CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

JUNE 2021
LEVEL 6 – UNIT 16 - THE PRACTICE OF COMPANY AND PARTNERSHIP LAW

Note to Candidates and Learning Centre Tutors:

The purpose of the suggested points for responses is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the June 2021 examinations. The suggested points for responses sets out a response that a good (merit/distinction) candidate would have provided. Candidates will have received credit, where applicable, for other points not addressed by the marking scheme.

Candidates and learning centre tutors should review the suggested points for responses in conjunction with the question papers and the Chief Examiners' **comments contained within this report,** which provide feedback on candidate performance in the examination.

CHIEF EXAMINER COMMENTS

This paper is a Level 6 paper and was appropriately demanding. Congratulations to those candidates that have passed this Unit.

Much of what is set out below has been said in previous reports, however it remains valid and is still required to be outlined and commented upon again.

Overall, those candidates that performed well reflected their abilities to apply their understanding to the facts and thereby produce good solid answers deserving of a higher mark. Some candidates, but by no means all, had taken little time to consider the documents provided in the case study materials and thereby sought to use the facts imparted and apply the documents as they progressed through the paper.

General performance:

Unsuccessful candidates need to be able to relate to their own performance to what was being required of them and to be able adapt their approach to this topic, revision and the assessment so that they are able to be successful in the future. Candidates are strongly encouraged not to just focus on the answer, but their overall approach.

It is worth a general observation that the performance by candidates was generally reflected by those who had fully and carefully prepared and reviewed the case study materials and were prepared to answer any change in the facts presented – as in previous papers, this paper relied on a good understanding of a set of facts set out in the Case Study materials. As per previous papers, the application of the mechanics of the document together with statute was key. There is always a marked differentiation in that such well performing candidates applied themselves according to their ability to tackling the questions such that they used their knowledge to provide sound advice taking into the facts supplied, as required by the questions. Those candidates that sought only to demonstrate knowledge of reading and imparting all that was known on a subject did not score as well; likewise, those that only gave cursory coverage to the question did not perform well.

General Advice:

In terms of approach and technique for examinations at this level, candidates must bear in mind that the intention is for the candidate to be able to apply his/her understanding of the practice partnership and company law such they are able to advise clients in a practical manner. In order to achieve this, candidates must resist the urge to write all that they know about a subject, which in this paper was all too often a problem; understandably this is a natural desire to demonstrate all that the candidate has read and knows. However, that approach will not work at this level. As has been stated before, application to the facts when answering questions is extremely important and often carried marks that candidates who only impart knowledge do not give themselves the opportunity to be awarded.

Additionally, as before, candidates, whilst revising, should not then be doing so in such a manner that they are rehearsing pre-prepared questions and answers. Less so in this paper than before, there remained instances where pre-prepared answers appeared to be relied upon with little consideration to the need to remain flexible and to be able to answer the questions as posed, rather than as desired.

Common weaknesses:

As has been said before, many candidates failed to appreciate that it is important when tackling problem questions to answer the question in the context to the issue raised by the question. Often the answers set out the law on a topic in issue without any great reference to the facts of the scenario, and often with no attempt being made to apply the principles that were actually relevant. This would then be followed by only a cursory discussion of the facts of the problem, often with only scant reference to the previous explanation of the law. A proper conclusion can only be demonstrated after careful application of the relevant principles of law to the facts of the scenario, and that demonstration is all the better made if the marker is then taken through the issues on a step-by-step basis with each step applied to the facts – candidates are strongly recommended to review the Suggested Points for Responses for further guidance on how they may achieve the intended aims.

Review of Case Study Materials:

Candidates are recommended to consider the manner in which they prepare, following the release of the Case Study materials. Candidates should try not to anticipate the questions following a review of the case study materials; rather analyse the facts to fully understand what is going on and then consider all the issues surrounding those facts, identify issues only and identify where problems may arise, of where there is uncertainty.

It is also worth repeating advice given in the past. Namely that candidates must not, when reviewing the Case Study materials, make assumptions about the facts or attempt to question spot – what the candidate may consider as a certain in terms of the type and wording of the question will invariably not be the question actually posed. Review the Case Study materials with an eye to be adaptable and fluid come the examination; remember the facts can be developed further come the examination, this can then alter the assumptions that may have been considered. Those candidates that do question spot invariably come to the examination with a pre-rehearsed answer which will not fit the question posed or be capable of incorporating additional or changed facts. Candidates should treat the examination as they would meeting a client for the first time, what you know from a brief telephone call or attendance note could change immediately when the client walks in the room.

15 Minutes Reading:

Candidates should also make appropriate use of the 15-minute reading time at the start of the examination. It is during this period that the candidate can read through the additional information provided in the examination paper, and how this relates to and moves on the pre-released Case Study materials. Candidates should pay particular attention to the wording or facts of the questions and discuss the relevant law, connecting their arguments to the actual issues raised by the questions. The candidate should always bear in mind that when tackling questions, the candidate must be able to demonstrate why the law he/she is writing about is relevant to the question, i.e. make sure that as you identify the relevant fact that demonstrates why it is so. It is the latter aspect that some candidates fail to do. Accordingly, it may be useful during this period to make notes on the key points of the law to be used and applied and the key facts to employ in giving a fully reasoned and considered piece of advice.

Examination technique:

When tackling the questions posed in the examination, it is important to keep in mind the IRAC approach to answering questions - Issue, Rule, Application, and Conclusion. This approach will help you structure your answers, and as you do you will be demonstrating to the examiners how you have reached your conclusions by leading them through your thought process and step-by-step analysis:

(1) Issue: read the questions carefully and identify that which is relevant from the facts, state exactly what the question of law is;

(2) Rule: identify and cite the applicable cases, statutory provisions or procedures that will help you make a correct legal analysis of the issue at hand - briefly, explain their requirements, identifying any key tests that must be applied;

(3) Application (or Analysis): this is the most important section of an IRAC because it develops the answer to the issue at hand. It requires you to apply the applicable statutory law or procedures identified to the facts – this is the provision of the advice. It is important in this section to apply the rules to the facts of the case and explain or argue why a particular rule applies or does not apply in the case presented; and finally

(4) Conclusion: by summarising what you have set out above and for problem questions whether the client can or cannot achieve their intended aims, or in the case of an essay question whether you agree or not with the statement you have been set to discuss. It is important that your conclusion does not introduce any new rules or analysis; restates the issue and provides the final answer.

Statute book:

Although previously stated, candidates are reminded that they are able to take with them into the examination room the prescribed statute book, a valuable resource if used correctly – if used correctly when studying, during revision and then in the examination itself, a source to rely upon for all answers. Candidates should seek to use the statute book as a means by which to support their answers, in that the statute book will provide the necessary statute references, the correct terminology, clarification of the necessary procedure that is being applied and the resource to flick through to identify additional points for inclusion.

Candidates must learn how to use this resource effectively in the examination room, and this starts with revision – when revising a topic, locate and identify the corresponding statutory provisions, read and understand the manner in which they operate. The effective use of statute in the exam will only seek to embellish answers and candidate performance. Care should be taken to identify and use the correct Model Articles – in too many assessments the wrong version has been used by candidates.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1

The first part of this question looked at identifying whether a business relationship was a partnership and the potential liability of being involved in a partnership and liability generally. Candidates that sought to identify and consider their understanding to the various tests and additional requirement under the Partnership Act 1890 did well. Likewise, those candidates that looked to relate this application back to the facts, performed well on this aspect of the question. However, too many candidates did seek to state the position of the law only, without application – it is important to continually seek to apply the law to the facts and draw conclusions that provide the necessary advice that is sought.

The second part of the question looked at any potential claim that could be made against a partner for the use of partnership assets for her own purpose and for not focussing sufficient time on the partnership. Generally, the issues were identified, however more was required to identify what is partnership property and to ensure that first, if a partner uses partnership property without permission from the other partners, then that partner must account for any profits as a result. Likewise, that if there is no provision dealing with work input and competing with the partnership, the implied position under the PA 1890 and common-law apply. It may not necessarily be possible to stop the individual involvement in their own enterprise as there is no obligation on a partner to spend time on the partnership business.

The final part of the question looked at the dissolution of the partnership and the settling of the debts. This required the careful consideration of how, in this instance the partnership could be brought to a close, rather than a consideration of all possible means of dissolving a partnership. It then required the application of section 44 of the partnership Act 1890.

For the full requirements, candidates are referred to the Suggested Points for Responses.

Question 2

This first question looked at the consequences arising from the failure to make a disclosure by a director and the validity of a meeting in which quorum was not possible to achieve. Whilst most candidates identified that a director was meant to make a disclosure of an interest and the subsequent liability arising from s177 and 182, most did not fully discuss the fact that the contract in question would be void at the instance of the company. Likewise, when discussing the issue of an inquorate meeting, the focus generally was not on directors duties under s171 and the reliance third party may place on the use of s40, but on trying to find a resolution to a problem that had in theory already occurred.

The final part of this question was not, as many thought, whether the company had capacity to enter into the loan, rather a loan to a director. The application of the possible exemption that could arise was applied with mixed success, as was the decision that the making of a loan did not require members approval. Only a few candidates answered this question well.

Question 3

This question required the candidates to advise the company on the steps it would be required to undertake in order to allot ordinary and preference shares. In relation to the issue of shares, most candidates covered the basic requirements for the allotment of shares well, although generally application and the use of statute was lacking – however, in this instance it was s551 that would apply as the company was to become a two-share company. Whilst most candidates identified that requirements under the right of pre-emption (and the means by which this could be either disapplied or waived – most did not identify that it applied as it was for non-cash assets) this was only covered in a cursory

manner; the detail and application was lacking by most candidates and the answers were then in general terms relating to the allotment of shares – too many candidates only sought to outline the procedure with little reference to the particular circumstances in hand.

A failing of candidates was the failure to consider those involved. In this instance, all the directors who were in post at this point in time would be required to declare their interests in the share allotment. This consequently required the issue of s177 and Article 14 to be addressed – and given the provisions of s177(6) and Art 14(4) which have permitted exclusions, nothing further was required, i.e. there was no issue associated with quorum. Only occasionally was this identified.

When addressing the procedural requirements, only a few candidates covered this well and only a few identified the need to credit the share account in respect of that sum representing the nominal value of the shares.
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Question 4

The first part of the question looked at the potential acquisition of a property by one party from another that was obviously close to the onset of insolvency. Most candidates were able to recognise that this was a transaction at an undervalue and presented good arguments as to why the onset of insolvency was upon the selling company under s122-123 Insolvency Act 1986. The transaction was not, as some thought, a preference nor was it one that saw a connected party issue arise. Most candidates did fail to identify that consequences for the acquiring party, namely that it could be a transaction set aside by a liquidator and the ensuing risks in entering into the transactions for those directors under s174

The final part of this question looked at the consequences for the directors in the event that the company is unable to pay its debts. This required consideration of the onset of insolvency under s122-123 Insolvency Act 1986, and then wrongful trading. Whilst most candidates were able to identify these issues the discussion, as it applied in these circumstances, was not necessarily well done. More particularly, this discussion required the need to identify and apply the various tests and liability arising for the debts of the company to two directors that had been relatively absent from the running of the company.

It may have been a question of timing, but aspects of this last question were poorly completed, and the more so by the weaker candidates.

SUGGESTED POINTS FOR RESPONSES LEVEL 6 – UNIT 16 - THE PRACTICE OF COMPANY AND PARTNERSHIP LAW
The purpose of this document is to provide candidates and learning centre tutors with guidance as to the key points candidates should have included in their answers to the June 2021 examinations. The Suggested Points for Responses do not for all questions set out all the points which candidates may have included in their responses to the questions. Candidates will have received credit, where applicable, for other points not addressed. Candidates and learning centre tutors should review this document in conjunction with the question papers and the Chief Examiners' reports which provide feedback on candidate's performance in the examination.

Question Number	Suggested points for responses	Max Marks
Q1(a)	An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justifications. Responses should include: • The business is a partnership, i.e. a relationship which subsists between persons carrying on a business in common with a view to a profit (s1(1) Partnership Act 1890). On the basis of the information provided, a business has been set up after an investment has been made and the purpose behind the business is clearly to make a profit, thus satisfying s1(1) Partnership Act 1890. • In relation to any liability that Henry may be associated with in relation to this partnership, and other's authority to bind the partnership (and thereby Henry), liability arises under the Partnership Act 1890 (joint) and the Civil Liability (Contribution) Act 1978 (making partners severely liable). Authority to bind the firm arises by virtue of: • s5 PA 1890 covers apparent authority for the partner to bind the firm and need to use the four stage test: 1. Is it the type of business carried on by the firm? 2. Would a partner usually have authority to bind the firm? 3. Does the third party know or reasonably suspect that the partner did not have authority? 4. Does the third party know or believe that the individual is not a partner? • s7 PA 1890 where an individual pledges the credit of the firm for a purpose not connected with the firm's business, the firm is not bound unless the pledge was specifically authorised by the other partners • s8 PA 1890 provides that a restriction on a partner's authority will not bind a third party unless they have notice of it.	10

	• s17 PA 1890 provides that a person who is admitted as a partner is not liable for act prior to joining and vice versa when retiring Responses could include: • Henry needs to note that liability may arise after he has ceased to be a partner under s9 PA 1890 and the Civil Liability (Contribution) Act 1978, and whilst he is held out to be a partner (s14 PA 1890). Privity of contract may also be an issue for any debt in which he is involved in negotiating.	
Q1(b)	An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justifications. Responses should include: • The equipment used is likely to be partnership property (s21 PA 1890). • s20 PA 1890, partnership property must be used exclusively for the Partnership. Can ask for any items to be returned, or compensation. • s29 PA 1890 if a partner uses partnership property without permission from the other partners, then that partner must account for any profits as a result. • s30 PA 1890 may apply if the business is of the same nature or in competition with the firm. • s29 PA 1890 may also apply if it is possible to establish Anton has been marketing/supplying clients of the partnership, and therefore Anton could also have to account for profit from his enterprise. Responses could include: • there is no provision in the partnership deed dealing with work input and competing with the partnership, the implied position under the PA 1890 and common-law apply. Not possible to stop Anton's involvement in his activities as there is no obligation on a partner to spend time on the partnership business.	10

Q1(c)	An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justifications. Responses should include: In the absence of any agreement to the contrary, this partnership can be dissolved by serving notice of dissolution (s32 PA 1890) on the other partners. This brings the business to an immediate end pursuant to the provisions of Partnership Act 1890. s44 Partnership Act 1890 sets out the specific rules for the distribution of assets from the partnership. A final account has to be drawn up. Once an account has been drawn up, the order of dissolution would be: • all losses must be paid first (first out of profits, then out of capital); • any balance of losses outstanding must be met by the partners individually in the proportion in which they are entitled to share profits; • payment to a partner for advances as distinguished from capital; • any money left over is then divided between the partners in the proportion in which the profits are divisible. After dissolution, the authority of the partners is limited to doing such things as are necessary for the winding up of the affairs of the partnership and completing unfinished transactions. Accordingly, Henry, Richard and Anton as partners must give notice of dissolution of the partnership to: • those who have dealt with the firm and notice in the London Gazette (s36 Partnership Act 1890), actual notice; and • the local press to make sure that third parties (i.e. outsiders, particularly suppliers) are aware of the limit on the authority of partners from the moment of dissolution particularly the suppliers. Responses could include: • As there is no formal partnership deed, or any evidence of any other contrary agreement between the partners. Should Henry serve such notice, it brings the business to an immediate end.	10
	Total	**30 marks**

Question Number	Suggested points for responses	Max Marks
Q2(a)	An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justifications. Responses should include: • Civil liability: declaration of interest in proposed transaction (s177 CA 2006). The consequence of breaching s177 CA 2006 is the same as a breach of the equivalent common law/equitable rule, i.e. the equitable rule as set down by Aberdeen Railway Company v Blaikie Bros [1854]. The contract becomes voidable at the election of the company and the director becomes liable to account for any profit she makes on the contract. Criminal liability: obligation/requirement under s182 CA 2006.	5
Q2(b)	An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justifications. Responses should include: The requirement/obligation requires that a director acts within powers, namely: • Art 11 Model Articles: quorum for board meeting is two persons, although amended to three here • Art 14 Model Articles: not to be counted as part of quorum if the director has or is interested in a transaction • s171 CA 2006: the directors must act within powers, including within company's constitution; contract becomes voidable if excess of powers • s40 CA 2006: those dealing with the company may entitled to assume that there is no limit on the authority of the directors to bind the company or to delegate responsibility to conduct the dealing, i.e. the requirement of good faith by third party. Consequently, the directors who attended the meeting and voted exceeded their powers. Julia could not vote and therefore could not count in the quorum (Art 14 Model Articles). There is no quorum when directors' decision is taken as only two could vote while a quorum of 3 was required. In addition, even though the matter had come up for discussion previously and it was likely that the transaction would be entered into, there was the non-disclosure of interest to directors.	7

	Responses could include: • As such, the transaction is voidable at the election of the company unless the other party can rely on s40 CA 2006 which would require it to have dealt in good faith.	
Q2(c)	An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justifications. Responses should include: The proposal to make the loan to Cat Jones is a loan to a director (s197 CA 2006) and requires a shareholders' ordinary resolution. s197 CA 2006 requires a written memorandum setting out: • the nature of the transaction or arrangement, • the amount and purpose of the loan • the extent of the company's liability connected with it to be made available to members before approval by ordinary or written resolution is given. • Exception: s204 CA 2006, provided the proposed loan is less than £50,000 – no provided loan for purposes of duties. As the loan is for £13,500 the exception will therefore apply and an OR of the shareholders will not be required. • Cat must disclose interest (s177 CA 2006) and cannot vote on matter (Article 14 Model Articles) so cannot count in quorum (Article 14 Model Articles). Responses could include: • The overall decision to grant the loan is a directors' decision.	8
	Total	**20 marks**

Question Number	Suggested points for responses	Max Marks
Q3(a)	An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justifications. Responses should include: • Share Capital: The directors of Surf & Turf Foods Limited ('STF') have no explicit authority to allot shares under the articles of association, nor does the company have any preference shares. • To allot the new shares to the existing shareholders, the private equity house, Batch Private Equity ('Batch') and Henry Brooker, STF will first need to create a new class of preference and then authorise the directors to allot all the new preference shares and the additional ordinary shares, in accordance with s551 (and s617) CA 2006. • The directors of STF must be authorised (s549-551 CA 2006). s550 CA 2006 provides that where a private company, such as STF, has only one class of shares (classes of shares defined in s629 CA 2006) the directors may exercise any power to allot shares, except to the extent that they are prohibited by the company's articles. As the proposal includes the allotment of preference shares, the directors will need be authorised under s551 CA 2006. In addition, to attach the rights to the preference shares, the articles will need to be amended by special resolution (s21 CA 2006). • The requirements as to the terms of the authority to allot shares are directed by s551 CA 2006. Under s551(2) CA 2006, STF can seek from its members the authority to give its directors the power to allot, either generally or for a particular allotment. When requesting the authority, s551(5) CA 2006 requires that it states the maximum amount of shares that may be allotted under that authority, in this case a minimum of 300,000 ordinary shares of £1 each and 300,000 preference shares of £1 each. s551(5) CA 2006 also specifies that the authority must state the date on which it will expire, which by reference to s551(4) CA 2006 must be not more than five years from the date of the resolution. • As the company is proposing to allot the ordinary shares ('equity securities', under CA 2006) for cash, the existing members should be offered the shares first (ss561 and 568 CA 2006),in proportion to their existing holdings. This allows those shareholders to preserve their percentage holding after the issue, provided that they have sufficient funds available to subscribe for the new	10

	allotment. The preference shares will not be 'equity securities' and therefore not subject to rights of pre-emption for the existing members. Responses could include: • On the presumption that the new investment is with the agreement of STF and its members, all shareholders will need to waive their pre-emption rights as either the shares they are buying are not in proportion to their existing holdings, or they are not buying new shares. • Alternatively, a member's special resolution disapplying the pre-emption rights could be sought under s570 CA 2006. Any member who objects to the issue may attempt to bring an action under s994 CA 2006, unfair prejudice. It is likely that the members will be willing to waive their pre-emption rights. (Procedure to be credited whether considered separately or in answers as progress)	
Q3(b)	An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justifications. Procedure to Allotment new shares: • first call a BM to resolve to alter the share capital of the company and seek the members' permission for the directors to allot a minimum of 300,000 ordinary shares of £1 each and 300,000 preference shares of £1 each. The members GM may be called on 14 days notice or on short notice procedure (s307 CA 2006 and Article 48 Model Articles). The members will vote on the ORs, the granting directors power to allot shares (ss549 and 551 CA 2006) and the SR (s21 CA 2006) amending the company's Articles to include the rights attached to the preference shares. • On the assumption that no SR is required disapplying pre-emption rights, the meeting will close. The board meeting will then re-convene. The board will then receive and resolve to allot new shares following receipt of the applications from the current directors (excluding Henry Brooker) at the agreed price. • All the current directors will have to declare their interest under s177 CA 2006 and Article 14, Model Articles in relation to the allotment of shares at the board meeting. Given the interest in the allotment of the shares each director will be prevented from voting on board meeting resolutions relating to the	15

	allotment, meaning that the board meeting will not be quorate. Accordingly the Article 14, Model Articles restrictions need to be either amended or suspended by an ordinary resolution (Article 14(3)) prior to any allotment. Administration: the directors will then need to resolve to allot the shares and affix the company's seal to the share certificates, update the register of allotments and members and prepare minutes of the board meeting and members meeting. The members will formally notify the Company of their interest in the shares (s113 CA 2006). A statement of capital and notices of new class of members (s638 CA 2006) will need to be sent to the Registrar together with the s21 and s551 resolutions, amended articles of association and Form SH01 of the allotment of shares for non-cash consideration. The sum representing the nominal value of the preference shares, £300,000, and the ordinary shares, £300,000 will be credited to the Called up share account (s580 CA 2006). £150,000 representing the market premium on the sale of the preference shares will be credited to the share premium account. Responses could include: • Alternatively, STF could use the written notice procedure under s288-300 CA 2006. (Procedure to be credited whether considered separately or in answers as progress)	
	Total	**25 marks**

Question Number	Suggested points for responses	Max Marks
Q4(a)	An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justifications. Responses should include: The sale of the freehold property by Binders Limited ('Binders') will arguably amount to a transaction at an undervalue (s238(1) Insolvency Act 1986 (IA 1986)). If the transaction is made at a 'relevant time' within Binders entering into liquidation, a liquidator can apply to the court for an order under s238(3) IA 1986 that restores the position of the company to what it would have been if it had not entered into that transaction: • A company enters into a transaction at an undervalue if it does so for no consideration or it receives significantly less consideration than that provided by the company itself (s238(4) IA 1986). • The court may not however make such an order if there is defence of good faith with reasonable grounds for believing that the transaction would benefit the company (s238(5) IA 1986); no suggestion here. • The time at which a company enters into a transaction at undervalue is a "relevant time" if the transaction is entered into within two years of the onset of insolvency (s240(1) IA 1986). However a time is not a relevant time unless the company is unable to pay its debts (within the meaning of s123 Insolvency Act 1986) at the time of the transaction or becomes unable to do so as a result of the transaction (s240(2) IA 1986). The sale would be at an undervalue, given the market value is £290,000 and the sale value is £220,000. It is further questionable whether it would benefit the company, and it may well therefore be set aside. On the basis that Binders has been served with Statutory Demands, it may be close to the "onset of insolvency", which is the date of the presentation of the petition for the administration order or the date of the commencement of the winding up (s240(3) IA 1986), and seems unable to pay its debts now. Responses could include: • Thomas Mullins and Janet Yeo , as directors, have a duty to exercise reasonable care, skill and diligence (s174 CA 2006); which they may breach if they proceed. As officers of the company, they may also be held to have misapplied property of the company and so held to be guilty of misfeasance under s212 IA 1986.	8

Q4(b)	An answer which offers advice based on evidence. It should supply possible alternatives and pro's and con's but highlight the best option with sound justifications. Responses should include: The first issue to be addressed related to the solvency status of the company and whether the company is at risk of being wound up. In applying s122(1) IA 1986, the question is whether the company is able to pay its debts. s123 provides that a company is unable to pay its debts if: • a creditor for more than £750 has served on the company a demand for the sum due and the company has for 21 days neglected to pay it; • execution on a judgment is returned unsatisfied. • it is proved to the court's satisfaction that the company is unable to pay its debts, taking into account its contingent and prospective liabilities; • if the court is of the opinion that it is just and equitable to have the company wound up. Should any grounds be applied against Binders, the most appropriate would therefore appear to be the first ground listed above by any recognised creditor. Therefore, a petition is possible. If the winding up petition remains unanswered, this is enough evidence that the company cannot pay its debts and Binders would therefore have strong evidence to seek a winding up order. Of course, the petition can be set aside by the court, though again there is no evidence to suggest, for example, that this is a disputed debt. Under s129 IA 1986, the commencement of the winding up actually begins at the time of presentation of the petition and the official receiver becomes the provisional liquidator. As a consequence, the risks faced by Thomas Mullins and Janet Yeo, should they decide to continue to trade from new premises in the anticipation that trade picks up, need to be reviewed and whether they risk being held liable for wrongful trading (entering into contracts with suppliers whilst the bank account is overdrawn), s214 IA 1986. s214 IA 1986 allows the court to make a past/present director of the company personally liable to contribute to the company's assets if: • the company has gone into insolvent liquidation; • at some point prior to the start of the winding up the person knew or ought to have known that there was no reasonable prospect of the company avoiding insolvent liquidation; and • the person was a director at that time and did not take every step to minimise the potential loss to the company's creditors.	17

	The company is insolvent (s123 Insolvency Act 1986); its debts exceed its liabilities and there is little prospect of an increase in orders in the short term. The directors clearly intend to continue to trade and, in the process, increase the expenses of the company. Subject to their knowledge or what they ought to know, they will be guilty of wrongful trading. At the very least, the directors are subject to an objective test of knowledge and they should be able to conclude this likelihood. It appears one director seems to have clear knowledge that the "writing is on the wall" (Thomas, and presumably Janet). The directors can expect to be required to make a contribution to the assets of the company should they proceed as intended and the company subsequently goes into insolvent liquidation. Thomas and Janet also therefore are at risk of being disqualified as a directors. The Company Directors Disqualification Act 1986 (CDDA 1986) provides for the disqualification of directors for up to 15 years (five years if the order is made by a Magistrates' Court). Under ss1 and 6 CDDA 1986 the court must disqualify a person for a specified period from being a director if it is satisfied that he has been a director of a company which has at any time become insolvent and his conduct as a director of that company makes him unfit to be concerned in the management of a company (s6 CDDA 1986). If both then continue to act as director, he would be personally responsible for the debts and liabilities of the company, s15 CDDA 1986. Responses could include: • Under s213 IA 1986, fraudulent trading, it would have to be established the company was permitted to trade whilst insolvent with the intention of defrauding creditors. On the facts, there is no such suggestion of intent.	
	Total	**25 marks**