

**JOINT INSOLVENCY EXAMINATION BOARD
NOVEMBER 2013 (SCOTTISH)
EXAMINERS' AND MARKING PLAN**

GENERAL NOTE

The following summary of pervasive matters of concern on the English papers also applies, to a greater and lesser degree, to the Scottish papers.

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

EXAMINERS' REPORT

GENERAL NOTE

4 candidates sat the exam. As the number of candidates is low it is not possible to draw any meaningful statistical results. Comments are accordingly restricted to areas of competence and reference to areas where candidates missed key matters.

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 was split into three distinct areas. The first, and the section with the least marks, dealt with the fundamental principle that must be followed when making a distribution. The answer sought a direct reference to S107 IA1986 which was mentioned by 3 candidates, the fourth, however, clearly understood the principle.

- (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)

- (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)

The second part asked for the calculation of the amount available to each class of creditor. This was well answered though one candidate miscalculated the "prescribed part" and one candidate missed the point that the sums available to a large number of ordinary creditors was small and accordingly did not consider options available in such circumstances, the third party, and the part with the largest number of marks, dealt with admissibility of claims. Candidates answered this part well and addressed issues in a logical manner. All followed the question by discussing each separate bullet point which was the key to maximising the obtaining of marks.

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 was split into three separate parts with the first part, worth 12 marks, requiring candidates to set out approximate calculations to demonstrate that an MVL was an option, and to draft a report to the shareholders/directors. The computational aspect was well answered albeit candidates treated capital gains tax arising on the disposal as a creditor rather than a cost of realisation. The form of report to the shareholders/directors was mixed with candidates not fully addressing the uncertainties or consequences of certain suggested actions.

- (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)**

The second part, worth 10 marks, sought other options in addition to the MVL. This was probably the worst answered section in the whole paper with candidates not raising the point that the company could be sold, that the shares could be sold or that a pre MVL sale of assets could be made.

- (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)**

The final part, worth 3 marks, asked for consideration of matters arising post appointment. Three candidates did not answer this section well and all generally failed to mention that the company's insurers should be contacted.

QUESTION 3

- (a) Assuming that the Interim Liquidator 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)**
- (b) Set out how the Liquidator of this Company should obtain authorisation for the basis of the Liquidator's remuneration. (6 marks)**

This was divided into two sections the first having 19 marks available. This part dealt with matters post an Interim Liquidator's appointment, after completion of statutory formalities. It was encouraging that no candidate addressed the statutory formalities and simply addressed the issues raised in the question. The marks obtained were variable and candidates who did not score well simply did not go into enough depth in their answer. Marks cannot be awarded if candidates do not state the basics. The second part, worth 6 marks, dealt with authorisation of remuneration. As with the first part were lost by failing to state the obvious.

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)
- (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)

This was a two part question. The first, worth 15 marks, dealt with legal and ethical issues arising in a Practice. The main issues of control and ability to carry out work were addressed though candidates made only passing reference to how the RPB's might view this firm. Candidates also correctly addressed the issue of the non-availability of the proposed Liquidator as the S09 meeting. The second part, worth 10 marks, asked what the retiring partner should do with her cases pre-retirement. The answers were generally superficial and lacked depth. Given that candidates had discussed the problems in the practice in the first part, three simply state that the cases should be transferred within the practice.

SUMMARY

It is considered that the paper was fairly set and the Candidates were asked question in a manner which directed them towards the answer sought.

The quality of answers was generally high, though given the very small number of the candidates, care has to be taken not to try to statistically analyse such a small population.

The drafting of questions into sub sections and bullet points does appear to point the candidate more directly to specific issues, rather than a long narrative question, where clients have to discover which areas are relevant as regards the answer sought. This practice does appear to lead to higher scoring.

LIQUIDATIONS EXAMINERS' MARKING PLAN

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

Calculation of prescribed part of net property (s176A and SI2003/2097): where net property >£10k:
 $50\% \times £10,000 = £5,000$
 $20\% \times £(20,000 - 10,000) = £2,000$
 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, 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; R7.31:

All fees, costs, charges and other expenses incurred in the course of winding up ...are to be regarded as expenses...

R4.15 – provable debts

Note: R4.67 – expenses in liquidation

s107

In all cases Liquidator can require further details of claim (R4.16) application of B(S) Act S48(5).

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 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 (s249b)).
Need to verify debt

Happy Ltd - first invoice time barred, others unsecured claims

Wishywashy Ltd = contingent claim (R4.16 applying S49 B(S) Act) 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.

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 Mrs 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 securities			
	BV	ETR	
Heritable property	2,500	2,500	
Less CGT	(400)	(400)	
	2,100	2,100	
Less due to Bank	(800)	(800)	
Surplus under standard security			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 securities (but subject to floating charge) (FC holder paid in full under standard security)			
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 ICAS guidelines regarding Conflicts of Interest and S95 and S96 IA 1986.

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.

3.(a) Assuming that the Interim Liquidator 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)

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 would 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

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)

Bouncy castle (executed Attachment) – s185, 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.

As no sale has been made the diligence can be cut down.

Sound and lighting equipment (executed Attachment) – 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 –

Obtain a copy of the lease. Does it terminate automatically on liquidation?

Landlord has exercised hypothec (a real right and security).

Can retain the fixtures and fittings owned by the company.

Liquidator should obtain valuation of assets concerned and attempt to negotiate with landlord.

Landlord can claim any balance of outstanding rent as an ordinary claim after deducting value of security.

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.

(b) Set out how the Liquidator of this Company should obtain authorisation for the basis of the Liquidator's remuneration. (6 marks)

If a Creditors' committee was established they will agree the level of remuneration.

or

At 1st creditors' meeting if no liquidation committee appointed the fees are set by the Court.

Basis for fixing remuneration is set out in Rule 4.32 of I(S) Rules 1986 and in S53 of the B(S) A 1985. Remuneration may be a commission calculated by reference to the value of assets which are realised but there shall in any event be taken into account the work, which having regard to that value, was reasonably undertaken, and the extent of the responsibilities in administering the estate.

In either case the Liquidator should provide sufficient supporting information to enable the committee or the court to form a judgment as to whether the proposed remuneration is reasonable having regard to all the circumstances of the case. It would be normal for a SIP 9 analysis of time incurred to be provided analysing time by activity and grade of staff. The IP should be prepared to disclose time and charge out values where remuneration is charged on a time basis. An up to date receipts and payments account should be provided.

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):

[ICAS] ethical guidelines. 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 behaviour

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 - ICAS: 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 R7.32 applying S 63 B(S) Act:

- 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 authorities;

SIP 11

Complaint by creditor

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

Sitting on funds – must distribute as soon as feasible

May indicate lack of control of cases; lack of resources to deal with distributions

(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 – guidance for IP's when leaving a practice (ICAS):

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;

Insolvency Guidance Paper 2 (ICAS) sets out what would be expected in an insolvency practice agreement or 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

Most likely can apply to court for block transfer of cases (Rule 74.32 of the Rules of Court of Session.

Reasons are retiral or ill health.

This may be most cost effective route

Procedure.

Discussion re which IP to transfer to.

**ADMINISTRATIONS, COMPANY VOLUNTARY ARRANGEMENTS and RECEIVERSHIPS
(SCOTLAND)
2013 EXAMINER'S REPORT**

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)**

Part (a) 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 outline 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.

The second part of (a) was for candidates to outline what procedures would be put in place by the Administrator. This part was generally poorly answered with many candidates unable to apply general Money Laundering Regulation knowledge to the case scenario.

Considering that candidates will be subject to Money Laundering training within their firms as well as through JIEB study, the marks obtained were disappointing. An alarmingly high proportion 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)**

Candidates were required to identify the matters that would warrant to be reported to the Disqualification Unit. Generally candidates were able to identify the key issues for the case and list some initial information they would seek.

A number of candidates simply listed the contents of Schedule 1 Parts I and II of the CDDA without applying to the circumstances of this case. Candidates should be aware that very few marks are awarded for simply listing legislation from the open book.

QUESTION 2

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

Candidates were required to identify which assets required to be realised and then demonstrate their knowledge of practical aspects of asset realisation, a core function for a prospective IP.

The majority of candidates were able to outline the steps they would take in relation to debt recovery, sale of plant and machinery and recovery of amounts paid into an incorrect account.

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 to the recovery of director loans and illegal dividends.

- (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)**

This part of the question was generally well answered by candidates and well laid out.

Disappointingly, no candidate identified that costs of realisation in respect of secured assets should be attributed against that asset sale. Very few candidates were able to demonstrate appropriate tax knowledge by identifying that there was a capital gain. Where this was identified there was a failure to identify that costs of realisation were allowable in calculating the gain to be taxed.

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) scenarios in comparison to an informal repayment arrangement.

Candidates generally scored well in setting out the outcomes of Proposal A and Proposal B as set out in the question but very few candidates identified that Proposal A could fail at some point after acceptance and therefore failed to consider fully the possible outcomes for the pension scheme.

Very few candidates clearly identified the monetary outcome for the pension scheme specifically under each of the proposals.

A significant number of 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. This part was poorly answered by candidates with a lack of commercial aspects of the proposals being considered.

- (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 points of contact in particular the actions surrounding the Section 120 Notice but failed to identify other pension scheme specific points of contact.

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 reasonably answered although a number of candidates tended to concentrate on how they would respond in relation to the sales process rather than the situation more generally.

- (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. Overall this part of the question was extremely poorly answered.

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.

Beyond this, there was virtually no evidence that candidates were aware of any other resolutions that would be considered by the meeting of creditors. A few candidates identified that approval for remuneration would have to be sought but did not deal with separate resolutions being required for pre-administration costs and post-administration remuneration.

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.
(10 marks)

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)

	<i>[memo]</i>				
	Statement of affairs 2013 to 30 July 2013	31 January 2013 to 30 July 2013	31 July 2013 to 5 November 2013	Total	
SECURED ASSETS					
Heritable property	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 workings
Book debt - Jone	-	-	37,500	37,500	See workings
Director loans	-	-	12,000	12,000	See workings
Recovery of illegal dividends	-	-	54,000	54,000	See workings
Interest receivable			150	150	Discretion
		<u>130,000</u>	<u>218,650</u>	<u>348,650</u>	
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 workings
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
		<u>(38,000)</u>	<u>(132,233)</u>	<u>(170,233)</u>	
		<u>92,000</u>	<u>86,418</u>	<u>178,418</u>	
FLOATING CHARGEHOLDERS					
Horfield bank		-	(41,875)	(41,875)	£600k + interest less available under fixed charge
Treetops Bank		-	(97,859)	(97,859)	See workings
		-	<u>(139,734)</u>	<u>(139,734)</u>	
UNSECURED CREDITORS					
To liquidator		-	(38,684)	(38,684)	Discretion if applied to court for permission to distribute
		<u>92,000</u>	<u>(92,000)</u>	<u>-</u>	

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%	
	<u>(32,500)</u>	<u>(32,567)</u>	

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	<u>(120,000)</u>		
Outstanding Book value	180,000	50,000	130,000
Collection rate		<u>75%</u>	<u>50%</u>
Realisations		<u>37,500</u>	<u>65,000</u>

Corporation tax workings (Capital Gains)

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

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	<u>60,000</u>	See below
Net assets at appointment	80,000	
Revaluation reserve		
Current BV	750,000	
Cost	(400,000)	(350,000)
Profit and loss reserve	<u>(270,000)</u>	
Recovery %	20%	
Recovery	<u>54,000</u>	

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	<u>(38,684)</u> (To liquidator)
Available for floating chargeholders	139,734

Treetops bank workings

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

Director loans

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

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 success	Proposal A		Proposal B
		Proposal fails - reliance on floating charge	Proposal fails - waiver of floating charge	
ASSETS SPECIFICALLY SECURED				
Heritable property		750,000		
Pension Scheme (Standard security)		<u>(750,000)</u>		
		<u>-</u>		
Trade debtors		400,000		
Due to Invoice Discounter		(375,000)		
Termination charges		(20,000)	Discretion	
Debt collection charges		<u>(20,000)</u>	Discretion	
Debtor (deficit)/surplus		<u>(15,000)</u>		
Heritable property		-		750,000
Due to Bungo Bank		<u>(150,000)</u>		<u>(150,000)</u>
(Deficit)/surplus to Bungo Bank under standard security		<u>(150,000)</u>		<u>600,000</u>
FLOATING CHARGE ASSETS				
Goodwill		25,000		25,000
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 assets specifically secured		-		600,000
Debt collection costs		-		(40,000)
Net Property (no Prefs)		<u>220,000</u>		<u>1,160,000</u>
Prescribed part		(47,000)		n/a for identifying no prescribed part applies
Available for floating chargeholders		<u>173,000</u>	173,000	<u>1,160,000</u>
Bungo Bank		(150,000)	(150,000)	-
ID Finance		(15,000)	(15,000)	
Pension Scheme		(8,000)	-	-
Surplus on Floating charges		<u>-</u>	8,000	<u>1,160,000</u>
Prescribed part		47,000	47,000	n/a
Available for distribution		<u>47,000</u>	55,000	<u>1,160,000</u>

Available for distribution	47,000	55,000	1,160,000
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	-
ID Finance	-	-	
Pension scheme	-	(250,000)	(3,700,000)
	<u>(778,000)</u>	<u>(1,020,000)</u>	<u>(3,065,000)</u>

Pension Scheme Outcome

From ID finance	375,000	375,000	375,000
From Assets specifically secured	-	750,000	750,000
From sale of property/contributions	1,000,000	-	-
From floating charge	-	8,000	-
Unsecured distribution	-	-	12,791
	<u>1,375,000</u>	<u>1,133,000</u>	<u>1,137,791</u>
			<u>1,015,858</u>
			<u>1,015,858</u>

Workings - unsecured divi

Debt	1,000,000	
Under standard security	(750,000)	
Under floating charge	-	
Shortfall	<u>250,000</u>	
Creditors exc pension	(825,000)	
pension	(250,000)	
total unsecured creditors	<u>(1,075,000)</u>	(4,225,000)
Distribution p	<u>0.051</u>	<u>0.275</u>

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. (5 marks)

- 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 Statement of Claim

(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 Court practice and case law:
 - 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
- If % basis
 - Reason for basis
 - Explanation of basis
 - Statement that % is consistent with other similar appointments
 - Comparison of remuneration to other basis.
- 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 and explain the considerations and decisions with which you will be faced 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)

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 effect of Section 39A, the difficulties that would arise if the Trustee sought to realise the Bankruptcy'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 struggled to work out the extent of the funds required to pay the bankruptcy costs and the creditors in full. 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 the Trustee 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 SIP 3A (Scotland) 2009 and the PTD Regulations 2008. This question in general was answered well.

Candidates were poor at explaining the position as regards the property and a few failed to appreciate that the apparent overvaluation was immaterial and of no relevance at an early stage in the PTD. Candidates struggled with the concept that sufficient contributions from an increased IPA would cover all liabilities and would eliminate the requirement to pursue funds from the other sources.

QUESTION 3

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

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

Part A was well answered with many candidates earning the majority of the available marks in respect of fundamental principles. Most showed an understanding of the fundamental principles and of the threats, the safeguards were less well answered.

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

Part B was answered reasonably well by those candidates who have had some practical experience. Whilst the majority of candidates were successful in identifying the obvious point of interaction (for example, on auditing accounts, on BRAs or heritage), 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

- (a) Prepare a Receipts and Payments Account from commencement up to today's date, showing the balance currently standing to the credit of the bankruptcy. (5 marks)**
- (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)**

(25 marks)

In the first requirement, candidates met with some mixed results when recreating a Receipts and Payments Account.

Most identified that Trustee's Remuneration should not be taken until approved, and therefore should not have entered it into any Receipts and Payments at this stage in the case.

In the second requirement, many candidates picked up easy points in relation to the four issues. 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.

Most candidates failed to calculate an estimated outcome, therefore failed to realise that if the Court Case against Captain Corcoran was successful, sufficient funds would be ingathered to pay costs and liabilities in full (subject to additional costs).

It felt that candidates had not left sufficient time for this question to deal with all issues and in general this was the question that let candidates down.

PERSONAL INSOLVENCY EXAMINERS' MARKING PLAN

QUESTION 1

Freehold residential property ("the Property")		
<i>The estimated value of Wilfred's interest in the Property</i>		
	£	
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 :Kate -Inhibition	(17,400)	
Less; Richard Sergeant (see note)	(7,000)	
Estimated value of Wilfred's interest	£59,600	
<p>Note:</p> <p>The Inhibition in favour of Richard Sergeant relate to debts due by Wilfred alone and are therefore against Wilfred's interest in the equity in the Property.</p>		
Potential issues and considerations		
<i>Possible challenge to the 40%</i>		
<p>The order made by the Court was made less than five year before the date of the bankruptcy petition, made in February 2009.</p> <p>and therefore it may be open to T to challenge the order under s35 of BSA 1985</p> <p>and to seek to obtain an interest greater than 40%;</p> <p>In order to recall this capital sum payment under s35(b) indicates that on the date of the making of the order the debtor was absolutely insolvent or was rendered so by implementation of the order.</p> <p>T could make enquiries (for example by obtaining the relevant solicitors' files).</p> <p>It is unclear what his financial position was at that date, he had the equity in family home but had not bought the flat yet.</p>		

Equity after Order =£84,000

Liabilities unknown at that date, but unlikely to be more than liabilities now, which are £63,500 excluding statutory interest.

Legal costs should be considered against the benefit of receiving an additional 10% which equates to £21,000, based on the unlikely chances of securing the Order.

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

Therefore it may be better to concentrate on other realisations and/or the 40% share that vests in T.

Inhibition by Richard Sargeant ("RS") and Kate

Inhibition registered July 2010. And February 2010 respectively, Date of Bankruptcy 20 November 2010, therefore under s37 (2) BSA 1985, both Inhibitions registered more than 60 days since the Bankruptcy then the Inhibitions are not cut down.

This will not stop the T from being able to sell the Heritable Property and grant clear Title.

and Richard Sargeant and Kate would receive payment from the proceeds if Heritable Property sold.

The Inhibitions would not receive preference status in ranking as they were granted after 2009 following the introduction of the Bankruptcy and Diligence (Scotland) Act 2007.

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.

The T should investigate whether a Gratuitous Alienation has taken place under s34;

Flat purchased January 2010 therefore within the timescale challengeable under s34; within 2 years;

S34(4) places burden on the party trying to uphold the transaction;

Defines are as per s34(4);

-Debtors assets greater than liabilities following transfer;

-Alienation was made for adequate consideration;

-Or alienation was a conventional gift;

T should make contact with Elsie in the first instance to see whether she would surrender her share; if not legal action should be considered.

T should also be mindful regarding s39A and renew the Inhibition on time, prior to 19 November 2013.

T should also 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

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	
Kate; Capital Sum (Note 3)	17,400	

RS (Note 5)	7,000
Total unsecured creditors	63,500
Statutory interest (Note 4) rounded	15,000
Total amount required to pay creditors	78,500
Costs of the bankruptcy	40,000
Estimated total amount required	£118,500

Notes:

1. Classified as a Postponed debt.
2. Classified as an ordinary creditor
3. Classified as an Ordinary Debt
4. Statutory interest started running on the date of the BO (20 Nov 2010). Assume for the purposes of calculation SI for 3 years.
5. Classified as an Ordinary Creditor, and assuming not paid from Heritable Proceeds.

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 s39A applies to the Property.

S39A conditions (a) to (g) to be considered;

Wilfred was living in the Flat on the day of the bankruptcy order: therefore s39A applies to the Flat.

T must take steps urgently to prevent Wilfred's interests in both properties reverting in him automatically under s39(2).

As regards the Flat, T should Renew the Inhibition without further delay, under s39A (3)(c)

As regards the Property T must renew the Inhibition as well under s39A (3) (c)

T should consider the funds required and thereafter instruct legal if he considers appropriate;

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.

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 interests 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 Court order

and 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 needs to succeed in increasing Wilfred's interest to about 90% to provide enough funds to pay all costs and creditors (90% of £130,000 is £117,000 –however £22,300 of the debt relates to Kate the ex wife therefore T could negotiate to reduce those liabilities on the basis that the family home would not need realised, based on this course of action.

QUESTION 2

Increases in creditors' claims/ undisclosed creditor

The law and practice

The position as regards the additional claims is that the Bank will be able to increase their claims to include the overseas transactions as they refer to transactions prior to the signing of the Trust Deed.

Under SIP 3A (Scotland)2009, the debtor should be advised that it is an offence to make false representations or to conceal assets or to commit any other fraud for the purposes of obtaining creditor approval to the Trust Deed.

The Bank have been notified of the Trust Deed.

The new creditors will be bound by the PTD

The undisclosed creditor, they have no higher right to recover their debt;

They would be classified as an ordinary creditor and are deemed to have acceded to the Trust Deed

Subject to Regulation 12 if a qualified creditor has not been sent the documents ...can at any time if the creditor avers that the provision for distribution of the estate is or is likely to be unduly prejudicial to a creditor or class of creditor.

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 will be disclosed to creditors in the next circular, minimum intervals of 12 months from signing the trust deed.

Maybe useful for the Trustee to issue a further circular to update creditors.

Under Regulation 17(3) of the PTD Regs, indicates that at intervals of not more than 12 months, beginning from when the trust deed is granted, the Trustee must send to the AIB a report of the management of the Trust Deed by the Trustee within the previous 12 month period in the form of Form 4.

The Brother would not have been in a position to agree to write off his debt when Reggie's Trust Deed was signed.

as the debt (described as being "longstanding") was comprised in the Brother's bankruptcy estate

The decision on whether or not to write off the debt is for 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 misstatement which the debtor should be advised is an offence - 5.4 of SIP 3A

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.

Increasing the total amount of creditors' claims by nearly a third (from £63,000 to £82,400) would materially reduce the dividend available.

This must be advised to creditors in next circular and noted on the Form 4 to the AIB after 12 months from signing the Trust Deed.

Steps by the Trustee

It is not acceptable for the Trustee to take the laissez-faire attitude he appears to have adopted.

The Trustee 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 Trustee should obtain confirmation from the Brother's trustee that he wishes to claim in Reggie's PTD.

If the Trustee concludes that Reggie knew about the bankruptcy, he should report to creditors and consider whether the terms of the trust deed are not being met and consider petition for Bankruptcy.

Per SIP3A if the Trustee considers that the Trust Deed is not achieving its purpose the Trustee must consider appropriate alternatives given all the circumstances of the case, and bearing in mind the interest of creditors.

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

The law and practice

This is a voluntary payment that was to be made by the mother.

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 PTD being approved.

and obtained her own legal advice

If she did not agree to introducing the funds the Trustee wasn't doing his job properly and his report was deficient;

and the creditors were misled into accepting the Trust Deed on a promise that was not going to be kept.

Steps by the Trustee

The Trustee must report the issue to creditors now.

The Trustee should immediately write to the mother and request payment.

Consideration of ending the Trust Deed and petitioning for Bankruptcy, or advising the Debtor that granting his discharge from the Trust Deed may not happen due to these issues that have arisen, is a possibility.

Non-payment of monthly contributions

The law and best practice

SIP 3A indicates that if contributions for a period of 3 months in a year have not been received then the Trustee has to inform creditors of this in the next annual report.

If so, the creditors should be advised of the reasons for non payment; and what further action the Trustee has taken in respect of the missed payments;

In either case the term of the PTD could be extended so that the missing payments are made up.

Analysis of the position

As yet there is no reportable issue;

but should November's contribution (due shortly) not be received then will need to reported to creditors

Steps by the Trustee

The Trustee 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

Increase in Disposable Income

Net Income £5,500

Less Allowable Expenditure;

Mortgage 1,000

Other 950

Total Allowable Expenditure 1,950

Uncommitted Income 3,550

The trustee should be requesting a substantial increase to the monthly contributions,

If the debtor failed to increase contributions then the Trustee should petition for Bankruptcy.

This would be in the interest of creditors ;

Although consideration of whether Bankruptcy would affect his job needs to be considered;

Trustee should interview the Debtor about his change to his financial situation;

Advise that if contributions increased to £3,000 per month for a further 34 payments that would equate to £102,000 plus the £400 in contributions would take the total funds to £102,400;

This would therefore be sufficient to pay creditors in full;

This would allow the debtor to keep additional uncommitted income of £550 a month, therefore there is incentive for debtor as well;

It may also make it possible that the funds from the debtor's mother may not be required nor equity in the heritable asset;

If the debtor did not agree to voluntarily increase his contributions, then subject to position of job, consideration of Bankruptcy would be required;

This would ensure that an IPO or a s32 note to court (If no signed IPA was in place following the Bankruptcy)

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

The law and practice

SIP 3A indicates that the Practitioner should obtain a professional valuation except where there is already a valuation from a reputable valuer, which the practitioner is satisfied remains current, the

practitioner may accept a valuation in lieu of obtaining a fresh valuation;

Included in the proposals sent to creditors under Regulation 8 of the PTD Regs, the trustee requires to disclose that he will provide on request a copy of the valuation.

Analysis of the position

The trust deed is still in the early stages;

The trustee should be gathering information and will be establishing how he will be realising the equity of £25,000;

It maybe that the debtor has already agreed to pay the equity at the end of the Trust Deed;

SIP 3A requires the Trustee to seek to reach agreement regarding how the equity in the property will be realised, as soon as possible in the circumstances, and should realise the highest amount for the equity which the Trustee thinks is obtainable in the circumstances of the case.

Steps by the Trustee

None

The PPI claim

The law and practice

PPI claim will convey to the Trustee,

considered Aquirenda

Set off may apply;

guidance may be sought from the "ICAS 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 PTD and therefore the trustee 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 PTD

Steps by the Trustee

The Trustee 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;

the position under the law of set off may be far from clear and the Trustee should take legal advice.

QUESTION 3

(a)

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.

(a) ii

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)

The Trustee (“T”)

The Accountant in Bankruptcy (“AIB”)

Commissioners (“C’s”)

The Bankrupt (“B”)

AIB Functions

The AIB Functions , in respect of T’s fall into the following principal areas;

The Accountant is an officer of the court in terms of Section 1(1A) of the Act.

The Accountant’s statutory functions in respect of Personal Insolvency cases as follows;

- The registration of personal insolvencies.
- The supervision of the performance of interim trustees; trustees and commissioners in the exercise of their statutory duties.
- The determination of debtors’ applications for sequestration.
- By virtue of Section 2(1B) of the Act, act as trustee in all sequestrations awarded by The Accountant, where The Accountant does not appoint a person to be the trustee.
- Act as trustee in all sequestrations where the court does not appoint a person to be trustee.

Documents (statutory or otherwise) to be sent to AIB

1. A copy of the debtor’s statement of assets and liabilities.
2. A copy of the inventory and valuation of the debtor’s estate (Section 38(1)©) of the Act.
3. A copy of the notification to creditors about the statutory meeting.
4. A copy of the signed minutes of the statutory meeting of creditors and any other meeting of creditors.
5. Where appropriate, a copy of his intimation to the creditors of his intention to apply for a certificate of discharge inter alia including therein intimation of the right to make representations.

N.B. Discharge of a trustee is appropriate only in cases where there is an elected trustee and it is not a statutory requirement. An interim trustee in such circumstances does not have to apply for discharge and in cases where the interim trustee himself becomes the elected trustee it is not anticipated that he will do so since his ultimate discharge as trustee will cover the period of

interim trusteeship – see section 57(5).

6. Where appropriate, a copy of the revised statement of the debtor's affairs.
7. Where appropriate, a copy of the Income Payment Agreement (IPA) and Income Payment Order (IPO).
8. An account of his intromissions and claim for remuneration.
9. If a replacement trustee is elected by the creditors, a copy of minutes of the meeting of creditors and the Court Order appointing the replacement trustee.
10. If a replacement trustee is elected by the creditors, a copy of the circular (or notification) to the debtor and the creditors intimating the amount of outlays and remuneration payable to the original trustee. together with a signed certificate of posting relative thereto.
11. If appropriate, a copy of the records of the private and public examination of the debtor or other relevant person (section 48(6) of the Act).
12. If appropriate, a copy of the intimation sent to the debtor advising him of the private examination of a third party and of the day, date, time and place of such private examination, together with a signed certificate of posting thereof (section 47(2)(b) of the Act).
13. If appropriate, copy of the intimation sent to every known creditor (and debtor if appropriate) advising of the public examination together with a signed certificate of posting thereof (section 45(3) of the Act).
14. In cases where there are no commissioners and the trustee's Accounts are to be audited by, and his scheme of division approved by, The Accountant, the creditors' claims and ground of debt together with the trustee's adjudications thereon.
15. Where commissioners are acting a copy of the trustee's accounts; claim for remuneration; and scheme of division of the funds; all as submitted to the commissioners (section 53(1) of the Act).
16. Where there are no commissioners, the trustee's accounts for audit; his claim for remuneration for determination; and his scheme for division for approval. all by The Accountant in terms of section 53 of the Act.
17. A copy of the circular (or notification) to the debtor and the creditors indicating the remuneration fixed to the trustee, together with a signed certificate of posting relative thereto.
18. On conclusion of the trustee's administration, the sederunt book; a copy of his audited final account; and consignment receipt(s) for unclaimed dividends (section 57(1)(b) of the Act).
19. A copy of the circular (or notification) sent by the trustee to the debtor and the creditors intimating inter alia his application for a certificate of discharge, together with a signed certificate of posting relative thereto.
20. Where there are no commissioners, all legal business accounts against the sequestrated estate,

<p>for perusal and onward transmission to the Auditor of Court for taxation, all prior to settlement of said legal business accounts.</p>
<p>Reportable Offences</p>
<p>The trustee must report to the AIB if he suspects that the debtor may have committed an offence;</p> <ul style="list-style-type: none"> - in relation to assets/conduct etc. <p>This will be reported on a Suspected Offences Report (SOR) at Appendix J to the trustee's notes.</p> <p>The Trustee must also complete a BRA to the AIB if he/she considers appropriate depending on debtor. Only the AIB can apply to the Sheriff under Section 56A Appendix K (6.3 of Notes).</p> <p>If Statutory Meeting to be held, no later than 4 days before meeting send to AIB:</p> <ul style="list-style-type: none"> - Statement of Assets and Liabilities. - Copy of debtor's affairs (Inventory and Valuation) - Trustees comments – Causes of Insolvency
<p>Resignation of T</p>
<p>If the date of sequestration is after 1 April 2008, the trustee can apply to the AIB if they wish to resign as trustee using Form 19 – Bankruptcy (Scotland) Regulations 2008,</p>
<p>Audit Accounts</p> <p>SOD needs to be submitted to AIB (if no Commissioner) along with accounts etc for audit under Section 53(1) of the Act – Appendix E per trustee notes.</p> <p>Trustee's accounts to AIB Section 52(1) plus copy vouchers (part 5 notes)</p> <p>If Commissioners, copy of accounts must still go to AIB (within 2 weeks of accounting end date) sent simultaneously to AIB.</p> <p>AIB must also see signed copy with Commissioners determination (5.1.13).</p> <p>(5.1.14) levels of fees <£10k (10k-15k) above £15k.</p> <p>The Accountant may request additional info or documents if this is required to assist her in the determination of trustee's remuneration.</p>
<p>Closure of case /Discharge</p>
<p>Discharge of Trustee – as soon as he has completed his administration of debtor's estate the trustee may apply to AIB for a Certificate of Discharge – S57(1)</p>

Trustee must send the sequestration Sederunt Book to AIB.

Stat obligations under S39(1) of Act on the trustee to consult with AIB regarding his/her intentions with the management of the sequestration.

The trustee must comply with any general or specific directions given to him by either;

- Creditors
- Sheriff, on application of Commissioner
- AIB
 - Must supply trustees first account of intromissions

A brief report indicating the trustee's opinion as to likely outcome of sequestration process and any intention to exercise or not, as the case may be, any of the general powers available to him as provided by S39(2) of Act.

The trustee should of course consult the AIB at any time he considers it appropriate or prudent to do so.

Heritage-Sanctions Required

Heritage (includes debtor's family home)

- Approval to sell a family home has to be received by AIB – Appendix G – before trustee can go ahead – when accepting an offer of the property.

The trustee must consult with AIB regarding their intention to sell or dispose of property which vests in trustee prior to commencement of the proposed action. See 6.11.9

T's records (Insolvency Practitioners Regulations 2005)

reg.15. T's IP record is open for inspection

reg.16. T's practice records (as defined) must be opened for inspection

QUESTION 4 (a)**Sequestration of Joseph Porter****Receipts and Payments Account****Period : 7 March 2013 to 6 November 2013**

	Note	£	£
Receipts			
Proceeds from Car	1	6,000	
Proceeds from Endowment Policy		27,000	
Total			33,000
Payments			
Agents Costs		1,100	
Disbursements	2	600	
			1,700
Balance			31,300
Held in Interest Bearing Account			31,300

Notes

1. Per SIP 7, show gross realisation.
2. Disbursements paid by Estate Funds-SIP 9 point 19

As commissioner's have been established they will fix the basis of the Trustee's remuneration so there will be no need for the Accountant in Bankruptcy to audit the Accounts.

(b)

Freehold property
<i>Prospects for recovery</i>
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.
<i>The law</i>
The gift cannot be a transaction at an undervalue under s34 as it took place over 5 years ago; Josephine would be classified as an Associate, but transaction took place more than 5 years ago but could be challengeable under common law. 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 Is Josephine holding B's interest on trust?
<i>What should T do?</i>
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 should take his own legal advice to see whether a legal action under common law would be successful. 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.
Money given to the grandson
<i>Prospects for recovery</i>

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 s34.

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.

Is successful, The Court under s34(4), shall grant decree of reduction or for such restoration of property to the debtors estate or other redress as may be appropriate.

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 shall not grant decree if the Debtor seeking to uphold the alienation establishes that;

-immediately, or at any other time, after the alienation the debtors assets were greater than liabilities; or

-alienation was for adequate consideration; or

-alienation was a birthday, Christmas or other conventional gift.

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.

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 s34.

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.

T should put the Building Society on notice that he is claiming the deposit as an asset in the bankruptcy

T should sent copy of Award of Bankruptcy to Building Society and note the T's interest.

If agreement with Josephine is not reached then legal action under s34 should commence to recover the funds.

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 before the making of the Award giving rise to the action probably predates the bankruptcy.

T must establish what type of claim, is it a personal injury claim or claim for solatium , unfair dismissal or defamation;

The T should not involve themselves in any speculative proceedings and should be very reluctant to sist themselves into actions commenced by the Debtor as the T may find themselves liable for the costs;

If classified as Acquirenda the proceeds would vest anyway in the T.

Maybe worthwhile to defer the Debtors Discharge anyway;

Although it is considered that the proceeds of an action automatically vest in the T as at the date of Tabling of the action

Case Law (Coutts Trustee v Coutts)

CC may seek to have the action struck out on the grounds that B had no locus to bring it.

What should T do?

T should write to CC's solicitors asking for full details of the action

and may need to 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 s15(9) –failure to disclose possible acquirenda or s67(1) making a false statement of assets and liabilities

and if this seems likely T should report the matter to the AIB in respect of a Bankruptcy Restriction Application

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, if court case against CC is included, but excluding action in respect of the Heritable Asset (at common law) will be sufficient to pay the costs and claims in full. This may help T to decide which assets to realise first.

Estimated Outcome

R and P Balance	£31,300
Josephine Funds	25,000
Grandson Funds	20,000
CC Court Case	124,000
Total	200,300
Trustees Remuneration to date	7,000
	193,300
Creditors –Estimated	148,000
Estimated Surplus	45,300

Clearly additional T's remuneration and potential legal costs will need to be considered and factored in. Also statutory interest would need to be considered.

Must establish the likelihood of success in the CC Court case.