QUESTION ONE

Section 252(1) of the Companies Act 61 of 1973 provides that –

“Any member of a company who complains that any particular act or omission of a company is unfairly prejudicial, unjust or inequitable, or that the affairs of the company are being conducted in a manner unfairly prejudicial, unjust or inequitable to him or to some part of the members of the company may . . . make an application to court for an order under this section”

Discuss the way in which the courts have interpreted this provision, including the kind of conduct which has (and has not) been held to constitute conduct which is “unfairly prejudicial, unjust or inequitable” in this context. Discuss also what relief the court is empowered to grant in terms of this section.

(30 marks)
QUESTION TWO

Section 424(1) of the Companies Act, 1973, applies —

"where it appears, whether it be in a winding-up, judicial management or otherwise, that any business of the company was or is being carried on recklessly or with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose”.

(a) Discuss the circumstances in which this provision can apply, and discuss the order which a court can make in terms of this provision.

(b) Discuss whether the potential liability imposed on directors in terms of section 424(1) of the Companies Act in respect of “reckless” conduct involves a clearer and/or more exacting criterion for liability than the common law principles in relation to a director’s duty to exercise care and skill.

(There is no division of marks between (a) and (b) and the question will be marked as a whole.)

(30 marks)

QUESTION THREE

"The rule in Foss v Harbottle is of continuing importance in modern company law."

Discuss this statement, explaining the content of the rule, and the distinction between a derivative action and a personal action.

Discuss whether (and if so how) the statutory derivative action in section 266 of the Companies Act has alleviated the difficulties, associated with the rule in Foss v Harbottle, which confront an aggrieved minority shareholder who believes that a wrong has been done in the context of a company’s affairs, and has not been redressed.

Briefly explain whether the rule in Foss v Harbottle applies to close corporations.

(30 marks)