Answers

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

Sheriff Court
Most of the civil business in Scotland takes place in the Sheriff Court. Scotland is divided geographically into six Sheriffdoms and Sheriffs hear cases where the defender is resident or domiciled in the Sheriffdom or the case concerns property in the Sheriffdom, or a delict occurred in the Sheriffdom. The Sheriff Court is a court of first instance and Sheriffs normally hear cases sitting alone. Sheriffs can hear cases for debt or damages without financial limit and have privative (exclusive) jurisdiction, where the value does not exceed £5,000.

There is a simplified procedure called the summary cause that is used in civil actions relating to sums of money not exceeding £5,000, and a small claims procedure for sums not exceeding £3,000. The Sheriff Court ordinary action is used in civil actions for sums of money of £5,000 and over. It can also be used in actions for delict and for divorce and other issues involving family law.

An appeal may normally be made either to the Sheriff Principal or to the Inner House of the Court of Session. An appeal may also be made from the Sheriff Principal to the Inner House of the Court of Session.

The Court of Session

The Court of Session has jurisdiction over the whole of Scotland. It sits in Edinburgh. The Court of Session is both a court of first instance and a court of appeal. It is divided into the Outer House and the Inner House. The Outer House is a court of first instance in which cases are normally heard by a judge (Lord Ordinary) sitting alone. Apart from cases where the value does not exceed £5,000, where the Sheriff Court has privative jurisdiction, the Outer House of the Court of Session can hear all civil cases in Scotland. It has privative jurisdiction over applications for judicial review, actions for reduction of contracts, and petitions for the winding up of companies where the paid up capital exceeds £120,000. Appeals are made to the Inner House of the Court of Session.

The Inner House is normally an appeal court. It is divided into the First and Second Division and appeals are normally heard by a bench of three judges, although a larger court may be convened.

The Inner House of the Court of Session can also exercise the *nobile officium* which is the extraordinary equitable jurisdiction of the Court of Session to provide a remedy where there is a gap in the law and no other remedy is available.

The Supreme Court

The Supreme Court, which came into operation in the autumn of 2009, is the highest court within the Scottish civil system. It replaces the House of Lords as the highest judicial forum and exercises all of that court's functions. It was felt that the previous location of the highest court in the land in the legislature was contrary to the separation of powers and consequently the members of the Supreme Court no longer sit in the House of Lords. It consists of 12 justices and hears appeals on the most important legal issues. The Supreme Court has taken over the hearing of devolution issues relating to Scotland from the Judicial Committee of the Privy Council.

The Supreme Court has no jurisdiction in Scottish criminal appeals.

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. See *Wolf* & *Wolf* v *Forfar Potato Co* (1984) in which because the acceptance of the offer to sell potatoes had varied some of the terms, it was held to be a counter-offer and to have caused the original offer to lapse. As the parties never did reach consensus, there was no contract.

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 obligation*

A unilateral obligation is one where one party promises something in return for some action on the part of another party. In relation to unilateral obligations, 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 obligations may be seen in *Carlill* v *Carbolic Smoke Ball Co* (1993), 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. In Scotland, unilateral obligations would normally need to be in writing if they are gratuitous, according to the Requirements of Writing (Scotland) Act 1995. The exception is if they are business contracts, or where the other party has acted in reliance on the offer to the knowledge of the offeror to his detriment.

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 defender and the pursuer?
- 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 Section 7 Companies Act 2006 (CA) sets out the method for forming a company, which is that one or more persons must subscribe their name to a *memorandum of association* and comply with the requirements of the provisions of the Act as to registration. Under s.9, the *memorandum of association* must be submitted to the companies' registrar together with an *application for registration*, which in turn lists other documents that must be submitted. As a result the following documents are required to be submitted.

(a) *The memorandum of association*

Although the 2006 Act retains the previous requirement for individuals wishing to form a company to subscribe their names to a memorandum of association it nonetheless significantly reduces the importance of the memorandum and as a consequence it is no longer possible to amend or update the memorandum of a company formed under the 2006 Act. Nonetheless the memorandum of association, which must be in the prescribed form, remains an important document to the extent that, as required by s.8, it evidences the intention of the subscribers to the memorandum to form a company and become members of that company on formation. Also in relation to a company limited by shares, the memorandum also provides evidence of the members' agreement to take at least one share each in the company.

(b) *Application for registration*

Although the 2006 Act only requires the memorandum and application for registration to be submitted, s.9 sets out other documents as well as the specific information that must be delivered to the registrar when an application for registration is made.

Section 9 provides that in *all* cases the application for registration must state:

- the company's proposed name;
- whether the company's registered office is to be situated in England and Wales (or Wales), in Scotland or in Northern Ireland;
- a statement of the intended address of the company's registered office (that is, its postal address as opposed to the preceding statement confirming the jurisdiction in which the company's registered office is to be situated);
- whether the liability of the company's members is to be limited and if so whether it is to be limited by shares or by guarantee;
- whether the company is to be a private or a public company.

(c) *Statement of capital and initial shareholdings*

This document is required where the company is to have a share capital. Alternatively a statement of guarantee is required where that is not the case (CA 2006 ss.10 & 11 set out the detailed provisions in these regards).

(d) *A statement of the company's proposed officers*

Section 12 explains that this requirement relates to:

- any person/persons who are to be the first director or directors of the company
- the person/s who is/are to be the first secretary.

(e) *A copy of any proposed articles*

As the model articles apply by default this requirement operates to the extent that the company does not intend to use the model articles.

(f) *A statement of compliance*

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

The appropriate fee must accompany the foregoing documents and once the registrar is satisfied that the requirements of the Act have been met, he shall issue a certificate that the company is duly incorporated. As previously, once issued the certificate is conclusive evidence that the requirements of this Act as to registration have been complied with and that the company is duly registered under the Act.

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 security in order to secure a debt. Once the asset is subject to a fixed security the company cannot dispose of it without the consent of the debenture holders. The asset most commonly subject to fixed securities is land, although any other long-term capital asset may also be charged. It would not be appropriate, however, to give a fixed security 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 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 holder, although the Enterprise Act 2002 introduced a new procedure to limit the powers of floating charge holders to appoint administrative receivers and requires them to make use of the general administration procedure.

Most securities, including both fixed and floating, have to be registered with the Companies Registry within 21 days of their creation. Failure to register the security as required has the effect of making the security void, i.e. ineffective, against any other creditor, or the administrator or liquidator of the company. The security, however, remains valid against the company, which means in effect that the holder of the security loses their priority as against other company creditors. In addition to registration at the Companies Registry, 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. A new Register of Floating Charges is being set up in Scotland, and when that statutory rule comes into force, floating charges will be created when registered, and their order of priority with other floating charges and fixed securities will be determined from that date. However, the statutory rules are not yet in force. Currently, as regards charges of different types, a fixed charge takes priority over a floating charge even though it was created after it.

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 their 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 2006 and who, in addition, may, or may not, be a director of the company. Private companies are no longer required to appoint company secretaries, although they still can do so if they wish.

Appointment

Section 1173 Companies Act (CA) 2006 includes the company secretary amongst the officers of a company. Every public company must have a company secretary and s.273 of the CA requires that the directors of a public company must ensure that the company secretary has the requisite knowledge and experience to discharge their functions. Section 273(2) & (3) sets out the following list of alternative specific minimum qualifications, which a secretary to a public limited company must have:

– they must have held office as a company secretary in a public company for three of the five years preceding their appointment to their new position;
– they must be a member of one of a list of recognised professional accountancy bodies, including ACCA;
– they must be a solicitor or barrister or advocate within the UK;
– they must have held some other position, or be a member of such other body, as appears to the directors of the company to make them capable of acting as company secretary.

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 Registry 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.

With specific regard to the Combined Code on Corporate Governance company secretaries are required:

– to ensure the flow of necessary information within the board of directors and its committees;
– to ensure that new board members are properly inducted into their positions;
– to ensure the professional development of company directors;
– to provide advice and guidance to the board and its chair on all matters relating to corporate governance.

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 tests 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 *Walker* v *Crystal Palace Football Club* (1910) a professional football player was held to be an employee of his club). The main shortcoming in the control test was its lack of subtlety. Highly skilled professionals, such as surgeons, by necessity have a high level of 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.

(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 employer (in *Whittaker* v *Minister of Pensions & National Insurance* (1967) a circus trapeze artist who was required to do other general tasks in relation to the operation of the circus was held to be an employee). However, even the integration test was not without problems, with some employers attempting to give the impression of using a self-employed work-force whilst effectively still controlling what that work-force did.

(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.

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 is that it examines all aspects of the situation in order to reach a determination. For example in *Nethermore (ST Neots)* v *Gardiner* & *Taverna* (1984), a group of home workers, i.e. people who carried out paid work in their own homes, were held to be employees on the grounds that they were subject to an irreducible minimum obligation to work for their employer.

8 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 Scotland it is competent to enter into gratuitous obligations, and the doctrine of consideration does not apply in Scotland. Thus, Ami has made a unilateral promise to pay a further £1,000 to both Bry and Cis. However, under the Requirements of Writing (Scotland) Act 1995 a gratuitous unilateral obligation must be in writing and signed by the promisor if it is to be binding, except if the promise is made in the course of a business (as in this case), where writing is not necessary. Thus, if it can be proved, Bry and Cis will be able to demand payment of the additional £1,000, even if there is no written promise to pay by Ami. Also, under the same Act, in a case of a promise made without writing, if a party acts in reliance on the promise to the knowledge of the promisor, the other party cannot deny the existence of the obligation even where there are no formalities if it would be detrimental to the promisee. This would be another reason for holding this promise binding, in the case of Bry, as he completes the job on time relying on the promise.

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 or registered as a limited liability partnership under the Limited Liability Partnerships Act 2000.

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 as in Scots law a partner is jointly and severally liable on debts contracted in the name of the partnership. 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 partnership, failing which, 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. Under s.9 of the Partnership Act 1890 partnership debts are said to be joint and several. One or more or all of the partners can be sued for the debt once it has been demanded from the firm, and those who have to pay have a right of relief against the firm and their fellow partners. 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 raises issues relating to the duties owed by company directors to their companies and the consequences of any breach of such duties. Before the Companies Act 2006 directors' duties were considered as an aspect of the fiduciary relationship that existed between those directors and their companies. Certain duties follow from a person being fixed as a fiduciary, and these fiduciary duties are analogous to the duties owed by a trustee to a beneficiary under a trust.

Under the previous regulation, directors were required to act honestly and with good faith for the benefit of the company in discharging their duties. This general duty to the company was sub-divided into the three further heads: the duty to act *bona fide* in the best interests of the company, the duty to exercise their powers for a proper purpose, and the duty not to allow his personal interests to conflict with his duties to the company.

Those common law rules/equitable principles have now been given statutory effect under the provisions of chapter 2 of the Companies Act 2006. Somewhat paradoxically, although subsection 171(3) of that Act clearly states that the statutory rules replace the previous rules, nonetheless subsection 171(4) provides that the statutory rules have to be interpreted and applied in the same way as the previous common law and equitable rules/principles from which they were derived, and thus retains those previous rules and principles.

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 takeover of their company.

These issues will be considered in turn below.

(i) *Harry's facility fee*

The rule that directors should not allow a conflict of interest to arise was strictly enforced by the courts in the United Kingdom and it can be clearly stated that directors were forbidden from entering into any arrangement which would involve, even the possibility of, a conflict between their personal interests and the interests of their company. The simplest statement of the rule is that directors were not permitted to profit personally from their position without full disclosure and the prior approval of the company (*Regal (Hastings)* v *Gulliver* (1942) and *Boardman* v *Phipps* (1967)).

There can be no clearer instance of a conflict of interest than the situation of a director taking a bribe. This general prohibition has been given specific statutory form in s.176 of the Companies Act 2006, which sets out the categorical duty of directors not to accept benefits from third parties (s.176 CA 2006).

Under s.176, a director must not accept a benefit from a third party, which is conferred by reason of his being a director or his doing, or not doing anything as director. For the purposes of s.176 CA 2006 a third party is any person other than the company, an associated company or a person acting on behalf of the company or the associated company.

By virtue of s.176(4), however, there is no breach of duty if the acceptance of the benefit by the director cannot reasonably be regarded as likely to give rise to a conflict of interest. As a result, immaterial benefits and those which are entirely unrelated to the affairs of the company will not be covered by s.176. The statute retains the previous civil law remedies available under the common law, as specifically stated in s.178 so directors in breach of the provision will be held liable to account to the company for any benefit received.

Applying the foregoing to Harry, it is unarguable that s.176 applies to his situation, as, no matter how the payment is referred to, it is nonetheless a benefit from a third party, Itt plc, to induce Harry to use his influence as a director to further the merger. As a result he has breached his duty to Gilt Ltd and not only will he be liable to be dismissed from the board by a simple majority vote (CA 2006 s.168), but he may also be required to pay any money received to Gilt Ltd.

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

Once again the Companies Act 2006 restates a previous fiduciary duty in statutory form, with s.171(b) setting out the long-standing common law rule that directors' powers should be used only for the purposes for which they were conferred. This rule is known as the 'proper purposes doctrine' and was developed by the courts in order to ensure that directors use their powers for the purpose for which those powers were given to them and not for any ulterior or improper purpose. Most of the cases on this point have related to the exercise by directors of their power to issue new shares in an attempt to assist or, alternatively to prevent, potential take-over bids for their companies. Thus in *Howard Smith* v *Ampol Petroleum* (1974) directors preferred one take-over bid as opposed to another, which was supported by the majority shareholding. In order to defeat the bid they disliked, the directors issued new shares, effectively reducing the existing majority to a minority holding in the company, incapable of blocking their preferred takeover bid. This was clearly an abuse of the directors' powers and a breach of their duty to act *bona fide* in the interests of the company (See also *Hogg* v *Cramphorn* (1966) and *Bamford* v *Bamford* (1969)).

Another aspect of this general fiduciary duty is that directors must not act in such a way as will fetter the exercise of their discretion in relation to decisions that affect the operation of the company. For example, directors might enter into a contractual agreement with some outsider to use their vote in a particular way at board meetings. Once again, such an agreement is a clear breach of their fiduciary duty, although it must be recognised that if directors enter into contract on behalf of the company, which they genuinely consider to be in the company's best interests, then they may bind themselves to vote in favour of any subsequent resolutions necessary to achieve the successful completion of the contract.

Applying the above to the facts of the problem, it is apparent that the board of directors have contravened the provision of s.171 of the Companies Act 2006 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 result, although their exceeding their powers could be ratified by a vote at a subsequent general meeting, nonetheless without that ratification, May could apply to the court to have the share allocation declared invalid and Itt plc's use of those shares to vote in favour of the takeover bid would also be invalidated. In any subsequent vote to ratify the improper use of the directors' powers, Itt plc would not be permitted to vote.

1 This question requires candidates to describe the structure and functions of the main civil courts in the Scottish 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 law 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' registry 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 gratuitous obligations, 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 and what is referred to as the 'improper purpose rule'.

8–10 marks	Candidates will exhibit a thorough knowledge of the law as set out in the Companies Act 2006 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.