Answers

1 The question deals with the doctrine of precedent and candidates are required to explain the scope of the doctrine and explain its applicability locally.

The doctrine of precedent can be seen to arise out of the definition of jurisprudence. The term 'jurisprudence' is deemed to possess two distinct meanings. The first is the science of law. Law, in fact, is often described as the philosophy of what is just and unjust. The second meaning of jurisprudence relates to case-law, that is, the authority of principles accepted by the courts for a certain length of time.

Res Judicata indicates a judgement that is not subject to appeal and is absolutely binding on the parties and on the courts in regard to that specific case. *Res Judicata* is taken to be the truth. However, for future similar cases one questions whether the doctrine of precedent is to apply, that is, whether a judgement possesses such binding authority which shall not allow the courts of justice the liberty to disagree with the pronouncements previously made by themselves or by other courts.

It has been held that to follow past decisions is a natural and necessary procedure in everyday affairs. To take the same course as has been taken previously, or as has usually been adopted in the past, not only confers the advantage of the accumulated experience of the past but also saves the effort of having to think out a problem anew each time it arises. Accordingly, in almost any form of organisation, precedents have to be established as guides for future conduct, and this applies not merely to legal systems but to all rules and norms creating bodies, whether clubs, government departments, firms or schools. There is, however, an inevitable danger that this tendency to follow past precedents may lead to stereotypical procedures and to stultify progress, and much of the working success of any organisation may depend on its ability to apply precedents creatively.

When one looks at the English legal system, which adheres to the doctrine of precedent, one notes that there is a certain amount of flexibility. Thus, courts of co-ordinate jurisdiction are not bound by each other's decisions and a decision of a lower court can only persuade but not bind its superior. A ruling by the House of Lords in 1898 stating that it is bound by its own decisions has now been replaced by the recognition that that tribunal, while treating its former decisions as normally binding, may depart from a previous decision when it appears just to do so. Thus, the basic flexibility of the system is preserved, not so much by the formal limitations on the rule of *stare decisis*, but by the relative freedom with which the UK courts may and often do determine the scope and limits of past precedents and whether to apply them to the fresh circumstances which have arisen, or to distinguish these from the facts and circumstances held to be material in previous cases. In this way, within certain limits, even in the UK there remains a certain amount of room for manoeuvre, without which no legal system would be workable. Only a totally static society would tolerate a completely rigid system of law.

In relation to the doctrine of precedent, it is interesting to note that in the UK, a distinction is drawn between the *ratio decidendi*, which is binding also for future cases, and *obiter dicta*, which are not binding. The *ratio decidendi* may be described as the result of the reduction of the judgement into the essential principle on which it ultimately rests by means of a process of elimination. The rest of the judgement is *obiter dictum*, which only has a persuasive value. In view of the fact that precedents are not binding in our legal system, it may be considered that there is no scope for the distinction between the *obiter dicta* and the *ratio decidendi* of cases. Technically such a distinction does not exist. However, in assessing the persuasive virtues of a judgement, it is frequently useful to keep distinct the central point, or *ratio decidendi*, on which the case was really decided from the academic dissertations of a general nature.

In civil law systems, as is the Maltese legal system, the doctrine of precedent is not adhered to. Such systems concur in denying absolute authority to judicial precedent and in attaching more weight in juristic writings. One important feature of these systems, such as the French, is that they are, although not invariably, based on a series of codes, so that the fabric of the law is regarded as primarily statutory; the judiciary's task being limited to applying the provisions of the codes itself to the given facts. However, the decisions of the courts have been acknowledged to play a major role in the development of the law.

Thus, jurisprudence is an important source of Maltese law. In order to better interpret local laws, the courts and lawyers also refer to court judgements and to the teachings of eminent jurists/writers. In drafting local legislation, reference has always been made to the laws existing under other jurisdictions. Therefore, in interpreting such legislation it is also essential that reference be made to both local and foreign court judgements in which the relative legislation was referred to and interpreted. Similarly, reference is made to the writings of foreign jurists in interpreting local legislation.

What is essential however is that, unlike the system in the United Kingdom, Malta does not adhere to the doctrine of precedent. Courts are not bound by any previous judgement. Court judgements are therefore considered merely as a means of assisting judges and lawyers to interpret the law.

2 A contract is deemed to be concluded when a valid offer is accepted. An offer or proposal is a unilateral act since it is made by the proposer to one or more contracting parties or to the public at large. An offer is the manifestation of the will and intention of one of the contracting parties to enter into an obligation with one or more third parties. It is therefore considered to be the first step in the creation of an obligation from which certain legal effects will ensue depending on whether or not the contract is ever concluded. Other than being unilateral, an offer is also indivisible, in that it must be considered as a whole and therefore based on the terms and conditions on which it is made.

In order for an offer to produce juridical effects it must also be (i) externally manifested; (ii) made with the intention of binding the offeror; (iii) complete; and (iv) made to a particular individual, his agent or to the public.

An offer must be externally manifested and must be addressed to and made known to the person to whom the proposal is being made. In order to be externally manifested the manifestation shall be either express or tacit. It is, however, held that where a contract has to be formalised by means of a public deed or by means of a private writing, then even the offer must be made in writing.

Once a proposer makes an offer he must make such offer with the intention not only to create a legal relationship with the person to whom the offer is made, but the offeror also undertakes to hold himself to the contract if this is accepted by the other party. An offer must also be complete and therefore contain all the elements essential for the conclusion of the contract or the contents must be such to render possible their determination.

Finally, an offer must be made to a particular person, his agent or to the public. In the case of an offer made to the public, the other contracting party is not determinable when the offer is made but will become such when a member of the public expresses his acceptance.

A contract is said to be concluded when there is unison of wills of the contracting parties, in that, it is at that moment that an agreement acquires juridical existence. The importance of the determination of the moment in which a contract is concluded lies in the fact that until the moment of conclusion, the consent which binds the parties may be withdrawn. Until a contract is concluded, the offer and existence remain two separate moments; however, when the contract is concluded there is unison of the offer and acceptance. Thereafter, the obligation is said to be created and to exist.

There has been debate whether, in order for the unison of wills to be perfect, the reciprocal knowledge of the other party is necessary. The debate is therefore about whether each of the parties must come to know of the intention of the other, to the extent that until this takes place the consent which binds the parties is not irrevocable.

The fact that the will of the proposer must be known to the person to whom the proposal is made to is obvious. According to the prevailing opinion, in order for consent to be perfect, knowledge of the other party is necessary. A declaration that the proposal is accepted, made by the person to whom the proposal is made, is not enough, in that, the proposer must be informed of the acceptance. There are various theories on this matter and the latter reflects the theory of information on which our law appears to be based.

There are, however, other systems like:

(i) the system of declaration – the simple manifestation of the intention is enough, even though the declaration is not made known to the proposer;
(ii) the system of transmission – the person to whom the offer is made has declared his intention of accepting it and has sent a declaration to the proposer to this effect. The fact that he has sent the acceptance makes the acceptance definitive;
(iii) the system of reception – a note of acceptance must be received by the proposer. It is only the reception by the proposer that makes the acceptance complete.

It is considered that the system of information is the most correct because in order for the wills of the parties to be united it is not enough that they have been externally manifested but it is also necessary that the manifestations themselves are united implying that they must exist externally vis-à-vis the other party, which is not possible unless the acceptance is made known to the other party.

Our civil law has never specifically and directly provided for the adoption of a particular system. This is possibly due to the fact that it is presumed that the contracting parties are within close distance from one another and a contract is concluded when an offer is communicated from one party to another and the acceptance likewise communicated by word of mouth. In the case of commercial contracts, the legislator did envisage that the parties may be at a distance. Thus, article 110 of the Commercial Code provides that a contract stipulated by means of correspondence, whether by letter or telegram, between parties at a distance, is not complete if the acceptance has not become known to the party making the offer within the time fixed by him or within such time as is ordinarily required for the exchange of the offer and the acceptance, according to the nature of the contract and the usages of trade generally.

3 The question deals with issues which relate to employment in the private sector and accordingly are regulated by the provisions of the Employment and Industrial Relations Act 2002. Employer and employee relationships in the private sector are most often regulated by contracts of employment. The two main types of contracts of employment are those of a definite duration and those for an indefinite duration. The main distinction which lies between the two, other than the period of employment, is the manner in which such contracts may be terminated. Both such contracts may be terminated during probation. Notice periods normally also apply in the termination of indefinite contracts of employment.

(a) Probation is a term not defined in our law. The law merely provides that the first six months of a worker's employment shall be probationary employment unless both parties agree on a shorter period of probation. Therefore, even if no reference is made to probation, the first six months of employment shall always be probationary.

In the case of a contract of service, or of an industrial agreement, in respect of employees holding technical, executive, administrative or managerial posts and whose wages are at least double the minimum wage for that year, such probationary period shall be of one year unless otherwise specified in the contract or agreement. The wording of the relative provision can be interpreted to mean that probation can be increased to any period.

The most important element about probation is that during such time either party may terminate the employment at will without giving any reason for doing so. The only limitation laid down is that if employment is terminated during probation and employment has continued for more than one month a week's notice has to be given.

It has often been questioned whether the period which may be stipulated allowing an employee to adapt to a new post following promotion be deemed to be a period of probation. It is held that since the law makes no mention of such probation and therefore there are no time limits laid down in this regard, whether or not such a period may be provided for is based on agreement reached between the employer and employee. What is certain, however, is that if the employer feels that the employee is not fit for the new post, he cannot terminate his employment as he would have been able to do so during probation on commencing employment, but can only take the necessary steps so that the employee reverts to his previous post.

(b) The law prescribes the notice periods applicable in the case of termination of indefinite contracts of employment.

The relative notice period shall vary according to the period for which the employee would have been in the continuous employment of the employer, as follows:

(i)	For more than one month but not more than six months	1 week;
(ii)	For more than six months but not more than two years	2 weeks;
(iii)	For more than two years but not more than four years	4 weeks;
(iv)	For more than four years but not more than seven years	8 weeks
(v)	For more than seven years	1 week for every additional year up to 12 weeks
(vi)	Such longer periods agreed upon in case of technical, administrative, managerial and executive posts.	

The notice period shall begin to run from the working day next following the day on which notice is given.

On receiving notice from the employer, the employee shall have the option:

1. to continue working for the employer until the notice period expires or,
2. at any time during the notice period require the employer to pay him a sum equal to half the wages that would be payable to him in respect of the unexpired notice period.

On receiving notice from the employee, the employer may

1. allow the employee to continue to work for him until the notice period lapses or,
2. at any time during the notice period, decide to pay the employee a sum equal to the wages that would have been payable in respect of the notice period.

Where the employee fails to give notice as aforesaid, he shall be liable to pay the employer a sum equal to half the wages that would be payable in respect of the notice period and if the employer fails to give notice, he shall be liable to pay the employee a sum equal to the wages that would have been due to him in respect of the notice period.

No notice need be given where employment is terminated for a good and sufficient cause.

4 This question deals with part of the constitutional documents of a limited liability company, namely the articles of association. It has been held that the articles of association are concerned with matters of internal organisation, which are primarily of interest to its own members and officers.

Whereas the memorandum of association is the contract whereby the shareholders agree to form the company and actually form it thereby giving it its own juridical existence, it is important that such relationships be regulated. Thus the need to have articles of association. As Farrar says, the articles are the domestic regulations of the company and govern its internal administration, since they determine how the powers conferred on the company by the memorandum shall be exercised. As held in a UK case, the memorandum is the area beyond which the actions of the company cannot go and inside that area the shareholders may make such regulations for their own government as they think fit.

It is not necessary to file the articles with the Registrar of Companies. In fact, article 75 of the Companies Act clearly provides that there *may* be registered with the memorandum, articles of association, which shall be signed by the subscribers to the memorandum and prescribing regulations for the company. If articles are not registered, or, if articles are registered, insofar as they do not exclude or modify the regulations contained in the First Schedule of the Act, then such regulations shall be the regulations of the company in the same manner, and to the same extent, as if they were contained in duly registered articles. Thus, the schedules are deemed to be directory and not mandatory in nature; they are intended to provide guidelines.

The First Schedule to the Companies Act is thus a model form of articles which may be adopted *in toto* or in part or amended as necessary. The First Schedule is divided into two parts: Part 1 contains the regulations for the management of a public company and Part 2 the regulations for the management of a private company. However, in practice, Part 1 is adopted in the case of private companies and it is amended to reflect the nature of such a company.

In the UK case *Holmes* v *Keyes* (1959) it was held that the articles should be regarded as business documents and should be construed to give them business efficacy. This is important because as held in another UK case *Scott* v *Frank Scott Ltd* (1940), the articles cannot be rectified by the courts. The power to alter is purely statutory and the alteration must be effected by an extraordinary resolution. If there is inconsistency between the articles, the courts will follow ordinary rules of construction and look at them as a whole, thereby trying to harmonise the different articles in compliance with the law. In other UK cases, the commercial construction adopted by the courts was so liberal that it almost amounted to rectification. However, as already stated, the courts are deemed not to be able to rectify the articles. The court may, however, resort to the memorandum to resolve any ambiguity in the articles, but in the case of a conflict, the memorandum is deemed to prevail.

Thus, the articles are deemed subordinate to the memorandum as they cannot confer wider powers than the memorandum. As held in the UK case *Guinness* v *Land Corp of Ireland* (1882), if there is any inconsistency between the two, the memorandum shall prevail and any alterations to the articles which conflict with the memorandum shall be void to the extent of such conflict. Furthermore, it has been held that the articles cannot fill any gap in the memorandum in respect of any matter which is, by law, required to be inserted in the memorandum since such conditions are introduced for the benefit of the creditors, the public and the shareholders. Thus, for example, the memorandum covers objects not powers, since the former not the latter are required to be specified in it. On the other hand, the articles must be read together with the memorandum to explain any ambiguity in the memorandum or supplement it on any matter in which it is silent. As is the case with the memorandum, the articles must not contain anything which is illegal or contrary to public policy.

The articles of association normally contain provisions dealing with the mode of transfer and transmission of shares in the company; the convening of general meetings and the voting thereat, including the number of votes required in order to pass ordinary and extraordinary resolutions and to form a quorum; the powers of the directors and any limitations thereon; the convening and holding of directors' meetings including the votes required to form a quorum and to take decisions; provisions relating to the status of a company depending on whether it is a private company, a private exempt company or a public company; matters relating to the issue of shares; the pledge of share; the rights appertaining to the different classes of shareholders; the duties of the company secretary; and the vesting of legal and judicial representation. As stated above in the absence of particular articles being registered, the provisions found in the Second Schedule to the Companies Act will apply. Practice has it in Malta that promoters/shareholders do file articles wherein they include additional clauses and exclude the applicability of others found in the said Schedule.

5 The existence of a partnership creates a juridical relationship between the partnership and the partners composing it. Such relationship gives rise to various rights and duties of the partners against and towards the partnership and of the latter against and towards the former.

A partnership *en nom collectif* may be formed by two or more partners, operates under a partnership name and has its obligations guaranteed by the unlimited and joint and several liability of all the partners: provided that at least one of the partners shall be either an individual or a body corporate, which has its obligations guaranteed by the unlimited and joint and several liability of one or more of its members.

On the other hand, a partnership *en commandite* operates under a partnership name and has its obligations guaranteed by the unlimited and joint and several liability of one or more partners, called general partners, and by the liability, limited to the amount, if any, unpaid on the contribution, of one or more partners, called limited partners: provided that at least one of the general partners shall be either an individual or a body corporate, which has its obligations guaranteed by the unlimited and joint and several liability of one or more of its members.

Particular rights and obligations are vested in and undertaken by the unlimited partners of partnerships *en nom collectif* and the unlimited partners of partnerships *en commandite*.

The principal rights of these partners include:

(i) Insofar as the deed does not provide otherwise, each partner is entitled to take part in the management of the partnership's business, inspect the books and records of the partnership and generally supervise and control the partnership's affairs by such means as he considers appropriate;

(ii) A partner may maintain an action against the partnership, not only for the recovery of sums which he has disbursed on account of the partnership, together with interest, but also in respect of any obligations which he has contracted in good faith in the affairs of the partnership, as well as in respect of risks inseparable from the management;

(iii) Every partner is entitled to share in the profits of the partnership. Where the deed of partnership does not fix the share of each partner's contribution to the partnership and with regard to a partner who has only contributed his personal services, his share of the profits shall be equal to that of the partner who has contributed to the partnership the least sum or portion. It is pertinent to point out, however, that a partnership may not distribute profits until it has made good all losses;

(iv) Every partner has the right to attend all meetings of the partnership and to vote thereat and, unless provided in the deed, every partner has one vote irrespective of the value of his contribution.

The principal duties of such partners include:

(i) Every partner owes the partnership all that which he has promised to contribute thereto within such time and upon such terms as may have been determined. In default, the partnership would have the right to bring an action against him for the performance of his obligations as well as for the payment of interest and, where competent, for further damages.

    With regards to the contribution which is to be made by the partners, the law provides that, unless specifically provided in the deed of partnership, things contributed to the partnership shall be deemed to have been transferred in full ownership. However, where any of the partners has contributed his own services only, the contributions made by the other partners shall, unless specifically provided in the deed of partnership, be deemed to have been made in usufruct;

(ii) A partner may not make use of the partnership property or take money from the partnership funds for his own private advantage without the consent of the other partners. Should he do so, the partner shall become a debtor of the partnership in interest where the partnership may also even have a right for damages against him. Where a partner takes funds from the partnership, unless he is the managing partner, he is presumed to have taken the funds for his personal advantage;

(iii) The partner who has agreed to contribute his skill to the partnership is bound to render an account of the profits made through the exercise of such skill, unless such skill is required in order to fulfil the purpose or object for which the partnership was set up, and unless all the other partners agree otherwise;

(iv) Every partner is held liable towards the partnership for any damage caused to the said partnership through his fault and he may not set off against such damage the profits derived by the partnership from the exercise of his skill in other affairs;

(v) A partner may not compete with the partnership. A partner shall not, in competition with the partnership and without the express consent of the other partners, carry on business on his own account or on account of others or be a partner with unlimited liability in another partnership. In default, the partnership may, at its option, either take action for damages and interest against the offending partner or demand payment of any profit made by him in violation of the aforesaid prohibition. The exercise of such rights is barred by a prescription period of two years from the date of the contravention;

(vi) Every partner must contribute his share of the losses sustained by the partnership, as opposed to sharing in the profits. Every partner's share of the losses is determined in the same manner as the share of profits is calculated. In most cases, this is fixed in the deed;

(vii) Every partner may, without the consent of the other partners, associate with himself a third party in his interest in the partnership. However, such partner may not be introduced into the partnership without the consent of the partners.

In the case of a partnership *en commandite*, the rights and duties of the general partners are the same as the partners in a partnership *en nom collectif*. On the other hand, the rights and obligations of the limited partners are different. In fact in the management of the partnership, there are cases where the rights of the limited partners are limited, while in other cases the limited partners are released from some of the duties of the general partners. The rights and duties of the limited partners include:

(i) Limited partners may not participate in the management and administration of the partnership unless so authorised by a special power of attorney;

(ii) Limited partners may inspect the books of account of the partnership;

(iii) Limited partners are not bound by the provisions of the law whereby the general partners may not, in competition with the partnership, and without the express consent of the other partners, carry on business on their own account or on account of others or be partners with unlimited liability in another partnership;

(iv) A limited partner shall in no case be bound to restore profits received in good faith;

(v) Unless the deed of partnership otherwise provides, a limited partner may assign his interest in the partnership. However, if the contribution of a limited partner is not fully paid up, any assignment of his interest in the partnership shall not have effect, with regard to the partnership, unless it is made with the consent of all the general partners;

(vi) Any changes in the deed of partnership which deprive limited partners of any of their rights shall require the unanimous consent of all the general partners and of all the limited partners, unless the deed of partnership otherwise provides.

6 **(a)** If, as is often the case, the shares in a company are all of one class, then these are necessarily ordinary shares. In fact, the Companies Act 1995 specifically provides that a company shall, at all times, have ordinary shares. As the name implies, ordinary shares confer on their holder the residue of rights of the company which have not been conferred on other classes. Ordinary shares usually carry the main financial risk if the company is unsuccessful; if, however, it is successful, they carry the lion's share of the profits. Subject to the rights of other classes (which are normally, though not always, limited in extent), ordinary shares are unlimited in their possibilities; in fact, after dealing with the distribution of profits as provided for in the articles, the remaining distributable profits will be available to them. Furthermore, on winding up of the company, the ordinary shareholders are entitled to the entire surplus of the assets remaining after payment of the liabilities of the company and after the return of the capital of all classes of shares, unless preference shareholders are given the right to participate in the distribution of the surplus assets.

One of the most important characteristics granted to ordinary shares is that they cannot be redeemed. Linked with this prohibition is the requirement for companies to have ordinary shares at all times. Unfortunately, however, the Act does not lay down any minimum number of ordinary shares which a company must always have and thus there could arise a situation where all the shares but one would be redeemed.

Ordinary shares can be sub-divided into different classes, with each class having certain rights which are not enjoyed by the other classes. It is submitted that these classes of shares are not termed as preferential because they do not afford any special rights in relation to dividends or to the distribution of assets on winding up. Thus, for example, a particular class of ordinary shareholders may be entitled to appoint a certain number of directors on the board, or, they may be granted special voting rights. In this regard, one must recall that which is stated in Regulation 1 of the First Schedule, in terms of which it is possible that certain ordinary shares are not given the right to vote or to receive dividends (non-voting and non-profit participating).

(b) The other most important class of shares which a company may issue are preference shares. As their name implies these shares carry some preferential rights in relation to other classes of shares, particularly ordinary shares. Although these preferential rights may be different types, they usually relate to the right to receive a fixed rate of dividend in preference to the other classes of shareholders, or the right to receive a proportionate part of the assets of the company on winding up. Furthermore, these rights may be further sub-divided into participating and non-participating rights and cumulative or non-cumulative rights.

The rights of preference shares are usually contained in the memorandum, the articles, or their terms of issue. In the UK case of *Scottish Insurance Corp Ltd* v *Wilsons* & *Clyde Coal Co Ltd* (1949), it was held that where the memorandum or articles clearly lay down the rights of the preference shares as to accumulation and participation as regards the dividend, those rights are *prima facie* exhaustive, that is no further rights can be implied. Text-writers have, however, opined that if the memorandum lays down rights which are *prima facie* exhaustive but which the articles further elaborate upon, then such further rights are effective. However, to eliminate doubts the Act under article 69(1)(f) requires that the rights be set out as precisely and as exhaustively as possible in the memorandum. If this is not done the difficulty would be to determine the rights carried by those shares, thereby giving rise to the possibility of inconsistency between that which was intended by the parties and that which may be construed by a court of law.

The principal right of preference shares is that of receiving a fixed percentage of the distributable dividends in preference to the other shareholders. As against debenture holders, preference shareholders are only entitled to their preferential treatment if the company has distributable profits. If there are no such distributable profits the preference shareholder will not get anything unless he has a cumulative right. Moreover, in most cases it is not enough that the company has distributable profits as in actual fact the dividend must first be declared.

Preference shares can also carry the right for cumulative dividends. Dividends are said to be cumulative, where if no dividend is declared in a year, or if declared they do not cover the fixed rate, the outstanding balance shall be carried forward and shall be paid out of the profits of subsequent years when the profits are available. In the case of non-cumulative preference shares, the outstanding balance will not be carried forward during subsequent years, and thus any preference dividend which is not paid is lost and cannot be claimed. As held in the UK case *Webb* v *Earle* (1875), where the clause defining the preferential rights declares that preference shares are entitled to a preferential dividend at a fixed specified rate, the dividend is *prima facie* cumulative. However, it is submitted that for clarity, it would be better if the word 'cumulative' were used in describing the preference shares. If, on the other hand, the intention is that the preferential right to dividends will not be cumulative, this must be clearly stated. In such a case the clause must state at which funds the holders of the preference shares are entitled to look for the payment of their dividend. Furthermore, on winding up, the holders of cumulative preference shares will only be entitled to the arrears of the dividends if these have actually been declared or if the memorandum, the articles or the terms of issue specifically so provide.

It is also possible for the memorandum, the articles or the terms of issue to provide that apart from their preferential dividend, preference shares shall also participate in the distribution of a further dividend, that is, they shall be entitled to participate *pari passu* with the ordinary shares after a dividend of a fixed percentage has been paid on the ordinary shares. This participating right must be specifically stated in the statutory document or the terms of issue and in default no such participating dividend right shall attach to such shares.

Although preference shares entitle their holders to preferential treatment in the case of the payment of dividends, unless the memorandum, the articles or the terms of issue specifically provide, the preference shares shall not entitle the holder to any additional rights in a winding up over shares issued at par. The same rule applies in the case of participating rights to capital. In fact, if the provisions defining the preference shareholders' rights expressly state that the shares shall be entitled to participate in the distribution of any surplus assets after all shares are repaid in full, the preference shareholders are entitled to participate in the distribution of all the remaining assets after the creditors, costs, preference dividends and paid up share capital are paid. If the memorandum, the articles and the terms of issue are silent on this matter, they would have to be interpreted so as to see whether such right is also available to the preference shareholders.

A further characteristic which we have seen is not applicable to ordinary shares but is only applicable to preference shares, is that the latter can be redeemed by their holder or by the company. In fact this emerges from Regulations 1 and 2 of Part 1 of the First Schedule of the Act as well as from article 115. Regulation 2, in particular, provides that subject to article 115, any preference shares may, with the sanction of an ordinary resolution, be issued on the terms that they are, or at the option of the company are liable, to be redeemed on such terms and in such manner as the company before the issue of the shares may by extraordinary resolution determine.

It is important to note that such redemption is only possible if permitted by, and under, the provisions of article 115. This provides that where a company, duly authorised by its memorandum or articles, issues preference shares, which are to be redeemed, or are liable to be redeemed at the option of the company or the shareholder, such shares shall only be redeemed out of those profits of the company which would otherwise have been available for dividend, or out of the proceeds of a fresh issue of shares made for the purpose of the redemption. In the latter case, the company shall have the power to issue shares up to the nominal value of the preference shares to be redeemed as if those preference shares had never been issued.

Furthermore, the terms and the manner of redemption must be laid down in the memorandum or articles of the company, the shares being redeemed must be fully paid up and the terms of redemption must require full payment on redemption. The premium, if any, payable on redemption must be provided for out of the profits of the company or out of the company's share premium account before the shares are redeemed. Where shares are redeemed other than out of the proceeds of a fresh issue, there shall, out of profits which would otherwise have been available for distribution as dividend, be transferred to the capital redemption reserve, a sum equal to the nominal amount of the shares redeemed. In this latter case, the provisions relating to the reduction of the issued share capital of a company shall, except as provided in article 115, apply as if the capital redemption reserve were paid-up share capital of the company. It is submitted that all five conditions must concur for the shares to be validly redeemed.

The law puts the capital redemption reserve to a further use. In fact it may, notwithstanding anything contained in article 115, be applied by the company in paying up unissued shares of the company to be issued to members of the company as fully paid bonus shares. Furthermore, preference shares redeemed under article 115 shall be treated as cancelled on redemption, and the amount of the company's issued share capital shall be diminished by the nominal value of those shares accordingly. However, it is to be noted that a redemption of preference shares by a company shall not to be taken as reducing the amount of the company's authorised share capital.

7 Though having a separate legal existence, a company is still an artificial person and can therefore only act through individuals. In the case of small classic private companies, ownership and control are often vested in the same people subject to financial control sometimes resting with an outside institution. In such companies there is a natural tendency to informality, with a blurring of managerial and shareholder functions. In larger companies, on the other hand, there is frequently a separation between ownership and control and a wide dispersal of share ownership. This gives management considerable scope for the exercise of power by virtue of their strategic position and control over the proxy machinery of general meetings. Having entered into the realms of the different organs in a company, one can say that we have entered into the much debated subject of corporate governance. Corporate governance was defined by the Cadbury Report as the system by which companies are directed and controlled. Thus, boards of directors are responsible for the governance of their companies. However, as held by Maw, although what remains fundamental is that the shareholders are actually the owners of the company and that the directors are there to run the business for its owners, corporate governance is an objective which is to be followed for the good, not only of the shareholders, but also of the employees, customers, bankers and for the reputation and standing of the economy.

The traditional closed system of corporate power and control, as referred to by Farrar, principally comprises the two main organs of a company, namely the general meeting of shareholders and the board of directors. It is generally held that while the board of directors manages the company and makes business policy decisions, the general meeting of the shareholders as a body elects the board and decides on organic change. A company is like a puppet, and the board is its mind and will. The puppet will respond only as a result of appropriate action being taken by the appropriate organ of control, that is, either the shareholders in general meeting or the directors within their delegated powers and authority.

It is therefore well established that each member of the board owes, individually and also collectively, duties to the general body of shareholders. These are enforceable against the directors by the company itself.

It can be stated without hesitation that the position of the board of directors as an organ of a company has, over the years, gained a more strategic position and it is often questioned whether the shareholders in a general meeting have retained ultimate control.

The extensive powers of the board can also be seen to arise out of their power to bind the company even when they perform acts which are outside the scope of their authority. Thus, the law provides that anything done by the board of directors which exceeds the limits of their authority or by any one director which is beyond his powers, shall be considered binding on the company unless that act exceeds any powers vested in such board or person, as the case may be, in terms of law. Therefore, the only instance in which acts that are *intra vires* the powers of the company but *ultra vires* those of the board shall not be deemed binding on the company, is where such exceed those powers vested in the board or the directors individually in terms of law.

While the centralisation of power in the board of directors undoubtedly serves to render the running of the company more efficient, conflicts of interest may arise where the management and shareholders do not share the same interests, as in the case of structural decisions like mergers and take-overs.

Other factions which are also considered to have a stake in a company and are therefore to be considered in analysing what action can be taken against defaulting directors, are the employees. In the UK and Malta there exists no compulsory recognition of the workforce in the organic structure of a company, although in practice the board of directors does consider their interests when taking decisions. Nonetheless there remains no statutory obligation to have regard of their interests and nor can the employees take court action against the directors to enforce this obligation and nor can they claim damages for its breach or compel the company to take employees' interests into account.

Also considered to have an interest in the control and management of a company are its creditors. While once again the board of directors should take account of the creditors of the company in so managing it, there is no explicit statutory obligation to do so. The only direct legal remedies which creditors appear to have against directors arise in very restricted cases, namely where the company is placed into liquidation and the directors are held liable for fraudulent and/or wrongful trading. It may also be said however that indirectly the rights of the creditors of a company are safeguarded in actions which a company may take against directors who have breached their fiduciary duties, in that, when damages are receivable by the company from the defaulting director, creditors would also benefit from such receipts provided that their claims are justified. In the same way however, as this form of protection is indirect, should the company decide not to proceed against the defaulting directors, the creditors would be left with no remedy other than in situations of dissolution.

It has also been held that the public at large also has an interest to see that the management of corporate entities is carried out effectively and to no-one's detriment. It is, however, held that directors can generally take the interests of the public into account but only if those interests do not conflict with the interests of the shareholders as a whole.

However, in practice the role of the board is often supervisory rather than managerial as extensive powers are delegated to individual directors and to professional executive managers, a group largely ignored by the basic legal structure. In terms of Part I of the First Schedule of the Companies Act 1995, directors may delegate any of the powers exercisable by them to a managing director or to any other director holding an executive office. One of the principal risks that a company may face in making such appointments is the loss of effective control and therefore it is essential that continuous and regular reporting requirements are enforced.

As noted above, the corporate structure envisages a division of power between the board and the general meeting with extensive power vested in the hands of the former which in turn delegates its powers to individual directors and professional managers. The problem is that, having accepted this division of power, the law must find ways of monitoring the exercise of that power and curbing abuses arising from it so that persons contributing capital are not exposed to undue risk. A recent practice which may be mentioned in this context is the use of proxies by the board to control the election of members to the board. This is what is termed as 'self-perpetuating' boards of directors by Gower, in that, in view of the fact that most often the attendance at a general meeting by a shareholder involves substantial cost, when the agendas are sent out for meetings in which directors are to be appointed, a proxy form is inserted in terms of which the chairman is appointed as proxy of the shareholders and therefore the present board is entrusted with re-constituting itself.

In Malta efforts to promote best practice in transparency, accountability and fairness in the governance of companies have translated into the Malta Stock Exchange approving the 'Code of Principles of Good Corporate Governance' (the Code) in 2001. Companies are required to report under the Code from the financial period ending December 2002. The Code applies specifically to all companies the securities of which are listed on the Official List and/or the Alternative Companies List of the Malta Stock Exchange, with the exception of Collective Investment Schemes. Compliance with the Code is not mandatory, but public companies are required to disclose the extent to which they comply thereto. Auditors are also required to include a report on the 'Statement of Compliance' drawn up by the directors, in the Company's Annual Report.

The principles laid down in the Code are 13 in total, and are set out below:

- A company should be headed by an effective board;
- Board appointments are to be made on the basis of certain key criteria;
- The board should monitor the operations of the company and ensure adherence to laws and regulations;
- The board should monitor any trading in the company's shares by its senior management and directors;
- The board should convene regularly to allow the directors to fulfil their responsibilities satisfactorily;
- The board should ensure that internal controls are effective, so that its decision-making capability and the accuracy of the company's financial reporting are constantly at a high level;
- The board should appoint the chief executive officer and be involved in the selection of senior management;
- The company should have clear and transparent policies on the remuneration of directors;
- Directors' remuneration should be reasonable, and sufficient to enable the company to attract and retain high quality executive directors;
- The company's Annual Report should contain a report by the Remuneration Committee;
- The board should ensure that the company communicates with the market effectively;
- The board should serve the legitimate interests of the company and be fully accountable to shareholders; and
- The board's primary aim should be the enhancement of the interest of the company and its shareholders.

8 **(a)** Lifting the corporate veil is the action taken rendering the shareholders of a limited liability company liable for their actions despite the fact that their liability is normally deemed to be limited to the unpaid part of the issued capital of the company. Such action is taken when the acts of the shareholders are serious enough to warrant personal action being taken against them.

The first statutory inroad to the concept of separate judicial personality arises out of the requirement that each company must be subscribed to by at least two members (except in the case of private exempt single member companies).

The number of shareholders may be reduced below two in several situations, as in the case of buy-outs or where shares are cancelled and forfeited by a shareholder for failure to pay his call on the unpaid part. If a company continues to exist over a period of time with only one member, there is a possibility that such a company be dissolved. Thus, the Companies Act 1995 provides that when the company continues to trade for more than six months having less than the statutory minimum number of shareholders the court shall dissolve the company and furthermore the remaining shareholder shall be held personally and unlimitedly liable for the company's obligations and such liability shall continue to be borne from the lapse of the six months to the dissolution of the company or until such time as the default is remedied. It is to be noted that after the lapse of six months, the court is obliged to allow the company a further period of 30 days to remedy the default. With the imposition of personal liability on the remaining shareholder which arises after the lapse of the six month period, the separate personality concept is not destroyed but the corporate veil is lifted.

Offences under the Companies Act, such as fraudulent and wrongful trading, also give rise to situations where the culprits are held personally and unlimitedly responsible for their acts and are therefore considered as further statutory inroads to the separate juridical personality doctrine.

Another form of lifting the veil is applied by extending it to embrace a group of companies. Here the veil of each one of the components is lifted to draw it over a large number of components. Such is the case when a group of legal entities is conducting a common activity, so that instead of referring to each one separately, one can regard them all as a single going concern, under one extended veil of incorporation. Company law recognises the group concept and requires, even locally, that when a parent–subsidiary relationship exists, consolidated accounts have to be drawn up.

Turning our attention to Farrar's categories of instances where the corporate veil is to be lifted, reference was made to trusts and with dealings with the enemy. There have been cases where the courts have found it necessary to pierce the corporate veil of trusts to analyse the characteristics of the trustees.

Various authors provide that under-capitalisation is another instance when the corporate veil should be lifted. The best known UK case in this respect is that of *Minton* v *Caveney* (1961), which although dealing with tort, gave reason for the court to conclude that the company concerned was under-capitalised, especially when compared with the type of business it was undertaking and the risk of loss.

(b) It is held that the most extreme form of lifting the veil is when the courts ignore it completely. 'Ignoring the veil' is seen as a sanction which the courts turn to when they think that the company was not founded for commercial or other sound grounds, but only as a means to defraud or defeat creditors or to circumvent laws. (The use of words like 'sham', 'puppet' and 'bubble' company are often used in this context.) In the UK case of *Gilford Motor Co Ltd* v *Horne* (1933), the managing director of a company entered into his service agreement undertaking that he would not solicit clients from his employer. In order to evade this obligation, he set up a company through which to do the soliciting. The court held that the company was a mere sham to cloak his wrong doings. Similarly, in the local case of *Herrera noe* v *Tancred Tabone et noe* an agreement had been entered into whereby, for a period of two years, either corporate party was not to engage employees of the other. The defendants then set up a new company which engaged two employees of the plaintiffs. The court concluded that the corporate veil could be lifted whereupon it was determined that both the defendant companies had common shareholders and directors and consequently held that the second company was merely set up to escape from its obligations undertaken in the agreement.

In the UK case of *Jones* v *Lipman* (1962) a man contracted to sell property but then changed his mind. In order to avoid being obliged to finalise the deal, he transferred the property to a company. The court held that the company could not be used to escape 'the eye of equity' and that specific performance be ordered against the company.

It has, however, been contended that in such cases, ignoring the company may not always do justice, in particular where other parties are affected, and other remedies may be resorted to instead. Thus, for example, a transfer of land to a controlled company by its owner, in order to evade execution of a personal contract of sale when its price has increased, can be repudiated without ignoring the company itself. In terms of the UK Insolvency Act, 1986, when a transfer was made with the intention to defraud creditors, the court was to make an order to restore the position as though the individual had not entered into the transaction. The same can be said of the transfer of property to or from a controlled property, where it has been held that the appropriate remedy would be to declare as void the transfer itself. If a company conveys its assets to a shareholder in fraud of creditors, the assets may be reached on the basis of fraudulent conveyance, exercised locally through the *actio pauliana*. If a contracting party tries to avoid the execution of the contract, maintaining that a company is the owner of the land, the court may order that as the controlling shareholder he is to have the necessary resolutions for the company to conclude the sale. If, on the other hand, a person transfers his assets to a company under his control so as to avoid their seizure by the creditors, the court may issue an injunction restraining him from disposing of his shares in the company, as well as restraining him for procuring the disposition of these assets. Therefore, there is no need to ignore the separate existence of the company.

In the case under consideration, the UK parent company may institute an action against the shareholders of Greystone Limited in their capacity as shareholders of Gebla Limited. Their action could be based on violation of the exclusivity agreement reached in view of the fact that this disallowed reaching any agreement, whether directly or indirectly, with their UK competitors. In this manner the courts will actually be 'lifting the veil' or 'ignoring the veil' of Gebla Limited despite the fact that this company is deemed to be a separate legal person from Greystone Limited.

9 The directors of Puzzled Limited wish to terminate Jane's employment on grounds of a good and sufficient cause and are convinced that Jane's actions would justify the termination of her employment. In advising the board of directors reference must first be made to the provisions of law dealing with the termination of employment for a good and sufficient cause.

Both definite and indefinite contracts of employment may be terminated for a good and sufficient cause. The Employment and Industrial Relations Act 2002 does not define what shall constitute a good and sufficient cause for termination of employment. The Act merely provides for a list of cases which cannot be considered as a good and sufficient cause. These cases are listed as follows:

(i) that the employee, at the time of the dismissal, was a member of a trade union, or seeking office as, or acting, or has acted, in the capacity of an employees' representative. This clause covers protection of the fundamental human right to freedom of association afforded protection under the Constitution and under the European Convention Act, 1987. Similarly just as one has the right to choose whether or not to be a member of a trade union, likewise one has the right to be a member of any union he chooses; or

(ii) except in the case of a private domestic employee, that the employee no longer enjoys the confidence of the employer. It has been held that as the meaning of the term 'confidence' is rather generic, this could lead to abuse. It is, therefore, opined that the reason why the confidence was lost should also be a good and sufficient cause, as for example that the employee is caught stealing; or

(iii) that the employee contracts marriage; or

(iv) that a female is pregnant with child or absent during maternity leave. This is precisely the defence which the directors fear shall be raised by Jane in the event that they terminate her employment at this moment in time; or

(v) where an employee discloses information, whether confidential or not, to a designated public regulating body, regarding alleged illegal or corrupt activities committed by his employer or persons acting in interest or on behalf of the employer. The law here provides for situations of whistle-blowing and protects the employee in such situations;

(vi) where an employee has filed a complaint or is participating in proceedings against the employer involving alleged violation of laws or regulations or is having recourse to competent administrative authorities in this regard;

(vii) that the business in which the employee is engaged has undergone a transfer of ownership unless the employer proves that the termination is necessary for economic, technical or organisational reasons entailing changes in the workforce.

Conduct which has, on several occasions, been found to constitute a good and sufficient cause by the Industrial Tribunal has been where the employee has engaged in activity found to be in competition with the activity of his employer. In one case, the employee was employed on a full-time basis. At the same time he was doing part-time work for a direct competitor of his employer. The employee, in this case, claimed that he had asked his supervisor whether he needed permission to carry out part-time work but his supervisor had replied in the negative. The Tribunal held that the employee's conduct represented an error in judgement and that permission to carry out part-time work was only granted when the nature of the part-time work was different to that carried out on a full-time basis.

Another good and sufficient cause to warrant termination of employment is the employee's inability to carry out his duties efficiently. Having said this, however, not every employee's mistake constitutes incompetence or negligence. In fact most often it depends on the circumstances of the case and when the employee's behaviour becomes serious enough to warrant dismissal.

In one case the employee had been dismissed from his job as general manager of a hotel after he had failed to achieve the financial targets for two years. In delivering its decision, the Tribunal noted that there was a very wide discrepancy between the targets projected and the results actually achieved. Also, the employee's contract of employment had actually placed the responsibility for achieving financial targets on the employee. This was one of the main reasons why the Tribunal accepted the employer's allegations of the employee's incompetence.

In the case under consideration, Jane had been acting in an improper manner by arriving to work late on several occasions and also by acting rudely with customers of the company. Jane had been reprimanded by her employer and had also been reprimanded in writing.

Maltese employment legislation does not stipulate the procedure to be adopted when disciplinary measures are to be taken against employees. Reference can however be made to practice adopted by other local entities as reflected in decisions of the Industrial Tribunal. Case-law, which although not binding, provides that an employer observe a number of procedural requirements prior to dismissing an employee. These procedural requirements emanate mainly from procedural fairness that should be adopted prior to termination as well as adherence to principles of natural justice (*audi alteram in partem* and *nemo judex in causa propria*). From past case-law, three requirements on the matter were laid down by the Industrial Tribunal, namely:

(i) the requirement of warnings prior to dismissal (preferably in writing). Warnings must also be clear and unequivocal. Warnings would not be required when a summary dismissal is justified;

(ii) the requirement that the reason for termination must reflect the truth; and

(iii) the requirement that the employee is given an opportunity to state his case prior to dismissal (in order to ensure that the principles of natural justice are being complied with to ensure the other party's right to be heard in attempting to state his/her case or to defend the accusations being brought against him).

With regards to the requirement to give warnings it is pertinent to note though that every case is to be judged on its own merits, as no case is alike. Hence there have been cases where the Tribunal has accepted that, in certain circumstances, the employer is entitled to dismiss the employee without prior warning. This reasoning was in fact followed in the case *Philip Camilleri* v *Travelex Financial Services (Malta) Ltd* (15 April 2003). This notwithstanding it would not be advisable for an employer to dismiss an employee without giving him warnings, as the reasoning behind a warning is to give the employee the opportunity to rectify the situation and change his conduct in order to prevent dismissal.

There does, however, exist a common usage that emanates from collective agreements agreed upon between Maltese employers and trade unions, to the effect that if there are no sufficient and valid reasons to terminate the employment of an employee summarily, an employee is to be given three warnings prior to dismissal. However, in one particular decision the Tribunal held that even if the three warnings are given to the employee this does not give the respondents (employer) 'a God given right to dismiss the appellant (employee)' (*Peter Gravina* v *AJ Services Ltd* (18 June 1993)). Therefore, warnings are to be examined individually whereby an employer may dismiss an employee after one or more warnings provided that the reason for dismissal is one which is just at law. Incidentally, although a verbal warning is still valid at law, it would be to the advantage of the employer to have all warnings recorded in writing.

In a situation such as that detailed in the question, having written warnings shall clearly serve a further purpose, in that, if action is taken by Jane against the company for unfair dismissal the company must have adequate evidence of the reasons for which employment is being terminated. Primarily therefore, the company should be able to prove that Jane's actions leading to her dismissal had nothing to do with her pregnancy but with her general behaviour, in respect of which she had already received two written warnings.

10 (a) In terms of law, the shareholders and not the directors may place a company into voluntary liquidation. It would be important for the directors to minute that they have recommended to the shareholders to liquidate the company. In terms of law, directors may be held liable for certain offences committed during the winding up period. Fraudulent trading arises where, in the course of the winding up of a company, it appears that business was carried on with the intent to defraud the creditors of the company or any other third party or for any other fraudulent purpose, in which case the court may, upon the application of either the official receiver, liquidator, creditor or member, impose personal liability without any limitation of liability on those who have been a party to the fraud. Wrongful trading applies in the case of an individual who, before the winding up, was a director of the company, and knew or ought to have known that there was no reasonable prospect that the company could not avoid being declared insolvent; provided that liability is avoided where the person concerned took every step to minimise the potential loss of the creditors on the assumption that he is a reasonably diligent person having the general knowledge, skill and experience expected of a person occupying his same post.

It is therefore essential that if the company is in a situation where it cannot continue to trade and pay its creditors, the directors actually discontinue incurring further debts.

It is to be noted that a company may be dissolved and wound up by the court if the company is unable to pay its debts. A company shall be deemed to be unable to pay its debts (i) if a debt due by the company has remained unsatisfied in whole or in part after 24 weeks from the enforcement of an executive title against the company by any of the executive acts specified in article 273 of the Code of Organisation and Civil Procedure; or (ii) if it is proved to the satisfaction of the court that the company is unable to pay its debts, account being taken also of contingent and prospective liabilities of the company. Also, in such an event the creditors may decide to commence liquidation proceedings.

(b) A company by extraordinary resolution appoints a liquidator for the purpose of winding up the affairs and distributing the assets of the company, and may fix the remuneration to be paid to him. Except where a company has appointed a liquidator at the meeting at which the extraordinary resolution to liquidate the company has been passed, the directors have to call a general meeting of the company, to be held within 30 days after the date of the dissolution, to appoint a liquidator. If for any cause whatsoever a liquidator is not appointed by the general meeting, any director shall apply to the court for the appointment of a liquidator and the appointment shall be made by the court. The application to the court for the appointment of a liquidator must be made within 14 days from the date for which the general meeting referred to above was summoned.

Notwithstanding the above, where the court has ordered that a company be wound up voluntarily by virtue of the provisions of law, and a declaration of solvency has been made, the court shall in the winding up order, at its sole discretion, either appoint a liquidator for the purpose of winding up the affairs and distributing the assets of the company and shall fix the remuneration to be paid to him; or give the necessary directives for the holding of a general meeting for the purpose of appointing a liquidator and for the fixing of the remuneration to be paid to him. A liquidator so appointed may be removed by extraordinary resolution of the company; except where he has been appointed by the court.

More than one person may be appointed to exercise the function of liquidator of a company. Where more than one liquidator is appointed, any power given may be exercised by one or more of them as may be determined at the time of their appointment, or in default of such determination, by any two of them acting jointly.

A person shall not be qualified to act as liquidator unless he is an advocate or is an individual who is a certified public accountant or certified public accountant and auditor, or is registered with the Registrar as fit and proper to exercise the function of liquidator. A person who is qualified to act as liquidator may not act as liquidator if he has held the office of director or company secretary or has held any other appointment with or in connection with that company, at any time during the four years prior to the date of dissolution of the company as determined in accordance with the provisions of this Act. The term 'director' includes a person in accordance with whose directions or instructions the directors of the company are or have been accustomed to act. Therefore, in view of the fact that you have held the post of chief financial officer with the company you may not be appointed liquidator of ABC Database Limited.

On the appointment of a liquidator, all the powers of the directors and of the company secretary shall cease. The liquidator, including the official receiver while occupying the office of liquidator, shall summon all meetings of creditors or contributories by giving not less than 14 days' notice thereof in a daily newspaper circulating wholly or mainly in Malta; and shall, not less than 14 days before the day appointed for the meeting, send by post to every person appearing in the company's accounting records to be a creditor of the company, notice of the meeting of creditors, and, to every person appearing in the company's accounting records or otherwise to be a contributory of the company, notice of the meeting of contributories.

The liquidator or any member, contributory or creditor may apply to the court to determine any question arising in the course of winding up of a company, or to exercise, as respects the enforcement of calls or any other matter, all or any of the powers which the court might exercise if the company were being wound up by the court. The liquidator may apply to the court to fix a time or times within which creditors are to prove their debts or claims or to be excluded from the benefit of any distribution made before those debts are proved. The court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as it thinks fit or may make such other order on the application as it so determines.

A liquidator shall be prohibited from transferring or disposing of any assets of a company, directly or indirectly, in favour of: (a) the liquidator himself, his partners or employees, or to the spouse of the liquidator, or to any other person related to him by consanguinity or affinity in the direct line, or, up to the third degree, in the collateral line; or (b) a commercial partnership, other than a company, of which he is a partner; or (c) a company of which he is a director, or of which he holds more than half in nominal value of its issued share capital, or in which he is entitled to more than half its voting power, or to a subsidiary or parent company thereof.

The liquidator may in the case of a members' voluntary winding up, with the sanction of an extraordinary resolution of the company, exercise any of the following powers:

(a) to pay creditors according to their ranking at law;

(b) to make any compromise or arrangement with creditors or persons claiming to be creditors, or having or alleging themselves to have any claim, present or future, certain or contingent, ascertained or which may be due in damages against the company or whereby the company may be rendered liable, and to refer any such matter to arbitration;

(c) to make calls on contributories or alleged contributories and to effect any compromise or arrangement in relation to debts, liabilities and claims of the company present or future, certain or contingent, ascertained or which may be due in damages, subsisting or supposed to subsist between the company and a contributory or alleged contributory or other debtor or alleged debtor, and all questions in any way relating to or affecting the assets or the winding up of the company, on such terms as may be agreed, and take any security for the discharge of any such call, debt, liability or claim and give a complete discharge in respect thereof;

(d) without sanction, exercise any of the other powers given by the Companies Act 1995 to a liquidator in a winding up by the court.

If the liquidator is, at any time after a declaration of solvency is made, of the opinion that the company will not be able to pay its debts within the period stated in the said declaration, he shall forthwith summon a meeting of the creditors, and shall lay before the meeting a statement of the assets and liabilities of the company. In the event of the winding up continuing for more than 12 months, the liquidator is to summon a general meeting of the company at the end of the first period of 12 months from the commencement of the winding up, and of each succeeding period of 12 months, or at the first convenient date within 3 months from the end of the period of 12 months, or within a longer term as the Registrar may allow, and shall lay before the meeting an account of his acts and dealings and of the conduct of the winding up during the preceding 12 months, including a summary of receipts and expenditure.

Within 30 days from the first 12 month period, the liquidator is to file with the Registrar a statement reflecting the proceedings and the position of the winding up commencing on the date when the liquidator was first appointed and drawn to the end of the period in respect of which the statement is made. When the liquidation process takes longer than 12 months this statement is to be filed in 6 monthly intervals, until the conclusion of the winding up process.

As soon as the affairs of the company are fully wound up, the liquidator shall make an account of the winding up, showing how the winding up has been conducted and how the property of the company has been disposed of and shall draw up a scheme of distribution indicating the amount due in respect of each share from the assets of the company, where applicable, and he shall cause the account to be audited by one or more auditors appointed by ordinary resolution of the company, or in default by the court. The liquidator shall thereupon call a general meeting of the company for the purpose of laying before it the account and scheme of distribution, if any, together with the auditors' report, and giving any explanation. Within seven days after the meeting, the liquidator shall send to the Registrar a copy of the account and of the scheme of distribution, if any, together with the auditors' report, and shall make a return to him of the holding of the meeting and of its date, and if the copy is not sent or the return is not made the liquidator shall be liable to a penalty, and, for every day during which the default continues, to a further penalty.

The Registrar, on receiving the account and the scheme of distribution, if any, together with the auditors' report and either of the returns mentioned above, shall register them, and on the expiration of three months from the publication of the relative notice, the Registrar shall strike the name of the company off the register. However, the court may, on the application filed within the said period of three months by the liquidator or by any other person who appears to the court to have an interest, make an order deferring the date at which the name of the company shall be struck off the register for such time and subject to such conditions as the court may provide.

Where in the course of the winding up of a company the liquidator has not taken into account any asset of the company, and the name of the company has been struck off the register, any interested person may, by an application, request the court to order the rectification of the scheme of distribution, and the court may, where it considers it appropriate, order such rectification under those terms and conditions it may deem fit. Where a company has made a distribution to its shareholders pursuant to a scheme of distribution and the name of such company has been struck off the register, any creditor whose claim against the company has not been satisfied may, by an application, claim what is due to him from the shareholders of the company *pro rata* to the amount received by the shareholders upon the distribution, and the court may, where it considers it appropriate, order that payments be made by the shareholders to such creditor under those terms and conditions it may deem fit, provided that in no case shall a shareholder be required to contribute an amount exceeding that received by him upon distribution. No application may be made after the expiration of five years from the date on which the name of the company has been struck off the register.

If a vacancy in the office of liquidator occurs by death, resignation or removal in the office of liquidator appointed by the company, the company shall by extraordinary resolution fill the vacancy. A general meeting shall be convened by any member, contributory or, if there was more than one liquidator, by the continuing liquidator or liquidators and notice of the meeting shall be given within 14 days of the occurrence of the vacancy. If for any cause whatsoever a liquidator is not appointed in the manner specified at law, or if a vacancy occurs in the office of a liquidator appointed by the court, any member, contributory or the continuing liquidator or liquidators may, at any time thereafter, apply to the court for the appointment of a liquidator, and the appointment shall be made by the court.

The court may, on the application of any member, creditor or contributory, remove a liquidator if it is satisfied that there exist sufficient grounds to warrant his removal and appoint another liquidator. A vacancy resulting from the death or resignation of a liquidator appointed by the court may, on the application of any member, creditor or contributory, be filled by the court. The liquidator shall, within 14 days after his appointment, deliver to the Registrar for registration a notice of his appointment stating his name and residence.

Upon the resignation of a liquidator from his office, he shall deliver to the Registrar for registration a notice of his resignation and the resignation shall only become effective on such registration. Where a liquidator is removed from office by the court in accordance with the provisions of law, the Registrar of Courts shall forthwith deliver a notice of such removal to the Registrar for registration. Where a liquidator has been removed by an extraordinary resolution of the company in a members' voluntary winding up, a notice thereof shall be delivered to the Registrar for registration by any member of the company who has duly been authorised by the same resolution or by the company in a general meeting.

This marking scheme is given as a guide to markers in the context of the suggested answer. Scope is given to markers to award marks for alternative approaches to a question, including relevant comment, and where well reasoned conclusions are provided. This is particularly the case for essay based questions where there will often be more than one definitive solution.

1 The question seeks to test the candidates' knowledge on the doctrine of precedent and its applicability by the local judicial system.

6–10 Answers will provide a detailed explanation of the doctrine and the stand taken by the local courts.

3–5 Answers in this band will provide less detail than those awarded marks falling in the upper band.

0–2 Extremely poor answers that show either no or very little knowledge of the subject area.

2 This question requires candidates to explain the importance of a valid offer and acceptance for a contract.

6–10 Detailed explanation of the meaning of offer and acceptance.

0–5 Weaker answers showing little or a brief explanation of the subject-matter of the question.

3 This question deals with two areas of employment law, probation and notice periods given in case of termination of employment.

6–10 Candidates make reference to both areas giving a clear explanation of both.

0–5 Little to less detail than will be provided in answers falling in the upper band.

4 This question refers to the articles of association of a limited liability company and requires candidates to detail the main features of such a document.

7–10 Answers earning such marks will distinguish between the memorandum and articles of association of a company and then reflect the provisions of the First Schedule to the Companies Act in order to discuss the main features of the articles.

4–6 A good explanation showing knowledge of the subject area, although perhaps lacking in detail.

0–3 No or very little knowledge of the subject area.

5 Candidates are expected to detail the principal rights and duties of the partners of partnerships *en nom collectif* and partnerships *en commandite*, distinguishing between the rights and duties of general partners and those of limited partners.

6 The question deals with two types of shares which may be issued by a limited liability company.

6–10 Thorough explanation of the nature of the different types of shares.

0–5 Weaker answers showing little or a scanty explanation of the nature and rights of the shares and of their shareholders.

7 This question deals with the concept of corporate governance requiring candidates to give a general yet detailed explanation of the subject-area.

6–10 A clear explanation of the concept of corporate governance with reference to the adoption of corporate governance principles in Malta.

0–5 Little to less detail than will be provided in answers falling in the upper band.

8 The question deals with the lifting of the corporate veil, which is closely linked to the concept of limited liability of shareholders of a company.

Candidates are expected to explain the significance of the concept of the corporate veil and the situations where such may be lifted with particular reference to the facts of the case as given in the question. Marks will vary depending on the level of detail given.

9 The question deals again with employment legislation and the termination of employment for a good and sufficient cause.

Candidates are expected to analyse the given facts of the case and determine whether there are sufficient grounds to warrant the termination of Jane's employment for a good and sufficient cause.

7–10 Candidates awarded such marks will have a sound knowledge of termination for a good and sufficient cause applicable in the case of termination of contracts of employment.

4–6 Candidates show that they are aware of what constitutes a good and sufficient cause but do not provide sufficient detail or accuracy.

0–3 Candidates demonstrate poor knowledge of the subject area.

10 The question deals with the role of the liquidator in a voluntary winding up procedure.

6–10 Candidates demonstrate a good understanding of the voluntary liquidation procedure and the role of the liquidator in such a procedure.

0–5 Little to reasonable detail given in answering the question.