Answers

1 (a) (i) Primary legislation

In Ireland, the Oireachtas has the sole power to make law by passing Acts of the Oireachtas or Acts of Parliament. This right is provided for by Article 15 of the Constitution and which also states that no statute repugnant to the Constitution shall be enacted and any repugnant statute is invalid.

The major legislative institutions of the State are the Dáil and the Seanad which, together with the President of Ireland who signs bills of the Oireachtas thereby making them Acts of the Oireachtas, are collectively referred to as the Oireachtas.

Legislation can be categorised in a number of ways. 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 The Safety, Health and Welfare at Work Act, 1989, was one such Act and it has now been replaced by the Safety, Health and Welfare at Work Act, 2005. 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, and the Sale of Goods Act, 1893, are examples of codifying legislation. Amending legislation is designed to alter an existing legal position, e.g. the Companies (Amendment) Act, 1983.

(ii) Delegated (secondary) legislation

Delegated or secondary legislation is a particularly important aspect of the legislative process. It is made by some person or body, often a government minister or local authority, to whom the Oireachtas has delegated its general law-making power. A validly enacted piece of delegated legislation has the same legal force and effect as the Statute or Act pursuant to which it is enacted. Also referred to as subordinate legislation, most delegated or secondary legislation is enacted by means of statutory instrument. Section 1 of the Statutory Instrument Act, 1947, defines a 'statutory instrument' as 'an order, regulation, rule, scheme or bye-law' made pursuant to a statutory power.

(i) *Orders* are generally made in respect of a single exercise of a delegated power and are of an administrative nature. For example, a section of an Act of the Oireachtas might provide that it shall not have legal force until the relevant minister makes a *commencement order* i.e. makes an order stating the date upon which the Act shall become operative.

(ii) *Regulations* are of a legislative nature and usually flesh out the matters contained in the parent statute. For example, a huge volume of Regulations have been made under the Freedom of Information Act, 1997.

(iii) *Rules* are also legislative in nature but are usually of a procedural type. For example, the Rules of the Superior Courts, 1986, regulate the practice and procedure of the Supreme Court and High Court.

(iv) *By-laws* are also legislative in nature but are generally confined to the area of a local authority. For example, they are used to impose charges for refuse collection.

(v) *Schemes* are like orders in that they are generally of an administrative nature. They are often used where the instrument involves figures such as details of fees or charges payable for services provided by a statutory body.

The use of delegated legislation has advantages over primary legislation:

(i) *Time-saving.* Delegated legislation can be introduced quickly, where necessary, in particular cases and permits rules to be changed in response to emergencies or unforeseen problems.

(ii) *Flexibility.* The use of delegated legislation permits ministers to respond on an *ad hoc* basis to particular problems as and when they arise.

(iii) *Access to particular expertise.* Given the highly specialised and extremely technical nature of many of the regulations that are introduced through delegated legislation it is necessary, therefore, that those authorised to introduce delegated legislation should have access to the external expertise required to make appropriate regulations. In regard to bye-laws, local knowledge should give rise to more appropriate rules than general Acts of the Oireachtas.

There are, however, some disadvantages in the prevalence of delegated legislation:

(i) *Accountability.* The Oireachtas is presumed to be the source of statute law, but with respect to delegated legislation government ministers, and the civil servants, who work under them to produce the detailed provisions, are the real source of the legislation. As a consequence, it is sometimes suggested that the delegated legislation procedure gives more power than might be thought appropriate to such unelected individuals.

(ii) *Bulk.* Given the sheer mass of such legislation, both members of the Oireachtas, and the general public, face difficulty in keeping abreast of delegated legislation.

(b) Judicial control of legislation

A validly enacted piece of delegated legislation has the same legal force as an Act of the Oireachtas under which it is enacted; but equally it only has effect to the extent that its enabling Act authorises it. Consequently, it is possible for delegated legislation to be challenged, through the procedure of judicial review, on the basis that the person or body to whom the

Oireachtas has delegated its authority has acted in a way that exceeds the limited powers delegated to them or has failed to follow the appropriate procedure set down in the enabling legislation. Any provision made in this way is said to be *ultra vires* and is void. Additional powers have been given to the courts under the European Convention on Human Rights Act 2003. Section 5 of the Act enables the High Court and, on appeal, the Supreme Court to make a declaration of incompatibility, which is a declaration that a 'statutory provision' is incompatible with the State's obligations under the Convention provisions. 'Statutory provision' is defined to include '[an] order, regulation, rule . . . bye-law or other like document made, issued or otherwise created under [an Act of the Oireachtas]'. Thus, it extends to delegated legislation. However, a declaration of incompatibility does not render the statutory provision invalid. Once a declaration is made, however, it is for the Oireachtas to act on such a declaration to remedy any shortcoming in the law if it so wishes.

Furthermore, a validly enacted piece of delegated legislation has the same legal force and effect as the Act of the Oireachtas under which it is enacted; but equally it only has effect to the extent that its enabling Act authorises it. Consequently, it is possible for delegated legislation to be challenged, through the procedure of judicial review, on the basis that the person or body to whom the Oireachtas has delegated its authority has acted in a way that exceeds the limited powers delegated to them or has failed to follow the appropriate procedure set down in the enabling legislation. Any provision in this way is said to be *ultra vires* and is void.

It should also be recalled that the primacy of European Union law over domestic law, means that any domestic law made in contravention of European Union law is subject to challenge and overturning in the courts.

2 This question invites candidates to examine the various remedies that may be available to innocent parties when they suffer as a consequence of a breach of contract.

Breach of a contract occurs where one of the parties to the agreement fails to comply, either completely or satisfactorily, with their obligations under it. A breach of contract may occur in three ways:

(i) where a party, prior to the time of performance, states that they will not fulfil their contractual obligation;
(ii) where a party fails to perform their contractual obligation;
(iii) where a party performs their obligation in a defective manner.

Any breach will result in the innocent party being able to sue for an appropriate remedy. In addition, however, some breaches will permit the innocent party to treat the contract as discharged. In this situation they can refuse either to perform their part of the contract, or to accept further performance from the party in breach.

The principal remedies for breach of contract are:

– damages;
– *quantum meruit*;
– specific performance;
– injunction.

Damages

Every failure to perform a primary obligation is a breach of contract. The secondary obligation on the part of the contract-breaker, by implication of the common law, is to pay monetary compensation to the other party for the loss sustained by him in consequence of the breach (*Photo Productions Ltd* v *Securicor Transport Ltd* (1980)).

Such monetary compensation for breach of contract is damages. There are two issues to consider: remoteness and measure.

(i) Remoteness of damage

This involves deciding how far down a chain of events a defendant is liable. The rule in *Hadley* v *Baxendale* (1854) states that damages will only be awarded in respect of losses which arise naturally, i.e. in the natural course of things; or which both parties may reasonably be supposed to have contemplated, when the contract was made, as a probable result of its breach.

The effect of the first part of the rule in *Hadley* v *Baxendale* is that the party in breach is deemed to expect the normal consequences of the breach, whether they actually expected them or not.

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. Thus in *Victoria Laundry Ltd* v *Newham Industries Ltd* (1949) the plaintiff was able to claim for damages with respect to the normal profits, but could not claim abnormal profits which would have resulted from an especially lucrative contract, which the defendant knew nothing about.

(ii) Measure of damages

Damages in contract are intended to compensate an injured party for any financial loss sustained as a consequence of another party's breach. The object is not to punish the party in breach, so the amount of damages awarded can never be greater than the actual loss suffered. The aim is to put the injured party in the same position they would have been in had the contract been properly performed.

Even damages of a non-financial nature can be recovered (*Jarvis* v *Swan Tours Ltd* (1973)).

It is possible, and common in business contracts, for the parties to an agreement to make provisions for possible breach by stating in advance the amount of damages that will have to be paid in the event of any breach occurring. Damages under such a provision

are known as liquidated damages. They will only be recognised by the court if they represent a genuine pre-estimate of loss, and are not intended to operate as a penalty against the party in breach (*Dunlop* v *New Garage & Motor Co* (1915)).

Quantum meruit

Quantum meruit means that a party should be awarded 'as much as he had earned', and such an award can be either contractual or quasi-contractual in nature. If the parties enter into a contractual agreement without determining the reward that is to be provided for performance, then in the event of any dispute, the court will award a reasonable sum.

Payment may also be claimed on the basis of *quantum meruit*, where a party has carried out work in respect of a void contract (*Craven-Ellis* v *Canons Ltd* (1936)).

Specific performance

An order for specific performance requires the party in breach to complete their part of the contract. The following rules govern the award of such a remedy.

(i) specific performance will only be granted in cases where the common law remedy of damages is inadequate. It is most commonly granted in cases involving the sale of land, where the subject matter of the contract is unique.
(ii) specific performance will not be granted where the court cannot supervise its enforcement. For this reason it will not be available in respect of contracts of employment or personal service (*Ryan* v *Mutual Tontine Westminster Chambers Association* (1893)).
(iii) specific performance, as an equitable remedy, will not be granted where the plaintiffs themselves have not acted properly.

Injunction

This is also an equitable order of the court, which directs a person not to break their contract. An injunction will only be granted to enforce negative covenants within the agreement, and cannot be used to enforce positive obligations (*Whitwood Chemical Co* v *Hardman* (1891)). However, it can have the effect of indirectly enforcing contracts for personal service (*Warner Bros* v *Nelson* (1937)).

Quasi-contractual remedies are based on the assumption that a person should not receive any undue advantage from the fact that there is no contractual remedy to force them to account. An important quasi-contractual remedy is an action for money paid and received. If no contract comes into existence for reason of a total failure of consideration, then under this action, any goods or money received will have to be returned to the party who supplied them.

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

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

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

(b) Just as in contract law, the position in negligence is that the person ultimately liable in damages is only responsible to the extent that the loss sustained was considered not to be too remote.

The test for remoteness was established in *The Wagon Mound (No 1)* (1961). The defendants negligently allowed furnace oil to spill from a ship into Sydney harbour, which subsequently caused a fire, which spread to, and damaged, the plaintiff's wharf. Although the defendants were held to be in breach of their duty of care, they were only liable for the damage caused to the wharf and slipway through the fouling of the oil. They were not liable for the damage caused by fire because damage by fire was at that time unforeseeable (the oil had a high ignition point and it could not be foreseen that it would ignite on water).

The test of reasonable foresight arising out of *The Wagon Mound* clearly takes into account such things as scientific knowledge at the time of the negligent act. The question to be asked in determining the extent of liability is, 'is the damage of such a kind as the reasonable [person] should have foreseen?' This does not mean that the defendant should have foreseen precisely the sequence or nature of the events.

This is illustrated in the case of *Hughes* v *Lord Advocate* (1963), where employees of the Post Office, who were working down a manhole, left it without a cover but with a tent over it and lamps around it. A child picked up a lamp and went into the tent. He tripped over the lamp, knocking it into the hole. An explosion occurred and the child was burned. The risk of the child being burned by the lamp was foreseeable. However, the vaporisation of the paraffin in the lamp and its ignition were not foreseeable. It was held that the defendants were liable for the injury to the plaintiff. It was foreseeable that the child might be burned and it was immaterial that neither the extent of his injury nor the precise chain of events leading to it was foreseeable.

The test of remoteness is not easy to apply. The cases themselves highlight the uncertainty of the courts. For example, in *Doughty* v *Turner Manufacturing Co Ltd* (1964), an asbestos cover was knocked into a bath of molten metal. This led to a chemical reaction, which was at that time unforeseeable. The molten metal erupted and burned the plaintiff, who was standing nearby. It was held that only burning by splashing was foreseeable and that burning by an unforeseen chemical reaction was not a variant on this. It could be argued that the proper question in this case should have been, 'was burning foreseeable?', as this was the question asked in *Hughes*. Two Irish examples of note are *Reeves* v *Carthy and O'Kelly* (1984) and *Burke* v *John Paul* & *Co Ltd* (1967). In *Reeves*, the doctors' defence was that, even if they were negligent in diagnosing the patient and prescribing medication, they were not liable for the patient having had a stroke because they could not have foreseen it in circumstances where they did not know that the patient suffered from Crohn's disease. The Supreme Court considered that the damage that occurred was of a type that was foreseeable (i.e. circulatory damage and shock) such that, even if the stroke was not foreseeable, if either doctor was negligent, he would be answerable for the stroke because that was the extent of the damage caused. In *Burke*, the plaintiff suffered a hernia because he had to use a cutting implement that was blunt and which therefore required him to exert greater pressure than he would have if it was sharp. The defendants submitted that they could not reasonably foresee that the plaintiff would suffer a hernia that was due to the plaintiff's congenital disposition. The court refused to accept this argument and held it to be immaterial that the defendants could not anticipate the full extent of the damage.

(c) There are two categories of economic/financial loss, which may form the basis of a claim in negligence. First, there is economic loss arising out of physical injury or damage to property; and, secondly, there is what is known as 'pure' economic loss, which is the sole loss sustained, unconnected with physical damage (*Spartan Steel and Alloys Ltd* v *Martin and Co* (1973)). Only the former is now recoverable, unless the claimant can show that there was a 'special relationship' between them and the defendant, in which the defendant assumed responsibility for the claimant's economic welfare (*Hedley Byrne & Co* v *Heller and Partners* (1964) & *Williams* v *Natural Life Health Foods Ltd* (1998)).

4 **(a)** Pre-emption rights refer to the rights of existing shareholders to be offered any new issue of shares before those shares can be offered to non-shareholders.

The purpose of pre-emption rights is to ensure that existing shareholders have an opportunity to maintain their interest in their company by preventing their percentage holding being watered down by the issue of shares to new members. There is, of course, no compulsion on the part of the shareholder to take the shares if they do not wish to.

Currently, by virtue of a s.23 S(A)A 1983, a private company cannot offer new shares for cash unless the existing shareholders have been offered the chance to buy the shares in proportion to their existing holding. This provision may, however, be ousted by the provisions of the memorandum or articles of association. Section 23(4) specifically exempts pre-emption rights where the allotment is to be paid for either wholly or partly in non-cash consideration.

As it is not always cost effective to offer new shares to all existing members, pre-emption rights can be waived by provision in the articles of association or by a special resolution of shareholders.

Pre-emption rights may also be included in a company's articles of association and it is not unusual in the case of private companies to offer a form of pre-emption right to existing members when others wish to sell their shares.

(b) A rights issue is the procedure through which a company raises new capital by offering new shares to its existing members. As the shares are offered to the existing shareholders in proportion to their existing holding, it can be seen as respecting and giving effect to the shareholders' pre-emption rights, even in situations where those rights have been suspended, as indicated previously. As the purpose is to raise new capital for the company, either because it is in difficulty, or needs the additional capital to expand its business, the shareholders who are offered the new shares are required to pay for them. However, as an inducement to engage in the deal, it is usual for the new shares to be offered at a discount to the current *market* value of the existing shares. It is essential to note that the discount is not on the *nominal* value of the shares, which is required by the rules of company law to be fully-paid as companies cannot issue shares at a discount.

Once again there is no compulsion to participate in the rights issue and often the rights to participate in the allotment of new shares are usually tradeable securities in themselves. Consequently shareholders who do not want to buy the new shares themselves may sell the rights to a third party.

(c) A bonus issue of shares, sometimes referred to as a scrip issue or more accurately a capitalisation issue is similar to a rights issue in that existing members receive new shares in proportion to their existing holdings, but it differs in one essential point: the individuals who receive the new shares usually do not have to pay anything for them; they are received free. However, as already pointed out in (b) above, it is a strict rule of company law that shares must be paid for and cannot be issued at a discount. This apparent anomaly is explained by the fact that the shares are paid for, but they are paid for by the company itself, rather than the members. It is perfectly possible for the company to issue partly paid-up bonus shares, in which case the recipients may have to make some contribution in the future.

In effect what the issue of bonus shares amounts to is a capitalisation of the company's reserves, some of which could have been distributed to the members in some other way such as dividends. This is not the case with all reserves as some non-distributable ones, such as the share premium account and the capital redemption reserve may be used to fund the bonus issue. Bonus issues must never be funded from a company's ordinary capital.

5 This question requires candidates to set out and explain the various registers and accounting records that companies are required to maintain.

(a) *Statutory Registers*
Companies are required to maintain a number of important registers, which are usually kept at the registered office and are open to public inspection. The registers are as follows:

Register of members. Under s.116 Companies Act (CA) 1963 every company is obliged to keep a register of its members and to include the following information in that register: the names and addresses of its members, the date on which each person was registered as a member and the date at which any person ceased to be a member. It must also indicate the number and class of shares held and the amount paid on those shares. This register must also record particulars of acquisitions of shareholding in excess of 50% in a plc.

Register of directors and secretaries. This requirement is set out in s.195 CA 1963. This sets out the details that have to be included in relation to directors and include their names, date of birth, nationality, residential address, occupation and importantly details of any other directorships held.

Register of charges. Section 109 CA 1963 requires all limited companies to keep a register of all charges affecting the property of the company and all floating charges on the undertaking or property of the company. Such registers must contain a short description of the property which has been charged, the amount of the charge and the names of the persons who hold it. Section 19 CA 1963 requires companies to keep a separate register of debentures.

Section 59 CA 1990 requires the maintenance of a register of directors' interests in shares and debentures.

(b) *Accounting records*
Essentially, a company must maintain three types of accounts, as follows:

1. Proper books of account: these must be made available to the officers of the company and must comply with s.202 CA 1990 by providing a true and fair view of the company's financial situation;
2. Balance sheet and profit and loss account: these must be made available to members in the annual general meeting. These accounts must also be prepared in compliance with the Companies Acts and give a true and fair view under s.149 CA 1963; and to enable the directors to ensure that any balance sheet or profit and loss account prepared by them gives a true and fair view of the company's state of affairs.

In particular the accounting records must contain: entries from day to day of all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place; a record of the assets and liabilities of the company; and where the company deals in goods: statements of stock held by the company and the end of each financial year of the company; all statements of stocktaking from which any statement as is mentioned in (a) above has been prepared; and except in the case of goods sold by way of ordinary retail trade, statements of all goods sold and purchased showing the goods and the buyers and sellers in sufficient detail to enable them to be identified.

6 This question requires an analysis of the duties owed by directors to their companies and which, in Ireland, are governed by the common law. In this regard, a director is in a fiduciary relationship with the company of which s/he is a director. These duties may be described as follows:

(a) the duty to act *bona fide* in the best interests of the company: in effect, this means that directors are under an obligation to act in what they genuinely believe to be in the best interests of the company. Thus in *Dawson International plc* v *Coats Paton plc* (1990) it was held that the agreement of a board of directors to support a particular takeover bid was subject to an implied fiduciary duty of that board to act in the best interests of the company, even if this meant going back on their previous agreement (see also *John Crowther Group Carpets* v *Carpets Internationale plc* (1990)). Further in *Re Frederick Inns (in liquidation)* (1994) the proceeds of the sale of the assets of four companies were used to discharge the debts owed to the Revenue Commissioners by the ten companies in the group. This payment left the four companies insolvent and the Supreme Court held that the payments were made in breach of the directors' fiduciary duty to act in the best interests of the four companies.

(b) the duty not to act for any collateral purpose: This may be seen as a corollary of the preceding duty in that directors cannot be said to be acting *bona fide* if they use their powers for some ulterior or collateral purpose. Directors are given their powers to use in the best interests of the company, and those powers must not be used for any other purpose. For example, directors should not issue shares to particular individuals in order merely to facilitate, or indeed prevent, a prospective takeover bid (*Howard Smith* v *Ampol Petroleum* (1974) and *Hogg* v *Craphorn* (1967)) or allot new shares for the purpose of ensuring that a particular shareholder acquires majority control (*Nash* v *Lancegaye Safety Glass* (1916)).

(c) the duty not to permit a conflict of interest to arise: This equitable rule is strictly applied by the courts and the effect of its operation may be seen in *Regal (Hastings)* v *Gulliver* (1942). In that case, the directors of a company owning one cinema provided money for the creation of a subsidiary company to purchase two other cinemas. After the parent and subsidiary companies had been sold at a later date, the directors were required to repay the profit that they had made on the sale of the shares in the subsidiary company on the ground that they had only been in the situation to make that profit because of their position as directors of the parent company. The principle propounded in this case is very strict and applies even where it is

established that the company could not have availed of the particular opportunity. This was seen in *Industrial Development Consultants Ltd* v *Cooley* (1972) wherein, after the company was unsuccessful in its bid for a particular contract, one of its directors feigned illness to avoid his employment contract with the company so that he could accept the contract which was offered to him in his personal capacity. The court held that Cooley acted in conflict with in his interest in the company and he was required to compensate it (see also *Cook* v *Deeks* (1916)). Any money that a director makes out of a conflict of interest is held on account or on constructive trust for the company and is therefore repayable.

7 (a) Under the Unfair Dismissals Act, 1977, employees have a right not to be unfairly dismissed. A number of situations are considered automatically to be unfair and, in those situations, once the employee proves that s/he has been dismissed, the onus is placed on the employer to prove that the dismissal was not for an unfair reason. Section 6(2) Unfair Dismissals Act, 1977 provides that a dismissal is unfair if it results, wholly or mainly, from one or more of the following:

1. the employee's membership, or proposal that s/he or another person become a member of, or is engaging in activities on behalf of a trade union;
2. the religious or political opinions of the employee;
3. civil proceedings against the employer to which the employee is, or will be, a party, or in which the employee was, or is likely to be, a witness;
4. criminal proceedings against the employer, in relation to which the employee has made, proposed or threatened to make a complaint or statement to the prosecuting authority or any authority connected with or involved in the prosecution or in which the employee was or is likely to be a witness;
5. the race or colour of the employee;
6. the pregnancy of the employee or matters connected therewith, unless
   (i) the employee was unable, by reason of the pregnancy or connected matters, to adequately do the work for which she was employed, or to continue to do such work without contravention by her or her employer of a statutory provision, and
   (ii) there was not, at the time of dismissal, any other employment with her employer that was suitable for her and in relation to which there was a vacancy, or the employee refused her employer's offer of corresponding alternative employment, being an offer made so as to enable her to be retained in the employment of her employer notwithstanding pregnancy.

Section 5 Unfair Dismissals (Amendment) Act, 1993 added the following unfair grounds for dismissal to s.6(2) Unfair Dismissals Act, 1997:

7. race, colour or sexual orientation of the employee;
8. the age of the employee;
9. the employee's membership of the travelling community.

In order to avail of the legislation, the employee must have been employed for at least one year, unless the unfair ground relates to trade union activities or pregnancy, in which case there is no minimum period.

On the other hand, a dismissal is fair if it results wholly or mainly from one or more of the matters specified in s.6(4) 1977 Act or if there were 'other substantial grounds' justifying the dismissal.

More specifically, s.6(4) provides that a dismissal shall not be unfair if it results wholly or mainly from one or more of the following:

(a) 'the capability, competence or qualifications of the employee for performing work of the kind which he was employed by the employer to do';
Although the terms have not been statutorily defined, capability has been interpreted as relating to a reduction in an employee's physical or mental capacity to do his/her job e.g. a driver losing his/her sight.
Competence is considered to relate to work performance and where there is a reduction in competence, an employee should generally be advised of the matter and given an opportunity to rectify the situation. Qualifications includes, for example, professional qualifications such as a solicitor who is struck off the roll of solicitors or a truck driver who loses his/her driving licence.

(b) 'the conduct of the employee';
This is generally confined to conduct affecting one's work e.g. an employee who holds a position of trust may be fired where (s)he is convicted of an offence. However, the courts will not uphold a standard policy of dismissal upon conviction. It should be noted that employees may be summarily dismissed for 'misconduct' (s.8 Minimum Notice and Terms of Employment Act, 1973). This arises where an employee acts otherwise than as a reasonable employee in the performance of the express or implied terms of his/her contract. As examples, misconduct may incorporate violence or drinking at work and, where these circumstances arise, the employer need not give the employee any notice. Whether 'on the spot' dismissal is justifiable will depend on the circumstances, e.g. drinking during working hours may justify summary dismissal of a truck driver but not an accountant.

(c) 'the redundancy of the employee';
Redundancy is defined by the Redundancy Payments Act 1967–1991. However, it will not be a fair ground where a selective redundancy is made.

(d) 'the employee being unable to work or continue to work in the position which he held without contravention (by him or by his employer) of a [statutory] duty'.
Thus, if a person is employed as a driver and is banned from driving, then they may be fairly dismissed.

(b) In relation to a successful claim for unfair dismissal, a Rights Commissioner, the Employment Appeals Tribunal and the Circuit Court (depending on the nature of the claim) may award any one of the following remedies:

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

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

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

If a Rights Commissioner, Employment Appeals Tribunal or the Circuit Court find in an employee's favour, the maximum amount of compensation that may be awarded for unfair dismissal is generally limited to 104 weeks' salary. However, where an employee is unfairly dismissed for a discriminatory reason (marital status or gender) the Employment Equality Act, 1998, provides that the employee may go directly to the Circuit Court and it may award unlimited compensation for the discrimination.

8 This question relates to the issue of whether the parties to an agreement can enforce its terms through court action. By definition, a contract is a binding agreement, but the important thing for this question is that not all agreements are contracts. In order to limit the number of cases that might otherwise be brought, the courts will only enforce those agreements, which the parties intended to have legal effect. Although expressed in terms of the parties' intentions, the test for the presence of such intention is an objective, rather than a subjective, one. For the purposes of this question in regard to intention to create legal relations, agreements can be divided into two categories, in which different presumptions apply.

Domestic and social agreements
In domestic and social agreements, there is a presumption that the parties do not intend to create legal relations.

In *Balfour* v *Balfour* (1919), a husband returned to Ceylon to take up his employment and he promised his wife, who could not return with him due to health problems, that he would pay her €30 per month as maintenance. When the marriage later ended in divorce, the wife sued for the promised maintenance. It was held that the parties had not intended the original promise to be binding and therefore it was not legally enforceable.

Another situation where it held that there was no intention to create legal relations can be seen in *Jones* v *Pandavatton* (1969), in which a mother was not held liable to maintain an agreement to pay her daughter a promised allowance.

It should be emphasised, however, that the presumption against the intention to create legal relations in such relationships is only that, a presumption and that, as with all presumptions, it may be rebutted by the actual facts and circumstances of a particular case as may be seen in *Merritt* v *Merritt* (1970). After a husband had left the matrimonial home, he met his wife and promised to pay her €40 per month, from which she undertook to pay the outstanding mortgage on their house. The husband, at the wife's insistence, signed a note agreeing to transfer the house into the wife's sole name when the mortgage was paid off. The wife paid off the mortgage but the husband refused to transfer the house. It was held that the agreement was enforceable as in the circumstances the parties had clearly intended to enter into a legally enforceable agreement. The normal presumption was also successfully rebutted in *Simpikins* v *Payes* (1955). In this case, a group of people, who shared a house, jointly took part in a competition, although it was only entered in the name of one of them. In spite of this fact, the court held that there was a clear contractual intention that all of those participating should benefit collectively from any prize won.

Commercial agreements
In commercial situations, the strong presumption is that the parties intend to enter into a legally binding relationship in consequence of their dealings.

In *Edwards* v *Skyways* (1964), employers undertook to make an *ex gratia* payment to an employee whom they had made redundant. It was held that in such a situation the use of the term *ex gratia* was not sufficient to rebut the presumption that the establishment of legal relations had been intended. The former employee, therefore, was entitled to the payment promised.

As with other presumptions, this one is open to rebuttal. In commercial situations, however, the presumption is so strong that it will usually take express wording to the contrary to avoid its operation. An example can be found in *Rose and Frank Co* v *Crompton Bros* (1925) in which it was held that an express clause stating that no legal relations were to be created by a business transaction was effective. In *Jones* v *Vernons Pools Ltd* (1938), the plaintiff claimed to have submitted a correct pools forecast, but the defendants denied receiving it and relied on a clause in the coupon which stated that the transaction was binding in honour only. Under such circumstances, it was held that the plaintiff had no cause of action in contract as no legal relations had been created.

Applying the above law to the facts in the problem scenario provides the following conclusions:

Amy and Ben
Although they are brother and sister it is clear from the facts of the situation that they entered into a business relationship with regard to the provision of the updating of the web site. Amy was to do the work for Ben's business and Ben was expected to, and indeed agreed to pay €1,000. In such circumstances there was a clear intention to create legal relations and Ben cannot avoid

his liability to pay Amy on the basis of their familial relationship. He may have wanted to help his sister, but he did so by entering into a business contract with her; one which she can enforce against him.

Che
The position in this instance is even stronger in Amy's favour. Even if he did have the motive to benefit Amy as his friend, Che can hardly claim that his agreement with her was a purely social one. It was clearly a business transaction and as such he is bound to comply with the original terms of the contract and pay the full contractual price of €1,000.

9 (a) Dividends are the return received by shareholders in respect of their investment in a company. Subject to any restriction in the memorandum of association, every company has the implied power to apply its profits in the distribution of dividend payments to its shareholders. Although the directors recommend the level of dividend payment, it is for the company in a general meeting to declare the dividend. This is one of the items conducted at the annual general meeting. If the directors decline to recommend a dividend then it is not open to the general meeting to overrule that decision and declare a dividend. The long standing common law rule is that dividends must not be paid out of capital (Flitcroft's case 1882). The current rules relating to the payment of dividends were introduced by the C(A)A 1983. Under the C(A)A 1983, the payment of a dividend to members is referred to as a distribution. Dividends can only be paid in accordance with Part IV of the C(A)A 1983.

Section 45(1) C(A)A 1983 provides that a company may not make a distribution except out of profits available for distribution.

Section 45(2) C(A)A 1983 defines 'profits available for distribution' in the following terms: '[a] company's profits available for distribution are its accumulated profits, so far as not previously utilised by distribution or capitalisation, less its accumulated realised losses so far as not previously written off in a reduction or reorganisation of capital duly made.

'Accumulated' profits means that dividends can only be declared from a revenue reserve. This means that a company cannot declare a dividend in a profitable year without making provision for previous years' losses. Furthermore, the profits must be 'realised', which means that a mere upward revaluation of a fixed asset does not constitute a realised profit. Such an upward revaluation can, however, be used to fund a bonus issue of shares to members. These rules apply to both public and private companies and both types of company must also meet the equitable test of solvency or the cash flow test i.e. each must be in a position to meet its debts as they fall due.

As has been stated, the foregoing realised profits test applies to both private and public companies. Public companies, however, must also comply with s.46(1) C(A)A 1983 which provides that:

'A public company may only make a distribution . . . if . . . the amount of its net assets is not less than the aggregate of its called-up share capital and undistributable reserves and if, and to the extent that, the distribution does not reduce the amount of those assets to less than the aggregate.'

This means that a public company must maintain its capital by ensuring that, before a dividend is paid, its net assets are at least equal to the aggregate of its called-up share capital and undistributable reserves. A company's undistributable reserves are:

(i) the share premium account;
(ii) the capital redemption reserve;
(iii) the amount by which the accumulated unrealised profits exceed its current accumulated unrealised losses;
(iv) any other reserve which the company is prohibited from distributing by virtue of statute or by virtue of its memorandum or articles.

Thus, private companies are not required to maintain their capital to the extent that public companies are required.

(b) Under the rule in *Flitcroft's case* any directors of a company who breached the distribution rules, and knowingly paid dividends out of capital, were held jointly and severally liable to the company to replace any such payments made. Section 49 C(A)A 1983 provides that dividends must be declared by reference to 'properly prepared' accounts. Section 50 C(A)A 1983 provides that a shareholder who knows, or has reasonable grounds, for believing, that a distribution has been made in contravention of the above rules, is liable to repay the distribution to the company (see *Precision Dippings Ltd* v *Precision Dippings Marketing Ltd* (1985)). Further, the directors may be held liable to repay to the company any improper payment of dividends (*Re Flitcroft's Case* (1882)).

Applying the foregoing to the problem at hand it is apparent that the loss from 2008–2009 cannot be ignored, as the company is required to take accumulated losses into account. Nor can the paper profit of €5,000 generated by the asset revaluation be taken into account as it is unrealised. As a result the realised trading profit of €3,000 for the year 2009–10 has to be set against the loss of €2,000 from the previous year, which means that Fan plc only had €1,000 available for distribution to its members by way of dividend.

As dividends amounting to a total of €4,000 was paid, it is apparent that €3,000 too much was paid in dividends.

As a result any shareholder who either knew or had reasonable grounds for knowing that the dividends were improperly paid will have to recompense the company to the extent that their dividends were overpaid. In the final analysis Dee and Eff will be personally liable to make good the difference to the company for any payments made to shareholders who do not fit into that category.

10 As with companies, business assets must be used to pay the debts of a partnership. However, unlike most companies, and unless registered as a limited partnership under the Limited Partnerships Act, 1907, members of partnerships do not benefit from the advantage of limited liability. Consequently, their personal wealth may be called upon to pay off business debts. Upon dissolution, the value of the partnership property is realised and the proceeds are applied in the following order:

(i) in paying debts to outsiders;
(ii) in paying to the partners any advance made to the firm beyond their capital contribution;
(iii) in paying the capital contribution of the individual partners.

Any residue is divided between the partners in the same proportion as they shared in profits (s.44 of the Partnership Act (PA) 1890).

If the assets are insufficient to meet debts, partners' advances and capital repayments, then the deficiency has to be made good out of any profits held back from previous years, or out of partners' capital, or by the partners individually (and personally) in the proportion to which they were entitled to share in profits.

Applying these rules to the partnership in question, the first step is for the value of the partnership assets to be realised in order to pay off the debts owed to the various outside creditors. As stated, the partnership assets are worth €20,000 and it has debts to outside creditors of €7,000. As the value of the assets is sufficient to cover all of these debts, the creditors will be paid their debts in full before any allocation between the partners.

The next stage in the problem is to consider Geo's advance of €3,000 to the partnership and as stated above he is entitled to receive repayment of that sum before any further distribution to the partners.

The effect of these payments is that amount left for distribution between the partners is only €10,000 (€20,000 less €7,000 to the outside creditors, less the €3,000 advance owed to Geo). This means that the partnership has actually suffered a loss of €30,000 on the original capital contributed by the members. That total loss will be allocated, according to the partnership agreement, in proportion to the capital contribution. As the total capital contribution was €40,000, Geo who provided €20,000 must suffer half of the loss (i.e. 20/40ths), Ho, who provided €12,000 must suffer 3/10ths of the loss (i.e. 12/40ths) and Io, who provided €8,000 will suffer 1/5th of the loss (i.e. 8/40ths). In terms of money, the losses will be: €15,000 for Geo, €9,000 for Ho and €6,000 for Io.

In practice these losses will merely reduce the amount of capital returned to the partners. Thus Geo will receive €5,000, Ho will receive €3,000 and Io will receive €2,000.

1 This question asks candidates to explain both what delegated legislation is and its importance in the contemporary legal system. It specifically requires a consideration of the way in which the courts seek to control it. The question is divided into two parts but may be answered globally.

(a) 5–6 marks A thorough answer, which explains the meaning of primary and secondary/delegated legislation. The perceived advantages and disadvantages may be considered but are not necessary for full marks to be awarded.

2–4 marks A less complete answer, perhaps lacking in detail or unbalanced in that it does not deal with some aspects of the question.

0–1 mark Little if any awareness of the topic.

(b) 3–4 marks A thorough answer dealing with the powers of the courts in relation to legislation. For full marks reference should be made to the European Convention on Human Rights Act 2003 and judicial review.

1–2 marks Some, but limited knowledge.

0 marks No knowledge whatsoever.

2 This question requires candidates to consider the various remedies for breach of contract.

8–10 marks A very good answer revealing a thorough to complete understanding of all of the remedies available for breach of contract, although a concentration on damages is to be expected.

5–7 marks A good answer but perhaps unfocused or lacking in detail as to the specific nature of the remedies. Perhaps simply a list of remedies with no consideration might warrant the lowest mark in this category.

2–4 marks Weak answer, unfocused or lacking in knowledge or detail.

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

3 This question requires candidates to explain three distinct but related aspects of the law of tort.

(a) This part of the question refers to the neighbour principle in the determination of a duty of care in the law of negligence.

3–4 marks A thorough understanding of the issues involved. It is likely that the best answers will focus on the cases, although examples might be used.

1–2 marks Some, but limited, understanding of the issue, perhaps not referring to any cases to support the explanation.

0 marks No knowledge of the topic.

(b) This part of the question refers to the issue of remoteness of damage in the law of negligence.

3–4 marks A thorough understanding of the issues involved. It is likely that the best answers will focus on the cases, although examples might be used.

1–2 marks Some, but limited, understanding of the issue, perhaps not referring to any cases to support the explanation.

0 marks No knowledge of the topic.

(c) This part of the question focuses specifically on the issue of liability for purely economic or financial loss as a result of a tortious action.

1–2 marks A good understanding of the issues involved. It is likely that the best answers will focus on the cases, although examples might be used.

0 marks No knowledge of the topic.

4 This question requires candidates to consider the various procedures relating to the issuing of shares to existing members. It is in three parts, although it is likely to be answered globally. Credit will be given for worked accountancy examples.

8–10 marks A very good answer revealing a thorough to complete understanding of all three elements of the question.

5–7 marks A good answer but perhaps unbalanced or lacking in detail.

2–4 marks Weak answer, unfocused or lacking in knowledge or detail.

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

5 This question requires candidates to explain the various registers and accounts that companies are required to maintain.

(a) This part of the question relates to registers.

4 marks	A very good answer, not only detailing the main registers, but explaining their purpose.
2–3 marks	A fair to good answer but perhaps unbalanced or lacking in detail.
0–1 mark	Very little, if any knowledge of the topic.

(b) This part of the question relates to accountancy records.

4–6 marks	A very good answer, explaining in some detail the various accounts required to be maintained by companies.
2–3 marks	A fair to good answer but perhaps unbalanced or lacking in detail.
0–1 mark	Very little, if any knowledge of the topic.

Credit will be given for accountancy records not strictly required by the legislation.

6 This question requires candidates to consider the duties owed by directors to their companies and requires some explanation of the duties rather than just listing them.

8–10 marks	Clear explanation of all or at least most of the duties.
5–7 marks	Fair knowledge of the duties, but perhaps lacking in detailed explanation.
2–4 marks	Some knowledge of the duties, perhaps merely dealing with one or two elements of the answer.
0–1 mark	Very little, if any knowledge of the topic.

7 This question relating to issues in employment law is divided into two parts.

(a) This part requires candidates to explain what is meant by unfair dismissal.

4–6 marks	A clear, concise explanation perhaps citing cases or examples.
2–3 marks	A clear understanding, but perhaps lacking authority or examples.
0–1 mark	Unbalanced, or may not deal with all of the required aspects of the topic. Alternatively the answer will demonstrate very little understanding of what is actually meant by unfair dismissal.

(b) This part requires candidates to explain the remedies available for unfair dismissal.

3–4 marks	Thorough to complete answers, showing a detailed understanding of all or certainly most of the remedies available.
1–2 marks	A clear understanding of the remedies, but perhaps lacking in detail.
0 marks	No knowledge of the topic whatsoever.

8 This question requires candidates to explain and apply the rules relating to intention to create legal relations.

8–10 marks	A very good answer revealing a thorough to complete understanding of the rules relating to intention to create legal relations, together with the ability to apply them accurately. It is very likely that cases will be referred to, although appropriate examples will be recognised.
5–7 marks	A good answer but perhaps unfocused or lacking in detail as to the specifics of the appropriate law.
2–4 marks	Weak answer, unfocused or lacking in knowledge or detail.
0–1 mark	Very little, if any knowledge of the topic.

9 This question requires candidates to explain the rules relating to the lawful distribution of company dividends. The question is divided into two parts, but is likely to be answered globally.

8–10 marks	A thorough understanding of law relating to dividends as it applies specifically to public companies. Cases may well be cited and will be credited.
5–7 marks	A clear understanding of the general law but perhaps lacking in detail or application.
2–4 marks	Some, but limited, understanding of the law and poor application.
0–1 mark	Little or no knowledge of the topic.

10 This question requires candidates to explain and apply the rules governing liability for debts on the dissolution of a partnership.

8–10 marks	This should provide a clear understanding of the legal rules and apply them accurately to the facts of the situation.
5–7 marks	This may show some detailed knowledge of the legislation but unable to apply it accurately.
2–4 marks	Some, but limited, understanding of the law and poor application.
0–1 mark	The poorest candidates will provide nothing but the briefest reference to the legislation and fail to apply it to the problem scenario.