# Answers

**1 (a)** The doctrine of binding precedent is one of the central principles of the Scottish legal system. The doctrine refers to the fact that, within the hierarchical structure of the Scottish 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 equal or 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.

The Hierarchy of the courts

The Supreme Court (previously the House of Lords) stands at the summit of the Scottish civil court structure and its decisions are binding on all civil courts below it in the hierarchy. As regards its own previous decisions, up until 1966 the House of Lords regarded itself as bound by its previous decisions. In a Practice Statement ([1966] 3 All ER 77) of that year, however, Lord Gardiner indicated that the House of Lords would in future regard itself as free to depart from its previous decisions where it appeared right to do so. There have been a number of cases in which the House of Lords has overruled or amended its own earlier decisions (e.g. *Conway* v *Rimmer* (1968); *Herrington* v *British Rail Board* (1972); *Miliangos* v *George Frank (Textiles) Ltd* (1976); *R* v *Shivpuri* (1986)) but this is not a discretion that the Supreme Court will exercise lightly. It has to be recognised that in the wider context the Supreme Court is subject to decisions of the European Court of Justice in terms of European Community law, and, with the implementation of the Human Rights Act 1998, the decisions of the European Court of Justice in matters relating to human rights.

In civil cases the Inner House of the Court of Session is generally bound by previous decisions of the Supreme Court and its own previous decisions, particularly by a decision of five or more judges. There are, however, a number of exceptions to this general rule. These exceptions arise where:

(i) there is a conflict between two previous decisions of the Inner House of the Court of Session.
(ii) a previous decision of the Inner House of the Court of Session has been overruled by the Supreme Court. The Inner House of the Court of Session can ignore a previous decision of its own which is inconsistent with European Community law or with a later decision of the European Court.
(iii) the previous decision was given *per incuriam*, i.e. in ignorance of some authority that would have led to a different conclusion (*Young* v *Bristol Aeroplane Co Ltd* (1944) and the Scottish case *Mitchell* v *Mackersy* (1905)).

The Outer House of the Court of Session is bound by the doctrine of *stare decisis* in the normal way and must follow decisions of the Supreme Court and the Inner House of the Court of Session. It is not bound by its own previous decisions.

The Sheriff Court is bound by the decisions of the Supreme Court and the Inner House of the Court of Session, but not by the judges in the Outer House of the Court of Session. Decisions by individual Sheriffs are not binding on other Sheriffs. Sheriffs are bound by the decisions of Sheriff Principals in their own sheriffdom.

In the criminal courts, precedent is applied more flexibly than in the civil courts. As the the Supreme Court has no jurisdiction in criminal matters in Scotland apart from in relation to devolution issues and human rights, the scope for the creation of precedent by the Supreme Court in criminal matters is limited. The High Court of Justiciary as a court of criminal appeal is bound by its own decisions but can convene a larger court to overrule its earlier decisions, as it did in the case of *Webster* v *Dominick* (2005). The High Court of Justiciary as a court of trial is bound by decisions of the High Court of Justiciary as an appeal court. The Sheriff Court is bound by the High Court of Justiciary as an appeal court and it has been held in some cases to be bound by decisions of the High Court of Justiciary as a court of trial, but a sheriff is not bound by decisions of other sheriffs. The Justice of the Peace Court is the lowest criminal court in Scotland. It is bound by decisions of the High Court of Justiciary as a court of criminal appeal and probably also by the High Court of Justiciary as a court of trial and possibly also by decisions of Sheriff Courts.

**(b)** Binding precedent

If a precedent was set by a court of equal or higher status to the court deciding the new case, then the judge in the present case should normally follow the rule of law established in the earlier case.

Persuasive precedent

From the foregoing it can be seen that courts higher in the hierarchy are not bound to follow the reasoning of courts at a lower level in that hierarchy. However, the higher courts will consider, and indeed may adopt, the reasoning of the lower court. As a consequence of the fact that the higher court is at liberty **not** to follow the reasoning in the lower court such decisions are said to be of persuasive rather than binding authority. It should also be borne in mind that Scottish courts are in no way bound to follow the reasoning of courts in different jurisdictions. However, where a court from another jurisdiction has considered a point of law that subsequently arises in a Scottish case, the Scottish courts will review the reasoning of the foreign courts and may follow their reasoning if they find it sufficiently persuasive.

**2 (a) Invitation to treat**

Invitations to treat are distinct from offers in that rather than being offers to others, they are in fact invitations to others to make offers. The person to whom the invitation to treat is made becomes the actual offeror, and the maker of the invitation becomes the offeree. An essential consequence of this distinction is that, in line with the ordinary rules of offer and acceptance, the person extending the invitation to treat is not bound to accept any offers subsequently made to them.

The following are examples of common situations involving invitations to treat:

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

(ii) **the display of goods on the shelf of a self-service shop** – In this instance the exemplary case is *Pharmaceutical Society of Great Britain* v *Boots Cash Chemists* (1953). The defendants were charged with breaking a law which provided that certain drugs could only be sold under the supervision of a qualified pharmacist. They had placed the drugs on open display in their self-service store and, although a qualified person was stationed at the cash desk, it was alleged that the contract of sale had been formed when the customer removed the goods from the shelf. It was held that Boots were not guilty. The display of goods on the shelf was only an invitation to treat. In law, the customer offered to buy the goods at the cash desk where the pharmacist was stationed.

(iii) **a public advertisement** – Once again this does not amount to an offer. This can be seen from *Partridge* v *Crittenden* (1968) in which a person was charged with 'offering' a wild bird for sale contrary to Protection of Birds Act 1954, after he had placed an advert relating to the sale of such birds in a magazine. It was held that he could not be guilty of offering the bird for sale as the advert amounted to no more than an invitation to treat.

(iv) **a share prospectus** – Contrary to common understanding such a document is not an offer. It is merely an invitation to treat, inviting people to make offers to subscribe for shares in a company.

**(b) A tender**

This form of invitation to treat arises where one party wishes particular work to be done and issues a statement asking interested parties to submit the terms on which they are willing to carry out the work. In the case of tenders, the person who invites the tender is simply making an invitation to treat. The person who submits a tender is the offeror and the other party is at liberty to accept or reject the offer as they please.

The effect of acceptance depends upon the wording of the invitation to tender. If the invitation states that the potential purchaser will require to be supplied with a certain quantity of goods, then acceptance of a tender will form a contract and they will be in breach if they fail to order the stated quantity of goods from the person submitting the tender. If, on the other hand, the invitation states only that the potential purchaser may require goods, acceptance gives rise only to a standing offer. In this situation there is no compulsion on the purchaser to take any goods, but they must not deal with any other supplier. Each order given forms a separate contract and the supplier must deliver any goods required within the time stated in the tender. The supplier can revoke the standing offer but they must supply any goods already ordered (*Great Northern Railway* v *Witham* (1873)).

**3** A delict is a wrongful act against an individual which gives rise to a non-contractual civil claim. The claim is usually for damages, although other remedies are available. Liability in delict is usually based on principle of fault, although there are exceptions. Negligence is recognised as the most important of the delicts, its aim being to provide compensation for those injured through the fault of some other person. However, an individual is not automatically liable for every negligent act that he or she commits and in order to sustain an action in negligence it must be shown that the party at fault owed a duty of care to the person injured as a result of their actions. Consequently, the onus is on the pursuer to establish that the defender owed them a duty of care. Even then there are defences available for the defender in a delict action.

**(a)** Although not strictly a defence for negligence, the application of the concept of contributory negligence can be used to reduce the amount of damages awarded in a particular case. It arises where the party making the claim is found to have contributed, through their own fault, to the injury they sustained. The onus is on the defender to show that the pursuer was at fault and contributed to their own injury. An early example of the principle may be seen in *Jones* v *Livox Quarries* (1952) in which a claimant was found to have contributed to their own injury by showing a lack of care for their own safety by riding on the back of a dumper truck. Another example may be found in *Sayers* v *Harlow* (1958) in which the damages awarded to a woman, who was injured escaping from a public toilet in which she had been trapped due to a defective lock, were reduced as her injuries had been exacerbated by the manner in which she tried to make her escape by climbing out of it.

If contributory negligence is demonstrated, then by virtue of the Law Reform (Contributory Negligence) Act 1945, the level of damages awarded will be reduced in line with and will depend upon the extent to which the claimant's fault contributed to the injury sustained.

**(b)** *Volenti non fit injuria* is a Latin tag which essentially translates as 'no injury can be done to a person who willingly accepts the risk'. Of course very serious injury can in fact be done to such a person, the point is that, as a result of their consent they lose their right to sue for damages for any injury suffered. Whilst contributory negligence operates to reduce the level of damages awarded, consent acts as a complete defence and no damages will be awarded if it is shown to apply.

Consent can be given where the claimant expressly agrees to the risk of injury or it may be implied from the claimant's conduct. An example of express consent may be seen in relation to medical treatment. In such situations the patient may be required to sign a consent form which removes the right to complain about what would otherwise amount to assault. Of course the patient does not consent to the surgeon carrying out any procedure negligently and on the occasion of such negligence an action for damages would still arise.

The principle of implied consent arose in *ICI* v *Shatwell* (1964) in which two brothers employed in a quarry ignored their employer's rules relating to safety, by testing detonators without using the shelter provided. As a result, the claimant was injured and sued the employer for breach of statutory duty as a result of his brother's actions. The court held that both brothers had impliedly consented to the risks by their actions and had participated quite willingly. Consequently the employer was not responsible to the injured brother. A Scottish example of *volenti non fit injuria* is *Titchener* v *British Railways Board* (1984) in which a girl took a short cut across a railway line and was hit by a train. Although no duty of care by the British Railways Board was held in this case, the court commented that the girl had been aware of the risks of crossing the line in this way. In *Morris* v *Murray* (1991) two men who had been drinking heavily decided to go for a flight in a light aircraft. The plane crashed, and Murray was killed, Morris tried to claim damages but the court held that the defence of *volenti non fit injuria* applied, as Morris was not so drunk that he could not appreciate the risk.

As may be seen, the defence relies upon the pursuer's consent to the risks, which should be distinguished from mere knowledge of it. Thus in *Dunn* v *Hamilton* (1939) a passenger accepted a lift in a car driven by a person she knew to be drunk. When she was injured as a result of the driver's careless driving it was held that she had not actually consented to the risk of being injured, even although she knew there was such a risk. Section 149 Road Traffic Act 1988 removed the possibility of consent being used as a defence against car passengers.

**4 (a)** The abbreviation LLP signifies that the business is operating as a limited liability partnership. It is a requirement that the names of such businesses must end with the words 'limited liability partnership' or the abbreviation LLP, in either upper or lower case. Ordinary partnerships, although in Scotland they have legal personality, do not benefit from any limitation on the liability of the various partners. Consequently the individual members of a partnership are jointly and severally liable for the debts of the partnership to the full extent of their personal wealth. The Limited Liability Partnerships Act 2000 provided for a new form of business entity, the limited liability partnership (LLP), which, although stated to be a partnership, is actually a corporation, with a distinct legal existence apart from its members. Most importantly, however, the new legal entity allows its members to benefit from limited liability, in that they will not be liable for more than the amount they have agreed to contribute to its capital.

In order to form an LLP, the appropriate form must be registered with the Registrar of Companies. The form must contain:

- the signatures of at least two persons who are associated for the purposes of carrying on a lawful business with a view to profit;
- the name of the LLP, which must end with the words 'Limited Liability Partnership' or the abbreviation 'LLP';
- the location of the LLP's registered office in England and Wales, or in Scotland;
- the address of the registered office of the LLP;
- the names and addresses of those persons who will be members on the incorporation of the LLP and a statement whether some or all of them are to be designated members (see below); and
- a statement of compliance.

On registration of the company, the Registrar will issue a certificate of incorporation.

There must be a minimum of two members of the LLP. If the membership should fall below two for a period of six months, then the remaining member will lose their limited liability and will assume personal liability for any liabilities incurred during that period that the LLP cannot meet. There is no maximum limit on membership.

Within the LLP, designated membership are responsible for ensuring that the LLP conforms with its duty to file its accounts with the Registrar of Companies.

In respect of LLPs, the essential filing requirements relate to:

- accounts;
- annual returns;
- changes in membership generally;
- changes in designated membership; and
- change to the registered office.

**(b)** The use of the abbreviation Ltd indicates that one is dealing with a private limited company. Private limited companies are incorporated enterprises and, as corporations, have an existence completely separate from that of their shareholder members. It is necessary that such companies be given a name and such is a requirement of the memorandum of association, which is required to establish the company.

Section 59 Companies Act (CA) 2006 requires all private limited companies to have the word limited, or its Welsh equivalent, as the last word in their names (there is an exemption under s.60 for non-profit private limited companies of an essentially charitable or educational nature).

Section 59 also allows the replacement of the full word 'limited' by the abbreviation 'Ltd', or its Welsh equivalent 'cyf'.

The reason for requiring the word limited at the end of the name is to publicise the fact that they are indeed limited companies, the liability of their members being limited to any amount remaining unpaid on the value of the shares held. Hence if shares are fully paid up the shareholders have no further responsibility for the debts of the company.

**(c)** The use of the abbreviation 'plc' indicates that one is dealing with a public limited company. As with private companies, so the plc is a separate legal entity from its members with its own name. Section 58 Companies Act requires the use of the word public limited company at the end of the company name or else the use of the abbreviation plc. Again there is a Welsh alternative ccc. Also, as with the private company, the shareholders in a public limited company enjoy limited liability determined by any amount remaining outstanding in relation to the shares they hold.

The major difference between the public limited company and the private limited company is that it is only the former that is allowed to issue shares to the general public. It is an offence for companies other than public ones to issues shares to the public (CA 2006 s.755).

Public limited companies tend to be very large and act as a mechanism for investment from outsiders. Many of them are listed on the Official Listing of the Stock Exchange, although it is important to emphasise that public limited companies are not necessarily listed on the stock market. As a result of the size and investment nature of public companies they are subject to much stricter controls, both at common law and under the companies legislation, than are private companies.

**5** The concept of 'capital' refers to the financial resources raised by companies to finance their operation. The essential distinction in company law is between share capital, that is provided by the members of the company, and loan capital, which the company borrows from outsiders.

**(a)** Ordinary shares

As defined in *Borland's Trustees* v *Steel* (1901) a share:

'…is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second…'

The nominal value of the shares held represents the maximum liability of a shareholder in a limited liability company. However, the actual liability of a shareholder is the amount remaining unpaid on any shares held. This difference arises in the following circumstances. When companies issue shares they may not require the full nominal value of the shares to be paid at once. This allows the company the possibility of raising further capital from its members as it becomes necessary in the future. The amount already paid to the company is referred to as called-up capital. Any uncalled capital represents the amount of potential liability. If the shares are fully paid up then the shareholder has no further liability towards meeting the company's debts. Purchasers of shares may be required to pay more than the nominal/face value of the shares, but shares cannot be issued at less than that value.

In regard to return, shares enjoy an advantage over other securities. If the company is profitable, not only will they enjoy dividend payments but the market value of their shares will go up. On the other hand if the company does not do well, they may well not receive any payment and the value of their shares will diminish.

As members of the company, ordinary shareholders are entitled to attend and vote at general meetings. One of their most important rights is to elect and dismiss the directors of the company who are involved in its day-to-day running for the general benefit of those members.

Ordinary shares usually carry rights of pre-emption, which entitles the holders to have first call on any new shares issued by the company.

Shares in public limited companies are usually freely transferable, but the transfer of shares in private companies may be restricted to existing members.

There are also strict rules governing the possibility of a company buying its own shares from its members.

**(b)** Preference shares represent a more secure form of investment than the ordinary share. The reason for this is that preference shares receive a fixed rate of dividend before any payment is made to the ordinary shareholders and usually they enjoy priority over ordinary shares with regard to repayment of capital. The actual rights enjoyed by the preference will be stated in the company's articles of association. Preference shareholders cannot insist on receiving a dividend payment, but as their dividend rights are usually cumulative, any failure to pay the dividend in one year has to be made good in subsequent years, subject to the company's profitability. Company law enforces the strict rule that dividends, whether on ordinary or preference shares, cannot be paid out of the company's capital.

Although, as with ordinary shares, the holders of preference shares are members of the company, their voting rights are restricted to any period when their dividends are in arrears.

**(c)** Debentures are documents that acknowledge a company's borrowing, although the term has been extended to cover the loan itself. As debenture holders lend money to the company they are its creditors, they are not members. As creditors they are entitled to receive interest, whether the company is profitable or not. It may even be necessary to use the company's capital to pay the debenture interest. Share dividends on the other hand must never be paid from capital. On liquidation debentures must be paid back before shareholders are paid.

It is usual for the company to provide security for the amount it has borrowed by issuing debentures. There are two methods of securing debentures: by means of a fixed charge over a specific item of property, or a floating charge over all of the company's property, some of which may be continuously changing, such as stock-in-trade. The disadvantage of floating charges is that they come after fixed charges when it comes to paying a company's debts.

As non-members, debenture holders have no right to attend or vote at company meetings, although they will be in the position to exercise more power if the company fails to pay interest on the loans, through exercising powers to secure their debts. They have no right to object to the company making further loans and securing those loans against its assets. The company may even provide fixed charges on the subsequent loans, thus reducing the security held by existing floating charge holders, unless there is an effective restriction on the company so doing.

There is no statutory restriction on debenture holders having debentures redeemed or purchased by the company.

**6** Under the provisions of the Companies Act (CA) 2006 there are three main types of resolutions: ordinary resolutions, special resolutions and written resolutions.

**(a) An ordinary resolution**

Section 282 CA 2006 defines an ordinary resolution of the members generally, or a class of members, of a company, as a resolution that is passed by a simple majority.

If the resolution is to be voted on a show of hands the majority is determined on the basis of those who vote in person or as duly appointed proxies, as both of these categories are entitled to vote. Where a poll vote is called the majority is determined in relation to the total voting rights of members who vote in person or by proxy.

**(b) A special resolution**

A special resolution is required for major changes in the company such as the change in name, reduction of share capital or winding up of the company. A special resolution of the members (or of a class of members) of a company means a resolution passed by a majority of not less than 75%, determined in the same way as for an ordinary resolution (CA s.283). If a resolution is proposed as a special resolution, it must be indicated as such, either in the written resolution text or in the meeting notice. Where a resolution is proposed as a special resolution, it can only be passed as such although anything that may be done as an ordinary resolution may be passed as a special resolution (s.282(5)). There is no longer a requirement for 21 days' notice where a special resolution is to be passed at a meeting.

Where a provision of the Companies Act requires a resolution, but does not specify what kind of resolution is required, the default position is for an ordinary resolution. However, the company's articles may require a higher majority, or indeed may require a unanimous vote to pass the resolution. The articles cannot alter the requisite majority where the Companies Act actually state the required majority, so if the Act provides for an ordinary resolution the articles cannot require a higher majority.

**(c) A written resolution**

Private limited companies are no longer required to hold meetings and can take decisions by way of written resolutions (s.281 CA 2006). The CA 2006 no longer requires unanimity to pass a written resolution. It merely requires the appropriate majority of total voting rights, a simple majority for an ordinary resolution (s.282(2)) and a 75% majority of the total voting rights for a special resolution (s.283(2)).

By virtue of s.288(5) CA 2006 anything which in the case of a private company might be done by resolution in a general meeting, or by a meeting of a class of members of the company, may be done by written resolution with only two exceptions:

- the removal of a director; and
- the removal of an auditor.

Both of these procedures still require the calling of a general meeting of shareholders.

A written resolution may be proposed by the directors or the members of the private company (s.288 (3)). Under s.291 in the case of a written resolution proposed by the directors, the company must send or submit a copy of the resolution to every eligible member. This may be done as follows:

- either by sending copies to all eligible members in hard copy form, in electronic form or by means of a website;
- by submitting the same copy to each eligible member in turn or different copies to each of a number of eligible members in turn;
- by a mixture of the above processes.

The copy of the resolution must be accompanied by a statement informing the members both how to signify agreement to the resolution and the date by which the resolution must be passed if it is not to lapse (s.291(4)). It is a criminal offence not to comply with the above procedure, although the validity of any resolution passed is not affected.

The members of a private company may require the company to circulate a resolution if they control 5% of the voting rights (or a lower percentage if specified in the company's articles). They can also require a statement of not more than 1,000 words to be circulated with the resolution (s.292). However, the members requiring the circulation of the resolution will be required to pay any expenses involved, unless the company resolves otherwise.

Agreement to a proposed written resolution occurs when the company receives an authenticated document, in either hard copy form or in electronic form, identifying the resolution and indicating agreement to it. Once submitted, agreement cannot be revoked.

The resolution and accompanying documents must be sent to all members who would be entitled to vote on the circulation date of the resolution. The company's auditor should also receive such documentation (s.502 CA 2006).

**7 (a)** Compulsory winding up

Winding up, or liquidation, is the process whereby the life of the company is brought to an end. It is a formal and strictly regulated procedure through which the company's assets are realised and distributed to its creditors and members. The procedure is governed by the Insolvency Act (IA) 1986. A compulsory winding up is a winding up ordered by the court under s.122 IA 1986 and has to be distinguished from the voluntary winding up procedures, either a members' voluntary winding up or a creditors' voluntary winding up, neither of which involve the court action to initiate them. The grounds under which a registered company may be wound up by the court under s.122 Insolvency Act 1986 (IA), are as follows:

(i) the company has passed a special resolution that it be wound up by the court;
(ii) it is a public company which has not within a year since its registration obtained a trading certificate with the share capital requirements;
(iii) it is an 'old public company' which has failed to re-register;
(iv) it has not commenced business within a year from its incorporation or has suspended its business for a whole year;
(v) (except in the case of a private company limited by shares or by guarantee) the number of members is reduced below two;
(vi) the company is unable to pay its debts;
(vii) the court is of the opinion that it is just and equitable that the company should be wound up;
(viii) in Scotland if the company is one which the Court of Session has jurisdiction to wind up, where there is a floating charge over the company's property and undertaking, and the court is satisfied that the security of the floating charge creditor is in jeopardy.

The most common of these grounds are (i), (vi), (vii).

If for any reason the members of the company no longer wish to continue the business they will use (i).

Outsiders may apply to have a company wound up under (vi). Section 123 (IA) provides that, if a company with a debt exceeding £750 fails to pay it within three weeks of receiving a written demand, then it is deemed unable to pay its debts.

Procedure (vii) may to be used in private companies where there is deadlock in management (*Re Yenidje Tobacco Co Ltd* (1916)).

**(b)** On the presentation of a petition to wind a company up compulsorily, the court may appoint a provisional liquidator to hold office with immediate effect. Otherwise, the court will appoint an interim liquidator to hold office from when the petition is granted, until the liquidator can be appointed by the creditors and members.

Consequences of an order for compulsory winding up are as follows:

– the winding up is deemed to have started on the date the petition was presented;
– any disposition of the company's property and any transfer of its shares after that date is void;
– the company's property may not be seized by creditors;
– no action can be taken against the company or its property without leave of the court;
– the directors are dismissed;
– the employees are also dismissed automatically.

The provisional or interim liquidator will require the present or past officers, or indeed employees, of the company to prepare a statement of the company's affairs. This statement must reveal:

– particulars of the company's assets and liabilities;
– names and addresses of its creditors;
– any securities held by the creditors (fixed or floating charges) and the dates on which they were granted;
– any other information which the provisional or interim liquidator may require.

After his appointment, the provisional or interim liquidator calls meetings of the company's members and creditors in order to select a liquidator to replace him and to select a liquidation committee if required. In the event of disagreement, the choice of the creditors prevails.

Section 143 IA 1986 states that the functions of the liquidator are 'to secure that the assets of the company are got in, realised and distributed to the company's creditors and, if there is a surplus, to the persons entitled to it'.

The assets of a company being wound up are to be applied in the following order:

– Secured creditors holding fixed charges
– Expenses incurred in the winding up including the liquidator's costs
– Preferential creditors who all rank equally
  Section 175 and Schedule 6 IA 1986 set out what are to be treated as preferred payments and these are essentially wages of employees together with all accrued holiday pay (£800 maximum).

- Creditors secured by a floating charge
- Ordinary unsecured creditors
  This category is the one that stands to lose most. It comprises the customers and trade creditors of the company. As creditors, they rank equally but, as is likely, if the company cannot fully pay its debts, they will receive an equal proportion of what is available.
- The deferred debts of the company
  These are debts owed to the members as members, for example, dividends declared but not paid.
- Members' capital
  After the debts of the company are paid, the members are entitled to the return of their capital, depending on, and in proportion to, the provisions of the articles of association.

Any remaining surplus is distributed amongst the members, subject to the rights given in the articles of association or other documents.

Once the liquidator has performed these functions, he must call a final meeting of the creditors, at which he gives an account of the liquidation and secures his release from the creditors. Notice of the final meeting has to be submitted to the Registrar of Companies and three months after that date, the company is deemed to be dissolved.

**8** This problem, in relation to the consequences following from breach of contract, can clearly be divided into two distinct elements, each of which requires a consideration of a specific aspect of the law relating to the payment of damages for breach of contract.

**(a) Az Ltd, Blud and the measure of damages**

The first element to be considered relates to the 'quantum or measure (i.e. the amount) of damages' that can be claimed by the party who suffered as a result of the breach of contract, and, of course, collaterally, the amount to be paid by the party actually in breach of the contract. Damages in contract are intended to compensate an injured party for any financial loss sustained as a consequence of another party's breach. The object is not to punish the party in breach, so the amount of damages awarded can never be greater than the actual loss suffered. The usual aim of the award of damages is to put the injured party in the same position they would have been in had the contract been properly performed (expectation loss). To this end the duty to mitigate losses ensures that the injured party is under a duty to take all reasonable steps to minimise their loss. As a result, the seller of goods which are not accepted has not only to try to sell the goods to someone else, but is also required to get as good a price as they can when they sell them (*Payzu* v *Saunders* (1919)). A subset of this rule, referred to as the market rule, requires that if goods are not delivered under a contract, the buyer is entitled to go into the market and buy similar goods, paying the market price prevailing at the time. They can then claim the difference in price between what they paid and the original contract price as damages. Conversely, if a buyer refuses to accept goods under a contract, the seller can sell the goods in the market and accept the prevailing market price. Any difference between the price they receive and the contract price, and only any such difference, can be claimed in damages.

In *Omak Maritime Ltd* v *Mamola Challenger Shipping Co* (2010) it was held that any money recovered by way of mitigation, following a breach of contract, must be taken into account when assessing the claimant's loss. The fundamental principle is that the claimant's actual position after mitigation must be compared to what it would have been had the contract been performed. In making such a comparison, any benefits received must be set off against the loss incurred from the original breach.

Applying the foregoing to the contract between Az Ltd and Blud, it can be seen that Az Ltd managed to recoup all of the costs and potential profit it would have made on the contract with Blud, so is not in a position to claim any further damages from Blud.

**(b) Az Ltd, Cam and liquidated damages**

The second aspect of the problem scenario relates to the issue of 'liquidated damages' and the validity of such procedures to predetermine the extent of any damages following from a breach of the underlying agreement.

It is common in business contracts for the parties to make provisions for possible breach by stating in advance the amount of damages that will have to be paid in the event of any breach of contract. This procedure is known as liquidated damages. However, such provisions will only be recognised by the court if they represent a genuine pre-estimate of loss and are not intended to operate as a penalty against the party in breach. If the court considers the provision to be a penalty, it will not give it effect but will assess and award damages in the normal way (*Dunlop* v *New Garage & Motor Co* (1915)).

In *Azimut-Benetti SpA* v *Darrell Marcus Healey* (2010) the court upheld a very onerous liquidated damages clause which, as in this scenario, was triggered by termination of a ship building contract. In that case the liquidated damages clause provided that, in the event of lawful termination, Azimut would be entitled to retain and/or recover an amount equal to 20% of the contract price. When Shoreacres, a company wholly owned by the defendant, failed to pay the first instalment, Azimut terminated the contract, and sought summary judgement for €7·1 million, 20% of the contract price. The court held that, on the facts of the case, the provision was 'not even arguably' a penalty clause: and read as a whole, it represented a commercially justifiable balance between the parties' interests. Consequently the €7·1 million had to be paid.

Applying *Azimut-Benetti SpA* v *Darrell Marcus Healey* to the facts of the scenario it can be concluded that, although the damages claimed appear extremely high, especially in relation to the early date of the breach, nonetheless they are not punitive *per se* and are likely to be treated as a genuine contractual pre-estimate rather than a penalty clause and so will be recognised as such and awarded by a court in any resultant court action.

**9** Employees are people working under a contract of service. Those who work under a contract for services are independent contractors. They are not employees, but are self-employed. It is essential to distinguish the two categories clearly, because important legal consequences follow from the placing of a person in one or other of the categories. For example, although employees are protected by various common law and statutory rights in relation to their employment, no such wide scale protection is offered to the self-employed.

The courts have developed tests for distinguishing the employee from the self-employed.

The first test is the control test. In using this test the key element is the degree of control exercised by one party over the other. The question to be determined is the degree to which the person who is using the other's services actually controls, not only what they do, but how they do it (*Walker* v *Crystal Palace Football Club* (1910)).

The integration test shifted the emphasis from the degree of control exercised over an individual to the extent to which the individual was integrated into the business of their putative employer (*Whittaker* v *Minister of Pensions & National Insurance* (1967)).

However, the integration test was not without problems, as some employers attempted to give the impression of using a self-employed workforce whilst effectively still controlling what that workforce did. The response on the parts of the courts was the development of the multiple, or economic reality, test. Rather than relying on one single factor, this test uses a more general assessment of the circumstances of any particular case in order to decide whether, or not, someone is an employee. And in so deciding the courts will not be bound by how the parties themselves describe the relationship (*Market Investigations* v *Minister of Social Security* (1969)).

The economic reality test was first established in *Ready Mixed Concrete (South East) Ltd* v *Minister of Pensions and National Insurance* (1968) in which it was held that there were three conditions supporting the existence of a contract of employment:

(i) the employee agrees to provide his own work and skill in return for a wage,
(ii) the employee agrees, either expressly or impliedly, that they will be subject to a degree of control, exercisable by the employer,
(iii) the other provisions of the contract are consistent with its being a contract of employment.

In deciding whether or not there is a contract of employment the courts tend to focus on such issues as whether wages are paid regularly or by way of a single lump sum; whether the person receives holiday pay; and on who pays the due national insurance and income tax. However, there can be no definitive list of tests as the whole point of the multiple test is that it examines all aspects of the situation in order to reach a determination.

Looking at the circumstances it can be seen that the manner in which they paid tax might indicate that they were self-employed, but the fact that Dan provided them with their equipment suggests that they were employees. In the final analysis the most significant factor would appear the degree to which Dan controlled them. Eve had to work for Dan only and on his premises, whereas Fred not only was allowed to work for others but, most importantly, he was also allowed to use others to do his work for Dan. This suggests clearly that Fred was not employed by Dan, although Eve was.

Such a conclusion would allow Eve to make a claim for redundancy on the basis that she was dismissed on the grounds that her skills were no longer required by her employer. Fred, however, is unlikely to succeed in a claim for redundancy.

Employees who have been dismissed by way of redundancy are entitled to claim a redundancy payment from their former employer. Under the Employment Rights Act (ERA) 1996 the actual figures are calculated on the basis of the person's age, length of continuous service and weekly rate of pay subject to statutory maxima. Thus employees between the ages of 18 and 21 are entitled to ½ week's pay for each year of service, those between 22 and 40 are entitled to 1 week's pay for every year of service, and those between 41 and 65 are entitled to 1½ weeks' pay for every year of service.

The maximum number of years' service that can be claimed is 20 and as the maximum level of pay that can be claimed is £400, the maximum total that can be claimed is £12,000 (i.e. 1·5 x 20 x 400).

Disputes in relation to redundancy claims are heard before an Employment Tribunal and on appeal go to the Employment Appeal Tribunal. The employer must act as would be expected of a 'reasonable employer' and in determining whether the employer has acted reasonably, the Employment Tribunal will consider whether, in the circumstances 'including the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating the reason given as sufficient reason for dismissing the employee.' (s.98(4) ERA 1996).

**10 (a)** The first part of this question requires a consideration of the situation of the various parties, in order to determine their status in relation to Just Ltd, which in turn will decide the nature and extent of their liability under the companies legislation.

From the problem scenario, it is apparent that, although not appointed as a director, Ger is concerned in the management of Just Ltd, as the others, Ham, Ive and Kim all follow his instructions. In law, the fact that he controls the operation of the business makes him a shadow director of the company as provided for in s.251 Companies Act 2006. This means that he is subject to all the rules and liabilities that apply to properly appointed directors.

Both Ham and Ive were actually appointed as directors so their status as such is clear.

Although Kim was not appointed as a director, he effectively ran the business, subject to Ger's instructions. As a consequence it is likely that he would be treated as a *de facto* director and subject to the full panoply of rules and regulations that directors are subject to.

**(b)** As the question scenario clearly states that Just Ltd was set up to run a fraudulent business and that Lyn suffered as a result of the fraud, it is unnecessary to pursue the issue of establishing fraud, as it can be taken as a given. Section 993 Companies Act 2006 creates the criminal offence of fraudulent trading, which applies to any or all of Ger, Ham, Ive and Kim in these circumstances, as it appears that they have knowingly been parties to carrying on the company's business with intent to defraud creditors. Section 996 applies whether or not the company is in the course of being wound up and renders all the parties liable to a fine and/or imprisonment for up to ten years, if tried and convicted on indictment.

As regards civil law, under s.213 Insolvency Act (IA) 1986, also relating to fraudulent trading, all four parties involved, Ger, Ham, Ive and Kim, will be liable to contribute to the company's assets to pay off creditors such as Lyn, in the event of its being wound up. It should be noted that s.213 IA does not only apply to directors, but to any person who has been party to the fraudulent trading, which clearly all four have.

A further issue in addition to the fraud, is the way in which Just Ltd has been used to avoid Ger's previous disqualification under the Company Directors Disqualification Act (CDDA) 1986.

The CDDA was introduced in an attempt to prevent the misuse of the company form by unscrupulous individuals looking to hide behind the corporate personality of the company to avoid personal liability for their actions. Section 4 CDDA refers to those who have been found guilty of the crime of fraud in the operation of companies, whilst s.10 covers those who have been liable for fraudulent trading under s.213 Insolvency Act 1986. In either event, the individual concerned may be disqualified from acting as a company director for a maximum period of 15 years. In the event, Ger was disqualified for a period of 10 years for his previous fraudulent activity (his disqualification would have prevented him from in any way, whether directly or indirectly, being concerned or taking part in the promotion, formation or management of a company). He, however, decided to circumvent the disqualification by establishing Just Ltd under the apparent control of Ham, Ive and Kim. Such a blatant attempt to avoid the effects of the banning order is, not surprisingly, covered by the provisions of the CDDA. Thus s.13 makes it a criminal offence for anyone to act in contravention of a disqualification order. Any such person is liable for the following penalties:

- imprisonment for up to two years and/or a fine, on conviction on indictment, and
- imprisonment for up to six months and/or a fine not exceeding the statutory maximum, on summary conviction.

Consequently, Ger will be liable to conviction and sentencing under the criminal law, but in addition he will face potential civil liability, as s.15(1) CDDA provides for personal liability for a company's debts, where a person takes part in the management of a company while subject to a disqualification order.

If Ger is clearly liable for both criminal and civil action to be taken against him, it remains to consider the responsibility under the CDDA of the other three parties in the operation of Just Ltd. There may be a distinction in the formal roles of the three, with Ham and Ive being *de jure* directors and Kim a *de facto* director. In any event, it would not actually be necessary to rely on Kim's status as a director as s.15, as it applies to those involved in assisting a disqualified person to avoid their disqualification, is sufficiently wide to cover Kim as well as Ham and Ive. Thus s.15(1)(b) extends personal liability for all the relevant debts of the company to:

'a person who is involved in the management of the company, [and] he acts or is willing to act on instructions given without the leave of the court by a person whom he knows at that time to be the subject of a disqualification order'.

Finally, where a person is personally responsible under s.15 for the relevant debts of a company, they are jointly and severally liable in respect of those debts with the company and any other person who, whether under that section or otherwise, is so liable.

In conclusion, Lyn can be assured that the assets of Just Ltd and the personal wealth of Ger, Ham, Ive and Kim are available to pay any debts owed by Just Ltd to her.

**1** This question requires candidates to consider the doctrine of precedent and in particular to explain two particular aspects of that doctrine.

**(a)** 6–7 marks A thorough to complete answer, describing and explaining the effect of the court hierarchy.

4–5 marks A less than complete answer, probably unbalanced, focusing only on one aspect of the question, or lacking in explanation.

2–3 marks Some knowledge, although perhaps not clearly expressed, or very limited in its knowledge and understanding of the topic.

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

**(b)** 3 marks Thorough treatment of the topic. Clearly explaining the meaning of the two types of precedent.

2 marks Less thorough answer, but showing a reasonable understanding of the topic of precedent.

0–1 mark Weak answer, perhaps showing some knowledge but little understanding of the topic generally.

**2** This question requires candidates to explain the concept of 'invitation to treat'. Part (a) raises the concept generally while part (b) deals with the related concept of an invitation for tenders.

**(a)** 5–7 marks A thorough answer explaining the meaning of invitation to treat together with either examples or cases to highlight the explanation.

2–4 marks Some general knowledge of the topic, but perhaps lacking in detail or cases/examples in support of the explanation.

0–1 mark Little, if any, knowledge of the concept or rules relating to an invitation to treat.

**(b)** 2–3 marks Good to complete account of tenders, distinguishing between the possible types.

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

**3** This questions requires candidates to explain the meaning and effect of two terms used in defences to the delict of negligence.

8–10 marks Thorough explanation of the meaning and effect of both elements of the question. Cases or examples will be expected to gain full marks.

5–7 marks Reasonable explanation of both concepts but perhaps lacking in detail or cases authority.

3–4 marks Some but limited knowledge of both elements or only dealing with one of them.

0–2 marks Very unbalanced answer, lacking in detailed understanding.

**4** This question asks candidates to explain the three terms that might be found at the end of the names of different business forms.

**(a)** 3–4 marks Good to complete answer which shows a knowledge of the meaning and effect of the term LLP.

1–2 marks Some knowledge of the meaning of LLP, but lacking in detail or an unbalanced answer not dealing with all the parts.

0 marks No knowledge whatsoever.

**(b)** 2–3 marks Good to complete answer which shows a knowledge of the meaning and effect of the term Ltd.

0–1 mark Little, if any, knowledge of the meaning of Ltd, but lacking in detail or an unbalanced answer not dealing with all the parts.

**(c)** 2–3 marks Good to complete answer which shows a knowledge of the meaning and effect of the term plc.

0–1 mark Little, if any, knowledge of the meaning of plc, but lacking in detail or an unbalanced answer not dealing with all the parts.

**5** This question requires candidates to consider the various investment mechanisms available to investors.

8–10 marks Full understanding and explanation of the various forms of investment. In order to secure full marks, candidates must consider the rights attached to each form.

5–7 marks Lacking in detail in some or all aspects of the possible investment forms. Unbalanced answer that only focuses on some of the forms.

3–4 marks Some, but little, knowledge of the topic.

0–2 marks Little, if any, knowledge of the topic.

**6** This question requires candidates to consider the way in which resolutions are voted on in companies. Parts (a)–(b) require candidates to explain the rules relating to ordinary and special resolutions and part (c) requires consideration of the procedure which permits private companies to operate on the written resolution procedure.

8–10 marks A good explanation of the distinct types of resolutions with a clear emphasis on written resolutions.

5–7 marks A good treatment of all of the types, but perhaps lacking in detail generally or specifically lacking in relation to one or more parts.

2–4 marks Some awareness of the area, but lacking in detailed knowledge.

0–1 mark Demonstrating very little, if any, understanding of what is actually meant by the types of resolutions.

**7** This question is in two parts, each carrying 5 marks. Part (a) requires candidates to explain the meaning of the term 'compulsory winding up', while part (b) requires an explanation of the grounds under which such a procedure can be instituted.

**(a)** 4–5 marks A thorough explanation of compulsory winding up generally.

2–3 marks Some, if little, knowledge of compulsory winding up. Perhaps too general or lacking in focus on the compulsory procedure.

0–1 mark Very little, if any, knowledge of the topic.

**(b)** 4–5 marks A thorough explanation of the grounds for compulsory winding under s.122 Insolvency Act 1986.

2–3 marks Some knowledge of the grounds for compulsory winding up, although perhaps not clearly expressed, or very limited in its knowledge and understanding of the topic.

0–1 mark Very little, if any, knowledge of the topic.

**8 (a)** The first element to be considered relates to the 'quantum of damages' that can be claimed by the party who suffered as a result of the breach of contract.

4–5 marks Full treatment of the issue of measure of damages together with supporting examples or cases. The actual outcome is not required to be as in the answer, as long as the answer considers all the points.

2–3 marks Fair analysis and treatment of the legal implications of the scenario, but perhaps lacking in detail or application.

0–1 mark Little, if any, knowledge or application of the appropriate legal principles.

**(b)** The second aspect of the problem scenario relates to the issue of 'liquidated damages' and the validity of such procedures to predetermine the extent of any damages following from a breach of the underlying agreement.

4–5 marks Full treatment of the issue of liquidated damages together with supporting examples or cases. The actual outcome is certainly not required to be as in the answer, as long as the answer considers all the points.

2–3 marks Fair analysis and treatment of the legal implications of the scenario, but perhaps lacking in detail or application.

0–1 mark Little, if any, knowledge or application of the appropriate legal principles.

**9** This question requires candidates to analyse a scenario in order to determine whether or not the parties are employees and consequently whether they can claim the benefits of employment legislation.

| | |
|---|---|
| 8–10 marks | Accurate knowledge of the legal principles involved linked to a sound application of those principles. It is highly unlikely that marks at this level could be achieved without reference to the cases, although it is possible nonetheless. |
| 5–7 marks | Sound knowledge of the law but perhaps lacking in application or alternatively not showing a sufficiently clear understanding of the legal principles involved. |
| 2–4 marks | Weak or unbalanced answer. Perhaps aware of the nature of the problem but lacking in clear knowledge of the law or deficient in relation to how those principles should be applied. |
| 0–1 mark | Very weak answer demonstrating little if any knowledge of the topic. |

**10** This question requires candidates to analyse a scenario in order to determine the status of the parties in relation to the operation of the company. It also requires a consideration of their potential liability under the appropriate provisions of the companies legislation.

**(a)**

| | |
|---|---|
| 3–4 marks | A good explanation of the status of the various parties, explaining their positions as either *de facto* or *de jure* directors. |
| 1–2 marks | Some but limited awareness of the law relating to the status if the parties as directors. |
| 0 marks | No knowledge of the subject area. |

**(b)**

| | |
|---|---|
| 5–6 marks | A good to full explanation of the liability of all of the parties under the Insolvency Act 1986 and Company Directors Disqualification Act (CDDA) 1986. |
| 3–4 marks | Some knowledge of the appropriate law, but perhaps lacking in detail or application as relates to the operation of the CDDA. |
| 0–2 marks | Weak answer lacking detailed knowledge of the topic. |