

CORPORATE LAWS & GOVERNANCE

PROFESSIONAL 1 EXAMINATION - AUGUST 2018

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.

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PROFESSIONAL 1 EXAMINATION - AUGUST 2018

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.** Logan has just been appointed to the position of company secretary with Thorne Manufacturing Plc. Following his appointment, Logan was informed that the company intended to make a bonus issue of shares to its ordinary shareholders based on a 5:1 ratio. It was planning to use the funds in its reserve capital account and share premium account to finance this issue. Logan was requested to ascertain the legality of this proposed issue, but as he knows little about corporate laws he has contacted you for advice.

REQUIREMENT:

- (a) Analyse the meaning of the term 'bonus issue of shares', commenting specifically upon how such an issue differs from a rights issue of shares. (4 marks)
- (b) Examine the source of the funds in the reserve capital account, and explain how these funds may be utilised. In light of this explanation, determine whether Thorne Manufacturing Plc can utilise these funds to effect a bonus issue of shares. (3 marks)
- (c) Critically review the source of the funds in the share premium account, and explain how these funds can be utilised. In light of this explanation, determine whether Thorne Manufacturing Plc can utilise these funds to effect a bonus issue of shares. (8 marks)
- (d) Describe any FIVE rights afforded to shareholders under the Companies Act 2014. (5 marks)
- (e) Logan has also been informed that, as part of his role, he must oversee the completion and filing of Thorne Manufacturing Plc's annual return. Outline the prescribed content of a company's annual return in accordance with Section 342 of the Companies Act 2014, commenting also on the documents that should be annexed to this return. (5 marks)

[Total: 25 marks]

2. In 2015, Hudson, the owner of the Crook and Craven Restaurant Ltd. died suddenly. Following his death, it was discovered that substantial money was missing from the company, and in excess of 70% of the monies due to creditors were unpaid upon the liquidation of the business. Following the liquidation, Hudson's children, Lennon and Tate, created a new company, L&T Holdings Ltd. Through this company, they purchased the land and buildings in which the Crook and Craven Restaurant was based, at a public auction of the company's assets. They have since established a new restaurant business on this site, which they have called The Crookery, and have recorded significant profits in the annual accounts.

In addition to Lennon and Tate (who are executive directors and shareholders in the company), there are three other non-executive directors in L&T Holdings Ltd., who sourced the finance to facilitate the purchase of the restaurant. One of these directors is Porter, who became suspicious that something was amiss, when on the three previous occasions that he attended the restaurant he discovered that only one of its two dining rooms was open. This was despite the fact that the restaurant was turning down bookings on the basis that it was booked out. On reviewing the accounts for these nights, he discovered that the income recorded was significantly in excess of that which could be generated when only one dining room is operational. He then became suspicious that Lennon and Tate were using the restaurant to launder the money that their father, Hudson, had siphoned off from the now liquidated company.

Based on his suspicions, Porter contacted Lincoln, a forensic accountant, to undertake a review of the accounts and report back to him and the other non-executive directors of the Board. Upon receipt of this report, which highlighted significant financial irregularities in relation to the restaurant and strong indications that it was being used as a front for money laundering, Porter requisitioned a general meeting of L&T Holdings Ltd. to present his findings and to pass a resolution to remove Lennon and Tate as executive directors of the company. Lennon and Tate are appalled by these events and have challenged Porter's authority to hire a forensic accountant to review the accounts, arguing that he has acted in breach of his corporate authority in doing this. Consequently, they are refusing to authorise a payment by L&T Holdings Ltd. to Lincoln in respect of the service he provided to the company.

REQUIREMENT:

- (a) Define the meaning of the term 'money laundering', and critically examine the elements of the offence of money laundering, as established by the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010-2013. Comment also on the ancillary money laundering related offences established by the Act. In addition, state the main penalties that Lennon and Tate may be exposed to if they are found guilty of the offence of money laundering. (10 marks)
- (b) Analyse the procedure that should be adopted by L&T Holdings Ltd. to effect the lawful removal of Lennon and Tate as company directors, referring specifically to the rights of Lennon and Tate in relation to their proposed removal. (5 marks)
- (c) Critically assess whether Porter had the corporate authority, on behalf of L&T Holdings Ltd. to hire Lincoln to undertake a forensic review of the restaurant's accounts, and assess the validity or otherwise of this review appointment. (6 marks)
- (d) As a consequence of these events, the other non-executive directors of L&T Holdings Ltd. have now insisted that an audit committee should be established. Evaluate the main functions of such a committee. (4 marks)

[Total: 25 marks]

- 3.** Harper and Cassidy decided to establish their own graphic design company. They hired Bennett as the company promoter to undertake various tasks and effect the registration of the business as a private company limited by shares. Harper and Cassidy requested that Bennett obtain an overdraft for the company. This would facilitate the day to day operational costs, leasing of a business premises in Cork city centre, and the purchase of office equipment and computers, as well as graphic design software, to facilitate the operation of the business. In return, Harper and Cassidy agreed a fee with Bennett and also decided to allocate him 5% of the issued share capital of the company.

Bennett completed all of the allocated tasks prior to the incorporation of the company. He also effected the registration of the company, which is called Anatomy Graphics Ltd. However, Harper and Cassidy have just discovered that the graphic design software that Bennett purchased was bought from a company with a poor reputation in the market regarding technical problems, but that this company offered Bennett a 10% personal commission on the sale if he awarded them the contract. Anatomy Graphics Ltd. does not intend to ratify this contract and is considering bringing an action against Bennett for breach of his duties as the company's promoter.

REQUIREMENT:

- (a) Critically review the content of the Constitutional document, accompanying statements and declarations that must be lodged with the Companies Registration Office to effect the registration of a private company limited by shares. (10 marks)
- (b) Analyse the main duties owed by a promoter to a company, and determine whether Bennett's actions amount to a breach of these duties, and the likely sanctions that he could face in the event of a breach. (6 marks)
- (c) Review the procedures that must be followed by Anatomy Graphics Ltd. to ratify the pre-incorporation contracts created by Bennett and the effect of such ratification. Comment also on the impact upon Bennett if Anatomy Graphics Ltd. refuses to ratify the contract he created on its behalf with the provider of the graphic design software. (4 marks)

[Total: 20 marks]

4. Kitteridge Transport Ltd. has been experiencing significant losses in recent months and is concerned that its unpaid creditors will seek to have the company placed into liquidation. In an attempt to remove as much cash from the company as possible, shareholders and directors, Archer and Mitchell, decided to manipulate the company accounts by failing to depreciate the company's assets and deferring payments due to its creditors. This was in order to declare a profit upon which they could pay a dividend. The entirety of this 'profit' was paid as a dividend to Archer and Mitchell, as well as to three other shareholders who have a holding in the company. Following the declaration of this dividend, Archer and Mitchell called a meeting of the company's shareholders to consider placing the company into voluntary liquidation. Unfortunately, before this meeting took place, Archer and Mitchell received notice that an application has been made by the Prudential Bank of Waterford to place the company into compulsory liquidation on the grounds of insolvency. Murray, a professional accountant, is approached by the bank and asked to consider acting as a liquidator to the company. Murray is unsure as to whether she is eligible to accept this position as her father is one of the three non-director shareholders in Kitteridge Transport Ltd.

REQUIREMENT:

- (a) Advise Kitteridge Transport Ltd. on the main distinction between voluntary liquidation and compulsory liquidation, commenting upon which is the more appropriate option in this situation.

(3 marks)

- (b) Critically discuss the procedure that must be adopted by the Prudential Bank of Waterford to place Kitteridge Transport Ltd. into compulsory liquidation.

Note: A discussion of the various grounds upon which such an application can be made is NOT required.

(7 marks)

- (c) Examine the various parties deemed ineligible to act as a company liquidator, and advise Murray regarding whether she is eligible to accept this appointment.

Note: A discussion of the qualifications of a liquidator is NOT required.

(6 marks)

- (d) Assess whether the dividend payment by Kitteridge Transport Ltd. is likely to be classed as an unlawful distribution, and discuss the consequences for Archer, Mitchell and the company's other three shareholders if this payment were to be classed as an unlawful distribution.

(4 marks)

[Total: 20 marks]

SECTION B
Answer either Question 5 or 6.

- 5.** A Board of Directors is expected to ensure effective operations within the organisation and in order to do so it is encouraged, under the Corporate Governance Code 2016 to establish appropriate committees to discharge this function.
- (a)** Discuss the role and responsibilities of the nomination committee as recommended by the Corporate Governance Code 2016.
(15 marks)
- (b)** Evaluate how the remuneration committee can assist the Board of Directors in ensuring the long-term sustainability of a business.
(15 marks)

[Total: 30 marks]

OR

- 6.**
- (a)** Discuss the role and responsibilities of the Office of the Director of Corporate Enforcement in Ireland.
(15 marks)
- (b)** Evaluate the role of institutional investors towards ensuring the accountability of the Board of Directors, under the Corporate Governance Code 2016.
(15 marks)

[Total: 30 marks]

END OF PAPER

SUGGESTED SOLUTIONS

THE INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS IN IRELAND

CORPORATE LAWS & GOVERNANCE

PROFESSIONAL 1 EXAMINATION - AUGUST 2018

SOLUTION 1

- (a) **Bonus Issue:** A bonus issue arises where a company capitalises profits or applies its reserve revenue or other funds to paying up unissued shares, which are then allotted to existing members by way of a bonus on a pre-emption basis. Bonus issues must never be funded from a company's ordinary capital – but from the company's reserves. These shares are generally fully paid-up. The allotment is in proportion to the shareholders existing holdings (0-3 marks).

Distinction: The main distinction between a bonus issue and a rights issue is that in a bonus issue the shareholder is given the shares as a gift (without having to pay for them) – whereas in a rights issue the shareholder is given the option to purchase a prescribed number of shares at a fixed price (0-1 mark).

- (b) **Reserve Capital:** This can be defined as un-called capital (arising from the issue of partly-paid shares) that is reserved for a special purpose. In accordance with the terms of the issue a company may specify that some or all of the uncalled capital may only be called up when the company is being wound-up or on the occurrence of a specific event – the remainder of the capital can be called for payment in accordance with the terms of the issue (0-2 marks).

Conclusion: Thorne Manufacturing PLC cannot utilise the reserve capital account to effect a bonus issue of shares (0-1 mark).

- (c) **Shares at a Premium:** A share premium is where a company issues shares above their par nominal value – the excess in value is the premium. In relation to the company accounts, the nominal value of the share is lodged into the issued capital account and the aggregate value of the premium must be lodged into the share premium account. This capital is also known as un-denominated capital and is defined as the excess of company capital over the nominal value of issued shares. In general this capital is classed as un-distributable (0-2 marks). There are three exceptions to the rule regarding this account being classed as un-distributable capital. These are as follows: (1) in the case of a merger – where one company has secured at least 90% equity share capital holding in another company, (2) in the event of group re-constructions – where a company allots shares to its holding company in consideration for the transfer of assets, other than cash, and (3) where the funds are used for the acquisition of shares of a body corporate as part of a takeover – where a company, "A", allots shares to the members of another company, "B", in exchange for all of the issued shares of "B" so that "B" becomes a wholly-owned subsidiary of "A" (0-3 marks). Outside these three exceptions the funds in the account can also be utilised to: (1) finance a bonus issue of shares (Section 83(1)(e) CA 2014), and (2) to pay/repay a premium due on the acquisition of own shares (Section 105(3)) (0-2 marks)

Conclusion: Thorne Manufacturing PLC can utilise its share premium account to effect a bonus issue of shares as this purpose is allowed by Section 83(1)(e) CA 2014 (0-1 mark).

- (d) **Shareholder Rights:** (1) the right to a dividend, when declared and payable by the company (ordinary shareholder have the right to a fluctuating dividend), (2) the right to attend and vote at company meetings (ordinary shareholders have full voting rights), (3) the right to return on their capital upon liquidation, where funds are available (ordinary shareholders are repaid last), (4) the right to share in any surplus capital upon the liquidation of the company, (5) the right of pre-emption in relation to any share issue, (6) the right to exert their rights as a minority in the event of oppression or disregarding of their interests as a member pursuant to Section 212 CA 2014, (7) the right to sue for breach of their shareholder rights pursuant to Section 31 CA 2014, (8) the right to access the company's constitutional documents, copies of the financial reports and the statutory registers, and (9) the right to receive statutory notices (any 5 = 0-5 marks)

- (e) **Annual Return:** Under Section 342 CA 2014, with the exception of some investment companies, all companies are obliged to file a return on an annual basis with the Registrar of Companies. The matters to be included in the annual return include: (1) the name and registered number of the company, (2) the address of the registered office of the company, (3) the financial period covered by the return, (4) details of all shares issued for cash or other consideration, any calls made on shares that have been received or remain unpaid, any commission paid or

discounts given on shares or debentures, (5) particulars of the total amount of indebtedness of the company that is secured by mortgages or charges, which are required to be registered, (6) a list of all persons, including names and addresses, who are members of the company, and of persons who have ceased to be members since the date of the last return, (7) details of shares held by each of the existing members, specifying the shares transferred since the date of the last return, and (8) particulars of the directors and secretaries to be entered in the company's Register of Directors and Secretaries (any 4 = 0-4 marks).

Additional Documents: The following documents must also be annexed to the annual return: (1) a copy of the balance sheet and the profit and loss account, (2) a copy of the Directors Report, including the Director's Compliance Statement (where applicable), and (3) a copy of the Auditors Report (where appropriate) (0-1 mark).

SOLUTION 2

(a) **Money Laundering:** This is the way in which criminals attempt to turn cash and other assets obtained from criminal activities into genuine assets through the financial services system and through established businesses (0-1.5 marks). The offence is regulated in Ireland by the Criminal Justice (Money Laundering and Financing Terrorism) Act 2010-2013 – according to Section 7(1) money laundering arises where a person: (1) conceals or disguises the true nature, source, location, disposition, movement or ownership of property or rights in relation to property connected to criminal activity, (2) converts or transfers that property (or provides advice or assistance in relation to conversion or transfer), for the purpose of avoiding prosecution or handles any property (receives it, or undertakes or assists in its retention, removal, disposal or realisation – or arranges to do any of these things), or (3) removes it from the State or brings it into the State, knowing or believing or acting in reckless disregard as to whether that property is, in whole or in part, directly or indirectly representing another person's proceeds of drug trafficking or other criminal activity (0-4.5 marks) – in addition, it is an offence for a person who knows or suspects that another person is engaged in money laundering not to report the fact to the relevant authority (0-1 mark) – it is also an offence to make a disclosure that is likely to prejudice a money laundering investigation (to tip a person off that you have reported them) (0-1 mark). A person guilty of a money laundering offence is liable to imprisonment for a term not exceeding 14 years and/or an unlimited fine, where prosecuted on indictment. Where prosecuted summarily the accused may be liable to a fine not exceeding €5,000 or imprisonment for a term not exceeding 12 months (or both) (0-2 marks).

(b) **Removal of a Director:** In accordance with Section 146 CA 2014 a director may be removed from the company by an ordinary resolution of the shareholders at a general meeting. A meeting proposing this resolution requires an extended period of 28 days notice to the shareholders. If the majority are in favour of removal the resolution is deemed passed and the CRO is notified (0-2 marks).

Rights of a Director: In effecting this removal the directors are entitled to: (1) be sent notice of this meeting, (2) attend this meeting and (3) make representations to the shareholders as to why they believe that they should not be removed. In *Glover v BLN Limited* (1973) the Court held that the removal of a director while failing to provide reasons for that removal was a breach of natural justice, and the Court awarded him damages for a breach of fair procedures/natural justice – this right to compensation/damages is now encompassed in Section 147 CA 2014 (0-3 marks).

(c) **Corporate Authority:** The key issue in this question relates to whether Porter had the authority to create a contract to hire Lincoln to undertake a forensic review of the accounts on behalf of L&T Holdings Ltd. As a non-executive director Porter would have no actual authority, either express or implied to enter into this type of contract, as it is significantly outside the scope of the role of a non-executive director. However, even if Porter acted outside the scope of his authority the contract may still be enforceable if estoppel/ostensible authority can be applied. 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." (0-4.5 marks).

Conclusion: As L&T Holdings Ltd (or Lennon and Tate as executive directors of the company) made no representation to Lincoln that Porter had the authority to create this contract, then L&T Holdings Ltd is not required to enforce this contract and make the requisite payment to Lincoln – in this situation Porter becomes personally liable to Lincoln in respect of this payment (0-1.5 marks)

(d) **Audit Committee:** the main functions of such a Committee are as follows: (1) to ensure the integrity of the financial statements, (2) to monitor the company's internal financial controls and, where appropriate, the internal control and risk management systems of the company, (3) to monitor internal audit effectiveness, (4) to oversee the appointment, re-appointment, removal, remuneration and terms of engagement of the external auditor, (5) to ensure the external auditor's independence, and (6) to monitor the supply of non-audit services by the external auditors, in order to assess whether their independence and objectivity is being jeopardised (any 4 = 0-4 marks)

SOLUTION 3

(a) **Registration of an LTD:** to register an LTD a single document Constitution must be lodged with the Registrar of Companies, this document must contain the following information in accordance with Section 19 of the Companies Act 2014: (1) the company's name, (2) a statement that it is a private company limited by shares registered under Part 2 of the Companies Act 2014, (3) a statement that the liability of its members is limited, (4) a statement regarding its share capital, containing either: (a) the amount of share capital with which it proposes to be registered ("its authorised share capital"), and the division of that capital into shares of a fixed amount specified in the Constitution, or (b) without stating such amount, that the share capital of the company will, at the time of its registration, stand divided into shares of a fixed amount specified in the Constitution, (5) a statement of the number of shares (which shall not be less than one) taken by each subscriber to the Constitution, and (6) if the company adopts supplemental regulations, a copy of those regulations outlining the rules governing the internal management of the company (0-6 marks). In addition a number of statements must be submitted with the Constitution, including: (1) a statement of the address of the registered office of a company, (2) a statement outlining the name of each person who is to be the first director/s of the company, (3) a statement outlining the name of the person who is to be the first secretary of the company (or deputy secretary or first assistant, where appropriate), and (4) a statement of the place (whether in the State or not) where the central administration of the company will normally be carried on (any 3 = 0-3 marks). These statement must be accompanied by a declaration to the effect that: (1) all the requirements in respect of registration of the company and of matters precedent and incidental thereto have been complied with, (2) the purpose, or one of the purposes, for which the company is being formed is the carrying on by it of an activity in the State, and (3) a declaration confirming that the particulars contained in the statement are correct (any 2 = 0-2 marks).

(b) **Duties of a Promoter:** the main duties of a promoter are as follows – (1) fiduciary duty: this requires the promoter to act in good faith and in the best interests of the company. This duty also imposes a disclosure requirement in relation to personal gains, any secret profits etc, (2) statutory duties: this duty relates to substantial property transactions (which require approval), an obligation to disclose in a company prospectus all promoters preliminary expenses, as well as interests in contracts/transactions in the previous five years. In all circumstances the disclosure must be full, frank and clear – a partial disclosure is not sufficient, as per *Gluckstein v Barnes* (1900). The disclosure must also be to a fully convened Board of Directors or to all existing and potential members of the company. In this situation the Board must be an independent board (as per *Erlanger v New Sombrero Phosphate Co* (1878)) (0-4 marks).

Conclusion: in this situation Bennett has acted in breach of both his statutory and fiduciary duties, as he did not act in the best interest of Anatomy Graphics Ltd, but acted in his own interest by making a personal commission which he failed to disclose (secret profit). In the circumstances he may be required to account for this profit, indemnify the company against any potential losses arising from this contract, and he could also be exposed to a discretionary disqualification order as per Section 842 CA 2014 (0-2 marks).

(c) **Ratification of Pre-Incorporation Contracts:** Section 45 CA 2014 empowers a company to ratify pre-incorporation transactions and contracts entered into by persons acting on its behalf. Following incorporation, this ratification must take place at a general meeting of the company through the passing of a resolution of the members. Upon ratification, the company (Anatomy Graphics Ltd) is regarded as bound by the contract as if it had been in existence at the date the contract was entered into (0-2 marks). If Anatomy Graphics Ltd refuses to ratify the contract created by Bennett with the provider of the graphic design software then this transaction will be personally binding upon Bennett, as the promoter (0-1 mark).

SOLUTION 4

- (a) **Types of Liquidation:** the main distinction between a voluntary and compulsory liquidation, is that a compulsory liquidation is forced upon a company by the Court and an official liquidator is appointed by the Court to undertake this process – whereas in a voluntary liquidation the members and creditors (members only in an MVL, both in a CVL) pass a resolution to liquidate and appoint the liquidator to achieve this purpose (0-2 marks) – in this situation as Kitteridge Transport Ltd is insolvent they could have effected a creditors' voluntary liquidation, which is generally more expeditious and less costly than a compulsory liquidation – but as there is evidence of fraudulent activity by the company's directors a compulsory liquidation may be more appropriate, as the compulsory liquidator has the power to investigate the company and its officers (0-1 mark).
- (b) **Procedure for Compulsory Liquidation:** (1) This category of liquidation arises where the Court is petitioned to have a company compulsorily wound-up. (2) Only a limited number of persons have the right to petition the Court to have the company liquidated, and such a petition is only permitted when certain grounds are established. Those persons entitled to petition the Court for a compulsory wind-up under Section 571 CA 2014 are: (A) the company itself, (B) a company creditor with a present liquidated debt due and owing to him, (C) a contributory or a member (section 212), (D) the Director Of Corporate Law Enforcement (ODCE), on foot of a report by an inspector appointed by either the Court or the Directorate (section 569(1)(g)) or (E) the Registrar of Companies, where he is aware of irregularities in the conduct of the affairs of the company. (3) The petition to liquidate must be served on the company and advertised in whatever national and district newspapers that the Court directs. (4) A date will be set by the Court to consider the petition – when considering a petition the Court may consider the views of other parties, particularly creditors. (5) Having heard the petition the Court may dismiss it, adjourn it or make any other order as it sees fit, including a winding-up order. (6) The court will not make an order for the liquidation of a company unless it is satisfied that the company has no obligations in relation to a bank asset that has been transferred to the National Asset Management Agency or where it has such an asset that NAMA has been served with the petition and has been given the right to be heard. (7) If a winding-up order is made then an official liquidator is appointed and such order must be delivered to the Registrar of Companies (Section 591) and it must also be published in Iris Oifigiuil (0-7 marks).
- (c) **Ineligibility to act as a Company Liquidator:** the following persons are ineligible to act as a company liquidator: (1) a person who is, or who has within 24 months of the commencement of the winding up been, an officer or servant of the company, (2) except with the leave of the court, a parent, spouse, civil partner, brother, sister or child of an officer of the company, (3) a person who is a partner or in the employment of an officer or servant of the company, (4) a person who is an un-discharged bankrupt, (5) a person who is not qualified for appointment as a liquidator of any other body corporate which is that company's subsidiary or holding company or a subsidiary of that company's holding company, or would be so disqualified if the body corporate were a company, (6) a person subject to a Disqualification Order, or (7) a person who does not hold adequate Professional Indemnity Insurance (the terms and level of which may be prescribed from time to time by IAASA) (any 5 = 0-5 marks) – conclusion that Murray is eligible to accept this appointment as although he is related to a shareholder of the company, he has no connection to a company officer (0-1 mark).
- (d) **Unlawful Distribution:** This refers to a dividend payment made by a company that it should not have made – in this situation the payment is unlawful as the company artificially manipulated their accounts by not depreciating assets and deferring payments to creditors in order to show a profit (that was not real) upon which to declare a dividend (0-2 marks). In accordance with Section 122 where an unlawful distribution occurs then any member who has reasonable grounds to believe that it was unlawful may be liable to repay this money to the company – therefore Archer and Mitchell will be obliged to repay this amount, as they were aware (as directors of the company) that the distribution was unlawful – in relation to the other three shareholders – as they are not directors they are unlikely to be aware that the distribution was unlawful and consequently it is highly unlikely that they will be required to repay this dividend – in this situation Archer and Mitchell, as directors, will most probably be liable to repay this loss (0-2 marks).

SOLUTION 5

- (a) Role/responsibilities of nomination committee (8 marks)
- Membership (4 marks)
- Disclosure (3 marks)

There should be a nomination committee which should lead the process for board appointments and make recommendations to the board. A majority of members of the nomination committee should be independent non-executive directors. The chairman or an independent non-executive director should chair the committee, but the chairman should not chair the nomination committee when it is dealing with the appointment of a successor to the chairmanship.

The nomination committee should evaluate the balance of skills, experience, independence and knowledge on the board and, in the light of this evaluation, prepare a description of the role and capabilities required for a particular appointment. The independent and unbiased approach evidenced in the nomination and appointment process should lead to increased confidence in the selection of the most suitable candidate

A separate section of the annual report should describe the work of the nomination committee, including the process it has used in relation to board appointments. This section should include a description of the board's policy on diversity, including gender, any measurable objectives that it has set for implementing the policy, and progress on achieving the objectives. . Where an external search consultancy has been used, it should be identified in the annual report and a statement made as to whether it has any other connection with the company.

(15 marks)

- (b) Role and purpose of remuneration committee (7 marks)
- Long term sustainable business (2 marks)
- Membership (3 marks)
- Reporting (3 marks)

Executive directors' remuneration should be designed to promote the long-term success of the company. Performance-related elements should be transparent, stretching and rigorously applied. The remuneration committee should judge, with caution, where to position their company relative to other companies.

Levels of remuneration for non-executive directors should reflect the time commitment and responsibilities of the role. There should be a formal and transparent procedure for developing policy on executive remuneration and for fixing the remuneration packages of individual directors. No director should be involved in deciding his or her own remuneration

The board should establish a remuneration committee of at least three, or in the case of smaller company's two, independent non-executive directors. The remuneration committee should make available its terms of reference, explaining its role and the authority delegated to it by the board.

Where remuneration consultants are appointed, they should be identified in the annual report and a statement made as to whether they have any other connection with the company. The committee should also recommend and monitor the level and structure of remuneration for senior management.

FRC UK Corporate Governance Code 2016 (15 marks)

[Total: 30 marks]

SOLUTION 6

- (a) Role of ODCE 5 marks
- Activites - compliance 5 marks
 - enforcement 5 marks

The role of the ODCE is to improve the compliance environment for business activity in Ireland by encouraging adherence to the companies acts, and bringing those who disregard the law to account.

Compliance

To achieve this mission, the ODCE will try to improve public understanding of company law duties by raising standards of compliance, influencing policy development, issuing publications, carrying out consultations and discussions with stakeholders.

Enforcement

ODCE will conduct fact finding operations, undertake prosecutions, and supervision of liquidators and receivers. The office of ODCE will deal with complaints from creditors, stakeholders and the general public in response to the actions of directors of insolvent companies. The office is responsible regulation of undischarged bankrupts, civil litigation and criminal prosecutions.

(15 marks)

- (b) Meaning of institutional investor 3 marks
Characteristics 3 marks
Special relationship 4 marks
Reporting 5 marks

Institutional investors represent pension funds, unit trusts and life assurance companies. They are a highly financial literate investor group and are therefore a highly influential voter group who should be able to monitor management's behaviour more efficiently than a dispersed group of individual shareholders.

The role of the institutional investors may include monitoring and engaging with companies on matters such as strategy, performance, risk, capital structure, and corporate governance, including culture and remuneration. Engagement is a purposeful dialogue with companies on these matters as well as on issues that are the immediate subject of votes at general meetings. The aim is to enhance the quality of engagement between investors and companies to help improve long-term risk-adjusted returns to shareholders. Companies who want to understand the approach and expectations of their major shareholders will engage in a dialogue throughout the year.

The stewardship code recognises their position and requires the institutional investor to disclose their voting history, meetings and issues with the management of the organisation on the institutional investors' website

(15 marks)

[Total: 30 marks]