Answers

1 (a) (i) Primary legislation

Legislation refers to law that has been created by the legislative body within a constitution. In the United Kingdom that body is Parliament, constituted by both the House of Commons and the House of Lords and Bills have to be considered in, and approved by, both houses before they become law, subsequent to the formality of its receiving royal approval. Under UK constitutional law, it is recognised that Parliament has the power to enact, revoke or alter such, and any, law as it sees fit. Even the Human Rights Act (HRA) 1998 reaffirms this fact in its recognition of the power of Parliament to make primary legislation that is incompatible with the rights provided under the European Convention on Human Rights (ECHR). Such primary legislation takes the form of Acts of Parliament; however, the role of delegated or secondary legislation, as a source of law, should not be underestimated.

Contemporary practice has seen the reduction of general and definitive Acts of Parliament that attempt to lay down detailed provisions covering every perceived possibility. Instead, the modern form of legislation tends to be of the enabling type, which simply states the general purpose and aims of the Act. Such Acts merely lay down a broad framework, whilst delegating to ministers of state the power to produce detailed provisions designed to achieve those general aims through secondary, delegated legislation.

(ii) Delegated (secondary) legislation

Generally speaking, delegated legislation is law made by some person or body to whom Parliament has delegated its general law-making power. A validly enacted piece of delegated legislation has the same legal force and effect as the Act of Parliament under which it is enacted.

Thus delegated legislation is law made by some person, or body, to whom Parliament has delegated its general law-making power. The output of delegated legislation in any year greatly exceeds the output of Acts of Parliament and, therefore, at least statistically it could be argued that delegated legislation is actually more significant than primary Acts of Parliament.

There are various types of delegated legislation including:

(i) *Orders in Council* permit the government, through the Privy Council to make law without the need to go through the full parliamentary process.

(ii) *Statutory Instruments* are the means through which government ministers introduce particular regulations under powers delegated to them by parliament in enabling legislation.

(iii) *Bye-laws* are the means through which local authorities and other public bodies can make legally binding rules and may be made under such enabling legislation as the Local Government Act (1972).

The use of delegated legislation has advantages over primary legislation:

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

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

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

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

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

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

(b) Judicial control of legislation

Section 4 HRA 1998 expressly retains the principle of parliamentary sovereignty in stating that the courts cannot declare primary legislation invalid as being contrary to the rights protected by the Act. The only way the courts can challenge such legislation is by issuing a declaration of incompatibility in such circumstances (*Bellinger* v *Bellinger* (2003)). It is then for Parliament to act on such a declaration to remedy any shortcoming in the law if it so wishes (the *Bellinger* case led to the enactment of the Gender Recognition Act 2004). However, such limitation does not apply to secondary legislation, which the courts can now declare invalid on the grounds of not being compatible with the HRA.

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

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

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

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

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

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

The principal remedies for breach of contract are:

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

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

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

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

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

Under the second part of the rule, however, the party in breach can only be held liable for abnormal consequences where they have actual knowledge that the abnormal consequences might follow. Thus in *Victoria Laundry Ltd* v *Newham Industries Ltd* (1949) the plaintiff was able to claim for damages with respect to the normal profits, but could not claim abnormal profits which would have resulted from an especially lucrative contract, which the defendant knew nothing about.

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

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

It is possible, and common in business contracts, for the parties to an agreement to make provisions for possible breach by stating in advance the amount of damages that will have to be paid in the event of any breach occurring. Damages under such a provision are known as liquidated damages. They will only be recognised by the court if they represent a genuine pre-estimate of loss, and are not intended to operate as a penalty against the party in breach (*Dunlop* v *New Garage & Motor Co* (1915)).

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

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

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

(i) specific performance will only be granted in cases where the common law remedy of damages is inadequate. It is most commonly granted in cases involving the sale of land, where the subject matter of the contract is unique.

(ii) specific performance will not be granted where the court cannot supervise its enforcement. For this reason it will not be available in respect of contracts of employment or personal service (*Ryan* v *Mutual Tontine Westminster Chambers Association* (1893)).

(iii) specific performance, as an equitable remedy, will not be granted where the plaintiffs themselves have not acted properly.

Injunction

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

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

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

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

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

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

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

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

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

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

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

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

In the UK there was no statutory requirement as to pre-emption rights before the European Community second company law directive (77/91) made it necessary for the law of the UK to be changed to introduce such rights.

Currently, by virtue of s.561 Companies Act (CA) 2006, a company cannot offer new shares for cash unless the existing shareholders have been offered the chance to buy the shares in proportion to their existing holding. Section 565 specifically exempts pre-emption rights where non-cash consideration is involved.

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

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

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

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

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

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

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

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

Register of members. Under s.113 Companies Act (CA) 2006 every company is under the obligation to keep a register of its members and to include the following information in that register: the names and addresses of the members, the date on which each person was registered as a member and the date at which any person ceased to be a member. It must also indicate the number and class of shares held and the amount paid on those shares.

Registers of directors and secretaries. This requirement is set out in the CA 2006, ss.162–165 for directors and ss.275–278 for company secretaries. Section 163 sets out the details that have to be included in relation to directors and includes their present and former names, date of birth, nationality, a service address which need not be the home address of the director, and occupation. Under s.165 the company must keep a separate register of directors' residential addresses, but this is not open to either ordinary members of the company or members of the public.

Register of charges. Section 876 CA 2006 requires all limited companies to keep a register of all fixed charges affecting the property of the company and all floating charges on the undertaking or property of the company. Such registers must contain a short description of the property, which has been charged, the amount of the charge and the names of the persons who hold it. Companies are not required to maintain a separate register of debenture holders but where they do maintain such a register it shall be open to inspection (CA s.743).

Register of interests in shares. This register is required under s.808 and relates to interests of a substantial nature in the voting shares of public limited companies. The level is currently set at 3%.

In addition to the registers, companies also keep records of directors' service contracts and indemnities, and records of resolutions and meetings of the company.

(b) *Accounting records*
Section 386 CA 2006 requires every company to keep accounting records and sets out what those records should be designed to achieve. They must be sufficient to

– show and explain the company's transactions, disclosing with reasonable accuracy, at any time, the financial position of the company at intervals of not more than six months;
– enable the directors to ensure that any accounts required to be prepared comply with the CA and International Accounting standards.

In particular the accounting records must contain:

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

Under CA s.394 a company's directors must prepare accounts for each accounting reference period, usually 12 months. These accounts must include a balance sheet and a profit and loss account (s.396) and must show a true and fair view of the company's state of affairs.

Accounting records must be kept for a period of three years for private companies and six years for public companies.

6 The Companies Act (CA) 2006 sets out a new statutory statement of seven general duties owed by directors to their companies as follows:

– *Duty to act within their powers*
Section 171 CA replaces existing similar common law duties and requires directors to act in accordance with the company's constitution. Section 17 of the Act provides that a company's constitution includes not only the company's articles of association but the resolutions and agreements specified in s.29, which includes special resolutions passed by the company and any resolutions or agreements that have been agreed to, or which otherwise bind classes of shareholders.

Directors are also required to use powers only for the purposes for which they were conferred. This is a restatement of the long-standing 'proper purposes doctrine'.

– *Duty to promote the success of the company for the benefit of members as a whole*
Section 172 CA 2006 replaces the previous common law duty on directors to act in good faith in the best interests of the company. In the course of making their decisions under Part 1 of the section, then, directors are now required to have regard to each of the following list of matters:

– the likely consequences of any decision in the long term,
– the interests of the company's employees,
– the need to foster the company's business relationships with suppliers, customers and others,
– the impact of the company's operations on the community and the environment,
– the desirability of the company maintaining a reputation for high standards of business conduct, and
– the need to act fairly as between members of the company.

The above list is non-exhaustive and directors must also have regard to other non-specific matters.

– *Duty to exercise independent judgement*
This duty, stated in s.173 CA 2006, reflects the previous rule prohibiting directors from fettering their discretion unless acting in accordance with an agreement duly approved by the company.

– *Duty to exercise reasonable skill, care and diligence*
Section 174 CA 2006 codifies and replaces the previous common law duty but in a way that reflects the recent tightening of control over directors in line with the standard set out in relation to wrongful trading in the Insolvency Act 1986, s.214.

– *Duty to avoid conflicts of interest*
Section 175 CA 2006 reflects the long-standing common law rule that directors, as fiduciaries, must respect the trust and confidence placed in them and should do nothing to undermine or abuse their position as fiduciaries. The practical effect of the rule is that any conflict of interest must be authorised by the members of the company, unless some alternative procedure is properly provided. In the case of a private company, a conflict can be authorised by the other directors of the board unless the company's constitution provides to the contrary. The position is the same for public companies, except that the constitution must expressly permit authorisation by the board.

– *Duty not to accept benefits from third parties*
Under s.176, a director must not accept a benefit from a third party, which is conferred by reason of (a) his being a director or (b) his doing (or not doing) anything as director. This duty is an aspect of the previous general duty to avoid conflicts of interest, but it has been stated separately in order to ensure that the obtaining of a benefit from a third party by a director can only be authorised by members of the company rather than by the board.

– *Duty to declare to the company's other directors any interest a director has in a proposed transaction or arrangement with the company*
Under s.177 CA 2006 a director must declare to the other directors any situation in which they are in any way, directly or indirectly, interested in a proposed transaction or arrangement with the company. Again this further emphasises the duty to avoid a conflict of interests by ensuring that directors are transparent about personal interests, which could, even remotely, be seen as affecting their judgement.

7 **(a)** Under the Employment Rights Act (ERA) 1996 employees have a right not to be unfairly dismissed. A number of situations are considered automatically to be unfair, however, once the employee has to show that they have been dismissed the onus is placed on the employer to show that they acted reasonably in dismissing them for a potentially fair reason within s.98 ERA.

The following are situations where dismissal is automatically unfair:

(i) Dismissal for trade union reasons. This applies where an employee has been dismissed for actual, or proposed, membership of a trade union, or is dismissed for taking part in trade union activities. It also applies where an individual has refused to join a trade union.
(ii) Dismissal on grounds of pregnancy or childbirth or other reason connected to her pregnancy or following her maternity leave period.
(iii) Dismissal in relation to health and safety issues, such as bringing to the employer's attention any reasonable concern related to health and safety matters or leaving their place of work in the face of a reasonably held belief that they faced serious danger.
(iv) Dismissal for making a protected disclosure to the appropriate authorities. This action, otherwise known as 'whistle blowing', covers criminal activity, breach of legal obligations, breach of health and safety provisions, and activity damaging to the environment on the part of the employer.
(v) Dismissal for asserting a statutory right governing such aspects of employment as the length of working time or minimum wage payment.

On the other hand, the following five categories may be counted as fair:

(i) Lack of capability or qualifications. However, even in this situation, the employer must show that not only was the employee incompetent but that it was reasonable to dismiss them.
(ii) Misconduct. Any such behaviour must be sufficient seriousness to merit the description 'gross misconduct'. Examples of such conduct might involve assault, drunkenness, dishonesty or a failure to follow instructions, or safety procedures, or persistent lateness.
(iii) Redundancy is a *prima facie*, a fair reason for dismissal as long as the employer has acted reasonably in introducing the redundancy programme.
(iv) In situations where continued employment would constitute a breach of a statutory provision, for example, if a driver is banned from driving then they may be fairly dismissed.
(v) Some other substantial reason such as a clash of personalities. This final general provision means that it is not possible to provide an exhaustive list of all grounds for 'fair dismissal'. However, none of the above reasons are sufficient in themselves to justify dismissal and under all instances the employer must act as would be expected of a 'reasonable employer'.

(b) In relation to a successful claim for unfair dismissal, an Employment Tribunal may award any one of the following remedies:

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

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

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

The calculation of a *basic* award of compensation is calculated in the same way as for redundancy payments and is subject to the same maximum level of payment. The actual figures are calculated on the basis of the person's age, length of continuous service and weekly rate of pay subject to statutory maxima. Thus employees between the ages of 18 and 21 are entitled to ½ week's pay for each year of service, those between 22 and 40 are entitled to 1 week's pay for every year of service, and those between 41 and 65 are entitled to 1½ weeks' pay for every year of service. The maximum number of years service that can be claimed is 20 and as the maximum level of pay that can be claimed is £350, the maximum total that can be claimed is £10,500, (i.e. 1·5 x 20 x 350).

In addition, however, a *compensatory* award of up to £66,200 may be made at the discretion of the tribunal and an *additional* award of up to £18,200 may be made where the employer ignores an order for re-employment or re-engagement, or the reason for dismissal was unlawful discrimination.

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

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

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

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

It should be emphasised, however, that the presumption against the intention to create legal relations in such relationships is only that, a presumption and that, as with all presumptions, it may be rebutted by the actual facts and circumstances of a particular case as may be seen in *Merritt* v *Merritt* (1970). After a husband had left the matrimonial home, he met his wife and promised to pay her £40 per month, from which she undertook to pay the outstanding mortgage on their house. The husband, at the wife's insistence, signed a note agreeing to transfer the house into the wife's sole name when the mortgage was paid off. The wife paid off the mortgage but the husband refused to transfer the house. It was held that the agreement was enforceable as in the circumstances the parties had clearly intended to enter into a legally enforceable agreement.

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

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

As with other presumptions, this one is open to rebuttal. In commercial situations, however, the presumption is so strong that it will usually take express wording to the contrary to avoid its operation. An example can be found in *Rose and Frank Co* v *Crompton Bros* (1925) in which it was held that an express clause stating that no legal relations were to be created by a business transaction was effective.

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

Amy and Ben
Although they are brother and sister it is clear from the facts of the situation that they entered into a business relationship with regard to the provision of the updating of the web site. Amy was to do the work for Ben's business and Ben was expected to, and indeed agreed to pay £1,000. In such circumstances there was a clear intention to create legal relations and Ben cannot avoid his liability to pay Amy on the basis of their familial relationship. He may have wanted to help his sister, but he did so by entering into a business contract with her; one which she can enforce against him.

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

9 **(a)** Dividends are the return received by shareholders in respect of their investment in a company. Subject to any restriction in the articles of association, every company has the implied power to apply its profits in the distribution of dividend payments to its shareholders. The long-standing common law rule is that dividends must not be paid out of capital (*Flitcroft's case* 1882). The current rules relating to the payment of dividends are to be found in part 23 Companies Act (CA) 2006. The Act governs, and imposes restrictions on distributions made by all companies, both public and private. Section 829 defines distribution as **any** payment, cash or otherwise, of a company's assets to its members, except for the categories stated in the section, which include the issue of bonus shares, the redemption of shares, authorised reductions of share capital, and the distribution of assets on winding up.

Section 830 goes on to provide the basic condition for distribution, applying to **all** companies, which, in essence, is that they must have 'profits available for that purpose'. This term is defined in the section as accumulated realised profits less accumulated realised losses, with profit or loss being either revenue or capital in origin.

It is important to note that the use of the term accumulated means that any previous years' losses must be included in determining the distributable surplus, and that the requirement that profits be realised prevents payment from purely paper profit resulting from the mere revaluation of assets. Section 841 provides that all losses are to be treated as realised except where a general revaluation of all fixed assets has taken place.

The foregoing realised profits test applies to both private and public companies, but public companies face an additional test in relation to distributions, in that s.831 requires that any distribution must not reduce the value of the company's net assets below the aggregate of its total called up share capital plus any undistributable reserves. The effect of this rule is that public companies have to account for changes in the value of their fixed assets, and are required to apply an essentially balance-sheet approach to the determination of profits.

(b) Under the rule in *Flitcroft's case* any directors of a company who breached the distribution rules, and knowingly paid dividends out of capital, were held jointly and severally liable to the company to replace any such payments made. The fact that the shareholders might have approved the distribution did not validate the illegal payment (*Aveling Barford Ltd* v *Perion Ltd* (1989)). Also at common law shareholders who knowingly received, or ought to have known that they had received an unlawful dividend payment were required to repay the money received, or to indemnify the directors for payments they might have already been required to have made (*Moxham* v *Grant* (1900)). Section 847 Companies Act 2006 restates the common law rule, providing that shareholders, who either know or have reasonable grounds for knowing that any dividend was paid from capital, shall be liable to repay any such money received to the company.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) 3–4 marks A thorough answer dealing with the powers of the courts in relation to legislation. For full marks reference should be made to the Human Rights Act 1998 and judicial review.

1–2 marks Some, but limited knowledge.

0 marks No knowledge whatsoever.

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

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

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

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

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

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

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

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

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

0 marks No knowledge of the topic.

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

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

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

0 marks No knowledge of the topic.

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

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

0 marks No knowledge of the topic.

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

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

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

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

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

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

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

4 marks A very good answer, not only detailing the main registers, but explaining their purpose.

2–3 marks A fair to good answer but perhaps unbalanced or lacking in detail.

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

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

4–6 marks A very good answer, explaining in some detail the various accounts required to be maintained by companies.

2– 3 marks A fair to good answer but perhaps unbalanced or lacking in detail.

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

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

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

8–10 marks Clear explanation of all or at least most of the duties.

5–7 marks Fair knowledge of the duties, but perhaps lacking in detailed explanation.

2–4 marks Some knowledge of the duties, perhaps merely dealing with one or two elements of the answer.

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

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

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

4–6 marks A clear, concise explanation perhaps citing cases or examples.

2–3 marks A clear understanding, but perhaps lacking authority or examples.

0–1 marks Unbalanced, or may not deal with all of the required aspects of the topic. Alternatively the answer will demonstrate very little understanding of what is actually meant by unfair dismissal.

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

3–4 marks Thorough to complete answers, showing a detailed understanding of all or certainly most of the remedies available.

1–2 marks A clear understanding of the remedies, but perhaps lacking in detail.

0 marks No knowledge of the topic whatsoever.

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

8–10 marks A very good answer revealing a thorough to complete understanding of the rules relating to intention to create legal relations, together with the ability to apply them accurately. It is very likely that cases will be referred to, although appropriate examples will be recognised.

5–7 marks A good answer but perhaps unfocused or lacking in detail as to the specifics of the appropriate law.

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

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

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

8–10 marks A thorough understanding of law relating to dividends as it applies specifically to public companies. Cases may well be cited and will be credited.

5–7 marks A clear understanding of the general law but perhaps lacking in detail or application.

2–4 marks Some, but limited, understanding of the law and poor application.

0–1 mark Little or no knowledge of the topic.

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

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