



## CHIEF EXAMINER REPORT

**June 2024**

**LEVEL 6 UNIT 1 – Company and Partnership Law**

The purpose of the report is to provide candidates and training providers with guidance as to the key points candidates should have included in their answers to the June 2024 examinations.

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

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

## Chief Examiner Overview

This was a small cohort on this occasion.

The strong answers across all questions did the following:

- Paid careful attention to what the question was asking
- For Part B questions, applied the law well and accurately to the facts
- Addressed each element of the question and tailored the answers, without mere repetition of the law regardless of the question
- Included relevant statutory and case references
- Analysed the law and addressed advantages and disadvantages where required
- Provided conclusions.

The weaker answers across all questions:

- Failed to address each element of the question
- Tended to recite the law without careful attention to the question and, in Part B, to the facts.
- Lacked any or accurate statutory references
- Often lacked adequate or any case law which is essential
- Application to the facts in Part B answers tended to be superficial
- Lacked clear conclusions

It is noted that the low numbers of candidates taking the Level 6 exams limits the scope for constructive feedback to be given and for firm conclusions to be reached. Therefore, feedback on candidate performance may be limited.

**Section A**

Question 1	25 marks
Strong answers paid attention to detail, but more limited responses did the opposite and failed to address the required advantages and disadvantages.	
Suggested Points for Response:	
<p>Liability issues:</p> <ul style="list-style-type: none"> <li>• Unlimited partnership: individual partners liable without limit for the debts and other liabilities of the partnership (s9 Partnership Act 1890 (PA 1890)).</li> <li>• Private companies: shareholders’ liability is limited to the amount, if any, outstanding on shares (CA 2006).</li> <li>• Limited liability partnership (LLP): liability of partners is limited to amount agreed to contribute to assets of partnership in the event of it being wound up.</li> <li>• Linked to the above, private limited companies and LLPs have separate legal personality (Salomon v Salomon &amp; Co Ltd [1897]) distinct from their members: legal entities in own right so they can enter into contracts, sue and be sued and are liable without limit for their own debts and liabilities.</li> </ul> <p>Comparison of regulation:</p> <ul style="list-style-type: none"> <li>• Companies and LLPs are highly regulated by statute – Companies Act 2006, Insolvency Act 1986, Limited Liability Partnerships Act 2000 and associated regulations.</li> <li>• For partnerships, the PA 1890 provides only a default set of rules in absence of agreement to contrary among partners (s24 PA 1890).</li> <li>• Company and LLP formation – statute regulates a clear-cut form and procedure. No such formalities for partnerships exist:</li> <li>• Companies and LLPs are formed by a statutory process of registration of documents with Companies House.</li> <li>• There are also ongoing requirements under the CA 2006; eg to file annual accounts and to register other documents at Companies House recording changes in the company’s directors, share capital, etc.</li> <li>• No formalities required for the formation of a partnership; a partnership exists if it satisfies the statutory test of two or more persons carrying on business with a view of profit (s1 PA 1890). Partnerships should have partnership agreement which adds to costs. (Kahn v Miah)</li> </ul> <p>Examples of advantages and disadvantages:</p> <ul style="list-style-type: none"> <li>• Disadvantage: Unlimited partnership: if the business fails the partners risk losing all property.</li> <li>• Advantage of using private company or LLP: shareholders/members know how much they may lose.</li> <li>• Companies are commercially flexible vehicles through which to conduct business without disadvantages of personal liability.</li> <li>• Disadvantage: a limited company does not always provide such security for members. Eg banks may insist upon personal guarantees from directors.</li> <li>• Lack of formality (and thus cost) of formation of partnerships can be a benefit. Cost of compliance with regulations can be relatively high for companies and LLPs.</li> </ul>	

- The lack of required publication and disclosure of information can be a benefit for partnerships.
- Documents filed at Companies House open to inspection by public; partnership is a private affair. This means that if secrecy is an issue for the members, partnership may be a more attractive option than a company or LLP.
- Partners in LLP are not subject to statutory duties in CA 2006 that apply to directors (ss170-177 CA 2006).

Question 2a	12 marks
Good answers included good coverage of case law and attention to what the question was asking. More limited responses often did not address each element of the question and referred to no case law.	
Suggested Points for Response:	
<ul style="list-style-type: none"> <li>• Contract is based on the articles of association</li> <li>• Section 33 states that the provisions of the constitution bind the company and members as if they were covenants</li> <li>• Hickman v Kent or Romney Marsh Sheepbreeders; Pender v Lushington</li> <li>• Unusual contract: eg it is not rectifiable as with a 'normal' contract (Scott v Frank F Scott), even if the articles do not express the parties' true intention</li> <li>• Courts interpret the articles using the reasonable person test (AG of Belize v Belize Telecom Ltd)</li> <li>• Either party may enforce the contract</li> <li>• Enforcement is limited to provisions concerning membership (Eley v Positive Government Security)</li> <li>• And not, for example, relating to directorship (Beattie v E&amp;F Beattie)</li> <li>• But some case law has, arguably, allowed the enforcement of 'outsider rights' (eg <u>Salmon v Quin and Axtens</u>)</li> <li>• Enforcement is subject to a 6 year limitation period</li> <li>• Brief conclusion</li> </ul>	

Question 2b	13 marks
This was less well-answered than (a), and candidates on occasion did not give specific examples of restrictions in the articles.	
Suggested Points for Response:	
<ul style="list-style-type: none"> <li>• Powers in the Model articles (eg MA 3, 5, 7 and 9)</li> <li>• Restrictions or limitations on powers, from MA 14 for example</li> <li>• Specific restrictions may be included, for example on borrowing or limits on entering into contracts</li> <li>• Requirement of shareholder approval over certain limits</li> <li>• Discussion of section 40 Companies Act 2006 (CA 2006) and its effect to override limitations</li> <li>• Power of directors to bind the company deemed free of any limitation in the company's constitution</li> <li>• Explanation of effect of section 41 CA 2006</li> <li>• BUT subject to requirement of good faith on the part of the contracting third party</li> <li>• Discussion of what is good faith (Wrexham Association FC Ltd (in Administration) v Crucialmove)</li> <li>• Conclusion</li> </ul>	

Question 3	25 marks
Data too limited for valid feedback.	
Suggested Points for Response:	
<ul style="list-style-type: none"> <li>• Outline of the principle and its purpose, derived from <u>Trevor v Whitworth</u></li> <li>• Range of examples of restrictions to support the principle, such as: <ul style="list-style-type: none"> <li>○ General prohibition on purchase of own shares (s658 CA 2006)</li> <li>○ Restrictions on payments of dividends (s830 CA)</li> <li>○ Shares cannot be issued at discount to nominal value (s580 CA 2006)</li> <li>○ Strict rules where there such restrictions are lifted (eg regarding buy back out of capital – see below)</li> </ul> </li> <li>• Exceptions to the restrictions, such as: <ul style="list-style-type: none"> <li>○ Company may reduce its share capital (Chapter 10 CA 2006)</li> <li>○ Subject to shareholder approval via special resolution and support of a solvency statement</li> <li>○ Court approval of reduction is required</li> <li>○ Company may also issue redeemable shares (but must also have in issue ordinary shares) (Part 18 CA 2006)</li> <li>○ Companies may buy back their own shares out of distributable profits, a fresh issue of shares, or (only private companies) out of capital (only after distributable profits have been used)</li> </ul> </li> <li>• Details of the procedural requirements on buy back, including necessary shareholder approval (ordinary or special resolution?); clear distinction between out of profits and out of capital procedures; solvency statement for buy back out of capital; mention of permitted capital payment</li> <li>• Conclusion that such exceptions themselves subject to strict procedural requirements</li> </ul>	

Question 4	25 marks
Strong answers addressed all elements of the question, with good coverage of case law. More limited answers did the opposite, although most covered the key issues adequately.	
Suggested Points for Response:	
<ul style="list-style-type: none"> <li>• The nature of fixed and floating charges, with reference to the Panama and Woolcombers cases</li> <li>• 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></li> <li>• 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></li> <li>• 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></li> <li>• 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</li> <li>• discussion of the case law on creation of charges over book debts: <u>Re Spectrum Plus Ltd (2005)</u>, (and <u>Siebe Gorman</u> and <u>Re New Bullas</u>), and issues of degree of control</li> <li>• 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</li> <li>• 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</li> <li>• 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 in respect of an existing debt</li> <li>• some analysis of the foregoing facts to show the relative advantages and disadvantages of the two types of charge for companies and creditors</li> <li>• Brief conclusion</li> </ul>	

## Section B

Question 1a	15 marks
Data too limited for valid feedback.	
Suggested Points for Response:	
<ul style="list-style-type: none"><li>• Requirement for authority of directors to allot (s549 CA 2006)</li><li>• How authority may be given – company with only one class of share (s550 CA 2006) – automatic authority.</li><li>• If more than one class, need for authority given by OR in GM or by WR.</li><li>• Application to the facts – if allot ordinary shares first, no need for OR under s551, as s550 applies</li><li>• As preference shares are second class of shares, OR then needed under s551 for authority to allot.</li><li>• Conditions attaching to the authority: it must state max number of shares and time limit on authority (max 5 years)</li><li>• Description of the statutory right of pre-emption (s561 CA 2006)</li><li>• “Equity securities” – definition (s560 CA 2006).</li><li>• Pre-emption will not apply to the preference shares – not equity securities.</li><li>• How pre-emption rights may be disapplied – s569 – by SR</li><li>• Application to facts – pre-emption not relevant to allotment of new preference shares, but need to be waived or disapplied by SR in relation to KL’s subscription for ordinary shares for cash.</li><li>• Need for registration of allotment (SH01) and SR.</li><li>• Brief conclusion</li></ul>	

Question 1b	10 marks
Data too limited for valid feedback.	
Suggested Points for Response:	
<ul style="list-style-type: none"><li>• Appointment of director – MA 17 – by the board or by shareholders (OR in GM or by WR)</li><li>• Service contract – term of 3 years will require shareholder approval – OR again (in GM or WR). (s188 CA 2006)</li><li>• A memorandum of the contract must be available for inspection at least 15 days before the general meeting or sent with WR</li><li>• Board will need to approve all proposals before shareholders do so and call GM or propose WR.</li><li>• Notice to be given of the GM (s307 CA 2006) with minimum period 14 clear days.</li><li>• Simple majority required for OR</li><li>• WR passed when the requisite majority have signified agreement</li><li>• Submission of form AP01 to Companies House</li></ul>	

Question 2	25 marks
Data too limited for valid feedback.	
Suggested Points for Response:	
<ul style="list-style-type: none"> <li>• Section 994 CA 2006: member can petition court in relation to unfair prejudice suffered from act or omission of company or conduct of co affairs.</li> <li>• Must show conduct of affairs of the company or omission unfairly prejudicial to interests as a member.</li> <li>• Distinguish between matters concerning running of company and merely 'private'. Most conduct here (absences and misuse of funds) concerns company</li> <li>• Sasha must show her interest as a member is being prejudiced. (Gamlestaden)</li> <li>• Could amount to mismanagement of the company</li> <li>• Courts are clear that this includes member's formal rights, such as those found in the company's constitution, or in the Companies Act.</li> <li>• But member's interests are broader than strict formal rights: in quasi-partnerships, member's interests can arise from informal understandings between members. Here they have been running business together for nearly 14 years.</li> <li>• <u>Ebrahimi v Westbourne Galleries Ltd [1973]</u>. Defined quasi-partnership. Close personal relationship between members, some or all the members expected to participate in management, and restrictions on transfer of shares to outsiders.</li> <li>• Sasha and Pedro have a close relationship as cohabitantes and have run the business together.</li> <li>• Likely remedies: order to buy out Pedro (assuming Pedro is reluctant to sell), although often order is for majority shareholder to buy out minority.</li> <li>• Likely success under s994 as several instances of prejudice of member's interests</li> <li>• Derivative claim under Chapter 11 CA 2006 (eg s260)</li> <li>• Grounds narrower than s994</li> <li>• Act or omission involving negligence, default, breach of duty, or breach of trust by director</li> <li>• Court must give permission to continue action; s263 gives factors for granting permission</li> <li>• There are 3 mandatory bars to permission – breach of duty authorised or ratified by members and where majority of members have right to deny minority from pursuing claim</li> <li>• Where court concludes that a hypothetical director, acting in accordance with duty to promote success of company, would not continue the claim.</li> <li>• Courts have said no claim only if 'no reasonable director' would pursue it. <u>Iesini</u>; <u>Cullen Investments v Brown</u> (2015).</li> <li>• Less likely success as narrower grounds applied by the courts</li> <li>• Possible order to buy out shares, but usually for the majority holder to buy out the minority</li> <li>• Discussion of valuation of shares to be sold under s994 order</li> <li>• Conclusion</li> </ul>	



Question 3a	11 marks
On the whole, answers were strong, addressing the different issues well and applying to the facts. It is usually a popular topic (partnerships).	
Suggested Points for Response:	
<ul style="list-style-type: none"> <li>• Section 9 Partnership Act 1890 (PA) joint and several liability (with the Civil Liability Contributions Act) is the starting point.</li> <li>• All partners in the partnership at the time of the liability are potentially liable.</li> <li>• Ask first: is there actual authority? Section 6 PA</li> <li>• Express actual – no as M has breached partnership agreement £2,000 limit.</li> <li>• Implied actual – no previous course of dealings with supplier.</li> <li>• Note any partner is an agent for the firm</li> <li>• Elements of s5 and ostensible/apparent authority should be examined and applied</li> <li>• Carrying on business in usual way. Eg United Bank of Kuwait. Is top of the range 3 D printer within scope? Possible.</li> <li>• Would they be expected to need such a 3D printer? Could be useful for set design and building. Higgins.</li> <li>• Did third party know M was a partner or had no authority? No previous dealings and nothing to suggest knew about the restriction in the agreement.</li> <li>• Conclusion that partnership as a whole is potentially liable.</li> </ul>	
Question 3b	8 marks
Suggested Points for Response:	
<ul style="list-style-type: none"> <li>• No requirement for a written agreement but preferable</li> <li>• PA 1890 will imply certain rights and obligations</li> <li>• Benefits of a written agreement clarify arrangements</li> <li>• Management roles can be provided for and respective rights and obligations set out</li> <li>• Helpful to set out capital input</li> <li>• Profit and loss sharing ratios can be specified. Don't have to be equal. as PA would imply equal sharing if no agreement to the contrary</li> <li>• Should set out that partnership will continue when a partner leaves.</li> <li>• Brief conclusion</li> </ul>	
Question 3c	6 marks
Suggested Points for Response:	
<ul style="list-style-type: none"> <li>• Elements of section 20 PA 1890</li> <li>• Property brought into the partnership stock or acquired on account of the firm</li> <li>• Need to ask question if the partnership will pay for the equipment</li> <li>• Will the equipment count as part of Helen's capital contribution?</li> <li>• Section 21: if the equipment is paid for out of partnership money, it will be deemed as partnership property</li> <li>• Brief conclusion</li> </ul>	

Question 4	25 marks
Data too limited for valid feedback.	
Suggested Points for Response:	
<ul style="list-style-type: none"> <li>• Application with references to for example lack of board meeting records; increase in salaries; vacation during time of financial difficulties; delegation to inexperienced non-directors.</li> <li>• Appears to be an adoption of a rather ‘head in the sand’ mentality</li> <li>• Discussion of the meaning of insolvency for the purposes of s214</li> <li>• 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 for example the CEO who has been in post for a long time.</li> <li>• 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).</li> <li>• A detailed analysis of section 213 (IA 1986), including the meaning of fraudulent trading and the requirement for intent to defraud – harder to prove</li> <li>• The most relevant directors’ duties under CA 2006: s172 and the duty to promote the success of the company</li> <li>• Explanation of the duty and application in circumstances where the company has a duty to act in the interests of creditors</li> <li>• Sanctions for breach of the s172 duty</li> <li>• 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</li> <li>• Potential outcomes of a disqualification: prohibition from being involved in the management of a company as they are considered ‘unfit’</li> <li>• Possible compensation order under s15A CDDA</li> <li>• 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</li> <li>• 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"> <li>• reference to any possible defences, such as the taking of every step to minimise loss to creditors under s214</li> <li>• action that a liquidator or administrator could take</li> <li>• for s214 for example, order by the court for a director to contribute to the assets of the company</li> </ul> </li> </ul>	