Do try and avoid too much guesswork on what will appear on the exam. As you will see, your examiner continues to draw a number of questions from past papers and it reiterates the requirement for consideration of past papers and examination reports. A review through these helps you understand what he is looking for and indeed the exact type of question that may be repeated!

There are always some over-reaching key reminders to bear in mind for the Company exam:

a) **Assess what the final part of the question asks you to focus on** – many questions will start introducing a set-up with two or three persons who are both directors and shareholders and could go a number of ways, but read the question and the last few lines most carefully, which will disclose the examiner’s focus and requirement.

b) **Answer the question asked – not the one you would like to be asked** – especially in an essay-style question, remember to revert back to the statement presented and truly consider / analyse the accuracy of same in discussing the area – do not treat an essay question as a ‘tell me all you know’ opportunity – the examiner is looking for focus and true consideration of the statement / quote presented. Using and repeating the language or quote in your answer and demonstrating how this is supported is often a useful technique of showing this approach. Equally in a problem scenario, don’t forget to cross-reference case-law / points being made back into the relevance of the circumstances posed.

c) **Structure your answer** – bear in mind the ILAC approach (Introduction, Law, Application and Conclusion) – the first and last are often overlooked, but don’t forget them, as the first is an opportunity to demonstrate a full awareness of the area and what the question is asking you to focus on. The latter is also key as the examiner will expect a summary of what your ultimate conclusions / advice actually is.

d) **Advise if problem question** - many students write essays for problem question answers and fail to actually ADVISE you client. Don’t forget to summarise your conclusions in the answer and leave the examiner clear as to the end view on each essay or problem question set.

e) **Case-law, case-law, case-law (and the Statutes!)** – as a related point to the foregoing, ensure that you are providing enough supporting case-law or statutory reference justifying your declarations or statements as to what the law is. Remember, it stands not because you say it – but because of the relevant supporting authorities. You should seek to have supporting law to every definitive statement or conclusion you are making throughout your answer (e.g. Company is at law a separate legal person – Salomon –v- Salomon).
f) If you are bringing in a copy of the Companies Act 2014 or Blackstone’s text please remember to post-it the document - writing or marking of it will not be accepted.

g) Structure your exam / Timing – possibly the biggest of all ‘over-reaching’ points – you have a limited timeframe, you need 5 questions. Pay careful attention to the time you spend on each question and be very strict on yourself in respect of time. Remember it is more likely you will pass with five fully completed average answers than three very good answers. If you are running out of time at the end even start to write out bullet points so the examiner can see you knew the information and give you some marks.

Now, a few notes on some of the key areas / cases to prepare for the examination:

Separate Legal Personality

This is an extremely popular question. It has often come up as an essay but it can be asked in a problem style like in Question 2, March 2014. Generally, there are two types of ways it can be asked.

The first is a question which asks you to identify the advantages and disadvantages of incorporation. This might also be asked slightly differently, i.e. what are the consequences of incorporation. **Key points in such an answer:**

1. **Advantages** – (i) limited liability / separate corporate personality, here you would discuss the case of *Salomon* (give brief set of facts), also you could flag the case of *Prest*. Or that the *Salomon* principle was emphatically endorsed in Ireland in *Sweeney v. Duggan* and *Shinkwin v Quin-Con Ltd & Quinlan*. If you have time you could say this one of the major benefits and differences between incorporation and partnership. (ii) Perpetual Succession / Transferable Interest – easy to transfer shares in a company all you need to do is sell them, however, there may be a restriction in respect of pre-emption rights (s.66 of the 2014 Act). In contrast, a partnership need the consent of the other partners. Further a company will continue despite one of its members dying, with a sole trader the business ends upon his death. (iii) Financing the Company – company can create a fixed or floating charge. Floating charge creates greater flexibility for company as can deal with charged assets in the day-to-day running of business without consent of creditor. (iv) Tax Regime – corporation tax is 12.5% whereas personal tax is either 20% or 40% or 45%.

Disadvantages – (i) Regulation and enforcement - the main disadvantages of incorporation is the amount of regulation and enforcement provisions to which the company and its officers will be subjected. A company’s directors will have a vast amount of compliance work to deal with, particularly in relation to notification requirements, auditing and accounting. No such requirements for other types of businesses. (ii) Cost of Incorporation (iii) A company must make certain information available to the company e.g. abridged financial statements. (iv) Cap on number of member’s

2. A question on the exceptions to *Salomon v- Salomon*. Could also be asked as ‘the Courts in lifting the veil’ or ‘consequences of the use of vague metaphorical language such as ‘mask’ or ‘cloak.’ You must give the facts of *Salomon*, candidates should always start with Salomon explaining the principle – then consider the various different grounds, briefly then say there are exceptions in statute and a number in common law. Your examiner often tailors questions to focus on these or one aspect thereof (bear in mind the exact text used in the question – ‘the Irish Courts’, ‘the Courts in lifting the veil’ – and also that occasionally the essay question has sought to hone in solely on the ‘single economic entity’ exception. Lifting the veil as a focus has been absent the last few papers and may be due an appearance (SLP has more come up as part, but not all, of a question on the consequences/advantages of forming a company).

Legislative grounds – e.g. s.610(1)(a) Act, Reckless & Fraudulent Trading under s.610(1)(b) 2014 Act and other legislation – Safety, Health and Welfare at Work Acts, Competition Acts, (e.g. *DPP v Roseberry Construction Ltd*) etc – where the veil / separate personality will be lifted.

Fraud/avoidance of legal duty, e.g. *Jones v- Lipman, Re: Bugle Press* – but remember that *Adams v- Cape Industries* makes it clear that planning to avoid future legal obligations is acceptable. Remember *Roundabout*
v Beirne – how this case would be decided differently and the defendants would be found liable under the Trade Union Act (UK) for such conduct.

Agency – Smith, Stone and Knight –v- Birmingham Corporation presents six factors, but they are not capable of universal application – Denham J.’s’ comments in Fyffes –v- DCC plc are quite relevant, in respect of the expected modern view that it is a question of substance rather than description of the parties themselves and in acknowledging (whilst not found in this case) that agency was still valid as an exception.

Single Economic Entity – has appeared as the sole focus on a SLP question before – therefore be able to take the examiner through the history and development of this exception – in Ireland started with the Power Supermarkets Limited –v- Crumlin Investments Limited – whilst now rejected in the UK, following the decision in Adams –v- Cape Industries, it remains a valid argument and exception in Ireland, as whilst doubt had been expressed on same especially in Rex Pet Foods Limited –v- Lamb Bros; Allied Irish Coal Suppliers –v- Powell Duffryn International Fuels, where Murphy J. had expressed doubt that same should be applied, save in the most exceptional of circumstances – Denham J. was happy to find that such ‘exceptional circumstances’ could still be found and were met in the Fyffes case and the argument thus still has merit. Remember, the Supreme Court appeal did not focus on the separate legal personality point, hence reference and reliance on the High Court decision. In UK – DHN Food Distributors v Tomer Hamlet LBC Lord Denning endorse that single economic entity an exception to Salomon and is separate to agency. UK’s move away from SEE by Lord Keith in Woolfson v Stathclyde Regional Council and in Adams v Cape Industries by Slade LJ.

Ultra Vires

This question has been a popular essay style question, however, because of s.38 of the 2014 Act a private company limited by shares, which is the most popular type of limited liability company, no longer has an objects clause and is therefore deemed to have the capacity to enter into any type of contract. Thus the ultra vires rules no longer apply to it. However, all other types of companies (DACs etc) still must have an objects clause and the ultra vires rules still apply to them (s.972) although even if they enter an ultra vires contract that may be still valid if ratified by the members by special resolution (s.973(4)). Your examiner could still ask a question like ‘outline/ compare and contrast the changes in respect of the Ultra Vires doctrine under the Companies Act 2014.’ (or possibly if may receive a far lower focus than it did historically).

Be open to elaborate upon points and critically assess, particularly with respect to how the doctrine has developed and that it no longer affords the same level of protection as one might previously have expected.

In any essay question, you may have to take your examiner through:

- the interpretation and general development of ultra vires – Ashbury Railway Carriage –v- Riche; Cotman –v- Brougham; Bell Houses Limited –v- City Wall Properties Limited as to development of principle – cat and mouse game played out between draughtsmen and judiciary;

- the objects –v- powers distinction, likely around the implications that nothing can save a power from being construed as such and their limitations that they must be exercised in furtherance of objects. The result of such breach is now different as well, in that it is enforceable against the company, but the Company retains a remedy against the director – Rolled Steel Products (Holdings) Limited –v- British Steel Corporation; PMPA Garages Limited ; Re: Fredrick’s Inns(a key element also assessed in the latter cases is around the question of whether a power is being exercised in furtherance of a company’s objects)

- the impact of differences in application / interpretation between express –v- ancillary powers, especially with regard to: gratuitous dispositions – Re: Horsley & Weight / Brady –v- Brady / Parke –v- Daily News Limited / Re: Greendale Developments

- over and above the Rolled Steel case, further legislative developments which have ‘eaten’ into the historical harshness and application of the doctrine. You must be able to take the examiner through and explain the application through S.8 of Companies Act 1963– and its’ scope of...
‘actually awareness’ and the consequence of being still able to enforce the contract against the company. Similarly, where the outsider had acted in good faith.

On one limited occasion recently, an UV question touched on a PLC entering into a ultra vires contract as well (Q.5, March 2015).

- s.1006(2) a PLC must have an objects clause.

- 1012(2) shareholders in a PLC can ratify an ultra vires contract by passing a special resolution.

- s.1012(3) – if the members become aware BEFORE the ultra vires contract is entered into, the members can seek an injunction, thereby, preventing same.

- s.1012(1) - No member can restrain a company from fulfilling its legal obligations to honour the loan transaction (once entered into) and repay the loan entered into by the PLC.

- s.1012(5) provides that a party to a transaction with a PLC is not bound to enquire as whether it is permitted by the PLC’s objects,

**Corporate Authority**

This area lends itself to appearance either as a problem question, or an essay question. In the former – you will inevitably have to consider the test and application of ostensible authority (often with a query as to the scope of ‘representations’ actually made), but likely also the Rule in Turquand’s case (thus both should be known well). The most common form of essay question also hones in on these areas, but also asks consideration of the implications on the enforcement/authorisation of contracts as well. Again, the classical latter question can be seen in the recent March paper. A problem question has not been asked in a while, but should not be overlooked in preparation.

Any questions thus will likely start with you explaining the context of actual authority and the distinguishing treatment and nature ostensible authority – *Kett –v- Shannon & English / Freeman & Lockyer –v- Buckhurst Park Properties* – would be the key case, as it includes the four step test of Diplock LJ – representation, by someone with authority, induced, within Constitution. Bear in mind the normal delegation to be seen under s.158(1) (if claimed a managing director is present).

Often a point of concern/analysis is whether the representation is appropriate to support / apply the four step test and find that someone had sufficient ostensible authority. Candidates should bear in mind that often the types of representation relied upon are those mainly by conduct *Armagas –v- Mundagas* or implicit *Ulster Factors –v- Entonglen*;

As mentioned above, analysis and exploration of the Rule in Turquand’s Case / Indoor Management Rule – is also likely. This relates to the reliance an outsider is entitled to makeover any internal requirements have been complied with – *Royal British Bank –v- Turquand . Allied Irish Bank Ltd. –v- Ardmore Studios International*. This is obviously somewhat of a different approach with respect to constructive notice and favourable to an outsider seeking to enforce a contract against the Company. Accordingly, you must also consider whether any of the exceptions where you cannot rely upon the rule should apply: – if known of irregularity / irregular transaction *Underwood –v- Bank of Liverpool & Martins* / if matter of public record *Irvine –v- Union Bank of Australia* / if never read the articles or memorandum *Rama Corporation Ltd –v- Proved Tin and General Investments Ltd*. 

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**Directors:**

This area is critical for study and preparation as most often appears and is core to the understanding of Company Law in general. Very important is (i) directors duties and (ii) restriction orders. Be aware that questions on directors though may take various forms and focus on various different areas:

a) The different types of directors should be capable of being explained –

- Shadow Directors – s.221 of the 2014 Act – test applied and explored to a greater extent in *Secretary of State for Trade and Industry v Deverell / Fyffes plc v DCC*.

- De-facto directors – *Secretary of State for Trade and Industry v Tolle / Grey v McLoughlin* – factors to be considered in relation to same.

These scenarios and tests might also overlap with a question generally about restriction of directors or on duties more generally (see March 2014).

b) The divesting of power and the circumstances when power and decision-making reverts back to the members (i.e. directors incapable of acting / acting ultra vires / directors exceeding powers) should be known, as occasionally focused on in essay questions.

c) The different common-law and now for the first time under the act these fiduciary duties have been codified under s.228 (see also s.227) and s.231 (which deals with disclosure of conflicts of interest). These duties owed by a director must be capable of both being briefly explained and elaborated upon with more detail, as same could be a small, or major part of a question – thus have a brief summation on each duty in mind.. This potential overlap and having to address both areas in an answer should always be borne in mind:

- **Duty to Act Bona Fides and in Best Interests of Company As a Whole** – focuses quite a lot on proper exercise of power or fettering a discretion – are they acting correctly in using same – *Howard Smith Ltd v Ampol Petroleum* but consider always even where not doing so, if the overall result benefits the company, it may be a valid use of power and not a breach of duty – consider *Regent Crest Plc v Cohen / Re: Jermyn Street Turkish Baths / Teck Corporation v Miller / Cabra Estates v Fulham Football Club*. However, these are only after explaining the initial principle and rule.

- **Duty to act with Due Skill, Care and Diligence** – Key points here would be to note the general expectations explored in cases such as *Re: City Equitable Fire Insurance* and *Re: Barings PLC*. However, also bear in mind that a director is only expected to have the skill, care and diligence that one would expect from someone of his experience / qualifications. This point has recently been further emphasised in respect of acknowledging a distinction between executive and non-executive directors and what one would expect from same – in *Re: Tralee Beef and Lamb Limited / Kavanagh*.

- **Duty to avoid Conflicts of Interest** – easily overlaps with assessment of s.231 of the 2014 Act and same should be borne in mind always as well – the Irish case law on setting up any competing company expresses severe doubts – *Springgrove Services Ltd. v O’Callaghan* being a key case – this also considers the absolute restriction of using confidential information from one business to benefit the other. The general severity of the doctrine against directors must always be noted – see generally *Regal Hastings Limited v Gulliver / Industrial Development Consultants Ltd v Cooley*. This is because due disclosure and approval will always dictate that no breach of duty occurs – thus easy to avoid if done properly. Also, the business chance exception – where the business has been given a true opportunity and rejected the ‘business chance’ will often arise for consideration – note *Peso Silver Mines v Cropper / Gencor v Dalby* – not relevant if not given the option.

d) Who does owe their duties to is also a key topic. Be able to stress the law relating to the core position that directors owe duties to the company – e.g. *Percival v Wright / Dawson International v Coats Paton Plc*, but then also the exceptional scenarios where a director may owe duties to shareholders (due to the relationship, or position of agent that the director puts himself in) – note *Coleman v Myers / Crindle Investments v Wymes / Allen v Hyatt*, or to creditors (where the
company is in an insolvent position – unable to pay its debts as they fall due) *Kinsella-v- Russell Kinsella & Co, Parkes & Sons v-Hong Kong and Shanghai Banking Corporation, Re: Fredrick Inns*, arguably also to employees.

e) A key question that often appears is one on restriction of directors. Whilst the question will always turn on whether the directed honestly and responsibly – within the meaning of s.819(2) – being one of the defences to a restriction order – and thus the factors highlighted in *La Moselle Clothing Limited* being explored and highlighted with multiple other relevant cases, for example: *Re: Costello Doors Ltd* (keeping proper books and records), *Re: Verit Hotel / Re: Digital Channel Partners Limited* (must not circumvent revenue monies), *Kavanagh-v-Delaney (Tralee Beef and Lamb)* (level of competence expected / true level, especially with professional persons, expected from non-executive directors – no amplification of non-executive directors rejected by Hardiman J in SC. Also mention Hardiman’s critical comments of the ODCE not giving reasons why went against recommendations of liquidator and ordered restriction application be brought, and possibly s.819 unconstitutional – ie. Reversal of burden), *Re: Usit Ireland, Grey v-McLoughlin, Re: Squash Ireland*. If restricted can still become director of company, comply with s.825 – director notify the company within 14days before his appointment that he is a restricted director, and as long as the company satisfies the capital requirements in s.826 - restricted company have minimum paid up share capital of 100,000. .823 - guilty of a category 2 offence. Also s.836(3) restricted director could be held personally liable for debts of company. Seeking removal of a restriction order –s.822, see *Robinson v Forest.*

Candidates should also always explain in their answers that the taking of such an order is obligatory on a liquidator, due to s.683 of the 2014 Act, unless excused by the ODCE – *Re: Verit Hotel* highlights the mandatory nature. Equally, the nature of what is involved in a restriction order is important to explain to your examiner, as to how it is not the same as a disqualification order.

Disqualification – s.839/840 does not appear as regularly, but study would be recommended as to core essence, impact of order and key cases – *Re: CB Readymix Limited, Re: Cladrose Limited, Director of Corporate Enforcement v-Nigel D’Arcy, Re: Kentford Securities Ltd.* This is to cover a possibility that it could be asked in conjunction with a question on restriction. Full preparation would encourage study of both areas.

f) Questions on directors can also arise on reckless and fraudulent trading. It is recommended that any question on reckless trading should focus on taking the examiner through the concept of reckless trading and both types of deemed reckless trading under s.610(1)(a). The key cases of *Re: Heffernon Kearns Ltd and Re: PSK Construction Ltd* demonstrate good analysis of the concepts and scope of requirements and are very relevant to refer to and demonstrate (in the first case) an example where the facts supported the flexibility of the court not to apply sanctions, relying on the defence under s.610(1)(b). Fraudulent trading obviously deals with more explicit behaviour of an inappropriate nature – see generally *Re: Hunting Lodges Ltd, Re: Kelly’s Carpetdrome, Re: Maidstone Building Provisions Ltd; Kennington v McGinley; Re Leo Getz Trading Ltd; Kirby v Petrolo Ltd and Stokes; Re Citywest Hire Ltd.* May also be about misfeasance (s.612)– directors breached their fiduciary duty and company is now insolvent.

g) A question comparing directors’ meetings to those of shareholders could also arise. This appears very rarely though and would be quite a minor area.
Shareholders

Whilst a general question on the ‘nature of a share’ could arise – the key areas in respect of likely appearance – are inevitably always the law relating to transfer and transmission of shares and also on the protection of minority shareholders. Essay questions asking you to discuss the characteristics and rights of shares were raised in Q.4 October 2015 and Q.3 April 2014.

1) Transfer and Transmission

This section refers very much to two distinct areas – s.95 the directors’ unlimited discretion to refuse to register and pre-emption rights – s.69 (see generally Safeguard Industrial Investments –v- National Westminster Bank Ltd / Lee and Company –v- Egan). Both are relevant for any such question, though often there will be more cases and points to make on the former. A claim for rectification may be taken under s.173 claiming that a director in refusing to register has not properly acted bona fides and for the benefit of the company as a whole (in breach of his basic directors duties) – see Smith v Fawcett; Banfi Limited –v- Moran, Re:Hafner, but the directors are still not obliged to give reasons unless some mala fides is alleged. Re: Dublin North City Building Company. Directors may rely on reasons known after they refuse registration – Village Cay Marine. Equally, personal dislike may not be enough to trigger a finding of rectification – Popley –v- Plannarive Limited contrast with Tangney v Clarence Hotel. The two month limit for making a decision under s.95 should also always be noted – Hackney Pavilion, Swanledale, Popley. Lastly, candidates – if dealing with the transmission of shares, should always consider s.212 and possible claim for such beneficiary of oppression under that legislation. Also consequences of refusal to register shares – Kinsella Alliance & Dublin Consumer Gas – not entitled to participate in company until registered. If registration refused then person you bought shares from is the legal own and they hold the shares on trust for the person who purchased the shares but is refused registration. Your examiner has suggested that it would make sense if there was an implied term that if registration is refused the share purchase contract can be annulled.

2) Minority Shareholders

The law relating to alteration of Constitution (and whether same is bona fides and in the interest of the company as a whole.

Candidates should also always be aware that whilst the area starts with the principle of expressed in Foss –v- Harbottle – the common-law exceptions to that principle, most notably of fraud (Cook –v- Deeks) and ultra vires (Simpson –v- Westminster Palace Hotel Company / Hennessy –v- National Agriculture), should always be noted and studied as well as the more popular statutory grounds under s.212 and s.212(2)(3). Please note that a comparative question between the common-law and statutory grounds is easily posed and has been presented in the past – examples of distinctions would include: derivative action –v- personal action, limited remedy –v- broad remedies under s.212, limited grounds –v- far broader grounds (see Crindle Investments –v- Wymes as an example).

With respect to s.212 (chapter 8) – the key case law as to what amounts to oppression should always be noted and explored: Re: Greenore Trading Co. Ltd / Scottish Co-Op –v- Meyer. Re: Westwinds Holding Co. flagging that only a single act of oppression may be sufficient to justify an order under s.212 may also be relevant if only one occurrence exists. Of course the fact that oppression in removal from management may also give rise to a s.212 remedy should always be borne in mind – and that a director may seek an injunction restraining such removal (Gilligan –v- O’Grady) - or where the company is more akin to a quasi-partnership, founded on basis of ongoing involvement and expectation of involvement in management of business, that s.212(2)(3) / s.569(e) may be the appropriate remedy (with order to wind-up the company) should always be noted – see, Re: Murph’s Restaurant / Re: Ebrahimi. If nothing serious done wrong to the other though, then no remedy may vest – O’Neill –v- Phillips.

Always note as well that s.212(2)(3) / s.569 (e) provides an appropriate remedy in the case of deadlock in the running of the company – e.g. Re: Yendje Tobacco Limited / Re: Tradalco.
Corporate Borrowings

VERY IMPORTANT. This is a critical area for study, as there has been a full question on nearly every paper in recent times.

Be able and willing to write a full question on:

distinguishing between fixed and floating charges – the nature of same, potentially leading to the invalidation of floating charges, requirement for both to be registered - s.409 within 21 days of creation – onus on company but under 2014 Act s.409(3) charge-holder can register charge and claim costs back from company – your examiner has stated onus for registration should be on charge holder – would ensure charge registered in time and particulars of charge correct. **ONUS ON LIQUIDATOR TO REGISTER A CHARGE (s.797)!** Fixed ranking higher on the order of priorities. Advantages of fixed v floating – companies ability to deal with charged property without consent of charge-holder if floating charge. However, a floating charge gives a charge-holder less priority to the asset if the company is wound up – floating charge holders generally don’t have priority to that asset over preferential creditors. Key cases would include **Illingworth v- Holdsworth, Welch v- Bowmaker, Re: Yorkshire Woolcombers Association Limited, Smith v- Bridgend County Council.** S.597 – floating charge can be invalidated if created within 12 months of company being wound up – see **Smurfit Paribas Bank v AAB Export Fianance.** Finally, floating charge is a present security – **Tullow Engineering.**

Crystallisation of floating charges – crystallising events – appointment of a receiver (over any floating charged asset not necessarily your charged asset); liquidation; crystallisation clause; pre-determined date; notice; cessation of business. What happens upon crystallisation – floating charge turns in a quasi-fixed charge, company is NO longer allowed deal with the charged asset without consent of creditor/charge-holder.

**JB O’Brien LTD– in HC Finlay Geoghegan J said given wording of s.621(7) (payment of preferential creditors in a winding up) even if floating charge crystallised BEFORE company went into liquidation, the floating charge creditor ranked BEHIND preferential creditors in respect of that charged asset. Overturned (in June 2015) by SC – now if floating charge crystallised BEFORE company wound up floating charge holder has priority to that charged asset over preferential creditors.**

Secondly, a problem question on fixed charges over book debts is always a possibility – the English case-law on **Natwest Bank v- Spectrum** could always be mentioned in that it shows the following of the key Irish cases in the area – especially **Re: Keenan Brothers.** The structure in the above case, as well as **Re: Wogan’s Drogheda and Re: Holidair,** needs to be understood, as the facts are often closely followed (in terms of structure of charge) in problem questions posed. **Re: Holidair** endorsed in UK in **Spectrum Investments.**

Do not overlook s.409 and the requirement of registration, which can easily be posed as part of a question where advice on the enforceability of the charge is required. The potential for extension of time under s.417(1) – however, is order for extension or amendment to Register is at discretion of court. Generally allow order unless company insolvent – **Telford Motors.** Know that the consequence of non-registration does not invalidate the loan, etc, merely that the charge cannot be enforced / you lose your priority, as against the liquidator and other creditors of the company. Somewhat related, is being able to distinguish retention of title clauses – as the key question here is whether a charge has been created – if so, then the end result is likely that same will be incapable of reliance as against the liquidator, as likely not registered in accordance with s.409 (extension of time where a company is insolvent / near liquidation / in liquidation is extremely unlikely).

Key to know is about that the charge certificate is conclusive evidence charge IS registered in CRO – even if charge registered outside of 21 day time limit but CRO issues charge certificate, this is conclusive evidence charge has been registered – **Eric Homes; Cl Nye; Lombard & Ulster Bank v Amurec** (Hamilton J judgment interesting as appeared to criticise the conclusive evidence rule, but said he was bound by statute.

If an error with particulars agreed between parties and particulars actually registered in CRO – particulars agreed between parties and stated in debenture document is what the charge holder has a charge over NOT what is state in CRO. This is because certificate of charge conclusive evidence charge registered NOT full extent of charge - **Charnley; Re: Mechanisations; Re; Shannonside: RE Valley Ice-cream (Ireland).**

Conclusive evidence rule could be unconstitutional under A.37 and incompatible with ECHR A. 6 – your examine and McGrath have said such a challenge would likely not be successfully because unlike **AG v Maher** is
a conclusive evidence in a civil case. S.415(3) – new wording may misapply conclusive evidence rule – this only an opinion, can only speculate how court will interpret it.

RETENTION OF TITLE CLAUSES (ROT). As a simple guide. Please know what is a ROT. The different types, then go through each one and whether, based on case law if it is registrable. If registrable and not registered then ROT void. bear in mind the following:

Simple Retention of Title – No charge (but of no use if good is irresversibly mixed or processed). Re: Charles Dougherty / Chaigley Farms Ltd –v- Crawford / Borden –v- Scottish Timber Product – not registrable

Enlarged Retention of Title – Charge (but may be savable if original good can be removed / extracted from mixed good) Re: Peachdart / Hendy Lennox –v- Graham Puttick Ltd – registrable if product manufactured or changed in way that can no longer separate it from orginal product supplier sold (eg. Cant separate leather sold from leather hand bags manufactured from it – Peachdart).

Proceeds of Sale Clause – Charge (See especially the Compaq Computers v- Abercorn Group Ltd and Carroll Group Distributors –v- G&F Bourke Ltd cases). Courtney has suggested the latter signals the ‘death knell for proceeds of sale clauses in Ireland. – registrable. Please compare with Australia where not registrable but regarded as creating a trust Associated Alloys.

All Sums Due Clause – No charge (Armour –v- Thyssen Edelstahlwerke applies). Not registrable. No Irish decision on this point but your examiner suggests that Ireland probably follow English decision.

Wording of s.409 ‘every charge created’ must be registered implies that not all ROT clauses are registrable-think of the case of goods the subject of such a clause which have become “mixed”/where segregation from manufactured goods is no longer possible.
BRIEF NOTES ON OTHER AREAS:

Amendment of Constitution

- These are small areas which may overlap with a question on minority shareholder protection or occasionally have formed a question on their own.
- In the former, whether an alteration was ‘bona fide and in the interests of the company as a whole’ is the key question.
- In the latter, explanation of the special statutory scheme of the contract and how it can apply only to rights’ qua member and not to ‘special contracts’ merely refereeing to the articles would be key (Browne –v- Law Trinidad, Bailey –v- New South Wales Medical Defence Union)

Unfair Preferences / Dispositions

- This is an area popularly covered under problem questions, with a few scenarios posed which consider transactions under both topics – both before and after the commencement of a winding-up.
- Unfair preference under s.604 2014 Act – various requirements to be established, most relevant often whether or not there is the ‘intention to prefer’ – re: Daly & Co. – ‘where pressure exists so as to overbear the volition of the debtor is not made with a view to prefer the creditor exerting it, or because the debtor cannot help it. The view to prefer is absent’. See generally Parkes & Sons Ltd –v- Hong Kong & Shanghai Banking Corporation / Station Motors Ltd –v- Allied Irish Bank (the onus of proof reverts onto the directors, as presumption where the directors or connected persons are benefiting from the disposition) & La Chatelaine Thudichum Ltd –v- Conway. Remember that an unfair preference can only arise where the beneficiary of that preference is in fact a creditor.
- If no unfair preference, consider s.608 of the 2014 Act (fraudulent dispositions- where the effect of the transaction is to defraud the company) and s.602 (for post-commencement of winding up transactions). Also consider the invalidation of floating charges (s.597) if the matter involves such a charge.
- If post-commencement dispositions – s.602 would arise, the flexibility of the court to approve the transaction should be borne in mind (Re: Al Levy (Holdings) Ltd ; Re: Industrial Services Company (Dublin)(No.2)). Various circumstances and transactions in this regard should be considered – payments on cheques (Re: Ashmark Ltd), lodgements into an overdrawn account (Re: Grey’s Inns Construction Ltd.), debiting of interest (Re: Ashmark Ltd). Also, the position of who the disponee, against whom repayment is due to the liquidator from, has raised some particular analysis in Ireland – where banks, on public policy grounds, have been acknowledged – Re: Industrial Services Company (Dublin) Ltd.

Liquidation

Along with s.212(2) & (3) – examined in conjunction with area on minority shareholder protection (s.212), this section would be the most commonly explored part of liquidation on the examination.

- Court application for winding-up for inability to pay debts. Proving insolvency – mostly if 21-day letter has been delivered and debt above 1,270 still remains unpaid – but more flexibility possible if other satisfaction of inability to pay – Taylor’s Industrial Flooring Ltd. –v- M&H Plant Hire Ltd.
- Application will be struck out, if an abuse of process though – if any valid defence to claimed debt / counter-claim which exhausts debt claimed Re: Pageboy Couriers / Stonegate Securities Limited –v- Gregory / Re: WMC Toughens Ltd.
- Jurisdiction to wind-up is discretionary – Meridian Communications Ltd. –v- Eircell / Re: Genport
- May be possible to obtain an interlocutory injunction to restrain the petition – Re: Truck and Machinery Sales / Coleport Building Company –v- Castle Contracts (Ireland) Ltd.
Just & equitable to liquidate company (s.569(e)) - Re Fuerta Ltd – Charleton J re-instated the types of applications the court will wind-up a company under s.569(e) – (i) where company was fraudulently promoted; (b) cases in which the company's substratum has gone; (c) cases of deadlock in the company; (d) cases in which there is a constitutional and administrative vacuum; (e) cases in which the management and conduct of the company are such that it is unjust and inequitable to require the petitioner to continue as a member; and (f) cases where a quasi-partnership has broken down.

**Receivership & Examinership**

- These areas have not been explored as much in examinations as one might imagine. Where same arise, they most often appear by way of essay-style question, with an essential focus and detailed understanding of the legislation and the inter-operation between these schemes and liquidation and the impact of each on the other, key to be known.
- The application of certain key case-law applying critical principles in the area (e.g. *Ruby Property Company* and the principles regarding receiver’s duties) would also be essential in any answer
- Appointment of the receiver MUST be done in accordance with the terms of the debenture document - Belohn.
- Appointment of receiver ‘upon demand’ – must give the company ‘reasonable and sufficient’ notice demanding repayment of the debt if the company is solvent - *Merrow; Belohn; O’Flynn v Carbon Finance.*
- Demand for repayment before close of ‘banking business’ – objective test applied to what ‘banking business’ means – *McCann v Halpin.*
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