

CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

JANUARY 2023

LEVEL 6 UNIT 16 – THE PRACTICE OF COMPANY & 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 January 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 explain their answers in sufficient detail, for example, failing to provide relevant legislative and/or case law references.
- 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 conversion of a shelf company, where many different steps were required to be taken.
- Some candidates appeared to run 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, as well as the features of different types of partnership (e.g., unlimited, LLP).
- Company – candidates should ensure that they understand the difference between conversion of a shelf company and incorporation from scratch, as well as the difference between transfer of shares and allotment.
- Insolvency procedures – some candidates lacked detailed knowledge and some suggested procedures which were inappropriate on the facts.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1(a)

Candidates generally performed well on this question, with most recognising the governing statute and interaction with the Partnership Agreement provided. Most candidates understood the operation of s.32c, but fewer mentioned the possibility of application to the Court under s.35. Although most candidates were able to explain how the partnership would be wound up, some failed to discuss in detail the effect of s.44. There were some instances of cross-crediting of correct marks within Question 1.

1(b)

Whilst most candidates discussed the partner's breach of duty and obligation to account for profit, some candidates were unclear about the continuation of the Partnership and how to bring in a new Partner – for some, this was due to a failure to read the documents provided carefully enough. Again, there were some instances of cross-crediting of correct marks within Question 1.

Question 2(a)

Most candidates provided reasoned explanations for the use of LLP or a private limited company. Weaker scripts sometimes failed to distinguish between different types of partnership or company, and/or were unclear about the taxation implications. A minority of candidates did not correctly explain how companies and dividends are taxed.

2(b)

Most candidates were clear on what a shelf company is and why one might be used. A small number of candidates were unclear about how a shelf company differs from incorporation from scratch. The amendments and filings required according to the fact pattern were described reasonably well by most candidates – weaker candidates tended not to deal methodically with all the changes necessary, in particular, transfer of shares and also updating of relevant registers.

Question 3(a)

Some candidates failed to adequately address the aspect of the question which requires discussion of the advantages and disadvantages of debt and equity as methods of financing. Although most

candidates were able to discuss the procedure required to allot ordinary and preference shares, some did not deal with authority to allot and/or disapplication of pre-emption rights accurately. Candidates generally performed less well regarding the loan aspect of the question – whilst majority of candidates were able to explain the procedure in respect of the registration of security, fewer were able to explain how the company approves the loan documentation.

3(b)

This question was generally well answered, and most candidates were able to identify suitable assets from the facts over which particular security would be likely to be sought. Some candidates failed to explain clearly the connection between non-payment of the loan and the security sought by the lender.

Question 4(a)

This question was generally well answered, with only a small number of candidates unable to identify and/or correctly interpret the Bushell v Faith clause in the documents provided. It is important that candidates distinguish between Board Meetings and General Meetings, rather than referring to 'Meetings' as a generic term.

4(b)

Most candidates correctly identified Wrongful Trading and Disqualification as potential issues on the facts. Some candidates did not go on to answer all aspects of the question, and in particular, did not consider breach of directors' duties and/or ways in which the director in question could mitigate their risk and potential claims such as Unfair Prejudice.

4(c)

A small minority of candidates did not answer this question, or provided a very short and superficial answer, possibly due to mis-managing their time in the assessment. Candidates who performed well in this assessment used the facts to support the advice provided in their answer.

SUGGESTED POINTS FOR RESPONSE**JANUARY 2023****LEVEL 6 UNIT 16 – THE PRACTICE OF COMPANY & PARTNERSHIP LAW**

Question Number	Suggested Points for Responses	Marks (Max)
1(a)	<p>The answer contains advice on the procedure and consequences of termination of an unlimited partnership.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Recognition of the existence of unlimited partnership and identification of governing statute & Partnership Agreement • Procedure for notice to dissolve the partnership under s.32(c) PA 1890 or by application to Court (s.35) • How partnership is wound up under s.38/s.39/s.44 <p>Answer should include:</p> <ul style="list-style-type: none"> • Any partner can give notice to the other partners to dissolve the partnership under s.32 (c) PA 1890 • Partnership will be dissolved from the date of the notice • Any losses must, under s.44, be paid first out of profits, then out of capital and, finally, by partners individually in proportion in which they share profits. • Partners are subject to unlimited liability (s.9) and so could be liable beyond the amount they invested <p>Answer could include:</p> <ul style="list-style-type: none"> • Advice that application to Court to dissolve the Partnership would not be the preferred procedure due to cost/time • Due to the current financial position, there is unlikely to be any residue on the facts to distribute to the partners • Reference to Insolvent Partnership Order 1994 / Partnership Voluntary Arrangement 	15
1(b)	<p>The answer contains advice on expulsion of a partner and continuation of an unlimited partnership.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Discussion of Bree’s actions constituting a breach of duty and obligation to account for any profit • Procedure for expulsion of Bree, bringing in a new partner and associated liabilities <p>Answer should include:</p> <ul style="list-style-type: none"> • Bree working for competing business is a breach of fiduciary duties / s.30 PA 1890 • Bree must account to the firm for private profits / s.29, s.30 	8



	<ul style="list-style-type: none"> Partnership Agreement expressly provides that majority of partners can expel New partner can be brought in if all partners agree / s.24(7) <p>Answer could include:</p> <ul style="list-style-type: none"> Reference to clause 4 of the Partnership Agreement Recognition that as two partners will remain if Bree is expelled, the partnership can continue Discussion of liabilities under s.17 PA 1890 Discussion of whether Bree's lack of work for the Partnership constitutes a breach of duty 	
Question 1 total:25 marks		
2(a)	<p>The answer consists of advice on advantages of running the business as a partnership or a company, including tax.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> Partnership Company <p>Answer should include:</p> <ul style="list-style-type: none"> Recognition of different types of partnerships and companies Reasoned explanation as to why unlimited partnership or LLP are suitable options on the facts e.g. unlimited partnership has limited disclosure, is informal. LLP has limited liability Reasoned explanation as to why private limited company is suitable on the facts e.g. quick and easy to set up, less regulated than public companies Limited liability / corporate veil / Salomon Taxation of partnership - partnerships are tax transparent / partners pay income tax on profit at prevailing rates Taxation of companies - Companies are liable for corporation tax on income profits and chargeable gains at prevailing rates <p>Answer could include:</p> <ul style="list-style-type: none"> Explanation as to why Limited Partnerships, public companies and companies limited by guarantee are not suitable on the facts Partners pay CGT on share of any capital assets Shareholders pay income tax on dividends received 	15
2(b)	<p>This answer consists of advice on the process of obtaining a shelf company, types of amendments and documents needed and who is responsible for filings.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> Explanation of what a shelf company is, advantages of using one and recognition that amendments are needed before it is used by the clients Analysis of the amendments needed 	15

	<ul style="list-style-type: none"> • Director responsible for filings and updating statutory registers, including details of forms and registers <p>Answer should include:</p> <ul style="list-style-type: none"> • Certificate of Incorporation has already been issued / company already exists • Appointment of Darius and Eamonn as directors (MA 17) followed by resignation of existing directors (Dubuisson and Singh) • Transfer of subscriber shares (from Dubuisson and Singh to Darius and Eamonn) • Board Resolution to change registered office • Change of name from Shelf Co X0737299 Limited to UV Fabric & Clothing Limited by Special Resolution - needs GM or WR • Director to submit filings at Companies House and update registers: <ul style="list-style-type: none"> ○ SR for change of name / Form NM01 ○ AD01 change of registered office (to The Grange, Ickleford, Herts) ○ TM01 resignation ○ AP01 appointment ○ Update relevant company registers e.g. Members / Directors <p>Answer could include:</p> <ul style="list-style-type: none"> • SR requires not less than 75% of shareholders to approve • As this is a private company limited by shares, Company Secretary is not required • Share capital held equally so shareholder decisions will need to be unanimous • Darius and Eamonn want to have an equal say in running the business, but there is no need to amend articles as casting vote (MA 13) has already been removed from the Model Articles. • PSC register 	
Question 2 total:30 marks		
3(a)	<p>The answer consists of advice on advantages and disadvantages of debt and equity financing and relevant law and procedure for entering into such transactions.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Advantages and disadvantages for the Company of issue of ordinary and preference shares and secured loan • Procedure for the issue of ordinary and preference shares • Procedure for the approval of loan and grant of security <p>Answer should include:</p> <ul style="list-style-type: none"> • Identification of key advantages and disadvantages – credit any valid points e.g. loan must be repaid irrespective of performance but share capital does not have to be; Dividends 	15

	<p>on shares are only paid if there is profit to distribute but loan bears interest; Payment of interest on loan is tax deductible but dividends are not; Issue of shares means that shareholders will have a say in how Company is run whereas Bank is less involved</p> <ul style="list-style-type: none"> • OR to allot shares, SR to disapply pre-emption rights • GM /WR required • Board Resolutions required to approve loan and grant of security • Discussion of post meeting matters such as filings at CH / updating of registers <p>Answer could include:</p> <ul style="list-style-type: none"> • Creation of preference shares – likely as amendment to Articles by SR • Filing requirements for allotment and security <ul style="list-style-type: none"> ○ SH01 within 1 month ○ Amended Articles (new class rights) ○ Update Register of Members and Charges ○ Form MR01, fee and security document to CH within 21 days of the date of creation of charge ○ HMLR registration of security over the building 	
3(b)	<p>The answer consists of advice on the purpose of security and the nature of fixed and floating charges.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Explanation of the concept of fixed and floating charges including reference to relevant case law • Explanation of the purpose of security • Type of assets subject to fixed and floating charges, in the context of the facts provided <p>Answer should include:</p> <ul style="list-style-type: none"> • Explanation of the concept of fixed and floating charges • Reference to the concept of risk to the Lender of non-payment/default on the loan and the Lender’s right to sell assets to satisfy the debt • This Company owns a building and vehicle (likely to be subject to a fixed charge) and stock (likely to be subject to a floating charge) <p>Answer could include:</p> <ul style="list-style-type: none"> • Discussion of relevant case law • Explanation of crystallisation of a floating charge 	7
Question 3 total:22 marks		

<p>4(a)</p>	<p>The answer consists of advice on the procedure for removal of a director.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • OR is required at a GM • Special Notice and the right to object at the GM • Impact of Bushell v Faith clause <p>Answer should include:</p> <ul style="list-style-type: none"> • OR required under s.168 to remove a director • Requirement for Special Notice (s.168(2)) and right to object (s.169) • Reference to the Bushell v Faith / weighted voting rights contained in the amended Model Articles <p>Answer could include:</p> <ul style="list-style-type: none"> • This OR cannot be passed via WR (s.288(2)) • Weighted voting rights will entrench Zara’s position and allow her to block removal as a director • Any claim Zara might be able to bring for wrongful dismissal, if she has a service contract as a director (s.168(5)). 	<p>6</p>
<p>4(b)</p>	<p>The answer consists of advice on duties and risks that the directors are subject to if they continue to trade when the company is in financial difficulties.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Risk of Wrongful Trading / Disqualification • Breach of directors’ duties • How Zara may be able to mitigate her risk • Potential claims by Zara – for Unfair Prejudice / Derivative Claim <p>Answer should include:</p> <ul style="list-style-type: none"> • Continuing to trade whilst in financial difficulty risks Wrongful Trading (s.214 IA 1986) / disqualification (CDDA 1986) • Discussion of directors’ statutory duties (e.g. s.174) and who they are owed to • Identifying ways to mitigate risk e.g. ‘every step’ defence / minuting her concerns at Board Meetings / obtaining advice from Insolvency Practitioner • Breach of duty / exclusion from Board Meeting may give rise to claims of Unfair Prejudice (s.994) by Zara in her capacity as a shareholder / or a Derivative Claim (s.260) on behalf of the Company <p>Answer could include:</p> <ul style="list-style-type: none"> • Zara is an accountant and would be held to a higher standard under s.174(2b) • Potential remedy for unfair prejudice could be an order for the Company to purchase Zara’s shares (s.996) 	<p>12</p>

<p>4(c)</p>	<p>The answer consists of advice on possible rescue procedures.</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Discussion of why Administration or CVA may be helpful • Reasoned conclusion with application to the facts provided <p>Answer should include:</p> <ul style="list-style-type: none"> • Basic explanation of Administration e.g. involves appointment of Insolvency Practitioner who has wide powers to manage and control the business with the aim of rescuing it if possible. Moratorium is put in place. Company can be put into Administration using Court or Out-of-Court procedure. • Basic explanation of CVA e.g. allows the Company to settle debts by only paying a proportion of the debt owed / come to some other arrangement about repayment. Must be approved by creditors. Managed by a CVA Supervisor. <p>Answer could include:</p> <ul style="list-style-type: none"> • Discussion of CIGA Moratorium 	<p>7</p>
<p>Question 4 total:25 marks</p>		