Answers

1 (a) Criminal law relates to conduct which the State considers with disapproval and which it seeks to control. Criminal law involves the *enforcement* of particular forms of behaviour, and the State, as the representative of society, acts positively to ensure compliance. Thus, criminal cases are brought by the State in the name of the Crown and cases are reported in the form of *Regina* v … (*Regina* is simply Latin for 'queen' and case references are usually abbreviated to *R* v ...). In criminal law the prosecutor prosecutes a defendant (or 'the accused') and is required to prove that the defendant is guilty *beyond reasonable doubt*. The Companies Act (CA) 2006 sets out many potential criminal offences, which may be committed by either the company itself, or its officers or other individuals. An example of this which may be cited is s.993, which relates to the criminal offence of fraudulent trading and applies to any person, not just directors or members, who is knowingly a party to the carrying on of a business with the intent to defraud creditors. The potential penalty on conviction is imprisonment for a maximum period of 10 years, or a fine or both.

Civil law, on the other hand, is a form of private law and involves the relationships between individual citizens. It is the legal mechanism through which individuals can assert claims against others and have those rights adjudicated and enforced. The purpose of civil law is to settle disputes between individuals and to provide remedies; it is not concerned with punishment as such. The role of the State in relation to civil law is to establish the general framework of legal rules and to provide the legal institutions to operate those rights, but the activation of the civil law is strictly a matter for the individuals concerned. Contract, tort and property law are generally aspects of civil law.

Civil cases are referred to by the names of the parties involved in the dispute, for example, *Smith* v *Jones*. In civil law, a claimant sues (or 'brings a claim against') a defendant and the degree of proof is on the *balance of probabilities*. In relation to the CA 2006, the duties owed to companies by directors set out in ss.171–177 may be cited as examples of civil liability, and directors in breach are liable to recompense the company for the consequences of their failure to comply with those duties, as is set out in s.178.

In distinguishing between criminal and civil actions, it has to be remembered that the same event may give rise to both. For example, where the driver of a car injures someone through their reckless driving, they will be liable to be prosecuted under the Road Traffic legislation, but at the same time, they will also be responsible to the injured party in the civil law relating to the tort of negligence. Similarly, a director may fall foul of both the criminal regulation of fraudulent trading (CA s.993) as well as breaching their duty to the company under one of the provisions of CA ss.171–177.

(b) The essential criminal trial courts are the magistrates' courts and Crown Courts. In serious offences, known as *indictable offences*, the defendant is tried by a judge and jury in a Crown Court. For less serious offences, known as *summary offences*, the defendant is tried by magistrates; and for 'either way' offences, the defendant can be tried by magistrates if they agree, but he may elect for jury trial.

Criminal appeals from the magistrates go to the Crown Court or to the Queen's Bench Division (QBD) Divisional Court 'by way of case stated' on a point of law or that the magistrates went beyond their proper powers.

Magistrates' courts have a significant civil jurisdiction, especially under the Children Act 1989 as 'family proceedings courts', but the main civil courts are the county court and the High Court.

There are about 220 county courts in England and Wales. They are presided over by district judges and circuit judges. County courts hear small claims, that is, those whose value is £5,000 or under, and fast track cases.

The High Court is divided into three divisions. The QBD deals with contract and tort. Chancery deals with cases involving land, mortgages, bankruptcy and probate. The Family Division hears matrimonial and child related matters and its Divisional Court hears appeals from magistrates' courts and county courts on these issues. Appeal is to the Court of Appeal and then to the Supreme Court on a significant point of law.

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 if 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) There are a number of ways in which an offer can come to an end and, as a result, no longer be open to acceptance. These are as follows:

(i) Rejection of offers
Express rejection of an offer has the effect of terminating the offer. Once rejected the offeree cannot subsequently retract and accept the original offer. A counter-offer, where the offeree tries to change the terms of the offer, has the same effect (*Hyde* v *Wrench* (1840)).

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 (*Stevenson* v *McLean* (1880)).

(ii) Revocation of offers
Revocation, the technical term for cancellation, occurs when the offeror withdraws their offer. There are a number of points that have to be borne in mind in relation to revocation, as follows:

– An offer may be revoked at any time before acceptance
Once revoked, it is no longer open to the offeree to accept the original offer (*Routledge* v *Grant* (1828)). The corollary of this point is, of course, that once the offer is accepted it cannot subsequently be withdrawn.

– Revocation is not effective until it is actually received by the offeree
This means that the offeror must make sure that the offeree is made aware of the withdrawal of the offer; otherwise it might still be open to the offeree to accept the offer. This applies equally when the offeror uses the post to withdraw the offer, as the postal rule does not apply in relation to the withdrawal of offers (*Byrne* v *Van Tienhoven* (1880)).

– Communication of revocation may be made through a reliable third party
Where the offeree finds out about the withdrawal of the offer from a reliable third party, the revocation is effective and the offeree can no longer seek to accept the original offer (*Dickinson* v *Dodds* (1876)).

– A promise to keep an offer open is only binding where there is a separate contract to that effect
This is known as an *option contract*, and the offeree/promisee must provide consideration for the promise to keep the offer open. If the offeree does not provide any consideration for the offer to be kept open, then the original offeror is at liberty to withdraw the offer at any time (*Routledge* v *Grant* above).

– In relation to unilateral contracts, revocation is not permissible once the offeree has started performing the task requested
A unilateral contract is one where one party promises something in return for some action on the part of another party. Rewards for finding lost property are examples of such unilateral promises. There is no compulsion placed on the party undertaking the action, but it would be unfair if the promisor were entitled to revoke their offer just before the offeree was about to complete their part of the contract (*Errington* v *Errington and Woods* (1952)).

(iii) Lapse of offers
Offers lapse and are no longer capable of acceptance in the following circumstances:

– At the end of a stated period
It is possible for the parties to agree, or for the offeror to set, a time limit within which acceptance has to take place. If the offeree has not accepted the offer within that period, the offer lapses and can no longer be accepted.

– After a reasonable time
Where no time limit is set, then an offer will lapse after the passage of a reasonable time. What amounts to a reasonable time is, of course, dependent upon the particular circumstances of each case.

– Where the offeree dies
This automatically brings the offer to a close.

– Where the offeror dies and the contract was one of a personal nature
In such circumstances, the offer automatically comes to an end, but the outcome is less certain in relation to contracts that are not of a personal nature (*Bradbury* v *Morgan* (1862)).

3 **(a)** The tort of negligence is based on the idea that people owe a duty of care to each other, but such a duty is not absolute and the law does not require unreasonable steps to be taken to avoid breaching that duty of care. In legal terms a breach of duty of care occurs if the defendant fails:

'… to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do; or doing something which a prudent and reasonable man would not do.' (*Blyth* v *Birmingham Waterworks Co* (1856))

Thus the fact that the defendant has acted less skilfully than the reasonable person would expect will usually result in breach being established. This is the case even where the defendant is inexperienced in his particular trade or activity. For example, a learner driver must drive in the manner of a driver of skill, experience and care (*Nettleship* v *Weston* (1971)). However, the standard of care expected from a child may be lower than that of an adult (*Mullin* v *Richards* (1998)).

Clearly the degree, or standard, of care to be exercised by such a reasonable person will vary depending on circumstances, but the following factors will be taken into consideration in determining the issue:

– **The seriousness of the risk**
The degree of care must be balanced against the degree of risk involved if the defendant fails in his duty. It follows, therefore, that the greater the risk of injury or the more likely it is to occur, the more the defendant will have to do to fulfil his duty. The degree of care to be exercised by the defendant may be increased if the claimant is very young, old or less able bodied in some way. The rule is that 'you must take your victim as you find him' (this is known as the egg-shell skull rule).

In *Haley* v *London Electricity Board* (1965) the defendants, in order to carry out repairs, had made a hole in the pavement. The precautions taken by the Electricity Board were sufficient to safeguard a sighted person, but Haley, who was blind, fell into the hole, striking his head on the pavement, and became deaf as a consequence. It was held that the Electricity Board was in breach of its duty of care to pedestrians. It had failed to ensure that the excavation was safe for all pedestrians, not just sighted persons. It was clearly not reasonably safe for blind persons, yet it was foreseeable that they might use the pavement.

The degree of risk has to be balanced against the social utility and importance of the defendant's activity. For example in *Watt* v *Hertfordshire CC* (1954), injury sustained by the plaintiff, a fireman, whilst getting to an emergency situation, was not accepted as being the result of a breach of duty of care as, in the circumstances, time was not available to take the measures that would have removed the risk.

– **Cost and practicability**
Any foreseeable risk has to be balanced against the measures necessary to eliminate it. If the cost of these measures far outweighs the risk, the defendant will probably not be in breach of duty for failing to carry out those measures (*Latimer* v *AEC Ltd* (1952)).

– **Skilled persons**
Individuals who hold themselves out as having particular skills are not judged against the standard of the reasonable person, but the reasonable person *possessing the same professional skill* as they purport to have (*Roe* v *Minister of Health* (1954)).

(b) Although not strictly a defence for negligence, the application of the concept of contributory negligence can be used to reduce the amount of damages awarded in a particular case. It arises where the party making the claim is found to have contributed, through their own fault, to the injury they sustained. The onus is on the defendant to show that the claimant was at fault and contributed to their own injury. An early example of the principle may be seen in *Jones* v *Livox Quarries* (1952) in which a claimant was found to have contributed to their own injury by showing a lack of care for their own safety by riding on the back of a dumper truck. Another example may be found in *Sayers* v *Harlow* (1958) in which the damages awarded to a woman, who was injured escaping from a public toilet in which she had been trapped due to a defective lock, were reduced as her injuries had been exacerbated by the manner in which she tried to make her escape by climbing out of it.

If contributory negligence is demonstrated, then the level of damages awarded will be reduced in line with, and will depend upon, the extent to which the claimant's fault contributed to the injury sustained (in *Jayes* v *IMI (Kynoch)* (1985) the award suffered a 100% reduction).

4 The first part of this question requires candidates to discuss the role of the company promoter and the second part the concept of the pre-incorporation contract in company law.

(a) There is no general statutory definition of a promoter in company law. In *Whaley Bridge Calico Printing Co* v *Green* (1880) Bowen L described the term promoter as 'a term not of law but of business, usefully summing up in a single word a number of business operations familiar to the commercial world, by which a company is generally brought into existence'.

Whether a person is a promoter or not is a question of fact and the determining factor is whether the individual in question will exercise control over the affairs of the company both before and after it is formed up until the process of formation is completed. A person is not to be treated as a promoter of a company simply on the basis that they act in a professional capacity with respect to the establishment of a company. Thus solicitors and accountants employed purely in their professional capacity in order to establish a company will not be considered to be promoters.

As with directors, promoters are in a fiduciary relationship with the company they are establishing. This is a position akin to that of a trustee and the most important consequence that flows from it is that the promoter is not entitled to make a profit from establishing the company, without full disclosure of that profit to either an independent board of directors, or to the existing and prospective shareholders in the company. Such a situation usually arises in situations where the promoters sell assets to the company they are in the process of forming. Failure to make such a disclosure will enable the company to: rescind the contract; claim damages or hold the promoter liable to account for any profit made (*Erlanger* v *New Sombrero Phosphate Co* (1878), *Gluckstein* v *Barnes* (1900); *Re Leeds* & *Hanley Theatres of Varieties* (1902)).

(b) A pre-incorporation contract is a contract which promoters enter into, naming the company as a party, prior to the date of the certificate incorporation and hence prior to its existence as a separate legal person. However, in law, the company cannot enter into a binding contract until it has come into existence through incorporation. The legal consequences of this situation are that:

– the company, when formed, is not bound by the contract even if it has taken some benefit under the contract.

- the company cannot ratify or adopt the contract even if it wishes to after it has become incorporated.
- The person who purportedly contracted on behalf of a company in respect of pre-incorporation contract is treated as if he had contracted on his own behalf.

These consequences are a result of the ordinary rules of agency law as stated in *Kelner* v *Baxter* (1866) but the third one has been restated and confirmed in s.51 Companies Act (CA) 2006, which provides that:

'a contract that purports to be made by or on behalf of a company at a time when the company has not been formed has effect, subject to any agreement to the contrary, as one made with the person purporting to act for the company or as agent for it, and he is personally liable on the contract accordingly.'

It can be seen from the wording of s.51 that liability of the agent is contractual, but it should be noted that this liability arises whether the promoter contracts as agent or not. Thus in *Phonogram Ltd* v *Lane* (1982) it was proposed to form a company, FM Ltd, to run a pop group. L made a contract with Phonogram Ltd 'for and on behalf of FM Ltd'. However, FM Ltd was never actually incorporated. Consequently the court held that Lane was personally liable for the money advanced to FM Ltd by Phonogram Ltd. The Court of Appeal held that the fact that Lane had signed 'for and on behalf of FM' made no difference to his personal liability.

To give effect to the words *'subject to any agreement to the contrary'* in s.51, the words used would need to amount to an express exclusion of liability. However, promoters can avoid liability for pre-incorporation contracts in a number of ways. For example:

- it is possible to avoid entering the contract until the company has actually been incorporated.
- the promoter may enter into an agreement 'subject to contract' with the effect that there is no binding agreement until the company itself enters into one. As the promoters are usually the first directors of the company, they can assure that the company does in fact enter into the pre-arranged contract.
- the promoters can expressly provide that they will bear no responsibility for any pre-incorporation contracts.

5 This question requires candidates to consider the procedures relating to the issuing of shares to the public and the rules relating to the payment for shares issued.

In order to register for incorporation, s.9 Companies Act (CA) 2006 requires companies with share capital to submit a statement of capital and initial shareholdings and s.10 requires the nominal value of those shares to be stated. This designated amount, set out at the initial registration of the company, establishes the nominal value of the shares in the company. Once issued the market value of the shares may diverge from that nominal value, but that nominal value remains fixed, unless altered through a strictly regulated procedure.

(a) It is possible, and not at all uncommon, for a company to require prospective subscribers to pay more than that nominal value of the shares they subscribe for. This is especially the case when the market value of the existing shares are trading at above the nominal value. In such circumstances the shares are said to be issued at a premium, the premium being the value received over and above the nominal value of the shares. Section 610 CA 2006 provides that any such premium received must be placed in a share premium account. The premium obtained is regarded as equivalent to capital and, as such, there are limitations on how the fund can be used. Section 610 provides that the share premium account can be used for the following limited purposes:

(i) to write off the expenses, commission or discount incurred in any issue of the shares in question;
(ii) to pay up bonus shares to be allotted as fully paid to members.

Section 687 also allows for the share premium account to be used to finance the payment due for any premium due on the redemption of redeemable shares.

Applying the rules relating to capital maintenance, it follows that what the share premium account cannot be used for is to pay dividends to the shareholders. The rules relating to share premiums apply whether the issue is for cash or otherwise and so a share premium account can arise where shares are issued in exchange for property which is worth more than the par value of the shares (*Shearer* v *Bercain Ltd* (1980)). In the light of that case, relief from the strict application of the rules relating to premium was introduced in the case of certain company group reconstructions (s.611 CA 2006) and company mergers (s.612 CA 2006).

(b) It is a long established rule that companies are not permitted to issue shares for a consideration that is less than the nominal value of the shares together with any premium due. The strictness of this rule may be seen in *Ooregum Gold Mining Co of India* v *Roper* (1892). In that case the shares in the company, although nominally £1, were trading at 12·5p. In an honest attempt to refinance the company, new £1 preference shares were issued and credited with 75p already paid (note the purchasers of the shares were actually paying twice the market value of the ordinary shares). When, however, the company subsequently went into insolvent liquidation, the holders of the new shares were required to pay a further 75p.

This common law rule is now given statutory effect in s.580 CA 2006. If a company does enter into a contract to issue shares at a discount it will not be able to enforce this against the proposed allottee. However, anyone who takes shares without paying the full value, plus any premium due, is liable to pay the amount of the discount as unpaid share capital, together with interest at 5% (s.580(2)/CA 2006). Also any subsequent holder of such a share who was aware of the original underpayment will be liable to make good the shortfall (s.588 CA 2006).

The reason for such rigour in relation to preventing the issue of shares at a discount is the protection of the company's creditors. Shareholders were seen to enjoy the benefit of limited liability but that privilege was only extended to them on the basis that they fully subscribed to a company's capital and in turn that capital was seen as a creditor fund against which they could claim in the event of a dispute.

In private companies it is possible to avoid the strict effect of this rule by exchanging shares for property that is overvalued (*re Wragg* (1897)). In public companies all such non-cash consideration has to be valued (s.593 CA 2006). Equally the effect of issuing shares at a discount may arise where the company pays underwriting commission under s.553 CA 2006 which permits a company, subject to authorisation in its articles and to disclosure, to issue shares at up to a 10% commission.

It should also be noted that the above only applies to shares. Debentures may be issued at a discount. This is the case even where they are convertible into shares, as long as they do not carry an immediate right to conversion (*Mosely* v *Koffyfontein Mines* (1904)).

6 **(a)** Corporate governance refers to the way in which companies are run and operated with the stated aim that they are run effectively and properly and are not subject to mismanagement, as has unfortunately been the case in regard to some notorious cases in the fairly recent past. Corporate governance has been defined as the system through which business corporations are directed and controlled. The corporate governance structure relates to the distribution of rights and responsibilities among different participants in the organisation, such as the board, managers, shareholders and other stakeholders, and lays down the procedures for decision-making in relation to corporate affairs. Corporate governance also provides, not only the structure through which the company objectives are set, but also the means through which those objectives are achieved and the process of monitoring the company's performance in the pursuit of those objectives.

According to the UK Corporate Governance Code, 'the purpose of corporate governance is to facilitate effective, entrepreneurial and prudent management that can deliver the long-term success of the company' and the classic definition of corporate governance is:

'… (T)he system by which companies are directed and controlled. Boards of directors are responsible for the governance of their companies. The shareholders' role in governance is to appoint the directors and the auditors and to satisfy themselves that an appropriate governance structure is in place. The responsibilities of the board include setting the company's strategic aims, providing the leadership to put them into effect, supervising the management of the business and reporting to shareholders on their stewardship. The board's actions are subject to laws, regulations and the shareholders in general meeting.'

Corporate governance is therefore about what the board of a company does and how it sets the values of the company, and is to be distinguished from the day to day operational management of the company by fulltime executives.'

(b) In order to ensure the effective corporate governance framework necessary to promote confidence in corporate reporting and governance, it has been deemed necessary to set out defined rules and regulations, including voluntary codes. One such code is the UK Corporate Governance Code, which was issued in May 2010 and replaced the Combined Code On Corporate Governance. The code is produced and overseen by the Financial Reporting Council (FRC), an independent regulator charged with that duty.

All companies incorporated in the United Kingdom that are listed on the main market of the London Stock Exchange must comply with its Listing Rules, which require them to account for the application of the code.

The code adopts a principles approach in that it sets out what are considered best practices for running companies rather than imposing strict rules that must be adhered to. As a consequence it establishes what is known as the 'comply or explain' approach and companies that are subject to its operation must comply with its rules and general principles, or explain why they have not complied with them. Whilst listed companies are expected to comply with the Code's provisions most of the time, it is recognised that departure from its provisions may be justified in particular circumstances. Every company must review each provision carefully and give a considered explanation if it departs from the code provisions.

The Code establishes principles of corporate governance, under five broad areas:

- leadership;
- effectiveness;
- accountability;
- remuneration;
- relationships with shareholders.

Each area of the code establishes principles and guidelines for the companies that come under its rule.

It also focuses attention on the role of institutional investors, whose passivity has been much criticised in the past. This aspect of corporate governance will be dealt with in a separate code relating to corporate stewardship, and will cease to apply in the Code when this comes into effect.

(c) As regards the structure of the board of directors the Corporate Governance Code requires that the board should include an appropriate combination of executive and non-executive directors (and in particular independent non-executive directors) such that no individual or small group of individuals can dominate the board's decision-taking. The requirement of independence if emphasised in the code and factors that might suggest a lack of genuine independence could include facts such as whether the director in question:

– has been an employee of the company or group within the last five years;
– has, or has had within the last three years, a material business relationship with the company either directly, or as a partner, shareholder, director or senior employee of a body that has such a relationship with the company;
– has received or receives additional remuneration from the company apart from a director's fee, participates in the company's share option or a performance-related pay scheme, or is a member of the company's pension scheme;
– has close family ties with any of the company's advisers, directors or senior employees;
– holds cross-directorships or has significant links with other directors through involvement in other companies or bodies;
– represents a significant shareholder; or has served on the board for more than nine years from the date of their first election.

Non-executive directors do not usually have a full-time relationship with the company, they are not employees and only receive directors' fees. The role of the non-executive directors, at least in theory, is to bring outside experience and expertise to the board of directors. They are also expected to exert a measure of control over the executive directors to ensure that the latter do not run the company in their, rather than the company's, best interests. As the Code puts it:

'As part of their role as members of a unitary board, non-executive directors should constructively challenge and help develop proposals on strategy. Non-executive directors should scrutinise the performance of management in meeting agreed goals and objectives and monitor the reporting of performance. They should satisfy themselves on the integrity of financial information and that financial controls and systems of risk management are robust and defensible. They are responsible for determining appropriate levels of remuneration of executive directors and have a prime role in appointing, and where necessary removing, executive directors, and in succession planning.'

The code requires that non-executive directors should:

– appoint one of the independent non-executive directors to be the senior independent director to provide a sounding board to the chairman and to serve as an intermediary for the other directors when necessary. The senior independent director should be available to shareholders if they have concerns.
– have meetings with the chairman without the executive directors present at least annually to appraise the chairman's performance and on other such occasions as deemed appropriate.
– where they have concerns which cannot be resolved about the running of the company or a proposed action, ensure that they are recorded in the board minutes.
– give a statement to the chairman for circulation to the board if they have such unresolved concerns on resignation.

It is important to note that there is no distinction in law between executive and non-executive directors, and the latter are subject to the same controls and potential liabilities as are the former (*Dorchester Finance Co* v *Stebbing* (1989)) and consequently, the code stresses that it is up to each non-executive director to reach a view as to what is necessary, in particular circumstances, to comply with the duty of care, skill and diligence they owe as a director to the company.

7 **(a)** Unfair dismissal is a statutory term. Under the Employment Rights Act (ERA) 1996, employees have a right not to be unfairly dismissed. Once an employee has shown 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 five categories may be counted as fair:

– lack of capability or qualifications.
– misconduct.
– redundancy.
– where continued employment would constitute a breach of a statutory provision.
– some other substantial reason such as a clash of personalities.

The following are situations where dismissal is automatically unfair:

– dismissal for trade union reasons.
– dismissal on grounds of pregnancy or childbirth or other reason connected to pregnancy or following maternity leave period.
– dismissal in relation to health and safety issues.
– dismissal for making a protected disclosure to the appropriate authorities.
– dismissal for asserting a statutory right governing such aspects of employment as the length of working time or minimum wage payment.

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.

(b) Constructive dismissal refers to the situation where an employer has made the position of the employee such that the employee has no other option than to resign. In other words the unreasonable actions of the employer force the employee to resign. Normally employees who resign deprive themselves of the right to make a claim for redundancy or other payments, but in the case of constructive dismissal, under s.136 ERA the employee is entitled to make a claim for unfair dismissal in spite of the fact that they actually resigned (*Simmonds* v *Dowty Seals Ltd* (1978)).

An employee may also be able to claim constructive dismissal where the employer is in breach of an implied term in the contract of employment (*Gardner Ltd* v *Beresford* (1978)) and in *Woods* v *WM Car Services (Peterborough)* (1982)). The action of the employer, however, must go to the root of the employment contract if it is to allow the employee to resign. In other words it must be a breach of some significance (*Western Excavating Ltd* v *Sharp* (1978)). If the employee does not resign in the event of a breach by the employer, the employee will be deemed to have accepted the breach and waived any rights. However, they need not resign immediately and may, legitimately, wait until they have found another job (*Cox Toner (International) Ltd* v *Crook* (1981)).

(c) Wrongful dismissal is a common law action and as such, generally, the only effective remedy available is the award of damages representing the loss of earnings sustained by the dismissed employee. The employee will, nonetheless, be expected to mitigate their loss by accepting suitable alternative employment. It is possible, in very limited circumstances, for the dismissed employee to seek an injunction to prevent the dismissal (see *Ridge* v *Baldwin* (1964) and *Irani* v *South West Hampshire Health Authority* (1985)).

8 This question asks candidates to analyse the problem scenario in terms of the rules relating to the waiver of existing contractual rights. However, it is initially necessary to establish that the parties are, in law, in a binding contractual relationship.

English law does not enforce gratuitous promises unless they are made by deed. Consideration has to be provided as the price of a promise. This is equally the case where a party promises to give up some existing rights that they have. Thus, at common law, if A owes B £10, but B agrees to accept £5 in full settlement of the debt, B's promise to give up existing rights must be supported by consideration on the part of A. This principle, that a payment of a lesser sum cannot be any satisfaction for the whole, was originally stated in *Pinnel's case* (1602), and reaffirmed in *Foakes* v *Beer* (1884).

This principle has been reconfirmed in the more recent case of *Re Selectmove Ltd* (1994). In this latter case, the company owed the Inland Revenue outstanding taxes. After some negotiation, the company agreed to pay off the debt by instalments. The company started paying but, before completion, it received a demand from the Revenue that the total be paid off immediately. The company relied on the authority of *Williams* v *Roffey Bros* (1990), which had established that the performance of an existing duty could, under particular circumstances, amount to valid consideration for a new promise. On that basis it was argued that its payment of the tax debt was sufficient consideration for the promise of the Revenue to accept it in instalments. The Court of Appeal held, however, that situations relating to the payment of debt were distinguishable from those relating to the supply of goods and services, and that in the case of the former the court was bound to follow the clear authority of the House of Lords in *Foakes* v *Beer*.

However, there are a number of situations in which the rule in *Pinnel's case* does not apply. The following will operate to fully discharge an outstanding debt:

(i) payment in kind
Consideration can take the form of money or money's worth. In other words, something or action may adequately support a promise, and A may clear an existing debt if B agrees to accept something else instead of money. It is important to note that payment by cheque is no longer treated as substitute payment in this respect (See *D & C Builders Ltd* v *Rees* (1966)).

(ii) payment of a lesser sum before the due date of payment
Such payment has of course to be acceptable to the party to whom the debt is owed.

(iii) payment of a lesser sum by a third party
Where a third party intervenes to pay off the existing debt, albeit with a lesser sum, then the original creditor is not allowed to break their agreement with that party by taking subsequent action against the original debtor (*Welby* v *Drake* (1825)).

(iv) a composition arrangement
This is an agreement between creditors to the effect that they will accept part-payment of their debts. As they have entered into a binding agreement to that effect, the individual creditors cannot subsequently seek to recover the unpaid element of the debt (*Good* v *Cheesman* (1831)).

(v) promissory estoppel
The equitable doctrine of *promissory estoppel* sometimes can be relied upon to prevent promisors from going back on their promises. The doctrine first appeared in *Hughes* v *Metropolitan Railway Co* (1877) and was revived by Lord Denning in the *High Trees case* (*Central London Property Trust Ltd* v *High Trees House Ltd* (1947)).

Applying the foregoing to the facts of the problem leads to the following results:

Bi
As Ari agreed to accept Bi's offer to do his accounts as part payment of his outstanding debt there is nothing further he can do to recover any more money. By accepting payment in kind his situation is covered by exception (i) above to the rule in *Pinnel's case*.

Cas
By accepting lesser payment from a third party, i.e. Cas's father, Ari is covered by exception (iii) above to the rule in *Pinnel's case* and he can take no further action against Cas.

Dex

Dex acted unilaterally and did nothing additional to compensate Ari for his part payment. Consequently Dex is covered by the general rule in *Pinnel's case* and remains liable to pay Ari the remaining half of his bill (*D & C Builders* v *Rees* and *Re Selectmove Ltd*).

9 This question requires candidates to consider the authority of company directors to enter into binding contracts on behalf of their companies.

Subject to the articles, the directors are responsible for the management of the company's business, for which purpose they may exercise all the powers of the company.

Article 3 of the model articles of association for private companies provides that the directors of a company may exercise all the powers of the company. It is important to note that this power is given to the board as a whole and not to individual directors and consequently individual directors cannot bind the company without their being authorised, in some way, so to do. There are three ways in which the power of the board of directors may be extended to individual directors.

(i) The individual director may be given *express authority* to enter into a particular transaction on the company's behalf. To this end, Article 5 allows for the delegation of the board's powers to one or more directors. Where such express delegation has been made then the company is bound by any contract entered into by the person to whom the power was delegated. However, in the present situation it does not appear that Hope has been expressly given the power to enter into the contract with Ima, and so the company cannot be made liable on this basis.

(ii) A second type of authority that may empower an individual director to bind his company is *implied authority*. In this situation, the person's authority flows from their position. Thus, although the board of directors may expressly confer any of their powers on a director as they see fit under Article 5, the mere fact of appointment to a particular position will mean that the person so appointed will have the implied authority to bind the company to the same extent as people in that position usually do. Whereas the previous model articles of association specifically provided for the delegation of the board's general authority to one or more managing directors, the new model articles make no such reference, other than the general power under Article 5. However, as implied actual authority to bind a company could always arise as a consequence of the appointment of an individual to a position other than that of managing director that previously specific rule now becomes the general rule in relation to implied authority. For example in *Hely-Hutchinson* v *Brayhead Ltd* (1968), although the chairman and chief executive of a company acted as its *de facto* managing director, he had never been formally appointed to that position. Nevertheless, he purported to bind the company to a particular transaction. When the other party to the agreement sought to enforce it, the company claimed that the chairman had no authority to bind it. It was held that, although the director derived no authority from his position as chairman of the board, he did acquire such authority from his position as chief executive and thus the company was bound by the contract he had entered into on its behalf.

Once again, however, it would appear that Ima cannot make use of this method of fixing Goal Ltd with liability for her contract, as Hope has not been appointed to any executive office in the company.

(iii) The third way in which an individual director may possess the power to bind his company is through the operation of ostensible authority, which is alternatively described as apparent authority, or agency by *estoppel*.

This arises where an individual director has neither express nor implied authority. Nonetheless, the director is held out by the other members of the board of directors as having the authority to bind the company. If a third party acts on such a representation, then the company will be *estopped* from denying its truth.

In *Freeman and Lockyer* v *Buckhurst Park Properties (Mangal) Ltd* (1964), although a particular director had never been appointed as managing director, he acted as such with the clear knowledge of the other directors and entered into a contract with the plaintiffs on behalf of the company. When the plaintiffs sought to recover fees due to them under that contract, it was held that the company was liable: a properly appointed managing director would have been able to enter into such a contract and the third party was entitled to rely on the representation of the other directors that the person in question had been properly appointed to that position.

The situation in the problem is very similar to that in *Freeman and Lockyer* v *Buckhurst Park Properties (Mangal) Ltd*. The board of Goal Ltd has permitted Hope to act as its chief executive, and he has even used that title. The board has therefore acquiesced in his representation of himself as Goal Ltd's chief executive and, consequently, they and Goal Ltd are bound by any contracts he might make within the scope of a chief executive's implied authority. As entering into a contract to draw up plans would clearly come within that authority, Goal Ltd will be liable to pay Ima or face an action for breach of contract.

10 One of the most significant advantages of the limited liability company is that once members have paid the full nominal value of their shares, they no longer face the prospect of any further liability. Even where the shares are not fully paid, the shareholders at least are clearly aware of the maximum potential payments that they stand to make, i.e. the amount remaining unpaid on their shares. This is precisely the meaning of limited liability – shareholders know exactly, and can control, the amount that they stand to lose if their company goes into insolvent liquidation. This situation can be contrasted with the situation of the ordinary partnership where the liability of the partners is not only uncertain, but also unlimited.

Personal guarantees are the means by which powerful lenders avoid the limited liability of the members of the company to which they lend money. Rather than merely relying on the capital of the company, the lenders require the members to enter into a contractual agreement that they will back the debts of the company with their own personal wealth. Effectively this device removes limited liability with respect to those lenders who are in a position to demand personal guarantees, although not ordinary trade creditors. In that way it undermines the theoretical effectiveness of limited liability by refusing to recognise it in practice.

When companies borrow money from a bank it is usual for them to provide security for any loans, known as debentures, given to them. 'Security' means that, in the event of the company being wound up, the creditor with a secured debt will have priority as regards repayment over any unsecured creditor. A fixed charge represents a legal claim against a particular item of property owned by the company issuing the debenture. The company cannot dispose of the property charged without the consent of the charge holder and in the event of the company failing in its duties, the creditor can have that property sold to realise the amount of their claim. A floating charge, on the other hand, 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.

Applying the foregoing to facts in the problem scenario it can be seen that the company has debts totalling £40,000; £30,000 owed to Oop bank plc, of which £20,000 is secured by a fixed charge over the company's land and £10,000 to ordinary trade creditors, with assets of £27,750.

Oop bank plc will be able to assert its priority over the creditors to the extent of its fixed charge and thus it will recover its original loan for £20,000 from the sale of the company's land. That will leave the company with unsecured debts of £10,000 to the trade creditors and £10,000 to Oop bank plc. However, as the shareholders have only partly paid for their shares, they will be required to make good the difference, up to the nominal value of their shares, to pay off the debts. In effect this means that Mat, Mary and Norm will each have to provide a further £750, making a total of £2,250. As a result the company will have a total of £10,000 to pay unsecured debts of £20,000. Consequently all the unsecured debts will be paid off from the company's remaining assets at the rate of 50 pence per £1 owed. It remains, however, to consider Mat's personal guarantee to Oop bank plc for the company's debts. As the company has outstanding unpaid debts of £5,000 owed to the bank, Mat will have to make good that amount from his personal assets.

In conclusion it can be seen that:

- the bank will receive all of the money owed to it by the company, either from the company or from Mat personally;
- the unsecured creditors will receive 50% of the debts owed to them by the company;
- both Mary and Norm will have to pay £750 towards the company's debts;
- Mat will have to pay both £750 on his unpaid shares and a further £5,000 on the basis of his personal guarantee.

Tutorial note

In the problem scenario Oop bank plc held a fixed charge over the land owned by the company. The situation would have been different had its debt been secured by a floating charge. In order to improve the position of unsecured creditors, the Enterprise Act 2002 introduced the concept of ring-fencing some of a company's assets for the exclusive use of unsecured creditors. Under the new regime, s.176A of the Insolvency Act 1986, which applies to floating charges created after 15 September 2003, a liquidator, administrator or receiver is required to make a prescribed part of the company's net assets available for the satisfaction of unsecured debts before any money can be paid in satisfaction of a floating charge. The procedure does not apply if the company's assets are less than £10,000; thereafter, the prescribed amount is set at 50% of the first £10,000 and 20% of any assets above that value up to a maximum of £600,000.

1 The first part of this question requires candidates to explain the difference between criminal and civil law and to demonstrate their understanding by providing examples of each category. As there are so many potential examples the model answer has only focused on one aspect, but any suitable alternative example will be credited.

(a)	5–7 marks	A detailed answer explaining the types of law and citing appropriate examples.
	2–4 marks	A less detailed answer; perhaps too general and lacking clear examples to support the understanding.
	0–1 mark	Little, if any, understanding of the concepts.
(b)	3 marks	Full explanation of the lower civil and criminal courts.
	1–2 marks	Good explanation, but perhaps lacking in some detail or missing out some important court.
	0 marks	Very weak, if any, understanding of the courts concerned.

2 This question requires candidates to explain the law relating to contractual offers and the circumstances under which they can be terminated.

(a)	4–5 marks	Thorough to complete explanation of the meaning of offer.
	2–3 marks	Some, but limited, knowledge of the topic. Perhaps uncertain as to meaning or lacking in detailed explanation or authority.
	0–1 mark	Very little or no understanding whatsoever.
(b)	4–5 marks	A good to complete explanation of how offers may be terminated.
	2–3 marks	Some idea about the issues but lacking in detail.
	0–1 mark	Very little, if any, understanding of the issues.

3 **(a)** This question requires candidates to explain the standard of care owed by one person to another in relation to the tort of negligence.

	4–6 marks	Full understanding and explanation of the topic. It is likely that cases will be cited as authority although examples will be acceptable as an alternative.
	2–3 marks	Some knowledge of the topic but lacking in detail.
	0–1 mark	Little, if any, knowledge of the topic.
(b)	4 marks	A good to complete explanation of contributory negligence, probably with supporting case authority.
	2–3 marks	Some idea about contributory negligence but lacking in detail.
	0–1 mark	Very little, if any, understanding of the issue.

4 The first part of this question essentially requires candidates to discuss the role and legal duties of promoters in company law. The second part of the question requires an explanation of the meaning of the term 'pre-incorporation contract' and the potential consequences of such a contract.

(a)	4–5 marks	Good to thorough explanation of the nature and function of a company promoter. The very best answers should have some reference to the fiduciary nature of the promoter's position with respect to the company with perhaps reference to cases.
	2–3 marks	Some, but limited, understanding of the role of the promoter, perhaps lacking in detailed legal knowledge of the subject.
	0–1 mark	Little, if any, knowledge on the topic.
(b)	4–5 marks	Thorough explanation of the common law and statutory provisions, perhaps with cases and some suggestion as to how to avoid the problems inherent in pre-incorporation contracts.
	2–3 marks	Some, but limited, understanding.
	0–1 mark	Little, if any, knowledge on the topic.

5 This question invites candidates to explain the meaning of the two rules relating to the payment for shares. Part (a) relating to payment at a premium carries 5 marks, as does part (b) which relates to payments at a discount.

(a)

4–5 marks	A good to complete explanation of what is meant by share premiums and how they are to be treated in law. Reference must be made to the changed provisions of the Companies Act 2006.
2–3 marks	Some idea about the issues but lacking in detail.
0–1 mark	Very little, if any, understanding of the issues.

(b)

4–5 marks	Full understanding and explanation of the topic. It is likely that cases will be cited as authority although examples will be acceptable as an alternative.
2–3 marks	Some knowledge of the topic but lacking in detail.
0–1 mark	Little, if any, knowledge of the topic.

6 It is likely that this question will be answered globally and will be marked as such.

8–10 marks	A good explanation of the meaning of corporate governance generally, the UK Corporate Governance Code in particular and the role of non-executive directors.
5–7 marks	A sound understanding of the area, although perhaps lacking in detail or balance.
2–4 marks	Some understanding of the area, but lacking in detail, perhaps failing to deal with the code.
0–1 mark	Little or no knowledge of the area.

7 This question requires candidates to consider three distinct aspects of employment law.

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

4–5 marks	A clear concise explanation perhaps citing cases or examples.
2–3 marks	A clear understanding, but perhaps lacking authority or examples.
0–1 mark	Unbalanced, or may not deal with all of the required aspects of the topic.

(b) This part requires candidates to explain what is meant by constructive dismissal.

3–4 marks	Candidates must demonstrate an understanding of what is meant by constructive dismissal, perhaps by citing cases or examples.
0–2 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 constructive dismissal.

(c) This part requires a simple explanation of wrongful dismissal.

2 marks	A clear explanation distinguishing it from the statutory unfair dismissal.
0–1 mark	Little or no real knowledge of the topic.

8 This question asks candidates to analyse the problem scenario in terms of the rules relating to the waiver of existing contractual rights. *Estoppel* may be mentioned, but there is no need to go into any great detail.

8–10 marks	A thorough to complete understanding of the legal issues in the question together with a clear analysis of the problem scenario and a correct application of the law to it.
5–7 marks	Good understanding of the law and supporting analysis and application.
2–4 marks	Some, if limited, knowledge of the law. Perhaps lacking in analysis and application.
0–1 mark	Little understanding of the legal issues arising from the question.

9 This question focuses on the authority of individual directors and how companies may be fixed with liability for contracts entered into by them.

8–10 marks	A thorough analysis of the scenario focusing on the appropriate rules of law and applying them accurately. It is extremely likely that cases will be cited in support of the analysis and/or application and any reference to articles of association must refer to the provisions of the current model articles.
5–7 marks	A clear understanding of the general law but perhaps lacking in detail or unbalanced in only dealing with some issues.
2–4 marks	Some, but limited, understanding of the law or completely lacking in application.
0–1 mark	Little or no knowledge of the relevant law.

10 This question requires candidates to consider a number of issues relating to companies' and shareholders' liability for debts.

8–10 marks	A thorough to complete understanding of the legal issues in the question together with a clear analysis of the problem scenario and a correct application of the law to it.
5–7 marks	Good understanding of the law and supporting analysis and application.
2–4 marks	Some, if limited, knowledge of the law. Perhaps lacking in analysis and application.
0–1 mark	Little understanding of the legal issues arising from the question.