

CHIEF EXAMINER COMMENTS WITH SUGGESTED POINTS FOR RESPONSES

JANUARY 2022

LEVEL 6 - UNIT 1 – 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

In the good scripts, candidates provided plenty of detail, accurate reference to statute and case law, and had carefully and correctly answered the question. There were some excellent answers, showing a good appreciation of the subject with a practical and professional element. Where comparison was required of principles or elements such as charges, strong answers compared in detail, rather than merely setting out everything known about the particular topic.

With the less good answers, candidates failed to include case law and sufficient and/or accurate reference to statute. In addition, candidates did not adequately take note of what the question was actually asking, and, for the Part B questions, failed to apply the law to the relevant facts. Answers tended to lack detail as well.

These candidates tend to focus too much on what they see to be the topic and regurgitate what they have learned rather than giving careful consideration to what the question was asking, or the facts were presenting.

All candidates need to be as accurate as possible especially with statutory and case law references, as well as ensuring they refer to correct terms and are detailed in their references to the facts in the Part B questions.

There were no recurring errors, but candidates are encouraged to read statutory provisions before applying them to ensure accuracy.

Overall, my advice continues to be to read the question carefully and ensure all elements are addressed, with application of the facts for Part B questions. For both Parts, detailed and accurate references to and application of relevant statute and case law are essential. Read statutory provisions fully to ensure correct understanding.

CANDIDATE PERFORMANCE FOR EACH QUESTION

PART A

Question 1

Answers ranged in quality. In (a) some analysed the role of the promoter well with good reference to case law and statute. Many answers were superficial with little reference to authorities. Overall answers were adequate.

Answers to (b) were on the whole fine, with candidates setting out the key points.

Question 2

Candidates generally performed better in this question, as it is fairly standard. However, those who performed well noted what the question was asking rather than merely reciting all they knew about the topic. There were some good comparative elements.

Question 3

This should have been a straightforward question but answers to both (a) and (b) were generally poor. They lacked detail and focus on what the question was asking. It is possible there were timing issues as candidates left this question until last.

Question 4

Answers were mixed, but there were numerous good ones with careful references to the authorities and consideration of the actual question. Again, this was quite a straightforward (and regular) question.

PART B

Question 1

This question should have been quite straightforward, but it generated lower marks than expected. Many candidates were distracted by discussing the existence of a partnership when this was clear from the facts, and they did not adequately analyse the facts and the law. (b) and (c) were better answered but they only carried 11 marks between them.

Question 2:

Surprisingly few candidates answered this question, some of whom possibly suffered from timing issues.

Question 3

This was poorly answered. There were issues of both understanding (or lack of it) and timing.

Question 4:

There were some good answers with attention to detail and application.

SUGGESTED POINTS FOR RESPONSE

LEVEL 6 - UNIT 1 – COMPANY & PARTNERSHIP LAW

Question Number	Suggested Points for Responses	Max Marks
1(a)	<p>Responses should include:</p> <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, including a duty not to make a secret profit • Fiduciary duty of the promoter and protection in case of breach (eg disclosure to prospective members (<u>Erlanger v New Sombrero</u>).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 to include <ul style="list-style-type: none"> ○ Contract with the company post-incorporation with indemnity ○ Contract of novation ○ Conditional contract with the third party ○ Use of shelf company <p>Responses could include:</p> <ul style="list-style-type: none"> • 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 	16
1(b)	<p>Responses should include:</p> <ul style="list-style-type: none"> • That company name should not be the same as an existing company’s name (section 66 CA 2006) 	9

	<ul style="list-style-type: none"> • 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 <p>Responses could include:</p> <ul style="list-style-type: none"> • Power of individual or company to seek injunction to restrain use of a name • Relevant case law • Possible change of name by special resolution 	
Question 1 Total:		25 marks

Question Number	Suggested Points for Responses	Max Marks
2	<p>The answer consists of an evaluation of the respective benefits of fixed and floating charges for a company and its creditors</p> <p>Marks should be distributed in the following areas:</p> <ul style="list-style-type: none"> • Respective characteristics of fixed and floating charges, including relevant statute and case law (max 7 marks) • Fixed and floating charges - benefits for creditors (max 8 marks) • Fixed and floating charges - benefits for companies (max 8 marks) • Short conclusion (max 2 marks) <p>Responses should include:</p> <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: <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 • discussion of the case law on creation of charges over book debts: <u>Re Spectrum Plus Ltd</u> (2005), (and Siebe Gorman and Re New Bullas), and issues of degree of control • the respective priorities of the charges on a winding up, 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 • the benefits of registration within the specified time limit (21 days of the creation of the charge: s859A(4) CA 2006); otherwise charge is void against an administrator or liquidator or any creditor of the company • section 245 Insolvency Act 1986 (IA 1986) – potential for invalidity (at the point of a company's insolvency) of a floating charge where it is taken over an existing debt 	25

	<p>Responses could include:</p> <ul style="list-style-type: none"> • administrators' rights: eg rights to take control over the company's undertaking to protect the interests of the charge holder. • Priority of any later properly registered legal charge over the floating charge. • Discussion of a 'negative pledge' pledge clause and its effect: where the charge holder has actual notice of the earlier floating charge and the relevant negative pledge. • HMLR registration requirements and effect on priorities to increase the chance of 'ordinary' unsecured creditors receiving something from the company, the Enterprise Act 2002 requires that a proportion of assets secured by a floating charge must (subject to various exceptions) be set aside to pay off unsecured creditors. The proportion of the assets which must be used in this way varies according to the amount of the company's 'net property'. 	
Question 2 Total:		25 marks

Question Number	Suggested Points for Responses	Max Marks
3(a)	<p>Responses should include:</p> <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 <p>Responses could include:</p> <ul style="list-style-type: none"> • 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 	8
3(b)	<p>Responses should include:</p> <ul style="list-style-type: none"> • 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 	17

	<ul style="list-style-type: none"> • 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) <p>Responses could include:</p> <ul style="list-style-type: none"> • 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 	
Question 3 Total:		25 marks

Question Number	Suggested Points for Responses	Max Marks
4	<p>Responses should include:</p> <ul style="list-style-type: none"> • Both concerned with protection of shareholders from for example wrong-doings of directors • Part 11 derivative claims brought by members of behalf of the company (s260 CA 2006 for example). • Narrower than 994 in terms of grounds: act or omission involving negligence, default, breach of duty, or breach of trust by director. • Court must give permission to continue action; s263 gives factors for granting permission: there are 3 mandatory bars to permission. • Breach of duty authorised or ratified by members. • Where the majority has the right to deprive the minority from pursuing a claim • Where the court concludes a hypothetical director, who was acting in accordance with duty to promote success of co, would not continue the claim. See <i>Iesini</i> case and <u>Cullen Investments v Brown</u> (2015). • S994: cases where a company’s affairs have been conducted in a way that is unfairly prejudicial to the interests of members generally or some part. • Interests are widely interpreted to include: • Formal rights of shareholder. 	25

	<ul style="list-style-type: none"> • Legitimate expectations (see Ebrahimi). • The court will give effect to parties' own understanding. See O'Neill. • Range of conduct is relevant, such as breach of directors' duties. Re CF Booth Ltd • It is possible to enforce interests enjoyed in capacity other than as a member. <u>Gamlestaden</u>. • S994 offers range of remedies which can be effective. • Court can make order as sees fit, including that the shares of the petitioner be purchased, and at a fair price. <u>Re Bird Precision Bellows</u>. <p>Responses could include:</p> <ul style="list-style-type: none"> • Discussion of valuation of shares to be sold under a s994 order • Discussion of prospects of success of respective actions and of costs issues (eg on a derivative claim, the claimant could ask for company indemnity against legal costs) • Brief conclusion on respective merits 	
Question 4 Total:		25 marks

SECTION B

Question Number	Suggested Points for Responses	Max Marks
1(a)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Section 9 Partnership Act 1890 (PA) joint and several liability (with the Civil Liability Contributions Act) is the starting point. • All partners in the partnership at the time of the liability are potentially liable. • Ask first: is there actual authority? Section 6 PA • Express actual – no as F has breached partnership agreement £2,750 limit. • Implied actual – no previous course of dealings with supplier. • Note any partner is an agent for the firm • Elements of s5 and ostensible/apparent authority should be examined and applied • Carrying on business in usual way. Eg United Bank of Kuwait. Is top of the range mower within scope? Likely yes. • Would they be expected to need such a mower? Higgins. • Did third party know F was a partner or had no authority? No previous dealings and nothing to suggest knew about the restriction in the agreement. • Conclusion that partnership as a whole is potentially liable. 	14

	<p>Responses could include:</p> <ul style="list-style-type: none"> • Knowledge of place of delivery of mower could be helpful • Partnership may be able to pursue F to indemnify it • Reference to abnormal or incredible transactions or debts incurred. • Reference to section 7 PA and pledging credit of the firm 	
1(b)(i)	<p>Responses should include:</p> <ul style="list-style-type: none"> • s17 PA and references to liability only when you are a partner, subject to • s14 and holding out and the required elements • s17 and no liability after you have left, subject to • s36 and correct notice to known third parties and in London Gazette. 	6
1(b)(ii)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Indemnity provision should such liability arise • Ensuring name is not on material and website before joining • Ensure that s36 notice is given – eg require provision in the agreement 	5
Question 1 Total:		25 marks

Question Number	Suggested Points for Responses	Max Marks
2	<p>Responses should include:</p> <ul style="list-style-type: none"> • The loan: provides a guaranteed form of income in terms of interest • If the company defaults, the loan can be enforced contractually • D would rank below any secured creditor though on a winding up and may not receive much if any payment • D could petition for the winding up of the company • Under Model articles, the directors have the power to borrow that is unrestricted • D would no say in how the company is run as a creditor, but as director he would be effectively running the company anyway and will have ain the management • The shares: there is no guaranteed income as dividends are only paid if declared • Any liability will be limited to what he pays for the shares due to the separate legal personality of the company (Salomon v Salomon) • He will have voting rights (Borland’s Trustee) and if he has more than 25% of the shares he can block a special resolution • He will still be a minority shareholder however but has rights under eg s994 • As shareholder, on a winding up he would be the last to be paid anything left after the debts of the company have been paid 	25

	<ul style="list-style-type: none"> • Appointment as director: by the existing directors in board meeting or by the shareholders through an ordinary resolution • His appointment must be registered on form AP01 at Companies House • If appointed before he invests, D will need to declare his interest in the loan under s177 CA 2006 • His name must be added to the company's register of directors • As MA 14 has been excluded, D will be able to vote in a Board meeting on the loan or on the issue of shares to him <p>Responses could include:</p> <ul style="list-style-type: none"> • No need to declare interest as s177(6)(c) is likely to apply • D will need to give consent to appointment by signing form AP01 • Appointment by general meeting or written shareholders' resolution • He could request some form of security for the loan to give better protection • He will become a member of the company and must be added to the register of members 	
Question 2 Total:		25 marks

Question Number	Suggested Points for Responses	Max Marks
3(a)	<p>Responses should include:</p> <ul style="list-style-type: none"> • Section 33 CA 2006: shareholders have the right to enforce the articles arising from the 'contractual nature of the articles.' • See eg <u>Hickman v Kent or Romney Marsh Sheep Breeders Association [1915]</u> or <u>Pender v Lushington [1877]</u>. • Not rights which member enjoys as 'an outsider', ie. in a capacity other than as a shareholder (<u>Eley v Positive Government Security Life Assurance Co [1876]</u> Right 'of pre-emption' is a right as shareholders (ie in article A) and therefore enforceable under s33 (<u>Rayfield v Hands [1960]</u>)). • Shareholder could take proceedings against the company itself. But company must then sue H. • S and G could sue H directly. <u>Rayfield v Hands [1958]</u>, such direct enforcement action might be possible, with a 'quasi partnership' – a small company with few shareholders as this is. • Valuation of the shares: how are articles to be construed. Courts are reluctant to rectify, even with clear evidence <u>Scott v Frank F Scott (London) Ltd [1940]</u>. <p>Responses could include:</p> <ul style="list-style-type: none"> • General approach of the courts is to view the articles as a commercial document <u>Attorney General of Belize v Belize Telecom Ltd [2009]</u>. • The court may give S and G's's interpretation of the Article A. 	15

<p>3(b)</p>	<p>The answer consists of discussion of how to resist the amendment of a company's articles of association.</p> <p>Marks should be distributed in the following areas, with reference to case law throughout:</p> <ul style="list-style-type: none"> • Discussion of procedural issues (max 6 marks) • Discussion of 'class rights' (max 4 marks) <p>Responses should include:</p> <ul style="list-style-type: none"> • Attempt to refuse to attend the shareholders' meeting called to change the articles. s318 CA 2006 provides that the quorum for a shareholders' meeting is 2 persons. No contrary provision here. • Argue that the resolution to remove Article A is not passed 'bona fide for the benefit of the company as a whole'. <u>Allen v Gold Reefs</u> [1900]. Test is a subjective one: the question is whether the shareholders themselves subjectively believed the alteration was for the benefit of the company (not whether the judge herself believed it to be so); see eg <u>Greenhalgh v Arderne Cinemas</u> [1950]. • Argue that the right this Regulation was a 'class right'. Class rights were defined in <u>Cumbrian Newspapers Group Ltd v Cumberland and Westmorland Herald</u> [1986] as any right which is enjoyed by only some of the shareholders in a company, and which those members hold in their capacity as shareholders. Cumbrian Newspapers: not necessary that it be 'attached' to the shares; it could be a class right even if it was personal to the current shareholder and would not pass to someone buying their shares. • This seems likely, this is a class right, then by virtue of s630 CA 2006, the right could only be altered if such alteration were first approved by a ¾ majority of the holders of that class right. <p>Responses could include:</p> <ul style="list-style-type: none"> • H could apply to the court, under s306 CA 2006, for an order that H alone could constitute a valid quorum. <u>Union Music Ltd v Watson</u> [2003] 	<p>10</p>
<p>Question 3 Total:</p>		<p>25 marks</p>

Question Number	Suggested Points for Responses	Max Marks
4	<p>Responses should include:</p> <ul style="list-style-type: none"> • Application with references to for example lack of board meeting records; vacation during time of financial difficulties; delegation to inexperienced non-directors. • Appears to be an adoption of a rather ‘head in the sand’ mentality • Discussion of the meaning of insolvency for the purposes of s214 • A detailed analysis of section 214 (IA 1986), including the conditions for the section to apply: the company is insolvent; the person was a director at the relevant time; what the director knew or should have concluded and the tests applied to the director’s knowledge – with reference to the levels of skills imposed on example the CEO who has been in post for a long time. • The sanction for breach of s214 – namely the order to contribute and the calculation of the contribution on a ‘compensatory’ basis (per Re Produce Marketing). • Awareness of s12 Corporate Insolvency and Governance Act 2020 – in assessing director’s contribution, court must assume director not responsible for any worsening of company’s financial situation between 1/3/2020-30/9/20 and between 26/11/2020-30/4/2021. • A detailed analysis of section 213 (IA 1986), including the meaning of fraudulent trading and the requirement for intent to defraud – harder to prove • The most relevant directors’ duties under CA 2006: s172 and the duty to promote the success of the company • Explanation of the duty and application in circumstances where the company has a duty to act in the interests of creditors • Sanctions for breach of the s172 duty • Possible disqualification under the CDDA 1986, including the relevant grounds – eg where a director is found to act in breach of company or insolvency law • Potential outcomes of a disqualification: prohibition from being involved in the management of a company as they are considered ‘unfit’ • Possible compensation order under s15A CDDA • Up to date case law throughout to illustrate the application of the different provisions. Eg Re Produce Marketing Consortium (No 2) Ltd, Brooks v Armstrong and Grant v Ralls • Throughout there should be clear application to the facts and identification of the possible consequences of the above actions, including: <ul style="list-style-type: none"> ○ reference to any possible defences, such as the taking of every step to minimise loss to creditors under s214 ○ action that a liquidator or administrator could take 	25

	<ul style="list-style-type: none">○ for s214 for example, order by the court for a director to contribute to the assets of the company <p>Responses could include:</p> <ul style="list-style-type: none">• Requirements to contribute to the assets of the company, leading to potential bankruptcy of the director <p>Insolvency could result in the bank calling in the loans and therefore enforcing the guarantees. This could also lead to personal bankruptcy</p>	
Question 4 Total:		25 marks