

PAYMENT FOR LOSS OF OFFICE:

s.215(1)(a)-(c) Payment for loss of office defined.

s.215(2) Compensation = includes both cash and non-cash benefits.

s.217 Ordinary resolution is required for loss of office payments unless:

- **s.221** the payment is max. £200 or
- **s.220** the payment is made in good faith, eg. pension

s.217(2) Approval needed from holding company as well.

s.217(4) No approval is required for a wholly-owned subsidiary.

s.217(3) A memorandum must be made available to shareholders

s.215(3) Still need ordinary resolution if payment made to a third party. Shareholder approval is also required for:

s.218 the transfer of the undertaking or property of a company, and

s.219 a transfer of shares in the company resulting from a takeover bid.

s.219(4) Neither the offeror nor their associates will be allowed to vote.

s.180(2) Shareholder approval is required.

IMPLICATIONS OF REMOVAL OF A DIRECTOR:

Tim has been removed as a director and he was also a shareholder with 23% of shares. If he would reach 25%, that would be a significant shareholding whereby he could block a special resolution. His wife has 7% and together they have 30% so they may be able to block a resolution together.

Employment implications:

Determine whether he is an employee:

1. **Executive directors:**
A director who has been appointed to executive office. Full-time employees with a contract service contract.
2. **Non-executive directors:**
s. 250 Non-executive directors = not an employee and would not take part in the running of the business.
3. **Shadow directors:**
s.251 Shadow director = a person in accordance with whose instructions the company's directors are accustomed to act.

STEP 1. Who is an Employee?

s.230(1) Employment Rights Act 1996 Employee = an individual working under a contract of employment.

Look at the substance and not the form of the contract.

Tests whether an individual is an employee:

1. **the personal service test** – does he perform work personally?
2. **the control test** – who has control over work place, hours, who does the work, what work is done and when?
3. **mutuality of obligation test** – employer has a duty to provide work, employee must accept when given.
4. **other factors** – economic reality and integration tests.

STEP 2. Wrongful dismissal – for non-executive directors:

Wrongful dismissal arises where the employer has dismissed the employee in breach of the terms of the employment contract by eg., failing to give the employee any or sufficient notice.

The amount of notice which is required will be determined by the employee's contract but this is **subject to a statutory minimum**.

ERA 1996 employees are entitled to 1 week's notice if employed for more than 1 month but less than 2 years. Employees employed for 2 years or more are entitled to **one week's** notice for **every completed year** of service up to 12 weeks' notice.

Claims must be brought within:

- **6 years** of the date of the dismissal (ordinary courts)
- **3 months** of the date of the dismissal (Employment Tribunal).

The remedy for wrongful dismissal is damages. The ex-employee must mitigate losses by seeking new employment. If the ex-employee finds a new job, or makes no attempt, then damages are reduced.

You can claim for both wrongful and unfair dismissal at the same time.

STEP 3. Unfair dismissal – for executive directors:

Must be an employee who must show:

1. **that he was dismissed:** dismissal includes constructive dismissal where the employee leaves the job because he is compelled to do so by the conduct of the employer.

2. **that he was employed for the qualifying period of service:** 1 years' continuous employment if the employment began before 6 Apr 2012, otherwise 2 years.
3. **that he was not in an excluded category (e.g. police).**

Then the employer has the burden of showing:

- that it had a fair reason for the dismissal; and
- that the dismissal was fair in all the circumstances.

Fair reasons for dismissal:

1. **Capability** - dismissal for incompetence or incapability is okay if he is unable to do the job properly.
2. **Conduct** - includes disobedience to orders; abusive language; theft; drunkenness at work; persistent lateness.
3. **Redundancy**
4. **Statutory illegality** - if their work permit expires.
5. **Some other substantial reason**

Was the dismissal fair in all the circumstances?

In order for the dismissal not to be declared unfair, **the procedures followed in carrying out the dismissal must also be fair:**

Employers must: investigate, hold a meeting with the employee, decide on appropriate action; and provide an opportunity to appeal.

Compensation:

Basic award: [AGE FACTOR] x [SERVICE] x [WEEK'S PAY]

+ **Compensatory award:** (actual loss suffered)

immediate loss of wages between the date of termination and the hearing + loss of other **fringe benefits** (bonus payments, pension rights)

The employee must **mitigate his loss** by looking for another job. If the employee has not found work by the time of the hearing, the Tribunal may also award an amount for future loss of wages and benefits.

Restrictive covenants:

Types of restrictive covenants:

1. **Non-competition**
These prevent the ex-employee from:
 1. working for a competitor; or
 2. setting up a competing company.
2. **Non-dealing**
These prevent any dealings between the ex-employee and customers (even if the customers approached him).
3. **Non-solicitation/poaching**
 1. of customers (prevents the ex-employee soliciting business of customers); or
 2. of staff
4. **Non-disclosure**

All restraints are **prima facie void and unenforceable unless they:**

1. protect a legitimate interest of the business (e.g. customer connections, stable workforce, trade secrets); and
2. go no further than is reasonably necessary to protect that legitimate interest.

Blue pencil test:

The court will strike out the unenforceable part of a restrictive covenant clause and will only enforce the remainder of the clause if it makes independent sense.

Are the restrictive covenants reasonable?

- **The duration of the restraint** – should not be longer than is necessary to protect the interest
- **The geographical scope of the restraint** – where is the business's customer base?
- **The needs/interests of the business** – is the nature of the business global or local? Is it very specialised?
- **The duties of the employee** – how senior is the employee? There is no justification a non-solicitation clause for someone who never had client contact
- **The interest that the business is seeking to protect and whether a lesser restriction would suffice.** Reasonableness factors, what is necessary to protect the employer's legitimate interests?

If the employee has a successful claim for wrongful dismissal then any restrictive covenants are unlikely to be enforceable. (employers' repudiatory breach)

Even where the interest is obvious, it is still generally advisable for the director to declare the interest to avoid any ambiguity.

STEP 3: The director must declare his interest:

s.182(1) A director need only make a disclosure under either s.177 or s.182 (depending on the timing of the transaction).

The director can give declare his interest:

- **s.177(2)(a) and s.182(2)(a)** Orally at a BM
- **s.184** If a non-recurring interest, the director can make a written declaration
- **s.185(3)** If a long-term interest, the director can give **general notice** stating the nature and extent of their interest.

STEP 4: The effect of the director's interest:

MA 14(1) An interest director **cannot vote** and **cannot count in the quorum** for board resolutions to approve that transaction.

MA 14(3) Exceptions to this rule:

- **MA 14(4)** the director's conflict arises from a permitted cause
- **MA 14(4)(b)** Subscribing for shares in the company is permitted
- The company disappplies/suspends MA 14(1) by ordinary resolution
- **s.21 Removal:** the company removes MA 14 altogether by spec. res. (**s. 22** assuming the provisions are not entrenched) and replace it with an article expressly permitting a director to vote and count in the quorum.

STEP 5: Conclude:

How will this affect the transaction in the given scenario? Will there still be sufficient votes to approve the transaction and to meet the quorum?

SUBSTANTIAL PROPERTY TRANSACTIONS:

Consider each transaction separately.

NAV: £904,500
Unamended MA
Sh: Max, Sam, others
D: Max, Sam, Agnes

STEP 1: State the general rule in s.190:

- s.190(1)** An arrangement requires ordinary resolution where:
1. **s.190(1)(a)** a company sells an asset to a director or connected person (**s.190(1)(b)**) or a company buys from a director/con.
 2. the asset is a non-cash asset
 3. the non-cash asset is not substantial

STEP 2: Is the asset substantial non-cash asset?

s.190(5) Where there are a series of transactions involving multiple non-cash assets, they only need to be approved by members once.
s.190(6) Anything to which a director is entitled under his service contract is excluded from being a substantial property transaction.

s.1163 Non-cash asset defined. (a loan is not a non-cash asset)
s.191 Substantial non-cash asset =

An asset worth $£0 < x \leq £5,000$ is **not** a substantial asset.
An asset worth $£100,000 < x$ is a substantial asset.
For multiple assets, use their aggregate value.

An asset worth $£5,000 < x \leq £100,000$ is a substantial asset only if it is worth more than **10% of the company's net asset value (NAV)**.

s.191(3)(a) see the company's accounts for NAV.
s.191(3)(b) If no statutory accounts, it's **the called up share capital**.

STEP 3: Is the transaction with a director or a connected person?

- s.252(2)(a)-(e) Connected persons = wide definition:**
- **s.253(2)** a member of the director's family: can be a spouse, partner, child, step child, parent (**not nephew or siblings**)
 - **ss.254-256** a company with which the director is associated (if the director and connected persons together own at least 20% of the share capital)

STEP 4: Is there a defence / exemption?

The company does not need to gain members' approval if:

- **s.195(6)** he took all reasonable steps to ensure compliance
- **s.195(7)** any connected person had no knowledge
- **s.192(b)** wholly-owned subsidiary of another company.

STEP 5: What if the director fails to obtain approval?

Shareholder approval in advance reduces the risk of breach

s.195(2) The transaction will be voidable by the company unless:

- bona fide rights have been acquired by a third party who was not a party to the transaction
- **s.196** allows for affirmation by the shareholders of the company by ordinary resolution within a reasonable period.

s.195(3)-(4) Directors who authorized transaction would be jointly and severally liable to account for any loss/pay damages. If the transaction is not voidable, the asset would be sold.

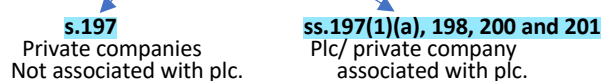
STEP 6: Duties triggered?

s.175 – conflict of interest
s.177 – declare that interest
s.172 – promote the interest of the company

LOANS TO DIRECTORS:

STEP 1. What is the nature of the company entering the transaction?

Plc or company associated with plc?



s.256(b) Being a subsidiary of a plc means being associated with it.

STEP 2: What is the nature of the transaction?

s.197(1) Ordinary resolution is required before a company can: make a loan (or quasi-loan or credit transaction) or give a guarantee

ss.198 – 200 Relevant provisions for Quasi-loans
s.199 Quasi-loan is defined.
ss.201–202(2) Credit transaction is defined **IMPORTANT***

s.190(1) Ordinary resolution can be obtained either:

- before the transaction is entered into, or
- after the transaction has been agreed

STEP 3: Is shareholder approval required? By which company?

Is the loan to a director or person connected to a director of the holding company? Is the company requiring shareholder approval of a wholly owned subsidiary?

STEP 4: Do any of the exceptions apply?

s.204-209 In any of the following situations **no need shareholders' approval:**

- **s.197(5) and s.201(6)** Shareholder approval is **not** required by wholly-owned subsidiaries, only the main company.
- **s.204** The funds were used to meet expenditure incurred on behalf of the company. Max. total amount of £50,000 or less.
- **s.207(1) Minor and business transactions:** Loans or quasi-loans to a director up to £10,000 can be given without shareholder approval. This figure rises to £15,000 for credit transactions.
- **s.209 A money-lending company**

s.213(7) Defence for any connected person and director who authorised the transaction **if they can show they had no knowledge of the circumstances constituting the contravention.**

STEP 5. Sanctions for non-compliance and for which persons?

s.213 The transaction will be voidable.
s.214 allows for the arrangement to be affirmed by the shareholders of the company and the holding company (where relevant) **by ord. res.** within a reasonable period.

s.213(3)-(4) Must account for any gain made directly or indirectly from the transaction and **indemnify** the company for any loss or damage resulting from the transaction.

STEP 6. Statutory duties?

Directors must always comply with their duties - **ss.172 and 177.**

BUYBACK PROCEDURES

Company's options

IF SHARES ISSUED AS REDEEMABLE: Redeem shares		IF NO REDEEMABLE SHARES: Purchase of own shares		
Redemption out of profits/fresh issue for the purpose	Redemption out of capital (private companies only)	De Minimis (rare)	Purchase of own shares out of distributable profits	Purchase of own shares out of capital (private companies only)
Check articles. Verify distributable profits (as applicable)	Check articles. Directors' statement and auditors' report. Accounts no more than 3 months old. Spec Res to approve payment out of capital	Purchase of own shares from capital (private companies only) Payments out of capital in a financial year not exceeding £15,000 or 5% of the value of the share capital (whichever is the lower)	Check articles. Contract + Ord Res to approve contract. (the articles may specify a SR to approve the contract) Verify distributable profits (as applicable)	Check articles. Contract + Ord Res + directors' statement + auditors' report. Accounts no more than 3 months old. SR to approve payment out of capital
		Check articles. Contract + Ord Res to approve contract.		

If no redeemable shares:

- Must have sufficient distributable profits. – Find this in the balance sheet as Equity/Retained Earnings/Retained profits
- If we don't have sufficient distributable profits this mean that we are using capital.

If shareholder is also a director:

s.694 Standard requirements:

- s.694(1) a contract to purchase own shares is required; and
- s.694(2) the terms of the contract need to be approved by ordinary resolution. The contract may be entered into with the purchaser conditional on the ordinary resolution being passed.
- s.695(3) The selling shareholder can vote on the resolution at the GM but the resolution will be ineffective if the votes represented by the shares he is selling, vote in respect of the shares being sold carried the resolution. – the vote in respect of the shares being sold cannot tip over the resolution.
- s.695 If the resolution is passed as a written resolution, all of the shareholder's votes are not counted.

The disclosure requirements:

- s.696(2) Where an ordinary resolution to approve an own share purchase is proposed at a general meeting, the contract must be disclosed at the company's registered office for a period of 15 days before the general meeting and also at the general meeting. Where such a resolution is proposed as a written resolution, a copy of the contract must be sent together with the copy of any written resolution (which requires more than 50% of total voting rights of eligible members).
- s.707(1) Within 28 days of the date on which the shares that are bought back are delivered to the company, the company must send a return to Comp. H.
- s.708(1) and a notice of cancellation together with
- s.708(2) a statement of capital.

Detail of procedures for share buyback – Redemption

Distributable profits	Capital
Check that shares were issued as redeemable shares	Check that shares were issued as redeemable shares
	s.709(1) Articles must not restrict or prohibit use of capital
	s.687(1) Only private companies
	s.714 A written statement of solvency by directors in support.
	s.714(6) Auditors' report, enquired into affairs, not aware of anything unreasonable in written statement
	s.714 Copy of directors' statement and auditors' report must be made available to members at GM or, s.718(2) in case of a written resolution, by being sent out with the written resolution and s.720(1)-(2) be available for inspection at the registered office
	s.716(1) SR to approve payment out of capital
	s.719 Notify creditors within a week of SR (London Gazette and national paper/all

	creditors) and file directors' statement and auditors' report at Companies House s.721(1)-(2) Creditors have a right to object within 5 weeks of the date of the SR to approve payment out of capital
s.689(1)-(2) Notification must be made to Companies House within one month of redemption and must be accompanied by a statement of capital	s.689(1)-(2) Notification must be made to Companies House within one month of redemption and must be accompanied by a statement of capital
Update Register of Members	Update Register of Members
s.688 Cancel/reissue share certificates	s.688 Cancel/reissue share certificates

Detail of procedures for share buyback - Purchase

De Minimis	Distributable profits	Capital
s.690(1) Articles must not restrict or prohibit own share purchase	s.690(1) Articles must not restrict or prohibit own share purchase	s.690(1) Articles must not restrict or prohibit own share purchase
Articles must authorise use of s.692(1ZA) procedure. Confirm capital payments in a financial year not exceeding lower of £15,000 or 5% of the value of the share capital		s.709(1) Articles must not restrict or prohibit use of capital
s.696(2) Contract must be available 15 days before GM including date of the GM itself or sent with any written resolution	s.696(2) Contract must be available 15 days before GM including date of the GM itself or sent with any written resolution	s.696(2) Contract must be available 15 days before GM including date of the GM itself or sent with any written resolution
s.687(1) Only private companies		s.687(1) Only private companies
		s.714 A written statement of solvency by directors in support
		s.714(6) Auditors' report, enquired into affairs, not aware of anything unreasonable in written statement
		s.714 Copy of directors' statement and auditors' report must be made available to members at GM or, s.718(2) in case of a written resolution, by being sent out with the written resolution and s.720(1)-(2) be available for inspection at the registered office
s.694(2) Ord Res to approve contract (the articles may specify Spec Res)	s.694(2) Ord Res to approve contract (the articles may specify Spec Res)	s.694(2) Ord Res to approve contract and s.716(1) Spec Res to approve payment out of capital
		s.719 Notify creditors within a week of Spec Res (London Gazette and national paper/all creditors) and file directors' statement and auditors' report at Companies House
		s.721(1)-(2) Creditors have a right to object within 5 weeks of the date of the SR to approve payment out of capital
ss.707(1) and 708(2) Returns must be sent to Companies House together with a statement of capital within 28 days of the purchase.	ss.707(1) and 708(2) Returns must be sent to Companies House together with a statement of capital within 28 days of the purchase.	ss.707(1) and 708(2) Returns must be sent to Companies House together with a statement of capital within 28 days of the purchase.
Update Register of Members	Update Register of Members	Update Register of Members
s.706 Cancel/reissue share certificates	s.706 Cancel/reissue share certificates	s.706 Cancel/reissue share certificates
s.702(2)-(3) Keep a copy of the contract at the registered office for 10 years from date of purchase of all the shares or date on which contract otherwise determines	s.702(2)-(3) Keep a copy of the contract at the registered office for 10 years from date of purchase of all the shares or date on which contract otherwise determines	s.702(2)-(3) Keep a copy of the contract at the registered office for 10 years from date of purchase of all the shares or date on which contract otherwise determines

short notice procedure could be used, there would be no point in calling this meeting on short notice due to the 15 day inspection requirement.

GM:

12. **Agenda?**
 - **s.188(2)(a)** To propose an **ordinary resolution** to approve the duration of the service contract to be entered into with **Karen Watts**

BM II:

14. **Agenda?**
 Propose board resolutions to:
 1. approve entry into the service contract
 2. authorise a signatory for the service contract
15. **Voting?**
MA 14(1) Karen Watts cannot count in the quorum for or vote on the board resolutions to approve entry into and authorise a signatory for the contract in which she is interested (the service contract).

PMM:

- s.228(2)(a)** Retain a copy of the service contract at the registered office for inspection
- s.228(4)** such other place as has been notified to the registrar.

REMOVAL OF DIRECTOR

FULL NOTICE – SHORT NOTICE – WRITTEN RES

For this question you may use:

- Full notice procedure – this example is using full notice procedure.
- Cannot use written res or short notice procedure for removing directors

BM I:

2. **Quorum**
MA 14(1) The interested director will not count in the quorum
MA 14(3)(a) unless the company previously disapplied MA 14.

3. **Agenda**

- **Propose board resolutions to:**
 1. **to propose an ordinary resolution to remove the director.**
 2. **s.302** call a GM to pass the ordinary resolution
 3. **Notice of GM?**
s.312(1) and s.360(1)-(3) Special notice of 28 days is required.
s.312(3) Where that is not practicable, 14 days' notice and an advertisement in a newspaper.
s.312(4) Call GM within 28 days after notice

s.169(3) The director has the right to make written representations to the company and to have the company distribute these to the members in advance of the meeting.

- s.288(2)(a)** Written resolution cannot be used.
- s.303** The directors can be required to call a GM by the shareholders
- s.305** The members can ultimately call the meeting themselves

GM:

3. **Agenda:**
s.169(2) The director must be given a chance to speak at the GM
s.168(1) The shareholders must pass an ordinary resolution approving the removal of the director.

BM II:

4. **Agenda:**
 · pass a board Resolution terminating the director's service contract. They will have to follow the correct procedure in order to avoid claims for wrongful dismissal and for executive directors: unfair dismissal and redundancy.

PMM:

2. **Cosec to file the following with the Registrar of Companies:**
 1. **s.167** Must inform Comp. H. of the removal of the director on form TM01 within 14 days.
3. **Update internal records:**
 1. **s.162** Must update the register of directors
 2. **s.165** Must update directors' residential addresses

TIMINGS OF REMOVAL:

Board agrees to removal of a director:

Day 1:

- s.168(1)** Notice submitted by disgruntled shareholders to company of proposed OR to remove directors.
- MA 7(1)** Directors need to pass a majority decision at the BM and a board resolution to call a GM to pass an OR to remove a director
- s.168(1), s.312(1) and s.360(2)** Must give 28 clear days = special notice

Day 15:

- Directors serve notice of GM and OR on other SH
- s.312(2), s.307(1), s.360(2)** 14 clear days notice to GM

DAY 30 EARLIEST FOR GM

Decide whether we have:

- **a cooperative board (directors complying with s.304) or**
- **an uncooperative board (directors not complying with s.304)**

Cooperative board:

Day 1:

- s.303(1)** Notice submitted by disgruntled shareholders to call GM
- s.168(1)** and propose OR to remove director
- Directors need to pass a majority decision at the BM and a board resolution to call a GM to pass an OR to remove a director

s.304(1)(a) Within 21 days directors must call GM

Day 22:

- Directors serve notice of GM and OR on other SH
- s.304(1)(b)** Board convenes GM within 21 days for a date of GM notice.
- Not clear days as 360(1) doesn't apply to s.304

DAY 50 EARLIEST FOR GM

Uncooperative board:

Day 1:

- s.303(1)** Notice submitted by disgruntled shareholders to call GM
- s.168(1)** and propose OR to remove director
- Directors need to pass a majority decision at the BM and a board resolution to call a GM to pass an OR to remove a director

End of day 22:

s.304(1)(a) Within 21 days directors must call GM

Day 50:

- Disgruntled shareholders serve notice of GM and OR on other SH
- s.305(1)** Disgruntled shareholders mean all those serving s.303 notice or those holding more than 50% of voting rights represented by them.
- s.305(4)** In the same way as GMs are called by directors.
- s.307(1) and s.360(2)** 14 clear days

DAY 38 EARLIEST FOR GM

SUBSTANTIAL PROPERTY TRANSACTIONS

FULL NOTICE – SHORT NOTICE – WRITTEN RES

For this question you may use:

- Full notice procedure – this example is using full notice procedure, which is common for these type of qs.
- Short notice
- Written resolution

BM 1:

1. **Quorum:**
2. **Agenda:**

Disclosures of interest:

- (b) **s.177(1)** Edward and Jeremy Lewis to disclose their interest in the contract between the Company and Jolly Roger Limited ('JRL') for the sale of the Marauder
- (c) To be on the safe side, Jeremy Lewis should also declare an interest in the sale of the Yacht as the transaction involves his father and therefore, arguably, he is also indirectly interested in the transaction.

Propose board resolutions to:

- (a) **s.302** call a GM to move ordinary resolutions to approve:
 - a. **s.190(1)(a)** the entry into the transaction between the Company and JRL regarding the sale of the Yacht