Fundamentals Pilot Paper – Skills module

Corporate and Business Law (English)

Paper F4 (ENG)

Time allowed
Reading and planning: 15 minutes
Writing: 3 hours

ALL TEN questions are compulsory and MUST be attempted.

Do NOT open this paper until instructed by the supervisor.

During reading and planning time only the question paper may be annotated. You must NOT write in your answer booklet until instructed by the supervisor.

This question paper must not be removed from the examination hall.

ACCA

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The question paper starts on page 3

ALL TEN questions are compulsory and MUST be attempted

1 **Explain the meaning and effect of delegated legislation, and evaluate its advantages and disadvantages, and how it is controlled by both Parliament and the courts.**

(10 marks)

2 **In relation to the contents of a contract explain the following:**

(a) **terms;** (2 marks)

(b) **conditions;** (3 marks)

(c) **warranties;** (3 marks)

(d) **innominate terms.** (2 marks)

(10 marks)

3 **In relation to the tort of negligence explain the meaning of 'duty of care'.**

(10 marks)

4 **State the documents necessary and the procedure to be followed in registering a public limited company and enabling it to start trading.**

(10 marks)

5 **In relation to company law explain and distinguish between the following:**

(a) **annual general meeting;** (5 marks)

(b) **extraordinary general meeting;** (2 marks)

(c) **class meeting.** (3 marks)

(10 marks)

6 **(a)** **Explain briefly what is meant by 'corporate governance'.** (4 marks)

(b) **Within the context of corporate governance examine the role of, and relationship between executive directors and non-executive directors.** (6 marks)

(10 marks)

7 **In relation to employment law, explain the operation of the rules relating to redundancy.**

(10 marks)

8 Al operates a small business manufacturing specialist engine filters. In January he placed an advertisement in a car trade magazine stating that he would supply filters at £60 per filter, but would consider a reduction in the price for substantial orders. He received a letter from Bash Cars plc requesting his terms of supply for 1,000 filters. Al replied, offering to supply the filters at a cost of £50 each. Bash Cars plc responded to Al's letter stating that they accepted his offer but that they would only pay £45 per filter. Al wrote back to Bash Cars plc stating that he would supply the filters but only at the original price of £50. When Al's letter arrived, the purchasing director of Bash Cars plc did not notice the alteration of the price and ordered the 1,000 filters from Al, which he supplied.

Required:

Analyse the situation from the perspective of contract law and in particular advise Al what price he is entitled to claim from Bash Cars plc.

(10 marks)

9 Flop Ltd was in financial difficulties. In January, in order to raise capital it issued 10,000 £1 shares to Gus, but only asked him to pay 75 pence per share at the time of issue. The directors of Flop Ltd intended asking Gus for the other 25 pence per share at a later date. However, in June it realised that it needed even more than the £2,500 it could raise from Gus's existing shareholding. So in order to persuade Gus to provide the needed money Flop Ltd told him that if he bought a further 10,000 shares he would only have to pay a total of 50 pence for each £1 share, and it would write off the money owed on the original share purchase.

Gus agreed to this, but the injection of cash did not save Flop and in December it went into insolvent liquidation, owing a considerable amount of money.

Required:

Explain any potential liability that Gus might have on the shares he holds in Flop Ltd.

(10 marks)

10 In January the board of directors of Huge plc decided to make a take over bid for Large plc. After the decision was taken, but before it is announced the following chain of events occurs:

(i) Slye a director of Huge plc buys shares in Large plc;

(ii) Slye tells his friend Mate about the likelihood of the take-over and Mate buys shares in Large plc;

(iii) at a dinner party Slye, without actually telling him about the take-over proposal, advises his brother Tim to buy shares in Large plc and Tim does so.

Required:

Consider the legal position of Slye, Mate and Tim under the law relating to insider dealing.

(10 marks)

End of Question Paper

Answers

1 This question asks candidates to explain both what delegated legislation is and its importance in the contemporary legal system. It specifically requires a consideration of the way in which Parliament and the courts seek to control it.

Within the United Kingdom, Parliament has the sole power to make law by creating legislation. Parliament, however, can pass on, or delegate, its law making power to some other body or individual. Delegated legislation is of particular importance in the contemporary legal context. Instead of general and definitive Acts of Parliament, which attempt to lay down detailed provisions, the modern form of legislation tends to be of the enabling type, which simply states the general purpose and aims of the Act. Such Acts merely lay down a broad framework, whilst delegating to ministers of state the power to produce detailed provisions designed to achieve those general aims. Thus delegated legislation is law made by some person, or body, to whom Parliament has delegated its general law making power. The output of delegated legislation in any year greatly exceeds the output of Acts of Parliament and, therefore, at least statistically it could be argued that delegated legislation is actually more significant than primary Acts of Parliament.

There are various types of delegated legislation:

(i) **Orders in Council** permit the government, through the Privy Council to make law. The Privy Council is nominally a non party-political body of eminent parliamentarians, but in effect it is simply a means through which the government, in the form of a committee of Ministers, can introduce legislation without the need to go through the full parliamentary process.

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

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

(iv) **Court Rule Committees** are empowered to make the rules, which govern procedure in the particular courts over which they have delegated authority under such Acts as the Supreme Court Act 1981, the County Courts Act 1984, and the Magistrates' Courts Act 1980.

(v) **Professional regulations** governing particular occupations may be given the force of law under provisions delegating legislative authority to certain professional bodies. An example is the power given to the Law Society, under the Solicitors' Act 1974, to control the conduct of practising solicitors.

The use of delegated legislation has the following advantages:

(i) **Time-saving.** Delegated legislation can be introduced quickly where necessary in particular cases and permits rules to be changed in response to emergencies or unforeseen problems. The use of delegated legislation, also saves Parliamentary time generally. It is generally considered better for Parliament to spend its time in a thorough consideration of the principles of enabling legislation, leaving the appropriate minister, or body, to establish the working detail under their authority.

(ii) **Access to particular expertise**. Given the highly specialised and extremely technical nature of many of the regulations that are introduced through delegated legislation, the majority of Members of Parliament simply do not have sufficient expertise to consider such provisions effectively. It is necessary therefore, that those authorised to introduce delegated legislation should have access to the external expertise required to make appropriate regulations. In regard to bye-laws, local knowledge should give rise to more appropriate rules than general Acts of Parliament.

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

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

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

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

The potential shortcomings in the use of delegated legislation considered above are, at least to a degree, mitigated by the fact that the courts have the ability to oversee and challenge such laws as are made in the form of delegated legislation.

Parliamentary control of delegated legislation.

Since 1973, there has been a *Joint Select Committee on Statutory Instruments*, whose function it is to scrutinise all statutory instruments. The Joint Committee is empowered to draw the special attention of both Houses to an instrument on any one of a number of grounds specified in the Standing Orders (No.151 of the House of Commons and No. 74 of the House of Lords)) under which it operates; or on any other ground *which does not relate to the actual merits of the instrument or the policy it is pursuing*.

The House of Commons has its own *Select Committee on Statutory Instruments* which is appointed to consider all statutory instruments laid only before the House of Commons. This committee is empowered to draw the special attention of the House to an instrument on any one of a number of grounds specified in Standing Order No. 151; or on any other ground. However, as with the joint committee, it is nor empowered to consider the merits of any statutory instrument or the policy behind it

Judicial control of delegated legislation.

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

Additional powers have been given to the courts under the Human Rights Act 1998 (HRA) with respect to delegated legislation. Section 4 of the HRA expressly states that the courts cannot declare *primary* legislation invalid as being contrary to the rights protected by the Act and limits them to issuing a declaration of incompatibility in such circumstances (*Bellinger* v *Bellinger* (2003)). It is then for Parliament to act on such a declaration to remedy any shortcoming in the law if it so wishes. However, such limitation does not apply to secondary legislation, which the courts can now declare invalid on the grounds of not being compatible with the HRA.

2 **(a)** **Contractual terms**, are statements which form part of the contract. Parties to a contract will normally be bound to perform any promise that they have agreed to and failure to perform will lead to an action for breach of contract, although the precise nature of the remedy will depend upon the nature of the promise broken. Some statements do not form part of a contract, even though they might have induced the other party to enter into the contract. These pre-contractual statements are called representations. The consequences of such representations being false is an action for misrepresentation not an action for breach of contract, and leads to different remedies. It is important, therefore, to decide precisely what promises are included in the contract. Once it is decided that a statement is a term, rather than merely a pre-contractual representation, it is further necessary to decide which type of term it is, in order to determine what remedies are available for its breach.

Terms can be classified as one of three types.

(b) Conditions

A condition is a fundamental part of the agreement – it is something which goes to the root of the contract. Breach of a condition gives the injured party the right either to terminate the contract and refuse to perform their part of it, or to go through with the agreement and sue for damages. The classic case in relation to breach of condition is *Poussard* v *Spiers* & *Pond* (1876) in which the plaintiff had contracted with the defendants to sing in an opera they were producing. Due to illness she was unable to appear on the first night, or for some nights thereafter. When Mme Poussard recovered, the defendants refused her services as they had hired a replacement for the whole run of the opera. It was held that her failure to appear on the opening night had been a breach of a condition, and the defendants were at liberty to treat the contract as discharged

(c) Warranties

A warranty is a subsidiary obligation which is not vital to the overall agreement, and in relation to which failure to perform does not totally destroy the whole purpose of the contract. Breach of a warranty does not give the right to terminate the agreement. The injured party has to complete their part of the agreement, and can only sue for damages. As regards warranties, the classic case is *Bettini* v *Gye* (1876) in which the plaintiff had contracted with the defendants to complete a number of engagements. He had also agreed to be in London for rehearsals six days before his opening performance. Due to illness, however, he only arrived three days before the opening night, and the defendants refused his services. On this occasion it was held that there was only a breach of warranty. The defendants were entitled to damages, but could not treat the contract as discharged.

For some time it was thought that these were the only two types of term possible, the nature of the remedy available being prescribed by the particular type of term concerned. This simple classification has subsequently been rejected by the courts as too restrictive, and a third type of term has emerged: the innominate term.

(d) Innominate terms

In this case, the remedy is not prescribed in advance simply by whether the term breached is a condition or a warranty, but depends on the consequence of the breach.

If the breach deprives the innocent party of 'substantially the whole benefit of the contract', then the right to repudiate will be permitted; even if the term might otherwise appear to be a mere warranty.

If, however, the innocent party does not lose 'substantially the whole benefit of the contract', then they will not be permitted to repudiate but must settle for damages, even if the term might otherwise appear to be a condition. The way in which the courts approach such terms may be seen in *Cehave* v *Bremer (The Hansa Nord)* (1976). In this case a contract for the sale of a cargo of citrus pulp pellets, to be used as animal feed, provided that they were to be delivered in good condition. On delivery, the buyers rejected the cargo as not complying with that provision, and claimed back the money they had paid to the sellers. Subsequently the same buyers obtained the pellets, when the cargo was sold off, and used them for their original purpose. It was held that since the breach had not been serious, the buyers had not been free to reject the cargo, and the sellers had acted lawfully in retaining the money paid.

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 principle of fault, although there are exceptions. Negligence is recognized 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.

The test for establishing whether a duty of care exists was initially set out in *Donoghue* v *Stevenson* (1932), the snail in the beer bottle case, in which the House of Lords established that a manufacturer owes a duty of care to the ultimate consumer of their goods. Irrespective of any lack of contractual relationship the manufacturer must exercise reasonable care to prevent injury to the consumer.

In putting forward the test to establish a duty of care Lord Atkin stated that:

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

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

The test in *Donoghue* v *Stevenson* was subsequently extended in *Anns* v *Merton LBC* (1978), Lord Wilberforce introducing a two stage test for establishing the existence of a duty, as follows:

– Is there a sufficient relationship of proximity or neighbourhood between the alleged wrongdoer and the person who has suffered damage such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter?

– If the first question is answered in the affirmative, are there then any considerations which ought to negate, reduce or limit the scope of the duty or the class of persons to whom it is owed or the damages to which a breach of duty may give rise?

The impact of *Anns* led to the expansion of negligence, as the policy reasons acted only to limit liability once a duty had been found to exist, as opposed to limiting the existence of the duty itself. However, there was gradual criticism of, and retreat from the approach taken by Lord Wilberforce. Thus in *Peabody Donation Fund* v *Sir Lindsay Parkinson* & *Co Ltd* (1984), it was stressed that the proximity test had to be satisfied before a duty of care could be found to exist.

The decision in Anns was eventually overruled by *Murphy* v *Brentwood DC* (1990), where it was held that local authorities owed a duty of care to a building owner to avoid damage to the building, which would create a danger to the health and safety of the occupants. The duty arose out of the local authority's powers to require compliance with building regulations. However, as the damage was held to be pure economic loss, it was irrecoverable.

The present position, appears to be that in establishing the existence of a duty of care in negligence, an incremental approach must be taken. The claimant must show that the defendant foresaw that damage would occur to the claimant, that is, that there was sufficient proximity in time, space and relationship between the claimant and the defendant. In practical terms, foreseeability of damage will determine proximity in the majority of personal injury cases. The courts will then, where appropriate, consider whether it is just and reasonable to impose a duty and whether there are any policy reasons for denying or limiting the existence of a duty, for example, under the floodgates argument. The courts will not necessarily consider these in all cases.

The final retraction from *Anns* and support for the incremental approach was seen in *Caparo Industries plc* v *Dickman* (1990), where the application of a three stage test for establishing a duty of care was recommended. This requires consideration of the following questions:

– Was the harm caused reasonably foreseeable?

– Was there a relationship of proximity between the defendant and the claimant?

– In all the circumstances, is it just, fair and reasonable to impose a duty of care?

It is apparent that the courts' current position is to continue to retreat from Anns to a more 'category-based' approach, as referred to in the ratio of *Donoghue* v *Stevenson*.

This was clearly summed up by Lord Hoffmann in *Stovin* v *Wise* (1996), as follows:

The trend of authorities has been to discourage the assumption that anyone who suffers loss is *prima facie* entitled to compensation from a person ... whose act or omission can be said to have caused it. The default position is that he is not.

4 Incorporation under the Companies Act 1985 requires companies to register certain documents with the Registrar of Companies. These documents are as follows:

(i) Memorandum of Association. This document contains the fundamental conditions on which the company is incorporated. It relates to matters that are of importance in the company's external dealings, such as the company's name, its objects, its capital structure, whether it is a public or a private company, and whether or not it enjoys limited liability. Except in the case of a single person private company, the memorandum must be dated and signed by at least two subscribers who agree to take at least one share in the company. The signatures of the subscribers must be witnessed by a third person.

(ii) Articles of Association. This document relates to the internal operation of the company and deals with such matters as the rights attached to particular shares, the calling and conduct of meetings. In fact companies need not register their own articles, as Table A Model articles will automatically apply. Articles submitted must be dated, signed by the subscribers, and witnessed in the same way as the memorandum.

(iii) Details of directors, secretary and registered office (form 10). This form sets out the names and other particulars of the first directors and secretary, with their consent to act in that capacity. It also states the address of the company's registered office. Again, the subscribers to the memorandum must sign it.

(iv) Declaration of compliance (form 12). This is a statutory declaration that the requirements of the Companies Act relating to formation have been complied with. It is made by a person, who is named as a director or secretary of the company, or by a solicitor engaged in the formation of the company.

Under s.12, the registrar will not register a company unless satisfied that all the requirements of the Companies Act in respect of registration have been complied with. Where, however, a certificate of incorporation has been given, then under s.13, it is conclusive evidence that the requirements of the Companies Acts have been complied with.

A private company is free to commence business and to borrow money as soon as it is incorporated, but a public company must not start its business or borrow money, until the registrar has also issued a certificate under s.117(1) CA 1985. The s.117 certificate will be issued only after the registrar is satisfied that the statutory requirements regarding minimum and paid up capital have been fulfilled. Thus, to obtain a trading certificate, the public company must register a statutory declaration to the effect that the nominal value of its allotted share capital is not less than the authorised minimum, currently £50, 000; and that the amount paid up on its allotted share capital is in accordance with the minimum requirement, currently 25%.

Companies originally registered as private may be converted to public companies at a later date. The procedure under s.43 CA achieves the same ends as s.117. It is an offence for a company to trade in contravention of s.117, and any officer of the company in default will be liable to prosecution. Finally, if a public company does not obtain a trading certificate within one year of its registration, the court (Insolvency Act 1986, s.122) may wind up the company.

5 In theory, the ultimate control over a company's business lies with the members in a general meeting. One would obviously conclude that a meeting involved more than one person; and indeed there is authority to that effect in *Sharp* v *Dawes* (1876) in which a meeting between a lone member and the company secretary was held not to be validly constituted. It is possible, however, for a meeting of only one person to take place in the following circumstances:

(i) in the case of a meeting of a particular class of shareholders and all the shares of that class are owned by the one member.

(ii) by virtue of s.371 of the Companies Act 1985 (CA) the court may order the holding of a general meeting at which the quorum is to be one member.

Types of meetings

There are three types of meeting:

(a) **the annual general meeting**. By virtue of s.366 of CA 1985, every company is required to hold an annual general meeting (AGM) every calendar year; subject to a maximum period of 15 months. This means that if a company held its AGM on 1 January 2000, then it must hold its next AGM by 31 March 2001 at the latest.

If a company fails to hold an AGM then any member may apply to the Secretary of State to call a meeting in default (CA s 367). The business conducted at AGMs tends to be routine such as the re-election of directors, consideration of accounts and approval of dividends. In line with the recognised distinction between public and private companies the CA 1989 introduced a provision, in the form of a new CA s 366 A, which permitted private companies, subject to approval by a unanimous vote, to dispense with the holding of annual general meetings. Under s.381 A of the CA 1985 it is no longer necessary for a private company to convene a general meeting where the members have unanimously signed a written resolution setting out a particular course of action.

(b) **the extraordinary general meeting**. An extraordinary general meeting (EGM) is any meeting other than an AGM. EGMs are usually called by the directors, although members holding 10% of the voting shares may requisition such a meeting by virtue of s 368 (CA 1985).

(c) **the class meeting**. This refers to the meeting of a particular class of shareholder; ie those who hold a type of share providing particular rights, such as preference shares. Where it is proposed to alter the rights attached to particular shares then it is necessary to acquire the approval of the holders of those particular shares to any such alteration. In order to achieve this approval, a meeting of those holding such shares has to be called to seek their approval of any proposed alteration (CA ss. 125–127).

Meetings may be convened in a number of ways by various people:

(i) by the directors of the company under Article 37 of Table A. Under s.142 CA 1985, to call meetings where there has been a serious loss of capital, defined as the assets falling to half or less than the nominal value of the called up share capital.

(ii) by the members using the power to requisition a meeting under s.368 CA 1985.

(iii) by the auditor of a company under s.392A, which provides for a resigning auditor to require the directors to convene a meeting in order to explain the reason for the auditor's resignation.

(iv) the Secretary of State may under s.367, on the application of any member, call a meeting of a company where it has failed to hold an AGM as required under section 366.

(v) the court may order a meeting under s.371, where it is impracticable otherwise to call a meeting.

6 (a) Corporate governance refers to the way in which companies are run and operated. According to the Organisation for Economic Co-operation and Development:

Corporate governance is the system by which business corporations are directed and controlled. The corporate governance structure specifies the distribution of rights and responsibilities among different participants in the corporation, such as, the board, managers, shareholders and other stakeholders, and spells out the rules and procedures for making decisions on corporate affairs. By doing this, it also provides the structure through which the company objectives are set, and the means of attaining those objectives and monitoring performance.

Although these interrelated issues have always been of concern in the way companies function, it cannot but be recognised that the increase in the attention placed on matters of corporate governance has been a result of the perceived weakness in company regulation which has been apparent in some of the recent scandals involving such large companies as Enron and Worldcom in America and Marconi and Parmalat in Europe.

In order to ensure an effective corporate governance framework it has been deemed necessary to set out defined rules and regulations, including voluntary codes. In the United Kingdom one such code is the Combined Code On Corporate Governance, which is the result of the review of the role and effectiveness of non-executive directors conducted by Derek Higgs and a review of audit committees conducted by Sir Robert Smith. This new combined code has applied to listed companies since November 2003. Companies have either to confirm that they comply with the Code's provisions or, where it does not, to provide an explanation of their non-compliance. Whilst listed companies are expected to comply with the Code's provisions most of the time, it is recognised that departure from its provisions may be justified in particular circumstances. Every company must review each provision carefully and give a considered explanation if it departs from the Code provisions.

(b) As regards the structure pf the board of directors the Combined Code requires that the board should include a balance of executive and non-executive directors (and in particular independent non-executive directors) such that no individual or small group of individuals can dominate the board's decision taking.

Executive directors usually work on a full time basis for the company and may be employees of the company with specific contracts of employment. Section 318 Companies Act (CA) 1985 requires that the terms of any such contract must be made available for inspection by the members. Section 319 renders void any such contract, which purports to be effective for a period of more than five years, unless it has been approved by a resolution of the company in a general meeting. In fact the Combined Code on Corporate Governance recommends that the maximum period for directors' employment contracts should be one year.

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

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

It is important to note that there is no distinction in law between executive and non-executive directors and the latter are subject to the same controls and potential liabilities as are the former.

7 This question requires candidates to explain the main features of the law relating to dismissal from employment on the basis of redundancy, paying particular regard to the way in which redundancy payments are calculated.

There are two major purposes behind the law relating to redundancy. The first purpose is to encourage employers to consider alternatives to dismissing their employees, and the second is to ensure that where employees have been dismissed on the grounds of redundancy that they should have at least a minimum level of payment to tide them over until hopefully they can regain employment. The law relating to redundancy is currently to be found in the Employment Rights Act 1996 (ERA). The determination of redundancy depends on the qualifying rules stated in that Act, and in order to be awarded redundancy payment individuals must follow the procedures stated therein.

Redundancy is defined in s 139(1) of the ERA as being: 'dismissal attributable wholly or mainly to:

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

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

It should be noted that even where a dismissal clearly falls within the above categories, an individual will not be able to claim redundancy payments unless they meet the qualification requirements, the most important of which relates to length of service. In order to qualify for redundancy payments an employee must have been continuously employed by the same employer or associated company for a period of two years. (The decision to reduce the length of service in relation to a claim for unfair dismissal to one year has not been extended to redundancy claims (*R* v *Sec State for Employment ex p Seymour Smith* (2000)).

Redundancy as a consequence of cessation of business is relatively straightforward and unproblematic although it should be noted that it applies to temporary as well as permanent cessation as seen in *Gemmell* v *Darngavil Brickworks Lid* (1967).

Problems do tend to arise in relation to the closure and relocation of the place of business. If the employer offers the employee a similar job at the new location, *which involves the employee in no added inconvenience*, then the employee cannot claim redundancy (see Managers (*Holborn Ltd* v *Hohne* (1977)). Where the employee does suffer additional inconvenience then they cannot be required to move unless they have an express mobility clause in their contract of employment, which require them to move with their job. An example of the former maybe seen in *O'Brien* v *Associated Fire Alarms* (1969) in which the plaintiff successfully claimed redundancy when he was dismissed for refusing to move from Liverpool to Barrow in Furness. However in *Rank Xerox Lid* v *Churchill* (1988) an employee with a mobility clause was not allowed to claim redundancy when required to move location of employment.

At the outset of redundancy proceedings the onus is placed on the employee to show that they have been dismissed, which they do by demonstrating that they are covered by s 136 of ERA, which provides four types of dismissal. These are:

(i) the contract of employment is terminated by the employer with or without notice;

(ii) a fixed term contract has expired and has not been renewed;

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

(iv) the contract is terminated by the death of the employer, or the dissolution or liquidation of the firm.

Normally employees who resign are not entitled to claim redundancy but type (iii) above provides for what is known as constructive dismissal in recognition of the situation where the unreasonable action of the employer has been tantamount to forcing the employee to resign. It is of course possible for the employee to behave in an unreasonable manner, and where they have refused to take up 'suitable' alternative employment offered to them by their employer they cannot claim redundancy. The difficulty arises in deciding what constitutes suitable alternative employment and can really only be decided on the facts of each case.

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

Employees who have been dismissed by way of redundancy are entitled to claim a redundancy payment from their former employer. Under the ERA the actual figures are calculated on the basis of the person's age, length of continuous service and weekly rate of pay subject to statutory maxima. Thus employees between the ages of 18 and 21 are entitled to ½ weeks pay for each year of service, those between 22 and 40 are entitled to 1 weeks pay for every year of service, and those between 41 and 65 are entitled to 1½ weeks pay for every year of service.

The maximum number of years service that can be claimed is 20 and as the maximum level of pay that can be claimed is £280, the maximum total that can be claimed is £8,400, (ie 1.5 x 20 x 280).

Disputes in relation to redundancy claims are heard before an industrial –tribunal and on appeal go to the Employment Appeal Tribunal.

There is also a statutory requirement for an employer to consult a recognised trade union or elected employees' representatives in good time to consider ways in which any redundancies can be avoided.

8 This question requires candidates to analyse the problem scenario from the perspective of contract law paying particular regards to the rules relating to: invitation to treat, offers, counter offers and breach of contract.

An offer is a promise to be bound on particular terms, and it must be capable of acceptance. The person who makes the offer is the offeror; the person who receives the offer is the offeree. The offer sets out the terms upon which the offeror is willing to enter into contractual relations with the offeree. An offer may, through acceptance by the offeree, result in a legally enforceable contract. However, it is important to distinguish what the law will treat as an offer from other statements which will not form the basis of an enforceable contract. The original advertisement in the magazine was not an 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. The classic case in this area is *Partridge* v *Crittenden* (1968) in which a person was charged with offering a wild bird for sale contrary to the Protection of Birds Act 1954, after he had placed an advert relating to the sale of such birds in a magazine. It was held that he could not be guilty of offering the bird for sale as the advert amounted to no more than an invitation to treat.

The original letters Al received from Bash Cars plc was a request for information and did not amount to offers to purchase filters from Al (*Harvey* v *Facey* (1893)). The first offer was made by Al when he wrote to both Bash Cars plc stating his terms of supply. Bash Cars plc was at liberty to accept Al's offer to supply the 1,000 filters at £50 each and thus enter into a binding contract, which Al would have had to perform or stand liable to pay damages for any breach of the contract. However, Bash Cars plc did not accept the original offer, stating that it was only willing to pay £45 per filter. That letter amounted to a counter offer, which made Al the offeree rather than the offeror, as he had originally been. The effect of such counter offers was to destroy Al's original offer, so that it could no longer be accepted (*Hyde* v *Wrench* (1840)) without further negotiations. Al's next letter restating his original terms represented a further counter-offer to the companies own counter-offer. That letters restored Al to his position as the offeror with Bash Cars re-assuming the role of offerees, who could accept or reject the terms as it wished.

By sending the order for the filters, the purchasing director of Bash Cars accepted Al's offer and therefore entered into a binding contract on Al's terms, which require the company to pay £50 per filter.

9 This question requires candidates to consider various issues relating to the issuing of shares by companies, the requirement for those shares to be paid for by shareholders and shareholders' potential liabilities for the debts of their companies.

The first issue relates to the shares taken by Gus in January. United Kingdom law requires that the capital of any company having share capital must be divided into shares of a designated and fixed amount (s.2(5)). The nominal value of the shares represents the extent of a shareholder's potential liability (*Borlands Trustees* v *Steel* (1901)).

There is, however, no requirement that companies issue shares to the full extent of their authorised capital, nor indeed is there any requirement that the company require its shareholders to immediately pay the full value of the shares.

The proportion of the nominal value of the issued capital actually paid by the shareholder is called the paid up capital. It may be the full nominal value, in which case it fulfils the shareholders responsibility to outsiders; or it can be a mere part payment, in which case the company has an outstanding claim against the shareholder. It is possible for a company to pass a resolution that it will not make a call on any unpaid capital. However, even in that situation, the unpaid element can be called upon if the company cannot pay its debts from existing assets in the event of its liquidation.

Consequently, there was nothing unlawful in the issue of the shares as partly paid up, but the remaining, unpaid, part, can always be called upon if the company requires it to pay off its debts.

The foregoing point is further strengthened by rules preventing companies from issuing shares at a discount. It is a long established rule that companies are not permitted to issue shares for a consideration that is less than the nominal value of the shares together with any premium due. The strictness of this rule may be seen in *Ooregum Gold Mining Co of India* v *Roper* (1892). In that case the shares in the company, although nominally £1, were trading at 12.5p. In an honest attempt to refinance the company, new £1 preference shares were issued and credited with 75p already paid (note the purchasers of the shares were actually paying twice the market value of the ordinary shares). When, however, the company subsequently went into insolvent liquidation the holders of the new shares were required to pay a further 75p.

The common law rule is now given statutory effect in s.100 Companies Act 1985 (CA) and is supported by s.99 which states that shares are only treated as paid up to the extent that the company has received money or money's worth. If a company does enter into a contract to issue shares at a discount it will not be able to enforce this against the proposed allottee. However, anyone who takes shares without paying the full value, plus any premium due, is liable to pay the amount of the discount as unpaid share capital, together with interest at 5% (s.100(2)/CA 1985). Also any subsequent holder of such a share who was aware of the original underpayment will liable to make good the shortfall (s.112 CA 1985).

Applying the foregoing to Gus's situation in relation to his shareholdings in Flop Ltd he cannot avoid liability to pay up to the full value of the shares he has taken in it. Thus in relation to the first lot of shares he will be liable to pay a maximum of £2,500 (25 pence x 10,000) shares and in relation to the second lot he will be liable to pay a maximum of £5,000 (50 pence x 10,000 shares). The extent of his liability will depend on the actual debts owed but cannot exceed the nominal value of the shares.

10 Dealing in shares, on the basis of access to unpublished price sensitive information, provides the basis for what is referred to as 'insider dealing' and is governed by part V of the Criminal Justice Act 1993 (CJA).

Section 52 of the CJA sets out the three distinct offences of insider dealing:

(i) an individual is guilty of insider dealing if they have information as an insider and deal in price-affected securities on the basis of that information.

(ii) an individual who has information as an insider will also be guilty of insider dealing if they encourage another person to deal in price-affected securities in relation to that information.

(iii) an individual who has information as an insider will also be guilty of insider dealing if they disclose it to anyone other than in the proper performance of their employment, office or profession.

The CJA goes on to explain the meaning of some of the above terms as follows:

(i) Dealing is defined in s.55 CJA, amongst other things, as acquiring or disposing of securities, whether as a principal or agent, or agreeing to acquire securities. Section 52 makes it clear that only such activity in a regulated market is covered by the Act.

(ii) Inside information is defined in s.56 as:
- relating to particular securities,
- being specific or precise,
- not having been made public and
- being likely to have a significant effect on the price of the securities.

(iii) Section 57 states that a person has information as an insider only if they know it is inside information and they have it from an inside source. The section then goes on to consider what might be described as primary and secondary insiders. The first category of primary insiders covers those who get the inside information directly through either:
- being a director, employee or shareholder of an issuer of securities; or
- having access to the information by virtue of their employment, office or profession.

The second category of insiders includes those whose source, either directly or indirectly, is a primary insider, as defined above.

Applying the general law to the problem scenario, one can conclude as follows:

(i) Slye is an 'insider' as he receives inside information from his position as a director of Huge plc. The information fulfils the requirements for 'inside information' as it relates to: particular securities, the shares in Large plc; is specific, in that it relates to the takeover; has not been made public; and is likely to have a significant effect on the price of the securities. On that basis Slye is clearly guilty of an offence under s.52 when he buys the shares in Large plc.

(ii) When Slye tells his friend Mate about the likelihood of the take-over he commits the second offence of disclosing information he has as an insider. Mate then becomes an insider himself and is guilty of dealing when he buys shares in Large plc.

(iii) When Slye advises his brother Tim to buy shares in Large plc, he commits the third offence under s.52 of encouraging another person to deal in price-affected securities in relation to inside information. Tim on the other hand has committed no offence for the reason that, although he has bought shares in Large plc, he has not received any specific information and therefore cannot be guilty of dealing on the basis of such information.

1 This question asks candidates to explain both what delegated legislation is and its importance in the contemporary legal system. It specifically requires a consideration of the way in which Parliament and the courts seek to control it.

6–10	A thorough answer which explains the meaning of delegated legislation and how it is introduced. The perceived advantages and disadvantages should be considered and all aspects of control should be mentioned. For full marks reference should be made to the Human Rights Act 1998.
0–5	A less complete answer, perhaps lacking in detail or unbalanced in that it does not deal with some aspects of the question.

2

8–10	Thorough explanation of the meaning of terms generally together with an explanation of the three categories of terms with reference to appropriate cases or examples.
5–7	Reasonable treatment of terms generally and one or even two of the types of terms, or a less complete treatment of all the elements.
0–4	Very unbalanced answer, focusing on only one aspect of the question and ignoring the others, or one which shows little understanding of the subject matter of the question.

3

8–10	Thorough explanation of the meaning of duty of care with appropriate references to cases.
5–7	Reasonable duty of care but perhaps lacking in detail or cases authority.
0–4	Very unbalanced answer, lacking in detailed understanding.

4

8–10	Answers will show a thorough understanding of the registration process, listing the documents required, and will make clear reference to the trading certificate in relation to public companies.
5–7	A sound understanding of the area, although perhaps lacking in detail.
2–4	Some understanding of the area but lacking in detail, perhaps failing to deal with the need for a trading certificate.
0–1	Little or no knowledge of the area.

5

8–10	A good treatment of all three types of meeting, probably, although not necessarily, with reference to statutory provisions.
5–7	A sound understanding of the area, although perhaps lacking in detail.
2–4	Some understanding of the area, but lacking in detail, perhaps failing to deal with one type of meeting.
0–1	Little or no knowledge of the area.

6

8–10	A good explanation of the meaning of corporate governance generally and the roles of the two types of directors in particular. Reference might well be made to the OECD or the Combined Code.
5–7	A sound understanding of the area, although perhaps lacking in detail.
2–4	Some understanding of the area, but lacking in detail, perhaps failing to deal the relationship of the two group of directors.
0–1	Little or no knowledge of the area.

7

8–10	A complete answer, demonstrating an understanding of what is meant by redundancy and the legal procedures controlling its operation, but must also be able to describe the way in which any payments are calculated.
5–7	An accurate recognition of the issues relating to redundancy and the calculations, but perhaps lacking in detail.
2–4	An ability to recognise some, although not all, of the key issues, or perhaps a recognition of the area of law but no attempt to apply that law.
0–1	Very weak answer showing no, or very little, understanding of the question.

8	8–10	A complete answer, highlighting and dealing with all of the issues presented in the problem scenario. It is most likely that cases will be referred to, and they will be credited.
	5–7	An accurate recognition of the problems inherent in the question, together with an attempt to apply the appropriate legal rules to the situation.
	2–4	An ability to recognise some, although not all, of the key issues and suggest appropriate legal responses to them. A recognition of the area of law but no attempt to apply that law.
	0–1	Very weak answer showing no, or very little, understanding of the question.
9	8–10	A complete answer, highlighting and dealing with all of the issues presented in the problem scenario. It is most likely that cases and statutory provisions will be referred to, and they will be credited.
	5–7	An accurate recognition of the problems inherent in the question, together with an attempt to apply the appropriate legal rules to the situation.
	2–4	An ability to recognise some, although not all, of the key issues and suggest appropriate legal responses to them. A recognition of the area of law but no attempt to apply that law.
	0–1	Very weak answer showing no, or very little, understanding of the question.
10	8–10	A good analysis of the scenario with a clear explanation of the law relating to the insider dealing, with detailed reference to statutory provisions.
	5–7	Some understanding of the situation but perhaps lacking in detail or reference to the statutes.
	0–4	Weak answer lacking in knowledge or application, with little or no reference to the statute.