

## Part One – Chartered Governance Qualifying Programme

# Company Law

### Sample Marking Scheme

**Time allowed:** 3 hours (plus 15 minutes reading time)

**Do not open this examination paper until the proctor tells you to do so.**

**You must not take this paper out of the examination workspace.**

The examination paper contains **9** questions of which you must attempt **8**. You must attempt **all questions** in Section A and **3 questions** in Section B.

Section A contains 25 marks and Section B contains 75 marks. There are **100 marks** available in total for the paper.

**Note:**

Unless otherwise specified, you should assume that an Act or an organisation referred to in the questions is a Malaysian Act or organisation.

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# Section A

## Compulsory questions

1. What is an “off the shelf” company? Explain the advantages and disadvantages of such companies. **(5 marks)**

Question number	Answer
1	<p><b>Award up to five marks for the following:</b></p> <p>An off the shelf company is one which has been incorporated but left dormant or “on the shelf” until it is purchased. (1)</p> <p>Such companies are usually created by incorporation agents or company formation agents. (1)</p> <p>The advantage of purchasing such a company is that the promoter does not need to incorporate the company. (1) This can be useful if the promoter lacks relevant knowledge or wishes to avoid the time, effort or costs of incorporation. (1)</p> <p>The main disadvantage is that the company will not be tailored to the needs of the promoter. (1)</p> <p>The promoter may need to change the company name, constitution, share structure etc. (1)</p> <p><b>Reward other valid responses.</b></p>
	<b>Total: 5 marks</b>

2. Explain the differences between a 'private company' and a 'public company'.

(5 marks)

Question number	Answer
2	<p>Award up to five marks for the following:</p> <p>A private company's name ends with the words "Sendirian Berhad" or its abbreviation "Sdn Bhd", whereas a public company's name ends with the words "Berhad" or its abbreviation "Bhd" (1)</p> <p>The maximum number of members in a private company is 50, whereas a public company may have unlimited number of members (1)</p> <p>A private company must have restriction on the transfer of shares, whereas a public company does not (1)</p> <p>A private company cannot offer its shares to the public, whereas a public company may (1)</p> <p>A private company is not required to hold an Annual General Meeting, whereas a public company must (1)</p> <p>A private company must have a minimum number of one local resident director, whereas a public company is required to have at least two (1)</p>
	<b>Total: 5 marks</b>

3. List five types of companies that can be incorporated under the Companies Act 2016.

**(5 marks)**

Question number	Answer
3	<p>The five types of company that can be created are:</p> <ul style="list-style-type: none"><li>• A public company limited by shares (1)</li><li>• A private company limited by shares (1)</li><li>• A public company limited by guarantee (1)</li><li>• A private unlimited company (1)</li><li>• A public unlimited company (1)</li></ul>
	<b>Total: 5 marks</b>

4. Section 74 of the CA2016 provides that shares in a company shall have no par or nominal value.

Explain the rationale for the migration to no par value regime.

**(5 marks)**

Question number	Answer
4	<p><b>Award up to five marks for the following:</b></p> <ul style="list-style-type: none"><li>• The nominal or par value is only applicable at the point of issuance of shares (1)</li><li>• The actual value of shares in a company varies in accordance with the current situation of the company (1).</li><li>• The issue price will be determined by factors such as the current value of the company, factors affecting the business of the company and the capital that the company is seeking to raise (2).</li><li>• The rights of the shareholders depend on the number of shares held and not the value of the shares when it was first issued (1).</li></ul> <p><b>Reward other valid responses.</b></p>
	<b>Total: 5 marks</b>

5. Who has the right to inspect or obtain a copy of a company's register of members? Explain the procedure which must be followed.

**(5 marks)**

Question number	Answer
5	<p><b>Award up to five marks for the following:</b></p> <p>Any member has the right to inspect the register of members free of charge. (1)</p> <p>Any other person may inspect the register on payment of a fee of RM10 or such lesser sum as the company requires (1)</p> <p>Any member or other person has the right to request the company to furnish him with a copy of the register pertaining to the names, addresses, number of shares held and amount paid on payment of fee of RM10 or lesser sum for every 100 words (2)</p> <p>The company must comply with the request for a copy of the register within 21 days or such reasonable period as the Registrar of Companies considers reasonable (1)</p> <p><b>Reward other valid responses.</b></p>
	<b>Total: 5 marks</b>

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**TOTAL FOR SECTION A = 25 MARKS**

# Section B

Three out of four questions

6. Rob and Dom have run a successful health food business in partnership for many years. In 2020 they decided to incorporate the business, and Camel Health Sdn Bhd (“Camel”) was formed. Camel has an issued share capital of RM60,000 which comprises 50,000 ordinary shares and 10,000 preference shares. All shares are fully paid. Since 2020 the company has been struggling financially. It has few assets and has run up a debt of over RM50,000 with Zebra Bhd, one of its largest suppliers.

Camel’s constitution states: “The holders of preference shares are entitled to a fixed dividend of 10 sen per share and preferential repayment of capital on a winding up of the company”.

Liz has recently joined Camel’s board as a director, and has expressed concern about the company’s financial situation. She is unhappy with the preference share arrangements. Liz suggests that the directors should cancel the preference shares and pay off the preference shareholders. If that is not possible, they should reduce the percentage of the preferential dividend to 5 sen per share. Rob and Dom agree. May, who holds 2,500 preference shares, learns of their plans and warns them that she will not approve the cancellation.

Advise Camel’s directors.

(25 marks)

Question number	Indicative content
<p>6 25 marks</p>	<p>There are two key issues to address, namely:</p> <ul style="list-style-type: none"> <li>• whether the directors can reduce the company’s share capital by cancelling the preference shares, and</li> <li>• whether they can vary the rights of the preference shareholders by changing the preferential dividend.</li> </ul> <p><b>Reduction in share capital</b></p> <p>Cancellation of the 10,000 preference shares will result in a reduction in the company’s share capital. A reduction in share capital goes against the doctrine of capital maintenance which is designed to protect the interests of creditors. Thus it is well established that companies may only reduce their share capital in the manner permitted by the Companies Act (<i>Trevor v Whitworth</i>). Under the CA 2016 the two methods of reduction are:</p> <ul style="list-style-type: none"> <li>• Special resolution followed by court confirmation</li> <li>• Special resolution supported by a solvency statement by the directors</li> </ul> <p>The question does not indicate that there is anything in the constitution restricting the reduction but the directors should check because if there were any restrictions in the constitution, the constitution would take precedence and a reduction would not be possible.</p> <p>Camel may wish to opt for the second method which is the more expedient as it does not require court involvement. This method is set out in s.117 CA 2016. The company must pass a special resolution supported by a solvency statement (s.117(1)(b)). As the company is a private company, the solvency statement must be made not more than 14 days before the date of the resolution (s.117(3)(b)(a)). It is a statement affirming that each of the directors has formed the view that:</p>

- As regards the company's situation at the date of the statement, there are no grounds on which the company could be found unable to pay its debts, and
- The company will be able to pay its debts as they fall due during the period of 12 months immediately following the date of the reduction of share capital.

The statement must be made by all directors.

The facts state that the company is struggling financially. However, this does not necessarily mean it is insolvent. If the directors are aware that the company is unable to pay its debts, they are not able to make the statement in good faith. If the directors sign a statement without having reasonable grounds for the opinions expressed in it, then an offence is committed by each director in default (s.114) and any resulting reduction will be void (*Macpherson v European Strategic Bureau Ltd*).

However, unless the directors know that the company is insolvent, the solvency statement method will be available.

The first method (special resolution followed by court confirmation) is also available to Camel. It is unlikely to be successful because the reduction could prejudice the interests of Zebra and any other creditors. The primary concern of the court in deciding whether to make an order is the interests of the company creditors (*Re Ratners Group Plc*).

In conclusion, given the company's financial position, it is unlikely that the directors will be able to reduce the company's share capital by cancelling the preference shares.

#### **Variation of class rights**

The other option for the board to consider is to reduce the rate of the preferential dividend. Answers should consider whether this amounts to a variation of the class rights of the preference shareholders. If it does amount to a variation, then the method for variation of class rights will be required under s.91(1).

The question of what amounts to a variation has been left to the court: *White v Bristol Aeroplane Co*, *Re Mackenzie and Co*. Answers should explain the distinction between altering a right and altering the shareholder's ability to enjoy the right. (as the latter will not amount to a variation).

The reduction of the rate of the dividend from 10 sen to 5 sen is an alteration of the class right itself, rather than an alteration which merely affects the enjoyment of the right (*Re Mackenzie and Co*). This will accordingly be a variation and so will only be valid where:

- The constitution provides for a method to vary the class right, then the method shall be complied with (s.91(1)(a)).
- Where there is no such provision in the constitution, the consent of the holders of the relevant class of shares is to be obtained in accordance with s.91(2).

Preference shareholders can consent either via consent in writing from the holders of at least 75% of the total voting rights of the shareholders in the class, or via a special resolution passed at a meeting of the class of preference shareholders (s.91(2)).

As May holds 25% of the voting rights of the preference shares, she will not have enough votes to prevent a special resolution being passed. However, as she holds at least 10% of the total voting rights in that class of preference shares, she may apply to the court to object to the variation under s.93.

	<p>Answers may note that when deciding whether to consent to a variation the shareholders should consider whether the dominant purpose of the variation is to benefit the class as a whole. If they do not do so, the variation may be invalidated.</p> <p>(British American Nickel Corp Ltd v MJ O'Brien Ltd).</p> <p>Note for markers: In <i>House of Fraser v AGCE</i>, the court held that cancellation of preference shares not generally amount to a variation of class rights, as long as the rights of the preference shareholders as set out in the constitution were respected. This issue is not discussed in the Company Law Study Text, but answers which make reference to the case should be rewarded.</p> <p>Do not reward responses which simply copy-paste sections of CA 2016.</p>
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Level	Mark	Descriptor
	0	No rewardable material.
<b>Level 1 (Fail)</b>	1-12	<p><b>Knowledge</b></p> <ul style="list-style-type: none"> <li>• (A) The answer may attempt to explain the rules on capital maintenance but it is likely to be unclear and not explained in full.</li> </ul> <p><b>Comprehension</b></p> <ul style="list-style-type: none"> <li>• (B) A few legal issues are identified but the points made are superficial and are accompanied by little detail.</li> <li>• (C) The answer demonstrates limited understanding of the factors that underpin capital maintenance. This is communicated in a basic way with simple or generalised statements.</li> <li>• (D) The answer makes few links between theory and practice.</li> <li>• (E) Points made are not applied to the scenario in the question.</li> </ul> <p><b>Analysis/evaluation</b></p> <ul style="list-style-type: none"> <li>• (F) There is little application of relevant knowledge and understanding which may not be supported by an evaluative statement.</li> <li>• (G) The answer includes limited analysis of the factors that underpin capital maintenance.</li> <li>• (H) Analysis is not used to make a judgement and is not supported by examples.</li> </ul>
<b>Level 2 (Pass)</b>	13-16	<p><b>Knowledge</b></p> <ul style="list-style-type: none"> <li>• (A) The answer includes an explanation of the rules on capital maintenance.</li> </ul> <p><b>Comprehension</b></p> <ul style="list-style-type: none"> <li>• (B) A few legal issues are identified and the points made are relevant and described in detail.</li> <li>• (C) The answer demonstrates a good understanding of the factors that underpin capital maintenance. This is communicated in a basic way with simple or generalised statements.</li> <li>• (D) The answer makes links between theory and practice.</li> <li>• (E) Points made are applied to the scenario in the question.</li> </ul>

		<p><b>Analysis/evaluation</b></p> <ul style="list-style-type: none"> <li>• (F) There is application of relevant knowledge and understanding, supported by an evaluative statement.</li> <li>• (G) The answer includes analysis of the factors that underpin capital maintenance.</li> <li>• (H) Analysis is used to make a judgement and is not supported by examples.</li> </ul>
<p><b>Level 3 (Merit / Distinction)</b></p>	<p>17-25</p>	<p><b>Knowledge</b></p> <ul style="list-style-type: none"> <li>• (A) The answer includes a clear and detailed explanation of the rules on capital maintenance.</li> </ul> <p><b>Comprehension</b></p> <ul style="list-style-type: none"> <li>• (B) A range of relevant legal issues are identified and the points made are described in some detail.</li> <li>• (C) The answer demonstrates a thorough understanding of the factors that underpin capital maintenance and is communicated in a logical writing structure.</li> <li>• (D) The answer makes strong links between theory and practice.</li> <li>• (E) A wide range of points are made which are applied to the scenario in the question.</li> </ul> <p><b>Analysis/evaluation</b></p> <ul style="list-style-type: none"> <li>• (F) There is good application of relevant knowledge and understanding supported by a focused evaluative statement.</li> <li>• (G) The answer includes in-depth analysis of the factors that underpin capital maintenance.</li> <li>• (H) Analysis is used to make a clear judgement which is supported by appropriate examples.</li> </ul>

7. Sarang Bhd (Sarang) is a furniture retail company. It has two directors, Ravi and Shoba, who are also the company's only shareholders with 50% each of the company's shares. On 31 March 2023 Sarang was placed in compulsory liquidation.

The liquidator sold the available assets of the company. Stock in a rented warehouse was sold for RM90,000, the company's three vehicles were sold for RM100,000, and a balance of RM10,000 was left in the company bank account.

The liquidator has discovered that Sarang has an outstanding corporation tax bill of RM22,000. She has also discovered a secured loan from Burung Bank of RM30,000. The full loan is still outstanding and no repayments have been made. The charge instrument, dated 10 September 2019, states that the loan is secured by a fixed charge over all Sarang's assets and business. The liquidator notices that the Bank has allowed Sarang to continue to deal with its bank account, book debts and stock without restriction.

Several of Sarang's suppliers have also submitted claims to the liquidator. There is an outstanding debt of RM60,000 to Merpati Bhd for IT equipment; the company owes RM30,000 in rent to its landlord Gagak Sdn Bhd; and there is a debt of RM10,000 to Swift Sdn Bhd for cleaning services. All these debts are unsecured.

Fifteen employees have come forward with claims for unpaid wages from two months leading up to the liquidation. Each of the employees is claiming RM 5,000.

The liquidator's fee is RM 12,000 and she has incurred additional expenses of around RM 6,000.

Explain how Sarang's assets will be distributed. Include in your answer a calculation showing the amount that each of the company's creditors will receive.

**(25 marks)**

Question number	Indicative content
7 25 marks	<p>The question requires an analysis of the order of distribution of a company's assets on insolvency. Note that answers should not just list the statutory order – in order to exceed a bare pass mark there must be some application of the rules to the facts of the question, and an attempt at a calculation using the figures given.</p> <p><b>Answers could include the following content.</b></p> <p>The first point to establish is the nature of the Bank's charge. The discussion on this point will carry 9 marks.</p> <p>If the bank's charge is correctly described as a fixed charge then the assets subject to it will fall outside the control of the liquidator. (1 mark) Instead the Bank can simply seize the charged assets and sell them. (1 mark)</p> <p>The charge taken by the Bank is described as a fixed charge, and this is the term used in the charge instrument. However, the description applied by the parties is not conclusive (<i>Street v Mountford</i>). (1 mark) Instead the courts will focus on the rights and obligations provided to the parties under the charge instrument. (1 mark)</p>

The characteristics of a floating charge are set out in *Re Yorkshire Woolcombers Association Ltd* as follows (3 marks):

1. The charge is taken over a class of assets as opposed to a specific asset;
2. The class of assets charged is constantly changing, and
3. Floating charges leave the company free to use and deal with those assets.

The facts indicate that the charge does not contain any restriction on the company's ability to deal with the charged assets. (1 mark) Further it is a charge taken over the entire undertaking. It should therefore be classified as a floating charge. (1 mark)

The discussion on the order for the distribution will carry 10 marks. The calculation will carry 6 marks.

The order of distribution is as follows.

Unlike a fixed charge, the assets subject to a floating charge are available to the liquidator and will rank behind some of the preferential debts.

The liquidator sold the RM90,000 worth of stock and the three vehicles for RM100,000. Combining this with the RM10,000 in Sarang's bank account means that the liquidator will have RM200,000 to distribute.

The general principle is that the secured creditors will be paid first. Only if there is any excess from the proceeds of sale, would the unsecured creditors be paid. However, among the unsecured creditors, some classes of creditors have priority over the floating charge and some have priority over other unsecured creditors. The ranking is prescribed in s.527 as follows:

1. Employees for their wages not exceeding RM15,000 each within a period of four months before the commencement of winding up (s.527(1)(b) and (4)). There are 15 employees who have not been paid their wages for two months before the court order to wind up the company. Section 467(2) states that the winding up commences on the date of the court order. Each employee will have priority for the RM5,000 owed to them. As there are 15 employees, the total will be RM75,000, leaving a balance of RM125,000.
2. Employees for their remuneration in respect of vacation leave accrued before the commencement of winding up (s.527(1)(d) and (4)). The scenario does not mention this class of preference creditors.
3. Employees social security scheme and provident funds for contributions payable during 12 months before the commencement of winding up (s.527(1)(e) and (4)). The scenario does not mention this class of preference creditors
4. Floating charge (s.527(4)). Sarang owes Burung Bank RM30,000. There is a balance of RM95,000 after Burung Bank is paid. Note that the floating charge cannot be avoided under s.529 as it falls outside the relevant time limits set out in that section.

5. Costs and expenses of the liquidation (s.527(1)(a)). The total is RM18,000. There is now a balance of RM77,000.
6. Employees for worker's compensation accrued before the commencement of winding up (s.527(1)(c)) The scenario does not mention this class of preference creditors
7. Federal taxes assessed at any time before the expiry of proving of debts (s.527(1)(f)). There is an outstanding bill of RM22,000. There is now a balance of RM55,000
8. Other unsecured creditors (s.527(1)). The other unsecured creditors are Merpati Bhd (RM60,000), Gagak Sdn Bhd (RM30,000) and Swift Sdn Bhd (RM10,000). The total debts are RM100,000. As there is a balance of RM55,000 after paying off the floating charge and preferential debts, Merpati Bhd, Gagak Sdn Bhd and Swift Sdn Bhd will not be paid in full. They will be paid only RM0.55 for every Ringgit owed to them.
9. Members. As there are no assets left, no distribution can be made so there is no need to discuss distribution of assets to members.

Answers should include set out the calculations determining the amount each creditor will receive, as follows:

	<b>Amount</b>	<b>Balance</b>
Total assets		RM200,000
Employees' wages	RM5,000 x 15 = RM75,000	RM125,000
Burung Bank	RM30,000	RM95,000
Liquidation expenses	RM18,000	RM77,000
Tax	RM22,000	RM55,000
Unsecured creditors	RM60,000 (Merpati) + RM30,000 (Gagak) + RM10,000 (Swift) = RM100,000	RM55,000 / RM100,000 = RM0.55 for every ringgit RM33,000 (Merpati) + RM16,500 (Gagak) + RM5,500 (Swift) = RM55,000

Level	Mark	Descriptor
	0	No rewardable material.
<b>Level 1 (Fail)</b>	1-12	<p><b>Knowledge</b></p> <ul style="list-style-type: none"> <li>• (A) The answer may attempt to explain the order of distribution of assets, but it is likely to be unclear and not explained in full.</li> </ul> <p><b>Comprehension</b></p> <ul style="list-style-type: none"> <li>• (B) A few legal issues are identified but the points made are superficial and are accompanied by little detail.</li> <li>• (C) The answer demonstrates limited understanding of the distribution of assets. This is communicated in a basic way with simple or generalised statements.</li> <li>• (D) The answer makes few links between theory and practice.</li> <li>• (E) Points made are not applied to the scenario in the question.</li> </ul> <p><b>Analysis/evaluation</b></p> <ul style="list-style-type: none"> <li>• (F) There is little application of relevant knowledge and understanding which may not be supported by an evaluative statement.</li> <li>• (G) The answer includes limited analysis of the distribution of assets.</li> <li>• (H) Analysis is not used to make a judgement and is not supported by examples.</li> </ul>
<b>Level 2 (Pass)</b>	13-16	<p><b>Knowledge</b></p> <ul style="list-style-type: none"> <li>• (A) The answer includes an explanation of the distribution of assets.</li> </ul> <p><b>Comprehension</b></p> <ul style="list-style-type: none"> <li>• (B) A few legal issues are identified and the points made are relevant and described in detail.</li> <li>• (C) The answer demonstrates a good understanding of the distribution of assets. This is communicated in a basic way with simple or generalised statements.</li> <li>• (D) The answer makes links between theory and practice.</li> <li>• (E) Points made are applied to the scenario in the question.</li> </ul> <p><b>Analysis/evaluation</b></p> <ul style="list-style-type: none"> <li>• (F) There is application of relevant knowledge and understanding, supported by an evaluative statement.</li> <li>• (G) The answer includes analysis of the distribution of assets.</li> <li>• (H) Analysis is used to make a judgement and is not supported by examples.</li> </ul>
<b>Level 3 (Merit / Distinction)</b>	17-25	<p><b>Knowledge</b></p> <ul style="list-style-type: none"> <li>• (A) The answer includes a clear and detailed explanation of the distribution of assets.</li> </ul> <p><b>Comprehension</b></p> <ul style="list-style-type: none"> <li>• (B) A range of relevant legal issues are identified and the points made are described in some detail.</li> <li>• (C) The answer demonstrates a thorough understanding of the distribution of assets and is communicated in a logical writing structure.</li> <li>• (D) The answer makes strong links between theory and practice.</li> <li>• (E) A wide range of points are made which are applied to the scenario in the question.</li> </ul>

		<p><b>Analysis/evaluation</b></p> <ul style="list-style-type: none"><li>• (F) There is good application of relevant knowledge and understanding supported by a focused evaluative statement.</li><li>• (G) The answer includes in-depth analysis of the distribution of assets.</li><li>• (H) Analysis is used to make a clear judgement which is supported by appropriate examples.</li></ul>
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Marking Scheme

8. Pandai Bhd (“Pandai”) is a company offering management consultancy services. Its directors are Karim, Larry and Benson. The company’s constitution contains the following objects clause:

*“The Company may engage in any activity directly related or incidental to the carrying out of management consultancy services”.*

Pandai has recently signed a contract to provide management consultancy services to a new client: Warna- Warni Sdn Bhd (“Warna”), an online clothing retailer. The directors know that Warna has a reputation for low pay and poor treatment of workers. They have also seen evidence that its production methods are not environmentally friendly. Furthermore, Warna has recently been the subject of some negative press coverage relating to its tax affairs. Benson is unhappy with the deal, which he believes will damage Pandai’s reputation, but Karim insists that Warna pays well and the deal offers opportunities to make significant profits.

The directors of Pandai agree to lend RM80,000 of the company’s funds to Maryam, Karim’s sister. The money is transferred to Maryam and she signs a contract agreeing to repay it in interest-free instalments over 5 years. Maryam uses the money to buy a car. Some of Pandai’s shareholders find out about the loan and demand that the money is repaid immediately.

- (a) Discuss whether the directors of Pandai are in breach of any general duties under the CA 2016 with regards to the transaction with Warna. (7 marks)

- (b) Is the loan agreement between Maryam and Pandai valid? (18 marks)

Question number	Indicative content
8 (a) 10 marks	<p>The relevant duties are those contained in ss.213 of the CA 2016.</p> <p><b>Warna-Warni Sdn Bhd and s.213</b></p> <p>Section 213 requires that a director shall at all times exercise his powers in accordance with the CA 2016, for a proper purpose and in good faith in th best interest of the company. The question to be asked is whether an honest man in the shoes of the director would view such action as in the company’s interest. Further, the interests of the members as a whole must be looked at. As “all” members should benefit from the action, the directors have to act fairly and consider the interests of the various classes of members. It is therefore difficult to prove a breach of the duty. It is not clear on the facts whether the directors genuinely believed their actions would be for the the benefit of the company to promote its success for the benefit of the members. Better answers should acknowledge this ambiguity.</p> <ul style="list-style-type: none"> <li>• Answers need not list all the have regard factors but should focus on the most relevant, namely the desirability of the company maintaining a reputation for high standards of business conduct</li> </ul> <p>The directors can demonstrate (perhaps in the board minutes) that they had regard to the relevant factors, and thus they may be able to demonstrate that they have discharged their duties properly.</p>

Level	Mark	Descriptor
	0	No rewardable material.
<b>Level 1 (Fail)</b>	1-3	<p><b>Knowledge</b></p> <ul style="list-style-type: none"> <li>• (A) The answer may attempt to explain directors duties, but it is likely to be unclear and not explained in full.</li> </ul> <p><b>Comprehension</b></p> <ul style="list-style-type: none"> <li>• (B) A few legal issues are identified but the points made are superficial and are accompanied by little detail.</li> <li>• (C) The answer demonstrates limited understanding of directors duties. This is communicated in a basic way with simple or generalised statements.</li> <li>• (D) The answer makes few links between theory and practice.</li> <li>• (E) Points made are not applied to the scenario in the question.</li> </ul> <p><b>Analysis/evaluation</b></p> <ul style="list-style-type: none"> <li>• (F) There is little application of relevant knowledge and understanding which may not be supported by an evaluative statement.</li> <li>• (G) The answer includes limited analysis of directors duties.</li> <li>• (H) Analysis is not used to make a judgement and is not supported by examples.</li> </ul>
<b>Level 2 (Pass)</b>	4-5	<p><b>Knowledge</b></p> <ul style="list-style-type: none"> <li>• (A) The answer includes an explanation of directors duties.</li> </ul> <p><b>Comprehension</b></p> <ul style="list-style-type: none"> <li>• (B) A few legal issues are identified and the points made are relevant and described in detail.</li> <li>• (C) The answer demonstrates a good understanding of directors duties. This is communicated in a basic way with simple or generalised statements.</li> <li>• (D) The answer makes links between theory and practice.</li> <li>• (E) Points made are applied to the scenario in the question.</li> </ul> <p><b>Analysis/evaluation</b></p> <ul style="list-style-type: none"> <li>• (F) There is application of relevant knowledge and understanding, supported by an evaluative statement.</li> <li>• (G) The answer includes analysis of directors duties.</li> <li>• (H) Analysis is used to make a judgement and is not supported by examples.</li> </ul>
<b>Level 3 (Merit / Distinction)</b>	6-7	<p><b>Knowledge</b></p> <ul style="list-style-type: none"> <li>• (A) The answer includes a clear and detailed explanation of the distribution of assets.</li> </ul> <p><b>Comprehension</b></p> <ul style="list-style-type: none"> <li>• (B) A range of relevant legal issues are identified and the points made are described in some detail.</li> <li>• (C) The answer demonstrates a thorough understanding of directors duties and is communicated in a logical writing structure.</li> <li>• (D) The answer makes strong links between theory and practice.</li> <li>• (E) A wide range of points are made which are applied to the scenario in the question.</li> </ul>

		<p><b>Analysis/evaluation</b></p> <ul style="list-style-type: none"> <li>• (F) There is good application of relevant knowledge and understanding supported by a focused evaluative statement.</li> <li>• (G) The answer includes in-depth analysis of directors duties.</li> <li>• (H) Analysis is used to make a clear judgement which is supported by appropriate examples.</li> </ul>
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Question number	Indicative content
<p>8 (b) 15 marks</p>	<p><b>Maryam</b></p> <p>Under s.213(1), the directors must act in accordance with the CA 2016 and company's constitution. Section 35(2) provides that where the company's constitution sets out the objects of the company, then the company shall be restricted from carrying on any business or activity that is not within those objects. As the company's constitution contains an objects clause, this limits the contractual capacity of the company and the authority of the directors. Making a loan to Maryam is most unlikely to fall within the restriction relating to "any activity directly related or incidental to the carrying out of management consultancy services". In making the loan to Maryam, the directors have not acted in accordance with the constitution. They have breached the duty in s.213(1) and will be obliged to compensate the company for any losses resulting from making the loan. Section 35(2) does not expressly save the transaction which is outside the company's objects clause. Thus, it is uncertain whether the loan agreement with Maryam will still bind the company.</p> <p>The duty under s.221 provides that a director who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the company, he must declare the nature of his interest to the board of directors. This would apply in the scenario where Karim has an indirect interest because Maryam is his sister. Answers should note that if a declaration of interest in a proposed transaction is not made, and the transaction goes ahead, then s.221(10) and (12) are engaged. Subsection (10) provides that the transaction is voidable at the option of the company, whereas subsection (12) covers a breach of this duty carries criminal penalties. If the directors were aware at the time of making the loan that Maryam is Karim's sister then a declaration is not required.</p> <p>In addition, s.222 provides that the interested director shall not participate or vote while the contract is being considered. If Karim participated or voted, then subsection (3) provides that the transaction is voidable at the option of the company, whereas subsection (4) covers a breach of this duty carries criminal penalties.</p> <p>Further, s.225 provides that a company cannot give a loan to a person connected to its director. According to s.197, a person connected to its director includes the director's sibling. There are exceptions to the principle in s.225, among which the company is an exempt private company or the loan is given in accordance with a scheme for the making of loans to employees which has been approved by the company. On the facts, Maryam is the sister of Karim who is a director of the Pandai, and the exceptions prescribed in subsection (2) do not apply.</p>

	<p>According to subsection (4), the contravention of this section carries criminal penalties for the directors who authorised the loan. Nevertheless, subsection (3) provides the loan in contravention of this section is recoverable.</p> <p>The question does not indicate whether there is a connection between Maryam and the company (there is a conflict). Therefore answers discussing other duties such as the duty to avoid a conflict of interest or to declare an interest in a proposed or existing transaction may be rewarded.</p>
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Level	Mark	Descriptor
	0	No rewardable material.
<b>Level 1 (Fail)</b>	1-8	<p><b>Knowledge</b></p> <ul style="list-style-type: none"> <li>• (A) The answer may attempt to explain the rules ultra vires and loans to persons connected to directors, but it is likely to be unclear and not explained in full.</li> </ul> <p><b>Comprehension</b></p> <ul style="list-style-type: none"> <li>• (B) A few legal issues are identified but the points made are superficial and are accompanied by little detail.</li> <li>• (C) The answer demonstrates limited understanding of the rules ultra vires and loans to persons connected to directors. This is communicated in a basic way with simple or generalised statements.</li> <li>• (D) The answer makes few links between theory and practice.</li> <li>• (E) Points made are not applied to the scenario in the question.</li> </ul> <p><b>Analysis/evaluation</b></p> <ul style="list-style-type: none"> <li>• (F) There is little application of relevant knowledge and understanding which may not be supported by an evaluative statement.</li> <li>• (G) The answer includes limited analysis of the rules ultra vires and loans to persons connected to directors.</li> <li>• (H) Analysis is not used to make a judgement and is not supported by examples.</li> </ul>
<b>Level 2 (Pass)</b>	9-12	<p><b>Knowledge</b></p> <ul style="list-style-type: none"> <li>• (A) The answer includes an explanation of the rules ultra vires and loans to persons connected to directors.</li> </ul> <p><b>Comprehension</b></p> <ul style="list-style-type: none"> <li>• (B) A few legal issues are identified and the points made are relevant and described in detail.</li> <li>• (C) The answer demonstrates a good understanding of the rules ultra vires and loans to persons connected to directors. This is communicated in a basic way with simple or generalised statements.</li> <li>• (D) The answer makes links between theory and practice.</li> <li>• (E) Points made are applied to the scenario in the question.</li> </ul> <p><b>Analysis/evaluation</b></p> <ul style="list-style-type: none"> <li>• (F) There is application of relevant knowledge and understanding, supported by an evaluative statement.</li> <li>• (G) The answer includes analysis of the rules ultra vires and loans to persons connected to directors.</li> <li>• (H) Analysis is used to make a judgement and is not supported by examples.</li> </ul>

<p><b>Level 3 (Merit / Distinction)</b></p>	<p>13-17</p>	<p><b>Knowledge</b></p> <ul style="list-style-type: none"> <li>• (A) The answer includes a clear and detailed explanation of the rules ultra vires and loans to persons connected to directors.</li> </ul> <p><b>Comprehension</b></p> <ul style="list-style-type: none"> <li>• (B) A range of relevant legal issues are identified and the points made are described in some detail.</li> <li>• (C) The answer demonstrates a thorough understanding of the rules ultra vires and loans to persons connected to directors and is communicated in a logical writing structure.</li> <li>• (D) The answer makes strong links between theory and practice.</li> <li>• (E) A wide range of points are made which are applied to the scenario in the question.</li> </ul> <p><b>Analysis/evaluation</b></p> <ul style="list-style-type: none"> <li>• (F) There is good application of relevant knowledge and understanding supported by a focused evaluative statement.</li> <li>• (G) The answer includes in-depth analysis of the rules ultra vires and loans to persons connected to directors.</li> <li>• (H) Analysis is used to make a clear judgement which is supported by appropriate examples.</li> </ul>
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10. In 2018, two friends, Mark and Louis, set up an advertising agency in partnership. Over time the business grew to become very profitable. Following advice from their lawyer, in 2021 Mark and Louis decided to incorporate it as a company. A notice of registration for MLA Bhd was issued on 10 November 2021. The company has a constitution, with the following clauses:

- (i) A director may be removed from office at any time by a decision of the board.
- (ii) On any resolution to remove a director, Louis will be entitled to 5 votes per share.

Mark and Louis were the only directors. The company had 1000 shares and Mark and Louis held 500 shares each.

In January 2022, Mark's sister Maria decided to invest in the company. Mark and Louis both transferred 100 shares each to Maria. It quickly became clear that Louis disagreed with Mark and Maria about the future direction of the company, and there was a heated argument. In December 2022, Mark and Maria called a general meeting where an ordinary resolution was passed to remove Louis as a director.

Louis is angry and upset. He tells you that the meeting took him by surprise: it was called with only a day's notice, and no agenda was circulated beforehand.

Advise Louis:

(a) whether his removal as a director was valid/ lawful.

(10 marks)

(b) whether any other personal remedies under the CA 2016 are available to him.

(15 marks)

Question number	Indicative content
9(a) 10 marks	<p>Section 206 provides for the procedure for the removal of director. The procedure applicable for a public company is different from that of a private company. According to s.206(1)(a), a director of a public company may be removed before the expiration of the director's period of office in accordance with this section. Subsections (2) and (3) provides that the method is an ordinary resolution with special notice. This method applies notwithstanding anything in the constitution or agreement between the company and the director. Thus, the method prescribed in the constitution does not apply.</p> <p><b>Power to remove a director</b> As Mark and Maria now hold 600 shares between them, they can lawfully remove Louis provided the meeting was validly called and the s.206 process adhered to.</p> <p><b>Process for removal under s.168</b></p> <ul style="list-style-type: none"> <li>• The resolution must take place at a meeting (s.206(2)).</li> <li>• Special notice of the resolution is required (s.206(3)), namely, 28 clear days (s.322(1)) must be given to the company. As it is an ordinary resolution, at least 14 clear days must be given by the company to the members. Louis says he was only given a day's notice, so this requirement has not been met.</li> <li>• Louis says that the agenda was not circulated before the meeting, so this requirement has not been met.</li> <li>• Section 207 also provides that a copy of the notice to remove the director must be given to that director. The director has the right to protest against his removal and may address the meeting and circulate written representations (s.207). As Louis did not have notice of the resolution, he was denied this opportunity.</li> </ul>

	<p><b>Weighted voting rights</b></p> <p>The constitution states that on a resolution to remove a director Louis is entitled to 5 votes per share. Section 206(2) does not permit an alternative method to remove the director of a public company. Thus, it is doubted that the weighted voting rights clause is enforceable.</p> <p>Applying s.206 and s.207 and relevant caselaw to the facts, there are a number of defects in the calling and conduct of the meeting and vote which make the resolution to remove Louis invalid. His removal is therefore ineffective.</p>
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Level	Mark	Descriptor
	0	No rewardable material.
<b>Level 1 (Fail)</b>	1-4	<p><b>Knowledge</b></p> <p>(A) The answer may attempt to explain the process for removal of a director, but it is likely to be unclear and not explained in full.</p> <p><b>Comprehension</b></p> <p>(B) A few legal issues are identified but the points made are superficial and are accompanied by little detail.</p> <p>(C) The answer demonstrates limited understanding of the process. This is communicated in a basic way with simple or generalised statements.</p> <p>(D) The answer makes few links between theory and practice.</p> <p>(E) Points made are not applied to the scenario in the question.</p> <p><b>Analysis/evaluation</b></p> <p>(F) There is little application of relevant knowledge and understanding which may not be supported by an evaluative statement.</p> <p>(G) The answer includes limited analysis of the process.</p> <p>(H) Analysis is not used to make a judgement and is not supported by examples.</p>
<b>Level 2 (Pass)</b>	5-6	<p><b>Knowledge</b></p> <ul style="list-style-type: none"> <li>• (A) The answer includes an explanation of the rules ultra vires and loans to persons connected to directors.</li> </ul> <p><b>Comprehension</b></p> <ul style="list-style-type: none"> <li>• (B) A few legal issues are identified and the points made are relevant and described in detail.</li> <li>• (C) The answer demonstrates a good understanding of the process for removal of a director. This is communicated in a basic way with simple or generalised statements.</li> <li>• (D) The answer makes links between theory and practice.</li> <li>• (E) Points made are applied to the scenario in the question.</li> </ul> <p><b>Analysis/evaluation</b></p> <ul style="list-style-type: none"> <li>• (F) There is application of relevant knowledge and understanding, supported by an evaluative statement.</li> <li>• (G) The answer includes analysis of the process.</li> <li>• (H) Analysis is used to make a judgement and is not supported by examples.</li> </ul>
<b>Level 3 (Merit / Distinction)</b>	7-10	<p><b>Knowledge</b></p> <ul style="list-style-type: none"> <li>• (A) The answer includes a clear and detailed explanation of the process for removal of a director.</li> </ul>

	<p><b>Comprehension</b></p> <ul style="list-style-type: none"> <li>• (B) A range of relevant legal issues are identified and the points made are described in some detail.</li> <li>• (C) The answer demonstrates a thorough understanding of the process and is communicated in a logical writing structure.</li> <li>• (D) The answer makes strong links between theory and practice.</li> <li>• (E) A wide range of points are made which are applied to the scenario in the question.</li> </ul> <p><b>Analysis/evaluation</b></p> <ul style="list-style-type: none"> <li>• (F) There is good application of relevant knowledge and understanding supported by a focused evaluative statement.</li> <li>• (G) The answer includes in-depth analysis of the process.</li> <li>• (H) Analysis is used to make a clear judgement which is supported by appropriate examples.</li> </ul>
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Question number	Indicative content
9(b) 15 marks	<p>The question requires a discussion of the potential remedies available to Louis in his personal capacity. As the facts of the question point strongly to an unfair prejudice petition, this is the key remedy answers should consider. However stronger answers may also consider other potential claims as set out below.</p> <p><b>The unfair prejudice claim</b></p> <p>Under s.346(1) a member may petition the court for a remedy where</p> <p>(a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or debenture holders including himself or in disregard of his or their interests as members, shareholders or debenture holders of the company; or</p> <p>(b) that some act of the company has been done or is threatened or that some resolution of the members, debenture holders or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or debenture holders, including himself.</p> <p>As Louis is a member within the definition in s.2(1) he has the right to bring a petition. He can bring a claim against the company even though the actions complained of were those of Mark and Maria.</p> <p><b>Grounds for a claim</b></p> <p>Note that conduct must relate to the affairs of the company, although in practice this phrase has been given a wide interpretation (e.g. <i>Re Home &amp; Office Fire Extinguishers</i>). Here, the acts of the Mark and Maria clearly related to the company's affairs, and so no issue arises.</p> <p><b>Interests of members</b></p> <p>In addition, the conduct complained of must unfairly prejudice Louis' 'interests as a member', meaning that the claim must be brought by the member in his capacity as a member. Louis is complaining about his removal as a director, so answers may question whether this amounts to a membership claim. However the case law indicates that a member's interests under s.346 are wider than just membership rights (<i>Gamlestaden Fastigheter AB v Baltic Partners Ltd</i>). Applying <i>Ebrahimi v Westbourne Galleries</i>, it would appear that MLA Bhd is a quasi-partnership.</p>

Although it has been incorporated as a company, in effect it is run as if it were a partnership with all founders retaining a say in management and a share of the business's profits. The court has held that in quasi-partnership companies, the roles of member and director are blurred so that the expectation to manage may amount to a membership interest (*Re a Company (No 00477 of 1986)*).

### Unfairly prejudicial conduct

In order for Louis to succeed he must show that the conduct complained of is both unfair and prejudicial (see *Saul D Harrison & Sons*). Whether conduct is unfairly prejudicial is a judgment to be made on the facts of the case. It is well established in the case law that exclusion from management of a quasi-partnership can amount to unfair prejudice (*Re Ghyll Beck Driving Range Ltd*). Louis probably had a legitimate expectation that he would remain involved in the management of the company and this may prompt a discussion of the decision in *O'Neill v Phillips* and the question of whether the petition should be allowed on the basis of equitable considerations.

### Remedies

If the petition is successful the court may make such order as it thinks fit for giving relief (s.346(2)). In practice the most likely order is a share purchase order, namely one requiring Mark and Maria to buy Louis out of the company at a fair price to be fixed by the court (*Grace v Biagioli*).

### Compensation

In addition to his rights under CA 2006, Louis may have a separate service contract with the company. If his service contract has been breached, he may still be able to claim damages from the company.

### Other

Unexpected answers should be rewarded provided they are properly argued and supported by relevant authorities. However do not reward discussions of the derivative claim or the petition for winding up.

Level	Mark	Descriptor
	0	No rewardable material.
<b>Level 1 (Fail)</b>	1-7	<p><b>Knowledge</b></p> <ul style="list-style-type: none"> <li>• (A) The answer may attempt to explain the unfair prejudice remedy, but it is likely to be unclear and not explained in full.</li> </ul> <p><b>Comprehension</b></p> <ul style="list-style-type: none"> <li>• (B) A few legal issues are identified but the points made are superficial and are accompanied by little detail.</li> <li>• (C) The answer demonstrates limited understanding of the remedy. This is communicated in a basic way with simple or generalised statements.</li> <li>• (D) The answer makes few links between theory and practice.</li> <li>• (E) Points made are not applied to the scenario in the question.</li> </ul> <p><b>Analysis/evaluation</b></p> <ul style="list-style-type: none"> <li>• (F) There is little application of relevant knowledge and understanding which may not be supported by an evaluative statement.</li> <li>• (G) The answer includes limited analysis of the process.</li> </ul>

		(H) Analysis is not used to make a judgement and is not supported by examples.
<b>Level 2 (Pass)</b>	8-9	<p><b>Knowledge</b></p> <ul style="list-style-type: none"> <li>• (A) The answer includes an explanation of the unfair prejudice remedy.</li> </ul> <p><b>Comprehension</b></p> <ul style="list-style-type: none"> <li>• (B) A few legal issues are identified and the points made are relevant and described in detail.</li> <li>• (C) The answer demonstrates a good understanding of the remedy. This is communicated in a basic way with simple or generalised statements.</li> <li>• (D) The answer makes links between theory and practice.</li> <li>• (E) Points made are applied to the scenario in the question.</li> </ul> <p><b>Analysis/evaluation</b></p> <ul style="list-style-type: none"> <li>• (F) There is application of relevant knowledge and understanding, supported by an evaluative statement.</li> <li>• (G) The answer includes analysis of the remedy.</li> <li>• (H) Analysis is used to make a judgement and is not supported by examples.</li> </ul>
<b>Level 3 (Merit / Distinction)</b>	10-15	<p><b>Knowledge</b></p> <ul style="list-style-type: none"> <li>• (A) The answer includes a clear and detailed explanation of the unfair prejudice remedy.</li> </ul> <p><b>Comprehension</b></p> <ul style="list-style-type: none"> <li>• (B) A range of relevant legal issues are identified and the points made are described in some detail.</li> <li>• (C) The answer demonstrates a thorough understanding of the remedy and is communicated in a logical writing structure.</li> <li>• (D) The answer makes strong links between theory and practice.</li> <li>• (E) A wide range of points are made which are applied to the scenario in the question.</li> </ul> <p><b>Analysis/evaluation</b></p> <ul style="list-style-type: none"> <li>• (F) There is good application of relevant knowledge and understanding supported by a focused evaluative statement.</li> <li>• (G) The answer includes in-depth analysis of the remedy.</li> <li>• (H) Analysis is used to make a clear judgement which is supported by appropriate examples.</li> </ul>

**TOTAL FOR SECTION B = 75 MARKS**  
**TOTAL FOR PAPER = 100 MARKS**

*The scenarios included here are entirely fictional. Any resemblance of the information in the scenarios to real persons or organisations, actual or perceived, is purely coincidental.*

**END**