Answers

1 **(a)** The civil court structure in ascending order of authority is as follows:

District Court
There is a District Court in most sizeable towns and claims for up to €6,348·69 are usually brought there. There are several matters in respect of which the District Court has no jurisdiction, most notably child abduction, divorce, probate, defamation, company and chancery matters. There is a right of appeal to the Circuit Court and significant issues of law that arise in the proceedings may be referred to the High Court under the 'case stated' procedure.

Circuit Court
The country is divided into a number of circuits; several judges sit permanently in the Dublin Circuit. There are some permanent judges in the Cork Circuit and, in the other circuits, judges hear cases in the principal towns, moving from town to town in the circuit. Where the amount of a claim is between €6,348·69 and €38,000, it is usually brought in the Circuit Court. Most of the main family law disputes are also heard by this court but it does not deal with company law or chancery matters. The Circuit Court also hears appeals from the District Court and the Employment Appeals Tribunal. There is a right of appeal to the High Court and questions of law may be referred from the Circuit Court to the Supreme Court under the 'case stated' procedure.

High Court
The High Court has jurisdiction to hear all civil disputes, although if the matter is within the jurisdiction of either of the lower courts, the case will usually be remitted to the appropriate court. Most company law and chancery disputes can only be dealt with in the High Court; it has exclusive jurisdiction in bankruptcy. Exceptionally, the trial is with a jury – such as in defamation cases. Only the High Court (or the Supreme Court on appeal) can declare that an Act of the Oireachtas to be unconstitutional. There is a right of appeal to the Supreme Court although in certain matters that right is confined to questions of law. There is a constitutionally guaranteed right of appeal to the Supreme Court.

Supreme Court
The Supreme Court hears appeals from the High Court and 'case stated' applications from the Circuit Court. It is the final court of appeal in these matters. For most cases, five Justices of the Supreme Court will sit to hear the appeal but seven, or more, are sometimes convened to hear very important cases.

(b) The doctrine of binding precedent, or *stare decisis*, lies at the heart of the Irish legal system. The doctrine refers to the fact that, within the hierarchical structure of the Irish courts, a decision of a higher court will be binding on a court lower than it in that hierarchy. In general terms, this means that when judges try cases they will check to see if a similar situation has come before a court previously. If the precedent was set by a court of higher status to the court deciding the new case, then the judge in the present case should follow the rule of law established in the earlier case. Where the precedent is from a lower court in the hierarchy, the judge in the new case may not follow but will certainly consider it. While High Court decisions bind courts lower in the hierarchy (i.e. the Circuit and District Courts), the High Court is not generally bound by other High Court decisions. This principle, however, is subject to exception. Generally, the High Court 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. Furthermore, in *Attorney General* v *Ryan's Hire Car* (1965) and *State (Quinn)* v *Ryan* (1965), the Supreme Court held that, although the normal practice would henceforth be, as previously, that decisions of the Supreme Court would continue to be binding on itself, the court could now depart from an earlier decision where it appeared right to do so. 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)).

The operation of binding precedent is reliant upon the existence of an extensive reporting service to provide access to previous judicial decisions. This is of particular importance to counsel, who are under a duty to bring all relevant case authority to the attention of the court, whether it advances their case or not. Consequently, they are expected to make themselves thoroughly aware of the current reports.

Not everything in a case report sets a precedent. The contents of a report can be divided into two categories:

(i) ***Ratio decidendi***
It is important to establish that it is not the actual decision in a case that sets the precedent; that is set by the rule of law on which the decision is founded. This rule, which is an abstraction from the facts of the case, is known as the *ratio decidendi* of the case. The *ratio decidendi* of a case may be understood as the statement of the law applied in deciding the legal problem raised by the concrete facts of the case.

(ii) ***Obiter dictum***
Any statement of law that is not an essential part of the *ratio decidendi* is, strictly speaking, superfluous; and any such statement is referred to as *obiter dictum* (*obiter dicta* in the plural), that is, said by the way. Although *obiter dicta* statements do not form part of the binding precedent, they are persuasive authority and can be taken into consideration in later cases, if the judge in the later case considers it appropriate to do so.

The division of cases into these two distinct parts is a theoretical procedure. Unfortunately, judges do not actually separate their judgements into the two clearly defined categories and it is up to the person reading the case to determine what the *ratio* is. In some cases, this is no easy matter, and it may be made even more difficult in appellate cases where each of the judges may deliver their own lengthy judgements with no clear single *ratio*.

2 This question requires candidates to consider two issues in relation to the formation of contracts.

(a) Intention to create legal relations

A contract is defined as a binding agreement, however, in order to limit the number of cases that might otherwise be brought, the courts will only enforce those agreements which the parties intended to have legal effect. Although expressed in terms of the parties' intentions, the test for the presence of such intention is an objective, rather than a subjective, one. Agreements can be divided into two categories, in which different presumptions apply.

(i) **Domestic and social agreements**
In these agreements, there is a presumption that the parties do not intend to create legal relations (*Balfour* v *Balfour* (1919)). However, any such presumption against the intention to create legal relations in such relationships may be rebutted by the actual facts and circumstances of a particular case, as may be seen in *Merritt* v *Merritt* (1970).

(ii) **Commercial agreements**
In these situations, the strong presumption is that the parties intend to enter into a legally binding relationship in consequence of their dealings (*Edwards* v *Skyways* (1964)). However, as with other presumptions, this one is also open to rebuttal. In commercial situations, however, the presumption is so strong that it will usually take express wording to the contrary to avoid its operation, as may be seen in *Rose and Frank Co* v *Crompton Bros* (1925). See also the Supreme Court decision in *Goulding Chemicals Ltd* v *Bolger and others* (1977).

(b) The doctrine of privity

As a general rule, contractual agreements can only affect those persons who have entered into the agreement expressed in the terms of the contract. Thus it is normally the case that no third party can rely on, or enforce, any terms in a contractual agreement to which they are not themselves a party (*Dunlop* v *Selfridge* (1915)).

However, it is possible to formally transfer the benefit of a contract to a third party. This process, known as assignment, must be in writing. It should be noted that the burden of a contract cannot be assigned without the consent of the other party to the contract.

It is also possible for a person to create a contract specifically for the benefit of a third party. In limited circumstances the promisee is considered as a trustee of the contractual promise for the benefit of the third party. In order to enforce the contract, the third party must act through the promisee by making them a party to any action (*Les Affreteurs Reunis SA* v *Leopold Walford (London) Ltd* (1919)).

A third party may enforce a contract in the following circumstances:

(i) the beneficiary sues in some other capacity. Although not a party to the original agreement, individuals may, nonetheless, acquire the power to enforce the contract where they are legally appointed to administer the affairs of one of the original parties (*Beswick* v *Beswick* (1967), where a widow, appointed administratrix of her late husband's estate, was able to successfully sue her nephew for specific performance of a beneficial agreement in that capacity).

(ii) the situation involves a collateral contract. This situation arises where one party promises something to another party if that other party enters into a contract with a third party: e.g. A promises to give B something if B enters into a contract with C. In such a situation, B can insist on A complying with the original promise (*Shanklin Pier* v *Detel Products Ltd* (1951)).

(iii) it is foreseeable that damage caused by any breach of contract will cause a loss to a third party (*Linden Gardens Trust Ltd* v *Lenesta Sludge Disposals Ltd* (1994)).

The other main common law exception to the privity rule is agency, where the whole point is for the agent to bring about contractual relations between their principal and a third party.

3 (a) In order to justify an action in the tort of negligence, the claimant has to demonstrate not only that the defendant owed them a duty of care, but also that the defendant actually breached that duty of care, causing loss or damage to the claimant.

However, those two steps must be further supported by the claimant showing that the loss or damage suffered was *a direct consequence* of the breach of duty of care. This final aspect of demonstrating negligence is referred to as causation and the claimant to show that the injury loss or injury sustained was caused by the defendant's negligence. This process is sometimes referred to as *causation in fact*. However, even where causation is proved, a negligence claim may still fail if the damage caused is held to be *too remote*. The issue of remoteness is sometimes referred to as *causation in law*. The test for remoteness is *reasonable foresight* as stated in *The Wagon Mound* (1961).

In Ireland, in *Fletcher* v *Commissioners of Public Works* (2003) the court was concerned with a situation whereby, as a result of the negligence of his employer, the plaintiff was negligently exposed to asbestos. Ultimately, the plaintiff suffered psychiatric injury resulting from his irrational fear of contracting a physical illness from the asbestos exposure in circumstances where the risk of contracting such a physical illness was remote. The plaintiff was awarded damages by the High Court and this award was overturned in the Supreme Court which held that it was unreasonable to impose a duty of care on employers to guard against mere fear of a disease even if such fear might have led to a psychiatric condition.

(b) The 'but for' test is a way of determining whether the claimant's loss or damage was caused by the defendant. In order to satisfy the test, the claimant must show that 'but for' the defendant's actions, the damage would not have occurred. If the damage would have occurred irrespective of a breach of duty on the part of the defendant, then the breach is not the cause.

Single causes

For example, in *Barnett* v *Chelsea and Kensington HMC* (1969), a doctor in a hospital casualty department sent a patient home without treating him, telling him to go and see his own doctor. The patient subsequently died from arsenic poisoning. While it was held that the doctor had been negligent in not examining the patient, the evidence indicated that he would have died anyway. Consequently, the doctor's conduct did not cause his death and he could not be held liable under the tort of negligence.

Also, in *Cutler* v *Vauxhall Motors Ltd* (1971), the plaintiff suffered a grazed ankle whilst at work, due to the defendant's negligence. The graze became ulcerated because of existing varicose veins and the plaintiff had to undergo an immediate operation to remove the veins. It was held that the plaintiff could not recover damages for the operation, because the evidence was that he would have had to undergo the operation within five years anyway, irrespective of the accident at work.

So, if the same result would have occurred regardless of the breach of duty, then the courts are unlikely to find that the breach caused the injury. This point is further supported by the case of *Robinson* v *Post Office* (1974), where a doctor failed to test for an allergic reaction before giving an anti-tetanus injection. However, it was held that the doctor would not be liable for the reaction of the patient, because the test would not have revealed the allergy in time.

Multiple causes

In relation to the 'but for' test, difficulties have arisen where there has been a number of potential causes of the injury or loss. In such a situation, the onus is on the claimant to show that the defendant's breach was the material contributory cause of his or her injury. Consequently, where there are a number of possible causes, establishing causation may prove difficult, particularly in medical negligence cases. In *Wilsher* v *Essex AHA* (1988), the plaintiff was born three months premature. He suffered almost total blindness as a result of a condition known as retrolental fibroplasia. It was claimed on behalf of the plaintiff that this was caused by the negligence of the doctor, who had failed to notice that the device for adding oxygen to the blood had been wrongly attached, resulting in an excessive dose of oxygen. However, medical evidence showed at least six potential causes of the plaintiff's blindness, the majority of which were inherent in premature babies. The House of Lords held that there was insufficient evidence to show which of the six caused the injury to the plaintiff.

However, the English courts on occasion have taken a more flexible approach, as may be seen in *Fairchild* v *Glenhaven Funeral Services Ltd* & *Others* (2002). In this case, the employees concerned had contracted mesothelioma due to a prolonged exposure to asbestos fibres gained during their employment with a number of different employers. It was therefore almost impossible to identify which period of employment was responsible for the employees contracting the disease. As the disease could be generated through exposure to just one fibre of asbestos – although the greater the exposure, the greater the chances of contracting the disease – the House of Lords was prepared to impose liability on all of the employers. It felt that all of the defendants, by failing to take reasonable care, had contributed to the risk.

The *Fairchild* approach was distinguished in Ireland in *Quinn (a minor)* v *Mid Western Health Board* (2005). The plaintiff was born at 39 weeks with severe brain damage. The plaintiff claimed that she should have been delivered at no later than 35 weeks gestation and that this would have avoided all, or most, of the brain damage. The defendants admitted negligence in the management of the pregnancy and that the plaintiff should have been delivered earlier than she was. However, they claimed that the brain damage was caused by an acute episode that occurred at 28–30 weeks gestation and that her outcome would not have been different if the plaintiff had been delivered earlier than she was. The Irish Supreme Court held that the plaintiff had failed to show that she would not have suffered the damage 'but for' the breach. It held that it was not sufficient for the plaintiff to establish that her condition worsened during the period from the start of difficulties until delivered. To succeed, she would have had to prove that early intervention would have prevented the damage. *Fairchild* was distinguishable because the Supreme Court considered that it turned on its own unique facts and was expressly confined by the House of Lords to a particular set of circumstances where it would be patently unjust not to find for the plaintiff where his condition must have been caused through the negligence of employer A or employer B, or both, but on application of the conventional 'but for' test of causation it could not be held that the plaintiff had successfully made out a case against either. In the Supreme Court in *Quinn*, the court emphasised that a *Fairchild* type situation in Ireland would be covered by s.11(3) Civil Liability Act 1961, which provides that 'where two or more persons are at fault and one or more of them is or are responsible for damage while the other or others is or are free from causal responsibility, but it is not possible to establish which is the case, such two or more persons shall be deemed to be concurrent wrongdoers in respect of the damage'.

The 'but for' test cannot solve all questions of factual causation. Indeed, where there has been an omission to act, or an act which does not in itself have physical consequences, it may not be an appropriate test.

(c) Where there is a break in the chain of causation, the defendant will not be liable for damage caused after the break. The issues are whether the whole sequence of events is the probable consequence of the defendant's actions and whether it is reasonably foreseeable that these events may happen. This break in the chain is caused by an intervening act and the law recognises that such acts fall into three categories, as follows:

(i) A natural event

A natural event does not automatically break the chain of causation. If the defendant's breach has placed the claimant in a position where the natural event can add to that damage, the chain will not be broken unless the natural event was totally unforeseeable. In *Carslogie Steamship Co Ltd* v *Royal Norwegian Government* (1952), a ship which was owned by Carslogie had been damaged in a collision caused by the defendant's negligence. The ship was sent for repair and, on this voyage, suffered extra damage, caused by the severe weather conditions. This resulted in the repairs taking 40 days longer than anticipated. It was held that the bad weather acted as a new intervening act, for which the defendant was not liable. The effect of the new act in this case prevented the plaintiff from recovering compensation for the time that it would have taken to repair the vessel in respect of the collision damage, as the ship would have been out of use in any case, due to the damage caused by the weather.

(ii) Act of a third party

Where the act of a third party, following the breach of the defendant, causes further damage to the claimant, such an act may be deemed to be a *novus actus*; the defendant will not then be liable for damage occurring after the third party's act. In *Lamb* v *Camden LBC* (1981), due to the defendant's negligence, a water main was damaged, causing the plaintiff's house to be damaged and the house to be vacated until it had been repaired. While the house was empty, squatters moved in and caused further damage to the property. It was held that the defendant was not liable for the squatters' damage. Although it was a reasonably foreseeable risk, it was not a likely event. Furthermore, it was not the duty of the council to keep the squatters out.

The third party's act need not be negligent in itself in order to break the chain of causation, although the courts take the view that a negligent act is more likely to break the chain than one that is not negligent, as can be seen in *Knightley* v *Johns* (1982).

(iii) Act of the claimant

The action of the claimant may itself break the chain of causation. However, if the act is reasonable and in the ordinary course of things, the event will not break the chain. In *McKew* v *Holland, Hannen and Cubbitts (Scotland) Ltd* (1969), the plaintiff was injured at work. As a result, his leg sometimes gave way without warning. He was coming downstairs when his leg gave way, so he jumped in order to avoid falling head first and badly injured his ankle. It was held that the defendants were not liable for this additional injury. The plaintiff had not acted reasonably in attempting to negotiate the stairs without assistance and his actions amounted to a *novus actus interveniens*.

4 The offence of bribery in Ireland is an old statutory offence but is one that is more often than not referred to as corruption.

As far back as 1889 the law prohibited corruption in public office, although the law was amended in the mid 1990s. In essence, any person who corruptly solicits or receives (or agrees to receive) for himself (or another person) any gift, loan, fee, reward, etc as an inducement to, or reward for, or otherwise on account of an office holder (or other person involved in a public body) doing or forbearing to do anything in respect of any matter, actual or proposed, in which the office holder or the public body is concerned, is guilty of an offence. Likewise, the person who gives or offers to gift any gift, loan, fee, reward, etc to the office holder in such a public body commits an offence.

In other legislation, the more general statutory offence may be divided into three categories:-

1. Where an agent or any other person: (a) corruptly accepts or obtains; or (b) corruptly agrees to accept or attempts to obtain; for themselves, or for any other person, any gift, consideration or advantage as an inducement to, or reward for, or otherwise on account of, the agent doing any act or making any omission in relation to their office or position or their principal's affairs or business shall be guilty of an offence;
2. It is also an offence for a person to: (a) corruptly give or agree to give; or (b) corruptly offer; any gift or consideration to an agent or any other person, whether for the benefit of that agent, person or another person, as an inducement to, or reward for, or otherwise on account of, the agent doing any act (or making any omission) in relation to their office or position or their principal's affairs or business shall be guilty of an offence;
3. In precisely the same way, a person who knowingly gives to any agent, or an agent who knowingly uses with intent to deceive their principal, any receipt, account or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which to their knowledge is intended to mislead the principal shall be guilty of an offence.

Persons who fall within the definition of 'agent' in the foregoing three offences includes:- any person employed or acting for another; an office holder or director of and an employee or special adviser to a public body (as those terms as defined by the Public Bodies Corrupt Practices Act 1889 as amended); a member of the Oireachtas; a member of the European Parliament; an Attorney General; the Comptroller and Auditor General; the Director of Public Prosecutions; a judge of any court in the State; and any other person employed or acting on behalf of the public administration of the State. It also includes a member of the government or parliament of any other state, a member of the Court of Auditors of the European Communities; a member of the European Commission; a public prosecutor or judge in any state; a judge of any court (or a member of any body) established under an international agreement to which Ireland is a party; and any other person employed by or acting on behalf of the public administration of any other state. In the same way, when an offence is committed by a company and the offence is proved to have been committed with the consent or connivance of or to be attributable to any wilful neglect on the part of an officer of the body corporate, or indeed a person who was purporting to act in that capacity, he is liable to be prosecuted for the offence, as well as the company.

Furthermore, in certain circumstances, in a prosecution for an offence of corruption, there will be a rebuttable presumption that any gift or consideration or advantage shall be deemed to have been given and received corruptly as an inducement or reward for certain acts or omissions. The most well known example of a prosecution of this nature in Ireland was that of DPP v George Redmond (2003).

On a European level, the specific offences of active and passive corruption were more recently created and the European Union (EU) directed each Member State take measures to ensure that conduct comprising passive corruption and active corruption was criminalised.

Passive corruption concerns the deliberate action of an official, who, directly or through an intermediary, requests or receives advantages of any kind whatsoever, for themselves or a third party, or accepts a promise of such an advantage, to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties in a way which damages or is likely to damage the European Communities' financial interests.

Active corruption, concerns the deliberate action of one who promises, or gives, directly or through an intermediary, an advantage of any kind whatsoever, to an official (for themself or for a third party) for them to act or refrain from acting in accordance with their duty or in the exercise of their functions in breach of their official duties in a way which damages or is likely to damage the European Communities' financial interests.

In compliance with its obligations under EU law, Ireland criminalised passive and active corruption in 2001.

5 **(a)** Dividends are the return received by shareholders in respect of their investment in a company. Subject to any restriction in the memorandum of association, every company has the implied power to apply its profits in the distribution of dividend payments to its shareholders. Although the directors recommend the level of dividend payment, it is for the company in a general meeting to declare the dividend. This is one of the items conducted at the annual general meeting. If the directors decline to recommend a dividend, then it is not open to the general meeting to overrule that decision and declare a dividend.

The long-standing common law rule is that dividends must not be paid out of capital (*Flitcroft's case* (1882)). The current rules relating to the payment of dividends were introduced by the Companies (Amendment) Act C(A)A 1983. Under the C(A)A 1983, the payment of a dividend to members is referred to as a distribution. Dividends can only be paid in accordance with Part IV of the C(A)A 1983. Section 45(1) C(A)A 1983 provides that a company may not make a distribution except out of profits available for distribution. Section 45(2) C(A)A 1983 defines 'profits available for distribution' in the following terms: '[a] company's profits available for distribution are its accumulated, realised profits, so far as not previously utilised by distribution or capitalisation, less its accumulated, realised losses, so far as not previously written off in a reduction or reorganisation of capital duly made.'

'Accumulated' profits means that dividends can only be declared from a revenue reserve. This means that a company cannot declare a dividend in a profitable year without making provision for previous years' losses. Furthermore, the profits must be 'realised', which means that a mere upward revaluation of a fixed asset does not constitute a realised profit. Such an upward revaluation can, however, be used to fund a bonus issue of shares to members. These rules apply to both public and private companies and both types of company must also meet the equitable test of solvency or the cash flow test, i.e. each must be in a position to meet its debts as they fall due.

(b) As has been stated, the foregoing realised profits test applies to both private and public companies. Public companies, however, must also comply with s.46(1) C(A)A 1983 which provides that: 'A public limited company may only make a distribution … if … the amount of its net assets is not less than the aggregate of the company's called-up share capital and undistributable reserves; and if, and to the extent that, the distribution does not reduce the amount of those assets to less than that aggregate.'

This means that a public company must maintain its capital by ensuring that, before a dividend is paid, its net assets are at least equal to the aggregate of its called-up share capital and undistributable reserves. A company's undistributable reserves are:

(i) the share premium account;
(ii) the capital redemption reserve;
(iii) the amount by which the accumulated unrealised profits exceed its current accumulated unrealised losses;
(iv) any other reserve which the company is prohibited from distributing by virtue of statute or by virtue of its memorandum or articles.

Thus, private companies are not required to maintain their capital to the extent that public companies are required.

(c) Under the rule in *Flitcroft's case*, any directors of a company who breached the distribution rules, and knowingly paid dividends out of capital, were held jointly and severally liable to the company to replace any such payments made. Section 49 C(A)A 1983 provides that dividends must be declared by reference to 'properly prepared' accounts. Section 50 C(A)A 1983 provides that a shareholder who knows, or has reasonable grounds, for believing, that a distribution has been made in contravention of the above rules, is liable to repay the distribution to the company (see *Precision Dippings Ltd* v *Precision Dippings Marketing Ltd* (1985)). Further, the directors may be held liable to repay to the company any improper payment of dividends (*Re Flitcroft's Case*).

6 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) 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 ten 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) 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) Duty to avoid conflicts of interest

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 owning 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.

7 Although employment law is a very statute-based subject, nonetheless there are underlying common law rules that apply and have effect in any employment relationship. Such rules apply to both employer and employee as indicated below.

(a) Duties of the employer

(i) **To provide work**

The employer normally will be expected to provide work for the employee and where the employee is skilled and needs practice to maintain those skills, there may be an obligation to provide a reasonable amount of work (*Byrne* v *RHN Foods* (1979)). No breach of this implied duty will occur so long as the employee continues to be paid, even though there may be no work available.

(ii) **To pay wages**

Normally, the rate of pay is expressly stated in the contract of employment. However, in the absence of an express provision, the law will impose the duty to pay a reasonable remuneration for the work done. Following from (i) above, an employer must pay employees their wages even if there is no work available, although an express term to the contrary may be included in the contract of employment. This has largely been replaced by statute, eg. Payment of Wages Act 1991.

(iii) **To indemnify the employee**

Where the employee in the course of his or her employment incurs any legal liability or necessary expenses on behalf of the employer, the employee is entitled to be indemnified or reimbursed.

(iv) **Mutual respect**

The employment relationship is assumed to be based on mutuality of respect, trust and confidence and the employer must not act in a way calculated to damage such mutuality. As will be seen, this is a reciprocal relationship, but it is clear that employers cannot treat their employees in an abusive manner (*Isle of Wight Tourist Board* v *Coombes* (1976)) and must be prepared to address any grievances they might have (*WA Goold (Pearmak) Ltd* v *McConnell* & *Another* (1995)).

(v) **To provide a safe system of work**

At common law, the employer is required to take reasonable care for the health and safety of his employees. Failure to comply will render the employer liable for an action in negligence. The duty extends to the provision of competent fellow employees, safe plant and equipment, a safe place of work and a safe system of work. If the employer has taken all reasonable steps to comply with the duty of care, then they will not be liable for any injury sustained (*Latimer* v *AEC Ltd* (1953)).

(b) Duties of the employee

There are a number of implied duties imposed on employees, which may all be understood as deriving from their relationship of trust and confidence with their employer and the consequential duty of loyalty and faithful service that derives from that relationship. The specific duties may be cited as:

(i) to act faithfully
This is the fundamental duty and it covers such aspects of confidentially, i.e. not passing on information derived from one's employment to outsiders and not competing with the employer either directly or indirectly.

The courts are reluctant to accept that what workers do in their spare time should be of any concern to their employer. Indeed, the Employment Appeals Tribunal (EAT) has found that an employee is entitled to work for another employer in his/her own free time provided that this does not conflict with his/her duties of confidentiality and fidelity (*Conroy* v *Travenol Laboratories* (1981) and *Mulchrone* v *Feeney* (1982)). However, sometimes an employer's interests may be harmed by an employee's spare-time work if this involves direct competition with the employer's business. Thus, in *ECI European Chemical Industries Ltd* v *Bell* (1981), an employer obtained an injunction restraining a chemist from breaching a restraint of trade clause in his contract of employment and joining a competing company. However, the EAT has found that the dismissal of a director of research in a laboratory was fair in circumstances where the director's pharmacist wife established a company that directly competed with his employer's business (*Fairbrother* v *Stiefel Laboratories* (1985)). This was notwithstanding the fact that there was no suggestion that the director had breached any of his contractual obligations of confidentiality, etc.

An employee may not do anything while still employed, which is in breach of the duty to act faithfully. However, it is perfectly lawful for ex-employees to canvass customers of their former employer after leaving service. Moreover, they are entitled to make use of any knowledge and skills acquired while in the former employer's business, apart from such information which can be classified as a trade secret. In this sense, the implied duty of confidentiality for ex-employees is narrower than in the case of an existing employee.

(ii) to obey reasonable orders
Employees must obey any reasonable and lawful instruction given to them by their employer. Whether any instruction fulfils these criteria is a matter of fact in each instance. The classic case in this area is *Pepper* v *Webb* (1969), in which a gardener not only indicated that he was not willing to follow an instruction but actually swore at his employer. In a subsequent action it was held that as the order was both lawful and reasonable, the gardener had breached his implied duty.

(iii) to use skill and care
Should an employee not exercise the level of skill and care that may reasonably be expected, then they will not only be liable to dismissal, but they may also lose the protection of the employer's duty to indemnify them for losses (see part (a) above), and be made personally liable for claims for compensation. The classic case in this instance is *Lister* v *Romford Ice and Cold Storage Ltd* (1957), in which an employee lorry driver, rather than his employer, was held liable to compensate a fellow worker, due to his gross negligence in driving his lorry, which was held to breach his implied duty of skill and care.

(iv) not to take bribes or make a secret profit
This duty almost goes without saying, as an example of the general duty of good faith, but it covers the situation where an employee has received money or gifts from customers or clients. In this instance, the classic case is *Boston Deep Sea Fishing Ice Co* v *Ansell* (1888), in which a managing director of a company was held to have been properly dismissed for having taken money as commission from the company's suppliers for orders he placed with them. Likewise, *Soros and Soros* v *Davison and Davison* (1994) confirmed that the general duty of confidentiality survives the termination of a contract of employment, regardless of whether the termination was lawful and/or whether the employee was unfairly dismissed. This case concerned dismissed employees selling information about their employment to a national newspaper.

8 **(a)** This part of the question requires candidates to examine the operation of the rules relating to whether or not the performance of existing contractual duties can provide consideration for some new promise.

Box entered into a contract with Ano Ltd to carry out the work for an agreed price. However, before the completion of the contract, Ano Ltd promised a further payment, although it is now refusing to pay more than the original agreed sum. The question is whether Box can enforce Ano Ltd's promise to pay him the additional sum.

In order to require Ano Ltd to make the full payment, Box must show that he provided legally 'sufficient' consideration for the new promise. The question, therefore, is whether the performance of existing contractual duties can ever provide consideration for a new promise. The long-established rule of contract was that the mere performance of a contractual duty already owed to the promisor could not be consideration for a new promise. Thus in *Stilk* v *Myrick* (1809), when members of a ship's crew deserted, the captain promised the remaining members of the crew that they would share the deserters' wages if they completed the voyage. Subsequently, however, when the owners refused to make the promised payment, it was held that the captain's promise could not be legally enforced as the sailors had only done what they were already obliged to do by their contracts of employment. Where, however, the promisee did more than they were already contractually bound to do, then the performance of the additional task does constitute valid consideration for a new promise (*Hartley* v *Ponsonby* (1857)).

It has generally been accepted that performance of an existing duty does not provide valid consideration (*Glassbrook* v *Glamorgan CC* (1925) and *Stilk* v *Myrick*). In England, however, the more recent English authority of *Williams* v *Roffey Bros* (1991) has indicated a contrary possibility. In Ireland, however, in *Truck and Machinery Sales Ltd* v *Marubeni Komatsu Ltd* (1996), the High Court declined to follow *Williams* v *Roffey Bros* and instead adopted (*obiter dictum*) the House of Lords decision in *Foakes* v *Beer* and the English Court of Appeal decision in *Re Selectmove* (1995) which applied *Foakes* v *Beer* (1884). On this basis, the High Court found (*obiter dictum*) that even if an agreement was reached of the nature alleged by the plaintiff, the plaintiff's promise to pay part of a debt was not good consideration. Hence, all the indicators in Ireland are that the performance of an existing contractual duty cannot amount to consideration for a new promise.

It remains to apply the legal principles to the case in point. First of all, as regards Box, he had a contract with Ano Ltd to provide the text for the book, but insisted that Ano Ltd increase its payment before he would complete the work. Even if the *William* v *Roffey Bros* principle was followed in Ireland, the reality in the present case is that Box is in an entirely different position to the plaintiff in that case because Box has exerted a form of economic duress on Ano Ltd to force it to increase the contract price. Hence, Ano Ltd was left with no real choice but to agree Box's terms or else it would have suffered a substantial loss through not being able to publish the book on time. As per *Truck and Machinery Sales Ltd* v *Marubeni Komatsu Ltd*, Box would be unable to enforce the promise for the additional €1,000.

(b) The essential issues to be disentangled from the problem scenario relate to breach of contract and the remedies available for such breach.

There seems to be no doubt that there is a contractual agreement between Cox and Ano Ltd. Normally, breach of a contract occurs where one of the parties to the agreement fails to comply, either completely or satisfactorily, with their obligations under it. However, such a definition does not appear to apply in this case as the time has not yet come when Cox has to produce the diagrams. He has merely indicated that he has no intention of doing so. This is an example of the operation of the doctrine of anticipatory breach. This arises precisely where one party, prior to the actual due date of performance, demonstrates an intention not to perform their contractual obligations. The intention not to fulfil the contract can be either express (*Hochster* v *De La Tour* (1853)) or implied (*Omnium Enterprises* v *Sutherland* (1919)).

When anticipatory breach takes place, the innocent party can sue for damages immediately on receipt of the notification of the other party's intention to repudiate the contract, without waiting for the actual contractual date of performance as in *Hochster* v *De La Tour*. Alternatively, they can wait until the actual time for performance before taking action. In the latter instance, they are entitled to make preparations for performance, and claim the agreed contract price (*White and Carter (Councils)* v *McGregor* (1961)).

Cox's action is a clear instance of express anticipatory breach and Ano Ltd has the right either to accept the repudiation immediately or affirm the contract and take action against Cox at the time for performance (*Vitol SA* v *Norelf Ltd* (1996)). In any event, Cox is bound to complete his contractual promise or suffer the consequences of his breach of contract. The potential remedies for breach of contract are twofold:

(i) Specific performance
This remedy is not available in respect of contracts of employment or personal service, so Cox cannot be legally required to the diagrams (*Ryan* v *Mutual Tontine Westminster Chambers Association* (1893)).

(ii) Damages
Ano Ltd can sue Cox for damages for breach of contract. The aim is to put the injured party in the same position they would have been in, had the contract been properly performed. As a result of Cox's refusal to complete the contract, Ano Ltd will have to pay an additional €500 to achieve performance of the contact as originally stated. Consequently, Cox will be liable to Ano Ltd for the additional outlay of €500.

9 This question requires candidates to consider several related points concerning the removal of directors and the nature of the articles of association and how they can be altered.

(a) Directors can be removed at any time by a simple majority vote of the members under s.182 Companies Act (CA) 1963. This right cannot be removed, although it can be restricted where the company has introduced weighted voting rights on such votes (*Bushell* v *Faith* (1969)). 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 on the resolution at the meeting at which it is considered (s.182). Fi, Gee and Ki can, therefore, use their majority voting power to remove Dee from her role as company director. Even if the removal of the person from the board of directors leads to a breach of their contract of service, the company cannot be prevented from doing so (*Southern Foundries Ltd* v *Shirlaw* (1940)). Directors in quasi-partnership private companies may have a legitimate expectation to act as a director and could seek to take action under s.994 (*Re Bird Precision Bellows Ltd* (1984)), but as the usual remedy offered would be a sale of shares at fair value, this would not further Dee's cause.

(b) Under s.25 CA 1963, articles of association constitute a contract between the members and the company, and *vice versa*, as well as a contract between the members. An essential point to bear in mind, however, is that the contract between members and the company only applies to membership rights and the articles cannot form a contract between the company and either a non-member, or a member acting in some other capacity than that of a member (*Eley* v *Positive Government Security Life Assurance Co* (1876)).

In this situation, Dee is claiming that the articles create a contract between her and the company for her to act as the company secretary. However, as acting as a secretary is clearly not a membership right, she would not normally be able to rely on the articles as the basis of the contract. It is possible for the courts to imply a contract of service from the behaviour of the parties and rely on the articles to provide the actual terms of the contract (*Re New British Iron Co ex parte Beckwith* (1898)), in which case Dee would be able to claim recompense on a *quantum meruit* basis.

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

It is extremely likely, therefore, that the alteration will be permitted. Fi, Gee and Ki control 75% of the voting power in the company and so are in a position to pass the necessary special resolution. Additionally, it would clearly benefit the company as a whole and the hypothetical individual shareholder to prevent Dee from passing on its secrets to a rival organisation, so Dee would lose any challenge raised in court.

10 As with registered companies, business assets must be used to pay the debts of a partnership. However, unlike most registered limited companies, members of ordinary partnerships, formed under the Partnership Act (PA) 1890, do not benefit from the advantage of limited liability and consequently their personal wealth may be called upon to pay off business debts. In order to gain the benefit of limited liability for all its members, partnerships may register as limited liability partnerships under the Limited Liability Partnerships Act 1907. The fact that the business name of the partnership in the scenario is HIJ Potteries indicates that it is not a limited liability partnership, but is to be treated as an ordinary partnership, and the ordinary rules of liability will apply. It remains to consider the fact that the partnership agreement provides that Jo's liability for any business debts has to be fixed at the level of her initial capital contribution of €1,000. In law, the partnership agreement is an internal document and its terms cannot bind outsiders without their express agreement. In effect, this has the result that outsiders can hold Jo liable for debts amounting to more than her agreed limit of €1,000. She would, however, be entitled to claim any additional sum paid over that amount from the other two partners.

Upon dissolution, the value of the partnership property is realised and the proceeds are applied in the following order:

(i) in paying debts to outsiders;
(ii) in paying to the partners any advance made to the firm beyond their capital contribution;
(iii) in paying the capital contribution of the individual partners.

Any residue is divided between the partners in the same proportion as they shared in profits (s.44 (PA) 1890)).

If the assets are insufficient to meet debts, partners' advances and capital repayments, then the deficiency has to be made good out of any profits held back from previous years, or out of partners' capital, or by the partners individually in the proportion to which they were entitled to share in profits.

Applying these rules to the partnership in question, the first step is for the value of the partnership assets to be realised in order to pay off the debts owed to the various outside creditors. As stated, the partnership assets are worth €5,000 and it has debts to outside creditors of €9,000. As a result, the partnership has external debts of €4,000. If the partnership cannot pay the outstanding debts, then the individual partners will become personally liable for any outstanding debt. Although, under s.9 PA 1890, partnership debts are said to be joint, the Civil Liability Act 1978 provides that a judgement against one partner does not bar a subsequent action against the other partners.

As the value of the assets is insufficient to cover all of these debts, the partners will be required to contribute additional funds to make good the shortfall. The losses will be met according to the partnership agreement, which stated that all profits and losses were to be divided in proportion to the capital contribution. Consequently the partners will be required to contribute as follows:

Han: €2,400
Ita: €1,200
Jo: €400

Jo, of course, has the right to recover any payment she makes beyond her original contribution of €1,000 from the other two partners.

The final stage in the problem is to consider Han's advance of €1,000 to the partnership. In this case, the losses will be divided between the partners in the ratio of 6:3:1, as with the other losses; so Han will lose another €600, and Ita a further €300. Jo's loss of €100 will be split between Han and Ita, so, in effect, only Ita will be required to pay an additional €50.

1 This question requires candidates to describe the structure of the main civil courts in the Irish legal system and also to explain the way in which cases are allocated between those courts.

(a) 4–6 marks A thorough to complete description of the various civil courts with an explanation of their relationships and function.

2–3 marks A less detailed treatment of the court structure but still covering the main courts.

1 mark Weak answer, perhaps just providing a sketch of the court structure with no explanation of that structure.

0 marks No knowledge of the court structure.

(b) 2–4 marks A good knowledge of the concept of binding precedent. The best answers will consider the binding effect of decisions of the High Court sitting as a Divisional Court and how the Supreme Court may depart from its own decisions.

1 mark Little knowledge of how precedent operates in practice.

0 marks No knowledge of the topic.

2 This question relating to issues in relation to the formation of contracts is divided into two parts and the marks will be allocated equally.

(a) Requires candidates to explain what is meant by intention to create legal relations.

4–5 marks A clear, concise explanation, perhaps citing cases or examples.

2–3 marks A clear understanding, but perhaps lacking authority or examples.

0–1 mark Very unbalanced, or may not deal with any of the required aspects of the topic. Alternatively, the answer will demonstrate very little, if any, understanding of what is actually meant by the term.

(b) Requires candidates to explain what is meant by the doctrine of privity in the law of contract.

4–5 marks Thorough to complete answer, showing a detailed understanding of the meaning and effect of the doctrine of privity.

2–3 marks A clear understanding the meaning of privity, but perhaps lacking in detail or application.

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

3 This question requires candidates to explain particular aspects of the concept of causation in relation to the law relating the tort of negligence.

(a) 2 marks A full to definitive answer providing a clear explanation of the meaning of causation.

0–1 mark Little, if any, understanding of the meaning or role of causation.

(b) 3–4 marks A full to definitive explanation of the 'but for' test. It is very likely that cases will be cited, but examples may be credited as well, where appropriate.

1–2 marks Some explanation, but lacking detail.

0 marks No understanding whatsoever.

(c) 3–4 marks A full to definitive explanation of the principle of *novus actus interveniens*. It is very likely that cases will be cited, but examples may be credited as well, where appropriate.

1–2 marks Some explanation, but lacking detail.

0 marks No understanding whatsoever.

4 This question requires candidates to consider the legislation that seeks to control bribery.

8–10 marks	Full to complete explanation of the nature and legal control over bribery.
5-7 marks	Fair knowledge, but perhaps lacking in detailed explanation.
2–4 marks	Some, but not detailed, awareness of the offences.
0–1 mark	Little or no knowledge of the topic.

5 This question requires candidates to explain the rules relating to the lawful distribution of company dividends and further requires the candidates to focus on the different rules that apply to public and private companies. Although divided into three parts, candidates may provide a global answer.

8–10 marks	A thorough understanding of the law relating to dividends as it applies to both public and private companies. Cases may well be cited and will be credited.
5–7 marks	A clear understanding of the general law, but perhaps lacking in detail or unbalanced in only dealing with one of the types of company.
2–4 marks	Some, but limited, understanding of the law.
0–1 mark	Little or no knowledge of the law.

6 This question requires candidates to explain three of the duties owed by directors to their companies. Although divided into three parts, candidates may provide a global answer.

8–10 marks	Clear explanation of the three duties.
5–7 marks	Fair knowledge of the duties, but perhaps lacking in detailed explanation.
2–4 marks	Some knowledge of the duties, perhaps merely dealing with one or two elements of the answer.
0–1 mark	Very little, if any, knowledge of the topic.

7 This question requires candidates to explain the common law duties imposed on employers and employees.

(a)	5–6 marks	Good awareness of the implied duties imposed on employers. Examples used to highlight answers.
	3–4 marks	Sound understanding but perhaps no examples.
	0–2 marks	Limited knowledge only about the topic.
(b)	3–4 marks	Good awareness of the implied duties imposed on employees.
	0–2 marks	Limited knowledge about the topic.

8 **(a)** This part of the question relates to the issue of whether the performance of an existing contractual duty can provide consideration for some new promise.

5 marks Accurate analysis of the situation together with a detailed knowledge of the general legal principles involved, linked to a sound application of those principles.

3–4 marks Sound knowledge of the law but perhaps lacking in application, or alternatively not showing a sufficiently clear understanding of the legal principles involved.

1–2 marks Weak or unbalanced answer. Perhaps aware of the nature of the problem, but lacking in clear knowledge of the principles or deficient in relation to how those principles should be applied.

0 marks Totally lacking in knowledge or application.

(b) This part of the question relates to the issue of anticipatory breach of contract and the consequences of any such breach.

5 marks Accurate analysis of the situation together with a detailed knowledge of the general legal principles involved, linked to a sound application of those principles.

3–4 marks Sound knowledge of the law but perhaps lacking in application, or alternatively not showing a sufficiently clear understanding of the legal principles involved.

1–2 marks Weak or unbalanced answer. Perhaps aware of the nature of the problem, but lacking in clear knowledge of the principles or deficient in relation to how those principles should be applied.

0 marks Totally lacking in knowledge or application.

9 This question requires candidates to consider several related points concerning the removal of directors and the nature of the articles of association and how they can be altered.

(a) 2 marks Complete explanation of the procedure for removing a company director.

1 mark Some knowledge but lacking detail.

0 marks No knowledge whatsoever.

(b) 3–4 marks Identification of some of the central issues together with an accurate application of the appropriate law. Case authorities may well be cited.

1–2 marks Weak answers which might recognise what the question is about but show little ability to analyse or answer the problem as set out. Towards the bottom of this range of marks, there will be major shortcomings in analysis or application of law.

0 marks No knowledge of the topic shown.

(c) 3–4 marks Identification of some of the central issues together with an accurate application of the appropriate law. Case authorities may well be cited.

1–2 marks Weak answers which might recognise what the question is about but show little ability to analyse or answer the problem as set out. Towards the bottom of this range of marks, there will be major shortcomings in analysis or application of law.

0 marks No knowledge of the topic shown.

10 This question requires candidates to explain and apply the rules governing liability for debts on the dissolution of a partnership.

8–10 marks This should provide a clear understanding of the legal rules and apply them accurately to the facts of the situation.

5–7 marks This may show some detailed knowledge of the legislation but inability to apply it accurately.

2–4 marks Some, but limited, understanding of the law and poor application.

0–1 mark Nothing but the briefest reference to the legislation and a failure to apply it to the problem scenario.