

**CHIEF EXAMINER COMMENTS WITH
SUGGESTED ANSWERS**

JANUARY 2021

**LEVEL 6 - UNIT 16 – THE PRACTICE OF COMPANY AND PARTNERSHIP
LAW**

Note to Candidates and Learning Centre Tutors:

The purpose of the suggested answers 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 2021 examinations. The suggested answers set out a response that a good (merit/distinction) candidate would have provided. The suggested answers do not for all questions set out all the points which candidates may have included in their responses to the questions. Candidates will have received credit, where applicable, for other points not addressed by the suggested answers.

Candidates and learning centre tutors should review the suggested answers in conjunction with the question papers and the Chief Examiners' comments contained within this report, which provide feedback on candidate performance in the examination.

The paper held up to the rigour of the assessment, and those candidates who took time to consider the case study materials prior to the assessment and sought to apply their knowledge to the facts performed and were accordingly rewarded well. In fact, the preparation of the majority of students was reflected in their performance in the first question where those that prepared and knew the documents, performed well. It is worth noting that the paper and approach taken is in line with the previous sitting.

Overall, the performance was much improved on this paper compared to previous sittings. This suggests that the paper was pitched at a level which was capable of being completed within the allocated time. All four questions performed similarly well in terms of Mean percentage. Questions 1 and 2 performed well with a higher pass rate compared to other questions, but this is suggestive only of those topic areas being well revised by candidates. Whilst the Pass and Merit grades were up substantially compared to previous papers, Distinctions were not; this suggests that the paper supports a strong performance of the average, fairly-well prepared candidate – rather than the paper being pitched at an inappropriate standard.

It is worth noting that, given the pandemic, it is likely that candidates had more time to prepare than would possibly have been the case.

Some questions did need careful reading, for example question 4(a) was focussed on share allotment, not substantial property transaction as some candidates thought and therefore lost marks. Additionally, the answers in a

number of instances, failing to address all aspects to fully cover the question also worked against too many candidates.

As in the past, in some instances, and has been noted in the past, a number of candidates appeared to be using the incorrect version of the Model Articles and were using Schedule 3 Model Articles for Public Companies rather than Schedule 1 Model Articles for Private Companies. This may have just been an issue of examination conditions and turning to the incorrect page, but candidates must however be alert to use the correct resources come the examination.

CHIEF EXAMINER COMMENTS

This paper is a Level 6 paper and was appropriately demanding. Congratulations to those candidates that have passed this Unit.

Overall, those candidates that performed well reflected their abilities to apply their understanding to the facts and thereby produce good solid answers deserving of a higher mark. The majority of candidates had taken little time to consider the documents provided in the case study materials and thereby sought to use the facts imparted and apply the documents as they progressed through the paper.

General performance:

Much of what is set out below in this section has been stated before, but it still needs to be stated – particularly in response to requests for feedback.

Unsuccessful candidates need to be able to relate to their own performance to what was being required of them and to be able adapt their approach to this topic, revision and the assessment so that they are able to be successful in the future. Candidates are strongly encouraged not to just focus on the answer, but their overall approach.

It is worth a general observation that the performance by candidates was generally reflected by those who had fully and carefully prepared and reviewed the case study materials, were prepared to answer any change in the facts presented – as in previous papers, this paper relied on a good understanding of a set of facts set out in the Case Study Materials. As per previous papers, the application of the mechanics of the document together with statute was key. There is always a marked differentiation in that such well performing candidates applied themselves according to their ability to tackling the questions. They used their knowledge to provide sound advice taking into account the facts supplied, as required by the questions. Those candidates that sought only to demonstrate knowledge of reading and imparting all that was known on a subject did not score as well; likewise, those that only gave cursory coverage to the question did not perform well.

General Advice:

In terms of approach and technique for examinations at this level, candidates must bear in mind that the intention is for the candidate to be able to apply

his/her understanding of the practice of partnership and company law such they are able to advise clients in a practical manner. In order to achieve this, candidates must resist the urge to write all that they know about a subject, which in this paper was all too often a problem; understandably there is a natural desire to demonstrate all that the candidate has read and knows. However, that approach will not work at this level. As has been stated before, application to the facts when answering questions is extremely important and often carries marks that candidates who only impart knowledge do not give themselves the opportunity to be awarded.

Additionally, as before, candidates whilst revising should not then be doing so in such a manner that they are rehearsing pre-prepared questions and answers. Less so in this paper than before, there remained instances where pre-prepared answers appeared to be relied upon with little consideration to the need to remain flexible and to be able to answer the questions as posed, rather than as desired.

Common weaknesses:

As has been said before, many candidates failed to appreciate that it is important, when tackling problem questions, to answer the question in the context to the issue raised by the question. Often the answers set out the law on a topic in issue without any great reference to the facts of the scenario, and often with no attempt being made to apply the principles that were actually relevant. This would then be followed by only a cursory discussion of the facts of the problem, often with only scant reference to the previous explanation of the law. A proper conclusion can only be demonstrated after careful application of the relevant principles of law to the facts of the scenario, and that demonstration is all the better made if the marker is then taken through the issues on a step-by-step basis with each step applied to the facts – candidates are strongly recommended to review the Suggested Answers for further guidance on how they may achieve the intended aims.

Review of Case Study Materials:

Candidates are recommended to consider the manner in which they prepare following the release of the Case Study Materials. Candidates should try not to anticipate the questions following a review of the case study materials; rather analyse the facts to fully understand what is going on and then consider all the issues surrounding those facts, identify issues only and identify where problems may arise, of where there is uncertainty.

It is also worth repeating advice given in the past. Namely that candidates must not, when reviewing the Case Study Materials, make assumptions about the facts or attempt to question spot – what the candidate may consider as a certain in terms of the type and wording of the question will invariably not be the question actually posed. Review the Case Study Materials with an eye to be adaptable and fluid come the examination; remember the facts can be developed further come the examination, this can then alter the assumptions that may have been considered. Those candidates that do question spot invariably come to the examination with a pre-rehearsed answer which will not fit the question posed or be capable of incorporating additional or changed facts. Candidates should treat the examination as they would meeting a client

for the first time, what you know from a brief telephone call or attendance note could change immediately when the client walks in the room.

15 Minutes Reading:

Candidates should also make appropriate use of the 15 minute reading time at the start of the examination. It is during this period that the candidate can read through the additional information provided in the examination paper, and how this relates to and moves on the pre-released Case Study Materials. Candidates should pay particular attention to the wording or facts of the questions and discuss the relevant law, connecting their arguments to the actual issues raised by the questions. The candidate should always bear in mind that when tackling questions the candidate must be able to demonstrate why the law he/she is writing about is relevant to the question, i.e. make sure that as you identify the relevant fact that demonstrates why it is so. It is the latter aspect that some candidates fail to do. Accordingly, it may be useful during this period to make notes on the key points of the law to be used and applied and the key facts to employ in giving a fully reasoned and considered piece of advice.

Examination technique:

When tackling the questions posed in the examination, it is important to keep in mind the IRAC approach to answering questions - Issue, Rule, Application, and Conclusion. This approach will help you structure your answers, and as you do you will be demonstrating to the examiners how you have reached your conclusions by leading them through your thought process and step-by-step analysis:

(1) *Issue*: read the questions carefully and identify that which is relevant from the facts, state exactly what the question of law is;

(2) *Rule*: identify and cite the applicable cases, statutory provisions or procedures that will help you make a correct legal analysis of the issue at hand - briefly, explain their requirements, identifying any key tests that must be applied;

(3) *Application (or Analysis)*: this is the most important section of an IRAC because it develops the answer to the issue at hand. It requires you to apply the applicable statutory law or procedures identified to the facts - this is the provision of the advice. It is important in this section to apply the rules to the facts of the case and explain or argue why a particular rule applies or does not apply in the case presented; and finally;

(4) *Conclusion*: by summarising what you have set out above and for problem questions whether the client can or cannot achieve their intended aims, or in the case of an essay question whether you agree or not with the statement you have been set to discuss. It is important that your conclusion does not introduce any new rules or analysis; restates the issue and provides the final answer.

Statute book:

Although previously stated, candidates are reminded that they are able to take with them into the examination room the prescribed statute book, a valuable resource if used correctly - if used correctly when studying, during revision and then in the examination itself, a source to rely upon for all answers. Candidates should seek to use the statute book as a means by which to support their answers, in that the statute book will provide the necessary statute references, the correct terminology, clarification of the necessary

procedure that is being applied and the resource to look through to identify additional points for inclusion.

Candidates must learn how to use this resource effectively in the exam room, and this starts with revision – when revising a topic, locate and identify the corresponding statutory provisions, read and understand the manner in which they operate. The effective use of statute in the exam will only see to embellish answers and candidate performance. Care should be taken to identify and use the correct Model Articles – in too many assessments has the wrong version been used by candidates.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1

This question looked at the liability for an order placed by a partner, who operated outside her remit but was part of a partnership agreement which had been put in place. This required not only elements of the partnership agreement to be applied but also, and importantly, an in-depth analysis of the provisions of the Partnership Act 1890. Those that did look to establish via this route did well. However, one aspect that was done less well was a further analysis of whether a retired partner was still liable under the Act.

The second part of the question looked at any potential claim that could be made against a partner for the use of partnership assets for her own purpose and for not focussing sufficient time on the partnership. Generally, the issues were identified, however more was required to identify what is partnership property and to ensure that first if a partner uses partnership property without permission from the other partners, then that partner must account for any profits as a result. Likewise, that if there is no provision dealing with work input and competing with the partnership, the implied position under the PA 1890 and common-law apply. It may not necessarily be possible to stop the individual involvement in her own enterprise as there is no obligation on a partner to spend time on the partnership business.

For the full requirements, candidates are referred to the suggested answers.

Question 2

This question looked at issues relating to directors:

- Appointment – generally when done well, candidates scored well. However careful reading of the question still needed to be considered as, whilst it was not asked, candidates did discuss the award of service contracts.
- Removal of a director – generally, candidates lost marks by not fully covering the procedure under ss168-169 and 312. Likewise, all too often potential steps to prevent removal were discussed on the basis of those steps one would consider when being appointed, rather than at the time of removal. Accordingly, s994 CA 2006 and s122(1)(g) IA 1986 were frequently missed.
- Compensation – this was covered with mixed results, with the lack of detail being an issue for most candidates.
- Disqualification – this was generally done well.

For the full requirements and further guidance, candidates are referred to the suggested answers. The means by which the answer is demonstrably applied to the facts should also be noted.

Question 3

The first part of the question looked at the tax consequences arising for the individual director in terms of a salary and dividend payment and the company from making such a dividend payment – although a number of candidates applied the incorrect law on the tax rates, the question was generally answered well. In relation to the transfer of shares as a gift, candidates are reminded that both CGT and IHT are applicable; those candidates that did identify both then proceeded to apply this well.

The final part of this question looked at the consequences for the directors in the event that the company is unable to pay its debts. This required consideration of the onset of insolvency under s122-123 Insolvency Act 1986, and then wrongful trading. Whilst most candidates were able to identify these issues, the discussion as it applied in these circumstances was not necessarily well done. More particularly, this discussion required the need to identify and apply the various tests and liability arising for the debts of the company to two directors that had been relatively absent from the running of the company.

Candidates are referred to the Suggested Answers for further guidance.

Question 4

The first part of this question required the candidates to advise the company on the steps it would be required to undertake in order to allot ordinary shares (not looking at the substantial property transaction that could arise from the facts, but not posed by the question). In relation to the issue of shares, most candidates covered the basic requirements for the allotment of shares well, although generally application and the use of statute was lacking – however, in this instance it was s550 that applied (the Company was a one class share company; s551 did not apply nor the need to seek members resolutions). Whilst most candidates identified that requirements under the right of pre-emption (and the means by which this could be either disapplied or waived – most did not identify that it applied as it was for non-cash assets) this was only covered in a cursory manner; the detail and application was lacking by most candidates and the answers were then in general terms relating to the allotment of shares – too many candidates only sought to outline the procedure with little reference to the particular circumstances in hand.

When addressing the procedural requirements, only a few candidates covered this well, and only a few identified the need to credit the share account in respect of that sum representing the nominal value of the shares.

The second part of this question was not, as many thought, a loan to a director, but rather whether the company had capacity to enter into the loan. Only a few candidates answered this question well.

Candidates are referred to the Suggested Answers for further guidance; the means by which the answer is demonstrably applied to the facts should also be noted.

SUGGESTED ANSWERS

LEVEL 6 - UNIT 16 – THE PRACTICE OF COMPANY AND PARTNERSHIP LAW

Question 1(a)

The first issue to address is whether the partnership, PSA, is bound by the order. It will be bound if Francesca herself had authority to bind the partnership in making this order (s6 Partnership Act 1890). First, does Francesca have express authority? Clearly, she does not, for based on the facts there is a limitation in the partnership deed of £1,000 Francesca has exceeded this by ordering the coffee for £7,500 (plus VAT) without authority from the other partners (normally at the weekly meeting).

However, could Francesca have implied (or 'usual') authority? The scope of such authority is determined, for partners, by s5 Partnership Act 1890? This requires the application of the following test:

1) Is the act related to business of the kind carried on by the firm?

Objective test: Probably yes - the purchase of products (i.e. coffee) is arguably connected to the business of a café, bakers and cake shop.

2) Would Francesca usually be expected to have authority?

Objective test: A partner is usually expected to have authority to buy goods related to the partnership. However, the issues that arise here are the value of £7,500, and that the coffee was delivered to Richard Fairlie's home rather than the Percival Street Artisans Café (PSA').

3) Does Escobar know or believe Francesca to be a partner?

Subjective test: There is no reason for Escobar to question this, Francesca's name appears on the headed notepaper used to place the order as a partner.

4) Does Escobar know or believe Francesca to have no authority?

Escobar cannot rely on Francesca having implied authority if it actually knows she does not have such authority. This point is also reinforced by section 8 PA 1890. This is a subjective test: Again, there is no reason, on the facts, for Escobar to think that Francesca does not have authority. The letter confirms that the order is being placed by the Café. However, it is possible that Escobar might question the order/be suspicious as the coffee is being delivered to a different address.

It is therefore likely that the partnership will be bound by the order placed by Francesca with Escobar.

In terms of liability for the order, Francesca is bound under privity of contract. All the current partners, Bradley, Francesca and Jess will be bound jointly under s9 Partnership Act 1890.

In addition, Escobar might also be able to bring an action against Rhodri Jones despite the fact that had ceased to be a partner by the time the order was

placed. s14 Partnership Act 1890 will continue to apply on the basis of holding out if (1) Escobar gives credit (i.e. the order is made on credit) and (2) the third-party relies on the representation that a person is a partner and (3) the partner is knowingly held out. In this instance Rhodri's name appears on the headed notepaper, and it will depend on whether Rhodri requested his name to be removed from the notepaper.

1(b)

The use of equipment is likely to be partnership property, as these are items, which were probably bought using partnership money (s21 Partnership Act 1890).

Under s20 Partnership Act 1890, partnership property must be used exclusively for PSA. Therefore, the partnership can in theory ask for this to be returned or reimbursed. However, it is not possible to return that has been used. Therefore, Francesca should be asked to compensate PSA.

s29 Partnership Act 1890 states that if a partner uses partnership property without permission from the other partners, then that partner must account for any profits as a result. On the facts, it appears that the partners have not given consent for Francesca to use these items, therefore, Francesca must account for any profits from the coffee business as a result of using these items.

As there is no provision in the partnership deed dealing with work input and competing with PSA, the implied position under the Partnership Act 1890 and common-law apply. It is not possible to stop Francesca's involvement in Centenary Coffee as there is no obligation on a partner to spend time on the partnership business.

Under s30 Partnership Act 1890, partners must account for profits if they carry out without consent of the other partners a business of the same nature and in competition with the firm. On the facts, it appears that the other partners have not given consent. Whether Centenary Coffee competes depends on whether the business is of the same nature and is marketed at the same clients. Whilst not a cafe, it is still possibly competing with the supply of coffee.

Section 29 Partnership Act 1890 may also apply in that handing out flyers in the cafe without permission could amount to using PSA's premises, and therefore Francesca will also have to account for profit from the coffee supply.

Question 2(a)

Francesca Cozens may be appointed a director of Centenary Coffee Limited ('the Company') either by the directors in a Board Meeting or by members in a General Meeting by Ordinary Resolution in accordance with Article 17(1) Model Articles.

To appoint by General Meeting, directors will need to call a GM on 14 clear days' notice or short notice (s307 CA 2006 and Article 48 Model Articles). Alternatively, the Company could use the written resolution procedure under s288-300 CA 2006.

However, Francesca is also to be awarded a director's service contract of three years. As this is for a fixed term exceeding two years, the term must be

approved by an ordinary resolution of the company (s188 CA 2006). A copy of the proposed agreement or a memorandum of its terms, including the term which requires members' approval, must be available for inspection by the members of the company at the company's registered office for not less than 15 days (s188(5) CA 2006). Alternatively, if a written resolution is used the memorandum should be attached to it. If such a term is granted before the members' approval is obtained, it is void and the agreement terminable at any time by the company on giving reasonable notice (s188(5) CA 2006).

Accordingly, as an ordinary resolution is required, the appointment and approval of the contract should be deferred to a General Meeting of the company. Francesca need not declare her interest in the grant of her service contract by virtue of s177(6)(c) CA 2006 but should be advised to do so as a matter of good practice. Francesca may not however vote or be counted in the quorum at the board meeting called to approve her service contract (Article 14 Model Articles).

Administration: a number of documents will need to be prepared, namely, Board Meeting minutes and resolutions (first to decide on the appointment and the terms of the service agreement, then to hold the required General Meeting to approve the term, and finally a subsequent Board Meeting to authorise the execution of the service contract), Notice of General Meeting and minutes, and the necessary Ordinary Resolution. The proposed agreement or a memorandum of its terms will need to be prepared, and letters noting the declaration of interest on the part of the director, updating of the registers of directors and Form AP01 to be completed and filed with the Registrar.

2(b)

Francesca Cozens may be removed from office by an ordinary resolution of the shareholders notwithstanding any contrary provision in any agreement between her and the company (s168 CA 2006). The proposed service contract will not therefore prevent Francesca's removal as a director before the term of that contract has come to end. However, the right of the company to remove her as a director will be without prejudice to any claim for compensation that Francesca might have if her removal constitutes a breach of her service contract (s168(5)).

Special Notice of any such proposed resolution must be given to the company at least 28 days before the meeting.

Francesca is entitled to protest her removal by speaking at the meeting called to consider the resolution to remove her and to make written representations to the meeting (s169 CA 2006).

She can be protected in the following ways:

- include a Bushell v Faith clause in the Articles to give her enhanced voting rights in the event of a resolution to remove her or to amend or remove the Bushell v Faith clause from the Articles (or the Bushell v Faith clause might also be prevented from amendment or removal by a 'provision for entrenchment', under s22 CA 2006)
- amend Article 18 Model Articles to reduce the circumstances in which a director would be disqualified from holding office

- by a clause in a separate shareholders' agreement which requires parties to that agreement to vote against any resolution to remove her as a director.

The articles of association may be amended by Special Resolution (s21 CA 2006), with a copy filed at Companies House (s30 CA 2006), together with a reprinted copy of the amended articles of association (s34 CA 2006).

Question 3(a)

Tax implications for Francesca in respect of any salary and any dividend received are as follows:

- Remuneration under a service agreement is income subject to income tax and taxable under Income Tax (Earnings and Pensions) Act 2003 (ITEPA). Under the PAYE scheme, tax is deducted at source by the employer, i.e. the company. Francesca's income tax liability will be calculated by taking her income, deducting her personal allowance and then applying the income tax rates. The basic rate is 20 percent and thereafter the balance will be taxed at the higher rate of 40 percent and then at the highest rate of 45 percent.
- Any dividends paid to Francesca will amount to taxable income, taxable under Part 4 IT(TOI)A 2005 and are paid gross, and have the benefit of an annual tax-free allowance. The allowance exempts the first £2,000 of a taxpayer's dividend income, but does not reduce total taxable income. As a result, dividends within the allowance count as taxable income when determining how much of the basic rate band or higher rate band has been used. Dividend income in excess of the tax-free allowance are taxed at the following rates 7.5% (basic rate taxpayers), 32.5% (higher rate taxpayers) or 38.1% (additional rate taxpayers).

The tax implications for Francesca if she gifts her shares are as follows:

- The gift would be a disposal for capital gains purposes. The basic gain is calculated by deducting the original purchase price paid by Francesca and the incidental expenses of acquisition plus the cost of disposal from the market value.
- The gain arising is then subject to capital gains tax at Francesca's basic rate of capital gains tax (for non-residential property) of 10%, rising to 20% should he be deemed a higher or additional rate taxpayer.
- The reliefs that Francesca could claim, in the following order, are: Business Asset Disposal Relief on the basis that the shares were a business asset of Francesca and held for at least 1 year prior to disposal. Francesca will have held more than 5 per cent of the shares and have been an officer and employee of the company, accordingly the gain will be taxed at a rate of 10 per cent.
- Alternatively, provided both Francesca and recipient elect, hold-over relief may be claimed (s165 TCGA 1992). Francesca's shares would have to qualify as business assets. If hold-over is claimed the recipient will be deemed to have acquired the assets at Francesca's original purchase price and Francesca's will not be liable for any tax. If claimed, hold-

over relief may not be claimed in conjunction with any other form of relief.

- The gift may also be subject to Inheritance Tax; treated as a lifetime transfer of value, which means that there would be no immediate Inheritance Tax implications. It would be a potentially exempt transfer (PET) for Inheritance Tax purposes. If Francesca dies within seven years of making the PET the value of the gift will be subject to IHT when the individual dies (subject to tapering). The value of the gift of the share of shares would be established at the time of transfer.
- Francesca can also claim her annual exemption for Capital Gains and Inheritance Tax.

3(b)

A director is not ordinarily liable for contracts entered into by the company. However by virtue of s214 Insolvency Act 1986 the court may hold that any person is liable to make such contribution to the company's assets as the court thinks proper if the company goes into insolvent liquidation; at some time before the commencement of the winding up of the company, that person knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation; and that person was a director of the company at that time.

The criteria against which a director's knowledge and actions are measured are the knowledge possessed and the action that would have been taken by a reasonably diligent person, having both the general knowledge, skill and experience to be expected of a person carrying out the same functions as are carried out by that director in relation to the company, and the general knowledge, skill and experience that that director actually has (s214(4) Insolvency Act 1986).

If the directors continue to trade and in the process increase the liabilities of the company, the company may then become unable to pay its trade creditors, i.e. its debts. A company is deemed to be unable to pay its debts, inter alia, if a creditor for more than £750 has served a statutory demand and remains unpaid for three weeks or if it is proved to the satisfaction of the court that it is unable pay its debts as they fall due (s123 Insolvency Act 1986). In the event that the company is unable to pay its debts, creditors may petition the Court for the compulsory winding up of the company on the ground that it is unable to pay its debts (s122(1)(f) Insolvency Act 1986).

If such circumstances do occur, the directors may be guilty of wrongful trading under s214 Insolvency Act 1986. There is a defence to wrongful trading but only if the director concerned can prove to the satisfaction of the court that after he concluded there was no reasonable prospect of the company avoiding going into insolvent liquidation, he took all reasonable steps to minimise the loss to the company's creditors. If found guilty of wrongful trading the court may, on application of the liquidator, order the delinquent directors to make such contribution to the assets of the company as it thinks proper.

Question 4(a)

The directors of the Company, a private company with only one class of shares, may exercise any power of the company to allot shares (or grant rights

to subscribe for or to convert any security into shares) without any further authority, unless they are prohibited from doing so by the company's articles of association (s550 CA 2006). Shares are of one class for this purpose if the rights attaching to the shares are in all respects uniform (s629 CA 2006). The Company has the model articles for a private company limited by shares, and these do not contain any restriction on the directors' authority to allot shares.

As there are no restrictions in the Company's articles on the power of allotment and there is only one class of share in issue before and after the proposed allotment, it would seem that the Company can rely on the more relaxed regime for private companies contained in s550 CA 2006. The directors will therefore need to pass a board resolution resolving to allot the new ordinary shares which should be recorded in board minutes.

The ordinary shares will have the right of pre-emption attached to them as they will be 'equity securities' for the purposes of s 560 CA 2006. As such they should be offered to existing holders of equity securities first, in proportion to their existing holdings and on the same or more favourable terms (s561 CA 2006). This allows those shareholders to preserve their percentage holding after the issue, provided that they have sufficient funds available to subscribe for the new allotment.

However, where the allotment of equity securities is for a non-cash consideration then the right of pre-emption does not apply (s565 CA 2006). Therefore as the allotment to Richard is in exchange for non-cash assets, the equity securities do not attract the right of pre-emption and may be allotted to Richard without the need to offer to existing holders of equity securities first nor with the need to seek either a waiver of entitlement or disapplication by means of a special resolution.

As a director of the Company, Richard, *prima facie*, will have to declare his interest under s177 CA 2006 in relation to the allotment of shares at the board meeting. However, since the directors can reasonably be assumed to be aware of the other's interest, Richard will be exempt from this requirement under s177(6)(b) CA 2006. Article 14, Model Articles provides that a director may not vote or be counted in the quorum in respect of an arrangement or transaction with the company in which he is interested. This however does not apply where the director's conflict of interest arises, as here, from a proposed subscription for shares.

As this is a private company there will be no need to value the assets being transferred to it.

Administration: a number of documents will need to be prepared, namely, Board Meeting minutes and resolutions (to first decide on the allotment, and to finalise the allotment), a statement of capital, Form SH01, transfer documents for the assets and letters noting the declaration of interest on the part of the directors and updating of the registers of allotments.

4(b)

In order to accept the loan from Andrew Smith, the Company's articles of association should be reviewed to confirm that there are no restrictions on the company's power to borrow money and to give security, and that its directors have the power to approve the loan and to issue a debenture. By virtue of s31 CA 2006, any company has unlimited capacity, save insofar as the company's

articles of association expressly limit its capacity. The Company has the Model Articles of Association for a private company limited by shares. The Model Articles do not contain any such express limitation of the company's capacity. At common law a trading company has an implied power to borrow money. Therefore, the Company will have the power to borrow money and to give security. Moreover, the Model Articles also give the directors a general authority to exercise all the powers of the company which would include the power to borrow without limit and to give security (Model Articles, Article 3).

However, it may be prudent to incorporate into the constitution an express power authorising the directors to exercise the company's power to borrow. It is highly likely that Andrew's advisers (if he has any) will request such an amendment. The articles of association may be amended by special resolution (s21 CA 2006), with a copy filed at Companies House (s30 CA 2006) together with a reprinted copy of the amended articles of association (s26 CA 2006).

Because the loan will be secured by way of a first fixed charge over the freehold of the Stables, searches should still be undertaken of the company's register of charges, at Companies House and at the Land Registry/Land Charges Registry to make sure no prior charges are registered against this property.

Once the charge has been created, it may be registered by delivering a s859D statement of particulars to Companies House (s859A(2) CA 2006), and a certified copy of the instrument creating the charge (s859A(3) CA 2006). It is very likely that Andrew's advisers will want to register the charge using Form MR01 which they should submit to Companies House within 21 days beginning with the day after the day on which the charge was created (s859A(2) and (4) CA 2006), together with the fee.

Registration of the charge is voluntary but failure to register it within the time limit renders the charge void against a liquidator or an administrator of the company, and also against the company's other creditors (s859H(3) CA 2006). For that reason the lender will want to make sure the charge is registered.

The Registrar issues a certificate of registration (s859A(2) and s859I(3) CA 2006), which (under s859I(6) CA 2006) is conclusive evidence that the charge is properly registered. If the charge is going to be over freehold property then it should be registered with the Land Registry if it is registered land.

In the event that the charge was not registered, the Company can make an application to the court for registration out of time under s859M CA 2006. This procedure allows the court, if satisfied the omission to register was accidental, to extend the time for registration. Alternatively, Andrew's advisers may request the Company to grant a new charge and attempt to ensure that this is registered before any third party registers a charge that would take precedence.