

# CORPORATE LAWS & GOVERNANCE

## PROFESSIONAL 1 EXAMINATION - APRIL 2018

### NOTES:

**Two envelopes** must be used to enclose answers:

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

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

### Section A:

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

### Section B:

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

### TIME ALLOWED:

3 hours, plus 10 minutes to read the paper.

### INSTRUCTIONS:

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

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

**Start your answer to each question on a new page.**

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

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

# CORPORATE LAWS & GOVERNANCE

PROFESSIONAL 1 EXAMINATION - APRIL 2018

Time allowed: 3 hours plus 10 minutes to read the paper.

**Section A:** You are required to answer **three** questions from this section.

**Section B:** You are required to answer **one** question from this section.

## SECTION A

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

- 1.** Seyward Technologies Ltd. has been experiencing significant cash flow problems in recent years. The company has been trying to develop a software application that would notify users of all last-minute entertainment deals (such as reduced price cinema or concert tickets, restaurant deals etc.) within a two-hour timeframe and 20 kilometre radius of where they are based. Initial testing showed flaws in the software that required further review. As a consequence of the delay in the launch of the app, Seyward Technologies Ltd. found itself in need of investment. Shylock Investments has offered to invest €2 million in Seyward Technologies Ltd. in the form of a debenture secured by a fixed charge on the company's main business premises. In return for this investment, Shylock has insisted that Seyward Technologies Ltd. reduce its capital exposure by purchasing a third of its own issued capital, freezing this capital as treasury shares, and allowing Shylock Investments the option of converting its debenture into ordinary shares through the re-issue of these treasury shares in January 2020. Shylock Investments has also told Seyward Technologies Ltd. that a further condition of this investment is that the name of the company is changed to Shylock and Seyward Technologies Ltd. and that it trades under the business name S&S Technologies. The directors of Seyward Technologies Ltd. have contacted you for advice regarding these issues.

### REQUIREMENT:

- (a) Outline the meaning of the term 'debenture', and evaluate the characteristics of a fixed charge. (5 marks)
- (b) Critically review the rules regarding the purchase by a company of its own shares and advise Seyward Technologies Ltd. of the steps that it should undertake in this situation in order to purchase back one third of its issued capital. (10 marks)
- (c) Examine the rules relating to and the main characteristics of Treasury Shares. (4 marks)
- (d) Advise Seyward Technologies Ltd. of the procedure that it should follow to effect an alteration of the company name, and the main restrictions imposed upon the choice of business names, pursuant to the terms of the Registration of Business Names Act 1963. (6 marks)

**[Total: 25 marks]**

- 2.** Willoughby Property Investments Ltd. (WPI) owns a variety of shopping centres and retail units throughout Ireland. Last year, it decided to build a new outlet shopping centre in Grangegorman, Dublin City, in the belief that the opening of the new light-rail line in this area would facilitate customer access to this centre and could attract customers from all parts of the country. To finance this development, WPI decided to sell some of its other properties. One of these properties was a small retail park located within three kilometres of Killareen (a large provincial town). Kasbian, a director of WPI was tasked with overseeing this sale. Within three weeks of the Killareen property being advertised for sale, Kasbian reported that he had received an offer on the property for the full asking price. Delighted with this, the Board of WPI authorised Kasbian to effect the sale of this property. However, two months after the sale was completed it was announced that one of the largest pharmaceutical companies in the world was establishing its global head office on the site adjacent to the former Killareen property, and, as a consequence of this fact, the value of the property had already increased by an excess of 60%. Upon further investigation, WPI discovered that the Killareen property was purchased by Sexton Properties Ltd., a company wholly owned by Kasbian's two sons, and that the mother-in-law of one of these sons is a local politician in Killareen. Consequently, she would have been aware of the impending purchase of the adjacent property by the pharmaceutical company.

Upon discovering these events, WPI has affected the lawful removal of Kasbian as an executive director of the company, and is now considering bringing legal action against him for both fraudulent trading and breach of duties. The company has contacted you for advice.

**REQUIREMENT:**

- (a) Critically evaluate the law in relation to fraudulent trading, commenting upon the elements of the offence and the resulting sanctions. Assess the likelihood of Kasbian being successfully prosecuted in this case. (10 marks)
- (b) Examine a director's statutory fiduciary duty regarding conflicts of interest and determine whether this duty has been breached by Kasbian in this situation. Explore the various sanctions that he may be exposed to in the event of such a breach. (7 marks)
- (c) Willoughby Property Investments Ltd. now wishes to appoint an executive director to fill the vacancy arising from Kasbian's removal. Advise the company on the FOUR main methods by which a director may be appointed to a company; and assess the essential characteristics of an executive director. (6 marks)
- (d) Hamilton has recently retired from his position as a non-executive director of WPI, after in excess of 25 years' service to the company. The company wishes to make him a payment of € 100,000 arising from his loss of office but is aware that there are certain procedures to be adopted in order to legitimise this payment.

Outline to Willoughby Property Investments Ltd. the procedure that it must comply with in order to lawfully effect a payment to a company officer arising from his/her loss of office.

(2 marks)

**[Total: 25 marks]**

- 3.** Up to 2016, the Whitemore County House Hotel Ltd. used to be one of Ireland's premier destinations for wedding receptions. Unfortunately, business has declined significantly in the last two years following an outbreak of legionnaire's disease at the hotel, which resulted from contaminated water in the air conditioning system. This outbreak resulted in the temporary closure of the hotel and the hospitalisation of more than 50 of the hotel's guests. The hotel was sued in negligence arising from this incident and had to pay substantial compensation to the affected parties. As a consequence, the hotel lost a number of bookings and has been struggling to pay its debts. In particular, for the past three months the hotel has not paid the mortgage attached to ten holiday cottages located on its grounds. This mortgage is in favour of the People's Bank of Leitrim. Last week, the bank notified the Whitemore County House Hotel Ltd. that in accordance with the terms of the mortgage, it is placing the company into receivership and had appointed Travers as the receiver.

Travers is a newly qualified accountant and this is his first appointment as a receiver. He has contacted you for advice.

**REQUIREMENT:**

- (a)** Examine the main role of a receiver, and comment upon any FOUR grounds that may constitute default and result in the appointment of a receiver to a company. (6 marks)
- (b)** Two of the cottages that are the subject of the receivership are currently let on a 12-month lease to a local manufacturing company to accommodate its temporary staff. Travers is aware that he has a duty to exercise reasonable care in disposing of company assets. However, he is unsure of the nature of this duty and whether he should sell these properties with the existing leases or wait for the leases to expire and then sell the property with vacant possession.
- Critically analyse the duty of a receiver to exercise reasonable care in disposing of company assets, and advise Travers as to how he should proceed in this situation. (6 marks)
- (c)** Review the various reporting obligations imposed upon Travers as receiver, pursuant to the Companies Act 2014. (5 marks)
- (d)** Assess any THREE effects of this receivership upon the Whitemore County House Hotel Ltd. (3 marks)

**[Total: 20 marks]**

4. Riley is employed with Pennywise Retail Ltd. as financial controller, based in its Wexford store. Last month, Riley was observed by the store manager, on the store's CCTV system, entering the stockroom after the store had closed, taking a number of items of freshly baked goods, putting these into a bag and leaving the store without paying for them. Following this, Riley was called to a disciplinary meeting with Pennywise Retail to answer an allegation of theft of company stock. At this meeting, he explained that company policy is to throw out all freshly baked goods that are not sold at the end of each day. He did not consider his actions amounted to theft, as this food was due to be dumped and therefore had no commercial value to the company. In addition, Riley stated that he is aware that other company employees also take unsold baked goods from the Wexford store and other branches of Pennywise Retail Ltd. As a consequence, he assumed that the company had unofficially authorised this practise. The disciplinary panel informed Riley that it would consider his response and that it would revert to him with the outcome of the hearing within three days.

Two days later, Riley was brought into the Wexford store manager's office and informed that arising from the disciplinary meeting, he was being summarily dismissed with immediate effect for theft of company property. Riley is both shocked and upset by this decision and believes that he has in fact been dismissed unfairly. He has contacted you for advice.

**REQUIREMENT:**

- (a) Outline the main conditions required to be satisfied in order for Riley to be eligible to bring an action for unfair dismissal. (3 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. (8 marks)
- (c) With reference to relevant case law, critically evaluate the obligation imposed upon an employer when considering a breach of duty by an employee to ensure that any penalty imposed is both fair and proportionate to the gravity of the breach. (4 marks)
- (d) Assess whether Riley's dismissal would be classed as a fair or unfair dismissal in this situation. Preview the main remedies available under the Unfair Dismissals legislation. (5 marks)

**[Total: 20 marks]**

**SECTION B**  
**Answer either Question 5 or 6.**

- 5.** *“High-quality corporate governance contributes to long-term company performance”.*  
*Financial Reporting Council 2018*

**REQUIREMENT:**

- (a)** Examine the role and responsibilities of the non-executive directors in enhancing corporate governance in an organisation. (15 marks)
- (b)** Evaluate the risk assessment approach which the Board of Directors is expected to undertake to ensure the long term sustainability of an organisation. (15 marks)

**[Total: 30 marks]**

**OR**

- 6.** You have been asked by your line manager to prepare a presentation in relation to the Corporate Governance for the staff training day.

**REQUIREMENT:**

Your presentation should include:

- (a)** The meaning and objectives of the five principles in the Corporate Governance Code 2016 and how these impact on governance in organisations. (18 marks)
- (b)** An analysis of the ‘comply or explain’ approach of the Corporate Governance Code 2016. (12 marks)

**[Total: 30 marks]**

**END OF PAPER**

## SUGGESTED SOLUTIONS

THE INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS IN IRELAND

# CORPORATE LAWS & GOVERNANCE

PROFESSIONAL 1 EXAMINATION - APRIL 2018

### SOLUTION 1

- (a) **Debenture:** this was defined in *Levy v Abercorris State & Slab Co. (1887)* as a document that creates a debt or acknowledges it (0-1 mark).

**Fixed Charge:** the main characteristics of a fixed charge are: (1) the charge attaches to a specific tangible company asset, (2) the charge attaches from the moment of its creation, (3) as a consequence of this charge the borrowing company cannot deal with the charged asset without the prior consent of the charge holder, (4) upon the disposal of the asset subject to the charge the borrower must either repay the loan from the proceeds of the sale before legal ownership is transferred or transfer the asset to the purchaser still subject to that charge, and (5) a fixed charge may be created by way of a legal or equitable mortgage over the asset (any 4 = 0-4 marks).

- (b) **Purchase by a company of its own shares:** Although there was a historical general prohibition on a company purchasing its own shares (*Trevor v Whitworth (1887)*) Section 102 CA 2014 now confirms that a company may acquire its own shares provided the conditions stipulated in Chapter 6 of the Act are complied with – under Section 102 CA 2014 such a purchase is permissible in the following situations: (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) – furthermore, a company can purchase its own shares through an authorised reduction of capital by effecting the summary approval procedure – this procedure needs to be effected by Seyward Technologies Ltd in this situation as the purchase does not fall within the remit of any of the other exceptions – to effect this procedure Seyward Technologies Ltd should undertake the following steps in accordance with Sections 202-208 CA 2014: (1) a declaration of solvency must be made by the directors of the company, (2) a special resolution of the shareholders at a general meeting must be passed within 12 months of effecting the reduction, (3) a report of an independent person qualified to act as a statutory auditor must confirm that the declaration of solvency is not unreasonable, and (4) a copy of the declarations and resolutions must be forwarded to the Registrar of Companies (CRO) (0-4 marks).

- (c) **Treasury Shares:** These arise where a company has purchased its own shares, but rather than cancelling them they freeze them, in order to preserve the right to re-issue them at a future date, without any further formalities – the right to create these shares is subject to the requirement that the nominal value of treasury shares held by a company may not, at any one time, exceed 10 per cent of its capital (Section 109(1)) – the main characteristics of treasury shares are that: (1) they do not carry any tangible benefits to the company who holds them, as they carry no voting rights, (2) they have no dividend payable on them, as per section 109(4) CA 2014, and (3) they have no rights or entitlements upon the liquidation of the company (0-4 marks).

- (d) **Company Names:** The name of a company may be altered (Section 30 CA 2014) by the passing of a special resolution (75%) of company members – at an EGM of the company with 21 days notice – upon the passing of this resolution the company must notify the Registrar of Companies and obtain their approval (0-2 marks).

**Restrictions:** The main restriction imposed by the Registration of Business Names Act 1963 upon the choice of business name is that a name is automatically disallowed if it is considered undesirable by the Registrar (Section 26(5)) – a name will be considered undesirable if: (1) it is an offensive or blasphemous name, (2) it suggests or implies a connection with any government department, local authority or State agency (where no such connection exists), (3) if it uses “bank, society, co-operative or insurance” in its name, unless it has obtained the appropriate permission from the Minister, (4) it includes a registered trademark, without production of the consent of its owner, (5) it is regarded as being misleading (Section 27(4)), or (6) it is the name of an existing company (any 4 = 0-4 marks).



## SOLUTION 2

- (a) **Fraudulent Trading:** (1) This is defined under Section 722 CA 2014 as occurring where any person was “knowingly” a party to the carrying on of the company’s business, with the “intent” to defraud the creditors of the company, or creditors of any other person, or for any fraudulent purpose – (2) in relation to this offence the legislation states that any person can be found liable – this means that the offence can be committed by company officers or any other person who is connected to the fraudulent act (0-2 marks) – (3) the test for fraudulent trading is quite difficult to prove as you must demonstrate “knowledge” and “intent to defraud” – although the fraudulent act may be either a one-off or a continuous action to complete the offence – examples: *Re Hunting Lodges Ltd (1985)*, *Re Kelly’s Carpetdrome Ltd (1983)*, *Re Aluminium Fabricators Ltd (1983)*, *Re Synnott (1996)* – siphoning-off company assets, using company assets for personal purposes, keeping two sets of books of account etc (0-4 marks) – regarding sanctions, fraudulent trading is a Category 1 offence and the criminal sanctions include: on summary conviction imprisonment not exceeding 12 months &/or a Class A fine – conviction on indictment imprisonment not exceeding 10 years &/or a fine of up to €500,000 – the civil sanctions encompass personal liability for the debts of the business arising from the fraudulent act (0-3 marks). In conclusion, it is likely that Kasbian will be successfully prosecuted for this offence, as the facts indicate that he undersold the company’s asset to family members in the knowledge that it would increase in value when the announcement of the arrival of the pharmaceutical company was made, and he did this knowing that it would defraud the shareholders of Willoughby Property Investments Ltd (0-1 mark)
- (b) **Duty re Conflicts of Interest:** Section 228 CA 2014 requires that directors must not put themselves in a position whereby their personal interests and those of the company are in conflict – this duty is judged objectively and therefore the motives of the directors are immaterial – within the ambit of this duty, the following actions by directors are also considered a breach of this duty: (1) where directors fail to disclose their interests in company contracts or make a secret profit from company transactions, as per *Aberdeen Railway Company v Blaikie Brothers (1854)*, and *Regal (Hastings) Ltd v Gulliver (1942)*, (2) where directors divert business opportunities from the company, as per *Industrial Development Consultants Limited (IDC) v Cooley (1972)* and *Cooks v Deeks (1916)*, or where (3) directors act in competition to the company and use confidential information from one business to benefit another business, as per *Irish Microforms v Browne (1987)* (0-5 marks) – in this situation the actions of Kasbian are in breach, as he had a substantial conflict that he failed to disclose – the main sanctions that he may be exposed to include: (1) liability to account to the company for any gain which he makes directly or indirectly from the breach of duty, or (2) to indemnify the company for any loss or damage resulting from that breach (Section 232) – in addition he may also be removed as a director and could be exposed to a discretionary disqualification order (0-2 marks).
- (c) **Appointment of a Director:** (1) The application for registration (formerly known as Form A1) or the Constitution of the company are used upon incorporation to state the names of the first directors of a company – Section 144 states that the first directors are those persons determined in writing by the subscribers of the Constitution or a majority of them, (2) thereafter, all subsequent appointments are governed by Constitution – Section 144 CA 2014 provides that a director may only be appointed individually by an ordinary resolution of the shareholders, (3) in a PLC 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 – this is again done by an ordinary resolution of the shareholders at an AGM, and (4) the Board of Directors can also appoint a person to act as a director where a casual vacancy arises between AGM’s but at the next AGM this person must resign and if they desire/are eligible they can ask the shareholders for re-election (0-4 marks).
- Characteristics of an Executive Director:** These are directors who are involved in the operational management of the business – they provide continuous attention to the affairs of the business and are generally an employee of the company – they often hold important positions within the day to day running of the business – for example, the Managing Director or the Finance Director etc (0-2 marks).
- (d) **Compensation for Loss of Office:** Section 251-253 CA 2014 requires the approval by a resolution of the members of a company in order for the Board of Directors to make a payment to a director or their dependants for the loss of their office, or compensation for the loss of office (0-2 marks).



### SOLUTION 3

- (a) **Role of a Receiver:** The main role of a receiver is to receive or secure the charged assets of a company, to realise the value of those assets, and to use the proceeds from this realisation to discharge the outstanding debt due to the lender, who appoints them (0-2 marks).

**Grounds for Appointment:** A receiver may be appointed where: (1) the company has defaulted on the principal or interest due on foot of the secured loan, (2) the company has commenced liquidation, (3) where the debt security is in jeopardy, (4) where another receiver is appointed on foot of the same charged asset, (5) where the company fails to maintain and insure the charged asset, or (6) where there is a material change in the management of the company or its financial position that may jeopardise its ability to repay the secured debt (any 4 = 0-4 marks).

- (b) **Duty to Exercise Reasonable Care in Disposing of Company Assets:** The main duty of the Receiver is to exercise reasonable care in disposing of company assets – (1) according to Section 439 CA 2014 “...a Receiver, in selling property of a company, shall exercise all reasonable care to obtain the best price reasonably obtainable for the property as at the time of the sale” – (2) in exercising this duty the receiver has the right, if necessary, to get independent advice – (3) as part of this duty the receiver should get a number of independent valuations of the property (generally three) and sell for the average of these valuations – (4) Section 439(3) CA 2014 requires that a receiver must not sell by private contract a non-cash asset of the company to a person who is, or who was, within three years prior to the date of the appointment of the receiver, an officer of the company unless he has given at least 14 days notice of his intention to do so to all the creditors of the company who are known to him or who have been intimated to him – and (5) where there are tenants in situ in the secured properties the Court in *Holohan v Friends Provident and Century Life Office (1966)* stated that to fulfill this duty the receiver must consider alternatives, and investigate the possibility of buying out the tenants from their lease and the cost of this versus the benefits of selling with vacant possession. Therefore in conclusion, Travers must consider this and undertake a cost/benefit analysis before selling the property with the tenants in place (0-6 marks).

- (c) **Reporting Obligations:** In accordance with Section 430 CA 2014 the receiver has a duty to: (1) report to the company, the Court, the CRO and the debenture holders or their trustees via a statement of affairs – this duty only arises where the receiver is appointed in relation to the whole, or substantially the whole, of the property of a company on behalf of the debenture holders of the company secured by a floating charge (Section 430(1)) – as per Section 431 this statement (which is prepared by the company and not the Receiver) should contain: (1) particulars of the company's assets, debts and liabilities, (2) the names and residences of its creditors, (3) the securities held by those creditors respectively, (4) the dates when those securities were respectively given, and (5) such further or other information as may be prescribed, (0-3 marks) (2) the receiver also has a duty to report to the CRO every six months on the progress of the receivership (Section 430(2)), and (3) the receiver has a duty to report to the DPP and ODCE if he suspects that a past or present officer committed a criminal offence under the legislation (Section 447) (0-2 marks).

- (d) **Effects of Receivership:** The following are the effects of the appointment of a receiver: (1) all floating charges crystallise, and become affixed to the assets/undertakings over which they were created, (2) the powers of the company and the director's authority are suspended in relation to the assets affected by the receivership, and can only be exercised with the consent of the receiver, (3) the receiver may institute proceedings for either fraudulent or reckless trading of company officers, (4) the receiver may, if he considers that the interests of the Debenture-Holder so require, dispose of any asset of the company affected by the Debenture, including the entire undertaking of the company, (5) the receiver is not liable on foot of contracts entered into by the company prior to his appointment (although these contracts remain binding on the company), unless he specifically agrees to be, (6) the receiver is personally liable for contracts entered into by him in the performance of his functions under Section 438(4), unless the contract provides otherwise, (7) contracts of employment between the company and its employees are not necessarily terminated by the appointment of a receiver where the receiver is acting as an agent of the company – although where the receiver terminates the employment of workers he is obliged to comply with the statutory requirements of employment law, and (8) the receiver can apply to the Court for an Order freezing the assets of the company during receivership (any 3 = 0-3 marks).

## SOLUTION 4

- (a) **Prerequisites to claim Unfair Dismissal:** (1) The worker (Riley) 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 (Riley) must have at least one year's continuous service with the employer – there are four exceptions to this service requirement obligation, namely where an employee is dismissed as a consequence of: (a) pregnancy related matters, (b) trade union activity, (c) making a protected disclosure, or (d) the exercise or attempted exercise of their rights under protective legislation (2 = 0-3 marks).
- (b) **Fair Dismissal Grounds:** In accordance with Section 6(4) of the Unfair Dismissals Act 1977-2015, 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 (0-3 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 (0-2 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 (0-2 marks), and (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 and Proportionate Penalties:** the law requires that the penalty imposed must be proportionate to the gravity of the employees breach – in effect, where an employee breaches their duty the employer should consider other options based on the nature of the breach, and not only dismissal – other options include suspension, verbal warnings, written warnings and final written warnings – dismissal should be reserved for serious breaches only or continuous breaches where prior warnings have already been given – in *Wilo Pumps and SIPTU (2005)* the Labour Court found “that dismissal was too severe a sanction” for clocking violations, in *Michael McCrann v Marks & Spencer Ireland Limited (2014)* the EAT awarded compensation as “... it is clear that ... no other sanction was considered ... [and] the sanction of dismissal was disproportionate to the alleged actions of the claimant and was contrary to fairness and natural justice” – in assessing fairness the entire tenure of the workers employment should be taken into consideration – in *Lorraine Fitzpatrick v Dunnes Stores (2014)* the EAT also gave an outcome of unfair dismissal due to the: “lack of proportionality [in] the decision to dismiss given the circumstances of the case and the personal background of the claimant with 12 years of service ... there was [inadequate] assessment or consideration of other sanctions given the background of long service” (0-4 marks).
- (d) **Conclusion:** Pennywise Retail Ltd did not apply a fair and proportionate penalty in the context of Riley's breach – his action is more akin to pilferage than theft, and therefore a dismissal in the circumstances is likely to be viewed as disproportionate – a warning would have been more suitable – as this is not an act of serious/gross misconduct a summary dismissal cannot really be justified (0-2 marks).

**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 5

- (a) Three fundamental characteristics of effective corporate governance are transparency, accountability and probity. Part of the responsibilities of the Chairman of the Board is to nurture an environment and culture where there is constructive and challenging dialogue. To achieve this, the role of the Non-Executive Directors (NED) are paramount. The NEDs must assess the performance of the management in setting realistic, yet stretching goals, monitor and report on performance and evaluate outcomes.

To achieve this, the NEDs must possess suitable experience and skills, represent a diverse background in terms of gender, age and geographic representation. They are expected to participate on all boards as independent scrutineers. The board is expected to be populated by a minimum of two NEDs and it is recommended that half the membership of the board of directors be NEDs. They can be appointed, normally, for up to six years with a maximum recommended board term of nine years.

To spearhead the dialogue and scrutiny the board will appoint a senior NED as a point of contact and to provide leadership. To enhance communication with shareholders the senior NED will be available, when required, to communicate with the shareholders.

As part of the board of directors review process the NED are expected to undertake an annual review of their performance with the Chief Executive. Disclosure of the backgrounds of the NEDs must be included with details on induction and training, attendance and committee memberships.

(15 marks)

- (b) A major part of the responsibilities of the board of directors is to determine the nature and extent of the principal risks facing the organisation in achieving its strategic objectives. The board must consider the level of risk it is willing to take in achieving its strategic objectives.

The board should establish formal and transparent arrangements for considering these risks in the form of risk assessment committees, activities undertaken by the internal and external auditors, establishing an audit committee and internal controls.

The board should maintain sound risk management and internal control systems. and monitor the effectiveness of these systems at least annually and report on the review in the annual report. The monitoring and review should cover all material controls, including financial, operational and compliance controls.

The directors should confirm in the annual report that they have carried out a robust assessment of the principal risks facing the company, including those that would threaten its business model, future performance, solvency or liquidity. The directors should describe those risks and explain how they are being managed or mitigated.

Taking account of the company's current position and principal risks, the directors should explain in the annual report how they have assessed the prospects of the company, over what period they have done so and why they consider that period to be appropriate.

(15 marks)

**[Total: 30 marks]**

## SOLUTION 6

### (a) Leadership

Every company should be headed by an effective board which is collectively responsible for the long-term success of the company. There should be a clear division of responsibilities at the head of the company between the running of the board and the executive responsibility for the running of the company's business. No one individual should have unfettered powers of decision and this independence should allow for oversight and scrutiny of the activities and decision making by the executive team.

The chairman is responsible for leadership of the board and ensuring its effectiveness on all aspects of its role. The Chairman will set the tone from the top of the organisation on the corporate culture and ethics, and provide support to the non-executives. The Head non-executive director should provide leadership and support to the non-executive directors.

### Effectiveness

The board and its committees should have the appropriate balance of skills, experience, independence and knowledge of the company to enable them to discharge their respective duties and responsibilities effectively.

There should be a formal, rigorous and transparent procedure for the appointment of new directors to the board to ensure independence and appropriate scrutiny.

All directors should be able to allocate sufficient time to the company to discharge their responsibilities effectively: should receive induction on joining the board: should regularly update and refresh their skills and knowledge to meet modern day corporate challenges.

The board should undertake a formal and rigorous annual evaluation of its own performance and that of its committees and individual directors and should report so in the annual report. All directors should be submitted for re-election at regular intervals, subject to continued satisfactory performance.

### Accountability

The board should present a fair, balanced and understandable assessment of the company's position and prospects to its shareholders and ensure an open dialogue operates. The decisions of the executive board members should be scrutinised by the non-executive directors.

The board is responsible for determining the nature and extent of the principal risks it is willing to take in achieving its strategic objectives. The board should maintain sound risk management and internal control systems and establish formal and transparent arrangements for considering how they should apply the corporate reporting, risk management and internal control principles and for maintaining an appropriate relationship with the company's auditors. The Chairman and Chief Executive should report to the shareholders in the annual report.

### Remuneration

Executive directors' remuneration should be designed to promote the long-term success of the company. Performance-related elements should be transparent, stretching and rigorously applied. There should be a formal and transparent procedure for developing policy on executive remuneration and for fixing the remuneration packages of individual directors. No director should be involved in deciding his or her own remuneration. The board should establish a nomination committee with non-executive directors and provide full disclosure in the annual report of its activities.

### Relations with shareholders

There should be a dialogue with shareholders based on the mutual understanding of objectives. The board as a whole has responsibility for ensuring that a satisfactory dialogue with shareholders takes place. The board should use general meetings to communicate with investors and to encourage their participation. Separate meeting should take place with institutional investors and the head non-executive director can play a role in enhancing the relationship with shareholders.

(18 marks)

- (b)** The “comply or explain” approach is the trademark of corporate governance in the UK. It has been in operation since the Code’s beginnings and is the foundation of its flexibility. It is strongly supported by both companies and shareholders and has been widely admired and imitated internationally.

The principles are the core of the Code and the way in which they are applied should be the central question for a board as it determines how it is to operate according to the Code. It is recognised that an alternative to following a provision may be justified in particular circumstances if good governance can be achieved by other means.

A condition of doing so is that the reasons for it should be explained clearly and carefully to shareholders, who may wish to discuss the position with the company and whose voting intentions may be influenced as a result. In providing an explanation, the company should aim to illustrate how its actual practices are consistent with the principle to which the particular provision relates, contribute to good governance and promote delivery of business objectives. It should set out the background, provide a clear rationale for the action it is taking, and describe any mitigating actions taken to address any additional risk and maintain conformity with the relevant principle. Where deviation from a particular provision is intended to be limited in time, the explanation should indicate when the company expects to conform with the provision.

(12 marks)

**[Total: 30 marks]**