CPA IRELAND | CERTIFIED PUBLIC ACCOUNTANTS

CORPORATE LAWS & GOVERNANCE

PROFESSIONAL 1 EXAMINATION - APRIL 2015

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, if you provide answers to **both** Question 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, if 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

CORPORATE LAWS & GOVERNANCE

PROFESSIONAL 1 EXAMINATION - APRIL 2015

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. Foorley Foods Ltd. has been in financial difficulty since 2013. It has continued to trade with the assistance of an overdraft facility from Wexford Mutual Savings Bank, and a personal loan from one of the company's shareholders/directors. However, as a result of declining sales in early 2015 the company failed to make a debenture payment to one of its secured creditors, the Kilkenny Prudential Bank, and the bank appointed Dalton, as Receiver, to recover the debt. This debt was secured by a fixed charge upon the company's business premises and a floating charge against the company's stock. Upon his appointment Dalton realised that the floating charge was never registered with the Companies Registration Office. Following discussions with Foorley Foods Ltd., the Kilkenny Prudential Bank agreed to the removal of Dalton as Receiver, on condition that Foorley Foods effect a creditors' voluntary liquidation of the company. Gideon has been appointed by Foorley Foods as the company's voluntary liquidator.

Upon his appointment, Gideon has discovered that Foorley Foods Ltd. has the following debts:

(1) An overdraft with the Wexford Mutual Savings Bank in the amount of €125,000;
(2) A fixed charge in favour of Kilkenny Prudential Bank over the company's main business premises, created and registered in January 2000;
(3) A floating charge in favour of Kilkenny Prudential Bank secured on the company's stock, created in September 2014, but never registered;
(4) €80,000 arrears of unpaid salaries due to the company's three main executive directors in the previous 7 months;
(5) A personal loan in favour of Tripp, one of the company's shareholders/directors, secured by a floating charge in the amount of €90,000 created 18 months ago;
(6) €40,000 due to the Rowan Flour Company in respect of goods supplied under a retention of title clause;
(7) A fixed charge over the company's machinery in favour of Kettle Investments Ltd. in the amount of €35,000 created on 10 January 2015 and registered on 27 January; and a fixed charge over the company's machinery in favour of Fury Manufacturing Ltd. in the amount of €25,000 created on 7 January 2015 and registered on 28 January. However, the present resale value of the machinery is €51,000.

The liquidation will also create a redundancy obligation upon the company amounting to €134,000.

REQUIREMENT:

(a) Discuss the distinction between the role of a company Receiver and a company Liquidator, and review briefly the main steps required to effect a creditors' voluntary liquidation.

(5 marks)

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

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

(4 marks)

(d) Assess the facts relating to the aforementioned debt and advise on the priority of any payment that may be made.

(11 marks)

[Total: 25 marks]

2. Wyatt is the Business Development Manager of Margery Financial Consultants Ltd. The company, which is based in Dublin, has been considering expanding the business and opening a new office in Cork City. The two executive directors of Margery Financial Consultants Ltd. and Wyatt travelled to Cork to view a number of premises. They identified a premise in Kingvalley Business Park that would ideally suit their needs. However, they thought that the lease for the premises was overvalued and asked Wyatt to remain in Cork and negotiate on their behalf with the Landlord of this premises to secure a reduction in the cost of the lease by at least 10%. They informed the Landlord that Wyatt would contact him to engage in discussions regarding the lease. Consequently, Wyatt entered into discussions with the Landlord and after protracted negotiations managed to get the Landlord to agree a 13% reduction in the lease, subject to the lease being signed for a period of 5 years, and within 3 working days. Wyatt then attempted to contact the two executive directors of Margery Financial Consultants Ltd., but was unable to do so, as they were both attending a conference in South Africa and their phones kept going to voicemail. After unsuccessfully attempting to contact the executive directors by phone and email for two consecutive days Wyatt made an executive decision to sign the lease on behalf of the company. He told the landlord that he was the Business Development Director of Margery Financial Consultants Ltd. and that he had the authority to sign this lease.

Following their return from South Africa, the executive directors discovered what Wyatt had done. Wyatt explained that he had unsuccessfully endeavoured to contact them and that he was acting in the best interest of the company. He also commented that he had, on numerous occasions, represented himself as an executive director of the company to company clients, to their knowledge and with their implied consent. The executive directors of Margery Financial Consultants Ltd. were not happy with the actions of Wyatt, and specifically drew his attention to a clause in the Articles of Association of the Company which state that no contract can be created by an officer of the company binding the company to an agreement exceeding 3 years without the prior consent of the Board of Directors. Wyatt was aware of this clause, but believed that his actions were acceptable as he was acting in what he believed to be the best interests of the company.

Margery Financial Consultants Ltd. have now decided to challenge the enforceability of the lease on the Cork premises and have informed Wyatt that they are considering taking legal action against him for breach of his fiduciary duty in relation to this lease. Since hearing of these events Wyatt has decided to resign from the company.

REQUIREMENT:

(a) Assess whether Wyatt would be viewed as a company director, and if so, how he would be classified? Comment also on the potential ramifications for Wyatt if he is classified as a company director.

(4 marks)

(b) Evaluate whether the contract created by Wyatt for the lease of the Cork premises is enforceable against Margery Financial Consultants Ltd. by discussing the law in relation to corporate authority.

(6 marks)

(c) With reference to relevant case law, examine the fiduciary obligations imposed upon company directors to act within their powers, and determine whether Wyatt breached his fiduciary duty by signing this lease. In the event he did breach fiduciary duty, what are the potential consequences of any such breach.

(7 marks)

(d) State the action that should be taken by Wyatt to effect his lawful resignation from the company. (2 marks)

(e) In light of Wyatt's resignation, Margery Financial Consultants Ltd. has now decided to bring in a non-executive director to the company. In this regard, advise them on the eligibility requirements imposed upon company directors and discuss the various methods by which a person can be appointed to the position of a company director.

(6 marks)

[Total: 25 marks]

3. Bennett is employed as Garage Manager and Head Mechanic with Cabot Car Repairs Ltd., a nationwide company. He commenced employment in 2009 as a mechanic, and in his first six months of service he received two warnings from the company. The first, an oral warning, was in respect of failing to charge a client for some components provided as a part of a repair service, resulting in the company having to incur the loss, and the second, a written warning, was in respect of using the company's resources to service a friend's car, without charge. Following these incidents, there was a significant improvement in Bennett's employee performance, and in 2012, he was promoted to the position of Garage Manager and Head Mechanic. In this role, he had received positive performance reviews and his salary had been increased on numerous occasions to reflect these reviews.

Unfortunately, an incident arose at the Garage last week that has been brought to the attention of the company. Bennett was overseeing the repair of two cars owned by ABC Accountants. When one of the employees of ABC Accountants came to collect one of the cars owned by the firm's managing partner, Bennett inadvertently released the unrepaired car to him. When this employee was driving this car back to the office the brakes failed, causing a collision with another car, which resulted in the death of the employee driving and serious injuries to the driver of the other car. ABC Accountants have informed Cabot Car Repairs Ltd. that the police are now investigating the incident and that it is likely that criminal proceedings will be issued against the company. Furthermore, they have also advised them that civil proceedings arising out of personal injuries and fatal injuries are likely to be brought against the company.

Following receipt of this news, Cabot Car Repairs Ltd. called Bennett to a meeting, explained the situation and then informed him that they were dismissing him with immediate effect. Bennett protested that he was not being treated fairly in the circumstances, but Cabot Car Repairs Ltd. replied that as he had already received a prior oral and written warning that they were within their rights to terminate his employment contract.

Bennett has contacted you for advice regarding this matter and informs you that he is considering suing Cabot Car Repairs Ltd. for unfair dismissal.

REQUIREMENT:

(a) Discuss any ONE of the conditions required to be satisfied in order to be eligible to bring an action for unfair dismissal.

(2 marks)

(b) Analyse the various grounds that would be classified as amounting to the fair dismissal of an employee, pursuant to the Unfair Dismissals legislation.

(6 marks)

(c) With reference to relevant case law, evaluate critically the procedures that should be adopted to effect a fair dismissal of an employee. In light of this evaluation, determine whether fair procedures were applied by Cabot Car Repairs Ltd. in effecting Bennett's termination of employment.

(8 marks)

(d) Assuming that fair procedures were applied by Cabot Car Repairs Ltd., state whether Bennett's action in releasing an unrepaired car would be classified as grounds for a fair dismissal, and if not, the remedies available to him under the Unfair Dismissals legislation.

(4 marks)

[Total: 20 marks]

OR

4. Hudson and Ryder have operated a business partnership, organising corporate events, since 2010. In the last year, due to the continued expansion of the business and the need to bring new investors into the business they have decided to convert the business partnership into a company. Hudson and Ryder both agreed that they would take responsibility for the formation of the company.

The partnership's main fixed asset was its business premises, which was sold to the company as part of the conversion. This asset was purchased by Hudson and Ryder in 2010 for €1.2m, but has since appreciated in value and is now worth €1.6m. Hudson and Ryder sold this asset to the company for €1.7m and personally retained the profit on this transaction. In addition, prior to the actual incorporation of the company, Ryder entered into a contract with Fielding Financial Investments to draft a prospectus regarding the proposed company in order to attract investors into the business. Ryder then agreed that the company would pay Fielding Financial Investments a finder's fee of 1% for every investor it brought into the business.

Upon incorporation, the company was named H&R Event Planners Ltd. Based on the Fielding Financial Investments prospectus, Dylan bought €500,000 worth of shares in this company. Unfortunately, Dylan has since discovered that Fielding Financial Investments were paid a €5,000 finder's fee arising from his investment and that Fielding Financial Investments is in fact owned by Ryder's father, Wilson. Dylan has also discovered that the business premises was overvalued by €100,000 and is considering challenging the actions of Hudson and Ryder on the basis of their breach of duties to the company.

REQUIREMENT:

(a) Appraise the role of both Hudson and Ryder in relation to effecting the formation of H&R Event Planners Ltd. and evaluate critically the duties owed by them in relation to the performance of this role.

(6 marks)

(b) Assess the nature of the contract created by Ryder on behalf of H&R Event Planners Ltd. with Fielding Financial Investments, commenting specifically on the enforceability or otherwise of these classifications of contract.

(4 marks)

(c) Review whether the actions of Hudson and Ryder in relation to the sale of the business premises and the finder's fee contract with Fielding Financial Investments amount to a breach of duties, and the consequences of any such breach.

(3 marks)

(d) Define a prospectus, and discuss the obligatory content of a company prospectus by virtue of Part I of the Third Schedule to the Companies Act 1963.

(5 marks)

(e) Upon incorporation, H&R Event Planners Ltd. received a Certificate of Incorporation from the Companies Registration Office. Outline to Dylan the importance of this document and the information contained within it.

(2 marks)

[Total: 20 marks]

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

5. The Institute of Risk Management (IRM) in London has made the following statements about risk and risk management.

IRM defines risk as:

"The combination of the probability of an event and its consequence. Consequences can range from positive to negative. All organisations have objectives at strategic, tactical and operational levels - anything that makes achieving these objectives uncertain is a risk. As our world becomes increasingly volatile and unpredictable, we must cope with greater uncertainty."

IRM defines risk management as:

"The systematic process of understanding, evaluating and addressing these risks to maximise the chances of objectives being achieved and ensuring organisations, individuals and communities are sustainable. Risk management also exploits the opportunities uncertainty brings, allowing organisations to be aware of new possibilities. Essentially, effective risk management requires an informed understanding of relevant risks, an assessment of their relative priority and a rigorous approach to monitoring and controlling them."

(www.theirm.org)

REQUIREMENT:

With reference to the above quotations:

(a) Discuss the board's responsibilities with regard to risk management and internal control as set out in the UK Corporate Governance Code.

(8 marks)

(b) Evaluate the characteristics of an effective risk management system that would address the key issues to which the IRM quotations, above, draws attention.

(22 marks)

[Total: 30 marks]

<u>OR</u>

6. As a new recruit to the Finance Department of XYZ plc, you have been tasked to provide materials that will be incorporated into a director induction pack for new board members.

REQUIREMENT:

To complete this task, you have been asked to prepare a briefing note that:

(a) Discusses the different legal categories of director in Ireland, as set out in the Office of the Director of Corporate Enforcement (ODCE) publication 'The Principal Duties and Powers of Company Directors'.

(10 marks)

(b) Evaluates critically a board's responsibilities for the fair, balanced and understandable presentation of the company's position and prospects in company reports, as set out in the UK Corporate Governance Code.

(20 marks)

[Total: 30 marks]

END OF PAPER

CORPORATE LAWS & GOVERNANCE

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SOLUTION 1

(a) **Distinction Between Receivership and Liquidation:** the objective of Receivership is to allow the debenture holder to appoint a Receiver to take possession of and sell the charged asset and to use this money to repay the debenture holder monies due, whereas the objective of Liquidation is to allow the Liquidator to take possession of all of the assets of the company, to sell them and to use this money to repay the debts of the company in the order of priority.

(0-2 marks)

Creditors Voluntary Liquidation: In accordance with Section 265-268 of the Companies Act 1963 (1) this is where a company is insolvent and the members of the company pass a resolution to liquidate the company, (2) the company must then call a meeting with the creditors within 10 days of the resolution being passed to commence a creditors' voluntary winding up, and (3) at this meeting the directors present a statement of affairs and a vote is then taken by the creditors to agree to a creditors voluntary liquidation, and a liquidator will be appointed.

(0-3 marks)

(b) **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)

(c) **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)

(d) **Priority of Payments on Liquidation:**

(1) The €40,000 due to the Rowan Flour Company in respect of goods 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) Debentures secured by fixed charges (these are paid in order of creation, provided they are registered within 21 days – therefore, payments are as follows: (a) the fixed charge in favour of Kilkenny Prudential Bank, (b) the charge in favour of Fury Manufacturing Ltd in the amount of €25,000, and (c) the fixed charge in favour of Kettle Investments Ltd in the amount of €26,000 (the balance of €9,000 arising as a consequence of the lack of equity in the asset ranks as unsecured debt).

(0-3 marks)

(3) Preferential debts (Revenue, Local Authority, employee salaries (accrued but unpaid in the last 4 months) and untaken leave) – these include (a) a sum equivalent to the last 4 months arrears of unpaid salaries due to the company's executive directors, and (b) the redundancy obligation upon the company in the amount of €134,000.

(0-2 marks)

(4) Debentures secured by floating charges (in order of creation and provided they are registered) – this means that the personal loan in favour of Tripp should be paid next – provided there is evidence that the company was solvent at the point this charge was created – otherwise, as this charge is in favour of a connected person, one of the company's shareholders/directors, and it was created within 2 years of liquidation, Section 288 CA 63 allows the floating charge to be avoided and the debt to rank as an unsecured debt.

(0-2 marks)

(5) Unsecured creditors – these include (a) a sum equivalent to 3 months arrears of unpaid salaries due to the company's executive directors, (b) the balance of €9,000 to Kettle Investments Ltd arising as a consequence of the lack of equity in the asset ranks as unsecured debt, (c) the overdraft with the Wexford Mutual Savings Bank in the amount of €125,000, and (d) the unregistered floating charge in favour of Kilkenny Prudential Bank.

(0-3 marks)

SOLUTION 2

(a) **Classifications of Director:** Wyatt is likely to be viewed as a director and classified as a de facto director. This is a director who is not formally appointed as a director, but acts as having undertaken the role of a director (as in the case of Wyatt). De Facto directors were defined in the cases of Re Lynrowan Enterprises Ltd. [2002] and in Re Hydrodam (Corby) Ltd. [1994]. In reality a de facto director is a person who is 'held out' by the company as a director even though he has not been officially appointed as a de jure director and in the event of a breach he will be liable as if they were properly appointed.

(0-4 marks)

(b) **Validity of the Contract/Corporate authority:** The key issue in this question relates to whether Wyatt had the authority to create a contract for the lease of the Cork premises on behalf of Maguire Financial Consultants Ltd. Generally a third party is entitled to assume that either a de facto director or Business Development Manager has actual authority to create a contract on behalf of the company, either express or implied. Even if he acted outside the scope of his authority then 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."*

(0-4.5 marks).

Conclusion: Therefore the lease on the Cork premises is enforceable by the Landlord against Maguire Financial Consultants Ltd.

(0-1.5 marks)

(c) **Fiduciary Duties:** One of the core fiduciary duties of a company director requires them to act within the parameters of their powers – in effect this means that they will not be deemed to be acting bona fide if they use their powers for some ulterior or collateral purpose. Accordingly, they should not: (1) engage in illegal transactions – such as arose in Cockburn v Newbridge Sanitary Steam Laundry Company Ltd (1915) by the Managing Director of the Company paying bribes to personnel in the war office in order to secure contracts for the company, (2) engage in ultra-vires actions – such as arose in Re Lee Behrens & Company (1932) – by the payment of an ultra-vires gift of a pension to the widow of a former director that conferred no benefit to the company as a whole, and (3) where the company's own Articles of Association place a limitation on the powers of directors, any action in contravention of the Article's will automatically amount to a breach of fiduciary duties. In Royal British Bank v Turquand (1856) the Directors borrowed in excess of the amount authorised by the Articles of Association, without the required approval of the shareholders, and were held personally liable for the loan arising from the fiduciary breach. Similarly, in Boschoek Pty Company Ltd v Fuke (1906) a contravention of the Articles regarding Directors fees could not be ratified by unanimously passing an ordinary resolution of approval, as the actions of the directors were in breach of their fiduciary duties.

(0-5 marks)

Conclusion: Wyatt breached his fiduciary duty by signing this lease as he acted in breach of the limitation contained in the Articles and therefore could not be regarded as acting in good faith and the best interests of the company (0-1 mark). The potential consequences of this breach include: (1) damages, (2) account for profits (where relevant), and (3) the potential imposition of a disqualification order.

(0-2 marks)

(d) **Resignation of a Company Director:** This can be effected by Wyatt providing notice in writing to the company of the fact of his resignation or by not offering himself for re-election (where retirement by rotation arises). When this occurs the remaining directors must notify the CRO and complete the requisite documentation (Form B10).

(0-2 marks)

(e) **Eligibility:** Although no formal qualifications attach to the position of director, the Companies Act 1963, and its subsequent amendments, prohibits the following people from acting as company directors: (1) un-discharged bankrupts, (2) corporate bodies, (3) the auditor of a company or its holding company, (4) a restricted person under the Companies Act 1990, or (5) a disqualified person under the Companies Act 1990.

(any 3 = 0-2 marks)

Appointment: This can arise by a variety of methods – (1) Form A1 or the Articles of Association can be used upon incorporation to state the names of the first directors of a company, (2) thereafter all subsequent appointments are governed by Articles of Association, which provides that appointment is made by an ordinary resolution of the shareholders at a general meeting on an individual basis, (3) an appointment may also arise following a retirement by rotation process provided the person is eligible for re-election, and wishes to be re-appointed, and (4) the Board of Directors can also appoint a person to act as a director – where a casual vacancy arises – but at the next AGM this person must resign and if they desire/are eligible they can ask the shareholders for re-election.

(any 2 = 0-4 marks)

SOLUTION 3

(a) **Prerequisites to claim Unfair Dismissal:** (1) The worker must be an employee – whether full-time, part-time, permanent, fixed term or specific purpose (and irrespective of the number of hours worked) employed under a contract of service, and (2) at the date of dismissal, the employee must have at least one year's continuous service with the employer. There are three exceptions to this service requirement obligation, namely where an employee is dismissed as a consequence of: (a) pregnancy related matters, (b) trade union activity or (c) the exercise or attempted exercise of their rights under protective legislation.

(any one = 0-2 marks)

(b) **Fair Dismissal Grounds:** In accordance with Section 6(4) of the Unfair Dismissals Act 1977-2007, as amended the following are grounds that will generally be classified as fair reasons for dismissal:

(1) lack of competence/capability and/or qualifications: competence relates to intellectual ability to complete the work, capability relates to mental and physical ability to perform the required tasks and qualifications relate to either academic, professional, technical, occupational or other qualifications – for example, a haulage driver who loses his driving licence as a consequence of drink driving may be dismissed for lack of suitable qualifications – in Moriarty v Greenes (Falcarragh) Ltd (1983) a dismissal for gross incompetence was deemed fair.

(0-2 marks)

(2) employee misconduct – an act of gross misconduct (such as criminal activity) may justify a summary dismissal – acts of continuous misconduct (such as absenteeism/tardiness etc) should result in a warning and ultimately dismissal if the behaviour continues, acts of isolated misconduct (not gross) should only warrant a warning and not dismissal – for example, in Burtchaell v Premier Recruitment International t/a Premier Group (2002) the breach by an employee of a known internet/email usage policy was classified as a fair ground for dismissal.

(0-1.5 marks)

(3) redundancy – this arises where the position no longer exists (downsizing, relocation, re-structuring etc) or the company no longer exists – subject to the redundancy being genuine and the selection being fair – in Davis v Blarney Woollen Mills (2009) a dismissal arising from redundancy was classified as unfair as the employee was selected as a result of a personality clash with his former boss, and not independent selection grounds, and

(0-1.5 marks)

(4) where continued employment would result in contravention of the law – this arose in Ponnampalam v Mid Western Health Board (1979) where the plaintiff, an Indian qualified doctor who failed to produce a Certificate of Sanction from the Hospital Board in accordance with the Health Act 1970, was deemed to be fairly dismissed.

(0-1 mark)

(c) **Fair Procedures when Dismissing an Employee:** These include the following: (1) the employee has the right to know the reasons for the proposed dismissal, (2) the employee should be given an opportunity to reply to those reasons, and have that reply and any other arguments or submissions listened to and evaluated before a decision is taken to dismiss them, (3) the employee has the right to be represented by an appropriate person so that the right to reply is real. Historically, an employer could preclude an employee from bringing a legal representative, but Burnsand Hartigan v Governor of Castlerea Prison (2005) challenged this position, (4) the employee has the right to an impartial hearing – with no bias or pre-judgment, (5) the penalty imposed must be proportionate to the gravity of the employees breach, and (6) the employee has the right of appeal. In Wilo Pumps and SIPTU (CD/05/172) the Labour Court found that dismissal was too severe a sanction for clocking violations where the individuals were either absent from the company premises while clocked in, and then clocked out by other employees or were involved in the clocking out of their colleagues. Similarly, in Teeling v Petrogas Group Ltd (2003) the dismissal of an employee for a minor act of misconduct, without warning, representation or knowledge that she was attending a disciplinary meeting at which her dismissal was being considered, and without the right of appeal was ruled as unfair. In Kelly v Dundalk FC (2010) the Employment Appeals Tribunal came to the conclusion that the club's dismissal of the claimant was unfair as they had *"failed to implement any fair procedure in dismissing the claimant ... the respondent had not given the claimant any relevant contract of employment [and] the claimant was dismissed by reason of the ending of the personal relationship between her and one of the directors."*

(procedures = 0-4 marks, case law = 0-3 marks)

Conclusion: Cabot Car Repairs Ltd did not apply fair procedures in effecting Wyatt's termination – he received no notice of the disciplinary meeting, was not informed of his right of representation, given an opportunity to defend himself or appeal the decision to dismiss him.

(0-1 mark)

(d) **Fair Dismissal Conclusion:** Wyatt's action in releasing an unrepaired car would be classified as grounds for a fair dismissal, as it may be seen as an act of gross misconduct that exposed Cabot Car Repairs Ltd to significant civil liability, as well as potential criminal liability – however, the prior oral and written warning are not relevant in making this determination, as they should now be expunged from his employment record, given that they arose in 2009/2010.

(0-1 mark)

Remedies available for Unfair Dismissal include: (1) reinstatement, to their former position on the same terms, with no break in the contract of employment, (2) re-engagement to a suitable alternative position, on such terms as the adjudication body deems appropriate, and (3) financial compensation, where there exists financial loss up to a maximum 104 week's salary, where there is no financial loss a maximum of 4 week's salary.

(0-3 marks)

SOLUTION 4

(a) **Promoters:** Both Hudson and Ryder will be classified as company promoters – this role was defined by the Courts (Twycross v Grant (1877)) as *"… one who undertakes to form a company with reference to a given project and to set it going, and who takes the necessary steps to accomplish that purpose".*

(0-1.5 marks)

Duties of a Promoter: (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 an independent valuation), 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 (Erlanger v New Sombrero Phosphate Co (1878)).

(0-4.5 marks)

(b) **Pre-Incorporation Contracts:** The contract created by Ryder on behalf of H&R Event Planners Ltd with Fielding Financial Investments is likely to be classed as a pre-incorporation contract. These are contracts created prior to the incorporation of the company. These contracts are only binding upon the company, when ratified. However, ratification problems exist based on an application of the rules of agency, as these contracts are entered into by an agent on behalf of a principal at a time when the principal does not legally exist (this arose in Kelner v Baxter (1866)). Section 37(1) CA 63 rectified this problem by empowering the company to ratify these contracts (as well as the liquidator if the company is liquidated prior to ratification). In this regard when ratification occurs then the ratification is then retrospective. In addition, the contract must be totally ratified – partial ratification is not possible. Where there is no ratification of these contracts then the promoter is deemed personally liable.

(0-4 marks)

(c) **Conclusion:** The actions of Hudson and Ryder in relation to the sale of the business premises amount to a breach of fiduciary duties, as they failed to disclose that they were making a personal profit of €100,000 on foot of the transfer of their partnership property to the company. In addition, the finder's fee contract with Fielding Financial Investments also amount to a breach of duties by Ryder – as he failed to disclose a conflict of interest and therefore is unlikely to be deemed to have been acting in the best interests of the company.

(0-1.5 marks)

Consequences of a Breach: Where a breach of duty arises the company may seek the possible (1) rescission of the contracts created by the promoter, (2) the repayment/account of profits made by the promoter, or (3) make a claim for damages against the promoter. A possible disqualification order may also be imposed.

(0-1.5 marks)

(d) **Prospectus:** This can be defined as "any prospectus, notice, circular, advertisement or other invitation, offering to the public for subscription or purchase any shares or debentures in the company" as per Section 2(1) CA 63.

(0-1.5 marks)

Contents of the prospectus: These include: (1) details of the share and loan capital of the company, (2) details of the company directors, including information as to their remuneration and any interests they hold in the company's shares, (3) details of the promoters and auditors of the company, (4) details of the property acquired, or to be acquired, from the proceeds of the issue, and (5) a report by the auditors of the profits and losses of the company, and its subsidiaries in the preceding five years, together with a statement of the assets and liabilities in the latest accounts.

(0-3.5 marks)

(e) **Certificate of Incorporation:** This document is classified as the birth certificate of the company and in accordance with Section 19(1) CA 63 it is viewed as conclusive evidence that all of the formalities of registration have been complied with, and that the company exists as a separate legal entity (0-1 mark). This Certificate of Incorporation contains the following information: (1) the name of the company, (2) the date of incorporation, and (3) the company's registered number.

(any 2 = 0-1 mark)

SECTION B

SOLUTION 5

(a) Indicator solution to this part of the question could encompass the following issues:

The UKCG Code stipulates the responsibility of the board for:

- determining the nature and extent of risk appetite;
- the significant risks it is willing to take in achieving its strategic objectives;
- conducting an annual review of the effectiveness of the company's risk management and internal control systems; and
- reporting to shareholders that they have done so, this report covering all material controls, including financial, operational and compliance controls.

[UKCG Code, 2012]

(8 marks)

(b) Indicator solution to this part of the question could encompass the following issues:

Reponses to this part of the question could encompass the characteristics of an effective risk management system such as those set out by the Committee of Sponsoring Organizations (COSO) of the Treadway Commission in their Enterprise Risk Management model, an Integrated Framework. Other risk management systems could be utilised, so long as they covered the core characteristics COSO identifies, these being:

- 'Internal Environment – The internal environment encompasses the tone of an organization, and sets the basis for how risk is viewed and addressed by an entity's people, including risk management philosophy and risk appetite, integrity and ethical values, and the environment in which they operate;
- Objective setting – Objectives must exist before management can identify potential events affecting their achievement. Enterprise risk management ensures that management has in place a process to set objectives and that the chosen objectives support and align with the entity's mission and are consistent with its risk appetite;
- Event Identification – Internal and external events affecting achievement of an entity's objectives must be identified, distinguishing between risks and opportunities. Opportunities are channelled back to management's strategy or objective-setting processes;
- Risk Assessment – Risks are analysed, considering likelihood and impact, as a basis for determining how they should be managed. Risks are assessed on an inherent and a residual basis;
- Risk Response – Management selects risk responses – avoiding, accepting, reducing, or sharing risk – developing a set of actions to align risks with the entity's risk tolerances and risk appetite;
- Control Activities – Policies and procedures are established and implemented to help ensure the risk responses are effectively carried out;
- Information and Communication – Relevant information is identified, captured, and communicated in a form and timeframe that enable people to carry out their responsibilities. Effective communication also occurs in a broader sense, flowing down, across, and up the entity; and
- Monitoring – The entirety of enterprise risk management is monitored and modifications made as necessary. Monitoring is accomplished through ongoing management activities, separate evaluations, or both.'

Moreover, the contextual circumstances for the operational effectiveness of a risk management system such as that advocated by COSO could be incorporated into responses to maximise performance, e.g. demonstration of an awareness that risk management is: an ongoing process; influenced by people throughout the organisation; related to the development of strategy; affecting all aspects of an organisation's functioning, and across all levels; forward looking to identify future events; a framework that provides an evidence base for assuring decisions around the effectiveness of governance and control systems; and an integrated approach that does not lead to 'silo' thinking around risk management, emphasising the interconnected nature of the subject.

(22 marks)

[TOTAL: 30 marks]

SOLUTION 6

(a) Indicator solution to this part of the question could encompass the following issues:

Response to draw from source ODCE Decision Notice 'The Principal Duties and Powers of Company Directors', detail of which is laid out below (ODCE, 2011):

Shadow Directors
In addition to those who are formally appointed as directors, any person, other than a professional adviser, with whose instructions the directors of the company normally comply is a 'shadow director'. In other words, where a person who is not a director exerts such an influence over the company's directors that those directors are accustomed to acting in accordance with that person's instructions, that person is a shadow director. The significance of being a shadow director is that a shadow director has many of the legal responsibilities of a director;

Alternate Directors
The Table A standard form articles make provision for 'alternate directors'. Alternate directors are persons who are nominated by a director to act in their absence. An alternate director can only be appointed with the agreement of a majority of the directors;

De Facto Directors
A 'de facto director' is a person who has not been validly appointed or who is disqualified but who in effect occupies the position of, and acts as if he were, a director. Such persons, although they may not have been validly appointed, also come within the ambit of section 2(1) of the 1963 Act.

In practice company directors are generally categorised as either being 'executive directors' or 'non-executive directors'. However, it is important to note that these are not legal classifications but rather are distinctions drawn under corporate governance best practice. Regardless of whether an individual is an executive or non-executive director, they have exactly the same legal responsibilities;

Executive Directors
Executive directors are directors of the company who are involved in the day to day management of the company. As these individuals are involved in the management of the company they may, in practice, have specific titles within the company, for example, managing director, finance director, marketing director etc.; and

Non-Executive Directors
Non-executive directors are not involved in the day to day management of the company and are appointed from outside the company. The rationale behind appointing non-executive directors is that, as they are not involved in the day to day management of the company, they can bring an independent voice and perspective to the board. It should be noted that for most companies there is no legal obligation to appoint non-executive directors. However, certain companies i.e. companies listed on the Stock Exchange are required to comply with codes of corporate governance best practice which do require the presence of non-executive directors on the board.'

(10 marks)

(b) Indicator solution to this part of the question could encompass the following issues:

The UKCG Code stipulates the responsibility of the board for:

- Presenting a fair, balanced and understandable assessment that extends to interim and other price-sensitive public reports and reports to regulators as well as to information required to be presented by statutory requirements;

- Establishing arrangements that will enable it to ensure that the information presented is fair, balanced and understandable;

- Explaining in the annual report their responsibility for preparing the annual report and accounts, and state that they consider the annual report and accounts, taken as a whole, is fair, balanced and understandable and provides the information necessary for shareholders to assess the company's performance, business model and strategy, there further being a statement by the auditor about their reporting responsibilities;

- An explanation in the annual report of the basis on which the company generates or preserves value over the longer term (the business model) and the strategy for delivering the objectives of the company; and

- Reporting in annual and half-yearly financial statements that the business is a going concern, with supporting assumptions or qualifications as necessary.

Reponses to this question might also usefully employ some of the techniques suggested in the Financial Reporting Council report ‘Towards Clear and Concise Reporting’ (2014), including:

- ‘Thinking about communication channels
  - o Targeting reports to match users’ needs
  - o Sending standalone strategic reports to shareholders

- Thinking about content
  - o Reporting on actions rather than just process
  - o Focusing on the level of sustainability reporting
  - o Removing standing information
  - o Changing the placement of five year financial summaries
  - o Reducing shareholder information
  - o Tailoring directors’ biographies
  - o Reducing the detail presented in the financial review

- Thinking about materiality
  - o Reviewing elements which are no longer relevant
  - o Removing elements which are no longer required
  - o Improving the quality of accounting policy disclosures
  - o Removing immaterial notes to the financial statements

- Thinking about layout
  - o Making effective use of the chairman’s, chief executive’s and finance director’s reports
  - o Using layout, cross-referencing and signposting
  - o Letting tables speak for themselves’

(20 marks)

[TOTAL: 30 marks]