JOINT INSOLVENCY EXAMINATION BOARD
NOVEMBER 2013 EXAM (ENGLAND)
EXAMINERS' REPORTS AND MARKING PLAN

GENERAL NOTE

Recent reports have referred to the need for candidates to demonstrate practical awareness and an ability to develop common sense solutions especially in personal insolvency and ACVAR. Some candidates were able to show these skills, but too often candidates' apparent lack of practical experience meant that they were unable to be definite about a point or resolute in deciding upon a course of action. Most candidates still appear more comfortable when a question can be answered from having read a text book or manual.

Candidates are often not taking the time to plan their answers. Allied to this, there were too many examples of a failure to read the question with sufficient care. The combined effect was that some candidates misunderstood the point of the question and wasted time writing irrelevancies.

Candidates should not waste time regurgitating facts and information contained in the question. Where the requirement is to prepare a report or a letter, it may be appropriate to include material that is set out in the question. Otherwise candidates should confine themselves to answering the questions

In exceptional circumstance, marks may be gained by pointing out that the facts set out in a question may be unlikely to apply in practice. However in general candidates can and usually do waste time if they try to 'unpick' the question, rather than accepting and dealing with the question that has been set.

A number of scripts were very difficult to read and parts of some scripts were illegible. Presentation – including neatness and legibility – remain important. At best untidy and hard to read work will cost candidates some holistic marks and at worst, when points are totally illegible, they cannot be awarded any marks.

Presentation of numerical information was often disappointing. On the corporate papers candidates struggled to distinguish between Receipts and Payments accounts and Estimated Outcome Statements and/or were unable to present these in an appropriate format.

Candidates should ensure that their answer is set out in a manner and format that is responsive to the question. If for example the requirements ask "What steps you would take…" the examiner expects a list of actions. Some candidates answer such a question with their own list of questions for example "What is amount outstanding?" rather than "Review the company records to identify how much the company is owed by the customer"

Candidates must not include more than one question in the same answer booklet. They must ensure that the front of the answer booklet is completed correctly; including checking the correct question number is entered in the appropriate space provided. They should not write answers or notes on the outside of the answer booklets.

LIQUIDATIONS NOVEMBER 2013

EXAMINERS' REPORT

QUESTION 1

(a) State the fundamental principle of the Act that a Liquidator must follow when making a distribution of a company's property. (2 marks)

This question tested candidates' understanding of the pari passu principle embodied in section 107 of the Insolvency Act 1986. Part 1a aimed to signpost candidates to section 107 and many candidates correctly identified it, although several wrote lists of "principles" such as ensuring expenses and preferential creditors are paid.

(b) Assuming that the Liquidator agrees all of the creditors' claims, set out the total amount available to each class of creditor and specify the rate of dividend to be paid to each class of creditor. In the above circumstances, explain the problems and solutions that the Liquidator may identify before paying a dividend. (6 marks)

This required a simple distribution statement. A significant number of candidates produced a poor distribution statement: some thought that the cost of distributing the prescribed part was deducted before the payment to the preferential creditors and not out of the prescribed part pot itself. Not many seemed to know that the net property had to be less than £10,000 and not the prescribed part itself for a distribution not to be necessary.

Some answers were clearly presented but others had a confused layout and the rates of dividend to each class of creditor were not clearly presented.

(c) For each of the items listed set out, with reasons, whether there is an admissible claim for dividend and, if so, in what amount. Where necessary, your answer should include the further steps that the Liquidator should take in ascertaining whether there is, or may be, a valid claim and, if so, in what amount? (17 marks)

This required candidates to set out, with reasons, whether or not a claim was admissible for dividend and in what amount.

Most candidates were able to correctly identify the easier issues, including the rule against double proof and the problems associated with the various claims made by a director. Hardly any candidates correctly identified either the issues surrounding protective awards or those surrounding a shortfall in a final salary pension scheme.

QUESTION 2

(a) Set out the approximate calculations to demonstrate that a Members' Voluntary Liquidation is an option for the Company. Draft a report to Mr and Mrs Daffodil that explains, in easy to understand terms, your calculations. The draft report should also explain the principal uncertainties that could change your view, the consequences for Mr and Mr Daffodil of the Company entering a Members' Voluntary Liquidation and the cost effectiveness of the procedure; (12 marks)

This tested candidates' ability to communicate complex solvency issues to key stakeholders. It required candidates to explain to the shareholders/directors of a small company the reason why a members' voluntary liquidation was an option and to set out the principal uncertainties that may change that advice. It required the drafting of a straightforward statement of affairs.

Those candidates, who produced a clear statement of affairs, demonstrated a good knowledge of members' voluntary liquidations.
A significant number did not prepare a coherent statement of affairs and consequently were unable to answer the rest of 2a. These candidates also gained low holistic scores for this question as they were

not able to demonstrate their ability to prepare straightforward financial information. Presentational problems included not grouping assets between those subject to charges (and including the appropriate liabilities) and those not subject to charges. Some candidates failed to prepare separate columns comparing book values to estimated realisable values.

(b) Set out the other options for realising the capital in the Company (in addition to Members' Voluntary Liquidation) that is available to Mr and Mrs Daffodil, taking into account Mrs Daffodil's desire to keep the paintings. For each option, set out its advantages and disadvantages. (10 marks)

This aimed to assess candidates' ability to provide advice to shareholders/directors who wish to withdraw capital from their company. It required candidates to set out other options (other than members' voluntary liquidation) for the shareholders to realise the capital. With some exceptions, this section was generally poorly answered. Some candidates correctly identified striking off as an option but, of those, not all identified its advantages and disadvantages. Fewer candidates mentioned sale of shares as an option.

(c) Assume that the Company enters Members' Voluntary Liquidation. Set out the points for the Liquidator to consider if the Company receives a claim, exceeding £3 million, from the insurer of a purchaser of a motorcycle who had received substantial injuries in a road accident (that occurred before the Liquidator's appointment) and claiming that the motorcycle was not roadworthy when it was sold. (3 marks)

Many candidates correctly answered 2c; setting out the considerations if the company became insolvent after it had entered members' voluntary liquidation.

QUESTION 3

(a) Set out how an Authorised Insolvency Practitioner may be appointed Liquidator to a Company that has been wound up by the Court. (3 marks)

Candidates were required to set out how an authorised insolvency practitioner may be appointed liquidator to a company that has been wound up by the court. Generally, this part was well answered and helped to boost marks.

(b)

(i) Assuming that an Authorised Insolvency Practitioner is appointed Liquidator to the Company (and the necessary formalities of appointment have been completed) write a file note setting out the legal and practical implications arising from the specific circumstances of the Company. Your note should set out, with reasons, what steps, if any, the Liquidator should take and any realistic assumptions made. (19 marks)

With some exceptions, the main part of question 3 (bi) was less well answered. Candidates' knowledge of the circumstances occurring in the period before and between the date of a petition for winding up a company and the date of the winding up order was tested. There were several common misconceptions, including references to preferences for void transactions and confusing distress with forfeiture. A few candidates focused on misconduct issues rather than the validity of transactions.

Some candidates were confused between voluntary winding up and winding up by the court.

(ii) Set out how the Liquidator of this Company should obtain authorisation for the basis of the Liquidator's remuneration. (3 marks)

Generally, this part was well answered and helped to boost marks. It required candidates to set out how a liquidator should obtain authorisation for the basis of remuneration in a winding up by the court

QUESTION 4

(a) Taking into account current practice and guidance, set out the legal and ethical issues that have arisen in the Practice and set out what may be done to resolve them.

(15 marks)

This tested candidates' understanding of the legal and ethical issues arising in an insolvency practice. Generally, this question was well answered. Candidates seemed more at ease with this discursive question.

(b) Set out the steps that Ann should take in respect of the cases in which she is Liquidator before she retires from the Practice on the grounds of ill health.

(10 marks)

Question 4b tested candidates' knowledge of the issues surrounding the retirement of an insolvency practitioner on health grounds. Generally, this question was well answered with candidates identifying the issues raised and relating them to the ethical guidelines. Not all candidates discussed the Succession Planning Guidance Paper.

EXAMINERS' MARKING PLAN

QUESTION 1

(a) State the fundamental principle of the Act that a Liquidator must follow when making a distribution of a company's property. (2 marks)

Pari passu principle.
IA 1986 s107: Subject to the provisions of this Act as to preferential payments, the company's property in a voluntary winding up shall on the winding up be applied in satisfaction of the company's liabilities pari passu and, subject to that application, shall (unless the articles otherwise provide) be distributed among the members according to their rights and interests in the company.

(b) Assuming that the Liquidator agrees all of the creditors' claims, set out the total amount available to each class of creditor and specify the rate of dividend to be paid to each class of creditor. In the above circumstances, explain the problems and solutions that the Liquidator may identify before paying a dividend. (6 marks)

Cash at bank:	£40,000	
Costs of Liquidation	£(5,000)	
Costs of agreeing preferential creditors	£(1,000)	
	£34,000	
Amount due to preferential creditors	£(14,000)	
Net property (s176A(6)	£ 20,000	£20,000
Prescribed part of net property (see calculation below)	£7,000	£(7,000)
Costs of agreeing claims of unsecured creditors	£(3,000)	
Amount available to unsecured creditors under prescribed part of net property	£4,000	
Amount available to floating charge holder		£13,000
Amount due to floating charge holder		£(18,000)
Shortfall to floating charge holder		£(5,000)

Calculation of prescribed part of net property (s176A and SI2003/2097): where net property >£10k:
50% x £10,000 = £5,000
20% x £(20,000 – 10,000) = £2,000
Net property = £5,000 + £2,000 = £7,000

Rate of dividend:
Preferential creditors: 100p/£
Prescribed part creditors: £4,000/£200,000 = 2p/£
Floating charge holder: £13,000/18,000 = 72.2p/£
Unsecured creditors, above prescribed part: 0

Problems:

Very small dividend to a large number of prescribed part creditors: costs of distribution
S176A(3) – prescribed part does not apply if the net property is less than the prescribed minimum and the liquidator thinks that the cost of making a distribution to the unsecured creditors could be disproportionate to the benefits.
In this question net property > £10,000 so this section does not apply.

S176A(5) Liquidator could apply to court for prescribed part to be disapplied on grounds costs of distribution would be disproportionate to the benefits (and see R7.3A, 7.4A), but courts have required dividend to be paid i.e. small amount not necessarily a reason not to pay.
Each case to be considered on its merits.
Need to consider, for example, how much each creditor is owed, e.g. are there a small number of creditors owed large amounts or are there a large number of creditors who are owed small amounts?
See:
Re Hydroseve Ltd [2007] EWHC 3026 (Ch);
Re Courts plc [2008] EWHC 2339 (Ch);
Re International Sections Ltd [2009] EWHC 137 (Ch);
QMD Hotels Ltd Administrators, Noters [2010]CSOH 168

(c) For each of the items listed set out, with reasons, whether there is an admissible claim for dividend and, if so, in what amount. Where necessary, your answer should include the further steps that the Liquidator should take in ascertaining whether there is, or may be, a valid claim and, if so, in what amount. (17 marks)

Note: R12.2(1):
All fees, costs, charges and other expenses incurred in the course of winding up ….are to be regarded as expenses…

R12.3 – provable debts

Note: R4.218 – expenses in liquidation

s107

R13.12 – Debt, liability in winding up

In all cases Liquidator can require further details of claim (R4.76).

Castor and Pollux: guarantor. Rule of double proof.

Employee claims for protective awards:
Alf redundant pre-insolvency and EAT decision pre-insolvency: provable debt and is preferential (treated as arrears of wages, s189 TULR(C)A 1992; IA 1986 Sch 6)
Bert redundant on date of liquidation and decision of EAT is post-insolvency: this is provable as it is a contingent debt (R13.12) at debt of liquidation. See *Haine & Secretary of State v Day* [2008] EWCA Civ 626, 11 June 2008
Consider also whether Alf and Bert have received relevant redundancy payments or have other claims in the Liquidation in respect of their employment (or relevant claims may be subrogated to RPS). There is no information in the question about any other claims that they may have.

Need to write to PPF to ascertain what its claim is.
May need to negotiate with PPF.
- s75 Pensions Act 1995 and 2004: on insolvent liquidation an amount equivalent to any shortfall in the assets of an occupational pension scheme (a "scheme") as against its liabilities, which exists immediately prior to the relevant event, is a debt.
PPF's claim will be unsecured claim.
(*Re Nortel; Re Lehman [2013] UKSC 52*)

Dizzy – director. Holiday pay - preferential if accrued holiday remuneration before relevant date (Sch 6 para 10)
Payments to suppliers = unsecured.
Need to verify debts.

Floaty Ltd is an associate of the Company as Dizzy controls both companies (s435(6)) and, therefore Floaty Ltd is connected with the Company (s249)b)).
Need to verify debt

Happy Ltd - first invoice time barred, others unsecured claims

Wishywashy Ltd = contingent claim (R13.12(3)) and so is a claim at date of liquidation. Liquidator needs to ascertain whether contingency has occurred – i.e. architect's certificate issued. Look at contract.

Colin's claim for industrial injury – no time limit on claim for personal injury.
Liquidator should ascertain what insurance cover the Company held.
If there is no insurance cover the Liquidator should write to Colin asking him to prove his claim.

QUESTION 2

(a) Set out the approximate calculations to demonstrate that a Members' Voluntary Liquidation is an option for the Company. Draft a report to Mr and Mrs Daffodil that explains, in easy to understand terms, your calculations. The draft report should also explain the principal uncertainties that could change your view, the consequences for Mr and Mr Daffodil of the Company entering a Members' Voluntary Liquidation and the cost effectiveness of the procedure. (12 marks)

Statement of Affairs at 31 October 2013

Assets Subject to charges

	Book Value	**Estimated to Realise**	
	£'000	£'000	£'000
Freehold property	2,500	2,500	
Less CGT	(400)	(400)	
	2,100	2,100	
Less due to Bank	(800)	(800)	
Surplus under fixed charge			1,300
Motor vehicles subject to hire purchase	160	80	
Less due to Happy Motors' Finance Plc	(80)	(80)	0
Used motorcycles	1,000	600	
Less due to Speedy Motor Cycle Finance Ltd	(100)	(100)	500
Assets not subject to charges			
Leasehold property	250	0	
Plant, furniture and equipment (excluding paintings)	100	10	
Paintings	10	50	
Parts and clothing stock	200	140	
Debtors	700	660	
Petty cash	2	2	862
Assets available to unsecured creditors			2,662
Trade creditors, VAT and PAYE	(900)		
Loan from Mr Daffodil	(150)	(1,050)	(1,050)
Surplus available for shareholders			1,612
Preference dividend	(50)		
Preference shares	(1,000)		
Ordinary shareholders	(2)		(1,052)
Surplus available for ordinary shareholders			560

Report should set out how arrived at ETR figures.
Explain difference between basis of balance sheet figures (accruals basis) and statement of affairs figures (cash basis).

Principal uncertainties: value of assets, including property. If assets < liabilities, MVL should not be recommended.
- need to ensure all liabilities are as stated.

S89 – statutory declaration of solvency – need to be certain company is solvent. Civil and criminal penalties

Written notification (and permission) s84(2A) and (2B) of floating charge holder required before resolution for MVL. Charge holder will need to be reassured about recouping its security.

Consider generally how to approach MVL in a cost efficient manner – i.e. realising assets and paying creditors before commencement by the directors, and distribution to shareholders in MVL.

Explain it will be possible to make distribution in specie if Mrs Daffodil wishes to keep the paintings. Special resolution of the company is required.
It will be necessary to ensure that distribution in specie is permitted by the Company's articles and, if not, to consider changing them. The value of the paintings will be deducted from her share of any dividend to shareholders.

Procedure and consequences of signing declaration of solvency (s89): directors' meeting, timescale, registration, penalties.

Consequences for directors of liquidation include cessation of directors' powers.

General presentation of statement of affairs and report to shareholders: clear and in easy to understand terms.

(b) Set out the other options for realising the capital in the Company (in addition to Members' Voluntary Liquidation) that are available to Mr and Mrs Daffodil, taking into account Mrs Daffodil's desire to keep the paintings. For each option, set out its advantages and disadvantages (10 marks)

Sell Company – ie shares

Sell business: i.e. assets and undertaking (with or without liabilities)

Sell assets and discharge liabilities (this would be a sensible approach before an MVL as well). Mrs Daffodil could purchase the paintings, would need valuation.
Cash could be distributed to Mr and Mrs Daffodil as dividends (and see below re ESC 16), but not share capital and other non-distributable reserves (in this case revaluation reserve but this would be eliminated on sale of property).
Note Share Capital here is only £2.
Nb paintings could be distributed to Mrs Daffodil as dividend but note provisions of CA 2006 s 845
i.e. distributions to shareholders are income and not capital but if a company has ceased to trade and, is effectively being wound up (but not subject to a formal MVL) ESC C16 allows a distribution as the equivalent of a distribution in a winding up.
The distribution is treated as a capital payment to be taken into account in determining the capital gains liabilities of the shareholders.
See the Enactment of Extra-Statutory Concessions Order 2012, SI 2012 no 266. This amends Chapter 3 of Part 23 of Corporation Taxes Act 2010 to provide that a distribution made by a company prior to its dissolution is not treated as a distribution for the purposes of the Corporation Taxes Acts provided that the total distributions made do not exceed £25,000. The Order also amends section 122(5) of TCGA 1992 to make this type of distribution a capital distribution. This means it is treated as capital receipts of the shareholders for the purpose of calculating any chargeable gains arising to them on their disposal of shares in the company.

Mr and Mrs Daffodil would need tax advice.

Following this could apply for Company may be dissolved (CA 2006 s 1000, 1003

Potential problems for Mr and Mrs Daffodil include 20 time year period before free of potential claims.

(c) Assume that the Company enters Members' Voluntary Liquidation. Set out the points for the Liquidator to consider if the Company receives a claim, exceeding £3 million, from the insurer of a purchaser of a motorcycle who had received substantial injuries in a road accident (that occurred before the Liquidator's appointment) and claiming that the motorcycle was not roadworthy when it was sold. (3 marks)

Check Company's insurance policy

If not covered company will be insolvent and must convert to CVL – s95.

Consider warranties given on motorcycle – any from manufacturer? By Company, covered by insurance?

If convert from MVL to CVL as there are insufficient assets to meet the liabilities, the Liquidator should resign. Consider Insolvency Ethical guidelines (ICAEW) para 400.31 Conflicts of Interest and para 400.85, Conversion of MVL to CVL:
Where there has been a Significant Professional Relationship, an Insolvency practitioner may continue or accept an appointment (subject to creditors' approval) only if he concludes that the company will eventually be able to pay its debts in full, together with interest.

However, the Insolvency practitioner should consider whether there are any other circumstances that give rise to an unacceptable threat to compliance with the fundamental principles.

QUESTION 3

(a) Set out how an Authorized Insolvency Practitioner may be appointed Liquidator to a Company that has been wound up by the Court. (3 marks)

Generally, OR becomes Liquidator (s136(2)) and OR can arrange for an authorised IP to become Liquidator (see below).
(At any time before winding up order, court can appoint Provisional Liquidator, s135)

By creditors: OR has to decide, within 12 weeks of OR's appointment (s136(5)), whether to convene a creditors' meeting for the purpose of choosing a person to be Liquidator in OR's place (s136(4)). See also s139.
In addition, OR may at any time summon creditors' meeting to appoint Liquidator (s136(4))

By Secretary of State: at any time, OR can apply to Sec of State for appointment of person of Liquidator in his place (s137(1))

By court:

- where winding up order immediately follows administration, court can appoint Administrator as Liquidator (s140(1));
- where winding up order is made while a Supervisor of a CVA is in place, court can appoint Supervisor as Liquidator (s140(2))

(OR does not become Liquidator).

(b)

(i) Assuming that an Authorised Insolvency Practitioner is appointed Liquidator to the Company (and the necessary formalities of appointment have been completed) write a file note setting out the legal and practical implications arising from the specific circumstances of the Company. Your note should set out, with reasons, what steps, if any, the Liquidator should take and any realistic assumptions made. (19marks)

Commencement of winding up = date of petition (s129(2)), i.e. 16 August 2013;

Organising event for Apa Ltd:

- See below re effect on employment contracts and dispositions of property

Liquidator should take steps to collect the debt of £20k

Banks

Village Bank overdrawn and Tiny Bank in credit throughout period between petition and order.
S127 dispositions of property: bank acts on the Company's instructions as its agent. This is so whether or not the account is overdrawn or in credit (Hollicourt (Contracts) v Bank of Ireland, [2001] 2 W.L.R. 290 [2001] 1 All ER 289 – overturning Re Gray's Inn Construction Co Ltd [1980] 1 WLR 711 on bank being liable to repay if account is overdrawn).

Other creditors

Liquidator can apply for repayment of £15k from the creditors. Were the payments of £15k ransom payments to complete the contract or were they needed directly to complete the contract? If the latter (all or part) – will probably be caught by s127 and Liquidator should apply for validation order, allowing payments.

Discussion:

- 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 wound not normally be validated but may be special circumstances.
    -

Standing orders, direct debits = dispositions of property

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)
If directors are employees, they can claim any arrears of wages, redundancy, etc in insolvency (consider if Tim is an employee or not: TR6 – Treatment of directors' claims as employees in insolvency)
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)
Payments to employees post-petition – pre order, will be subject to validation by court (s127)

Note: when Liquidator appointed the Sheriff's Office is served notice under s184

Bouncy castle (walking possession pre-petition and order) – 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.
Has execution been completed? Goods must have been sold.

Sound and lighting equipment (walking possession: between petition and order) – 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.
If forfeit lease, liquidator could demand return of goods on premises.
Liquidator could demand relief against forfeiture if there is value in the lease (in this case, would have to be > £30k, rent owing)

Seizure of car – not caught by s127 as subject to a charge.

Debts should be collected, but advance payments not collectable.
Liquidator unlikely to want to trade on these two occasions (sanction required Sch 4) but timing of events likely to be impractical anyway.

Consider whether:
- Is Hilda a shadow director?;
- Actions/lack of action by Tim (and Hilda if a shadow director) give rise to wrongful trading and/or misfeasance.

(ii) Set out how the Liquidator of this Company should obtain authorisation for the basis of the Liquidator's remuneration. (3 marks)

Creditors' committee or
At 1st creditors' meeting, R4.52(1)(c), if not established liquidation committee;
If not fixed by committee or creditors' meeting, use scale rates per Sch 6 to the rules
Nb OR can give sanction in absence of liquidation committee but NOT for remuneration. Dear IP ch7
Possibly apply to court.

QUESTION 4

(a) Taking into account current practice and guidance, set out the legal and ethical issues that have arisen in the Practice and set out what may be done to resolve them.

(15 marks)

The issues highlighted in the question indicate that the partners (and in particular Barbara) and the Practice are not working to the high standards expected of Authorised Insolvency Practitioners.
The legal and ethical issues include (discussion and suggestions for resolution):

[ICAEW] ethical guideline [D Insolvency]. IPs should take steps to ensure that the ethical guidelines are applied in all work relating to an insolvency appointment and in work that may lead to an insolvency appointment.

Fundamental principles (also contained in SIP 1: all SIPs should be read in conjunction with the wider principles contained in the ethical guidelines): objectivity; integrity; professional competence and due care; confidentiality; professional behavior

Need to identify threats to fundamental principles:
- self-interest; self-review; advocacy; familiarity; intimidation

- Were there too many cases for two practitioners?
- Should not accept appointment if not sufficient resources;

Bring another IP into the Practice;

- Barbara needs to become more engaged with the caseload: she does not seem to carry out, or show any interest in, case work;

- in any case Barbara should have taken over day to day management of cases as soon as Ann became ill

- Insolvency Guidance Paper - Control of Cases (ICAEW Tech 16/05): IP has obligation to ensure that cases are controlled and administered at all times.
- Need to put procedures in place to achieve this and when doing so, including when delegating to staff, need to ensure appropriate level of control

When delegating work need to ensure that work is being carried out in a proper and efficient manner appropriate to the case

- Not employing sufficient staff?

- was manager sufficiently experienced?

SIP 8 – liquidator must be present at s98 meeting

- not possible to chair two meetings at same time

Excessive payments to accountants – is this an introduction fee for work? Not permitted, SIP 8
Possible offence under Bribery Act 2010
(Fees will be disclosed in report to creditors)

Notices must be sent to “the creditors”, s98(1A).
Discussion in relation to ethical guidelines.

Late responses to correspondence – see rpb guidance: must acknowledge and reply to correspondence in a timely manner.

Late filings at CH:
- indication of lack of control of case;
- need to put [diary] systems in place to ensure sent out on time.
-

Late progress reports – see R4.49B; R4.49C:
- indication of lack of control;
- need to put [diary] systems in place to ensure sent out on time;
-

Client account not reconciling:
- consider client money regs;
- need to investigate:
- may be error/carelessness/incompetence by staff;
- may be fraud;
- possible money laundering offence; if so need to inform relevant authorites;

SIP 11

Complaint by creditor
- may trigger rpb investigation;
- there should be a Practice complaints procedure

(b) Set out the steps that Ann should take in respect of the cases in which she is Liquidator before she retires from the Practice on the grounds of ill health

(10 marks)

Ann should bear in mind the overriding principle contained in Insolvency Guidance Paper – Succession Planning (ICAEW Tech 17/05):
Insolvency appointments are personal to an insolvency practitioner, who has an obligation to ensure that cases are properly managed at all times, and to have appropriate contingency arrangements in place to cover a change in the insolvency practitioner's circumstances. The over-riding principle is that the interests of creditors and other stakeholders should not be prejudiced.

Ann
- should consider continuity on regular basis, (and especially here given that there are only 2 partners)
- Consider continuity agreement (required for sole practitioners)
- Should normally arrange for transfer of cases in good time before retirement (and, in this case, as far as health permits);
- If Ann is unable to do so, it would normally be assumed that Barbara, as the other partner in the practice would apply to take over the cases (but in this case, consider Barbara's conduct) in order to safeguard interests of creditors;
-

Appendix to guidance paper sets out what would be expected in a partnership agreement, including:
- death/illness/incapacity of partner, or otherwise leaving the firm;
- timescale of handover of cases, including obligations of each IP and financial arrangements;
- if IP is to remain as office holder: ownership/access to working papers; indemnity insurance; financial arrangements.
-

Ann should ensure that cases are progressed as far as possible, given her ill health

May need to leave file notes of outstanding matters

In joint appointments, she may resign and remaining Liquidator remains in office
But problem about Barbara's practice

Can still resign from individual appointments and call creditors' meetings to appoint new liquidator
- R4.108(4)

Most likely can apply to court for block transfer of cases (R7.10C)
Part 7 of Ins Rules Ch1A, R7.10A – R7.10D) and Ch2 and R7.11 Reason: R7.10B(b) – retires or R7.10B(c)

– ill health.
This may be most cost effective route
Procedure.

Discussion re which IP to transfer to.

ACVAR NOVEMBER 2013

EXAMINER'S REPORT

The Administrations, CVA and Receiverships JIEB paper aims to assess both practical application and the candidate's knowledge of the subject matter. This years' sitting highlighted that generally candidates are well prepared in terms of subject knowledge but many lack the ability to apply or adapt this knowledge to the particular circumstances of the question.

QUESTION 1

(a) For the purpose of trading the Company in Administration detail your obligations in relation to the Money Laundering Regulations 2007 and explain the procedures that you would put in place in this respect (15 marks)

First part of this question aimed to assess a candidate's knowledge of the Money Laundering Regulations and apply this to a trading administration.

Many candidates took the opportunity to set out their entire knowledge of the Money Laundering Regulations without applying it to the case. Answers frequently dealt with the obligations of an Insolvency Practitioner in respect of their formal appointment (identifying the directors/shareholders of the Company subject to the insolvency proceedings) rather than trading the administration as outlined in the requirements.

A large proportion of candidates identified that the Company was a high value dealer and that registration was necessary but many did not demonstrate an understanding of the implications or obligations resulting from this status.

The second part required candidates to outline the procedures that would be put in place by the Administrator. A large proportion of candidates were able to obtain marks through discussion of the role of a Money Laundering Officer but there was a tendency not to provide sufficient detail. For example many candidates stated "Identify whether there is an MLRO" but failed to explain what they would do if there was or wasn't one at the Company concerned.

This question was answered well where candidates understood that it was the customers of the Company that would be subject to checks. Very few candidates outlined the documents that could provide satisfactory identification for individuals and companies.

As candidates will be subject to Money Laundering training within their firms as well as through JIEB study, the marks awarded were disappointing. It is of concern that a large number of candidates appeared to have little understanding or knowledge of this area.

(b) Set out the matters relating to the conduct of the Company's directors that you would report to the Disqualification Unit and the initial information you would obtain to support your report. (10 marks)

From the facts stated in the case, candidates were asked to pull out the matters that could warrant a report to the Disqualification Unit. Generally candidates were able to identify the key issues for the case outlined and list some initial information they would seek.

A number of candidates took the opportunity to list every matter they could think of reporting to the Disqualification Unit whether or not it applied to this case for example "Misuse of factoring facilities" was frequently quoted when it clearly was not applicable to the case. Candidates should be aware that when determining the holistic mark consideration is given to the overall quality of the answer and the inclusion of relevant material.

QUESTION 2

(a) Outline the steps that you would take to realise the remaining assets of the Company.
(10 marks)

The majority of candidates were able to outline the steps they would take in relation debt recovery, sale of plant and machinery and recovery of amounts paid into an incorrect account. Many candidates were able to achieve a high percentage of the marks that were available in relation to those particular assets.

There were a number of comments frequently made by candidates that the examiner wishes to highlight:

- There appeared to be a widespread view that a compromised settlement of debts was appropriate as the first stage of collection even where there was no known dispute. The examiner would expect candidates to demonstrate an understanding that uncontested debts should not be compromised without good reason.

- Candidates referred to taking legal action against the bank regarding the funds due to the administrator. On a practical and professional level this would be a matter of last resort.

- Where the question states that assets have been sold by the officeholders agents it is not normally necessary to discuss whether such assets were sold at fair value and the consequences should this not have been the case.

Very few candidates identified other assets that were included in the question but not explicitly included in the statement of affairs thereby missing out on marks relating the recovery of director loans and illegal dividends. It appeared that the majority of candidates had completely ignored the 'Background' section of the question.

Despite the failure to identify all of the assets to be recovered the quality of answers in relation to realisation of other assets was good.

(b) Assuming that all assets are dealt with and making other reasonable assumptions prepare a final Receipts and Payments account for the Administration.
(15 marks)

It is of concern that a number of candidates were unable to set out a Receipts and Payments account and there seemed to be frequent confusion as to the difference between this and an estimated outcome statement. Relatively few candidates set out the account with multiple columns including the Statement of Affairs balances, period transactions and cumulative balances.

A number of candidates did score highly on this question, typically those that set out the account in appropriate columns and identified that there were fixed and floating charge assets/costs to be presented accordingly.

Many candidates presented accounts that showed an overdrawn bank position – even if calculations presented such a position one would expect candidates to identify that either this was not possible or state an appropriate assumption. Good candidates identified that a final Receipts and Payment account should add up to zero and credit was given to those who stated an appropriate assumption for dealing with the surplus.

A very basic Capital Gains tax calculation was included and the few candidates that attempted this were generally unsuccessful. Many did identify that corporation tax would be payable on the interest receivable.

QUESTION 3

(a) Using the information provided and where appropriate stating your reasonable assumptions, set out a comparison of the outcomes from the Scheme's perspective. (15 marks)

Part (a) required candidates to calculate the return to a major creditor, in this case a pension scheme, under formal insolvency (administration) in comparison to an informal repayment arrangement.

The syllabus requires knowledge of non-formal methods for dealing with financial difficulties but relatively few candidates appeared comfortable with this. The possibility of a compromise of a debt without an insolvency event appeared to be unknown to a large number of candidates. As a consequence many decided that this must be a CVA. Some candidates therefore turned what was a very simple calculation as to what the return would be to the scheme into a complex and sometimes arbitrary calculation involving assumptions about property price increases and contributions to the 'CVA'.

Generally candidates were able to present their answer in an appropriate format however there was an evident lack of understanding as to the differing treatment of fixed and floating charge assets. Several candidates wasted time by including costs that the notes to the requirements stated should be ignored.

(b) Set out a list of commercial points relating to the proposals that you would cover with the Trustees in the meeting. (5 marks)

Part (b) asked candidates to list a number of points that the Trustees of the pension scheme would wish to cover in a meeting with the proposed insolvency practitioner. Few candidates sought to negotiate the terms other than within the context of a CVA – for example higher contributions. Many identified that the sale of the property may not cover the final payment into the scheme however most answers assumed that there was no other way that this shortfall could be met.

(c) Set out the occasions when and the reasons why interaction may be required between the Scheme and the Administrators. Detailed procedural steps are not required. (5 marks)

This part of the question required a list of occasions where an Insolvency Practitioner would interact with the pension scheme.

Most candidates were able to identify several points of contact in particular the actions surrounding the Section 120 Notice. The candidates who logically followed an Administration from beginning to end listing the key contact points were able to achieve a high mark.

QUESTION 4

(a) Outline the steps you would take to handle the situation with Mott in the lead up to the meeting of creditors. (5 marks)

This part of the question was answered well although most candidates concentrated on commercial issues and ignored procedural points that would be checked by the Insolvency Practitioner, thereby limiting their marks.

(b) Set out in a note to your case manager the process that you would follow in the event that every resolution proposed at the initial meeting of creditors is rejected. (20 marks)

This part of the question required candidates to identify the resolutions normally proposed at an initial meeting of creditors (in an Administration) and for each of these list the steps that would be taken to deal with their rejection.

The key resolution at such a meeting is for the approval of the Administrators' proposals and the majority of candidates identified this and listed the provisions within the Act in relation to an application to court. Most candidates did not go any further than stating the provisions in the Act whereas marks were available for the entire process – i.e. from rejection to a Court decision.

Considering that candidates should have experience of convening such meetings it was surprising that very few were able to identify any other resolutions that would be proposed. Some candidates identified that approval for remuneration would have to be sought but went no further than stating that an application to Court would be required. Very few candidates identified that separate resolutions are sought for pre-administration costs and post-administration remuneration nor referred to the relevant Practice Direction.

A minority of candidates mentioned exit route and the appointment of subsequent liquidators (the question stated that there would be a distribution to unsecured creditors so candidates should have identified that liquidation would be appropriate or an application to court would have been necessary for distribution) or discharge from liability, matters commonly dealt with at such a stage of the Administration.

EXAMINATION MARKING PLAN

Question 1

(a) For the purpose of trading the Company in Administration detail your obligations in relation to the Money Laundering Regulations 2007 and explain the procedures that you would put in place in this respect. (15 marks)

- As dealing in goods with transactions in excess of €15,000 Company is a High Value dealer:
  - Check registered with HMRC as a High value dealer.
  - If not register
- Establish a Money Laundering Reporting Officer
- Ensure that staff at the Company have had the required training
- Ensure not committing an offence;
  - Concealing, disguising, converting or transferring criminal property
  - Avoid entering into or becoming concerned with an arrangement which the IP knows or suspects facilitates the acquisition, retention, use or control of criminal property.
  - Acquire, possess or use criminal property
- Report existing suspicions to SOCA;
  - Avoid tipping off
  - Discuss with firm MRLO
  - Take legal advice
  - Via standard disclosure form or limited intelligence value report form
  - Report as soon as possible
  - Mark as urgent due to pending sale
- Sale of stock
  - Take no action for 7 working days in relation to the bulk sale unless SOCA consent
  - Make enquiries to ensure not dealing with criminal property; seek SOCA consent
- Review existing procedures and policies
- Establish procedures to prevent money laundering:
  - Ensure that new customers' identities are verified; obtain and take copies of evidence establishing
    - for individuals the customers' full name and address; passport, photo driving licence, recent utility bills, tax notifications.
    - For companies certificate of incorporation, evidence of registered office, copy annual return names of directors and beneficial shareholders.
  - Electronic evidence is sometimes sufficient but unlikely to be so in its own right in this situation
  - If not face to face undertake enhanced due diligence, e.g. certification of documents, additional documents, payment through a bank account in the UK.
  - Check registers of politically exposed or high risk names
  - Review identification processes and procedures for existing customers and if necessary re-verify or seek verification of identification as above.
  - For business relationships, obtain information on the purpose and intended nature of the business relationship
  - Ensure documentation maintained for at least 5 years following end of business relationship/sale

- Check to ensure procedures are being followed:
  - Sign off process for all sales by senior member of IP team/IP

(b) Set out the matters relating to the conduct of the Company's directors that you would report to the Disqualification Unit and the initial information you would obtain to support your report. (10 marks)

Reporting

- Best practice suggests that Criminal offences should be reported by an Administrator also to Intelligence Operations at BIS

Late Annual return

- Obtain copy of ARs from Companies House with filing date
- Review and summarise late returns
- Criminal offence but practically insufficient in itself to warrant report.

Proper accounting records (s386CA)

- Create full inventory of company records
- Interview bookkeeper
- Have employees confirm that the list is complete
- Review electronic records
- Criminal offence

Requirement to notify and register with HMRC:
Requirement to account for tax:

- Corporation Tax
- PAYE/NI
- VAT
- High Value Dealer
- Misuse of crown monies
- Obtain confirmation from HMRC that Company not registered for each of the above and has not submitted returns

Abandonment of Company – breach of Companies Act Duties

Failure to maintain record of employees

Possibly failure to co-operate

General actions

- Attempt contact with directors
- Contact company solicitors/advisors to obtain company information

Mis-appropriation of company funds

- Possible transaction defrauding creditors, money laundering, misfeasance
- Company search of customers to establish connections
- Obtain bank statements to identify all transactions
- Obtain details of beneficiaries and sources of funds from bank
- Consider contacting beneficiaries of transactions and sources of funds subject to SOCA
- Suspected Criminal activities

Incorrectly filed dormant accounts False accounting – destroying records

Question 2

(a) Outline the steps that you would take to realise the remaining assets of the Company. (10marks)

Illegal dividends

- Establish when distributions made and to whom
- Establish if distributions occurred when there were insufficient reserves
- Establish who the shareholders are
- Write to the shareholders stating illegal and seeking repayment
- Shareholders may have defence of good faith
- Consider legal action if appropriate

Director's loan accounts

- Obtain full details of transactions from the company records
- Demand repayment from the directors
- Consider enforcement if directors fail to pay debts
- Consider what defences the directors may have
- Consider ability to repay

Debt paid into incorrect account

- Ask bank to pay over funds to Administrator

Residual P&M

- Instruct agents to dispose
- Ensure no third party claims

Jone Limited

- Obtain supporting documentation for delivery of goods;
    - Proof of delivery
    - Despatch book
    - Statement of delivery driver
- Send supporting documentation to customer
- Consider meeting/liaison or negotiation
- Check company status and ability to repay
- Solicitor's letter if still refuse to pay
- Legal action if necessary
- Consider if any reservation of title claim

Heath Cove Limited

- Ensure have correct address; companies house, directories, website, etc.
- Attempt other means of contact:
    - Telephone, Email, Fax, Visit customer site
- Use of tracing agent
- Legal letters
- Letters sent registered post
- Legal action if necessary
- Consider if any reservation of title claim

General

- Seek legal advice
- Ensure documentation and paperwork secured

- Discuss issues with directors
- Consider cost v benefit of any action

(b) Assuming that all assets are dealt with and making other reasonable assumptions prepare a final Receipts and Payments account for the Administration. (15 marks)

	Statement of affairs	*[memo]* 31 January 2013 to 30 July 2013	31 July 2013 to 5 November 2013	Total	
SECURED ASSETS					
Freehold	600,000	625,000	-	625,000	
Costs of realisation					
Administrators costs		(10,000)	-	(10,000)	any reasonable amount (allocation of total adm rem)
Legal costs		(10,000)	-	(10,000)	any reasonable amount
Agent's costs		(9,375)	-	(9,375)	any reasonable amount/%
Holding costs		(5,000)	-	(5,000)	any reasonable amount
Due to Horfield bank	(600,000)	(590,625)	-	(590,625)	Assumed paid from proceeds
Shortfall to bank	-	-	-	-	
ASSET REALISATIONS					
Stock	50,000	45,000	-	45,000	30p in £ - 30% of £150,000
P&M	25,000	10,000	25,000	35,000	
Book debts - already realised	150,000	75,000	25,000	100,000	£25k relates to cash paid into the old bank account
Book debt - Heath cove	-	-	65,000	65,000	See w orkings
Book debt - Jone	-	-	37,500	37,500	See w orkings
Director loans	-	-	12,000	12,000	See w orkings
Recovery of illegal dividends	-	-	54,000	54,000	See w orkings
Interest receivable			150	150	Discretion
		130,000	218,650	348,650	
Costs of realisation					
Corporation tax on interest		-	(45)	(45)	(£150 x 30%)
Administrators costs		(32,500)	-	(32,500)	per question
Administrators costs		-	(37,500)	(37,500)	£80k less fixed charge (discretion), less already paid
Corporation tax on capital gain		-	(57,188)	(57,188)	See w orkings
Legal costs		-	(35,000)	(35,000)	Balance of £45k
Agent's costs		(5,500)	(2,500)	(8,000)	(£45k+10k x10%), Assumed 10% commission continues
		(38,000)	(132,233)	(170,233)	
		92,000	86,418	178,418	
FLOATING CHARGEHOLDERS					
Horfield bank		-	(41,875)	(41,875)	£600k + interest less available under fixed charge
Treetops Bank		-	(97,859)	(97,859)	See w orkings
		-	(139,734)	(139,734)	
UNSECURED CREDITORS					
To liquidator		-	(38,684)	(38,684)	Discretion if applied to court for permission to distribute
		92,000	(92,000)	-	

Notes to the final R&P: VAT treatment

Interest workings

Amount due to bank	Simple	Compound	
Number of months	13	13	31/3/12 (date of statement) to 30/4/13 (sale of property)
Interest rate	5%	5%	
interest %	5.42%	5.43%	
	(32,500)	(32,567)	Assumed no interest since 30/4/13 or discretion if calculation attempt

Book debts

		Jone	Heath Cove
Book value	300,000		
Book value of collected to date	(120,000)		
Outstanding Book value	180,000	50,000	130,000
Collection rate		75%	50%
Realisations		37,500	65,000

Corporation tax workings (Capital Gains)

	Property	
Cost	400,000	
Net Proceeds	(590,625)	(Net of costs)
Gain	(190,625)	
Tax rate	30%	
CGT	(57,188)	

Assume no gain no loss on other capital items

Illegal dividend workings

Book value of assets		1,250,000	
Liabilities			
Unsecured		(500,000)	
Treetops		(130,000)	
Amount due to Horfield Bank		(600,000)	
D Loan not on SOA		60,000	See below
Net assets at appointment		80,000	
Revaluation reserve			
Current BV	750,000		
Cost	(400,000)	(350,000)	
Profit and loss reserve		(270,000)	
Recovery %		20%	
Recovery		54,000	

Assuming that entire deficit is a result of dividends (< 2years of preference dividends - company trading at break-even). Credit for any reasonable assumption and calculation.

Prescribed part

Net Property	178,418	
Prescribed part	(38,684)	(To liquidator)
Available for floating chargeholders	139,734	

Treetops bank workings

Debt	(130,000)	
Available for floating chargeholders	139,734	(from above)
Horfield bank	(41,875)	FIRST RANKING shortfall
Available for Treetops	97,859	

Director loans

Net pay p.a.	120,000
Net pay monthly	10,000
Number of months	6
Loan account at appointment	60,000
Recovery % (from question)	20%
Recovery £	12,000

Statement of Affairs

Barbut Limited

	Note	Book value	Expected to realise
		£	£
Assets specifically pledged			
Freehold property	i	750,000	600,000
Amount due to Horfield Bank	ii	(600,000)	(600,000)
		150,000	-
Assets not specifically pledged			
Book debts	iii	300,000	150,000
Stock	iv	150,000	50,000
Plant and machinery	iv	50,000	25,000
Surplus from fixed charge		150,000	-
		650,000	225,000
Preferential creditors			-
			225,000
Prescribed part			(48,000)
Amounts avaialble for floating chargehodler			177,000
Treetops Bank			(130,000)
Amounts available for unsecured creditors			95,000
Unsecured creditors			(500,000)
Deficit to creditors			(405,000)

Question 3

(a) Using the information provided and where appropriate stating your reasonable assumptions, set out a comparison of the outcomes from the Scheme's perspective. (15 marks)

Estimated Outcome Statement

	Proposal A			Proposal B	
	Proposal success	Proposal fails - reliance on floating charge	Proposal fails - waiver of floating charge		
FIXED CHARGE ASSETS (ASSETS SPECIFICALLY PLEDGED)					
Freehold property		750,000			
Pension Scheme		(750,000)			
		-			
Trade debtors		400,000			
Due to Invoice Discounter		(375,000)			
Termination charges		(20,000)	Discretion		
Debt collection charges		(20,000)	Discretion		
Debtor (deficit)/surplus		(15,000)			
Goodwill		25,000		25,000	
Freehold property		-		750,000	
Due to Bungo Bank		(150,000)		(150,000)	
(Deficit)/surplus to Bungo Bank under fixed charge		(125,000)		625,000	
FLOATING CHARGE ASSETS					
Trade debtors		-		400,000	(80% £500k)
Stock		75,000		75,000	
Plant and Machinery		120,000	OK to assume offer val	100,000	
Surplus from fixed charge assets		-		625,000	
Debt collection costs		-		(20,000)	Discretion
Net Property (no Prefs)		195,000		1,180,000	
Prescribed part		(42,000)		n/a	for identifying no prescribed part applies
Available for floating chargeholders		153,000	153,000	1,180,000	
Bungo Bank		(125,000)	(125,000)	-	
Due to Invoice Discounter		(15,000)	(15,000)		
Pension Scheme		(13,000)	-	-	
Surplus on Floating charges		-	13,000	1,180,000	
Prescribed part		42,000	42,000	n/a	
Available for distribution		42,000	55,000	1,180,000	

Available for distribution		42,000	55,000		1,180,000
Trade Creditors		(350,000)	(350,000)		(350,000)
HMRC		(75,000)	(75,000)		(75,000)
Other creditors		(100,000)	(100,000)		(100,000)
Employees (assumed no liability)		(300,000)	(300,000)	discretion	-
Pension scheme	PS cannot rank for presribed part distribution	-	(250,000)		(3,700,000)
		(783,000)	(1,020,000)		(3,045,000)
Pension Scheme Outcome					
From ID finance	375,000	375,000	375,000		
From Fixed Charge	-	750,000	750,000		
From sale of property/contributions	1,000,000	-	-		
From debenture	-	13,000	-		
Unsecured distribution	-	-	12,791		1,033,373
	1,375,000	1,138,000	1,137,791		1,033,373

Workings - unsecured divi		
Debt	1,000,000	
Under fixed charge	(750,000)	
Shortfall	250,000	
Creditors exc pension	(825,000)	
pension	(250,000)	
total unsecured creditors	(1,075,000)	(4,225,000)
Distribution p	0.051	0.279

Assumptions

Company's financial position does not materially change over the next 5 years.
That goodwill realisable in event of option A failure
P&M in Option A realises valuation

(b) Set out a list of commercial points relating to the proposals that you would cover with the Trustees in the meeting. (5 marks)

On the face of it Proposal A should provide a better outcome to the Scheme even if fails post deal
Trustee will have to contact the Pensions Regulator as a matter of urgency
Requirement for sign off by Pensions Regulator
Negotiations over deal structure:

- Higher debt position to roll forward under Proposal A
- Equity stake
- Personal or other guarantees
- Shareholder payment
- Higher ranking floating charge
- How goodwill valued under B – profitable business

Additional Information required to fully assess the proposal

- Copy business plan/forecasts
- Recent trading performance
- Establish how the market has been tested in relation to the proposed business sale
- Update on timing; has a notice of intention to appoint administrators been filed.
- Copy valuations
- Other options considered
- Reasons for urgency/current creditor pressure
- Intentions for funding the apparent shortfall between the current property value and the proposed final payment

(c) Set out the occasions when and the reasons why interaction may be required between the Scheme and the Administrators. Detailed procedural steps are not required. (5 marks)

- Where there is a proposed pre-pack under SIP 16 IP should discuss with major creditors; Pension scheme likely to be major creditor
- If Scheme has security then directors/company would have to serve notice on the Scheme prior to Administration
- Scheme would receive notice of appointment
- Trustees could claim for unpaid contributions using RP
- IP should file Section 120 notice which would be served on the Scheme
- Scheme would enter into assessment period
- IP would have to state whether the scheme could be rescued
- If shortfall on assets then Scheme would enter into the PPF
- PPF would take over responsibility for the provision of benefits subject to limits
- PPF would be a creditor of the company for s75 debt
- PPF would receive notices in the Administration
    - Meeting of creditors
    - Depending on liability PPF Could demand creditors' meeting
    - Proposals
    - Subsequent meetings
    - Progress reports
- Could be on a creditors' committee
- Extension request
- Officeholder may contact regarding investigations

- Final report
- TPR could issue a financial support direction which (subject to the Supreme Court's decision in *Nortel/Lehman* could rank as an administrative expense). TPR guidance post *Nortel* – won't rule this out but would normally consent to admin costs being paid first, would normally support the rescue culture. ***Note: Court of Appeal ruling post cut-off date.***

Question 4

(a) Outline the steps you would take to handle the situation with Mott in the lead up to the meeting of creditors. (5marks)

- Attempt to resolve the problem: discuss and explain with creditor the rationale behind the outcome regarding the business sale
- Explain implications on cost of dealing with rejection and possible impact on creditor return
- Establish if there are any issues other than the sale
- Meet creditor to discuss the situation
- Consider negotiation with creditor
- Ensure creditor has complied with requirement for proxy
- Check validity of proof of debt

(b) Set out in a note to your case manager the process that you would follow in the event that every resolution proposed at the initial meeting of creditors is rejected.

(20 marks)

Approval of proposals

- Seek legal advice
- If rejected then report the fact to court p55(1)
- Report result of meeting to Companies House
- Applying to court for directions
- Court may:
    - Provide that the appointment shall cease to have effect at from a specified time
    - Adjourn the hearing conditionally
    - Make an interim order
    - Make an order on a petition for winding up
    - Make any order the court thinks appropriate

Approval of current administrators as liquidators

- If creditors approve then current administrators can be liquidators
- Creditors can propose their own liquidators
- Ensure proposed liquidator is duly qualified and has the appropriate bond in place
- Ensure proposed liquidator has consented to act
- If creditors approve alternate liquidator then administrator would file the relevant notice stating this and exit in the normal way
- Administrator retains charge over assets in relation to liabilities.

Creditors' committee

- Creditors may appoint a committee of between 3 and 5 persons
- Cannot vote against the formation
-

Approval of pre-appointment fees

- Where administrator has made a statement of pre-administration costs
- Approval by committee or if no committee creditors
- Apply to court if no determination or administrator unhappy (see below)
-

Approval of remuneration and category 2 disbursements

- Fees set by a creditors' committee or failing that creditors
- If not approved then apply to court within 18 months of appointment
- At least 14 days' notice to creditors committee
- If no committee notice to one or more of the creditors as determined by the court
- Creditors can attend court hearing
- Court may make order that costs are cost of administration.
- Would have to follow Practice Direction; Insolvency Proceedings:
    - Justification: It is for the appointee who seeks to be remunerated at a particular level and / or in a particular manner to justify his claim and in order to do so the appointee should be prepared to provide full particulars of the basis for and the nature of his claim for remuneration
    - Benefit of the doubt: any doubt resolved against appointee
    - Value of service: The remuneration of an appointee should reflect the value of the service rendered by the appointee, not simply reimburse the appointee in respect of time expended and cost incurred
    - Fair and reasonable: The amount of the appointee's remuneration should represent fair and reasonable remuneration for the work properly undertaken or to be undertaken.
    - Proportionality of information: court has reference to the level of fees being sought
    - Proportionality of remuneration: proportionate to the nature, complexity and extent of the work
    - Provide in addition to the above:
        - the background to, the relevant circumstances of and the reasons for the appointment
        - description of work divided into tasks/categories
        - why beneficial
        - what has been achieved (value)
        - Total hours by staff and grade
        - Details of their relevant skills, experience, qualifications, seniority
        - the steps, if any, to be taken or that have been taken by the appointee to avoid duplication of effort and cost in respect of the work to be completed or that has been completed in respect of which the remuneration is sought;
        - the steps to be taken or that have been taken to ensure that the work to be completed or that has been completed is to be or was undertaken by individuals of appropriate experience and seniority relative to the nature of the work to be or that has been undertaken.
        - where, exceptionally, the appointee seeks remuneration in respect of time spent by secretaries, cashiers or other administrative staff whose work would otherwise be regarded as an overhead cost forming a component part of the rates charged by the appointee and members of his staff, a detailed explanation as to why such costs should be allowed should be provided.
        - In order that the court may be able to consider the views of any persons who the appointee considers have an interest in the assets that are under his control, provide details of:
        - what (if any) consultation has taken place between the appointee and those persons and if no such consultation has taken place an explanation as to the reason why;
        - number and value of the interests of the persons consulted including details of the proportion (by number and by value) of the interests of such persons by reference to the entirety of those persons having an interest in the assets under

the control of the appointee. ▪ Details of changes in charge out rates and reasons for it o If % basis ▪ Reason for basis ▪ Explanation of basis ▪ Statement that % is consistent with other similar appointments ▪ Comparison of remuneration to other basis. o Copy: ▪ R&P ▪ Reports ▪ Other documents that may assist ▪ Evidence of consultation
Approval of discharge from liability • Takes effect from a time by resolution of the creditors committee or if no committee creditors or • At a time specified by court • Administrator would apply to court • Application would normally cover both fees and discharge •
General • Maintain meeting minutes • Notify creditors of court applications and outcomes

PERSONAL INSOLVENCY NOVEMBER 2013

EXAMINER'S REPORT

QUESTION 1

Set out the issues. Explain the considerations facing you and the decisions which you will need to make when dealing with Wilfred's interests in the Property and the Flat. Support what you say with relevant calculations and state any assumptions which you have made.

(25 marks)

Note: Ignore VAT

Too many candidates did not appear to plan and instead launched straight into what was a familiar topic. However, the key to this question lay in the calculations which showed that, prima facie, realising just one of the property interests would not be sufficient.

On the whole candidates were able to calculate the value of the Bankrupt's interests in the two properties. Good points were made about the exoneration issues, the effect of Section 283A, the difficulties that would arise if the Trustee sought to realise the Bankrupt's interest in the former matrimonial home and the equity issues relating to the flat. Many candidates identified the fact that the value of the Bankrupt's interest in the flat was capable of being increased.

However, candidates were far less successful when working out the extent of the funds required to pay the bankruptcy costs and the creditors in full. There was a lot of confusion over the debts due to the former wife and to the Bankrupt's present partner. As a result, many candidates were unable to develop and discuss the key strategic points behind the question, draw a sensible conclusion and identify that only the Bankrupt's interest in the flat would need to be realised.

QUESTION 2

Prepare the briefing note required by Mr Grosvenor. Explain, in relation to each of the issues described by Mr Grosvenor, the relevant law and practice. Set out your analysis of each issue and describe the steps that the Supervisor should be taking to deal with each.

(25 marks)

This question provided well prepared candidates with the opportunity to gain good marks by applying the terms of the Straightforward Consumer IVA Protocol and the Standard Conditions to a practical situation. The standard of answers varied widely. Those who could demonstrate knowledge of the Protocol and the Conditions often scored well: however, there were a significant number of candidates who appeared not to be familiar with these important documents.

As a result, whilst most candidates were able to analyse most issues and to make some good points, only those conversant with the Protocol and Conditions were able to identify the solutions and the steps to be taken. Too many had to resort to the hackneyed phrase "refer to the proposal", scoring no marks by doing so.

Candidates were poor at explaining the position as regards the property and too many failed to appreciate that the apparent overvaluation was immaterial and of no relevance six months into the IVA. Too many candidates wrongly thought that the over-valuation amounted to a material misstatement and explained the actions to be taken as a result, whereas in practice the Supervisor would not need to do anything for another 4 years. Candidates also struggled with the PPI claim and few presented a coherent strategy for dealing with this.

QUESTION 3 **(25 marks)**

Candidates' scripts for this question demonstrated clearly that too many can answer questions where the solution comes from book learning but struggle when asked to tackle problems where practical experience is an advantage.

(a) Set out the fundamental principles and the principal categories of threat with which an Insolvency Practitioner must be concerned. (5 marks)

Set out the safeguards that an Insolvency Practitioner should put in place in order to address any threats identified by him. (6 marks)

This was well answered with many candidates earning the majority of the available marks. Most showed an understanding of the fundamental principles and of the threats and safeguards, although a minority gave the impression that they were simply regurgitating information learned by rote during their studies.

(b) Identify when and why such interaction is or may be required. (14 marks)

This was far more easily answered by those candidates who have had some practical experience and it was therefore little surprise that this part was not so well answered. Whilst the majority of candidates were successful in identifying the obvious point of interaction (for example, on case handover or sanction), far fewer explained the less common occasions when interaction is or could be required. Candidates who planned their answers by working through the lifecycle of a bankruptcy administration in a logical order were more successful.

QUESTION 4 **(25 marks)**

(a) Prepare a schedule setting out the individual entries in the Insolvency Services Account up to today's date, and calculate the balance currently standing to the credit of the bankruptcy. (5 marks)

In the first requirement, candidates met with very mixed results when recreating the ISA account. It was disappointing to see how many candidates had little or no idea about either what an ISA account looks like or the entries which routinely appear. Some candidates wasted time by preparing an estimated outcome for the bankruptcy. Most recognised the need to include the Secretary of State's fee although calculating it met with varying degrees of success. Far fewer candidates were aware of the need to include the ISA's quarterly banking charge and the fees levied for cheques and BACS transfers.

(b) Set out your views on the prospects of making any recoveries from the four matters identified by you and explain what further steps you, as Trustee, should take. In each case support what you say by referring to the relevant law and by stating any assumptions which you have made. (20 marks)

In the second requirement, many candidates made good bread and butter points in relation to the four issues although some candidates appeared to have difficulties with the distinctions between transactions at an undervalue and preferences. Only a minority of candidates were able to make solid practical suggestions about what the Trustee should do. Those that were able to do this scored good, sometimes very good, marks.

EXAMINATION MARKING PLAN

QUESTION 1

Set out the issues. Explain the considerations facing you and the decisions which you will need to make when dealing with Wilfred's interests in the Property and the Flat. Support what you say with relevant calculations and state any assumptions which you have made.

(25 marks)

Freehold residential property ("the Property")

The estimated value of Wilfred's interest in the Property

	£
The Property at valuation	650,000
Less: Fairfax Bank	(380,000)
Less: Yeoman Finance	(60,000)
Equity after deducted joint secured debts	£210,000
Wilfred's share @40%	84,000
Less :CSA (see note)	(17,400)
Less; Richard Sergeant (see note)	(7,000)
Estimated value of Wilfred's interest	£59,600

Note: The CSA charge and the charging order in favour of Richard Sergeant relate to debts due by Wilfred alone and are therefore marshalled against Wilfred's interest in the equity in the Property.

Potential issues and considerations
(Possible challenge to the 40%)

The order made by the Family Court was made less than one year before the date of the bankruptcy petition and therefore it may be open to T to challenge the order under s339 or s340
and to seek to obtain an interest greater than 40% and/or to obtain an order allowing him to realise Wilfred's interest sooner than in 7 years' time.
However, T would not succeed in his claim unless he could show that the order was obtained through fraud, mistake, misrepresentation or collusion (*Hill v Haines*).
T could make enquiries (for example by obtaining the relevant solicitors' files).
It is possible that Kate may wish to claim an interest greater than 60% perhaps on the grounds that Wilfred moved out nearly 5 years ago, and that she has been solely responsible for the mortgage and the upkeep of the Property as Wilfred appears not to have met his obligations to pay maintenance following the principles in *Jones v Kernott*
Possible challenge to the charging orders obtained by Richard Sergeant ("RS")
The obtaining of a charging order is an enforcement procedure to which s346 potentially applies.
The final charging order was made after the making of the bankruptcy order and therefore execution was not completed at the commencement of the bankruptcy (s346(5)).
RS is not entitled to retain the benefits of the charging order but he is only unable to do so as against the Official Receiver and T.
It is open to T to ask RS to remove his two restrictions and if RS declines to do so T can apply to Court for their removal and seek the costs of doing so from RS.
Whether T will wish to seek to go to the trouble and expense of doing this will depend upon other considerations in the bankruptcy.
If RS's security is removed, he can claim in Wilfred's bankruptcy as an unsecured creditor.

Leasehold flat ("the Flat")

The estimated value of Wilfred's interest in the Flat

	£
The Flat at valuation	180,000
Less: Tower Mortgages	(50,000)
Equity	£130,000
Estimated value of Wilfred's interest @ 50%	£65,000

Potential issues and considerations

(Possible challenge to the 50%)

The way in which the legal title is held may determine the extent of the respective interests held in the Flat by Elsie and Wilfred.

In the absence of any evidence or considerations to the contrary, as tenants in common Elsie and Wilfred each have a 50% interest

However, there is a significant imbalance in the way in which the purchase of the Flat was funded.

Is the fact that Elsie and Wilfred own the Flat as tenants in common rather than as joint tenants an indication that they do not intend

their interests to be equal?

T should make enquiries about the possible existence of documentation giving Wilfred a greater interest for example a deed of trust.

T should obtain a copy of the Transfer entered into when the Flat was acquired as this may show that Wilfred has an interest other than 50%.

T should look for evidence of an interest other than 50% by considering matters such as:

- Advice given and discussions that took place prior to acquisition
- The subsequent behaviour of Elsie and Wilfred
- How their finances are organised.
- How the costs of maintaining the Flat have been met
- The relationship between Elsie and Wilfred.

The fact that Wilfred appears to have funded the entire deposit as well as taking joint responsibility for repaying the mortgage suggests that his interest should be greater (perhaps much greater) than 50%.

One argument might be that Wilfred has an 86% interest in the Flat (adding the deposit (£130,000) to half the mortgage (£50,000 ÷ 2 = £25,000) gives £155,000 which is 86% of the original purchase price of £180,000).

The principles in *Stack v Dowden* and *Jones v Kernott* are relevant.

Amount required to pay creditors and costs in full.

	£
Credit card companies	13,800
Jack Point (petitioning creditor)	14,400
Kate (Note 1)	4,900
Elsie (Note 2)	6,000
CSA (Note 3)	0
RS (Note 5)	0
Total unsecured creditors	39,100
Statutory interest (Note 4)	9,384
Total amount required to pay creditors	48.484
Costs of the bankruptcy	40,000
Estimated total amount required	£88,484

Notes:

1. Loan was given whilst Wilfred and Kate were married but as Kate was not Wilfred's spouse at the date of the bankruptcy order the debt is not deferred under.s329.
2. Provable as a loan by Elsie to Wilfred even though the monies were used to pay a fine which, if outstanding at the date of the BO, would not have been provable under r12.3(2)
3. An obligation to pay monthly amounts under an order made in family proceedings is not a provable debt (r12.3(2)(a)).
4. Statutory interest started running on the date of the BO (04/01/11). Assume for the purposes of calculation SI for 3 years.
5. Assumes RS's status as a secured creditor is not challenged by T. If RS is unsecured, the total amount required increases by £8,680 (£7,000 plus statutory interest for 3 years) bringing the total to £97,164.

Decisions facing T
(The need for immediate action)

Whatever T is going to do in the future, he must ensure that he retains the ability to realise Wilfred's interest in both the Property and the Flat, both valuable assets.
The BO was made nearly 3 years ago.
Kate (as former Spouse) was living in the Property on the date of the bankruptcy order: therefore s283A applies to the Property.
Wilfred was living in the Flat on the day of the bankruptcy order: therefore s283A applies to the Flat.
T must take steps urgently to prevent Wilfred's interests in both properties reverting in him automatically under s283A(2).

As regards the Flat, T should make an application now seeking orders for possession and sale
As regards the Property T could make an application under s283A(6)/r6.237C for an order extending the three year period for example to a date 6 months or 1 year after the younger child becomes 18.
Alternatively T could apply for orders for possession and sale but with the proviso that he cannot enforce these until the younger child's 18th birthday.
The Court Order should provide for T to be able to realise Wilfred's interest at an earlier date on the occurrence of specified events, e.g. if Kate decides to sell the Property voluntarily.
If T takes the view that he is not, for the time being, able realise Wilfred's interest in the Property, one way forward might be for T to apply for an charge under s313.

Which asset to realise?

It is for T to decide which interest(s) to realise.
On the information to hand, neither Wilfred's interest in the Property (£59,600) nor his interest in the Flat (£65,000) would, by

themselves, realise sufficient to pay the costs of the bankruptcy and creditors in full.
T may be faced with realising both assets unless he is able to take steps to increase the value of Wilfred's interest in at least one of the properties.

Increasing Wilfred's interest in the Property from 40% is probably an uphill struggle.
It is even possible that his interest could be reduced to less than 40%.
Kate would most likely oppose any attempt by T to realise Wilfred's interest in the Property
as it is her and her children's home and she has the benefit of the Family Court order
She may assert that there are sufficient other assets (i.e. Wilfred's interest in the Flat) to pay all costs and creditors.

There are much better prospects of T succeeding in claiming an enhanced interest in the Flat.
T only needs to succeed in increasing Wilfred's interest to about 70% to provide enough funds to pay all costs and creditors (70% of £130,000 is £91,000 – more than the estimated £88,484 required).

QUESTION 2

Prepare the briefing note required by Mr Grosvenor. Explain, in relation to each of the issues described by Mr Grosvenor, the relevant law and practice. Set out your analysis of each issue and describe the steps that the Supervisor should be taking to deal with each.

(25 marks)

Increases in creditors' claims

The law and practice

The position as regards additional claims is governed by The Standard Conditions for Individual Voluntary Arrangements (April 2012 revised version).("the Standard Conditions")
The Standard Conditions provide that if the debts and liabilities exceed by 15% or more the estimate given in the proposals, there is a breach of the IVA.
Potentially relevant are the rights of a person bound by an IVA to petition for the debtor's bankruptcy (s264(1)(c)).
The Court can make a bankruptcy order on a petition under s264(1)(c) only if it is satisfied that information given by a debtor was false or misleading in any material particular or there was a material omission (s276(1)(b))..
The new creditors will be bound by the IVA.

Analysis of the position

	Per proposals	Current position
	£	£
The Bank	24,000	26,200
Finance creditors	39,000	42,000
New creditor	0	1,200
Total claims (excluding the Brother's)	63,000	69,400
The Brother	0	13,000
Total claims	£63,000	£82,400

Ignoring the Brother's claim, creditors' claims have increased by £6,400 (£69,400-£63,000) or about 10%.
This additional amount will not constitute a breach under the Standard Conditions nor would it be considered by the Court to be a material misstatement or omission
Under an IVA prepared under The Straightforward Consumer IVA Protocol 2013 Version ("The Protocol") the Supervisor has discretion to admit claims that do not exceed 110% of the amount stated by the debtor

The Brother would not have been in a position to agree to write off his debt when Reggie's IVA was approved as the debt (described as being "longstanding") would have comprised in the Brother's bankruptcy estate and either subject to s287 (Official Receiver to be receiver and manager between bankruptcy order and the appointment of a trustee) or, if a trustee had already been appointed, had vested in him under s306.
The decision on whether or not to write off the debt is for the OR or the trustee to make and not the Brother.
The writing off of the debt was therefore of no effect and the debt is still payable.
Was Reggie aware that his Brother had been made bankrupt?
If Reggie was aware and did not point this out to his Nominee, this almost certainly constitutes a material misstatement and/or omission on which a bankruptcy order could successfully be sought.
If Reggie was not aware of his Brother's bankruptcy then the mistake could be considered inadvertent.

The inclusion of the Brother's claim takes the total of creditors' claims to £82,400, or £19,400 (31%) above the claims disclosed in the proposals which is a breach of the IVA under the Standard Conditions.
Increasing the total amount of creditors' claims by nearly a third (from £63,000 to £82,400) would materially reduce the dividend available.

Steps by the Supervisor

It is not acceptable for the Supervisor to take the laissez-faire attitude he appears to have adopted.
The Supervisor must report to creditors now disclosing the issue
He must make full enquiries into the circumstances surrounding the purported writing off of the Brother's claim giving Reggie and the Brother only limited time in which to co-operate.
The Supervisor should obtain confirmation from the Brother's trustee that he wishes to claim in Reggie's IVA
If the Supervisor concludes that Reggie knew about the bankruptcy, he should report to creditors and seek their agreement to his immediately terminating the IVA and presenting a petition for Reggie's bankruptcy.
If the Supervisor concludes that Reggie did not know about his Brother's bankruptcy, he must (under the Standard Conditions) report to the creditors and ask them what they wish to do about the greatly increased creditors' claims and/or reduced dividend.

Failure by Reggie's mother to pay £20,000

The law and practice

This is a breach of the IVA under the Standard Conditions as it is a simple failure to meet an obligation under the IVA.

Analysis of the position

The injection of the £20,000 was probably a key component in enabling Reggie to offer the increased dividend to creditors.
Payment was due by 27 September 2013 so is now well overdue.
It's not clear whether Reggie's Mother gave her agreement to paying the £20,000 prior to the IVA being approved and obtained her own legal advice
If she did not agree to introducing the funds the Nominee wasn't doing his job properly and his report was deficient and the creditors were misled into accepting the IVA on a promise that was not going to be kept.
If this is the case the IVA should be ended now.
In any event the breach is Reggie's and the onus is on him to remedy it.

Steps by the Supervisor

The Supervisor must report the issue to creditors now.
The Supervisor should require Reggie to remedy the breach immediately and serve a notice of breach under the Standard Conditions
If Reggie fails to do so the Supervisor has the discretion to end the IVA which, given the material nature of the issue, he should exercise.

Non-payment of monthly contributions

The law and best practice

Under the Standard Conditions a breach of the IVA occurs when there are arrears of contributions equivalent to three months or more.
It is open to the Supervisor to agree with Reggie a payment break of up to six months once during the terms of the IVA
or to agree a payment holiday or holidays (of no more than 3 months payments in total) should, for any unforeseen reason, the debtor's income decrease or expenditure increase affecting his ability to make a monthly payment in full or at all.
In either case the term of the IVA is extended so that the missing payments are made up.
It is unlikely that, at this stage, the Court would regard two late contributions as grounds for making a

bankruptcy order.

Analysis of the position

As yet there is no breach but should November's contribution (due shortly) not be paid, Reggie will, under the Standard Conditions, be in breach of the IVA.
Non payment at such an early stage in the term of the IVA may bring into question whether Reggie can afford to make monthly contributions at all.

Steps by the Supervisor

The Supervisor should not be waiting to see either if the late payments are made or the November payment materialises but making immediate contact with Reggie to find out why the payments have not been made and if there is real problem trying to sort it out before a breach occurs.
The Supervisor may determine that a payments break or holiday is appropriate

Apparent over-valuation of Reggie's interest in his home

The law and practice

Under the Protocol an IVA should provide for an attempt to release the debtor's equity in his home six months prior to the expiry of the IVA (usually at month 54).
This is done via remortgage or third party payment or by the debtor making an additional 12 monthly contributions
The amount to be released is a maximum of 85% of the debtor's estimated equity.
Incremental cost of the remortgage should not exceed 50% of the monthly contributions at the review date.
Affordability must be taken into account.
If the debtor's interest (taking into account costs) is under £5,000 then no release is necessary.

Analysis of the position

The date for the release of Reggie's interest is four years away and the amount of his equity will be calculated at the relevant time.
Unless it can be shown that there was a material misstatement or omission by Reggie there is nothing to be done.
Assuming 50/50 ownership with his wife, a reduction in the value of Reggie's interest of £15,000 suggests that the property was overvalued by £30,000.

On a property worth c£750,000 a margin of £30,000 (either way) in a valuation is hardly material.

Steps by the Supervisor

None

The PPI claim

The law and practice

Under the Standard Conditions, any repayment, for whatever reason, to the debtor by a creditor during the continuance of the IVA is first used to reduce the debt to the creditor.
Who is entitled to any surplus depends upon the wording of the IVA.
If the IVA covers all assets (as will be likely under a protocol compliant IVA) the surplus is paid to the Supervisor.
If the proposals do not catch any PPI refund, any surplus will be payable to the debtor.
Some guidance may be sought from the "Guidance Note on Payment Protection Insurance Mis-selling Claims" issued by the RPBs ("the Guidance Note").

Analysis of the position
It's quite likely that Reggie has no locus to pursue the PPI claim as it will almost certainly be an asset in the IVA and therefore the Supervisor should be dealing with it. It looks as if any successful PPI claim against the Bank will do no more than result in the Bank reducing its claim in the IVA. Steps by the Supervisor The Supervisor should take over conduct of the claim from Reggie and should make enquiries into the existence of any similar claims and follow these up as appropriate. As the Guidance Note makes clear, the position under the law of set off may be far from clear and the Supervisor should take legal advice.

QUESTION 3

(a) Set out the fundamental principles and the principal categories of threat with which an Insolvency Practitioner must be concerned. (5 marks)

Set out the safeguards that an Insolvency Practitioner should put in place in order to address any threats identified by him. (6 marks)

1st Requirement

Fundamental principles

Integrity. An Insolvency Practitioner ("IP") should be straightforward and honest in all professional and business relationships.
Objectivity. An IP should not allow bias, conflict of interest or undue influence of others to override professional or business judgements.
Professional competence and due care. An IP has a continuing duty to maintain professional knowledge and skill at the level required to ensure that a client or employer receives competent professional service based on current developments in practice, legislation and techniques. An IP should act diligently and in accordance with applicable technical and professional standards when providing professional services.
Confidentiality. An IP should respect the confidentiality of information acquired as a result of professional and business relationships and should not disclose any such information to third parties without proper and specific authority unless there is a legal or professional right or duty to disclose. Confidential information acquired as a result of professional or business relationships should not be used for the personal advantage of the IP or third parties.
Professional behaviour. An IP should comply with the relevant laws and regulations and should avoid any action that discredits the profession. IPs should conduct themselves with courtesy and consideration towards all with whom they come into contact when performing their work.

Categories of threat

Self-interest threats which may occur as a result of the financial or other interests of a practice or IP or of a close or immediate family member of an individual within the practice.
Self-review threats which may occur when a previous judgement made by an individual within the practice needs to be re-evaluated by the IP.
Advocacy threats which may occur when an individual within the practice promotes a position or opinion to the point where subsequent objectivity may be compromised.
Familiarity threats which may occur when, because of a close relationship, an individual within the practice becomes too sympathetic or antagonistic to the interests of others.
Intimidation threats which may occur when an IP may be deterred from acting objectively by threats, actual or perceived.

2nd Requirement

Safeguards across a practice

Leadership that stresses the importance of compliance.
Policies and procedures to monitor quality control of engagements.
Documented policies about the identification of threats to compliance with the fundamental principles, the evaluation of the significance of those threats and the identification of safeguards to eliminate or reduce the threats to an acceptable level.
Documented internal policies and procedures requiring compliance with the fundamental principles.
Policies and procedures to consider the fundamental principles before accepting an insolvency appointment.
Policies and procedures about the identification of interests or relationships between individuals in a practice and third parties.

Policies and procedures to prohibit individuals who are not members of the insolvency team from

inappropriately influencing the outcome of an insolvency appointment.
Timely communication of a practice's policies and procedures, including changes, and appropriate training and education on such policies and procedures.
Designating a member of senior management to be responsible for overseeing the adequate functioning of the safeguarding system.
Having a disciplinary mechanism to promote compliance with policies and procedures.
Policies and procedures to encourage and empower individuals within a practice to communicate to senior levels within the practice and/or the IP any issue relating to compliance with the fundamental principles that concerns them.

Safeguards in relation to an insolvency assignment

Generally it will be inappropriate for an IP to accept an insolvency appointment where a threat to the fundamental principles exists or may reasonably be expected to arise during the course of the appointment unless:
disclosure is made, prior to appointment, of the existence of the threat to the Court or to the creditors and no objection is made to the IP being appointed; and
Safeguards are or will be available either to eliminate the threat or to reduce it to an acceptable level.

Involving and/or consulting with another IP from within the practice to review the work done.
Consulting an independent third party, such as a creditors' committee, an RPB or another IP.

Involving another IP to perform part of the work, including possibly another IP taking a joint appointment where the conflict arises during the course of the assignment.

Obtaining legal advice from a solicitor or barrister with the appropriate experience and expertise.
Changing the members of the insolvency team.
The use of separate IPs and/or staff.
Information barriers to prevent access to information.
Clear guidelines on issues of security and confidentiality.
The use of confidentiality agreements.
Regular review of the application of the safeguards by a senior individual in the practice not involved with the assignment.
Terminating the financial or business relationship that gives rise to the threat.
Seeking directions from the Court.

(b) Identify when and why such interaction is or may be required. (14 marks)

In this part:
- The Trustee ("T")
- The Official Receiver ("OR")
- The Secretary of State ("SoS")
- Creditors' committee ("CC")
- The Bankrupt ("B")
- Public examination ("PE")
- Insolvency Services Account ("ISA")

Following appointment of T

r.6.130. OR (as chairman of the 1st meeting of creditors at which T is appointed) must send certificate of T's appointment to him.
r.6.121. Where the Court appoints T (usually following a petition by a supervisor of an IVA) OR must send

the order appointing T to him.
r.6.122. Where SoS appoints T, OR must send T's certificate of appointment to him.

s.312. OR to deliver possession of property, books papers and records to T.
r.6.125. OR has an obligation to do all that is required to put T into possession of the estate and must give T all information about B's affairs and the bankruptcy so that T can effectively carry out his duties
r.6.125. Or must give T a copy of any report sent by OR to creditors
r.6.125. On taking possession T must discharge any balance due to OR or (more usually)give a written undertaking to do so.
r.6.103. OR to send proofs of debt to T with a list, which T authenticates and returns to OR.

Sanction for T's actions

ss. 302 and 314. In the absence of CC its powers are vested in SoS and T must apply to SoS for sanction to exercise powers in part 1 of sch 5
or to appoint B to carry out certain functions including carrying on his business
or for ratification of anything done by T without permission.
s.326. In absence of CC, T needs sanction from SoS to make a distribution in specie

Assisting OR in his duties and OR's investigations

s.305. T has obligation to give information to OR, produce and permit inspection of books, papers and other records and give such other assistance as OR may reasonably require.
T's general duty under s.305 extends to reporting to the OR details of any possible criminal offence committed by B.
T may be required to provide information to the OR in connection with a BRO application
s.290. If a PE of B is to take place, T may take part. Liaison between OR and T will be necessary.
r.6.172. OR must give T notice of the hearing fixed for a PE.

Resignation, removal, vacation of office and release etc of T

r.6126. T to give OR notice of creditors' meeting called to receive T's resignation.
r.6.127 If T chairs such a meeting (likely), he must send to OR copies of resolutions passed and certificate of T's resignation (if accepted) and (if new T appointed) a copy of the certificate of appointment.
r.6.127. Notice of T's resignation (required by s.298(7)) must be sent to the OR with a copy of T's account of his administration as sent to creditors.
r.6.128. If T given permission to resign by the Court, T must send a copy of the Court's order to OR together with a copy of T's notice of resignation.
r.6.129. T must give the OR notice of a creditors' meeting called to remove T.
r.6.129. If T chairs such a meeting (likely), he must send to OR copies of resolutions passed and certificate of T's

removal (if accepted) and (if new T appointed) a copy of the certificate of appointment.
r.6.131. Where T has been removed, certificate of removal endorsed with date filed in Court must be sent to T and (if appointed) new T.
r.6.135. If T has resigned or been removed and has not been granted his release, T must apply to SoS for this.
r.6.145. Where T intends to vacate office (by resignation or otherwise) he must give notice of his intention to OR.
r.6.145. On giving such notice T must give details of property remaining in the estate and of T's dealings with it.
r.6.146. On vacating office, T must hand over to OR (or any successor T if appointed) the assets, records, proofs, correspondence and other papers, together with B's books, papers and records.

Loss of qualification as insolvency practitioner

r.6.144. If T ceases to be qualified to act as such, he must give notice to OR.

Closure of the case

s,332 T may need to obtain a certificate from the SoS if no s313 charge has been imposed.
r.6.137. Notice of the holding of a final meeting of creditors, accompanied by a copy of T's report laid

before the meeting, must be sent by T to SoS.
r.6.137. If a final meeting resolves against T's release, he must apply to SoS for this.
T must tell the OR about any unrealised assets

Application by B to act as a director

r.6.204. If OR makes a report to the Court on such an application, OR musts send a copy to T.
r.6.204. Both OR and T can appear on the application, so liaison between them will be required.

Annulment and discharge

r.6.207. If an application to annul is made under s282(1)(b) (debts and expenses paid in full) T must prepare a report, a copy of which must be sent to OR
r.6.214. Following annulment, T must send a copy of his final account to SoS.
r.6.215. When an application is made for suspension of discharge, T and OR (whichever is the applicant) must send the other copies of their report/evidence
r.6.217. If B applies for discharge under s280, OR must give T notice of the hearing.
r.6.218. If B applies for discharge under s280, OR must prepare a report and send a copy to T

Banking and related matters (Insolvency Regulations 1994)

reg.21. If T wants to open a local bank account he must apply to SoS for authorisation to do so
reg.23. T can ask SoS to make dividend payments by electronic transfer
reg.23A. T can ask SoS to invest surplus funds in Government securities
reg.27. T's financial and trading records must s be handed over to OR if OR succeeds T in office
reg.28. T must, on request, send SoS an account of his receipts and payments
reg.28. where T vacates office either prior to or after a final meeting of creditors, T must send and account of his receipts and payments to SoS.
reg.28. On request, T musts send SoS vouchers, bank statements and any other information required
reg.29. On demand by SoS, T must produce for inspection his books and records
reg.30. T can apply to OR for authority to sell, destroy or otherwise dispose of B's books, papers and records.
reg.31. unclaimed or undistributed assets, dividends and other money must be paid into the ISA by T

T's records (Insolvency Practitioners Regulations 2005

reg.15. T's IP record is open for inspection by SoS.
reg.16. T's practice records (as defined) must be opened for inspection on the request of SoS.

QUESTION 4

(a) Prepare a schedule setting out the individual entries in the Insolvency Services Account up to today's date, and calculate the balance currently standing to the credit of the bankruptcy. (5 marks)

1st Requirement

	Note	£	£
OR's administration fee	1		1,715.00
Deposit on petition	2	700.00	
Banking fee 1/7/13	3		22.00
Proceeds of car	4	4,900.00	
S of S administration fee	5		2,885.00
Proceeds of policy		27,000.00	
S of S administration fee	6		4,050.00
Banking fee 1/10/13	3		22.00
BACS for T's costs			600.00
BACS fee	3		0.15
Cheque for petition costs			1200.00
Cheque fee	3		1.10
Balance			22,104.75
		£32,600.00	£32,600.00

Notes

1. Insolvency Proceedings (Fees) Order 2004 ("IPFO") Sch 2 Fee B1
2. IPFO Art 6(1)(c)
3. Insolvency Practitioners and Insolvency Services Account (Fees) Order 2003
4. This would be grossed up in T's own accounting records but not in the ISA
5. IPFO Sch 2 Fee B2. (0% x £1,300) + (100% x £1,700) + (75% x £1,500) + (15% x £400) (NB 0% band is reduced from £2,000 to £1,300 due to receipt of deposit on petition)
6. IPFO Sch 2 Fee B2. (15% x £27,000)

As a committee has been established it will most likely fix the basis of the Trustee's remuneration so there will be no need to call a creditors' meeting to do this.

(b) Set out your views on the prospects of making any recoveries from the four matters identified by you and explain what further steps you, as Trustee, should take. In each case support what you say by referring to the relevant law and by stating any assumptions which you have made. (20 marks)

Freehold property

Prospects for recovery

It's too early to be confident about success but the Bankrupt ("B") appears to have gifted a half interest in Pinafores when Tuckers was registered in Josephine's sole name.
Had this not happened the interest would now be available to be realised for the benefit of B's creditors
There is potentially a material recovery of up to £130,000 to make although costs may be higher than usual.

The law

The gift cannot be a transaction at an undervalue under s339 as it took place over 5 years ago
but potentially could be a transaction defrauding creditors under s423 under which there is no time limit.
The burden will be on the Trustee ("T") to show that the purpose behind Tuckers being registered in Josephine's name alone was to put an asset belonging to B beyond the reach of someone making, or at some future date may make, a claim against B.

The recent admission by B about the Senior Partner's attitude to partners' assets may be a good indication (or even an admission?) that registering Tuckers in Josephine's name was intended to remove B's interest from being claimed by his present or future creditors
Following [*Treharne and*] *Sands v Clitheroe (BPIR)*
Is Josephine holding B's interest on trust?

What should T do?

T could try and locate the files of the solicitors who dealt with the purchase of Tuckers but it is likely that these will have been destroyed some time ago.
T could try getting further information from B and Josephine but T knows enough now to take his own legal advice which may be that he has enough information already to warrant starting proceedings
The likely costs need to be established as Josephine will almost certainly fight to save her home although that should not stop T from trying to reach an agreement with Josephine to obviate the need for any proceedings.
Actions under s423 are not bound to succeed therefore if proceedings become necessary T will need to protect his position by asking his Solicitors and Counsel to act under CFAs and by arranging adverse costs insurance.
T should try to register a restriction at the Land Registry but as Tuckers is registered in Josephine's name alone she may object.
This could lead to hearings before the Land Registry Adjudicator and potentially in the Courts
T may have a better chance of getting his restriction registered if he has started s423 proceedings.

Money given to the grandson

Prospects for recovery

On the face of it this is a solid claim and the prospects of getting the Court to agree that the £20,000 should be repaid are good.
But whether or not the grandson is in a position to return the £20,000 under any Court order must be in doubt (the money went into bricks and mortar)
and given the Court's wide discretion in the orders it can make actually getting the £20,000 could be a long, drawn out and relatively expensive exercise.

The law

This was a gift made within 5 years of the presentation of the bankruptcy petition and is therefore potentially a transaction at an undervalue under s339.
The gift took place within two years of the date of the bankruptcy petition and therefore whether B was solvent or insolvent at the time is irrelevant.
The motives behind B giving the money to the grandson are not relevant and the fact that the transaction was for no consideration is enough.
The Court has wide powers under s342 when deciding how to adjust the position between the parties
for example ordering the transfer of property to T or requiring money to be paid to T.
T might be well advised to seek a monetary order
The Court could even decide that, in all the circumstances, there should be no restitution at all.

What should T do?

T should open negotiations with the grandson and perhaps his civil partner to see if an agreement can be reached which avoids proceedings.
Negotiating may give T a better idea about the grandson's ability to repay the funds without recourse to selling his property and/or the difficulties likely to be faced by T in practice in making a realisation.
Reaching agreement would save costs and may enable T to justify settling for a discounted amount.

Money in Josephine's deposit account

Prospects for recovery

Excellent – the best of the four claims.
Being a fixed rate deposit the money is probably still there and in the absence of opposition from Josephine can be recovered.

The law

This was a gift made within 5 years of the presentation of the bankruptcy petition and is therefore potentially a transaction at an undervalue under s339.
The gift took place within two years of the date of the bankruptcy petition and therefore whether B was solvent or insolvent at the time is irrelevant.
The motives behind B giving the money to Josephine are not relevant and the fact that the transaction was for no consideration is enough.
Alternatively T could claim that Josephine is holding the money in trust for B (and therefore now for T).

What should T do?

T should try to reach agreement with Josephine under which the money is repaid with repayment when the 3 year fixed term ends in May 2014.
T should ask Josephine to sign an irrevocable instruction to the Building Society to pay the money to T.
In the absence of any such agreement T will need to make a claim under s339 now.
T should put the Building Society on notice that he is claiming the deposit as an asset in the bankruptcy and may need to back this with a Court order preventing the Building Society from paying the money away until ownership is

determined.

Proceedings against Captain Corcoran ("CC")

Prospects for recovery

No idea at all either as to likelihood or amount

The law

As the action started very shortly after the making of the bankruptcy order the issue giving rise to the action probably predates the bankruptcy.
Things in action comprise in the bankruptcy estate (*Ord v Upton*) and the action therefore vests in T unless the cause of action is purely personal to B, for example actions for personal injury, defamation or a claim for unfair dismissal.
Hybrid actions (in part relating to property and in part personal) vest solely in a trustee (*Ord v Upton*) but the trustee would hold any personal damages on trust for B.
CC may seek to have the action struck out on the grounds that B had no locus to bring it.
If T decides in due course that the action should continue he should not get the proceedings amended to show T as the claimant but should start fresh proceedings.

What should T do?

T should write to CC's solicitors asking for full details of the action
and may need to agree/seek an adjournment of the proceedings while he finds out what is going on.
T should interview B and seek from him and, if any, his solicitors full details of the claim.
T should consider whether B has committed an offence under s352 (non disclosure of property comprised in his bankruptcy estate) and if this seems likely T should report the matter to the OR.

Points of general application

T will need to keep the Committee fully informed and will require its sanction to proceed with the actions and appoint solicitors.
The figures suggest that the available assets are sufficient to pay the costs and claims in full. This may help T to decide which assets to realise first.