
Answers

- 1 This question requires the candidates to consider the various sources of United Kingdom law.

Legislation

This is law produced through the Parliamentary system. This is the most important source of law today for two reasons. Firstly, in terms of quantity, Parliament produces far more legal rules than any other source. Secondly, and perhaps even more importantly, the doctrine of parliamentary sovereignty within the United Kingdom means that Parliament is the ultimate source of law and, at least in theory, it can make whatever laws it wishes. It is an effect of this doctrine that the courts cannot challenge, either the authority of Parliament, or the laws it makes in the exercise of that authority. Although the Human Rights Act 1998, which introduces the European Convention on Human Rights into the United Kingdom, does not directly challenge parliamentary sovereignty, it remains to be seen what effect it has on the long-term relationship between judges and Parliament.

Parliament consists of three distinct elements: the House of Commons, the House of Lords and the Monarch, but the real source of power is the House of Commons which has the authority of being the democratically elected institution. Before any legislative proposal, known at that stage as a bill, can become an Act of Parliament it must proceed through, and be approved by, both Houses of Parliament and must receive the Royal Assent.

Since the Parliament Acts of 1911 and 1949, the blocking power of the House of Lords has been restricted to a maximum of one year. However, as bills must complete their process within the life of a particular parliamentary session, a failure to reach agreement in both Houses within that period can lead to the total loss of the bill. It is for that reason that the current government removed a clause on lowering the age of homosexual consent to 16 from the general Act in which it was contained.

Legislation can be categorised in a number of ways. Public Acts relate to matters affecting the general public, whereas Private Acts relate to particular individuals or institutions. Alternatively, Acts of Parliament can be distinguished on the basis of their function. Some create new laws, but others are aimed at rationalising or amending existing legislative provisions. Consolidating legislation is designed to bring together provisions previously contained in a number of different Acts, without actually altering them. The Companies Act 2006 was an example of a consolidation Act. Codifying legislation, on the other hand, seeks not just to bring existing statutory provisions under one Act but also looks to give statutory expression to common law rules. The Partnership Act 1890 and the Sale of Goods Act 1893, now 1979, are good examples of this.

Delegated legislation is a particularly important aspect of the legislative process. It is law made by some person or body, usually a government minister or local authority, to whom Parliament has delegated its general law-making power. A validly enacted piece of delegated legislation has the same legal force and effect as the Act of Parliament under which it is enacted. Delegated legislation can take the form of: Orders in Council; Statutory Instruments; Bye-Laws; or Professional regulations. In numerical terms the production of individual pieces of delegated legislation greatly outnumbers the production of general public Acts of Parliament.

Case Law

This is law created by judges in the course of deciding cases. The doctrine of *stare decisis* or binding precedent refers to the fact that courts are bound by previous decisions of courts equal or above them in the court hierarchy. It is the reason for a decision, the *ratio decidendi*, that binds. Everything else is *obiter dictum* and need not be followed.

The House of Lords can now overrule its own previous rules, but the Court of Appeal cannot. Judges, however, do have the ability to avoid precedents they do not wish to follow through the procedure of distinguishing the cases on their facts, and, of course, they have a very large number of cases and precedents to choose from.

One of the major advantages of the system of precedent is that it provides for certainty and the saving of the time and money of all the parties concerned. This is achieved by the fact that it should be possible to predict how a case will be decided if it falls within a clear precedent without actually having to take the case to court. The system of judges making law through their decisions also allows them scope for introducing flexibility into the legal system as they extend or distinguish existing precedents. This flexibility, however, by necessity undermines the very certainty that is supposed to be one of the main benefits of the system of precedent. Finally, the role of the judges within the UK constitution is to interpret, and not to create, law, and perhaps this latter point explains why most judges are very wary of openly admitting that they actually do make law.

The European Union

Since joining the European Community, now the European Union, the United Kingdom and its citizens have become subject to European Community (EC) law. In areas where it is applicable, European law supersedes any existing United Kingdom law to the contrary (see *Factortame Ltd v Secretary of State for Transport* (1989)).

The sources of EC law are: internal treaties and protocols; international agreements; secondary legislation; and decisions of the European Court of Justice.

Custom

Although there is always the possibility of a specific local custom, which has been in existence since 'time immemorial', acting as a source of law, in practice the limitations which operate in relation to custom render it an extremely unlikely source of contemporary law.

With regard to the operation of the Law Commission it should be noted that its role is to make recommendations relating to changes in legal provision, but it has no power itself to make such alterations.

- 2** Breach of contract occurs when one of the parties to the contract fails to perform their part of the agreement, either fully or partially i.e. they fail completely to perform what they have contracted to do, or they perform their obligation in a defective manner. As a consequence of this failure the court may award remedies against the party in breach of the contract, the most usual of which is damages.

Usually breach of contract only becomes apparent at, or after, the time set for the performance of the contract. Anticipatory breach, however, occurs before the due date of performance. It occurs where one of the parties shows a clear intention not to be bound by their agreement and indicates that they will not perform their contractual obligations on the actual due date of performance.

In the situation of anticipatory breach, the innocent party can sue for damages immediately they are made aware of the breach. However, they are not required to take immediate action. They can, if they so choose, wait until the actual time for performance before taking action. If they do elect to wait until the set time for performance, then they are entitled to make preparations for performance of their part of the contract; and claim the agreed contract price. In *White & Carter (Councils) v McGregor* (1961), McGregor contracted with the plaintiffs to have advertisements placed on litter bins which were supplied to local authorities. The defendant wrote to the plaintiffs asking them to cancel the contract. The plaintiffs refused to cancel, and produced, and displayed, the adverts as required under the contract. They then claimed payment. It was held that the plaintiffs were not obliged to accept the defendant's repudiation, but could perform the contract and claim the agreed price.

Anticipatory breach can take either of two specific forms: express anticipatory breach or implied anticipatory breach.

Express anticipatory breach occurs where one of the parties declares, before the due date of performance, that they have no intention of complying with the terms of the contractual agreement. An example of this may be seen in *Hochster v De La Tour* (1853). In April, De La Tour engaged Hochster to act as his courier on his European tour, starting on 1 June. On 11 May De La Tour wrote to Hochster stating that he would no longer be needing his services. The plaintiff started proceedings for breach of contract on 22 May, and the defendant claimed that there could be no cause of action until 1 June. It was held, however, that the plaintiff was entitled to start his action as soon as the anticipatory breach occurred, i.e. when De La Tour stated he would not need Hochster's services.

Implied anticipatory breach does not arise from any direct indication from either of the parties that they will not perform their contractual agreement, but results from the situation where one of the parties does something, which makes subsequent performance of their contractual undertaking impossible. An example of this may be seen in *Omnium D'Enterprises v Sutherland* (1919). In this case the defendant had agreed to let a ship to the plaintiff, but before the actual time for performance, he actually sold the ship to another party. It was held that the sale of the ship amounted to a clear repudiation of the contract and that the plaintiff could sue for breach of contract from that date, without having to wait until the actual date of performance of the contract.

- 3** A tort is a wrongful act against an individual which gives rise to a non-contractual civil claim. The claim is usually for damages, although other remedies are available. Liability in tort is usually based on the principle of fault, although there are exceptions. Negligence is recognised as the most important of the torts, its aim being to provide compensation for those injured through the fault of some other person. However, an individual is not automatically liable for every negligent act that he or she commits and in order to sustain an action in negligence it must be shown that the party at fault owed a duty of care to the person injured as a result of their actions. Consequently, the onus is on the claimant to establish that the respondent owed them a duty of care. Even then there are defences available for the defendant in a tort action.

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

If contributory negligence is demonstrated, then by virtue of the Law Reform (Contributory Negligence) Act 1945, the level of damages awarded will be reduced in line with and will depend upon the extent to which the claimant's fault contributed to the injury sustained (in *Jayes v IMI (Kynoch)* (1985) the award suffered a 100% reduction).

- (b)** *Volenti non fit injuria* is a Latin tag which essentially translates as 'no injury can be done to a person who willingly accepts the risk'. Of course very serious injury can in fact be done to such a person; the point is that, as a result of their consent they lose their right to sue for damages for any injury suffered. Whilst contributory negligence operates to reduce the level of damages awarded, consent acts as a complete defence and no damages will be awarded if it is shown to apply.

Consent can be given expressly where the claimant expressly agrees to the risk of injury or it may be implied from the claimant's conduct. An example of express consent may be seen in relation to medical treatment. In such situations the patient may be required to sign a consent form which removes the right to complain about what would otherwise amount to the tort of battery. Of course the patient does not consent to the surgeon carrying out any procedure negligently and on the occasion of such negligence an action for damages would still arise.

The principle of implied consent arose in *ICI v Shatwell* (1964) in which two brothers employed in a quarry ignored their employer's rules relating to safety, by testing detonators without using the shelter provided. As a result, the claimant was

injured and sued the employer for breach of statutory duty as a result of his brother's actions. The court held that both brothers had impliedly consented to the risks by their actions and had participated quite willingly. Consequently the employer was not responsible to the injured brother.

As may be seen the defence relies upon the claimant's consent to the risks, which should be distinguished from mere knowledge of it. Thus in *Dunn v Hamilton* (1939) a passenger accepted a lift in a car driven by a person she knew to be drunk. When she was injured as a result of the driver's careless driving it was held that she had not actually consented to the risk of being injured, even although she knew there was such a risk. Section 149 of the Road Traffic Act 1988 removed the possibility of consent being used as a defence against car passengers.

4 The word 'capital' is used in a number of different ways in relation to shares.

- (a)** Under the provisions of the Companies Act (CA) 1985 the memorandum of a limited company with a share capital was required to state the amount of the share capital with which the company proposed to be registered and the nominal amount of each of its shares. This was known as the 'authorised share capital' and set a limit on the amount of capital which the company could issue, subject to increase by ordinary resolution. Section 9 of the CA 2006 removes the concept of 'authorised capital' and replaces it with the requirement to submit a 'statement of capital and initial shareholdings' to the registrar in the application to register the company.

The statement of capital and initial shareholdings is essentially a 'snapshot' of a company's share capital at the point of registration.

Section 10 CA 2006 requires the statement of capital and initial shareholdings to contain the following information:

- the total number of shares of the company to be taken on formation by the subscribers to the memorandum;
- the aggregate nominal value of those shares;
- for each class of shares: prescribed particulars of the rights attached to those shares, the total number of shares of that class and the aggregate nominal value of shares of that class; and
- the amount to be paid up and the amount (if any) to be unpaid on each share (whether on account of the nominal value of the shares or by way of premium).

The statement must contain such information as may be required to identify the subscribers to the memorandum of association. With regard to such subscribers it must state:

- the number, nominal value (of each share) and class of shares to be taken by them on formation; and
- the amount to be paid up and the amount (if any) to be unpaid on each share.

Where a subscriber takes shares of more than one class of share, the above information is required for each class.

- (b)** Issued capital represents the nominal value of the shares actually issued by the company and public companies must have a minimum issued capital of £50,000 or the prescribed euro equivalent (s.763 CA 2006).
- (c)** Paid-up capital. This is the proportion of the nominal value of the issued capital actually paid by the shareholder (s.547 CA 2006). It may be the full nominal value, in which case it fulfils the shareholder's responsibility to outsiders; or it can be a mere part payment, in which case the company has an outstanding claim against the shareholder. Shares in public companies must be paid up to the extent of at least a quarter of their nominal value (s.586 CA 2006).
- (d)** Once established, the nominal value of the share remains fixed and does not normally change. However, the value of the shares in the stock market may be subject to daily fluctuation depending on a number of interrelated factors, such as the profitability of the company, the prevailing rate of interest or prospective takeover bids. Thus the market value of a share of £1 nominal value may be as much as £5 or higher, or as low as 1 penny.

5 Under the provisions of the Companies Act (CA) 2006 there are three types of resolutions: ordinary resolutions, special resolutions and written resolutions.

- (a)** Section 282 CA 2006 defines an ordinary resolution of the members generally, or a class of members, of a company, as a resolution that is passed by a simple majority.

If the resolution is to be voted on a show of hands, the majority is determined on the basis of those who vote in person or as duly appointed proxies. Where a poll vote is called, the majority is determined in relation to the total voting rights of members who vote in person or by proxy.

A special resolution of the members (or of a class of members) of a company means a resolution passed by a majority of not less than 75% determined in the same way as for an ordinary resolution (s.283). If a resolution is proposed as a special resolution, it must be indicated as such, either in the written resolution text or in the meeting notice. Where a resolution is proposed as a special resolution, it can only be passed as such although anything that may be done as an ordinary resolution may be passed as a special resolution (s.282(5)). There is no longer a requirement for 21 days' notice where a special resolution is to be passed at a meeting.

Where a provision of the Companies Acts requires a resolution, but does not specify what kind of resolution is required, the default provision is for an ordinary resolution. However, the company's articles may require a higher majority, or indeed may require a unanimous vote to pass the resolution. The articles cannot alter the requisite majority where the Companies Acts actually state the required majority, so if the Act provides for an ordinary resolution the articles cannot require a higher majority.

(b) Written resolutions

Private limited companies are no longer required to hold meetings and can take decisions by way of written resolutions (s.281 CA 2006). The Companies Act 2006 no longer requires unanimity to pass a written resolution. It merely requires the appropriate majority of total voting rights, a simple majority for an ordinary resolution (s.282(2)) and a 75% majority of the total voting rights for a special resolution (s.283(2)).

By virtue of s.288 (5) CA 2006 anything which in the case of a private company might be done by resolution in a general meeting, or by a meeting of a class of members of the company, may be done by written resolution with only two exceptions:

- the removal of a director; and
- the removal of an auditor

both of which still require the calling of a general meeting of shareholders.

A written resolution may be proposed by the directors or the members of the private company (s.288 (3)). Under s.291 in the case of a written resolution proposed by the directors, the company must send or submit a copy of the resolution to every eligible member. This may be done as follows:

- either by sending copies to all eligible members in hard copy form, in electronic form or by means of a website;
- by submitting the same copy to each eligible member in turn or different copies to each of a number of eligible members in turn;
- by a mixture of the above processes.

The copy of the resolution must be accompanied by a statement informing the members both how to signify agreement to the resolution and the date by which the resolution must be passed if it is not to lapse (s.291(4)). It is a criminal offence not to comply with the above procedure, although the validity of any resolution passed is not affected.

The members of a private company may require the company to circulate a resolution if they control 5% of the voting rights (or a lower percentage if specified in the company's articles). They can also require a statement of not more than 1,000 words to be circulated with the resolution (s.292). However, the members requiring the circulation of the resolution will be required to pay any expenses involved, unless the company resolves otherwise.

Agreement to a proposed written resolution occurs when the company receives an authenticated document, in either hard copy form or in electronic form, identifying the resolution and indicating agreement to it. Once submitted, agreement cannot be revoked.

The resolution and accompanying documents must be sent to all members who would be entitled to vote on the circulation date of the resolution. The company's auditor should also receive such documentation (s.502 CA 2006).

6 By virtue of s.172 Companies Act 2006 a director of a company must act in the way he considers would be most likely to promote the success of the company for the benefit of its members as a whole.

Specifically the director must consider the following:

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

The above list is not exhaustive, and merely highlights areas of particular importance for the directors to focus on. The actual decision as to what will promote the success of the company has to be taken in good faith by the directors. This ensures that business decisions on, for example, strategy and tactics are for the directors, and not subject to decision by the courts.

Subsection 172(2) provides that where, or to the extent that, the purposes of the company consist of, or include, purposes other than the benefit of its members, then the reference to promoting the success of the company for the benefit of its members in subsection (1) is to be read as referring to achieving those other purposes. This subsection is aimed at, essentially, but not exclusively, charitable companies and community interest companies. Consequently where the purpose of the company is other than the benefit of its members, the directors must act in the way they consider, in good faith, would be most likely to achieve that purpose. Where the company is partially for the benefit of its members and partly for other purposes, the extent to which those other purposes apply in place of the benefit of the members is a matter for directors to determine, once again, in good faith.

Subsection 172(3) provides that the general duty is subject to any specific enactment or rule of law requiring directors to consider or act in the interests of creditors of the company. This formally recognises that the duty to the shareholders is displaced when the company is insolvent or is heading towards insolvency. For example, s.214 of the Insolvency Act 1986 provides a mechanism

under which the liquidator can require the directors to contribute towards the funds available to creditors in an insolvent winding up, where they ought to have recognised that the company had no reasonable prospect of avoiding insolvent liquidation and then failed to take all reasonable steps to minimise the loss to creditors.

As directors owe their duties to the company (see *Percival v Wright* (1902)) it is apparent that many of the duties set out in s.172 (1) are not capable of being enforced if the company itself, or members of the company, does not wish to enforce those duties.

- 7 (a) This question requires candidates to explain the provisions of the Employment Rights Act (ERA) 1996 relating to the statutory grounds covering fair dismissal. The grounds on which dismissal is capable of being fair are set out in s.98 ERA 1996. The Act places the burden of proof on the employer to show that the grounds for dismissal are fair. There are five categories as follows:

(i) **Lack of capability or qualifications**

Capability is defined in s.98 in terms of 'skill aptitude, health or any other physical or mental quality', and qualifications relate to 'any degree, diploma, or other academic, technical or professional qualification relevant to the position which the employee held'. However, even in this situation, the employer must show that not only was the employee incompetent but that it was reasonable to dismiss them.

(ii) **Misconduct**

To warrant instant dismissal the employee's conduct must be more than merely trivial and must be of sufficient seriousness to merit the description 'gross misconduct'. Examples of such conduct might involve assault, drunkenness, dishonesty or a failure to follow instructions, or safety procedures, or persistent lateness.

(iii) **Redundancy**

This is, *prima facie*, a fair reason for dismissal as long as the employer has acted reasonably in introducing the redundancy programme.

(iv) **In situations where continued employment would constitute a breach of a statutory provision**

If the continued employment of the person dismissed would be a breach of some statutory provision then the dismissal of the employee is again, *prima facie*, fair. For example, if a person is employed as a driver and is banned from driving then they may be fairly dismissed.

(v) **Some other substantial reason**

The above particular situations are not conclusive and are supported by this general provision which allows the employer to dismiss the employee for 'some other substantial reason'. As a consequence, it is not possible to provide an exhaustive list of all grounds for 'fair dismissal'. Examples that have been held to be substantial reasons have included: conflicts of personalities, failure to disclose material facts, refusal to accept necessary changes in terms of employment, and legitimate commercial reasons.

It has to be emphasised that the above reasons are not sufficient in themselves to justify dismissal and under all instances the employer must act as would be expected of a 'reasonable employer'. 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). In this case the burden of proof is neutral.

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 it would usually be inappropriate to dismiss someone for lack of capability without providing them with the opportunity to improve their skills. Nor would redundancy, *per se*, provide a justification for fair 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.

- (b) Normally employees who resign deprive themselves of the right to make a claim for redundancy or other payments. However, s.136 ERA covers situations where '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'. This provision relates to what is known as 'constructive dismissal', which covers the situation where an employer has made the situation of the employee such that the employee has no other action than to resign. In other words the unreasonable actions of the employer force the employee to resign. In such a situation the employee is entitled to make a claim for unfair dismissal, no matter the fact that they actually resigned. In *Simmonds v Dowty Seals Ltd* (1978) Simmonds had been employed to work on the night shift. When his employer attempted to force him to work on the day shift he resigned. It was held that he could treat himself as constructively dismissed because the employer's conduct had amounted to an attempt to unilaterally change an express term of his contract. An employee may also be able to claim constructive dismissal where the employer is in breach of an implied term in the contract of employment (*Gardner Ltd v Beresford* (1978)). In *Woods v WM Car Services (Peterborough)* (1982) it was further held that there is a general implied contractual duty that employers will not, without reasonable or proper cause, conduct themselves in a manner that is likely to destroy the relationship of trust and confidence between employer and employee, and that such an obligation is independent of and in addition to the express terms of the contract.

The action of the employer, however, must go to the root of the employment contract if it is to allow the employee to resign. In other words it must be a breach of some significance. In *Western Excavating Ltd v Sharp* (1978), Sharp was dismissed

for taking time off from work without permission. On appeal to an internal disciplinary hearing, he was reinstated but was suspended for five days without pay. He agreed to accept this decision but asked his employer for an advance on his holiday pay as he was short of money: this was refused. He then asked for a loan of £40: that was also refused. Consequently Sharp decided to resign in order to get access to his holiday pay. Sharp instituted a claim for unfair dismissal on the basis that he had been forced to resign because of his employers' unreasonable conduct. The employment tribunal found in Sharp's favour on the grounds that his employer's conduct had been so unreasonable that Sharp could not be expected to continue working there. However, on appeal the Court of Appeal held that before a valid constructive dismissal can take place the employer's conduct must amount to a breach of contract which is such that it entitles the employee to resign. In Sharp's case there was no such breach and therefore there was no constructive dismissal. However, in *British Aircraft Corporation v Austin* (1978) a failure to investigate a health and safety complaint was held to be conduct amounting to a breach of contract on the part of the employer, which was sufficient to entitle the employee to treat the contract as terminated.

If the employee does not resign in the event of a breach by the employer, the employee will be deemed to have accepted the breach and waived any rights. However, the employee need not resign immediately and may, legitimately, wait until they have found another job (*Cox Toner (International) Ltd v Crook* (1981)).

- 8 This question requires candidates to analyse the problem scenario from the perspective of contract law paying particular regard to the rules relating to: invitation to treat, offers, and option contracts. The scenario involves three distinct cases which should be dealt with in turn in applying the following rules of contract law.

Alvin and Bert

The price notice on the car did not constitute a legal offer, it was merely an invitation to treat. As such it is not an offer to sell but merely an invitation to others to make offers. The point of this is that the person extending the invitation is not bound to accept any offers made to them as may be seen in *Fisher v Bell* (1961) in which it was held that having switch-blade knives in the window of a shop was not the same as offering them for sale. Consequently Bert is not in a position to sue Alvin.

Alvin and Cat

An offeror may withdraw their offer at any time before it has been accepted and once revoked it is no longer open to the offeree to accept the original offer. Also a promise to keep an offer open is only binding where there is a separate contract to that effect. This is known as an option contract, and the offeree must provide additional consideration for the promise to keep the offer open. If not, then the offeror can simply withdraw the offer under the normal rules relating to revocation of offers.

As Cat did not provide any consideration to form an option contract, Alvin is not bound to wait for her to return and can sell the car to anyone else if he so chooses.

Alvin and Del

This is a perfectly ordinary contract. The fact that Alvin had previously contracted not to sell it, does not affect Del and he is entitled to take good title to the car.

- 9 Section 21 of the Companies Act 2006 provides for the alteration of articles of association on the passing of a special resolution. However, at common law 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, but 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. This was in spite of the fact that the company needed additional capital and the majority shareholder was willing to provide that capital if they could gain total control of the company.

In *Dafen Tinplate Co Ltd v Llanelly Steel Co* (1907) a minority shareholder was acting to the detriment of the company. Nonetheless, an alteration to the articles, to allow for the compulsory purchase of any member's shares on request so to do, was also held to be too wide to be 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.

Applying the law to the facts in the problem scenario, it might seem that, as Fred is in direct competition with Glad Ltd, the alteration would be valid in line with the *Sidebottom v Kershaw Leese & Co* case, but it should be noted that the actual alteration to the articles goes much wider than is necessary to cover Fred's situation as it extends to all members, whether or not they are in competition with the company. Consequently it is unlikely that the alteration would be validated by the court as being in the interest of the company as a whole on the basis of *Dafen Tinplate Co Ltd v Llanelly Steel Co* (1907).

10 Sam has clearly used his powers for an unauthorised purpose. Unfortunately for the other partners they cannot repudiate his transaction with the bank, even although it was outside his actual authority. The reason being that it is within his implied authority as a partner to enter into such a transaction. As a trading partnership, all the members have the implied authority to borrow money on the credit of the firm and the bank would be under no duty to investigate the purpose to which the loan was to be put. As a result the partnership cannot repudiate the debt to the bank and each of the partners will be liable for its payment. It has to be stated, however, that Sam will be personally liable to the other partners for the £10,000 and as a further consequence of his breach of his duty not to act in any way prejudicial to the partnership business, the partnership could be wound up.

Tam's purchase of the used cars was also clearly outside of the express provision of the partnership agreement. Nonetheless the partnership would be liable as the transaction would be likely to be held to be within the implied authority of a partner in a garage business (*Mercantile Credit v Garrod* (1962)). Once again Tam, the partner in default of the agreement, would be liable to the other members for any loss sustained in the transaction.

As regards the payment for the petrol, that is clearly within the ambit of the partnership and the members are all liable for non-payment.

If the partnership cannot pay the outstanding debts then the individual partners will become personally liable for any outstanding debt. Although under s.9 of the Partnership Act 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. Once the debts owed to outsiders have been dealt with, then the internal financial relationships of the partners amongst themselves will be dealt with according to the partnership agreement.

- 1** In order to get full marks candidates must deal well with each of the three areas and not confine themselves to an extended treatment of only one, or two of them. Also the question asks for a consideration of the main sources of contemporary law. It would be inappropriate, therefore, to present an extended treatment of the role of custom as a source of law, to the exclusion of a more detailed treatment of the other sources. The following marking scheme details the way in which marks would be allocated in relation to this question.
- Each major part would be notionally allocated 3 marks, with the additional mark for a particularly good treatment of one of the sources or reference to some other source.
- 8–10 marks: Thorough treatment of the three major sources with perhaps reference to other sources such as custom or perhaps the role of the Law Commission, although the latter is certainly not necessary.
- 5–7 marks: Thorough treatment of two of the sources, or a less complete treatment of the three.
- 2–4 marks: Some understanding but lacking in detail. Perhaps unbalanced answer, focusing on only one aspect of the question and ignoring the others.
- 0–1 mark: Shows little understanding of the subject matter of the question.
- 2** This question requires candidates to show understanding of what is meant by anticipatory breach. In demonstrating such understanding candidates should mention the consequences of such a breach of contract, but answers should not focus too much on remedies.
- 8–10 marks: A thorough explanation of the concept of breach providing cases or examples by way of explanation.
- 5–7 marks: A clear understanding of what is meant by breach but perhaps lacking in the detail expected of the very best answers.
- 2–4 marks: Some understanding of the breach, but confused or lacking in explanation as to meaning or effect.
- 0–1 mark: No real understanding of the meaning of the term.
- 3** 8–10 marks: Thorough explanation of the meaning and effect of both elements of the question. Cases or examples will be expected to gain full marks.
- 5–7 marks: Reasonable explanation of both concepts but perhaps lacking in detail or cases authority.
- 3–4 marks: Some but limited knowledge of both elements or only dealing with one of them.
- 0–2 marks: Very unbalanced answer, lacking in detailed understanding.
- 4** This question seeks an explanation of the different types of share capital listed together with an explanation of the difference between the nominal value of shares and their market value.
- 8–10 marks: Thorough explanation of all of the elements in the question.
- 5–7 marks: Thorough treatment of some of the elements, or a less complete treatment of all of them.
- 0–4 marks: Unbalanced to very unbalanced answer, focusing on only one element and ignoring the others, or one which shows little understanding of the subject matter of the question.
- 5** This question requires candidates to consider the way in which resolutions are voted on in companies.
- (a)** Requires candidates to explain the rules relating to ordinary and special resolutions.
- 3–5 marks: A good explanation of the difference between the two types of resolution.
- 0–2 marks: Some awareness of the area but lacking in detailed knowledge.
- (b)** 3–5 marks: Candidates must not only show an understanding of what is meant by a written resolution but also the rules relating to them.
- 0–2 marks: Unbalanced, or may not deal with all of the required aspects of the topic. Alternatively the answer will demonstrate very little understanding of what is actually meant by a written resolution.
- 6** This question requires candidates to explain the duty of directors to promote the success of the company and to whom such a duty is owed.
- 8–10 marks: A very good answer revealing a thorough to complete understanding of both elements of the question.
- 4–7 marks: A good answer but perhaps unfocused or lacking in detail as to the specific duties applied under s.172.
- 0–3 marks: Weak answer, not fully explaining the law or issues involved.

- 7** This question relating to issues in employment law is divided into two parts and the marks will be allocated equally.
- (a)** Requires candidates to explain the provisions of the Employment Rights Act 1996 relating to the statutory grounds covering fair dismissal.
- 3–5 marks: A good explanation of the grounds upon which dismissal may be fair.
0–2 marks: Some awareness of the area but lacking in detailed knowledge.
- (b)** 3–5 marks: Candidates must show an understanding of what is meant by constructive dismissal, perhaps citing cases or examples.
0–2 marks: Unbalanced, or may not deal with all of the required aspects of the topic. Alternatively the answer will demonstrate very little understanding of what is actually meant by constructive dismissal.
- 8** This question asks candidates to analyse the scenario provided in the light of the rules relating to the formation of a contract. In particular it requires an examination of the distinction between offer and invitation to treat, and the operation of option contracts.
- 8–10 marks: A thorough treatment of all of the rules relating to the formation of contracts together with a clear and correct application of those rules to the problem scenario. Cases will be expected to be provided at this level.
5–7 marks: Good analysis and case support, although perhaps limited in appreciation.
3–4 marks: Recognition of the areas covered by the question, but lacking in detail.
0–2 marks: Very weak answers which might recognise what the question is about but show no ability to analyse or answer the problem as set out.
- 9** This question requires candidates to examine the law relating to the power of companies to change their articles of association.
- 8–10 marks: Candidates will exhibit a thorough knowledge of the relevant law together with the ability to analyse the problems contained in the question.
5–7 marks: Candidates will exhibit a sound knowledge of the relevant law together with the ability to recognise the issues contained in the question. Knowledge may be less detailed or analysis less focused.
3–4 marks: Identification of some of the central issues in the question and an attempt to apply the appropriate law. Towards the bottom of this range of marks there will be major shortcomings in analysis or application of law.
0–2 marks: Very weak answers which might recognise what the question is about but show no ability to analyse or answer the problem as set out.
- 10** This question refers to key issues relating to the powers, authority and liability of partners.
- 8–10 marks: Candidates will exhibit a thorough knowledge of partnership law together with the ability to analyse the problems contained in the question.
5–7 marks: Candidates will exhibit a sound knowledge of partnership law together with the ability to recognise the issues contained in the question. Knowledge may be less detailed or analysis less focused.
3–4 marks: Identification of some of the central issues in the question and an attempt to apply the appropriate law. Towards the bottom of this range of marks there will be major shortcomings in analysis or application of law.
0–2 marks: Very weak answers which might recognise what the question is about but show no ability to analyse or answer the problem as set out.