

JOINT INSOLVENCY EXAMINATION BOARD

OVERALL COMMENTS ON THE NOVEMBER 2015 EXAMINATION (SCOTLAND)

Introductory remarks

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

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

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

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

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

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

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

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

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

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

Counterproductive habits

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

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

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

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

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

Electronic marking

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

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

JOINT INSOLVENCY EXAMINATION BOARD

LIQUIDATIONS (SCOTLAND)

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

General comments

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

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

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

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

Question 1

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

Candidates were required to identify issues in court winding-up and set out how they would resolve them. The issues included post-appointment dispositions, recovery of rent arrears, general property issues, validity of an attachment order, decision to trade and incomplete customer orders.

This question was on the whole reasonably well answered.

Quite a few candidates misunderstood Section 127 IA86 and thought that it also meant that payments into the company's bank account constituted dispositions by the company. Some candidates also wasted time stating irrelevant legislation because they failed to recognise that the attachment order against the assets was incomplete. One candidate actually asked a question here rather than answering the point and would have gained a mark if he had made the point rather than asking the examiner the question.

Question 2

(a) (i) Prepare a Statement of Affairs for the Company as at 30 October 2015; (16 marks)

(a) (ii) Prepare a deficiency account for the Company as at 30 October 2015; (4 marks)

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

Question 2 (a)(i) was well answered, with some achieving full marks, although some candidates failed to recognise that there was no prescribed part and very few dealt with the finance lease correctly or brought down the fixed charge surplus. Candidates should really be aware that a debt due to a Local Authority is not a Crown debt available for Crown set off.

Question 2 (a)(ii) was very poorly answered overall. Some candidates showed a complete lack of understanding as to what the purpose of a deficiency statement was.

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

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

This question was poorly answered, with many candidates repeating verbatim the tests laid out in s123 of the Act for which only one mark was available.

The majority of the marks available were for the practical application of those tests e.g. obtaining cash flow projections and reviewing the balance sheet position, which few candidates mentioned.

For relevant case law, one candidate referred to *Eurosail and Bucci v Carmen Re Casa Estates (UK) Ltd (In Liquidation)* [2014].

Question 3

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

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

This question was well answered and candidates performed well by picking up easy marks on the ethics principles e.g. objectivity and self-interest. It was noted that most candidates also considered issues beyond those relating to conflict of interest, such as compliance with money laundering regulations, KYC, ability to pay fees, and many marks were picked up because of this.

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

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

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

Overall this procedure question was generally well answered.

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

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

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

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

Question 4

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

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

Overall the quality of the answers varied, with some excellent scripts countered with some very poor ones. Few candidates mentioned case law, despite this being a requirement of the question.

A number of candidates concentrated on the antecedent transactions and failed to comment on the stock, debtors and air conditioning unit mentioned in the statement of affairs for which there were easy marks available.

Many candidates mentioned misfeasance several times, but marks can only be allocated once.

Most candidates identified Arthur as a shadow director, but relatively few candidates mentioned that the directors who had resigned would also need to be considered in any investigations. Few candidates addressed the requirements of SIP2 and the need for an initial investigation.

Few candidates mentioned that by purchasing stock through Arthur there may be a fraudulent trading action, instead some candidates identified it as a preference or a gratuitous alienation. In terms of wrongful trading, this was often identified however the steps you would need to take to consider whether it was worth pursuing were rarely mentioned e.g. evidence needed or any possible defence the directors may have.

EXAMINER'S MARK PLAN

LIQUIDATIONS (SCOTLAND)

NOVEMBER 2015

Question 1 (25 marks)

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

File note layout

Date of liquidation = date of petition = 15 7 15 (IA s129(2))

ii – consequences of being unaware of winding up petition: trading between date of petition and order (between 15 7 15 and 18 9 15).- ascertain extent of trading;

- IA s127 – Avoidance of property, dispositions, etc – void unless court authorises: consider applying to court to validate transactions if for benefit of estate and/or ascertain who payments made to and write to recover funds.

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

i Bank account in debit at all times – no dispositions of property to the bank which acts as Company's agent. The banking transactions are only part of the process by which dispositions of the company's property are made and therefore the bank cannot be pursued for restitution (*Bank of Ireland v Hollis Court (Contractors) Ltd [2000] BCC 57*) (applies whether co in dr or cr) overturned *Re Grey's Inn Construction Co Ltd [1980] 1WLR 711*

Confirm whether bank account was frozen

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

Discussion.

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.

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

Irritancy of lease governed by Law Reform (Miscellaneous Provisions) (Scotland) Act 1985

Consider what type of lease has been granted. Does the lease specify that it is a short assured tenancy? If not, is it an assured tenancy?

What options are available to you to irritate the lease? Check the irritancy provisions of the lease and Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 s4.

Is the lease registered? If so, serve a charge on the tenant. If not, serve an irritancy notice in compliance with the terms of the lease. Irritancy notice must give at least 14 days and allow tenant to remedy the monetary breach within the notice period.

If there is a non-monetary breach, the landlord can only irritate if a fair and reasonable landlord would irritate in the circumstances.

Liquidator to check whether flat is occupied and if lease permits the sub-letting of the flat.

If the main lease is irritated, the sub-lease will also fall unless otherwise agreed between landlord and tenant.

How to proceed?

Obtain legal advice.

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

Obtain and review copy of sublease

Consider whether the tenant has a guarantor you can call on. Consider if there is there a rental deposit you can use.

Check Z Finances Plc charge is valid and obtain statement of outstanding amount due to Z Finances Plc to confirm that no balance is outstanding.

Confirm that the security has been properly discharged

s185 Effect of diligence (Scotland)

- (1) In the winding up of a company registered in Scotland, the following provisions of the Bankruptcy (Scotland) Act 1985—
 - (a) subsections (1) to (6) of section 37 (effect of sequestration on diligence); and
 - (b) subsections (3), (4), (7) and (8) of section 39 (realisation of estate), apply, so far as consistent with this Act, in like manner as they apply in the sequestration of a debtor's estate, with the substitutions specified below and with any other necessary modifications.
 - (2) The substitutions to be made in those sections of the Act of 1985 are as follows—
 - (a) for references to the debtor, substitute references to the company;
 - (b) for references to the sequestration, substitute references to the winding up;
 - (c) for references to the date of sequestration, substitute references to the commencement of the winding up of the company; and
 - (d) for references to the permanent trustee, substitute references to the liquidator.
 - (3) In this section, " the commencement of the winding up of the company" means, where it is being wound up by the court, the day on which the winding-up order is made.
 - (4) This section, so far as relating to any estate or effects of the company situated in Scotland, applies in the case of a company registered in England and Wales as in the case of one registered in Scotland.
- iv Sheriff Officers initially entered onto premises on day before petition for non-payment of a balance due to a trade creditor, and then took control of van on day of petition.

AO is available following expiry of a charge for payment served following award of a decree for payment. Governed by Debt Arrangement and Attachment (Scotland) Act 2002.

s11 Articles exempt from attachment include any implements, tools of trade, books or other equipment reasonably required for the use of the debtor in the practice of the debtor's profession, trade or business and not exceeding in aggregate value £1,000;

- (b) any vehicle, the use of which is so reasonably required by the debtor, not exceeding in value £1,000.

Sheriff Officers should then report attachment to sheriff within 14 days (s17) and removal and auction of attached items is permitted following 7 days after such report is lodged (s19).

Petition has been lodged prior to report being submitted and therefore attachment has not been completed. In any event, s185 IA 1986 renders any attachment executed within 60 days prior to the commencement of the winding up ineffectual to create a preference.

S185

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

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

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

IA s185 any attachment, sequestration, distress or execution put in force against the estate or effects after the commencement of the winding up is void;

v Landlord not entitled to change locks – must follow terms of lease and Law Reform (Miscellaneous Provisions) (Scotland) Act 1985

Landlord may have a hypothec claim. Landlord could seek to take an inventory of items at the premises with a view to exercising such claim. Hypothec will not cover property which is not owned by the tenant and will not apply to future rent.

v Trading between petition and order – s127 see above.

Deposits for kitchens placed into overdrawn bank account.

Consider wrongful trading and consider including in report into director's conduct.

Stock/WIP will have no value, although liquidator should consider completing the contracts and opening bank account.

No longer need sanction under Sch 4 to carry on the business.

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

Consider what employees will be needed

Can orders be completed from the Company's workshop

Can Liquidator get hold of WIP in the workshop

Landlord's Hypothec

Any retention of title issues.

Other trading considerations

Directors

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

Employees

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

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

Advise Order 3 supplier to contact haulier to obtain goods back

Customers will have unsecured claim for deposits – inform of position

Suppliers may have ROT claim and an unsecured claim, also potential disposition of assets if paid between winding up petition and order so any payments may be clawed back.

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

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

Question 2 (25 marks)

(a) Prepare a Statement of Affairs for the Company as at 30 October 2015 (16 marks);

(b) Prepare a deficiency account for the Company as at 30 October 2015 (4 marks);

Clearly state any reasonable assumptions which you have made.

NOTE: Ignore VAT

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

i Statement of Affairs at 30 October 2015

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

ii. Deficiency Account

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

S123 – company deemed unable to pay its debts if:

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

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

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

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

Identify if company has any outstanding statutory demands or unsatisfied court decrees, charges for payment etc.

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

Review management accounts to confirm balance sheet position

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

Interview directors and finance staff to confirm financial position

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

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

Assess whether the company has any other alternative sources of funding

Adjust balance sheet for estimated to realise values on insolvency

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

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

Question 3 (25 marks)

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

Ethical issues: consider insolvency ethical guidelines:

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

Referral by aunt, friend of partner.

Relationship to junior employee who is your cousin.

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

- audit relationship
- tax relationship with LLP or partners
- relationship with Anytown Bank plc or other creditors
- Tulip's Nominee/DOF Administrator/Mrs Greenfingers

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

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

Safeguards could be;

Consult with second partner

Second partner to review advice given

Consult with regulatory body

KYC

Money laundering checks

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

Agreed engagement letter?

- does Partnership have funds to pay fees for advice?
- have all partners agreed to engage you?

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

- outline procedure for calling s98 meeting
- responsibilities of designated partners

Swear Statement of Affairs

- need to call members (Partners') meeting – will need to look at provisions of Partnership Agreement and confirm who the members are. In the absence of a provision re winding up, the decision to wind up will have to be by a majority of members

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

- need to give 5 business days' notice to floating charge holder (Anytown Bank), in writing, of winding up resolution. Anytown Bank may take steps to recover its debt, through appointment of administrator. The Partners or proposed Liquidator should discuss the position with the bank – it will have to be shown that it will not be worse off by appointment of Liquidator.

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

Pass ordinary resolution to appoint liquidator

Pass ordinary resolution re liquidator's remuneration

Need a quorum

Members to call creditors meeting

SIP 8

- Take reasonable steps to ensure list of creditors provided by partners is correct (include contingent claims e.g. Greenfingers)
- not all creditors' addresses are recorded on creditors ledger; discuss with partners, review books and records for creditor details
- notice served on all classes of creditors at same time
- minimum 7 clear days' notice to be given, notice to be despatched as early as possible
- Advertise in Gazette and local newspaper (consider most appropriate newspaper given there are missing creditors details)

- detail former name if applicable
 - detail resolutions to be passed (remuneration, costs of preparing Statement of Affairs and convening meeting)
 - EC Regs for Casse SA
 - Brudt A/S Danish, exempt from EU Reg
- (provide additional time for creditors to receive notice if overseas)
- R4.12 (as applied by Part 5) (first meeting of creditors)
 - Notice summoning meeting must specify meeting venue, time and when by and where proxies must be lodged

Information to be sent to creditors prior to meeting:

- proxy form (SIP 10)
- claim form
- SIP 9
- Statement of affairs to be made available
- list of creditors to be made available

Venue of creditors meeting to be:

- adequate for number of creditors expected to attend
- convenient date and time
- convenient geographical location

Book meeting room

Consider who should be asked to attend the creditors meeting – if require company personnel to attend meeting must give notice (R4.14)

Decide which partner will act as chair of creditors meeting

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

Statement of affairs

Details of proposed Liquidators prior involvement with the company or its partners. Disclose relationship with cousin and referrer together with safeguards.

Details of members meeting including resolutions passed

Details of calling of s98 meeting (date partners gave instructions for calling meeting and date on which meeting actually called, costs)

Brief report on LLP's trading history

- consider which creditors to accept for voting purposes and in what amount

Chair and proposed Liquidator to consider:

R4.15 Entitlement to vote

R4.15 Chairman's discretion to allow vote

R4.15 Admission and rejection of proof

Tulip also owes money – consider whether set off is likely to apply. Mutual dealings.

Consider conversion rate for € creditors, R4.17. Or Chair can exercise discretion.

Mrs Greenfingers – personal injury. Consider/discuss how much to accept debt for voting purposes.

Insurance issues

Consider how much to accept landlord's debt for voting purposes. Also landlord is a connected person.

Bluebell – Liquidator should ask creditors at meeting for any issues that need to be brought to his attention.

Will need to look into the issue after appointment.

- Procedure at creditors' meeting

Attendance list

Nominations for liquidator

Liquidators' consent to act, confirmation they are an insolvency practitioner and duly qualified

Liquidation committee appointed?

Pass any other resolutions

R4.19 Chairman to certify appointment and send certificate of appointment to Liquidator (Form 4.8 (Scot))

- SIP12

Report to creditors following meeting per SIP8

Advertise appointment in Gazette and any other paper within 14 days (s109)

Send notice of appointment to Registrar of Companies within 14 days (s109)

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

File note layout

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

Bring books and records up to date

Amounts recoverable under contracts – consider whether any amounts can be billed
 Consider whether there is any possibility of a sale of the business to another accountancy practice where value could be obtained for outstanding WIP, together with a better realisation of debtors
 Advances of drawings – Liquidator can pursue individual partners
 (note there are no salaried partners who would be regarded as employees)
 Write to partners requesting repayment
 If fail to make repayments consider how to recover funds – do they have sufficient assets; initiate sequestration proceedings?
 Daisy car purchase – consider if gratuitous alienation (s242)
 Insolvency presumed as Daisy is a connected person (s249)
 Transaction took place within 5 yrs
 Consider defence; entered into in good faith; carried out for purpose of company's business or reasonable grounds for believing it would benefit the company.
 Obtain details of car and whether Daisy still owns it
 Obtain car valuation from when purchased and then when sold to Daisy, was there a reason for the drop in value?
 Speak to Daisy; can you agree a settlement
 Prepayments – write to Rose and Crocus requesting cessation of services and final bill.
 Request any refund due.
 Tulip: confirm whether debt can be set off (Scottish equivalent)
 Confirm claim has been submitted to Trustee
 Confirm timing of dividends
 DOF – confirm LLP has submitted claim form..
 Review Trustee's Proposals (when received) for estimated dividend and likely timing
 Consider if LLP can make insurance claim against DOF's insurers for inferior work
 IT litigation – contact solicitors. Solicitors to inform court of liquidation.
 Consider whether to continue with proceedings, how strong is the claim?
 Any insurance cover in place to cover costs?
 Does IT Limited have funds to pay any settlement?
 Consider whether can agree out of court settlement
 Review validity of bank's security
 Personal guarantees in place. If partners repay amounts due from members, likely bank will recover £70k in full and therefore personal guarantees won't be called on.
 Provide bank with estimated outcome statement.
 Majority of creditors over 90 days old – wrongful trading s214
 Consider when partners knew or ought to have known company was insolvent
 Review cash flow
 Note in D return
 Greenfingers – pass claim when received to insurers
 Obtain copies of accident book
 Pass any relevant details (e.g. contact numbers of witnesses) onto insurers
 Leasehold property.
 Confirm position in writing to landlord/partners
 Review copy of lease
 Determine whether need property going forward
 Obtain valuation of lease, any lease premium? Also confirm rent payable is at market rate, given connected party landlord.
 Will landlord exercise hypothec?
 If premises not required and no premium, request surrender of lease.
 Rent payable whilst Liquidator is in occupation is liquidation expense.
 Need to look into ownership of freehold to determine whether it is an asset of the Partnership.
 Confirm whether there is any equity in the property
 Obtain Land Register search and drive-by valuation
 Could ask partners to sell property in order to repay debts owed to LLP.
 Investigations (SIP 2) – formally request that creditors inform you of any matters of concern
 Obtain full details and evidence regarding furniture from Bluebell
 Review cash book for transactions
 Review asset register to confirm all assets accounted for and included on statement of affairs and balance sheet
 Review make-up of amounts due from members
 Interview partners
 Include in D return

Question 4 (25 marks)

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

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

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

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

Here Arthur appears to be at least a shadow director *Re Hydrodam (Corby) Ltd [1994]*
Betty, Catty, Deidre and Ethel are all de jure directors

CVA Supervisor not considered a director as professional advisors not usually shadow directors
Liquidator has a duty to investigate what assets there are and what recoveries can be made
SIP2 initial review:

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

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

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

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

Send directors questionnaires to all directors

Request any relevant information on matters of concern from the CVA Supervisor

Potential wrongful trading action s214

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

Cash flow forecasts

Management accounts (balance sheet insolvent test)

Whether audited accounts have been qualified

Evidence of creditor pressure (e.g. suppliers refusing supply, court judgements, statutory demands)
Company had two overdrawn bank accounts for past two years

Defence "took every step with a view to minimising the potential loss to the company"
Mond v Bowles & Ors [2011]

Review books and records to confirm whether

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

- sourced additional funding

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

Resignation is not a defence – Ethel resigned 2 Sept 2015

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

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

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

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

Consider *Eaton v Robert Eaton Ltd [1988]*

Review Betty's employment contract

Was remuneration paid as salary or director's fees

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

Options for Liquidator ascertaining/recovering assets:

SIP2

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

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

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

S246 unenforceability of lien on books and records

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

Gratuitous alienation s 242 IA – transfer of lease potential undervalue c£600k

Transaction took place within the challengeable period – 2 years from onset of insolvency or 5 years if the other party to the transaction is an associate i.e. date of winding up resolution 29 September 2015.

Meaning of "associate" – BA(Sc) 1985 s74. Catty is an associate of Elogen.

Liquidator to confirm no grounds for defence, obtain valuation of lease at time of transfer, Land Registry search.

Consider whether transfer of lease to Catty falls foul of s190-s191 CA06, failure to seek prior approval for substantial non cash asset from the Company.

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

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

Is rent paid for head office and 2 warehouses reasonable – obtain agents valuation

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

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

Consider if any payments to Catty were unfair preferences under s243. Challengeable period is 6 months prior to commencement of winding up.

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

Defences – ordinary course of business; debt was due and payable unless collusive to prejudice general body of creditors; reciprocal mandates, unless collusive to prejudice general body of creditors.

Request repayment from Catty of all monies paid where not due

If not received, then consider court action

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

Review accounts to see if made out of distributable reserves

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

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

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

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

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

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

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

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

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

Company can seek order to make Arthur account for profits
S213 fraudulent trading – has business been carried on with intent to defraud creditors
Applies to shadow directors i.e. Arthur

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

Directors' responsibilities: fiduciary duties CA 2006 ss171-177
In particular failing to promote the success of the company s172CA06 (*re Southern Counties Fresh Foods Ltd [2008] and GHLM Trading Ltd v Maroo [2012]*); avoid conflict of interest s175CA06 (Catty); declare interests in proposed transactions s177CA06 (see below)
Court can order payment of damages where Company has suffered a loss, restoration of property.
s212 misfeasance – obtain Court order for compensation

Per *Paycheck Services 3 Ltd [2010]* cannot bring a s212 claim against a shadow director
Take legal advice

Consider settlement for any/all of above and means of directors and Catty to pay any settlement

Consider reporting duties under Proceeds of Crime Act 2002, in particular cash transfers by Arthur and unreconciled cash books

JOINT INSOLVENCY EXAMINATION BOARD

ADMINISTRATIONS, COMPANY VOLUNTARY ARRANGEMENTS AND RECEIVERSHIPS (SCOTLAND)

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

Question 1 (25 marks)

This was a relatively straightforward question testing the candidate's ability to deal with a range of employee matters as an Administrator of a company.

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

Candidates were required to outline the Administrator's responsibilities to those employees to be retained and made redundant, with the relevant timeline and redundancy/retention numbers supplied in the question. The majority of candidates managed to make a good attempt at setting out the initial responsibilities for retained staff and for those made redundant however there was a clear lack of knowledge for most candidates when it came to the redundancy consultation process and TUPE consultation, with very few candidates recognising the various steps involved and the information that would need to be provided. Some candidates took the opportunity to write everything they knew about the TUPE legislation and protective awards and missed the basic responsibilities.

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

Candidates were asked to set out "in plain English" a note to employees of their entitlements, how these would be calculated and who they would claim these from. Most candidates scored relatively well as would be expected by listing out the various entitlements and how these could be claimed. It was apparently clear from the scripts which candidates had practical experience of dealing with employee claims as those candidates were able to set out clearly how the process would work in practice and the timescales for payments from the RPO/Administrator. There were however a few candidates who over complicated this and forgot that they were writing a note to employees and over loaded the note with technical jargon and irrelevant content. No candidates mentioned benefits in kind or expenses as potential claims.

Question 2 (25 marks)

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

The bulk of the question related to preparing a trading cashflow which was poorly answered. This appeared to be a combination of a lack of understanding of preparing cashflows and running out of time.

The overall layout of most candidates' cashflows was good however the content and notes section were extremely poor. Whilst most candidates managed to deal with the sales section well, and the VAT on the sales side, almost all of the candidates forgot to add VAT onto costs. No candidates dealt with the PAYE/NI deductions appropriately and simply left the payroll costs in as a gross figure on a weekly basis. The few candidates that did account for PAYE/NI in the post column forgot to deduct this from the weekly wages which over inflated costs on a weekly basis. Whilst most candidates recognised the split of ROT stock, only one candidate recognised that this was an orderly wind down and the objective would be to realise the stock through trading and sell the residual post trading. Some candidates made their own assumptions on sales and costs despite the question providing the information to do the necessary calculations.

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

Despite the question specifying that the answers were to be relevant to the circumstances, candidates tended to try and note down a list of general items which they would consider when deciding whether to trade. Even if

candidates had poorly attempted the cashflow, the narrative part of the question still gave enough information for candidates to make relevant assumptions based on the individual circumstances. Given the type of business candidates should have focussed on relevant considerations like lack of warranties, chargebacks and supervision of cash/security of assets.

Question 3 (25 marks)

Generally candidates achieved a reasonable mark on this question but we would remind candidates to read the question and think about who they are advising prior to answering. The question asked candidates to advise the creditor in this situation but many candidates advised as if in the shoes of an Administrator and therefore went off in the wrong direction in their answers. There was also an element of candidates placing good answers in the wrong sections which highlights the importance of reading each individual question.

Set out for Roseberry;

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

Most candidates managed to pick up marks here by listing ways to mitigate losses.

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

The question was looking for candidates to use their practical knowledge of dealing with retention of title claims to advise the creditor how they could recover their goods. A number of candidates missed the point on who they were advising and simply sought to list everything they knew about ROT and how they could defeat the claim as if sitting in an Administrator's shoes. The best answers were kept brief and were well structured in terms of process, information and issues. A lot of easy marks were missed by candidates who sought to demonstrate their technical knowledge by listing case law whilst missing the basic considerations like doing a stocktake or submitting an ROT questionnaire. We would remind candidates to think about what they would actually do when faced with this scenario in practice which should help them focus on what advice needs to be given.

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

Candidates tended to overlap this answer with part (b) and ended up with good answers in the wrong section. Generally most candidates managed to recognise the process to be put in place.

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

This question sought to test candidate's awareness of the circumstances against the CVA process. Most candidates answered well, keeping their answers clear and concise on the actual CVA process and applying the relevant circumstances given that the CVA would be proposed by an Administrator.

Question 4 (25 marks)

Candidates were asked to advise directors on a potential pre pack purchase of assets and think about the key issues they would face and also assist with putting together an offer for the assets. Most candidates missed the point on who they were advising which lead to a volume of information on pre packs and justifying the sale of the assets which was not relevant in the circumstances. Again, we would encourage candidates to think about who they are advising before answering.

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

Most candidates managed to list the key issues faced however very few managed to make this specific to both the circumstances of the question and advising from a director's perspective. It was clear which candidates had dealt with this scenario in practice.

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

This part was poorly answered by most, with very few candidates able to actually set out how to structure an offer in the circumstances. The question provided enough information to generate reasonable assumptions on what level of offer to make and only a few candidates actually noted down what they would advise the directors to offer and why. The advice being provided by some candidates to directors was concerning and demonstrated a clear knowledge gap when it comes to how to deal with a business and assets sale from a purchaser's perspective. Any candidates who have dealt with a sale of a business out of administration should have been able to simply turn this around and think about what they would have considered acceptable as an Administrator which would have allowed them to structure the best deal in the circumstances for their client which was the directors. No candidates mentioned the fact that the directors should purchase via a new co.

EXAMINER'S MARK PLAN

ADMINISTRATIONS, COMPANY VOLUNTARY ARRANGEMENTS AND RECEIVERSHIPS (SCOTLAND)

NOVEMBER 2015

Question 1 (25 marks)

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

Retained

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

Redundancy Consultation

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

- to be made.
 - Selection process
 - Objective criteria
 - Document decisions
 - Economic, technical or organisational reason
- Information provided to:
 - Representatives
 - Trade Union at its head or main office

Transfer consultation

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

Dismissed

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

General

- Access to employee records

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

RP1 form must be completed.

Weekly pay

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

Redundancy pay

RPO will pay statutory redundancy pay:

- Weekly limit of £475
- Maximum of 30 weeks (£14,250)
- Must have worked for at least 2 years
- Continuous employment is taken into account
- Weeks calculated as;
 - 0.5 weeks for each full year aged under 22
 - 1 week for each full year aged 22 or over and under 41
 - 1.5 weeks for each full year 41 or over
- Maximum of 20 years

- Redundancy pay (under £30,000) is not taxable

Contractual redundancy pay

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

Arrears of pay

Arrears preferential up to £800.

RPO

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

Contractual

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

Subject to notional tax deduction and National Insurance

Notice pay

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

Holiday pay

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

Expenses

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

Pension contributions

Paid by RPO

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

Protective award

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

Benefits in Kind

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

QUESTION 2

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

Sales	Online Retail		Week					Total
			1	2	3	4	5 After	
Weekly uplift	100	30						
	50%	50%						
	150	45						
VAT	20%	20%						
Weekly Income	180	54						
Cash sales - Retail			27.0	27.0	27.0	27.0	27.0	135.0
Card sales - Retail					27.0	27.0	27.0	54.0
Card sales - Online			180.0	180.0	180.0	180.0	180.0	900.0
Sales income			207.0	207.0	234.0	234.0	234.0	54.0
								1,170.0
Sale of residual stock	60% per q							52.5
VAT on residual stock								10.5
								52.5
TOTAL INCOME			207.0	207.0	234.0	234.0	234.0	117.0
								1,233.0
Card costs - Retail	2% calculated		-	-	(0.5)	(0.5)	(0.5)	(1.1)
Card costs - Online	3.0% calculated		(5.4)	(5.4)	(5.4)	(5.4)	(5.4)	-
								(27.0)
Staff costs - direct			(7.5)	(7.5)	(7.5)	(7.5)	(7.5)	
Staff costs - central	(150 x 80% /12)		(10.0)	(8.0)	(6.0)	(4.0)	(2.0)	
PAYE/NI	30% or any rea		5.3	4.7	4.1	3.5	2.9	(20.3)
Net pay			(12.3)	(10.9)	(9.5)	(8.1)	(6.7)	
								(47.3)
Website - ongoing			(2.5)	(2.5)	(2.5)	(2.5)	(2.5)	
Website - ongoing (VAT)			(0.5)	(0.5)	(0.5)	(0.5)	(0.5)	
Website - arrears			(36.0)					
Website advertising	2.5%		(4.5)	(4.5)	(4.5)	(4.5)	(4.5)	-
Website advertising (VAT)			(0.9)	(0.9)	(0.9)	(0.9)	(0.9)	
								(22.5)
								(4.5)
Warehouse								(10.6)
Warehouse (VAT)								(2.1)
								(10.6)
Distribution costs	10%		(15.0)	(15.0)	(15.0)	(15.0)	(15.0)	
Distribution costs (VAT)			(3.0)	(3.0)	(3.0)	(3.0)	(3.0)	
								(75.0)
								(15.0)
Rent and Rates	Assumed payable after period							(40.0)
Rent and Rates (VAT)	Assumed Rates 1/3 of cost and not subject to VAT							(5.3)
								(40.0)
Heat, light and power								(20.0)
								(20.0)
VAT								(176.0)
								(176.0)
TOTAL PAYMENTS			(80.1)	(42.7)	(41.8)	(40.4)	(39.0)	(255.2)
								(499.1)
Net			127.0	164.4	192.2	193.6	195.0	(138.2)
								733.9

Workings

Stock usage - Non ROT

Online b/f	Margin	650.0	537.5	425.0	312.5	200.0		
Used	25.0%	(112.5)	(112.5)	(112.5)	(112.5)	(112.5)		
Online c/f		<u>537.5</u>	<u>425.0</u>	<u>312.5</u>	<u>200.0</u>	<u>87.5</u>		

Retail b/f	margin	150	120.0	90.0	60.0	30.0		
Used	33.3%	(30.0)	(30.0)	(30.0)	(30.0)	(30.0)		
Retail c/f		<u>120.0</u>	<u>90.0</u>	<u>60.0</u>	<u>30.0</u>	<u>-</u>		

Warehouse cost	0.50%	3.25	2.69	2.13	1.56	1.00		
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VAT

Output VAT

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

Input VAT

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

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

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

Question 3 (25 marks)

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

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

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

Process

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

Information

- Copy of terms and conditions
 - Check nature of clause; all monies, simple
- Copy of account opening form
- Complete reservation of title questionnaire

- Copy invoices
- Copy stocktake
- Evidence to trace identifying marks to delivery notes to invoices
- Statement/historic balances (to check zeroing of the account)

Issues/Challenges

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

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

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

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

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

Process

- Administrator gets their proposals agreed; to put forward a CVA
- Administrator drafts CVA proposal
- CVA proposal sent out to creditors
- No Nominee report
- Includes Outcome statement
- CVA meeting convened, usually same day as meeting to consider administrator's proposals
- Creditors vote at the meeting
- More than 75% of those voting need to approve the CVA

- If 50% of unconnected parties vote against CVA not approved
- If approved control handed back to the directors and the Administration ended
- If CVA rejected then administration would continue.

QUESTION 4

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

Landlord

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

Working capital

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

Reservation of title

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

Employees

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

Wages

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

Supplier reaction

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

Key supplier

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

Contractual/customer

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

Other

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

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

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

Price

Tangible assets

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

Intangible

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

Stock

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

Employees – reducing liabilities

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

Debtors

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

Customer contracts

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

General

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

JOINT INSOLVENCY EXAMINATION BOARD

PERSONAL INSOLVENCY (SCOTLAND)

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

Question 1 (25 marks)

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

The first part of question 1 should not have presented any difficulty to candidates with a working knowledge of assessing a debtor's income and expenditure for the purposes of fixing a DCO. This is a topical issue and candidates should be aware of the principles and developments in this area.

Candidates generally scored well for outlining the requirements of the legislation.

Candidates also scored well by providing sensible suggestions about the information they would request to verify the figures, albeit this was also an area where "easy" marks were missed by those who did not.

However, it was clear that a significant number of candidates did not understand what the Common Financial Tool is or some of the principles which are set out in the Guidance about how to use it. For example, a worrying number were not aware of the general principle that the Income and Expenditure of the whole household should be considered unless there is a specific reason not to, or that if a debtor's expenditure in a category is less than the allowance, they should not simply be given the full allowance.

Only a minority of candidates mentioned contingency and none treated it as set out in the Guidance.

Generally candidates would have scored better if they had stated their reasoning as requested in the question.

Some calculations were incomplete and appeared to have been abandoned, candidates should be encouraged to follow through on their calculations even if they realise mistakes have been made, as marks can be obtained for understanding how to conclude the calculation even where the figures are incorrect.

Only a limited number of candidates considered the level of monthly contribution over the DCO term and commented on the total to be paid in the context of the total level of debt.

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

This part of the question was also topical and required some awareness of the well-publicised changes to Personal Pensions which allow individuals to draw a lump sum of up to 25% tax free from their pension at age 55. Doing so would have allowed John to pay his creditors in full and avoid the need to secure a DCO for 48 months.

Only about half of candidates identified that approved Personal Pensions do NOT vest in the sequestrated estate which is basic knowledge.

It appeared that all many candidates knew about pensions was the Trustee's ability to challenge excessive contributions. Whilst worth mentioning there was no evidence of excessive contributions in the detail provided in the question.

Better candidates did identify the potential for a lump sum and commented on the possibility of negotiating with John regarding this.

Few candidates made any comment about the options available if he was not prepared to negotiate and only one made any reference to recent case law in this area.

Question 2 (25 marks)

Requirements

- (a) **In the light of Thomas's application, prepare a memorandum to Joe describing what is expected of the Trustee by legislation and advise Joe of the actions he should take generally. (10 marks)**

The majority of candidates recognised (whether intentionally or by accident) that despite being a Pre BADAS case, the transitional provisions in relation to recall mean that an application for recall on the grounds that creditors can be paid in full should be made to the AIB.

As in question 1, candidates scored well on the legislative requirements. However, were only able to make limited suggestions about the practical steps which should be taken and mainly focused on the Trustee's Fees and the legal action.

Few made any comment on the requirement to secure the PPI funds or how creditors would be paid in practice.

A number of candidates were confused about the status of PPI as an asset in the sequestrated estate.

- (b) **Calculate the estimated amount required to pay the debts and the expenses of the Sequestration in full and estimate the surplus funds available to Thomas. Clearly state any assumptions that you have made. (10 marks)**

This part of the question was generally answered well.

However, every candidate assumed that payment of statutory interest was a requirement to recall the sequestration. It is not.

Most also excluded the Student Loan debt on the basis that the debtor would not be discharged from his Student Loan without recognising that (a) this does not prevent Student Loans from submitting a claim and (b) the debtor would possibly want to pay this debt anyway, if he is not to be discharged from it.

Other common omissions, were legal fees to date and to close, the AIB Audit fees, other statutory fees set out in the legislation and VAT.

- (c) **Draft the Statement of the Debtor's Affairs which Joe must submit to the Accountant in Bankruptcy. (5 marks)**

It is accepted that with a limited number of recall applications granted since 1 April 2015, few candidates will have had the opportunity to do this in practice. However, the question was very simple, it asked for a Statement of Affairs and this combined with the legislation which candidates used to answer part (a) would provide the content for the notes to the SOA.

Those candidates that recognised this scored very well. A number of candidates failed to provide any sort of Statement of Affairs at all.

Question 3 (25 marks)

Requirements

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

- (a) **discuss the legal position, the extent of the Trustee's interest in the Property and the overall equity position. Set out what further information you may require. (20 marks)**
- (b) **stating your reasons, advise Muriel of the amount she should initially offer for her husband's interest in the Property. (5 marks).**

This question required candidates to advise the wife of a debtor about the Trustee's interest in the family home and how much she should have to offer to acquire it based on a number of issues raised in the question.

This question was the least well answered in the paper and with few exceptions marks were very low. This is concerning as there is nothing new here and it required candidates to address issues which are raised repeatedly in any case where the Trustee has to realise his interest in a family home. It is apparent that few

candidates had any practical experience of negotiation as an alternative to a Court action whether from the perspective of acting as Trustee or advising a debtor or spouse.

Very few candidates, considered the position of the secured lenders and their right to take repossession proceedings, and how Muriel would fund her offer and deal with the secured creditors. Only one candidate commented on the Capital Gains Tax liability in the event of a sale of the property.

Marks were scored for identifying sensible pieces of information which would allow you to advise Muriel further.

In general, better marks would probably have been achieved if candidates had spent time at the outset planning the structure of their letter to Muriel. Only a limited number of candidates produced a coherent letter which clearly set out the position, outlined the issues/options to consider and provided clear recommendations, which would be of value to Muriel.

It should also be noted that the question did not ask candidates to provide a detailed explanation of the process of sequestration or the AIB's role in supervising it, time was wasted by some in doing just that.

Question 4 (25 marks)

- (a) **Based on the information provided in these calls, prepare a memo to your Assistant setting out the issues, specific to these circumstances, that you will need to address in the coming days and the additional information you will need to obtain. (20 marks)**
- (b) **Write a brief letter to Mr Holmes explaining how he could be appointed as, and setting out the main roles and responsibilities of, a Commissioner. (5 marks)**

This question provided an example scenario that an Insolvency Practitioner could be faced with immediately following their appointment to a small farm.

Part (a) was generally answered well. Most candidates were confidently able to identify the actions to take regarding the properties, tractor and milking equipment. Comments in relation to the cattle were more mixed. Most were able to suggest the need to obtain specialist advice, however, few really grasped the need to take practical steps to ensure that the animals were milked and fed. A few candidates unhelpfully dwelled at length on the extent to which they would be liable if the cattle died rather than trying to suggest a practical solution.

Better candidates identified the need to assess the DCO, realise the value for the shareholding. However, only a small minority commented on the need to ensure that the Trustee was paid for sums due at appointment for the milk supplies and any future supplies.

Candidates paid attention to the question and mainly confined themselves to commenting on the issues raised in the question and urgent issues which could be inferred. This was an improvement in comparison to similar questions in previous sittings. There was however, at least one candidate who wasted time and over 2 pages outlining generic actions which would be taken in every case.

Part (b) was also generally well answered with good marks being achievable from a quick review of the relevant legislation. Some candidates had clearly recognised this and tackled this part of the question first or in succinct bullet points. Those that ran out of time and did not attempt it were at a disadvantage.

The average mark for this question was the highest in the paper and a significant majority passed this question.

EXAMINER'S MARK PLAN

PERSONAL INSOLVENCY (SCOTLAND)

NOVEMBER 2015

Question 1

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

General

In keeping with the SG policy objective that "those who can pay, should pay" John should pay any surplus income into his sequestrated estate for the benefit of creditors.

The provisions of the BADA(S) Act 2014 apply to this case as sequestration was awarded after 1 April 2015.

Surplus income must be calculated with reference to the Common Financial Tool Regulations and the Common Financial Tool Guidance which specify that a debtor's ability to make a contribution should be assessed using the CFT. In this case, the Common Financial Statement available from the Money Advice Trust.

Reg 3 specifies that the DCO should be the **whole** of the surplus income in excess of the expenditure or the CFS trigger figures.

Income

Include wife's income in calculating total of household income,

This is in line with the general approach in the CFT Guidance which requires consideration of the full household I&E.

Evidence of net income in the form of wage slips, preferably for 3 months should be requested. Establish whether any other sources of household income, for example, pension income or any benefit income.

Request Bank statements to support additional income received, or the absence of it.

Expenditure

Expenditure under the CFT is split into essential expenditure where allowance is made for the actual cost and expenditure where allowances are set out.

Essential Expenditure

Rent is an essential cost. Consider whether reasonable in relation to the area, and size of property, this seems reasonable. Obtain copy of rent agreement.

Likewise Gas, Electricity and Water are essential and seem reasonable. Request copies of utility bills;

Council tax is an essential cost and would be allowable. English case *Kaye v South Oxfordshire District Council* – not payable during period from date of bankruptcy order to end of financial year. However, this has not been adopted by Councils in Scotland. Generally the Councils approach varies and no Guidance has yet been issued by the AIB.

Either the Council will submit a claim for the full year or will not and insist on payments. Make allowance at present and vary depending on the Council approach. Obtain copy of Council Tax Bill or check with reference to Local Council Website;

Allowances under the CFS

Include Food, drink and household under housekeeping, within the CFS therefore allow the figure requested;

Credit card repayments not allowable – these are claims in the sequestration;
Loan repayments – ditto;

Fines/costs are legitimate expenditure provided they are imposed by the Court;
Clothing is within the allowance for “Other”.

There are other items that have not been included, such as dental/healthcare, insurances, telephones etc which can be regarded as reasonable domestic expenditure – such costs may have been included in the food/drinks etc or within the “Household expenditure” by John. There is a specific allowance for telephone and there is headroom within some of the other allowances. A review of Bank statements may identify expenditure not included. Care should be taken to ensure that these are real costs and not simply being included because there is an allowance for them.

Contingency – The CFT provides for a contingency provision of 10% of the monthly surplus up to a maximum of £20 per month.

Period

The debtor should make a contribution of his surplus income for a 48 month (4year) period. Period can be shortened if sufficient funds are realised to finalise the sequestration or lengthened if there are periods of non payment.

The Trustee can apply to vary or quash the DCO if circumstances change.

If the debtor experiences an income shock they are entitled to request one payment break of up to six months. However the contribution period will be extended, so in view of Trustee’s ability to vary the DCO when circumstances change, it is difficult to see the attraction of this to the debtor.

Mechanism

This assessment should be made by the Trustee in the six weeks following appointment and he should propose a level of contribution to the AIB (Appendix O).

The AIB will issue a DCO (Form 25)

Agree with debtor whether he will make payment from his Bank account by Standing Order or whether he would like it deducted directly by his Employer.

If the debtor does not pay for a period of 2 consecutive months and fails to comply with a request to instruct payment from his employer, the DCO can be sent to the employer or other third party who may have funds (in this case employer) who must comply with the DCO and make payment to the Trustee. They are entitled to charge a fee for doing so.

Suggested Amount

Income

Self	1600	
Wife	<u>800</u>	
		2400

Expenditure

Rent (Essential)	500	
Gas Electric & Water (Essential)	100	
Council Tax (Essential)	125	
Housekeeping	480	
Travel (Mr & Mrs)	90	
Other (Clothing) 80		
Fines	40	
	<u> </u>	
		<u>1,415</u>
Surplus		985

Contingency – 10% up to £20 per month (20)

Revised surplus is £965

Debtor's net earnings are 66% of Household Income.

Therefore he will pay a proportionately greater share of the expenditure

And his share of the surplus being 2/3rds, i.e.£637

Therefore, propose a DCO to AIB of £637 per month subject to the whether the debtor identifies any additional expenditure prior to or during the interview which could be allowed under the CFT.

Likely total recovery $48 \times £637 = £30,576$ compared to unsecured debts of £26,500. Likely that costs and interest will exceed the difference and therefore 48 months payment required.

Bonus mark for commenting that the allowances assumed are not actually correct under the Common Financial Statement.

(b) Explain, in view of the existence of the Pension, the actions you would you take regarding the future administration of John's sequestration. (7 marks)

Pension

Approved Personal Pension does not vest in the sequestration.

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

25% tax free lump sum would more than pay creditors in full.

Scope for negotiation with debtor to take some benefits and apply to recall sequestration, to avoid the need to keep DCO payments for 4 years.

Establish whether debtor has made any decision to take lump sum/annuity benefits.

Contact pension provider to establish current position regarding lump sum, any current pension income and historic payments made to scheme.

Income from a personal pension would be subject of the DCO if John retires. A further I&E assessment would be done using the CFT and application made to vary or quash the DCO assessed at the initial interview as appropriate.

If he has drawn or intends to draw any lump sum in the future then per the AIB Note for Guidance it is "safer" to assume that the lump sum does not vest and instead treat as income and seek a contribution. The position regarding vesting is currently untested in the Scottish Courts.

You would seek a one off variation of the DCO for the lump sum, limited to the funds you would need to pay the costs, debts and interest in full.

If no election has been made by the debtor but the debtor is entitled to elect to take a payment, and he does not intend to do so, then in Scotland there is no case law or guidance for the Trustee on the extent to which the Trustee can compel the debtor to do so. Depending on the sums involved, the English cases of **Raithatha v Williamson** and **Horton v Henry** could be considered although these are in conflict.

Under Raithatha:

If debtor does not take benefits, then make application to court for an Order that he should take benefits, including payment of any lump sum and/or annuity.

Under Horton:

Court is unlikely to make any DCO re pension.

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

If debtor won't negotiate a lump sum, likely that you will not be able to force the issue and will have to rely on the DCO from income for the 48 month period.

S39 – allows the Trustee to challenge excessive pension contributions and consideration could be given to whether to challenge payments made to date. There is no evidence of this in the question with fund value being reasonable in context of age of debtor and previous role with High Street Bank. As noted above request details of historic payments made.

Question 2 (25 marks)

(a) In the light of Thomas's application, prepare a memorandum to Joe describing what is expected of the Trustee by legislation and advise Joe of the actions he should take generally. (10 marks)

Basis for recall

An application for recall may be made to the AIB on the grounds that a debtor is able to pay their debts in full.

This provision was introduced by the BADA(S) Act 2014 (implementation 1 April 2015). The transitional provisions means that it applies to any sequestration whether awarded prior to or after the implementation date.

On the face of it with available funds of £67k and known creditors of c£33,500 (including petitioning costs), funds of c£33,500 would be available to cover the costs of the process to date and therefore recall seems feasible.

Note that it is not a requirement of the recall process to pay statutory interest.

Practical Steps

Establish where the £67k of PPI compensation is, are the funds with the lender, the debtor (hopefully unlikely as you are in office), or the debtor's solicitor.

Since these funds would represent an asset in the estate if recall does not proceed, they should be secured, preferably in the Trustee's account.

Establish whether the funds, if not already paid out, will be available within the 8 week period.

Confirm that tax on any statutory interest element of the compensation payment has been deducted by the lender at source this is likely since the payment has probably been made after October 2013.

Although the tax liability is the debtor's PPI Guidance is that the Trustee should ensure that provision is made for the payment of this liability.

If the claim has been pursued by a claims management company, the Trustee is under no obligation to pay their fee. In practical terms here as there are probably sufficient funds to pay their fee then the debtor can pay them on receipt of his reversion.

Advise your legal agents of the recall application. Ask them to advise the Court and seek to sist the action in relation to the property.

Sequestration will continue until recall is awarded but it would be prudent not to incur further cost.

It is also unlikely that the Sheriff would award eviction in the circumstances.

Ask your legal agent to confirm their costs and outlays to date and also any further cost they will incur to sist the action.

Review Firm's WIP and calculate costs to conclude.

Advise the debtor's solicitor of what the Trustee's time costs and outlays are and seek their agreement to these.

Agree with the debtor's solicitor who is going to pay the creditors and how this will be evidenced. They could facilitate the distribution or the Trustee could do so for an associated cost.

Issue debtor's guide to recall.

Legal requirements

Prepare a Statement of Affairs and submit to the AIB within 21 days of receipt of the notice (ie today).

Where the debts have not been paid provide details of these and indicate whether there are sufficient assets to pay creditors in full within 8 weeks. This will depend on the information you have established above.

Notify the creditors within 7 days and give them 14 days (from notice) to submit a claim.

If a creditor does submit a different claim you will have to submit a revised SOA to the AIB within 7 days of expiry of the 14 day period.

If the Trustee cannot secure the debtor's agreement to his accounts, remuneration and outlays then these will have to be audited by the AIB.

If/once the creditors have been paid in full then a revised SOA should be submitted to the AIB in order that recall can be granted.

- (b) Calculate the estimated amount required to pay the debts and the expenses of the Sequestration in full and estimate the surplus funds available to Thomas. Clearly state any assumptions that you have made. (10 marks)

Sequestration of Thomas Tucker

Calculation of Funds required to recall sequestration

	Notes	£	£
Unsecured debts			
HMRC		3,200	
Credit cards		4,370	}
Bank loan		8,105	}
Bank overdraft		190	}
Store cards		7,940	}
Student loan	1	<u>3,300</u>	
			27,105
Postponed - debt due to Wife	2		<u>5,000</u>
			32,105
Costs			
Trustee's Costs			
Trustee's fees (excl VAT)		4,620	
Disbursements (excl VAT)		380	
Costs to close	3	<u>1,000</u>	
			6,000
Vat on Trustees Fees and disbursements	4		1,200
Legal Fees & Outlays to date and to close	5		2,000
AIB Audit Fee	6		1,400
Petitioning Costs			1,450
Sederunt book fee	7		<u>36</u>
Total costs and expenses			12,086
			<u>44,191</u>
Total required to pay debts and expenses			<u>44,191</u>
Funds Expected			67,000
Funds available to Debtor			<u>22,809</u>

Assumptions/Notes

1. Student loan debt would not be discharged, however Student Loans are entitled to claim for sums due to them
2. Wife's claim is deferred but still needs to be paid if he is to pay all creditors in full. Wife could waive her claim in which case creditors will reduce accordingly
3. Assume £1,000 (or other appropriate amount) of future time costs. This needs to reflect who is going to do the distribution ie if Joe this will be higher
4. Assume not VAT registered, so VAT is not recoverable and is therefore an expense.
5. Request details of fees and outlays incurred by legal agents including costs to sist action (any sensible number)
6. Audit Fee = 17.5% of Fees and outlays (excl stat fees and realisation expenses)
7. Statutory fees, assume Reg Award and Supervision fee already incurred and distribution fee will not apply

Other comments/assumptions

1. From these funds debtor will still have to provide for his legal fees (which on the basis of these estimates will also include distribution costs).
2. Creditors would be entitled to interest calculated at 8% from date of WTC to expected date of payment (say 1 months time) through the sequestration.
It is not a requirement of recall to pay this sum, the creditors could object to the recall on the grounds that they are losing out

on this sum which would be as follows:-

Date of Award of seqn:	17-Jul-13
Date of dividend - 2 months	04-Dec-15
No. days for interest calc	1110
$£27,105 * 8\% * 1110 / 365$	6778.48

This tends not to happen in practice, though it may be prudent to provide for it.

3. Assume tax on compensation payment has been deducted at source if not flag this potential liability to debtor/solicitor.

Statement of Affairs of Thomas Tucker
Date of Sequestration 17 July 2013

	Notes	£	
Assets			
Property at Equity		35,000	
Compensation for mis selling of payment protection insurance		<u>67,000</u>	
Assets available		102,000	
Estimated costs of Sequestration	1	<u>12,086</u>	Bring total from funds required
Funds available to pay unsecured creditors		89,914	
Known creditors	2	27,105	Bring total from funds required
		<u>5,000</u>	
Surplus available		<u><u>57,809</u></u>	

1 This includes all current and future costs of the sequestration. Within this, time costs of £4,620 and disbursements of £380 both excluding VAT have been incurred by me. I estimate that I will incur time costs to close of £1,000.

My request for fees and outlays has been approved by Mr Tucker.

2. This figure represents all creditors claims submitted to date. No payments have been made to creditors at this time. Creditors have been notified of the recall application and any additional claims requested.

3 I have been advised by x Bank that funds of £67,000 due in respect of mis sold payment protection insurance will be paid to me by 30 November.{ sensible comment about when funds available} These funds will be sufficient to facilitate a distribution to creditors within 8 weeks.
 I have sisted an application for the eviction of the debtor from the property at. Assuming funds are received from X Bank, it will not be necessary to progress this action

Question 3 (25 marks)

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

- (a) discuss the legal position, the extent of the Trustee's interest in the Property and the overall equity position. Set out what further information you may require. (20 marks)

General - Letter format

Legal Position

At the date of Bankruptcy Muriel's husband's half share of the property vests in the Estate.

The Trustee has a duty to realise the value of this share for the benefit of his creditors.

The Trustee should deal with his interest as soon as possible and appears to be doing so. That said, he has 3 years to "action" this. He has 3 years to be able to evidence that he has done so, before sending a memorandum to the Keeper to renew the notice on the Register of Inhibitions.

There is therefore time to negotiate.

As Muriel and the couple's children reside in the property, this falls into the definition of Family Home under s40 of the Act.

This section means that the Trustee must either have the consent of Muriel to any sale or must obtain the consent of the Court.

If Muriel will not voluntarily consent to a sale then the Trustee would have to raise an action for division and sale of the property and for eviction.

The Court will have regard to the needs and resources of Muriel and her children before granting consent.

The Court can refuse consent or can postpone the granting of consent by a period of up to 1 year.

In general Courts tend to grant these orders and there is limited case law to support cases where they do not.

Refer to Gourlay Trustee vs Gourlay where the granting of the order was considered to be detrimental to health. Are there any such considerations here.

In addition to the Trustee, Muriel needs to consider the position of the chargeholders either of whom could initiate repossession proceedings if payments are not being made.

As the Trustee has to realise his interest, Muriel's options are either to:-

- Voluntarily consent to the sale (potentially improving her reversion);
- Negotiate with the Trustee about the sum required to acquire his interest in her husband's share of the property (assuming she has the means to do so);
- Defend the action if there are circumstances which would suggest the Court may not award or may delay the Order.

Equity

The valuation is £450k-£220k-£50k = £180k, with the husband's half share being £90k. This is how the Trustee has calculated his interest.

This assumption could be changed if there is a minute of agreement which varies the split of the sales proceeds for example, if Muriel is to be repaid her £30k deposit from any sales proceeds thereby reducing the value of her husband's share of the equity.

It is difficult to see how the second charge can have been obtained without Muriel's knowledge.

Considerable further information and documentation is required both from Muriel about this. If Muriel has genuinely signed the documentation then she will have to accept that her husband does not have to bear the full share.

If however, her signature had been forged then there is a potential argument that the full share would lie to be repaid from her husband's share.

Unless it can be demonstrated that the chargeholder has acted in bad faith then the charge is likely to stand.

Further information required

Obtain a copy of the solicitors file from the purchase of the property (if still available)

Looking for a minute of agreement if any available in relation to whether she was due a higher share of the sales proceeds due to having paid the deposit.

Or title deeds may indicate whether alternative split of proceeds was agreed.

Obtain property search.

Obtain copies of the loan documentation – in particular, who has signed the documentation for the second charge.

Obtain redemption statement for both loans.

Has Muriel maintained the mortgage in the period between the separation and the date of bankruptcy. If so can she provide evidence of this, eg bank statements. This is likely to be an unsecured claim but Muriel could plead this in any event, there may well be a dividend.

Is Muriel still maintaining the mortgage (and reducing the redemption). She could try and argue that the Trustee is being unjustly enriched by this, albeit presumably she is benefiting from being in the property.

Does Muriel agree with the valuation that the Trustee has obtained. The fact that she was unaware of the sequestration would suggest that this is not an internal valuation. Is there a reasonable argument that the property could be worth less than £450k.

Muriel should be advised to obtain her own valuation from a chartered surveyor to either confirm the Trustee's valuation.

Or to provide evidence of a reduced valuation that might support a further reduced offer.

Are there any considerations such as special adaptations to the property.

(b) stating your reasons, advise Muriel of the amount she should initially offer for her husband's interest in the Property. (5 marks).

Muriel's offer

Is Muriel making an offer to ensure the Trustee abandons his interest or does she actually want the half share of the property to be conveyed to her. The question assumes the former.

This is subject to Muriel being able to fund this offer and to maintain the ongoing payments on the securities (consider position of second security)

Assuming she can fund it, and make payment to the securities, **Muriel's starting point should be that she is fully exonerated from the second charge**

and thus her share of the equity would be calculated as:

$£450k - £220k = £230,000$

Wife's 50% share = £115,000

Husband's share = $£115,000 - £50,000 = \mathbf{£65,000}$

Allow for costs savings if an offer is made as an alternative to sale:

Estate agents costs of sale (including Home Report and EPC) say 1.5% = £6,750 + £350

legal costs for action for division and sale £10,000;

conveyancing costs. (est £1,000)

Total £18,100

Muriel should suggest that she would vigorously defend the action and therefore these costs will be high.

Consider that a CGT liability may be incurred by the Trustee on a sale in relation to the period of time when the property was not the main residence. Broadly $£450k - £180k = £270k * 8/15 \text{ years} = £144k / 2 = £72k$ less personal allowance $£10k * 28\% = £17k$. (also consider letting relief and provision for last 18 months This argument may not be valid if title transfers to Muriel.

On the information available at this stage, suggest offering £30,000 (roughly £65,000 - £18,100 - £17,000) as an alternative to the sale of the property.

Be prepared to negotiate upwards.

Muriel should be advised to seek legal advice particularly in view of future divorce proceedings.

Note – Unless agreement about the deposit is documented unlikely to be considered by Trustee, similarly arguments re mortgage payment will probably be rejected and there is no evidence that the valuation is inaccurate.

Question 4 (25 marks)

(a) Based on the information provided in these calls, prepare a memo to your Assistant setting out the issues, specific to these circumstances, that you will need to address in the coming days and the additional information you will need to obtain. (20 marks)

Livestock/ Business

Priority is the addressing the livestock and in particular their welfare.

They need fed and they will also need milked twice a day.

Secure agreement of debtor to care for them until a solution can be found. Notwithstanding his comments about his alternative job.

If he will not do so liaise with Vet/valuer/local farmers to procure a solution.

Contact specialist Livestock valuer and ask them to attend the farm tomorrow to provide their valuation and recommendations for sales strategy of the livestock. Ask them whether disease will prevent their sale or simply reduce the value. If they can be sold what is the most cost effective way of doing this ie sale on the island or transporting to mainland.

Secure the passports of the cattle which should be on the farm (they cannot be sold without this).

Contact Vet and ask him for further details of the disease affecting the cattle which can be provided to the valuer and whether there are any issues you should be aware of regarding their welfare.

Once you have established a disposal strategy you will need to procure any further feed required.

Find out if feed has any potential ROT claims.

Contact Island dairies, to make them aware of your appointment and ask them not to make payment of further monies for milk already delivered to the debtor.

Agree whether they will take ongoing supplies and pay you for them until the cattle are sold. Establish position regarding invoicing and ensure this is brought up to date and that Island Dairies pay you for any outstanding balance.

Instruct valuation of plant and machinery and tractor and agree disposal strategy. Should they remain with farm to improve realisation.

Establish whether there is any outstanding finance on these assets.

Milk quota seek advice on whether any value in this.

Debtor due any single Farm Payment?

Property

Conduct title searches on both farms to check ownership and securities granted. In particular is High Cliff Farm encumbered?

Check for additional properties in the Islands, the debtor did not disclose High Cliff to you.

Windy Head Farm

The inhibition over the property having been secured less than 60 days prior to the WTC will be cut down assuming dates are correct.

Based on the range of values provided (£70k to £120k), there will be around £10k to £35k equity in the debtor's one half share of the property. It is your duty to maximise the recovery from this asset.

Contact debtor's wife to make her aware of your appointment and that you will not consent to the property being sold at auction until you can establish your position.

Contact the auctioneer to tell them same and establish their views on the likely disposal price at auction.

Obtain your own independent valuation of the Farm property as soon as possible. Ask the valuer to comment on the strategy re retaining equipment on site.

Consider asking your legal agent to check the title as soon as possible to ensure that you have clear title and no issues have been caused by the decrofting.

Confirm with the mortgage lender the sums due to them and clarify whether the mortgage is being paid. Check that the farm is insured and ensure that this continues after your appointment and reflects your appointment.

High Cliff Farm

Obtain a copy of the lease and confirm whether it has been registered.

Instruct a valuation of this Farm, ensure valuer has a copy of the lease and ask him to comment on whether the granting of a lease has affected the valuation of the Farm, ie will it be more difficult to dispose of with a 50 year lease in place. Is the rent reasonable? Confirm amounts due to secured lender – if there is one.

Consider disposal strategy based on value/sums due to secured lender and the lease.

If the lease is reducing equity value then seek advice from your legal agent on the validity of the lease and the likely costs of challenging the granting of the lease as a gratuitous alienation.

(b) Write a brief letter to Mr Holmes explaining how he could be appointed as, and setting out the main roles and responsibilities of, a Commissioner. (5 marks)

Other - specific

The debtor will need to be interviewed to establish whether there are any other assets liabilities, not disclosed in the initial call. (certainly he did not mention High Cliff Farm).

Complete an assessment of the debtors ability to pay a contribution from his new employment using the CFT.

Advise the AIB of the amount which you propose that the debtor pay as a DCO and request that they make a DCO in this sum. This needs to be done within six weeks of appointment.

Establish value of the debtor's shareholding in Island Dairies. Obtain accounts from Companies House.

Consider provisions in Memorandum and Articles for how these shares can be disposed of and then develop strategy for sale.

Consider the impact on the value of the shareholding (if any) of supplier, Mr Watson no longer supplying milk to Island Dairies.

Write to creditors advising of your appointment. In particular seek claim from Mr Holmes. Establish the nature of his claim, does he have decree? Understand from Mr Watson why he disputes it.

Write to Farmers Bank and Island Bank to freeze balance on any current account held by Mr Watson.

Establish whereabouts of books and records and write to Mr Watson's accountant to confirm appointment and obtain copies of last accounts prepared.

Establish if Mr Watson has any employees (none mentioned) and advise them of their rights.

Letter to Mr Holmes

Confirm details of appointment/provide claim form and ask him to return it with supporting evidence (now needs to be done in 120 days) but in his case you would like it soon.

The commissioners are elected by the general body of the creditors, normally at the statutory meeting of creditors.

Their general functions are to advise and supervise the trustee in his management of the estate. In terms of Section 39(1) of the Act, the trustee must consult with and have regard to any advice offered to him by the commissioners regarding his recovery, management and realisation of the estate.

He need not however follow such advice if, for example, he considers it to be counter to the better interests of the general body of creditors. In such cases the commissioners, if so inclined, can nevertheless seek to secure the trustee's compliance through an application to the court in terms of Section 39(1)(b) of the Act.

Commissioners have no power to deal directly with or transact with the estate and they are expressly barred from purchasing any part of the debtor's estate.

No more than five commissioners may act at any one time, but, if fewer than that number are elected, additional commissioners, within the limit of five, may be elected at any subsequent meeting of creditors.

A commissioner must be:-

- a creditor of the debtor whose claim has been accepted by the interim trustee at the statutory meeting or by the trustee at any other meeting of creditors, or;
- a mandatory of such a creditor.

The following cannot be a Commissioner:

- the debtor;
- a person who is an associate of the debtor or of the trustee, this includes any relation by blood or marriage of the debtor;
- any business partner of the debtor and any employee; or, any person who holds an interest opposed to the general interests of the creditors.

The office of commissioner is entirely gratuitous and not even out of pocket expenses incurred can be recovered from the bankruptcy estate.

Commissioners are given specific discretionary powers in the exercise of their functions, in terms of The Bankruptcy (Scotland) Act 1985 Commissioners may:

Section 3(1)(f): inspect the trustee's accounts at all reasonable times;

Section 3(2): offer advice to the trustee in the performance of his functions;

Section 39(1)(b): apply to the sheriff for directions to be given to the trustee;

Section 45(1): require the trustee to apply to the sheriff for an order bringing the debtor or any relevant person before the sheriff for public examination;

Section 52(2): consent to the trustee varying the duration of accounting periods;

Section 52(4)(b): authorise the trustee to pay the preferred debts at any time;

Section 52(5): consent to the postponement of payment of a dividend to the ordinary creditors until the next accounting period;

Section 53(2A): dispense with taxation of a legal account;

Section 65(1)(a): consent to the trustee referring to arbitration any claim or question of whatever nature which may arise in the course of the bankruptcy;

Section 65(1)(b): consent to the trustee compromising any claim of whatever nature made against or on behalf of the sequestrated estate require the trustee to call a meeting of commissioners; and,

Sched 6, para 18: call a meeting of commissioners themselves if the trustee fails to do so within 14 days of a request being made to him by a commissioner for such a meeting.