

JOINT INSOLVENCY EXAMINATION BOARD

OVERALL COMMENTS ON THE NOVEMBER 2015 SITTING

Introductory remarks

All three papers this year comprised essentially practical questions that examined candidates' knowledge of, and their ability to apply, law and practice central to the work of any Insolvency Practitioner. Some candidates were able to demonstrate that they have a solid understanding of insolvency law and practice and that they could use this to tackle the problems and issues presented to them. As a consequence, some very good marks were awarded.

However, there were too many candidates whose answers suggested that they lack essential skills and/or that they could not set down clear practical advice founded on a good understanding of the relevant underlying principles.

Core skills and the application of insolvency law and knowledge to practical scenarios

It was very disappointing that too many candidates were unable to demonstrate that they possess skills that are core to the work of the insolvency profession.

As in previous years, candidates presented with the need to prepare or manipulate numbers too often showed that they were unable to do this to an acceptable level, or at all. In their individual reports the examiners make a number of references to this failing. Candidates who sit the examination believing that that they will be able to gain enough marks without worrying about numbers and numbers based questions are putting themselves at a material disadvantage. Not only are they throwing away the opportunity to gain valuable marks (the syllabus indicates that approximately 30% of marks will be allocated to "numbers") but they are also flagging up to the examination team the fact that they lack a key skill, one without which any competent Insolvency Practitioner cannot do his/her work.

An emerging trend is the inability shown by too many candidates properly to advise a third party (for example an individual creditor, the spouse of a bankrupt or a board of directors). The work of an Insolvency Practitioner is more than just being a competent Office Holder. Any Insolvency Practitioner must be able to advise third parties, but candidates often seem unable to adapt their approach to do this successfully. Whilst the underlying law and principles will be the same for an Office Holder and a third party with whom he/she is engaged, the objectives of and tactics to be adopted by the third party will often be very different from those of the Office Holder. Candidates must be able to show that they are able to appreciate the differences in approach and adapt their thinking when advising a third party.

For a number of years the annual reports by examiners have drawn attention to the failure of too many candidates to apply their knowledge to practical situations. Candidates' scripts this year suggest that this is still the case. Candidates appear to think that they can gain enough marks to pass simply by committing to paper all that they know about a particular subject. The fact that a checklist committed to memory is being regurgitated without real understanding is obvious to the examination team, particularly (1) when some or all of what is written either has passing or no relevance to the question, and/or (2) what is presented is far more in quantity than can possibly be justified by the question. Candidates are reminded that the syllabus indicates that approximately 40% of marks will be allocated to the practical application of insolvency law and knowledge.

Candidates who adopt the "quantity over quality" approach are not demonstrating the clarity of thought required of an Insolvency Practitioner. If they compound this by failing to apply knowledge in a coherent manner (or at all) to the practical requirements of the question, they will be unlikely to pass the examination. No amount of tuition on examination technique will ever compensate for a candidate's inability (1) to identify concisely the relevant issues, (2) to set these out in a coherent fashion, and then (3) to apply these to the facts of the question.

This year the inability to carry out core skills, compounded by a failure to apply knowledge to practical situations, meant that far too many scripts were presented which were uninspiring and unconvincing. This led to the examination team concluding that the candidates concerned had not done enough to pass. A clear signal that this was the case was provided by the holistic marks awarded, which too often suggested that the scripts presented were not good enough. Candidates need to recognise the importance of holistic marks, which are a

very good indicator of the quality of a script and which can, and often do, form an important part of the pass/fail decision.

In a year when all the questions were mainstream, presenting candidates with good opportunities to show their knowledge, skills and abilities, some candidates grasped that opportunity and presented good tightly written scripts. However, the impression given in too many cases was of candidates who do not possess key skills and lack practical experience. The inevitable result, in a year when pass marks reflected the relative straightforwardness of the papers, was that such candidates scored too few marks to pass.

Counterproductive habits

Candidates are exhibiting habits or practices that do not help their cause.

Too much time is wasted copying out facts from the question. Unless it is necessary to do this (perhaps as part of writing a letter or memo as required by the question's requirements) candidates should avoid this practice. It wastes time and no marks are awarded for being able to copy.

There is a tendency for candidates to repeat points that they have already made when answering a particular question or part question. This not only wastes time but is also an indication to the examination team that the candidate is not on top of the subject. However good the point made may be, marks can never be awarded for repeating it.

Poor handwriting has been a recurring theme in examiners' reports over the years. In a minority of cases candidates persist in presenting scripts that are difficult to read. Examples of words or phrases that are impossible to read are too common. There is a limit to the efforts that the examination team will make to decipher poor or illegible handwriting and candidates are again reminded that marks cannot be given if something cannot be read.

There have been a number of instances this year of candidates not reading questions properly or taking insufficient care to ensure that their answers are directed to the requirements. No marks can be given for answering a question other than that set. The solution lies in candidates taking time to plan and ensuring that they fully understand what is required of them.

Electronic marking

This was the first JIEB exam sitting to be fully marked using computer based marking and candidates were presented with a different booklet format to previous sittings. The rules are that, for each paper, candidates receive a single booklet divided into 4 sections, one for each question. If additional paper is required supplementary booklets are available on request. It is disappointing that some candidates are unfamiliar with, or were unable to follow, the revised requirements.

All responses, no matter where they are written down, are marked. However, particularly in supplementary booklets it was at times difficult to locate the relevant answer, particularly if questions had been answered out of order. Candidates who do not follow simple requirements (1) are running the risk that mark-worthy points are missed during the marking process, and (2) do not show themselves in their best light.

JOINT INSOLVENCY EXAMINATION BOARD

LIQUIDATIONS

EXAMINER'S REPORT AND MARK PLAN FOR THE NOVEMBER 2015 SITTING

General comments

Three of the questions required candidates to set out the steps they would take to deal with identified issues. As in previous years, the use of checklists and regurgitation of standard insolvency knowledge without applying this to the facts of the question, meant that too many candidates failed to gain good marks despite writing pages of script. The use of words such as "steps" in the requirements to a question should highlight to candidates that they must demonstrate that they can apply their insolvency law and knowledge in practice. Candidates are reminded that there are no marks in the mark plan for repeating the facts contained in the question.

Despite relevant case law being a specific requirement in two of the questions, very few candidates referenced this in their answers. Those that did mention case law scored much higher marks, with higher holistic marks available for candidates who demonstrated good case law knowledge throughout their scripts.

As ever, some candidates were well prepared and showed a clear knowledge and understanding of Liquidations and this was reflected in some strong marks. On the other hand, handwriting continues to be an issue; and as with previous years, an inability to apply knowledge to practical issues and the general lack of understanding of the insolvency legislation inevitably led to some candidates being awarded low holistic marks.

Liquidations questions have historically been very detailed which whilst being very time pressured, provided candidates with lots of opportunities to pick up marks. Going forward, there will be an increased focus on enabling candidates to be able to demonstrate an in depth knowledge and practical understanding of insolvency issues.

Question 1

Write a file note explaining your strategy for dealing with the issues that you have identified. Stating your reasons and any assumptions made, set out the steps that should be taken by you, as Liquidator, to resolve each issue. (25 marks)

Candidates were required to identify issues in a compulsory winding-up and set out how they would resolve them. The issues included post-petition dispositions, Commercial Rent Arrears Recovery (CRAR), general property issues, validity of enforcement processes, decision to trade and incomplete customer orders.

This question was generally poorly answered, with many candidates wasting time by writing out checklists learnt in relation to freehold and leasehold properties rather than applying their knowledge and answering the question. A lot of candidates also wasted time repeating the facts in the question for which no marks can be awarded.

Quite a few candidates misunderstood Section 127 IA86 and thought that it also meant that payments into the company's bank account constituted dispositions by the company. Candidates also wasted time stating irrelevant legislation because they failed to recognise that the enforcement process against the assets in the Controlled Goods Agreement was incomplete, as the Enforcement Agents still had control of the goods upon receipt of the notice of insolvency (winding up petition), and therefore they must pass the goods back to the Liquidator. Finally, several candidates also discussed in detail completing a Directors' return when this was clearly a compulsory liquidation.

Question 2

- (a) (i) **Prepare a Statement of Affairs for the Company as at 30 October 2015; (16 marks)**
- (ii) **Prepare a deficiency account for the Company as at 30 October 2015; (4 marks)**

Question 2 (a) required the preparation of a Statement of Affairs and Deficiency Account for a company limited by guarantee.

Question 2 (a)(i) was well answered, although some candidates failed to recognise that there was no prescribed part and very few dealt with the finance lease correctly or brought down the fixed charge surplus.

Those that answered Question 2 (a)(ii) were able to score good marks. However there was a noticeable number of candidates who did not attempt this part of the question, which suggests a general lack of understanding of Deficiency Accounts.

(b) Set out, by reference to the tests laid down in the Act and to relevant case law, how you would assess whether or not a limited company is able to pay its debts. (5 marks)

Question 2(b) required candidates to explain how they would assess whether a company was able to pay its debts with reference to the tests laid down in the Act and relevant case law.

This question was poorly answered, with many candidates repeating verbatim the tests laid out in s123 of the Act for which only one mark was available. The majority of the marks available were for the practical application of those tests e.g. obtaining cash flow projections and reviewing the balance sheet position, which few candidates mentioned. For relevant case law, some candidates referred to Eurosail but very few mentioned *Bucci v Carmen Re Casa Estates (UK) Ltd (In Liquidation)* [2014]

Question 3

(a) Set out the issues you should consider when deciding whether or not to provide advice to the LLP; (6 marks)

Candidates were required to consider whether or not they should provide advice to a LLP, which had been referred to them by their Aunt whose best friend was a partner of the LLP. There was also a Cousin who worked for the LLP.

Candidates performed well by picking up easy marks on the ethics principles e.g. objectivity and self-interest, and many mentioned not working on the case personally if the engagement was accepted.

(b) Set out the practical and legal steps required to place the LLP into Creditors' Voluntary Liquidation; (5 marks)

This part of the question required candidates to recognise the difference between a Creditors' Voluntary Liquidation ("CVL") for a limited company and a CVL for an LLP. This caused confusion for some candidates, particularly as the members were the partners.

Candidates also needed to be mindful that there were only 5 marks available for Q3b. Careful consideration was required as to what to include in their answer, and not to give in to the temptation to spend too much time on a question they felt comfortable with, regurgitating checklists of facts.

Overall this procedure question was generally well answered.

(c) Write a file note of the practical and legal steps that would need to be taken in the Liquidation to resolve the specific matters of which you are currently aware. (14 marks)

Candidates were required to identify issues in this LLP CVL and set out how they would resolve them. The issues included unbilled WIP, partner drawings, potential transaction at undervalue, recoverability of book debts, unsecured creditors, property issues and potential misappropriated funds.

The majority of candidates were able to comment on each issue: however, many went into too much detail e.g. explaining every possible aspect of how you can reclaim the partners drawings and even going into misfeasance, preference and taking the partners to court if they didn't co-operate and then explaining what these were in turn, or setting out various claims against Daisy in relation to the car transaction.

Some candidates were also repetitive with their answers, particularly in stating the same principle several times. Candidates would have saved time by stating the principle once, and then applying facts and setting out practical steps as relevant.

Both these issues affected candidates' time management and didn't gain them any additional marks. However, overall this question was answered well.

Question 4

Set out the steps that you, as Liquidator, should take to seek to address the matters so far identified by you. Give reasons for your proposed courses of action and make reference to relevant legislation and case law. (25 marks)

This question related to a ready meal manufacturer that had entered into a CVL. Candidates were required to set out the steps they would take to deal with various antecedent transactions and other issues detailed in an extract from the statement of affairs including stock, debtors and unsecured creditors.

Overall the quality of the answers varied, with some excellent scripts countered with some very poor ones. Far too few candidates mentioned case law despite being asked to do so in the requirement.

A number of candidates concentrated on the antecedent transactions and failed to comment on the stock, debtors and air conditioning unit mentioned in the statement of affairs for which there were easy marks available. Many candidates mentioned misfeasance several times, but marks can only be allocated once.

Most candidates identified Arthur as a shadow director, but relatively few candidates mentioned that the directors who had resigned would also need to be considered in any investigations. Not many candidates addressed the requirements of SIP2 and the need for an initial investigation. Several candidates stated that SIPs imposed duties on directors which suggests a fundamental misunderstanding of what SIPs are.

Few candidates mentioned that by purchasing stock through Arthur there may be a fraudulent trading action. Instead some candidates identified it as a preference, transaction at undervalue or transaction potentially subject to being impugned under s423. In terms of wrongful trading, this was often identified however the steps that would need to be taken to consider whether it was worth pursuing were rarely mentioned.

EXAMINER'S MARK PLAN

LIQUIDATIONS

NOVEMBER 2015

QUESTION 1

1. Write a file note explaining your strategy for dealing with the issues that you have identified. Stating your reasons and any assumptions made, set out the steps that should be taken by you, as Liquidator, to resolve each issue. (25 marks)

File note layout

Alf is potentially unaware of the winding up petition.

Consequences: trading between date of petition and order (between 15 7 15 and 18 9 15) therefore need to ascertain extent of trading;

IA s127 – Avoidance of property dispositions – void unless court authorises.

Consider if petition was validly served on Alf if as he states, he was unaware of it.

Bank account in debit at all times – no dispositions of property to the bank which acts as Company's agent.

The banking transactions are only part of the process by which dispositions of the company's property are made and therefore the bank cannot be pursued for restitution (*Bank of Ireland v Hollis Court (Contractors) Ltd [2000] BCC 57*) (applies whether co in dr or cr) overturned *Re Grey's Inn Construction Co Ltd [1980] 1WLR 711*

Confirm whether bank account was frozen

Obtain copies of bank statements/management accounts to identify any post-petition dispositions

Discussion of the principles established in *Re Gray's Inn Construction*:

- creditors have right to pari passu division of assets at commencement of winding up;
- continuation of business, and so position of assets and payments out in ordinary course of business after presentation of petition may be beneficial to creditors;
- on the other hand, their interests should not be prejudiced by transactions effected after presentation of petition. Court has to carry out balancing act;
- payments to one existing creditor at the expense of the others would not normally be validated but may be special circumstances.

How to recover arrears of rent on shop with sublet flat above.

Commercial Rent Arrears Recovery (CRAR) contained in Tribunals Courts and Enforcement Act 2007 and Taking Control of Goods Regulations 2013.

TCE Act s72 and Sch 12: Liquidator to consider whether can use CRAR enforcement procedure

Need to check lease to ascertain:

- it is in writing (s74) and
- applies to commercial premises (s75)

However, the premises are not 100% commercial premises because the flat is sublet as a dwelling (s75).

Therefore CRAR cannot be used UNLESS the sublease is in breach of a superior lease and if the occupation as a dwelling is in breach of the terms of the Company's lease or any superior lease (s75(4) and (5))

Liquidator to check whether sublease is in breach of superior lease and whether dwelling is in breach of the terms of the lease.

CRAR also does not apply where the premises are occupied as a dwelling with another use – a lease which comprises both a retail shop and a flat will not be covered by CRAR if the flat is occupied or the terms of the lease permit occupation as a dwelling (s75(3)).

Liquidator to check whether flat is occupied and if lease permits occupation as a dwelling.

Can't exercise CRAR re arrears of insurance

If CRAR is applicable, Liquidator to check other CRAR requirements:

- minimum amount rent owed has to be 7 days net rent (i.e. including any interest and VAT) (s77 & reg

52)

- due and payable before notice of enforcement given (s77)
- certain or capable of being calculated with certainty (s77)
- is the lease continuing? (s75)

Consider how to proceed:

Obtain legal advice.

Obtain reason why rent hasn't been paid (tenant insolvent?) and request rent arrears

Obtain and review copy of sublease

Consider whether the tenant has a guarantor you can call on.

Consider issuing a s6 Notice requiring the subtenant to pay rent direct to the company as head landlord.

Consider if there is there a rental deposit you can use. Obtain an alternative valuation for premises if occupied by sub tenant.

IA s183, where a creditor has issued execution against the goods... and the company is subsequently wound up, he is not entitled to retain the benefit against the liquidator unless he has completed the execution or attachment before the commencement of the winding up.

Re Modern Jet Support Centre [2005] 1 WLR 3880 (distrain not a form of execution within the meaning of s183 of the Insolvency Act 1986)

Enforcement Agent initially entered onto premises on day before petition for non-payment of rent, and then took control of van on day of petition (i.e. post commencement).

Controlled Goods Agreement ("CGA") enables Alf to keep hold of the assets under the CGA whilst he pays back what he owes under an agreed payment schedule. If Alf didn't keep to the payment schedule, Enforcement Agent must give 7 clear days' notice if they intend to sell the items.

Enforcement process is not complete if Enforcement Agent still has control of the goods upon receipt of notice of insolvency (winding up petition), and they must pass goods to the Liquidator.

Here Enforcement Agent hasn't taken any further action due to correspondence entered into with Alf re tools, therefore need to:

confirm Enforcement Agent hasn't sold goods;

confirm Enforcement Agent is aware of winding up petition and order;

obtain copy of CGA and payment schedule;

confirm location of goods under CGA;

inform landlord of appointment;

Liquidator to take back control of goods.

Liquidator to confirm whether any of the tools belong to Alf personally and if so, return to Alf

Consider if property is insured, if rent (which includes insurance) is unpaid.

Confirm whether the landlord has a rent deposit or the lease was guaranteed by a third party

Obtain valuation of lease, if no value offer surrender or disclaim lease. If value in lease consider if you can assign it.

IA s128 any attachment, sequestration, distress or execution put in force against the estate or effects after the commencement of the winding up is void;

Landlord changing locks – forfeiture of lease is valid. Nb changing locks is not a proceeding. Peaceable re-entry of the premises by the landlord is not an action or legal proceeding per s130(2) IA86 (*Ezekiel v Orakpo* [1977])

If forfeit lease, liquidator could demand return of goods on premises.

Liquidator could demand relief against forfeiture if there is value in the lease

Obtain details of any rent deposit held by landlord

As Z Bank has been paid in full, there are no fixed or floating charges, therefore can't appoint Administrator or Administrative Receiver

Deposits for kitchens placed into overdrawn bank account.

Consider wrongful trading and report to Official Receiver for investigation into director's conduct.

Stock/WIP will have limited value as kitchens are bespoke, although liquidator should consider completing the contracts and opening bank account.

Require sanction under Sch 4 to carry on the business (*note this changed on the 26 May 2015, however exam is based on law up to 30 April 2015*).

Need to ascertain whether it will benefit estate and any risks involved.

Consider what employees will be needed

Can orders be completed from the Company's workshop

Can Liquidator get hold of WIP in the workshop

Any retention of title issues.

Other trading considerations

Directors:

Winding up order has effect of dismissing the directors and terminating their powers (Fowler v Broad's Patent Night Light Co [1893] 1 Ch 724

Employees:

Winding up order constitutes notice of termination of employment to all employees of the company (Measures Bros Ltd v Measures [1910] 2 Ch 248)

If decide not to complete orders inform customers, haulier and supplier of position.

Advise Order 3 supplier to contact haulier to obtain goods back

Customers will have unsecured claim for deposit, and need to inform them of their position

Confirm if Order 1 has been paid in full and should therefore be released to the customer.

Suppliers may have ROT claim and an unsecured claim

Potential disposition of assets if paid between winding up petition and order so any payments may be clawed back.

Supplier is Polish? Liquidation is governed by EC Regulations, main proceedings, need to comply with Article 40 & 42

Other general steps –talk to Alf, review Statement of affairs and books and records

QUESTION 2

- (a) (i) Prepare a Statement of Affairs for the Company as at 30 October 2015 (16 marks);
 (ii) Prepare a deficiency account for the Company as at 30 October 2015 (4 marks);

Clearly state any reasonable assumptions which you have made.

NOTE: Ignore VAT

- (b) Set out, by reference to the tests laid down in the Act and to relevant case law, how you would assess whether or not a limited company is able to pay its debts. (5 marks)

(25 marks)

(a) i Unhappy Leisure Centre Limited Statement of Affairs at 31 October 2015

	BV £'000	ETR £'000	Change
Assets Subject to charges			
Freehold land and buildings	4,000	3,000	(1,000)
Less due to Village Bank Plc (400 + 2,000)	(2,400)	(2,400)	0
Surplus under fixed charge c/d	1,600	600	
Gym equipment	400	200	(200)
Less due to AssetFinance Plc (100 + 300)	(400)	(400)	
Shortfall to AssetFinance Plc c/d		(200)	
Assets not subject to charges			
Plant and equipment (BV 2,000 – 400) [ETR ((2000 x 75%) – 400) x 50%	1,600	550	(1,050)
Furniture and fittings (say ETR 20% x BV)	600	120	(480)
Stock/work in progress (100 – 15) =BV discussion re ROT, ETR = 0, included in building value???	100	0	(90)
Stock ROT = 10			
Debtors	600	298	(302)
ETR			
Trade debtors – say 70% x300 = 210			
Other income and prepayments = 0			
Rainy MBC – set off with amount owing or not - R4.90? 200 - 112			
Cash (200 – 10) 10 due to independent instructors, assume held on trust as bank account is in credit and funds can be traced	200	190	(10)
Assets available to preferential creditors		1,158	
Preferential creditors [Holiday and arrears of wages 12+8]		(20)	20
		1,138	
(nb prescribed part n/a as no longer floating charge holder – paid out of fixed charge)			
Fixed charge surplus b/d		600	
Assets available to unsecured creditors		1,738	
Unsecured creditors:			
AssetFinance Plc b/d	(200)	(200)	0
Trade creditors [1,800 – 10 Swimalot, discussion re ROT, here assumed no all monies)	(1,800)	(1,790)	10
Deferred income and accruals – reasons for assumption that will not have to pay or otherwise	(1,500)	0	1,500
Tax and social security	(20)	(20)	0
Other creditors (130 – 8 (pref wages) – 10 (sports instructors cash) – 112 (Rainy MBC set off)	(130)	0	130
Deferred tax	(100)	0	100
Shortfall to unsecured creditors		(2,010)	(272)

(ii) Deficiency Account as at 30 October 2015

	£'000	£'000
Correct layout		
Surplus per balance sheet		1,150
Decrease in value of:		
- land and buildings	(1,000)	
- value of gym equipment	(200)	
- plant and equipment	(1,050)	
- furniture and fittings	(480)	
- stock	(90)	
- debtors	(302)	
- cash transfer to independent instructors	(10)	(1,982)
Change in creditors:		
Decrease in		
Deferred income and accruals	1,500	
Deferred tax	100	
ROT	10	
Rainy MBC set off	112	(260)
Less items arising on insolvency:		
Preferential holiday pay		(12)
Deficit per statement of affairs		(272)

(b)

S123 – company deemed unable to pay its debts if:

S123(1)(a) creditor owed a sum exceeding £750 and has an unsatisfied outstanding statutory demand for at least 3 weeks

S123(1)(b) unsatisfied judgement, decree or court order

S123(1)(e) proved to the satisfaction of the court that the company is unable to pay its debts as and when they fall due

S123(2) value of the company's assets is less than the amount of its liabilities, taking into account contingent and prospective liabilities

Identify if company has any outstanding statutory demands or unsatisfied judgements or court orders

Balance sheet test is not normally enough on its own, need to consider whether can pay debts as and when they fall due:

Review management accounts to confirm balance sheet position

Obtain cash flow projections to identify if company can pay debts as and when they fall due

Interview directors and finance staff to confirm financial position

Assess working capital position to confirm if company can pay debts as and when fall due

Obtain written confirmation from finance providers to confirm whether or not they will continue to support company

Assess whether the company has any other alternative sources of funding

Adjust balance sheet for estimated to realise values on insolvency

Bucci v Carmen Re Casa Estates (UK) Ltd (In Liquidation) [2014] held that if a company is only able to pay debts by incurring further debt, in any commercial sense it was insolvent.

BNY Corporate Trustee Services Ltd v Eurosail [2013] held that the cash flow test must take into account debts falling due in the reasonably near future

QUESTION 3

(a) Set out the issues you should consider when deciding whether or not to provide advice to the LLP (6 marks);

Consider insolvency ethical guidelines:

Consider perceived and actual threats to fundamental principles (here key threats likely to be self-interest; advocacy; familiarity)

Referral by aunt, who is a friend of a partner. Aunt is an associate.

Relationship to junior employee who is your cousin.

Consider whether there are any other professional or personal relationships, or financial interests in the LLP, or other entities controlled by Daisy or other partners, which could impair objectivity;

- audit relationship

- tax relationship with LLP or partners

- relationship with Anytown Bank plc or other creditors

- Tulip's Nominee/Dahlia Office Fitters ("DOF") Administrator/Mrs Greenfingers

Consider whether the client should be accepted given SRA intervention

If threat cannot be eliminated, need to evaluate significance and apply safeguards.

If safeguards cannot mitigate the threat to an acceptable level need to consider whether appropriate to provide advice

Safeguards could be;

Consult with second partner

Second partner to review advice given

Take joint appointment

Ensure that the manager doesn't work on the case

Consult with regulatory body/ICAEW hotline

KYC

Money laundering checks

Do you have suitable staff, in the right location with the right qualifications and experience

Agreed engagement letter?

Does Partnership have funds to pay fees for advice?

Have all partners agreed to engage you?

(b) Set out the practical and legal steps required to place the LLP into Creditors' Voluntary Liquidation (5 marks);

Qualifying Floating Charge Holder

Give 5 business days' notice to floating charge holder (Anytown Bank).

The Partners or proposed Liquidator should discuss the position with the bank – it will have to be shown that it will not be worse off by appointment of Liquidator.

Limited Liability Partnership Regulations 2001 apply here, alongside IA86

Review Partnership Agreement

Call LLP board meeting

Call members (Partners') meeting

14 days' notice to be given, notice period can be waived if 90% of members consent (here as 3 members, will need all of them to consent)

Partners to prepare and swear Statement of Affairs

Pass special resolution to place LLP into CVL (filed with Registrar of Companies within 15 days and advertised in Gazette within 14 days)

Pass ordinary resolution to appoint liquidator

Pass ordinary resolution re liquidator's remuneration

SIP 8

Take reasonable steps to ensure list of creditors provided by partners is correct

Not all creditors' addresses are recorded on creditors ledger; discuss with partners, review books and records for creditor details

Minimum 7 clear days' notice served on all classes of creditors at same time.

Advertise in Gazette and local newspaper

Send notice to Sheriff's Office, solicitors and debt collecting agencies (and County Courts if applicable)

Consider EC Regs for Casse SA

Information to be sent to creditors prior to meeting:

- proxy form (SIP 10)

- proof of debt
- SIP 9
- Statement of affairs to be made available
- list of creditors to be made available

Liquidator and directors to prepare information to be provided at creditors meeting

Consider which creditors to accept for voting purposes and in what amount

Hold creditors meeting

Vote on resolutions, need majority in value of creditors voting to pass resolutions and appoint Liquidator

(c) Write a file note of the practical and legal steps that would need to be taken in the Liquidation to resolve the specific matters of which you are currently aware. (14 marks)

File note layout

Consider amounts recoverable under contracts – can any amounts be billed

Ensure orderly handover of client files and issues

Advances of drawings – Liquidator can pursue individual partners

S214A – if within 2 yrs of commencement of winding up, partners took drawings and LLP was or became insolvent as result, Court can require partners to make a contribution to the LLP's assets

Write to partners requesting repayment

If fail to make repayments consider how to recover funds – do they have sufficient assets; initiate bankruptcy proceedings?

Daisy car purchase – consider if transaction at an undervalue s238

Insolvency presumed (s240(2)) as Daisy is a connected person (s249)

Transaction took place within 2 yrs

Consider defence; entered into in good faith; carried out for purpose of company's business or reasonable grounds for believing it would benefit the company.

Obtain details of car and whether Daisy still owns it

Obtain car valuation from when purchased and then when sold to Daisy, was there a reason for the drop in value?

Speak to Daisy; can you agree a settlement

Prepayments – write to Rose and Crocus requesting cessation of services and final bill.

Request any refund due.

Tulip: confirm whether debt can be set off (4.90)

Confirm claim has been submitted to Supervisor

Confirm timing and quantum of dividends

Dahlia/DOF – confirm LLP has submitted proof of debt in Dahlia's bankruptcy:

Obtain details of estimated dividend and likely timing from Trustee

Consider if LLP can make insurance claim against DOF's insurers for inferior work

IT litigation – contact solicitors and update Court file

Consider whether to continue with proceedings, how strong is the claim?

Any insurance cover in place to cover costs?

Does IT Limited have funds to pay any settlement?

Consider whether can agree out of court settlement

May need to consider whether need authorisation under Rule 4.218A if insufficient assets to fund litigation (will depend on recoveries from members)

Review validity of bank's security

Personal guarantees in place. If partners repay amounts due from members, likely bank will recover £70k in full and therefore personal guarantees won't be called on.

Provide bank with estimated outcome statement.

Overseas creditors

Convert debt using exchange rate at date of appointment (Rule 4.91)

For Casse SA ensure comply with EC Regulation on Insolvency Proceedings 2000 Article 40 and Article 42 by sending Notification of appointment in all the official languages of the EU (doesn't apply to Danish creditor)

Greenfingers – pass claim when received to insurers

Obtain copies of accident book

Pass any relevant details (e.g. contact numbers of witnesses) onto insurers

Leasehold property.

Confirm position in writing to landlord/partners

Review copy of lease

Determine whether need property going forward

Obtain valuation of lease, any lease premium? Also confirm rent payable is at market rate, given connected

party landlord.

If premises not required and no premium, request surrender of lease.

If landlord doesn't consent, disclaim lease s178

Rent payable whilst Liquidator is in occupation is liquidation expense.

Need to look into ownership of freehold to determine whether it is an asset of the Partnership.

Confirm whether there is any equity in the property

Obtain Land Registry search and drive-by valuation

Could ask partners to sell property in order to repay debts owed to LLP.

Bluebell - obtain full details and evidence regarding furniture from Bluebell

Investigations (SIP 2):

Formally request that creditors inform you of any matters of concern

Review cash book for transactions

Review asset register to confirm all assets accounted for and included on statement of affairs and balance sheet

Review make-up of amounts due from members

Review balance sheet v Statement of Affairs to confirm all assets and liabilities included (no fixed assets and allegations of misappropriated funds?)

Bring books and records up to date

Majority of creditors over 90 days old – wrongful trading s214

Consider when partners knew or ought to have known company was insolvent

Review cash flow

Interview partners

Include in D return

QUESTION 4

Set out the steps that you, as Liquidator, should take to seek to address the matters so far identified by you. Give reasons for your proposed courses of action and make reference to relevant legislation and case law. (25 marks)

Consider who is/has been a director, including shadow director?

Discuss definition: CA 2006 s250; IA s251: "any person occupying the position of director by whatever name called" and "shadow director": "a person in accordance with whose directions or instructions the directors of the company are accustomed to act (but so that a person is not deemed a shadow director by reason only that the directors act on advice given by him in a professional capacity)"

Re *Paycheck Services 3 Ltd [2010]* Arthur, as an individual director of Catty a corporate director, is not liable as a de facto director as this would pierce the corporate veil.

Here Arthur appears to be at least a shadow director Re *Hydrodam (Corby) Ltd [1994]*

Betty, Catty, Deidre and Ethel are all de jure directors

CVA Supervisor not considered a director as professional advisors not usually shadow directors

Consider who needs to be included in D return – all those who are/were directors and shadow directors in last 3 years from date of appointment

Send directors questionnaires to all directors

SIP2 initial review:

Invite creditors (and creditors committee if formed) to bring to your attention "any concerns regarding the way in which the company's business has been conducted, and on potential recoveries for the estate"

Obtain and review company's books and records to enable you to compare the Statement of affairs with the last filed and management accounts over a 12 month period, "in order to ascertain whether all significant fixed and current assets can be identified and material movements in fixed and current asset can be properly explained".

"Preliminary review of the books, records and minutes for the last six months in order to identify any unusual or exceptional transactions."

Potential wrongful trading action s214

Identify when Company became insolvent to identify when directors knew or ought to have known "no reasonable prospect that company would avoid going into insolvent liquidation"

Review minute book

Cash flow forecasts

Management accounts (balance sheet insolvent test)

Whether audited accounts have been qualified

Evidence of creditor pressure (e.g. suppliers refusing supply, court judgements, statutory demands)

Company had two overdrawn bank accounts for past two years

Defence "took every step with a view to minimising the potential loss to the company"

Mond v Bowles & Ors [2011]

Review books and records to confirm whether

- consulted with bankers/professional advisors
- prepared up to date cash flow forecasts
- dealt only in cash
- avoided taking new credit
- sourced additional funding

Can bring a s214 claim against a shadow director i.e. Arthur s214(7)

Resignation is not a defence – Ethel resigned 2 Sept 2015

Betty didn't draw salary in four months leading to Liquidation – possible defence to s214.

Review payroll records to confirm annual salary, consider if annual salary of £120,000 is reasonable.

Consider general knowledge, skills and experience of directors to evaluate whether wrongful trading action will be successful.

Ethel is an accountant, therefore level of general knowledge, skills and experience expected to be higher than fellow directors

Is Betty an employee?

Technical Release 6 – Treatment of Directors' Claims as "Employees" in Insolvencies

Can Betty claim arrears of wages from the Redundancy Payments Service?

Consider *Eaton v Robert Eaton Ltd [1988]*

Review Betty's employment contract

Was remuneration paid as salary or director's fees

Preferential claim of £40,000 seems high as preferential wages limit is £800. Could include occupational pension contributions or unpaid holiday – review payroll and holiday records.

Options for Liquidator ascertaining/recovering assets:

Consider SIP2 and:

IA s234, Getting in the company's property (books and records, stock held by Slow Freight Forwarders and by Catty, stock documents held by Catty)

s235, duty to cooperate with office holder (includes directors, Arthur and auditor),

s236, Inquiry into company's dealings (Arthur, auditors and directors) *Re Sasea Finance Ltd v KPMG [1998]* confirming this applies to auditors

S246 unenforceability of lien on books and records

Request any books and records from auditors, can't hold lien over these for unpaid fees

Transaction at undervalue s238 – transfer of lease potential undervalue c£600k

Insolvency presumed as Catty is a connected party

Transaction took place at relevant time – 2 years from onset of insolvency i.e. date of winding up resolution 29 September 2015.

Defence, transaction entered into in good faith, purpose of company's business or believed it would benefit the company.

Liquidator to confirm no grounds for defence, obtain copy and valuation of lease at time of transfer, Land Registry search. Consider whether transfer of lease to Catty falls foul of s190-s191 CA06, failure to seek prior approval for substantial non cash asset from the Company.

Confirm whether £30,000 lease value is more than 10% of net assets

Transactions with Catty – confirm what services were provided by Catty to the Company, s177 CA06 compliance?

Is rent paid for head office and two warehouses reasonable – obtain agents valuation

Identify what payments of £200,000 and multiple £500,000 were for – rent?

Request details from CVA Supervisor re payments made whilst Company was in CVA

Consider if any payments to Catty were preferences under s239.

Review books and records to identify whether any payments made to Catty when company was insolvent or became insolvent as a result of the preference?

Desire to influence presumed as Catty is a connected party

Request repayment from Catty of all monies paid where not due

If not received, then consider court action

As Catty is a Jersey company s426 IA86 application may be required

Dividend – should be out of distributable reserves, CA 2006 s847

Review accounts to see if made out of distributable reserves

Discuss with CVA Supervisor as 2013 dividend would have been made whilst Company in CVA

Request dividend is repaid

Fixtures and fittings, obtain assets, confirm ownership, insure, instruct agent to value and sell.

Perishable stock therefore need for urgent action

Stock at Company's premises – consider if it has any value, do you have the necessary licenses to sell it, any potential purchaser, consider if cost effective to realise the stock, and disposal strategy if can't sell

Stock with Slow Freight Forwarders - confirm if haulier holds lien over stock. If there is net value in the stock negotiate stock release

If no value, consider disclaiming s178(3), given potential liability may arise to dispose of stock

Stock may be held by Catty – speak to Catty's staff, consider s234/s235. Review books and records to ascertain if Catty purchases stock from the Company – debtor, ROT?

Debtors:

Deidre loan – formally request repayment of loan. Consider options if Deidre in Australia, does she have assets to repay, consider issuing bankruptcy petition if fails to pay

Book debts - write to debtors confirming appointment and requesting repayment of book debts. Consider instructing debt collection agency

Essex air conditioning unit – potential ROT creditor, is air conditioning unit now part of the building?

Essex warehouse owned by Catty, confirm who directed Company to contract to purchase unit.

S213 fraudulent trading – has business been carried on with intent to defraud creditors

Stock purchased through Arthur directly – s177 CA06 director has a duty to declare an interest in a proposed transaction, review records to confirm whether Arthur had declared nature and extent of interest

Company can seek order to make Arthur account for profits

Applies to shadow directors i.e. Arthur

Here, evidence of incurring credit when knew no reasonable prospect creditors would be repaid; cash transfers out by Arthur/Catty

Directors' responsibilities: Fiduciary duties CA 2006 ss171-177

In particular failing to promote the success of the company s172CA06 (*re Southern Counties Fresh Foods Ltd [2008]* and *GHLM Trading Ltd v Maroo [2012]*); avoid conflict of interest s175CA06 (Catty); declare interests in proposed transactions s177CA06 (see below)

Failure to keep adequate books and records s386CA06

Court can order payment of damages where Company has suffered a loss, restoration of property.

s212 misfeasance – obtain Court order for compensation

Per *Paycheck Services 3 Ltd [2010]* cannot bring a s212 claim against a shadow director
Consider settlement for any/all of above and means of directors and Catty to pay any settlement
Consider money laundering and reporting duties under Proceeds of Crime Act 2002, given cash transfers by Arthur and unreconciled cash books

JOINT INSOLVENCY EXAMINATION BOARD

ADMINISTRATIONS, COMPANY VOLUNTARY ARRANGEMENTS AND RECEIVERSHIPS

EXAMINER'S REPORT AND MARK PLAN FOR THE NOVEMBER 2015 SITTING

General comments

There were several areas within this year's paper where it appeared that candidates had not fully read the question or its requirements. As a result there were lengthy responses on remotely connected subjects that failed to answer the question set. A good example of this is question 4 where the words 'pre-pack' seem to have set a good number of candidates off on writing everything they know about SIP 16 without any consideration to the party to which their advice was to be addressed or the subject on which they had been asked to advise.

It is also necessary to highlight the tendency not to provide full answers and therefore not achieve a mark for the relevant point. As an example a common phrase seen within scripts in many places is "seek legal advice". This will not achieve a mark unless the candidate explains what they are seeking legal advice on. In addition one of the objectives of the paper is to test the candidate's understanding of insolvency related legal matters and therefore such a phrase cannot be used to replace the required level of understanding of these issues – for example if you are being asked to advise the directors it would be inappropriate to suggest they seek legal advice unless there is a specific and relatively complex area.

It appears that the majority of candidates focus on quantity of points within their answer rather than quality assuming for example that if there are 5 marks available that they have to write 10 points to achieve the maximum marks. Good quality key points may have marks weighted so that candidates demonstrating an understanding of the point they are making or showing awareness of the key issues in the circumstances are rewarded.

Question 1

This question set out a scenario where a business would be traded within administration with the intention to sell it as a going concern. The question centred on employee related matters.

(a) Given the circumstances, outline your responsibilities to the employees, including both those you intend to make redundant and those you wish to retain. (10 marks)

The majority of candidates identified responsibilities relating to employees that had been made redundant but many went into detail regarding the actual claims themselves (part b). Most also identified that there was a need to consult in relation to redundancies but very few recognised that consultation should also be undertaken in relation to the potential TUPE transfer.

It appeared that the candidates generally had a narrow field of knowledge on the subject - quite a large proportion of candidates failed to mention certain key (and topical) responsibilities to retained employees such as Health and Safety, insurance and the requirement to pay them.

(b) Using plain English, set out a note for the employees outlining the process for claiming amounts owing to them. Explain how such amounts would be calculated and from whom they would be claimed. (15 marks)

Many candidates were able to provide a comprehensive note for the employees concerned and therefore achieved a good mark on this section of the paper. There appeared to be some difficulty translating this into language that would be easy for a non-insolvency person to understand; in particular there was liberal use of the terms unsecured creditor, preferential creditor, floating charge creditor and protective award without making it clear what these meant and the associated implications.

Question 2

This was a mainly numeric question requiring the preparation of a cash flow forecast for an administration trading period.

- (a) Stating your reasonable assumptions and showing your calculations, set out a cash flow forecast for a 5 week period from 16 November 2015, including an additional column for any receipts or payments that may occur outside this time. (20 marks)**

Generally candidates presented their forecast in an appropriate format with notes for workings.

Many candidates continue to struggle with the concept of VAT at even the most basic level and chose ignore it all together. In real situations, IPs preparing such forecasts cannot assume that VAT is irrelevant to the situation; it forms a fundamental part of a trading cash flow and as such candidates should have at least a basic knowledge as to its effect on sales and purchases. Candidates that 'assumed no VAT' missed out on marks for the basic calculation of adding 20% to the figures included in the cash flow. Similarly only the better candidates identified that payments to employees are made net of tax and National Insurance deductions.

It was also clear that many candidates had a lack of practical knowledge as to how liabilities are paid in such situations assuming for example that utilities, rent and rates would be paid weekly. Whilst such payment terms are not unheard of (in particular rent) simply stating "assumed paid weekly" would not score marks whereas a comment such as "assumed rent paid weekly to maintain good working relationship with landlord" would have. Going further and adding something around quarter dates and negotiation with landlord the candidate could have achieved an even higher mark. Such comments would not have been appropriate for utilities that, considering the trading period, would likely fall within the 'after' column.

The better candidates managed to maintain a record of stock usage over the period and account for reservation of title claims. Many simply assumed that stock had to be paid for in full weekly.

- (b) Prepare a file note setting out the key issues that, in these circumstances, you would have to consider before taking the final decision as to whether to trade the Company in Administration. (5 marks)**

A few good candidates were able to come up with some points for this part of the question but many candidates did not properly attempt it or wrote general factors that were not particularly relevant to these specific circumstances.

Question 3

In this question candidates were required to advise a creditor of a company that would shortly be subject to the administration procedure where the intention was to propose a CVA.

- (a) Your recommendations as to what actions it should take in order to minimise its potential loss. (5 marks)**

The majority of candidates failed to appreciate that a creditor can do things other than claiming reservation of title to the goods recently supplied. The better responses covered the practical aspects such as cancelling orders and notifying credit insurers.

- (b) The steps required and information that would have to be provided to Dalby or its Administrator to allow Roseberry to recover goods previously supplied. Include an outline of the potential challenges that Roseberry may face in these circumstances when seeking to recover the stock. (10 marks)**

Most candidates were able to demonstrate an understanding of the issues and steps required in relation to making a reservation of title claim. The better responses included problems that may be faced in these particular circumstances such as identifying the sheet metal supplied.

- (c) How the provision of future supplies to Dalby in Administration should be structured and matters relating to this that Roseberry should be aware of. (5 marks)**

Most candidates discussed credit terms but only a few explained the practical aspects relating to authorisation of purchases and even fewer the relevance of the priority of payment for costs incurred by the Administrator.

- (d) A broad overview as to what a CVA is, its purpose and, considering these circumstances, the key steps to approval. (5 marks)**

Whilst most candidates were able to explain the purpose of a CVA there was a disappointing number of candidates that ignored the fact that this was to be proposed by the Administrator. As a consequence there were some lengthy responses covering the contents of a Nominee's report. In addition many failed to explain the relationship between the Administrator's proposals and approval of the CVA.

Question 4

Candidates were required to advise the directors in relation to a pre-pack in the context of there being a third party Insolvency Practitioner acting as Administrator.

- (a) Assuming that the sale of the Company's trade and assets will be completed by an Administrator, prepare a note to the Directors outlining the key issues that they will need to consider regarding their proposed acquisition. (15 marks)**

There were a surprising number of candidates that took the opportunity to detail the obligations of the Administrator in relation to a pre-packaged sale. Some candidates wrote several pages listing the SIP13/16 disclosure requirements that the Insolvency Practitioner is required to make, wasting valuable time for no reward.

Several candidates also discussed antecedent transactions and wrote, sometimes at length, about wrongful trading and dissipating assets. The relevance of these points to the Directors' proposed acquisition from an Administrator was not clear.

Candidates should ensure that they address their answer to the intended audience, in this case the directors. It would not be necessary in this case for the directors to ensure, check or confirm that the Insolvency Practitioner appointed is meeting their associated regulatory and statutory obligations.

- (b) In these circumstances and bearing in mind what an Administrator may consider acceptable, explain how you would propose the Directors structure an offer to the Administrator for the Company's trade and assets. (10 marks)**

Good answers to this part of the question made an attempt to quantify an offer and explain the basis of the price they were suggesting.

Many candidates however appeared unwilling to provide any advice as to how the issues could be addressed some making statements such as "consideration should be given on how Reservation of Title should be dealt with". To achieve a good mark it was necessary to explain how the issues could be dealt with in these example mechanisms for minimising the associated risk that would also be acceptable to an administrator.

EXAMINER'S MARK PLAN

ADMINISTRATIONS, COMPANY VOLUNTARY ARRANGEMENTS AND RECEIVERSHIPS

NOVEMBER 2015

QUESTION 1

- (a) Given the circumstances outline your responsibilities to the employees, including those you intend to make redundant and those you wish to retain.
(10 marks)

Retained

- Safe working environment (Health and safety)
- Pay
 - Not personal liability
 - Liability free period 14 days; adoption of contracts
 - Qualifying liabilities
 - Pay
 - Holiday pay; for the holiday accrued during the administration
 - Pensions; contributions to scheme
- Maintain employee liability insurance

Redundancy Consultation

- Establish if there are nominated representatives in relation to staff not subject to Union representation.
- Arrange for nominations and appointment if necessary
- Notify Job Centre Plus
- Seek legal advice in relation to process etc.
 - Redundancy
 - HR1
 - Provided to;
 - Representatives
 - Insolvency Service (redundancy payment service)
 - Meaningful consultation meetings. Seek suggestions as to how to:
 - Avoid redundancies
 - Reduce the number
 - Mitigate the consequences
 - As Consult at least 30 days prior to redundancy
 - Insolvency not special circumstance
 - Information to be provided:
 - the reasons for the redundancies
 - the numbers and descriptions of employees whom it is proposed to dismiss as redundant
 - the total number of employees of any such description employed by the employer at the establishment in question
 - the proposed method of selecting the employees who may be dismissed
 - the proposed method of carrying out the dismissals, with due regard to

- any agreed procedure, including the period over which the dismissals are to take effect.
 - the proposed method of calculating the amount of any redundancy payments to be made.
 - Selection process
 - Objective criteria
 - Document decisions
 - Economic, technical or organisational reason
- Information provided to:
 - Representatives
 - Trade Union at its head or main office

Transfer consultation

- Should consult employee representatives about anything to do with the transfer that would affect the employees
- Employee information provided to acquirer
- Inform representatives/union
 - that a transfer is happening
 - when it's happening
 - why it is happening
 - how the transfer will affect the employee
 - whether there'll be any reorganisation
 - how many agency workers they're using and what types of work they are doing

Dismissed

- Assist employees in completion of RP1 forms
- Letter of dismissal
- P45s and other leaver forms completed
- Submission of RP14 information to RPS

General

- Access to employee records

(b) Using plain English, set out a note for the employees outlining the process for claiming amounts owing to them. Explain how such amounts would be calculated and from whom they would be claimed. (15 marks)

RP1 form must be completed.

Weekly pay

Payments made by the Redundancy Payment Service are subject to a statutory weekly limit of £475.

Redundancy pay

RPO will pay statutory redundancy pay:

- Weekly limit of £475
- Maximum of 30 weeks (£14,250)
- Must have worked for at least 2 years
- Continuous employment is taken into account
- Weeks calculated as;
 - 0.5 weeks for each full year aged under 22

- 1 week for each full year aged 22 or over and under 41
- 1.5 weeks for each full year 41 or over
- Maximum of 20 years
- Redundancy pay (under £30,000) is not taxable

Contractual redundancy pay

- Amounts over that paid by the RPO will be an unsecured, non-preferential claim
- Proof of debt for completed to note claim in insolvency
- Payment will depend on funds available to distribute

Arrears of pay

Arrears preferential up to £800.

RPO

- RPO will pay up to 8 weeks wages
- Capped at statutory limit

Contractual

- Amounts over statutory limit to be notified to Administrator
- Proportion of unpaid element may classify as being Preferential.
 - Calculated by taking the amount not paid by the RPO as a percentage of the total arrears multiplied by £800.

Subject to notional tax deduction and National Insurance

Notice pay

- Statutory notice pay paid by RPO
 - 1 week for every full year worked
 - Entitled if worked more than 1 month (1 week's pay)
 - Max 12 weeks
 - Reduced for income received during period
 - May reduce claim if employee failed to mitigate loss
 - Statutory limit applied to weekly pay after deduction of earnings
 - Form sent on expiry of notice period for information about earnings during notice period
 - Payment made after notice period expired.
- Contractual notice
 - Any excess over paid by the RPO is an unsecured, non-preferential claim
- Subject to notional tax deduction

Holiday pay

- All preferential
- Subject to tax and national insurance
- Paid by RPO
 - Max 6 weeks
 - Accrued in the last 12 months
 - Subject to weekly limit
- Contractual
 - Any excess ranks as preferential

Expenses

- Not paid by the RPO
- Unsecured, non-preferential claim

Pension contributions

Paid by RPO

- Employer contributions lowest of
 - 12 months contributions,
 - 10% of 12 months' pay and
 - Amount certified to meet liability to pay employee's pensions.
- 12 months employee contributions.
- Contributions in respect of remuneration not actually paid is not paid

Protective award

- Tribunal decision required
- RPO will pay to the extent that arrears of wages claimed is less than 8 weeks.

Benefits in Kind

- Not paid by the RPO
- Unsecured, non-preferential claim

QUESTION 2

- (a) Stating your reasonable assumptions and showing your calculations, set out a cash flow forecast for a 5 week period from 16 November 2015, including an additional column for any receipts or payments that may occur outside this time. (20 marks)

Sales	Online		Retail		Week					Total
	1	2	3	4	5	After				
Weekly uplift	100	30								
	50%	50%								
	150	45								
VAT	20%	20%								
Weekly Income	180	54								
Cash sales - Retail		27.0	27.0	27.0	27.0	27.0				135.0
Card sales - Retail				27.0	27.0	27.0	54.0			135.0
Card sales - Online	180.0	180.0	180.0	180.0	180.0	180.0				900.0
Sales income	207.0	207.0	234.0	234.0	234.0	234.0	54.0			1,170.0
Sale of residual stock							60% per q			52.5
VAT on residual stock										10.5
TOTAL INCOME	207.0	207.0	234.0	234.0	234.0	234.0	117.0			1,233.0
Card costs - Retail							2% calculated			(2.7)
Card costs - Online							3.0% calculated			(27.0)
Staff costs - direct		(7.5)	(7.5)	(7.5)	(7.5)	(7.5)				(37.5)
Staff costs - central	(150 x 80% /12)	(10.0)	(8.0)	(6.0)	(4.0)	(2.0)				(30.0)
PAYE/NI	30% or any rea	5.3	4.7	4.1	3.5	2.9			(20.3)	-
Net pay		(12.3)	(10.9)	(9.5)	(8.1)	(6.7)				(47.3)
Website - ongoing		(2.5)	(2.5)	(2.5)	(2.5)	(2.5)				(12.5)
Website - ongoing (VAT)		(0.5)	(0.5)	(0.5)	(0.5)	(0.5)				(2.5)
Website - arrears		(36.0)								(36.0)
Website advertising	2.5%	(4.5)	(4.5)	(4.5)	(4.5)	(4.5)			-	(22.5)
Website advertising (VAT)		(0.9)	(0.9)	(0.9)	(0.9)	(0.9)				(4.5)
Warehouse									(10.6)	(10.6)
Warehouse (VAT)									(2.1)	(2.1)
Distribution costs	10%	(15.0)	(15.0)	(15.0)	(15.0)	(15.0)				(75.0)
Distribution costs (VAT)		(3.0)	(3.0)	(3.0)	(3.0)	(3.0)				(15.0)
Rent and Rates	Assumed payable after period								(40.0)	(40.0)
Rent and Rates (VAT)	Assumed Rates 1/3 of cost and not subject to VAT								(5.3)	(5.3)
Heat, light and power									(20.0)	(20.0)
VAT									(176.0)	(176.0)
TOTAL PAYMENTS		(80.1)	(42.7)	(41.8)	(40.4)	(39.0)	(255.2)			(499.1)
Net		127.0	164.4	192.2	193.6	195.0	(138.2)			733.9

Workings

Stock usage - Non ROT								
Online b/f	Margin	650.0	537.5	425.0	312.5	200.0		
Used	25.0%	(112.5)	(112.5)	(112.5)	(112.5)	(112.5)		
Online c/f		<u>537.5</u>	<u>425.0</u>	<u>312.5</u>	<u>200.0</u>	<u>87.5</u>		
Retail b/f		150	120.0	90.0	60.0	30.0		
Used	33.3%	(30.0)	(30.0)	(30.0)	(30.0)	(30.0)		
Retail c/f		<u>120.0</u>	<u>90.0</u>	<u>60.0</u>	<u>30.0</u>	<u>-</u>		
Warehouse cost	0.50%	3.25	2.69	2.13	1.56	1.00		

VAT

Output VAT

On sales	34.5	34.5	39.0	39.0	39.0	9.0	195.0
On stock disposal	-	-	-	-	-	10.5	10.5
Total Output VAT	<u>34.5</u>	<u>34.5</u>	<u>39.0</u>	<u>39.0</u>	<u>39.0</u>	<u>19.5</u>	<u>205.5</u>

Input VAT

Website - ongoing (VAT)	(0.5)	(0.5)	(0.5)	(0.5)	(0.5)	-	(2.5)
Website advertising (VAT)	(0.9)	(0.9)	(0.9)	(0.9)	(0.9)	-	(4.5)
Warehouse (VAT)	-	-	-	-	-	(2.1)	(2.1)
Distribution costs (VAT)	(3.0)	(3.0)	(3.0)	(3.0)	(3.0)	-	(15.0)
Rent and Rates (VAT)	-	-	-	-	-	(5.3)	(5.3)
	<u>(4.4)</u>	<u>(4.4)</u>	<u>(4.4)</u>	<u>(4.4)</u>	<u>(4.4)</u>	<u>(7.5)</u>	<u>(29.5)</u>

Net	30.1	30.1	34.6	34.6	34.6	12.0	176.0
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(b) Prepare a file note setting out the key issues, in these circumstances you would have to consider before taking the final decision as to whether to trade the Company in Administration. (5 marks)

- Better result than not trading
 - Could sell the stock for 60% of £800,000 = £480,000
 - Lower than the amount realised by trading out
 - Would have to consider Administrators' supervision costs
- Risk of not achieving forecast sales – level of fixed costs means that if sales are not achieved then benefit reduces
- Card processing; risk of chargebacks
- Ability to supervise and control cash
- Enough of the right stock (post Reservation of title)
- Availability of short term funding
- Will staff retention pose an issue
- Does trading facilitate achievement of the administration purpose
- Can control over website/warehouse be practically achieved
- Will sales be achievable if no warranties provided

QUESTION 3

(a) **Your recommendations as to what action it should take in order to minimise its potential loss. (5 marks)**

- Ensure all outstanding orders cancelled
- Insurance – check, notify as necessary
- ROT – notify of claim over goods supplied
- Notify IP of claim
- Bad debt relief claim (must wait 6 months)
- Pursue directors (did they provide any guarantees?)
- Consider assisting ongoing trade if this maximises realisations and results in a better return

(b) **The steps required and information that would have to be provided to Dalby or its Administrator to allow Roseberry to recover goods previously supplied. Include an outline of the potential challenges that Roseberry may face in these circumstances when seeking to recover the stock. (10 marks)**

Process

- Notify Company and IP of claim
- Attend premises and undertake stock take
 - Note identifying packaging
 - Note serial numbers/batch codes
 - Ensure attended by IP staff
 - Ensure stock take signed off by IP staff
 - Request stock be segregated
 - Consider labelling identified stock
- Consider legal letter regarding claim and (no) permission to use
- Potentially agree continued use provided paid for by administrator (post administration only)
- Consider application to court if necessary. Court would apply Re; Atlantic.

Information

- Copy of terms and conditions
 - Check nature of clause; all monies, simple
- Copy of account opening form
- Complete reservation of title questionnaire
- Copy invoices
- Copy stocktake
- Evidence to trace identifying marks to delivery notes to invoices
- Statement/historic balances (to check zeroing of the account)

Issues/Challenges

- Has an ROT clause been incorporated into the trading relationship
- How easily identifiable is the stock or could it be confused with other suppliers
- Is any of their product supplied to the customer via another party; may cause problems distinguishing between suppliers
- Has any of the steel been cut – may be difficult to claim ROT over this
- Is the stock all in one location

(c) **How the provision of future supplies to Dalby in Administration should be structured and matters relating to this that Roseberry should be aware of. (5 marks)**

- Authorisation process

- Letter usually sets out what staff members are authorised to order goods.
- Purchase order must be signed by authorised member of Administrators' team
- Risk
 - Cost of the Administration
 - Priority of payment – ranks as a necessary disbursement before remuneration, etc.
 - No guarantee of payment – in the event that there are insufficient funds to meet necessary disbursements Roseberry may not get paid
 - Credit insurance unlikely to cover supplies to administrator
- Terms
 - Price to be agreed with Administrator. Roseberry may wish to consider increasing price.
 - Credit terms to be agreed with Administrator
 - Ensure payment process understood.
- Assisting may result in a better outcome for creditors including Roseberry

(d) A brief, concise overview as to what a CVA is, its purpose and in these circumstances the associated process. (5 marks)

- Agreement between Dalby and its creditors
- To repay all or a proportion of the debt over a period of time
- Usually 3 to 5 years
- Usually monthly contributions payable out of profits
- May include sale of assets for benefit of creditors
- Normally results in a write off of a proportion of the debt once CVA concluded
- If approved binding on all unsecured creditors
- Supervised by IP. The Supervisor monitors performance against the proposal and takes action if required.
- Better return than liquidation
- Directors retain/regain control

Process

- Administrator gets their proposals agreed; to put forward a CVA
- Administrator drafts CVA proposal
- CVA proposal sent out to creditors
- No Nominee report
- Includes Outcome statement
- CVA meeting convened, usually same day as meeting to consider administrator's proposals
- Creditors vote at the meeting
- More than 75% of those voting need to approve the CVA
- If 50% of unconnected parties vote against CVA not approved
- If approved control handed back to the directors and the Administration ended
- If CVA rejected then administration would continue.

QUESTION 4

(a) Assuming that the sale of the Company's trade and assets will be completed by an Administrator, prepare a note to the Directors outlining the key issues that they will need to consider regarding their proposed acquisition. (15 marks)

Landlord

- Is it necessary to renegotiate the lease?
- Will the landlord be willing to provide a new lease
- Will there be any issues in seeking an assignment of the existing lease
- Rent likely to be payable immediately either as part of a lease assignment or licence to occupy.

Working capital

- £5 million loss to break even over 3 months – will have to fund losses to that point
- Will Bleaklow provide a facility to NewCo?
- Alternative sources of finance
- Is £10m enough to acquire and deal with working capital?

Reservation of title

- Administrator will seek to place risk on purchaser
- Risk of 'conversion' if use stock that belongs to third party
- May have to return stock or pay for it
- Commercial deal may be necessary to maintain relationship with suppliers

Employees

- Employees transfer under TUPE.
- Redundancies
 - Overheads = £60 million, saving of £20 million required to break even
 - Annual salaries = £48 million, so significant redundancies
 - How fund redundancy costs.
 - Risk of unfair dismissal claims if connected to transfer
 - Risk of protective awards

Wages

- Arrears of wages subject to statutory limits fall into insolvency. Balance falls on NewCo
- May have to pay wages to maintain employee goodwill.

Supplier reaction

- Suppliers may increase prices
- Risk of non supply
- Credit terms likely to reduce or be non existent

Key supplier

- Critical to ongoing trade and therefore must be kept on board
- May be necessary to pay off arrears to maintain supply
- May be possible to agree a time to pay arrears to ease cash flow

Contractual/customer

- Contracts likely to be terminable on insolvency – customers may cancel
- Customers may be more difficult to obtain going forward due to insolvency
- Possible not to take on all existing contracts – unprofitable contracts may be left with insolvent company.

Other

- May take on environmental issues
- Insurance may be more difficult to obtain
- Warranties (lack of) for previous work/part complete work may cause issues.
- Consider if any licences in place that newco would require.
- Re-use of company name

(b) (In these circumstances and bearing in mind what an Administrator may consider acceptable, explain how you would propose the Directors structure an offer to the Administrator for the Company's trade and assets. (10 marks)

- Who acquire – use a new co
- What acquired
 - Assets
 - Trading name
 - Interest in contracts
 - Intellectual property/Goodwill
 - Customer records, etc.

Price

Tangible assets

- Compare the Administrators' alternative situation – likely closure
 - 90d valuation = £5,020 (£5m assets, £20k other) less £400k rent = £4,620k
 - 180d valuation = £6,025 less £800k rent = £5,025k
 - Plus other holding costs – rates, power etc.
 - Say £300k and £600k respectively
 - Best outcome to Administrator in closure likely to be around £4.4m
- Seek deferred terms – under best outcome scenario Administrator would not receive funds for over 180days.
- ADM unlikely to accept entirely deferred
- Any reasonable suggestion as to proportion deferred and term
- Consider offering (or ADM will require) security and/or guarantee

Intangible

- Company loss making
- No alternative buyers
- Goodwill etc. no real value
- Therefore offer token sum

Stock

- Need to take account of ROT claims
- 10p in £ for stock not subject to ROT
- Pay as used
- Possible long stop date
- Administrator to deal with ROT quickly
- ADM to give NewCo option to negotiate with supplier before returning goods.

Employees – reducing liabilities

- 'Saving' in preferential and non-preferential employee claims to be calculated
- Consider offsetting dividend improvement against price.

Debtors

- Seek a share in the benefit of improving the debt collection;
- Debt collection commission to reflect the risk of non-payment

- Consider reducing the consideration to account a proportion of the improvement in collection. This may be difficult if sacrificing floating charge assets to protect fixed charge assets
- If funding available consider making an offer for debtors reflecting the risk of non-collection should the business cease trading.

Customer contracts

- Explain what contracts required
- Assignment of contracts to newco
- If incapable of assigning for value elsewhere offer token sum
- If there is a value to the contracts offer similar net value

General

- Licence to occupy required to give time to negotiate with landlord; offer to pay licence fee monthly in advance
- ADM to assist in novation of contracts, lease agreements etc.
- ADM to be allowed access to premises

JOINT INSOLVENCY EXAMINATION BOARD

PERSONAL INSOLVENCY

EXAMINER'S REPORT AND MARK PLAN FOR THE NOVEMBER 2015 SITTING

QUESTION 1

- (a) **Giving your reasons and detailing any further enquiries you would make, calculate the amount which you should seek as contribution from income. Explain the mechanism(s) by which such contributions could be secured and the period(s) over which any contributions should be made. (18 marks)**

The answers to part (a) were variable. The most appropriate method of calculation would be to aggregate the debtor's and his wife's income, then deduct the reasonable domestic expenses (identifying those which were not reasonable, such as excessive entertaining or creditor repayment) and then apportion the balance between them. The better prepared candidates did just that and produced decent, well explained calculations of the surplus. In general, the items of excessive expenditure were identified and reasonable alternative amounts were put forward. Many candidates recognised that some leeway is necessary to allow for "contingencies" however, the extent of the leeway suggested by candidates varied enormously.

In the main, the practical issues regarding the Nil Tax coding and the fact that Council Tax may not be payable for the remainder of the tax year were not commented upon. Further, many candidates speculated about persuading the debtor and his wife to move to a cheaper home, or persuading the wife to work longer hours, which are not realistic or practical.

- (b) **Explain, in view of the existence of the Pension, the actions you would take regarding the future administration of the bankruptcy. (7 marks)**

Whilst the legal position is currently unclear, practitioners still need to be able to deal with the practical issues regarding pensions in bankruptcies. The majority of candidates were aware of the Raithatha/Horton issues, and the resultant current legal uncertainty, although a much smaller number gave any clear recommendation as to what to do in practice. A number of candidates demonstrated confusion about pensions and the impact of bankruptcy on them, and many failed to distinguish between the case where the debtor has or has not yet taken benefits.

Only a minority spotted the potential for the bankruptcy costs, debts and interest to be paid in full by taking the tax free lump sum, with the result that the debtor could resolve matters in a short space of time rather than being tied in to an IPA/IPO for 3 years, which may have been an attractive option for the debtor.

QUESTION 2

- (a) **In the light of Thomas's application, prepare a memorandum setting out Joe's position. Describe what will be expected of Joe by the Court and advise Joe of the actions he should take generally. (8 marks)**

This part of the question was generally poorly answered. Many candidates did not identify that there is no requirement for the Trustee to submit a formal report, but that, as an Officer of the Court it would be appropriate for the Trustee to provide information which might assist the Court. Rather than adopting an appropriately neutral position, particularly regarding matters of which the Trustee has limited or no knowledge, many saw it as the Trustee's role to challenge the annulment application and defend the petition.

Many candidates made reference to the impact of the 3 year rule on the property and therefore wasted time by making irrelevant comments about protecting and realising this asset rather than focussing on the requirements of the question.

In the main candidates did not recognise the need to protect the Trustee's position regarding his outstanding costs, displaying a lack of commercial awareness.

- (b) (i) **Calculate the estimated amount required to pay the bankruptcy debts and the expenses of the bankruptcy in full, and estimate the surplus funds that will be available to Carol. Clearly state any assumptions that you have made. (10 marks)**
- (ii) **Draft the Trustee's report to Court. (7 marks)**

On the whole this section was answered rather better, and most candidates made a reasonable attempt to carry out the calculation. The more involved aspects, such as the Secretary of State Fee were not so well done, and whilst most candidates made an attempt to calculate it, this was often based on the full amount of the inheritance rather than the amount required to pay in full. Interest on claims was generally calculated appropriately, although the period for which interest was calculated varied, both in terms of the start date and also in terms of a reasonable estimate of the date upon which the dividend would be declared/paid.

Having carried out the calculation of the amount required to pay in full, many candidates did not then address the actual requirement to state how much the bankrupt will get back by way of surplus.

Generally candidates were aware of the main report sections and used these headings to structure their answer. This led to reasonable responses in general but often the more practical points of obtaining release and securing the funds were missed.

Some candidates presented a "Final report to Creditors" despite the clear requirements of the question and the availability of the relevant rule regarding the content of an annulment report, as provided in Butterworths.

QUESTION 3

Write a letter to Muriel. In your letter, you should

- (a) **explain the different ways in which property may be owned jointly, and the effect that this may have on the calculation of Muriel's share of the equity in the Property; (5 marks)**
- (b) **discuss, with reference to relevant case law, the overall equity position and the extent of Muriel's interest in the Property, setting out what further information you may require (16 marks); and**
- (c) **stating your reasons, advise Muriel of the amount she should initially offer for her husband's interest in the Property. (4 marks)**

The quality of answers to part (a) was variable – some were very comprehensive, some very sketchy and several had Joint Tenancy and Tenancy in Common the wrong way round. About half the candidates made no mention of the right of survivorship.

Most candidates recognised the principle of exoneration in part (b) and appreciated that the wife claiming exoneration would need to show her financial independence. The answers were however short on case law. Most mentioned Pittortou but few went on to discuss the more recent cases of Lemon v Chawda and Day v Shaw. There were some lengthy discussions of equitable accounting, which were not relevant to the question and perhaps displayed confusion between this and exoneration.

Almost all candidates set out the correct computation to show exoneration in respect of the second charge although some decided there should be no exoneration and made an offer approaching £62,500 less costs. This showed a weakness in terms of negotiating tactics and would have been poor advice to the wife.

QUESTION 4

- (a) Explain the voting process to be followed at the creditors' meeting. Giving your reasons, explain how you would treat each vote. (12 marks)
- (b) Based purely on the votes made by proxy, state whether the variation proposed by Elmer would be approved or rejected. Give your reasons for reaching this conclusion. (5 marks)
- (c) On the assumption that Jillian Russell attends and votes to reject the variation, explain what steps you should take as Supervisor and explain how the costs of the IVA will be discharged. (8 marks)

Generally the responses were good and results show that this was the best answered question on the paper.

Part (a) was answered really well and a number of candidates got full or almost full marks. Those that scored less well often just focussed on the votes for individual creditors without outlining the general voting rules, admission and rejection of claims and the 2 stage voting process. Occasionally the definition of an Associate was misunderstood or misinterpreted.

Following on from this, whilst part (b) was also well done in general, a small number of candidates excluded the bank from the second round of voting thinking it excluded associated *and partially secured* creditors. Despite the clear requirements of the question, some candidates brought Jillian Russell's vote into this calculation. The requirements were specifically worded to reflect the fact that, in practice, it would be appropriate to summarise the votes by proxy so that the likely outcome of the meeting was known, subject therefore only to the impact of any votes in person.

Many candidates launched into the actions to take on failure before or without ascertaining that the IVA variation would be actually be rejected as a result of Jillian Russell's vote and what that would mean for the IVA. Most candidates were however able to describe the steps the Supervisor should take as a result of the failure.

EXAMINER'S MARK PLAN

PERSONAL INSOLVENCY

NOVEMBER 2015

QUESTION 1

- (a) Giving your reasons and detailing any further enquiries you would make, calculate the amount which you should seek as contribution from income. Explain the mechanism(s) by which such contributions could be secured and the period(s) over which any contributions should be made. (18 marks)
- (b) Explain, in view of the existence of the Pension, the actions you would take regarding the future administration of the bankruptcy. (7 marks)

General

In keeping with the "can pay, should pay" approach of the insolvency regime, debtor should pay any surplus into his bankruptcy estate for the benefit of creditors.

Any amount should be such that it does not reduce the net income of the debtor below that required to meet the reasonable domestic needs of the bankrupt and his family

Income

Should include wife's income in calculating total of household income, as it is assumed that she will contribute to the household expenses.

During the period from bankruptcy order to following 5 April, debtor will have an NT tax code, meaning that he will pay no tax. Therefore there will be increased income during this period, all of which should be claimed, either direct from the debtor or from HMRC. This amounts to approx. £400 per month

Expenditure

Food, drink etc looks high for just 2 people, and entertaining friends/going out may be regarded as excessive given the bankruptcy order. Suggest reducing these items to something more reasonable
Household expenditure – request details of what this relates to.

Council tax is not payable during period from date of bankruptcy order to end of financial year, as per *Kaye v South Oxfordshire District Council*, and thus any payments made post bankruptcy can be recovered from the Council, which in turn should include the full amount due for the financial year in its claim. Expenditure is therefore reduced for that period in the calculation. Alternatively, if wife agrees to pay this liability, treat as an expense but no claim in the bankruptcy

Credit card repayments and loan repayments are not allowable – these are claims in the bankruptcy.
Fines/costs are legitimate expenditure provided they are imposed by the Court.

There are other specific items that have not been included that might normally be expected, such as dental/healthcare, insurances, telephones etc which can be regarded as reasonable domestic expenditure – such costs may be included in the food/drinks etc amount, or within the household expenditure which may explain why these amounts are so high.

Best practice is to use or have reference to the Office of National Statistics Living Costs and Food Survey, formerly known as the Household (family) Expenditure Survey, or other recognised tables of average household expenditure as a guide.

Period of Contributions

Max 3 years in length, and can (usually will) end after discharge of bankrupt.

Nil Tax Payments and payments in lieu of Council Tax would last until 5 April 2016

During the period, the payment amount can be varied upwards or downwards (by agreement or order) to take account of changes in income and/or expenditure.

Mechanism

Initially seek agreement with debtor via an Income Payment Agreement (s310A), which is an Agreement in writing, the aim of which is to achieve a legally binding scheme but without the need for a Court Order, thus avoiding costs of a formal IPO application, which in turn will reduce the funds available to creditors.

If agreement is not possible, consider application for an Income Payment Order pursuant to s310 of the Act, but in doing so, consider the likely costs of application and whether there will be an overall benefit to creditors as a result of taking such action.

IPA or IPO must be agreed/obtained prior to discharge.

If necessary, payment can be "secured" by obtaining an attachment of earnings order so that the employer deducts the funds and pays the trustee direct.

Suggested Amount

Income		
Self	1600	
Wife	833	
		2433
Expenditure		
Rent	500	
Food & drink (excl. entertaining friends and going out)	350	
Gas, Electric, Water	100	
Household expenditure	80	
Clothing	80	
Motor expenses – self	60	
Motor expenses – wife	30	
Council tax (from 1 April 2015 only)	125	
Fines/costs following driving conviction	40	
		<u>1365</u>
Surplus		1068

Debtor's net earnings are approximately twice that of his wife, therefore it is reasonable to assume that he will pay a proportionately greater share of the expenditure. His share of the surplus being 2/3rds, i.e. £712, suggest seek £700 per month

In addition, seek payment of the surplus income arising as a result of the Nil Tax coding up to end of March 2016 of approx £400 per month for 6 months

Pension

S 310 (7) – income comprises every payment in the nature of income which from time to time is made to him.

The pension itself is not an asset, however, the pension lump sum and annuity is treated as income, so if debtor takes benefits during the period of an IPA/IPO it can be claimed.

Debtor was 55 on 23 October 2015 so should be able to take benefits from that date

Firstly, establish whether debtor has made any decision to take benefits:

- Contact pension provider to establish current position
- Write to debtor

If he has made an election to take benefits then such benefits can be claimed within the IPA. Any lump sum should be claimed in its entirety, whilst any annuity or other amounts could be claimed as increased income – the equivalent monthly amount of the extra income should be added to the payments to be made by the debtor for the remainder of the 3 year period. The total amount claimed should be subject to only receiving sufficient to pay the costs, debts and interest in full

If no such election to take benefits has been made, then there is currently a conflict between *Raithatha v Williamson* and *Horton v Henry*

Under *Raithatha*:

If debtor does not take benefits, then make application to court for an Order that he should take benefits, including payment of any lump sum and/or annuity. Application must be made before discharge. Write to debtor to request him to take benefits and pay funds under IPA. Write to pension provider and request that they withhold any payments from the pension pending negotiations/outcome of court application

Under Horton:

Court is unlikely to make an IPO re pension.

Horton is the most recent decision, at the same level of court, so is the most likely precedent and is likely to be followed.

In general, it should be noted that the 25% tax free lump sum would more than pay creditors in full. Therefore, there is scope for negotiation with debtor to take some benefits and apply to annul bankruptcy order, to avoid the need to keep IPA payments for 3 years, which the debtor may consider to be beneficial.

Take legal advice.

QUESTION 2

- (a) **In the light of Thomas's application, prepare a memorandum setting out Joe's position. Describe what will be expected of Joe by the Court and advise Joe of the actions he should take generally. (8 marks)**
- (b) (i) **Calculate the estimated amount required to pay the bankruptcy debts and the expenses of the bankruptcy in full, and estimate the surplus funds that will be available to Carol. Clearly state any assumptions that you have made. (10 marks)**
- (ii) **Draft the Trustee's report to Court. (7 marks)**

Application by Thomas

Application on the basis of order should not have been made is usually due to some failure in the process. Annulment decision is always at the discretion of the court. The Trustee should adopt a neutral position in respect of the application, as he had no direct knowledge of the circumstances leading to the bankruptcy.

Annulment under s282(1)(a) –there is no formal requirement for the Trustee to submit a Report to Court pursuant to rule 6.207.

However, practically it would be useful to advise the court of other creditors, and of circumstances that existed at the time of the bankruptcy order, and now, in order for the court to be able to exercise its discretion in deciding whether a bankruptcy order is inevitable notwithstanding any technical defect in the process.

Trustee should advise the court of the outstanding costs generally, and should, from a practical perspective, seek to protect his position regarding his costs and who should pay them in the event that the bankruptcy order is annulled.

Usually petitioning creditor is ordered to pay them. In these circumstances, delays by debtor and lack of co-operation will have significantly contributed to the costs. In particular the costs of possession and sale proceedings would have been avoided had the debtor made his application earlier

It is therefore likely that some costs will be awarded against debtor.

The Trustee should ensure that costs are settled/provided for as part of any annulment order.

As per rule 6.210, Trustee shall attend, although in practice, he would usually instruct lawyers to attend and represent him to ensure Trustee's position is protected. Alternatively, he could write to court and request that the Trustee be excused attendance on the grounds of seeking to reduce costs, but only if outcome of the hearing is clear.

Payment in full calculation

	Notes	£	£
Total debts due to Creditors	1&2	33,805	
Interest @ 8%	5	<u>1,800</u>	
			35,605
Trustee's fees (excl VAT)	3	6,620	
Disbursements (excl VAT)		380	
Official Receiver's costs	7	1,100	
Other costs (quarterly ISA charges 2 x £22)		44	
Petition costs		1,450	
VAT on Trustees fees and disbursements	6	<u>1,400</u>	
			<u>10,994</u>
			46,599
Secretary of State fees (S)	4		10,629
Total (T)			57,228
Total funds expected			200,000
Surplus			142,772

Assumptions/Notes

1. Student loan debt is not provable and should therefore be excluded from the calculation
2. Husband's claim is deferred under s329 but still needs to be paid if she is to pay all creditors in full. Husband could waive his claim in which case creditors and interest will reduce accordingly
3. Assume £2,000 (or other appropriate amount) of future time costs
4. Sec of State fees:

Band	Rate	Funds Banked	Cumulative fee
up to £2,000	0%	2000	-
£2,000 - £3,700	100%	3700	1700
£3,700 - £5,200	75%	5200	2825
£5,200 - £401,200	15%	401200	62225
>£401,200	1%	1000000	68213

Fees are charged on funds paid into the ISA, so are payable on the total amount to pay in full, including the sec of state fees themselves. It is a circular calculation, as follows:

Total amount = "T"

Sec of State Fee = "S"

$T = 46,599 + S$

$S = 2,825 + (T - 5,200) * 15\%$

$S = 2,825 + (46,599 + S - 5,200) * 15\%$

$S = 2,825 + (41,399 + S) * 15\%$

$S = 2,825 + 6,210 + 0.15 * S$

$0.85 * S = 9,035$

$S = 10,629$

5. Interest calculated at 8% from date of bankruptcy order to expected date of payment

- estimated 2 months time (or other reasonable assumption)

Date of Bankruptcy Order: 06 May 2015

Date of dividend - 2 months 04 Jan 2016

No. days for interest calc 243

Interest = $£33,805 * 8\% * 243 / 365 = £1800$

6. Assume not VAT registered, so VAT is not recoverable and is therefore an expense.

7. OR costs = Admin fee of £1,850 less deposit of £750

Report to Court – rule 6.207

Heading – court name and reference, debtor's name

Circumstances leading to bankruptcy:

- Date of petition
- Identity of petitioner – HMRC
- Date of Order
- Date and nature of Trustee's appointment

Assets at date of Bankruptcy Order

- Inheritance £220,000

Liabilities at date of Bankruptcy Order

- List of creditors

Position at date of application

- Inheritance likely to be £200,000, confirmation received from executors
- Claims – student loan not provable
- List of creditors who have not proved – none identified but clarify whether Notice of Intended Dividend has been issued

Other matters:

- set out position re costs & expenses, including Trustees remuneration – confirm basis of remuneration, date agreed, amount of time costs
- Append payment in full calculation
- Confirm no other assets realised
- Advise the court whether Trustee consents to the application
- Funds have not actually been received nor properly secured so currently Trustee unable to consent
- No payments have been made – either to creditors or to the Trustee
- Trustee should obtain an undertaking from the executors/solicitors
- Report should request that the court makes appropriate order re Trustee's release if annulment granted i.e. on filing final account in court

QUESTION 3

Write a letter to Muriel. In your letter, you should

- (a) explain the different ways in which property may be owned jointly, and the effect that this may have on the calculation of Muriel's share of the equity in the Property (5 marks)
- (b) discuss, with reference to relevant case law, the overall equity position and the extent of Muriel's interest in the Property, setting out what further information you may require, (16 marks) and
- (c) stating your reasons, advise Muriel of the amount she should initially offer for her husband's interest in the Property (4 marks).

Jointly Owned Property

Property can be owned jointly by more than 2 people. Only up to 4 owners will be shown on H M Land Reg – more than 4 will be documented on the purchase documentation

Joint Tenancy – held in equal shares, and the rule of survivorship applies

Tenancy in Common – in equal shares unless specified otherwise but can be in different proportions, e.g. 60:40, 70:30, 99:1 etc

Crucial difference = survivorship – i.e. that property owned on a Joint Tenancy is held on trust for each other, and that upon the death of one of them, their share reverts to the other joint tenants. Bankruptcy order severs joint tenancy and creates a tenancy in common – i.e. it determines the extent of each person's interest

Ask Muriel to confirm (if she knows) the basis on which the property is jointly owned.

Equity

Starting point is the legal position - if Joint Tenants, then tenancy is broken on the making of the bankruptcy order and thus assumption is equal shares - 50:50 – Stack v Dowden

Equity is £450k-£220k-£105k = £125k and the debtor's share would ordinarily be half of that figure - i.e. £62,500

This is how the trustee has calculated his interest

This assumption can be displaced by evidence of a common intention to hold the property in other than equal shares (Kernott v Jones), but no such evidence appears to be available

Effect of second charge

Doctrine of Exoneration – wife is in the position of a surety in respect of the second charge, and is entitled to be indemnified by her husband, i.e. second charge payable out of his share first, with any shortfall coming out of her share - Re Pittortou – rebuttable presumption that equity of exoneration arises

Lemon & Wood v Chawda (2013) – circumstances which do not justify the inference that exoneration applies

Pooling of resources - H&W had operated as a family unit taking the benefit of ups and downs jointly. Presumption that exoneration applied was negated. In this situation, Trustee is likely to rely on this case to rebut any presumption that Muriel is exonerated from the second charge.

In order to counter the impact of Lemon v Chawda, Muriel should seek to use the decision in Day v Shaw & Another (2014) in which the court decided that exoneration applied, although there was no analysis of the pooling of family resources

Further information required:

- Obtain a copy of the solicitors file from the purchase of the property (if still available)
- Failing that, obtain documents from land registry evidencing the purchase, to show the way in which the property was jointly purchased
- Specifically obtain copy of the Transfer document (TR1) evidencing how the property was to be held
- Obtain copies of the loan documentation

- Is there any documentation contemporaneous with the date of the granting of the second charge, which clarifies their respective interests?
- e.g. declaration of trust
- Did she obtain legal advice at the time? – if so, get file
- What was the intention of the parties at the time the second charge was granted?
- Any other documentation in support?
- Evidence of lack of pooling of resources such as separate bank accounts, separate credit cards, utilities etc in separate names
- Evidence of the extent of her income and over what period - provide copy wage slips, P60s, tax returns
- Ascertain whether Muriel was involved in or employed by the debtor's business
- Evidence of the financial results of the husband's business in the period since the loan was granted such as
 - Accounts
 - bank statements
 - tax returns

Muriel's offer

Muriel's starting point should be that she is fully exonerated from the second charge and thus her share of the equity would be calculated as:

- £450k-£220k= £230,000
- Wife's 50% share = £115,000
- Husband's share = £115,000-£105,000 = £10,000

Allow for costs savings:

- agents costs of sale
- legal costs for potential possession and sale
- conveyancing costs

Suggest offering £5,000 but be prepared to negotiate upwards. Muriel should be advised to obtain her own valuation from a chartered surveyor to either confirm the Trustee's valuation or to provide evidence of a reduced valuation that might support a further reduced offer

She should obtain redemption statement/current outstanding balance in respect of mortgage/charge
Muriel should be advised to seek legal advice

QUESTION 4

- Explain the voting process to be followed at the creditors' meeting. Giving your reasons, explain how you would treat each vote. (12 marks)**
- Based purely on the votes made by proxy, state whether the variation proposed by Elmer would be approved or rejected. Give your reasons for reaching this conclusion. (5 marks)**
- On the assumption that Jillian Russell attends and votes to reject the variation, explain what steps you should take as Supervisor and explain how the costs of the IVA will be discharged. (8 marks)**

Voting process

Entitlement to vote:

- Creditor must have lodged claim
- By the date and time stated in the notice
- Claim has been admitted for voting purposes
- Chairman has discretion to admit or reject claims for voting purposes
- in whole or in part
- whether secured or unsecured

Two stage voting process:

- Any resolution for the variation of the IVA requires a majority of three-quarters or more in value
 - of those present and voting
 - in person or by proxy
 - to vote in favour in order

for the variation to be approved

- Any resolution is invalid if those voting against include more than half of the creditors who are not,

to the chairman's belief, Associates of the debtor as per s435 IA86

Treatment of votes

- Faxed proxies are acceptable
- Spooner's Bank – claim is secured against the property, Bank is entitled to vote only in respect of the unsecured element of its claim after deducting the value of its security. Proxy vote is therefore for £12,500
- Pewterschmidt Finance – proxy appears valid for full amount of claim
- Mrs Hartman - proxy appears valid for full amount of claim.
- She is, however, an Associate and therefore her vote will be discounted in the second stage of the voting process
- HMRC – proxy appears valid for full amount of claim
- Brian Griffin - proxy appears valid but calculation of interest is incorrect. It has been calculated for the whole 2 year period of the loan. Interest can only be claimed up to the date of approval of the IVA, i.e. for a 3 month period.
- $£10,000 \times 8\% \times 3/12 = £200$. Total claim is £10,200
- Being a "close friend" does not make him an Associate within the meaning of s435
- Jillian Russell – as an individual creditor, she is entitled to attend and vote at the meeting without lodging a proxy.
- As a former girlfriend, she is not an associate

Voting based on proxies

Creditor	For	Against
Spooner's Bank Ltd	12,500	
Pewterschmidt Finance		9,300
Mrs Hartman	40,000	
H M Revenue & Customs		10,900
Brian Griffin	10,200	
	<hr/>	
	62,700	20,200
	75.63%	24.37%

Votes in favour of the variation amount to more than 75% and therefore the second stage of voting is required

Second stage of the voting process:

Creditor	For	Against
Spooner's Bank Ltd	12,500	
Pewterschmidt Finance		9,300
Mrs Hartman	-	
H M Revenue & Customs		10,900
Brian Griffin	10,200	
	<hr/>	
	22,700	20,200
	52.91%	47.09%

Even with the vote of Mrs Hartman excluded, there is still in excess of 50% of non associated creditors voting in favour of the variation.

Next Steps

If Jillian Russell votes against, then the outcome of the voting process is as follows:

Creditor	For	Against
Spooner's Bank Ltd	12,500	
Pewterschmidt Finance		9,300
Mrs Hartman	40,000	
H M Revenue & Customs		10,900
Brian Griffin	10,200	
Jillian Russell		18,000
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	62,700	38,200
	62.14%	37.86%

As less than 75% have voted in favour, the variation is rejected. There is no need to go through the second stage of the voting process. The debtor has indicated that he will not be able to continue with the IVA if his variation proposal is rejected.

Supervisor should therefore issue a Certificate of Termination as a result of the debtor's breach.

Certificate of Termination shall be sent

- to the Debtor
- and to all creditors
- Within 28 days of the terminating event (i.e. date of meeting)
- together with Supervisor's report explaining reason for termination,
- R&P
- Must also be sent to Sec of State

In accordance with Standard Conditions, Supervisor should retain sufficient funds coming into his hands during the course of the IVA as represents his best estimate of the costs of petitioning for the debtor's bankruptcy, such costs to be provided for in priority to any other costs of the arrangement.

Supervisor is holding £2,500 (being 5 payments of £500) which should be sufficient for this purpose.

Remaining funds are held in trust – N T Gallagher

Outstanding costs of the IVA are a first charge on the bankrupt's estate – s276(2) IA86