Answers

1 This question requires candidates to explain and distinguish between the *ratio decidendi* and the *obiter dictum*.

The most important part of a court judgement is the *ratio decidendi*. This is the reasons of the decision. This part of the judgement is binding. In other words, the parties to the case are bound by the decision of the court. If a similar case comes before another court, the court will, as a general rule, follow the judgement. The *stare decisis* rule is relevant in this regard. In terms of the doctrine of *stare decisis*, case law and a court's decision creates a precedent that must be followed by the judges of the same division and courts of a lower order that are subordinate to that court. As stated before, a court is only bound by the *ratio decidendi* of a decision, which is the legal principle laid down by a court in a previous decision, and which was necessary for the decision or order.

Statements falling outside the *ratio decidendi* are known as the *obiter dictum* or incidental remarks. These relate to statements made by the judge outside the facts of the case, or to answer hypothetical questions or to give an example. These incidental remarks are not part of the *ratio decidendi* and subsequent courts are not bound by these statements or remarks. It may, of course, have strong persuasive authority. If an *obiter dictum* is applied by a later court, it becomes part of the *ratio decidendi* of the later decision and thus binding.

2 This question asks candidates to explain the rules relating to the award of damages in the context of the law of contract.

The remedy of damages is available to an innocent party where they have suffered a loss due to breach of contract by the other party. The innocent party should be placed in the position they would have been in, had the contract been carried out. This is done by way of a payment made by the party who committed the breach of contract.

Certain rules influence the recoverability of damages as well as the extent of the claim and make it difficult and sometimes even impossible for the injured party to succeed with a claim for damages. To avoid this problem, parties often include a penalty clause in their agreement in terms of which they agree that a pre-determined amount of damages shall be paid in the event of breach of contract.

The principles that must be applied when calculating damages are as follows:

The plaintiff is not automatically entitled to damages merely because a breach of contract occurred. They must prove that they actually sustained damages as well as the extent of their loss. A court will not award nominal damages and a plaintiff must have suffered damages in a calculable amount and prove the same. In the calculation, the plaintiff's current financial position is compared with the hypothetical position in which they would have been had the contract been fulfilled in the way originally intended by the parties. Any benefit accruing to the prejudiced party due to the breach of contract has to be deducted from the amount of damages that the party who had committed the breach has to pay the prejudiced party.

The damages must be the direct result of the breach of contract. The debtor is not liable for damages incurred independently from the breach of contract and which were not caused by such breach. Even if the damages were caused by the breach of contract, only such damages may be claimed which were actually foreseen or should reasonably have been foreseen by the parties at the time they made the contract. A distinction is made between general and specific damage. General damage flows naturally from the breach of contract and the parties are presumed to have contemplated it when they entered into the contract. Specific damage is not a natural or probable result of the breach of contract. The plaintiff must prove that the parties did actually foresee the damages at the time of conclusion of the contract and that an express or tacit agreement exists that such damage would be recoverable.

The recoverability of the damages is also restricted by the fact that the creditor cannot recover damages that they could have prevented through reasonable care. It is usually said that a plaintiff must mitigate their damages. If the debtor can prove that the creditor failed to take such steps that a reasonable man would have taken to ensure that further damages are prevented, the creditor will not be able to claim these damages from the debtor.

3 In this question candidates have to distinguish the rights of shareholders from debenture holders.

The Companies Act 2008 defines a 'share' as 'one of the units into which the proprietary interest in a profit company is divided' (s.1). Shares are movable, transferable property without a nominal or par value.

A shareholder is essentially one of the contributors of the fund that sets up a company. This fund is the share capital of the company. A 'share' is the unit of the contribution made to the share capital. It is property in itself and can be traded.

The number of shares must be authorised in the memorandum of incorporation. The memorandum of incorporation of a company must set out the classes of shares and the number of each class that a company is authorised to issue. This is referred to as the 'authorised share capital' of a company. A company may only issue shares that are authorised by the memorandum of incorporation. However, a company's board of directors may increase or decrease the authorised share capital. Further, they may reclassify any shares authorised but not issued.

If a company issues 100 shares and the price per share that a shareholder pays is R1, the company will have a share capital of R100. In other words, the company will have raised R100 to use in its business. After the initial issue, the share will be worth what the market is willing to pay for it.

In *Standard Bank of SA Ltd* v *Ocean Commodities Inc* (1983), the court held that a share usually entitles its holder to vote at a shareholders' meeting, to share in dividends if declared by the board and to share in any assets of the company after it has been wound up. It is therefore clear that there are personal rights attached to shares. The extent of these rights depends on the class of shares held.

A debenture is an acknowledgement by a company that the company owes the debenture holder a certain sum of money, as evidenced in the document. Debenture holders are creditors of the company by virtue of having extended loans to the company.

The duties of the company towards the debenture holders can be secured or unsecured. A trustee will usually be appointed to hold security on behalf of the debenture holders. If the company defaults on its commitments to the debenture holders, the trustee will be able to enforce the security on their behalf, without the need for every debenture holder to institute action individually.

The board of directors may authorise the company to issue debentures without approval of the shareholders, unless otherwise indicated in the memorandum of incorporation.

Distinctions between shareholders and debenture holders therefore include:

The shareholder of a company has the right to a share in the profits of a company (provided that a dividend is declared by the company) and a right to a share in the net assets of the company if it is wound up. However, a shareholder is also under a duty to abide by the company's memorandum of incorporation.

As a debenture is a debt instrument, the holder of a debenture has effectively loaned a sum of money to the company on certain terms. Accordingly, the debenture holder is entitled to repayment of the sum of money loaned to the company and is therefore a creditor of the company. A debenture is a document issued by a company acknowledging that it is indebted to the debenture holder in the amount stated therein (*Coetzee* v *Rand Sporting Club* (1918)).

Debenture holders may have a right to attend and vote at general meetings and to appoint directors, and have special privileges regarding the allotment of securities, unless the memorandum of incorporation provides otherwise (s.43(3)). This was, however, not previously the case under the Companies Act 1973.

4 In this question candidates have to explain the delict of 'passing off'.

The main source of protection against unlawful competition lies in the common law by way of a delictual action for an interdict or damages. A few statutory provisions also protect competitors.

The private law of competition therefore deals with the delict of unlawful competition. The law of delict imposes a general liability for unlawful conduct, provided all the elements of a delict are present. These elements are: an act, unlawfulness, fault, causation and damage or injury to personality (harm).

One of the most common forms of unlawful competition is passing off, or the imitation of a rival's distinctive marks. It is a representation by one person that their business or merchandise is associated with that of a competitor. The test is to ask whether there is a reasonable likelihood that the public will be confused into believing that the business of one trader is that of another.

The use or imitation of a competitor's distinctive mark may also result in passing off. If the mark is also registered in terms of legislation, the trader has an additional statutory remedy for infringement.

In an action for passing off, the plaintiff must prove the following:

(a) that the trade mark, service mark or trade name that they claim has been imitated is known in the market and has acquainted with the public a reputation associated with the goods, services or business and;

(b) that the defendant's conduct is likely to deceive the public into thinking that the two businesses or the merchandise is the same thing or connected.

5 In this question candidates are required to explain and distinguish between an employee and someone who is self-employed for purposes of employment law.

In most cases, it is clear to the parties and to outsiders whether or not a worker is an 'employee' for purposes of falling under the scope of labour legislation. There are situations, however, where it becomes more difficult to distinguish between an employee and someone who is self-employed. This distinction is important because only employees are protected in terms of the Basic Conditions of Employment Act 1997 and the Labour Relations Act 1995. In order to claim unfair dismissal in terms of the Labour Relations Act, the dismissed person will first have to show that they were indeed an 'employee' and, as such, protected against unfair dismissal.

A contract with someone who is self-employed could be characterised as a contract whereby one person hires another person to do a specific job or specific piece of work. The object of the contract with someone who is self-employed is the performance of the specified work or the production of a specified result. It is the product or the result of the labour which is the object of the contract, rather than the labour itself, as in the contract of employment. The element of control is very different in the relationship of someone who is self-employed.

A contract of employment can be defined as the basis of the relationship between an employee and an employer. It is an agreement in terms of which one party (the employee) places their labour under the control of another party (the employer), in exchange for some form of remuneration. Because of the difficulty in identifying the contract of employment in borderline cases, three tests have been used to try to distinguish between an employment contract and other contracts which involve the provision of work:

(a) The **control test** was based on the element of control, which at one time was regarded as the most important aspect of the employment contract. According to this test, the presence of control points to the existence of an employment relationship. However, in an environment where many 'employees' are highly skilled and often act independently of the employer (doctors, captains of ships and pilots, for example), the courts have tended to concentrate on the employer's right to control rather than actual control.

(b) The **organisation test** asks whether the worker is part and parcel of the organisation of the employer. This test has been considered too vague, and it has been dismissed by the courts.

(c) The courts today use the so-called **multiple or dominant impression test**. This test looks at the employment relationship as a whole, rather than looking at a single factor, such as control or integration. Some of the important factors which courts have found relevant are: the employer's right to select who will do the work; the power to discipline and dismiss; the employee's obligation to work for a given time and for certain hours; whether remuneration is paid for time worked or for a particular result; whether remuneration is paid on a commission basis; whether the employer provides the employee with tools, equipment and office space; and whether the employer has the right to utilise the employee's labour potential as it sees fit. The court weighs up all these and other factors to decide whether or not the dominant impression is that the person in question is an employee.

6 This question requires candidates to briefly explain when the courts will 'lift' or 'pierce' the corporate veil.

In certain instances the courts are prepared to 'lift' or 'pierce' the corporate veil. In the *Cape Pacific Ltd* v *Lubner Controlling Investments (Pty) Ltd* (1995) judgement, the court confirmed that it has no general discretion simply to disregard a company's separate legal personality. But where 'fraud, dishonesty or other improper conduct' is present 'other considerations will come into play' (as per Smalberger JA). The court indicated that it would adopt a more flexible approach, namely of taking all the facts of each case into consideration when determining if the veil should be pierced. A balance should then be struck between the need to persevere the separate legal identity of the company against policy considerations in favour of piercing the corporate veil. It further held that the test used in the *Botha* v *van Niekerk* (1983) case was too rigid. In terms of the *Botha* case, the court held that the seller must have suffered an 'unconscionable injustice' before the court could lift the veil.

In *Hülse-Reutter* v *Gödde* (2001), the court agreed that a court has no general discretion simply to disregard a company's separate legal personality. The corporate veil would only be lifted if there was evidence of misuse or abuse of the distinction between the company and those who control it and this has enabled those who control the company to gain an unfair advantage. A dual test was therefore used introducing the element of an unfair advantage.

The following cases serve as examples where the courts have disregarded or may disregard the separate legal personality of a corporation. In *Daimler Co Ltd* v *Continental Tyre and Rubber Co* (1916), it was held that the court was entitled to look at the nationality of the members and directors of a company, during the First World War in Britain, to determine whether the company was an enemy alien or not.

In *Robinson* v *Randfontein Estates Gold Mining Co Ltd* (1921), the court refused to take into consideration the separate existence of a subsidiary where the subsidiary was used as a 'device' in evading a director's fiduciary duties to the holding company.

In *The Shipping Corporation of India Ltd* v *Evdomon Corporation* (1994), it was held that fraud, dishonesty and improper conduct in the conduct of a company's affairs or its establishment can justify the disregarding of the legal personality of the company.

Lastly, in *Airport Cold Storage (Pty) Ltd* v *Ebrahim and Others* (2008), the court confirmed that one of the most fundamental consequences of incorporation of a company is that a company is a juristic entity separate from its members. The court held that it does not have a general discretion to simply disregard the separate existence of a corporation. The court acknowledged that the circumstances in which a court will disregard it are far from settled. The court indicated that the starting point is that special circumstances, like fraud, should be present indicating that a corporation is a mere disguise for the true facts.

The Companies Act 2008 follows the example of the Close Corporations Act 1984 by codifying the general principle of piercing the corporate veil.

Section 20(9) Companies Act 2008 provides that if a court finds that the incorporation of a company or any act by or use of a company constitutes an unconscionable abuse of its juristic personality, the court may declare that the company will be deemed not to be a juristic person in respect of rights, liabilities and obligations relating to the abuse.

The wording of the section is a combination of s.65 Close Corporations Act 1984 and the judgement in *Botha* v *Van Niekerk*. It ignores the view expressed in *Cape Pacific Ltd* v *Lubner Controlling Investments (Pty) Ltd* that described the test in *Botha* v *van Niekerk* as too rigid.

We do not know what test will be used and it remains to be seen how the courts will decide what would constitute an unconscionable abuse and to what extent they will use the existing case law dealing with the common-law rule of piercing the corporate veil.

It therefore seems that there are still no hard and fast rules; no general discretion of the courts and that the fact of each case will still have to be taken into consideration when deciding whether to pierce the corporate veil.

7 This question asks candidates to explain how an agency relationship is established. A person who wishes to conclude a contract does not have to do so personally. Such person may prefer, whether for the sake of convenience, or for other purposes, to authorise someone else to enter into the contract on their behalf or in their name. Sometimes representation is essential. A legal entity like a company or a close corporation cannot, for example, itself conclude a contract. The enterprise must of necessity be represented by a natural person or persons.

The concept of agency or representation arises when one person, the agent or representative, concludes a juristic act for or on behalf of another, who is called the principal, with the result that a legal tie arises between the principal and the third party. Any rights acquired and duties assumed by the agent are for the principal and not for the agent.

For a person to perform an act of representation, certain requirements must be met. In the first instance, the principal must exist. Even if the principal subsequently comes into existence, they will not be able to ratify what was purported to have been done on their behalf (*Kelner* v *Baxter* (1866) and *McCullogh* v *Fernwood Estate Ltd* (1920)). Anyone with the capacity to perform juristic acts can appoint an agent to act on their behalf.

Second, the agent must have authority to perform the act. This authority given by the principal to the agent to represent them may be express, or it may be implied by law or on the facts. The most common source of authority is the express authorisation of the principal of their intention that the other party shall act on their behalf. Normally no formal requirements are imposed for such authorisation. The authorisation is a unilateral act, although it may be closely linked to a contract. In certain instances legislation may require a formal appointment by means of a written power of attorney. Authorisation by way of agreement between the parties does not necessarily have to be express, but can also arise by tacit, implicit agreement. The tacit agreement is established by the fact that the principal's conduct and attitude in respect of the agent is such that the only reasonable inference which may be drawn is that the principal wishes the agent to act on their behalf. If, for instance, a farmer were to send their cattle to an auction, and the auctioneer sold the cattle to a purchaser, the farmer's conduct would indicate that they had given the auctioneer tacit authority to sell the cattle. In certain instances the authority is implied by law and does not come about by agreement. In many of these instances the agent's authority is derived from their appointment to a particular office. The consent of the principal for such authorisation is not required. For example, the guardian of a minor has the authority to conclude juristic acts on behalf of the minor.

Third, the agent must make it clear that they are acting for someone else and not in their personal capacity. No specific words to this effect are required but the words 'for' or 'for and behalf of' indicate representation in practice. The agent need not identify the principal. The same person can act as principal and agent simultaneously.

An agent's authority may include the authority to delegate, that is to authorise a sub-agent to perform a juristic act for the principal. The power to delegate may be given expressly or tacitly. Whether the principal intended the agent to have the power to delegate is a question of fact. An important consideration is whether performance of the act requires particular skill or expertise, or whether the act can be performed by any person.

8 This question requires candidates to analyse the problem scenario by discussing the law relating to the duty of care, skill and diligence, in the context of company law.

A director's duty of care and skill has its origins in the common law. *Re City Equitable Fire Insurance Co Ltd* (1925) is often referred to as containing the roots of this obligation. This is not a fiduciary duty, but is based on delictual or aquilian liability for negligence.

In *Fisheries Development Corporation of SA Ltd* v *Jorgensen* (1980), the concepts of care and skill were examined and the court also referred to *Re Brazilian Rubber Plantations & Estates Ltd* (1911).

The court held as follows:

The required degree of care and skill to a large degree depends on the nature of the company's business, and the specific duties assigned to the director. A distinction must be drawn between executive and non-executive directors, in the sense that a non-executive director is not expected to give continuous attention to the affairs of the company.

It is not expected of a director to have special expertise or experience. What is, however, expected is that the director exercises the degree of skill and care one could reasonably expect from a person with their knowledge and experience. Directors will not be held liable for mere errors of judgement.

A director may rely on other officials and management unless there are reasons for questioning the judgement of such officials or management. A director must, however, still give due regard and exercise their own judgement in doing so.

Remedies for breach of the duty of care and skill may be based on contract, if a contract was concluded between the company and the director. Alternatively, a delictual claim for damages may be instituted, in which case all the delictual requirements must be proven.

In *Re D'Jan of London Ltd* (1994), the court departed from the traditional subjective test and applied a dual test.

Section 76 Companies Act 2008 has partially codified the duty of care and skill and provides that the director must exercise that degree of care, skill and diligence that may reasonably be expected of a person carrying out the same functions in relation to the company as those carried out by the director.

An objective test is applied to determine what a reasonable director would have done in the same situation. The objective test that is applied, however, contains subjective elements in that the general knowledge, skill and experience of the particular director in question are taken into consideration. Therefore, the Act adopts a dual test. In terms of s.76(4) Companies Act 2008, a statutory business judgement rule is also accepted.

If a director had taken reasonably diligent steps to become informed about the matter, had no personal financial interest in the matter and had a rational basis for believing that the decision was in the best interest of the company, then their actions will be excused.

In principle, no distinction is made between executive and non-executive directors when considering the applicability of duties (*Howard* v *Herrigel NNO* (1991)). However, when judging the director's conduct, it may be considered.

The board is not collectively responsible for breaches of duties by some of the directors – each will be decided on their own.

Since Adam contributed a particular skill to the board, it was not necessary that he attended all the board meetings. However, if he did not attend any meeting, it may lead to the conclusion that he had been negligent.

From the above, it can be argued that the decision to go ahead with the software development was a legitimate business risk. It does not matter that Adam may have realised that it could lead to losses as long as he had weighed this possibility against potential gains and had decided that it was in the best interest of the company to go ahead. The question is whether a reasonable person with Adam's expertise would have come to the same conclusion. Therefore, the objective test now includes a subjective element in the sense that the particular director's (Adam's) general knowledge, skill and experience are taken into consideration. There is no indication that Adam's conduct was unreasonable. As an expert in this field, however, Adam had a higher duty (subjective element). The business judgement rule and its application are relevant in this regard. Clearly, the nature of the business and the task expected of him require expertise. If his decision had been an informed one, he would not have breached his duty of care and skill. It is, however, not clear from the facts whether Adam will succeed by relying on the business judgement rule. It is also not clear whether he had, in fact, made an informed decision. However, the aim of the business judgement rule is to protect directors against incurring liability for errors in judgement or for poor business decisions, subject to complying with the requirements. One can argue that he should have attended some meetings in order to be informed.

9 This question requires candidates to analyse the problem scenario from a perspective of corporate governance and specifically board committees. It also deals with the duties of a company secretary.

The Companies Act 2008 requires that a public company and a state-owned company have to appoint an audit committee. Unless it is a subsidiary, in which case the audit committee of the holding company will act as audit committee. Cinema Stores Ltd is a company which is obliged to have an audit committee as required in the Companies Act 2008.

This is in addition to any other company which may voluntarily decide to appoint an audit committee. The audit committee must be elected at the annual general meeting. The board of directors of Cinema Stores Ltd therefore cannot appoint the committee on their own. However, the first members of the audit committee may be appointed by the incorporator(s) or by the board. This is most probably the case in question.

The committee should comprise at least three members, who must be directors of the company. Certain persons are, however, excluded from membership such as people who are involved in the day-to-day management of the company, prescribed officers, full-time employees, material suppliers or customers of the company and persons related to these persons. It is clear that Dave and Edwin fall within these categories and cannot be appointed as members of the audit committee.

It is therefore clear that the composition of the audit committee is now determined in Companies Act 2008. These provisions are not alterable. It further means that the audit committee is no longer a committee of the board of directors, but a statutory organ of the company.

The duties of a company secretary are set out in s.88 Companies Act 2008, and include (but are not restricted to) the following:

(a) providing the directors of the company collectively and individually with guidance as to their duties, responsibilities and powers;

(b) making the directors aware of any law relevant to or affecting the company;

(c) reporting to the company's board any failure on the part of the company or a director to comply with the Memorandum of Incorporation and Companies Act 2008;

(d) ensuring that minutes of all shareholders' meetings, board meetings and the meetings of any committees of the directors, or of the company's audit committee, are properly recorded in accordance with Companies Act 2008;

(e) certifying in the company's annual financial statements whether the company has filed required returns and notices in terms of Companies Act 2008, and whether all such returns and notices appear to be true, correct and up to date;

(f) ensuring that a copy of the company's annual financial statements is sent, in accordance with Companies Act 2008, to every person who is entitled to it; and

(g) carrying out the functions of a person designated in terms of s.33(3) Companies Act 2008 (i.e. person responsible for filing the company's annual return).

10 In terms of s.8 Companies Act 2008, two types of companies can be formed, namely profit and non-profit companies. Four entities qualify as profit companies, namely a public company, a state-owned company, a personal liability company and a private company.

A public company ('Ltd') can be listed on the JSE Limited and its shares may be offered to the public and are freely transferable. This company can be formed by one person and must have at least three directors. They are also obliged to hold annual general meetings, appoint an auditor, a company secretary, and an audit committee.

A state-owned company ('SOC Ltd') is registered in terms of the Companies Act 2008 and either listed as a public entity in Schedule 2 or 3 Public Finance Management Act 1999, or owned by a municipality. Examples of state-owned companies are: ACSA; Denel; South African Airways. The majority of the provisions applicable to public companies apply to state-owned companies except if an exemption has been granted by the Minister. Chapter 3 Companies Act 2008 applies except to the extent that the company has been exempted by the Minister.

A personal liability company ('Inc' or 'Incorporated') must meet the criteria for a private company, and is mainly used by professional associations (such as attorneys). The memorandum of incorporation must state that it is a personal liability company. Directors are jointly and severally liable along with the company for debts and liabilities contracted during their term of office. Section 19(3) uses the word 'contracted' and not 'incurred', which was held by the court in *Fundtrust (Pty) Ltd (In Liquidation)* v *Van Deventer* (1997) to limit directors' liability to contractual debts, and to exclude delictual and statutory liabilities.

A provision that the directors and past directors will be liable jointly and severally, together with the company, for debts and liabilities of the company which were contracted during their periods of office must be included in the memorandum of incorporation of a personal liability company. The effect of the inclusion of such a clause is that creditors would be able to hold the directors jointly and severally liable for the company's contractual debts and liabilities. A director who had paid the debts will have a right of recourse against his or her fellow-directors for their proportionate share. (See *Sonnenberg McCloughlin Inc* v *Spiro* (2004).) The doctrine of constructive notice applies in terms of s.19(5) Companies Act 2008.

A private company's ('(Pty) Ltd') memorandum of incorporation must prohibit the offering of any securities to the public and restricts the transferability of its securities. Private companies are no longer limited to 50 shareholders as was the case under the Companies Act 1973. This company can be formed by one person and must have at least one director.

It is specifically stated in the question that Fred and his three friends want to form a company. It is also added that they only want Fred to be a director and that they want the administration as simple as possible. Above it is stated that only one director is needed for a private company. A private company is also much simpler than a public one, where one has to appoint an auditor, a company secretary and an audit committee. Furthermore, with a public company one has to appoint three directors. Based on the possibility of joint liability, one would clearly not recommend Fred and his friends to make use of a personal liability company. In view of the facts provided and the characteristics of the different types of companies, it would be best for Fred to incorporate a private company.

1 This question asks candidates to explain and distinguish between the *ratio decidendi* and the *obiter dictum* when interpreting court judgements.

6–10 A thorough answer will explain both concepts in detail. Reference to the *stare decisis* doctrine is also necessary to explain the binding effect of the *ratio decidendi*.

0–5 A less complete answer, perhaps lacking in detail or unbalanced in that it does not deal with some of the aspects of the question.

2 In this question candidates are expected to explain the rules relating to the award of damages in the context of contract law.

8–10 Thorough to complete answers, showing detailed understanding of all or certainly most of the principles involved.

5–7 A clear understanding of the topic, perhaps lacking in detail.

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

0–1 Little or no knowledge of the topic.

3 This question deals with capital. Candidates have to distinguish the rights of shareholders from debenture holders.

8–10 A thorough explanation and discussion of shares and debentures and the differences between the two concepts.

5–7 Some awareness of the area but lacking in detailed knowledge.

2–4 Some, but limited, discussion of the differences between the two concepts.

0–1 Little or no discussion.

4 This question requires candidates to explain the delict of passing off.

8–10 Thorough to complete answers, showing detailed understanding of all or certainly most of the principles involved.

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

2–4 Some knowledge, although not clearly expressed, or very limited in its knowledge and understanding of the delict of passing off.

0–1 Little or no knowledge of the topic.

5 In this question candidates are required to explain and distinguish between an employee and someone who is self-employed for the purposes of employment law.

6–10 A good explanation of the differences. Reference to the various tests is important and necessary.

3–5 Some awareness of the area but lacking in detailed knowledge.

0–2 Little or no knowledge of the topic.

6 This question deals with company law and piercing of the corporate veil. Candidates are required to explain when the courts will 'lift' or 'pierce' the corporate veil.

8–10 Thorough to complete answers, showing detailed understanding of all or certainly most of the principles involved. Good answers will also refer to relevant case law. Reference to the new position in terms of the Companies Act 2008 should be credited.

5–7 A clear understanding of the topic, perhaps lacking in detail. Reference to case law is limited.

2–4 Some knowledge, although not clearly expressed, or very limited in its knowledge and understanding of separate legal personality and the disregard thereof.

0–1 Little or no knowledge of the topic.

7 This question requires candidates to explain how an agency relationship is established.

6–10 Clear understanding and explanation of the relevant principles.

0–5 Some understanding of the concepts. Lower band answers will show little or no knowledge of the area.

8 This question requires candidates to analyse a problem scenario that raises issues relating to directors' duties.

8–10 Clear analysis of the problem scenario – recognition of the issues raised and a convincing application of the legal principles to the facts. Candidates should refer to the common law as well as the Companies Act 2008.

5–7 Sound analysis of the problem – recognition of the major principles involved and a fair attempt at applying them. Perhaps sound in knowledge but lacking in analysis and application.

2–4 Unbalanced answer perhaps showing some appropriate knowledge but weak in analysis or application.

0–1 Very weak answer showing little analysis, appropriate knowledge or application.

9 This question deals with the composition of the audit committee as well as the duties of the company secretary.

8–10 Thorough to complete answers, showing detailed understanding of all, or certainly most, of the principles involved. Candidates have to discuss both parts of the question, the part on the composition of the audit committee as well as the duties of the company secretary.

5–7 A clear understanding of the topic, perhaps lacking in detail. Limited application of the principles involved to the facts in question.

2–4 Some knowledge, although not clearly expressed, or very limited in its knowledge and understanding of the composition of the audit committee.

0–1 Little or no knowledge of the topic.

10 In this question candidates must advise on the characteristics of profit companies as established in terms of the Companies Act 2008.

6–10 Clear understanding of the characteristics relating to all or most of the different profit companies. They need to apply it to the facts provided.

0–5 Some understanding but only to one or two of the different types of profit companies. Insufficient application.