

JOINT INSOLVENCY EXAMINATION BOARD
NOVEMBER 2014 EXAMINATION (ENGLAND)
EXAMINERS' REPORTS AND MARKING PLANS

INTRODUCTORY COMMENTS

The comments in this introductory section have been inspired by comments made by the subject Examiners in their individual reports which are attached. The introductory comments are made either because they are of general application, or they reflect comments which have been made more than once in the Examiners' reports.

The application of knowledge to the facts of the question

Many questions give candidates facts about a particular situation and require them to identify an issue or problem and to say how this should be dealt with or resolved. Previous Examiners' reports have referred to the fact that candidates are often able to identify the issue and the point of law which applies, but that far fewer are able to apply this knowledge to the facts of the question and to present coherent and workable solutions and/or advice.

It should be apparent to those who study the mark plans reproduced as part of this report and those attached to previous reports that the Examiners are often looking to candidates to set out clear advice and solutions based on the given facts and the relevant law and best practice. Those candidates who do not demonstrate that they possess the practical knowledge to provide a full answer with the required advice and solutions cannot be awarded the marks that can make the difference between passing and failing the examination.

There are still too many candidates who approach their answers by identifying an issue or point of law and by writing down, sometimes at inordinate length, all they know about that particular subject. This can, and too often does, result in Examiners being presented with pages of script which, whilst largely right in themselves, are irrelevant to the question. Too often, whole pages of script cannot be awarded any marks at all. Candidates who approach answers in this way are wasting time and, invariably, are amongst the weaker candidates who struggle to pass the examination.

Demonstrating a wider knowledge of insolvency

All three Examiners make reference in their reports to many candidates' failures to refer to established case law or recent developments when presenting their answers. By not doing this, candidates miss out on marks which are available and do not give themselves the best chance of gaining higher holistic marks.

Candidates must ensure that they are aware of developments in the law and in the wider insolvency environment and are able to show this knowledge where possible in the examination. To do this, candidates will need to read widely and ensure that that they are alert to, and absorb, what is going on beyond the confines of their formal studies.

Numbers and their presentation

Questions involving the calculation and presentation of numbers are regularly set in all three papers. Many candidates demonstrate that they are comfortable with manipulating numbers and with their presentation. However, a sizeable minority of candidates still has difficulties with "numbers questions" and score very poorly. The manipulation and presentation of numbers is a key skill for Insolvency Practitioners and candidates who do not demonstrate this in their answers are always going to struggle to pass the examination.

Poor handwriting

As in previous years poor handwriting was an issue for a few candidates. If candidates are aware that they have poor handwriting they must make a special effort to ensure that their answers are legible. Candidates who persist in using handwriting that is either illegible or difficult to read are putting themselves at a material disadvantage.

Candidates should note that the introduction of electronic marking means that scripts may now be considered by the examination team on a computer screen. Candidates will appreciate that it can sometimes be more difficult to read documents on screen, making it even more imperative to avoid poor handwriting.

The use of Butterworths Insolvency Law

Some candidates indicated on their scripts that they had used the 15th edition of Butterworths. The “Notes to Candidates and Syllabus for the Examination” issued for the 2014 examination made it clear that the 16th edition of Butterworths would be used by Examiners when setting and marking the papers. Candidates who use out of date editions of Butterworths run the risk of getting things wrong.

The order of answering questions

Candidates are, of course, free to answer questions in whatever order they choose. However, where an individual question is divided into specified parts with a stated number of marks being awarded for each part, it is often structured in that way in order to assist candidates’ thought processes. Candidates who approach “multipart” questions by answering the individual parts in a random order often fare less well than those who approach the question from the beginning and work through it in a logical order.

JOINT INSOLVENCY EXAMINATION BOARD

LIQUIDATIONS

EXAMINER'S REPORT AND MARK PLAN FOR THE NOVEMBER 2014 SITTING

General comments

Some candidates were well prepared and showed a clear knowledge and understanding of Liquidations. However, although many candidates had an adequate knowledge of the insolvency legislation and consequently gained some marks, many failed to gain significant marks as they were unable to apply this knowledge to practical situations. These candidates seemed to have no knowledge of relevant case law that interpreted/expanded upon the legislation and failed to discuss the practical problems and solutions to the various issues raised.

Some of the questions required straightforward numerical analysis: no difficult calculations were required. Some candidates failed to gain marks for the numerical parts: poor and inaccurate numerical answers indicated a lack of understanding of the issues raised in the question.

The inability to apply their knowledge to practical issues and the general lack of understanding of the insolvency legislation inevitably led to some candidates being awarded low holistic marks.

Question 1

- (a) **Set out how you would address each outstanding matter in order to reach the position where the interim dividend can be declared. Where appropriate calculate the amount which should be accepted by you, as Liquidator, as a claim in the Liquidation or set out the further information you will require in order to calculate that amount. State your reasons and assumptions. (20 marks)**
- (b) **Prepare an estimated distribution statement, stating your further reasonable assumptions. (5 marks)**

Candidates were required to resolve a series of issues before an interim dividend could be paid in a Creditors' Voluntary Liquidation following an Administration. The Liquidator had not been the Administrator. The issues included suggestions of impropriety by the Administrator, Liquidator's fees, Directors' transactions and the Company's dealings with various types of Shareholder.

This question was generally well answered, although not all candidates produced a clear distribution statement. Too many candidates failed to remember that the Liquidator had not been the previous Administrator and incorrectly stated that the Liquidator would not need fee approval in the Liquidation.

Question 2

- 2(a) **Set out the entitlements of the employees in the Liquidations of each of the three Companies. (9 marks)**

Question 2 (a) tested candidates' knowledge of the relevant dates of employee preferential claims in Liquidation in relation to other insolvency procedures, as well as the various other employee claims that arise. It required candidates to set out the entitlements of employees in three different companies that had entered Liquidation in different circumstances. The first Company was in Creditors' Voluntary Liquidation following the filing of Form 2.34B at Companies House and the second was in Creditors' Voluntary Liquidation because of breaching a condition of a Company Voluntary Arrangement. The third Company was wound up by the Court when an Administrative Receiver had previously been appointed over its assets and undertaking.

With some exceptions, question 2(a) was generally poorly answered. Most candidates seemed not to be aware that, for the purposes of the National Insurance Fund, the relevant date is date of Company Voluntary Arrangement and not the date of the Creditors' Voluntary Liquidation for the purposes of the payment of preferential creditors (Employment Rights Act 1996, sections 182 and 183). This was confirmed in Secretary of State for Business Enterprise and Skills McDonagh & Ors UKEAT/0287/12/ LA; Secretary of State for Business Enterprise and Skills v Pengelly & Ors, UKEAT/0312/12/ LA. Candidates seemed to be unaware of these decisions.

The overall holistic mark for question 2 tended to be lower because of candidate's poor understanding of question 2(a).

- 2(b) In preparation for your meeting with George, write a file note addressing George's concerns and setting out the options for the Bank. Set out what further information you may need. Your note should include an explanation of the implications for the Bank if the Company goes into insolvent Liquidation. (16 marks)**

Question 2(b) tested candidates' ability to advise a secured creditor of a Company that was threatened with imminent insolvent liquidation. This part was better answered with nearly three quarters of candidates gaining half or more marks. Some candidates struggled to advise the bank on the actions it could take to protect its position, but several provided clear advice.

Question 3

- (a) Set out the main legislative and other sources that you would consult when considering cross border insolvency; (4 marks)**
- (b) Taking into account the specific circumstances of the English Company, and making and stating any reasonable assumptions, set out, with reasons, where you consider the location of the English Company's Centre of Main Interest to be; (5 marks)**

Question 3 tested candidates' knowledge and understanding of the issues arising in cross border insolvency. It gave information about a group of companies, variously registered in England, Luxembourg and Jersey. The English Company had branches in England, France and Germany.

Question 3(a) and (b) tested candidates' knowledge of the main legislative and other sources that may be consulted when considering cross border insolvency and of the matters to be determined when seeking to establish a company's Centre of Main Interests (COMI).

Most candidates specified at least one source to which they would refer when considering cross border insolvency. A surprising number failed to refer to the Cross Border Insolvency Regulations 2006 (SI2006/1030) but most referred to the European Insolvency Regulation (Council Regulation (EC) 1346/2000 on Insolvency Proceedings). In answering question 3(a), several candidates seemed to randomly list items, presumably in the (incorrect) hope that one or more may be correct: these included R3 helpline; other insolvency practitioners; regulatory professional bodies and SIPs 9 and 15. This scattergun approach is not conducive to scoring good marks.

Generally, candidates provided an adequate explanation of COMI although it was apparent that some candidates had little if any idea about this subject.

- (c) Making and stating any reasonable assumptions, write a file note setting out, with reasons, the issues that may be encountered if the English Company were to be placed into Creditors' Voluntary Liquidation in England and explaining how these issues may be resolved; (10 marks)**

Question 3(c) was poorly answered with a minority of candidates gaining half marks or more. Even those candidates who had correctly answered parts (a) and (b) failed to apply these answers to the circumstances of the question and did not discuss the issues in a meaningful way: most failed to draw on the case law that has developed.

- (d) Write a file note setting out, with reasons, how the Holding Company and the Jersey Company may each be wound up in England. A detailed explanation of the procedures is not required. (6 marks)**

Question 3(d) required candidates to set out, without giving a detailed explanation of the procedures, how the Luxembourg and Jersey companies may be wound up in England and Wales. This was also poorly answered, with candidates showing they had little knowledge of case law.

Generally, the holistic marks awarded for question 3 were low.

Question 4

- (a) **Prepare a statement of affairs and deficiency account for the Company at 31 October 2014, setting out any reasonable assumptions you make. (8 marks)**
- (b) **Taking into account the known specific circumstances of the Company, identify the issues that will need to be dealt with when placing the Company into Creditors' Voluntary Liquidation, as well as the issues that may be anticipated to arise during the Liquidation. (12 marks)**
- (c) **Set out the issues that a Liquidator of the Company needs to consider in response to Clare's plan to establish a new salon. (5 marks)**

This question required candidates to consider a small, owner managed hairdressing Company with few assets that needed to be placed into Creditors' Voluntary Liquidation.

Question 4(a) required the preparation of a straightforward Statement of Affairs and Deficiency Account. Many candidates were able to do this, but too many demonstrated that they do not have the necessary confidence or skills to prepare these bread and butter documents.

Question 4(b) required candidates to set out the issues that need to be considered when placing the Company into Creditors' Voluntary Liquidation and anticipating those that may arise during the Liquidation. Surprisingly, some candidates seemed to struggle answering this question, by simply appearing unable to identify the issues that arise in this mainstream area.

Question 4(c) required candidates to consider the shareholder/director's proposal to re-establish a hairdressing company, with the same name. Some candidates seemed to be more confident answering part (c), although few mentioned the need for Clare to take independent advice.

EXAMINERS' MARKING PLAN - LIQUIDATIONS

QUESTION 1

- 1(a) Set out how you would address each outstanding matter in order to reach the position where the interim dividend can be declared. Where appropriate, calculate the amount which should be accepted by you, as Liquidator, as a claim in the Liquidation or set out the further information you will require to calculate that amount. State your reasons and assumptions. (20 marks)

Candidates should be aware of/discuss the order of payment from the assets in a Liquidation. Supreme Court in Nortel ([2013] UKSC 52) summarised the order of payment from the assets in a Liquidation:

- fixed charge creditors;
- expenses of the insolvency proceedings;
- preferential creditors;
- floating charge creditors [*after prescribed part*];
- unsecured provable debts;
- statutory interest;
- non-provable liabilities;
- shareholders

Candidates should also relevant legislation to consider/discuss when answering this question:

S107 – Distribution of company's property;

S115 – Expenses of voluntary winding up;

S175 – Preferential debts (general provisions);

S176ZA – Payment of expenses of winding up (England & Wales);

S189 – Interest on debts

R4.181 – Debts of an insolvent company to rank equally

R4.218 – General rule as to priority

R12.2 – Costs, expenses, etc.

R12.3 – Provable debts

R13.12 – "Debt", "liability" (winding up)

i Mandible Ltd: concern about Administrator's fees:

- look at Administrator's response;
- look at level of fees, SIP 9 disclosure by Administrator, was this compatible with work done by Administrator;
- consider Administrator's SIP 9 report and whether further investigation needs to be done into the time spent by Administrator (assuming fees on a time cost basis) and/or other basis of remuneration and work done;
- consider R2.67;
- consider costs of any investigation work compared to outcome for creditors (SIP 2, para 5)
- if necessary, consider whether Administrator should be reported to her rpb via the Insolvency Service's Single Gateway

ii Additional invoice from Administrator:

- should be considered as part of i above;
- ensure properly approved in administration;
- should be paid by Liquidator out of assets of which the Administrator had custody or control immediately before cessation [Sch B1 para 99(3)]

iii Credit controller of Mandible Ltd:

- explain Liquidator entitled to remuneration;
- needs approval for basis of fees;
- may be appropriate to ask creditors if they consider it appropriate to form Liquidation Committee, Mandible Ltd may wish to be represented;
- SIP9
- note although liquidation follows administration, the office holder here changes and therefore a new remuneration resolution is required (R4.127 – R4.127B)

iv Sternum Ltd – need to verify that Administrator approved the work provided for £30,000 during the Administration, If so this should be paid as expense of Administration, and remaining £170,000 will be unsecured claim in Liquidation. If not approved by Administrator, the unsecured claim will be £200,000.

v Humerus Limited remains a debtor for £40,000. Pelvis Limited remains a creditor for £150,000. Even though the debts have been assigned to Humerus Limited, Humerus Limited cannot set off the amounts as assignment occurred after date of Administration (R4.90(2)(d)).

vi Ron Dopey: provided that the transaction for purchase of stationery was at arm's length (which it seems to be) Ron is a creditor for £75,000. The director's loan account for £100,000 will need further investigation.

As a director Ron is connected with the Company and is an associate of the Company (s249 and see also s436)

vii Debt of £2million. Liquidator will need to enter into negotiations with the debtor. No longer necessary to obtain sanction of creditors or creditors' committee: Sch 4, para 6A.

viii Preference dividend – ranks after unsecured creditors (including interest):

£1m x 7% x 0.5 = £35,000.

Preference share capital also ranks after all creditors (including interest) but before shareholders. It seems that there will be insufficient funds to pay anything to the preference shareholders, either in respect of the dividend or the capital.

S74(2)(f)

ix £190,000 loan, provided verified, will be an unsecured creditor which will rank ahead of the preference dividend.

x Liquidator should make a call on ordinary shares for the unpaid element. $10,000 \times 10 \times 60p = £60,000$

Liquidator does not need sanction to compromise calls (Sch 4 para 6A)

See also, s74 – liability as contributories of present and past members, s74(1) and (2)(d); s79; s80

x Ordinary shareholder will remain an unsecured creditor and this amount will rank ahead of any repayment of share capital. No set off.

s74

1(b) Prepare a distribution statement, stating your further reasonable assumptions. (5 marks)

	£	£
Cash transferred to Liquidator from Administrator		
		1,500,000
Call on ordinary shares		60,000
Less Administration expenses		
Administrator's fees	(100,000)	
Agent's fees	(50,000)	
Sternum Limited	(30,000)	
		(180,000)
Less Liquidator's expenses		
Liquidator's fees (say)	£ 50,000)	(50,000)
Add back: Bank interest - say 5 months = £5,000 less corporation tax @20% = £4,000 (note)	4,000	
Debt collected by Liquidator £2,000,000 x 10%	200,000	204,000
Available for distribution		<u>1,534,000</u>
Preferential creditors (paid in administration)	0	
Floating charge creditors (paid in administration)	0	
Prescribed part (n/a)	0	
Unsecured creditors		
Admitted by Administrator for voting purposes		(10,000,000)
Sternum Limited	(170,000)	
Ron Dopey	(75,000)	
Loan from preference shareholder (not in respect of preference shares)	(190,000)	(435,000)
Unsecured creditors in Liquidation		(10,435,000)
Dividend to unsecured creditors		1,534,000
$1,534,000/10,435,000 \times 100$ pence = 14.70 pence/£		
Loss to unsecured creditors		(8,901,000)
Unpaid preferential dividend	35,000	
Preferential share capital	1,000,000	
Loss to preferential shareholders		(1,035,000)
Loss to ordinary shareholders		(100,000)
CT rate = 20% (small profits rate) and 21%		

**2(a) Set out the entitlements of the employees in each of the Liquidations of the three Companies.
(9 marks)**

Employee entitlement on redundancy

Preferential status

IA 1986 s386 and Sch 6

Employees can claim (using Form RP1), subject to a maximum of [£464]:

Amounts eligible to claim using form RP1 (ERA 1996, s184)

- Arrears of wages, up to a maximum of 8 weeks
- Up to six weeks' accrued holiday pay (maximum of one year's entitlement – can't carry over)
- Pay in lieu of notice – statutory entitlement only
- Protective award - classed as arrears of pay for purpose of limits
- Redundancy pay – statutory entitlement only (based on length of service)
- Occupational pension scheme – lowest of 12 months' contributions or 10% of 12 months' pay, or amount certified as payable.

Discussion of:

- relevant date for employees in different circumstances of the three companies;
- different definition of "insolvency" in ERA 1996;
- Relevant date when CVA precedes CVL = date of CVA (confirmed by EAT decisions in *Secretary of State for Business Enterprise and Skills McDonagh & Ors UKEAT/0287/12/ LA*; *Secretary of State for Business Enterprise and Skills v Pengelly & Ors, UKEAT/0312/12/ LA*).

IA 1986, s387 defines relevant date for determining existence and amount of preferential debt:

S387(3)(c) relevant date is date of CVL resolution unless, inter alia, the company is being wound up following administration pursuant to para 83 of Sch B1 (moving from admin to CVL);

S387(2) – relevant date for company in CVA = date of admin if company in admin or if not date of CVA;

S387(2a) – relevant date for company in CVA preceded by moratorium = date of filing

S387(b) – if court winding up, not preceded by admin,

ERA 1996, s185 defines "appropriate date" for arrears of pay and holiday pay as the date the employer became insolvent.

For unfair dismissal and protective awards, it is the later date of dismissal, insolvency or the date the tribunal made the award. For any other claim, it is the later of insolvency or dismissal.

ERA 1996, s 183(3) defines "insolvency"

Fibula Plc

No impact on change of procedure on employees if enter CVL using para 83. i.e. employee claims at date of admin or date of redundancy, if later.

Relevant date for employee claims = date of admin, if exit from admin to CVL using para 83.

If, for any reason exit to CVL is not through para 83, relevant date would be date of resolution to wind up.

In addition to any statutory claims, the employees may have claims for any contractual obligations that they had entered into with Fibula Plc.

Note: The commencement of a CVL does not automatically terminate employees contracts of employment as the liquidator is an agent of the company and not an officer of the court.

The remuneration of any employees assisting the office holder will be an expense of the office holder.

Metatarsals Plc

Employees who are employed by companies which had entered CVA and subsequently entered into liquidation are not entitled to be paid out of the National Insurance Fund (See - *Secretary of State for Business v McDonagh and others UKEAT/0287/12 and UKEAT/0312/12*).

Payments from the National Insurance Fund includes: arrears of pay holiday pay, notice pay, basic award for compensation for unfair dismissal, some payments re apprentices (s184, ERA 1996).

Relevant date is date of CVA and not date of CVL for the purposes of the payment of preferential creditors from the National Insurance Fund. The employees will have an unsecured claim in the liquidation for these amounts.

If employees had no arrears at date of the CVA, but had arrears of wages/holiday pay that had accrued during the CVA, they will have no preferential claim in the liquidation. In addition, there is no "expenses regime" (compared to administration) that permits the liquidator to pay the arrears that occurred in the CVA. They will have an unsecured claim in the liquidation.

Phalages Limited

Can be two relevant dates.

Relevant date for 12 employee claims is date of administrative receivership and date of liquidation for 3 employees.

2(b) In preparation for your meeting with George, write a file note addressing George's concerns and setting out the options for the Bank. Set out what further information you may need. Your note should include an explanation of the implications for the Bank if the Company goes into insolvent Liquidation. (16 marks)

Structure of file note – consider whether helpful to those working on/reviewing the case.

IP would need to check that charges are registered (and if there are any prior charges) and review terms/dates of charges and should explain this to George.

Solvency of Company

From the information available the only asset of any value may be the land, which has a book value of £300,000

Assume that the business does not have a value and so the goodwill will be worth £0;

Stocks are on site and WIP is uncertified and so, in practical terms, there is not likely to be much value here.

You would need to have more information about the WIP.

Trade debtors have a book value of £500,000 of which £450,000 is due from Pisiform Plc which is in CVL. The remaining £50,000 maybe collectable but more information is needed on this debt to give any opinion. George would need to be made aware that, in insolvencies, debt collections often achieve less than book value.

The Company has only one client and, unless it can find another client soon then it will have to enter into an insolvency procedure.

Will Company have to notify Bank before entering CVL?

George has not mentioned the date the Bank's floating charge was created.

If it was created on/after 15 9 03: the Company must give the Bank five business days notice, in writing that it intends to pass a winding up resolution. Unless the Bank consents in writing to the passing of the resolution within that 5 day period, the Company cannot pass the resolution until the end of the 5 day period (s84(2B)).

This time period will give the Bank the opportunity to take other action (see below).

If the floating charge was created before 15 9 03: the Company does not have to give the Bank this notice.

Nevertheless, in a CVL the members usually pass a winding up resolution on the same day as the s 98 creditors' meeting and all creditors' must be given 7 days' notice of the meeting, as well as the meeting to be advertised in the Gazette and so the Bank should have some notice.

The shareholders meeting and creditors' meeting may take place up to 14 days apart (s98(1A)(a) – "Centrebind". This will occur to protect the assets and the Liquidator has restricted powers (s166) in the period between the members' and creditors' meetings.

Will the Bank be notified if the Company is wound up by the Court?

R4.11 Unless court directs otherwise, petition for WU must be published in Gazette not less than 7 business days before hearing and not less than 7 business days after service of petition on Company.

What options are available to Bank?

Bank could allow CVL to occur.

Note: in the event of a s98 meeting the Bank may not want to vote as it will lose its secured status (R4.88(2)).

It may value its security and vote on the unsecured balance (R4.88(1))

(See also R4.95 – 4.99 – re value of security; surrender for non-disclosure; redemption by liquidator; test of security's value; realisation of security by creditor)

Court winding up – Bank, or another creditor, could petition court. Court may appoint a provisional liquidator.

Administrative receivership: available if floating charge created before 15 9 03, can appoint admin receiver even if liquidator has been appointed.

Fixed charge/LPA receivership over property (not an insolvency procedure), can appoint even if liquidator has been appointed.

Administration: if floating charge created on/after 15 9 03, can appoint administrator Sch B1, para 14 and not administrative receiver (if floating charge created before 15 9 03, charge holder can also appoint administrator)

In any case, Bank may discuss situation with the directors and suggest that Company/directors appoint an administrator SchB1, para 22

CVA – the circumstances of the Company make it unlikely to be suitable for a CVA

Turnaround – in or out of CVA or admin.

Consider how finance a turnaround – from Bank or elsewhere.

Considerations for the Bank

Insolvent Liquidation

Bank does not lose its security (see above re voting for unsecured element)

Bank may still appoint fixed charge receiver over property.

Alternatively, could negotiate fee with Liquidator to sell property on its behalf.

If cannot agree a fee, fees may be taken in accordance with R4.127B(2) and taken out of the proceeds of realisation (R4.127B(4))

CGT:

- the sale of the parcels of land will trigger a CGT liability if sold from a Company in Liquidation.
- administrative receivership (if floating charge created before 15 9 03) will avoid triggering a CGT

liability.

- Similarly receivership will avoid CGT liability if no Liquidation

More information will need to be gathered about whether there will be a chargeable gain (regardless of whether or not a fixed charge/LPA or administrative receiver has been appointed).

Any CGT will be deducted from the proceeds of sale. A CGT liability will be avoided if the Company does not enter Liquidation [or Administration].

“Agency” status of Liquidator in relation to Company compared to receiver.

Consider timing of sale of land and appointment of Liquidator.

If floating charge created before 15 9 03 – Bank may still appoint admin receiver

If no admin receiver, liquidator may take fees in accordance with R4.127B(3) and taken out of the proceeds of realisation (R4.127B(4))

Costs/expenses of liquidation and impact on Bank:

S176ZA Liquidator must pay expenses of Liquidation (for priority of payment see R4.218) from assets available for the payment of general creditors (not including amounts available under the prescribed part);

- if the assets available for general creditors are insufficient to meet the expenses, proper liquidation expenses (except for litigation expenses) may be taken from assets comprised in or subject to any floating charge (i.e. before the claims of preferential creditors and floating charge holders).

If the liquidator has

- instituted, proposes to institute or continue legal proceedings or
- is in the process of defending or proposes to defend any legal proceedings brought or likely to be brought against the company

and before or at any stage in the proceedings, he is of the opinion that there are insufficient assets for payment of general creditors are or will be insufficient to pay litigation expenses and he will have to use funds comprised in the floating charge

In this case all of the Company’s assets are subject to floating charge.

Litigation expenses (R4.218A – R4.218E)

If there the liquidator wishes to pursue any litigation. The liquidator must request approval or authorisation of the litigation expenses from the creditor most immediately likely to receive some payment in respect of his claim but would not be paid in full - the “specified creditor” i.e. the preferential creditors and/or the floating charge holder(s).

There are circumstances when the liquidator can apply to court for approval, including if the specified creditor is the defendant.

Preferential creditors

These must be paid out of the proceeds of the floating charge (in any procedure) ahead of any payment to the charge holder. S386 and sch 6.

Note preferential creditors are not paid out of fixed charge assets.

Prescribed part creditors

If the floating charge was created on/after 15 9 03: a prescribed part of the floating charge must be set aside to pay the unsecured creditors (s176A and Insolvency Act 1986 (Prescribed Part) Order 2003 (SI2003/2097) (Applies to any procedure, n/a to admin receivership as it is only effective for charges created on/after 15 9 03)

Court winding up

Above applies to court as well as CVL – court winding up may be more expensive? Funds in ISA

Would Administration have a better outcome for Bank than Liquidation?

Administration is a collective procedure and, although purpose may be to realise property in order to make a distribution to.... Secured or preferential creditors...(SchB1 para 3(1)(c)), Administrator must consider interests of all creditors (para 3(2))

Property sale will trigger CGT liability in administration as in liquidation.

Bank would have more control over who is to be Administrator and very little control over the appointment of a Liquidator, but once appointed both office holders have to act independently and in the best interests of creditors.

Preparation of estimated outcome statement.

3(a) Set out the main legislative and other sources that you would consult when considering cross border insolvency; (4 marks)

European Insolvency Regulation [Council Regulation (EC) 1346/2000 on insolvency proceedings].

Cross Border Insolvency Regulations 2006 [SI2006/1030]

Insolvency Act 1986:

S426 - co-operation between courts exercising jurisdiction in relation to insolvency

s221 – winding up of unregistered companies

Statutory judgment enforcement regime: Foreign Judgments (Reciprocal Enforcement) Act 1933

Case law – both UK and European court

Common law

3(b) Taking into account the specific circumstances of the English Company, and making and stating any reasonable assumptions, set out, with reasons, where you consider the location of the English Company's Centre of Main Interest (COMI) to be; (5 marks)

COMI:

EC Regs and Uncitral Model Law: it is presumed that a corporate debtor's COMI is the location of the company's registered office, unless there is proof to the contrary (*article 3, Insolvency Regulation* and *article 16(3), Model Law*).

In determining the location of a debtor's COMI in the EC Regs, importance must be given to:

- the place where the debtor company has its central administration;
- Where the bodies responsible for the management and supervision of a company are in the same place as its registered office, and
- where the management decisions of the company are taken from.

[Interedil Srl (in liquidation) v Fallimento Interedil Srl and another [2011] EUECJ C-396/09]

Discussion: UK Company registered office in London; main accounting department in London; consider location of creditors; French and English branches equal size; location of directors and where decisions are taken – France or England? Directors – Holding Company (Luxembourg); Anthony where is he located?

COMI:

- must be ascertainable to third parties (Re Daisytek ISA Limited (2003) (unreported))
- in order to rebut the registered office presumption it must be shown that the head office functions take place elsewhere

(Re Eurofood IFSC Limited [2005] BCC 1021)

The Court of Appeal: Eurofood clearly established that: each company has its own COMI; and the head office presumption can be rebutted only by objective factors ascertainable by third parties. These factors should already be in the public domain and what a typical third party would learn as a result of dealing with the Company.

Matters that could only be established on enquiry should be excluded. The proper course therefore was to start with the presumption of COMI based on the registered office address. A non-exhaustive list of relevant issues to be considered was (in no order of importance):

who are the companies creditors/customers and where are they based?

under what law does it contract with creditors/customers?

where do its banking relationships take place?

where do customers contact/ correspond with the company?

where is its head office?

from where does it conduct business?

where are its employees based?

where are directors based?

where are shareholders based?

where is its management based?

where do board meetings take place?

where are administrative and accounting functions carried out?

where are the majority of its assets based?

where are the main bank accounts of the company based? where are the annual accounts filed?

Where are the auditors based?

(Re Stanford International Bank Ltd (in liquidation) [2010] EWCA Civ 137)

See also: BRAC Rent-A-Car International Inc, *Re* (2003) EWHC 128; (2003) 1 WLR 1421 Ch D

3(c) Making and stating any reasonable assumptions write a file note setting out, with reasons, the issues that may be encountered if the English Company is placed into Creditors' Voluntary Liquidation in England and explaining how these issues may be resolved; (10 marks)

File note

Discussion required around the following issues (n.b. no knowledge of French, German or other foreign insolvency processes is necessary)

CVL Liquidator in UK

- assume COMI of UK Company in UK and so main proceedings can be instituted in UK (art 3(1))

Liquidator will need to apply to court on form 7.20A (R7.62) for confirmation of appointment as voluntary liquidator. This is for the liquidator's appointment to be recognised under the EC Regs

There seems to be a possibility of an insolvency appointment in France. An insolvency appointment is also possible in Germany.

Secondary proceedings

There may be secondary proceedings in France and/or Germany (art 17 – 28)

EC Regs Art3(3) – any secondary proceedings must be winding up proceedings.

Reason for secondary proceedings

The existence of main proceedings allows the opening of secondary proceedings without the Company's insolvency being examined in the country where secondary proceedings are proposed (Art 29)

Must be an establishment

EC Regs Art 3(2) – where COMI is in one EC state, the courts of another EC State have jurisdiction to open insolvency proceedings against the Company only if it has an establishment in that state.

A French Court refused jurisdiction to open proceedings in respect of an Italian registered company as it had no establishment in France. (This judgment was set aside on appeal, on the grounds that the liquidator's application was not intended to "open" insolvency proceedings but to join the Italian company to the proceedings already opened). *Rastelli Davide e C Snc v Hidoux* (in his capacity as liquidator appointed

Law applicable is law of country of main proceedings, whether or not there are secondary proceedings (Art 37)

Conflict of law issues (Art 5 – 15) – generally law applicable in country of secondary proceedings:

security rights; set-off; retention of title; contracts relating to immovable property; payment systems and financial markets; contracts of employment; effects on rights subject to registration; Community patents and trade marks; detrimental acts; protection of third party purchasers; and effects on pending lawsuits.

Employee problems in Germany dealt with under German law.

Retention of title problems in Germany also dealt with under German law.

Where a company was subject to main proceedings in Italy and secondary proceedings in the UK – the assets in the UK would be distributed in accordance with UK insolvency law [*Re Alitalia Linee Aeree Italiane SpA, Connock & Boyden v Fantozzi* [2011] EWHC 15 (Ch), [2011] BPIR 308]

Synthetic insolvency:

- to retain value of assets (Anthony considers value in whole of business) UK Liquidator will want to protect assets in France and Germany.

The liquidator in the main proceedings can lose control of the assets if there are second proceedings.

This may hamper the sale of the business and/or not achieve maximum value for the assets.

To avoid secondary proceedings, the UK Liquidator may come to an agreement with the French and/or German creditors

Collins and Aikman: main proceedings of 24 companies in 10 EC jurisdictions, the administrators were mostly able to avoid secondary proceedings by entering into discussion with creditors in each of the different countries and provided them with assurances that their priorities as creditors in the local jurisdictions would be respected in the absence of secondary proceedings. The assurances were subsequently ratified by the court

[*Collins & Aikman Europe SA Collins & Ors, Re Insolvency Act 1986*, Court of Appeal - Chancery Division, June 09, 2006, [2006] EWHC 1343 (Ch)]

Nortel

MG Rover [High Court, Birmingham District Registry, 11 May 2005, HHJ Norris WC, Case Nos 2375-2382 of 2005 (unreported) and French Supreme Court (commercial chamber) 27 June 2006, No. 03-19.863]

If there are no secondary proceedings the Liquidator should take steps to dismiss the employees in France and Germany (under relevant laws) as well as in the UK

Practical issues in general

3(d) Write a file note setting out, with reasons, how the Holding Company and the Jersey Company may each be wound up in England. A detailed explanation of the procedures is not required. (6 marks)

Holding Company

COMI seems to be in Luxembourg

It is possible to change COMI, but is it worthwhile in the given circumstances? i.e. is the insolvency regime in England more favourable than in Luxembourg (no knowledge of Luxembourg proceedings) as rescue of the Holding Company is unlikely?

EC Regs – preamble para 4 states that it is necessary to avoid transferring assets or judicial proceedings from one jurisdiction to another to obtain a more favourable legal position (i.e. to avoid forum shopping)

It is possible to change COMI by moving registered office and/or central and financial administration to another jurisdiction to benefit from a more favourable insolvency process.

It was held that the COMI had moved to England from Luxembourg (even though the registered office was in Luxembourg) because the head office and principal operating address had moved to England, creditors had been notified of the change of address, a press release had been issued, a London bank account had been set up and the Company had been registered as an overseas company under the Companies Act.

Although the change of COMI was allowed because of the availability of restructuring in England.

[*Hellas Telecommunications (Luxembourg) II* [2011] EWHC 3176 (Ch)]

Note in this case the Holding Company is not likely to be restructured.

Jersey Company

This is not in EC.

COMI probably in Jersey.

IA s426 applies

Assets in England (and France and Germany).

and may also be wound up as an unregistered company s221.

Appeal Court has ruled that UK courts have authority to grant assistance to a foreign court under s426 even where an insolvency proceeding has not been opened in the foreign court.

[HSBC Bank plc v Tambrook Jersey Limited [2013] EWCA Civ 576]

4(a) Prepare a statement of affairs and deficiency account for the Company at 31 October 2014, setting out any reasonable assumptions you make; (8 marks)

Scary Hair Limited: Statement of Affairs at 31 October 2014

Ref	Assets subject to charges	Book Value £	Estimated To Realise £	£
	Motor vehicle	5,000	1,000	
	Due to Dodgy Motor Finance Plc	(6,000)	(6,000)	
	Shortfall to Dodgy Motor Finance Plc c/d		(5,000)	
	Assets not subject to charges			
	Leasehold improvements	15,000	0	
	Rent bond held by Landlord's solicitor	30,000		
	Less rent arrears	(15,000)		
	Less dilapidations	0	15,000	
	Fixtures, fittings and equipment	10,000	1,000	
	Stock	3,000		
	Bubbly Shampoo Suppliers Limited ROT claim (assume valid)	(1,500)		
		1,500	150	
	Estimated assets available to preferential creditors			16,150
1	Wage arrears	(3,700)		(3,700)
	Assets available to unsecured creditors			12,450
	Prescribed part creditors	n/a		
	Trade creditors	(40,000)		
	Add back quarterly rent	15,000		
	Add back Bubbly Shampoo Suppliers Limited (ROT)	1,500		
	Dodgy Motor Finance Plc b/d	(5,000)		
	Mrs Robinson – increase in claim	(47,000)		
	HMRC - VAT	(18,000)		
	HMRC – PAYE/NI	(10,000)		
	Director's loan	(20,000)		
	Bank loan and overdraft	(42,000)		
1	Wage arrears	(3,300)		
2	Redundancy pay	(13,867)		
3	Pay in lieu of notice	(12,250)	(194,917)	
	Estimated deficiency to unsecured creditors			(182,467)
	Share capital		(2)	
	Estimated deficiency to shareholders			(182,469)

Notes to Statement of Affairs

- 1 Employee preferential creditors
 Sch 6, para 9 wages owed for the whole or any part of the period in the 4 months before the relevant date of the insolvency. Subject to maximum of £800/employee (Insolvency Proceedings (Monetary Limits) Order 1986 SI1986/1996, art 4
 4 employees are owed over £800 and one is owed less than £800:
 $4 \times £800 = £3,200 + £500 = £3,700$
 Remaining wages $£7,000 - 3,700 = £3,300$ are unsecured
 No information given on holiday pay and so assume none or state assumption.
- 2 Redundancy pay
 Each employee aged between 30 and 40 years is entitled to one weeks pay for each year of service, subject of a maximum of £464 per week (Employment Rights Increase In Limits) Order 2014 (SI 2014 No382).
 In this case each employee has worked for the Company for 7 years and all but one earn over the maximum of £464/week:
 i.e. $464 \times 7 \text{ years} = £3,248$ per employee.
 $3,248 \times 4 \text{ employees} = £12,992$
 Remaining employee earns £500/month (say £125/week): $125 \times 7 \text{ years} = £875$
 $£12,992 + £875 = £13,867$
- 3 Notice pay: it is not stated in question whether or not notice of termination of employment has been given.
 If assume there is no notice then employees would be entitled to one week's wages for each year employed (as all employed for < 12 years), say:
 $7/4 \times 7,000 = £12,250$
 and subject to mitigation if employee(s) is employed during the notice period.
 For both redundancy and notice assumed no contractual obligations. Would need to ascertain this, especially whether or not Clare has a contract of employment with the Company. Alternatively need to state assumptions.

Scary Hair Limited: Estimated Deficiency Account at 31 October 2014

	£	£
Accumulated deficit per balance sheet		(110,002)
Reduction in value of leasehold improvements	(15,000)	
Rent bond less rent arrears (30,000 – 15,000)	15,000	
Reduction in value of stocks	(1,350)	
Reduction in value of fixtures, fittings and equipment	(9,000)	
Reduction in value of motor vehicle	(4,000)	
Change in stocks (ROT claim)	(1,500)	
Reduction in creditors – rent arrears	15,000	
Reduction in creditors – ROT claim	1,500	
Increase in Mrs Robinson's claim	(47,000)	
Redundancy pay and pay in lieu of notice	(26,117)	(72,467)
Deficiency per statement of affairs		(182,469)

4(b) Taking into account the known specific circumstances of the Company, identify the issues that need to be dealt with when placing the Company into Creditors' Voluntary Liquidation, as well as the issues that may be anticipated to arise during the Liquidation. (12 marks)

Issues that need to be addressed – placing company into CVL:

Money laundering/Identity checks/KYC

Fees

If assisting to place Company into CVL an IP will need to ascertain source of fees – there are no funds in Company:

- will Clare pay? Does she have the resources
- Will IP rely on being paid out of assets (risk that there may not be any assets – low realisable values and risk rent bond may not be forthcoming;
- Or Clare guarantees payment? (if she has resources)

Similar considerations on accepting appointment if no funds available for fees.

Written instructions/ensure director aware of her responsibilities

IP needs to obtain written instructions from Clare, as director, which clearly define the matters on which he/she advises (SIP 8, para 4)

Conflict of interest\competent to provide advice

Ensure no conflict of interest (SIP 8, para 6)

Ensure level of competence of IP to provide advice (SIP 8, para 7)

Court winding up

Need to talk to director of Bubbly re possibility of it petitioning for court winding up and to ascertain whether it is content with a CVL and whether court winding up would be better. Should discuss costs of doing so (although note ranking of petitioner for repayment of costs – R4.218(3)(h)). May also discuss who it wishes to be Liquidator (also depends upon strength of its vote). Should point out that court usually wants to see some advantage of court winding up over CVL (if Company in CVL).

Court will only override wishes of majority of creditors in special circumstances. Re Lubin, Rosen and Associates Ltd (1975) 1 AELR 577)

- If there is a court winding up – CVL liquidator must vacate office as the OR becomes Liquidator (s136).

- Any costs and expenses incurred in CVL will be subject to approval by the Court or may apply to court under R4.130.

See also Re Tony Rowse NMC Ltd [1996] BCC196

Note timescale for petition which has not yet been made.

Procedure to place Company into CVL

Discussion of Act, Rules and SIPs should be in context of circumstances of question.

Check articles before advising on convening members' meeting

S84 – special resolution of members to wind up

S85 – notice in Gazette

S98 – 100 – convene and hold creditors' meeting

Also, R4.49, 4.53 - 4.71

SIP 8 paras 8 -11 venue and time of meeting

Note para 11 re when to hold meetings of members and creditors, in the circumstances of the question it seems no reason to hold meetings on different dates.

SIP 8 paras 12 – 19: notice of meeting;

SIP 8 paras 20 - 21 – provision of information prior to creditors' meeting;

SIP 8, paras 22 – 27 , proxies and other representation. Also, SIP 10 Proxies

SIP 8, para 28 – proofs of debt;

SIP 8, para 29, Availability of proxies and POD for inspection;

SIP 8,, para 30 -33, Attendance at meetings;

SIP 8, para 34 – 38, Information to be provided at meeting;

SIP 8, para 39 - 52, Conduct of meeting;

SIP 8, para 53, Provision of Information to Liquidator;

SIP 8 para 54, Report to creditors following meeting

Mrs Robinson's personal injury claim:

- need to consider how to treat claim for voting purposes;
- no legal action has yet been taken and so it cannot easily be quantified;
- the minimum amount seems to be £3,000 as both parties seemed to be nearing agreement, at least before Mrs Robinson's hair started to fall out;
- Was Clare, as a director, negligent in not renewing public liability insurance?

Voting for Liquidator at s98 meetings – R4.67 – 4.70

R4.67(3) – a creditor shall not vote in respect of a debt for an unliquidated amount except where the chairman agrees "to put upon the debt an estimated minimum value for the purpose of entitlement to vote and admits his proof for that purpose."

Ethical considerations re desire to be appointed liquidator, comments on rival firm advising Mrs Robinson.

Retention of title

Consider valuation of claim for voting purposes.

Post liquidation:

Need to ascertain when clause agreed by Company and nature of clause. Whatever type of clause should identify goods to unpaid invoices (even in all monies clause)

- allowed by Sale of Goods Act 1979 for sale of specific goods;

- IA, s251: definition;

- must be incorporated into contract (standard terms of trading) at time of supply, and agreed before supply;

- incorporation of ROT clause may be by signature; "reasonable notice"; "course of dealing"; trade

association terms; reference to another document;

Email terms and conditions with order? Emphasis of ROT clause on invoice – could argue course of dealing?

Q does not specify what the nature of the ROT clause is, e.g. simple, all monies.

If all monies clause – should ascertain when balance with Bubbly Shampoo Ltd was nil.

Consider whether Clare's conduct needs further investigation – consider whether any funds to recover (what are Clare's personal assets?)

General issues re all liquidations, including dealing with employees, landlord, insurance

**4(c) Set out the issues that a Liquidator of the Company needs to consider in response to Clare's plan.
(5 marks)**

Liquidator is acting for Company and should advise Clare to take independent advice.

(Ethical Guidelines – including need to be independent, advocacy threat)

Also SIP 13, para 4

Consider SIP 13, Acquisition of Assets of Insolvency Companies by Directors: duty to act in best interests of company, its creditors and members (para 3)

Liquidator will need to consider issues in SIP 13, para 6

Discussion of issues re restriction on reuse of company name – s216.

What is a prohibited name: s216(2)

What is the restriction: s216(3)

Application to court for permission to use name, s216(3)

What are penalties: s216(4), s430, Sch10

Personal liability for debts following contravention – s217

JOINT INSOLVENCY EXAMINATION BOARD
ADMINISTRATIONS, COMPANY VOLUNTARY ARRANGEMENTS AND RECEIVERSHIPS
EXAMINER'S REPORT AND MARK PLAN FOR THE NOVEMBER 2014 SITTING

General comments

This was the first JIEB exam sitting subject to computer based marking ("e-marking") and as such candidates were presented with a different booklet format to other papers and previous sittings. In this respect candidates received a single booklet divided into 4 sections; one for each question. If additional paper was required supplementary booklets were available on request.

About 90% of candidates successfully managed to answer the relevant question in the correct location. As this was the first sitting using different stationery, all responses no matter where they were answered were marked.

In this paper there was a general improvement in candidates' presentation skills with the majority of answers being legible and following the appropriate template. However there appeared to be an increase in the proportion of candidates failing to answer the specific requirements of the question; instead adopting a scattergun approach and including many pages of irrelevant information.

Question 1

This was a predominantly numerical question testing candidate's ability to identify the appropriate level of contributions to a CVA and preparing an associated comparison of outcome.

(a) Based on the information provided, set out the level of monthly contributions to a CVA you would consider appropriate to be put forward to creditors. (5 marks)

Candidates were required to recommend a level of contributions based upon the Company's expectations as to profit improvement. The majority of candidates were able to make a good attempt of these calculations and the answers were well presented. The better candidates recognised that a proportion of the profit would normally be proposed as contributions (rather than the entire profit) and that the proposed remuneration of the directors was unlikely to be acceptable to creditors.

(b) Stating appropriate assumptions, prepare a Comparative Estimated Outcome Statement for inclusion in a CVA proposal. (15 marks)

There was general confusion within the candidate group as to what the CVA outcome should be compared against, with variations including comparisons to Administration, Compulsory Winding Up and Voluntary Liquidation. The majority of candidates were, however able to present their answers in an appropriate columnar format.

Many candidates struggled to appropriately categorise assets in the relevant fixed and floating charge sections of the Outcome Statement; however the majority recognised that within a CVA that these assets would be excluded. A high proportion of candidates also identified the respective process costs and gained marks for reasonable assumptions. The majority of (but not all) candidates correctly identified that, due to the date of debenture, the prescribed part would not apply.

The employee liability calculations were disappointing with a relatively small number attempting to calculate what was a simple redundancy and notice pay calculation of 4 employees.

A proportion of responses failed to include details of the assumptions or calculation they had applied and therefore lost out on marks. In the case of an assumption, this should be stated clearly to obtain marks. Workings for calculated figures should be included so that it is clear that the candidate is applying the appropriate methodology.

- (c) Without listing the requirements under the Rules and Statements of Insolvency Practice, set out the key matters in these particular circumstances that you would disclose to creditors within your Nominee's report. (5 marks)**

Despite the requirements specifying that answers were to be relevant to the circumstances, a large proportion of candidates presented a long list of general items that would be included within a Nominees Report. Numerous candidates wasted valuable time writing pages of information that was not relevant in the context of the question for which few if any marks could be awarded. Candidates should take care when reading the requirements of questions.

In this question candidates were required to identify key matters specific to the case that a Nominee would wish to bring to the attention of Creditors – in this case the Company's Directors projecting a marked turnaround of the profitability of the Company. Candidates generally did not highlight the risks associated with Management's plans, although many did identify some of the antecedent transactions that would also be reported. Generally it appeared that candidates thought that the role of the Nominee was purely administrative, providing general statutory information rather than adding value to the Creditors' decision as to whether they should accept the proposal. Section 2 of the Act makes it clear that opinions of the Nominee are required.

Question 2

This question should have been answered well by candidates especially those that deal regularly with Administrations. Generally candidates achieved a good mark on this question however many went off topic and wasted time listing points that were not required, perhaps leading to time pressure on other questions.

- (a) Prepare a note for the Directors outlining the conditions under which an Administrator can be appointed to the Company. Include within your note an explanation as to the meaning of insolvency and how it may apply to these circumstances. (10 marks)**

Candidates were required to outline the circumstances under which an Administrator can be appointed. Whilst one of the key factors (insolvency) was included specifically in the question there was very little focus on this by all but the best candidates. Very few candidates made reference to recent case law regarding the tests of insolvency.

This part of the question generated significantly long answers with many candidates outlining the full process of placing the company into Administration including consideration of ethics, documents filed, notifications, small company moratoriums, etc. Often buried within several pages of extraneous information was mention of achieving a 'purpose' however candidates rarely gave it more than a casual short comment. Candidates are reminded that their answers should be focused on the specific question being asked and a scattergun approach is only likely to result in increased time pressure on other questions and with few marks being awarded.

- (b) Set out alternative, non-insolvency options the Company could consider for dealing with the loan from Dechy. (5 marks)**

The majority of candidates were able to identify a number of restructuring options, however they were unable to explain how they could be applied in the circumstances. For example many candidates focused on generating funds through invoice finance (debtors £4.5m) or by selling stock (£3m): however they did not explain how this could assist in dealing with the loan (£10.5m).

- (c) Summarise the responsibilities of the Directors in the period leading up to the appointment of an Administrator. (10 marks)**

Most candidates were able to list matters that Directors should be aware of but a number failed to properly explain their answer. Examples include comments such as "Avoid making a preference" and "Ensure stock is not dissipated" without any explanation being given as to what was meant.

Disappointingly few candidates actually commented on trading profitably during this period and a surprising number discussed the Directors' responsibilities to enhance shareholder value.

Overall candidates generally performed well on this part of the question, which should be expected considering that the majority of candidates will be regularly issuing letters to Directors of Companies into the lead up to Administration or Liquidation.

Question 3

This question was split between technical and aspects of a Fixed Charge Receiver's appointment and the practical considerations in relation to completion of a property development. Overall this was the poorest answered question on the paper with candidates performing better at the practical part of the question rather than the theoretical, Fixed Charge Receiver specific aspects. It identified that many candidates are not familiar with the process of the appointment of a Receiver.

There did also appear to be general lack of understanding of the differences between a Receiver appointed under an agreement and one appointed under the Law of Property Act.

(a) Set out the steps required to appoint a Fixed Charge Receiver over the site. (10 marks)

Generally candidates were able to pick up a few of the stages to the appointment process. Responses that scored highly set out their answers logically in chronological order, those that did not tended to miss out key stages of the process.

(b) Explain the role of a Fixed Charge Receiver and outline their duties. (5 marks)

Generally candidates were able to demonstrate an understanding of the role of a Fixed Charge Receiver however many wasted time outlining their powers rather than focusing on the question requirements.

(c) Outline the matters you would review and the information you would require in order to establish whether or not to complete the Project. (10 marks)

This was the more practical aspect of the question and marks were awarded for any reasonable and appropriate points made. This part of the question was answered better than the other two, probably as it was not specific to the role of a Receiver.

The few candidates that thought about the issues logically and made relevant points for each issue scored highly. Overall very few candidates adopted this approach and whilst this part was better answered than (a) or (b) the majority of candidates could identify no more than a small number of relevant points.

Question 4

Candidates were presented with a situation where a floating charge had been granted to a Bank shortly prior to the appointment of an Administrator. The company concerned had continued to trade after the granting of the debenture with funds being received into and paid out of a secured overdraft.

Overall the presentation of answers was good: however candidates generally were unable to apply the principle being tested.

(a) In these circumstances, explain the effect of the legislation which may affect the Bank's security position. (3 marks)

Whilst most candidates were able to identify the relevant aspect of the Insolvency Act (Section 245) very few were able to copy out the relevant points, explain it or apply it to the circumstances of the case.

(b) Ignoring any claims that the LLP may have against its Partners, prepare a Statement of Affairs as at 31 October 2014 showing clearly how the Bank's claim would rank for dividend purposes. (14 marks)

Generally the Statement of Affairs format presented by candidates was good however the weaker candidates included Administration costs and ignored the existence of fixed charge assets. Most candidates correctly calculated the prescribed part.

Whilst many candidates had identified in part (a) that only part of the floating charge would be invalid very few attempted to calculate the extent of its validity and many made the assumption within their answer that the charge was entirely invalid. A number of candidates presented a comparative statement of an entirely valid or entirely invalid floating charge. Those that attempted the calculation of the debenture's extent of validity achieved a high mark on this question.

- (c) Calculate the amount for which the Partners may be liable under their personal guarantees to the Bank and outline other potential liabilities arising from the failure of the LLP for which they may also be responsible. (8 marks)**

Very few candidates successfully calculated the extent of the Partners' liability under their personal guarantee but the better candidates that attempted to do so picked up valuable marks.

Generally candidates struggled to identify other possible liabilities with most candidates focusing on general misfeasance in relation to reporting the claim to the insurers. A few candidates mentioned s214A.

**JIEB ADMINISTRATIONS, COMPANY VOLUNTARY ARRANGEMENTS AND RECEIVERSHIPS
NOVEMBER 2014**

EXAMINATION MARKING PLAN

Question 1

(a) Based on the information provided, set out the level of monthly contributions to a CVA you would consider appropriate to be put forward to creditors. (5 marks)

	IF ON ANNUAL BASIS		IF ON 9M BASIS		ON A MONTHLY BASIS
	£'000	£'000	£'000	£'000	£'000
Loss for the 9 months		(990)		(990)	(110)
Estimated loss for the 12 months		(1,320)			
Salary savings from redundancies		400		300	33.33
Robert pay cut					
Current gross pay	25		25		
For the period	300		225		
Saving	25%	75	25%	56.25	6.25
Other staff					
9 month pay	1,350		1,350		
Gross up	1,800		1,350 n/a		
Less Robert	(300)	From above	(225)	From above	
Less redundancies	(400)	From above	(300)	From above	
Remaining salaries	1,100		825		
Saving	10%	110	10%	82.5	9.17
Improvement in margin					
Current margin %	20.00%		20.00%		
Protected margin %	30.00%		30.00%		
Improvement	10.00%		10.00%		
Sales	6,300		6,300		
Grossed up	8,400		6,300		
Profit improvement		840		630	70.00
Motor vehicle costs					
Current cost	120		120		
Grossed up	160		120		
Saving	50%	80	50%	60	6.67
Rent reduction					
Current cost	225		225		
Grossed up	300		225		
Saving	25%	75	25%	56	6.25
Utilities savings					
Current cost	75		75		
Grossed up	100		75		
Saving	20%	20	20%		
Other costs (leased printer)		40		30	3.33
			for consistency necessary to annualise		
Add back loss on disposal (one off)					
For period		67		50	5.56
Mr Austin cost (dividends not included in net loss)		(100)		(75)	(8.33)
Estimated CVA profit		<u>287</u>		<u>215</u>	<u>23.89</u>

	IF ON ANNUAL BASIS		IF ON 9M BASIS		ON A MONTHLY BASIS
	£'000	£'000	£'000	£'000	£'000
Annualised		287		287	286.67
Adjustments for high costs					
Mrs Austin		40			Any reasonable assumption – this example assumed £60K pa
Robert Austin		<u>165</u>			Any reasonable assumption – this example assumed £60K pa
		<u>492</u>			
Contribution rate		80%			Any reasonable assumption
Contributions		<u>393</u>			
Contribution		<u>33</u>			

(b) Stating appropriate assumptions, prepare a Comparative Estimated Outcome Statement for inclusion in a CVA proposal. (15 marks)

	Book Value £'000	CVA £'000	Liquidation £'000	
Assets subject to a fixed charge				
Tangible assets	1,010	-	1,010	Any reasonable assumption but less than or equal to BV
Due to finance companies	<u>(1,000)</u>	-	<u>(1,000)</u>	
	10	-	10	
Trade debtors	1,600	-	1,280	Any reasonable assumption - here 80% see below
Less due to Stubbs Commercial Finance Limited	<u>(1,280)</u>	-	<u>(1,280)</u>	
Less Stubbs charges (termination, legal, etc.)	-	-	<u>(50)</u>	Any reasonable assumption
	320	-	<u>(50)</u>	
Assets subject to a floating charge				
Stock	2,200	-	550	Any reasonable assumption
Other debtors	25	-	-	Any reasonable assumption
Surplus from trade debts	320	-	-	If there is one from above
Surplus from fixed assets	10	-	10	If there is one from above
Preference	-	-	100	Any reasonable assumption
Transaction at undervalue (vehicle)	-	-	50	Any reasonable assumption
Illegal dividends	-	-	-	Any reasonable assumption
Contributions	-	1,967	-	assumed years x profit contribution in (a)
	<u>2,555</u>	<u>1,967</u>	<u>710</u>	
Costs				
Liquidator costs		-	(50)	Any reasonable assumption
Nominee costs		(7)	-	Any reasonable assumption
Supervisor costs		(25)	-	Any reasonable assumption
Other costs (Agents, legal etc.)		(5)	(25)	Any reasonable assumption
Available for preferential creditors		<u>1,930</u>	<u>635</u>	
Preferential creditors				

Employee arrears of pay	(3)	(40)	Assumed £800 per employee - 4 in CVA, 50 in liquidation (45+4+robert) Calc in Liquidation = 1350/50 ees /9 months x 12 months /52 weeks /5 days x 2 days owing
Employee holiday pay	(3)	(14)	
Available after preferential creditors	1,923	581	
Prescribed part	n/a	-	Pre-enterprise Act charge
Available for floating charge holders	1,923	581	
Floating charge holder - Stubbs	n/a	(50)	If negative from above
Available after floating charge holders	1,923	531	
Prescribed part	n/a	-	
Available for unsecured	1,923	531	
	1,923	531	
Unsecured creditors			
Shortfall to Bartoli Finance Limited	-	-	If there is one from above
Shortfall to Stubbs Commercial Finance Limited	-	-	If there is one from above
Trade creditors	(2,100)	(2,100)	(2,100)
HMRC	(400)	(400)	(400)
Director loan	(50)	(50)	(150)
Leased asset obligation	-	(90)	(90)
Employees	-	(23)	(104)
Other creditors	(345)	(345)	(345)
Shortfall to unsecured creditors	(1,085)	(2,658)	
Dividend to unsecured creditors p in £	0.64	0.18	

Assumptions

- Bartoli Finance Limited has a consolidation clause
- Assumed 80% of debts recoverable - any reasonable assumption
- Other debtors not recoverable
- Dividends not recoverable
- 5 year CVA
- No arrears of pay or a calculation or any reasonable assumption based on ee numbers (CVA illustration assumes 4 redundant ees owed full £800, liq assumes 50 ees owed full £800)
- No holiday pay outstanding or any reasonable assumption based on employee numbers (CVA (4 employees) and Liq (50 employees) illustration assumes 2 days each)
- Director repays preference
- Director repays Transaction at an Undervalue
- Director participates in CVA - alternative is that he may defer until after CVA

Employee workings

Role	Age	Service	Weekly pay	Notice pay	Redundancy weeks	Redundancy pay
Sales Director	36	2	2,885	5,769	2.0	928
Sales Coordinator	32	1	1,827	1,827	-	-
Quality control manager	40	3	1,538	4,615	3.0	1,392
Marketing director	55	4	1,442	5,769	6.0	2,784
				17,981		5,104
Total employee liability				23,085	Statutory	464

If liability is reflective of entire workforce then total employee claims are:

Salary for 4 as % of total Payroll	400	/	1,800	22%
Applied to cost			(£1,350k/9*12)	103,881

- Assumes full statutory notice (no mitigation) and redundancy (any reasonable assumption over notice periods, mitigation and contractual redundancy)

(c) Without listing the requirements under the Rules and Statements of Insolvency Practice, set out the key matters in these particular circumstances that you would disclose to creditors within your Nominee's report. (5 marks)

Matters to highlight in Nominee's report

- Loss of sales staff may impact on ability to generate sales.
- Loss of Quality control manager may also impact on deliverability of projections.
- Improvements to gross profit may be difficult within a CVA.
- Improvement to margin significantly higher than achieved in 2013.
- May be difficult to change utility supplier if debt outstanding.
- Creditors unlikely to accept that Robert gets paid £225,000 per year.
- Offences to report to creditors:
 - Possible illegal dividends – shareholder receiving in good faith?
 - Preference in relation to payment of director loan account
 - Transaction at an undervalue in relation to company car

Question 2

(a) Prepare a note for the Directors outlining the conditions under which an Administrator can be appointed to the Company. Include within your note an explanation as to the meaning of insolvency and how it may apply to these circumstances. (10 marks)

- Company is or is likely to become unable to pay its debts (s123)
- Distinction should be given between considerations of cash flow, and considerations of assets and liabilities (Eurosail)

Balance sheet test (s123(2))

- Focus on the debts which were due or would fall due in the reasonably near future
- Subsidiary investment likely to be impaired reducing net assets by £7m
- Contingent liability of £1m from subsidiary guarantee should be included
- Other parent guarantees could increase liabilities
- Loan not due – repayable over long period; arguable that the £8m long term liabilities does not 'count' for the test
- Breach of covenant may result in the loan becoming immediately due

	£
Net assets	3,400,000
Impair investment	(7,000,000)
Subsidiary guarantee	(1,000,000)
Impair intercompany debtor	<u>(3,000,000)</u>
Revised net liabilities	<u><u>(7,600,000)</u></u>

Cash flow test s123(1)(e)

- Audit fee overdue
- Net Current assets of £3.4m
 - Includes £3m of intercompany unlikely to be recoverable
- Other creditors in arrears? HMRC?
- £100,000 losses per month; Company likely to become insolvent.
- Unable to support Graf suggests that cash flow limited

Legal action test s123(1)

- (a) Statutory demand left unpaid or secured or compounded amounting to over £750. No indication of such an issue
- (b)-(d) depending on location; no indication of CCJs or enforcement action

The administration order is reasonably likely to achieve the purpose of administration:

- Rescuing the Company as a going concern; or (if this is not possible);
- Achieving a better result for the Company's creditors as a whole than would be likely if the Company were wound up (without first being in administration); or (if this is not possible);
- Realising property in order to make a distribution to one or more secured or preferential creditors.

Circumstances where administrator cannot be appointed:

- Not in liquidation para 8(1)
- Effects or carries out contracts of insurance subject to para 9(3)
- Has a liability in respect of deposit but not authorised deposit taker para 9(1)
- Directors out of court; no winding up petition outstanding

(b) Set out alternative, non-insolvency options the Company could consider for dealing with the loan from Dechy. (5 marks)

- Compromise of debt – bank may agree a reduction in its debt in the Company.
- Compromise of debt – bank may accept full and final settlement from third party.
- Debt for equity swap – bank may accept a reduction in its debt in return for a share (or all) of the equity.
- Debt rescheduling – the repayment profile could be extended.
- Interest forgiveness – the company could ask the bank to suspend payment of interest.
- Refinance – unlikely due to losses and security position.
- Security – the above may be supported by additional external security/Personal guarantees.
- Shareholder/director/external investor finance.
- Asset based lending; potentially part of a solution.
- Options require losses to be addressed; interest from the above could be substantially reduced but may be insufficient in itself to bring the company to profitability.

(c) Summarise the responsibilities of the Directors in the period leading up to the appointment of an Administrator. (10 marks)

- Responsibility for conduct of the Company's affairs remains with its directors until the formal appointment of an insolvency practitioner.
- Companies Act 2006 duties continue to apply but over riding responsibility to creditors.
- Company should only make such payments as are necessary to preserve its assets and continue the Company's trade:
 - Directors must *either* (a) be satisfied that the Company is trading profitably and that it will be able to meet all further debts incurred, *or* (b) honestly and reasonably believe that continuing to trade will result in a more beneficial realisation of the assets than immediate cessation.
 - Existing creditors are only paid when this must be done to ensure the continuation of essential supplies that cannot be sourced elsewhere.
- Wrongful trading risk - directors who know, or ought to realise, that there is no reasonable prospect of avoiding insolvent liquidation may be personally liable for wrongful trading unless they can demonstrate that they have taken every step to minimise the potential loss to creditors.
- No further credit should be incurred and any goods or services required must be specifically paid for immediately and before the date of any proposed insolvency procedure.
- Delivery of all further goods/services previously ordered, but not required, should not be accepted.
- No disposal of the Company's goods should be made to any creditor or customer who is owed money by the Company whether or not they are entitled to claim a set-off on any grounds.
- No disposal of the Company's assets should take place. This does not include stocks that are sold in the ordinary course of business for full value.
- Credit / charge cards issued to directors / senior personnel should no longer be used.

- All assets of the Company should be properly insured and all liability insurances such as for employees, products, property, owners and public liability should be maintained. The appropriate premiums should be paid.
- Bank account
 - If the Company's bank account is overdrawn and that overdraft liability is not secured against the Company's assets, no further funds should be paid into the overdrawn account.
 - If there are guarantees on an overdraft may be appropriate to ring fence funds to be paid in.
 - If the Company has granted security to the bank legal advice on nature of charge and entitlement to funds.
- No creditor claiming Retention of Title (ROT) to goods previously supplied should be permitted to remove any goods pending the appointment of an Insolvency Practitioner to the Company.
- No goods of the Company should be despatched or deposited with carriers, hauliers or warehousemen who are owed money by the Company.
- No redundancy or collective employment scheme should be undertaken or implemented by the Company without prior consultation with employees as required by law and after discussion with proposed administrators.
- Keep records of and rationale behind decisions.
- Keep records and file returns as required by Companies Act.
- Deposits should not be accepted if there is a risk of non-completion or such funds should be placed on trust.

Question 3

(a) Set out the steps required to appoint a Fixed Charge Receiver over the site. (10 marks)

Pre appointment

- Agree terms of engagement:
 - Basis of fees
 - Terms of indemnity between the appointor and appointee
- Consider any ethical issues.
- Ensure have the skills and expertise required.
- Establish if company in liquidation as this will impact on agency of the receiver.
- Establish if the Company is in administration as if it is then consent of administrator or permission of the court required.

Process

- Establish if there are any other charge holders.
- Consider impact of any deed of priority.
- Legal review facility and security documentation to establish:
 - Charge filed at Companies House and land registry.
 - If loan repayable on demand or whether other event of default has arisen.
 - Powers conferred by the documentation on the receiver.
 - Joint appointment – check powers can be exercised individually.

- In accordance with facility documentation serve letter of demand requiring immediate payment of all sums due.
- Consider whether debtor will invite the appointment of a receiver.
- If debt not repaid then a receiver can be appointed but:
 - Debtor must have opportunity to implement the mechanics of payment.
 - Care should be exercised where appointment out of business hours.
- Document of appointment sent to proposed receiver:
 - Appointment must be accepted by the end of the business day following the day of receipt.
 - Appointment effective from time of signature of receiver.
- Appointment can be accepted orally.
- Notice of appointment to Companies House within 7 days.
- Notify the Company of appointment. Contact directors and explain situation.
- Obtain legal advice on validity of appointment.

(b) Explain the role of a Fixed Charge Receiver and outline their duties. (5 marks)

Role:

- Recover money due to the lender and/or;
- Protect the position of the lender by taking control of an asset
- Not necessarily terminal.
- Independence; Receiver must act independently of bank or may be deemed agent of the bank.

Duties:

- Principle duty to lender.
- Also duty to:
 - Debtor/borrower.
 - Other charge holders.
 - Guarantors.
 - Other interested parties.
 - Preferential creditors.
- Must act in good faith, take reasonable precautions and exercise good faith in sale process and due diligence in the management of the charged asset
- Duty to sell the property at best reasonable price:
 - Does not extend to taking steps or incurring costs to enhance the prospects of sale.
 - Does not extend so far as to require a sale to be delayed.
 - *Silven Properties Limited & Anor v RBS & Ors.*
- Notice of appointment to Companies House within 7 days.
- Notice of ceasing to act to Companies House.
- File Receipts and Payments accounts within 1 month of the anniversary of appointment and subsequently every 6 months.
- Account for taxes such as VAT and CIS.

(c) Outline the matters you would review and the information you would require in order to establish whether or not to complete the Project. (10 marks)

- Establish level of funding required:
 - Obtain a copy of build plan and costs.
 - Obtain a full review of the build status.
 - Review assumptions contained in build plan.
 - Consult appropriate professionals (e.g. surveyor).
 - Establish revised build plan and funding requirements.
 - Establish if funding will be provided by bank (or guarantors or other parties)
 - Indemnity from bank for costs/liabilities.
- Review financial benefit of completion:
 - Value of property in current position compared to value of completed units.
 - Establish how issues regarding snagging and post-sale warranties will be dealt with.
- Discuss with insurers and ensure proper insurance in place.
- Establish new home warranty position.
- Establish if any warranties have obtained to date from sub-contractor work undertaken.
- Establish if subsidence issues have been resolved or addressed.
- Environmental issues
 - Establish the previous use for the site; brownfield.
 - Obtain any reports obtained pre-build.
 - Consult appropriate professionals if necessary.
- Health and safety
 - Establish what procedures and policies are in place and if deficient put processes in place.
 - Consider security arrangements.
 - Appoint appropriate professionals if necessary.
- Establish the employee position
 - Number.
 - Status - arrears of pay.
 - Roles of staff members.
 - Employment contracts - personally liable for contracts adopted. Adoption after 14 days.
 - Consider appointment of main contractor.
- Planning permission
 - Obtain copy of planning permission.
 - Establish whether work undertaken to date complies with planning.
 - Establish if any other matters apply such as tree preservation orders etc.
- Legal title
 - Establish whether freehold or leasehold.
 - Review title documents for any restrictive covenants.
- Existing contractor
 - Establish level of creditor arrears.
 - Establish whether co-operation of contractor required for completion; e.g. certificates relating to groundwork rectification.
 - If necessary discuss with contractor the situation to establish a mutually agreeable way forward.
- Developer contributions
 - Establish if any Section 106 (Town & Country Planning Act 1990) or CIL Regulations 2010 obligations exist.
 - Establish if road adoption Section 38 agreement in place.
 - Establish if any performance bonds have been provided to secure obligations.

- Charge holders
 - Establish if other charge holders exist and discuss strategy with them and seek their opinion.
 - Discuss strategy and benefit/cost with appointor and seek their opinion.
 - Establish view of other interested parties such as guarantors.

Question 4

(a) In these circumstances, explain the effect of the legislation which may affect the Bank's security position. (3 marks)

- Section 245 Avoidance of certain floating charges.
- Floating charge created at a relevant time is invalid except to the extent of the aggregate of new monies provided to the company.
- Company traded post creation of the charge and funds received and paid.
- The relevant time is 2 years for a connected party and 12 months for unconnected .
 - Bank appears to be unconnected.
 - Charge was created during the relevant period.
- It is also only a relevant time if the LLP was unable to pay its debts within the meaning of s123 or unable to as a consequence. Due to the existence of the insurance claim it is likely that at the date the charge was created the LLP was insolvent.

- (b) Ignoring any claims that the LLP may have against its Partners, prepare a Statement of Affairs as at 31 October 2014 showing clearly how the Bank's claim would rank for dividend purposes. (14 marks)

Statement of Affairs of Zardo Architectural design LLP

	Book value £'000		Estimated to realise £'000	
Assets specifically Pledged				
Goodwill	nil		10	
Amounts due to Watson Bank			(2,350)	See workings
Shortfall to Watson Bank			(2,340)	
Assets not specifically pledged				
Work in progress	6,000	10%	600	
Debtors	4,500	25%	1,125	
Office equipment	unknown		15	
Available for preferential creditors			1,740	
Preferential creditors			-	
			1,740	
Prescribed part			(351)	
Available for floating charge holder			1,389	
Floating charge holder			(1,250)	(from calculation)
Surplus to floating charge holders			139	
Prescribed part			351	
Unsecured non-preferential creditors				
HMRC			(200)	
Trade creditors			(50)	
Insurance claim			(3,500)	
Unsecured claim (floating charge holder)			(1,090)	
Shortfall to creditors			(4,350)	
Shareholders			??	
Deficit to shareholders				

- Assumed that assets stay at same level as per question

Bank position calculation

			£'000
Bank b/f			(2,500)
Receipts from debtors			
Debtors	4,500	from Q	
Days	90	from q	
Per day	50	4500/90	
trading period	28	from Q	1,400
Payments out			
Partners	(150)		Assuming continued
Salaries	(400)		£600k - £200k
Purchases	(50)		Trade creditor amount
PAYE/NI	(200)		Assumed September paid during Oct
VAT	(450)		from Q
			(1,250)
Debt due to bank as at 31/10/14			<u>(2,350)</u>

(c) Calculate the amount for which the Partners may be liable under their personal guarantees to the Bank and outline other potential liabilities arising from the failure of the LLP for which they may also be responsible. (8 marks)

- Tax liabilities - LLP tax transparent and therefore any tax payable on profits is a personal liability. Conversely partners may be able to claim losses.
- Personal guarantees – if the partners have provided any personal guarantees to suppliers, landlord, lease companies etc.
- Partners' drawings (s214A) in last 2 years - if partner had reasonable grounds for believing the LLP was unable to pay its debts as they fall due at the time of withdrawal or if there was no reasonable prospect of avoiding insolvent liquidation. Applicable if the LLP enters liquidation.
- Common law
 - Even if acting on LLP business partner could be liable to client for own negligent acts.
 - Could be liable to LLP if partners' negligence causes the insolvency.
- Negligence/breach of duty for failure to adhere to the terms of insurance resulting in an uninsured loss.

- Bank PG (limited to £50,000 per person) as follows:

Debt	(2,350)	
Paid under fixed charge	10	
Paid under floating charge	<u>1,250</u>	
	(1,090)	

Paid under unsecured

Unsecured debts (exc. bank)	(3,750)
Paid under prescribed part	<u>351</u>
Debt	(3,399)
Bank unsecured claim	(1,090)
Bank unsecured claim as % of total	24%

Floating charge surplus	139	From (b)
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Dividend to bank	34	34
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Total shortfall to bank	<u>(1,056)</u>
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Partners	30
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Liability each	<u>(35)</u>
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JOINT INSOLVENCY EXAMINATION BOARD

PERSONAL INSOLVENCY

EXAMINER'S REPORT AND MARK PLAN FOR THE NOVEMBER 2014 SITTING

General comments

This paper examined topics which should be core for anyone working in personal insolvency.

As with recent papers, scoring good marks depended on candidates' ability to demonstrate practical knowledge and to apply this to the facts. Such skills are key for any insolvency practitioner but were often not shown by candidates sitting this paper.

It was disappointing that, as in some prior years, a number of candidates showed a lack of personal insolvency awareness by using terminology which has no place in personal insolvency. Inappropriate references to Directors, Companies House and Registrar of Companies appeared far too often. Such references can prevent candidates from being awarded higher holistic marks.

QUESTION 1

Draft the memorandum. Set out the steps that you would take to deal with the seven proofs. In each case explain the legal and/or other principles which you will need to apply and set out any further information which you will require. (25 marks)

The information in the question indicated that the dividend was sizeable, and that the seven proofs were the most significant. Therefore, the adjudication of these larger claims would have a significant impact upon the overall dividend rate and thus the ultimate return to all creditors. Unfortunately candidates failed to identify this important practical implication when dealing with this question.

On the whole, candidates made a reasonable attempt to comment on each of the seven proofs, and made sensible observations. In particular, the issues regarding the landlord's claim and the HMRC claim were well understood. Candidates fared less well in understanding the significance of the husband's claim, the rule against double proof and the practical steps that would need to be taken in order to establish whether the husband could claim at all, irrespective of whether such a claim would be deferred or not.

Overall, whilst candidates demonstrated a reasonably good knowledge of the theoretical issues, key practical points were often either misunderstood, or missed entirely.

QUESTION 2

Write a letter to Mr. Jones. In your letter you should:

- (i) explain the role of a Nominee, the purpose of his report to creditors and the obligations placed on him by legislation, best practice and relevant case law. A listing of the contents of a proposal as prescribed by Rule 5.3 is not required. (20 marks)**

The candidates who scored best on the first section of this question appeared to have planned well and structured their answers in the same way in which the requirements of the question were set out. By structuring their answers so, candidates gave themselves the maximum opportunity to pick up marks by covering all of the requirements. Those candidates who scored less well adopted a scattergun approach, particularly regarding the obligations placed on the Nominee.

Most candidates were clear on the primary duties of the Nominee but few indicated practical knowledge by explaining that usually the Nominee will draft the proposal. Many candidates wasted time discussing the role of an advisor and supervisor when this was not asked for. The purpose of the Nominee's report was well answered, with most candidates being aware that the Nominee should give an opinion on the likelihood of approval, the prospects of successful implementation and that the proposal should be fit, fair and feasible. However, many candidates referred to reporting to the Court, even though there was no interim order.

Most candidates knew the content of the Nominee's report and thus scored well in that section. The better candidates explained the purpose of these entries in the report and related them to a trading IVA and thus tended to score higher holistic marks. Few, if any candidates mentioned discussing modifications with the debtor prior to the meeting, which again is a crucial practical aspect. In terms of the obligations placed upon the nominee by Common Law, most candidates correctly referred to *Greystoke* and the three tests.

- (ii) set out your suggestions as to the steps that Mr. Jones might himself take to be satisfied that he should support an IVA proposal made by Kate. (5 marks)**

The second part of the question was generally poorly answered. Whilst a reasonable number of candidates stated that Mr. Jones could block the IVA so was in a strong position to negotiate, a disappointing number failed to recognise the potential impact on his own business and few considered the implication of the loss of a major customer. Candidates often referred to carrying out investigations but did not consider the simple, practical aspects of speaking to other creditors and attending the meeting.

QUESTION 3

- (a) Prepare a cash flow forecast on a monthly basis for the Business for the year ending 31 October 2015. Set out your supporting calculations and state clearly any assumptions which you have made. (12 marks)**
- (b) Prepare a profit and loss account for the Business for the year ending 31 October 2015 and a balance sheet as at that date. Set out your supporting calculations and state clearly any assumptions which you have made. (8 marks)**
- (c) Giving your reasons, set out the practical difficulties and risks facing George were he to continue to trade the Business in an IVA. (5 marks)**

Note: Ignore all taxation, including VAT

The range of marks awarded for this question was dramatic. Some candidates scored very highly whilst a number of others achieved very low marks. Those low scoring answers appeared to be from candidates who either answered part (c) only and made no attempt at parts (a) and (b), or answered part (c) first and therefore only made generic comments, thus failing to score the marks available for practical observations.

Most candidates who attempted parts (a) and (b) were comfortable with the layout of a cash-flow forecast, although some candidates could have scored more marks by including workings to the cash-flow. This is particularly relevant where the numerical accuracy of the figures was wrong, but the candidates may have otherwise picked up marks for stating assumptions and showing their workings.

The profit and loss account and balance sheet sections were generally completed well. For those candidates who didn't score so well on these sections, it appears that often they included figures straight from the cash-flow rather than using the accruals basis. The depreciation charge was sometimes missed on the profit and loss account or balance sheet, or both.

QUESTION 4

- (a) What factors would you take into account in making the decision on whether or not to continue to trade? (5 marks)**

This first part of the question was generally reasonably well answered with a pleasing number of candidates picking up all of the available marks. Most candidates correctly identified that trading should only be carried out if necessary for the beneficial winding up of the Garage. The better prepared candidates gained marks by then identifying that with only 2 services booked, the inference was that future trade was unlikely to be profitable. Most candidates mentioned that sanction would be required and that some negotiation would be needed with the landlord to enable trade to continue. Potential risk issues and Health & Safety considerations were widely commented upon.

- (b) Assuming you decide not to continue to trade, identify the issues to be dealt with and the actions that you and the Agent will need to take in the next week. In relation to each issue, state clearly the relevant law and any assumptions which you have made. (20 marks)**

Part (b) was less well answered, despite the fact that there were considerable marks available for practical observations regarding the various scenarios, which should be familiar to candidates with experience in any form of insolvency, whether corporate or personal. A number of candidates gave chapter and verse about routine tasks such as file opening, considering the ethical position regarding the appointment and whether the appointee is a suitably qualified Insolvency Practitioner (despite the statement at the beginning of the question). Such matters were considered to be irrelevant and scored no marks, and spending effort on them wasted valuable time.

EXAMINATION MARKING PLAN – PERSONAL INSOLVENCY

QUESTION 1

Draft the memorandum. Set out the steps that you would take to deal with the seven proofs. In each case explain the legal and/or other principles which you will need to apply and set out any further information which you will require. (25 marks)

General remarks

The dividend is substantial - in the region of 50p in the £ before the 7 claims are considered. Therefore, the adjudication of the few larger claims will have a significant impact upon the overall dividend rate and thus the returns to all creditors. The remaining claims are relatively small, and thus adjudication of the larger claims needs to be robust whilst the remaining claims need not be subjected to the same degree of rigour.

Admit/reject claims in accordance with IR 6.104 & 6.105

HMRC Claim

A claim based upon assessments is valid unless and until returns are submitted which supersede the assessments. Therefore, from a practical perspective, it would be appropriate to review the books and records in an attempt to submit returns which may reduce the size of the HMRC claim.

Try to ascertain from the records if the debtor used an accountant and if so, contact them to see when the last returns were submitted and if they are prepared to prepare and submit the outstanding returns.

Although such actions are likely to delay any dividend, and incur a modest further cost, it is likely that it will result in a significant reduction in the HMRC claim. Check with HMRC that they are prepared to accept late returns and will amend the claim upon receipt.

It is perfectly acceptable for interest and penalties to be included, provided that they are properly calculated and that interest is only included up to the date of the bankruptcy order. Review and agree amounts and periods.

The Crown is entitled to offset the VAT refund against the income tax liability.

Landlord's claim

Any arrears of rent outstanding at the date of bankruptcy will constitute a bankruptcy debt and will thus be a provable debt in the bankruptcy (IR6.112). Effect of disclaimer – s315(3) determines the liability of the debtor/his estate. The disclaimer creates an immediate notional debt to the landlord.

Re Park Air Services - landlord is entitled to claim the full amount of future rent as set out in the lease, less a credit for rent obtainable in the event that the premises is re-let on the open market following the disclaimer, and less a discount for early payment. Disclaimer crystallises the future loss as a present claim at the disclaimer date (Park Air Services) or discount per rule 11.13. Obtain a copy of the lease and review to ensure claim for current and future rent is calculated in accordance with the terms of the lease.

Dilapidations – lease must provide for payment of dilapidations by the debtor. Landlord must provide itemised list of dilapidations, with quotations, or better still, invoices to support each material item. Round sum figure suggests that dilapidations claim may not be an itemised amount. Landlord cannot simply claim an overall sum, without itemised list – Chittenden v Pepper 2006.

Binwell

There is clearly a dispute between the debtor and Binwell, but more information is needed in order to adjudicate on the claim. The debtor appears to have previously instructed a solicitor therefore it is important to obtain the file from the solicitor and establish what actions, if any, were taken and what further steps are available

Review the boxes of records to identify any correspondence with Binwell which may evidence the counterclaim. Similarly, identify any correspondence from dissatisfied customers. Obtain full details from the debtor on the gross claim by Binwell including requesting copy invoices etc in support, and the reasons for the dispute.

Are there any claims for poor quality products within the other, smaller proofs, which may provide evidence in support? Binwell claim should be reduced by the cost (rather than sale value) of any such items.

Seek legal advice on the merits of any claim against Binwell. Right of action for consequential losses vests in the Trustee, who must decide whether there is any merit in the claim. Trustee must be mindful of commercial considerations, and not dilute the dividend unnecessarily. It may be more cost effective to negotiate a net claim. Given your knowledge that the debtor contemplated legal proceedings, you should give notice to the debtor of your decision, so that she is able to appeal against the decision should she see fit (IR6.105(2)). Advise Mrs Dixon that claim now vests in the estate

Mrs. Stephens

Mrs. S would appear to have a valid claim in the bankruptcy estate provided she can evidence the cost of repairs. However, if the debtor had taken out appropriate insurance, Mrs. S would have a claim under the Third Parties (Rights Against Insurers) Act 2010. If successful, this will have the effect of reducing the level of claims and thus enhancing the dividend for creditors.

Review boxes of records to identify any reference to insurance of vehicles

Claim value is small so consider how cost effective it is to investigate or challenge the claim further

Customer's claim for legal costs

Court order imposing liability on debtor for payment of the customer's legal costs was pre-bankruptcy. Although the assessment of costs took place after bankruptcy, this simply quantifies a previously unquantified claim and is therefore provable. Interest is payable provided that it is included in the terms of the court order and will be calculated from the date of the court order in September 2012 to the date of the bankruptcy order. Obtain a copy of the court order.

Trustee will need to inform the creditor of the incorrect application of the interest calculation, and seek the creditor's agreement to amend the claim accordingly in order to avoid the need to partially reject.

Mr. Dixon

Mr. Dixon is jointly liable for the debts due to each of the banks. Their separation has no effect on this position and as there has been no divorce, there will not be any orders in ancillary relief proceedings which might affect his liability. It is important to establish how much has been paid to each bank, and whether the payments made by Mr. Dixon to the banks have fully repaid the liability to the banks.

If the banks have not been fully paid, they remain as the Primary creditor, and are thus entitled to claim in the bankruptcy in their own right. In this circumstance, Mr. Dixon is unable to make a claim of his own, as it would constitute a double proof in respect of the same debt. If however he has paid one or more of the banks in full, he is entitled to make a claim.

Normally a spouse's claim is deferred pursuant to s329 IA86 to be paid only after all other creditors have been paid in full plus interest. But Mr. Dixon may be able to rank alongside other creditors if he has a subrogated claim having paid off the bank.

Dunstan

Obtain information from the Official Receiver's agent to identify what was returned, to whom, and when. Cross reference this information with the invoices in support of the claim from Dunstan.

Ensure that the claim has been reduced for the value of the items that were returned to Dunstan. Upon establishing that Dunstan is an audit client, you should refer to the Ethical Guidelines issued by the trustee's RPB regarding the potential conflict

Although the claim is material, the fact that the creditor is an audit client of the firm is unlikely to be sufficiently material to amount to a conflict of interest such that the Trustee would need to resign. Practically, it would be appropriate to instruct an independent third party to adjudicate on the claim, such as another Insolvency Practitioner not connected to the firm, or a solicitor with relevant experience.

Reference should be made in the next progress report or the final report to creditors of how this potential conflict has been dealt with.

QUESTION 2

(25 marks)

Write a letter to Mr. Jones. In your letter you should:

- (i) explain the role of a Nominee, the purpose of his report to creditors and the obligations placed on him by legislation, best practice and relevant case law. A listing of the contents of a proposal as prescribed by Rule 5.3 is not required. (20 marks)
- (ii) set out your suggestions as to the steps that Mr. Jones might himself take to be satisfied that he should support an IVA proposal made by Kate. (5 marks)

Role of Nominee and Purpose of Report

The nominee is the person who is to act in relation to the voluntary arrangement, for the purpose of supervising its implementation – s253(3) IA86.

In theory, the debtor prepares the proposal and gives it to the nominee for consideration. Nominee to provide an independent/objective review and assessment of the proposals. In practice, the nominee will be heavily involved in its preparation

Primary duties are:

- Report to creditors on proposal
- Summon a meeting of creditors
- Act as chairman at the meeting
- Report on outcome of the meeting

Primary purpose is to give the nominee's opinion as to whether the debtor's proposal has a reasonable prospect of being approved and implemented and whether a meeting of creditors should be summoned.

Is the proposal fit to be considered by creditors?

Is it fair & feasible?

And an acceptable alternative to bankruptcy?

Obligations placed upon him by legislation

Nominee must ensure that the proposal complies with all relevant legislation and be satisfied that the debtor is either an undischarged bankrupt or is insolvent.

Nominees report plus proposal must be submitted within 14 days of receipt of proposal, to all known creditors, and (if debtor bankrupt) to the OR and any appointed Trustee.

Notice of meeting must be given to all creditors – minimum 14 days' notice to be given. Meeting to be held no more than 28 days from receipt of proposal. Nominee should usually be chairman of meeting.

Chairman/nominee to report the outcome of the meeting–

- approved/rejected,
- resolutions taken,

Report outcome to Secretary of State

Obligations placed upon him by Best Practice

Prior to submitting his report, nominee should be satisfied that the proposal is structured and drafted such that it is easily understood and that it is likely to proceed to a successful conclusion. Face to face meeting with debtor. Nominee should act in accordance with ethical principles.

In his report, Nominee should comment upon:

- Extent of investigation into debtor's circumstances
- Basis of asset valuations
- Extent to which reliance can be placed upon debtor's estimates of liabilities
- Attitude/co-operation of debtor and instances of failure

- Discussions with secured/key creditors
- Attitude of major unsecured creditor
- Previous failures
- Estimate of likely result for creditors if IVA approved
- Likely effect of rejection
- Details of claims that could be pursued by a trustee in bankruptcy

Nominee to advise any third parties to seek independent legal advice. In practice, nominee would either prepare, or at least check all calculations, cash flow forecasts, etc and the statement of affairs. A sensitivity analysis should be carried out on any forecasts to assess the impact should relevant assumptions change.

Pre meeting preparation – discuss proposed modifications with debtor, sound out major creditors, prepare proxy schedules etc

Obligations placed upon him by Case Law

Re a debtor (No. 222 of 1990) – nominee must bring a considered opinion to bear on the proposal as expected of a professional person, and a “critical eye” upon the debtor’s statement of assets & liabilities – exercise professional judgement.

Desirable for the report to contain an express statement that the proposal complies with the legislation

Re Greystoke – three tests that the nominee should apply:

- True position re assets/liabilities is not materially different from that shown in the proposal
- Proposal has a real prospect of being implemented in the way that it is represented it will be
- No already manifest yet unavoidable prospective unfairness

If these not met, nominee should not normally recommend a meeting to consider the proposals, unless he clearly sets out his reasons for recommending one

Steps to be taken by Mr. Jones

His claim of £37,000 out of total indebtedness of £140,000 is just over 25% and he therefore has the voting power to reject the proposal. Mr. Jones should review proposal and check that his own claim is accurately stated. If not, there may be other mistakes/issues which might affect the potential success of the IVA.

Use his experience of the market and any current issues within the industry to assess whether her proposal is reasonable and achievable. Use his knowledge of doing business with Kate to assess her trustworthiness and desire for the IVA to succeed. Discuss proposal directly with Kate and/or the nominee.

Establish extent of overall indebtedness and identify other major creditors. Contact them for their views, and whether they will support her proposal.

Attend the meeting of creditors and raise questions, and listen to any issues raised by others in attendance and/or instruct the IP to attend on behalf of Mr. Jones. Suggest possible modifications

Ultimately, his decision whether or not to support the proposal depends upon the overall impact upon his business compared to the alternative, which is most likely to be bankruptcy. Given her position as a major customer, accounting for 10% of Malham’s turnover, how would losing her business and writing off £36k affect his business?

QUESTION 3

(25 marks)

- (a) Prepare a cash flow forecast on a monthly basis for the Business for the year ending 31 October 2015. Set out your supporting calculations and state clearly any assumptions which you have made. (12 marks)
- (b) Prepare a profit and loss account for the Business for the year ending 31 October 2015 and a balance sheet as at that date. Set out your supporting calculations and state clearly any assumptions which you have made. (8 marks)
- (c) Giving your reasons, set out the practical difficulties and risks facing George were he to continue to trade the Business in an IVA. (5 marks)

Note: Ignore all taxation, including VAT

WORKINGS

<p>Opening balance sheet 1 November 2014</p> <p>Debtors Monthly sales £20,000 Sales to non-public each month are 40% Monthly non-public sales are £8,000 Non-public customers pay in second month following sale Sales for Sept and Oct 14 not yet paid These will be received in Nov and Dec £8,000 + £8,000 = £16,000</p> <p>Creditors for supplies Supplies are acquired in month of sale Supplies are paid for in month following sale GP% is 50% on public sales and 40% on non-public sales Public sales are 60% of all sales and non-public 40%</p> <table style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="text-align: left;">Monthly:</th> <th style="text-align: right;">Total</th> <th style="text-align: right;">Public</th> <th style="text-align: right;">Non-public</th> </tr> </thead> <tbody> <tr> <td>Sales</td> <td style="text-align: right;">20,000</td> <td style="text-align: right;">12,000</td> <td style="text-align: right;">8,000</td> </tr> <tr> <td>GP</td> <td style="text-align: right;">9,200</td> <td style="text-align: right;">6,000</td> <td style="text-align: right;">3,200</td> </tr> <tr> <td>COS</td> <td style="text-align: right; border-top: 1px solid black; border-bottom: 1px solid black;">10,800</td> <td style="text-align: right; border-top: 1px solid black; border-bottom: 1px solid black;">6,000</td> <td style="text-align: right; border-top: 1px solid black; border-bottom: 1px solid black;">4,800</td> </tr> </tbody> </table> <p>Supplies unpaid for Oct only: £10,800</p>	Monthly:	Total	Public	Non-public	Sales	20,000	12,000	8,000	GP	9,200	6,000	3,200	COS	10,800	6,000	4,800	<p>Closing balance sheet 31 October 2015</p> <p>Debtors Monthly sales £25,000 Sales to non-public each month are 40% Monthly non-public sales are £10,000 Non-public customers pay in second month following sale Sales for Sept and Oct 15 not yet paid These will be received in Nov and Dec £10,000 + £10,000 = £20,000</p> <p>Creditors for supplies Supplies are acquired in month of sale Supplies are paid for in month following sale GP% is 50% on public sales and 40% on non-public sales Public sales are 60% of all sales and non-public 40%</p> <table style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="text-align: left;">Monthly:</th> <th style="text-align: right;">Total</th> <th style="text-align: right;">Public</th> <th style="text-align: right;">Non-public</th> </tr> </thead> <tbody> <tr> <td>Sales</td> <td style="text-align: right;">25,000</td> <td style="text-align: right;">15,000</td> <td style="text-align: right;">10,000</td> </tr> <tr> <td>GP</td> <td style="text-align: right;">11,500</td> <td style="text-align: right;">7,500</td> <td style="text-align: right;">4,000</td> </tr> <tr> <td>COS</td> <td style="text-align: right; border-top: 1px solid black; border-bottom: 1px solid black;">13,500</td> <td style="text-align: right; border-top: 1px solid black; border-bottom: 1px solid black;">7,500</td> <td style="text-align: right; border-top: 1px solid black; border-bottom: 1px solid black;">6,000</td> </tr> </tbody> </table> <p>Supplies unpaid for Oct only: £13,500</p>	Monthly:	Total	Public	Non-public	Sales	25,000	15,000	10,000	GP	11,500	7,500	4,000	COS	13,500	7,500	6,000
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Cashflow Forecast

	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sept	Oct	Total
Receipts													
Opening debtors	8,000	8,000											16,000
Sales to the public (60% x £20,000)	12,000	12,000	12,000	12,000	12,000	12,000							72,000
Sales to the public (60% x £25,000)							15,000	15,000	15,000	15,000	15,000	15,000	90,000
Sales to hotels etc (40% x £20,000)			8,000	8,000	8,000	8,000	8,000	8,000					48,000
Sales to hotels etc (40% x £25,000)									10,000	10,000	10,000	10,000	40,000
													0
One off sale made in Mar paid in May							60,000						60,000
	20,000	20,000	20,000	20,000	20,000	20,000	83,000	23,000	25,000	25,000	25,000	25,000	326,000
Payments													
Creditors	10,800												10,800
Supplies (paid one month after sale) (50% x 12,000) + 60% x 8000)		10,800	10,800	10,800	10,800	10,800	10,800						64,800
Supplies (paid one month after sale) (50% x 15000) + (60% x 10000)								13,500	13,500	13,500	13,500	13,500	67,500
One off sale: COS = 60% paid for in month of sale as supplies received a month early 60% x £60,000					36,000								36,000
Overheads	7,500	7,500	7,500	7,500	7,500	7,500	9,500	9,500	9,500	9,500	9,500	9,500	102,000
Drawings	2,500	2,500	2,500	2,500	2,500	2,500	2,500	2,500	2,500	2,500	2,500	2,500	30,000
Additional re IVA	500	500	500	500	500	500	500	500	500	500	500	500	6,000
	21,300	21,300	21,300	21,300	57,300	21,300	23,300	26,000	26,000	26,000	26,000	26,000	317,100
Net receipts	-1,300	-1,300	-1,300	-1,300	-37,300	-1,300	59,700	-3,000	-1,000	-1,000	-1,000	-1,000	8,900
Opening bank balance	7,000	5,700	4,400	3,100	1,800	-35,500	-36,800	22,900	19,900	18,900	17,900	16,900	7,000
Closing bank balance	5,700	4,400	3,100	1,800	-35,500	-36,800	22,900	19,900	18,900	17,900	16,900	15,900	15,900

Candidates may assume that the opening creditor figure of £10,800 is a claim in the IVA, and thus not include it as a payment in the cash flow. Either treatment is allowable provided the assumption is stated. If candidates exclude it as a payment, the closing bank balance each month should be increased (or overdraft reduced in March and April) and the closing balance at the year end will be increased by £10,800 in both the cash flow and the balance sheet

Profit and loss - y/e 31 October 2015			£	£
Sales				
Public	(6x12000) + (6x15000)		162,000	
Non-public	(6x8000) + (6x10000)		108,000	
One off			60,000	
			<hr/>	330,000
Cost of sales				
Public	50% x 162,000		(81,000)	
Non -public	60% x 108,000		(64,800)	
One off	60% x 60000		(36,000)	
				<hr/>
				(181,800)
Gross profit				<hr/>
				148,200
Costs				
Overheads	6 x 7,500 + 6 x 9,500		(102,000)	
Depreciation	25% x £22,000		(5,500)	
			<hr/>	(107,500)
Net profit				<hr/>
				40,700
Drawings				
	Living 12x2,500		(30,000)	
	IVA 12x500		(6,000)	
			<hr/>	(36,000)
Net profit after drawings				<hr/>
				4,700

Balance sheet	31-Oct-15	
	£	£
Fixed assets (£22,000 – 5,500)		16,500
Debtors (2x£10,000)		20,000
Bank account		15,900
		<hr/>
		52,400
Creditors (1x£13,500)		(13,500)
		<hr/>
Proprietor's funds		<u>38,900</u>
Funds b/f		34,200
Profit for the year	40,700	
Drawings (12x2500)	(30,000)	
IVA drawings (12x500)	(6,000)	
	<hr/>	
		4,700
Proprietor's funds		<u>38,900</u>

Practical difficulties

The key practical difficulty is that the cash flow projection indicates that the bank account will become overdrawn in March and April.

The bank has indicated that it will not permit the account to become overdrawn.

This overdraft arises as a result of the need to pay for the supplies for the one-off contract.

Alternative short term funding may need to be secured to enable trading to continue during this time.

Or George will need to try to renegotiate either the payment terms to suppliers or from the hotel chain for this one off contract.

In general, the underlying business is not profitable, and were it not for the on off contract, (which makes a profit of £24,000) there would be a loss after drawings meaning that payments into the IVA would not be made.

There is therefore an over-reliance on the one off contract and he will need to secure more of this type of work for the business to be viable in the longer term.

Position will be exacerbated by any late payments or bad debts from customers.

George should carry out a sensitivity analysis on his projections to assess the impact of changes to his assumptions.

QUESTION 4

(25 marks)

(a) What factors would you take into account in making the decision on whether or not to continue to trade?

(5 marks)

To trade or not to trade

Determine whether it is necessary and practicable for the garage to continue to trade remembering that trading should only be carried out if necessary for the beneficial winding up of the Garage.

If considering trading on, sanction will be required (IA86. s 314 and sch5).

The lack of routine business (only two services booked) suggests that carrying on the business will not be profitable.

Identify whether there are any special reasons to continue to trade: for example would it be worthwhile completing any of the restoration projects in progress.

If trading in some form is desirable, prepare projections (P&L and cashflow) to determine whether to do so would be practicable and establish the need for and availability of any funding requirement.

Rent will need to be paid and the landlord will need to agree to your occupation – especially if the lease is forfeit on bankruptcy.

Will it be necessary to retain any employees and if so, are they willing to work for you and how will they be paid
Can you continue to use the premises and are there environmental or Health & Safety issues that might prevent or inhibit trade.

Is a specialist licence needed?

It will be necessary to get insurance to cover the continued trade which may be difficult or restricted.

Is the co-operation of the bankrupt needed, and if so what is his attitude thus far?

- (b) Assuming you decide not to continue to trade, identify the issues to be dealt with and the actions that you and the Agent will need to take in the next week. In relation to each issue, state clearly the relevant law and any assumptions which you have made.**

(20 marks)

The premises

Obtain a copy of the lease.

Undertake a valuation of the lease although given that only 2 years out of 25 remain, that rent is in arrears and a large dilapidations claim is likely, the lease is probably of little or no value and given the ongoing liabilities, onerous.

Consider to what extent you will need to use or to have access to the premises, e.g. for removal of assets and/or continued trading.

Mr Whitely retains a limited right of distress for unpaid rent under IA86 s347 so there will be a need to negotiate with Mr Whitely and agree terms of use/access.

Solicitors should be instructed to reply to the letter from Mr Whitely's solicitors and the suggestion that you are personally liable as claimed must be refuted.

If the letter includes a "notice to elect" then it is likely that the lease will need to be disclaimed, in which case arrangements will need to be made immediately for the removal of saleable assets.

The arrangement with the hotel about the 1st floor accommodation should be ended immediately to avoid any liability issues arising.

The current occupants should be allowed to remove any personal belongings.

Motor vehicles

Establish the ownership of each vehicle.

If any of the four cars in the property is owned by third parties, find out whether the Garage has been paid for works carried out and collect any sums outstanding.

If necessary, consider if a repairer's lien can be exercised.

If thought appropriate, negotiate the terms (payment and otherwise) for any future work.

Once payment issues resolved, return vehicles owned by third parties to them.

Undertake valuation of all vehicles owned by the Garage.

Consider the best way of realising the vehicles owned by the Garage – take agent's advice as it may be appropriate for disposals to take place through private treaty or specialist sales, rather than through, for example, a general auction.

Parts/Suppliers

Check for Retention of Title issues, as there appear to be outstanding creditors. Review piles of post for statements and invoices for evidence of further ROT claims from suppliers.

Contact any other creditors identified from pile of post although if the parts derive from breaking cars there is unlikely to be a material problem.

Take a broad inventory of the parts and undertake a valuation.

Consider possible methods of disposal, for example through a specialist auction or trade/enthusiast internet websites

Consider contacting marque owners' clubs or similar.

Health and safety issues

Consider the action to be taken as regards:

- General state of the premises, including the yard
- The rusty barrels in the shipping container
- Access (authorised or otherwise) to the premises.
- the large quantity of paint

Specialist advice may be required, as may specialist waste removal services.

Olive Beauvoisin

Trace the proceeds of the sale into the Garage's bank account.

If the bank account is in credit, take advice on the possibility of OB being able to trace the proceeds.

She is less likely to have a claim if the account is overdrawn, but that may not be the whole story as the arrangement with OB and the sale all occurred after the making of the bankruptcy order.

Inform OB that she should take her own legal advice.

Employees

Establish the position as regards the receptionist and any other people working at the Garage.

Bankruptcy order does not automatically terminate their employment.

Meet with employees and issue relevant ERA claim forms and discuss their entitlements.

Do you need to retain any staff? Depends on whether any staff are needed to assist with the wind up of the business

General issues

Cancel the two booked services.

Insurance – consider the need to obtain open cover insurance over premises and assets pending full inventory and valuation of assets.

Site visit by insurer may be necessary given the specialist nature of the vehicles and the Health & Safety issues identified.

Security – change locks and consider whether premises are otherwise secure.

Is there the need for physical security pending full valuations etc?

Is there an alarm? If so, contact alarm company to advise of appointment, change contact details and change alarm code.

Secure business books and records for future use.

AML – carry out checks to identify relevant individuals given potential high value of cash transactions.