



# **CORPORATE LAW**

## **PROFESSIONAL LEVEL EXAMINATION**

### **SAMPLE PAPER 2021**

#### **NOTES:**

Questions 1 & 2 are compulsory

Choose 2 questions from questions 3 to 6.

#### **TIME ALLOWED:**

3 hours, plus 10 minutes to read the paper.

#### **INSTRUCTIONS:**

This is a closed-book examination.

Marks for each question are shown. The pass mark required is 50% in total over the whole paper.

You are reminded that candidates are expected to pay particular attention to their communication skills and care must be taken regarding the format and literacy of the solutions. The marking system will take into account the content of your answers and the extent to which answers are supported with relevant legislation, case law or examples, where appropriate.

# CORPORATE LAW

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### Question 1 (Compulsory Question)

Maxwell is a qualified accountant and operates a business called *Taxation Solutions*, which prepares tax returns for revenue purposes for self-employed persons and small businesses. Each client is required to sign a contract with *Taxation Solutions*, which includes an exclusion clause, which states as follows:

*Taxation Solutions shall not be liable for any errors or omissions in their completed tax returns however caused, and any term, condition or warranty imposing liability, whether statutory, common law or otherwise, is hereby specifically excluded.*

Two years ago, *Taxation Solutions* prepared a revenue return for Hannon, a farmer, but since filing this return Hannon has been the subject of a revenue audit, and has been informed that the grant income he obtained for the Department of Agriculture, Food and the Marine for setting aside some of his land for the planting of trees should have been declared as part of his annual income, and that consequently he now has an outstanding tax liability, which includes penalties and interest, of €82,000. Hannon is appalled by this as he had advised Maxwell of his grant income when he submitted his accounts to *Taxation Solutions*, but Maxwell had assured him that this grant income was tax exempt. Hannon has now informed Maxwell that he intends to sue *Taxation Solutions* for €82,000 damages arising from their errors in the preparation of his tax returns, but Maxwell explained that he cannot sue, by highlighting the exclusion clause in the contract. However, Hannon has subsequently written to Maxwell notifying him that he intends to challenge the validity of this exclusion clause.

Maxwell, on behalf of *Taxation Solutions*, has now contacted you seeking advice.

#### Required:

A. In the context of contract law:

(1) Define an exclusion clause.

**(2 marks)**

(2) Outline any THREE rules of incorporation of an exclusion clause **(3 x 2 marks)**.

**(6 marks)**

(3) On the assumption that this exclusion clause is validly incorporated into Hannon's contract with *Taxation Solutions*, advise Hannon as to how the Courts are likely to interpret this clause, and whether *Taxation Solutions* will be able to rely on it to escape liability in this situation.

**(2 marks)**

B. Hannon's solicitor has advised him that he can sue *Taxation Solutions* in either contract law, or under the law of tort for negligence. The solicitor explained to Hannon that to sue in negligence he would have to prove that the actions of *Taxation Solutions* were in breach of the requisite standard of care. Hannon is unsure as to what this means, and he has contacted you seeking clarification.

(1) Explain the meaning of the term standard of care, and review the main test applied by the Court in assessing whether the standard has been breached, commenting on the FOUR main factors that are taken into consideration in applying this test.

**(8 marks)**

(2) Outline the main factor taken into consideration in assessing breach of the standard of care in cases of professional negligence.

**(2 marks)**

C. Hannon has been told that he should lodge proceedings in the High Court against *Taxation Solutions*, but he is unaware of the jurisdiction of this Court. Advise Hannon as to the jurisdiction of the High Court, citing FIVE specific examples.

**(10 marks)**

**(Total 30 marks)**

## Question 2 (Compulsory Question)

Baxter is a qualified accountant, who has worked in private practice for the past fifteen years. Last week he was contacted by his sister Flora, who told him that she had decided to quit her job and establish her own engineering company. She then asked him if he was willing to act as a non-executive director and statutory auditor of that company and invest in that company by purchasing shares. As an inducement Flora offered Baxter the right to purchase either ordinary shares or preference shares at a 40% discount on their nominal value. Baxter was delighted to be asked to act as a director and auditor and is interested in purchasing shares, but he has not studied company law since he was an accounting student and is unsure as to whether he is competent to accept this position, as he is not *au fait* with the rules regarding directors and share capital. He has contacted you seeking advice.

### Required:

- A. List any FOUR persons or entities who are ineligible to accept the position of company director and advise Baxter as to whether he is eligible to act as a company director and statutory auditor of his sister's engineering company.  
(5 marks)
- B. Explain the distinction between an executive director and a non-executive director.  
(5 marks)
- C. Outline the procedure for the removal of a company director, as well as the rights of a director in the context of any proposed removal.  
(6 marks)
- D. Explain the distinction between ordinary shares and preference shares under any FOUR headings.  
(8 marks)
- E. Discuss the meaning of the term nominal value and examine the rules regarding issuing shares at a discount. Based on this examination advise Baxter as to whether he should purchase discounted shares in his sister's engineering company.  
(6 marks)

**(Total 30 marks)**

### Question 3 (Optional Question)

Parker is the Chief Executive Officer (CEO) of the *Balmoral Hotels Ltd*, a nationwide chain of luxury boutique hotels. Since the closure of hotels in 2020, arising from the national lockdown as a consequence of the Covid-19 pandemic, Parker has been eager to boost the hotel's business since its re-opening, despite the lack of international tourists visiting Ireland. Consequently, *Balmoral Hotels Ltd* ran a promotion in conjunction with a national television morning show offering a prize of a week's stay with breakfast and evening meals for two persons. The competition was very successful and received over 500,000 applicants. Since this competition *Balmoral Hotels Ltd* has used the personal information received from the competition's applicants to send them out promotional information about the hotels. *Balmoral Hotels Ltd* has also shared this information with its sister company in Northern Ireland, *Hampton Hotels Ltd*, who have added these applicants to their direct marketing lists. In recent months *Balmoral Hotels Ltd* has received numerous complaints from competition applicants asking for their personal data to be removed from their mailing lists and threatening raising a complaint to the Data Protection Commission for breach of data protection laws. To date Parker has simply ignored any complaints received.

Last month Hamilton, a qualified accountant, was conducting a statutory audit of *Balmoral Hotels Ltd* when he discovered the complaint letters that Maxwell had received from the competition applicants. Hamilton subsequently met with Maxwell and demanded that he address these complaints. When Maxwell refused, Hamilton informed him that he would be reporting these breaches as part of his duties as the company's statutory auditor. Maxwell believes that such reporting does not fall within the remit of a statutory auditor and has contacted you seeking advice.

#### Required:

A. In the context of the Data Protection Acts 1988-2018 and the General Data Protection Regulation:

- (1) Explain the meaning of the term *personal data*. (2 marks)
- (2) List any FIVE rules/principles of data processing. (5 marks)
- (3) Discuss any THREE breaches committed by *Balmoral Hotels Ltd* in this situation. (3 marks)

B. In relation to the statutory auditor:

- (1) Explain the role of the statutory auditor. (2 marks)
- (2) Outline any THREE duties of the statutory auditor. (6 marks)
- (3) Advise Maxwell as to whether reporting *Balmoral Hotels Ltd* data protection breaches falls within Hamilton's remit as the company's auditor. (2 marks)

**(Total 20 marks)**

#### Question 4 (Optional Question)

Briony is the managing partner in the accounting firm of *Lowe and Paige*. Under the terms of the partnership agreement any appointment of staff, receiving an income in excess of €50,000 per annum requires the approval of all of the partners of the firm. Despite this provision, last month Briony appointed Alex as the office manager, on an annual salary of €60,000 plus a performance bonus. When the other six partners in the firm became aware of this fact, they sought to terminate Alex's appointment, on the grounds that Briony did not have the authority to create this contract. Alex is distressed by this situation, as he has already provided his current employer with notice to terminate his position.

Following this incident Briony was called to a partnership meeting and informed that the firm considered her actions in breach of her duties as a partner and that consequently, they were considering her expulsion from the firm. Following this meeting Briony agreed to voluntarily resign from the partnership, rather than face a potential expulsion.

*Lowe and Paige* have now contacted you for advice in relation to these issues.

#### Required:

A. In the context of the law of agency:

- (1) Define an agent and list the parties in an agreement relationship. **(3.5 marks)**
- (2) Outline any THREE methods by which a contract of agency may be created. **(4.5 marks)**
- (3) Advise Alex as to whether his contract with *Lowe and Paige* is legally enforceable by examining whether or not Briony had the authority to create this contract. **(2 marks)**

B. In the context of partnership law:

- (1) List the main duties owed by a partner in a partnership and determine whether the actions of Briony were in breach of those duties. **(6 marks)**
  - (2) State the type of approval required to effect the expulsion of a partner from a partnership. **(1 mark)**
  - (3) Advise *Lowe and Paige* of the liability of Briony, as a retiring partner, for the debts of the firm. **(3 marks)**
- (Total 20 marks)**

### Question 5 (Optional Question)

*Foxford Catering Ltd* had defaulted on payments due on foot of a secured loan in recent months, and as a consequence the debenture holder, *Longford Prudential Bank DAC*, appointed Kennedy, as their Receiver to protect their interests. As the security for the loan is a floating charge over the entire undertaking of the business, Kennedy sought a purchaser to buy out the business in order to raise enough cash to repay the debenture loan. After months of negotiation by Kennedy, *Mainline Foods PLC* agreed to purchase the entire undertaking of *Foxford Catering Ltd* on favourable terms. However, *Mainline Foods PLC* included a stipulation in the negotiations that *Foxford Catering Ltd* reduce its workforce of 150 people by 10, as they believed that the business was overstaffed. Kennedy reluctantly agreed to do this, although she has been met by opposition from *Foxford Catering Ltd's* board of directors, who believe that she could have obtained a better price for the company if she waited six months, as *Foxford Catering Ltd* was tendering for a valuable contract, and they were down to the last two bidders. If *Foxford Catering Ltd* is awarded this contract, then the company's value will increase significantly, and they will not need to terminate the employment of any staff. As a consequence of this opposition, both the staff and directors of *Foxford Catering Ltd* have contacted you seeking advice.

#### Required:

A. In the context of the law of receivership:

(1) Outline the role of a Receiver.

**(1.5 marks)**

(2) Explain any THREE characteristics of a floating charge.

**(3 marks)**

(3) Discuss any THREE duties owed by a Receiver to a company, and determine whether the actions of Kennedy in selling the entire undertaking of the company now, and not awaiting the results of the tender process are in breach of her duties as a Receiver.

**(5.5 marks)**

B. In the context of employment law:

(1) Define the meaning of the term redundancy.

**(2 marks)**

(2) List any SIX grounds that amount to unfair selection for the purpose of redundancy.

**(3 marks)**

(3) Examine the way in which redundancy payments are calculated.

**(3 marks)**

(4) If an employee felt that they were unfairly selected for redundancy, state the adjudication forum in which they should lodge their claim, as well as the time-period within which such a claim should be lodged.

**(2 marks)**

**(Total 20 marks)**

### Question 6 (Optional Question)

*Darlington Technologies PLC* is an Irish company that manufactures computer products. Tennyson is a director of this company and is also employed as its Purchasing Manager. The Articles of Association of *Darlington Technologies PLC* specifically state that Tennyson's appointment as the Purchasing Manager is for a period of ten years. Unfortunately, six months ago Tennyson ordered a large consignment of microchips from a supplier in the Philippines, costing €1.2m, but following the installation of these microchips into Tablets manufactured by *Darlington Technologies PLC* the devices started to overheat and consequently put themselves into automatic shut-down. In addition, these devices, which stated that they had 12-hours of battery life, would only operate for three hours without recharging. Upon inspection *Darlington Technologies PLC* discovered that the microchips were draining the battery life of these devices. As these issues were only discovered when the Tablets were launched onto the market, the company has since received an abundance of consumer complaints alleging that the devices are in breach of the provisions of the Sale of Goods legislation. Arising from these complaints *Darlington Technologies PLC* has decided to alter their Articles of Association in order to remove Tennyson as the company's Purchasing Manager three years into his ten-year tenure.

They have now contacted you seeking advice in relation to these matters.

#### Required:

A. In the context of the Sale of Goods Act 1893:

- (1) Discuss the implied obligations regarding sales by description and assess whether the Tablets manufactured by *Darlington Technologies PLC* are in compliance with these obligations. **(2 marks)**
- (2) Examine the concept of merchantable quality and assess whether the Tablets manufactured by *Darlington Technologies PLC* would be deemed to be of merchantable quality. **(6 marks)**
- (3) Outline the main remedies that are available for breach of this legislation. **(2 marks)**

B. In the context of company meetings:

- (1) State the type of resolution required to effect an alteration of the Articles of Association, and the requisite notice period to convene a meeting to vote on this resolution. **(2 marks)**
  - (2) Outline the TWO main methods by which voting may take place at a company meeting, commenting on the advantages and disadvantages of each method. **(5 marks)**
  - (3) Discuss the rules regarding quorums and company meetings. **(3 marks)**
- (Total 20 marks)**



## SUGGESTED SOLUTIONS

THE INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS IN IRELAND

# CORPORATE LAW

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### Question 1 Suggested Solution:

- **A. (1) Definition of an Exclusion Clause:** this is a clause in a contract that attempts to exclude or limit liability in the event of non-performance of the contract or a breach of contract **(0-2 marks)**
- **A. (2) Incorporation of an Exclusion Clause:** this may arise in the following ways: ((1) this may arise by signature: where the injured party has signed the contract containing an exemption clause – if the injured party signs without reading the contract, the clause will still be considered validly incorporated into the contract – as per L’estrage v Graucob (1934) - it may also arise in an unsigned written contract, provided the notice is prominently displayed and the clause is not hidden amongst a mass of other printed material, (2) by reasonable notice: a party to a contract that contains an exemption clause must be given reasonable notice of the clause either before or at the time of entering the contract, not after – when determining whether reasonable notice was given the courts will have regard to all the circumstances and take into account factors, such as when the notice was given, what form the notice was given in and how serious the effect of the limitation or exemption has on the injured party – as outlined in Chapelton v Barry Urban District Council (1940), and Thornton v Shoe Lane Parking Ltd (1971) or (3) by a course of dealing: even if insufficient notice of the exemption clause has been given, the courts may still determine that the clause is validly incorporated if the parties have had previous dealings on a regular/consistent basis with each other – as arose in Spurling Ltd v Bradshaw (1956), and Rambler Motors (1972) **(any 3 x 2 marks = 0-6 marks)**
- **A. (3) Validity of the Clause:** it is unlikely that this clause will be deemed valid as it is trying to exclude liability in relation to the negligence of *Taxation Solutions* in every situation and this is prohibited under the exclusionary rule (wherein liability as a consequence of negligence is generally not permitted) and the EC (Unfair Terms in Consumer Contracts Regulations) 1995-2013, which would classify this term as an unfair term – therefore *Taxation Solutions* cannot use this clause to escape liability in this situation and must compensate Hannon for his losses arising from their negligence **(any 1 = 0-2 marks)**
- **B. (1) Standard of Care:** the issue of whether or not the standard of required care is breached is ascertained based upon the reasonable man test – in effect this test asks whether a hypothetical person of reasonable prudence, common sense and common knowledge have committed the act complained of **(0-2 marks)** – in determining whether a reasonable man would act in a certain manner the Court review the following factors: (1) the probability of the accident – the higher the probably of an accident – the higher the standard of care required – in Healy v Bray UDC (1962/3) and in Bolton v Stone (1951) the minuscule probability of an accident relieved both defendants of liability, (2) the gravity of the threatened injury – the higher the gravity, the higher the standard imposed – in Paris v Stepney Borough Council (1951) because the gravity of the injury was high

the failure of the defendant to take reasonable measures to reduce a risk breached the standard of care, (3) the social utility of the defendant's actions – the motivation behind the defendant's conduct may be a factor in determining negligence, as arose in Watt v Hertfordshire County Council (1954), and (4) the cost of eliminating the risk – where the risk is low and the cost is high, failing to eliminate a risk completely may not amount to negligence – however where the risk or gravity is high, cost is not a factor – in Donaldson v Irish Motor Racing Club (1959) the Court held that the organisers of a motor race were not liable when one of the cars veered off the road and ploughed into the spectators as the practicality of eliminating the risk would have diminished its enjoyment (**4 x 1.5 = 0-6 marks**)

- **B. (2) Standard of Care and Professional Negligence:** the test applied is the skilled person test (often referred to as the Bolam test), which requires a professional to follow a general or approved practice and to act to the standard of a reasonable person who holds that professional qualification or expertise (**0-2 marks**)
- **C. Jurisdiction of the High Court:** (1) this court can award unlimited damages in contract and civil wrong cases (such as tort), (2) it also deals with succession, (3) trusts, (4) wardship/wards of court, (5) company law, (6) defamation cases, (7) bankruptcy, (8) constitutional cases, (9) judicial separation and divorce matters (where matters are complex and the valuation of marital assets are difficult to ascertain) – and (10) the High Court also has supervisory jurisdiction over inferior courts, administrative bodies and persons with quasi-judicial functions by way of judicial review (**any 5 x 2 = 0-10 marks**)

### Question 2 Suggested Solution:

- **A. Director Ineligibility:** the following persons/entities are prohibited from acting as a company director: (1) a person under the age of 18 years, (2) a disqualified person, (3) a restricted person (except where the company is highly capitalised and follows specific capital maintenance rules), (4) a corporate entity, and (5) the company's auditor (**any 4 = 0-4 marks**) – therefore, if Baxter accepts the position as company director he cannot also act as the company's statutory auditor – as he only one occupy one of these position at any point in time (**0-1 mark**)
- **B. Types of Directors:** (1) Executive Directors – these are directors who are involved in the operational management of the business, in that they provide continuous attention to the affairs of the business – they are often an employee of the company, for example, Managing Director – and they usually hold important positions within the day to day running of the business (**0-2 marks**) – (2) Non-Executive Directors – these are directors appointed to manage the business on a transient basis and they are more involved in strategic management at board level, and not involved in the operational running of the company – they are appointed due to their expert knowledge, experience, attainment or skills – their role is to act as monitors of the executive directors (by ensuring that they are acting within their powers and the companies objectives (DACs and PLCs)) and to provide the board of directors with additional expertise and an objective view point (**0-3 marks**)
- **C. Removal of a Company Director:** (1) a director can be removed from office by the passing of an ordinary resolution at a general meeting, (2) extended notice of 28 days or more must be served by the company on the shareholders indicating the intention to remove the director, and (3) a vote is then taken and if passed by a majority of those present the CRO must be notified (**3 = 0-3 marks**) – the rights of a director in relation to their proposed removal are as follows: (1) a copy of

the resolution proposing to remove the director must be given to the director concerned, (2) the director has a right to make written representations and have them circulated by the company to all the members before the general meeting, (3) if the representations are not sent they must be read out at the general meeting, and (4) the director has the right to speak at the meeting (**any 3 = 0-3 marks**)

- **D. Distinction Between Ordinary and Preference Shares:** (1) Ordinary shareholders are the main risk takers in the company as they bear the burden of the company's fortunes as they are the last to be paid upon the liquidation of the business, whereas preference shareholders are less risky than ordinary shares in that they are generally paid in priority to ordinary shares, (2) ordinary shareholders are generally only paid dividends following payment to the preference shareholders, (3) ordinary shareholders are paid a variable dividend, which varies in accordance with the profit/performance of the company – this right is not cumulative, whereas preference shareholders are issued with a fixed percentage return on investment – this right is normally cumulative, so if no profit is declared in any particular year, the right to a dividend may accumulate to the next profit period (and up to a maximum period of six years), and (4) ordinary shares are generally voting shares and these shareholders can influence company policy by exercising voting rights at general meetings (AGM/EGM) relating to company business, whereas preference shares generally have no ability to influence company policy as they have no voting rights (**4 x 2 = 0-8 marks**)
- **E. Nominal Value:** the nominal value of a share is the base value of the share set upon the incorporation of the company and stated in the company's Constitution – it is the minimum value for which the share can be sold (**0-1.5 marks**)
- **Shares at a Discount:** (1) there is a general prohibition in company law in relation to issuing shares at a discount on nominal value and this act affects the integrity of the capital account – (2) although there is no restriction on issuing shares discounted per their market value – (3) where a company breaches this rule it will be liable to repay the difference between the discounted price and the nominal value, plus interest (**3 = 0-3 marks**) – Baxter should not purchase these discounted shares as he would be liable to repay the discount where he is aware of it (which he is) – in addition, breach is also classified as a Category 3 offence (**0-1.5 marks**)

### Question 3 Suggested Solution:

- **A. (1) Personal Data:** this can be defined as any data information relating to an identified or identifiable living individual, held either electronically or manually and includes any information that can be used either directly or indirectly to identify a living natural person (**0-2 marks**)
- **A. (2) Rules on Data Processing:** these can be summarised as follows: (1) data must be obtained and processed lawfully, fairly and transparently, (2) data should only be kept for one or more specified, lawful and explicit purposes and not further processed in a manner that is incompatible with those purposes, (3) a data controller is required to ensure that the processing of data is adequate, relevant, and not excessive, (5) data must be kept safe and secure, (6) data should be retained for no longer than is necessary for the purpose or purposes for which it was obtained, and (7) the data controller must be able to demonstrate, their compliance with all of the principles of data protection (**any 5 = 0-5 marks**)
- **A. (3) Conclusion:** *Balmoral Hotels Ltd* are in breach as: (1) the competition applicants data was disclosed for a purposes incompatible for which it was obtained and should not have been disclosed to a third party without their consent, (2) their data was processed for a purpose

incompatible for which it was obtained, (3) the data was retained for an excessive time period (and should have been deleted once the competition was closed) **(3 = 0-3 marks)**

- **B. (1) Role of the Statutory Auditor:** the role of the statutory auditor is to examine the company's accounts in order to ascertain whether they truly and fairly represent the financial position of the company **(0-2 marks)**
- **B. (2) Duties of a Statutory Auditor:** these can be summarised as follows: (1) to investigate the financial affairs of the company – this requires the auditor to be alert to any wrongdoings by company officers – according to Re Kingston Cotton Mill Company (No.2) (1896) they should act as a watchdog but not a bloodhound, (2) to report to members (Section 336 and 391 CA 2014) – this requires the auditor to report to the members on all of the accounting records laid before the company in a general meeting and present a report to the members of the company, (3) to report where a company fails to keep proper books of account, (4) to report any suspicion that company officers have committed an indictable offence, (5) auditors are required to act with professional integrity and act within the ethical and legal standards of the profession, (6) the auditor must comply with the obligations of the Finance Act (Section 172 Finance Act 1995) – this requires the auditor to report suspicions of taxation breaches to the Revenue Commissioners and to the company – and request rectification by the company, and (7) the auditor is also obliged to act with due care and skill in the performance of his duties – this requires that the auditor does not perform his duties in a negligent manner, as per Kelly v Haughey Boland and Co (1989) **(any 3 x 2 = 0-6 marks)**
- **B. (3) Reporting Obligations:** as certain breaches of the data protection legislation, as well as certain data protection offences, may be prosecuted on indictment, Hamilton would be acting within his remit in reporting the breaches by *Balmoral Hotels Ltd* to the Office of the Director of Corporate Enforcement **(0-2 marks)**

#### Question 4 Suggested Solution:

- **A. (1) Agents:** an agent is a person/entity given the authority to create a contract on behalf of another person/entity or to bring the parties into contractual relations **(0-2 marks)** – the three parties to an agency contract are (1) the principal, (2) the agent, and (3) the third party **(0-1.5 marks)**
- **A. (2) Creation of a Contract of Agency:** these may be created as follows: (1) by actual authority – this can be express consent (written, oral, formal or informal – mutual consent) – or implied consent based on usual authority/customary authority, (2) by operation of law/agency of necessity – this arises in the event of extraordinary circumstances – such as situations of emergency relating to the transportation of goods or where one person has possession of another's goods, and they act in the interests of an uncontactable principal in an emergency situation to protect their interests, (3) by ratification – this arises where the agent acts beyond lawful authority and his actions are ratified/legitimised by principal, and (4) by estoppel/ostensible authority – this is where the actions/representations of the principal allows a third party to believe that the person is his agent – or where the actions of the principal have postulated this fact **(any 3 x 1.5 = 0-4.5 marks)**
- **A. (3) Conclusion:** the employment between Alex and *Lowe and Paige* is legally enforceable – as although Briony did not have actual authority to create this contract, either express or implied (as

a consequence of the provision in the partnership agreement), she nonetheless had ostensible authority (as per Freeman & Lockyer v Buckhurst Park Properties (Mangal) Limited (1964)), as Alex is entitled to presume that she had the authority as a consequence of *Lowe and Paige* appointing her to the position of managing partner in the firm **(0-2 marks)**

- **B.(1) Duties of a Partner in a Partnership:** there are three main duties owed by a partner under the Partnership Act 1890 – these are: (1) a duty of disclosure – this requires a partner to provide all the other partners with full information relating to any transaction that impacts the partnership – in Law v Law (1905) the failure by the partnership to disclose certain assets to a potential new partner facilitated the rescission of the contract, (2) a duty to account – this requires a partner to account for all benefits obtained from any transaction carried out for the benefit of the partnership, in Bentley v Craven (1853) the action of the defendant in purchasing stock on his own account and later selling it to the firm, without declaring his self-interest amounted to a breach of duty, and (3) a duty not to compete – this prohibits a partner from competing with the business of the partnership without the express consent of the other partners, as arose in Glassington v Thwaites (1823) – in addition (4) there is also a fiduciary duty imposed upon a partner to act in good faith and in the best interest of the firm – this requires that a partner discloses any conflicts of interest and does not make a secret profit from their position, and (5) there is also a contractual duty imposed upon a partner to comply with the terms of the partnership agreement (whether verbal or written) **(5 = 0-5 marks)**
- **Conclusion:** (1) Briony has acted in breach of her contractual duties, by not complying with the terms of the partnership agreement, and (2) she has also breached her fiduciary duty, as non-compliance with the partnership agreement means that she was not acting in the best interests of the firm **(any 1 = 0-1 mark)**
- **B. (2) Expulsion of a Partner:** unless otherwise stated in the partnership agreement, the Partnership Act 1890 stipulates that the expulsion of a partner requires the unanimous consent of the partners **(0-1 mark)**
- **B. (3) Liability of a Retiring Partner:** (1) a retiring partner is liable for all debts and obligations that arise under any contract entered into by the firm prior to his retirement, unless he has been indemnified by the existing creditors and the firm – (2) in addition a retiring partner may be liable for debts under contracts entered after his retirement with existing creditors, unless he has given notice to these existing creditors that he is no longer a partner in the firm **(2 = 0-3 marks)**

#### Question 5 Suggested Solution:

- **A. (1) Role of the Receiver:** the main function of a Receiver is to go into a company, realise the charged asset or the value of the undertaking and pay off the principal and interest due on foot of a secured debt **(0-1.5 marks)**
- **A. (2) Characteristics of a Floating Charge:** the main characteristics of this charge can be summarised as follows: (1) this is a charge floats that over all or part of a class of assets both present and future that change in the normal course of business, (2) the company can trade freely with the assets in the normal course of business without having to gain permission, (3) the assets which floating charges are attached to are usually more realisable assets (i.e. sell more easily), (4) in liquidation, floating charges crystallise and attach to the assets over which they previously

floated, and (5) floating charges are only repaid after fixed charges and preferential debts have been satisfied **(any 3 = 0-3 marks)**

- **A. (3) Duties of a Receiver:** these include the following: (1) notification: they are required to notify the company, the CRO and the public of their appointment, (2) duty to exercise reasonable care in disposing of company assets: this requires the Receiver to have the asset independently valued and to seek independent advice, if necessary – but in Ruby Property Co Ltd and McNally v Kilty and Superquin (2003) the Court held that: “[I]f ... evidence shows that “the best price reasonably obtainable” was in fact obtained, then irrespective of other considerations it cannot be said that a receiver is in breach of [the companies legislation”, (3) duty to report: the Receiver must report to the company by means of a statement of affairs, and they must report to the CRO every 6 months on the progress of the receivership, as well as to the ODCE, if there is any suspicion of criminal offences being committed by company officers, (4) to pay company debts in the correct order: this priority is the same as the priority in liquidation, and (5) compliance: a Receiver has a duty to comply with any request from the ODCE in relation to the production of their books for examination **(any 3 x 1.5 = 0-4.5 marks)**
- **Conclusion:** Kennedy in selling the entire undertaking of the company now, and not awaiting the results of the tender process is not in breach of her duties as a Receiver, as the Receiver’s duty is to get the best available price for the charged asset in the present, and not to await future events that may positively or negatively influence the value of the charged asset **(0-1 mark)**
- **B. (1) Redundancy:** Section 7(2) of the Redundancy Payments Act 1967 defines redundancy as being a dismissal attributable wholly or mainly to (1) the fact that the employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed, or (2) the fact that the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where they were so employed have ceased or diminished or are expected to cease or diminish **(any 2 = 0-2 marks)**
- **B. (2) Grounds that amount to unfair selection for Redundancy:** these include any selection based on the following grounds: (1) gender, (2) marital or civil status, (3) family status, (4) religious belief, (5) age, (6) race, (7) disability, (8) sexual orientation, (9) membership of the travelling community, (10) trade union membership, (11) pregnancy, (12) where the employee has taken legal action against the employer, (13) where the employee has been involved in lawful industrial action against the employer, (14) where the employee has made a protected disclosure under the terms of the Protected Disclosure Act 2014, or (15) because an employee has exerted (or attempted to exert) their rights under protective legislation (including minimum pay) **(any 6 = 0-3 marks)**
- **B. (3) Redundancy Payment:** statutory redundancy payments amount to two weeks’ pay per every year of service, regardless of age, plus a bonus week – there is a maximum ceiling of €600 per week – although an employer may provide a higher redundancy payment as a voluntary measure **(0-3 marks)**
- **B. (4) Forums:** a complaint can be lodged with the Workplace Relations Commission, with a right of appeal to the Labour Court **(0-1 mark)** – such a complaint must be made within 6 months of the alleged breach, this can be extended to 12 months where there is a reasonable cause for the delay **(0-1 mark)**

### Question 6 Suggested Solutions:

- **A. (1) Sale by Description:** there is an implied obligation that assumes that goods sold by description must correspond to that description – a sale by description does not preclude a sale where goods are exposed for sale and selected by the consumer – a description includes tags, labels etc... - in O'Regan v Micro-Bio (Ireland) Ltd (1980) a H-120 vaccine was recommended, but a H-52 vaccine was supplied, amounting to a breach of the requirements of sale by description **(0-1 mark)**
- **Conclusion:** the Tablets manufactured by *Darlington Technologies PLC* are not in compliance with these obligations, as they were described as having a 12-hour battery life, which they did not actually have **(0-1 mark)**
  
- **A. (2) Merchantable Quality:** Section 14 imposes an implied obligation that goods sold are of merchantable quality – this means that this should be as durable as one can expect taking account the price, description and all other relevant circumstances (time of sale, changing standards) – as in Egan v McSweeney (1956) – a product is not merchantable quality where the performance of the product is prejudiced and the defect cannot be easily remedied or repaired without expense or taking some time to perform – the only exception is defects brought to the attention of the buyer before contract is made, or defects obvious to a reasonable person, as per Grant v Australian Knitting Mills (1936) **(0-3 marks)**
- **Fitness for Purpose:** this implied term also assumes that the goods are fit for the purpose intended, assuming normal usage – in Baldry v Marshall (1925) the defendants were in breach of fitness for purpose obligations when they supplied a Bugatti when asked to provide a comfortable car for touring – if the goods are going to be used for an alternate purpose, and the seller is aware of this purpose, then the buyer can assume that they are fit for that alternate purpose – where a reasonable alternate use is notorious within the market – then an assumption of fitness for purpose is assumed, unless the seller specifically states otherwise **(0-2 marks)**
- **Conclusion:** the Tablets manufactured by *Darlington Technologies PLC* are not merchantable quality, as they overheat and shut-down, which impact the consumers ability to use them **(0-1 mark)**
  
- **A. (3) Remedies:** the main remedies are (1) a repair, (2) replacement, (3) refund, or (4) damages where the consumer suffers a loss as a consequence of a breach **(0-2 marks)**
  
- **B. (1) Alteration of the Articles:** this requires the passing of a special resolution at a general meeting of the company **(0-1 marks)** – the members need to be given 21-days' notice of this meeting **(0-1 marks)**
  
- **B. (2) Voting at Meetings:** voting is governed by a company's Constitution – the general rule is that it takes place first by a show of hands, wherein every member gets one vote – and a result is declared by the chairperson of the meeting – this declaration is deemed conclusive – the advantage of this method is that it is quick, the disadvantage is that it does not reflect the number of shares held or proxy votes, and it lacks privacy **(0-2.5 marks)** – after a show of hands the chairperson or 3 shareholders (present in person or by proxy) or 10% of the voting shareholders present in person or by proxy, can demand for poll (secret ballot) – the results of the poll take precedence over show of hands – poll voting depends upon number of shares held by the shareholder – the right to conduct a poll cannot generally be excluded by the Constitution – the advantage is that it reflects shareholding and proxy votes, and is private, the disadvantage is that it is more cumbersome and time consuming **(0-2.5 marks)**

- **B. (3) Quorum:** (1) this is the minimum number of people that must attend a meeting in order for it to be valid, (2) a company's quorum is generally stated in its Constitution, (3) the Companies Act 2014 states that the minimum quorum is 2 persons, (4) the quorum may be present in person or by proxy, (5) if there is no quorum within 15 minutes of the commencement of the meeting then the chairperson must adjourn the meeting to a later date (usually the same place and time one week later) – although if the quorum was present during the meeting – but not present at voting the votes cast are still valid, as established in Re Hartley Baird (1955) **(any 3 = 0-3 marks)**