



CHIEF EXAMINER REPORT

JANUARY 2025

LEVEL 6 UNIT 1 – Company and Partnership Law

The purpose of the report is to provide candidates and training providers with guidance as to the key points candidates should have included in their answers to the January 2025 examinations.

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

Candidates will have received credit, where applicable, for other points not addressed.

Chief Examiner Overview

This was a small cohort on this occasion.

Only four candidates sat this assessment. Some strong answers were produced that addressed the question carefully and provided good detail on case law and legal provisions. Weaker answers lacked detail, references to case law and sufficient analysis and, for Part B questions, application to the facts.

In part B questions, candidates are advised to review the facts and consider carefully who is doing what and how this affects their answers to the question.

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 may be limited.

Section A

| Question 1 | 25 marks |
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| Data too limited for valid feedback. | |
| Suggested Points for Response: | |
| <ul style="list-style-type: none"> • Partner is an agent of the partnership when acting on behalf of it (s5 PA 1890) • Authority can be actual (express or implied) or apparent/ostensible • Implications of a partner acting within their authority: the partnership is liable in contract, but liability is unlimited in relation to the partners. S9 and Civil Liabilities (Contributions) Act – joint and several • Actual authority can arise from express agreement, eg set out in a partnership deed; or from course of dealings. Reference to ss 6 and 7 PA 1890 • If a partner acts outside their actual authority, sections 5 and 8 must be applied as apparent authority is to be considered. [Allow for reference to ‘implied’ authority as academic interpretations differ.] • Each of the elements of section 5 PA should be discussed carefully, and case law referenced. (Eg Polkinghorne and Mercantile Credit). • Consequently, liability can still fall on a partnership, because the partner’s authority is ‘apparent’ to a third party. • Where the partnership is bound, if partnership assets are insufficient to meet partnership liabilities, the partners may have to use their own assets to meet such liabilities • If a partner binds a firm through apparent authority, the partnership may be able to recover from the partner for breach of actual authority – eg as a breach of the partnership agreement. • Incoming partner: not liable for debts before they join (s17(1) PA), unless they are held out (knowingly) or hold self out to be a partner in a transaction (s14 PA). Third party/creditor must show reliance on such representations. • Retiring partner is not liable for debts incurred after leaving the partnership; only those incurred while they were still a partner (s17(2) PA). • Examples of how express or implied authority can arise: express provision in a partnership agreement; activity accepted impliedly by other partners. • Partnership agreement may require a partner to indemnify the partnership for breach of actual authority • Even if a partner exceeds their actual and apparent authority, the other partners may ratify a transaction which that partner purports to make on behalf of the firm. • S 14 and holding out could also apply to retiring partner. • Possible indemnity to be sought by retiring partner from partnership • Novation agreement to be entered into between retiring partner, remaining partners and the creditor/third party | |

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| Question 2a | 17 marks |
| Data too limited for valid feedback. | |
| Suggested Points for Response: | |
| <ul style="list-style-type: none"> • Definition of 'promoter', with reference to the Twycross case • Outline of what a 'promoter' may do, including the registration of a company • The nature of a pre-incorporation contract • Discussion of the potential personal liability of the promoter making pre-incorporation contract • The relevance of 'agreement to the contrary' and section 51 Companies Act 2006 (CA 2006) • The court's strict approach and case law including Phonogram • Means of protection against liability for pre-incorp contracts, to include • Contract with the company post-incorporation with indemnity • Contract of novation • Conditional contract with the third party • Use of shelf company • The fiduciary duties of promoters, including a duty not to make a secret profit • protection in case of breach (eg disclosure to prospective members (Erlanger v New Sombrero) • Power of company to rescind contract where promoter fails to disclose secret profit and relevant case law (eg Re Cape Breton) • Consequences of insolvency of company on third party rights • Relevance of speed of incorporation to limit the risk of liability for pre-incorp contracts | |

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| Question 2b | 8 marks |
| Data too limited for valid feedback. | |
| Suggested Points for Response: | |
| <ul style="list-style-type: none"> • That company name should not be the same as an existing company's name (section 66 CA 2006) • Name should not be offensive or suggest connection with for example a local authority (ss 53 and 54) • Consent of secretary of state in certain circumstances (with examples) • That name must include 'limited' or 'Ltd' or Welsh equivalent, for example, or plc equivalent • Name effective from formal registration of the company • Name to be disclosed at the registered office, and on business communications such as invoices, stationery and website • Reference to relevant Regulations • Power of individual or company to seek injunction to restrain use of a name • Relevant case law • Possible change of name by special resolution • Difference between company name and business name (and perhaps some mention of possibility of passing off action regarding choice of latter) | |

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| Question 3a | 7 marks |
| Data too limited for valid feedback. | |
| Suggested Points for Response: | |
| <ul style="list-style-type: none"> • Requirement of a stock transfer form (STF) (under Stock Transfer Act 1963) completed by transferor. Section 770 CA 2006 • Delivery of the STF with a share certificate (if there is one) to the transferee • Transferee pays any consideration to transferor • Transferee is responsible for getting STF stamped and paying stamp duty at the appropriate rate. • 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. • Model article 26 provides regulations on share transfer Transferee becomes legal owner when entered on the register of members • A company cannot register a transfer of shares without a proper instrument • Directors must act in good faith in making decision to refuse to register a transfer (<u>Smith v Fawcett</u>) • Section 771: directors must either register the transfer, or give notice of refusal, within 2 months. • Updates may be needed at Companies House to reflect changes of persons with significant control | |

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| Question 3b | 6 marks |
| Data too limited for valid feedback. | |
| Suggested Points for Response: | |
| <ul style="list-style-type: none"> • Possible limited restriction: refusal by a company's directors to register a transfer under MA 26. Current restriction provides for directors' discretion. • 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 • Some explanation for why companies might adopt the preceding two types of restriction Pre-emption provisions may include detailed requirements for valuation of the shares and identification of the share price • Possible requirement that a director must sell any shares in company to existing shareholders when they cease to be a director | |

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| Question 3c | 12 marks |
| Data too limited for valid feedback. | |
| Suggested Points for Response: | |
| <ul style="list-style-type: none"> • Reference to the relevant CJA provisions, ss 52 to 58 • The <u>criminal</u> offence is for individuals only • Behaviour must occur in the UK • 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 • Discussion of the meaning of the following: <ul style="list-style-type: none"> • ‘insider’: has information from an inside source, s57, eg company director or employee • ‘inside information’ and all its elements s56, s58 (where information is ‘public’) • The FCA has the power to impose penalties • Penalties include: a fine or imprisonment • Statutory defences: s53 • Discussion of the secondary offences of unlawful disclosure of inside information and of encouraging • Difficulty of bringing successful prosecutions under the CJA • Possible disqualification under CDDA | |

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| Question 4 | 25 marks |
| Data too limited for valid feedback. | |
| Suggested Points for Response: | |
| <ul style="list-style-type: none"> • On a compulsory winding up, the Official Receiver (OR) initially becomes the provisional liquidator (s136 IA 1986) • The OR will call meetings of creditors and members to appoint a liquidator. • If none is appointed, the OR will be the liquidator • On a voluntary winding up, the creditors or members will appoint the liquidator • In a members' voluntary, the liquidator must advertise the appointment in the London Gazette and with the Companies' Registrar (s91 IA 1986) • On a creditors' voluntary, the creditors may nominate a liquidator (s100 IA 1986). Members also meet to appoint one. • In the case of a clash, the creditors nominee prevails • Derivation of powers from section 167 the IA 1986 and associated rules • Paying off classes of creditors in full (if possible) in the prescribed order (s175 IA 1986) • Bringing proceedings in the company's name • Summoning general meetings when necessary • Carrying on the company's business as necessary • Selling company property • Power to call into question the action of directors • Detailed discussion of sections 238, 239, 244, 245 and 423 in particular, including <ul style="list-style-type: none"> ○ requirement of inability to pay debts/insolvency ○ the nature of the transactions, ○ time limits, ○ nature and relevance of connected person ○ where the burden of proof lies ○ what the liquidator must prove to enable avoidance ○ the consequences of such avoidance ○ any defences available to the company or persons involved ○ references to case law (eg MC Bacon, Re M Kushler • The liquidator must be an authorised insolvency practitioner • Exceptionally, the court may appoint a provisional liquidator between petition and the making of the winding up order • More detail on the order of payment of creditors, eg preferential creditors and prescribed proportions of floating charges • Implications of registered charges • Disclaimer of onerous property • Bringing of misfeasance proceedings | |

Section B

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| Question 1a | 7 marks |
| Data too limited for valid feedback. | |
| Suggested Points for Response: | |
| <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 • Choice of name • Payment of a fee • Company exists once certificate of incorporation has been issued • Possibility of use of a shelf company • The need for a business transfer agreement as Grace will effectively sell the business to the company in return for shares • Possibility of use of a business name as well as the registered name | |

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| Question 1b | 12 marks |
| Data too limited for valid feedback. | |
| Suggested Points for Response | |
| <ul style="list-style-type: none"> • Section 33 CA: articles form a contract between the company and each member • General provisions concerning membership • Key case law on s33 – eg Rayfield v Hands; Hickman v Kent • Hickman v Kent or Romney Marsh Sheepbreeders; Pender v Lushington • Unusual contract; eg it is not rectifiable as with a 'normal' contract (Scott v Frank F Scott), even if the articles do not express the parties' true intention • Enforcement of the contract by a member whose rights are being infringed • Eley v Positive Government Security • Not for example relating to directorship (Beattie v E&F Beattie) • But some case law has, arguably, allowed the enforcement of 'outsider rights' (eg <u>Salmon v Quin and Axtens</u>) • Regulation of the internal management of the company • Directors can manage the company as they see fit (MA 3) • Articles can be altered only by special resolution • Courts interpret the articles using the reasonable person test (AG of Belize v Belize Telecom Ltd) • Articles can be the Model articles or can be tailored • Model articles (default articles) give wide powers to directors • Specific restrictions can be imposed on directors; for example on powers to borrow • Possible protections through weighted voting rights. • Possible s994 or derivative action – protections for minority • Enforcement is subject to a 6 year limitation period | |

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| Question 1c | 6 marks |
| Data too limited for valid feedback. | |
| Suggested Points for Response: | |
| <ul style="list-style-type: none"> • Unlimited liability of a sole trader • No separation of the business from Grace • Personal assets can be at stake • Liability of a shareholder limited to any amount unpaid on shares received • On winding up, Grace will receive capital back if company is solvent • Grace should effectively pay in full for the shares that are issued to her when she transfers the business to the company • Common for shareholders in small companies to give personal guarantees for some company liabilities • Shareholder is at bottom of list for asset distribution on a winding up | |

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| Question 2 | 25 marks |
| Data too limited for valid feedback. | |
| Suggested Points for Response: | |
| <ul style="list-style-type: none"> • The principle itself: derived from common law and the case of Trevor v Whitworth (1887): a company cannot return money to its shareholders, except after payment of all the company's creditors in a winding up or as permitted in the CA 2006 • The share capital is maintained to protect the interests of creditors • Shareholders are not liable to contribute to the debts of a company apart from any amount unpaid on their shares • Significant statutory regulation of the principle • S690 permits a company to buy back its own shares, subject to requirements • Requirements: shares to be fully paid (as they are here) and no restrictions in the articles - Model Articles contain no such restrictions • Company can use distributable profits or the proceeds of a fresh issue of shares. Sufficient profits here • Purchase will be off market, s694 • A board meeting should approve the buy back and the contract subject to shareholder approval and convene the GM or propose a written shareholder resolution • A contract is required that must be approved by the shareholders by ordinary resolution, s 694 (in general meeting, on 14 clear days' notice, or by written resolution). • Contract to be available for inspection 15 days before the GM, s696 (thus short notice of the GM is not possible) or sent with the written resolution to the members eligible to receive the written resolution • Tami cannot vote on the contract. Otherwise the resolution could be invalidated • Approval of the contract authorises the buy back (up to a limit of 5 years) • Following completion and payment to Tami, the shares will be cancelled • Tami should return any share certificate to the company | |

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| Question 3 | 25 marks |
| Suggested Points for Response: | |
| <ul style="list-style-type: none"> • The nature of fixed and floating charges, with reference to the Panama and Woolcombers cases • a floating charge can only be created by a company and is an equitable charge created over a generic class of assets (such as Enviropaks's undertaking here): <u>Re Panama, New Zealand and Australian Royal Mail Co.</u> • 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> • 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> • 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 • Re lawyer friend's advice: Discussion of the case law on creation of charges over book debts: <u>Re Spectrum Plus Ltd</u> (2005), (and <u>Re New Bullas</u>): whether there is the necessary control for the lender (Agnes) over the charged assets to give rise to a fixed charge and whether the borrower is able to use the moneys received to carry on the business. • in <u>Spectrum</u> the court overruled previous cases (eg <u>Re New Bullas</u> (1994)): for a fixed charge to be created over book debts a lender must exert a high degree of control over the charged assets – for example requiring the borrower to pay sums received into a specified account, and from which the borrower could withdraw sums only with the consent of the lender. Likelihood that Agnes will have little control over the charge or assets secured by it • Agnes's protections: the charge will be a 'qualifying floating charge' giving the charge holder the right to appoint an administrator. • a degree of priority over other, in particular unsecured, creditors regarding the proceeds of sale of the assets subject to the charge. • this priority is 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. Agnes's charges would rank behind the bank's existing fixed charge, as fixed charges generally rank in order of creation and above floating charges. • Advice to register the charge with Companies House within the relevant time period after its creation. If not registered within the specified time limit (21 days of the creation of the charge: s859A(4) CA 2006), then it is void against an administrator or liquidator or any creditor of the company. • However, even if the charge is properly registered, it takes effect subject to any earlier (and properly registered) equitable charge over the same asset. • Unsecured creditors taking priority - preferential creditors: employees owed for example unpaid wages and accrued holiday remuneration (175 IA 1986); possible expenses of the winding up paid out of proceeds of sale of assets covered by a floating charge, s176ZA IA 1986. • Risk of any floating charge being set aside under s245 IA 1986, when the company goes into insolvency, if the charge was given to secure a 'pre-existing debt' owed by the company. Here the original loan is a 'pre-existing debt'. • New additional loan could also be treated as a pre-existing debt if that additional loan is made to the company before the floating charge is <i>actually</i> created: see <u>Re Shoe Lace Ltd</u> (1992). Agnes should ensure that the new loan is only made <i>after</i> the floating charge has been created. • Then the floating charge would be valid insofar as it provides security for the additional loan, but would be potentially void insofar as it provides security for the existing loan of £150,000 – only in event of company's insolvency within a certain period. • To be set aside under s245, the charge given to secure the earlier loan must be created within 12 months of the onset of insolvency in favour of an unconnected person (here Agnes), and | |

only if the company is unable to pay its debts at this time (or becomes unable as a result of creating the charge).

- Detail is not known about Enviropaks's finances, but they seem profitable. unknown

Question 4a

9 marks

Suggested Points for Response:

- Appointment by the board or in general meeting (by ordinary resolution), under MA 17
- If by shareholders, convene a general meeting or use a written resolution
- Enter name on register of directors
- Notify Companies House on form AP01
- Service contract: because it is for a fixed term over 2 years, shareholder approval required of the term, s188 CA 2006.
- Ordinary resolution by GM or written resolution
- Memorandum of contract to be provided to shareholders. If GM inspection for 15 days prior to meeting
- If approval not obtained, the term of 3 years is void, contract becomes terminable on reasonable notice, but contract still otherwise valid.
- Note of duty of director to disclose interest in transaction with company, s177
- But even if Ameer is appointed before his service contract is approved, s177(6)(c) provides an exception to this
- MA 14 still applies
- Mention of Wright v Atlas case

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| Question 4b | 8 marks |
| Data too limited for valid feedback. | |
| Suggested Points for Response: | |
| <ul style="list-style-type: none"> • Ameer should declare the contract as an interest under s177 for example at the board meeting at which the contract is considered and approved. • MA 14 also applies: he cannot be counted in a quorum on the vote on the lease, nor can he vote it, unless an ordinary resolution is passed to waive MA 14 for this transaction • Explanation of regime applicable to 'substantial property transactions' between director and company, and application to facts of the case, especially around the determination of 'substantial' and the consequences if the transaction is caught. • Mention of s177(6)(b) | |

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| Question 4c | 8 marks |
| Data too limited for valid feedback. | |
| Suggested Points for Response: | |
| <ul style="list-style-type: none"> • Reference to the fact that Martha has not been formally appointed • Seems to be de facto director (Re Hydrodam and s250 CA 2006) • Not a shadow director as she does not appear to be giving instructions to the company that it follows, s251 CA 2006 • Martha will, if found to be a de facto director, be subject to duties under CA. • Brief outline of duties – especially s173 and 174 – possible higher standard of skill attributed to Martha • Question whether she is part of the corporate governing structure (Hollier) • Reference to duty to promote the success of the company, s172 CA 2006 • Possible wrongful trading implications if company falls into insolvency | |