Answers

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

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

Contract, tort and property law are generally aspects of civil law.

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

In distinguishing between criminal and civil actions, it has to be remembered that the same event may give rise to both. For example, where the driver of a car injures someone through their reckless driving, they will be liable to be prosecuted under the Road Traffic legislation, but at the same time, they will also be responsible to the injured party in the civil law relating to the tort of negligence. Similarly, a director may fall foul of both the criminal regulation of fraudulent trading (s.993 CA 2006) as well as breaching their duty to the company under one of the provisions of ss.171–177 CA 2006.

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

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

Further appeal is to the Court of Appeal (Criminal Division) and then to the Supreme Court on a significant point of law.

2 This question requires an explanation of the rules relating to the acceptance and revocation of offers in contract law.

(a) Acceptance is necessary for the formation of a contract. Once the offeree has accepted the terms offered, a contract comes into effect. Both parties are bound: the offeror can no longer withdraw their offer, nor can the offeree withdraw their acceptance. The rules relating to acceptance are:

(i) Acceptance must correspond with the terms of the offer. Thus, the offeree must not seek to introduce new contractual terms into their acceptance (*Neale* v *Merrett* (1930)).

(ii) A counter-offer does not constitute acceptance (*Hyde* v *Wrench* (1840)). Analogously, a conditional acceptance cannot create a contractual relationship (*Winn* v *Bull* (1877)).

(iii) Acceptance may be in the form of express words, either oral or written. Alternatively, acceptance may be implied from conduct (*Brogden* v *Metropolitan Railway Co* (1877)).

(iv) Generally, acceptance must be communicated to the offeror. Consequently, silence cannot amount to acceptance (*Felthouse* v *Bindley* (1863)).

(v) Communication of acceptance is not necessary, however, where the offeror has waived the right to receive communication. Thus in unilateral contracts, such as *Carlill* v *Carbolic Smoke Ball Co* (1893), acceptance occurred when the offeree performed the required act. Thus, in the *Carlill* case, Mrs Carlill did not have to inform the Smoke Ball Co that she had used their treatment.

(vi) Where acceptance is communicated through the postal service, then it is complete as soon as the letter, properly addressed and stamped, is posted. The contract is concluded even if the letter subsequently fails to reach the offeror (*Adams* v *Lindsell* (1818)). However, the postal rule will only apply where it is in the contemplation of the parties that the post will be used as the means of acceptance. If the parties have negotiated either face to face, in a shop, for example, or over the telephone, then it might not be reasonable for the offeree to use the post as a means of communicating their acceptance and they would not gain the benefit of the postal rule.

The postal rule applies equally to telegrams (*Byrne* v *Van Tienhoven* (1880)). It does not apply, however, when means of instantaneous communication are used (*Entores* v *Miles Far East Corp* (1955)).

In order to expressly exclude the operation of the postal rule, the offeror can insist that acceptance is only to be effective on receipt (*Holwell Securities* v *Hughes* (1974)). The offeror can also require that acceptance be communicated in a particular manner. Where the offeror does not insist that acceptance can only be made in the stated manner, then acceptance is effective if it is communicated in a way no less advantageous to the offeror (*Yates Building Co* v J *Pulleyn* & *Sons* (1975)).

(b) Revocation is the technical term for the cancellation of an offer and occurs when the offeror withdraws their offer. The rules relating to revocation are:

(i) An offer may be revoked at any time before acceptance. However, once revocation has occurred, it is no longer open to the offeree to accept the original offer (*Routledge* v *Grant* (1828)).

(ii) Revocation is not effective until it is actually received by the offeree. This means that the offeror must make sure that the offeree is made aware of the withdrawal of the offer, otherwise it might still be open to the offeree to accept the offer (*Byrne* v *Tienhoven* (1880)).

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

(iv) A promise to keep an offer open is only binding where there is a separate contract to that effect. Such an agreement is known as an option contract, and it must be supported by separate consideration for the promise to keep the offer open.

(v) In relation to unilateral contracts, i.e. a contract where one party promises something in return for some action on the part of another party, revocation is not permissible once the offeree has started performing the task requested (*Errington* v *Errington* & *Wood*s (1952)).

3 (a) The law does not require unreasonable steps to be taken to avoid breaching a duty of care. In legal terms, a breach of duty of care occurs if the defendant fails:

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

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

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

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

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

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

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

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

(b) The position in negligence is that the person ultimately liable in damages is only responsible to the extent that the loss sustained was considered not to be too remote. The test for remoteness was established in *The Wagon Mound (No 1)* (1961). The defendants negligently allowed furnace oil to spill from a ship into Sydney harbour, which subsequently caused a fire, which spread to, and damaged, the plaintiff's wharf. Although the defendants were held to be in breach of their duty of care, they were only liable for the damage caused to the wharf and slipway through the fouling of the oil. They were not liable for the damage caused by fire because damage by fire was at that time unforeseeable (the oil had a high ignition point and it could not be foreseen that it would ignite on water).

The test of reasonable foresight arising out of *The Wagon Mound* clearly takes into account such things as scientific knowledge at the time of the negligent act. The question to be asked in determining the extent of liability is, 'is the damage of such a kind as the reasonable [person] should have foreseen?' This does not mean that the defendant should have foreseen precisely the sequence or nature of the events.

This is illustrated in the case of *Hughes* v *Lord Advocate* (1963), where employees of the Post Office, who were working down a manhole, left it without a cover but with a tent over it and lamps around it. A child picked up a lamp and went into the tent. He tripped over the lamp, knocking it into the hole. An explosion occurred and the child was burned. The risk of the child being burned by the lamp was foreseeable. However, the vaporisation of the paraffin in the lamp and its ignition were not foreseeable. It was held that the defendants were liable for the injury to the plaintiff. It was foreseeable that the child might be burned and it was immaterial that neither the extent of his injury nor the precise chain of events leading to it was foreseeable.

4 (a) Shareholders in limited liability companies enjoy the benefit of limited liability and usually cannot be required to pay more than the value of the shares they take in their company. However, that privilege is only extended to them on the basis that they fully subscribe to the company's capital. In turn, that capital is seen as a fund against which creditors can claim in the event of a dispute. Capital maintenance refers to the way in which the capital fund of limited liability companies can be used and, most essentially, reduced. The fundamental rule is that payments may not be improperly made out of capital to the detriment of the company's creditors. To that end, company law lays out rules as to what may be considered proper payment from capital and, in particular, establishes clear rules relating to the payment of dividends and the ways in which capital can be reduced.

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

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

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

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

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

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

5 This question requires candidates to explain the operation and potential liability of members of three distinct types of partnerships.

(a) The ordinary partnership

This is the most common form of partnership. Ordinary partnerships involve potential unlimited liability for their members, should the business run into financial difficulties. It is possible to attempt to limit individual liability within the partnership by setting specific limits on the liability of the individual partners. This, however, has no effect on the external liability of the various members of the partnership who will remain liable for the full extent of the partnership debts. As a result, any partner who has to pay more than the amount agreed internally will be in the position to raise an action to recover any amount paid out in addition to their agreed limit from the other members of the partnership.

(b) The limited partnership

The Limited Partnerships Act (LPA) 1907 allows for the formation of limited partnerships. For members of a partnership to gain the benefit of limited liability under this legislation, the following rules apply:

– limited partners are not liable for partnership debts beyond the extent of their capital contribution, but in the ordinary course of events they are not permitted to remove their capital;
– at least one of the partners must retain full, that is unlimited, liability for the debts of the partnership;
– a partner with limited liability is not permitted to take part in the management of the business enterprise and cannot usually bind the partnership in any transaction. If a partner acts in contravention of this rule, they will lose the right to limited liability;
– the partnership must be registered with the Companies Registry.

Very few limited partnerships were ever registered as partnerships could access the advantages available under the LPA 1907, and more, by simply registering their business as a private limited company.

(c) The limited liability partnership

As has already been seen, the main shortcoming with regard to the standard partnership is the lack of limited liability for its members. The Limited Liability Partnerships Act 2000 provided for a new form of business entity, the limited liability partnership (LLP). Although stated to be a partnership, the new form is a corporation, with a distinct legal existence apart from its members. As such it has the ability:

– to hold property in its own right;
– to sue and be sued in its own name.

It has perpetual succession and consequently an alteration in its membership does not have any effect on its existence. Most importantly, however, the new legal entity allows its members to benefit from limited liability as they will not be liable for more than the amount they have agreed to contribute to its capital.

To form a limited liability partnership:

– two or more persons must subscribe to an incorporation document;
– the incorporation document must be delivered to the Companies Registry;
– a statement of compliance must be completed by a solicitor or subscriber to the incorporation document.

The incorporation document must include:

– the name of the LLP (subject to restrictions);
– the address of the registered office;
– the names and addresses of those who will be members on incorporation of the LLP;
– the names of at least two designated members, whose duty it is to ensure that the administrative and filing duties of the LLP are complied with. If no such members are designated, then all members will be assumed to be designated members.

6 (a) This question requires candidates to explain the meaning and procedures involved in the course of a voluntary liquidation in company law. One of the many consequences of incorporation is that a registered company becomes a legal entity in its own right having existence apart from its member shareholders. One of the attributes of this legal personality is that the company has not only separate, but also perpetual, existence, in that it continues irrespective of changes in its membership. Indeed, the company can continue to exist where it has no members at all. Winding up, or liquidation, is the process whereby the life of the company is brought to an end and its assets realised and distributed to its members and/or creditors. The rules governing winding up are detailed in the provisions of the Insolvency Act (IA) 1986 and the exact nature of the procedure depends on the type of winding up involved and depends upon the solvency of the company at the time when liquidation commences. Winding up can be conducted on a voluntary basis, in which case the members of the company themselves determine that the time has come for it to come to an end, or alternatively, the court may make an order that the company's life should come to an end. This question refers to the first of these alternatives, voluntary winding up.

Section 84 IA states that a company may be wound up voluntarily:

(i) when any period fixed for the duration of the company by the articles expires, or any event occurs, which shall, according to the articles, lead to its dissolution. Under such circumstances the winding up has to be approved by an ordinary resolution.

(ii) for any other reason whatsoever. Under these circumstances a special resolution is required to approve the winding up.

This is the procedure the members would follow if the company is insolvent.

In any case the winding up is deemed to have started on the date that the appropriate resolution was passed.

(b) **(i)** A members' voluntary liquidation takes place when the directors of the company are of the opinion that the company is solvent and is capable of paying off its creditors. The directors are required to make a formal declaration to the effect that they have investigated the affairs of the company and that in their opinion it will be able to pay its debts within 12 months of the start of liquidation. It is a criminal offence for directors to make a false declaration without reasonable grounds. On appointment, by an ordinary resolution of the company, the job of the liquidator is to wind up the affairs of the company, to realise the assets and distribute the proceeds to its creditors. On completion of this task, the liquidator must present a report of the process to a final meeting of the shareholders. The liquidator then informs the Registrar of the holding of the final meeting and submits a copy of their report to them. The Registrar formally registers these reports and the company is deemed to be dissolved three months after that registration.

(ii) A creditors' voluntary liquidation takes place when the company is insolvent when it is decided to wind it up. The essential difference between this and the former type of liquidation is that, as the name implies, the creditors have an active role to play in overseeing the liquidation of the company and there is no declaration of solvency. First, a meeting of the creditors must be called within 14 days of the resolution to liquidate the company at which the directors must submit a statement of the company's affairs. The creditors have the final say in who should be appointed as liquidator and may, if they elect, appoint a liquidation committee to work with the liquidator. On completion of the winding up, the liquidator calls and submits their report to meetings of the members and creditors. The liquidator then informs the Registrar of the holding of these final meetings and submits a copy of their report to them. The Registrar formally registers these reports and the company is deemed to be dissolved three months after that registration.

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

(a) the fact that his employer has ceased, or intends to cease,

(i) to carry on the business for the purposes of which the employee was employed by him, or
(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business

(i) for employees to carry out work of a particular kind, or
(ii) for employees to carry out work of a particular kind in the place where the employee was so employed by the employer, have ceased or diminished or are expected to cease or diminish.'

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

(i) the contract of employment is terminated by the employer with or without notice;
(ii) a fixed term contract has expired and has not been renewed;
(iii) the employee terminates the contract with or without notice in circumstances which are such that he or she is entitled to terminate it without notice by reason of the employer's conduct;
(iv) the contract is terminated by the death of the employer, or the dissolution or liquidation of the firm.

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

Employees who have been dismissed by way of redundancy are entitled to claim a redundancy payment from their former employer. Under ERA 1996, the actual figures are calculated on the basis of the person's age, length of continuous service and weekly rate of pay subject to statutory maxima. Thus employees between the ages of 18 and 21 are entitled to ½ week's pay for each year of service, those between 22 and 40 are entitled to 1 week's 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 which can be claimed is 20 and as the maximum level of pay which can be claimed is £430, the maximum total which can be claimed is £12,900 (i.e. 1·5 x 20 x 430).

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

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

There is clearly a binding contractual agreement between Art Ltd and Bel, which Bel has stated she intends to break. Normally breach of a contract occurs where one of the parties to the agreement fails to comply, either completely or satisfactorily, with their obligations under it. However, such a definition does not appear to apply in this case as the time has not yet come when Bel has to produce the manuscript. She has merely indicated that she has no intention of doing so. This is an example of the operation of the doctrine of anticipatory breach. This arises precisely where one party, prior to the actual due date of performance, demonstrates an intention not to perform their contractual obligations. The intention not to fulfil the contract can be either express or implied.

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

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

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

Remedies for breach of contract

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

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

Damages in contract are intended to compensate an injured party for any financial loss sustained as a consequence of another party's breach. The object is not to punish the party in breach, so the amount of damages awarded can never be greater than the actual loss suffered. The aim is to put the injured party in the same position they would have been in had the contract been properly performed.

The rule in *Hadley* v *Baxendale* (1845) states that damages will only be awarded in respect of losses which arise naturally, or which both parties may reasonably be supposed to have contemplated when the contract was made, as a probable result of its breach.

The effect of the first part of the rule in *Hadley* v *Baxendale* is that the party in breach is deemed to expect the normal consequences of the breach, whether they actually expected them or not. Under the second part of the rule, however, the party in breach can only be held liable for abnormal consequences where they have actual knowledge that the abnormal consequences might follow (*Victoria Laundry Ltd* v *Newham Industries Ltd* (1949)).

Applying these rules to the scenario, it is evident that Bel has effected an anticipatory breach of her contract with Apt Ltd and will be liable to it for damages suffered as a consequence.

As for the extensive preliminary expenses, Bel would certainly be liable for them, as long as they were in the ordinary course of Apt Ltd's business and were not excessive (*Anglia Television* v *Reed* (1972)).

As regards the profits from the contract to supply the book club, the issue would be as to whether this was normal profit or amounted to an unexpected gain, as it was not part of Apt Ltd's normal market when the contract was signed. If *Victoria Laundry Ltd* v *Newham Industries Ltd* were to be applied, it is unlikely that Apt Ltd would be able to claim that loss of profit from Bel. However, it is equally plausible that the contract was an ordinary commercial one and that Bel would have to recompense Apt Ltd for any losses suffered from its failure to complete contractual performance.

9 This question requires candidates to analyse a problem scenario and explain and apply the law relating to directors' duties generally and specifically the rules applying when a director has a personal interest in a contract entered into by their company.

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

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

Section 175 CA 2006 deals with the general duty to avoid conflicts of interest and replaces the previous common law no-conflict rule. Under the previous rule, certain consequences followed if directors placed themselves in a position where their personal interests came into conflict with their duties to the company, unless the company knew about the conflict and specifically consented to it. Section 175 continues that procedure in an amended form, which allows the other independent directors to authorise the conflict. However, any conflicted directors must not be counted in the quorum for the meeting or vote. Section 180 also preserves the ability of the members of a company to authorise conflicts which would otherwise be a breach of this duty.

One obvious area where directors place themselves in a position involving a conflict of interest is where they have an interest in a contract with the company. Sections 177 and 182 CA 2006 place a specific duty on directors to declare any interest, direct or indirect, in any contracts, either proposed or already existing, with their companies. Any declaration of interest must be made at the board meeting which first considers the contract, or if the director becomes interested in the contract after that, at the first meeting thereafter. Failure to disclose any interest renders the contract voidable at the instance of the company and the director may be liable to account to the company for any profit made in relation to it. Section 183 makes it a criminal offence punishable by a fine if a director fails to make the required declaration in relation to an existing contract.

Section 185 CA 2006 states that a director's disclosure can take the form of a general declaration of interest in a particular company, which is considered sufficient to put the other directors on notice for the future.

Applying the above to the problem scenario, it appears that Cy did not declare his interest in either Fox Ltd generally, or the particular contract in question. Dix plc could have avoided the contract had they found out earlier and acted sooner, but in any case Cy can be held liable to account to Dix plc for any profit he made on the deal, or, more significantly, he will be liable to account to Dix plc for its significant loss on the contract. Cy will also be liable to prosecution and a fine under s.183 CA 2006.

10 This question requires candidates to consider and explain a problem scenario which raises issues relating to directors' statutory duties under ss.213 and 214 Insolvency Act (IA) 1986 as they apply to fraudulent and wrongful trading.

At common law, the duties owed by directors to their company and the shareholders, employees and creditors of that company were notoriously lax. Statute has, by necessity, been forced to intervene to increase such duties in order to provide a measure of protection for those concerned.

Common law did not place any great burden on directors in regard to liability for company losses. Damages could be recovered against directors for losses caused by their negligence but the level of such negligence was high. As was stated in *Lagunas Nitrate Co* v *Lagunas Syndicate* (1899), it must, in a business sense, be culpable or gross. The laxity of the situation at common law has been much tightened by statute, particularly by the development of civil liability for wrongful trading, which was introduced by s.214 IA 1986.

Fraudulent trading

There has long been civil liability for any activity amounting to fraudulent trading. Thus, s.213 IA 1986 governs situations where, in the course of a winding up, it appears that the business of a company has been carried on with intent to defraud creditors, or for any fraudulent purpose. In such cases, the court, on the application of the liquidator, may declare that any persons who were knowingly parties to such carrying on of the business are liable to make such contributions (if any) to the company's assets as the court thinks proper. The major problem in making use of s.213, however, lies in meeting the very high burden of proof involved in proving dishonesty on the part of the person against whom it is alleged.

Wrongful trading

Wrongful trading does not involve dishonesty but, nonetheless, it still makes particular individuals potentially liable for the debts of their companies. Section 214 IA 1986 applies where a company is being wound up and it appears that, at some time before the start of the winding up, a director knew, or ought to have known, that there was no reasonable chance of the company avoiding insolvent liquidation. In such circumstances, then, unless the directors took every reasonable step to minimise the potential loss to the company's creditors, they may be liable to contribute such money to the assets of the company as the court thinks proper. In deciding what directors ought to have known, the court will apply an objective test, as well as a subjective one and s.214 IA establishes a minimum standard of what may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company.

The manner in which incompetent directors will become liable to contribute to the assets of their companies was shown in *Re Produce Marketing Consortium Ltd* (1989), in which two directors were held liable to pay compensation from the time that they ought to have known that their company could not avoid insolvent liquidation, rather than the later time when they actually realised that fact.

In addition, directors may be disqualified from holding office for a period of up to 15 years under the provisions of the Company Directors Disqualification Act (CDDA)1986 if they are found liable for either fraudulent or wrongful trading.

Applying the foregoing law to the problem scenario, it is unlikely that there is sufficient evidence to substantiate a claim against Gim or Hom for fraudulent trading, as apparently they genuinely thought they could trade their way out of difficulty. Although it has to be recognised that Gim and Hom did actually disguise the debts of the company, they did not do so in order to benefit themselves.

It would appear, however, that the two of them are certainly liable for an action for wrongful trading, as they carried on trading after it was clear that they ought to have known that there was no reasonable chance of the company avoiding insolvent liquidation. Nor can it be claimed that they took every reasonable step to minimise the potential loss to the company's creditors. Indeed, it was their continued trading which caused the creditors to suffer an additional loss beyond what they would have suffered had IMP Ltd been wound up at an earlier date.

It remains to determine from which date Gim and Hom should be held responsible for the debts of the company and it is immediately apparent that there was no real prospect of the company avoiding insolvent liquidation as early as October 2012. Consequently, they will be personally liable for any debts accrued by the company after that date.

They will also be liable to be disqualified from acting as company directors under the CDDA.

1 **(a)** The first part of this question requires candidates to explain the meaning of criminal and civil law.

(i) 2–3 marks A detailed answer explaining criminal law and perhaps citing appropriate examples.
1 mark A less detailed answer; perhaps too general and lacking examples.
0 marks No understanding of the concept.

(ii) 2–3 marks A detailed answer explaining civil law and perhaps citing appropriate examples.
1 mark A less detailed answer; perhaps too general and lacking examples.
0 marks No understanding of the concept.

(b) 3–4 marks Full explanation of the criminal courts.
1–2 marks Good explanation, but perhaps lacking in some detail or missing out some important court.
0 marks Very weak, if any, understanding of the courts concerned.

2 This question requires an explanation of the rules relating to the acceptance and revocation of offers in contract law.

(a) 4–6 marks A good to complete answer dealing with most, if not all, of the issues relating to acceptance of offers.
2–3 marks A less detailed answer, perhaps recognising what the question relates to but lacking in detailed knowledge of the rules.
0–1 mark Little or no understanding of the concept.

(b) 3–4 marks A good to complete answer dealing with most, if not all, of the issues relating to revocation of offers.
1–2 marks A less detailed answer, perhaps recognising what the question relates to but lacking in detailed knowledge of the rules.
0 marks No understanding of the concept.

3 **(a)** 4–6 marks Full understanding and explanation of the topic. It is likely that cases will be cited as authority, although examples will be acceptable as an alternative.
2–3 marks Some knowledge of the topic but lacking in detail.
1 mark Unbalanced answer, lacking in detailed understanding
0 marks No understanding of the concept.

(b) This part of the question refers to the issue of remoteness of damage in the law of negligence.

3–4 marks A thorough understanding of the issues involved. It is likely that the best answers will focus on the cases, although examples might be used.
1–2 marks Some, but limited, understanding of the issue, perhaps not referring to any cases to support the explanation.
0 marks No knowledge of the topic.

4 This question requires candidates to consider the linked concepts of capital maintenance and the payment for shares.

(a) Requires an explanation of the overall concept of capital maintenance.

2 marks	Clear answer providing explanation of the creditor fund and the way in which a company's capital may be used and may not be used. Reference may be made to limited liability and examples of the operation of the doctrine may be provided.
1 mark	Some knowledge of the concept but lacking any depth or explanation. Perhaps merely a reference to the idea of the creditor fund.
0 marks	No knowledge of the topic.

Part (b) relating to payment at a premium carries 4 marks, as does part (c) which relates to payments at a discount.

(b)	3–4 marks	A good to complete explanation of what is meant by share premiums and how they are to be treated in law. Reference must be made to the provisions of the Companies Act 2006.
	1–2 marks	Some idea about the issues but lacking in detail.
	0 marks	No understanding of the issues.
(c)	3–4 marks	Full understanding and explanation of the topic. It is likely that cases will be cited as authority, although examples will be acceptable as an alternative.
	1–2 marks	Some knowledge of the topic but lacking in detail.
	0 marks	No knowledge of the topic.

5 This question requires candidates to explain the operation of three types of partnerships, one unlimited and the others benefitting from limited liability.

(a)	2 marks	Full understanding of unlimited liability of ordinary partners.
	1 mark	Some understanding of the liability of such partners.
	0 marks	No knowledge whatsoever.
(b)	2–3 marks	A thorough answer explaining fully the rules relating to the limited partnership.
	1 mark	Little, if any, explanation. Perhaps lacking reference to the rules relating to this form.
	0 marks	No knowledge of the topic whatsoever.
(c)	4–5 marks	A thorough answer explaining fully the rules relating to the limited liability partnership.
	2–3 marks	Some knowledge of the operation of limited liability partnerships but lacking in detail. Perhaps lacking in any reference to the rules relating to this form.
	1 mark	Little knowledge or understanding.
	0 marks	No knowledge of the topic whatsoever.

6 **(a)** Requires a general explanation of the concept of voluntary liquidation and carries 6 marks.

4–6 marks	Thorough to full answer explaining the meaning and effect of voluntary liquidation.
1–3 marks	Some knowledge but perhaps lacking in detail or structure.
0 marks	No knowledge of the topic.

(b) Requires candidates to explain what is meant by the two specific forms of voluntary liquidation.

(i)

2 marks	Available for explaining what is meant by a members' voluntary liquidation. To gain full marks, a clear explanation of the meaning and procedures relating to a members' voluntary liquidation must be provided. Both aspects must be considered to get all 2 marks.
1 mark	Fair knowledge of the topic, but perhaps lacking in detail or not dealing with both aspects of the question.
0 marks	No knowledge of the topic.

(ii) 2 marks are available for explaining what is meant by a creditors' voluntary liquidation.

2 marks	Good knowledge clearly explained with reference to the companies legislation. To gain full marks, a clear explanation of the meaning and procedures relating to a creditors' voluntary liquidation must be provided.
1 mark	Clear understanding, but perhaps lacking in detail or not dealing with both aspects of the question.
0 marks	No knowledge of the topic.

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

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

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

8–10 marks	Full explanation of the meaning and effect of anticipatory breach of contract in the context of the scenario provided, together with appropriate application of those rules and legal remedies.
5–7 marks	Some explanation and application but perhaps lacking in detail or application or remedies.
2–4 marks	Some knowledge, although perhaps not clearly expressed, or very limited in its knowledge and understanding of the topic.
0–1 mark	Little or no knowledge of the topic.

9 This question requires candidates to analyse a problem scenario and explain and apply the law relating to directors' contracts with their companies.

8–10 marks	A good analysis of the scenario with a clear explanation of the law relating to contracts between directors and their companies, both at common law and under statute. References to the Companies Act 2006 will be provided.
5–7 marks	Some understanding of the situation but perhaps lacking in detail or reference to the statute.
3–4 marks	Weak answer lacking in knowledge or application, with little or no reference to the Companies Act.
1–2 marks	Little, if any, knowledge of the appropriate legal principles.
0 marks	No knowledge whatsoever of the substance of the question.

10 This question requires candidates to consider, fraudulent trading under s.213 Insolvency Act 1986, and wrongful trading under s.214 Insolvency Act 1986.

8–10 marks	A good analysis of the scenario with a clear explanation of the law relating to fraudulent and wrongful trading, together with an accurate application of that law.
5–7 marks	Fair to good understanding of the situation but perhaps lacking in detail or reference to the statute.
3–4 marks	Weak answer lacking in knowledge or application, with little or no reference to the provisions of the Insolvency Act 1986.
1–2 marks	Little knowledge of the appropriate legal principles.
0 marks	No knowledge whatsoever of the substance of the question.