Answers

1 This question requires candidates to explain customary law as a source of law.

South African law consists of a number of sources. Some sources are authoritative while others merely have persuasive authority. Courts are bound by authoritative sources whereas those of persuasive authority may serve to convince a court to apply or interpret a legal rule in a particular way.

Certain rules of conduct are observed because it has become customary in a particular group of people to respect such usages. Customary law does not consist of written rules, but develops from the habits of the community and is carried down from generation to generation. In modern communities where the rate of development is very rapid, custom has less opportunity to develop into law. Once the need for a particular legal rule arises, the legislature simply steps in and lays down such a rule. Yet, even today it may still happen that custom develops into law. In *Van Breda* v *Jacobs* (1921) a local custom amongst fishermen was that once they set their lines on a beach where no boats are permanently stationed, for the purpose of catching a shoal of fish seen moving along the coast, no further fishermen are entitled to set lines within any reasonable distance in front of the lines already set. This was held to be duly established by the evidence as a valid custom. It appears from this judgement that the following requirements must be met before a customary rule will be recognised as a legal rule:

(a) it must be reasonable
(b) it must have existed for a long time
(c) it must be generally recognised and observed by the community
(d) the contents of the customary rule must be certain and clear.

The court's decision that a particular custom is valid merely recognises the custom as being law and does not give the custom greater force than it had before. Nevertheless, the validity of the custom is thereby established.

Customary law, also called trade usages, also plays an important role in the business and commercial world. It is often alleged that a trade usage exists within a certain trade or business and that the parties to a contract are bound by it. The same requirements as those for proving a rule of customary law apply. For example, a trader who alleges that a customer must pay an installation fee for a television or a stove bought from the trader must prove all the requirements set out above. Where one of the requirements has not been proved, the court will not enforce the usage.

2 This question asks candidates to explain the meaning of an offer and to distinguish it from an invitation to do business.

An offer is a declaration of intention by one party (the offeror) to another (the offeree), indicating the performance that he is prepared to make, and the terms on which he will make it. An offer is usually addressed to a specific person, but it may also be addressed to a group of people, or even to the general public. If an offer is made to the world at large, it can be accepted by anyone (*Bloom* v *The American Swiss Watch Company* (1915)).

An offer may, through acceptance by the offeree, result in a legally enforceable contract. It is important, therefore, to distinguish what the law will treat as an offer from other statements that will not form the basis of an enforceable contract. For example, the offer must be capable of acceptance. Thus it must not be too vague and the intended obligations must be stated unequivocally and unconditionally so that the rights and duties intended by the offer are determined or ascertainable. It is also essential to distinguish genuine offers from the following: a mere statement of intention; merely supplying information or an invitation to do business.

The offer must be made with the serious intention of creating a legal obligation. An offer to conclude a contract must be distinguished from an invitation to do business. This is an invitation to others to make offers. The person extending the invitation is not bound to accept any offers made to them. Common examples involving invitations to do business are:

The display of goods in a shop window. The classic case in this area is *Crawley* v *Rex* (1909) in which a shopkeeper refused to accept the offer that was made to him in respect of goods that were on a sale. The intention of the declarer will in each case determine whether his declaration constituted a real offer, or merely an invitation to do business.

A public advertisement. An advertisement in a newspaper, or the price tag stuck to a product in a self-service shop does not as a general rule constitute an offer. The customer who decides to buy something makes an offer to the shopkeeper at the till. The shopkeeper can decide whether he wants to accept the offer.

Acceptance is necessary for the formation of a contract. Once the offeree has agreed to the terms offered, a contract comes into existence. Both parties are bound and can enforce the terms of the agreement through the courts. However, if the offerees expressly reject an offer made to them, then such rejection has the effect of bringing the offer to an end. The effect of this is that they cannot subsequently retract the rejection and purport to accept the original offer. A similar consequence follows from a counter-offer, which is treated as an implicit rejection of the original offer. In order to form a binding agreement acceptance must correspond with the terms of the offer, so that it is not open to the offeree to unilaterally alter the terms of the offer. The effect of any such alteration is to bring the original offer to an end, and once again the offeree cannot accept the original offer. A counter-offer should not be confused with a request for further information. This does not end the offer, which can still be accepted after the new information has been elicited.

3 In this question candidates have to explain the role of an agent and have to provide examples of agency relationships.

A person who wishes to conclude a contract does not have to do so personally. He may prefer, whether for the sake of convenience, or for other purposes, to authorise someone else to enter into the contract on his behalf or in his name. Sometimes representation is essential. A legal entity like a company or a close corporation cannot, for example, conclude a contract by itself. The enterprise must of necessity be represented by a natural person or persons.

The concept of agency, or representation, arises when one person, the agent or representative, concludes a juristic act for and on behalf of another, who is called the principal, with the result that a legal tie arises between the principal and a third party or third parties. Any rights acquired and duties assumed by the agent are for the principal and not for the agent. Used in this sense, agency comprises the totality of juristic relationships which arise among these three parties.

The incidence of agency complies with various needs in modern society. In the first place, the interests of those who have no capacity to act can be protected. Secondly, agency makes it possible for juristic acts to be performed on behalf of persons who are absent. This juristic institution also renders it possible for the specialised services of specific agents to be utilised, for example, for a power of attorney to be given to an attorney to register property in the name of someone else on behalf of the seller.

For a person to perform an act of representation, certain requirements must be met. In the first instance, the principal must exist. Anyone with the capacity to perform juristic acts can appoint an agent to act on his behalf. Secondly, the agent must have authority to perform the act. The agent must make it clear to the third party that he (the agent) is acting for someone else and not in a personal capacity. No specific words to this effect are required. But the following expressions or words are frequently encountered in practice to indicate representation: 'for', 'on behalf of', 'pp' and 'qq'. The agent need not identify the principal. The same person can act as principal and agent simultaneously. For example, if Andrew and Ben wish to buy something jointly, Andrew may act both in his personal capacity and as Ben's agent in concluding the contract of sale.

If the parties have agreed on the payment of remuneration and the agent has substantially performed his mandate, the principal must pay him the remuneration. The agent must prove that there was an undertaking to pay. Since an agent merely creates the legal relationship between his principal and the third party, there is normally no legal relationship between the agent and the third party. The only obligations that are created, altered or terminated are those between the principal and the third party. The agent incurs no liability to the third party unless he agreed expressly or by implication to do so.

4 This question requires candidates to explain how partnerships are established.

A partnership is established when the prospective partners conclude a partnership agreement with one another. A valid partnership agreement is a prerequisite for the establishment of a partnership. The contract must be between two or more persons to constitute a partnership. Legal entities such as companies and close corporations may be parties to a partnership agreement. A contract of partnership should comply with all the requirements of a valid contract. This requirement is not peculiar to a partnership contract only, but applies in respect of any other contract. The parties to the contract must reach agreement as to the nature and the content of their contract.

The law does not prescribe any general formalities regarding the formation of a partnership agreement. The agreement may, therefore, be concluded in writing, or orally or even tacitly. The parties to the contract may, however, agree among themselves that certain formalities have to be complied with, for instance that the contract must be put into writing and signed by all the prospective parties before it will be binding. In such a case no partnership agreement arises before compliance with the agreed formalities. Although there is no general requirement that the partnership agreement must be in writing, it is advisable for partners to put their agreement in writing to eliminate disputes about their partnership.

Like any contract, partnership agreements can be subjected to certain conditions and terms. The parties to the contract may, therefore, agree that the partnership will only be established when a certain condition has been fulfilled, for instance when they are awarded a certain tender. The parties to the contract can also subject their agreement to a term, for example, by establishing their partnership for a limited term such as one year. The partnership will then dissolve automatically when the specified term expires, unless the partners come to a different arrangement.

A partnership should be formed in the common interest of the parties in the sense that the intention should be that each partner will derive a profit from it. The object of making a profit should also be that each of the partners may expect to share therein. No partnership can exist without community of profit. Should the parties agree that one or more of them will not be entitled to a share of the profits, no partnership comes into existence. This requirement is met if a partner has only a hope or an expectation of sharing in the profit, for example, where the particular partner will share in the profits only when it exceeds a specific amount. If this threshold is, however, so high that the parties cannot reasonably and objectively be said to envisage that the amount would be met at all, this may amount to an exclusion of one of the partners to share in the profits of the partnership. If this is the case, no partnership would have come into being.

Each partner must contribute something, or undertake to contribute something to the partnership. This contribution may be capital, services, knowledge or skill. The contribution must be made unconditionally and it must be subjected to the risk of the partnership business. A person who makes a contribution to the partnership business on condition that it must be repaid to him irrespective of the success of the enterprise, is a creditor of the partnership, and not a partner. It is permissible for a partner to receive interest on a loan to the partnership.

The question of whether a specific asset belongs to the partnership or to a partner in his personal capacity often arises. It is, for instance, important when partners want to exercise their rights over partnership property or when creditors of the partnership or

of an individual partner want to attach property of the debtor. When answering this question the position between the partners must be distinguished from the position between the partners and third parties. Among the partners, the intention of the parties, and not the compliance with the applicable legal formalities of the law of things, is conclusive. In so far as the partners are concerned, an asset is a partnership asset when partners agree that it is a partnership asset. Among the partners, the asset is a partnership asset although the ownership in that asset has not been transferred to the partnership correctly in accordance with the rules of the law of things. Among themselves they will, therefore, enjoy the rights of joint co-owners in undivided shares in respect of that property (*Michalow* v *Premier Milling Co* (1960)). The bare fact that the partners regard the asset as a partnership asset among them is not sufficient to make it a partnership asset as far as third parties are concerned. For third parties, the asset is only a partnership asset if the partners carried out their intention correctly by complying with the applicable formalities of the law of things. If these formalities have not been complied with, an asset which the partners regard among themselves as partnership property will not be partnership property as far as third parties are concerned. Generally, such an asset will therefore not be subject to attachment by a partnership creditor.

5 In this question candidates are required to analyse the duty of care of company auditors.

A company auditor usually stands in a contractual relationship to the company which appoints him as such. In the performance of his duties to the company in terms of his contract, the auditor must act with reasonable care and skill. If the auditor acts without reasonable care and skill he is liable to the company for any damages suffered by the company. The company will usually be able to choose between suing its auditor for breach of contract or in delict, as the same conduct on the part of the auditor is usually actionable on either of these two grounds.

In an action for damages against the auditor for breach of contract, the company will have to prove the contractual relationship, the breach of contract complained of, and the loss it suffered as a result of the breach. In the case of breach of contract, damages are calculated on the basis that the injured party should be placed as near as possible in the same position as he would have been had the contract been properly executed. If, for example, the auditor neglected his duties and thus failed to detect the fraud of an employee of the company, the company should be placed in the position that it would have been in, had the auditor duly complied with his duties.

In *Thoroughbred Breeders' Association* v *Price Waterhouse* (2001) the audit contract was not reduced to writing but it was tacitly agreed that the audit would be conducted in accordance with the generally accepted auditing standards and with due professional care required of an auditor in public practice. The audit failed to discover the theft of a promissory note by one of the company's financial managers and that several substantial sums of cash had not been deposited for long periods of time. The company knew that the financial manager had a criminal record, but never disclosed this to the auditor. Damages were claimed from the auditor on the grounds that if he had performed his duties, the thefts perpetrated by the financial manager would have been uncovered and further thefts by him would have been prevented. The Supreme Court of Appeal found that the auditor was negligent and therefore had committed breach of contract. There was also factual causation between the breach of contract and the loss suffered by the plaintiff. The loss suffered by the plaintiff was also not too remote as it flowed naturally and generally from the breach. Furthermore, the court found that the fact that the plaintiff appointed a person with a criminal record such as the financial manager in a senior position may amount to carelessness, but that this carelessness was not the sole cause of the plaintiff's loss. The plaintiff's loss was caused by the auditor's negligence. As the plaintiff's claim was based on breach of contract, there was no room for an apportionment of loss between the parties. The auditor was thus held liable for the loss suffered by the plaintiff.

The company can also couch its action for damages against the auditor in delict. In such a case, all the elements of delictual liability must be proved before the auditor can incur any liability. The liability of company auditors is further regulated by the Auditing Profession Act 26 of 2005. Section 46(2) Act provides that in respect of any opinion expressed or report or statement made by a registered auditor in the ordinary course of duties, the registered auditor does not incur any liability to a client or any third party, unless it is proved that the opinion was expressed or the report or the statement was maliciously, fraudulently or pursuant to a negligent performance of the registered auditor's duties. Third parties may thus sue an auditor only if the opinion expressed or report was made pursuant to a negligent performance of the auditor's duties and the auditor knew, or could in the particular circumstances have been expected to know that the third party would rely on the report or the opinion expressed.

6 This question requires candidates to explain how a close corporation can be bound in a contract.

The common law requirements for a juristic person to be bound by a contract on its behalf are that (a) the juristic person must have the necessary capacity and powers to perform the particular act; and that (b) the juristic person's representative must have the necessary authority to bind the juristic person in respect of the particular contract.

The *ultra vires* doctrine and the doctrine of constructive notice do not apply to close corporations. A close corporation has the capacity and powers of a natural person of full capacity in so far as a juristic person is capable of having such capacity or exercising such powers (s.2(4) Close Corporation Act of 1984). For this reason the *ultra vires* doctrine of company law has no application in respect of close corporations. The statement of the principal business of the corporation in the founding statement does not affect the corporation's capacity and powers. There is also no constructive notice of any particulars stated in a founding statement (s.17).

For most practical purposes the legal capacity of a close corporation is unlimited and does not hinder its participation in business. Those having dealings with a close corporation do not run any risk of finding the validity of transactions being affected by internal limitations on the corporation's legal capacity. This does not, however, imply that a close corporation's capacity and powers are completely unlimited for all purposes. A close corporation is incapable of acts normally associated with the physical being of natural

persons such as contracting a marriage or making a will. There are also various restrictions on close corporations. A close corporation cannot, for example, act as trustee of a unit trust scheme or practice as an advocate.

The power of members to bind the corporation is set out in s.54 Act. This section provides that, as far as *bona fide* third parties dealing with the corporation are concerned, every member is an agent of the corporation. An act of a member binds the corporation to such third parties dealing with the corporation, whether or not the member performed the act for the carrying on of the business of the corporation. If a member's power to represent the corporation is restricted or excluded, the member will still bind the corporation in respect of an outsider, unless the outsider has, or ought reasonably to have, knowledge of the fact that the member has no power to act for the corporation in the particular matter (s.54(2) read with s.46).

A corporation may furthermore be bound to a contract falling outside its scope of business even if it was not actually or ostensibly authorised or ratified by the corporation. This will, however, only be the case if the outsider did not have, or ought reasonably to have had, knowledge of the member's lack of authority. It should be kept in mind that no person is deemed to be acquainted with the contents of the corporation's public documents, including its association agreement, merely because such documents are registered by the Registrar or lodged with the Registrar, or are kept at the registered office of the corporation. This exclusion of constructive notice provides even further protection to an outsider dealing with the corporation.

Since there is no constructive notice of the provisions of an association agreement, knowledge of internal restrictions on members' powers contained therein is not imputed to outsiders. They are entitled to assume that each member has the necessary authority to act on behalf of the corporation in a transaction, whether or not the particular transaction was entered into by the member for the carrying on of the business of the corporation.

A close corporation may authorise a person who is not a member to act as its agent. Based on the general principles of representation, the close corporation will be bound by an agreement entered into on its behalf by such a non-member if the non-member had the express or implied authority from the close corporation to enter into the agreement on the close corporation's behalf.

7 This question deals with employment law. Candidates must state how the courts decide whether someone is self-employed or is an employee.

In most cases it is clear to the parties and to outsiders whether or not a worker is an 'employee' for purposes of falling under the scope of labour legislation. There are situations, however, where it becomes more difficult to distinguish between an employee and an independent contractor, who may also be self-employed. This distinction is important because only employees are protected in terms of the Basic Conditions of Employment Act of 1997 and the Labour Relations Act of 1995. In order to claim unfair dismissal in terms of the Labour Relations Act, the dismissed person will first have to show that he or she was indeed an 'employee' and, as such, protected against unfair dismissal. If he or she cannot do so, they have no contractual remedies at their disposal.

A contract with an independent contractor could be characterised as a contract whereby one person hires another person to do a specific job or specific piece of work. The object of the contract with an independent contractor is the performance of the specified work or the production of a specified result. It is the product or the result of the labour which is the object of the contract, rather than the labour itself, as in the contract of employment. The element of control is very different in the independent contactor relationship.

Due to the difficulty in identifying the contract of employment in borderline cases, three tests have been used to try to distinguish between an employment contract and other contracts which involve the provision of work:

The **control test** was based on the element of control, which at one time was regarded as the most important aspect of the employment contract. According to this test, the presence of control points to the existence of an employment relationship. However, in an environment where many 'employees' are highly skilled and often act independently of the employer (doctors, captains of ships and pilots, for example) the courts have tended to concentrate on the employer's right to control rather than actual control.

The **organisation test** asks whether the worker is part and parcel of the organisation of the employer. This test has been considered too vague, and it has been dismissed by the courts.

The courts today use the so-called **multiple** or **dominant impression test**. This test looks at the employment relationship as a whole, rather than looking at a single factor, such as control or integration. Some of the important factors which courts have found relevant are: the employer's right to select who will do the work; the power to discipline and dismiss; the employee's obligation to work for a given time and for certain hours; whether remuneration is paid for time worked or for a particular result; whether remuneration is paid on a commission basis; whether the employer provides the employee with tools, equipment and office space; and whether the employer has the right to utilise the employee's labour potential as it sees fit. The court weighs up all these and other factors to decide whether or not the dominant impression is that the person in question is an employee.

8 This question requires candidates to analyse the problem scenario and to consider whether Ben is liable to pay for Andrew's lost crop.

From the facts it is clear that Ben is in breach of contract. One of the remedies which the law puts at the disposal of the innocent party, where he or she has suffered loss as a result of the breach of contract of the other party, is damages. Damages are the common law remedy for breach of contract and are available where a pecuniary loss has been sustained by the innocent party. In deciding what damages are to be paid, the courts use a number of rules and principles. These rules relate to the remoteness of damage and to the measure of damages.

A plaintiff is not automatically entitled to damages merely because a breach of contract occurred. He must prove that he actually sustained damages as well as the extent of his loss. A court will not award nominal damages and a plaintiff must have suffered damages in a calculable amount and prove his damages (*Scott* v *Poupard* (1971)). Damages can be claimed once only and in the form of a monetary amount. This means that the plaintiff must calculate and prove his damages carefully (including future damages) as he will not be able to claim repeatedly for additional damages on the same set of facts. Translating this principle into practical realities has proved to be an exceedingly difficult task.

The aim of the law of contract is to put the plaintiff, through the award of damages, in the position he would have been in if the contract had been carried out. However, it would be unfair if the party in breach of contract were held liable for every consequence of his action no matter how far down the chain of causation it appeared. In order to limit potential liabilities, the courts have established clear rules about consequential liability in such a way as to deny the award of damages for consequences that are deemed to be too remote from the original breach. The damages must be the direct result of the breach of contract. The debtor is not liable for damages incurred independently from the breach of contract and which were not caused by such breach (*Svorinic* v *Biggs* (1985)). Even if the damages were caused by the breach of contract, only such damages may be claimed, which were actually foreseen or should reasonably have been foreseen by the parties at the time that they made the contract. In *Standard Chartered Bank of Canada* v *Nedperm Bank Ltd* (1994), it was held that the reasonable foreseeability test does not require that the exact nature and extent of the loss or the precise manner of its occurrence should have been reasonably foreseeable. It suffices that the general nature of the harm and the general manner of its occurrence were reasonably foreseeable. To establish what the parties actually contemplated or may be supposed to have contemplated, one should consider the subject-matter and terms of the contract itself, or the special circumstances known to both parties at the time of conclusion of the contract.

Damages in contract are intended to be compensatory rather than punitive. The aim is to put the injured party in the hypothetical position he would have been in had the breach of contract not taken place. It is said that the party is entitled to his positive interest or interest in the performance of the contract. The position in which the prejudiced party finds himself now (after breach of contract) must be compared with the position he would have been in had the breach not taken place (the position he would have been in had the contract been fulfilled properly). No comparison must be made with the position he had been in before the conclusion of the contract (*Lillicrap, Wassenaar and Partners* v *Pilkington Brothers* (1985)). The recoverability of the damages is also restricted by the fact that the creditor cannot recover damages that the creditor could have prevented through reasonable care. It is usually said that a plaintiff must mitigate its damages. If the debtor can prove that the creditor failed to take such steps that a reasonable person would have taken to ensure that further damages are prevented, the creditor will not be able to claim these damages from the debtor (*De Pinto* v *Rensea Investments* (1977)).

It would appear that Andrew will be entitled to recover the amount of the loss from Ben. It should, however, be borne in mind that Ben could prove that Andrew did not take sufficient steps to mitigate his loss, for example, by renting a tractor to harvest the crops on his fields. Had Andrew done that, Ben would be liable for the rent of the tractor. If, however, there was no tractor to rent at the time, Andrew could not have mitigated his loss.

9 This problem deals with the question of whether a shareholder can be held liable for the debts of a company.

When a company registers under the Companies Act of 1973 it becomes a corporate entity with the effect that from then on it is treated as having its own distinct legal personality, completely separate from its members. The doctrine of separate personality is an ancient one, although the clearest expression of it can be found in the famous case of *Salomon* v *Salomon* (1897). A number of important consequences flow from the fact that companies are treated as having a legal personality in their own right, but there are also a number of situations where the courts will ignore the separate legal personality of the company. In such situations the courts will hold the shareholders liable for the debts of the company.

One consequence of the doctrine of separate personality is that companies have full contractual capacity in their own right. Equally, they can sue and be sued in their own right, so once a contract is entered into by a company, it is the company, rather than its individual members, that is liable for any default. As member of a limited company, Dennis's personal liability is limited to the amount of his shares in the company. Cindy will have to claim as an ordinary unsecured creditor of the company, and the fact that the company has gone into liquidation makes it unlikely that she will recover much, if anything, from the company.

The fact that Cindy suspects that Dennis knew that his company would not have the money to pay for the carvings may have some significance. It is true that the corporate structure can be abused. The courts have recognised this in the past. In *Lategan* v *Boyes* (1980) it was suggested that the courts 'would brush aside the veil of corporate identity time and again where fraudulent use is made of the fiction of legal personality'. In the case of *Orkin Bros Ltd* v *Bell* (1921) the directors of a company were held personally liable to a seller, who sold goods to a company at the insistence of its directors when they knew the company to be in insolvent circumstances and totally unable to pay for the purchase. It appeared that the sole purpose of the transaction was to diminish the personal liability of the directors under a contract of suretyship. This was held to constitute a fraud on the seller and he obtained

judgement against the directors personally. It has, however, been pointed out that the true basis of the court's decision was actually that when directors order goods, there is an implied representation by them that they believe that the company will probably be able to pay for them, so that if they actually know that there is no such likelihood, they commit fraud. In *Cape Pacific Ltd* v *Lubner Controlling Investment (Pty) Ltd* (1995) the Supreme Court of Appeal confirmed that where fraud, dishonesty or other improper conduct is found to be present, the need to preserve the separate corporate identity must be balanced against policy considerations that arise in favour of piercing the corporate veil. The court also pointed out that if a company, otherwise legitimately established and operated, is misused in a particular instance to perpetrate a fraud, or for a dishonest or improper purpose, there is no reason in principle or logic why its separate personality cannot be disregarded in order to fix the individual or individuals responsible with personal liability. As in most areas of law that are based on the application of policy decisions, it is difficult to predict when the courts will ignore separate personality. What is certain is that the courts will not permit the corporate form to be used for a clearly fraudulent purpose, or to evade a legal duty.

In *Hülse-Reutter* v *Gödde* (2001) the Supreme Court of Appeal reiterated that there 'can be no doubt that the separate legal personality of a company is to be recognised and upheld except in the most unusual circumstances. A court has no general discretion simply to disregard the existence of a separate corporate identity whenever it considers it just or convenient to do so. The circumstances in which a court will disregard the distinction between a corporate entity and those who control it are far from settled. Much will depend on a close analysis of the facts of each case, considerations of policy and judicial judgement. Nonetheless what is … clear is that as a matter of principle in a case such as the present there must be at least some misuse or abuse of the distinction between the corporate entity and those who control it which results in an unfair advantage being afforded to the latter.'

The conclusion is that even though Cindy suspects that Dennis knew that his company does not have the money to pay for the order, it is unlikely that a court will hold him personally liable for the debt.

10 This question seeks to test the candidates' understanding of directors' fiduciary duties, and in particular, the duty not to make a profit at the expense of his company.

The general principle of the South African law as stated by Innes CJ in *Robinson* v *Randfontein Estates Gold Mining Co* (1921) is that where one man stands to another in a position of confidence involving a duty of trust, he is not allowed to place himself in a position where his interests conflict with his duty. In this case, Robinson, the chairman of the board, purchased a farm in his own name after his company, which was anxious to acquire the farm, could not reach finality with the sellers. He purchased the farm through an agent and thereafter sold it to the company at a substantial profit. The then Appellate Division held that Robinson was not justified in making a profit from his office nor placing himself in a position where his personal interests conflicted with the duties arising out of his fiduciary position. He was consequently ordered to repay to the company the profit which he had made.

A director may not for personal gain make use of information which he acquired in his capacity as director. The strict limitation on deriving benefit from the office of director serves to diminish possible conflicts of interest between a director and his company. While such additional advantages are frequently referred to as 'secret profits', the rule applies equally even if the advantage was openly, in good faith and in no way made at the expense of the company. The decisive factor is whether the advantage arose from the director's occupation of office; whether or not the company has been deprived of any advantage is immaterial (*Regal (Hastings) Ltd* v *Gulliver* (1942)). On the same principle, a director may not, for personal gain, make use of information which he acquired in his capacity as a director. In *Industrial Development Consultants Ltd* v *Cooley* (1972) the managing director of a company negotiated with a third party with a view to concluding a contract on behalf of the company. The third party was dissatisfied with the organisation of the company, but was prepared to conclude the contract with the managing director in his personal capacity. The managing director consequently resigned his office without disclosing the true state of affairs, and thereafter concluded the contract with the third party in his personal capacity. The court decided that the managing director was liable to the company for all the profit he had made as a result of having allowed his interests and his duty to conflict. A director may, thus, be in breach of the fiduciary duty owed by him to his company despite the termination of his office. In *Island Export Finance Ltd* v *Umunna* (1986) it was held that a director's fiduciary duty did not cease upon resignation.

The directors are liable to account once it is established: (a) that what the directors did is so related to the affairs of the company that it can properly be said to have been done in the course of their management and in utilisation of their opportunities and special knowledge as directors, and (b) that what they did resulted in a profit to themselves. A director is disqualified from usurping for himself, or diverting to another person or company with whom or with which he is associated, a maturing business opportunity which his company is pursuing. He is also precluded from so acting even after his resignation where the resignation may fairly be said to have been prompted or influenced by a wish to acquire for himself the opportunity sought by the company, or where it was his position with the company, rather than a fresh initiative, that led him to the opportunity which he later acquired: See *Sibex Construction (SA) (Pty) Ltd* v *Injectaseal CC* (1988).

Applying these legal principles to the problem scenario, Edwin obtained the information about the availability of a certain building at a reasonable price and its ideal location for a thriving restaurant business while he was a managing director of the company. His resignation seems to be prompted or influenced by a wish to acquire for himself the opportunity to purchase the building for running a restaurant. It is his position with the company, rather than a fresh initiative, that has led him to it.

It is not relevant that his former company could not have acquired the building and run a restaurant. As far as law is concerned, Edwin put himself in a position where his fiduciary duty to the company and his interests conflicted. If the company does not have the financial resources to ask Edwin to sell the building back to the company, it can ask Edwin to account to the company for all the profits that Edwin has made from the restaurant business.

1 This question asks candidates to explain customary law as a source of law.

6–10 A thorough answer will explain the requirements that have to be met to prove the existence of a custom or trade usage. For full marks, reference should be made to all the relevant principles of law.

0–5 A less complete answer, perhaps lacking in detail or unbalanced in that it does not deal with some of the aspects of the question.

2 In this question candidates are expected to explain what an offer is in the law of contract and to distinguish an offer from an invitation to do business.

8–10 Full and accurate account of what an offer is and how it differs from a mere invitation to do business. Clear statement of the governing principles of relevant law with perhaps some examples and reference to case law.

5–7 Reasonable treatment or a less comprehensive treatment of the subject matter of the question.

0–4 Very weak answer, focusing only on some of the requirements, or one that shows little understanding of the question.

3 This question deals with agency. It requires candidates to explain the role of the agent and to provide examples of agency relationships.

8–10 Thorough to complete answers, showing detailed understanding of all, or certainly most, of the principles involved. Good answers will provide examples of the relationship.

5–7 A clear understanding of the topic, perhaps lacking in detail. Alternatively an unbalanced answer showing good understanding of one part but less in the others.

2–4 Some knowledge, although not clearly expressed, or very limited in its knowledge and understanding of the agency relationship.

0–1 Little or no knowledge of the topic.

4 This question deals with partnership law. Candidates must explain how partnerships are established.

8–10 A thorough explanation of the issues involved. It is likely that the best answers will deal with the formalities of establishing a partnership contract as well as the issues relating to the contributions to the partnership fund.

5–7 A clear understanding of the topic but lacking in detail.

2–4 Some, but limited, understanding of the issue.

0–1 Little or no understanding of the topic.

5 This question requires candidates to analyse the duty of care of company auditors.

6–10 A good explanation of contractual as well as delictual duty of care of auditors. It is expected that candidates provide a sound explanation of the type of relationship the auditor may have with the client company.

3–5 Some awareness of the area but lacking in detailed knowledge.

0–2 Little or no knowledge of the topic.

6 This question requires candidates to explain how close corporations are bound in a contract.

8–10 Thorough treatment of all the aspects of the question.

5–7 Thorough treatment of the majority of the aspects.

2–4 Some but limited knowledge of the topic. Perhaps uncertain as to meaning or lacking in detailed explanation or authority.

0–1 Little or no knowledge of the topic.

7 This question deals with employment law and candidates must state how the courts decide whether someone is an employee or is self-employed.

8–10 A complete answer, demonstrating an understanding of the distinction between an employee and an independent contractor with reference to the various tests to determine this.

5–7 An accurate recognition of the issues relating to the distinction, but perhaps lacking in detail.

2–4 An ability to recognise some, although not all, of the issues, or perhaps recognition of the area of law but no attempt to apply the law.

0–1 Very weak answer showing no, or little, understanding of the question.

8 This question requires candidates to analyse a problem scenario that raises issues relating to the recovery of damages in the law of contract.

8–10 Clear analysis of the problem scenario – recognition of the issues raised and a convincing application of the legal principles to the facts.

5–7 Sound analysis of the problem – recognition of the major principles involved and a fair attempt at applying them. Perhaps sound in knowledge but lacking in analysis and application.

2–4 Unbalanced answer perhaps showing some appropriate knowledge but weak in analysis or application.

0–1 Very weak answer showing little analysis, appropriate knowledge or application.

9 This question deals with the corporate personality of a company and the possibility of piercing the corporate veil.

8–10 An analysis of the scenario focusing on the appropriate rules of law and applying them accurately.

5–7 A clear understanding of the general law but perhaps lacking in detail or unbalanced in only dealing with some issues.

2–4 Some, but limited, understanding of the law or completely lacking in application.

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

10 This question seeks to test the candidates' understanding of directors' fiduciary duties, and in particular, the duty not to make a profit at the expense of his or her company.

8–10 Full and accurate identification of the issues. Excellent statement of the relevant principles. Sound resolution of the issues by applying the relevant legal principles.

5–7 Identification of some issues in the problem and a fair attempt to apply legal principles to these issues. Supportable conclusions.

0–4 Very weak answer with little understanding of the issues. No reference to relevant authorities.