CORPORATE LAWS & GOVERNANCE

PROFESSIONAL 1 EXAMINATION - APRIL 2019

NOTES:

Two envelopes must be used to enclose answers:

- Enclose answers to questions in **Section A in one envelope**, and
- Enclose answers to questions in **Section B in a second envelope**.

Mark clearly on each envelope the Section to which the answers relate.

Section A:

You are required to answer **three** questions from this section, (Questions 1, 2 and **either** 3 or 4). However, should you provide answers to **both** Questions 3 and 4, you must draw a clearly distinguishable line through the answer not to be marked. Otherwise, only the first answer to hand for each of these two questions will be marked.

Section B:

You are required to answer **one** question from this section. However, should you provide answers to each question in this section, you must draw a clearly distinguishable line through the answer not to be marked. Otherwise, only the first answer to hand for each of these two questions will be marked.

TIME ALLOWED:

3 hours, plus 10 minutes to read the paper.

INSTRUCTIONS:

During the reading time you may write notes on the examination paper, but you may not commence writing in your answer book.

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

Start your answer to each question on a new page.

You are reminded to pay particular attention to your communication skills, and care must be taken regarding the format and literacy of your 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.

List on the cover of each answer booklet, in the space provided, the number of each question attempted.

THE INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS IN IRELAND

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Time allowed: 3 hours plus 10 minutes to read the paper.
Section A: You are required to answer **three** questions from this section.
Section B: You are required to answer **one** question from this section.

SECTION A

Answer both Questions 1 and 2 and either Question 3 or 4.

1. Olivander Recruitment Consultants Ltd (ORL) has been in financial difficulty for the last three years, arising from growing competition from the online market. The situation reached crisis point in December 2018 when its main client, a multinational technology company, informed ORC it was terminating its exclusive service contract with ORC for the recruitment of manufacturing staff. As this contract accounted for in excess of 30% of the company's annual turnover, ORC's directors decided that the business was no longer financially viable. They called a meeting of both the members and creditors in late March 2019, requesting that they effect a creditors' voluntary liquidation of the company. A resolution was passed to this effect, and Jones was appointed as voluntary liquidator in early April 2019.

Upon his appointment, Jones discovered that the following debts are owed by ORC:

(1) €15,000 secured by a floating charge in favour of SOS DAC, registered in March 2018;
(2) €176,000 due to a former employee in respect of personal injuries arising from an occupational accident. These damages were awarded by the Court five months ago and are still unpaid;
(3) €30,000 due to Garland Technologies, secured by a fixed charge against its Dublin premises, registered in January 2019. Prior to this charge being created, the debt was unsecured. However, a fixed charge was registered in return for a guarantee by Garland Technologies it would not request full repayment of the debt until January 2020 or take legal action against the company for non-payment until after the 2020 deadline;
(4) €56,000 overdraft in favour of Longford Mutual Trust Bank;
(5) Commercial property rates due to the City Council in the amount of €1,400;
(6) €75,000 debenture due to the Prudential Bank of Roscommon, secured by a fixed charge against its Galway premises, and registered in January 2010;
(7) €23,000 secured by a floating charge in favour of Bardot Management Consultants, registered in September 2018;
(8) €18,000 in unpaid wages due to the company's Chief Executive Officer, Hendrix;
(9) €31,000 due to Fabron Technologies in respect of portable technologies supplied to the company under a Retention of Title Clause;
(10) €327,000 in respect of employee redundancies; and
(11) €2,000 in respect of declared, but unclaimed, dividends owed since 2014.

Furthermore, Jones has learned that in addition to its assets, ORC has a reserve capital of €200,000. Jones plans on charging a fee of €6,000 to effect the liquidation of the company.

REQUIREMENT:

(a) Analyse the nature of a floating charge, commenting specifically on when this charge crystallises. (5 marks)

(b) Explain the nature of a Retention of Title Clause, commenting on any TWO classifications of these clauses.

(4 marks)

(c) Identify any SIX debts of a company that are classified as preferential debts. (3 marks)

(d) Assess the priority of payment and validity of all of ORC's debts. Comment also upon the obligation placed on Jones in the context of ORC's reserve capital of €200,000 and the unclaimed dividends of €2,000.

(13 marks)

[Total: 25 marks]

2. Bryon incorporated Tullah Belle Confectionery Ltd. (TBC) in 2004, and was the managing director of this company until it was liquidated in 2017. Arising from the liquidation, a Restriction Order was imposed upon Bryon for three years, and legal proceedings were taken against him for reckless trading. Despite this Restriction Order, Bryon instructed his wife Rayne to incorporate a new company, The Clementine Chocolate Factory Ltd.(CCF), in 2017. Rayne was appointed as the managing director of this company, and Bryon's siblings Yeats, Hardy and Wilde were appointed as executive directors of the company. Despite not being appointed as a director of CCF, Bryon continued to take an active part in both the operational and strategic management of the company.

In May 2018, CCF was approached by Pennywise Retail, an international discount retail supermarket, and asked if it was interested in producing a range of discount confectionary items that would be sold exclusively in Pennywise Retail's stores, both nationally and internationally. A board meeting of CCF was requisitioned to discuss this proposed contract. Bryon was present at the meeting and was very enthusiastic about undertaking this project as it had the potential to double the turnover of the company within three years. Yeats, Hardy and Wilde were not as enthused about this contract, as they were concerned that selling CCF's goods in a discount retail chain would devalue its brand. Additionally, this would require substantial investment in production machinery, premises and staff to be able to accommodate this contract. Their primary concern was that this contract would result in the company's need to borrow a significant sum of money that would impact liquidity and cause it significant financial exposure if the contract was cancelled in the future. Accordingly, when the board voted upon whether to undertake this contract Yeats, Hardy and Wilde voted against it and Rayne was the only director who voted in favour. Bryon was furious at the outcome of the meeting and stormed out.

However, despite the vote against this contract at the directors' meeting Yeats, Hardy and Wilde subsequently discovered that Rayne was persuaded by Bryon to sign a three-year contract with Pennywise Retail to provide a range of discount confectionery. When Yeats, Hardy and Wilde confronted Rayne regarding this contract, she told them to speak to Bryon as she was acting on his explicit instructions. Yeats, Hardy and Wilde are now planning to challenge the validity of this contract on the basis that Rayne contravened a resolution of the board when she signed it. In addition, Wilde was so infuriated by Bryon's actions that he contacted the Office of the Director of Corporate Enforcement (ODCE) and claimed that that Bryon was acting in contravention of the Restriction Order. The ODCE has since commenced proceedings against Bryon for breach of his Restriction Order, but Bryon is challenging this action on the grounds that he is not, in fact, acting as a company officer. The ODCE has requested a copy of CCF's register of directors for the purpose of its investigation, but Yeats, Hardy and Wilde do not believe that this Register has ever been maintained by the company.

REQUIREMENT:

(a) Define the term director, and assess whether Bryon would be viewed as a company director, and if so, how he would be classified. Comment also on the potential ramifications for Bryon if he is classified as a company director.

(5 marks)

(b) Critically examine the nature of a Restriction Order, commenting specifically on the consequences for Bryon if the Court determines that he has acted in contravention of this Order.

(6 marks)

(c) Review the law in relation to reckless trading, focusing specifically on the actions that Bryon may have engaged in that resulted in an action for reckless trading being taken against him, and discuss the sanctions available in respect of this offence.

(5 marks)

(d) Critically evaluate whether the contract signed by Rayne with Pennywise Retail is enforceable against The Clementine Chocolate Factory Ltd by discussing the law in relation to corporate authority.

(5 marks)

(e) Identify any FOUR items of information that are part of the prescribed content of the Register of Directors, commenting also upon where this Register must be maintained, and the sanctions for non-compliance with the maintenance obligations.

(4 marks)

[Total: 25 marks]

3. Henshaw has been a minority shareholder in Waldorf Bespoke Furniture Ltd (WBF) since 1992. Up to 2016, the profits of the company were steadily increasing but there was an 8% drop in profits in 2017 and a further 10% decline in 2018. Henshaw was surprised by the deteriorating profits as he was aware that the company had obtained numerous orders to design furniture for boutique hotels around Ireland and, in the last year had been awarded a lucrative contract with an international chain of restaurants to create art deco design pieces. After the last annual general meeting, Henshaw asked his accountant, Zandra, to undertake a thorough analysis of the accounts of WBF. Following this review, Zandra informed Henshaw that the main reason for the declining profits was that €125,000 had been paid to Anouk Consulting Ltd in 2017 and a further €230,000 in 2018, but there was no evidence in the accounts to show the purpose of these payments.

Henshaw then contacted the Companies Registration Office to review the accounts of Anouk Consulting Ltd and was shocked to discover that the company has only one client, WBF, and that the registered office of the company is the home address of the managing director of WBF, Powell. Upon further investigation, he discovered that Anouk Consulting Ltd was incorporated in 2017 with only one shareholder and director, who is the brother-in-law of Powell.

Following these discoveries, Henshaw believes that Powell has been falsifying company contracts and siphoning off company funds to a fictitious company, Anouk Consulting Ltd, as there is no evidence that this is a real trading company. Henshaw contacted the solicitors asking them to take legal action against Anouk Consulting Ltd and Powell for fraud against WBF. The solicitors informed him that as a consequence of the company's separate legal personality, only the company itself can take such an action. However, they suggested that the Court may be willing to lift the veil of incorporation in this situation in order to rectify the wrong.

Henshaw has contacted you for advice

REQUIREMENT:

(a) Critically examine the concept of separate legal personality, commenting specifically on the advantages bestowed upon a company arising from its separate legal existence.

(6 marks)

(b) Review the concept of lifting the veil of incorporation and state the THREE main reasons upon which the veil of incorporation may be lifted by virtue of legislation.

(6 marks)

(c) Critically analyse any TWO grounds upon which the veil of incorporation can be lifted at the absolute discretion of the Court, using case law to support your answer.

(5 marks)

(d) Based on this analysis in your response to (c) above, advise Henshaw as to the likelihood of the veil of incorporation being lifted in this situation. Justify your answer.

(3 marks)

[Total: 20 marks]

4. Over the last five years FTF Foods Ltd. has been introducing self-service checkouts in its retail stores. In addition, in the last six months, it has decided to buy in fresh meat already butchered, thereby eliminating the need to employ butchers in each of the stores. As a consequence of these measures, all butchers, employed in the 30 nationwide stores will be made redundant, as well as 30% of retail assistants and 50% of retail supervisors. Overall, these actions will reduce the nationwide workforce of over 600 by 23% resulting in salary savings of almost €500,000 per annum. The company plans to offer some of the retail supervisors the option of staying on as store night managers on the same salary and general terms and conditions of employment, but with substantially different working hours.

REQUIREMENT:

(a) Define the term 'redundancy', and state any TWO eligibility requirements for redundancy. (5 marks)

(b) Evaluate any TWO rights of an employee who is selected for redundancy. (4 marks)

(c) Critically analyse the law in relation to offers of alternative employment and redundancy. Advise FTF Foods Ltd. as to whether the retail supervisors would be legally obliged to accept the offer of alternative employment as store managers, and whether their (the store managers) refusal could result in the forfeiture of their right to statutory redundancy payments.

(6 marks)

(d) Analyse the specific requirements that may be imposed upon FTF Foods Ltd. as a consequence of the fact that it is planning to make 23% of its workforce redundant. Comment also on the penalties for non-compliance.

(5 marks)

[Total: 20 marks]

SECTION B
Answer <u>either</u> Question 5 or 6.

5. As risks and uncertainties are heightened due to increased global trade tensions and Brexit, the challenges facing Irish businesses are at an all-time high.

REQUIREMENT:

(a) Advise how the board of directors of a company could implement a risk management strategy to address future uncertainties. (20 marks)

(b) Critically assess the role an audit committee can have in risk mitigation. (10 marks)

[Total: 30 marks]

<u>OR</u>

6. *"A healthy culture both protects and generates value. It is therefore important to have a continuous focus on culture, rather than wait for a crisis".*

Corporate Governance and the Role of Boards. Financial Reporting Council, 2016.

REQUIREMENT:

(a) Critically assess the role of the non-executive directors in developing and enhancing an appropriate culture for good governance. (18 marks)

(b) Discuss how the remuneration committee can assist in the long-term sustainability of the business. (12 marks)

[Total: 30 marks]

END OF PAPER

SUGGESTED SOLUTIONS

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SOLUTION 1 (Compulsory Question):

A. **Floating Charges:** This was defined in Re Yorkshire Woolcombers Association Limited (1903) as: *"… a charge on a class of the company's assets, both present and future, which in the ordinary course of the company's business change over time, and which the company can deal with and carry on any business relating thereto until such time as the holder enforces that charge"* (0-2 marks). This charge floats over the secured asset until crystallisation – at which point it attaches to the asset itself or to whatever part of the asset is available at that time (0-1 mark). A floating charge crystallises upon: (1) liquidation, (2) receivership, (3) at a pre-determined date that the parties have stipulated, (4) on the occurrence of a specified event, as agreed by the parties, or (5) upon cessation (including sale) of the company's business. (any 4 = 0-2 marks)

B. **Retention of Title Clause:** This a clause whereby the seller may specify that he or she retains title to the goods until they are paid for, even if the buyer resells or alters the goods – they are also referred to as romalpa clauses *(Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd [1976])* (0-1 mark). There are three main classifications of such clauses: (1) Simple Retention Of Title Clauses: where the supplier retains the legal title in the goods supplied, in their original state, until payment has been received, (2) Aggregated Retention Of Title Clauses: where the supplier retains the legal title in the goods supplied, after they have been incorporated into a manufactured product, until payment has been received, and (3) Proceeds of Sale Clauses: where the supplier claims legal title to the money received by the company from the sale of the manufactured product or from the goods in the state supplied, until payment has been received. (any 2 = 0-3 marks)

C. **Preferential Debts:** Under Section 621(2) CA 2014 preferential debts include: (1) all local rates payable within the previous 12 months, (2) all assessed taxes – assessed within the previous 12 months, (3) all social welfare contributions payable within the previous 12 months, (4) all wages and salary payable within the last 4 months, up to a maximum payment of €10,000 per employee, (5) all accrued holiday pay, (6) all sickness and pension payments in respect of employees, (7) all unfair dismissal and minimum notice claims, (8) all redundancy payments payable within the last 12 months, and (9) damages due in respect of personal injuries to employees. (any 6 = 0-3 marks)

D. **Priority and Validity of Debt upon Liquidation:**

(1) The €31,000 due to Fabron Technologies in respect of portable technologies supplied under a Retention of Title Clause will be repaid first through either the return of the goods or the proceeds of the sale – depending on the nature of the clause. (0-1 mark)

(2) Cost of Liquidation: Jones' liquidation fee of €6,000 will be repaid next (as well as any other costs of liquidation). (0-0.5 marks)

(3) Debentures secured by fixed charges (these are paid in order of registration): The €75,000 debenture due to the Prudential Bank of Roscommon. (0-0.5 marks)

(4) Preferential debts: All of these debts rank pari passu and include: (a) the €10,000 in unpaid wages to the CEO, (b) the redundancy obligation upon the company in the amount of €327,000, (3) €176,000 due to a former employee in respect of personal injuries claim, and (4) €1,400 to Cork City Council for commercial property rates. (0-2 marks)

(5) Debentures secured by floating charges (in order of registration): (1) The €15,000 secured by a floating charge in favour of Sutton Office Supplies, registered in March 2018, and (2) the €23,000 due to Bardot Management Consultants, registered in September 2018 – however, as this floating charge was created within 12 months of liquidation – Jones has the authority to invalidate it, unless there is evidence that Olivander Recruitment Consultants Ltd was solvent when this charge was created (as per Section 597 CA 2014) – if it is invalidated this charge will rank as an unsecured debt. (0-2 marks)

(6) Unsecured creditors: All of these debts rank pari passu and include: (a) the balance of €8,000 due in unpaid wages to the CEO, (b) the €56,000 overdraft in favour of Longford Mutual Trust Bank, and (c) the €23,000 due to Bardot Management Consultants, if the floating charge is invalidated. (0-1.5 marks)

(7) Dividends: The €2,000 declared but unclaimed dividends – the statute of limitation for reclaiming this dividend is 12 years – but in liquidation Section 623 CA 2014 requires the liquidator to lodge this unclaimed amount into an account prescribed by the Minister – funds can be claimed from this account for up to 6 years, unless the company's Constitution provides otherwise. (0-2 marks)

Unfair Preference: The €30,000 due to Garland Technologies is likely to be struck out as an unfair preference as the company is likely to have been insolvent at the point of creation. Section 604 CA 2014 defines an unfair preference as any act relating to property done by an insolvent company, in favour of a creditor, with a view to giving that creditor preference over other creditors in the event of liquidation. Any unfair preference created within 6 months of the liquidation of the company is automatically invalid and void, where the company was insolvent at the point the charge was created – this period extends to two years if it is in favour of a director or a connected person. The burden of proving an unfair preference is on the liquidator. (0-2 marks)

Reserve Capital: This relates to partly-paid shares, where the unpaid portion is reserved for a specific purpose or for the liquidation of the company. In this situation Jones must call for the payment of the outstanding amount and use these monies to assist in the repayment of the company's debts. (0-1.5 marks)

SOLUTION 2 (Compulsory Question):

A. **Directors:** From a legal perspective a director is defined as any person involved in the management of a company (0-1 mark). In this situation Bryon is likely to be viewed as a director and classified as a shadow director. This is a person in accordance with whose directions or instructions the directors of a company are accustomed to act – as defined by Section 221 CA 2014. This person does not take the title of director and remains in the background of a company, but they instruct and direct the board of directors as to how to act in relation to company matters (0-3 marks). If Bryon is classified as a shadow director then he is exposed to exactly the same liability as a properly appointed director, and subject to the same duties and obligations. (0-1 mark)

B. **Restriction Orde**r: By virtue of Sections 818-836 CA 2014 any person who acts as a Director/shadow Director of an insolvent company, within 12 months of it going into liquidation, may be restricted from being a director or secretary of another company for a period of five years. This provision is designed to avoid an abuse of the concept of separate legal personality and limited liability whereby a person winds up an insolvent company owing large debts and shortly afterwards starts up another company without ever having to make good the debts of the first company – this process was historically known as "phoenix trading" (0-3 marks). In relation to acting while restricted – (1) it is an offence to act as a director or secretary while restricted unless the company is highly capitalised – this can be defined as a public limited company with an issued share capital of at least €500,000 or any other company with an issued share capital of at least €100,000. (2) Where a restricted person does not fall within this exception and still continues to act as a director of another company that goes into liquidation then the restricted director may be made personally liable without limit for the debts of the second company (Section 859 CA 2014) – in this situation they may also be subject to a Disqualification Order (Section 848 CA 2014). (3) Breach of the Restriction Order is also a Category 2 offence which will result in Disqualification for up to 10 years or any period as directed by the Court (Section 855 CA 2014). (any 2 = 0-3 marks)

C. **Reckless Trading:** In accordance with Section 610 CA 2014 this offence arises where company officers are knowingly party to the carrying on of any business of the company in a reckless manner – the offence can be committed by any company officer. The application can be made by the Liquidator, Examiner or Receiver, or by any applicant who can show that the company is unable to pay its debts – as such this offence only arises on the liquidation of the company (0-2 marks). In accordance with subsection 3 this offence can arise where an officer of the company (such as Bryon) is: (1) carrying on the business below the standard of their general knowledge, skill and experience, or (2) by the contracting of a debt by the company and where the officer did not honestly believe on reasonable grounds that the company would be able to pay the debt when it fell due for payment, as well as other debts. The offence can also arise where a company trades while insolvent (any 2 = 0-2 marks). The penalty imposed under the legislation (Section 610(2) CA 2014) for reckless trading is personal liability, without limit, for the debts created as a consequence of this reckless activity – although they may also be the subject of a discretionary Disqualification Order. (0-1 mark)

D. **Validity of the Contract/Corporate authority:** The key issue in this question relates to whether Rayne had the authority to create a contract with *Pennysaver Retail* on behalf of *The Clementine Chocolate Factory Ltd*. Generally a third party is entitled to assume that a director (and in particular a Managing Director) has actual authority to create a contract on behalf of the company, either express or implied. Even though Rayne did not have actual authority, based on the resolution of the Board, then the contract may still be enforceable where estoppels/ostensible authority applies. This arises where 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. It is not open to the agent to confer the authority on himself – the representation must come from someone with actual authority or be made by the principal himself. This situation may also arise by a course of dealing or a history of contracts between the parties. Relevant case law includes: *Panorama Developments (Guildford) Limited v Fidelis Furnishing Fabrics Limited (1971), and Freeman & Lockyer v Buckhurst Park Properties (Mangal) Limited (1964)* – according to Lord Diplock in the latter case: *"... [a]n "apparent" or "ostensible" authority ... is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the "apparent" authority, so as to render the principal liable to perform any obligations imposed upon him by such contract."* (0-3.5 marks).

Conclusion: Therefore the contract between The Clementine Chocolate Factory Ltd and Pennysaver Retail is legally enforceable as by appointing Rayne as Managing Director The Clementine Chocolate Factory Ltd represented that she had the ability to create contracts on their behalf (0-1.5 marks)

E. **Register of Directors:** In accordance with Section 149 the Register of Directors must contain the following information: (1) the directors forename, surname and any other names, (2) their date of birth, (3) their usual residential address, (4) their nationality, (5) their business occupation, if any, and (6) particulars of any other directorships that they hold in other corporate bodies (within the last 5 years) (any 4 = 0-2 marks). This Register must be maintained at the registered office of the company – and any default regarding its maintenance is classed as a Category 3 offence. (0-2 marks)

SOLUTION 3 (Optional Question):

A. **Separate Legal Personality:** A company is a separate legal entity from its members. This means that from the moment that the company is incorporated it is viewed as a separate legal person to the people who own it. This concept was first recognised in the case of *Salomon v Salomon & Co Ltd (1897)*. This case concerned the conversion of an existing business into a limited liability company. Salomon (the plaintiff) became the principal shareholder in this company (the defendant) and was also given a debenture valued at £10,000 in this company. When the company was liquidated the validity of the debenture was challenged based on fraud. The Court ruled that legally a company was separate from its shareholders and therefore the debenture was valid (0-3 marks). The main benefits of separate personality are that a company can: (1) own their own property, (2) enter in contractual relations with either natural persons or other companies, (3) commit crimes and be held responsible for such crimes, (4) have perpetual existence and will only cease to exist where it is struck off the Register of Companies, (5) be sued or sue other persons, and (6) all company shareholders MAY have limited liability, where the company is registered as a limited liability company. This means that upon liquidation they will not be required to make any contribution towards company debts where their shares are fully-paid. (any 3 = 0-3 marks)

B. **Lifting the Veil of Incorporation:** Although the principle of separate legal personality is central to company law, there are a number of situations where the company and its members can be identified together and treated the same. Essentially, the privilege of incorporation can only be availed of as long as *"there was no fraud and no agency and if the company was a real one and not a fiction or a myth".* When any of these circumstances occur, the Court will strip away the veil of incorporation surrounding the company – this is known as lifting/piercing the veil of incorporation. In doing so, the corporate personality remains intact but the members and company officers may be held responsible for the obligations which would normally be the obligations of the company. In Re a Company (1985) the Court held that it would use its power to pierce the corporate veil if doing so is necessary to achieve justice, irrespective of the legal validity of the corporate structure (0-4 marks). The three main reasons why the veil may be lifted are: (1) to enforce the provisions of the Companies Act 2014, (2) to avoid fraud, and (3) to deal with a group of companies. (0-2 marks)

C. **Lifting the Veil by Legislation:** This can arise in any of the following situations: (1) Liability for Company Name Irregularities: Section 27 CA 2014 provides that if a company fails to affix its name properly on its place of business, letters, documents, and bills of exchange, the officer of the company will be liable on summary conviction, to a fine not exceeding €5,000 or imprisonment for a term not exceeding six months or both, (2) Liability where a PLC trades without a Certificate to Commence: in accordance with Section 1010(7) where a PLC does business or exercises borrowing powers without a valid trading certificate, the PLC and any officer of it who is in default will be guilty of a category 3 offence and personal liability for debts may be imposed, (3) Liability for Taxation Offences: Section 94 of the Finance Act 1983 provides that when a tax offence is committed by a company with the consent of a person within the company, that person may also be subject to legal proceedings, (4) Liability for Fraudulent Trading: Section 722 CA 2014 provides that if any person is knowingly a party to the carrying on the business of a company with intent to defraud its creditors or the creditors of any other person, or for any fraudulent purpose, he or she shall be guilty of a Category 1 offence. Therefore, the company is not liable, the veil of incorporation is lifted and the person committing the fraudulent act becomes personally liable, (5) Liability for Reckless Trading: Section 610 CA 2014 states that if in the course of liquidation a company officer is a party to carrying out business in a reckless matter, the court may, if it considers it proper to do so, upon application by a liquidator/creditor, hold such person personally responsible for all or any of the debts that the court directs. Again, the veil of incorporation is 'pierced' and the officer is made personally liable, (6) Liability re Contribution/Pooling Orders upon winding-up: Section 600 CA 2014 prescribes that a company may be required to contribute to the debts of related companies, taking into account the extent of the company's control over the related company, and (7) Liability for the Failure to Maintain Proper Books of Account: Section 286 imposes liability upon the company and its directors for failure to maintain proper accounting records. This is classed as either a Category 1 or 2 offence. (any 2 = 0-5 marks)

D. **Courts Discretionary Grounds:** The Court at its absolute discretion can lift the veil in any of the following situations: (1) Implied Agency: where an agency relationship exists between the company and its members the Court may, at its discretion, lift the veil of incorporation. This arose in *Smith, Stone and Knight Ltd v Birmingham Corporation (1939)* which involved a compulsory acquisition by the defendant of premises in which the subsidiary of the plaintiff carried on its business. The Court allowed the claim on the basis that the parent had the right to challenge this action, as the subsidiary corporation was simply an agent of the parent company, (2) Single Economic Entity: where the relationship between companies in the same group is so intertwined that they should be treated as a single economic entity, the Courts will lift the veil of incorporation to reflect the economic and commercial realities of the situation. This arose in *Power Supermarkets Limited v Crumlin Investments Limited & Dunnes Stores (Crumlin) Limited (1981)* wherein a restrictive covenant in a lease was upheld against the defendant as the new owners of the shopping centre and the company granted a lease in contravention of the plaintiff's restrictive covenant were in fact the same economic entity, (3) Where the company was formed for fraudulent or illegal purposes, or for the avoidance of legal duties: one such example would be where the company is being used to avoid existing legal

obligations or legal liabilities (such as to obtain tax concessions). In these circumstances the Courts are willing to set aside the corporate veil to impose liability upon the company's officers. This arose in *Gilford Motor Company v Horne (1933)* wherein the defendant sought to avoid a restraint of trade clause in his contract of employment by establishing a company with his wife and son as sole officers and shareholders, and himself as an employee, (4) To establish the true residency of the company: In *Daimler v Continental Tyre Company (1916)* the defendant owed monies to the plaintiff, a British registered company, whose directors and shareholders were German. Under wartime laws trading with the enemy was forbidden. The Court looked beyond the corporate personality to those who controlled the company and concluded that the plaintiff was not obliged to pay the debt, as to do so would constitute trading with an enemy of the state, and (5) Where the company is, in reality, a quasi-partnership: this arises where the relationship between company shareholders/officers is more akin to a partnership, whose existence is dependent upon the degree of trust and communication between the partners – this arose in *Re Murph's Restaurant (1979)* wherein a company run akin to a partnership was liquidated when a company shareholder/officer was treated oppressively and unfairly by the majority in breach of obligations of mutual trust and confidence.

Conclusion: It is likely that the Court will lift the veil in this situation as: (1) the evidence suggests that Powell is engaged in fraudulent trading (which is a statutory ground), and (2) *Anouk Consulting Ltd* appears to have been incorporated for a fraudulent purpose (which is a discretionary ground) – it seems to be a fiction to facilitate the illegal transfer of funds from *Waldorf Bespoke Furniture Ltd.* (0-3 marks)

SOLUTION 4

A. **Definition of 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 (2) has ceased, or intends to cease, to carry on that business in the place where the employee was so employed, or (3) the fact that the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where they were so employed have ceased or diminished or are expected to cease or diminish – it is important to note that it is the position that is made redundant and not the employee per se. (0-3 marks)

Eligibility Requirements: These are as follows: (1) the worker must be an employee (employed under a contract of service), (2) the employee must be over 16 years, with a contract of service for at least 2 years after their 18th birthday, and (3) the dismissal must be by reason of redundancy. (any 2 = 0-2 marks)

B. **Rights of an Employee upon Redundancy:** These include the following: (1) the right to a redundancy payment: in accordance with Section 10 of the Redundancy Payments Act 2003 statutory redundancy payments are equivalent to two weeks' pay per every year of reckonable service, regardless of age, plus a bonus week – a statutory week's pay is subject to a maximum threshold of €600 per week – although an employer may provide a higher redundancy payment as a voluntary measure, (2) the right to statutory minimum notice in accordance with Section 7 of the Redundancy Payments Act 2003: this is a minimum entitlement of two weeks' notice of dismissal by redundancy – the actual notice will also be subject to legislation (Minimum Notice and Terms of Employment Act 1973) and the express terms of the contract, and (3) Section 7(2) of the Redundancy Payment Acts 1979 provides that within two weeks of the employment termination by reason of redundancy the employee has the right to time off during the notice period in order to seek alternative employment – such as time off to meet with recruitment agents, attend interviews or training courses – however, an employer is entitled to request that all affected employees furnish them with evidence of arrangements made for these purposes, provided that it is not detrimental to the employee's interest to do so. (any 2 (or alternatives) x 0-2 marks each = 4 marks)

C. **Alternative Employment:** The obligation to offer alternative employment is not mandatory and will depend upon whether alternate employment is available with that employer (0-1 mark) – the obligation to accept alternate employment depends upon whether it is classified as suitable alternative employment or not – for it to be classified as suitable alternative employment the: (1) new role cannot differ from the previous contract, (2) the position must take immediate effect – in this situation it must be accepted by the employee – an unreasonable refusal of a suitable alternate position results in the forfeiture of entitlement to redundancy – discussion as to what is considered a suitable alternate position – as per *Modern Injection Moulds Ltd v Price (1976), Caulfield v Dunnes Stores (2003)* (0-2 marks) – where the alternate employment differs from the previous position and therefore is not classed as suitable alternative employment, the employee is entitled to reject this position and take redundancy – alternatively, the employee can elect to undertake a different alternate position on a trial basis for 4 weeks, and still elect for redundancy at the end of this period by rejecting the alternative position – in this situation the new or renewed contract takes effect within 4 weeks from the ending of the previous contract, and, if the employee accepts the position there is no entitlement to redundancy. (0-2 marks)

Conclusion: *Farm to Table Fresh Foods* retail supervisors are not legally obliged to accept the offer of alternative employment as store managers, as this is not likely to be classed as suitable alternate employment – and this refusal will not result in the forfeiture of their right to redundancy – they retain this right. (0-1 marks)

D. **Consultation Obligations:** By virtue of Section 6-7 of the Protection of Employment Act 1977 and the Protection of Employment (Exceptional Collective Redundancies and Related Matters Act) 2007 there is a statutory obligation upon any employer who plans to undertake collective redundancies (more than 10% of the workforce within a period of 30 days – where the company employs more than 20 employees) to consult the trade union or if there is no trade union, the elected body of employee representatives at least 30 days in advance of making the first redundancy. As *Farm to Table Fresh Foods* are planning on making 23% of its workforce redundant, these consultation obligations must be complied with. These representatives must be consulted regarding: (1) the rationale for the proposed redundancies, (2) the number of employees affected, (3) the possibility of avoiding or reducing the proposed redundancies, (4) the method/(s) of selection being used to implement redundancies, and (5) the period during which it is proposed to effect the proposed redundancies. The purpose of the consultation is to look at methods of reducing or avoiding the necessity for redundancies, and allow for discussions regarding how this could be achieved. There is also a statutory obligation for the employer to give written notice to the Minister (0-4 marks). Failure to comply is treated as a criminal offence and the employer is liable on indictment to a fine of up to €250,000, the Court may also award a protective award (which can be up to a maximum of 90 days' pay for every employee) against the employer. (0-1 mark)

SOLUTION 5

(a) Role of board. 7 marks
Risk assessment 7 marks
Strategy. 4 marks
Communication. 2 marks

Discussion should refer to:

The board should carry out a robust assessment of the company's emerging and principal risks. Consider the opportunities and threats facing the business; financial, operational, business model, technological and regulatory etc. The responsibility of this assessment may be delegated to the audit committee. The board will have to consider the possible impact on the continuity of business in light of the risk identified. The board are responsible for identifying ways to mitigate the impact of the risks on the business and its business model.

The board should monitor the company's risk management approach on a continuous basis and disclose in the annual report.

The board will confirm in the annual report that it has completed this assessment, include a description of its principal risks, procedures in place to identify emerging risks and an explanation of how these are being managed and mitigated.

Other comments accepted. (20 marks)

(b) Discussion should refer to:

The audit committee should consist of independent non-executive directors with a minimum of three. They are tasked with reviewing the internal control and risk management system. They will direct the internal audit department as required to develop and manage an appropriate risk management system within the business. They will consider reports from the internal and external auditors and report back to the board of directors.

(10 marks)

[Total: 30 marks]

SOLUTION 6

(a) Non-executive directors 8 marks
Developing a culture 6 marks
Communication 4 marks

A non-executive director is an independent external party who participates on the board of directors. The role is to bring a questioning probing approach to the board and to evaluate the activities of the Chief Executive and the executives. Part of their role is to ensure that there is a culture of openness and accountability. They will bring a probity to the board and approach that should challenge the views and activities of the board. The chief non-executive director will provide support to all board members and act as a point of contact for shareholders and wider stakeholders. By having this non-executive director it is expected that there will be a point of contact internally for employees to also speak with members on the board.

It is expected that the non-executive director will undertake training on the nature of the business, carry out visits throughout the business to gain an understanding of the nature of the business and the conduct of its staff.

By reviewing the strategy, risk management and internal controls et cetera the non-executive directors play a key role in a supervisory capacity evaluating the actions of the board and senior management organisation.

It is expected that the chairperson of the board will be an independent non-executive director who will in fact set the tone of the board and its operations. The chairperson of the board is responsible for the tone and the culture within the board. It is expected within the organisation that the culture will be determined by the approach and the actions of the board and senior management

(18 marks)

(b) remuneration committee 6 marks
Package 4 marks
Long term 2 marks

The remuneration committee is tasked with tasked with determining the remuneration package paid to its executive and its non-executives. Its goal is to ensure that recipients are awarded an appropriate remuneration package which includes short term and long term motivational measures.

The remuneration committee will consist of non-executive director is with advice from other sources to determine what would be the appropriate range of incentives and forms of remuneration.

They will consider short-term and immediate payments for example in the form of salary and also long-term share based incentive schemes which will be linked to the success of the business strategy in the long term.

By offering a range of cash and non-cash based payments in the short term and the long term it is expected that executives will be motivated for the long-term survival of the business and not focus on short-term payments to the detriment of the survival of the business.

(12 marks)

[Total: 30 marks]