Answers

1 The civil court structure in ascending order of authority is as follows:

District Court: There is a District Court in most sizeable towns and claims for up to €6,348·69 are usually brought there. There are several matters in respect of which the District Court has no jurisdiction, most notably child abduction, divorce, probate, defamation, company and chancery matters. There is a right of appeal to the Circuit Court and significant issues of law that arise in the proceedings may be referred to the High Court under the 'case stated' procedure.

Circuit Court: The country is divided into a number of circuits; several judges sit permanently in the Dublin Circuit. There are some permanent judges in the Cork Circuit and, in the other circuits, judges hear cases in the principal towns, moving from town to town in the circuit. Where the amount of a claim is between €6,348·69 and €38,000, it is usually in the brought in the Circuit Court. Most of the main family law disputes are also heard by this court but it does not deal with company law or chancery matters. The Circuit Court also hears appeals from the District Court and the Employment Appeals Tribunal. There is a right of appeal to the High Court and questions of law may be referred from the Circuit Court to the Supreme Court under the 'case stated' procedure.

High Court: The High Court has jurisdiction to hear all civil disputes, although if the matter is within the jurisdiction of either of the lower courts, the case will usually be remitted to the appropriate courts. Most company law and chancery disputes can only be dealt with in the High Court; it has exclusive jurisdiction in bankruptcy. Exceptionally, the trial is with a jury – such as in defamation cases. Only the High Court (or the Supreme Court on appeal) can declare that an Act of the Oireachtas to be unconstitutional. There is a right of appeal to the Supreme Court although in certain matters that right is confined to questions of law. There is a constitutionally guaranteed right of appeal to the Supreme Court.

The Supreme Court: The Supreme Court hears appeals from the High Court and 'case stated' applications from the Circuit Court. It is the final court of appeal in these matters.

2 **(a)** *Offer*

An offer sets out the terms upon which an individual is willing to enter into a binding contractual relationship with another person. It is a promise to be bound on particular terms, which is capable of acceptance. The essential factor to emphasise about an offer is that it may, through acceptance by the offeree, result in a legally enforceable contract. The person who makes the offer is the offeror; the person who receives the offer is the offeree.

Offers, once accepted, may be legally enforced but not all statements will amount to an offer. It is important, therefore, to be able to distinguish what the law will treat as an offer from other statements, which will not form the basis of an enforceable contract. An offer must be capable of acceptance. It must therefore not be too vague (*Scammel* v *Ouston* (1941)). In *Carlill* v *Carbolic Smoke Ball Co* (1893) it was held that an offer could be made to the whole world and could be accepted and made binding through the conduct of the offeree.

In addition an offer should be distinguished, from the following:

(i) a mere statement of intention, which cannot form the basis of a contract even although the party to whom it was made acts on it (Re *Fickus* (1900)).
(ii) a mere supply of information, as in *Harvey* v *Facey* (1893) where it was held that the defendant's telegram, in which he stated a minimum price he would accept for property, was simply a statement of information, and was not an offer capable of being accepted by the claimant.

(b) **(i)** *Counter-offer*

A counter-offer arises where the offeree tries to change the terms of the original offer that has been made rather than directly accepting it. The consequence of making a counter-offer is to bring the original offer to an end so it is no longer possible for that original offer to be accepted at a later time. For example, in *Hyde* v *Wrench* (1840), Wrench offered to sell his farm for £1,000. Hyde offered £950, which Wrench rejected. Hyde then informed Wrench that he accepted the original offer. It was held that there was no contract. Hyde's counter-offer had effectively ended the original offer and it was no longer open to him to accept it.

A counter-offer must not be confused with a request for information. Such a request does not end the offer, which can still be accepted after the new information has been elicited. See *Stevenson* v *McLean* (1880), where it was held that a request by the offeree as to the length of time the offeror would give for payment did not terminate the original offer, which he was entitled to accept prior to revocation.

(ii) *Unilateral offer*

A unilateral offer is one where one party promises something in return for some action on the part of another party. In relation to unilateral offers, revocation is not permissible once the offeree has started performing the task requested. Reward cases are examples of such unilateral promises. There is no compulsion placed on the party undertaking the action but it would seem to be unfair if the promisor were entitled to revoke their offer just before the offeree was about to complete their part of the contract. An example of unilateral contracts may be seen in *Carlill* v *Carbolic Smoke Ball Co* (1893), where the company promised to pay £100 to anyone who caught influenza after using their product. No one was forced to buy the product but once they did and started using it, the company was bound by its promise. In *Errington* v *Errington* (1952), a father promised his son and daughter-in-law that he would convey a house to them when they had paid off the outstanding mortgage. After the father's death, his widow sought to revoke the promise. It was held that the promise could not be withdrawn as long as the mortgage payments continued to be met.

3 An individual is not automatically liable for every negligent act that he or she commits and in order to sustain an action in negligence it must be shown that the party at fault owed a duty of care to the person injured as a result of their actions.

Consequently, the onus is on the claimant to establish that the respondent owed them a duty of care.

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

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

It can be seen that this neighbour test for deciding the existence of a duty of care is an objective, rather than a subjective one. It is not a matter of what the 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.

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

The test in *Donoghue* v *Stevenson* was extended further in *Anns* v *Merton LBC* (1978), Lord Wilberforce introducing a two stage test for establishing the existence of a duty, as follows:

– Is there a sufficient relationship of proximity or neighbourhood between the alleged wrongdoer and the person who has suffered damage such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter?
– If the first question is answered in the affirmative, are there then any considerations which ought to negate, reduce or limit the scope of the duty or the class of persons to whom it is owed or the damages to which a breach of duty may give rise?

The impact of *Anns* led to the expansion of negligence, as the policy reasons acted only to limit liability once a duty had been found to exist, as opposed to limiting the existence of the duty itself. However, there was gradual criticism of, and retreat from the approach taken by Lord Wilberforce. Thus in *Peabody Donation Fund* v *Sir Lindsay Parkinson & Co Ltd* (1984), it was stressed that the proximity test had to be satisfied before a duty of care could be found to exist.

The decision in *Anns* was eventually overruled by *Murphy* v *Brentwood DC* (1990).

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

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

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

4 Registration under the Companies Act (CA) 1963 requires a public company to register certain documents with the Registrar of Companies. These are as follows:

(i) *Memorandum of association*
This document contains the fundamental conditions on which the company is incorporated. It relates to matters that are of importance in the company's external dealings, such as its name, objects, capital structure, a statement to the effect that it is a public company, and that it enjoys limited liability.

(ii) *Articles of association*
This document relates to the internal operation of the company and deals with matters such as the rights attached to particular shares, the calling and conduct of meetings. In fact, companies need not register their own articles, as the model articles will automatically apply by default. Articles submitted must be dated, signed by the subscribers and witnessed in the same form as the memorandum.

(iii) *Form A1*
This requires a number of details, including: the company name; its registered office; the name, address and signature of its secretary; the name and address of the solicitor acting; details and signatures of the directors and a statement as to whether

or not they are Irish residents; the signatures of the subscribers or the solicitor acting; a declaration that the Companies Acts 1963 to 2009 have been complied with and which must be signed by a solicitor who is engaged in the company formation or a person named as a director or secretary of the company and this must be duly witnessed; a declaration to the effect that the purpose of the company's formation is to carry on an activity within the State; and the completion and signature of the capital duty statement which is contained within the form.

Whether limited by shares or guarantee, a public limited company must have a share capital. Public companies limited by guarantee are a rarity. The number of shareholders in a public company may exceed 50. With respect to its memorandum of association, the essential difference is that the words 'public limited company', 'plc' the Irish equivalent of 'cuideachta phoibli teoranta' or its abbreviation 'c.p.t.' be included in the name (C(A)A 1983 s.4). The memorandum must also state that the company is a plc and that the share capital of the company is at least €38,092·14 and it should also be noted that at least 25% of this figure is paid up. There must also be at least seven members (s.5 CA 1963).

Section 5 of the Companies (Amendment) Act 1983 requires that the Registrar of Companies must be satisfied of compliance with all the requirements of the Companies Acts in respect of registration and of matters precedent and incidental thereto. From the date of incorporation stated in the certificate of incorporation, the company is capable of exercising all the functions of an incorporated company and having perpetual succession with a common seal (s.18(2) CA 1963).

5 Companies ordinarily raise the money they need to finance their operations through the issue of share capital, but it is equally common for companies to raise additional capital through borrowing.

(a) Debentures

A debenture is a document, which acknowledges the fact that a company has borrowed money. The use of the term debenture, however, has been extended to cover the loan itself. A debenture may be issued to a single creditor or to a large number of people, in which case each of the creditors has a proportionate claim against the total 'debenture stock'.

As creditors of the company, debenture holders receive interest on their loans and are entitled to receive payment whether the company is profitable or not. As regards repayment, debts rank in order of creation, so earlier debentures have to be paid before those created later. Where debentures are issued as part of a series, it is usual for a *pari passu* clause to be included in the document creating the debt, with the effect that all of the loans made within the series rank equally with regard to repayment.

Debentures which have no security are referred to as 'unsecured loan stock'. It is usual, however, for debentures to provide security for the amount loaned. Security means that if the company is wound up, the secured creditor will have priority in terms of repayment over any unsecured creditor. There are two types of security for company loans: fixed charges and floating charges.

(b) Fixed charge

In this situation a specific asset of the company is made subject to a charge in order to secure a debt. Once the asset is subject to the fixed charge the company cannot dispose of it without the consent of the debenture holders. The asset most commonly subject to fixed charges is land, although any other long-term capital asset may also be charged. It would not be appropriate, however, to give a fixed charge against stock-in-trade, as the company would be prevented from freely dealing with it without the prior approval of the debenture holders. Such a situation would obviously prevent the company from carrying on its day-to-day business. If the company fails to honour the commitments set out in the document creating the debenture, such as meeting its interest payments, the debenture holders can appoint a receiver who will if necessary sell the asset charged to recover the money owed. If the value of the asset that is subject to the charge is greater than the debt against which it is charged then the excess goes to pay off the rest of the company's debts. If it is less than the value of the debt secured then the debenture holders will become unsecured creditors for the amount remaining outstanding.

(c) Floating charge

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

All charges, including both fixed and floating, have to be registered with the Companies' Office within 21 days of their creation. Failure to register the charge as required has the effect of making the charge void, i.e. ineffective, against any other creditor, or the liquidator of the company. The charge, however, remains valid against the company, which means in effect that the holder of the charge loses their priority as against other company creditors. In addition to registration at the Companies' Office, companies are required to maintain a register of all charges on their property. Although a failure to comply with this requirement constitutes an offence, it does not invalidate the charge.

In relation to properly registered charges of the same type, they take priority according to their date of creation. However, as regards charges of different types, a fixed charge takes priority over a floating charge even though it was created after it.

It is possible to obtain court permission for later registration of a charge e.g. where failure to register was by mistake or due to inadvertence. However, the court cannot allow the rights of subsequent charge holders to be prejudiced. Thus, any charge that is registered late is registered subject to those charges already registered.

6 This question requires candidates to consider the important role of the company secretary in relation to the operation of companies. The corporate governance structure specifies the distribution of rights and responsibilities among different participants in the corporation, such as, the board, managers, shareholders and other stakeholders, and spells out the rules and procedures for making decisions on corporate affairs. The essence of corporate governance is to ensure that companies are properly run and that its officers are accountable and subject to control. Whilst it is usual to focus on directors when considering the idea of corporate governance, it should be remembered that company secretaries also have an important function to perform in relation to the proper conduct of company affairs.

Every public company is required to have a secretary, who is one of the company's officers for the purposes of the Companies Act (CA) 1963 and who, in addition, may, or may not, be a director of the company.

Appointment

Section 2(1) (CA) 1963 includes the company secretary amongst the officers of a company. Under s.172 CA 1963, a public company must have a company secretary and s.236 Companies Act (CA) 1990 requires that the directors of a public company must ensure that the company secretary has the requisite knowledge and experience to discharge their functions. Furthermore, any person appointed to the office of secretary after the commencement of the 1990 Act must be:

(i) a member of a recognised professional body;
(ii) a person who appears to the directors, to be capable of being a secretary, based on experience or professional membership; or
(iii) a person who has been secretary of another company or companies for at least three of the five years preceding his/her appointment.

Duties

The duties of company secretaries are set by the board of directors and therefore vary from company to company, but as an officer of the company, they will be responsible for ensuring that the company complies with its statutory obligations. The following are some of the most important duties undertaken by company secretaries:

– to ensure that the necessary registers required to be kept by the Companies Acts are established and properly maintained;
– to ensure that all returns required to be lodged with the Companies' Office are prepared and filed within the appropriate time limits;
– to organise and attend meetings of the shareholders and directors;
– to ensure that the company's books of accounts are kept in accordance with the Companies Acts and that the annual accounts and reports are prepared in the form and at the time required by the Acts;
– to be aware of all the statutory requirements placed on the company's activities and to ensure that the company complies with them;
– to sign such documents as require their signature under the Companies Acts.

Powers

Although old authorities, such as *Houghton & Co* v *Northard Lowe & Wills* (1928) suggest that company secretaries have extremely limited authority to bind their company, later cases have recognised the reality of the contemporary situation and have extended to company secretaries potentially extensive powers to bind their companies. As an example consider *Panorama Developments Ltd* v *Fidelis Furnishing Fabrics Ltd* (1971). In this case the Court of Appeal held that a company secretary was entitled 'to sign contracts connected with the administrative side of a company's affairs, such as employing staff and ordering cars and so forth. All such matters now come within the ostensible authority of a company's secretary.'

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

Given the importance of the distinction the courts have developed a variety of test for distinguishing the employee from the self-employed.

(i) *The control test*

The first test to be applied by the courts was known as the control test and depended upon the degree to which the person who is using the other's services actually controls; not only what they do, but how they do it. In *Roche* v *Kelly* (1968), Walsh J said that 'the principle and determining test is the master's right to direct servants as to what is to be done and how to do it'. The main shortcoming in the control test was its lack of subtlety. Highly skilled professionals, such as surgeons, by necessity have a high level control over how they perform their day-to-day work, which meant that, under the control test, they were deemed to be self-employed rather than employees. Consequently, they were personally liable for any negligence in their performance, rather than the Health Authority, which used their services. This was seen in *O'Friel* v *St. Michael's Hospital* (1982), where the court held that hospital administrators could not exercise control over how a consultant surgeon did his work and the very title of consultant surgeon implied the contrary to employment. Such weakness in the control test led to the courts developing a more subtle test.

(ii) *The integration test*

The integration test shifted the emphasis from the degree of control exercised of an individual to the extent to which the individual was integrated into the business of their putative employer. This test was first stated in *Stevenson* v *MacDonald and Evans* (1952) and was applied in *In re Sunday Tribune Ltd* (1984) in relation to three individuals. One individual wrote for the newspaper on a regular basis and wrote on subjects suggested by him and accepted by the editor or on subjects as directed by the editor. His fee was determined by reference to a collective agreement with the National Union of Journalists. Applying the integration test, the court held that he was not an employee. A second individual, who wrote a weekly column 50 weeks of the year and who received holiday pay was an employee. A third individual, described as a sub-editor who did shift-work on a part-time basis was also an employee.

(iii) *The multiple, or economic reality test*

The economic reality test was first established in *Ready Mixed Concrete (South East) Ltd* v *Minister of Pensions and National Insurance* (1968). In that case, rather than relying on one single factor the court held that there were three conditions supporting the existence of a contract of employment:

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

(iv) *The enterprise test*

Finally, the 'enterprise' test was developed in *Market Investigations Ltd* v *Minister for Social Security* (1969), which is similar to the mixed test except that the question considered by the court is, 'is the person who has engaged himself to perform the services performing them as a person in business on his own account?'. Again, rather than relying on one single factor, this test uses more general assessment of any particular case in order to decide whether someone is an employee. In so deciding, the courts will not be bound by how the parties themselves describe the relationship. Thus, it is immaterial that the agreement between the parties states that someone is to be self-employed; if the indications are otherwise, then the person will be recognised, and treated, as an employee.

Market Investigations Ltd contracted several persons for short periods to carry out surveys on several occasions. The persons contracted could specify exactly when and where they wished to work and were not given holiday pay. However, applying the enterprise test to the facts that the company specified the persons to be interviewed, the questions to be asked and how the answers were to be recorded, the court was satisfied that an interviewer was not in business on her own account and was therefore an employee.

The same test and principles were applied in *Denny Foods* v *Minister for Social Welfare* (1998). Demonstrators of merchandise products in supermarkets were deemed employees despite the fact that they worked unsupervised, were not paid a salary and received no holiday or sick pay. Instead, after each demonstration, the demonstrator would get the manager of the relevant supermarket to sign an invoice which the demonstrator would then submit to the plaintiff company for payment.

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

8 The provision of some form of consideration is an essential requirement in the establishment of contractual relationships. This question requires candidates to examine the operation of the rules relating to whether or not the performance of existing contractual duties can provide consideration for some new promise.

Bry and Cis entered into a contract with Ami to carry out the work for an agreed price. However, before the completion of the contracts Ami promised each of them a further payment, although she is now refusing to pay more than the original agreed sum of €5,000. The question is whether Bry and Cis can enforce Ami's promise to pay them the additional sums.

In order to require Ami to make payment at the new level, those claiming it must show that they provided legally 'sufficient' consideration for her promise. The question, therefore, is whether the performance of existing contractual duties can ever provide consideration for a new promise. The long-established rule of contract was that the mere performance of a contractual duty already owed to the promisor could not be consideration for a new promise. Thus in *Stilk* v *Myrick* (1809) when members of a ship's crew deserted, the captain promised the remaining members of the crew that they would share the deserter's wages if they completed the voyage. Subsequently, however, when the owners refused to make the promised payment it was held that the captain's promise could not be legally enforced as the sailors had only done what they were already obliged to do by their contracts of employment. Where, however, the promisee did more than they were already contractually bound to do then the performance of the additional task does constitute valid consideration for a new promise (*Hartley* v *Ponsonby* (1857)).

The more contemporary case of *Williams* v *Roffey Bros* (1991) expanded the category of consideration. In that case the Court of Appeal held that Roffey Bros had enjoyed practical benefits as a result of their promise to increase Williams' previously agreed payment for work under an existing contract, although Williams did no more than they were contractually bound to do. The benefits enjoyed were that the work would be completed on time, they would not have to pay any penalty; and they would not suffer the bother and expense of getting someone else to complete the work.

As a result it would now seem that the performance of an existing contractual duty can amount to consideration for a new promise in circumstances where there is no question of fraud or duress, and where practical benefits accrue to the promisor.

It remains to apply the preceding legal principles to the case in point. First of all as regards Bry, he had a contract with Ami to do the plastering, but insisted that Ami increase his money before he would complete the work. Bry might try to argue that his situation falls within the ambit of *Williams* v *Roffey Bros*, and that therefore he can enforce the promise. He would point out that Ami did enjoy practical benefits in that the gallery was finished on time thus allowing her to open her exhibition. It is clear, however, that this situation is significantly different in that whereas in *Williams* v *Roffey Bros* the plaintiff did not exert any undue pressure on the defendants to induce them to make their promise of additional money, in this situation Bry has clearly exerted a form of economic duress on Ami to force her to increase the contract price: Ami was left with no real choice but to agree to Bry's terms or else she would have suffered a potentially substantial loss. Such unfair pressure would take the case outside of *Williams* v *Roffey Bros*, and the old rule as stated in *Stilk* v *Myrick* would apply, and Bry would be unable to enforce the promise for the additional €1,000.

As regards Cis, it would appear that he did no more than he was required to do under his contract with Ami. Consequently he would be subject to the operation of *Stilk* v *Myrick* and could not enforce the promise for the additional €1,000.

9 This question can be divided into three distinct sections.

The first element of this question requires a consideration of Fi's situation with respect to her potential liability. Partnerships do not normally provide their members with limited liability, unless the partnership has been registered as a limited partnership under the Limited Partnerships Act 1907.

The situation in the problem scenario indicates that the partners have not gone through the appropriate procedure for the establishment of a limited partnership or a limited liability partnership. As a result, as far as outsiders are concerned, Fi is fully liable for any debts of the partnership and could be required to pay more than her agreed maximum payment of €100,000. Fi would, however, be entitled to rely on the internal partnership agreement to limit her liability within the partnership. This would mean that although she could be liable to outsiders beyond the €100,000, she would be able to claim reimbursement of any payments made above that limit from the other two partners, always assuming that they were in a position to make such a payment.

Chi has clearly used her powers for an unauthorised purpose. Unfortunately for the other partners, they cannot repudiate her transaction with the bank, even although it was outside her actual authority. The reason being, that it is within his implied authority as a partner to enter into such a transaction. As a trading partnership, all the members have the implied authority to borrow money on the credit of the firm and the bank would be under no duty to investigate the purpose to which the loan was to be put. As a result the partnership cannot repudiate the debt to the bank and each of the partners will be liable for its payment. It has to be stated, however, that Chi will be personally liable to the other partners for the €10,000 and as a further consequence of her breach of his duty not to act in any way prejudicial to the partnership business, the partnership could be wound up.

Di's purchase of the books was also clearly outside of the express provision of the partnership agreement. However, nonetheless the partnership would be liable as the transaction would be likely to be held to be within the implied authority of a partner in a gallery business (*Mercantile Credit* v *Garrod* (1962)). Once again, Di, the partner in default of the agreement, would be liable to the other members for any loss sustained in the transaction.

As regards any partnership debt owing, that is clearly within the ambit of the partnership and the members are all liable for non-payment.

If the partnership cannot pay the outstanding debts then the individual partners will become personally liable for any outstanding debt. Once the debts owed to outsiders have been dealt with, only then the internal financial relationships of the partners amongst themselves will be dealt with according to the partnership agreement.

10 This question requires an analysis of corporate opportunity and the rules relating to directors' duties 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.

There are two particular issues that emerge from the problem scenario. The first relates to the fact that Harry has taken a facility fee from Itt plc and the second relates to the fact that the board of directors has used its general power to allot shares to pursue the particular end of assuring the successful take-over of the company.

These issues will be considered in turn below.

(i) *Harry's facility fee*

A director's fiduciary relationship with the company of which s/he is a director creates an equitable 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, a company owned a cinema and the directors of that company paid 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 basis 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 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.

In the present case, there can be no clearer instance of a conflict of interest that the situation of a director taking a bribe regardless of the label that is given to the payment. It is a benefit from a third party, Itt plc, to induce Harry to use his influence as a director to further the merger. As a consequence, he has breached his duty to Gilt Ltd and not only will he be liable to be dismissed from the board but he may also be required to pay any money received to Gilt Ltd.

(ii) *The allotment of shares to Itt plc*

A director's fiduciary relationship with the company of which s/he is a director creates a duty to act act *bona fide* in the best interests of the company and a duty not to act for any collateral purpose. The first of these two duties 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. The duty not to act for any collateral purpose may be seen as a corollary of the duty to act in the best interests of the company i.e. 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)).

Applying the above duties to the facts of the problem, it is apparent that the board have contravened their fiduciary duties in that they have used their power to allot shares, not for the primary purpose of raising capital for their company, but for the ulterior purpose of facilitating the takeover. As a consequence, May could apply to the court to have the share allocation declared invalid.

1 This question requires candidates to describe the structure and functions of the main civil courts in the Irish legal system

8–10 marks	A thorough to complete description of the various civil courts with an explanation of their relationships and function. At this level it is required that answers make reference to the Supreme Court.
5–7 marks	A less detailed treatment of the court structure but still covering the main courts. This represents the maximum mark that can be achieved without reference to the Supreme Court.
3–4 marks	Weak answer, perhaps just providing a sketch of the court structure with no explanation of that structure.
0–2 marks	Little or no understanding of the topic.

2 This question is divided into three parts and requires candidate to explain the meaning of three elements in contract law: offer, counter-offer and unilateral offer.

(a) 3–5 marks A good to complete answer explaining the meaning of an offer.
1–2 marks For some indication as to the meaning of offer.

(b) **(i)** 2–3 marks Awarded for explanation of the meaning and effect of counter-offer depending on clarity of explanation.
1 mark For some knowledge.

(ii) 2 marks For a good to complete explanation of the meaning and effect of a unilateral offer.
1 mark Some idea about unilateral offers but lacking in detail.

3 This question requires candidates to explain the meaning of the concept duty of care in the tort of negligence.

8–10 marks	Thorough explanation of the meaning of duty of care with appropriate references to cases.
5–7 marks	Reasonable on duty of care but perhaps lacking in detail or cases authority.
3–4 marks	Unbalanced answer, lacking in detailed understanding
0–2 marks	Very unbalanced answer, demonstrating very little understanding.

4 This question requires candidates to list and explain the documents required to be submitted to the Companies' Office in order to register a company.

8–10 marks	Thorough explanation of the documents and procedure.
5–7 marks	Reasonable treatment but perhaps lacking in detail.
3–4 marks	Unbalanced answer, perhaps not dealing with all elements of the question or lacking in detailed knowledge of those elements.
0–2 marks	Very weak answer demonstrating little understanding of the documents or procedure.

5 This question requires candidates to consider how companies may raise loan capital and how they secure such loans against their assets. Marks will be allocated as indicated in the paper.

8–10 marks	A good to full answer providing a clear explanation of each of the elements of the question.
5–7 marks	Sound understanding of the concepts but perhaps lacking detail or slightly unbalanced.
3–4 marks	Weak answer lacking in detailed knowledge.
0–2 marks	Very weak answer demonstrating little understanding of the topic.

6 This question requires candidates to consider the company secretary in the context of the idea of corporate governance.

8–10 marks	Thorough treatment of all three aspects of the question including at least some consideration of corporate governance itself.
5–7 marks	Thorough treatment of some aspects of the question or a reasonable, but less than full, treatment of some aspects.
3–4 marks	Unbalanced answer, merely dealing with a limited number of aspects of the question.
0–2 marks	Demonstrating little or no understanding of the nature of the question.

7 This question asks candidates to explain the common law rules used to distinguish contracts of service from contracts for services.

8–10 marks	A thorough treatment of all of the rules, perhaps placing them in their historical context but certainly providing case support.
5–7 marks	Good analysis and case support, although perhaps limited in appreciation.
3–4 marks	Recognition of the areas covered by the question, but lacking in detailed analysis.
0–2 marks	Little or no analysis or knowledge of the subject of the question.

8 Marks for this question will be awarded on the basis of a general knowledge of the law together with an ability to analyse the problem scenario and apply the general legal principles to the particular situation of the problem. In particular marks will be given for explanations of consideration, the law relating to existing duties and how those rules may be avoided. *Knowledge of specific cases is not a requirement.*

8–10 marks	Accurate analysis of the situation together with a detailed knowledge of the general legal principles involved linked to a sound application of those principles.
5–7 marks	Sound knowledge of the law but perhaps lacking in application or alternatively not showing a sufficiently clear understanding of the legal principles involved.
3–4 marks	Weak or unbalanced answer. Perhaps aware of the nature of the problem but lacking in clear knowledge of the principles or deficient in relation to how those principles should be applied.
0–2 marks	Very weak answer. Perhaps mentioning some of the issues involved in the question but failing to consider them in any detail or merely recounting the facts of some of the cases with no attempt to derive principles or apply them.

9 This question refers to key issues relating to the powers, authority and liability of partners.

8–10 marks	Candidates will exhibit a thorough knowledge of partnership law together with the ability to analyse the problems contained in the question.
5–7 marks	Candidates will exhibit a sound knowledge of partnership law together with the ability to recognise the issues contained in the question. Knowledge may be less detailed or analysis less focused.
3–4 marks	Identification of some of the central issues in the question and an attempt to apply the appropriate law. Towards the bottom of this range of marks there will be major shortcomings in analysis or application of law.
0–2 marks	Very weak answers that might recognise what the question is about but show no ability to analyse or answer the problem as set out.

10 This question refers to issues relating to the directors' duties and in particular the duty not to accept personal benefits.

8–10 marks	Candidates will exhibit a thorough knowledge of the law, together with the ability to analyse the problems contained in the question. It is likely, but not necessary, for candidates to make reference to the previous non-statutory rules. It is likely that reference will be made to case authorities.
5–7 marks	Candidates will exhibit a sound knowledge of the law together with the ability to recognise the issues contained in the question. Knowledge may be less detailed or analysis less focused.
3–4 marks	Identification of some of the central issues in the question and an attempt to apply the appropriate law. Towards the bottom of this range of marks there will be major shortcomings in analysis or application of law.
0–2 marks	Very weak answers that might recognise what the question is about but show no ability to analyse or answer the problem as set out.