Answers

1 **(a)** The doctrine of binding precedent, or *stare decisis*, lies at the heart of the Botswana legal system. The doctrine refers to the fact that, within the hierarchical structure of the Botswana courts, a decision of a higher court will be binding on a court lower than it in that hierarchy. In general terms, this means that when judges try cases they will check to see if a similar situation has come before a court previously. If the precedent was set by a court of equal or higher status to the court deciding the new case, then the judge in the present case should follow the rule of law established in the earlier case. Where the precedent is from a lower court in the hierarchy, the judge in the new case may not follow but will certainly consider it.

The operation of binding precedent is reliant upon the existence of an extensive reporting service to provide access to previous judicial decisions. This is of particular importance to counsel, who are under a duty to bring all relevant case authority to the attention of the court, whether it advances their case or not. Consequently they are expected to make themselves thoroughly aware of the current reports.

Not everything in a case report sets a precedent. The contents of a report can be divided into two categories:

– ***Ratio decidendi***
It is important to establish that it is not the actual decision in a case that sets the precedent, that is set by the rule of law on which the decision is founded. This rule, which is an abstraction from the facts of the case, is known as the *ratio decidendi* of the case. The *ratio decidendi* of a case may be understood as the statement of the law applied in deciding the legal problem raised by the concrete facts of the case.

– ***Obiter dictum***
Any statement of law that is not an essential part of the *ratio decidendi* is, strictly speaking, superfluous; and any such statement is referred to as *obiter dictum* (*obiter dicta* in the plural), that is, said by the way. Although *obiter dicta* statements do not form part of the binding precedent, they are persuasive authority and can be taken into consideration in later cases, if the judge in the later case considers it appropriate to do so.

The division of cases into these two distinct parts is a theoretical procedure. Unfortunately, judges do not actually separate their judgments into the two clearly defined categories and it is up to the person reading the case to determine what the *ratio* is. In some cases, this is no easy matter, and it may be made even more difficult in appellate cases, where each of the judges may deliver their own lengthy judgments with no clear single *ratio*.

(b) This part of the question relates to the various mechanisms through which judges alter or avoid precedents. These are:

Reversing is the procedure whereby as the result of an appeal, a superior court in the hierarchy reverses the decision of a lower court in the same case. It is possible for the higher court to approve the *ratio* yet not agree with its application by the lower court and consequently reverse that court's decision.

Overruling is the procedure whereby a court higher up in the hierarchy sets aside a legal ruling established in a previous case. It is somewhat anomalous that, within the system of *stare decisis*, precedents gain increased authority with the passage of time. As a consequence, courts tend to be reluctant to overrule long-standing authorities even though they may no longer accurately reflect contemporary practices or morals. Overruling operates retrospectively with the effect that the principle of law overruled is held never to have been law. Overruling a precedent might, therefore, have the consequence of disturbing important financial arrangements, made in line with what were thought to be settled rules of law. It might even, in certain circumstances, lead to the imposition of criminal liability on previously lawful behaviour (See *R* v *R* (1992)). However, the courts will not shrink from overruling authorities where they see them as no longer representing an appropriate statement of law.

Distinguishing is the main device used by the judiciary where they want to avoid following an otherwise apparently binding precedent. As the *ratio decidendi* of any case is an abstraction from, and is based upon, the material facts of the case, this opens up the possibility that a court may regard the facts of the case before it as significantly different from the facts of a cited precedent and thus consequently it will not find itself bound to follow that precedent. Judges use the device of distinguishing where, for some reason, they are unwilling to follow a particular precedent and the law reports provide many examples of strained distinctions where a court has quite evidently not wanted to follow an authority that it would otherwise have been bound by.

2 This question invites candidates to state the legal consequences of breach of contract generally and of repudiation in particular. In other words, what will be the legal effect where one of the parties to a contract, before the date of performance, indicates that they have no intention of complying with the terms of the contract, or, alternatively, it becomes apparent that they are no longer in the position to perform the contract?

Breach of contract occurs when one of the parties to the contract fails to perform their part of the agreement, either fully or partially. Usually breach of contract only becomes apparent at, or after, the time set for performance of the contract. Repudiation, however, occurs before the date of performance. Repudiation as a form of breach of contract is understood as any behaviour by a party to a contract indicating that they do not intend to honour their obligations. A person can behave in this way with regard to all their obligations in terms of the contract, for example where they deny the existence of the contract, where they try without justification

to withdraw from the contract or where they give notice that they cannot or will not perform. However, it is also possible for a party to repudiate only some of their obligations or a part of the contract, for example, where they tender inadequate or defective performance as proper performance.

The act of repudiation together with the intention to repudiate already constitutes a breach of contract. This does not mean that the contract is automatically terminated due to one party's unilateral repudiation of their contractual obligations. The other contracting party has a choice whether or not to accept the repudiation. If they decide to accept the repudiation they immediately obtain the right to cancel the contract and to claim damages for breach of contract.

If, on the other hand, the innocent party decides not to accept the repudiation, the contract remains in full force. Such a contract can be enforced by means of an order for specific performance. The aim of a claim for specific performance is to force the defaulting party, by an order of court, to render performance in the very terms agreed upon by the parties. In terms of such an order the party who commits breach of contract is forced to deliver or manufacture an object of a specific quality and to pay damages as surrogate for performance. However, after the decision in *Isep Structural Engineering and Plating (Pty) Ltd* v *Inland Exploration Co (Pty) Ltd* (1981) there is a great amount of uncertainty whether damages can be claimed as surrogate for performance as an alternative to a claim for specific performance.

In the past the courts in certain instances refused an order for specific performance. After the decision in *Benson* v *SA Life Assurance Society* (1986) the position seems to be that the courts will only use their discretion not to make such an order if the order would cause an unjust result or would be contrary to public policy. Where the obligation to perform is a relatively simple act, such as to sign a particular contract, the courts will readily grant an order for specific performance. As a general rule, however, the courts will not grant an order where it could work great hardship on the defaulting party or the public at large.

3 This question asks candidates to discuss the essentials of a partnership. The essentials relate to those features which are unique to the partnership agreement and which distinguish it from other types of agreements.

(a) Contribution

Each partner must make a contribution to the partnership or give a binding undertaking to make a contribution. The contribution may, for instance, be money, corporeal or incorporeal things (for instance copyright), expertise or labour. A contribution can also consist of a combination of different types of contributions, for example labour and money. There is no specific restriction on the type of contribution that must be delivered as long as it has commercial value. The nature of the contributions may also differ from partner to partner. The contribution must be exposed to the risk of the undertaking. If a person makes a contribution on condition that it will be returned to him even if the enterprise fails, that contribution will not meet the requirement of the essentials.

(b) Profit as object

The main object of the parties must be to procure patrimonial benefit. This benefit is usually referred to as 'profit'. Patrimonial benefit, however, is much wider than the narrow accounting definition of 'profit', because it also includes the avoidance of a financial loss or the reduction of expenses. If the parties to the enterprise are not interested in making a profit but have another objective, such as the advancement of culture or sport, no partnership is formed.

(c) Business to be carried on for joint benefit

The nature and extent of the business which a partnership can carry on is widely divergent. A partnership may, for instance, be aimed at the completion of a single transaction, for example a specific building project. After completion of that project the partnership usually dissolves, unless the partners agree to the contrary.

Each partner must be entitled to procure patrimonial benefit from the partnership. If the agreement is concluded on the basis that the profit will accrue exclusively to some of the parties to the contract or that some of the parties will be wholly excluded from profit sharing, the relationship does not constitute a partnership. A partnership can also not be established on the basis that one party is to receive all the profits while the other parties have to bear all the losses. However, this requirement does not imply that the partners must receive equal shares in the profit. A disproportionate division is valid, as is an agreement that a party will only share in the profit if the net profit exceeds a stipulated profit margin.

4 This question requires candidates to discuss the fiduciary duties and duties of care and skill that members of close companies owe their companies. Members of a close company often stand in a close relationship towards each other and may then in this respect be akin to partners. However, they owe their fiduciary duties to the company as a separate legal *persona* and not to each other as in the case of partners. The Companies Act 2003 gives an overview of the fiduciary duties of members of close company.

The Companies Act 2003 sets out to define some of these fiduciary duties of members 'without prejudice to the generality of the expression *fiduciary relationship*' (s.264 (2)). These provisions are based largely on the principles enunciated by the courts over the years in relation to the fiduciary duties of directors. In terms of s.264 (2) of the Act, every member is bound to render to every other member full information of all things affecting the company. Every member of a close company must account to the company for any benefit derived by him without the consent of the other members from any transaction concerning the company or from any use by him of the company's property, name or business connection. Where a member of a close company, without the consent of the other members, directly carries on any business of the same nature as, and competing with, that of the company he must account for and pay over to the company all profits made by him in that business.

Section 267 of the Companies Act 2003 establishes the duty of members of close companies to act with due care and skill. A member is accordingly liable to the corporation for loss caused by his failure to carry on the business with the degree of care and skill that may reasonably be expected from a person of his knowledge and experience. Two aspects should be noted in particular. Firstly, it is a requirement that *loss to the company* must be proven. This is not a requirement for liability in terms of s.264 of the Act. Secondly, the person will only be liable if he did not act with the 'degree of care and skill that may reasonably be expected from a person of his knowledge and experience'. This requirement introduces an element of subjective (personal) judgement which means that members would only be liable for a breach of this duty in exceptional cases. Breaches of this duty may be ratified by the written approval of all the members where they are cognizant of all the material facts: s.267 (2).

5 This question requires candidates to consider two alternative categories of company: those limited by guarantee and those limited by shares. In this context, liability refers to the extent to which shareholders in companies are responsible for the debts of their companies and limited liability indicates that a limit has been placed on such liability. The point is that the limitation on liability is enjoyed by the member shareholders rather than the company.

As will be considered further below, one of the major advantages of forming a company is limited liability. Companies can, however, be formed without limited liability (*Salomon* v *Salomon* & *Co* (1897); Companies Act 2003, s.91). Such companies are incorporated and receive all the benefits that flow from incorporation except limited liability. Consequently the shareholders in such unlimited companies remain liable to the full extent of their personal wealth for any unpaid debt of the company. It should be noted that, in line with the doctrine of separate personality, even in the case of unlimited companies any subsequent debt is owed to the company and not directly to the creditors of the company (*Salomon* v *Salomon* & *Co* (1897); Companies Act 2003, s.91). The compensating benefit enjoyed by such companies is that they do not have to submit their accounts and make them available for public inspection.

The great majority of companies, however, are limited liability companies. This means that the maximum liability of shareholders is fixed and cannot be increased without their agreement. There are two ways of establishing limited liability. One such is the company limited by guarantee. This type of limited liability is usually restricted to no-trading enterprises such as charities and professional and educational bodies. It limits the shareholders' liability to an agreed amount which is only called on if the company cannot pay its debts on being wound up. In reality, the sum guaranteed is usually a nominal sum, so no real risk is involved on the part of the guarantor.

The more common procedure is to limit liability by reference to shares. The effect of this is to limit liability to the amount remaining unpaid on shares held. If the shareholder has paid the full nominal value of the shares to the company, then that is the end of responsibility with regard to company debts. Consequently, if the company should subsequently go into insolvent liquidation the shareholders cannot be required to contribute to its assets in order to pay off its outstanding debts.

6 This question requires candidates to consider the meaning and effect of 'winding up' in 'company law' and can be tackled as follows:

(a) One of the many consequences of incorporation is that a registered company becomes a legal entity in its own right having existence apart from its member shareholders. One of the attributes of this legal personality is that the company has not only separate, but perpetual existence, in that it continues irrespective of changes in its membership. Indeed the company can continue to exist where it has no members at all. Winding up, or liquidation, is the process whereby the life of the company is brought to an end and its assets realised and distributed to its members and/or creditors. The rules governing winding up are detailed in the Companies Act and the exact nature and procedure depends on the type of winding up involved and depends on the solvency of the company at the time liquidation commences.

(b) **(i)** Voluntary winding up

A voluntary winding up, whether it be by members or creditors, is initiated by a special resolution passed by members. The winding up only commences once the resolution has been passed.

Voluntary winding up by members

This takes place when the directors of the company are of the opinion that the company is solvent and is capable of paying off its creditors. Security, to the satisfaction of the Master, for the payment of the debts of the company within a period of not exceeding 12 months from the commencement of the winding up must be furnished before registration of the resolution, unless the Master has dispensed with security (Companies Act 2003, s.409 (1). The Master will only dispense with security if the directors furnish an affidavit that, to the best of their knowledge and belief, and according to the records of the company, the company has no debts (Companies Act 2003, s.409 (2). After registration of the resolution the Master normally appoints the person nominated by the members as liquidator. The powers of the liquidator are the same as in other types of winding up.

Voluntary winding up by creditors

This takes place when the company is insolvent when it is decided to wind it up. The essential difference between the former type of winding up is that, as the name implies, the creditors have an active role to play in overseeing the liquidation of the company. Where a creditors voluntary winding up is envisaged, the directors of the company must make out a statement of the affairs of the company in prescribed form. This is submitted to the general meeting of the company convened for the passing of the winding up resolution. After registration of the resolution, the rest of the proceedings in a winding up by creditors is similar to that of a winding up by the court.

(ii) Compulsory winding up

This is a winding up ordered by the court under s.369. Although the section provides for six distinct grounds for such a winding up the most important is that the company is unable to pay its debts. Section 368 provides that if a company with a debt exceeding P1,000 fails to pay it within three weeks of receiving written demand, then it is deemed to be unable to pay its debts. Section 370 states who may apply to the court to have a company wound up and includes the company itself, members and creditors.

When a company is the subject of a compulsory winding up order no court action can be started or continued against it without the approval of the court. The process of liquidation is in essence the same as that in the case of the insolvency of a natural person.

7 (a) Money laundering is the process by which the proceeds of crime, either money or other property, are converted into assets, which appear to have a legitimate rather than an illegal origin. The aim of the process is to disguise the source of the property, in order to allow the holder to enjoy it free from suspicion as to its source.

The process usually involves three distinct phases:

- placement is the initial disposal of the proceeds of criminal activity into apparently legitimate business activity or property.
- layering involves the transfer of money from business to business, or place to place in order to conceal its initial source.
- integration is the culmination of the previous procedures through which the money takes on the appearance of coming from a legitimate source.

Money laundering was first made a criminal offence in Botswana by the Proceeds of Crime Act 1990.

(b) The Proceeds of Crime Act 1990 seeks to control money laundering by creating three categories of criminal offences in relation to the activity.

- **laundering**

  The first category of principal money laundering offences relates to laundering the proceeds of crime, or assisting in that process.

  It is an offence to conceal, disguise, convert, transfer or remove criminal property from Botswana. Concealing or disguising criminal property is widely defined to include concealing or disguising its nature, source, location, disposition, movement or ownership or any rights connected with it (see Proceeds of Serious Crime Act, s.14).

- **failure to report**

  The second category of offence relates to failing to report a knowledge or suspicion of money laundering.

  It is an offence for a person who knows or suspects that another person is engaged in money laundering not to report the fact to the appropriate authority. However, the offence only relates to individuals, such as accountants who are acting in the course of business in the regulated sector.

- **tipping off**

  The third category of offence relates to tipping off. It is an offence to make a disclosure, which is likely to prejudice any investigation under the Act.

8 This question tests the candidates' understanding of the rules of offer and acceptance.

(a) For the creation of a contract, it is necessary that two or more parties should have reached an agreement, and before this can be done, it is necessary that one party should have stated his terms to the other party and that the second party should have accepted those terms. This process involves an offer and an acceptance.

The offer

The offer is the first requirement in the formation of a contract. An offer is a promise by the offeror to do or abstain from doing something provided that the offeree will accept the offer and pay or promise to pay the price of the offer. An offer contains two ingredients: an intimation of willingness to be bound; and the statement of the price. An offer must be firm and unambiguous.

The first issue therefore is whether Tony's letter to Jimmy is an offer. The letter indicates Tony's willingness to sell *Please Be True* at a price of P7,000·00. The language used is firm, clear and unambiguous. It would appear therefore that Tony's letter amounts to an offer. The offer must be communicated to the offeree before it can be accepted. In the present case, Jimmy received Tony's letter so the offer was effectively communicated to the offeree.

Acceptance

The acceptance of an offer is the act which completes the formation of the contract. Until there is acceptance there is nothing but a revocable offer which binds nobody. After acceptance, there is a complete contract which binds both parties. The acceptance contains two ingredients: the acceptance of the offeror's proposal; and either the promise requested by the offeror, or the performance of the act required.

Acceptance must be absolute and unconditional, and must indicate willingness to contract on the exact terms put by the offeror. Where the promised acceptance adds to the terms of the offer or varies them, that does not amount to a proper acceptance. Such a purported acceptance is known as a counter-offer and thus capable of acceptance. A counter-offer amounts to a rejection of the original offer, which then ceases to be capable of acceptance: *Hyde* v *Wrech* (1840).

The second issue therefore is whether Jimmy's letter amounted to an acceptance. In the letter Jimmy indicated a willingness to buy *Please Be True* but indicated that he was only ready to buy the horse at P5,000·00. Applying the above principles, Jimmy's letter did not amount to an acceptance but a counter-offer. Tony was free to accept this new offer. As a general rule it is essential that an acceptance should be communicated to the offeror, and until so communicated and actually received by the offeror, the contract is incomplete. Therefore, a mere mental intention to accept is not enough. A person cannot be deemed to have accepted an offer merely because he has not expressly rejected it, even where the original offer has stated that acceptance will be presumed unless the offeror indicates to the contrary. In other words, silence does not amount to acceptance: *Felthouse* v *Bindley* (1862). In the present case Tony did not reply to Jimmy's rejection of the original offer terminating that offer. Accordingly Jimmy's telephone call to Tony stating that he was now willing to buy *Please Be True* for P7,000·00 came too late. There was no offer for him to accept and therefore no valid contract came into existence between Tony and Jimmy. Jimmy's action for breach of contract is therefore not likely to succeed.

(b) The answer would not be different if Jimmy had replied inquiring whether Tony 'could not go any lower than P7,000·00'. Such an inquiry would amount to an attempt to re-open negotiations. As stated above, an acceptance must be absolute and unconditional. Tony's inquiry does not meet this criteria and is therefore not an acceptance. There would be no contract between the parties.

9 This question requires candidates to analyse a problem scenario and explain and apply the law relating to directors' contracts with their companies and the law relating to insider dealing.

(a) As a consequence of the position they hold, company directors owe fiduciary duties to their companies. One such duty is *the duty not to permit a conflict of interest and duty to arise*. This equitable rule is strictly applied by the courts and the effects of its operations may be seen in *Regal (Hastings)* v *Gulliver* (1942). In that case the directors of a company owning one cinema provided money for the creation of a subsidiary company to purchase two other cinemas. After the parent and subsidiary companies had been sold at a later date, the directors were required to repay the profit they had made on the sale of their shares in the subsidiary company on the grounds that they had only been in the situation to make that profit because of their positions as directors of the parent company. It is not necessary to prove an actual conflict of interest, merely the possibility of such a conflict, and the rigorous nature of this principle may be seen in *Boardman* v *Phipps* (1967).

One obvious area where directors place themselves in a position involving a conflict of interest is where they have an interest in a contract with the company. The common law position was that in the event of any such situation arising, any contract involved was voidable at the instance of the company (*Aberdeen Rly Co* v *Blaikie* (1854)). Section 135 of the Companies Act 2003 places a duty on directors to declare any interest, direct or indirect, in any contracts with their companies, and provides for a fine if they fail in this regard. A director's disclosure can take the form of a general declaration of interest in a particular company, which is considered sufficient to put the other directors on notice for the future. Any declaration of interest must be made at the board meeting that first considers the contract, or if the director becomes interested in the contract after that, at the first meeting thereafter.

Applying the above to the problem scenario, it appears that Thembi did not declare her interest in either, Savuti Ltd generally, or the particular contract in question. Okavango Ltd could have avoided the contract had they found out earlier and acted sooner, but in any case Thembi can be held liable to account to Okavango Ltd for any profit she made on the deal. Thembi will also be liable to prosecution and a fine under s.135 (5) of the Companies Act 2003.

(b) Dealing in shares, on the basis of access to unpublished price sensitive information, provides the basis for what is referred to as 'insider dealing' and is governed by s.324 of the Companies Act 2003.

Section 324 (1) of the Companies Act 2003 provides that any person who, whether directly or indirectly, **knowingly** deals in a company security on the basis of unpublished price sensitive information in respect of that security commits an offence if such person knows that such information has been obtained by virtue of a relationship of trust or any other contractual relationship, whether or not the person concerned is a party to that relationship, or through espionage, theft, bribery, fraud, misrepresentation or any other wrongful method, irrespective of the nature thereof. Such a person is liable on conviction to a fine not exceeding P100,000·00 or to imprisonment for a term not exceeding two years.

Section 324 (2) defines 'unpublished price sensitive information' in respect of a security as information which:

(i) relates to matters in respect of the internal affairs of a company or its operations, assets, earning power or involvement as offeror or offeree company in an affected transaction;

(ii) is not generally available to the reasonable investor in the relevant market for that security; and

(iii) would reasonably be expected to affect materially the price of such security if it were generally available.

Applying the general law to the problem scenario, one can conclude that Thembi is an 'insider' as she receives inside information as a result of her position as a director of Okavango Ltd. The information is unpublished price sensitive information. On that basis Thembi is clearly guilty of an offence under s.324 when she buys the additional shares in Okavango Ltd.

She is also in breach of her fiduciary duty to the company and Okavango Ltd can require her to account for the profit she made on the share deal.

10 This question tests the candidates' understanding of the rules that govern dismissal in employment law.

(a) Where an employer dismisses an employee without notice, this amounts to summary dismissal. He may do this if the employee has committed a serious act of misconduct and if so will incur no liability. If, however, he has no sufficient justification, he will be liable for breach of contract and the employee may claim a remedy for wrongful dismissal. Wrongful dismissal is a statutory remedy which is pursued by means of an action for compensation in the Industrial Court. It is a remedy available to any employee, regardless of length of service. Wrongful (or unfair) dismissal is a concept created by industrial relations legislation and is an extremely important element of modern employment protection legislation. There are three remedies available: compensation, reinstatement and any other suitable remedy. In considering a claim for wrongful (or unfair) dismissal, the Industrial Court will also consider whether the employer acted with procedural fairness, which means that the employer should hold a fair disciplinary hearing before deciding to dismiss the employee.

An employer is only justified in summarily dismissing an employee if the employee is guilty of serious misconduct. The following are justifiable circumstances.

(i) *Wilful disobedience* of a lawful order if it amounts to wilful and serious defiance of authority. An isolated incident of wilful disobedience need not disturb a long-term working relationship: *Laws* v *London Chronicle* (1957).

(ii) *Misconduct* in connection with the business, or outside it, if it is sufficiently grave. Examples would include acceptance of a secret commission and disclosure of confidential information.

(iii) *Incompetence* or neglect, insofar as the employee lacks or fails to use skill which he professes to have.

(iv) *Other* circumstances including dishonesty, gross negligence, and drunkenness.

It seems likely that both Morena and Kgabo will succeed in an action for wrongful dismissal: both men have clean driving records and the accidents are minor ones.

The maximum compensation for wrongful dismissal which may be awarded by the Industrial Court is six months' salary. It appears that in this case Sonic Coach Tours Ltd held no disciplinary hearings before dismissing the two employees. Since the dismissals are both substantively and procedurally unfair, the Industrial Court may award the maximum compensation.

(b) If both employees had been defrauding the company of fares paid by passengers, their dismissals may be regarded as substantively fair because theft is an act of serious misconduct in terms of s.26 (4) of the Employment Act. However, it is again necessary for the company to hold a fair disciplinary hearing before dismissing either employee.

In deciding whether dismissal is the appropriate penalty for theft, the company may take into account Kgabo's ten years' length of service and decide that a lesser penalty is more appropriate if for example, the theft is of a minor nature.

1 This question requires candidates to consider the doctrine of precedent and in particular to explain particular terms operative within that doctrine.

(a) 3–5 A thorough, to complete answer, explaining the meaning of the two terms.

0–2 A less than complete answer, probably unbalanced, focusing only on one of the terms, or lacking in detail.

(b) 3–5 A thorough answer demonstrating a clear understanding of the three terms.

0–2 A less than complete answer, probably unbalanced, focusing only on one or two of the terms, or lacking in detail.

2 This question requires candidates to show understanding of what is meant by breach generally and repudiation in particular. In demonstrating such understanding candidates will be required to consider the consequences of such a breach of contract.

8–10 A thorough explanation of the concept providing cases or example by way of explanation.

5–7 A clear understanding of what is meant by repudiation but lacking in the detail expected of the very best answers.

2–4 Some understanding of repudiation, but confused or lacking in explanation as to meaning or effect.

0–1 No real understanding of the meaning of the term.

3 This question invites candidates to discuss the *essentialia* of a partnership. It is very straightforward and there is very little room for ambiguity.

8–10 Answers will show a thorough knowledge and provide a detailed explanation of all parts of the question.

5–7 A sound answer but lacking in the detail or thoroughness of the very best answers.

2–4 Some knowledge of the *essentialia* of a partnership but lacking in specific points.

0–1 Very little or no knowledge about partnerships.

4 This question requires candidates to explain what is meant by the terms fiduciary duties and duties of care and skill as it applies to members of a close company.

6–10 Answers will demonstrate a thorough knowledge of the area. For the very highest marks, all the duties will have to be considered with ample reference to the provisions of the Companies Act 2003.

0–5 Limited understanding of the nature of the question and/or unbalanced treatment of the topic.

5 **(a)** 3–5 Thorough knowledge of companies limited by guarantee. What they are, where they are used and the nature of liability.

0–2 Little if any knowledge of the operation of companies limited by guarantee.

(b) 3–5 For a thorough explanation of liability limited by reference to the amount unpaid on shares and how it operates.

0–2 Little if any knowledge of how limited liability operates.

6 This question requires candidates to explain what is meant by winding up generally before going on to consider the two specific terms of winding up.

(a) 2 marks are available for explaining what is meant by winding up generally and will be awarded *pro rata* with regard to clarity and understanding.

(b) **(i)** 2–4 Clear explanation of voluntary liquidation.

0–2 Lacking in knowledge or clarity or unbalanced.

(ii) 2–4 Good explanation of compulsory winding up.

0–1 Little if any knowledge.

7 This question requires a general explanation of the meaning of money laundering together with a consideration of the way in which the Proceeds of Crime Act 1990 seeks to control it.

(a) 3–5 A clear and accurate explanation of the term money laundering.

0–2 Fair explanation of the term but lacking in detail.

(b) 3–5 Good explanation of the offences under the Act.

0–2 Fair explanation but lacking in detail.

8 The first part of this question carries 7 marks. The second part carries 3 marks. Answers at the top of the band in the respective parts of the question will show excellent command of the rules and principles that govern offer and acceptance in the law of contract and will accurately state the principles and resolve the issues. Answers at the bottom of the bank show little knowledge or understanding; major errors, gaps or omissions.

9 This question requires candidates to analyse a problem scenario and explain the law relating to directors' contracts with their companies and the law relating to insider dealing.

(a) 3–5 A good analysis of the scenario with a clear explanation of the law relating to contracts between directors and their companies, both at common law and under statute. Cases and/or references to the Companies Act 2003 will be provided.

0–2 Weak answer lacking in knowledge or application, with little or no reference to the Companies Act 2003.

(b) 3–5 A good analysis of the scenario with a clear explanation of the law relating to insider dealing. Appropriate reference to the Companies Act 2003 will be provided.

0–2 Weak answer lacking in knowledge or application, with little or no reference to the legislation.

10 The question is split into two parts worth 7 and 3 marks respectively. Answers at the top of the band in each part of the question will show good understanding of the matters tested and will be able to state accurately the applicable legal rules.

Weak answers will show little understanding or knowledge, perhaps with major errors, omissions or inaccuracies.