Answers

1 (a) The civil court structure in England in ascending order of authority is as follows:

Magistrates' courts
Magistrates' courts have a significant, if limited, civil jurisdiction. They hear family proceedings under the Domestic Proceedings and Magistrates' Courts Act 1978 and the Children Act 1989. In such cases the court is termed a 'family proceedings court'. More generally, magistrates' courts have powers of recovery in relation to council tax arrears and charges for water, gas and electricity.

County courts
The network of county courts was introduced in 1846 to provide for local adjudication of relatively small-scale litigation. There are currently some 240 county courts. The county court jurisdiction extends to probate, property cases, tort, contract, bankruptcy and insolvency.

Of particular importance with regard to the county court is the provision of a small claims procedure operated under its auspices. This procedure essentially allows for an arbitration hearing to be conducted by a district judge in most cases involving claims of no more than £5,000. This small claims procedure is designed to be quicker, less formal and less expensive than a county court hearing.

The High Court of Justice
The High Court has three administrative divisions: the Court of Chancery, the Queen's Bench Division and the Family Division.

The Queen's Bench Division
This is the main common law court and is the division with the largest workload. Its main jurisdiction is related to contract and tort cases.

The Chancery Division
This division deals with issues relating to land, mortgages, trusts and the administration of the estates of the dead, copyright, company law, partnership, revenue law and insolvency.

The Family Division
The Family Division of the High Court, as its name indicates, deals with all family matters, including issues relating to minors, legitimacy and adoption.

The Court of Appeal (Civil Division)
This court hears appeals from the three divisions of the High Court. Usually, three judges will sit to hear an appeal, although for very important cases five may sit.

The Supreme Court
The Supreme Court is the final Court of Appeal in civil as well as criminal law. Most appeals reaching the Supreme Court come from the Court of Appeal, but there is also a 'leapfrog' procedure by which an appeal may go to the Supreme Court directly from the High Court if the High Court judge certificates the case as being suitable for the Supreme Court to hear and the Supreme Court gives leave to appeal. For most cases, five Justices of the Supreme Court will sit to hear the appeal but seven, or more, are sometimes convened to hear very important cases.

(b) This part of the question requires an explanation of the way in which the Civil Procedure Rules operate via the tracking system to allocate cases between the county court and the High Court.

Since the 1999 civil justice reforms, the civil system works on the basis of the court, upon receipt of the claim, allocating the case to one of three tracks for a hearing. These are: (i) small claims; (ii) fast track; and (iii) multi-track. (Civil Procedure Rules Part 26)

(i) **The small claims track** (CPR Pt 27)
The concept of 'arbitration' as such disappears and is replaced by a small claims hearing for cases involving a claim of no more than £5,000, except for personal injury claims and claims relating to housing disrepair where the limit remains £1,000. Aspects of the previous small claims procedure which were retained include its informality, the interventionist approach adopted by the judiciary, the limited costs regime and the limited grounds for appeal (misconduct of the district judge or an error of law made by the court).

Parties can consent to use the small claims track even if the value of their claim exceeds the normal value for that track, but subject to the court's approval. Cases are dealt with quickly and informally and often without the need for legal representation or a full hearing.

(ii) **The fast track** (CPR Pt 28)
In accordance with one of the main principles of the Woolf reforms, the purpose of the fast track is to provide a streamlined procedure for the handling of moderately-valued cases, i.e. those with a value of more than £5,000 but less than £25,000, where the trial is to last no longer than one day and there is limited need for experts in court.

(iii) **The multi-track** (CPR Pt 29)
The multi-track is intended to provide a flexible regime for the handling of the higher value, more complex claims, that is, those with a value of over £25,000, which is to be managed by the courts.

The Civil Procedure Rules operate the same process irrespective of whether the case forum is the High Court or the county court. Generally, county courts will hear small claims and fast track cases while the more challenging multi-track cases will be heard in the High Court.

2 This question requires candidates to consider two issues in relation to the formation of contracts.

(a) Intention to create legal relations

A contract is defined as a binding agreement, however, in order to limit the number of cases that might otherwise be brought, the courts will only enforce those agreements which the parties intended to have legal effect. Although expressed in terms of the parties' intentions, the test for the presence of such intention is an objective, rather than a subjective, one. Agreements can be divided into two categories, in which different presumptions apply.

(i) **Domestic and social agreements**
In these agreements, there is a presumption that the parties do not intend to create legal relations (*Balfour* v *Balfour* (1919)). However, any such presumption against the intention to create legal relations in such relationships may be rebutted by the actual facts and circumstances of a particular case, as may be seen in *Merritt* v *Merritt* (1970).

(ii) **Commercial agreements**
In these situations, the strong presumption is that the parties intend to enter into a legally binding relationship in consequence of their dealings (*Edwards* v *Skyways* (1964)). However, as with other presumptions, this one is also open to rebuttal. In commercial situations, however, the presumption is so strong that it will usually take express wording to the contrary to avoid its operation, as may be seen in *Rose and Frank Co* v *Crompton Bros* (1925).

(b) The doctrine of privity

As a general rule, contractual agreements can only affect those persons who have entered into the agreement expressed in the terms of the contract. Thus it is normally the case that no third party can rely on, or enforce, any terms in a contractual agreement to which they are not themselves a party (*Dunlop* v *Selfridge* (1915)).

However, it is possible to formally transfer the benefit of a contract to a third party. This process, known as assignment, must be in writing. It should be noted that the burden of a contract cannot be assigned without the consent of the other party to the contract.

It is also possible for a person to create a contract specifically for the benefit of a third party. In limited circumstances the promisee is considered as a trustee of the contractual promise for the benefit of the third party. In order to enforce the contract, the third party must act through the promisee by making them a party to any action (*Les Affreteurs Reunis SA* v *Leopold Walford (London) Ltd* (1919)).

A third party may enforce a contract in the following circumstances:

(i) the beneficiary sues in some other capacity. Although not a party to the original agreement, individuals may, nonetheless, acquire the power to enforce the contract where they are legally appointed to administer the affairs of one of the original parties (*Beswick* v *Beswick* (1967), where a widow, appointed administratrix of her late husband's estate, was able to successfully sue her nephew for specific performance of a beneficial agreement in that capacity).

(ii) the situation involves a collateral contract. This situation arises where one party promises something to another party if that other party enters into a contract with a third party: e.g. A promises to give B something if B enters into a contract with C. In such a situation, B can insist on A complying with the original promise (*Shanklin Pier* v *Detel Products Ltd* (1951)).

(iii) it is foreseeable that damage caused by any breach of contract will cause a loss to a third party (*Linden Gardens Trust Ltd* v *Lenesta Sludge Disposals Ltd* (1994)).

The other main common law exception to the privity rule is agency, where the whole point is for the agent to bring about contractual relations between their principal and a third party.

In the area of motoring insurance, statute law has intervened to permit third parties to claim directly against insurers, but much wider statutory intervention has been introduced by the Contracts (Rights of Third Parties) Act 1999.

3 (a) In order to justify an action in the tort of negligence, the claimant has to demonstrate not only that the defendant owed them a duty of care, but also that the defendant actually breached that duty of care, causing loss or damage to the claimant.

However, those two steps must be further supported by the claimant showing that the loss or damage suffered was *a direct consequence* of the breach of duty of care. This final aspect of demonstrating negligence is referred to as causation and the claimant to show that the injury loss or injury sustained was caused by the defendant's negligence. This process is sometimes referred to as *causation in fact*. However, even where causation is proved, a negligence claim may still fail if the damage caused is held to be *too remote*. The issue of remoteness is sometimes referred to as *causation in law*. The test for remoteness is *reasonable foresight* as stated in *The Wagon Mound* (1961).

(b) The 'but for' test is a way of determining whether the claimant's loss or damage was caused by the defendant. In order to satisfy the test, the claimant must show that 'but for' the defendant's actions, the damage would not have occurred. If the damage would have occurred irrespective of a breach of duty on the part of the defendant, then the breach is not the cause.

Single causes

For example, in *Barnett* v *Chelsea and Kensington HMC* (1969), a doctor in a hospital casualty department sent a patient home without treating him, telling him to go and see his own doctor. The patient subsequently died from arsenic poisoning. While it was held that the doctor had been negligent in not examining the patient, the evidence indicated that he would have died anyway. Consequently, the doctor's conduct did not cause his death and he could not be held liable under the tort of negligence.

Also, in *Cutler* v *Vauxhall Motors Ltd* (1971), the plaintiff suffered a grazed ankle whilst at work, due to the defendant's negligence. The graze became ulcerated because of existing varicose veins and the plaintiff had to undergo an immediate operation to remove the veins. It was held that the plaintiff could not recover damages for the operation, because the evidence was that he would have had to undergo the operation within five years anyway, irrespective of the accident at work.

So, if the same result would have occurred regardless of the breach of duty, then the courts are unlikely to find that the breach caused the injury. This point is further supported by the case of *Robinson* v *Post Office* (1974), where a doctor failed to test for an allergic reaction before giving an anti-tetanus injection. However, it was held that the doctor would not be liable for the reaction of the patient, because the test would not have revealed the allergy in time.

Multiple causes

In relation to the 'but for' test, difficulties have arisen where there has been a number of potential causes of the injury or loss. In such a situation, the onus is on the claimant to show that the defendant's breach was the material contributory cause of his or her injury. Consequently, where there are a number of possible causes, establishing causation may prove difficult, particularly in medical negligence cases. In *Wilsher* v *Essex AHA* (1988), the plaintiff was born three months premature. He suffered almost total blindness as a result of a condition known as retrolental fibroplasia. It was claimed on behalf of the plaintiff that this was caused by the negligence of the doctor, who had failed to notice that the device for adding oxygen to the blood had been wrongly attached, resulting in an excessive dose of oxygen. However, medical evidence showed at least six potential causes of the plaintiff's blindness, the majority of which were inherent in premature babies. The House of Lords held that there was insufficient evidence to show which of the six caused the injury to the plaintiff.

However, the courts on occasion have taken a more flexible approach, as may be seen in *Fairchild* v *Glenhaven Funeral Services Ltd & Others* (2002). In this case, the employees concerned had contracted mesothelioma due to a prolonged exposure to asbestos fibres gained during their employment with a number of different employers. It was therefore almost impossible to identify which period of employment was responsible for the employees contracting the disease. As the disease could be generated through exposure to just one fibre of asbestos – although the greater the exposure, the greater the chances of contracting the disease – the House of Lords was prepared to impose liability on all of the employers. It felt that all of the defendants, by failing to take reasonable care, had contributed to the risk.

The 'but for' test cannot solve all questions of factual causation. Indeed, where there has been an omission to act, or an act which does not in itself have physical consequences, it may not be an appropriate test.

(c) Where there is a break in the chain of causation, the defendant will not be liable for damage caused after the break. The issues are whether the whole sequence of events is the probable consequence of the defendant's actions and whether it is reasonably foreseeable that these events may happen. This break in the chain is caused by an intervening act and the law recognises that such acts fall into three categories, as follows:

(i) **A natural event**

A natural event does not automatically break the chain of causation. If the defendant's breach has placed the claimant in a position where the natural event can add to that damage, the chain will not be broken unless the natural event was totally unforeseeable. In *Carslogie Steamship Co Ltd* v *Royal Norwegian Government* (1952), a ship which was owned by Carslogie had been damaged in a collision caused by the defendant's negligence. The ship was sent for repair and, on this voyage, suffered extra damage, caused by the severe weather conditions. This resulted in the repairs taking 40 days longer than anticipated. It was held that the bad weather acted as a new intervening act, for which the defendant was not liable. The effect of the new act in this case prevented the plaintiff from recovering compensation for the time that it would have taken to repair the vessel in respect of the collision damage, as the ship would have been out of use in any case, due to the damage caused by the weather.

(ii) **Act of a third party**

Where the act of a third party, following the breach of the defendant, causes further damage to the claimant, such an act may be deemed to be a *novus actus*; the defendant will not then be liable for damage occurring after the third party's act. In *Lamb* v *Camden LBC* (1981), due to the defendant's negligence, a water main was damaged, causing the plaintiff's house to be damaged and the house to be vacated until it had been repaired. While the house was empty, squatters moved in and caused further damage to the property. It was held that the defendant was not liable for the squatters' damage. Although it was a reasonably foreseeable risk, it was not a likely event. Furthermore, it was not the duty of the council to keep the squatters out.

The third party's act need not be negligent in itself in order to break the chain of causation, although the courts take the view that a negligent act is more likely to break the chain than one that is not negligent, as can be seen in *Knightley* v *Johns* (1982).

(iii) **Act of the claimant**
The action of the claimant may itself break the chain of causation. However, if the act is reasonable and in the ordinary course of things, the event will not break the chain. In *McKew* v *Holland, Hannen and Cubbitts (Scotland) Ltd* (1969), the plaintiff was injured at work. As a result, his leg sometimes gave way without warning. He was coming downstairs when his leg gave way, so he jumped in order to avoid falling head first and badly injured his ankle. It was held that the defendants were not liable for this additional injury. The plaintiff had not acted reasonably in attempting to negotiate the stairs without assistance and his actions amounted to a *novus actus interveniens*.

4 **(a)** Bribery is defined as 'giving someone a financial or other advantage to encourage that person to perform their functions or activities improperly or to reward that person for having already done so. So this could cover seeking to influence a decision-maker by giving some kind of extra benefit to that decision-maker rather than by what can legitimately be offered as part of a tender process.' (Ministry of Justice Guide to the Bribery Act 2010)

(b) There are four categories of offences of bribery under the Act:

(i) **Offences of bribing another person** (s.1 BA)
It is an offence to offer a financial or other advantage to another person to perform improperly a relevant function or activity, or to reward a person for the improper performance of such a function or activity.

(ii) **Offences relating to being bribed** (s.2 BA)
It is an offence where a person receives or accepts a financial or other advantage to perform a relevant function or activity improperly. 'Relevant function or activity' includes any function of a public nature, any activity connected with a business, any activity performed in the course of a person's employment, and any activity performed by – or on behalf of – a body of persons. The activity may be performed in a country outside the UK.

(iii) **Bribery of foreign public officials** (s.6 BA)
It is an offence directly, or through a third party, to offer a financial or other advantage to a foreign public official (FPO) to influence them in their capacity as a FPO, and to obtain relevant business, or an advantage in the conduct of business.

'FPO' means an individual who holds a legislative, administrative or judicial position of any kind outside the UK, or who exercises a public function outside the UK, or is an official or agent of a public international organisation.

(iv) **Failure of commercial organisations to prevent bribery** (s.7 BA)
It is an offence for a commercial organisation (a UK company or partnership) if a person associated with it bribes another person intending to obtain or retain business, or to obtain or retain an advantage in the conduct of the business, for the organisation. This could take place outside the UK. Section 8 defines associated persons as someone who performs services for – or on behalf of – the commercial organisation, and, therefore, could be an employee, agent or subsidiary.

(c) While s.7 makes it an offence for a commercial organisation to fail to prevent bribery, it also provides a full defence against any such allegation. Thus, a commercial organisation will have a defence if it can show that adequate procedures have been put in place to prevent persons associated with it from engaging in bribery. This defence also serves the purpose of ensuring that commercial organisations have developed procedures to prevent bribery.

Although no definition of 'adequate procedures' is provided, Ministry of Justice guidance indicates six principles which underpin the defence of adequate procedures.

These principles are:

(i) **Proportionate procedures**
The procedures taken by an organisation should be proportionate to the risks it faces and the nature, scale and complexity of its activities. A small organisation would require different procedures to a large multinational organisation.

(ii) **Top-level commitment**
The top-level management should be committed to prevent bribery and foster a culture within the organisation in which bribery is unacceptable.

(iii) **Risk assessment**
Organisations should assess the nature and extent of their exposure to risks of bribery, including potential external and internal risks of bribery. For example, some industries are considered higher risk than others, such as the extractive industries; some overseas markets may be higher risk where there is an absence of anti-bribery legislation.

(iv) **Due diligence**
The organisation should apply due diligence procedures in respect of persons who perform services for – or on behalf of – the organisation in order to mitigate bribery risks.

(v) **Communication**
The organisation should ensure its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training, proportionate to the risks it faces. Communication and training enhances awareness and helps to deter bribery.

(vi) **Monitoring and review**

The organisation should monitor and review procedures designed to prevent bribery and make improvements where necessary. The risks an organisation faces may change and, therefore, an organisation should evaluate the effectiveness of its anti-bribery procedures and adapt where necessary. The question of whether an organisation had adequate procedures in place to prevent bribery is a matter that will be determined by the courts by taking into account the circumstances of the case. The onus will, however, be on the organisation to prove it had adequate procedures in place.

5 **(a)** Dividends are the return received by shareholders in respect of their investment in a company. Subject to any restriction in the articles of association, every company has the implied power to apply its profits in the distribution of dividend payments to its shareholders. Although the directors recommend the level of dividend payment, it is for the company in a general meeting to declare the dividend. This is one of the items conducted at the annual general meeting. If the directors decline to recommend a dividend, then it is not open to the general meeting to overrule that decision and declare a dividend.

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

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

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

(b) As has been stated, the foregoing realised profits test applies to both private and public companies, but public companies face an additional test in relation to distributions, in that s.831 requires that any distribution must not reduce the value of a public company's net assets below the aggregate of its total called-up share capital plus any undistributable reserves. In this regard, undistributable reserves include the share premium account, capital redemption reserve fund and the excess of accumulated unrealised profits.

The effect of this rule is that public companies have to account for changes in the value of their fixed assets, and are required to apply an essentially balance-sheet approach to the determination of profits.

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

6 The Companies Act (CA) 2006 sets out a new statutory statement of seven general duties owed by directors to their companies. The three duties raised in this question are the most important of those duties.

(a) **Duty to promote the success of the company**

Section 172 CA 2006 replaces the previous common law duty on directors to act in good faith in the best interests of the company. In the course of making their decisions under s.172(1), directors are now required to have regard to each of the following list of matters:

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

The list above is non-exhaustive and directors must also have regard to other non-specific matters. Additionally, s.172(3) makes specific reference to the need to consider the interests of the company's creditors where the company is operating under straitened circumstances.

Section 172 is based on the concept of 'enlightened shareholder value' but, nonetheless, it clearly privileges the rights of the shareholders over the other interests mentioned. This is especially apparent when it is remembered that, as emphasised in s.172(2), all duties are owed, not to the various interested stakeholders mentioned, but to the company itself.

(b) Duty to exercise reasonable skill, care and diligence

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

Section 174 requires that a director must exercise 'reasonable' care, skill and diligence and adds that the requirement means the care, skill and diligence that would be exercised by a reasonably diligent person with:

(a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company; and
(b) the general knowledge, skill and experience that the director has.

It is expected that all directors who are performing either specific or general functions perform to a standard appropriate to those functions. Directors who actually lack the knowledge or skills to fulfil particular roles, or perform particular functions, will not be allowed to rely on their lack of competency as an excuse for not showing a required measure of skill or diligence. Thus, for example, it would be expected that a finance director would be able to understand accounts, otherwise they should not be in that position; the function sets the standard expected, not the actual ability of the director, as historically was the case.

Under the second, subjective, element of the test, a director's particular professional or business skills will have a bearing on whether they have met the standard of skill and diligence expected of them. However, this element can only increase that basic standard. For example, a qualified lawyer or accountant would be expected to know more about certain issues than a non-specialist director and would be expected to bring their particular skill to bear on company issues in the area of their particular expertise.

(c) Duty to avoid conflicts of interest

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

The duty not to accept benefits from third parties, specifically covered in s.176, is an aspect of the previous general duty to avoid conflicts of interest.

7 Although employment law is a very statute-based subject governed particularly by the Employment Rights Act 1996, nonetheless there are underlying common law rules that apply and have effect in any employment relationship. Such rules apply to both employer and employee as indicated below.

(a) Duties of the employer

(i) To provide work

The employer normally will be expected to provide work for the employee and where the employee is skilled and needs practice to maintain those skills, there may be an obligation to provide a reasonable amount of work (*Langston* v *Amalgamated Union of Engineering Workers* (1974)). No breach of this implied duty will occur so long as the employee continues to be paid, even though there may be no work available.

(ii) To pay wages

Normally, the rate of pay is expressly stated in the contract of employment. However, in the absence of an express provision, the law will impose the duty to pay a reasonable remuneration for the work done. Following from (i) above, an employer must pay employees their wages even if there is no work available, although an express term to the contrary may be included in the contract of employment. Where workers, in the pursuit of an industrial dispute, offer only part performance by working to rule or adopting a 'go-slow' policy, the employer can refuse to accept such part performance and can refuse to make any payment for work done.

(iii) To indemnify the employee

Where the employee in the course of his or her employment incurs any legal liability or necessary expenses on behalf of the employer, the employee is entitled to be indemnified or reimbursed.

(iv) Mutual respect

The employment relationship is assumed to be based on mutuality of respect, trust and confidence and the employer must not act in a way calculated to damage such mutuality. As will be seen, this is a reciprocal relationship, but it is clear that employers cannot treat their employees in an abusive manner (*Isle of Wight Tourist Board* v *Coombes* (1976)) and must be prepared to address any grievances they might have (*WA Goold (Pearmak) Ltd* v *McConnell & Another* (1995)).

(v) To provide a safe system of work

At common law, the employer is required to take reasonable care for the health and safety of his employees. Failure to comply will render the employer liable for an action in negligence. The duty extends to the provision of competent fellow employees, safe plant and equipment, a safe place of work and a safe system of work. If the employer has taken all reasonable steps to comply with the duty of care, then they will not be liable for any injury sustained (*Latimer* v *AEC Ltd* (1953)).

(b) Duties of the employee

There are a number of implied duties imposed on employees, which may all be understood as deriving from their relationship of trust and confidence with their employer and the consequential duty of loyalty and faithful service that derives from that relationship. The specific duties may be cited as:

(i) **to act faithfully**
This is the fundamental duty and it covers such aspects of confidentially, i.e. not passing on information derived from one's employment to outsiders and not competing with the employer either directly or indirectly.

The courts are reluctant to accept that what workers do in their spare time should be of any concern to their employer (*Nova Plastics Ltd* v *Froggett* (1982)). However, sometimes an employer's interests may be harmed by an employee's spare-time work if this involves direct competition with the employer's business (*Hivac Ltd* v *Park Royal Scientific Instruments Ltd* (1946)).

An employee may not do anything while still employed, which is in breach of the duty to act faithfully. However, it is perfectly lawful for ex-employees to canvass customers of their former employer after leaving service. Moreover, they are entitled to make use of any knowledge and skills acquired while in the former employer's business, apart from such information which can be classified as a trade secret. In this sense, the implied duty of confidentiality for ex-employees is narrower than in the case of an existing employee (*Faccenda Chicken Ltd* v *Fowler* (1986)).

(ii) **to obey reasonable orders**
Employees must obey any reasonable and lawful instruction given to them by their employer. Whether any instruction fulfils these criteria is a matter of fact in each instance. The classic case in this area is *Pepper* v *Webb* (1969), in which a gardener not only indicated that he was not willing to follow an instruction but actually swore at his employer. In a subsequent action it was held that as the order was both lawful and reasonable, the gardener had breached his implied duty.

(iii) **to use skill and care**
Should an employee not exercise the level of skill and care that may reasonably be expected, then they will not only be liable to dismissal, but they may also lose the protection of the employer's duty to indemnify them for losses (see part (a) above), and be made personally liable for claims for compensation. The classic case in this instance is *Lister* v *Romford Ice and Cold Storage Ltd* (1957), in which an employee lorry driver, rather than his employer, was held liable to compensate a fellow worker, due to his gross negligence in driving his lorry, which was held to breach his implied duty of skill and care.

(iv) **not to take bribes or make a secret profit**
This duty almost goes without saying, as an example of the general duty of good faith, but it covers the situation where an employee has received money or gifts from customers or clients. In this instance, the classic case is *Boston Deep Sea Fishing Ice Co* v *Ansell* (1888), in which a managing director of a company was held to have been properly dismissed for having taken money as commission from the company's suppliers for orders he placed with them.

8 **(a)** This part of the question requires candidates to examine the operation of the rules relating to whether or not the performance of existing contractual duties can provide consideration for some new promise.

Box entered into a contract with Ano Ltd to carry out the work for an agreed price. However, before the completion of the contract, Ano Ltd promised a further payment, although it is now refusing to pay more than the original agreed sum. The question is whether Box can enforce Ano Ltd's promise to pay him the additional sum.

In order to require Ano Ltd to make the full payment, Box must show that he provided legally 'sufficient' consideration for the new promise. The question, therefore, is whether the performance of existing contractual duties can ever provide consideration for a new promise. The long-established rule of contract was that the mere performance of a contractual duty already owed to the promisor could not be consideration for a new promise. Thus in *Stilk* v *Myrick* (1809), when members of a ship's crew deserted, the captain promised the remaining members of the crew that they would share the deserters' wages if they completed the voyage. Subsequently, however, when the owners refused to make the promised payment, it was held that the captain's promise could not be legally enforced as the sailors had only done what they were already obliged to do by their contracts of employment. Where, however, the promisee did more than they were already contractually bound to do, then the performance of the additional task does constitute valid consideration for a new promise (*Hartley* v *Ponsonby* (1857)).

The more contemporary case of *Williams* v *Roffey Bros* (1991) expanded the category of consideration. In that case, the Court of Appeal held that Roffey Bros had enjoyed practical benefits as a result of their promise to increase Williams' previously agreed payment for work under an existing contract, although Williams did no more than they were contractually bound to do. The benefits enjoyed were that the work would be completed on time, they would not have to pay any penalty; and they would not suffer the bother and expense of getting someone else to complete the work.

As a result, it would now seem that the performance of an existing contractual duty can amount to consideration for a new promise in circumstances where there is no question of fraud or duress, and where practical benefits accrue to the promisor.

It remains to apply the preceding legal principles to the case in point. First of all as regards Box, he had a contract with Ano Ltd to provide the text for the book, but insisted that Ano Ltd increase its payment before he would complete the work.

Box might try to argue that his situation falls within the ambit of *Williams* v *Roffey Bros*, and that therefore he can enforce the promise. It is clear, however, that this situation is significantly different in that whereas in *Williams* v *Roffey Bros* the plaintiff did not exert any undue pressure on the defendants to induce them to make their promise of additional money, in this situation Box has clearly exerted a form of economic duress on Ano Ltd to force it to increase the contract price; Ano Ltd was left with no real choice but to agree to Box's terms or else it would have suffered a potentially substantial loss through not being able to publish the book on time. Such unfair pressure would take the case outside of *Williams* v *Roffey Bros*, and the old rule as stated in *Stilk* v *Myrick* would apply, and Box would be unable to enforce the promise for the additional £1,000.

(b) 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 Cox and Ano 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 Cox has to produce the diagrams. 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 (*Hochster* v *De La Tour* (1853)) or implied (*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)).

Cox's action is a clear instance of express anticipatory breach and Ano Ltd has the right either to accept the repudiation immediately or affirm the contract and take action against Cox at the time for performance (*Vitol SA* v *Norelf Ltd* (1996)). In any event, Cox is bound to complete his contractual promise or suffer the consequences of his breach of contract. The potential remedies for breach of contract are twofold:

(i) Specific performance
This remedy is not available in respect of contracts of employment or personal service, so Cox cannot be legally required to the diagrams (*Ryan* v *Mutual Tontine Westminster Chambers Association* (1893)).

(ii) Damages
Ano Ltd can sue Cox for damages for breach of contract. The aim is to put the injured party in the same position they would have been in, had the contract been properly performed. As a result of Cox's refusal to complete the contract, Ano Ltd will have to pay an additional £500 to achieve performance of the contact as originally stated. Consequently, Cox will be liable to Ano Ltd for the additional outlay of £500.

9 This question requires candidates to consider several related points concerning the removal of directors and the nature of the articles of association and how they can be altered.

(a) Directors can be removed at any time by a simple majority vote of the members under s.168 Companies Act (CA) 2006. This right cannot be removed, although it can be restricted where the company has introduced weighted voting rights on such votes (*Bushell* v *Faith* (1969)). Those proposing to remove the director must give the company 28 days' notice of the resolution and the director in question must receive a copy of the resolution and is entitled to speak on the resolution at the meeting at which it is considered (s.169). Fi, Gee and Ki can, therefore, use their majority voting power to remove Dee from her role as company director. Even if the removal of the person from the board of directors leads to a breach of their contract of service, the company cannot be prevented from doing so (*Southern Foundries Ltd* v *Shirlaw* (1940)). Directors in quasi-partnership private companies may have a legitimate expectation to act as a director and could seek to take action under s.994 (*Re Bird Precision Bellows Ltd* (1984)), but as the usual remedy offered would be a sale of shares at fair value, this would not further Dee's cause.

(b) Under s.33 CA 2006, articles of association constitute a contract between the members and the company, and *vice versa*, as well as a contract between the members. An essential point to bear in mind, however, is that the contract between members and the company only applies to membership rights and the articles cannot form a contract between the company and either a non-member, or a member acting in some other capacity than that of a member (*Eley* v *Positive Government Security Life Assurance Co* (1876)).

In this situation, Dee is claiming that the articles create a contract between her and the company for her to act as the company secretary. However, as acting as a secretary is clearly not a membership right, she would not normally be able to rely on the articles as the basis of the contract. It is possible for the courts to imply a contract of service from the behaviour of the parties and rely on the articles to provide the actual terms of the contract (*Re New British Iron Co ex parte Beckwith* (1898)), in which case Dee would be able to claim recompense on a *quantum meruit* basis.

(c) Section 21 CA 2006 provides for the alteration of articles of association on the passing of a special resolution, requiring a 75% vote in favour of the proposition. Any such alteration has to be made '*bona fide* in the interest of the company as a whole'. This test involves a subjective element, in that those deciding the alteration must actually believe they are acting in the interest of the company. There is additionally, however, an objective element requiring that any alteration has to be in the interest of the 'individual hypothetical member' (*Greenhalgh* v *Arderne Cinemas Ltd* (1951)). Whether any alteration meets this requirement depends on the facts of the particular case. In *Brown* v *British Abrasive Wheel Co Ltd* (1919), an alteration to a company's articles to allow the 98% majority to buy out the 2% minority shareholders was held to be invalid as not being in the interest of the company as a whole. However, in *Sidebottom* v *Kershaw Leese & Co* (1920), an alteration to the articles to give the directors the power to require any shareholder, who entered into competition with the company, to sell their shares to nominees of the directors at a fair price was held to be valid.

It is extremely likely, therefore, that the alteration will be permitted. Fi, Gee and Ki control 75% of the voting power in the company and so are in a position to pass the necessary special resolution. Additionally, it would clearly benefit the company as a whole and the hypothetical individual shareholder to prevent Dee from passing on its secrets to a rival organisation, so Dee would lose any challenge raised in court.

10 As with registered companies, business assets must be used to pay the debts of a partnership. However, unlike most registered limited companies, members of ordinary partnerships, formed under the Partnership Act (PA) 1890, do not benefit from the advantage of limited liability and consequently their personal wealth may be called upon to pay off business debts. In order to gain the benefit of limited liability for all its members, partnerships may register as limited liability partnerships under the Limited Liability Partnerships Act 2000. However, in such circumstances the name of the business must end with the words 'limited liability partnership', or the abbreviation LLP. The fact that the business name of the partnership in the scenario is HIJ Potteries indicates that it is not a limited liability partnership, but is to be treated as an ordinary partnership, and the ordinary rules of liability will apply. It remains to consider the fact that the partnership agreement provides that Jo's liability for any business debts has to be fixed at the level of her initial capital contribution of £1,000. In law, the partnership agreement is an internal document and its terms cannot bind outsiders without their express agreement. In effect, this has the result that outsiders can hold Jo liable for debts amounting to more than her agreed limit of £1,000. She would, however, be entitled to claim any additional sum paid over that amount from the other two partners.

Upon dissolution, the value of the partnership property is realised and the proceeds are applied in the following order:

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

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

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

Applying these rules to the partnership in question, the first step is for the value of the partnership assets to be realised in order to pay off the debts owed to the various outside creditors. As stated, the partnership assets are worth £5,000 and it has debts to outside creditors of £9,000. As a result, the partnership has external debts of £4,000. If the partnership cannot pay the outstanding debts, then the individual partners will become personally liable for any outstanding debt. Although, under s.9 PA 1890, partnership debts are said to be joint, the Civil Liability Act 1978 provides that a judgement against one partner does not bar a subsequent action against the other partners.

As the value of the assets is insufficient to cover all of these debts, the partners will be required to contribute additional funds to make good the shortfall. The losses will be met according to the partnership agreement, which stated that all profits and losses were to be divided in proportion to the capital contribution. Consequently the partners will be required to contribute as follows:

Han: £2,400
Ita: £1,200
Jo: £400

Jo, of course, has the right to recover any payment she makes beyond her original contribution of £1,000 from the other two partners.

The final stage in the problem is to consider Han's advance of £1,000 to the partnership. In this case, the losses will be divided between the partners in the ratio of 6:3:1, as with the other losses; so Han will lose another £600, and Ita a further £300. Jo's loss of £100 will be split between Han and Ita, so, in effect, only Ita will be required to pay an additional £50.

1 This question requires candidates to describe the structure of the main civil courts in the English legal system and also to explain the way in which cases are allocated between those courts.

(a) 4–6 marks A thorough to complete description of the various civil courts with an explanation of their relationships and function.

2–3 marks A less detailed treatment of the court structure but still covering the main courts.

1 mark Weak answer, perhaps just providing a sketch of the court structure with no explanation of that structure.

0 marks No knowledge of the court structure.

(b) 2–4 marks A good knowledge of the three tracks. The very best answers will consider the allocation of cases between the High Court and the county court.

1 mark Little knowledge of the way cases are allocated under the Civil Procedure Rules.

0 marks No knowledge of the topic.

2 This question relating to issues in relation to the formation of contracts is divided into two parts and the marks will be allocated equally.

(a) Requires candidates to explain what is meant by intention to create legal relations.

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 Very unbalanced, or may not deal with any of the required aspects of the topic. Alternatively, the answer will demonstrate very little, if any, understanding of what is actually meant by the term.

(b) Requires candidates to explain what is meant by the doctrine of privity in the law of contract.

4–5 marks Thorough to complete answer, showing a detailed understanding of the meaning and effect of the doctrine of privity.

2–3 marks A clear understanding the meaning of privity, but perhaps lacking in detail or application.

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

3 This question requires candidates to explain particular aspects of the concept of causation in relation to the law relating the tort of negligence.

(a) 2 marks A full to definitive answer providing a clear explanation of the meaning of causation.

0–1 mark Little, if any, understanding of the meaning or role of causation.

(b) 3–4 marks A full to definitive explanation of the 'but for' test. It is very likely that cases will be cited, but examples may be credited as well, where appropriate.

1–2 marks Some explanation, but lacking detail.

0 marks No understanding whatsoever.

(c) 3–4 marks A full to definitive explanation of the principle of *novus actus interveniens*. It is very likely that cases will be cited, but examples may be credited as well, where appropriate.

1–2 marks Some explanation, but lacking detail.

0 marks No understanding whatsoever.

4 This question requires candidates to consider the relatively recent legislation that seeks to control bribery.

(a) Requires a general definition/consideration of bribery.

1–2 marks Fair to full answer.

0 marks No knowledge of the topic.

(b) Requires a consideration of the offences.

5–6 marks Full to complete examination of the four offences with some explanation.

3–4 marks Some, but not detailed, awareness of the offences.

1–2 marks Some, but little, awareness of the offences.

0 marks No knowledge whatsoever of the topic.

(**c)** Requires a consideration of the defence of adequate procedures.

2 marks Good explanation of the defence.

1 mark Some, but not detailed, awareness of the defence.

0 marks No understanding at all.

5 This question requires candidates to explain the rules relating to the lawful distribution of company dividends and further requires the candidates to focus on the different rules that apply to public and private companies. Although divided into three parts, candidates may provide a global answer.

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

5–7 marks A clear understanding of the general law, but perhaps lacking in detail or unbalanced in only dealing with one of the types of company.

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

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

6 This question requires candidates to explain three of the duties owed by directors to their companies. Although divided into three parts, candidates may provide a global answer.

8–10 marks Clear explanation of the three duties.

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

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

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

7 This question requires candidates to explain the common law duties imposed on employers and employees.

(a) 5–6 marks Good awareness of the implied duties imposed on employers. Examples used to highlight answers.

3–4 marks Sound understanding but perhaps no examples.

0–2 marks Limited knowledge only about the topic.

(b) 3–4 marks Good awareness of the implied duties imposed on employees.

0–2 marks Limited knowledge about the topic.

8 **(a)** This part of the question relates to the issue of whether the performance of an existing contractual duty can provide consideration for some new promise.

5 marks	Accurate analysis of the situation together with a detailed knowledge of the general legal principles involved, linked to a sound application of those principles.
3–4 marks	Sound knowledge of the law but perhaps lacking in application, or alternatively not showing a sufficiently clear understanding of the legal principles involved.
1–2 marks	Weak or unbalanced answer. Perhaps aware of the nature of the problem, but lacking in clear knowledge of the principles or deficient in relation to how those principles should be applied.
0 marks	Totally lacking in knowledge or application.

(b) This part of the question relates to the issue of anticipatory breach of contract and the consequences of any such breach.

5 marks	Accurate analysis of the situation together with a detailed knowledge of the general legal principles involved, linked to a sound application of those principles.
3–4 marks	Sound knowledge of the law but perhaps lacking in application, or alternatively not showing a sufficiently clear understanding of the legal principles involved.
1–2 marks	Weak or unbalanced answer. Perhaps aware of the nature of the problem, but lacking in clear knowledge of the principles or deficient in relation to how those principles should be applied.
0 marks	Totally lacking in knowledge or application.

9 This question requires candidates to consider several related points concerning the removal of directors and the nature of the articles of association and how they can be altered.

(a)

2 marks	Complete explanation of the procedure for removing a company director.
1 mark	Some knowledge but lacking detail.
0 marks	No knowledge whatsoever.

(b)

3–4 marks	Identification of some of the central issues together with an accurate application of the appropriate law. Case authorities may well be cited.
1–2 marks	Weak answers which might recognise what the question is about but show little ability to analyse or answer the problem as set out. Towards the bottom of this range of marks, there will be major shortcomings in analysis or application of law.
0 marks	No knowledge of the topic shown.

(c)

3–4 marks	Identification of some of the central issues together with an accurate application of the appropriate law. Case authorities may well be cited.
1–2 marks	Weak answers which might recognise what the question is about but show little ability to analyse or answer the problem as set out. Towards the bottom of this range of marks, there will be major shortcomings in analysis or application of law.
0 marks	No knowledge of the topic shown.

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

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