Answers

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

Legislation
This is law produced through the Parliamentary system. This is the most important source of law today for two reasons. First, in terms of quantity, Parliament produces far more legal rules than any other source. Second, and perhaps even more importantly, the doctrine of parliamentary sovereignty within the United Kingdom means that the UK Parliament is the ultimate source of law and, at least in theory, it can make whatever laws it wishes. It is an effect of this doctrine that the courts cannot challenge either the authority of the UK Parliament, or the laws it makes in the exercise of that authority. Although the Human Rights Act 1998, which introduces the European Convention on Human Rights into the United Kingdom, does not directly challenge parliamentary sovereignty, it remains to be seen what effect it has on the long-term relationship between judges and Parliament.

The UK Parliament consists of three distinct elements: the House of Commons, the House of Lords and the Monarch, but the real source of power is the House of Commons, which has the authority of being the democratically elected institution. Before any legislative proposal, known at that stage as a bill, can become an Act of Parliament, it must proceed through, and be approved by, both Houses of Parliament and must receive the Royal Assent. Since the Parliament Acts of 1911 and 1949, the blocking power of the House of Lords has been restricted to a maximum of one year.

Legislation can be categorised in a number of ways. Public Acts relate to matters affecting the general public, whereas Private Acts relate to particular individuals or institutions. Alternatively, Acts of Parliament can be distinguished on the basis of their function. Some create new laws, but others are aimed at rationalising or amending existing legislative provisions. Consolidating legislation is designed to bring together provisions previously contained in a number of different Acts, without actually altering them. The Companies Act 2006 was an example of a consolidation Act. Codifying legislation, on the other hand, seeks not just to bring existing statutory provisions under one Act but also looks to give statutory expression to common law rules. The Partnership Act 1890 is a good example of this.

Acts are also passed by the Scottish Parliament following the passage of the Scotland Act 1998, which created the system of devolution of certain powers of legislation to Scotland. These include legislation on family law, property law and criminal law. Unlike the UK Parliament, the Scottish Parliament is not a sovereign Parliament and Acts of the Scottish Parliament can be challenged on the grounds of being beyond the legislative competence of the Parliament, or contrary to European law or to the European Convention on Human Rights.

Delegated legislation is a particularly important aspect of the legislative process. It is law made by some person or body, usually a government minister or local authority, to whom Parliament has delegated its general law making power. A validly enacted piece of delegated legislation has the same legal force and effect as the Act of Parliament under which it is enacted. Delegated legislation can take the form of: orders in council; statutory instruments; bye-laws; or professional regulations. The Scottish Parliament also has power to enact delegated legislation.

Case Law
This is law created by judges in the course of deciding cases. The doctrine of *stare decisis* or binding precedent refers to the fact that courts are bound by previous decisions of courts equal or above them in the court hierarchy. It is the reason for a decision, the *ratio decidendi*, which binds. Everything else is *obiter dictum* and need not to be followed.

The Supreme Court can now overrule its own previous rules, but the Inner House of the Court of Session cannot, although a larger court can be convened which can overrule a previous decision. Judges, however, do have the ability to avoid precedents they do not wish to follow through the procedure of distinguishing the cases on their facts, and, of course, they have a very large number of cases and precedents to choose from.

One of the major advantages of the system of precedent is that it provides for certainty and the saving of time and money of all the parties concerned. This is achieved by the fact that it should be possible to predict how a case will be decided if it falls within a clear precedent, without actually having to take the case to court. The system of judges making law through their decisions also allows them scope for introducing flexibility into the legal system as they extend or distinguish existing precedents. This flexibility, however, by necessity undermines the very certainty that is supposed to be one of the main benefits of the system of precedent. Finally, the role of the judges within the UK constitution is to interpret, and not to create, law, and perhaps this latter point explains why most judges are very wary of openly admitting that they actually do make law.

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

The European Union
Since joining the European Community, now the European Union, the United Kingdom and its citizens have become subject to European Union (EU) law. In areas where it is applicable, European law supersedes any existing United Kingdom law to the contrary (see *Factortame Ltd* v *Secretary of State for Transport* (1989)).

The sources of EU law are: internal treaties and protocols; international agreements; secondary legislation; and decisions of the Court of Justice of the European Union.

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

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

(a) Remoteness of damage

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

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

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

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

Under the second part of the rule, however, the party in breach can only be held liable for abnormal consequences where they have actual knowledge that the abnormal consequences might follow. In *Victoria Laundry Ltd* v *Newman Industries Ltd* (1949) it was decided that the plaintiff could claim damages in relation to the loss of normal profits due to the defendant's delay, as that loss was a natural consequence of the delay. A second claim for damages in relation to an especially lucrative contract failed, however, on the grounds that the loss was not a normal one, but was a consequence of an abnormal contract, about which the defendant knew nothing. The decision in the *Victoria Laundry* case was confirmed by the House of Lords in *The Heron II* (1969), although the actual test for remoteness was reformulated in terms of whether the consequence should have been 'within the reasonable contemplation of the parties' at the time of the contract. A Scottish decision that took a similar approach to that in *Hadley* v *Baxendale* is *SS Den of Ogil Co Ltd* v *Caledonian Railway Co* (1902) 5F 99.

(b) The measure of damages

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

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

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

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

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

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

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

There are numerous instances of delictual actions, for example, occupiers' liability, nuisance or defamation, but the most important is probably the delict of negligence.

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

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

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

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

(ii) The delict of passing off was developed to prevent one person from using any name which is likely to divert business their way by suggesting that the business is actually that of some other person, or is connected in any way with that other business. An action for passing off thus enables people to protect the goodwill they have built up in relation to their business activity. To this end, the pursuer may be granted a court interdict to prevent the use of a particular name. Thus in *Ewing* v *Buttercup Margarine Co Ltd* (1917), the plaintiff successfully prevented the defendants from using a name that suggested a link with his existing dairy company. It cannot be used, however, if there is no likelihood of the public being confused, where for example the companies are conducting different businesses (*Dunlop Pneumatic Tyre Co Ltd* v *Dunlop Motor Co Ltd* (1907) and *Stringfellow* v *McCain Foods GB Ltd* (1984)). Nor can it be used where the name consists of a word in general use (*Aerators Ltd* v *Tollitt* (1902)).

Part 41 of the Companies Act 2006 does not prevent one business from using a name that is very similar to that of another business, so the delict of passing off will still have an application in the wider business sector.

4 Section 7 Companies Act (CA) 2006 sets out the method for forming a company, which is that one or more persons must subscribe their name to a memorandum of association and comply with the requirements of the provisions of the Act as to registration. Under s.9, two documents must be delivered to the registrar: the memorandum of association and the application for registration.

(a) Memorandum of Association

Although the CA 2006 retains the previous requirement for individuals wishing to form a company to subscribe their names to a memorandum of association, it nonetheless significantly reduces the importance of the memorandum and as a consequence, it will not be possible to amend or update the memorandum of a company formed under the CA 2006. Nonetheless the memorandum of association, which must be in the prescribed form, remains an important document to the extent that, as required by s.8, it evidences the intention of the subscribers to the memorandum to form a company and become members of that company on formation. In relation to a company limited by shares, the memorandum also provides evidence of the members' agreement to take at least one share each in the company. Under s.28, provisions in the memorandums of existing companies will be treated as provisions in the articles if they are of a type that will not be in the memorandums of companies formed under the CA 2006.

(b) Application for registration

Under CA s.9, the application for registration must contain:

- the company's proposed name;
- whether the company's registered office is to be situated in England and Wales (or Wales), in Scotland or in Northern Ireland;
- a statement of the intended address of the company's registered office;
- whether the liability of the company's members is to be limited and if so, whether it is to be limited by shares or by guarantee;
- whether the company is to be a private or a public company;
- a copy of any proposed articles to the extent that the company does not intend to use the model articles (this issue will be dealt with in more detail below);
- memorandum of association.

The application must also contain the following additional documents:

- a statement of capital and initial shareholdings or a statement of guarantee under ss.10 and 11;
- a statement of the company's proposed officers under s.12;
- a statement of compliance under s.13;
- registration fee.

Section 13 requires a statement of compliance. Such a statement does not need to be witnessed and may be made in either paper or electronic form. Under s.1068, the registrar is authorised to specify the rules relating to, and who may make, such a statement. Section 1112 makes it a criminal offence to make a false statement of compliance, as is the case in relation to all documents delivered to, or statements made to, the registrar.

(c) Articles of Association

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

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

As previously, the articles of association form a statutory contract between the company and its members and between each of the members in their capacity as members (s.33 CA 2006), and the previous common law will continue to be applied as appropriate.

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. Model articles were provided for in the Companies (Model Articles) Regulations 2008 (SI No 3229).

5 **(a)** As shareholders in limited companies, by definition, have the significant protection of limited liability, the courts have always seen it as the duty of the law to ensure that this privilege is not abused at the expense of the company's creditors. To that end, they developed the doctrine of capital maintenance, the specific rules of which are now given expression in the Companies Act (CA) 2006. The rules, such as that stated in CA 2006 s.580 against shares being issued at a discount, ensure that companies receive at least the full nominal value of their share capital. The rules relating to the doctrine of capital maintenance operate in conjunction to those rules to ensure that the capital can only be used in limited ways. Whilst this may be seen essentially as a means of protecting the company's creditors, it also protects the shareholders themselves from the depredation of the company's capital.

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

(b) The procedures through which a company can reduce its capital are laid down by ss.641–653 Companies Act 2006.

Section 641 states that, subject to any provision in the articles to the contrary, a company may reduce its capital in any way by passing a special resolution to that effect. In the case of a public company, any such resolution must be confirmed by the court. In the case of a private company, however, it is possible to reduce capital without court approval, as long as the directors issue a statement as to the company's present and continued solvency for the following 12 months (ss.642 and 643). The special resolution, a copy of the solvency statement, a statement of compliance by the directors confirming that the solvency statement was made not more than 15 days before the date on which the resolution was passed, and a statement of capital must be delivered to the registrar within 15 days of the date of passing the special resolution.

Section 641 sets out three particular ways in which the capital can be reduced by:

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

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

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

It can be seen that procedure (i) reduces the potential creditor fund since the company gives up the right to make future calls against its shares and procedure (iii) reduces the actual creditor fund by returning some of its capital to the members. In recognition of this fact, creditors are given the right to object to any such reduction. However, procedure (ii) does not actually reduce the creditor fund, it merely recognises the fact that capital has been lost. Consequently, creditors are not given the right to object to this type of alteration (ss.645 and 646).

Under s.648, the court may make an order confirming the reduction of capital on such terms as it thinks fit. In reaching its decision, the court is required to consider the position of creditors of the company in cases (i) and (iii) above and may do so

in any other case. The court also takes into account the interests of the general public. In any case the court has a general discretion as to what should be done. If the company has more than one class of shares, the court will also consider whether the reduction is fair between classes. In this it will have regard to the rights of the different classes in a liquidation of the company since a reduction of capital is, by its nature, similar to a partial liquidation.

When a copy of the court order together with a statement of capital is delivered to the Registrar of Companies, a certificate of registration is issued (s.649).

6 Winding up, or liquidation, is the process whereby the life of the company is terminated. It is the formal and strictly regulated procedure whereby the business is brought to an end and the company's assets are realised and distributed to its creditors and members. The procedure is governed by the Insolvency Act (IA) 1986 and may be divided into three distinct categories:

– members' voluntary winding up,
– creditors' voluntary winding up,
– compulsory winding up.

Administration, on the other hand, is a means of safeguarding the continued existence of business enterprises in financial difficulties, rather than merely ensuring the payment of creditors. Administration was first introduced in the IA 1986. The aim of the administration order is to save the company, or at least the business, as a going concern, by taking control of the company out of the hands of its directors and placing it in the hands of an administrator. Alternatively, the procedure is aimed at maximising the realised value of the business assets.

Once an administration order has been issued, it is no longer possible to commence winding up proceedings against the company or enforce charges, retention of title clauses, or even hire-purchase agreements against the company. This major advantage was in no small way undermined by the fact that, under previous provisions, an administration order could not be made after a company had begun the liquidation process. Since companies are required to inform any person who is entitled to appoint a receiver of the fact that the company is applying for an administration order, it was open to any secured creditor to enforce their rights and to forestall the administration procedure. This would cause the secured creditor no harm, since their debt would more than likely be covered by the security, but it could well lead to the end of the company as a going concern.

The Enterprise Act 2002 introduced a new scheme, which limited the powers of floating charge holders to appoint administrative receivers, whose function had been essentially to secure the interest of the floating charge holder who had appointed them, rather than the interests of the general creditors. By virtue of the Enterprise Act 2002, which amends the previous provisions of the IA 1986, floating charge holders no longer have the right to appoint administrative receivers, but must now make use of the administration procedure as provided in that Act. As compensation for this loss of power, the holders of floating charges are given the right to appoint the administrator of their choice.

The function of the administrator is to:

– rescue the company as a going concern, or
– achieve a better result for the company's creditors as a *whole* than would be likely if the company were to be wound up, or
– realise the value of the property in order to make a distribution to the secured or preferential creditors.

The administrator is only permitted to pursue the third option where:

– he thinks it is not reasonably practicable to rescue the company as a going concern, and
– he thinks that he cannot achieve a better result for the creditors as a whole than would be likely if the company were to be wound up, and
– if he does not unnecessarily harm the interests of the creditors of the company as a whole.

An application to the court for an administration order may be made by a company, the directors of a company, or any of its creditors, but in addition the Enterprise Act allows the appointment of an administrator without the need to apply to the court for approval. Such 'out of court' applications can be made by the company or its directors, but may also be made by any floating charge holder.

During the administration process the administrator has the powers to:

– do anything necessary for the management of the company
– remove or appoint directors
– pay out monies to secured or preferential creditors *without the need to seek the approval of the court*
– pay out monies to unsecured creditors *with the approval of the court*
– take custody of all property belonging to the company
– dispose of company property. This power includes property which is subject to both fixed and floating charges, which may be disposed of without the consent of the charge holder, although they retain first call against any money realised by such a sale.

The administration period is usually 12 months, although this may be extended by six months with the approval of the creditors, or longer with the approval of the court. When the administrator concludes that the purpose of their appointment has been achieved, a notice to this effect is sent to the creditors, the court and the companies registry. Such a notice terminates the administrator's appointment. If the administrator forms the opinion that none of the purposes of the administration can be achieved, the court should be informed and it will consider ending the appointment. Creditors can always challenge the actions of the administrator through the courts.

7 This question requires candidates to explain the provisions of the Employment Rights Act (ERA) 1996 relating to the statutory grounds covering both fair and unfair dismissal.

(a) The grounds on which dismissal is capable of being fair are set out in s.98 (ERA) 1996. The Act places the burden of proof on the employer to show that the grounds for dismissal are fair. There are five categories as follows:

(i) Lack of capability or qualifications
Capability is defined in s.98 in terms of 'skill, aptitude, health or any other physical or mental quality', and qualifications relate to 'any degree, diploma, or other academic, technical or professional qualification relevant to the position which the employee held'. However, even in this situation, the employer must show that not only was the employee incompetent but that it was reasonable to dismiss them.

(ii) Misconduct
To warrant instant dismissal, the employee's conduct must be more than merely trivial and must be of sufficient seriousness to merit the description 'gross misconduct'. Examples of such conduct might involve assault, drunkenness, dishonesty or a failure to follow instructions, or safety procedures, or persistent lateness.

(iii) Redundancy
This is, *prima facie*, a fair reason for dismissal as long as the employer has acted reasonably in introducing the redundancy programme.

(iv) In situations where continued employment would constitute a breach of a statutory provision
If the continued employment of the person dismissed would be a breach of some statutory provision then the dismissal of the employee is again, *prima facie*, fair. For example, if a person is employed as a driver and is banned from driving then they may be fairly dismissed.

(v) Some other substantial reason
The above particular situations are not conclusive and are supported by this general provision which allows the employer to dismiss the employee for 'some other substantial reason'. As a consequence, it is not possible to provide an exhaustive list of all grounds for 'fair dismissal'. Examples that have been held to be substantial reasons have included: conflicts of personalities, failure to disclose material facts, refusal to accept necessary changes in terms of employment, and legitimate commercial reasons.

It has to be emphasised that the above reasons are not sufficient in themselves to justify dismissal unless the employer acts as would be expected of a 'reasonable employer'.

(b) The following are situations where dismissal is automatically unfair:

(i) Dismissal for trade union reasons
This applies where an employee has been dismissed for actual, or proposed, membership of a trade union, or is dismissed for taking part in trade union activities. It applies equally where an individual has refused to join a trade union.

Dismissal of individuals involved in a strike, lock out, or other industrial action is not unfair as long as all of those engaged in the action are dismissed. The employer cannot select which individuals to dismiss from the general body of strikers.

(ii) Dismissal on grounds of pregnancy or childbirth
Section 99 ERA 1996 provides that dismissal is automatically unfair where the principal reason for the dismissal is related to the employee's pregnancy or other reason connected to her pregnancy; or following her maternity leave period, for childbirth or any reason connected with childbirth.

(iii) Dismissal in relation to health and safety issues
Section 100 ERA 1996 provides that employees have a right not to be dismissed for carrying out any health and safety related activities for which they have been appointed by their employer; or for bringing to the employer's attention any reasonable concern related to health and safety matters. Nor can they be dismissed for leaving their place of work in the face of a reasonably held belief that they faced serious danger.

(iv) Dismissal for making a protected disclosure
This is covered by s.103A ERA and protects 'whistle blowing' employees who have reported their employer for engaging in certain reprehensible activity. Such protected activity is set out in s.43 ERA and covers criminal activity, breach of legal obligations, breach of health and safety provisions, and activity damaging to the environment.

(v) Dismissal for asserting a statutory right
Section 104 ERA provides that a dismissal is automatically unfair where the principal reason for it is victimisation of the employee for having taken action against the employer to enforce their statutory rights. Rights under the Working Time Regulations 1998 and the National Minimum Wage Act 1998 are specifically covered in ss.101(A) and 104(A) ERA.

(vi) Dismissal on transfer of an undertaking
The Transfer of Undertakings (Protection of Employment) Regulations (TUPE) protect employees under such circumstances, unless there are economic, technical or organisational reasons justifying the dismissal.

(vii) **Dismissal for a spent criminal conviction**
The Rehabilitation of Offenders Act 1974 covers this aspect and prevents any such dismissal.

(viii) Finally, dismissal is automatically unfair if exercised in relation to employees for refusing to work on Sundays in the retail sector.

8 This question asks candidates to analyse the scenario provided in the light of the rules relating to the formation of a contract. In particular, it requires an examination of the distinction between offer and invitation to treat, and the various ways in which an offer can be accepted.

(a) The first issue to determine is whether Ali's advertisement was an offer or whether it was merely an invitation to treat. An offer is a promise to be bound on particular terms. The offer may, through acceptance by the offeree, result in a legally enforceable contract. It is important to distinguish an offer from other statements, which will not form the basis of an enforceable contract. In particular, an offer must be distinguished from an invitation to treat, which is an invitation to others to make offers. The person extending the invitation is not bound to accept any offers made to them. Examples of invitations to treat are: displays of goods in a shop window (*Fisher* v *Bell* (1961)); displays of goods on the shelves of a self-service shop (*Pharmaceutical Society of Great Britain* v *Boots Cash Chemists* (1953)).

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

(b) **Bud**
Acceptance is necessary for the formation of a contract. Once the offeree accepts the terms offered, a contract comes into effect and both parties are bound. Acceptance may be in the form of express words, either spoken or written; or it may be implied from conduct. The general rule requires that acceptance must be communicated to the offeror, although there are exceptions. These arise either where the offeror has waived the right to receive communication, as in unilateral contracts such as that in the *Carlill* case, or alternatively where acceptance is through the postal service. In the latter circumstances acceptance is complete as soon as the letter, properly addressed and stamped, is posted (*Thomson* v *James* (1855); *Jacobsen Sons & Co* v *Underwood & Son Ltd* (1894)). The postal rule will only apply, however, where it is in the contemplation of the parties that the post will be used as the means of acceptance.

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

(c) **Cil**
In order to form a binding agreement, acceptance must correspond with the terms of the offer. Thus the offeree must not seek to introduce new contractual terms into their acceptance (*Neale* v *Merritt* (1830); *Wolf & Wolf* v *Forfar Potato Co* (1984)). Any attempt to do so amounts to a counter-offer and leaves the original offeror at liberty to accept or reject the new offer as they choose.

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

(d) **Das**
An offeror may withdraw their offer at any time before it has been accepted and once revoked, it is no longer open to the offeree to accept the original offer. In Scots law a promise can be binding if there is evidence that the promisor intended to be bound (*Smith* v *Oliver* (1911)). This kind of obligation is a unilateral gratuitous obligation and normally under the Requirements of Writing (Scotland) Act 1995, this kind of obligation would need to be in writing, except where it is in the course of a business, which is the case here. It may, therefore, be that Ali is in breach of his unilateral obligation to Das to keep the offer open and may be liable in damages to him, although the sale to Ed will be binding.

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

The Companies Act (CA) 2006 places directors' duties on a statutory basis. However, although s.170 provides that the new statement of duties replaces the old common law rules and equitable principles, it nonetheless expressly provides that the duties now stated in the Act are to be interpreted and applied in the same way as those rules and principles were.

Section 172 establishes a general duty on directors to promote the success of their company, however, more specific duties are provided for in subsequent sections.

Under s.175, a director of a company must avoid a situation in which they have, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company. Section 175(2) specifically provides that it 'applies in particular to the exploitation of any property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity)'.

The duty, however, does not apply to a conflict of interest arising in relation to a transaction or arrangement between the director and the company. Nor does it apply where the situation cannot reasonably be regarded as likely to give rise to a conflict of interest, or where it has been authorised by the directors.

Further, s.176 places directors under a duty not to accept benefits from third parties. Specifically a director must not accept a benefit from a third party, which is conferred by reason of

(a) his being a director, or
(b) his doing (or not doing) anything as director.

This duty is an aspect of the general duty to avoid conflicts of interest, but it has been stated separately in order to ensure that the obtaining of a benefit from a third party by a director can only be authorised by members of the company rather than by the board. However, s.176(4) provides that no breach of duty takes place if the acceptance of the benefit by the director 'cannot reasonably be regarded as likely to give rise to a conflict of interest'. As a result, it is likely that 'inconsequential' benefits or those 'totally unrelated' to the affairs of the company will be permissible.

Section 178 specifically preserves the previous common law civil consequences of breach of any of the general duties and consequently remedies available may include:

(i) damages or compensation where the company has suffered loss;
(ii) restoration of the company's property;
(iii) an account of profits made by the director; and
(iv) rescission of a contract where the director failed to disclose an interest.

Applying the preceding rules to the facts of the problem scenario, it can be seen that Fay has breached her statutory duties under CA 2006 ss.175 and 176 by passing on the research results to Ix plc in return for the substantial payment. It is also clear that the rules against allowing a conflict of interest to arise apply, even if the company cannot itself take advantage of the opportunity wrongly misappropriated. This continues the previous very strict application of principle (*Regal (Hastings)* v *Gulliver* (1942)). Applying this to the facts of the problem, it would appear that Fay will be held liable to account to FGH Ltd for any profits she made on the transaction.

In addition, as directors can be removed at any time by a simple majority vote of the members under s.168 CA, Gus and Het can use their majority voting power to remove Fay from her role as company director. This is the case, even if the removal leads to a breach of their contract of service (*Southern Foundries Ltd* v *Shirlaw* (1940)). Those proposing to remove the director must give the company 28 days notice of the resolution and the director in question must receive a copy of the resolution and is entitled to speak to the resolution at the meeting at which it is considered (CA s.169).

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

The value of shares in a company on the stock market fluctuates in relation to the underlying performance of the company. Amongst other things, good company results will lead to an increase in the value of the shares. It is, of course, the fact that share prices fluctuate in this way that provides the possibility of individuals making large profits, or losses, in speculating in shares. It also, however, provides other people with the opportunity to take advantage of their close relationship with particular companies in order to make profits from illegal share dealing. Such illegal trading in shares, known as insider dealing, occurs when someone trades on the basis of price sensitive information before the general public has access to that information. Insider dealing is governed by the Criminal Justice Act (CJA) 1993.

Section 52 CJA 1993 states that an individual who has information as an insider is guilty of insider dealing if they deal in securities that are price-affected securities in relation to the information. They are also guilty of an offence if they encourage others to deal in securities that are linked with this information, or if they disclose the information other than in the proper performance of their employment, office or profession.

Section 56 makes it clear that securities are price affected in relation to inside information if the information, made public, would be likely to have a significant effect on the price of those securities.

Section 57 defines an insider as a person who knows that they have inside information and knows that they have the information from an inside source. This section also states that inside source refers to information acquired through being a director, employee

or shareholder of an issuer of securities, or having access to information by virtue of their employment, office or profession. Additionally, and importantly, it also treats as insiders those who acquire their information from those primary insiders previously mentioned.

There are a number of defences to a charge of insider dealing. For example, s.53 makes it clear that no person can be so charged if they did not expect the dealing to result in any profit or the avoidance of any loss.

On summary conviction, an individual found guilty of insider dealing is liable to a fine not exceeding the statutory maximum and/or a maximum of six months imprisonment. On indictment, the penalty is an unlimited fine and/or a maximum of seven years imprisonment. There is also the possibility that the person who benefits from the information, which belongs to the company, will be required to account to it for any profit made. This would certainly be the case with regard to directors who engaged in insider dealing, as they would have breached their fiduciary duties.

Applying the law to the situation in the problem, it can be seen that, as an employee of Jaz plc, Kip is an insider under s.57, and the information he has is certain to affect the price of the company's shares. It follows, therefore, that when he buys the shares in Jaz plc, Kip is liable to a charge of insider dealing under s.52 CJA 1993. Kip is also liable for the separate offence, under s.57, of disclosing the information to Lu other than in the proper performance of their employment.

As he received the information from an insider, Lu is treated as an insider under s.57 and is liable for trading on the basis of the information under s.52.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 mark Some reasonable attempt at explaining the law of delict.

0 marks A total absence of knowledge.

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

1–2 marks Some knowledge but lacking in detail.

0 marks No knowledge whatsoever.

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

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

0 marks No knowledge of the topic whatsoever.

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

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

2 marks — A good general understanding of the topic.

1 mark — Some knowledge.

0 marks — No knowledge whatsoever of the topic.

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

3–4 marks — Good explanation of the contents of the application required by statute. Reference to sections need not be made.

1–2 marks — Some, but limited, knowledge of the contents of the application.

0 marks — No knowledge of the topic whatsoever.

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

3–4 marks — Good explanation of the contents of the articles of association.

1–2 marks — Some, but limited, knowledge of the contents of the articles of association.

0 marks — No knowledge of the topic whatsoever.

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

(a) 3–4 marks — Thorough explanation of the doctrine of capital maintenance, perhaps with some examples of its application.

1–2 marks — Little knowledge of the topic.

0 marks — No knowledge of the topic whatsoever.

(b) 5–6 marks — Good to full consideration of the procedure for reducing capital. Reference must be made to the Companies Act 2006 procedure and the difference between public and private companies should be mentioned specifically.

2–4 marks — Some general knowledge but lacking in detail as regards to the process or not mentioning the difference between the two company forms.

0–1 mark — Little or no understanding of the process.

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

8–10 marks — A good explanation of the meaning and effect of administration generally and contrasting its purpose with that of compulsory winding up and explaining its rules.

5–7 marks — Fair explanation of the process of administration, perhaps lacking in detail or focusing on only certain aspects of the procedure.

2–4 marks — Some, if little, explanation of administration, but perhaps too general or lacking in any detail, or alternatively very unbalanced.

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

7 This question requires candidates to explain the provisions of the Employment Rights Act 1996 relating to the statutory grounds covering both fair and unfair dismissal. It is divided into two parts and the marks will be allocated equally.

(a) 3–5 marks — A good explanation of the grounds upon which dismissal may be fair.

0–2 marks — Some awareness of the area, but lacking in detailed knowledge.

(b) 3–5 marks — A thorough explanation of the grounds upon which dismissal will be automatically unfair.

0–2 marks — Some awareness of the area, but lacking detailed knowledge.

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

(a) 3–4 marks Full analysis and explanation of the nature of Ali's advertisement

1–2 marks Some analysis and explanation, but lacking in detail.

0 marks No knowledge whatsoever of the topic.

(b) 2 marks A full explanation of Bud's situation in law.

1 mark Some, but limited, explanation.

0 marks No knowledge or explanation.

(c) 2 marks A full explanation of Cil's situation in law.

1 mark Some, but limited, explanation.

0 marks No knowledge or explanation.

(d) 2 marks A full explanation of Das' situation in law.

1 mark Some, but limited, explanation.

0 marks No knowledge or explanation.

9 This question requires a consideration of the statutory duties placed on company directors under the Companies Act 2006.

8–10 marks Thorough to complete answers, showing a detailed understanding of the rules relating to conflict of interest.

5–7 marks A clear understanding of the topic but perhaps lacking in detail or application.

2–4 marks Some knowledge, although perhaps not clearly expressed, or very limited in its application.

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

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

8–10 marks Thorough to complete answers, showing a detailed understanding of the rules relating to insider dealing.

5–7 marks A clear understanding of the topic but perhaps lacking in detail or application.

2–4 marks Some knowledge, although perhaps not clearly expressed, or very limited in its application.

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