

CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

LEVEL 6 UNIT 16 – THE PRACTICE OF 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

General feedback:

- Most candidates provided good answers to the questions, demonstrating sound application of the law to the facts provided. Some candidates did not consistently apply the law to the facts.
- Most candidates did explain the main issue arising, but sometimes did not deal with additional issues which were set out in the question.

Feedback on exam technique and guidance:

- Some candidates failed to answer all of the issues arising within a question. Candidates should ensure that they read the question carefully and ensure that their answer methodically addresses every single element/issue set out in the question. This was particularly apparent in respect of company procedure on appointment of a director and allotment of shares, where many different steps were required to be taken.
- Some candidates ran out of time and therefore were unable to fully answer every question. It is recommended that candidates plan their time in the assessment carefully, ensuring that they have attempted an answer to every single question on the paper.

Common errors and guidance:

- Partnership – candidates should ensure that they understand the interaction between the relevant legislation and any Partnership Agreement.
- Business Media – candidates should ensure they understand the features of different types of business media (e.g. unlimited partnership, LLP, limited company).
- Insolvency procedures – lack of detailed knowledge of the relevant procedures including the elements that would need to be proven by a liquidator to bring a claim.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1(a)

Candidates generally performed very well on this question, with many candidates gaining high marks. Most candidates were able to identify the nature of the business structure, provide relevant advantages and disadvantages and suggest how the client's situation could be improved.

(b)

This question was generally answered well. Most candidates correctly identified the options available to the client based on the client's circumstances provided in the facts and many candidates identified advantages and disadvantages of the type of business structures identified. Weaker candidates only identified features of the relevant business structures but were not able to explain which ones were advantages or disadvantages.

(c)

Candidates generally performed well on this question. Most were able to identify the different tax regimes for each type of business structure recommended. Many Candidates referred to incorporation tax rather than corporation tax for companies.

Weaker Candidates were not able to provide the detail of these regimes such as the relevant tax rates. A few candidates correctly explained that the business would need to register for VAT if the business' turnover exceeded the VAT threshold.

Question 2 (a)

Most candidates were able to discuss the procedure required to allot ordinary shares and to appoint a director but some did not deal with authority to allot and/or pre-emption rights accurately. The majority of candidates dealt with the appointment of a director well.

The question required a detailed explanation of the procedure from start to finish, most candidates dealt with this well but some focussed too heavily on one part of the procedure such as the general meeting and did not fully explain what comes before a general meeting i.e. board meeting is held to call a general meeting and so those candidates failed to pick up marks available for the procedure of a board meeting etc.

2(b)

Candidates generally performed well on this question correctly identifying most of the documents that need to be entered into to complete the transactions. The documents that were most often missed were updating the internal records such as the statutory books of the company and minutes of the meetings. Most candidates correctly identified all of the forms to be filed at Companies House.

(c)

Generally, candidates were able to identify and explain director's duties well. However many candidates did not explain who the duties are owed to and the consequences of breaching a director's duty. In some cases, the fact that a breach would lead to consequences was mentioned but there was no explanation of what would happen to the director e.g. return of company property/account for profits etc.

Question 3(a)

Candidates generally performed well; most candidates correctly identified the ways in which one partner could terminate the partnership by applying the rules in the Partnership Act to the facts given. However weaker candidates were not able to explain that the email is a binding agreement between the partners meaning that one partner could bring a claim for breach of contract against the other. Most candidates were able to explain that the partnership could not continue with one person and that if the client wanted to carry on the business, she would need to become a sole trader or find another partner.

(b)

Most candidates identified the key issue here by explaining the relevant sections of the Partnership Act and concluding that the client could recover the money, but many candidates failed to apply the facts sufficiently.

(c)

The majority of candidates answered this question well and most were able to explain the concept of agency clearly and apply the law to the facts given. Stronger candidates were able to set out the relevant tests, apply the facts to each of those tests and reach the correct conclusion. Weaker Candidates often reached the correct conclusion but were not able to set the tests out and apply the facts fully.

Question 4(a)

Most candidates correctly identified wrongful trading as the most likely potential claim the directors may face although a small number did not. Many candidates correctly identified the elements that a liquidator would have to show to bring a claim for wrongful trading and they applied the facts given in respect of individual directors to the relevant law. Most candidates were able to explain the consequences should such a claim be brought by the liquidator, but few were able to accurately explain the potential defence and how that would be evidenced.

4 (b)

Many candidates failed to explain the statutory order of priority in sufficient detail. Most were able to set out some of the order and most were able to identify the client's position in the priority order enabling them to reach a reasonable conclusion having applied the facts given.

SUGGESTED POINTS FOR RESPONSE

LEVEL 6 UNIT 16 – THE PRACTICE OF COMPANY & PARTNERSHIP LAW

Question Number	Suggested Points for Responses	Marks (Max)
1(a)	<p>The answer should include:</p> <p>This is an unlimited partnership, two or more people working together with a view to making a profit s1(1) Partnership Act 1890 (PA), no requirement for an agreement/formal arrangement.</p> <p>Advantages – private, informal, no ongoing filing obligations/costs</p> <p>Disadvantages – unlimited liability, no agreement in place re profits/capital/division of labour/what happens on termination etc, must rely on inadequacies of PA.</p> <p>Could improve situation by having a formal agreement.</p> <p>The answer could include:</p> <p>Clauses a partnership agreement could/should include e.g. financial input/work input/shares in income and profit/decision making/duration/death/bankruptcy/retirement /expulsion.</p>	7
1(b)	<p>The answer should include:</p> <p>Limited liability partnership (LLP) or private limited company (Co.) would be most suitable.</p> <p>Advantages of LLP / Co. include – limited liability, can provide more security options (floating charges), would be good because they are looking to raise extra finance. Companies can also raise equity finance, good for this business because potentially have an investor.</p> <p>Disadvantages of LLP / Co. include – more filing/disclosure burden so less privacy and more cost, more formalities to incorporate e.g. forms to be filed at Companies House.</p> <p>LLP – need at least two members (have that here), an LLP agreement, register at Companies House and complete relevant Companies House forms</p>	14

	<p>Co – need to register at Companies House and complete relevant Companies House forms (IN01), need to have at least one director and one share must be issued, identify registered office, accounting reference date, chose company name and register articles of association.</p> <p>The answer could include:</p> <p>No need for a company secretary in a private limited company.</p> <p>Explanation based on facts as to why running the business as a sole trader (more than one person here), incorporating a public company (insufficient capital) are unsuitable.</p>	
1(c)	<p>The answer should include:</p> <p>LLPs – tax transparent, partners pay income tax on profit at relevant rate and capital gains tax on sale of any business assets.</p> <p>Companies – are liable for corporation tax on income profits and chargeable gains at relevant rate.</p> <p>The answer could include: discussion of tax treatment of any dividends or directors’ salaries paid out by company to shareholders/directors.</p> <p>Might need to register for VAT if turnover is over £85,000 VAT, can choose to if turnover is under threshold. Product is likely to be zero rated but could recover output tax.</p>	5
Question 1 Total:26 marks		
Question Number	Suggested Points for Responses	Marks (Max)
2(a)	<p>The answer should include:</p> <p>Board meeting (BM) to call general meeting (GM) to pass the shareholder resolutions identified below, board votes by majority, BM adjourns.</p> <p>GM 14 clear days’ notice s307(1)/360 Companies Act 2006 (CA) or short notice s307 (4)-(6)CA, majority in number of shareholders holding 90% must agree. However short notice will not be appropriate for service contract approval.</p> <p>Directors could appoint Model Article (MA) 17(1)(b) in a BM, alternatively could be appointed at the general meeting by shareholder ordinary resolution (OR), MA 17(1)(a).</p> <p>Directors must be authorised to allot shares (s549-551CA).</p> <p>S550CA applies: it appears that Maximum has, and will continue to have, only one class of share. So, directors have automatic authority to allot.</p>	15



	<p>However, pre-emption rights under s561 likely to apply, since the shares being issued appear to be equity securities. Since all new shares are being offered to Emma, the pre-emption rights will need to be either disapplied by SR, or renounced by the existing shareholders who are entitled to those rights.</p> <p>BM reconvenes, board resolves to allot shares, enter into the service contract and complete the documentation (see below)</p> <p>The answer could include:</p> <p>S177CA Emma should declare her interest (good practice) but she is exempt s177(6).</p> <p>Alternatively, could use WR procedure ss288-300 in which case the memorandum setting out the proposed contract must be sent with the WR to the eligible members.</p> <p>Consequences of not approving the service contract would mean the provision of a three-year guaranteed term is void and the contract would be deemed to include a reasonable notice period.</p>	
2(b)	<p>The answer should include:</p> <p>File the following at Companies House – SR to disapply pre-emption rights, statement of capital (SH19), return of allotment (SH01), form AP01 (s167)</p> <p>Update company books – register of members, directors and minute books, issue share certificates to Emma.</p> <p>Board minutes, notice of GM and GM minutes/WR.</p> <p>Service contract.</p>	5
2(c)	<p>The answer should include:</p> <p>Director’s duties are owed to the Company and not the shareholders, they are set out in Ss171-178CA.</p> <p>These include – duty to act within powers, duty to exercise independent judgment, duty to exercise reasonable skill, care and diligence, duty to avoid conflicts, duty not to accept benefits from third parties, duty to declare interest in proposed transaction or arrangement Ss171-177CA.</p> <p>S178CA - consequences of breach are same as if corresponding equitable principles or common law rules applied.</p> <p>Remedies for a company for breach of any duty (except s174) is for the director to account for profits made, return company property, pay</p>	8

	<p>compensation, rescind contract, injunction against director (as applicable). Remedy for breach of s174 is damages for negligence.</p> <p>The answer could include:</p> <p>A claim would be brought by the company following a majority vote of board, but shareholder(s) can also bring claim on behalf of company (derivative action).</p> <p>OR required to approve Emma’s service contract because it guarantees her term of employment for more than two years (s188CA). A memorandum setting out the proposed contract must be available at the registered office for not less than 15 days before the GM and at the GM itself (s188(5)CA).</p>	
Question 2 Total: 28 marks		
Question Number	Suggested Points for Responses	Marks (Max)
3(a)	<p>No legal formalities required to set up a partnership so the terms in the email are likely to be legally binding on the partners, where the email does not deal with an issue the PA will apply.</p> <p>Email says both will work 3 days per week but Rosa does not appear to be doing that so she may be in breach of contract and Tiwa could potentially sue for breach of contract, may be able to sue for damages. Tiwa cannot expel Rosa under PA (s25 PA) and nothing in the email about expulsion.</p> <p>Could Tiwa terminate the partnership? Explain that partnership can be terminated/dissolved by notice in writing to Rosa (assuming it is a partnership at will/or for an undefined term: ss 26 and 32 PA).</p> <p>Could Tiwa carry on business on her own? Neither Tiwa nor Rosa would be continuing the partnership business, but each would be free to set up their own dog-walking business.</p> <p>Answer could include: if Tiwa wanted to continue a partnership, but without Rosa, she could try to find another person to buy Rosa out then the partnership can continue.</p> <p>Possibility of Tiwa seeking dissolution of partnership by court, under s35(c) or (d) PA.</p> <p>The answer could include:</p> <p>If the partnership were terminated there is nothing to prevent Tiwa from setting up a dog walking/dog sitting business on her own, she has not signed restrictive covenants.</p>	10

	Partnership assets would be applied to meet debts/liabilities, any surplus paid to partners in accordance with their agreement i.e. equally.	
3(b)	<p>The answer should include:</p> <p>Breach of s29 PA (partner must account for any profits made by use of partnership property) and 30PA (partner must not compete with the partnership business, if they do, they must account to the firm for all profits made). Evidence is needed to prove each of these things.</p>	5
3(c)	<p>The answer should include:</p> <p>The email at Document 4 forbids partners from buying anything which costs more than £250 without the other partner’s agreement in advance.</p> <p>But firm will likely still be bound (s5 PA) by the contract because each partner is an agent of the firm and of their fellow partners. Rosa has actual (ostensible) authority, dog beds could be thought to be in the ordinary course of their business and the seller of the dog beds is unlikely to know that Rosa does not have actual authority.</p> <p>The partners will therefore be liable to pay the £500 but Tiwa should consider an action against Rosa for breach of contract.</p> <p>Answer could include:</p> <p>S8 PA would only apply if the person selling the dog beds had notice of the restriction (set out in the email).</p>	7
Question 3 Total:22 marks		
Question Number	Suggested Points for Responses	Marks (Max)
4(a)	<p>The answer should include:</p> <p>Potential liability for wrongful trading, claim can be brought against any director, s214(1) Insolvency Act 1986 (IA) by a liquidator, s214 (2)(a) if Opus goes insolvent liquidation.</p> <p>Liquidator would have to show that at some point prior to winding up a director knew or ought to have concluded that there was no reasonable prospect that Opus would avoid going into insolvent liquidation, s214(3)</p> <p>Court will apply two tests: objective - the reasonably diligent person test, s214(2)(b) and s214(3), s214(4); and subjective, knowledge skill and experience of the director e.g. Yasmine.</p> <p>Yasmine is an accountant and has extensive experience so therefore a higher test will apply to Yasmine’s expected conduct, we don’t know what the other directors previous experience is.</p>	13

	<p>If successful may lead to the directors having to contribute to the assets and could lead to disqualification, s6/10 CDDA</p> <p>To protect themselves the directors should do regular financial checks, call regular BMs and continue to raise concerns, take independent advice form an IP etc.</p> <p>The answer could include:</p> <p>There appears to be a realistic possibility that Opus may trade out of the financial difficulties so would be worth waiting to find out outcome of the pitch.</p> <p>How any contribution that is ordered to be made would be calculated (on a 'compensatory' basis: Re Produce Marketing).</p>	
4(b)	<p>The answer should include:</p> <p>Liquidator's costs of preserving and realising assets subject to a fixed charge, fixed charge creditors of which Wooton Bank is, Bank will get money from sale of fixed charge assets i.e. the property.</p> <p>Expenses of the winding up, preferential debts e.g. unpaid wages up to £800 per employee, ring fenced fund, floating charge creditors, bank has floating charge over other assets, unsecured creditors, interest on unsecured debts, shareholders rank last</p> <p>Bank will be an unsecured creditor if not fully paid. Opus is an unsecured creditor, Opus very unlikely to recover all sums owed to it - all unsecured creditors will benefit from ring-fenced fund.</p> <p>The answer could include: An explanation of how the ring-fenced fund is calculated.</p>	11
Question 4 Total:24 marks		