

Concentrate **QUESTIONS & ANSWERS**

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Q&A
COMPANY LAW

Third Edition

Imogen Moore

practise technique › boost your confidence › achieve success

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Guide to the book

Every book in the Concentrate Q&A series contains the following features:

ARE YOU READY?

Are you ready to face the exam? This box at the start of each chapter identifies the key topics and cases that you need to have learned, revised, and understood before tackling the questions in each chapter.

DIAGRAM ANSWER PLANS

Not sure where to begin? Clear diagram answer plans at the start of each question help you see how to structure your answer at a glance, and take you through each point step by step.

KEY DEBATES

Demonstrating your knowledge of the crucial debates is a sure-fire way to impress examiners. These at-a-glance boxes help remind you of the key debates relevant to each topic, which you should discuss in your answers to get the highest marks.

SUGGESTED ANSWER

What makes a great answer great? Our authors show you the thought process behind their own answers, and how you can do the same in your exam. Key sentences are highlighted and advice is given on how to structure your answer well and develop your arguments.

QUESTION

Each question represents a typical essay or problem question so that you know exactly what to expect in your exam.

LOOKING FOR EXTRA MARKS?

Don't settle for a good answer—make it great! This feature gives you extra points to include in the exam if you want to gain more marks and make your answer stand out.

CAUTION!

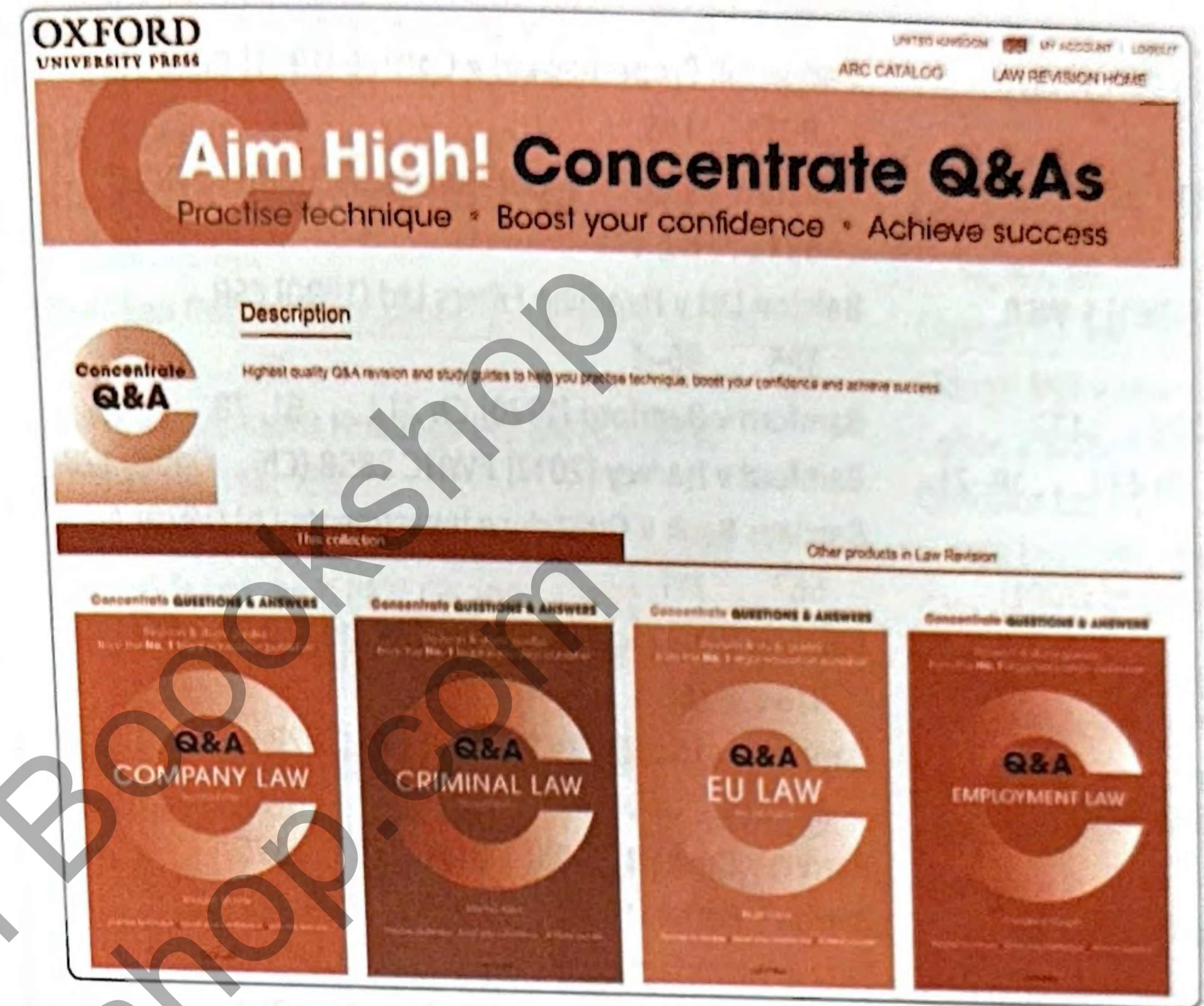
Don't fall into any traps! This feature points out common mistakes that students make, and which you need to avoid when answering each question.

TAKING THINGS FURTHER

Really push yourself and impress your examiner by going beyond what is expected. Focused further reading suggestions allow you to develop in-depth knowledge of the subject for when you are looking for the highest marks.

Guide to the online resources

Every book in the Concentrate Q&A series is supported by additional online materials to aid your study and revision: www.oup.com/uk/qanda/



- Extra essay and problem questions with guidance on how to approach them.
- Video guidance on how to put an answer plan together.
- Audio advice on revision and exam technique from Nigel Foster.

all these elements—but you can add interest by raising an argument from the start, bringing in wider and deeper critical thought, and sometimes merging the P, the E, and the A to be more concise and show your mastery of the law.

Dealing with Questions: Problems

Problem questions give a series of facts and ask you to advise one or more of the parties. You need to identify the legal issues arising, keeping an eye on all the facts. Don't just ignore facts that seem inconvenient—even if you conclude a particular point is not legally relevant, you need to indicate why (otherwise the examiner may think you missed the point). Focus on who you are advising and direct your response accordingly; this shows the examiner you are really thinking about the problem and not the topic generally.

IRAC is a well-known approach to problem questions. It stands for Issue, Rule (or Relevant Law), Apply, Conclude. (It also appears as ILAC or IPAC—Issue, Law/Point, Apply, Conclude.) Just as with PEA, IRAC is a tool and not an end in itself. IRAC ensures you have covered the things you need to cover and, particularly if you lack confidence, helps you to work steadily through the issues. IRAC is less effective if applied to a question as a whole: if you set out all the issues, followed by all the law, then the application, and then a conclusion, the discussion of the law can be quite descriptive without a focus on the facts, and the application and analysis may be limited or insufficiently linked to the facts. IRAC is more effectively used within sections, rather than the essay as a whole—use it to check that for each of the points you identified, you have clearly identified the issue and relevant law, applied the law to the facts, and concluded on that point.

Tips for Exam Success

Prepare actively: Revision needs to establish solid foundations—knowledge and understanding of the syllabus topics—but should also ensure you can analyse, criticize, and apply the law convincingly. A good student moves beyond describing the relevant law and is able to apply it; recognize problems, inconsistencies, and 'grey areas', consider its significance and effect, critique the approach of statute or the courts, consider how it could (or should) be applied in new situations, etc. Conventional revision such as reading, thinking, note-making, and mind-mapping is important, but you should also develop your skills through practice—test your knowledge and understanding against questions and other challenges and critically evaluate your own efforts. Practice can also help you cope better with time pressures and stress come the exam itself.

Learn, don't memorize: Don't be tempted to try to memorize material, particularly model answers, to reproduce in full or in part in the exam. Even if that were academically acceptable (it isn't!), it is a clear sign to the marker that you have not understood the topic and engaged with the question you have been asked. Use model or practice answers to show you different ways of explaining and analysing issues, and to help you develop your own understanding and skills by giving you a tool to critique your own work.

Answer the question: Too often students don't get the marks they expect because they discuss a topic too generally, rather than answering the question set. It is answering the question that shows the examiner you have really understood the subject, and can use (and not simply reproduce) your knowledge. Focus on the question, and explicitly identify the issues. Concentrate on these, even if this means you have to jettison some knowledge that you'd really hoped to share with the examiner. Never reproduce a prepared answer.

Be time-aware: Split your time in the exam sensibly, allocating enough time to each question. Spending too long on one question is highly unlikely to gain you sufficient extra marks to compensate

for an incomplete or missed answer at the end. Similarly, don't spend too long on any answer, or on an introduction or setting out the basics—get to the main issues as quickly as you can. Taking a few minutes to plan your answer before starting to write will help enormously with this.

Make connections: The interlinking nature of topics in company law means it is very important in the exam to concentrate on the question and not jump to conclusions about what topic(s) it covers. When studying and revising, you will naturally focus on individual topics, but you should also aim to understand the subject as a whole and the connections between topics, rather than viewing each topic as entirely self-contained. Your own course of study, together with your reading, will help you grasp the principles and see the connections—mind-mapping helps here too.

Be structured: A clear structure allows you to work steadily and logically through the issues that arise, so always take a few minutes to plan your answer. There is no single 'right' way to structure a company law answer (subject to anything your lecturer says to the contrary) but remember that every answer needs a start, a middle, and an end. The start is the introduction. For an essay, this could identify the context and issues, explain your approach and/or argument, and ideally link explicitly to the question. In a problem question, keep it brief, just identifying the area of law and/or issues, so you don't get distracted by general discussion. The middle contains the main sections of your essay. Separate issues into paragraphs (and don't be afraid to use sub headings); explain and analyse each issue, linking to the question and/or applying the law to the problem, reaching interim conclusions on each point. Splitting the issues in this way helps to encourage analysis and comment as you go along, rather than waiting until the final paragraph. The end of your essay is the conclusion. This should wrap up your discussion, pulling together any threads of argument, and linking back to the question, ensuring the essay is addressed, or advice provided.

Stand out from the crowd: Examiners love to see a student really focusing on the question, critiquing (as well as confidently explaining) the law, and engaging with (not just reciting) the material, including further reading. Show off your wider appreciation of (relevant) developments in the legal and commercial worlds, topical issues, and recent news stories. Don't overplay this—your first priority must be to deal with the law—but deeper awareness and interest in the subject is valuable. You can also bring in relevant elements of legal theory and/or commercial practice, using your own course (the syllabus and the teaching) as a guide to what your examiners might expect.

Keep calm: Easier said than done, but thinking (and writing) requires a calm head. Initial panic can make questions seem incomprehensible but take a deep breath and read them again. Remember that if you've attended classes, prepared the work, undertaken the revision, and practised your skills, there is nothing you can't tackle. Ultimately an exam is there to test you, but not to trick you—enjoy the ride.

2 Companies and Corporate Personality

ARE YOU READY?

In order to attempt the questions in this chapter you will need to have covered the following topics:

- Forms of business enterprise and distinguishing features
- Consequences of incorporation
- Company formation requirements and restrictions
- Issues arising in the pre-formation period
- Corporate personality and the *Salomon* case
- Piercing or lifting the veil of incorporation
- Connections (in particular) with: directors, constitution, management and governance, corporate liability, insolvency
- Note: Coverage of some of these issues—particularly forms of business enterprise, and registration—can vary widely between courses, so please check your own syllabus

KEY DEBATES

Debate: Availability/appropriateness of business vehicles and limited liability

Do the available business vehicles adequately meet the needs of modern businesses? One issue surrounds the requirements of small businesses, and whether it is appropriate or necessary to offer limited liability with the additional formalities and restrictions that brings. Various papers, notably those by Judith Freedman and Andrew Hicks, address this point, while the introduction in 2001 of a new business vehicle with limited liability, the LLP, also gave rise to much discussion. Other developments, such as recent reforms to the older 'limited partnership', and increasing interest in

developing appropriate business forms for social enterprises, are beyond the scope of most company law courses.

Debate: The nature of the company and the role of company law

What is the status of the company—a purely private contractual arrangement, or a 'concession' or privilege granted by the State? What should be the proper role of company law in supporting, enabling, and regulating companies? Although these issues can seem largely theoretical, these notions underpin much thinking on corporate regulation and topical issues such as corporate social responsibility. There can be very different perspectives on companies and company law; for example contrast Cheffins, B, *Company Law: Theory, Structure and Operation* (Oxford, 1997) and Parkinson, J, *Corporate Power and Responsibility: Issues in the Theory of Company Law* (Cambridge, 1993). The Company Law Review (see in particular *The Strategic Framework*, 1999) touched on these issues when considering company law reforms.

Debate: How far should the courts be willing to lift/pierce the veil of incorporation?

Whether and to what extent the veil of incorporation should be pierced has been a very long-running debate, and, although not in those terms, underpins *Salomon v A. Salomon & Co Ltd* itself. While some (including the courts in this jurisdiction, see *Prest v Petrodel Resources Ltd*) favour commercial certainty and a strict approach, others would prefer a more interventionist and proactive approach, particularly in relation to involuntary creditors. This debate links to the wider debate about the availability and risks of limited liability.



QUESTION 1

While studying art at university, Mei has been designing and making her own greetings cards to send to friends and family. Following positive feedback she has now decided to develop this into a business and her friend Gok (a business studies graduate) is going to join her to provide business and marketing expertise. The business will need some initial capital to obtain appropriate premises and stock. Mei and Gok seek your advice on the most appropriate business form for their new enterprise and the benefits and drawbacks of that choice. They are anxious to protect their personal assets from business risk.

Advise Mei and Gok.



CAUTION!

- Don't just describe the different types of business enterprise—the examiner wants to see that you really appreciate what the key features are and how they relate to the problem facts
- Avoid a simple list of advantages and disadvantages of incorporation

A private company is cheap and simple to form and offers the advantage to Mei and Gok that their liability would be limited to their capital contribution as opposed to their being exposed to unlimited personal liability. It also provides a bit more flexibility in respect of the provision of capital.⁸ Mei and Gok could provide the capital themselves, either by way of shareholder investment (in return for their shares) or by way of a loan, but would then be at risk of losing the money in the event of the business failing. They could issue shares to friends and family in return for investment, but should bear in mind more shareholders could lead to later disputes and disagreements. More likely, the capital investment would come from a loan, probably from a bank, and the business may benefit from slightly better rates because it could offer a floating charge (as well as a fixed charge) over business assets as security for the loan, whereas sole traders and (general) partnerships are not able to grant a floating charge. In reality, as well as taking security for the loan, the bank will probably require Mei and/or Gok to act as guarantor/surety for the debts of the company meaning that they would effectively lose the benefit of limited liability in respect of these debts. Research by

Freedman indicates that over half of small business proprietors have given personal guarantees ('Small businesses and the corporate form: burden or privilege?' (1994) 57 MLR 55).⁹ This insistence on personal guarantees from banks (and other providers of credit) means that the benefit of limited liability for Mei and Gok may not be as extensive as they might suppose.

Mei and Gok should also be aware that using a limited company does not protect their personal assets in all circumstances, particularly if they do not act responsibly if the company gets into financial difficulty. As directors, they could be made personally liable in the event of the company's insolvency, for example for wrongful trading under **Insolvency Act 1986 s. 214**, or could be disqualified from acting as directors under the **Company Directors Disqualification Act 1986 (CDDA 1986)**, which could now also lead to a compensation order being granted against them (**CDDA 1986, s. 15A**).

Another possible drawback of using the corporate form is that some company information will be available for public inspection—known as 'the price of incorporation'. However, as long as the company qualifies as a 'small' company under **CA 2006, ss. 382–3**, as seems likely here, the extent of the disclosure of its affairs would be greatly reduced, and it will be exempt from the audit requirement of **CA 2006, s. 477**. The criteria are: two out of three (tested every other year) of: turnover—not more than £10.2m; balance sheet total—not more than £5.1m; number of employees—not more than 50 (**CA 2006, ss. 382–3**). To this extent, the threat of disclosure is greatly diminished and the company can enjoy almost the same degree of

privacy as a partnership. Companies are subject to more regulation, and thus a higher administrative burden than partnerships, but some of this administrative burden has been reduced for small companies by **CA 2006** (the reform agenda explicitly followed a 'Think Small First' approach to reduce the legislative burden on small companies¹⁰) so for example Mei and Gok will not need to appoint a company secretary (**s. 270(1)**) and will not need to hold Annual General Meetings (**s. 336**).

For Mei and Gok a private limited company is a sensible option (and one chosen by many small businesses: there are over 3 million companies on the register, the majority of them small private companies). It is not without its drawbacks and some of the apparent benefits may prove to be limited but as their prime concern appears to be to minimize their risk, a company is the easiest way of achieving this aim, in part at least. To reduce the scope for later disagreements they should consider making specific provision in the company's articles of association (the main constitutional document of the company) and/or enter into a separate shareholder agreement to deal with the resolution of disputes between them.

¹⁰ This indicates that you have read more widely about the reform of company law and understand some of the policy thinking behind the legislation

LOOKING FOR EXTRA MARKS?

- Engage with some of the relevant research in the area to support your points and show your deeper understanding of the issues
- Use your broad understanding of company law to raise pertinent issues, particularly those that impact on liability and capital raising, rather than limiting yourself to points covered specifically within the lecture topic

QUESTION 2

'Despite being viewed as the key advantage of incorporation, the benefit of limited liability may prove to be illusory and so be outweighed by the disadvantages of incorporation.'

Discuss.

CAUTION!

- Avoid a simple list of advantages and disadvantages of incorporation, this would not give you any scope for analysis and would not adequately address the question
- Don't provide a general account of 'lifting the veil'—this question is focused on limited liability in the wider context rather than veil-lifting

⁸ Deal expressly with capital as it is raised in the question

⁹ This shows both that you appreciate the reality of business life, and that you have engaged with academic work

DIAGRAM ANSWER PLAN

Potential advantages of incorporation—is limited liability the 'key' advantage?

Lack of benefit of limited liability in practice for many companies

Drawbacks to incorporation—weighing up benefits and disadvantages

Continuing potential for personal liability

A

SUGGESTED ANSWER

On registration, members of a limited company gain the advantage of limited liability—their liability is limited (for a company limited by shares) to the amount unpaid on their shares (**Companies Act 2006 (CA 2006), s. 3(2)**). Accordingly, while a member would lose their investment in the event of the company's insolvency, the rest of their personal wealth is safe, protected by the 'veil of incorporation' separating the company from its members. As a member in a small company will commonly invest only a small amount (often as little as £1), there may be little financial risk. This contrasts with the position of a sole trader or partnership where the trader/partners are personally liable for the business debts. Understandably this benefit of limited liability is often seen as the key advantage of incorporation¹ and writers such as Easterbrook and Fischel ('Limited liability and the corporation' (1985) 52 U Chi L Rev 89) have written persuasively on the broader economic rationale behind limited liability. Nonetheless, the benefits of limited liability may indeed prove illusory for members of some companies and be outweighed by disadvantages of incorporation.

Salomon v A. Salomon & Co Ltd [1897] AC 22 established that the veil of incorporation applies just as much to 'one-man companies' as it does to the multi-member large corporations initially envisaged by Parliament, so members even of very small companies can benefit from limited liability. Although the decision has been criticized (Kahn-Freund described the decision as 'calamitous', tempting traders to incorporate when there was no business need: 'Some reflections on company law reform' (1944) 7 MLR 54),² the availability of limited liability to practically all who seek it is now firmly established.

¹ This shows that your initial explanation of the essential points—limited liability, the veil, risk, etc is all directed to answering the question

² Judicious citation of academic work can show you have read more widely and understand different points of view

³ Engage with the academic articles—here you can use them to bring together the law, practice, and respected research

⁴ This shows you are keeping an eye on the question but also challenging the statement

⁵ Use terms from the question itself to show you are answering it

⁶ Don't waste your time trying to memorize long passages, but if you can remember a few pithy comments from your reading, whether cases or articles, it can add interest and depth to your work

⁷ The following paragraph and a half look at relevant cases and show how important it is to be able to summarize the relevant facts and points of law very succinctly

It might be assumed most traders choosing to use a limited company do so largely to benefit from this protection. However, research by Freedman and Hicks indicates³ this protection is only one of many factors influencing a trader—other factors as diverse as tax and prestige/credibility can also be highly influential (Freedman, 'Small businesses and the corporate form: burden or privilege?' (1994) 57 MLR 555; Hicks, 'Corporate form: questioning the unsung hero' [1997] JBL 306). Incorporation also brings other benefits, such as flexibility of organizational structure and increased financing options including the ability to bring in outside investors and offer floating charges. Accordingly, while limited liability may be a significant benefit of incorporation, it is not the only benefit.⁴

In any event, members of small companies in particular may not benefit fully from limited liability. The inadequate capital of many small companies may mean the company cannot borrow against the security of its own assets. Private companies have no minimum capital requirement and often have only a nominal capital (a public company in contrast must have a minimum capital of £50,000 (**CA 2006, s. 763**)). This makes it difficult for the company to obtain credit from banks and suppliers without external support. Banks commonly require additional security for any loans (Freedman's research revealed over 50 per cent of respondents had personal guarantees to the bank), and suppliers may also seek protection through third-party guarantees. This means those seeking protection through limited liability are in fact likely to be liable as guarantors for loans or lines of credit, and so face personal losses (even bankruptcy) in the event of the company's failure. The benefit of limited liability is indeed illusory in such situations⁵ and as Freedman has observed, some traders may be incorporating to 'obtain the unattainable'.⁶

What is more, incorporation may have disadvantages, sometimes unforeseen. A trader might well form a company without the benefit of legal advice and fail to appreciate fully the consequences. The research of Freedman and Hicks shows the majority of entrepreneurs are not particularly aware of, or interested in, the precise legal form their business will take. But the veil of incorporation may have negative as well as positive effects. For example, in⁷ *Macaura v Northern Assurance Company* [1925] AC 619, Macaura was unaware that his transfer of property to a company in which he was virtually the sole shareholder, meant he no longer owned the property. As a result, a policy taken out in his name over that property was not covered by the insurance since he no longer had an insurable interest in it.

A further example is *Tunstall v Steigman* [1962] 1 QB 593 where Steigman, the landlord of a pair of shops, gave notice to the lessee of

one on the ground (**Landlord and Tenant Act 1954, s. 30(1)(g)**) she intended to occupy the premises for the purpose of her business. However, the court held that she had not met the requirements as the business was not to be carried on by her but by her company—which was a separate legal entity. A similar lack of awareness of the separation of the company and its proprietor meant that in *Re Lewis's Will Trusts* [1985] 1 WLR 102 Lewis' bequest of 'my freehold farm and premises' to his son failed because the farm had been transferred to a company. Although Lewis owned three-quarters of the shares in the company (his son owned the other shares) the bequest failed as the farm was owned by the company, not Lewis. Individuals may also get into difficulty through failing to recognize that the company is a separate legal person and treating the company's assets and bank accounts as mere extensions of their private assets: *Attorney-General's Reference (No. 2 of 1982)* [1984] QB 624 established that a sole shareholder of a company could nevertheless be guilty of stealing from 'his' company.

Generally, shareholders and directors are safe from the courts piercing the veil of incorporation to impose liability on them for company debts. The reluctance of the higher courts to pierce the veil as seen in *Salomon v A. Salomon & Co Ltd* has been confirmed in *Prest v Petrodel Resources Ltd* [2013] UKSC 34,⁹ limiting veil-piercing to very rare situations where the evasion principle applies. However, statute may remove the protection of the veil of incorporation. Directors may find themselves liable to contribute to the assets of a company in insolvent liquidation where they have engaged in fraudulent or wrongful trading (**Insolvency Act 1986 (IA 1986), ss. 213–14**), or to meet the claims of creditors where they have misused the name of a company that had previously gone into insolvent liquidation (**IA 1986, s. 217**). Liquidators may also use the misfeasance procedure (**IA 1986, s. 212**) to recover from directors who have been breached their duties. Successful claims by a liquidator can result in large orders against directors eg *Re DKG Contractors Ltd* [1990] BCC 903; *Re Purpoint Ltd* [1991] BCC 121. In such cases the benefits of limited liability are significantly reduced.

Directors may also be found personally liable for torts committed within the company environment, depending on the circumstances. It is not common for directors to be found personally liable for negligent misstatements in the context of company activity as the courts require evidence that the director assumed personal responsibility (see *Williams v Natural Life Health Food Ltd* [1998] 1 WLR 830) but where a director does assume personal responsibility, liability can follow as in *Fairline Shipping Co v Adamson* [1974] 2 All ER 967 where the court was influenced

⁹ There isn't time in this question to go into veil-piercing in depth but you can show you have the necessary understanding

by the fact that the director communicated in the first person and on personal notepaper. Directors have also been held personally liable for other torts, for example in *Standard Chartered Bank v Pakistan National Shipping Corpn (Nos. 2 and 4)* [2002] 3 WLR 1547 the court held the managing director liable in deceit. The veil of incorporation will not protect all those behind it in respect of all their actions.

⁹ Let the examiner know where you are in your structure—it shows you are still in control

In conclusion,⁹ it has been seen that while limited liability is an attractive proposition for many entrepreneurs, it is not the only reason for incorporation in practice. Furthermore, its benefits are often illusory and it does not guarantee total protection from personal liability. Incorporation may result in unplanned and undesired outcomes, particularly when an entrepreneur does not fully appreciate the consequences of separate legal personality. In addition, the 'privilege' of limited liability is balanced by the need to comply with formalities and disclose information at Companies House. This increases the administrative burden through the need to file documents such as confirmation statements (previously annual returns), as well as reducing privacy. Disclosure obligations are reduced for small companies but even small additional burdens with the attendant cost of compliance and potential loss of privacy may be too much if the benefits of limited liability are not fully available. For some traders the disadvantages of incorporation could indeed outweigh the apparent benefit of limited liability.¹⁰

¹⁰ It can be helpful to make a clear link back to the question at the end



LOOKING FOR EXTRA MARKS?

- Consider how the merits and drawbacks of incorporation and the effect of limited liability might differ for businesses of different sizes and types and different types of shareholder
- Recognize how some statutory provisions (or other legal mechanisms) may impose personal liability on individuals despite otherwise limited liability



QUESTION 3

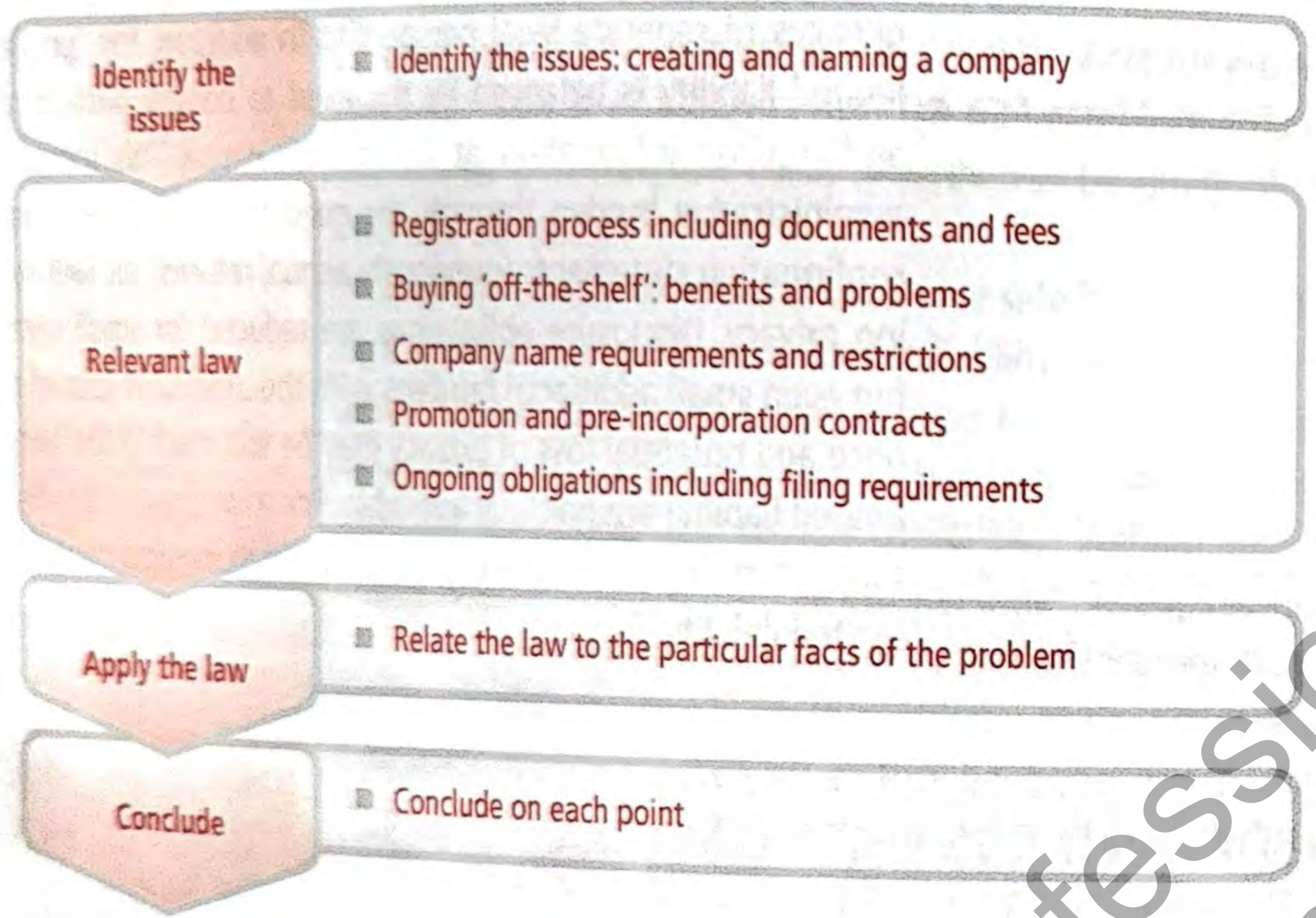
Youssef and Zelda are friends who recently graduated from the University of Woolbridge and decided to set up a fashion design business. Having considered their options, they have decided to set up a company to conduct the business. They are considering calling their business either 'F U Fashion' or 'Great University Trends'.

Advise Youssef and Zelda on the steps they will need to take, and any issues or restrictions they should bear in mind, in creating and naming their company.

CAUTION!

- Avoid just describing the registration process or the name restrictions—assess the different elements and provide advice based on the facts of the question
- Don't just copy out statutory material: make sure you link relevant material to the facts
- Don't go into detail on the merits of the corporate form as the question tells us that the decision about the business form has already been made

DIAGRAM ANSWER PLAN



SUGGESTED ANSWER

Youssef and Zelda should be aware that the company will (unlike a partnership) have its own separate legal personality and so they would not normally be liable for the company's debts or other liabilities (*Salomon v A. Salomon & Co Ltd* [1897] AC 22). From the facts of the question it appears that they intend to be the only directors and shareholders of the company, but the flexibility of the company form means they could easily involve others if they wanted—whether by appointing someone as director to share management of the business, or by providing shares to people, for example family members who wish to invest without running the business. However, unlike a partnership (which can arise under the Partnership Act 1890, s. 1(1) without any need for formality),¹ the friends will need to observe various formalities in order to create a company.

¹ Shows, in passing, that you appreciate the difference between a company and a partnership

Creating the Company

Youssef and Zelda can choose between creating the company by registering it themselves, or purchasing a company 'off the shelf'.² A shelf company is one that has already been created by a company formation agent and is available for immediate purchase.

If they choose to register their own company (*Companies Act 2006 (CA 2006), ss. 7–13*) they will need to complete various documents and send these to the registrar of companies at Companies House (based in Cardiff for companies registered in England and Wales) either in paper form or electronically:

- Memorandum of association³ (s. 8)
 - Youssef and Zelda must subscribe their names to the memorandum—the document that forms the company. It is no longer part of the company's constitution.
- Application for registration (s. 9(2))
 - This states the company's basic details including its proposed name, the address of its registered office, and that it is (in this case) a private company.
- Articles of association (s. 9(5)(b))
 - Articles (the company's constitution) need not be filed if Youssef and Zelda wish to use model (standard form) articles. The current model articles are found in the *Companies (Model Articles) Regulations 2008*. If they want to have some bespoke articles, they could register these and the model articles would then fill any gaps by virtue of s. 20.
- Statement of capital and initial shareholdings (ss. 9(4)(a) and 10)
 - This states the company's share capital and shareholdings. Most small private companies (as this will be) have minimal share capital, eg the friends could have a share capital of £2 with each taking a single £1 share.
- Statement of proposed officers (ss. 9(4)(c) and 12)
 - It is assumed that Youssef and Zelda will be the company's first directors. They do not need particular qualifications but must be over 16 (s. 157(1)), which they obviously are. Their names, addresses, and consent to act should go in this document. They can use a service address to keep their residential addresses off the public register though, which might be sensible for example if their fashion business uses fur, to avoid intimidation.
- As it will be a private company they do not need a company secretary⁴ (s. 270(1)).
- Statement of compliance (s. 13)
 - Youssef and Zelda must state that all the registration requirements have been complied with and the registrar can take this statement as evidence of compliance.

Youssef and Zelda must also pay a registration fee, which is currently £40 by post (or £10 using filing software or £12 online).⁵ Same-day

² Very many companies are 'purchased' rather than created from scratch by their eventual users

³ In this and other 'bullet points' that follow, the basic information is combined with references to the facts of the problem to show the question is being addressed

⁴ Recognizes the change to the law in the CA 2006

⁵ Impress the examiner by showing that you are aware of wider practical points as well as the legal points

registration can be obtained for a higher fee. If all documents are in order the registrar registers them under CA 2006, s. 14 and issues a Certificate of Incorporation (CA 2006, s. 15) which is conclusive evidence that the registration requirements have been complied with. The company comes into existence at the point of registration (CA 2006, s. 16).

If Youssef and Zelda did not want to prepare and send the incorporation documentation they could buy a shelf company, which is ready to use straight away. It costs more to buy a shelf company than register a company yourself, but it is not expensive (£50 is fairly standard). There are potential disadvantages to buying a company off the shelf as it will not be in exactly the form Youssef and Zelda might have chosen, so they should make changes to the articles to avoid problems later on. A shelf company will not have the desired name but the name can be changed by means of a special resolution (or other procedure specified in the articles) under CA 2006, s. 77(1), or they could leave the company's name unchanged and trade under a different business name. As a company comes into existence on registration (not on purchase or change of name) they should bear in mind that their company exists prior to their purchase. This is not normally a problem but can lead to complications; for example the pre-incorporation contract provisions (CA 2006, s. 51)⁶ do not apply where a company is already in existence at the time of the contract but under a different name (*Oshkosh B'Gosh Inc v Dan Marbel Inc Ltd* [1989] BCLC 507).

Naming the Company

There are some important requirements and restrictions in the choice of name for the company (see CA 2006, Part 5), which also apply to business (or trading) names under CA 2006, Part 41. First, as a private company the company's name must end with 'limited' or 'Ltd' (or the Welsh equivalent if the company were to be registered in Wales, rather than England and Wales) (CA 2006, s. 59). Further, a company must not be registered if, in the opinion of the Secretary of State, use of its name would constitute an offence or be offensive (CA 2006, s. 53). It is possible that 'F U Fashions'⁷ would be perceived as offensive: *R v Registrar of Companies, ex parte Attorney-General* [1991] BCLC 476 revealed that the registrar had rejected 'Prostitutes Ltd' and 'Hookers Ltd' as possible names for a new company.

Approval of the Secretary of State is required if a company's proposed name would be likely to give the impression that the company is associated with the government, local authority, or specified public authorities (CA 2006, s. 54). This does not seem to be a problem in this case. The Secretary of State's approval must also be obtained if the name contains any word or expression specified in regulations

⁶ Use your knowledge of other, connected, topics to add weight to your consideration of shelf companies

⁷ Try to relate your knowledge of the naming restrictions to the specific names suggested

⁸ Shows awareness of why the Regulations were updated

⁹ It wouldn't matter if you didn't know what the list contained—you could still make an informed comment and relate it to the question, eg 'if the list contains the word "University" then ...'

¹⁰ As the facts of the problem do not disclose any issues particularly relevant to promoters' duties, it is best not to go into too much detail

under CA 2006, s. 55—currently the Company, Limited Liability Partnerships and Business Names (Sensitive Words and Expressions) Regulations 2014. This list was reduced under the government's 'Red Tape Challenge'⁸ initiative to reduce the legislative burden on business but does include 'University'⁹ so Youssef and Zelda would have to obtain approval if they want to use this name.

The company name must not be the same as, or too similar to, any other company name on the register (CA 2006, s. 66). To avoid this problem Youssef and Zelda can check the register of company names via the Companies House website. If the company is registered with a name that is the same as, or too similar to, another company's name then it could be directed to change it under CA 2006, s. 67. Or if someone objected that the company name is sufficiently similar to a name associated with them so as to be likely to mislead by suggesting a connection between them, there is an adjudication process under CA 2006, ss. 69–74 which could also lead to a direction to change the company's name.

The company's name (whether or not a business name is used) must be disclosed at the registered office, business premises, on business communications, and websites (CA 2006, s. 82 and the Companies (Trading Disclosures) Regulations 2008).

Other Issues

Youssef and Zelda should keep in mind that during the pre-formation process they can be regarded as company promoters¹⁰ as they are taking the necessary steps to form a company with reference to a particular project (*Twycross v Grant* (1877) 2 CPD 469). As promoters they owe fiduciary duties to the company (see, eg *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218) and they must ensure that all material facts are disclosed and any profits they make personally must be accounted for to the company. They should also be aware that any contracts entered into prior to incorporation will operate as contracts with them personally under CA 2006, s. 51 (*Phonogram Ltd v Lane* [1982] QB 938). Once the company is incorporated, it will only be bound by such contracts if the parties novate the contract and so the friends should ensure this is done following incorporation to avoid any potential personal liability.

Once the company is registered, there are ongoing responsibilities. Annual accounts and confirmation statements (formerly annual returns) must be filed at Companies House (CA 2006, s. 441) unless the company is exempt, and changes to the company's constitution, directorships, membership, etc must also be notified to Companies House. Filing fees are due each time so there are ongoing financial consequences attached to the 'privilege' of forming a company.