

CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

JANUARY 2022

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 2022 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

The strongest papers demonstrated the following:

Careful and thorough reference to the facts.

Accurate and detailed application of the law to the facts.

Detailed and accurate references to the relevant statutory provisions and procedure.

Candidates had clearly absorbed and understood the Case study materials and related them to the additional facts provided with the questions.

The weaker papers generally lacked clarity, detail and poorly applied the law to the facts. There was a lack of grasp of the details of company procedure and clear distinction between shareholders and directors.

The following points may assist candidates to perform better:

Be completely familiar with the facts of the case study and refer to them carefully in the exam, reading the new facts alongside them thoroughly. Use the reading time.

Be sure to read the questions carefully – be clear what they are asking and whom you are advising. In your answers work through each relevant element of for example the appropriate statutory provision(s) methodically to assist with creating a coherent answer.

Give plenty of relevant precise references to statute – thinking about what is applicable to the facts.

Try to avoid a scattergun approach to setting out the legal issues – cover the relevant issues. Write as clearly as possible – this includes precision in terminology and application to the facts.

CANDIDATE PERFORMANCE FOR EACH QUESTION

Question 1

- (a) This question concerned partner liability. The quality of answered varied, but the strong answers methodically worked through the various elements of establishing liability (including through sections 5 and 6 of the Partnership Act for example, as well as the partnership deed). The weaker answers were less precise and lacked coherence.
- (b) Answers to this question, on termination of a partnership vis a vis a particular partner, again varied. Detailed reference was required to both the partnership deed and the Act.

Question 2

- (a) This question required clear advice on the appointment of a director and approval of a service contract. There were many good thorough answers that applied the law well to the facts and gave a detailed procedural plan. As before, careful attention to detail and accuracy was needed.
- (b) Comments are similar to those for 2(a). Candidates should pay careful attention to the number of marks and consider how much detail is required. Also note that here the question had two elements: the procedure for removal of a director as well as the protections available from such removal.

Question 3

- (a) This question required advice on the transfer of partnership assets to a company. A number of scripts achieved high marks, covering the issues, including a substantial property transaction. Quite a few however sadly missed the point or lacked adequate precision. It is unclear whether some candidates had time problems, but when a transaction such as this is concerned, candidates are advised to think carefully about the structure of what is happening and the implications for the parties.
- (b) This part of question 3 related to the possibility of a charge of wrongful trading under the Insolvency Act section 214. Answers on the whole were very good or adequate. This was a question that merited working carefully through each of the required elements of for example section 214.

Question 4

- (a) In relation to the allotment of ordinary and preference shares, candidates needed to identify the permissions required. Careful reference to the requirements of the Companies Act was required, with accurate application to the facts. The stronger scripts took a systematic approach and covered the issues in detail. Poorer scripts were less clear.
- (b) Similar comments apply to this question which required the procedure in relation to allotment. Answers ranged in quality but more contained less detail than was required. This may have been because of timing problems, but this should have been a relatively straightforward identification of allotment formalities building on the answer to 4(a).

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

Question Number	Suggested Points for Responses	Max Marks
1(a)	<p>Responses should include:</p> <ul style="list-style-type: none"> liability arises under the Civil Liability (Contribution) Act 1978 and s9 Partnership Act 1890. The Partnership Act 1890 liability is only joint. The firm, and therefore the partners, liable if incurred by someone acting on behalf of the firm with authority, i.e. Hugo. The limits of the partnership deed (clause 7.1.6) of £10,000 will not be binding on the supplier, unless they have knowledge of the restriction in accordance with s8 PA1890. There is nothing on the facts to suggest this. Is the Partnership bound under s5 PA 1890: <ol style="list-style-type: none"> Is the act related to business of the kind carried on by the firm? Would Hugo usually be expected to have authority? Does supplier know or believe Hugo to be a partner? Does the supplier know or believe Hugo to have no authority? Application: Hugo did not have actual authority, the ability to incur liabilities is capped at £10,000. But all liable if the seller can rely on s5 PA 1890. Given nature of business it is likely that the purchase of cleaning products would be regarded as an act for carrying on in the usual way the business of the Partnership. Therefore the firm is liable. Hugo is also bound under privity of contract. All partners are bound jointly s9 PA 1890. 	15
1(b)	<p>Responses should include:</p> <ul style="list-style-type: none"> Hugo can be expelled provided the right to do so has been expressly agreed between the partners (s25 PA 1890). Clause 20 – as Hugo’s activities to incur a debt over the limit set by the partnership deed of £10,000 (clause 7.1.6) is a serious breach of the terms of the agreement or any duty which has as 	12

	<p>its object or effect the material disadvantage of the partnership (clause 20.1.1).</p> <ul style="list-style-type: none"> • Hugo can only be expelled if two thirds of the other partners vote to expel him (Clause 18.3); i.e. Abigail and Demi to be in agreement. • Expulsion will not terminate the partnership (clause 2.1), but it does permit Hugo's interest to be bought out (clause 21). • Procedure in accordance with the partnership deed: • Hugo must be served with 14 clear days' notice of a partner's expulsion (clause 18.1) together with a statement of the grounds of expulsion to Hugo (clause 18.3) • the meeting itself, must be quorate (clause 18.3) • Hugo must be given opportunity to be heard at meeting (clause 18.3) • two thirds of the other partners must vote for expulsion (clause 18.3) • notice of expulsion must then be given within 3 months of becoming aware of the breach or ground for expulsion (ie three months from when they became aware of the purchase of the supplies at the Convention) (clause 20.1) 	
Question 1 Total:		27 marks

Question Number	Suggested Points for Responses	Max Marks
2(a)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Appointment: <ul style="list-style-type: none"> • either by the directors in accordance with Article 17(1) MA in a BM or GM by OR. • by GM: directors will need to call a GM on 14 clear days' notice or short notice (s307 CA 2006 and Article 48 MA); or written resolution procedure (s288-300 CA 2006). • Service contract term of five years: <ul style="list-style-type: none"> • must be approved by OR (s188 CA 2006). Proposed agreement/memorandum must be available for inspection not less than 15 days before general meeting (s188(5) CA 2006). Or if a written resolution is used the memorandum should be attached to it. • If granted before approval, void and terminable at any time by reasonable notice (s188(5) CA 2006). • Abigail may not however vote or be counted in the quorum at the board meeting called to approve her service contract (Article 14 MA). • Administration: BM minutes and resolutions (to decide on appointment, to hold GM to approve term and subsequent BM to authorise and grant the service contract), Notice of GM and minutes, OR, the proposed agreement/memorandum, declaration of interest, updating registers and Form AP01. <p>Responses could include:</p> <ul style="list-style-type: none"> • As OR is required, the appointment and approval of the term should be by GM. Abigail need not declare her interest in the 	15

	grant of her service contract under s177(6)(c) CA 2006 but should as a matter of good practice.	
2(b)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Removed from office by an OR (s168 CA 2006). • the proposed service contract will not prevent removal, however, the right of the company to remove her will be without prejudice to any claim for compensation (s168(5)) • Special Notice must be given to the company at least 28 days before the meeting. • entitled to protest removal by speaking at the meeting called to consider the resolution to remove and to make written representations to the meeting (s169 CA 2006). • She can be protected in the following ways: <ul style="list-style-type: none"> • Bushell v Faith clause in the Articles to give enhanced voting rights in the event of a resolution to remove her or to amend/remove the clause, • amend Article 18 MA to reduce the circumstances in which a director would be disqualified from holding office, • The articles of association may be amended by SR (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). <p>Responses could include: separate shareholders' agreement which requires parties to that agreement to vote against any resolution to remove her as a director.</p>	8
Question 2 Total:		23 marks

Question Number	Suggested Points for Responses	Max Marks
3(a)	<p>Responses should include:</p> <ul style="list-style-type: none"> • This is a substantial property transaction. Abigail will be a director prior to the transfer of the business of the partnership by her (and her fellow partners) to the company. • s190 CA 2006: a company may not acquire from a director and a director may not acquire from the company, a substantial non-cash asset unless the arrangement is either first approved or made conditional upon being approved by a members' ordinary resolution. • In this instance: <ul style="list-style-type: none"> • the Company is to acquire from one of its directors various non-cash assets (equipment and vehicles). A 'non-cash' asset is any property or interest in property other than cash (s1163 CA 2006). • s191 CA 2006: a non-cash asset is "substantial" in relation to the company if its value exceeds 10% of the company's net asset value and is more than £5000 or its value exceeds £100,000. The Company is yet to trade (and the investment from PNY Investments is yet to be made). At most, it will only have issued the two subscriber shares. The net assets of the Company are 	17

	<p>effectively nil. The transfer of the partnership business will therefore be substantial in value.</p> <ul style="list-style-type: none"> • The acquisition requires the approval of members by OR. If not obtained the transaction will be voidable at the instance of the company. Directors who authorise the transaction without such approval are liable to indemnify the company for any loss or damage which results. • Abigail will be interested in the transaction this will require a disclosure of interest under s177 Companies Act 2006 unless all the other directors are already aware of her interest (s177(6)(b) CA 2006). Abigail will not be permitted to vote at the directors' meeting at which this matter is considered nor will she count in the quorum (Article 14 MA). <p>Responses could include:</p> <ul style="list-style-type: none"> • As the Company will have four directors, three of whom will be interested in the transaction therefore quorum will not be achieved. Quorum for a directors' meeting is two under Article 11 MA. Without a quorum business cannot be validly conducted at board meetings. • The solution is therefore to seek an OR under Article 14(3) MA to disapply the articles (either generally or for the single transaction) and so allow the directors to vote on the transaction at directors' meeting despite the fact that they are interested. 	
3(b)	<p>Responses should include:</p> <ul style="list-style-type: none"> • A director is not ordinarily liable for contracts entered into by the company. • But s214 IA 1986 liable to make such contribution to the company's assets if company goes into insolvent liquidation; • Test: before winding up, knew or ought to have concluded that there was no reasonable prospect of avoiding into insolvent liquidation; and director that time; knowledge measured against a reasonably diligent person (s214(4) IA 1986). • Potential for wrongful trading (s214 IA 1986). • If guilty of wrongful trading maybe ordered to contribution to the assets of the company as it thinks proper. <p>Responses could include:</p> <ul style="list-style-type: none"> • If unable to pay debts, creditors may petition for the compulsory winding up (s122(1)(f) IA1986), owes £750 and served with a statutory demand which is unpaid for 3 weeks or it is unable pay its debts as they fall due (s123 IA 1986). 	10
Question 3 Total:		27 marks

Question Number	Suggested Points for Responses	Max Marks
4(a)	<p>Responses should include:</p> <p>Allotment of Share Capital:</p> <ul style="list-style-type: none"> • directors must be authorised to allot (s549-551 CA 2006) <ul style="list-style-type: none"> ○ No explicit authority to allot shares, nor do preference shares exist (newly incorporated shelf company) ○ as proposal includes the allotment of preference shares, need be authorised under s551 CA 2006 ○ rights to the preference shares need to be included in the articles, SR (s21 CA 2006) ○ or directors authorised by authority in articles or OR (s551 CA 2006), may be for particular exercise or generally; must state maximum number and date it will expire (s551 CA 2006) ○ s551(5) CA 2006, states maximum amount of shares that may be allotted under that authority (2,500,000 ordinary and 1,000,000 preference shares of £1 each). • directors need to pass a board resolution allotting the new ordinary shares • Pre-emption rights: s561 CA 2006, where a company is proposing to allot the ordinary shares (“equity securities”) for cash • existing members should be offered the new ordinary shares first in proportion to their existing holdings, i.e. Abigal, Demi and Hugo. • a private company with only one class of shares, statutory pre-emption rights may be dis-applied by articles or by special resolution (s570 CA 2006). • need to dis-apply pre-emption rights by SR, or waive their pre-emption rights. • The preference shares will not be ‘equity securities’ and therefore not subject to rights of pre-emption for the existing members. 	11
4(b)	<p>Responses should include:</p> <ul style="list-style-type: none"> • GM to create preference shares by amending the articles, and authorise allotment, the meeting closes. BM re-convene and will then receive and resolve to allot new shares following receipt of the application from 3PPP at the agreed price. • Directors: declare interest under s177 CA 2006 at BM. • As all directors can reasonably be assumed to be aware of the other’s interest, exempt under s177(6)(b) CA 2006. • Article 14, does not apply where the director’s conflict of interest arises from a proposed subscription for shares. • Administration: the directors will then need to resolve to allot the shares and affix the company’s seal to the share certificates, update the register of allotments and members and prepare minutes of the board meeting and members meeting. The registers of members be updated (s113 CA 2006). A statement of capital and notices of new class of members (s638 CA 2006) will need to be sent to the Registrar together with the s21 and s551 resolutions, amended articles of association and Form SH01 of the allotment of shares for non-cash consideration. 	12

	<p>Responses could include:</p> <ul style="list-style-type: none">• Alternatively, could use the written resolution procedure under s288-300 CA 2006.• The sum representing the nominal value of the preference shares, £1,000,000, and the ordinary shares, £2,500,000 will be credited to the Called up share account.	
Question 4 Total:		23 marks