

## CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

### LEVEL 6 UNIT 1 – COMPANY & PARTNERSHIP LAW

JUNE 2023

#### 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 2023 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

Those achieving high marks in both Parts A and B had clearly revised well, understood key concepts and were able to articulate them accurately, and, in Part B, with relevant application to the facts. Such answers provided a thorough discussion of all relevant elements of the questions, evaluating, assessing or analysing, as required. Case law and statute were addressed thoroughly, accurately and specifically.

The weaker answers tended to be superficial or vague, lacked case law and accurate statutory references. Not all elements of each question were addressed, with answers often merely regurgitating the law, rather than carefully applying it (in Part B) or analysing or assessing as the question required.

To improve, candidates need to check their understanding of key concepts – such as the distinction between directors and shareholders and their respective procedures, or the nature of partnership liability.

Candidates need to read the question and think carefully what it is asking. Many candidates should work on how they approach their answers. This should be methodical, by working through every word and each element of the question (and facts) and ensuring that, where required, each fact is

addressed and the law applied to it. Careful thought needs to be given to how to approach questions requiring critical assessment or evaluation. These command words should not be, but often are apparently, ignored in answers.

It is absolutely vital that answers are supported by relevant (up to date) case law and/or statute and answers must be detailed to help demonstrate good understanding, not merely broad or vague statements of the law.

Some candidates struggled with timing. It is hard in a time-pressured situation, but a little time in the exam should be allocated to planning, and if at all possible to review, to ensure that the questions have been appropriately answered. Practising answers may also help with overcoming these challenges.

Finally, some candidates are encouraged to work on their written English, grammar and spelling. Some answers lacked clarity and accuracy as a result.

## CANDIDATE PERFORMANCE FOR EACH QUESTION

### Section A

#### Question 1

This question, along with AQ2 and BQ1, were the most popular, There were a few very strong answers but in both parts (a) and (b) reference to case law and relevant statute was often lacking, or lacking in sufficient detail. Answers in the main lacked the critical assessment the question required. The weakest candidates demonstrated poor understanding of fundamental concepts.

#### Question 2

The strong answers cited case law and statute and engaged in good comparison of the different types of charges.

#### Question 3

Overall answers were quite mediocre. Detailed reference to the requisite procedure was lacking.

#### Question 4

There were 9 answers to this question (including one that was not marked as the candidate had answered all in Part A as well as 2 in Part B). Most of the answers were adequate, but lacking case law and evaluation as required. The strongest candidates did engage with evaluation and gave relevant case law.

## Section B

### Question 1

Application of the relevant law to the facts was often poor or very limited and key details were missed, for example in relation to how liability can arise (in (b)), ie through the types of authority, and on the elements of section 14 and holding out. A few commendable answers were detailed, accurate and thoughtful in their application.

### Question 2

As it was usually the final question, some answers suffered from timing problems and on the whole were superficial.

### Question 3

No candidates answered this question. The topic of the question is rarely popular, but it was a surprise that no-one answered it.

### Question 4

Few candidates answered this question. There were possibly timing issues with this question or candidates were put off by the question requiring discussion of administration.

## SUGGESTED POINTS FOR RESPONSE

### LEVEL 6 UNIT 1 – COMPANY & PARTNERSHIP LAW

Question Number	Suggested Points for Responses	Marks (Max)
1(a)	<p>Responses should include:</p> <ul style="list-style-type: none"><li>• Definition of ‘promoter’, with reference to the Twycross case</li><li>• Outline of what a ‘promoter’ may do, including the registration of a company</li><li>• The nature of a pre-incorporation contract</li><li>• Discussion of the potential personal liability of the promoter</li><li>• The relevance of ‘agreement to the contrary’ and section 51 Companies Act 2006 (CA 2006)</li><li>• The court’s strict approach and case law including Phonogram</li><li>• Means of protection to include<ul style="list-style-type: none"><li>○ Contract with the company post-incorporation with indemnity</li><li>○ Contract of novation</li><li>○ Conditional contract with the third party</li><li>○ Use of shelf company</li></ul></li></ul> <p>Responses could include:</p> <ul style="list-style-type: none"><li>• Fiduciary duty of the promoter and protection in case of breach (eg disclosure to prospective members (Erlanger v New Sombrero))</li></ul>	12



	<ul style="list-style-type: none"> <li>• Power of company to rescind contract where promoter fails to disclose secret profit and relevant case law (eg Re Cape Breton)</li> <li>• Consequences of insolvency of company on third party rights</li> <li>• Relevance of speed of incorporation to limit the risk of liability</li> </ul>	
1(b)	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Separate legal personality</li> <li>• Salomon v Salomon</li> <li>• Company is responsible for its own debts</li> <li>• Case law to include: Adams v Cape, Prest and Nutritek</li> <li>• Most recent decisions such as Hurstwood Properties</li> <li>• Detailed discussion of the grounds including shams/facades; statutory provisions and agency</li> <li>• Insufficient grounds such as the interests of justice or separate economic entity</li> <li>• Restrictive approach of the courts</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Possible liability in tort and the circumstances required to exist: <u>Chandler v Cape Vedanta and Okpabi</u>.</li> </ul>	13

**Question 1 Total:25 marks**

Question Number	Suggested Points for Responses	Marks (Max)
2	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• the nature of fixed and floating charges, with reference to the Panama and Woolcombers cases</li> <li>• a floating charge can only be created by a company and is an equitable charge created over a generic class of assets: <u>Re Panama, New Zealand and Australian Royal Mail Co</u>.</li> <li>• on creation, the floating charge does not attach to specific items within the class of assets. The charge attaches to particular assets only when it 'crystallises' into a fixed charge: <u>Illingworth v Holdsworth</u>.</li> <li>• that until crystallisation, the chargor company is free to deal with the assets under the charge without reference to the chargee: <u>Re Yorkshire Woolcombers Association Ltd</u>.</li> <li>• discussion of the possible difficulties of creating a fixed charge over the company's book debts – ie the debts owed to the company and payments received in respect of such debts</li> <li>• discussion of the case law on creation of charges over book debts: <u>Re Spectrum Plus Ltd (2005)</u>, (and Siebe Gorman and Re New Bullas), and issues of degree of control</li> <li>• the respective priorities of the charges on a winding up, restricted by rules (i) governing the registration and priority of different charges over the same asset, and (ii) designed to ensure a fairer treatment of unsecured creditors</li> <li>• the benefits of registration within the specified time limit (21 days of the creation of the charge: s859A(4) CA 2006); otherwise charge is</li> </ul>	25



	<p>void against an administrator or liquidator or any creditor of the company</p> <ul style="list-style-type: none"> <li>• section 245 Insolvency Act 1986 (IA 1986) – potential for invalidity (at the point of a company’s insolvency) of a floating charge where it is taken in respect of an existing debt</li> <li>• some analysis of the foregoing facts to show the relative advantages and disadvantages of the two types of charge for companies and creditors</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• administrators’ rights: eg rights to take control over the company’s undertaking to protect the interests of the charge holder.</li> <li>• Priority of any later properly registered legal charge over the floating charge.</li> <li>• Discussion of a ‘negative pledge’ pledge clause and its effect: where the charge holder has actual notice of the earlier floating charge and the relevant negative pledge.</li> <li>• HMLR registration requirements and effect on priorities</li> <li>• Enterprise Act provision to set aside proportion of assets secured by a floating charge to pay off unsecured creditors.</li> </ul>	
<b>Question 2 total:25 marks</b>		
Question Number	Suggested Points for Responses	Marks (Max)
3(a)	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Requirement of a stock transfer form (STF) (under Stock Transfer Act 1963) completed by transferor. Section 770 CA 2006</li> <li>• Delivery of the STF with a share certificate (if there is one) to the transferee</li> <li>• Transferee pays any consideration to transferor Transferee is responsible for getting STF stamped and paying stamp duty at the appropriate rate.</li> <li>• Once stamped, delivery of the STF to the company with any share certificate. Company issues new share certificate and adds new member (transferee) to register of members.</li> <li>• Model article 26 provides regulations on share transfer</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• A company cannot register a transfer of shares without a proper instrument</li> <li>• Directors must act in good faith in making decision to refuse to register a transfer (<u>Smith v Fawcett</u>)</li> <li>• Section 771: directors must either register the transfer, or give notice of refusal, within 2 months.</li> <li>• Updates may be needed at Companies House to reflect changes of persons with significant control</li> </ul>	7

Question Number	Suggested Points for Responses	Marks (Max)
3(b)	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Possible limited restriction: refusal by a company’s directors to register a transfer under MA 26</li> <li>• Smaller companies may also include in the articles pre-emption requirement: shares to be first offered to existing shareholders before they are offered to an outsider</li> <li>• Some explanation for why companies might adopt the preceding two types of restriction</li> </ul> <p>Responses could include</p> <ul style="list-style-type: none"> <li>• Pre-emption provisions may include detailed requirements for valuation of the shares and identification of the share price</li> <li>• Possible requirement that a director must sell any shares in company to existing shareholders when they cease to be a director</li> </ul>	6
3(c)	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Reference to the relevant CJA provisions, ss 52 to 58</li> <li>• The <u>criminal</u> offence is for individuals only</li> <li>• Behaviour must occur in the UK</li> <li>• Behaviour – dealing in (buying or selling) price affected securities on a regulated market (eg the London Stock Exchange) as an insider - s52(1) and s55</li> <li>• Discussion of the meaning of the following: <ul style="list-style-type: none"> <li>– ‘insider’: has information from an inside source, s57, eg company director or employee</li> <li>– ‘inside information’ and all its elements s56, s58 (where information is ‘public’)</li> </ul> </li> <li>• The FCA has the power to impose penalties</li> <li>• Penalties include: a fine or imprisonment</li> <li>• Statutory defences: s53</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Discussion of the secondary offences of unlawful disclosure of inside information and of encouraging</li> <li>• Difficulty of bringing successful prosecutions under the CJA</li> <li>• Possible disqualification under CDDA</li> </ul>	12
<b>Question 3 Total:25 marks</b>		

Question Number	Suggested Points for Responses	Marks (Max)
4	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Duties developed in case law and then introduced to statute (CA 2006) to control wide powers (eg <u>Aberdeen Railway Company v Blaikie Bros</u> (1854).</li> <li>• Statutory general duties in Chapter 2, Part 10 CA 2006. The statutory general duties are owed by the director to the company (s170 (1) CA 2006).</li> <li>• The equitable principles still relevant both to the interpretation and application of the statutory duties (s170 (4) CA 2006) and to the civil consequences of breach (s178 CA 2006).</li> <li>• The duty to promote the success of the company (s172 CA 2006) – most fundamental of the duties. Act in good faith to promote the success of the company for the benefit of its members as a whole - subjective test. Interests of the members generally paramount but directors to “have regard to” eg employees and the environment.</li> <li>• Creditors’ interests paramount on insolvency (<u>GHLM Trading Ltd v Maroo</u> (2012)) in preference to those of the members. See also <u>Dickinson V NAL</u> (2017) and <u>BTI 2014 LLC v Sequana</u> (2022).</li> <li>• The duty to exercise reasonable care skill and diligence (s174 CA 2006). Subjective and objective test. (see <u>Re City Equitable Fire Insurance Company Ltd</u> (1925) and contrast <u>Re Barings Plc</u> (1999)). <u>Raithatha v Baig</u> (2017)</li> <li>• The duty to avoid conflicts of interest and duty (s175 CA 2006). In particular re exploitation for personal gain of any property, information or opportunity that a director obtains in his capacity as a director of the company. <u>Thermascan Ltd v Norman</u> (2011).</li> <li>• Section 177 – disclosure of interests in transactions – with section 182. Note that the duty to avoid conflicts of interest does not extend to transactions in which director is interested. Instead subject to the duty of disclosure both under s177 CA (Duty to declare interest in proposed transaction or arrangement) and s182 CA 2006 (Duty to declare interest in existing transaction or arrangement).</li> <li>• Model Article 14 – directors cannot count in a quorum or vote on issues in which they have any interest</li> <li>• How MA 14 can be avoided (permitted exceptions and removal from the articles)</li> </ul> <p>Answer could include:</p> <ul style="list-style-type: none"> <li>• Duty to act within powers (s171 CA 2006), (<u>Howard Smith Ltd v Ampol Petroleum</u> (1974) and <u>Hogg v Cramphorn</u> (1966)). Linked to conflict and acting in best interests; duty not to accept benefits (s176).</li> <li>• Reference to restrictions on transactions with directors in relation to avoiding conflicts; eg substantial property transactions</li> <li>• Shareholder approval of service contracts with term of over 2 years</li> </ul>	25
<b>Question 4 Total:25 marks</b>		



**SECTION B**

Question Number	Suggested Points for Responses	Marks (Max)
1(a)	<p>Responses should include discussion of:</p> <ul style="list-style-type: none"> <li>• Unlimited partnership: relation that subsists between persons carrying on business in common with a view of profit (s1 PA 1890). A written agreement is not necessary provided the s1 definition is satisfied.</li> <li>• Key elements to this definition</li> <li>• Two or more persons carrying on a business in common. There are 2 partners in the scenario currently and will be 3 – Mina to share profits and to contribute capital.</li> <li>• Business is defined fairly widely by s45 PA 1890 as including every trade, occupation or profession.</li> <li>• Section 2 PA 1890 provides some guidance: co-ownership (eg a joint tenancy, tenancy in common, joint property) does not of itself create a partnership. Evidence – eg the lease of the property to the business</li> <li>• A business may consist of a single venture or, perhaps more frequently, a series of continuing activities. <u>Khan and Another v Miah and Another</u> (2001)</li> <li>• There must however be more than mere agreement to form a partnership (<u>Ilott v Williams</u> (2013)). They are carrying on the business.</li> <li>• Concept of a business being carried on “in common” implies shared responsibility for decision making. Management roles assumed by S and I</li> <li>• Must be intention to carry on business “with a view of profit”</li> <li>• Section 2 (3) PA 1890 provides that the receipt by a person of a share of profits is prima facie evidence that he is a partner</li> <li>• Here profits to be shared between the 3. Strong grounds that this is partnership.</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Profit-sharing – one of several factors to be taken into account – but is a strong indicator</li> <li>• Contrast with employer/employee relationship</li> </ul>	10
1(b)	<p>Answer should include:</p> <ul style="list-style-type: none"> <li>• Unlimited nature of liability</li> <li>• Joint and several, s9 PA (contract) and under s10 (tort)</li> <li>• Liability arising only on joining, s17 and while a partner</li> <li>• Partners can bind the partnership as an agent acting within authority (sections 5, 6, 7 and 8)</li> <li>• Personal liability if in breach of authority</li> </ul> <p>Answer could include:</p> <ul style="list-style-type: none"> <li>• How to limit liability – eg indemnity and implementation of s36 PA notice provisions</li> <li>• Personal assets can be at risk to meet liabilities</li> </ul>	9





1(c)	<p>Answer should include:</p> <ul style="list-style-type: none"> <li>• Breakdown of section 14 PA</li> <li>• Person should knowingly be held out or hold themselves out</li> <li>• Protections include indemnity from the existing partners</li> <li>• Ensure name is not added to the stationery until formally join the partnership</li> </ul>	6
<b>Question 1 Total:25 marks</b>		
Question Number	Suggested Points for Responses	Marks (Max)
2(a)	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Appointment of director – MA 17 – by the board or by shareholders (OR)</li> <li>• Service contract – term of 30 months will require shareholder approval – OR. (s188 CA 2006)</li> <li>• A memorandum of the contract must be available for inspection at least 15 days before the general meeting</li> <li>• Board will need to approve all proposals before shareholders do so.</li> <li>• General Meeting may be called by directors (s302 CA 2006)</li> <li>• Notice to be given of the meeting (s307 CA 2006) with minimum period 14 clear days.</li> <li>• Requirement for a quorum and how quorum constituted (s318 CA 2006)</li> <li>• Voting on a show of hands or on a poll.</li> <li>• Majorities required for OR (simple)</li> <li>• Form AP01 for appointment to Companies House (usually online)</li> <li>• Private company so WR procedure could be used</li> <li>• Directors may circulate a WR to all ‘eligible members’</li> <li>• Requirements for content of WR – statement informing members how to assent and lapse period</li> <li>• WR passed when the requisite majority have signified agreement</li> <li>• Majorities required</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Meaning of ‘clear days’ – exclusive of the day notice is given and the day of the meeting (s360 CA 2006)</li> <li>• Short notice not possible for approval of service contract term because of pre-meeting inspection requirement.</li> <li>• When GM notice deemed to be given – s1147 CA 2006</li> </ul>	10

2(b)	<p>Answer should include:</p> <ul style="list-style-type: none"> <li>• Need for SR to change the name (s21 CA 2006)</li> <li>• Written resolution possible or GM on full or short notice.</li> <li>• Form NM01 and SR to be (by post or more usually online) to Companies House</li> <li>• CH will return certificate of incorporation on change of name</li> <li>• Name must not be the same as an existing company</li> </ul> <p>Answer could include:</p> <ul style="list-style-type: none"> <li>• Checks that no other business exists with the same name</li> <li>• Company stationery must be changed and other disclosure requirements complied with</li> </ul>	6
2(c)	<p>Responses should include:</p> <ul style="list-style-type: none"> <li>• Contract is based on the articles of association</li> <li>• Section 33 states that the provisions of the constitution bind the company and members as if they were covenants</li> <li>• <u>Hickman v Kent or Romney Marsh Sheepbreeders; Pender v Lushington</u></li> <li>• Unusual contract; eg it is not rectifiable as with a 'normal' contract (<u>Scott v Frank F Scott</u>), even if the articles do not express the parties' true intention</li> <li>• Courts interpret the articles using the reasonable person test (AG of <u>Belize v Belize Telecom Ltd</u>)</li> <li>• Either party may enforce the contract.</li> <li>• Reference to enforcement of weighted voting rights.</li> <li>• Enforcement is limited to provisions concerning membership (<u>Eley v Positive Government Security</u>)</li> <li>• And not for example relating to directorship (<u>Beattie v E&amp;F Beattie</u>)</li> <li>• But some case law has, arguably, allowed the enforcement of 'outsider rights' (eg <u>Salmon v Quin and Axtens</u>)</li> <li>• Enforcement is subject to a 6 year limitation period</li> </ul> <p>Answers could include:</p> <ul style="list-style-type: none"> <li>• It is a form of protection of the minority</li> <li>• Apparent creation of relationship between members (<u>Rayfield v Hands</u>)</li> </ul>	9
<b>Question 2 Total:25 marks</b>		
Question Number	Suggested Points for Responses	Marks (Max)
3	<p>Answer should include:</p> <ul style="list-style-type: none"> <li>• Dividends can only be paid of available profits (relevant CA provisions)</li> <li>• Outline of the principle of maintenance of capital, derived from <u>Trevor v Whitworth</u></li> <li>• Range of examples of restrictions to support the principle, such as: <ul style="list-style-type: none"> <li>○ General prohibition on purchase of own shares (s658 CA 2006)</li> <li>○ Strict rules where such restrictions are lifted (eg regarding buy back out of capital – see below)</li> </ul> </li> </ul>	25



	<ul style="list-style-type: none"> <li>• Exceptions to the restrictions, such as: <ul style="list-style-type: none"> <li>○ Company may also issue redeemable shares (but must also have in issue ordinary shares) (Part 18 CA 2006)</li> <li>○ Companies may buy back their own shares out of distributable profits, a fresh issue of shares, or (only private companies) out of capital (only after distributable profits have been used)</li> </ul> </li> <li>• Details of the procedural requirements on buy back, including necessary shareholder approval (ordinary or special resolution?); clear distinction between out of profits and out of capital procedures;</li> <li>• Can mention possible payment out of capital but not relevant here as sufficient profits</li> <li>• solvency statement for buy back out of capital; mention of permitted capital payment</li> <li>• Clear application to the facts that the company here can use its distributable profits as it has sufficient both for the dividends and for the buy back</li> <li>• Conclusion that such exceptions themselves subject to strict procedural requirements but that DPL should not have an issue</li> <li>• Note Lyle will not be able to vote on the buy back</li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Possible breach of directors’ duties for unlawful distribution (eg Birstow v Queen’s Moat House)</li> <li>• Where shares are issued at a premium, premium is treated as part of the share capital and cannot be reduced (s610 CA 2006)</li> </ul>	
--	---	--

**Question 3 Total:25 marks**

Question Number	Suggested Points for Responses	Marks (Max)
4	<p>Answer should include:</p> <ul style="list-style-type: none"> <li>• Antonio is a qualifying floating charge holder if the terms say so</li> <li>• Can apply to appoint an administrator but must give 2 business days’ notice</li> <li>• Court will appoint administrator who will then take over the management of the company with a view to rescuing it in the first instance</li> <li>• Reference to Sch B1 of the Insolvency Act</li> <li>• Discussion of sections 214 and 213 IA</li> <li>• Since 2015, an administrator has been able to take action under ss213 and 214 against company directors on an insolvent administration</li> <li>• Application with references to for example lack of board meeting records; vacation during time of financial difficulties; inexperienced (non-???) directors.</li> <li>• Appears to be an adoption of a rather ‘head in the sand’ mentality</li> <li>• Discussion of the meaning of insolvency for the purposes of s214</li> <li>• A detailed analysis of section 214 (IA 1986), including the conditions for the section to apply: the company is insolvent; the person was a director at the relevant time; what the director knew or should have</li> </ul>	25



	<p>concluded and the tests applied to the director’s knowledge – with reference to the levels of skills imposed on example the CEO</p> <ul style="list-style-type: none"> <li>• The sanction for breach of s214 – namely the order to contribute and the calculation of the contribution on a ‘compensatory’ basis (per Re Produce Marketing).</li> <li>• Analysis of section 213 (IA 1986), including the meaning of fraudulent trading and the requirement for intent to defraud – harder to prove.</li> <li>• CEO has secured additional lending by stating the business is doing OK. This could be dishonesty – proof will be necessary of this. But this could also fall under s214.</li> <li>• Up to date case law throughout to illustrate the application of the different provisions. Eg Re Produce Marketing Consortium (No 2) Ltd, <u>Brooks v Armstrong</u> and <u>Grant v Ralls</u></li> <li>• Throughout there should be clear application to the facts and identification of the possible consequences of the above actions, including: <ul style="list-style-type: none"> <li>○ reference to any possible defences, such as the taking of every step to minimise loss to creditors under s214</li> <li>○ action that a liquidator or administrator could take</li> <li>○ for s214 for example, order by the court for a director to contribute to the assets of the company</li> </ul> </li> </ul> <p>Responses could include:</p> <ul style="list-style-type: none"> <li>• Requirements to contribute to the assets of the company, leading to potential bankruptcy of the director</li> <li>• Insolvency could result in the bank calling in the loans and therefore enforcing the guarantees. This could also lead to personal bankruptcy</li> <li>• Possible disqualification under the CDDA 1986, including the relevant grounds – eg where a director is found to act in breach of company or insolvency law</li> <li>• Inability to appoint an administrator if the floating charge is invalid under s245 IA, but this does not seem to be the case here.</li> </ul>	
<b>Question 4 Total: 25 marks</b>		