**SUMMARY QUESTIONS**

**ESSAY QUESTIONS**

1. How may the members of the company engage in the management of the company at general meetings? Explain the rights of the members and how they directly affect the decision-making through the moving of resolutions.

**Indicative content outline answer:**

* Whilst the members of the company delegate the powers of the management of the company to the directors, who themselves conduct decision-making through powers granted to them and through their own board meetings, the members themselves take responsibility for moving resolutions of the company.
* Resolutions are used to perform functions of the company.
* There exist two types of meeting that a company may call: The Annual General Meeting (AGM) and general meetings.
* Resolutions may be moved at general meetings insofar as notice of the meeting and the resolution is given to the members of the company and the meeting is held and conducted in accordance with the CA 2006 and the company’s articles. The calling of these meetings is a power granted to the directors of a company, however, where the director(s) does not call a meeting and the members wish one to take place, these members have the power to require the directors to take this action.
* The CA 2006 provides details of how the companies must conduct meetings to ensure that resolutions moved are lawful.
* The CA 2006 identifies the quorum necessary at the meeting (the minimum numbers of the company’s members who need to be present to allow resolutions to be effectively moved). A company limited by shares or by guarantee and having only one member will have reached a quorum when one qualifying person is present at a meeting. In other cases, and subject to the company’s articles, two qualifying persons present at the meeting are a quorum unless the qualifying persons are the representatives of the same corporation or the persons are the proxies of the same member.
* A member may be elected to be the chairperson (including a proxy) of the general meeting by a resolution of the company, but this is subject to the company’s articles as who may or may not be chairperson.
* In the case of voting, the company’s articles must allow the right for a vote through poll at a general meeting on any question other than the election of the chairperson or the adjournment of the meeting.
* When a member wishes to exercise his/her right to vote on a poll taken at a general meeting, a member with more than one vote has the right not to use his/her votes in the same way. This may be achieved by appointing more than one proxy to vote at the meeting.
* The CA 2006 provides the member with the right to appoint another person (the proxy) to exercise any or all of their rights to attend, speak and vote at a meeting of the company.

### *General Meetings*

* Every public company must hold an AGM within six months of its financial year-end. The company must state that the meeting is an AGM, and notice must be provided that such a meeting is to be called.
* The members of the company may require the circulation of resolutions to be moved (or intended to be moved) at the AGM, and such a resolution may be properly moved unless it would, if passed, be ineffective (such as being inconsistent with the company’s constitution); defamatory of any person; or if it were frivolous or vexatious.

## *Resolutions at Meetings*

* Resolutions are the decisions made at the company meetings. There are various types of resolution that may be moved by a company. With reference to the resolutions that may be moved by a private company, a written resolution or one moved at a meeting of the company’s members are available. The benefit of moving a written resolution is that there is no necessity of a meeting of the members, they are sent the resolution and they sign this resolution if they are in agreement.
* A public company must move resolutions at a meeting of the members (or a class of members) and it may not move written resolutions by a majority using the procedure in CA 2006 ss. 288-300. However, at common law, such resolutions can be passed if unanimous.
* Where the CA 2006 requires a resolution of a company, or of the members (or a class of members) and the type of resolution required is not specified, it is assumed that an ordinary resolution is required unless the company’s articles requires a higher majority or unanimity. Whilst this does provide the company with some flexibility, or control over the resolutions to be moved, there are protections in the CA 2006 to prevent, for example, a director being removed before the expiry of his/her term of office through a written resolution because the CA 2006 provides for important safeguards against potential abuse.

2. Assess the role of a liquidator appointed to oversee the winding-up of a company. Explain the powers granted to the liquidator and how they may deal with the directors and creditors of the company.

**Indicative content outline answer**

* A company being wound-up and being liquidated essentially refers to the company ceasing to exist. Liquidation may take effect either through a petition to a court for the compulsory liquidation of the company (under the Insolvency Act 1986, s. 124A); or the members may seek the voluntary liquidation of the business.
* The liquidator, who must be a qualified insolvency practitioner, is appointed to wind up the company and to dispose of its assets in the best interests of the creditors and formally remove the company’s registration at Companies House.
* The liquidator will seek to collect any assets that are owed to the company and then dispose of these to realise any capital. Having realized these assets, the proceeds are then distributed to the creditors, and having settled its debts (where possible), any remaining proceeds are distributed to the company’s members.
* A very significant power is provided through IA 1986 s. 178 that gives the liquidator the power to disclaim onerous property so as to cease the company from completing unprofitable contracts. The third party would then have to bring an action for breach against the company but they would be considered to be an unsecured creditor.
* Where the liquidator believes that a person should make some contribution to the company’s assets, they may make an application to the court. If, in the course of the winding-up of a company, it appears that a person who was or is an officer of the company; a liquidator, administrator or administrative receiver of the company; or has been or is concerned in the promotion, formation or management of the company, and has misapplied or retained money or property of the company, or guilty of any misfeasance or in breach of any other fiduciary duty, the court may, on the application of the Official Receiver; liquidator; or any creditor or contributory, examine the person’s conduct. Following this investigation, the court may compel them to repay, restore or account for the money or property or any part of it (including interest at a rate the court thinks fit).
* Where the company has gone into liquidation; at some time before the commencement the person knew, or ought reasonably had known, that there was no reasonable prospect of the company avoiding the liquidation; and that person was a director / shadow director at the time, shall be guilty of wrongful trading if they did not take reasonable steps to minimise any potential loses to the creditors.

**PROBLEM QUESTIONS**

1. All Bright Consumables (ABC) Ltd was a successful company, operating primarily a business of developing and selling technology products. It supplied goods to customers directly, but had a particularly lucrative contract to supply its touch screen computers to a sales company (Sign’em Up Quick Plc (SUQ)).

As the recession hit the UK, ABC Ltd found it difficult to maintain its standards and started using inferior technology in its products. It entered into an agreement with HTD to supply these products and granted a charge over its factory for LCD displays supplied by HTD and used in the manufacture of the screens. Soon after using HTD’s screens, and with continued complaints regarding reliability and durability, SUQ exercised its right to bring the relationship of supply with ABC Ltd to an end.

Due to the loss of its contract, ABC Ltd found itself in financial difficulties. It could not maintain repayments to HTD for the supply of the screens. ABC Ltd owed HTD £30,000 for the screens supplied, it had means to satisfy this debt, and asked for the advice of its accountants. The accountants suggested that the company should cease trading immediately and be wound up. However, the directors, eager to rescue the business, continued trading but just continued getting into ever more debt.

Advise HTD as to proceedings it may take to have the company wound up. Would any responsibility be placed on the directors of ABC Ltd for not taking the accountants’ advice on ceasing trading?

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* The liquidator will seek to collect any assets that are owed to the company and then dispose of these to realise any capital. Having realised these assets, the proceeds are then distributed to the creditors, and having settled its debts (where possible), any remaining proceeds are distributed to the company’s members.
* A very significant power is provided through IA 1986 s. 178 that gives the liquidator the power to disclaim onerous property so as to cease the company from completing unprofitable contracts. The third party would then have to bring an action for breach against the company but they would be considered to be an unsecured creditor.
* Where the liquidator believes that a person should make some contribution to the company’s assets, they may make an application to the court. If, in the course of the winding-up of a company, it appears that a person who was or is an officer of the company; a liquidator, administrator or administrative receiver of the company; or has been or is concerned in the promotion, formation or management of the company, and has misapplied or retained money or property of the company, or guilty of any misfeasance or in breach of any other fiduciary duty, the court may, on the application of the Official Receiver; liquidator; or any creditor or contributory, examine the person’s conduct. Following this investigation, the court may compel them to repay, restore or account for the money or property or any part of it (including interest at a rate the court thinks fit).
* Where the company has gone into liquidation; at some time before the commencement the person knew, or ought reasonably had known, that there was no reasonable prospect of the company avoiding the liquidation; and that person was a director / shadow director at the time, shall be guilty of wrongful trading if they did not take reasonable steps to minimise any potential loses to the creditors.

***Compulsory Winding Up***

* Section 122 IA 86 specifies as follows:

“A company may be wound up by the court if-

……..

1. the company is unable to pay its debts
* Inability of the company to pay its debts (s. 122(1)(f) IA 86). A company is unable to pay its debts if;
* it cannot pay a debt of over £750 within a period of 21 days of a request for payment (s. 123(1)(a) IA 86)
* failure to make payment after a court judgment (s. 123(1) (b)(c) and (d)).
* inability to pay debts as they fall due (s. 123(1)(e)). This is not common.
* Under the IA 86 s. 124 those entitled to petition to have the company wound up are:
* The company
* The directors
* Creditor(s)
* A contributory
* The Secretary of State
* The Official Receiver
* The procedure for winding-up a company by the court is as follows:
1. Application by petition to court
2. Intimation to all interested parties
3. Grant of petition by court and appointment of liquidator
4. Advertisement of liquidation and invitation to creditors to send in claims and attend meetings.
5. Preparation of the company’s state of affairs
6. Establishment of a liquidation committee
7. Getting in the company’s property
8. Payment of claims to creditors and return of capital, if any, to members
9. Final meeting and dissolution of company
* Out of the funds available to the liquidator, he/she must pay the preferential debts (s. 175 IA 86). The order of distribution is as follows:
* Fixed charge holders;
* Fees of the liquidator;
* Preferential debts;
* Floating charge holders;
* Unsecured debts (*pari passu*);
* Return of capital to members in accordance with the Articles.
* When all sums have been paid out and the final account is ready, a last meeting is held and the Registrar is asked to dissolve the company.
* Specific points in relation to the question is for HTD (creditor) to serve a written demand for payment at the company’s registered office. If three weeks pass with a failure to receive payment or the debt being secured to the creditor’s satisfaction, the company is deemed to be unable to pay (and the minimum owed is in excess of £750).
* A more speedy remedy is to follow s. 123(1)(e) – and petition the court, claiming the debt and this has not been disputed, and being unable to repay should be wound up (*Taylor’s Industrial Flooring Ltd v H Plant Hire (Manchester) Ltd* [1990] BCLC 216).
* The nature of fixed charges needs to be considered.
* You should consider the identifiable breach of duty to the creditors and the potential misfeasance proceedings under s. 212 IA 86, and their conduct and possible contribution to the company’s assets. The proof of intent required to establish that the directors acted to defraud the creditors / for a fraudulent purpose is the criminal test (beyond reasonable doubt).
* The issue of wrongful trading under s. 214 may be an easier / more successful action – and the subsequent action under the CDDA 1986 automatic disqualification of the directors for a maximum of 15 years (and with the actions of the directors of Jackson’s Paint Ltd this behaviour would likely make them unfit and be disqualified for a minimum of 2 years (s. 6)).

2. Raz is a minority shareholder (he holds 5 per cent of the shares) of Happy Harry’s Bottles Ltd and is concerned by the actions of the directors. The directors are also majority shareholders (holding, jointly, 62 per cent of the shares) who refuse to hold a general meeting when asked to in order to discuss their actions and the future direction of the company. Raz would also like to put a resolution to the meeting and needs information on how, if at all, this may be achieved.

Prepare a report for Raz outlining the rules regarding a company meeting being called, and how many shareholders are needed to require a meeting called for to be held.

**Indicative content outline answer:**

* The company’s directors are required to call the meeting in either of the following circumstances:
1. where they have received the request from members representing at least the required percentage of the paid-up capital of the company as carries the right of voting at general meetings; or
2. in the case of a company not having a share capital, members who represent at least the required percentage of the total voting rights of all member possessing the right to vote at general meetings. The percentages required are identified in s. 303 as 10 per cent unless, in the case of a private company, more than 12 months has elapsed since the end of the last general meeting–called in pursuance of a requirement under this section of the Act. Or in relation to which any members of the company had rights with respect to the circulation of a resolution, no less extensive than they would have had if the meeting had been so called at their request. In these cases the required percentage is 5 per cent.
* The request has to identify the general nature of the business to be dealt with and it may include the text of a resolution that is intended to be (properly) moved at the meeting.
* This request may be in hard copy or electronic form but it must be authenticated by the person(s) making it.
* Where a meeting has been properly requested, s. 304 requires the director(s) to call a meeting within 21 days from the date on which they became subject to the requirement, and this must be held not more than 28 days after the date of the notice convening the meeting.
* Further, where the request has identified a resolution intended to be moved at the meeting, details of this resolution must accompany the notice.
* Where such a resolution is a special resolution, the directors must follow the requirements provided in s. 283.

**Where the directors fail to call the meeting**

* Where the requirements of s. 303 have been complied with and the directors fail to call the meeting, the members who requested the meeting, or any of them representing more than half of the total voting rights of all of them, may themselves call a general meeting and do so at the company’s expense (limited to reasonable expenses).
* The meeting must be called for a date not more than three months after the date on which the directors became subject to the requirement to call the meeting, and it must be called in as similar a manner as possible as other meetings called by the directors.

**Power of a court to order a meeting**

* It may be the case that with smaller companies, the shareholder may have disagreements with the directors to such an extent that, for example, the shareholder(s) will not attend the meetings to allow for resolutions to be moved.
* Where it is impractical to call a meeting in a manner which it would normally be called, or required by the company’s articles, or the CA 2006, a court may through its own motion or through an application of a director of the company, or a member of the company who would be entitled to vote, order for a meeting to be called, held and conducted in any manner the court thinks fit (and when conducted in this way, the meeting will be considered for all purposes to have been duly called, held, and conducted).
* Such power also extends to the court giving directions as it deems expedient, such as providing that one member of a company present at the meeting be deemed to constitute a quorum.
* The court will not, however, give a member a voting power that the member does not possess under the company’s constitution. Note that this procedure is not intended to resolve petty squabbles between the equal members of a company.
* Discuss *Ross v Telford* in relation to the limits of the courts’ willingness to use the Companies Act to resolve internal squabbles between shareholders.