Answers

1 (a) Statutory interpretation

In order to apply any piece of legislation, judges have to determine its meaning. In other words, they are required to interpret the statute before them in order to give it meaning. The difficulty, however, is that the words in statutes do not speak for themselves and interpretation is an active process, and at least potentially a subjective one depending on the situation of the person who is doing the interpreting.

Judges have considerable power in deciding the actual meaning of statutes, especially when they are able to deploy a number of competing, not to say contradictory, mechanisms for deciding the meaning of the statute before them. There are, essentially, two contrasting views as to how judges should go about determining the meaning of a statute – the restrictive, literal approach and the more permissive, purposive approach.

(b) The literal approach

The literal approach is dominant in the Scottish legal system, although it is not without critics, and devices do exist for circumventing it when it is seen as too restrictive. This view of judicial interpretation holds that the judge should look primarily to the words of the legislation in order to construe its meaning and, except in the very limited circumstances considered below, should not look outside of, or behind, the legislation in an attempt to find its meaning.

Within the context of the literal approach there are two distinct rules:

(i) The literal rule

Under this rule, the judge is required to consider what the legislation actually says rather than considering what it might mean. In order to achieve this end, the judge should give words in legislation their literal meaning, that is, their plain, ordinary, everyday meaning, even if the effect of this is to produce what might be considered an otherwise unjust or undesirable outcome. In *Whitley* v *Chapell* (1868), the legislation under consideration made it an offence to impersonate any person *entitled* to vote. The accused had actually impersonated a dead person and was found not guilty, as a dead person was not entitled to vote. For a Scottish case, see *Ayrshire Employers Mutual Insurance* v *IRC* (1946), where the surpluses of mutual companies were interpreted as not being 'profits' which was the word used in the Finance Act, despite the fact that the court was sure that Parliament had intended them to be taxable.

(ii) The golden rule

This rule is applied in circumstances where the application of the literal rule is likely to result in what appears to the court to be an obviously absurd result. It should be emphasised, however, that the court is not at liberty to ignore, or replace, legislative provisions simply on the basis that it considers them absurd; it must find genuine difficulties before it declines to use the literal rule in favour of the golden one. As examples, there may be two apparently contradictory meanings to a particular word used in the statute, or the provision may simply be ambiguous in its effect. In such situations, the golden rule operates to ensure that preference is given to the meaning that does not result in the provision being an absurdity. In *Adler* v *George* (1964), the defendant was found guilty, under the Official Secrets Act 1920, with obstruction 'in the vicinity' of a prohibited area, although she had actually carried out the obstruction 'inside' the area.

(c) The purposive approach

The purposive approach rejects the limitation of the judges' search for meaning to a literal construction of the words of legislation itself. It suggests that the interpretative role of the judge should include, where necessary, the power to look beyond the words of statute in pursuit of the reason for its enactment, and that meaning should be construed in the light of that purpose so as to give it effect. This purposive approach is typical of civil law systems. In these jurisdictions, legislation tends to set out general principles and leaves the fine details to be filled in later by the judges who are expected to make decisions in the furtherance of those general principles.

European Union (EU) legislation tends to be drafted in the civil law manner. The need to interpret such legislation has forced a change in that approach adopted by UK courts in relation to EU legislation and even with respect to domestic legislation designed to implement EU legislation. Thus, in *Pickstone* v *Freemans plc* (1988), the House of Lords held that it was permissible, and indeed necessary, for the court to read words into inadequate domestic legislation in order to give effect to EU law in relation to provisions relating to equal pay for work of equal value.

However, it has to recognised that the purposive rule is not particularly modern and has its precursor in a long established rule of statutory interpretation, namely the mischief rule.

The mischief rule

This rule permits the court to go behind the actual wording of a statute in order to consider the problem that the statute is supposed to remedy.

In its traditional expression, it is limited by being restricted to using previous common law rules in order to decide the operation of contemporary legislation. Thus in *Heydon's case* (1584), it was stated that in making use of the mischief rule, the court should consider what the mischief in the law was which the common law did not adequately deal with and which statute law had intervened to remedy. Use of the mischief rule may be seen in *Leadbetter* v *Hutchison* (1934), in which the High Court of Justiciary interpreted 'cart' to include a motor-cycle combination, so as to make the statute apply to the mischief.

2 This question invites candidates to examine the law relating to important issues in the law of contract.

(a) The role of writing in the creation of contract

Most contracts do not need writing for their creation, and can be agreed orally or by actings. However, under the Requirements of Writing (Scotland) Act 1995, writing is required for the creation of (i) contracts relating to land; (ii) unilateral gratuitous obligations (unless they are created in the course of a business, when oral obligations will be binding), trusts in which the trustor intends also to be sole trustee of his own property, and wills.

Contracts relating to land need to be in writing because there needs to be certainty as to what is being transferred and to whom. Normally, there is a written contract followed by a disposition which is executed by the granter before one witness and the disposition is then recorded in the Land Register.

The reason why unilateral gratuitous obligations, trusts where the trustor is also the sole trustee, and wills need to be in writing is mainly because of the need to ensure there is sufficient evidence of the gift or the trust or the legacy under a will, if these obligations are later disputed.

Different forms of writing provide different levels of formality. Documents to be valid need to be subscribed by the granter. If the signature is also witnessed, with details of the witness added, it raises a presumption that it was signed by the granter. To have this status, a will must be signed on every page as well as being subscribed before one witness. Alternatively, a certificate from a court can be obtained which will give the document the same status.

Under the Requirements of Writing (Scotland) Act 1995, an electronic document with a digital signature complying with the Act is as valid as a traditional signature. Contracts are carried out electronically in many areas.

However, if these obligations are not created in writing, the statute allows for these obligations to be binding against the obligant if the other party has acted in reliance on the transaction which was not in writing, to the obligant's knowledge. This concept is personal bar, and it can make a contract which lacks necessary formalities valid, provided third parties are not affected.

For some obligations, there are statutory rules about the provision of certain pre-contractual information in writing, e.g. consumer credit contracts. Contracts of employment must by statute either be entered into in writing or certain written information must be provided to the employee about the contract.

Often, though writing is not legally necessary, writing is used for the creation of contracts which do not need to be entered into in writing, to ensure that all parties are in agreement in order to prevent disputes. This would be true where the subject matter of the contract is valuable or complex, or there is a long-term personal relationship involved, such as a partnership.

(b) Third party rights

The rule of privity of contract applies, by which contracts generally create enforceable rights only between the parties to them, and third parties are not entitled to enforce these contractual obligations. Its operation may be seen in *Blumer* v *Scott* (1874), in which a shipbuilder sold an unfinished ship to a purchaser on the basis that engineers would be contracted by the shipbuilder to fit the engines to the satisfaction of the purchaser, and this was backed by a liquidated damages clause covering delays. There were delays, and the engineers were sued for damages by both the shipbuilder and the purchaser. The court held that the purchaser had no claim against the engineers because it had no contract with them.

There are a number of ways in which consequences of the application of a strict rule of privity may be avoided to allow a third party to enforce a contract. These occur at both common law and under statute.

Common law

(i) The beneficiary sues in some other capacity.
A person who was not originally a party to a particular contract may, nonetheless, acquire the power to enforce the contract where they are legally appointed to administer the affairs of one of the original parties. This can arise by transmission, which is an involuntary transfer arising, e.g., on the death of a party to a contract (to an executor) or on bankruptcy (to a trustee in sequestration) or on liquidation of a company.

(ii) A party to a contract may be required under it to undertake obligations to a third party.
An example might be the construction of a commercial building, where there is likely to be an employer who has a contract with a main contractor, who in turn has contracts with specialised sub-contractors. In such a case, the sub-contractors may be required to give guarantees of their work to the employer. Also, the contract between the employer and the main contractor may provide for some of the payment for the contract to be retained for the benefit of the sub-contractors to cover the contingency of the insolvency of the main contractor.

(iii) There is a valid assignation of the benefit of the contract.
A party to a contract can transfer the benefit of that contract to a third party through the formal process of assignation. The assignation must be in writing, and the assignee receives no better rights under the contract than the assignor possessed. The burden of a contract cannot be assigned without the consent of the other party to the contract. An assignation has to be intimated in writing to the debtor under the contract.

(iv) Where it is foreseeable that damage caused by any breach of contract will cause a loss to a third party.
In *St Martins Property Corporation Ltd* v *Sir Robert McAlpine & Sons Ltd* (1994), the original parties had entered into a contract for work to be carried out on property with the likelihood that it would subsequently be transferred to a third

party. The defendant's poor work, amounting to a breach of contract, only became apparent after the property had been transferred. There had been no assignation of the original contract and, normally, under the doctrine of privity, the new owners would have no contractual rights against the defendants and the original owners of the property would have suffered only a nominal breach as they had sold it at no loss to themselves. Nonetheless, the House of Lords held that, under such circumstances, and within a commercial context, the original owner should be able to claim full damages on behalf of the third party for the breach of contract. In *McLaren Murdoch & Hamilton Ltd* v *Abercromby Motor Group Ltd* (2003), a Scottish case, the court took the opposite approach and where defective work was discovered after ownership had transferred to a third party, the first party was allowed to sue on the basis that the defective work had been done during the time when the first party was the owner.

(v) A third party has a *jus quaesitum tertio* (right acquired by a third person).
At common law in Scotland a third party to a contract may be able to sue on a contract to which they are not a party if certain conditions are met:

First, the third party must be identified in the contract either by name or by belonging to a specified class of beneficiaries. Second, it must be clear from the terms of the contract that the parties intended to benefit that third party. An example of this is a life insurance policy taken out by one person on their own life under which another person will benefit from payment under the policy in the event of their death. Third, it must be clear from the terms of the contract that the intention to create the third party right is irrevocable. On this element see *Carmichael* v *Carmichael's Executrix* (1920).

The other main exception to the privity rule at common law is agency, where the agent brings about contractual relations between two other parties even where the existence of the agency has not been disclosed.

Statute

Statute has intervened in relation to the doctrine of privity to provide third party rights in the field of motor insurance where third parties claim directly against the insurers of the party against whom they have a claim.

3 **(a)** 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.

The test for establishing whether a duty of care exists was initially set out in *Donoghue* v *Stevenson* (1932), the snail in the ginger beer bottle case. In putting forward the test to establish a duty of care, Lord Atkin stated that:

'You must take reasonable care to avoid acts and omissions which you could reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? … any person so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts and omissions which are called in question.'

It can be seen that this neighbour test for deciding the existence of a duty of care is an objective, rather than a subjective, one. It is not a matter of what the defender actually considered, but what they ought to have considered. Nor does the test require the contemplation of the resultant effect on the specific individual injured, but merely requires that identity of a class of individuals who might be injured as a consequence of the defender's lack of care.

The idea of the neighbour, or proximity, test was extended in *Hedley Byrne* v *Heller* (1964), which established the possibility of liability for negligent misrepresentation causing economic loss, where a party gave inaccurate advice or information to another party, within a special relationship, and that party subsequently and reasonably relied on it.

In *Caparo Industries plc* v *Dickman* (1990), a three stage test for establishing a duty of care was recommended. This requires consideration of the following questions:

- Was the harm caused reasonably foreseeable?
- Was there a relationship of proximity between the parties?
- In all the circumstances, is it just, fair and reasonable to impose a duty of care?

The present position appears to be that in establishing the existence of a duty of care in negligence, an incremental approach must be taken. The pursuer must show that the defender foresaw that damage would occur to the pursuer, that is, that there was sufficient proximity in time, space and relationship between the pursuer and the defender. In practical terms, foreseeability of damage will determine proximity in the majority of personal injury cases. The courts will then, where appropriate, consider whether it is just and reasonable to impose a duty and whether there are any policy reasons for denying or limiting the existence of a duty, for example, under the floodgates argument.

(b) The law does not require unreasonable steps to be taken to avoid breaching a duty of care. In legal terms, a breach of duty of care occurs if the defender fails to display the standard of care of the reasonable man, which is an objective test as shown in *Muir* v *Glasgow Corporation* (1943).

Thus the fact that the defender has acted less skilfully than the reasonable person would expect will usually result in a breach being established. This is the case even where the defender is inexperienced in his particular trade or activity. For example, a learner driver must drive in the manner of a driver of skill, experience and care (*Nettleship* v *Weston* (1971)). However, the standard of care expected from a child may be lower than that of an adult (*Mullin* v *Richards* (1998)).

Clearly the degree, or standard, of care to be exercised by such a reasonable person will vary depending on the circumstances, but the following factors will be taken into consideration in determining the issue:

(i) **The seriousness of the risk**

The degree of care must be balanced against the degree of risk involved if the defender fails in his duty. It follows, therefore, that the greater the risk of injury or the more likely it is to occur, the more the defender will have to do to fulfil his duty. The degree of care to be exercised by the defender may be increased if the pursuer is very young, old or less able bodied in some way. The rule is that 'you must take your victim as you find him' (this is known as the egg-shell skull rule).

In *Haley* v *London Electricity Board* (1965), the defendants, in order to carry out repairs, had made a hole in the pavement. The precautions taken by the Electricity Board were sufficient to safeguard a sighted person, but Haley, who was blind, fell into the hole, striking his head on the pavement, and became deaf as a consequence. It was held that the Electricity Board was in breach of its duty of care to pedestrians. It had failed to ensure that the excavation was safe for all pedestrians, not just sighted persons. It was clearly not reasonably safe for blind persons, yet it was foreseeable that they might use the pavement.

The degree of risk has to be balanced against the social utility and importance of the defender's activity. For example, in *Watt* v *Hertfordshire CC* (1954), injury sustained by the plaintiff, a fireman, whilst getting to an emergency situation, was not accepted as being the result of a breach of duty of care as, in the circumstances, time was not available to take the measures which would have removed the risk.

(ii) **Cost and practicability**

Any foreseeable risk has to be balanced against the measures necessary to eliminate it. If the cost of these measures far outweighs the risk, the defender will probably not be in breach of duty for failing to carry out those measures (*Latimer* v *AEC Ltd* (1952)).

(iii) **Skilled persons**

Individuals who hold themselves out as having particular skills are not judged against the standard of the reasonable person, but the reasonable person possessing the same professional skill as they purport to have (*Bolam* v *Friern Hospital Management Committee* (1957)).

4 This question requires candidates to explain the concept of limited liability and to consider three alternative categories of companies; the first unlimited in nature, whilst the second and third are limited in different ways.

(a) In this context, liability refers to the extent to which shareholders in companies are responsible for the debts of their companies and limited liability indicates that a limit has been placed on such liability. The point is that the limitation on liability is enjoyed by the member shareholders rather than the company. One of the major advantages of forming a company is that the members of the company may achieve limited liability. The great majority of registered companies are limited liability companies. This means that the maximum liability of shareholders is fixed and cannot be increased without their agreement. There are two ways of establishing limited liability in relation to a registered company.

Members of ordinary partnerships, formed under the Partnership Act 1890, do not have the advantage of limited liability and are personally liable for any partnership debts. However, non-active members of partnerships formed under the Limited Partnerships Act 1907 may benefit from limited liability, as long as they do not get involved in the operation of the business. All members of partnerships formed under the Limited Liability Partnerships Act 2000 benefit from limited liability set at the extent of their capital contribution.

(b) Section 3 Companies Act (CA) 2006 sets out the various types of companies which can be registered in terms of different liabilities.

(i) Companies can be formed without limited liability. These, by virtue of s.3(4) CA 2006, are referred to as unlimited companies. Such companies are incorporated under the Companies Acts and receive all the benefits which flow from incorporation except limited liability. Consequently, the shareholders in such unlimited companies remain liable to the full extent of their personal wealth for any unpaid debt of the company. It should be noted that, in line with the doctrine of separate personality, even in the case of unlimited companies, any subsequent debt is owed to the company and not directly to the creditors of the company. The compensating benefit enjoyed by such companies is that they do not have to submit their accounts and make them available for public inspection.

(ii) The company limited by guarantee (s.3(3) CA 2006) is restricted to private companies of a non-trading kind such as charities and professional and educational bodies. It limits the members' liability to an agreed amount which is only called on if the company cannot pay its debts on being wound up. In reality, the sum guaranteed is usually a nominal sum, so no real risk is involved on the part of the guarantor.

(iii) The more common procedure is to limit liability by reference to shares (s.3(2) CA 2006). The effect of this is to limit liability to the amount remaining unpaid on shares held (s.74(2)(d) Insolvency Act 1986). If the shareholder has paid the full nominal value of the shares to the company, then that is the end of responsibility with regard to company debts. Consequently, if the company should subsequently go into insolvent liquidation, the shareholders cannot be required to

contribute to its assets in order to pay off its outstanding debts. Both private and public companies can be formed on this basis.

5 The Company Directors Disqualification Act (CDDA) 1986 was introduced to control individuals who persistently abused the various privileges which accompany incorporation, most particularly the privilege of limited liability. The Act applies to more than just directors and the court may make an order preventing any person (without leave of the court) from being:

– a director of a company;
– a liquidator or administrator of a company;
– a receiver or manager of a company's property; or
– in any way, whether directly or indirectly, concerned with or taking part in the promotion, formation or management of a company.

The CDDA 1986 identifies three distinct categories of conduct, which may, and in some circumstances must, lead the court to disqualify certain persons from being involved in the management of companies.

(a) General misconduct in connection with companies

This first category involves the following:

(i) A conviction for an indictable offence in connection with the promotion, formation, management or liquidation of a company or with the receivership or management of a company's property (s.2 CDDA 1986). The maximum period for disqualification under s.2 is 5 years where the order is made by a court of summary jurisdiction, and 15 years in any other case.

(ii) Persistent breaches of companies legislation in relation to provisions which require any return, account or other document to be filed with, or notice of any matter to be given to, the Registrar of Companies (s.3 CDDA 1986). Section 3 provides that a person is conclusively proved to be persistently in default where it is shown that, in the five years ending with the date of the application, they have been adjudged guilty of three or more defaults (s.3(2) CDDA 1986). This is without prejudice to proof of persistent default in any other manner. The maximum period of disqualification under this section is five years.

(iii) Fraud in connection with winding up (s.4 CDDA 1986). A court may make a disqualification order if, in the course of the winding up of a company, it appears that a person:

(1) has been guilty of an offence for which they are liable under s.993 Companies Act 2006, that is, that they have knowingly been a party to the carrying on of the business of the company either with the intention of defrauding the company's creditors or any other person or for any other fraudulent purpose (s.41(1)(a) CDDA 1986); or

(2) has otherwise been guilty, while an officer or liquidator of the company or receiver or manager of the property of the company, of any fraud in relation to the company or of any breach of their duty as such officer, liquidator, receiver or manager (s.4(1)(b) CDDA 1986).

The maximum period of disqualification under this category is 15 years.

(b) Disqualification for unfitness

The second category covers:

(i) disqualification of directors of companies which have become insolvent, who are found by the court to be unfit to be directors (s.6 CDDA 1986). Under s.6, the minimum period of disqualification is 2 years, up to a maximum of 15 years;

(ii) disqualification after investigation of a company under Pt XIV CA 1985 (it should be noted that this part of the previous Act still sets out the procedures for company investigations) (s.8 CDDA 1986). Once again, the maximum period of disqualification is 15 years.

Schedule 1 to the CDDA 1986 sets out certain particulars to which the court is to have regard in deciding whether a person's conduct as a director makes them unfit to be concerned in the management of a company. In addition, the courts have given indications as to what sort of behaviour will render a person liable to be considered unfit to act as a company director. Thus, in *Re Lo-Line Electric Motors Ltd* (1988), it was stated that:

'Ordinary commercial misjudgement is in itself not sufficient to justify disqualification. In the normal case, the conduct complained of must display a lack of commercial probity, although ... in an extreme case of gross negligence or total incompetence, disqualification could be appropriate.'

These cases are brought by the Department of Business Innovation and Skills. Under this section, it is competent for the person to be offered the opportunity to give an undertaking not to act as a director for a period of time, rather than be taken to court.

(c) Other cases for disqualification

This third category relates to:

(i) participation in fraudulent or wrongful trading under s.213 or s.214 Insolvency Act 1986 (s.10 CDDA 1986);

(ii) undischarged bankrupts acting as directors (s.11 CDDA 1986).

For the purposes of most of the CDDA 1986, the court has discretion to make a disqualification order. Where, however, a person has been found to be an unfit director of an insolvent company, the court has a duty to make a disqualification order (s.6 CDDA 1986). Anyone who acts in contravention of a disqualification order is liable:

(i) to imprisonment for up to two years and/or a fine, on conviction on indictment; or

(ii) to imprisonment for up to six months and/or a fine not exceeding the statutory maximum, on conviction summarily (s.13 CDDA 1986).

6 **(a)** Section 9 Companies Act (CA) 2006 requires a 'statement of capital and initial shareholdings' to be submitted to the registrar in the application to register a company with share capital. Such a statement is essentially a 'snapshot' of a company's share capital at the point of registration.

Section 10 CA 2006 requires the statement of capital and initial shareholdings to contain the following information:

– the total number of shares of the company to be taken on formation by the subscribers to the memorandum;
– the aggregate nominal value of those shares;
– for each class of shares: prescribed particulars of the rights attached to those shares, the total number of shares of that class and the aggregate nominal value of shares of that class; and
– the amount to be paid up and the amount (if any) to be unpaid on each share (whether on account of the nominal value of the shares or by way of premium).

The statement must contain such information as may be required to identify the subscribers to the memorandum of association. With regard to such subscribers, it must state:

– the number, nominal value (of each share) and class of shares to be taken by them on formation, and
– the amount to be paid up and the amount (if any) to be unpaid on each share.

Where a subscriber takes shares of more than one class of share, the above information is required for each class.

The foregoing applies to companies limited by shares. Section 11 CA 2006 states that private companies limited by guarantee must provide details as to those parties entering into the guarantee and the extent of their commitment.

(b) The articles of association are the main element of a company's constitution and in effect they are the rules which govern a company's internal affairs. Companies are free to make such rules about their internal affairs as they think appropriate, subject to the proviso that any such rules must not contain anything that is either contrary to:

– the general law, or
– the specific provisions of the Companies Act 2006.

Articles of association form a statutory contract between the company and its members and between each of the members in their capacity as members (s.33 CA 2006).

Section 18 requires all registered companies to have articles of association, and they have to be contained in a single document and must be divided into consecutively numbered paragraphs (s.18(3)).

Section 19 gives the Secretary of State the power to prescribe 'default' model articles for the different types of company. Such model articles apply to companies where they have not registered any articles of their own, or have not specifically excluded the operation of the model article in question. The articles of association for private and public companies are different in content, in recognition of the essential distinction between the ways in which the two business forms operate.

Section 21 CA 2006 provides for the alteration of articles of association on the passing of a special resolution, requiring a 75% vote in favour of the proposition. Any such alteration has to be made '*bona fide* in the interest of the company as a whole'. This test involves a subjective element, in that those deciding the alteration must actually believe they are acting in the interest of the company. There is additionally, however, an objective element requiring that any alteration has to be in the interest of the 'individual hypothetical member' (*Greenhalgh* v *Arderne Cinemas Ltd* (1951)).

Articles of association cannot be altered where the alteration would be contrary to specific provisions of the companies legislation or general law.

In addition, s.22 CA 2006 permits companies to 'entrench' provisions in their articles. This means specific provisions may only be amended or removed if certain conditions are met which are more restrictive than a special resolution. For example, any such entrenched right may require the agreement of all the members before it can be altered or removed. However, such rights must not be written so that the articles can never be amended.

Further, there are other ways in which some provisions of the company's constitution can effectively be made unalterable. Thus the articles may give a member additional voting power, sufficient to block a resolution to alter articles on particular points (*Bushell* v *Faith* (1970)). Alternatively, the articles may provide that when a meeting is held to vote on a proposed alteration of the articles, the quorum present must include the member concerned, thus indirectly allowing that person the power to prevent any alteration by simply refusing to attend the meeting.

7 (a) Constructive dismissal

Normally, employees who resign deprive themselves of the right to make a claim for redundancy or other payments. However, s.136 Employment Rights Act 1996 (ERA) covers situations where 'the employee terminates the contract under which he is employed (with, or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct'. This provision relates to what is known as 'constructive dismissal' which covers the situation where an employer has made the situation of the employee such that the employee has no other reasonable action open to them but to resign. In other words, the unreasonable actions of the employer force the employee to resign. In such a situation the employee is entitled to make a claim for unfair dismissal, no matter the fact that they actually resigned. In *Simmonds* v *Dowty Seals Ltd* (1978), Simmonds had been employed to work on the night shift. When his employer attempted to force him to work on the day shift he resigned. It was held that he could treat himself as constructively dismissed because the employer's conduct had amounted to an attempt to unilaterally change an express term of his contract. An employee may also be able to claim constructive dismissal where the employer is in breach of an implied term in the contract of employment (*Gardner Ltd* v *Beresford* (1978)). In *Woods* v *WM Car Services (Peterborough)* (1982), it was further held that there is a general implied contractual duty that employers will not, without reasonable or proper cause, conduct themselves in a manner which is likely to destroy the relationship of trust and confidence between employer and employee and that such obligation is independent of, and in addition to, the express terms of the contract.

The action of the employer, however, must go to the root of the employment contract if it is to allow the employee to resign. In other words, it must be a breach of some significance. In *Western Excavating Ltd* v *Sharp* (1978), Sharp was dismissed for taking time off from work without permission. On appeal to an internal disciplinary hearing, he was reinstated but was suspended for five days without pay. He agreed to accept this decision but asked his employer for an advance on his holiday pay as he was short of money; this was refused. He then asked for a loan of £40; that was also refused. Consequently Sharp decided to resign in order to get access to his holiday pay. Sharp instituted a claim for unfair dismissal on the basis that he had been forced to resign because of his employers' unreasonable conduct. The employment tribunal found in Sharp's favour on the grounds that his employer's conduct had been so unreasonable that Sharp could not be expected to continue working there. However, on appeal the Court of Appeal held that before a valid constructive dismissal can take place, the employer's conduct must amount to a breach of contract, which is such that it entitles the employee to resign. In Sharp's case there was no such breach and therefore there was no constructive dismissal. However, in *British Aircraft Corporation* v *Austin* (1978), a failure to investigate a health and safety complaint was held to be conduct amounting to a breach of contract on the part of the employer which was sufficient to entitle the employee to treat the contract as terminated.

If the employee does not resign in the event of a breach by the employer, the employee will be deemed to have accepted the breach and waived any rights. However, they do not need to resign immediately and may, legitimately, wait until they have found another job (*Cox Toner (International) Ltd* v *Crook* (1981)).

(b) In relation to a successful claim for unfair dismissal, an Employment Tribunal may award any one of the following remedies:

(i) reinstatement,
(ii) re-engagement, or
(iii) compensation.

Reinstatement is where the dismissed employee is treated as not having been dismissed in the first place.

Re-engagement means that the dismissed employee is re-employed under a new contract of employment.

The calculation of a *basic* award of compensation is calculated in the same way as for redundancy payments and is subject to the same maximum level of payment. 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 which can be claimed is 20 and as the maximum level of pay that can be claimed is £430, the maximum total that can be claimed is £12,900 (i.e. 1·5 x 20 x 430).

In addition, however, a *compensatory* award of up to £72,300 may be made at the discretion of the tribunal and an *additional* award of up to £22,360 may be made where the employer ignores an order for re-employment or re-engagement, or the reason for dismissal was unlawful discrimination.

8 This question invites candidates generally to consider the incorporation of terms, and especially adverse terms, into contracts and to examine the effect of the law relating to unfair contract terms, i.e. The Unfair Contract Terms Act (UCTA) 1977 and The Unfair Terms in Consumer Contracts Regulations 1999.

(a) An exclusion clause can have no effect if it is not part of the contract, so the first question which has to be decided is whether the exclusion clause has been incorporated into the contract or not. There are three ways in which such a term may be inserted into a contractual agreement: by signature, notice or custom.

(i) It is a well-established principle that an exclusion clause will not be incorporated into a contract unless the party affected actually knew of it, or was given sufficient notice of it. As regards the notice on the receipt, Bust Ltd will no doubt claim that it provided sufficient notice of their terms of trade to make it part of any subsequent contract. In order for notice to be adequate, however, the document bearing the exclusion clause must be an integral part of the contract, and given

at the time the contract is made. Thus in *Chapleton* v *Barry UDC* (1940), notice on the back of a receipt was insufficient communication to incorporate an exclusion clause (see also *Olley* v *Marlborough Court Ltd* (1949)). Given judicial hostility to exclusion clauses, it is unlikely that the notice on the receipt would be accepted as providing the actual terms of the contract entered into at a later date. And in any case Abid did not even see the notice on the receipt which raised doubts as to its clarity. As was held in *Thornton* v *Shoe Lane Parking Ltd* (1971), the greater the exemption, the greater the degree of notice required and in the circumstances the extent of the exclusion sought by Bust Ltd would require extremely clear notification.

(ii) A second equally well-established principle states that if a person signs a contractual document, then they are bound by its terms, even if they did not read it (*L'Estrange* v *Graucob* (1934)), the only exception to this being where they were misled by the other party into signing the contract (*Curtis* v *Chemical Cleaning* & *Dyeing Co* (1951)). In the problem scenario, although Abid had signed previous contracts including the exemption clause, he did not actually sign anything on this occasion. Consequently Bust Ltd cannot rely on this means of limiting their liability into the contract.

A Scottish case on this point is *McCutcheon* v *David MacBrayne Ltd* (1964), in which the House of Lords held that although terms may be incorporated into a contract by a prior course of dealings, in a case where the injured party had only general knowledge that there were terms (rather than specific knowledge of them), and the injured party had not on this occasion signed a risk note as he normally did, the transport company's exclusion clause for negligence was not imported, and hence the transport company was liable when the ferry sank and McCutcheon's car was damaged.

(iii) Where parties have had previous dealings on the basis of an exclusion clause, that clause may be incorporated into later contracts (*Spurling* v *Bradshaw* (1956)). However, it must be shown that the party subject to the exclusion clause was actually aware of its existence, and in this instance the previous signing of a document containing the exclusion is not sufficient to incorporate it into later contracts (*Hollier* v *Rambler* (1972)). In the circumstances of the present problem, it is clear that Abid did sign contracts containing exclusion clauses previously and the exclusion clause was highlighted. It is not certain, however, whether he was actually aware of the content of the contracts he signed, but it is likely that the exclusion clause will be incorporated into the contract.

(b) Section 2(1) UCTA 1977 provides an absolute prohibition on exemption clauses in relation to liability in negligence resulting in death or injury. It is therefore clear that Bust Ltd cannot avoid responsibility for the injury sustained by Abid and will be liable for the injuries he suffered as a result of the negligence of their mechanic.

9 This question requires candidates to explain the implied authority of a company secretary.

Implied authority is the authority which derives from a person's position. It arises from the relationship which exists between the principal and the agent and from which it is assumed that the principal has given authority to the other person to act as their agent. Thus, it is implied from the particular position held by individuals that they have the authority to enter into contractual relations on behalf of their principal and third parties are entitled to assume that agents holding a particular position have all the powers which are usually provided to such an agent. Without actual knowledge to the contrary, they may safely assume that the agent has the usual authority which goes with their position.

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

In relation to companies, there are many layers of implied authority. For example, a person appointed as managing director usually is entitled to exercise all the powers of the company. Consequently, a managing director can bind the company in any contract within its capacity, even if their actual authority has been curtailed in some way. Equally, other agents of the company have different authority, thus shop assistants are able to bind their employers to contracts within the limited area of their authority.

This also applies in relation to company secretaries, just as much as managing directors; the only question is the extent of the secretary's implied authority. Although the old authorities such as *Houghton* & *Co* v *Northard Lowe* & *Wills* (1928) treated company secretaries as having very little authority to bind their companies, later cases have recognised the important role of the modern company secretary. Thus in *Panorama Developments Ltd* v *Fidelis Furnishing Fabrics Ltd* (1971), the Court of Appeal held that a company secretary was entitled to 'sign contracts connected with the administrative side of a company's affairs'.

Applying the *ratio* in *Panorama Developments Ltd* it is likely that the following results would ensue:

(a) The contract for the maintenance of the photocopiers may be excessively long and expensive, but there is no doubt that such a contract is within the ambit of a company secretary's implied authority and consequently the company, Do plc, will be required to honour the contract.

(b) This contract is clearly in breach of Chu's authority, but the actual contract is within a company secretary's implied powers and, as long as Ex plc are unaware of his breach of duty, Do plc will be liable on this contract as well.

(c) In this case, Chu has not only clearly exceeded his actual authority, but has equally gone beyond his implied authority. In this situation Do plc will not be liable for the contract.

10 Companies ordinarily raise the money they need to finance their operations through the issue of share capital, but it is equally common for companies to raise additional capital through borrowing. Such borrowing on the part of the company does not give the lender any interest in the company but represents a claim against the company. There are two types of security for company loans:

Fixed security

In this situation a specific asset of the company is made subject to a security in order to secure a debt. Once the asset is subject to the fixed security, the company cannot dispose of it without the consent of the debenture holders. The asset most commonly subject to fixed securities is land, using a form of security called a standard security in Scotland, although any other long-term capital asset may also be charged, as may such intangible assets as book debts, which would be done by assignation in security in Scotland. It would not be appropriate, however, to give a fixed charge against stock-in-trade as the company would be prevented from freely dealing with it without the prior approval of the debenture holders. Such a situation would obviously prevent the company from carrying on its day-to-day business. A standard security over land has to be registered at the Land Register in Scotland before it is registered at the Companies Registry. If the company fails to honour the commitments set out in the document creating the debenture, such as meeting its interest payments, the debenture holders can call up the security and sell the asset charged to recover the money owed. If the value of the asset which is subject to the security is greater than the debt against which it is secured, then the excess goes to pay off the rest of the company's debts. If it less than the value of the debt secured, then the debenture holders will become unsecured creditors for the amount remaining outstanding.

Floating charge

The floating charge is most commonly made in relation to the 'undertaking and assets' of a company and does not attach to any specific property whilst the company meets its requirements as stated in the loan document. The security is provided by all the property owned by the company, some of which may be continuously changing, such as stock-in-trade. Thus, in contrast to the fixed security, the use of the floating charge permits the company to deal with its property without the need to seek the approval of the debenture holders. However, if the company commits some act of default, such as not meeting its interest payments, or going into liquidation, the floating charge is said to crystallise. This means that the floating charge becomes a fixed charge over the assets detailed, and its value may be realised in order to pay the debt owed to the floating charge holder.

All charges, including both fixed and floating, have to be registered with the Companies Registry within 21 days of their creation. Failure to register the charge as required has the effect of making the charge void, i.e. ineffective, against any other creditor, or the liquidator of the company. The charge, however, remains valid against the company, which means in effect that the holder of the charge loses their priority as against other company creditors.

In relation to properly registered charges of the same type, they take priority according to their date of creation. However, as regards charges of different types, a fixed charge takes priority over a floating charge even though it was created after it. Generally, there is nothing to prevent the creation of a fixed charge after the issuing of a floating charge, and, as a legal charge against specific property, that fixed charge will still take priority over the earlier floating charge.

As all the charges in the scenario were properly registered, it follows that the fixed charge takes precedence over the floating charges. A standard security is created on the date when it is registered in the Land Register. While there is legislation in Scotland for there to be a Register of Floating Charges, and when that comes into force, floating charges will rank with other charges according to their date of registration in that Register, that legislation is not yet in force. Currently, floating charges are created on the date when they are executed by the company creating the charge, and they rank with each other according to their date of registration at the Companies Registry in Scotland. Therefore, unless there is an agreement to the contrary, the charges assume the following priority:

(i) Ko-Bank's loan, secured by a fixed security created on 5 April;

(ii) Jo's loan, secured by a floating charge registered on 12 April;

(iii) Ina's loan, secured by a floating charge registered on 15 April.

1 This question requires candidates to consider the powers of judges to interpret legislation and the rules they apply in exercising such interpretative powers. Although the question requires answers to focus on the two main general approaches, it also requires an explanation of the various traditional rules of statutory interpretation employed by the courts.

(a) Requires an explanation of the meaning of statutory interpretation.

2 marks	Good explanation of why judges are required to interpret particular statutes.
1 mark	Some recognition of the need for statutory interpretation but lacking detail.
0 marks	No knowledge of the topic.

(b) Requires a consideration of the literal approach, including the golden rule.

3–4 marks	Full detailed explanation with supporting cases or examples.
1–2 marks	Limited knowledge of the topic; perhaps lacking detail or cases/examples.
0 marks	No knowledge of the topic under consideration.

(c) Requires a consideration of the purposive approach, including the mischief rule.

3–4 marks	Full detailed explanation with supporting cases or examples.
1–2 marks	Limited knowledge of the topic; perhaps lacking detail or cases/examples.
0 marks	No knowledge of the topic under consideration.

Candidates may simply produce a global answer considering the traditional rules and will be marked according to the content provided.

2 This question requires candidates to explain certain fundamental issues of contract law.

(a)	3–5 marks	A full to definitive answer providing a clear explanation of the circumstances in which writing is required for the creation of contracts.
	0–2 marks	Little, if any, understanding of the topic under consideration.
(b)	3–5 marks	A full to definitive answer on privity of contract. It is likely that cases will be cited, but examples may be credited as well.
	1–2 marks	Some explanation but lacking detail.
	0 marks	No understanding whatsoever.

3 This question requires candidates to consider the concept of duty of care in the delict of negligence. Part (a) refers to the existence of such a duty and part (b) to the standard of the duty owed.

(a)	4–5 marks	Thorough explanation of the meaning of duty of care with appropriate references to cases.
	2–3 marks	Reasonable on duty of care but perhaps lacking in detail or cases authority.
	1 mark	Unbalanced answer, lacking in detailed understanding.
	0 marks	No understanding of the concept.
(b)	4–5 marks	Full understanding and explanation of the topic. It is likely that cases will be cited as authority although examples will be acceptable as an alternative.
	2–3 marks	Some knowledge of the topic but lacking in detail.
	1 mark	Unbalanced answer, lacking in detailed understanding.
	0 marks	No understanding of the concept.

4 **(a)** This question requires candidates to provide an explanation of the concept of limited liability.

3–4 marks A good to full explanation of limited liability referring to both companies and partnerships.

1–2 marks Some but incomplete explanation, perhaps lacking in detail.

0 marks No knowledge of the concept.

(b) **(i)** 2 marks A full explanation of unlimited liability and why it might be used.

1 mark Some knowledge but lacking explanation.

0 marks No knowledge of the topic.

(ii) 2 marks For an explanation of limited liability on the basis of guarantee and when it might be used.

1 mark Some knowledge but lacking explanation.

0 marks No knowledge of the topic.

(iii) 2 marks For a thorough explanation of liability limited by reference to the amount unpaid on shares and how it operates.

1 mark Some knowledge but lacking explanation.

0 marks No knowledge of the topic.

5 This question requires candidates to explain the operation of the Company Directors Disqualification Act 1986.

8–10 marks Thorough to complete answer, showing a detailed understanding of the legislation.

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

2–4 marks Some knowledge, although perhaps not clearly expressed, or very limited in its knowledge and understanding of the topic.

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

6 This question requires an explanation of two compulsory documents required for the formation of a limited company.

(a) 3–4 marks A good to full explanation of the statement of capital and initial shareholdings.

1–2 marks Some but incomplete explanation, perhaps lacking in detail.

0 marks No knowledge of the concept.

(b) 5–6 marks A good to full explanation of articles of association and how they can be changed.

3–4 marks Some but incomplete explanation, perhaps lacking in detail or not dealing with the procedure for altering articles.

1–2 marks Some but very limited knowledge of articles of association.

0 marks No knowledge of the concept.

7 This question relating to issues in employment law is divided into two parts and the marks will be allocated equally.

(a) Requires candidates to explain what is meant by constructive dismissal.

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

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

0–1 mark Unbalanced, or may not deal with all of the required aspects of the topic. Alternatively, the answer will demonstrate very little understanding of what is actually meant by constructive dismissal.

(b) 4–5 marks Thorough to complete answers, showing a detailed understanding of all or certainly most of the remedies available for unfair dismissal.

2–3 marks A clear understanding of the remedies, but perhaps lacking in detail.

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

8 This question is divided into two quite distinct parts, the first of which carries 7 marks and the second 3 marks.

(a) 6–7 marks Knowledge of, and application of, the rules governing the incorporation of exclusion clauses into contracts and analyses the problem scenario in order to decide whether the particular exclusion clause has formed a part of Abid's contract.

3–5 marks Knowledge of the rules relating to incorporation, or at least some of them, but may not analyse the facts of the situation presented or offer an appropriate conclusion.

1–2 marks Recognition of what the problem entails but will not demonstrate any real knowledge of the rules relating to the question.

0 marks No knowledge whatsoever of the topic area.

(b) Does not require extensive reference to the Unfair Contract Terms Act (UCTA) 1977.

3 marks Good understanding of the effect of s.2 UCTA 1977.

1–2 marks Some knowledge of the relevance of UCTA 1977, but perhaps lacking in precision or application.

0 marks No knowledge of UCTA 1977.

9 This question requires candidates to explain the implied authority of a company secretary and apply the law relating to that topic appropriately to the three distinct contracts.

8–10 marks Thorough to complete answers, showing a detailed understanding of the implied authority as it applies to company secretaries and applying that law accurately.

5–7 marks A clear understanding of the topic, but perhaps lacking in detail. Alternatively, an unbalanced answer showing good understanding of one part but less in the others. Perhaps not applying the law accurately in the various contracts.

2–4 marks Some knowledge, although perhaps not clearly expressed, or very limited in its knowledge and understanding of the topic. Or perhaps the knowledge is not accurately applied.

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

10 This question relates to specific aspects of the law relating to loans extended to companies. It requires an explanation of the different types of security and an understanding of the procedure for registering charges securing loans and the priority of any such charges.

8–10 marks Thorough to complete answers, showing a detailed understanding of the law relating to debentures and charges securing them. The various loans will be placed in the correct order with an explanation of why that order applies.

5–7 marks A clear understanding of the topic, but perhaps lacking in detail. Alternatively, an unbalanced answer showing good understanding of one part but less in the others. Perhaps not applying the law accurately in the examples provided.

2–4 marks Some knowledge, although perhaps not clearly expressed, or very limited in its knowledge and understanding of the topic. Or perhaps the knowledge is not accurately applied.

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