CPA IRELAND | CERTIFIED PUBLIC ACCOUNTANTS

CORPORATE LAWS & GOVERNANCE

PROFESSIONAL 1 EXAMINATION - APRIL 2016

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** 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, 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. Carrow and Rook Plc was incorporated in 1987 with the objective of opening and operating a variety of boutique hotels around Ireland. The main shareholders and directors of the company are all part of the same family, and although the company is a public limited company it is run as a family based business and has never obtained a Stock Exchange listing. The business has grown significantly since its incorporation and by the start of 2016 there were 18 hotels within the group. Lennon is one of the directors of Carrow and Rook Plc, and holds 20% of the issued share capital in the company. He is nearing retirement age and wants to sell his shares in Carrow and Rook Plc in order to fund his retirement. He has been approached by an international hotel chain which offered to purchase his shares, but has decided to give the other shareholders the right of first refusal to purchase his shareholding. Following this, the directors of Carrow and Rook Plc called a meeting with the company's accountant to discuss their options. The accountant advised them that the Articles of the company provide a lien over the partly paid shares of the company. She instructed them to make a call for payment due on all partly paid shares issued by the company. She further advised to use this money, as well as retained profit, to buy out Lennon's shares and to then effect a reduction of the issued capital. She also recommended that the status of the company be altered to a designated activity company, as the family had no intention of obtaining a listing on any Stock Exchange and wanted to ensure that the shares of the company would not be sold to any third party.

The directors of Carrow and Rook Plc have contacted you for advice regarding these matters.

REQUIREMENT:

(a) Advise Carrow and Rook Plc as to the main option available to them if a shareholder fails to meet a call for payment on foot of a partly paid share. Clearly explain in your advice what a 'lien on' shares is.

(5 marks)

(b) Critically assess the various methods by which a company can effect a reduction of its capital and the procedure that must be adopted by Carrow and Rook Plc (as a public limited company) to effect a lawful reduction of its issued share capital in accordance with the Companies Act 2014.

Note: a discussion of the method used by an LTD (summary approval procedure) to reduce its capital is NOT required.

(8 marks)

(c) In addition to effecting a lawful reduction of capital, analyse any FOUR other situations in which a company is permitted to lawfully purchase its own shares.

(6 marks)

(d) Define a designated activity company and evaluate the main features of this business form. (6 marks)

[Total: 25 marks]

2. Devon is a director of Landon Executive Travel Ltd, a company that provides private jet charters. Business has been booming in recent years and the company has been considering leasing two new jets. At a recent directors' meeting, the expansion of the fleet was discussed and Devon was tasked with obtaining quotations for the cost of leasing these jets from a variety of companies. At a subsequent meeting, Devon reported back to the Board. She explained that following extensive research she had narrowed the options down to two competing companies, and that she was throwing her support behind Kitteridge Aeronautical Ltd, because of its track record within the industry for the quality of its jets and maintenance record. The directors decided to enter into a leasing agreement with this company, and contracts were signed to this effect. Although the Constitution of Landon Executive Travel Ltd states that shareholder approval is required for any individual contract valued in excess of €1 million and despite the fact that the lease agreement with Kitteridge Aeronautical Ltd exceeded this amount, no such meeting took place and no approval was obtained.

In the last month, it has come to the attention of Landon Executive Travel Ltd that other companies, also with excellent track records in the industry, could have provided the jets at a lower cost. Upon investigation it has been discovered that Devon is in fact a shareholder and director in Kitteridge Aeronautical Ltd and that her son is also a director in this company. Devon failed to disclose this information to the company secretary when she submitted information to be included in the Register of Directors.

Landon Executive Travel Ltd is now considering challenging the validity of this contract and removing Devon from her position as director, arising from her breach of duties.

REQUIREMENT:

(a) Critically assess the validity or otherwise of the contract created between Landon Executive Travel Ltd and Kitteridge Aeronautical Ltd, and advise Landon Executive Travel Ltd whether the company can legally repudiate this contract.

(9 marks)

(b) With reference to the Companies Act 2014, critically examine the statutory obligation imposed upon directors where they have an interest in company contracts and advise Devon on the penalties she may be exposed to for breach of this provision.

Note: A discussion of statutory fiduciary duties is NOT required. (6 marks)

(c) Analyse the procedure that should be adopted by Landon Executive Travel Ltd to effect the lawful removal of Devon as company director, commenting specifically on the rights of Devon in relation to her potential removal.

(5 marks)

(d) Outline the consequences for Devon of her failure to disclose her non-executive directorship in Kitteridge Aeronautical Ltd to the company secretary of Landon Executive Travel Ltd for the purpose of maintaining the Register of Directors.

(2 marks)

(e) In addition to details of directorships in other companies, outline the FOUR other pieces of information contained in the Register of Directors, and state the time period within which the company secretary is obliged to disclose changes in this Register to the Registrar of Companies.

(3 marks)

[Total: 25 marks]

3. Dale is a qualified CPA who has previously been employed in the financial services sector. In 2007, he was recruited to work for a firm of Munster-based estate agents, Paddington Estates, as a mortgage broker to assist potential purchasers obtain credit finance to purchase residential properties. His contract stated that he was employed under a contract for services and the agreement between himself and Paddington Estates was that he would be paid on a commission basis for every mortgage he helped to secure. Dale submits invoices on a monthly basis and has always been responsible for his own tax affairs and he is also featured on the Paddington Estates website and in their brochure as its mortgage consultant. He has been provided with Paddington Estates business cards indicating his Paddington Estates email address and his personal phone number where he can be contacted. He does not have a designated desk in any of the Paddington Estates offices, but is allowed to use all of its facilities and meeting rooms in order to meet with potential clients. Dale's contract with Paddington Estates does not prohibit him from working with other businesses and he has a number of personal clients for whom he acts as a financial adviser, completely separate to his work with Paddington Estates. Every financial quarter there is a business development meeting, followed by lunch and drinks for all staff of Paddington Estates and Dale is required to attend this meeting.

Last month, Dale was called to a meeting with the CEO of Paddington Estates and notified that the business had just been placed in insolvent liquidation and that all offices were closing. Consequently his contract was being terminated with immediate effect. When Dale queried his entitlements on the termination of his contract, the CEO informed him that Paddington Estates had no obligations to him as he was employed as a contractor and not as an employee.

Dale has contacted you for advice regarding this matter as he is unsure of the importance of the distinction and how the Courts are likely to classify his working relationship with Paddington Estates.

REQUIREMENT:

(a) Review the importance of the distinction between being employed under a contract of service and a contract for services under any TWO relevant headings.

(4 marks)

(b) Critically review any THREE tests used by the Courts to make this distinction, using case law to support your answer. In light of this review, determine whether Dale is likely to be classed as being employed under a contract of service or a contract for services in this situation.

(12 marks)

(c) Irrespective of your answer to (b) above, in the event of Dale been classed as an employee, advise him of any TWO specific rights or entitlements that arise upon the termination of his contract of employment.

(4 marks)

[Total: 20 marks]

OR

4. Legacy Costume Designers Ltd has been in financial difficulty in recent years. Last month the company lost a contract with one of its main clients, a national theatre company, and as a consequence the company accountant has notified the directors of the company that it is now insolvent. As a result, the directors have decided to effect a creditors' voluntary liquidation of the company. To achieve this, the company's secretary requisitioned a general meeting of the company in order to pass a resolution to liquidate. This meeting was scheduled to take place in a local hotel. Unfortunately, minutes after the meeting commenced (and at a time when the meeting was not yet quorate) part of the roof of the hotel collapsed due to storm conditions and heavy rainfall and water began pouring into the room. As a consequence of this, the chairperson, Tanner, adjourned the meeting and rescheduled it for the next day at an alternative venue.

Stafford is one of the shareholders of Legacy Costume Designers Ltd and was in attendance at the meeting that was adjourned. Due to previous commitments he was not in a position to attend the rescheduled meeting and was unable to appoint a 'proxy' due to a lack of time between the adjourned and rescheduled meeting. He spoke with a variety of other shareholders who were also in a similar position.

At the rescheduled meeting the quorum was not present and Tanner, as chairperson, spoke with the directors about cancelling the meeting and postponing it to a later date. The directors were reluctant to do this as they were anxious that they could be deemed liable for reckless trading if they allowed the company to continue to trade while insolvent. So, despite the lack of a quorum, they instructed Tanner to proceed with the meeting and a resolution was passed by the members present to effect the liquidation of the company. Tanner is unsure of the validity of this resolution – given that the meeting at which it was passed was not quorate. Tanner has approached you to discuss this and other matters relating to the liquidation.

REQUIREMENT:

(a) Evaluate the rules regarding adjournment of meetings, and advise Tanner as to whether his actions in this regard are in accordance with the Companies Act 2014.

(6 marks)

(b) Examine the rules regarding quorums and meetings and, based on this, assess the validity or otherwise of the resolution passed to effect the liquidation of the company, should Stafford or any other shareholder of the company challenge it on the grounds that the rescheduled meeting was not quorate.

(6 marks)

(c) Following the passing of a resolution to liquidate by the members, analyse the procedure that should be adopted to effect a creditors' voluntary liquidation of Legacy Costume Designers Ltd.

(4 marks)

(d) Discuss the eligibility requirements to act as a company liquidator, pursuant to the provisions of the Companies Act 2014.

(4 marks)

[Total: 20 marks]

SECTION B
Answer One Question Only from either Question 5 or 6.

5. *"Executive compensation has become a major issue in corporate governance. The explosive increase in executive compensation, especially with respect to share-based compensation, has attracted considerable public scrutiny"*
Kumar, A., Zattoni, A. (2016) *"Executive Compensation, Board Functioning and Corporate Governance",* Corporate Governance: An International Review, vol. 24, no. 1, pp2-4

REQUIREMENT:

(a) Analyse the role and responsibilities of the remuneration committee in enhancing corporate governance and securing improved long-term performance.

(14 marks)

(b) Critically assess the role of Non-Executive Directors on the remuneration committee and evaluate their contribution as key members of that committee.

(14 marks)

Format & Presentation (2 marks)

[Total: 30 marks]

OR

6. *"The aim remains to foster a better quality of monitoring and engagement between companies and investors, which will assist in delivering better company performance and thus better returns to investor"*
Financial Reporting Council, January 2016. Developments in Corporate Governance and Stewardship 2015.

REQUIREMENT:

(a) Discuss what is meant by "Accountability" and "Transparency" in the context of corporate governance. (8 marks)

(b) Evaluate the usefulness of corporate governance disclosures to individual shareholders with small investments.

(6 marks)

(c) Critically assess the role which the institutional shareholders can assume in mitigating the agency problem.

(14 marks)

Format & Presentation (2 marks)

[Total: 30 marks]

END OF PAPER

SUGGESTED SOLUTIONS

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SOLUTION 1

(a) Lien on Shares: In accordance with Section 80 CA 2014 a lien is where a company has a provision in its Constitution to the effect that the company has first claim on the shares of the shareholder if the shareholder is in debt to the company (0-2 marks).

Calls for Payment: Where a company makes a call for payment on foot of a partly-paid share and the shareholder cannot pay the outstanding amount due on the shares within 30 days of the call then these shares can be: (1) forfeited to the company (Section 81) or (2) the shareholder can voluntarily surrender them – in addition, (3) the company is also entitled to sell the shareholders shares (Section 80(5)-(7) and 81) (0-3 marks).

(b) Reduction of Capital: in accordance with Section 84 CA 2014 there are a variety of methods by which a company can reduce its capital (all of which are subject to the provisions of its Constitution) including the following: (a) removing or reducing liability for any capital remaining as yet unpaid – in effect the company is deciding that it will not need to call on that unpaid capital in the future, (b) the repayment to members of some part of the paid-up value of their shares in excess of the company's requirements – in effect, the company actually returns some of its capital to its members on the basis that it does not actually need that level of capitalisation to carry on its business, or (c) cancelling any paid capital which has been lost through trading losses or is unrepresented by assets – this brings the balance sheet into balance at a lower level by reducing the capital liabilities in recognition of a loss of assets (0-4 marks).

In a PLC any reduction of capital requires the following: (1) the company must pass a special resolution setting out the terms of the reduction, (2) the company must then apply to the court by petition for an order confirming the reduction, (3) the resolution is not effective until confirmed by the court, and (4) if confirmed the company must notify the CRO – in addition, a PLC cannot reduce its capital below its authorised minimum (Section 1084) (0-4 marks).

(c) Purchase by a company of its own shares: Although there is a general prohibition on a company purchasing its own shares (Trevor v Whitworth (1887)) there are exceptions to this rule under Section 102 CA 2014 as follows: (1) the transfer or surrender to the company, other than for valuable consideration (Section 102(a)), (2) pursuant to a Court Order (such as an application for oppression by a minority under Section 212), (3) the purchase or redemption of redeemable shares (Section 105) – in this instance the acquisition must be from profits available for distribution and authorised by the Constitution, the class or by a special resolution, and (4) pursuant to a merger or division of the company under Chapter 3 or 4 of Part 9 of CA 2014 – in addition, (5) a PLC may also purchase its own shares through a market purchase (approved by an ordinary resolution) or (6) an off-market purchase (approved by a special resolution) in certain situation (Sections 1074-5) (any 4 = 0-6 marks).

(d) Designated Activity Company: A DAC is a company established under Part 16 CA 2014 – in effect it is a private company limited by shares or guarantee and having an objects clause in its Constitution (0-1 mark). Its main features are as follows: (1) it is a company created by the registration of a Memorandum and Articles of Association (Section 967), (2) the Memorandum may contain an objectives clause stating the purpose for which the company was established, and which can be altered by a special resolution of the members (Section 974), (3) it must have at least two directors (Section 985), (4) although it cannot list or trade its securities on the market, it can apply to have debt instruments listed on the Stock Market (Section 981), (5) it cannot dispense with the requirement to have an AGM, where it has more than one member (Section 988), (6) the name of the company must end in DAC or its equivalents (Section 969), (7) the company secretary can be one of the directors of the company, (8) the company has limited liability (Section 965(4)) and (9) it has an authorised share capital (Section 967(2)(e) – where limited by shares) (any 5 = 0-5 marks).

SOLUTION 2

(a) Validity of the Contract Between Landon Executive Travel Ltd and Kitteridge Aeronautical Ltd: The validity of this contract needs to be determined by an application of the indoor management rule – as the company has acted in breach of its own Constitution. Under the terms of the indoor management rule where a third party contracts with a company they are entitled to presume that things done within a company are done according to correct procedures as required by the company's Constitution. In other words, an outsider is entitled to presume that issues of internal management have been transacted in a procedurally correct manner. This rule originates from the case of Royal British Bank v Turquand (1856). In this case the company's Constitution required prior shareholder approval for loans in excess of a defined threshold. Despite this provision, the directors borrowed money in excess of the threshold without the approval of the shareholders, and then argued that the loan from the Royal Bank was invalid (due to the breach). The Court held that the Bank, as outsiders were entitled to presume that issues of internal policy, such as the taking of votes, had been done according to the correct procedures. Therefore, as the borrowing was within the company's general powers and the Bank had no way of checking if an ordinary resolution had been passed, the Court held that the loan was valid and accordingly it had to be repaid. However, it is important to note that the indoor management rule does not apply in cases where the facts should make the outsider enquire further, for example, where there are suspicious circumstances. In AL Underwood Limited v Bank of Liverpool & Martins (1924) Underwood had a personal account with the defendant bank. He also ran a company under the name AL Underwood Limited, in which he was the major shareholder and only company director. Underwood paid company cheques into his personal account. When the company got into financial difficulty the Receiver sued the bank for the money lodged into Underwood's personal account. The bank held that it was entitled to assume that that the account into which the cheques were paid was an internal issue of the company. The Court held that the lodging of company cheques into a personal account was so unusual that the bank should have made further enquiries. Therefore the bank could not rely on the indoor management rule to invalidate the contract (0-7 marks).

Conclusion: Based on the application of this rule the contract between Landon Executive Travel Ltd and Kitteridge Aeronautical Ltd is potentially unenforceable as Devon is one of the shareholders and directors Kitteridge Aeronautical Ltd so the rule does not apply as she would be aware that proper procedures were not followed to effect the creation of this contract. Therefore this contract is voidable and may be set aside if challenged by Landon Executive Travel Ltd (0-2 marks).

(b) Statutory Obligation to Disclose Interests in Contracts: The actions of Devon are in breach of Section 231 of the Companies Act 2014, which requires a director to disclose any direct or indirect interest in contracts or proposed contracts with the company at a meeting of the directors of the company. The director must make a declaration of interest, disclosing the nature of their interest and this must be made to the Board at the meeting at which the question of entering into the contract is first proposed or at the next meeting of the directors held after the director becomes interested. This disclosure must be made to a duly convened full board meeting (as per Guinness plc v Saunders and Ward (1988)). Section 231(6) requires that every disclosure must be entered into the records kept by the company, and open for inspection by any officer or member of the company (0-5 marks).

Penalties: Default of this provision will result in the contract being voidable at the option of the company and Devon may be sanctioned for this non-disclosure and asked to account for any profit made by virtue of this transaction – in addition, Devon may be removed for breach of duties and exposed to a discretionary Disqualification Order (0-1 mark).

(c) 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).

(d) Consequences of Non-Disclosure of Other Directorships: In accordance with Section 150 CA 2014 a failure to disclose this directorship is classed as a Category 3 offence – which may result in a Class A fine and a term of imprisonment not exceeding 6 months or both (0-2 marks)

(e) Content of the Register of Directors: In accordance with Section 149(2) CA 2014 the Register of Directors should contain the following information: (1) the directors present forename and surname and any former forename and surname, (2) their date of birth, (3) their usual residential address, (4) their nationality, and (5) their business occupation, if any (any 4 = 0-2 marks).

Time Period: The company secretary must disclose any changes in this Register to the CRO within 14 days (Section 149(8)) (0-1 mark).

SOLUTION 3

(a) Importance of the distinction between an Employee and a Contractor: this distinction is important for a variety of reasons including the following: (1) protective employment legislation – this only applies to employees who have rights pursuant to legislation such as the Unfair Dismissals Act, Minimum Notice Act, Redundancy Payments Act, Maternity and Adoptive Leave Acts, Payment of Wages Act etc – none of these pieces of legislation bestow rights on independent contractors, (2) vicarious liability – in general terms an employer is vicariously liable for the actions of employees but not independent contractors, (3) preferential payments on liquidation – when a company is placed in liquidation any salary (up to a maximum of €10,000) owed to an employee and any untaken annual leave is classed as a preferential debt – whereas any monies due to an independent contractor is classed as an unsecured debt, and (4) the tax and social welfare code also differentiates between them – employees pay tax on a PAYE basis – whereas contractors are self-assessed – in addition, employees have access to certain payments under the social welfare code (such as disability allowance, unemployment assistance (job seekers benefit) where their working week is reduced to 3 days or less, or where they lose their job) which are not available to independent contractors (any 2 x 2 = 0-4 marks).

(b) Tests to distinguish between an Employee and a Contractor: (1) Control Test: this test questions whether the employer controls all aspects of the employees work – in effect have they control over the work done, the method of completion, the means employed to achieve the result, and the time and place the task is to be done – there are inherent problems with the test in the context of professional workers – who are subject to limited control – such as in Tierney v An Post (2000) wherein even though the worker was under the control of An Post he was still not classified as an employee, (2) Integration Test: this test asks whether the worker is employed as part of the business, and whether the work done is integral to the business – it also looks at whether other workers assume that the worker is an employee based on how integrated they are in the business and their access to facilities and resources – the application of this case was illustrated in Re Sunday Tribune (in Liquidation) (1984) and in Kelly v Irish Press (1985) in the context of journalist/editors who were described as contractors but integrated into the business – the main problem with the integration test is the difficulty in its application to small businesses where most workers irrespective of status are integrated, (3) Enterprise Test: this test questions whether the person has engaged himself to perform services as a person in business on his own account – it asks whether the worker has made a financial investment in the work, can he reap a reward/profit from effective performance of the job, and whether there is a financial risk in undertaking the work – in McDermott v Loy (1982) the lack of entrepreneurship indicated an employee relationship – problems with the enterprise test arise in the context of employees paid on a commission basis – who can profit from the effective performance of their job but are still classed as employees, and (4) Mixed/Reality Test: in this test all factors are considered equally (although there is more focus on control in the mixed test) and an overview is taken – relevant factors include: method of pay, right to select and dismiss, ability to delegate performance of duties, provision of training and equipment, level of financial risk undertaken by the worker, whether the worker has the opportunity to profit from effective management of the task – the application was seen in Mahon v Henry Denny & Sons Ltd 1997 where the worker was classified as a employee by taking a holistic view of all aspects of the working relationship, and in particular the fact that she could not alter her earnings which were fixed by the employer (any 3 x 3 marks = 0-9 marks) .

Conclusion: Dale is a contractor as: (1) he is not subject to the general control of Paddington Estates regarding his work – this is demonstrated by the fact that they do not control his days or hours of work – except requiring him to attend quarterly meetings – the nature of the work he does, and he is allowed to work outside the company without restriction, (2) there is some evidence of integration, as although he does not have a permanent desk in their offices and has his own phone, he does have a company email address and business cards, and he is on their website and in their brochure, (3) there is evidence of entrepreneurship as his earnings are entirely dependent on the mortgages that he secures and he can take on personal clients, and (4) therefore from a reality perspective the balance of his employment attributes indicate that he is more likely to be classed as a contractor than as an employee (any 3 = 0-3 marks).

(c) Rights if Dale is an employee: (1) the right to redundancy for the loss of his job – the amount of payment is 2 x length of service + a bonus week x weekly salary (capped at €600) i.e. 2 x 9 + 1 = 19 x weekly salary or €600, whichever is the less, (2) the right to notice depending upon the terms of the contract or legislation (as Dale is employed between 5-10 years he is entitled to 4 weeks as per the Minimum Notice and Terms of Employment Act 1973), (3) the right to time off during notice period: this is to look for new employment, attend interviews or training courses – and must be evidenced where requested by the employer, and (4) the right to a reference/statement of employment upon termination of his appointment – including start date and finish date, job title and job description (any 2 x 2 = 0-4 marks).

SOLUTION 4

(a) Adjournment of Meetings: In accordance with Section 182(5) if within 15 minutes after the time appointed for the commencement of the general meeting a quorum is not present, then the chairperson is empowered to adjourn the meeting. Similarly, Section 187(4) CA 2014 provides that the chairperson may with the consent of any meeting at which a quorum is present, and where directed by the meeting, adjourn the meeting from time to time and from place to place. In Kinsella v Alliance & Dublin Gas Consumer Company (1982) the Court held that the chairman had no power to adjourn a meeting without the consent of the majority – where it has not become disorderly. No business can be conducted at an adjourned meeting except the unfinished business from the original meeting. If a meeting is adjourned for a period of 30 days or more then notice must be given for the re-commencement of this meeting. Regarding adjournments Section 182(5)(b) states that the meeting will stand adjourned to the same day in the next week, at the same time and place or to such other day and at such other time and place as the directors may determine (0-5 marks).

Conclusion: That the actions of the Tanner as chairperson of Legacy Costume Designers Ltd in adjourning the meeting were in accordance with company law – but his actions in relation to the rescheduled meeting were not as the date of the rescheduled meeting was made by him and not the directors of Legacy Costume Designers Ltd and the timing of the rescheduled meeting did not facilitate the appointment of proxies (0-1 mark).

(b) Quorums and Meetings: In accordance with Section 182 CA 2014 the general rule is that for a meeting to be valid the quorum must be present. Unless otherwise stated in the company's Constitution the quorum comprises two people present in person or by proxy. Section 182(5) provides that if the quorum is not present within 15 minutes of convening the meeting then the meeting must be adjourned. However, in Re Hartley Baird (1955) the Court held unless the Articles of Association state otherwise the meeting must only be quorate within the requisite timeframe of commencement, but does not necessarily have to be quorate when a vote is taking place. In accordance with Section 182(5)(b)(ii) if at the rescheduled meeting a quorum is not present within half an hour after the time appointed for the commencement of the meeting, then the members present will constitute the quorum (0-4 marks).

Conclusion: Stafford or any of the other shareholders of the company cannot challenge the resolution to liquidate the company due to the fact that the meeting was not quorate as Section 182(5)(b)(ii) applies – and the meeting is deemed quorate. Notwithstanding this fact it could be challenged on the grounds that they were deprived of their shareholder rights to appoint a proxy in this situation (0-2 marks).

(c) Creditors Voluntary Liquidation: Following the passing of an ordinary resolution to liquidate the following procedure should be followed to effect a creditors voluntary liquidation in accordance with Section 587 CA 2014: (1) a meeting of creditors must be held on either the same day that the members' ordinary resolution is passed or at the latest the day following the day on which the members' ordinary resolution is passed, (2) the creditors are entitled to 10 days notice of this meeting and this notice should also be advertised in two daily newspapers circulating in the area in which the registered office of the company or its principal place of business is based, (3) at the creditors meeting the directors must lay before it a statement of affairs showing particulars of the company's assets, debts and liabilities, as well as a list of the creditors and the debts owed, and explain to the creditors that the company is insolvent and cannot pay its debts, (4) a vote is then taken by the creditors to agree to a creditors voluntary liquidation, and a liquidator will be appointed (Section 588), and (5) a Committee of Inspection may also be appointed to assist the liquidator (Section 667) (any 4 = 0-4 marks).

(d) Qualifications of a Liquidator: the Companies Act 2014 introduced the requirement that liquidators must now be qualified to act – Section 633 states that to be eligible they must be: (1) a member of a prescribed accountancy body (who holds the relevant practising cert), (2) a practising solicitor, who is a member of the Law Society of Ireland (who holds the relevant practising cert), (3) members of other professional bodies recognised by IAASA, (4) a person qualified under the laws of another EEA state, (5) a person with practical experience of liquidation and knowledge of the relevant law, as registered with IAASA, and (6) a person who holds adequate Professional Indemnity Insurance (the terms and level of which may be prescribed from time to time by IAASA) (any 4 = 0-4 marks).

SOLUTION 5

(a) Since the 1990s there has been an explosive increase of executive compensation in the US which has spread globally over the last 25 years. This increase has led to more public and governmental scrutiny and consideration of the elements to the executives' salaries. The role of boards in the executive compensation process has garnished more attention with increasing amounts of executive pay.

The Cadbury report devoted attention to executive remuneration but it was the Greenbury report and the code of practice which focus specifically on issues relating to directors pay. An important aim is to create remuneration committees that will determine pay packages needed to attract, retain and motivate directors of the quality required but should avoid paying more than is necessary for this purpose. The remuneration committee should determine an appropriate balance between fixed and performance-related, immediate and deferred remuneration. Performance conditions, including non-financial metrics where appropriate, should be relevant, stretching and designed to promote the long-term success of the company. Remuneration incentives should be compatible with risk policies and systems and upper limits should be set and disclosed.

Remuneration committees were established to determine the company's policy on executive remuneration including pension rights and any associated payments. The objective is to prevent executive directors determining and designing their own remuneration packages. This is supported by the academic literature which identifies remuneration committees as an essential requirement in preventing executives writing and signing their own paycheques. Levels of remuneration should be sufficient to attract, retain and motivate directors of the quality required to run the company successfully, but a company should avoid paying more than is necessary for this purpose. A significant proportion of executive directors' remuneration should be structured so as to link rewards to corporate and individual performance. The committee should also recommend and monitor the level and structure of remuneration for senior management.

To enhance accountability the members of the remuneration committee should be listed each year in the report to shareholders and, for enhanced transparency, the company should make a report each year to the shareholders on behalf of the board.

This report should include full details of all elements of the remuneration package for each individual director by name detailing basic salary, benefits in kind, annual bonuses, long-term incentive schemes including share options as well as pension entitlements. Requirements were developed further in later editions of the Combined Code. The range of incentives must focus, not purely on the immediate term but on a 3 to 5 year scale. This longer term focus is expected to generate any increase in shareholder value with enhanced corporate financial performance. Performance-related elements should be transparent, stretching and rigorously applied.

Shareholders should be able to see the remuneration that incentivises executive to maximise shareholder value. This should go in some way to reducing the agency cost for these organisations. Focus on external forces such as social conformity and social prestige in the determination of executive compensation is an element which is becoming more common of late, but with little real impact.

The role of the shareholder in vetoing or confirming the remuneration package has been enhanced over the last 10 years. However, the actual power gained by such a change is a lot less than anticipated as the vote is only advisory. (14 marks)

(b) The agency theory perspective of the presence of independent non-executive directors on the company board should help to reduce the conflict-of-interest between shareholders and the company management. The increased monitoring conducted by an independent voice in the boardroom should lead to enhanced accountability.

The board should establish a remuneration committee of at least three, or in the case of smaller companies two, independent non-executive directors,.Non-Executive directors can provide advice and direction, monitor the company's management decisions and the legal and ethical performance, monitor the adequacy of the controls in place and review the appointment, evaluation and remuneration of directors. The non-executive directors need to have the integrity, high ethical standards and the ability and willingness to challenge and probe directors decisions.

The majority of non-executive director should be independent of management and free from any relationship that could affect their independence other than their fees and shareholders.

Lo, K and Wu, S (2015) Private information in Executive Compensation, Corporate Governance: An International Review, vol. 24, no. 1, suggest that independent directors are better at monitoring the CEO compared with less independent directors, however, their inability to have constant access to information, because of their external roll, can limit their knowledge base. The involvement of non-executive director may inhibit the entrepreneurial approach of the business and therefore hinder the performance.

(14 marks)
(2 professional marks)

[Total: 30 marks]

Refer to the Higgs and Tyson report

SOLUTION 6

(a) The definitions of corporate governance include certain characteristics one of which is the notion of Accountability: in a narrow definition this relates to corporations being accountable to shareholders. Definitions of corporate governance recognise a broader level of accountability which is to shareholders and other stakeholders. There is now an interest, within the financial community, in a broader stakeholder orientated approach with corporate organisations being held accountable to the whole of society, future generations and the natural world. Shareholder interest can only be satisfied by taking account of stakeholder interests as companies that are accountable to all of their stakeholders over the long term are more successful and more prosperous.

Transparency: is a central element of a well-functioning system of corporate governance. Corporate Disclosure is the principal means by which companies are transparent. Disclosure relates to a whole array of different forms of information via the annual report, voluntary and other forms of corporate communications through websites et cetera. Improvements in disclosure leads to improvement in transparency which is one of the most important aims of corporate governance reform worldwide by the OECD. Improving the disclosure is likely to reduce agency costs as there is a better information flow which in turn reduces information asymmetry.

(8 marks)

(b) Wider ownership has given rise to higher costs in resolving the agency problem. Small shareholdings can now access information on the governance and operations of an organisation including detailed information on risk management, board composition and function and disclosures on how decisions are made at board level thereby enhancing the understanding of the smaller shareholder. The objective of corporate governance is enhanced performance leading to increased shareholder wealth whether this is a small or a large shareholder. Improved accountability through dialogue and transparency with shareholders can only improve performance and enhance the shareholders understanding. All shareholders, irrespective of the size of holdings, have the right to receive the annual report and to attend the AGM and post their questions.

(6 marks)

(c) Concentration of ownership has become a feature over the last 25 years to the point that institutional shareholdings now represent the dominant shareholder class.

Main types of institutional investors are pension funds, life insurance companies, unit trusts and investment trusts. Institutional investors represent another powerful corporate governance mechanism and can monitor management. This influence on company management can be substantial and can be used to bring management activities in line with stakeholder views.

However, there increased involvement means higher monitoring of management and can actually lead to solving the agency problems. They are in a prime position to monitor the company management to help to align the interests of those of the shareholders. Some are more actively involved in corporate decision leading to a more active role in developing corporate governance codes of practice and policy documents. The introduction of the stewardship code in 2012 recognises the enhanced position the institutional investor now populates. However, this new dominant breed of shareholder is presenting a problem as well as a solution to the problem. One must remember that the institutional investors are not actually the shareholders rather they represent shareholders through a complex web of ownership. One of the concerns of this form of ownership is its emphasis on short-termism in investment.

The institutional investor is required to disclose its voting policy and communication with the company via its website. This increased involvement should encourage regular one-to-one meetings with directors, make positive use of the voting rights and they should pay attention to the composition of the board of directors.

(14 marks)
(2 professional marks)

[Total: 30 marks]

Refer to the Cadbury, Myners and Hampel report.