Answers

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

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

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

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

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

(b) *Binding precedent*
If a precedent was set by a court of equal or higher status to the court deciding the new case then the judge in the present case should normally follow the rule of law established in the earlier case.

The Hierarchy of the Courts
The House of Lords stands at the summit of the English court structure and its decisions are binding on all courts below it in the hierarchy. As regards its own previous decisions, up until 1966 the House of Lords regarded itself as bound by its previous decisions. In a Practice Statement ([1966] 3 All ER 77) of that year, however, Lord Gardiner indicated that the House of Lords would in future regard itself as free to depart from its previous decisions where it appeared right to do so. There have been a number of cases in which the House of Lords has overruled or amended its own earlier decisions.(e.g. *Conway* v *Rimmer* (1968); *Herrington* v *British Rail Board* (1972); *Miliangos* v *George Frank (Textiles) Ltd* (1976); *R* v *Shivpuri* (1986)) but this is not a discretion that the House of Lords exercises lightly. It has to be recognised that in the wider context the House of Lords is no longer the supreme court and its decisions are subject to decisions of the European Court of Justice in terms of European Community law, and, with the implementation of the Human Rights Act 1998, the decisions of the European Court of Justice in matters relating to human rights.

In civil cases the Court of Appeal is generally bound by previous decisions of the House of Lords and its own previous decisions. There are, however, a number of exceptions to this general rule. The exceptions arise where:

(i) there is a conflict between two previous decisions of the Court of Appeal.
(ii) a previous decision of the Court of Appeal has been overruled by the House of Lords. The Court of Appeal can ignore a previous decision of its own which is inconsistent with European Community law or with a later decision of the European Court.
(iii) the previous decision was given *per incuriam*, i.e. in ignorance of some authority that would have led to a different conclusion (*Young* v *Bristol Aeroplane Co Ltd* (1944)).

Courts in the criminal division, however, are not bound to follow their own previous decisions which they subsequently consider to have been based on either a misunderstanding or a misapplication of the law.

The Divisional Courts of the High Court are bound by the doctrine of *stare decisis* in the normal way and must follow decisions of the House of Lords and the Court of Appeal. They are also normally bound by their own previous decisions, although in civil cases it may make use of the exceptions open to the Court of Appeal in *Young* v *Bristol Aeroplane Co Ltd*, and in criminal appeal cases the Queen's Bench Divisional Court may refuse to follow its own earlier decisions where it feels the earlier decision to have been wrongly made.

The High Court is bound by the decisions of superior courts. Decisions by individual High Court Judges are binding on courts inferior in the hierarchy, but such decisions are not binding on other High Court Judges although they are of strong persuasive authority and tend to be followed in practice.

Crown Courts cannot create precedent and their decisions can never amount to more than persuasive authority. County courts and Magistrates' courts do not create precedents.

Persuasive precedent

From the foregoing it can be seen that courts higher in the hierarchy are not bound to follow the reasoning of courts at a lower level in that hierarchy. However, the higher courts will consider, and indeed may adopt, the reasoning of the lower court. As a consequence of the fact that the higher court is at liberty *not* to follow the reasoning in the lower court such decisions are said to be of persuasive rather than binding authority. It should also be borne in mind that English courts are in no way bound to follow the reasoning of courts in different jurisdictions, and it should be remembered that for this purpose Scotland qualifies as having its own legal system. However, where a court from another jurisdiction has considered a point of law that subsequently arises in an English case, the English courts will review the reasoning of the foreign courts and may follow their reasoning if they find it sufficiently persuasive.

2 This question invites candidates to examine some of the principles relating to the doctrine of consideration in relation to the law of contract.

(a) English law does not enforce every promise that might be made under every circumstance. One way in which the courts limit the type of promise that they have to deal with is through the operation of the doctrine of consideration. English law does not enforce gratuitous promises, i.e. promises given for no return, unless of course such promises are given by way of formal deed. The requirement is that for a simple promise to be enforced in the courts as a binding contract, it is necessary that the person to whom the promise was made, i.e. the promisee, should have done something in return for the promise. That something done, or to be done, constitutes consideration. Consideration can be understood, therefore, as the price paid for a promise. The element of bargain implicit in the idea of consideration may be seen in Sir Frederick Pollock's definition of it, subsequently adopted by the House of Lords in *Dunlop* v *Selfridge* (1915), as:

'An act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable.'

An alternative and shorter definition of consideration is that it is 'some benefit to the promisor or detriment to the promisee'. It is important to note, however, that both elements stated in that definition are not required to be present to support a legally enforceable agreement. Although in practice there usually is a reciprocal exchange of benefit and detriment, it is nonetheless possible for a promisee to provide consideration for a promise without the action directly benefiting the promisor. For example, A can promise to pay B for doing something that benefits C. In such a situation A enjoys no direct benefit but can enforce the agreement, whilst C who enjoys the benefit cannot directly enforce the agreement between A and B.

(b) **(i)** The statement that consideration must be sufficient but need not be adequate refers to the fact that it is for the parties themselves to determine the terms of their contract. In deciding the contractual validity of any agreement, the court will merely look to ensure that there is some element that constitutes valid consideration. As long as it finds formal consideration, the court will not intervene to require substantive equality in the value of the goods or promises exchanged, as long as the agreement has been freely entered into. Thus in *Thomas* v *Thomas* (1842) the executors of a man's will promised to let his widow live in his house in return for rent of £1 per year. It was held that £1 was sufficient consideration to validate the contract, although it did not represent an adequate rent in economic terms. Equally, in *Chappell & Co* v *Nestle Co* (1959), it was held that a used chocolate wrapper was sufficient consideration to form a contract, even although it had no economic value whatsoever to Nestle.

It has generally been accepted that performance of an existing duty does not provide valid consideration (*Glassbrook* v *Glamorgan CC* (1925) and *Stilk* v *Myrick* (1809)). However, the more recent authority of *Williams* v *Roffey Bros* (1990) has indicated a contrary possibility.

(ii) Past consideration does not actually count as valid consideration sufficient to make any agreement based on it a binding contract. Normally consideration is provided either at the time of the creation of a contract or at a later date. In the case of past consideration, however, the action is performed before the promise that it is supposed to be the consideration for. Such action is not sufficient to support a promise, as consideration cannot consist of any action already wholly performed before the promise was made (*Re McArdle* (1951)).

There are exceptions to the rule that past consideration will not support a valid contract. For example, where the plaintiff performed the action at the request of the defendant *and payment was expected*, then any subsequent promise to pay will be enforceable (*Re Caseys Patents* (1892)).

Also, under s.27 of the Bills of Exchange Act 1882, past consideration can create liability on a bill of exchange.

3 This question requires candidates to consider the law relating to terms in contracts. It specifically requires the candidates to distinguish between terms and mere representations and then to establish the difference between express and implied terms in contracts.

(a) As the parties to a contract will be bound to perform any promise they have contracted to undertake, it is important to distinguish between such statements that will be considered part of the contract, i.e. terms, and those other pre-contractual statements which are not considered to be part of the contract, i.e. mere representations. The reason for distinguishing between them is that there are different legal remedies available if either statement turns out to be incorrect.

A representation is a statement that induces a contract but does not become a term of the contract. In practice it is sometimes difficult to distinguish between the two, but in attempting to do so the courts will focus on when the statement was made in relation to the eventual contract, the importance of the statement in relation to the contract and whether or not the party making the statement had specialist knowledge on which the other party relied (*Oscar Chess* v *Williams* (1957) and *Dick Bentley* v *Arnold Smith Motors* (1965)).

(b) Express terms are statements actually made by one of the parties with the intention that they become part of the contract and thus binding and enforceable through court action if necessary. It is this intention that distinguishes the contractual term from the mere representation, which, although it may induce the contractual agreement, does not become a term of the contract. Failure to comply with the former gives rise to an action for breach of contract, whilst failure to comply with the latter only gives rise to an action for misrepresentation.

Such express statements may be made by word of mouth or in writing as long as they are sufficiently clear for them to be enforceable. Thus in *Scammel* v *Ouston* (1941) *Ouston* had ordered a van from the claimant on the understanding that the balance of the purchase price was to be paid 'on hire purchase terms over two years'. When *Scammel* failed to deliver the van *Ouston* sued for breach of contract without success, the court holding that the supposed terms of the contract were too uncertain to be enforceable. There was no doubt that *Ouston* wanted the van on hire purchase but his difficulty was that *Scammel* operated a range of hire purchase terms and the precise conditions of his proposed hire purchase agreement were never sufficiently determined.

Implied terms, however, are not actually stated or expressly included in the contract, but are introduced into the contract by implication. In other words the exact meaning and thus the terms of the contract are inferred from its context. Implied terms can be divided into three types.

Terms implied by statute
In this instance a particular piece of legislation states that certain terms have to be taken as constituting part of an agreement, even where the contractual agreement between the parties is itself silent as to that particular provision. For example, under s.5 of the Partnership Act 1890, every member of an ordinary partnership has the implied power to bind the partnership in a contract within its usual sphere of business. That particular implied power can be removed or reduced by the partnership agreement and any such removal or reduction of authority would be effective as long as the other party was aware of it. Some implied terms, however, are completely prescriptive and cannot be removed.

Terms implied by custom or usage
An agreement may be subject to terms that are customarily found in such contracts within a particular market, trade or locality. Once again this is the case even where it is not actually specified by the parties. For example, in *Hutton* v *Warren* (1836), it was held that customary usage permitted a farm tenant to claim an allowance for seed and labour on quitting his tenancy. It should be noted, however, that custom cannot override the express terms of an agreement (*Les Affreteurs Reunnis SA* v *Walford* (1919)).

Terms implied by the courts
Generally, it is a matter for the parties concerned to decide the terms of a contract, but on occasion the court will presume that the parties intended to include a term which is not expressly stated. They will do so where it is necessary to give business efficacy to the contract.

Whether a term may be implied can be decided on the basis of the officious bystander test. Imagine two parties, A and B, negotiating a contract, when a third party, C, interrupts to suggest a particular provision. A and B reply that that particular term is understood. In just such a way, the court will decide that a term should be implied into a contract.

In *The Moorcock* (1889), the appellants, owners of a wharf, contracted with the respondents to permit them to discharge their ship at the wharf. It was apparent to both parties that when the tide was out the ship would rest on the riverbed. When the tide was out, the ship sustained damage by settling on a ridge. It was held that there was an implied warranty in the contract that the place of anchorage should be safe for the ship. As a consequence, the ship owner was entitled to damages for breach of that term.

Alternatively the courts will imply certain terms into unspecific contracts where the parties have not reduced the general agreement into specific details. Thus in contracts of employment the courts have asserted the existence of implied terms to impose duties on both employers and employees, although such implied terms can be overridden by express contractual provision to the contrary.

4 **(a)** Except in relation to specifically exempted companies, such as those involved in charitable work, companies are required to indicate that they are operating on the basis of limited liability. Thus private companies are required to end their names, either with the word 'limited' or the abbreviation 'ltd', and public companies must end their names with the words 'public limited company' or the abbreviation 'plc'. Welsh companies may use the Welsh language equivalents (Companies Act (CA)2006 ss.58, 59 & 60).

Companies Registry maintains a register of business names, and will refuse to register any company with a name that is the **same** as one already on that index (CA 2006 s.66).

Certain categories of names are, subject to the decision of the Secretary of State, unacceptable *per se*, as follows:

(i) names which in the opinion of the Secretary of State constitute a criminal offence or are offensive (CA 2006 s.53)
(ii) names which are likely to give the impression that the company is connected with either government or local government authorities (s.54).
(iii) names which include a word or expression specified under the Company and Business Names Regulations 1981 (s.26(2)(b)). This category requires the express approval of the Secretary of State for the use of any of the names or expressions contained on the list, and relates to areas which raise a matter of public concern in relation to their use.

Under s.67 of the Companies Act 2006 the Secretary of State has power to require a company to alter its name under the following circumstances:

(i) where it is the same as a name already on the Registrar's index of company names.
(ii) where it is 'too like' a name that is on that index.

The name of a company can always be changed by a special resolution of the company so long as it continues to comply with the above requirements (s.77).

(b) The tort of passing off was developed to prevent one person from using any name which is likely to divert business their way by suggesting that the business is actually that of some other person or is connected in any way with that other business. It thus enables people to protect the goodwill they have built up in relation to their business activity. In *Ewing* v *Buttercup Margarine Co Ltd* (1917) the plaintiff successfully prevented the defendants from using a name that suggested a link with his existing dairy company. It cannot be used, however, if there is no likelihood of the public being confused, where for example the companies are conducting different businesses (*Dunlop Pneumatic Tyre Co Ltd* v *Dunlop Motor Co Ltd* (1907) and *Stringfellow* v *McCain Foods GB Ltd* (1984). Nor can it be used where the name consists of a word in general use (*Aerators Ltd* v *Tollitt* (1902)).

Part 41 of the Companies Act (CA) 2006, which repeals and replaces the Business Names Act 1985, still does not prevent one business from using the same, or a very similar, name as another business so the tort of passing off will still have an application in the wider business sector. However the Act introduced a new procedure to deal specifically with company names. As previously under the CA 1985, a company cannot register with a name that was the same as any already registered (s.665 Companies Act (CA) 2006) and under CA s.67 the Secretary of State may direct a company to change its name if it has been registered in a name that is the same as, or too like a name appearing on the registrar's index of company names. In addition, however, a completely new system of complaint has been introduced.

(c) Under ss.69–74 of CA 2006 a new procedure has been introduced to cover situations where a company has been registered with a name

(i) that it is the same as a name associated with the applicant in which he has goodwill, or
(ii) that it is sufficiently similar to such a name that its use in the United Kingdom would be likely to mislead by suggesting a connection between the company and the applicant (s.69).

Section 69 can be used not just by other companies but by any person to object to a company names adjudicator if a company's name is similar to a name in which the applicant has goodwill. There is list of circumstances raising a presumption that a name was adopted legitimately, however even then, if the objector can show that the name was registered either, to obtain money from them, or to prevent them from using the name, then they will be entitled to an order to require the company to change its name.

Under s.70 the Secretary of State is given the power to appoint company names adjudicators and their staff and to finance their activities, with one person being appointed Chief Adjudicator.
Section 71 provides the Secretary of State with power to make rules for the proceedings before a company names adjudicator.
Section 72 provides that the decision of an adjudicator and the reasons for it, are to be published within 90 days of the decision.

Section 73 provides that if an objection is upheld, then the adjudicator is to direct the company with the offending name to change its name to one that does not similarly offend. A deadline must be set for the change. If the offending name is not changed, then *the adjudicator will decide* a new name for the company.

Under s.74 either party may appeal to a court against the decision of the company names adjudicator. The court can either uphold or reverse the adjudicator's decision, and may make any order that the adjudicator might have made.

5 **(a)** As shareholders in limited companies, by definition, have the significant protection of limited liability the courts have always seen it as the duty of the law to ensure that this privilege is not abused at the expense of the company's creditors. To that end they developed the doctrine of capital maintenance, the specific rules of which are now given expression in the Companies Act (CA) 2006. The rules, such as that stated in CA 2006 s.580 against shares being issued at a discount, ensure that companies receive at least the full nominal value of their share capital. The rules relating to the doctrine of capital maintenance operate in conjunction to those rules to ensure that the capital can only be used in limited ways. Whilst this may be seen essentially as a means of protecting the company's creditors, it also protects the shareholders themselves from the depredation of the company's capital.

There are two key aspects of the doctrine of capital maintenance: firstly that creditors have a right to see that the capital is not dissipated unlawfully; and secondly that the members must not have the capital returned to them surreptitiously. There are a number of specific controls over how companies can use their capital, but perhaps the two most important are the rules relating to capital reduction and company distributions.

(b) The procedures through which a company can reduce its capital are laid down by ss.641–653 Companies Act 2006.

Section 641 states that, subject to any provision in the articles to the contrary, a company may reduce its capital in any way by passing a special resolution to that effect. In the case of a public company any such resolution must be confirmed by the court. In the case of a private company, however, it is also possible to reduce capital without court approval as long as the directors issue a statement as to the company's present and continued solvency for the following 12 months (ss.642 & 643). The special resolution, a copy of the solvency statement, a statement of compliance by the directors confirming that the solvency statement was made not more than 15 days before the date on which the resolution was passed, and a statement of capital must be delivered to the registrar within 15 days of the date of passing the special resolution.

Section 641 sets out three particular ways in which the capital can be reduced by:

(a) removing or reducing liability for any capital remaining as yet unpaid. In effect the company is deciding that it will not need to call on that unpaid capital in the future.
(b) cancelling any paid up capital which has been lost through trading or is unrepresented by in the current assets. This effectively brings the balance sheet into balance at a lower level by reducing the capital liabilities in recognition of a loss of assets.
(c) repayment to members of some part of the paid-up value of their shares in excess of the company's requirements. This means that the company actually returns some of its capital to its members on the basis that it does not actually need that level of capitalisation to carry on its business.

It can be seen that procedure (a) reduces the potential creditor fund, for the company gives up the right to make future calls against its shares and procedure (c) reduces the actual creditor fund by returning some of its capital to the members. In recognition of this fact, creditors are given the right to object to any such reduction. However procedure (b) does not actually reduce the creditor fund, it merely recognises the fact that capital has been lost. Consequently creditors are not given the right to object to this type of alteration (ss.645 & 646).

Under s.648 the court may make an order confirming the reduction of capital on such terms as it thinks fit. In reaching its decision the court is required to consider the position of creditors of the company in cases (a) and (c) above and may do so in any other case. The court also takes into account the interests of the general public. In any case the court has a general discretion as to what should be done. If the company has more than one class of shares, the court will also consider whether the reduction is fair between classes. In this it will have regard to the rights of the different classes in a liquidation of the company since a reduction of capital is by its nature similar to a partial liquidation.

When a copy of the court order together with a statement of capital is delivered to the registrar of companies a certificate of registration is issued (s.649).

6 The Company Directors Disqualification Act (CDDA) 1986 was introduced to control individuals who persistently abused the various privileges that accompany incorporation, most particularly the privilege of limited liability. The Act applies to more than just directors and the court may make an order preventing any person (without leave of the court) from being:

(i) a director of a company;
(ii) a liquidator or administrator of a company;
(iii) a receiver or manager of a company's property; or
(iv) in any way, whether directly or indirectly, concerned with or taking part in the promotion, formation or management of a company.

The CDDA 1986 identifies three distinct categories of conduct, which may, and in some circumstances must, lead the court to disqualify certain persons from being involved in the management of companies.

(a) *General misconduct in connection with companies*
This first category involves the following:

(i) A conviction for an indictable offence in connection with the promotion, formation, management or liquidation of a company or with the receivership or management of a company's property (s.2 of the CDDA 1986). The maximum period for disqualification under s.2 is five years where the order is made by a court of summary jurisdiction, and 15 years in any other case.

(ii) Persistent breaches of companies legislation in relation to provisions which require any return, account or other document to be filed with, or notice of any matter to be given to, the registrar (s.3 of the CDDA 1986). Section 3 provides that a person is conclusively proved to be persistently in default where it is shown that, in the five years ending with the date of the application, he has been adjudged guilty of three or more defaults (s.3(2) of the CDDA 1986). This is without prejudice to proof of persistent default in any other manner. The maximum period of disqualification under this section is five years.

(iii) Fraud in connection with winding up (s.4 of the CDDA 1986). A court may make a disqualification order if, in the course of the winding up of a company, it appears that a person:

(1) has been guilty of an offence for which he is liable under s.993 of the CA 2006, that is, that he has knowingly been a party to the carrying on of the business of the company either with the intention of defrauding the company's creditors or any other person or for any other fraudulent purpose; or
(2) has otherwise been guilty, while an officer or liquidator of the company or receiver or manager of the property of the company, of any fraud in relation to the company or of any breach of his duty as such officer, liquidator, receiver or manager (s.4(1)(b) of the CDDA 1986).

The maximum period of disqualification under this category is 15 years.

(b) *Disqualification for unfitness*

The second category covers:

(i) disqualification of directors of companies which have become insolvent, who are found by the court to be unfit to be directors (s.6 of the CDDA 1986). Under s. 6, the minimum period of disqualification is two years, up to a maximum of 15 years;
(ii) disqualification after investigation of a company under Pt XIV of the CA 1985 (*it should be noted that this part of the previous Act still sets out the procedures for company investigations*) (s.8 of the CDDA 1986). Once again, the maximum period of disqualification is 15 years.

Schedule 1 to the CDDA 1986 sets out certain particulars to which the court is to have regard in deciding whether a person's conduct as a director makes them unfit to be concerned in the management of a company. In addition, the courts have given indications as to what sort of behaviour will render a person liable to be considered unfit to act as a company director. Thus, in *Re Lo-Line Electric Motors Ltd* (1988), it was stated that:

'Ordinary commercial misjudgment is in itself not sufficient to justify disqualification. In the normal case, the conduct complained of must display a lack of commercial probity, although . . . in an extreme case of gross negligence or total incompetence, disqualification could be appropriate.'

(c) *Other cases for disqualification*

This third category relates to:

(i) participation in fraudulent or wrongful trading under s.213 of the Insolvency Act (IA)1986 (s.10 of the CDDA 1986);
(ii) undischarged bankrupts acting as directors (s.11 of the CDDA 1986); and
(iii) failure to pay under a county court administration order (s.12 of the CDDA 1986).

For the purposes of most of the CDDA 1986, the court has discretion to make a disqualification order. Where, however, a person has been found to be an unfit director of an insolvent company, the court has a duty to make a disqualification order (s.6 of the CDDA 1986). Anyone who acts in contravention of a disqualification order is liable:

(i) to imprisonment for up to two years and/or a fine, on conviction on indictment; or
(ii) to imprisonment for up to six months and/or a fine not exceeding the statutory maximum, on conviction summarily (s.13 of the CDDA 1986).

7 Redundancy is defined in s.139(1) of the Employment Rights Act (ERA) 1996 as being: 'dismissal attributable wholly or mainly to:

(a) the fact that his employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him, or has ceased, or intends to cease to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where they were so employed, have ceased or diminished or are expected to cease or diminish.'

In order to qualify for redundancy payments an employee must have been continuously employed by the same employer or associated company for a period of two years. At the outset of redundancy proceedings the onus is placed on the employee to show that they have been dismissed which they do by demonstrating that they are covered by s.136 of ERA 1996, which provides four types of dismissal. These are:

(i) the contract of employment is terminated by the employer with or without notice;
(ii) a fixed-term contract has expired and has not been renewed;

(iii) the employee terminates the contract with or without notice in circumstances which are such that he or she is entitled to terminate it without notice by reason of the employer's conduct;
(iv) the contract is terminated by the death of the employer, or the dissolution or liquidation of the firm.

Once dismissal has been established a presumption in favour of redundancy operates and the onus shifts to the employer to show that redundancy was not the reason for the dismissal.

Employees who have been dismissed by way of redundancy are entitled to claim a redundancy payment from their former employer. Under the ERA 1996 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 $^1/_2$ weeks pay for each year of service, those between 22 and 40 are entitled to 1 weeks pay for every year of service, and those between 41 and 65 are entitled to $1^1/_2$ 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 £330, the maximum total that can be claimed is £9,900, (i.e. 1.5 x 20 x 330).

Disputes in relation to redundancy claims are heard before an Employment Tribunal and on appeal go to the Employment Appeal Tribunal. The employer must act as would be expected of a 'reasonable employer' and in determining whether the employer has acted reasonably, the Employment Tribunal will consider whether, in the circumstances 'including the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating the reason given as sufficient reason for dismissing the employee.' (s.98(4) ERA 1996). Reasonable employers should follow the ACAS 'Code of Practice on Disciplinary Practice and Procedures in Employment' in relation to the way they discipline and dismiss their employees. Thus redundancy, *per se*, does not provide a justification for dismissal, unless the employer had introduced and operated a proper redundancy scheme, which included preferably objective criteria for deciding who should be made redundant, and provided for the consideration of redeployment rather than redundancy.

8 The essential issues to be disentangled from the problem scenario relate to breach of contract and the remedies available for such breach.

There seems to be no doubt that there is a contractual agreement between Arti and Bee Ltd. Normally 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. However, such a definition does not appear to apply in this case as the time has not yet come when Arti has to produce the text. He has merely indicated that he has no intention of doing so. This is an example of the operation of the doctrine of anticipatory breach. This arises precisely where one party, prior to the actual due date of performance, demonstrates an intention not to perform their contractual obligations. The intention not to fulfil the contract can be either express or implied.

Express anticipatory breach occurs where a party actually states that they will not perform their contractual obligations (*Hochster* v *De La Tour* (1853)). Implied anticipatory breach occurs where a party carries out some act which makes performance impossible *Omnium Enterprises* v *Sutherland* (1919)).

When anticipatory breach takes place the innocent party can sue for damages immediately on receipt of the notification of the other party's intention to repudiate the contract, without waiting for the actual contractual date of performance as in *Hochster* v *De La Tour*. Alternatively, they can wait until the actual time for performance before taking action. In the latter instance, they are entitled to make preparations for performance, and claim the agreed contract price (*White and Carter (Councils)* v *McGregor* (1961)).

It would appear that Arti's action is clearly an instance of express anticipatory breach and that Bee Ltd has the right either to accept the repudiation immediately or affirm the contract and take action against Arti at the time for performance (*Vitol SA* v *Norelf Ltd* (1996)). In any event Arti is bound to complete his contractual promise or suffer the consequences of his breach of contract.

Remedies for breach of contract

(i) *Specific performance*
It will sometimes suit a party to break their contractual obligations, even if they have to pay damages. In such circumstances the court can make an order for specific performance to require the party in breach to complete their part of the contract. However, as specific performance is not available in respect of contracts of employment or personal service Arti cannot be legally required to write the book for Bee Ltd (*Ryan* v *Mutual Tontine Westminster Chambers Association* (1893)). This means that the only remedy against Arti lies in the award of damages.

(ii) *Damages*
A breach of contract will result in the innocent party being able to sue for damages.
Bee Ltd, therefore, can sue Bob for damages, but the important issue relates to the extent of such damages.

The estimation of what damages are to be paid by a party in breach of contract can be divided into two parts: remoteness and measure.

Remoteness of damage
The rule in *Hadley* v *Baxendale* (1845) states that damages will only be awarded in respect of losses which arise naturally, 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 (*Victoria Laundry Ltd* v *Newham Industries Ltd* (1949)).

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. In order to achieve this end the claimant is placed under a duty to mitigate losses. This means that the injured party has to take all reasonable steps to minimise their loss (*Payzu* v *Saunders* (1919)). Although such a duty did not appear to apply in relation to anticipatory breach as decided in *White and Carter (Councils)* v *McGregor* (1961) (above).

Applying these rules to the fact situation in the problem it is evident that as Arti has effected an anticipatory breach of his contract with Bee Ltd he will be liable to them for damages suffered as a consequence, if indeed they suffer damage as a result of his breach. As Bee Ltd will be under a duty to mitigate their losses, they will have to commit their best endeavours to find someone else to produce the required text on time. If they can do so at no further cost then they would suffer no loss, but any additional costs in producing the text will have to be borne by Arti.

However, if Bee Ltd is unable to produce the required text on time the situation becomes more complicated.

(i) As regards the profits from the contract to supply the accountancy body with all its text, the issue would be as to whether this was normal profit or amounted to an unexpected gain, as it was not part of Bee Ltd's normal market when the contract was signed. If *Victoria Laundry Ltd* v *Newham Industries Ltd* were to be applied it is unlikely that Bee Ltd would be able to claim that loss of profit from Arti. However, it is equally plausible that the contract was an ordinary commercial one and that Arti would have to recompense Bee Ltd for any losses suffered from its failure to complete contractual performance.
(ii) As for the extensive preliminary expenses Arti would certainly be liable for them, as long as they were in the ordinary course of Bee Ltd's business and were not excessive (*Anglia Television* v *Reed* (1972)).

9 This question requires an analysis of the doctrine of corporate opportunity and the rules relating to directors' duties. Section 178 of the Companies Act (CA) 2006 places directors' duties on a statutory basis, and although s.170 provides that the new statement of duties replaces the old common law rules and equitable principles, it nonetheless expressly provides that the duties now stated in the Act are to be interpreted and applied in the same way as those rules and principles were. Section 178 specifically preserves the existing civil consequences of breach of any of the general duties, so the remedies for breach of the newly stated general duties will be exactly the same as those that were available following a breach of the equitable principles and common law rules that the general duties replace. Section 178(2) specifically provides that the directors' duties are enforceable in the same way as any other fiduciary duty owed to a company by its directors and remedies available may include:

(i) damages or compensation where the company has suffered loss;
(ii) restoration of the company's property;
(iii) an account of profits made by the director; and
(iv) rescission of a contract where the director failed to disclose an interest.

It should be noted that the foregoing does not apply to the duty to exercise reasonable care, skill and diligence under s.174, which is not considered to be a fiduciary duty.

Section 175 of the Act specifically deals with the duty to avoid conflicts of interest and replaces the previous no-conflict rule. Under the previous rule, certain consequences followed if directors placed themselves in a position where their personal interests came into conflict with their duties to the company, unless the company knew about the conflict and specifically consented to it. Section 175 continues that procedure in an amended form, which allows the other independent directors to authorise the conflict. Any conflicted directors must not count in the quorum for the meeting or vote. The section makes clear that a conflict of interest may, in particular, arise when a director makes personal use of information, property or opportunities belonging to the company or specifically under ss.177 and 182 where the duties to declare interests in transactions are set out, when a director enters into a contract with his company. This is the case whether or not the company itself could have taken advantage of the property, information or opportunity, so once again the previous common law and equitable rules are maintained. As well as allowing the directors to approve a conflict under s.175, s.180 preserves the ability of the members of a company to authorise conflicts that would otherwise be a breach of this duty.

Applying the preceding rules to the facts of the problem scenario it can be seen that Des has beached his statutory duty under CA 2006 s.175 by allowing a conflict of interest to arise without declaring it to the board and getting the approval of the other directors or indeed the members.

The operation of the previous fiduciary duty not to make an undisclosed benefit from the position as directors and not to profit personally from what is a corporate opportunity even survived after the director in question has left the company (*IDC* v *Cooley* (1972)). As the CA 2006 continues the previous equitable principles and specifically states that the duty to avoid conflicts of interest applies to former directors, Des will still be liable for his action.

It is also now clear that the rules against allowing a conflict of interest to arise apply even if the company cannot itself take advantage of the opportunity wrongly misappropriated, which continues the previous very strict application of principle (*Regal (Hastings)* v *Gulliver* (1942)). However the duty is not infringed if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest: s.175(4)(a).

Applying this to the facts of the problem it would appear that Des has acted in breach of his statutory duty and will be held liable to account to the company for any profits he made on the transaction.

He will not be allowed to hide his personal profit behind the separate personality of Flush Ltd as the courts will simply lift the veil of incorporation as in *Gilford Motor Co* v *Horne* (1933).

10 This question requires candidates to recognise and explain the law relating to two criminal offences: insider dealing and money laundering.

(a) Insider dealing is dealing in shares, on the basis of access to unpublished price sensitive information. Such activity is unlawful and is governed by part V of the Criminal Justice Act 1993 (CJA). Money laundering refers to the attempt to disguise the origin of money acquired through criminal activity in order to make it appear legitimate. The aim of the process is to disguise the source of the property, in order to allow the holder to enjoy it free from suspicion as to its source.

Such activity is regulated by the Proceeds of Crime Act 2002 (PCA) together with the specifically anti-terrorist legislation, the Terrorism Act 2000 and the Anti-terrorism Crime and Security Act 2001 and the Prevention of Terrorism Act 2005.

Under s.52 of the Criminal Justice Act (CJA) 1993 an individual is guilty of insider dealing if they have information as an insider and deal in price-affected securities on the basis of that information.

Section 54 specifically includes shares amongst those securities and dealing is defined in s.55, amongst other things, as acquiring or disposing of securities, whether as a principal or agent, or agreeing to acquire securities.

Section 56 defines 'inside information' as:

(i) relating to particular securities;
(ii) being specific or precise;
(iii) not having been made public; and
(iv) being likely to have a significant effect on the price of the securities.

Section 57 states that a person has information as an insider only if they know it is inside information and they have it from an inside source and covers those who get the inside information directly through either:

(i) being a director, employee or shareholder of an issuer of securities; or
(ii) having access to the information by virtue of their employment, office or profession.

On summary conviction, an individual found guilty of insider dealing is liable to a fine not exceeding the statutory maximum and/or maximum of six months imprisonment. On indictment the penalty is an unlimited fine and/or a maximum of seven years imprisonment. It is quite clear from the facts of the problem scenario that Greg has engaged in insider dealing under the CJA 1993.

(b) Although he has tried to disguise his criminal activity, that has merely involved him in further criminal activity; money laundering.

Under s.327 of the Proceeds of Crime Act 2002 it is an offence to conceal, disguise, convert, transfer or remove criminal property from England and Wales, Scotland or Northern Ireland. Concealing or disguising criminal property is widely defined to include concealing or disguising its nature, source, location, disposition, movement or ownership or any rights connected with it. These offences are punishable on conviction by a maximum of 14 years' imprisonment and/or a fine.

Applying the general law to the problem scenario, one can conclude that Greg is an 'insider' as he receives inside information as a result of his position as a director of Huge plc. The information fulfils the requirements for 'inside information' as it: relates to particular securities, the shares in Kop plc; is specific, in that it relates to the company's take-over plans; has not been made public; and is likely to have a significant effect on the price of the securities. On that basis Greg is clearly guilty of an offence under s.52 of the CJA when he arranges for Jet Ltd to buy the shares in Kop plc.

It is equally apparent that Greg has attempted to disguise the source of his profit from the illegal activity of insider dealing by pretending that it is the result of legitimate work that he has carried out for his company Imp Ltd. As a consequence he would also be liable for prosecution under s.327 of the Proceeds of Crime Act 2002.

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

(a) 3–4 marks A thorough, to complete answer, explaining the meaning of the two terms.
0–2 marks A less than complete answer, probably unbalanced, focusing only on one of the terms, or lacking in detail.

(b) 4–6 marks Thorough treatment of the topic. Clearly explaining the meaning of the two types of precedent.
2–3 marks Less thorough answer, but showing a reasonable understanding of the topic of precedent.
0–1 mark Weak answer, perhaps showing some knowledge but little understanding of the topic generally.

2 This question requires candidates to examine some of the essential principles relating to the doctrine of consideration in relation to the law of contract.

8–10 marks A thorough, to complete answer detailing what is meant by consideration and the two rules. It is likely that case authority will be provided, and they will be rewarded accordingly.
5–7 marks A limited understanding, or a lack of balance or clarity in regard to the various parts of the question.
0–4 marks Very unbalanced, only dealing with parts of the question or lacking in detail.

3 **(a)** 2–3 marks A good explanation of the distinction between terms and representations. No reference to misrepresentation is needed.
0–1 mark Very little knowledge of the meaning of the concepts.

(b) 5–7 marks Thorough treatment of the topic. Clearly distinguishing between the two types of terms and explaining most, if not all of the ways in which terms may be implied into contracts.
2–4 marks Less thorough answer, but showing a reasonable understanding of the topic.
0–1 mark Weak answer, perhaps showing some knowledge but little understanding of the topic generally.

4 **(a)** 3–4 marks Good explanation of the rules relating to company names.
0–2 marks Some but limited knowledge of the control over company names.

(b) 3–4 marks Good explanation of the tort of 'passing off' with case authority to support the explanation.
0–2 marks Some but limited knowledge of 'passing off' or control over company names.

(c) 2 marks Good explanation of the role of the company names adjudicators and why they are necessary.
0–1 mark Little if any knowledge of the concept.

5 **(a)** 3–4 marks Thorough explanation of the doctrine of capital maintenance perhaps with some examples of its application.
0–2 marks Some knowledge but lacking in detail.

(b) 4–6 marks Good to full consideration of the procedure for reducing capital. Reference must be made to the 2006 Act procedure and the difference between public and private companies should be mentioned specifically.
2–3 marks Some general knowledge but lacking in detail as regards to the process or not mentioning the difference between the two company forms.
0–1 mark Little or no understanding of the process.

6 This question requires candidates to explain the operation of the Company Directors Disqualification Act 1986.

8–10 marks Thorough to complete answers, showing a detailed understanding of the legislation.
5–7 marks A clear understanding of the topic, but perhaps lacking in detail. Alternatively an unbalanced answer showing good understanding of one part but less in the other.
2–4 marks Some knowledge, although perhaps not clearly expressed, or very limited in its knowledge and understanding of the topic.
0–1 mark Little or no knowledge of the topic.

7 This question requires candidates to explain the meaning of the term redundancy and the legal rules relating to it.

8–10 marks Thorough to complete answers, showing a detailed understanding of the concept of redundancy, the rules for calculating payment and probably making reference to the legislation.
5–7 marks A clear understanding of the topic, but perhaps lacking in detail.
Alternatively an unbalanced answer showing good understanding of one part but less in the other.
2–4 marks Some knowledge, although perhaps not clearly expressed, or very limited in its knowledge and understanding of the topic.
0–1 mark Little or no knowledge of the topic.

8 This question requires candidates to analyse a problem scenario from the perspective of contract law and apply the appropriate legal rules.

8–10 marks	Clear analysis of the problem scenario – recognition of the contract law issues raised and a convincing application of the legal principles to the facts. Appropriate case authorities are likely to be cited.
6–7 marks	Sound analysis of the problem – recognition of the major principles involved and a fair attempt at applying them. Perhaps sound in knowledge but lacking in analysis and application.
3–5 marks	Unbalanced answer perhaps showing some appropriate knowledge but weak in analysis or application.
0–2 marks	Very weak answer showing little analysis, appropriate knowledge or application.

9 This question requires a consideration of the statutory duties placed on company directors under the Companies Act 2006.

8–10 marks	Thorough to complete answers, showing a detailed understanding of the rules relating to conflict of interest.
5–7 marks	A clear understanding of the topic but perhaps lacking in detail or application.
2–4 marks	Some knowledge, although perhaps not clearly expressed, or very limited in its application.
0–1 mark	Little or no knowledge of the topic.

10 This question requires candidates to explain the meaning and regulation of the two criminal offences of insider dealing and money laundering and apply that law to a problem scenario. Candidates may mention market abuse as an alternative to insider dealing in which case they should be credited for their knowledge.

8–10 marks	Clear analysis of the problem scenario – recognition of both the criminal law issues raised and a convincing application of the legal principles to the facts.
6–7 marks	Sound analysis of the problem – recognition of the major principles involved and a fair attempt at applying them. Perhaps sound in knowledge but lacking in analysis and application.
3–5 marks	Unbalanced answer perhaps showing some appropriate knowledge but weak in analysis or application.
0–2 marks	Very weak answer showing little analysis, appropriate knowledge or application.