil's attempt to pay with a cheque did not comply with the original offer and leaves her with no grounds for complaint. The decision in *D & C Builders Ltd* v *Rees* (1966) as to cheques being equivalent to money is not to the point in this situation, as Ali wanted immediate payment for the rug. Therefore Cil has no right of action against Ali.

(d) Das

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.

In Das's case, at first sight it would appear that he did not provide any consideration for Ali's keeping the offer open and, therefore, he could not complain when Ali withdrew the offer, as he did by agreeing to sell the rug to Ed.

9 This question requires candidates to consider the breach of directors' duties and the consequences of such breach.

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

(a) the duty to act *bona fide* in the best interests of the company – In effect this means that directors are under an obligation to act in what they genuinely believe to be the best interests of the company. Thus in *Dawson International plc* v *Coats Paton plc* (1990), it was held that the agreement of a board of directors to support a particular take-over bid was subject to an

implied fiduciary duty of that board to act in the best interests of the company, even if this meant going back on their previous agreement (see also *John Crowther Group Carpets* v *Carpets Internationale plc* (1990)). Further in *Re Frederick Inns (in liquidation)* (1994), the proceeds of the sale of the assets of four companies were used to discharge the debts owed to the Revenue Commissioners by the 10 companies in the group. This payment left the four companies insolvent and the Supreme Court held that the payments were made in breach of the directors' fiduciary duty to act in the best interests of the four companies.

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

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

Applying the rules to the problem scenario, it is clear that Fay has breached her statutory duty to act *bona fide* in the best interests of FGH Ltd and, indeed, in breach of the duty not to permit a conflict of interest to arise by working for and passing on information acquired in her capacity as director of FGH Ltd to Ix plc and in return for substantial payment. It is also clear that the rules against allowing a conflict of interest to arise apply, even if the company cannot itself take advantage of the opportunity wrongly misappropriated. This continues the previous very strict application of principle (*Regal (Hastings)* v *Gulliver* (1942)). Applying this to the facts of the problem, it would appear that Fay will be held liable to account to FGH Ltd for any profits she made on the transaction.

In addition, as directors can be removed at any time by a simple majority vote of the members under s.182 Companies Act (CA) 1963, Gus and Het can use their majority voting power to remove Fay from her role as company director. This is the case, even if the removal leads to a breach of their contract of service (*Southern Foundries Ltd* v *Shirlaw* (1940)). Those proposing to remove the director must give the company 28 days notice of the resolution and the director in question must receive a copy of the resolution and is entitled to speak to the resolution at the meeting at which it is considered (s.182 CA 1963).

10 This question invites candidates to consider the criminal offence of insider dealing and requires a detailed account of the law relating to that area.

This question involves the various criminal offences connected with what is known as insider dealing. In order to understand how such practices operate, it is essential to distinguish between the nominal value of shares and the market value of the share: what the share is actually worth. Whilst the former is fixed in the company's memorandum of association, the latter is free to fluctuate with demand. It is, of course, the fact that share prices fluctuate in this way that provides the possibility of individuals making large profits, or losses, in speculating in shares.

At a basic level, the value of shares may be seen as a reflection of the underlying profitability of the company; the more profitable the company, the greater its potential to pay dividends and the higher the value of its shares. Once the actual performance of a company is revealed in its accounts and statements, the market value of its share capital will be adjusted in the market to reflect its true worth, either upwards if it has done better than expected, or downwards if it has done worse than was expected.

Share valuation depends upon accurate information as to a company's performance or its prospects. To that extent, knowledge is money, but such price sensitive/affected information is usually only available to the individual share purchaser after the company has issued its information to the public. If, however, the share buyer could gain prior access to such information, then they would be in the position to predict the way in which share prices would be likely to move and consequently to make substantial profits.

Such dealing in shares, on the basis of access to unpublished price sensitive information, provides the basis for what is referred to as 'insider dealing'.

Insider dealing is governed by the Investment Funds, Companies and Miscellaneous Provisions Act (IFCMPA) 2005 and the Market Abuse (Directive 2003/6/EC) Regulations (MADR) 2005. The MADR 2005 was implemented in order to give effect to Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 ('the Market Abuse Directive').

Regulation 2 MADR 2005 comprehensively defines 'inside information'. This includes: information of a precise nature relating (in)directly to one or more issuers of financial instruments or a financial instrument(s) which has or have not been made public and which, if were made public, would be likely to have a significant effect on the price of those financial instruments or on the price of related derivative financial instruments.

The MADR 2005 further defines ‘information which, if it were made public, would be likely to have a significant effect on the prices of financial instruments or related derivative financial instruments’ as meaning ‘information that a reasonable investor would be likely to use as part of the basis of the investor’s investment decisions’.

The MADR 2005 also defines ‘information of a precise nature’ as information that:

(a) indicates:

  (i) a set of circumstances which exists or may reasonably be expected to come into existence, or
  (ii) an event which has occurred or may reasonably be expected to occur, and

(b) is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or events, as the case may be, on the prices of financial instruments or related derivative financial instruments.

‘Financial instrument’ is defined to include ‘transferable securities’ which means shares in companies and other securities equivalent to shares in companies, bonds and other forms of securitised debt which are negotiable on the capital market, and any other securities normally dealt in giving the right to acquire any such transferable securities by subscription or exchange or giving rise to a cash settlement.

Regulation 5(1) MADR 2005 deals with insider dealing and generally provides that: a person to whom Regulation 5 applies who possesses inside information shall not use that information by acquiring or disposing of, or by trying to acquire or dispose of, for the person’s own account or for the account of a third party, directly or indirectly, financial instruments to which that information relates.

Regulation 5(2) provides that a person to whom Regulation 5(1) applies shall not:

(a) disclose inside information to any other person unless such disclosure is made in the normal course of the exercise of the first-mentioned person’s employment, profession or duties, or

(b) recommend or induce another person, on the basis of inside information, to acquire or dispose of financial instruments to which that information relates.

The persons who fall within the category of ‘insider’ are dealt with in Regulation 5(3) which provides that the prohibition on the use of inside information shall apply to:

(a) any person who possesses the inside information concerned:

  (i) by virtue of the person’s membership of the administrative, management or supervisory bodies of the issuer of the financial instrument,
  (ii) by virtue of the person’s holding in the capital of the issuer,
  (iii) by virtue of having access to the information through the exercise of the person’s employment, profession or duties, or
  (iv) by virtue of the person’s criminal activities.

(b) if any person falling within Regulation 5(1)(a) is a legal person, any natural person who takes part in the decision to carry out, for the account of the legal person, any transaction in financial instruments, or

(c) any other person who possesses the inside information concerned while the person knows, or ought to have known, that it is inside information.

Thus, in terms of determining whether information is ‘insider information’, there are three categories of person to which it applies. First, a person who possesses information that is not available generally and is price sensitive and who obtained that information due to his/her involvement/connection with the company or as a result of his/her criminal activity. Second, if the person who falls within the first category is actually a company, any human person who participates in the decision to carry out any transaction in financial instruments for that company is essentially an insider. The third category is all encompassing and includes a ‘tipee’, i.e. any person who acquires the inside information and knows or ought to have known that it is inside information. Thus, such a tipee is prohibited from dealing in the financial instruments, passing on the information or recommending another person to deal in the financial instruments. It is a matter for evidence whether that information is price sensitive, i.e. whether, if more generally available, the price of the financial instrument would be higher or lower, as the case may be.

Section 33 IFCMPA 2005 creates a civil liability for insider dealing. Its provisions include one that provides that a person who breaches Regulation 5 shall be liable:

(a) to compensate any other party to the transaction concerned who was not in possession of the relevant information for any loss sustained by that party by reason of the difference between the price at which the financial instruments concerned were acquired or disposed of and the price at which they would have been likely to have been acquired or disposed of in such a transaction at the time when the first-mentioned transaction took place if that information had been generally available, and

(b) to account to the body corporate or other legal entity which issued the financial instruments concerned for any profit accruing to the first-mentioned person from acquiring or disposing of those instruments.

With respect to criminal liability, Regulation 49 of the MADR 2005 makes insider dealing a criminal offence. Regulation 53 MADR 2005 provides that the offence of insider dealing may be prosecuted by the Central Bank and Financial Services Authority of Ireland (CBFSAI) in the District Court, in which case the penalty is limited to a fine not exceeding €5,000 and/or 12 months imprisonment. Section 32 IFCMPA 2005 also provides that the offence may be prosecuted on indictment (i.e. in the Circuit Court), in which case the penalty is up to €10,000,000 and/or 10 years imprisonment.

Applying the law to the situation in the problem, it can be seen that, as an employee of Jaz plc, Kip is an insider under Regulation 5(3) MADR 2005, and the information he has is certain to affect the price of the company's shares. It follows, therefore, that when he buys the shares in Jaz plc, Kip is liable to a charge of insider dealing under Regulation 49 MADR 2005. Kip is also liable for the separate offence, under Regulation 5(3) MADR 2005, of disclosing the information to Lu other than in the proper performance of their employment.

As he received the information from an insider, Lu is treated as an insider under Regulation 5(3) MADR 2005 and is liable for trading on the basis of the information.

1 This question requires candidates to explain the main sources of law. Candidates may achieve full marks for very good answers relating to the two main sources, but marks are available for consideration of other sources.

8–10 marks Thorough treatment of the two major sources.

5–7 marks Fair treatment of the two main sources, but perhaps lacking in detail.

2–4 marks Some understanding but lacking in detail. Perhaps an unbalanced answer, focusing on only one aspect of the question and ignoring the others.

0–1 marks Shows little understanding of the subject matter of the question.

2 This question is divided into two parts, each worth 5 marks. Each part should be marked independently on its own merits, although candidates may well run the two parts together.

(a) 4–5 marks The best answers will provide a clear explanation of the test for deciding remoteness of damage and cite case authority or examples to support the explanation.

2–3 marks A fair coverage but lacking detail or authority.

0–1 mark Little, if any, knowledge or explanation.

(b) 4–5 marks Good analysis and explanation of the rules for determining the measure of damages. Cases may be cited in support but are not necessary to achieve full marks.

2–3 marks Weaker answers may show some understanding of the rules. Alternatively, they may be unbalanced or deal only with one aspect of the question.

0–1 mark Little, if any, knowledge or explanation.

3 This question is divided into three separate parts. The first part requires an explanation of the meaning of 'tort' generally and the two later parts require explanations of specific torts: namely negligence and passing off.

(a) 2 marks Explaining the meaning and operation of tort law.

1 mark Some reasonable attempt at explaining tort law.

0 marks A total absence of knowledge.

(b) 3–4 marks Good explanation of the meaning of negligence with the main requirement of the tort mentioned.

1–2 marks Some knowledge but lacking in detail.

0 marks No knowledge whatsoever.

(c) 3–4 marks Good explanation of the tort of passing off with case authority to support the explanation.

1–2 marks Some, but limited, knowledge of passing off or control over company names.

0 marks No knowledge of the topic whatsoever.

4 The question requires candidates to explain three constitutional documents relating to registered companies.

(a) This part relating to the memorandum of association only carries two marks.

3–4 marks	A good general understanding of the topic.
1–2 marks	Some knowledge.
0 marks	No knowledge whatsoever of the topic.

(b) This part relates to the application for registration.

2–3 marks	Good explanation of the contents of the application required by statute. Reference to sections need not be made.
1 mark	Some, but limited, knowledge of the contents of the application.
0 marks	No knowledge of the topic whatsoever.

(c) This part relates to a company's articles of association.

2–3 marks	Good explanation of the contents of the articles of association.
1 mark	Some, but limited, knowledge of the contents of the articles of association.
0 marks	No knowledge of the topic whatsoever.

5 This question requires candidates to explain the doctrine of capital maintenance in company law and the way in which companies can legally reduce their capital.

(a)	3–4 marks	Thorough explanation of the doctrine of capital maintenance, perhaps with some examples of its application.
	1–2 marks	Little knowledge of the topic.
	0 marks	No knowledge of the topic whatsoever.
(b)	5–6 marks	Good to full consideration of the procedure for reducing capital. Reference must be made to the Companies Act 1963 procedure and the difference between public and private companies should be mentioned specifically.
	2–4 marks	Some general knowledge but lacking in detail as regards to the process or not mentioning the difference between the two company forms.
	0–1 mark	Little or no understanding of the process.

6 This question requires candidates to explain the meaning of examinership.

8–10 marks	A good explanation of the meaning and effect of examinership generally and contrasting its purpose with that of compulsory winding up and explaining its rules.
5–7 marks	Fair explanation of the process of examinership, perhaps lacking in detail or focusing on only certain aspects of the procedure.
2–4 marks	Some, if little, explanation of examinership, but perhaps too general or lacking in any detail, or alternatively very unbalanced.
0–1 mark	Little or no knowledge of the topic.

7 This question requires candidates to explain the provisions of the Unfair Dismissals Act 1977 and Unfair Dismissals (Amendment) Act 1993 relating to the statutory grounds covering both fair and unfair dismissal. It is divided into two parts and the marks will be allocated equally.

(a)	3–4 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)	3–6 marks	A thorough explanation of the grounds upon which dismissal will be automatically unfair
	0–2 marks	Some awareness of the area, but lacking detailed knowledge.

8 This question requires candidates to analyse a problem scenario on the topic of contract law. In particular, it requires an explanation of the rules relating to the formation of contracts, especially the distinction between offers and invitations to treat and the rules of acceptance of offers.

(a) 3–4 marks Full analysis and explanation of the nature of Ali's advertisement
1–2 marks Some analysis and explanation, but lacking in detail.
0 marks No knowledge whatsoever of the topic.

(b) 2 marks A full explanation of Bud's situation in law.
1 mark Some, but limited, explanation.
0 marks No knowledge or explanation.

(c) 2 marks A full explanation of Cil's situation in law.
1 mark Some, but limited, explanation.
0 marks No knowledge or explanation.

(d) 2 marks A full explanation of Das' situation in law.
1 mark Some, but limited, explanation.
0 marks No knowledge or explanation.

9 This question requires a consideration of the statutory duties placed on company directors under companies' legislation.

8–10 marks Thorough to complete answers, showing a detailed understanding of the rules relating to conflict of interest.
5–7 marks A clear understanding of the topic but perhaps lacking in detail or application.
2–4 marks Some knowledge, although perhaps not clearly expressed, or very limited in its application.
0–1 mark Little or no knowledge of the topic.

10 This question requires candidates to analyse a problem scenario and apply the law specifically relating to insider dealing.

8–10 marks Thorough to complete answers, showing a detailed understanding of the rules relating to insider dealing.
5–7 marks A clear understanding of the topic but perhaps lacking in detail or application.
2–4 marks Some knowledge, although perhaps not clearly expressed, or very limited in its application.
0–1 mark Little or no knowledge of the topic.