

# CORPORATE LAWS & GOVERNANCE

## PROFESSIONAL 1 EXAMINATION - AUGUST 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, 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.

# CORPORATE LAWS & GOVERNANCE

PROFESSIONAL 1 EXAMINATION - AUGUST 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.** Mitch's uncle, Smythson, recently died and under the terms of his uncle's will Mitch has inherited shareholdings in two different companies, as follows:

- (1) He inherited 100,000 €1 ordinary shares in Ramsey Wine Merchants Ltd. When Mitch received a copy of the share certificate in respect of these shares it stated that these shares were partly-paid in the amount of €0.30 per €1 share.
- (2) He inherited 50,000 €1 preference shares in Sorenson Cheese Emporium Ltd. These shares were purchased at a premium of €0.40 on every €1 share sold.

Mitch has recently received notice of a meeting organised by Ramsey Wine Merchants Ltd, in which they are proposing to increase the company's issued share capital by executing a rights issue. They are proposing to allow shareholders to purchase one additional share for every five held, and are also proposing that the company provides financial assistance to any shareholder who requests it to effect this purchase.

Mitch has also received notice of a proposed meeting being held by Sorenson Cheese Emporium Ltd seeking (1) authorisation to issue shares for non-cash consideration and (2) to effect a variation to the rights of preference shareholders by reducing the right to receive cumulative preference dividends by 2 years.

As Mitch knows nothing about company law, he has contacted you seeking advice regarding these matters.

### REQUIREMENT:

- (a) Analyse the nature of the ordinary shares that Mitch has inherited in Ramsey Wine Merchants Ltd, commenting specifically on his rights and obligations in relation to these shares if this company is placed in liquidation. (3 marks)
- (b) Examine the capital maintenance rules regarding the provision of financial assistance by a company to purchase its own shares, including a discussion of the proper procedure to be adopted by the company to ensure corporate compliance, and the circumstances where this procedure does not need to be adopted. (7 marks)
- (c) In relation to the shares that Mitch inherited in Sorenson Cheese Emporium Ltd, review the rules that apply where a company issues shares at a premium. (4 marks)
- (d) Evaluate the rules in relation to the issue of shares for non-cash consideration. (7 marks)
- (e) Discuss the procedure that must be adopted by Sorenson Cheese Emporium Ltd to effect a variation of the class rights of preference shareholders, and advise Mitch as to the consequences of the passing of this proposed resolution. (4 marks)

**[Total: 25 marks]**

2. Ruben is a director of Cooper Technology and Diagnostics Ltd. The company has 20 shareholders and is run solely by Ruben and his father Murray, who are the company's executive directors. In the last number of years Ruben has developed a serious on-line gambling problem and has incurred personal debt amounting to approximately €80,000. To alleviate his financial problem Ruben borrowed €50,000 from the company in January 2014. He drafted a document to formalise this loan and asked his father Murray to sign it, when he was signing other company documents. Murray signed off on this document without reading it, and was unaware that Ruben borrowed this money from the company. Despite the loan, Ruben's financial situation did not improve and he continued to lose money through on-line gambling.

Six months ago, because of an outstanding debt due to Bet 24-7, he was called to a meeting with the debt management department of this company. During this meeting Ruben explained that he was not in a position to pay the outstanding debt in totality, but was happy to agree an instalment plan to cover the repayments. The financial controller of Bet 24-7 suggested an alternate option to Ruben. He explained that there was certain income that Bet 24-7 could not show in its financial accounts and proposed an arrangement whereby Cooper Technology and Diagnostics Ltd would invoice Bet 24-7 a fixed sum every month for IT maintenance services (which would not be provided) and that in return Cooper Technology and Diagnostics Ltd would ostensibly purchase software from Drury Component Suppliers, a subsidiary of Bet 24-7, for the exact value of the IT maintenance services. No work or goods would ever be exchanged between the companies, except on paper, and Ruben was told that if he agreed to this option that the totality of his debt due to Bet 24-7 would be written off within 12 months, and that the company would agree to continue to extend him lines of gambling credit. Ruben agreed to this proposal and these "transactions" have been recorded in the company's accounts.

Last month, the offices of Cooper Technology and Diagnostics Ltd were raided by the police and both Ruben and Murray were arrested on suspicion of facilitating money laundering. Murray was completely unaware of what Ruben was up to and was released without charge following police questioning. Ruben admitted his role in the Bet 24-7 scam to the police and has since been charged with money laundering.

Following these events, the shareholders of Cooper Technology and Diagnostics Ltd requisitioned a meeting with the directors to explain the situation. Only Murray attended this meeting, at which he explained that as a consequence of his deteriorating health he had left most of the running of the company to Ruben in the last year. Only following Ruben's arrest had Murray actually reviewed the accounts of the company in detail, at which point he became aware of Ruben's borrowing from the company, the unusual transactions with Bet 24-7 and Drury Component Suppliers and realised that the company was in fact insolvent and would need to be liquidated.

Following this meeting, Finlay was appointed as voluntary liquidator of Cooper Technology and Diagnostics Ltd by the creditors. Finlay has since notified the shareholders and creditors that as Murray is a member of professional accountancy body an action should be brought against him for reckless trading in relation to the company.

The shareholders of Cooper Technology and Diagnostics Ltd have now contacted you for advice regarding these matters.

#### **REQUIREMENT:**

- (a) Assess the rules regarding directors' loans pursuant to Section 31 of the Companies Act 1990, as amended by the Company Law Enforcement Act 2001 and the Companies (Amendment) Act 2009. This examination should explain the rule, as well as the exceptions to this rule, and what must be proved in order to successfully prosecute for this breach. Comment also on the validity, or otherwise, of Ruben's loan. (10 marks)
- (b) Define the term money laundering and discuss the elements of the offence of money laundering as established by the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010, as well as the potential sanctions that can be imposed upon Ruben, if he is found guilty of this offence. (8 marks)
- (c) Review the law in relation to reckless trading and discuss the potential liability, or otherwise, of Murray in respect of this offence. (7 marks)

**[Total: 25 marks]**

- 3.** Delaney is a majority shareholder in Tyson Engineering Ltd, holding 30% of the issued capital in the company, which he inherited from his father upon his death. Despite the fact that Delaney is a major shareholder, he is not a company director, and in fact he has clashed with the directors of the company, his two uncles, on numerous occasions in the past and often used his shareholding to veto the passing of special resolutions.

Last month, Delaney booked a month long holiday for himself and his family, and within one week of making this booking he received notice of an extraordinary general meeting (EGM) being convened by Tyson Engineering Ltd for the purpose of (1) effecting an alteration to the company's Articles of Association removing the right of pre-emption, and (2) increasing the issued share capital of the company by allowing the directors to purchase company shares. If these alterations are effected it will result in the reduction of Delaney's shareholding from 30% to 24% and will effectively mean that Delaney will not be able to prevent the directors from passing special resolutions.

As Delaney was due to be away on holidays on the day of the proposed meeting he contacted Hayes, the company secretary, informing him that he wanted his sister (Delaney's) Eden to attend the meeting as his proxy. However, he subsequently received a letter from Hayes stating that the directors are refusing to allow a proxy to attend this meeting, and stating that he was required to attend personally, or that the resolution would be dealt with in his absence. Delaney decided to attend the meeting to prevent the passing of these resolutions, but following a vote (based on a show of hands) the directors refused to allow a poll vote to take place, and as the two directors voted in favour of these resolutions they were deemed passed, despite Delaney's protests.

Delaney has now contacted you for advice regarding the legality or otherwise of the actions of Tyson Engineering Ltd's directors.

**REQUIREMENT:**

- (a) Evaluate the procedure to be followed to alter the Articles of Association, and the rules that apply in determining the validity or otherwise of any such alteration. In light of this evaluation, determine whether the proposed alteration by the directors of Tyson Engineering Ltd is in compliance with these requirements. (7 marks)
- (b) Define the term 'oppression' pursuant to Section 205 of the Companies Act 1963, and assess the rules applied by the Court in determining whether shareholder rights have been oppressed. In light of this assessment, determine whether the actions of the directors of Tyson Engineering Ltd are likely to be viewed as oppressive. (9 marks)
- (c) Explain the main distinction between voting at company meetings based on a show of hands as opposed to a poll, and list the various parties who can request a poll vote. (4 marks)

**[Total: 20 marks]**

**OR**

- 4.** Avery is a director of two companies, which trade as public bars and restaurants in South County Dublin.

One of the companies of which Avery is a director, Hutton Vintners Ltd, trades under the name of Rafferty Fox. The company has been experiencing a decline in income in the last year and is now on the verge of insolvency. Avery believes that this company could be rescued if its finances were restructured and he is considering making an application to have this company placed into examinership.

The other company of which Avery is a director, Pinewood Vintners Ltd, trades under the name Rafferty Fox and Hound, and Avery is concerned that any negative publicity in relation to the financial issues being experienced by Hutton Vintners Ltd, trading as Rafferty Fox, should not negatively impact the reputation of Pinewood Vintners Ltd, trading as Rafferty Fox and Hound. To that end he is considering changing the business name of Pinewood Vintners Ltd to The Armadillo in the Prayer Garden.

**REQUIREMENT:**

- (a)** In relation to the law on examinership, review each of the following:
- (i) The purpose of examinership; (3 marks)
  - (ii) The procedure to make an application for examinership in the High Court; and (7 marks)
  - (iii) The effect of an Order for examinership upon the company and its creditors. (5 marks)
- (b)** Examine the limitations imposed upon the choice of Business Name in accordance with the provisions of the Registration of Business Names Act 1963, and advise Pinewood Vintners Ltd on the likelihood of it being allowed to register this name, when another unrelated restaurant in North County Dublin trades under the name The Armadillo in the Churchyard. (5 marks)

**[Total: 20 marks]**

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

- 5.** You are a newly qualified accountant working for ABC plc. You have been tasked to prepare a document for the newly appointed Chair of the Audit Committee. She has requested that a briefing note be compiled that covers the following issues, making specific reference to the Financial Reporting Council (FRC) Guidance on Audit Committees:

**REQUIREMENT:**

- (a)** Discuss the key issues relating to the audit committee and the relationship it has with the board of directors.  
(9 marks)

- (b)** Evaluate the role and responsibilities of the audit committee as part of corporate governance arrangements.  
(18 marks)

(3 Professional marks)

**[Total: 30 marks]**

**OR**

- 6.** *'The board's role is to provide entrepreneurial leadership of the company within a framework of prudent and effective controls which enables risk to be assessed and managed.'*

Financial Reporting Council, FRC Guidance on Board Effectiveness

**REQUIREMENT:**

With reference to the above quotation from the FRC:

- (a)** Discuss the role played by Executive Directors on the board in securing effective corporate governance outcomes.  
(10 marks)

- (b)** Evaluate the components and characteristics of the decision-making processes an effective board would be expected to demonstrate.  
(20 marks)

**[Total: 30 marks]**

**END OF PAPER**

## SUGGESTED SOLUTIONS

THE INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS IN IRELAND

# CORPORATE LAWS & GOVERNANCE

PROFESSIONAL 1 EXAMINATION - AUGUST 2015

### SOLUTION 1

- (a) **Ordinary Shares:** Characteristics of Ordinary Shares: These shares are classed as the equity shareholders of the company as they bear the burden of the company's performance. They have the following characteristics: (1) they are risk takers as they are the last to be paid upon the liquidation of the business, and if there is no funds available on liquidation they receive no return on capital, (2) they possess the possibility of capital growth in that they have a right to a share of any available assets/funds upon winding-up if funds are available, (3) they receive a return called a dividend, but its payment is completely dependent upon company performance – if profits are available for distribution and the directors declare a distribution then they may receive a dividend, and (4) ordinary shares generally have the ability to influence company policy by exercising voting rights at meetings (AGM/EGM) relating to company business (any 3 = 3 marks) or

**Partly-Paid Shares:** The 100,000 €1 ordinary shares inherited by Mitch in Ramsey Wine Merchants Ltd are partly-paid shares. The characteristics of these shares are as follows: (1) these are shares purchased without paying the full amount due on subscription, (2) where a person purchases partly paid shares and a call is made for the payment of the balance due then the shareholder is contractually obliged to pay the balance due, (3) if the company goes into liquidation then any sums outstanding on foot of partly paid shares are automatically called for payment – therefore, Mitch has a potential liability on these shares of the unpaid portion (€70,000), and (4) a shareholder who purchases partly-paid shares enjoys full shareholder rights in respect of these shares, including the right to a dividend on the paid-up portion of these shares (any 3 = 3 marks)

- (b) **Financial Assistance to Purchase Shares:** Capital maintenance rules prohibit a company raising funds and lending them to shareholders to purchase company shares as this would amount to the company providing financial assistance for the purchase of its own shares (0-1 mark). Section 60 CA 63 (and Section 41(1) CAA 83) prohibits both direct and indirect financial assistance, although the legislation does provide exceptions to this rule. Where a company passes a special resolution (within 12 months of the transaction), accompanied by a statutory declaration of solvency (within 24 days of giving the assistance), which is then registered with the CRO (within 21 days of the assistance), and providing a right for the minority shareholders to apply for protective relief, then that company can provide financial assistance for the purchase of its own shares. The statutory declaration must include (1) the form of the assistance, (2) the recipient, (3) the purpose of the assistance, and (4) a declaration of the ability of the company to pay its debts as they fall due (0-4 marks). Other exceptions include: (1) where the company lends money in the normal course of business, (2) paying dividends, (3) the discharge of a liability lawfully incurred by the company, and (4) lending money to purchase shares as part of an employee share scheme or to persons in employment to acquire shares in the company. (any 2 = 0-2 marks)
- (c) **Shares at a Premium:** A share premium is where a company issues shares above their par nominal value – the excess in value is the premium. In relation to the company accounts, the nominal value of the share is lodged into the issued capital account and the aggregate value of the premium must be lodged into the share premium account. (0-1 mark). In accordance with Section 62(2) CA 63 the account can only be utilised as follows: (1) paying up un-issued shares for use in a bonus issue (a gift of shares to existing shareholders that converts the premium into share capital) – (2) to write off the preliminary expenses of the company (such as a promoters preliminary expenses) – (3) to write off any expenses, commission or discount relating to any issue of shares or debentures by the company, or (4) the paying of any premium due on the redemption of redeemable shares/debentures. (any 3 = 3 marks)
- (d) **Issue of shares for non-cash consideration:** Although there is a general prohibition on issuing shares for non-cash consideration and the requirement that shares must be paid in full and by cash (0-1 marks), the Companies (Amendment) Act 1983 introduced new exceptions and rules regarding the issue for non-cash consideration as follows: (1) Section 26 requires that if the consideration for the shares is for work or services, the work or services must be performed prior to the allotment, and the contract for the allotment of shares on this basis must be delivered to the CRO (0-1.5 marks), (2) Section 29 requires that if the consideration for the



shares is an undertaking or promise to perform an act, that undertaking must be performed within 5 years (0-1.5 marks), and (3) Section 30 requires that if the consideration for the shares in a public company is a non-cash asset, an independent valuer/qualified auditor must value the asset, within six months prior to the allotment, and prepare a report that must be filed with the Registrar of Companies. The report must contain: (1) the nominal value of the shares, (2) the premium, if any, payable on the shares (3) a description of the consideration, the method used to value it and the date of the valuation, and (4) the extent to which the nominal value of the shares and any premium are to be treated as paid up by the consideration or in cash (Section 30(6)). (0-3 marks)

- (e) **Variation of Class Rights:** The procedure is usually established in the Memorandum/Articles of Association and requires consent by way of a special resolution of the holders of the issued shares of that class or by written consent of at least three-quarters in nominal value of that class (Section 38(2)&(5) C(A)A 1983). Any breach and shareholders can exert their rights under Section 205 CA 63. Where the holders of not less than a 10% aggregate of these class of shares object to the alteration, only a decision of the court can confirm the alteration. (0-2.5 marks)

**Conclusion:** If the resolution to effect this variation is passed then this means that Mitch's right to unpaid arrears of the cumulative preference dividend in respect of these 50,000 €1 shares will be reduced from 6 years to 4 years. (0-1.5 marks)



## SOLUTION 2

- (a) **Loans to Directors:** This is governed by Section 31 CA 90. This section contains a prohibition against loans/quasi loans/credit transactions and guarantees from a company or its subsidiaries to a director or any connected person. (0-1.5 marks)

**Exceptions:** However there are some exceptions to this prohibition, including: (1) where the loan is less than 10% of the value of the company's assets (Section 32) or (2) intra-company transactions (Section 35 as amended by Section 79 CLEA 2001), or (3) the advancing of money to a director for reasonable business expenses (Section 36) – which must be vouched for within a reasonable time period, and (4) where the transaction is in the normal course of business – in regular trade terms (Section 37) – such as where the company is a bank or financial institution. (any 3 = 0-3 marks)

**Guarantees:** Section 78 of the Company Law Enforcement Act 2001 requires that: (1) a guarantee of a loan or any security in connection with a loan, quasi-loan or credit transaction made to a director or connected person must be approved by special resolution of the members of the company, (2) the directors must also make a declaration of solvency stating that the guarantee/security will not impact on the ability of the company to repay its debts, and (3) the declaration must be supported by an independent report and the company should notify the registrar of the loan. (3 = 0-3 marks)

**Mens Rea:** Section 7 of the Companies (Amendment) Act 2009, states that every officer who is “in default” of Section 31 (in that they authorise or who, in breach of his duty, permits, a transaction) is guilty of an offence, regardless of whether they were aware that the company was contravening Section 31. (0-1.5 marks)

**Conclusion:** It is highly likely that this loan is in breach of Section 31 – unless it falls under the Section 32 exception – even if it does Ruben is still in breach of his duties to the company – as he was acting in his own interests and not the company's. (0-1 mark)

- (b) **Money Laundering:** This is the way in which criminals attempt to turn cash and other assets obtained from criminal activities into genuine assets through the financial services system and through established businesses. (0-1.5 marks)

**Elements:** The offence is defined under Section 7(1) of the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 as being committed where a person engages in any of the following acts in relation to property that is the proceeds of criminal conduct: (1) concealing or disguising the true nature, source, location, disposition, movement or ownership of the property, or any rights relating to the property, (2) converting, transferring, handling, acquiring, possessing or using the property, or (3) removing the property from, or bringing the property into, the State. (any 4 = 0-4 marks)

**Mens Rea:** To be found guilty of the offence the accused must have knowledge that, or be reckless as to whether, the property is the proceeds of criminal conduct. (0-1 mark)

**Penalties:** If Ruben is found guilty of money laundering he is liable to imprisonment for a term not exceeding 14 years and/or an unlimited fine, where he is prosecuted upon indictment. Where the prosecution arises summarily upon conviction he may be liable to a fine not exceeding €5,000 (subject to the terms of the Fines Act 2010, as amended) or imprisonment for a term not exceeding 12 months (or both). (0-1.5 marks)

- (c) **Reckless Trading:** In accordance with Section 297A CA 63 this offence arises where company officers are knowingly party to the carrying on of any business of the company in a reckless manner – the offence can be committed by any company officer. The application can be made by the Liquidator, Examiner or Receiver, or by any applicant who can show that the company is unable to pay its debts. (0-1.5 marks)

In accordance with subsection 2 this offence can arise where an officer of the company is (1) carrying on the business below the standard of their general knowledge, skill and experience, or (2) by the contracting of a debt by the company and where the officer did not honestly believe on reasonable grounds that the company would be able to pay the debt when it fell due for payment, as well as other debts. The offence can also arise where a company trades while insolvent. Subsection 7 allow for liability not to be imposed where there is evidence that the company officer acted “honestly and responsibly”. In *Re Hefferon Kearns Ltd (No.2)* [1993] relevant factors in determining whether the actions of the company officers were reckless included: (1) the fact that the company officers had kept proper books of account, (2) personally guaranteed company loans, and (3) traded out of near insolvency in the past. (examples – any 3 = 0-3 marks, any one case = 0-1.5 marks)

**Conclusion:** Liability may be imposed upon Murray, because as a CPA accountant it is obvious that he acted below the standard that would reasonably be expected of him in this situation – as a result he may be exposed to civil liability for the debts of the business. (0-1 mark)

## SOLUTION 3

- (a) **Alteration of the Articles:** In accordance with Section 15 CA 63 an alteration of the Articles requires a special resolution, which necessitates calling an extraordinary general meeting (EGM) with 21 days clear notice, and approval by a 75% majority of voting shareholders in attendance at that meeting. (0-1.5 marks)

**Rules:** In assessing the validity of this alteration, the Court will take into consideration the fact that the right to alter the Articles is subject to such alteration not overriding the Companies Acts, the Memorandum of Association and the general rules of law. In addition, there is a legal requirement that the alteration to the Articles must be made bona fide and in the best interests of the company as a whole (as per *Allen v Gold Reefs of West Africa* [1990]) – in effect the question asked is if the alteration is in the interest of the “individual hypothetical member”. Where an alteration does not invidiously discriminate between shareholders, the Courts are inclined to hold that any such alteration is deemed to be in the best interests of the company as a whole. However, if the alteration appears unreasonable when viewed objectively, then the Court has the ability to invalidate the alteration. This determination will be made based on the individual facts of each case. (0-3.5 marks) In *Greenhalgh v Arderne Cinemas Ltd* (1950) an alteration to the Articles altering a pre-emption clause that facilitated a direct sale of shares to non-members where an ordinary resolution was passed, was deemed valid as the majority of the shareholders genuinely believed that the change was in the best interests of the company as a whole. Conversely, in *Brown v British Abrasive Wheel Co Ltd* (1919) an alteration to a company’s Articles to allow the 98% majority to buy out the 2% minority shareholders was held to be invalid as not being in the interest of the company as a whole. (Any one case = 0-1 mark)

**Conclusion:** In relation to the proposed alteration by Tyson Engineering Ltd this may be challenged on the basis that it is not bona fide – if the sole purpose of the proposed alteration is to deprive Delaney of his voting rights and in particular his ability to veto special resolutions. (0-1 mark)

- (b) **Oppression:** According to Section 205 CA 63 oppression arises where the company exercises its authority in a burdensome, harsh and wrongful manner, or where the actions of the company cause financial loss to the shareholders as a whole or as a class (also as per *Scottish Cooperative Wholesale Society v Meyer* [1959]). (0-1.5 marks)

**Rules re Oppression:** (1) there is no requirement of mal fide (although the existence of bad faith is indicative of oppression), (2) the action does not need to be illegal – negligence or carelessness will suffice (in *Clubman Shirts* (1983) the continuous failure to produce annual accounts showed a complete cavalier attitude that could constitute oppression – also in *Re Murph’s Restaurant* (1979) the Court held that the exclusion of a director from management, while not unlawful, can amount to oppression), (3) however, where the act is fraudulent or illegal it will be oppressive (*Re Greencore Trading Company Ltd* [1980]), (4) the conduct does not have to be continuous – a one-off act will often suffice (in *Re Westwind Holdings Company Ltd* (1974) the manner in which the company’s assets were sold was held by the Court to be a sufficient act of oppression to invoke Section 205), (5) an oppressive act must occur – the mere possibility does not facilitate the lodging of the petition (in *Re a Company* (1982) a petition by a minority shareholder failed on the grounds that it was premature to bring such an action before any final decision to proceed with alleged oppressive behaviour was actually taken), and (6) incompetence/mismanagement is not automatically oppression – unless it is intentional mismanagement (as arose in *Irish Press v Ingersoll* [1995]). (Any 4 rules = 0-6 marks)

**Conclusion:** The actions of the company directors of Tyson Engineering Ltd are oppressive to Delaney as they appear to be undertaken in order to extinguish his voting rights as a shareholder. If this proposed alteration to the Articles is not bona fide and in the best interests of the company then it will be oppressive. In addition, the fact that they have deprived him of his membership rights in relating to voting by proxy and calling for a poll voting are also likely to be classified as oppressive. (0-1.5 marks)

- (c) **Voting Methods:** The main distinction between these voting based on a show of hands and a poll vote are as follows: (1) in a vote based on a show of hands – each shareholder is only entitled to one vote, whereas with poll voting you can vote based on your actual shareholding, (2) a vote based on a show of hands is a public vote, whereas poll voting is by secret ballot, (3) you cannot reflect proxy voting with a show of hands, but you can with poll voting, (4) there may be no actual record of voting based on a show of hands (this depends on the number of shareholders – there may not be an actual count of the votes for and against a resolution), whereas there is a permanent accurate record of all poll voting. (Any 2 = 0-2 marks)

**Requesting a Poll Vote:** the following people can request a poll vote: (1) the chairperson, (2) three shareholders (present in person or by proxy) or (3) 10% of the voting shareholders, present in person or by proxy (Section 137 CA 63). (any 2 = 0-2 marks)

## SOLUTION 4

(a)

- (1) **Purpose of Examinership:** The concept of examinership was developed under the Companies (Amendment) Act 1990 to provide a period of protection (70 days) to companies in financial difficulty but who are not yet insolvent. The purpose of the protection is to give the company some breathing space, free from the risk of liquidation or other legal proceedings, in order to allow the examiner to investigate the company's affairs and to report to the Court on its prospects for survival. Justice Fennelly in Gallium Limited and the Companies Amendment Act 1990 (2009) stated that: "... [t]he entire purpose of Examinership is to make it possible to rescue companies in difficulties. The protection period is there to facilitate examination of the prospects of the rescue. However, the protection may prejudice the interests of some creditors. The court will weigh the existence and degree of any such prejudice in the balance". In effect, the purpose of examinership is to endeavour to save companies where there is a reasonable prospect of survival. (0-3 marks)
- (2) **Procedure:** In order to appoint an examiner a petition must be presented to the High Court (if the company's debts are greater than €317,500). This application may be made by: (1) the company, (2) its directors, (3) its creditors, or (4) shareholders. (0-1 marks)

All petitions must be made in utmost good faith (*uberrima fides*) in order for the Court to be satisfied that all information supplied to it by the company is based on truth. A serious lack of good faith may result in the examiner being discharged and his proposals being rejected. In *Re Wogans (Drogheda) Ltd (No.2)* (1993) the Court refused to sanction a scheme of arrangement where the directors deliberately misstated the value of revenue debts in the balance sheet presented on foot of the Section 2(2) petition, on the basis that this material non-disclosure was a substantial abuse of process. (0-1 marks)

The petition, when presented, must also nominate a person to be appointed as examiner and state that the petitioner believes that the company has a reasonable prospect of survival as a going concern. (0-1 marks)

In accordance with Section 7, of the Companies Amendment Act (No. 2) 1999 in order to justify this opinion a report of an independent accountant must be attached to the application corroborating this opinion and indicating the extent of the funding required for trading during the examinership period and the source of that funding. Section 7 states that this independent accountants report must contain the following information:

- (a) Details of the identity of the company Directors, other officers and shadow Directors
- (b) Details of other companies of which the Directors are also Directors
- (c) A statement of the affairs of the company, detailing the company's assets, debts and liabilities at the date of appointment, and provide a list of creditors and securities
- (d) A statement of opinion by the Accountant as to whether he considers that the company has a reasonable prospect of survival as a going concern, and the steps that must be taken by the company to ensure this, including proposals for a compromise or scheme of arrangement
- (e) The Accountant's opinion as to whether the formulation, acceptance and confirmation of proposals for a compromise or scheme of arrangement with the company's creditors and members would facilitate such survival
- (f) The Accountant's opinion as to whether his work should be assisted by a direction of the Court, extending the role and membership of the creditor's committee
- (g) The Accountant's opinion as to whether proposals for a compromise or scheme of arrangement with the company's creditors would be more advantageous to the members and creditors as a whole, than the winding-up of the company
- (h) The Accountant's opinion as to whether disparities exist that would indicate the existence of fraudulent or reckless trading (any 5 = 0-2.5 marks)

The petition may also be accompanied by a copy of the proposals for a compromise or a scheme of arrangement for submission to all interested parties. If the petition is presented by either the company or its directors, a statement of the assets and liabilities of the company must be completed within 7 days of lodging the petition. (0-1 marks)

Once the petition is lodged the Registrar of Companies (CRO) must be notified within three days. (0-0.5 marks)

**(3) Effect of the Appointment of an Examiner:** The main effect is that the company is immune from legal proceedings – this immunisation manifests itself in the following ways: (1) Receivers: If a Receiver has been appointed to the company for less than 3 days and the company is successfully placed under examinership – the Receiver’s position is usurped and the Receiver will be powerless during the period of examinership. No application for receivership can be made when the company is in examinership. (Section 5(2)(b)), (2) Liquidation: The liquidation process cannot be initiated during examinership (Section 5(2)(a) CAA 90), (3) No legal action may be initiated against the company once an examiner has been appointed (including actions relating to company property, charges, minority protection, guarantees etc ...) (Section 5(2)(c)&9d)), and (4) No recovery of goods held under a retention of title clause or hire purchase/consumer credit agreement can take place (Section 5(2)(e)). (any 4 = 0-5 marks)

**(b) Company Names:** All business names must be registered under the Registration of Business Names Act 1963. A name is automatically disallowed if it is considered undesirable by the Registrar of Companies (Section 86 CLEA 2001). However, there is a possible appeal to the High Court where a name is refused registration (0-1 mark). The following names are considered undesirable: (1) offensive, immoral or blasphemous names, (2) names suggesting a connection with any government department, local authority or State agency, where no such connection exists (3) a name that uses “bank, society, co-operative or insurance” in its name, unless it has obtained the appropriate permission from the Minister, (4) a name that includes a registered trademark, without production of the consent of its owner, (5) a name that it regarded as being misleading or confusingly similar to a registered name, or (6) a name of an existing company. (any 3 = 0-3 marks)

**Conclusion:** It is highly unlikely that Pinewood Vitners Ltd will be permitted to register the business name, The Armadillo in the Prayer Garden, as it is confusing similar to the name of another restaurant, The Armadillo in the Churchyard and is likely to amount to passing-off. (0-1 mark)

## SOLUTION 5

Suggested solution could cover the following issues:

(a) With regard to issues relevant to risk management and internal control, responses could draw on the matters highlighted in the UK Corporate Governance Code in this regard, in terms of principles and supporting provisions, these being, in relation to the board:

- having responsibility for the determination of risk appetite of the company in the pursuit of strategic objectives,
- as part of the process of establishing the nature and extent of the significant risks willing to be taken, processes for determining risk tolerance and the operation of systems to monitor risk should be developed;
- having responsibility for the maintenance of sound systems of risk management and internal control;
- conducting annual reviews, at least, of the systems of risk management and internal control, followed up with reporting the outcomes of these reviews to shareholders; and
- ensuring that reviews of systems are comprehensive in terms of coverage, ensuring that all manner of control are covered, spanning financial, operational and compliance controls.

0.5 marks for each issue identified

1.5 marks for each issue discussed, dependent on the quality of response evidenced

**(9 marks)**

(b) In relation to the role audit committees play in corporate governance, responses could draw on the matters highlighted in the UK Corporate Governance Code in this regard, in terms of principles and supporting provisions, these being:

- the principal responsibilities of the audit committee being articulated formally in written terms of reference that sets out its ambit of activity, including:
  - o the monitoring of the integrity of the company's financial statements, in the process reviewing significant financial reporting judgements and announcements relating to financial performance;
  - o reviewing the company's internal financial controls if this is not already done separately by either a separate risk management committee;
  - o reviewing the internal control and risk management systems of the company;
  - o monitoring how effective the company's internal audit function is;
  - o making recommendations in relation to the appointment, re-appointment, removal and remuneration of the external auditor;
  - o reviewing and monitoring the independence and objectivity of the external auditors and the effectiveness of the overall audit process, having regard for the regulatory context in which it is conducted;
  - o developing and implementing policy relating to the supply of non-audit services by the external auditors, having regard to relevant ethical guidance in relation to this issue;
  - o a catch all provision requiring it to report to the board any areas where proactive action or improvement is required; and
  - o the need for the audit committee to prepare a report for the board setting out it has discharged its responsibilities.
- the terms of reference of the audit committee being made available, clearly setting out the nature of its role, and how this relates to the board;
- the provision of advice to the board on whether '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';
- the role of the audit committee in reviewing arrangements to facilitate employees of the company reporting potential improprieties, the committee ensuring that appropriate arrangements are in place for the independent and meaningful investigation of such allegations;
- as part of the role of the audit committee reviewing the effectiveness of the internal audit function, the committee should regularly consider the need for an internal audit function in a company that does not have one, with explanations provided if necessary;



- the need for a separate section of the annual report that sets out the activities undertaken by the audit committee in discharging its governance role, including: the key issues the committee dealt with in relation to the financial statement, and how the committee dealt with these issues; an ‘explanation of how it has assessed the effectiveness of the external audit process and the approach taken to the appointment or reappointment of the external auditor, and information on the length of tenure of the current audit firm and when a tender was last conducted’; and an explanation of how the objectivity and independence of the external auditor were maintained in the case of where the external auditor has provided non-audit services.

0.5 marks for each issue discussed

1.5 marks for each issue evaluated, dependent on the quality of response evidenced

**(18 marks)**

**(3 professional marks)**

**[Total: 30 Marks]**

## SOLUTION 6

Suggested solution could cover the following issues:

- (a) In relation to the role executive directors play in corporate governance, responses could draw on the matters highlighted in the UK Corporate Governance Code in this regard, in terms of principles and supporting provisions, these being:
- they have the same duties as all members of a unitary board, extending, as a board members, to areas beyond their ambit of responsibility in their executive roles – they should be reminded of this by the Chairman of the board, in addition ensuring they receive appropriate induction and training in the process of developing their professional board skills;
  - they should not regard themselves as part of the CEO team when serving in their board roles: they should consider themselves as part of the unitary board, contributing to more effective decision making by virtue of 'greater knowledge, involvement and commitment at the point of decision';
  - executive directors' board skills can be enhanced and further developed if they serve on other boards; the CEO is the highest ranking executive and s/he plays a key role in effective corporate governance, particularly with regard to proposing strategy to the board, and delivering agreed strategies;
  - a key and crucial relationship is that between the Chairman and CEO, a relationship that should be articulated and recorded formally for the purpose of ensuring that there is no overlap between the two roles; as the most senior executive in the company, the CEO has the key role to play in setting the 'tone at the top' of the organisation, setting good example to employees around issues relating to how the board expects them to display appropriate corporate values, culture and behaviours consistent with same. The CEO also ensures the views of employees are communicated to the board, particularly in relation to issues relevant to the business;
  - the CEO plays a critical role in ensuring s/he is aware of executive directors' views on business issues so as to enhance the quality of discussion and decision making in the boardroom; the CFO has an important role to provide 'high-quality information to the board on the financial position of the company'; and executive directors have detailed knowledge of the workings of the company, giving them particularly important insights when dealing with strategic matters. They should, however, appreciate the role their NED colleagues play in relation to the provision of effective constructive challenge, and the Chairman and CEO should ensure this important process takes place.

0.5 marks for each issue identified

1.5 marks for each issue discussed, dependent on the quality of response evidenced

**(10 marks)**



- (b) In relation to decision making of an effective board, the following issues could be pertinent to the response, in line with FRC guidance in this regard:
- The critical, and most important, factor in being an effective board is the ability to take, and arrive at, good quality decisions, a process that should be underpinned by quality information sources.
  - To facilitate the achievement of good quality decisions, boards should devote time to developing decision making processes of how it, as a forum for effective decision making, organises itself, the board agenda, and the work schedule of the committees that serve the board;
  - This process, according to the Financial Reporting Council, is best facilitated by:
    - o 'high-quality board documentation;
    - o obtaining expert opinions when necessary;
    - o allowing time for debate and challenge, especially for complex, contentious or business critical issues;
    - o achieving timely closure; and
    - o providing clarity on the actions required, and timescales and responsibilities'.
  - The FRC further draw attention to the issues boards should be aware of that can limit decision making effectiveness, these being:
    - o 'a dominant personality or group of directors on the board, which can inhibit contribution from other directors;
    - o insufficient attention to risk, and treating risk as a compliance issue rather than as part of the decision-making process, especially in cases where the level of risk involved in a project could endanger the stability and sustainability of the business itself;
    - o failure to recognise the value implications of running the business on the basis of self-interest and other poor ethical standards;
    - o a reluctance to involve non-executive directors, or of matters being brought to the board for sign-off rather than debate;
    - o complacent or intransigent attitudes;
    - o a weak organisational culture; or
    - o inadequate information or analysis'.
  - With regard to the role judgment plays in securing effective, quality decisions, best practice draws attention to the key governance issues boards need to alive to, particularly those that interfere with judgment. These include: the recognition of conflicts of interest; the distortion to decision making emotional attachments can bring, a point related to the conflict of interest issue; and relying too heavily on past decisions to make decisions in the future.
  - Best practice in relation to board effectiveness further argues that the following matters should be borne in mind when attempting to make better decisions: an explanation of the process for preparing information for the board in assisting it make decisions about the proposals being presented to the board; the option of seeking independent, third party expert opinion about issues the board is considering; considering the establishment of ad hoc board committees to consider issues in further detail; and having reviews of past decisions, good and bad, to assess the effectiveness of the decision making processes undertaken by the board.

0.5 marks for each issue identified

1.5 marks for each issue discussed, dependent on the quality of response evidenced

**(17 marks)**  
**(3 professional marks)**

**[Total: 30 Marks]**