FE1 COMPANY LAW

NIGHT BEFORE NOTES

A key reminder for the exam is to 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. Also, should it be 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.

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

Separate Legal Personality

Any question has to start with explanation of ***Salomon –v- Salomon*** being the key cornerstone case, establishing the principle – but be aware that a question focusing on the advantages /disadvantages, consequences of incorporation, requires more than just this area – though exploration of the principle and relevant cases explaining what it means in practice would be a big part of same – e.g. ***O'Neill –v- Ryan , Macaura –v- Northern Assurance, Turnstalll –v- Steigman, Lee-v-Lee's Air Farming.***

Equally, a question in this area may focus in on the exceptions when the veil / separate personality may be lifted – candidates should always start with Salomon explaining the principle – then consider the various different grounds. Don't forget that there any numerous legislative grounds – e.g. s.140 / s.141 of the 1990 Act, Reckless & Fraudulent Trading under s.297 / s.297A (as amended) and other legislation – Safety, Health and Welfare at Work Acts, Competition Acts, etc – where the veil / separate personality will be lifted. However, the common-law exceptions are most commonly the key aspects for any such question –

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;

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.

Directors:

The different types of directors should be capable of being explained – Shadow Directors – s.27 of the 1990 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- Tjolle / Grey –v- McLoughlin*** – factors to be considered in relation to same.

The different common-law 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:

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 intiial 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.29 / s.31 of the 1990 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 and 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.

Who directors owe their duties to has been overlooked somewhat on recent exams and may be overdue an appearance as well. 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: Fredricks Inns,*** arguably also to employees under s.52 of the 1990 Companies Act.

Lastly, a key question that inevitably appears is on restriction of directors. Whilst the question will always turn on whether the directed honestly and responsibly – within the meaning of s.150(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 other relevant cases, ***Re: Costello Doors Ltd*** (keeping proper books and records), ***Re: Verit Hotel*** (must not circumvent revenue monies), ***Kavanagh –v- Delaney*** (level of compentence expected / true level, especially with professional persons, expected from non-executive directors).

Candidates should also always explain in their answers that the taking of such an order is obligatory on a liquidator, due to s.56 of the 2001 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.

<u>Corporate Borrowings</u>

A critical area always for study. Be able and willing to write a full question on distinguishing between fixed and floating charges – the nature of same, s.288 potentially leading to the invalidation of floating charges, requirement for both to be registered, but fixed ranking higher on the order of priorities. Key cases would include ***Illingworth –v- Holdsworth, Welch –v- Bowmaker, Re: Yorkshire Woolcombers Association Limited, Smith –v- Bridgend County Council***. 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 folowing 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.

Do not overlook s.99 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.106 could always be relevant to highlight as well. Know that the conseuqence 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 liqudator, as likely not registered in accordance with s.99 (extension of time where a company is insolvent / near liquidation / in liqudation is extremely unlikely). As a simple guide, 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***

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.***

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.

All Sums Due Clause – No charge (***Armour –v- Thyssen Edelstahlwerke*** applies).

<u>Shareholders</u>

Whilst a general question on the 'nature of a share' coud 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.

1) **Transfer and Transmission**
   This section refers very much to two distinct areas – the case law on Model Regulation 3 – the directors' unlimited discretion to refuse to register and pre-emption rights (see generally ***Safeguard Industrial Investments –v- National Westminister 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. On Model Reg 3, a claim for rectification may be taken under s.122 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 ***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***. Equally, personal dislike may not be enough to trigger a finding of rectification – ***Popley –v- Planarrive Limited.*** The two month limit for making a decision under s.84 should also always be noted. Lastly, candidates – if dealing with the transmission of shares, should always consider s.205(6) and possible claim for such beneficiary of oppression under that legislation.

2) **Minority Shareholders**
   The law relating to alteration of Articles of Association (and whether same is bona fides and in the interest of the company as a whole) or altering the objects clause in the Memorandum of Association (and the right to seek an injuction against same under s.10(6) of the 1963 Act) could be relevant as small pieces in a question on this area.

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.205 and s.213(f). 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.205(3), limited grounds –v- far broader grounds (see ***Crindle Investments –v- Wymes*** as an example).

With respect to s.205 – 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 oppresion may be sufficient to justify an order under s.205 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.205 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.213(f) 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.213(f) provides an appropriate remedy in the case of deadlock in the running of the company – e.g. ***Re: Yendje Tobacco Limited / Re:Tradalco.***

SOME BRIEF NOTES ON OTHER AREAS:

Ultra Vires

- Interpretation – ***Ashbury Railway Carriage –v- Riche; Cotman –v- Brougham; Bell Houses Limited –v- City Wall Properties Limited*** as to development of priniciple;
- Objects –v- Powers, correct exercise of power in furtherance of object, result of breach now that enforceable against company, but remedy against director – ***Rolled Steel Products (Holdings) Limited –v- British Steel Corporation ; PMPA Garages Limited ; Re: Fredrick's Inns***
- Difference in express –v- ancillary powers, esp. re: gratuitous dispositions – ***Re: Horsley & Weight / Brady –v- Brady / Parke –v- Daily News Limited / Re: Greendale Developments***
- S.8, 1963 Act – if not actually aware, may be able to enforce contract against company / equally S.I. 163 of 1973 – if have acted in good faith.
- Harsh criticism of doctrine, be aware of the proposed rejection of the doctrine as advanced by the Company Law Reform Group, advancd in recent Company Law Consolidation and Reform Bill.

Corporate Authority

- Actual authority and distinguish ostensible authority – ***Freeman & Lockyer –v- Buckhurst Park Properties*** – key is the four step test of Diplock LJ – representation, by someone with authority, induced, within articles and memorandum – Model Reg 80 (if board of directors) / Model Reg 112 if claimed a managing director is present;
- Representation – mainly by conduct ***Armagas –v- Mundagas*** or implicit ***Ulster Factors –v- Entonglen***;
- Rule in Turquand's Case / Indoor Management Rule – outsider entitled to assume that any internal requirements have been complied with – ***Royal British Bank –v- Turquand . Allied Irish Bank Ltd. –v- Ardmore Studios International***
- Exceptions to the Rule in Turquand's Case – 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.***

Reckless and Fraudulent Trading

- s.297A(1)(a) / s.297A(2) focus on 'deemed' reckless trading grounds. Case-law which analyses the interpretation of these legislative grounds – ***Re: Hefferon Hearns Ltd / PSK Construction.*** Bear in mind the flexibility of the court to excuse on the basis of the defence under s.297A(6) – that directors acted honestly and responsibly.
- Fraudulent trading – s.297A(1)(b) – more explicit / clearer grounds of these – see generally ***Re: Aluminium Fabricators Ltd / Re: Kelly's Carpet Drome Ltd / Re: Hunting Lodge Ltd*** (one single instance of fraud can be sufficient for a finding of fraudulent trading).

Fraudulent Preferences / Dispositions

- Fraudulent preference under s.286(1), 1963 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***.
- If no fradulent preference, s.139 of the 1990 Act – fraudulent dispositions and s.288 regrading the invalidation of floating charges should also be considered.
- If post-commencement dispositions – s.218 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 Inn 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 – s.213(e)

- Court application for winding-up for inability to pay debts. Proving insolvency as per s.214 – mostly if 21-day letter has been delivered and debt above 1,270 still remains unpaid – but more flexiblity 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: Truckc and Machinery Sales / Coleport Building Company –v- Castle Contracts (Ireland) Ltd.***