



CHIEF EXAMINER REPORT

JANUARY 2024

LEVEL 6 UNIT 1 – Company and Partnership Law

The purpose of the suggested points for responses is to provide candidates and Training Providers with guidance as to the key points candidates should have included in their answers to the January 2024 examinations.

The suggested points for responses sets out points that a good (merit/distinction) candidate would have made.

Candidates will have received credit, where applicable, for other points not addressed in the suggested points for responses or alternative valid responses.

Chief Examiner Overview

This was a small cohort.

The key strengths of the high-scoring scripts were as follows:

- Methodical answers addressed each element of the question, including the command words such as 'critically analyse' or 'advise';
- A high level of critical analysis where required, within a strong coherent structure that supported the discussion;
- Accurate, precise and thorough references to case law and statute;
- Careful application to the facts as well as the question in the Part B answers;
- Answers were incisive and went well beyond merely repeating legal provisions;
- Conclusions provided; and
- Time was used effectively so no answer was prejudiced.

These elements were lacking in scripts that did not perform well:

- It is essential to refer to case law and specific statutory provisions as much as possible in the answers, to support the proposition being made and give more precision to the answers
- Pay careful attention to the command words in the question: do you need to 'critically assess' or 'analyse'? Do not just repeat what the law says.
- Where a number of parties are involved in the Part B questions, carefully identify who is doing what.
- Again in the Part B questions, do not merely regurgitate the law – apply to the facts.
- When applying statutory provisions, such as section 5 PA 1890, or section 214 IA 1986, work through each element and apply it methodically.
- Where timing was an issue, candidates are advised to split their time as evenly as possible across the exam and use the 15 minutes reading time wisely to plan their answers.
- Include a brief conclusion.
- Candidates are further advised to review carefully their understanding of for example the distinction between directors and shareholders and their respective proceedings, as well as the legal position in relation to the lifting of the corporate veil. This latter topic is one that requires clear and methodical addressing of the case law.

Candidate Performance and Suggested Points for Responses

It is noted that the low numbers of candidates taking the Level 6 exams limits the scope for constructive feedback to be given and for firm conclusions to be reached. Therefore, feedback on candidate performance is limited.

Section A

Question 1	25 marks
Question 1 (a) and (b): Nature of partnerships and agreements This question was answered by 9 candidates out of the ten. It was generally well answered. Marks ranged from 10 to 21 with most 18 or above. For (a) most candidates analysed the nature of the partnership well with good case references. In (b) answers tended to be more general, but still adequate.	
Suggested Points for Response:	
(a) 16 marks <ul style="list-style-type: none">• No statutory formalities required for the formation of a partnership, nor requirement for an agreement• A partnership exists if it satisfies the statutory test of two or more persons carrying on business in common with a view of profit (s1 PA 1890).• Meaning of 'business'• With a view of profit: uncertainty in law on this. Receipt of profits is prima facie evidence of being partner. <u>Cox v Hickman</u>. There must be a profit motive• Varieties of co-ownership – eg joint tenancies – also are not a partnership• One off venture/commencement of business – eg <u>Mann v D'Arcy</u>; <u>Khan v Miah</u>	
(b) 9 mark <ul style="list-style-type: none">• If no agreement, limiting default provisions of PA apply• Agreement therefore can:• Provide clarity and certainty in the event of dispute for example• Define roles of partners; profit sharing ratios and requirements to contribute to the business and to capital• Define how the management works –meetings for example• Provide for how disputes can be resolved• Define partnership property.• Exclude PA s25 (unanimity required to expel a partner) and provide for majority decision• Can provide for continuation of partnership on retirement of a partner – less disruptive	

Question 2	25 marks
<p>Question 2: s994 and derivative actions</p> <p>This question was not a popular choice. As with many others in other questions, answers often lacked case law.</p>	
<p>Suggested Points for Response:</p>	
<ul style="list-style-type: none"> • Protection of minority shareholders under both provisions from, for example, wrong-doings of directors • S994: cases where a company's affairs have been conducted in a way that is unfairly prejudicial to the interests of members generally or some part • Interests are widely interpreted to include: <ul style="list-style-type: none"> • Formal rights of shareholder. • Legitimate expectations (see Ebrahimi). • The court will give effect to parties' own understanding. See O'Neill. • Range of conduct is relevant, such as breach of directors' duties. <i>Re CF Booth Ltd</i> • It is possible to enforce interests enjoyed in capacity other than as a member. <i>Gamlestaden</i>. • S994 offers range of remedies which can be effective. • Court can make order as sees fit, including that the shares of the petitioner be purchased, and at a fair price. <i>Re Bird Precision Bellows</i>. • Part 11 derivative claims brought by members of behalf of the company (ss260 and 261 CA 2006). • Narrower than 994 in terms of grounds: act or omission involving negligence, default, breach of duty, or breach of trust by director. • Court must give permission to continue action; s263 gives factors for granting permission: there are 3 mandatory bars to permission: <ul style="list-style-type: none"> • Breach of duty authorised or ratified by members. • Where the majority has the right to deprive the minority from pursuing a claim • Where the court concludes a hypothetical director, acting in accordance with duty to promote success of company, would not continue the claim. See <i>lesini case</i> and <i>Cullen Investments v Brown</i> (2015). 	

Question 3	25 marks
<p>Question 3: Lifting the corporate veil and parent co liability</p> <p>More limited responses lacked detail and analysis of the case law and a conclusion on the question. The better answers engaged in good analysis.</p>	
<p>Suggested Points for Response:</p>	
<ul style="list-style-type: none"> • Nature of separate legal personality • <i>Salomon v Salomon</i> • Company is responsible for its own debts • Case law to include: <i>Adams v Cape</i>, <i>Prest</i> and <i>Nutritek</i> • Detailed discussion of the grounds including shams/facades; statutory provisions and agency • Insufficient grounds such as the interests of justice or separate economic entity • Possible liability in tort and the circumstances required to exist: <i>Chandler v Cape</i> and <i>Vedanta</i> 	

Question 4	25 marks
<p>Question 4: Buy back and dividends – the maintenance of capital rule Those who attempted did not score highly because they lacked the critical assessment required to answer the question.</p>	
<p>Suggested Points for Response:</p>	
<ul style="list-style-type: none"> • Dividends can only be paid of available profits (relevant CA provisions) • Outline of the principle of maintenance of capital, derived from Trevor v Whitworth • Range of examples of restrictions to support the principle, such as: <ul style="list-style-type: none"> ○ General prohibition on purchase of own shares (s658 CA 2006) ○ Strict rules where such restrictions are lifted (eg regarding buy back out of capital – see below) • Exceptions to the restrictions, such as: <ul style="list-style-type: none"> ○ Company may also issue redeemable shares (but must also have in issue ordinary shares) (Part 18 CA 2006) ○ Companies may buy back their own shares out of distributable profits, a fresh issue of shares, or (only private companies) out of capital (either for small repurchases, under s692(1ZA) or, for larger repurchases, only after distributable profits have been used) • 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; • Conclusion that exceptions to the rule themselves subject to strict procedural requirements 	

Section B

Question 1	25 marks
<p>Question 1: incorporation and shares vs loan as investment</p> <p>This was the second most popular question with seven answers ranging from 7 to 16. Some candidates appeared not to have read the facts or instructions carefully enough and advised in relation to the wrong parties.</p>	
<p>Suggested Points for Response:</p> <ul style="list-style-type: none">• Requirement for registration to create the company• Filing of forms with Companies House• Details of director(s)• Shareholders and shareholdings• Company constitution (memorandum and articles)• Model Articles or tailored articles• Payment of a fee• Company exists once certificate of incorporation has been issued• Name must end in 'limited' or 'ltd'• Name must not be the same as or similar to that of another company• Need to check the register for this• As a lender, Glenda would have no say in the running of the company – would therefore not dilute Sania's control as sole shareholder• Obligation to pay interest on the loan and the principal as required by the loan agreement – would be payable before any dividends could be paid to Sania• If company defaults, Glenda could enforce any charge – again repayable prior to any return of capital to Sania• However, some control depending on the nature of the charge or charges granted.• Discussion of key features of fixed and floating charges• Points on registration of any charges and how these charges would affect the company's ability to borrow elsewhere, eg from the bank• In terms of issue of shares Glenda could have a say in company matters where shareholder approval is required• Level of influence depends on percentage shareholding. Eg if she had more than 25% of the shares, she can block a special resolution• Glenda would enjoy a variety of statutory or constitutional rights as a shareholder eg under s994 or Part 11 CA 2006 – potentially more disruptive to Sania• Glenda would expect company to pay dividends as return for her investment• Procedure required for issue of shares• Directors must have authority to allot under s549 CA• Section 550 CA should apply so no ordinary resolution needed for authority to allot• s561 CA (pre-emption rights) would apply, subject to for example Sania's waiver of rights or disapplication under s569 in the articles or by later special resolution	

Question 2	25 marks
<p>Question 2: Directors duties, appointment, service contract and an SPT</p> <p>There were five answers to this question that had 3 parts. The issues were a lack of application in (a) with little case law; lack of precision in (b) on the procedure and lack of analysis of the facts in (c) where the key issue of a substantial property transaction was not spotted.</p>	
Suggested Points for Response:	
<p>(a) (12 marks)</p> <ul style="list-style-type: none"> • Duties developed to control wide powers (eg Aberdeen Railway Company v Blaikie Bros (1854) and MA 3 • 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. • The duty to exercise reasonable care skill and diligence (s174 CA 2006). Subjective and objective test. (see Re City Equitable Fire Insurance Company Ltd (1925) and contrast Re Barings Plc (1999)). Raithatha v Baig (2017) • Told H has considerable experience in the sector so possibly a higher standard of skill and care • 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 her capacity as a director of the company. Thermascan Ltd v Norman (2011). Will need to address continued involvement in a potentially competing business. • 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. <p>(b) 6 marks)</p> <ul style="list-style-type: none"> • Appointment by resolution of the board or by shareholders in GM or by WR (ordinary resolution) (MA 17) • Registration (by AP01) with Companies House • Update of CID’s internal register of directors • Only board resolution needed to approve service agreement (as it is not for a fixed term) • Hiba cannot vote on her own contract (MA 14) • She will not have to declare her interest (s177(6)(c)) <p>(c) (7 marks)</p> <ul style="list-style-type: none"> • Explanation of the elements of section 190, etc • Transaction between a director and a company for a non-cash asset over £100,000 or 10% of a company’s net assets • Requirement of ordinary resolution to approve the transaction • Hiba cannot count in the quorum or vote on the transaction (MA 14) • She should declare her interest under s177 unless section 177(6)(b) applies (ie all other directors are aware) 	

Question 3	25 marks
<p>Question 3: Partnership authority, expulsion and comparison with companies and LLPs Answers were generally good from 15 to 17. As in previous sessions, answers could have covered partnership authority issues more precisely. Generally, the comparison part (c) was done well.</p>	
<p>Suggested Points for Response:</p>	
<p>(a) (8 marks)</p> <ul style="list-style-type: none"> • Unlimited liability of partners • Joint and several liability under s9 PA 1890 • Types of authority: express implied and apparent/ostensible • Discussion and application of elements of section 5 PA 1890 • K's express authority breached – exceeds limit in agreement • In any event, purchase of car unlikely to be for the purposes of the business • No information that the car dealer knew K was a partner • Unlikely that purchase regarded as for purpose of carrying out business of the firm • Kris likely to be personally liable <p>(b) (5 marks)</p> <ul style="list-style-type: none"> • Reference to section 25 PA 1890. • A majority cannot remove a partner. • Not clear if the agreement provides for removal by a majority • Check for an oral agreement if nothing in writing <p>(c) (12 marks)</p> <ul style="list-style-type: none"> • Comparison of liability in LLP, unlimited partnership and company • LLP: liability limited to contribution • Personal assets not at risk with LLP • LLPs governed by more up to date legislation • Formal registration required • Unlimited partnership – liability can extend to personal assets • Discussion of separate legal personality • Meaning of limited liability – limited to any amount unpaid on shares - and key implications. Shareholders not liable for company's debts (usually) • Salomon v Salomon 	

Question 4	25 marks
Question 4: challenging in solvency transactions and wrongful trading Cohort too small to provide feedback.	
Suggested Points for Response:	
<ul style="list-style-type: none"> • Possible wrongful trading by the directors • The elements of section 214 • Objective and subjective tests • Individual directors and their potential liability • What each director should have known for example and the standard applied to each • Sam – limited experience so for example objective test • Higher standard expected of Ray as an accountant • Application of facts: did the directors take every step to minimise loss? Possibility not as the directors took holidays and did not hold BMs during financial difficulties • Possibility of contribution to the company's assets • Possible invalid floating charge (s245 IA) • Charge created at the relevant time before insolvency is invalid except to the extent it is given for new consideration. Likely invalid here as it was created over existing overdraft. • Relevant time is within 12 months of onset of insolvency (or 2 years where the charge is in favour of a connected person). No connection here. • Consequence – charge is invalid and cannot be enforced by the bank. • Possible transaction at undervalue (s238 IA) • Relevant time (s240) – application – within 2 years of onset of insolvency (ie when the company goes into liquidation). Transaction was less than 2 years before • Company was unable to pay its debts at the time of the transaction – it was in financial difficulty. • Definition of company's inability to pay its debts (s123 IA) • Transaction is for consideration considerably less than the value of the asset • Presumption of insolvency when the transaction is with a connected person (s240(2) IA) – as here. • Defence if the transaction was in good faith • Consequences: possible return of the asset to the company by order of the court (s241) 	