CHAPTER 18: COMPANY III – COMPANY MEETINGS, SHAREHOLDER-PROTECTION, AND LIQUIDATION OF COMPANIES

QUESTION 1

Explain the difference between an ordinary and special resolution and how these are made. Can company resolutions be made without the need for a meeting?

Answer:

- An ordinary resolution is one that is passed by simple majority i.e. more than 50% of shareholders who vote in person or by proxy at a general meeting), (Companies Act 2006 (CA) 282).
- Shareholders must be given at least 14 days' notice of the content of the proposed resolution.
- Ordinary resolutions are used for the more routine decisions.
- A special resolution is a resolution passed by a majority of not less than 75% of the shareholders (CA 283).
- Shareholders must be given at least 14 days' notice of the proposed special resolution and the notice must set out the exact text of the proposed special resolution and state that it is a special resolution.
- A copy of every special resolution passed must be filed at Companies House.
- Special resolutions are required for major changes.
- A private company may pass any decision by a written resolution apart from a decision to dismiss a director or auditor before the expiry of their term of office.

QUESTION 2

The Companies Act 2006 gives protection to minority shareholders by allowing minority shareholders to bring 'derivative claims' and also allows minority shareholders to sue for 'unfair prejudicial conduct'. Explain and discuss these actions.

Answer:

- A shareholder can bring a derivative claim on behalf of the company, against a director, a former director or a shadow director (Companies Act 2006 ss 260 to 264).
- The claim must be for an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust and may have taken place before the claimant became a shareholder.
- A derivative claim requires two stages, Stage 1, the claimant shareholder must get permission of the court to bring the claim by showing that there is sufficient evidence to justify further investigation. Stage 2, the court will decide, on hearing evidence from both sides whether the case should continue.
- The court must refuse permission to continue if a notional director acting properly in promoting the success of the company would not continue with the claim, or if the claim

arises from an act or omission that the company has authorised to be carried out, or if the act or omission has taken place and the company has ratified it, (CA 263).

- The court also takes other issues into account such as the views of the disinterested shareholders, and if shareholder seeking to continue with the claim is acting in good faith.
- If the claim is successful it is the company as a whole that will benefit and any compensation awarded by the court will go to the company although the shareholder will be able to recover their legal costs of bringing the claim.
- A shareholder may prefer to bring a petition to a court on grounds of unfair prejudice with the prospect of recovering compensation on his own behalf rather than commencing a derivative action.
- Any shareholder may petition the court on the grounds that the affairs of the company are being or have been conducted in a manner that has unfairly prejudiced the shareholders generally or a section of shareholders which includes at least himself, or there is a proposal to take such action (CA s994).
- The conduct must be both unfair and prejudicial to the minority shareholder(s) but it does not have to be illegal and the directors do not have to have acted negligently or in bad faith.
- It is up to the shareholder to show that the conduct is unfair and prejudicial.
- A court will not generally interfere if it is just a case of poor management.
- A court has a wide discretion on what type of remedy to award, the most common being that the petitioner shareholder's shares be purchased by the controlling shareholders or the company at a fair value. *Rodliffe (Simon) v Rodliffe (Guy) and Home & Office Fire Extinguishers Ltd* (2012).

QUESTION 3

George owns shares in Organic School Dinners plc. He wants to propose a resolution that the company should endeavour to source organic food locally. He has gained the support of a number of other shareholders. Explain to George whether he can require the company to hold a meeting to consider his resolution, or if his resolution could be added to the agenda of the company's Annual General Meeting, or if he could require the company to circulate the resolution as a written resolution.

Would your answer be different if the company was a private limited company, Organic School Dinners Ltd?

Answer:

- Shareholders can require the directors to convene a general meeting providing they hold at least 10% of the voting shares in the company and include in their request the text of a resolution which they intend to propose at the meeting, (Companies Act 2006 (CA) s303).
- The resolution is circulated with the notice of the meeting and may include a statement of up to 1000 words in support of their proposed resolution.
- Provided George has the support of the relevant number of shareholders he will be able to require OSD PLC to hold a meeting.

- Alternatively George will be able to require OSD PLC to place his proposed resolution on the agenda of the AGM provided he and his supporting shareholders hold at least 5% of the total voting rights entitled to vote on the proposed resolution or the resolution is proposed by at least 100 shareholders holding on average £100 of paid up shares (CA s388).
- If it is a private company, and more than 12 months have elapsed since the last general meeting then the shareholders holding at least 5% of the voting shares can require a meeting.
- Public companies cannot pass written resolutions but if it is a private company provided George and the other shareholders hold at least 5% of the voting rights of all shareholders entitled to vote on the resolution then he can require the company to circulate a written resolution.
- For all proposed resolutions – their content must not be ineffective, defamatory, vexatious or frivolous.

QUESTION 4

Flora Exotic Ltd, a company selling plants, has a large number of debts but continues to trade. Kerry has supplied large quantities of fertiliser to Flora Exotic Ltd but, despite several reminders, their account for £5,000 has not been paid.

a) Advise Kerry, who wishes to petition the court to have Flora Exotic Ltd wound up.
b) Consider if the directors of Flora Exotic Ltd may be liable for wrongful trading.

Answer:

a)

- The Insolvency Act 1986 lists a number of grounds on which a company may be wound up, one of which is that the company is unable to pay its debts. As a creditor, Kerry can apply for a court order of compulsory liquidation.
- Kerry will have to prove that Flora Exotic Ltd cannot meet its debts. She can do this by proving the value of the company's total assets is less that its total debts. Alternatively she can serve a statutory notice on FE Ltd at its registered office, requiring payment of the debt of £5,000, and if it is not paid within 21 days FE Ltd will be regarded as unable to meet its debts.
- It will be a court decision whether the company is wound up and a liquidator is appointed.

b)

- If FE Ltd has been trading when insolvent then its directors may be liable for wrongful trading (Insolvency Act 1986 s213).
- The liquidation must show that the director knew or ought to have known that there was no reasonable prospect of the company avoiding insolvent liquidation and the director did not take sufficient steps to minimise the potential loss to creditors.
- The director will be judged on the standard expected of a reasonably diligent director having the general knowledge, skill and experience as would reasonably be expected of a person carrying out the same functions as that director.

- If there has been wrongful trading, the liquidator can apply to the court for an order that the directors contribute to the company's assets and the court may disqualify the directors from being company directors for up to 15 years, (Directors Disqualification Act 1986 s10).