JOINT INSOLVENCY EXAMINATION BOARD

NOVEMBER 2009 EXAM (SCOTLAND)

EXAMINERS' REPORT AND MARKING PLANS

ADMINISTRATIONS, COMPANY VOLUNTARY ARRANGEMENTS and RECEIVERSHIPS NOVEMBER 2009 (SCOTLAND)

EXAMINER'S REPORT

EXAMINATION MARKING PLANS

The marking plans are set out below after each examiner's report. Markers are encouraged to use discretion and to award partial marks where a point is either not explained fully or made by implication. The marking plan is also adapted to give credit for valid points made by candidates. Inclusion of extraneous material often causes candidates to lose time that should be spent addressing the questions that were asked, and may adversely affect the holistic score.

QUESTION 1

This question required candidates to calculate accrued liabilities that would transfer to the purchaser of the business and assets of an insolvent business under the TUPE Regulations and how the RPO would treat such claims.

The calculation part of the question was generally well answered, however, the vast majority of candidates failed to address the actual question asked, i.e. the value of the retention should TUPE apply. As a result candidates calculated the amounts employees would receive from the RPO or spent time calculating the preferential and unsecured elements of each employees claim. A number of candidates either ignored notional tax and mitigation or did not know which claims this should be applied to.

The second part of the question was very poorly answered with candidates either failing to address the matters raised in the question, not understanding even the basic fundamentals of how the RPO treats claims in respect of redundant employees and failure to refer to the case law.

QUESTION 2

This question required candidates to demonstrate their knowledge of the risks in trading a company in receivership, an office holder's priorities in the first week of his appointment and his duties to the preferential creditors.

Part A of this question was poorly answered with candidates failing to relate the risks to the company in question. Had candidates thought more widely about the industry in which the company operated, and the challenges this would present a receiver, it is likely they would have scored higher.

The spread of marks for Part B of the question was wide, with a few candidates scoring very well, demonstrating that some had a clear understanding of the legal and practical matters that require to be addressed in the initial week of a receivership appointment. Conversely, it was clear the candidates who had little practical experience of trading appointments highlighting only statutory matters.

The final part of the question was poorly answered. Few candidates had a good working knowledge of SIP 14.

QUESTION 3

This question required an awareness of the preliminary considerations affecting the decision to accept appointment as Nominee in relation to a proposed Company Voluntary arrangement ("CVA") and the steps that a subsequently appointed Supervisor should take generally throughout the duration of the approved CVA. Candidates were also asked to set out a comparison of the estimated outcomes of the proposed CVA and liquidation reflecting the facts given

The initial matters that should be considered before acceptance of the appointment as Nominee was poorly answered with candidates, again, focussing on statutory and ethical considerations. Few candidates attempted to apply any form of practical knowledge including liaising with key creditors to garner their support for the proposed arrangement.

Part B was very poorly answered. While a number of candidates may not have practical experience of a CVA, it is an important tool in an insolvency practitioner's arsenal. The lack of practical experience, however, cannot explain candidates' failure to discuss the legal duties of a Supervisor during the CVA.

The final part of the question was very well answered with the majority of candidates dealing with deferred family interests, CGT and the differing claims that would arise on a CVL. A significant minority of candidates, however, failed to distinguish between liabilities and costs.

QUESTION 4

This question asked candidates to demonstrate various aspects of gaining an extension to an administration, the preparation of a receipts and payments account and how to deal with a distribution to unsecured creditors.

Parts A (i) and (ii) were both answered very well, with the majority of candidates demonstrating a sound knowledge of Rules 2.38 and 2.44, in respect of the extension, and SIP 9 in respect of the administrator's remuneration. Some candidates did not refer, in particular, to the requirements of Rule 2.38 (entitlement to vote) so threw away easy marks.

Candidates did not, however, fair as well in relation to the alternative ways to gain an extension to the administration. Those candidates that were comfortable with Schedule B1 and the Insolvency (Scotland) Rules scored adequately, however, the majority of answers were inadequate with candidates failing to appreciate that paragraph 52(1)(b) (no required creditors' meeting) was applicable.

The receipts and payments account was very well answered with a significant number of candidates gaining full marks. It was therefore all the more surprising, that few candidates were able to use this information to correctly calculate the prescribed part and the additional amount the bank would recover.

The final part of this question was poorly answered with a significant number of candidates not appreciating an administrator did not have an automatic power to distribute the prescribed part, or, at the other extreme, stating there were no circumstances in which an administrator could distribute to unsecured creditors. The few candidates who appreciated the ways in which such a distribution could be achieved, and the alternatives, scored well.

ADMINISTRATIONS, COMPANY VOLUNTARY ARRANGEMENTS and RECEIVERSHIPS NOVEMBER 2009 (SCOTLAND)

EXAMINATION MARKING PLAN

QUESTION 1

(a) Calculate the amount of the retention sum in respect of the claims of the five redundant employees against the Company. (Assume that any claim requiring mitigation is mitigated by 50%). (10 marks)

See MS Excel file Q1 AE Ramsey & Co Ltd see overleaf
Statutory notice pay is 1 week for each complete year of service - max 12 weeks
A claim for notice pay must be mitigated
Notice pay is subject to deduction of notional tax
Statutory redundancy is payable up to a weekly limit of £350

QUESTION 1
AE RAMSEY & CO LTD

Question - Table

Employee	Service Years	Age	Weekly Pay (5 day week)	Arrears of Pay (in days)	Remaining Holidays Due (in days)	Redundancy Qualifying weeks
1	2	19	600	20	3	1
2	5	33	1,000	20	9	5
3	1	24	800	20	4	0
4	15	51	1,500	20	13	25
5	12	43	1,250	20	14	21

Answer

Employee	Arrears of Pay £	Holiday Pay £	Lieu of Notice Pay £	Redundancy Pay £	
1	2,400	360	1,200	350	
2	4,000	1,800	5,000	1,750	
3	3,200	640	800	0	
4	6,000	3,900	18,000	8,750	
5	5,000	3,500	15,000	7,350	
			40,000		
Mitigation			-20,000		
			20,000		
Notional Tax@20%			-4,000		
	20,600	10,200	16,000	18,200	**65,000**

(b) State, with reasons, how, under the ERA, the Redundancy Payments Office is likely to deal with the claims of both the five redundant employees and the ten employees employed by the purchaser. (10 marks)

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) protects employee rights when a business they work in is taken over by a new owner.
Normally, employees employed by the new owner will have continuity of employment from the old to the new owner and the new owner will be liable for any debts owed under contracts of employment.
This protection will also normally apply to any employees dismissed in connection with the transfer and whose dismissals will therefore be deemed automatically unfair unless made for an economic, technological or organisational reason.
The TUPE protection may or may not apply where the previous owner was insolvent at the time of the business transfer
TUPE protection will apply to insolvencies where the intention is to rescue the business
TUPE protection will not apply to insolvencies where the intention is to liquidate assets in order to distribute the proceeds to creditors.
Whether TUPE protection does or does not apply to a business sale in an Administration is not absolutely clear. The Regulations do not specify to which of the different types of formal insolvency procedure in the UK the TUPE protection will or will not apply.
The EAT recently ruled (Oakland v Wellswood (Yorkshire) Ltd) that TUPE did not apply in a case where the purpose of Administration was to make a distribution of assets to creditors rather than to rescue the company. That decision has since been overturned by the Court of Appeal (so far as it related to unfair dismissal) but no additional guidance was given on the EAT's findings in relation to TUPE
If the Administration is deemed to constitute a liquidation of assets, TUPE will not apply – no protection of employee rights.
If the Administration is deemed to constitute a rescue procedure, TUPE will apply – protection of employee rights.
The five redundant employees
If TUPE is deemed not to apply, the 5 redundant employees would have claims against the insolvent employer and not the purchaser.
Consequently under the Employment Rights Act 1996, their claims up to certain limits should be paid from the National Insurance Fund by the RPO.
If TUPE is deemed to apply the RPO will still pay dismissed employees arrears of wages and holiday pay to the normal NIF limits
The ten employees employed by the purchaser
If TUPE is deemed not to apply the transferred employees would not have protected employment rights. No liability for unpaid contractual debts would pass to the new owner.
Consequently under the Employment Rights Act 1996, their claims for arrears of pay, holiday pay, pay in lieu of notice and redundancy pay, up to certain limits should be paid from the National Insurance Fund by the RPO.
Claims in excess of the ERA limits would form residual claims against the insolvent transferee
If TUPE is deemed to apply the transferred employees would have protected employment rights.
Nevertheless, to assist the rescue, the RPO will pay arrears of wages and holidays taken but unpaid (NB not accrued holiday pay) up to the usual ERA limits (8 wks @ £350 and 6 wks @ £350 respectively)
The RPO's debt will stay with the insolvent company
The transferee will be liable for any residual debt.

Question 2 – Revie Engineering Ltd

(a) Identify the risks generally of trading a company in Receivership. (8 marks)

Fundamental risk
Continued trading should only be undertaken in order to enhance the recovery prospects for the secured creditors and is not otherwise prejudicial to the interests of the preferential creditors
The fundamental risk of continued trading is that the actual outcome for creditors is worse than if there had been no continued trading
Supplementary risks
No purchaser found for the business and assets on a "going concern" basis and therefore assets are sold at break up value
The prospect of maximising the value of book debts and/or work-in-progress is not fulfilled
The prospect of realising significant value for goodwill, intellectual property rights or other intangible assets is not fulfilled.
The prospect of mitigating liabilities (e.g. employee liabilities) is not fulfilled
The assumptions underlying the trading forecast prove inaccurate such that profit/loss from continued trading is materially at -ve with the forecast
The level of funding required to support trading evidenced by the cash flow forecast proves inadequate
Valid ROT claims prove more extensive than anticipated
Key suppliers/hauliers fail to support continued trading such that availability of raw materials/other inputs becomes a problem
Key directors/employees leave or fail to cooperate
Major customers fail to support continued trading or require terms which are not acceptable
Bad debts are incurred because of the failure of customers to pay
Unforeseen environmental issues have a detrimental impact on trading
Unforeseen health and safety issues have a detrimental effect on trading
Strike action or lack of cooperation from employees/labour force arising from some grievance or disagreement
The risk that controls over trading fail for some reason
If leasehold property, the rent position and the ability to negotiate terms with the landlord
Problems with production/process which adversely affects product/service standards/quality
Claims arising as a result of continued trading e.g. for product failures
No moratorium against creditor actions & proceedings e.g. repossession of HP/leased assets
Adoption of employee contracts (qualifying liabilities) after 14 days
Termination of contracts on appointment of receiver
Termination of licences on appointment of receiver
No recognition of receivership under EC Regulations
Personal liability for contracts entered into, unless specifically excluded

(b) Outline your main priorities during the first week of your appointment in this case. (8 marks)

Administrative arrangements
Solicitors instructed to advise on scope and validity of appointment and charges over assets
Job code, bank accounts and administrative records set up
Obtain company search (if not already done so)
Arrange appropriate staffing
Notices and communications
Appointment served on Company, filed with Reg of Companies and advertised in Edinburgh Gazette and local paper
Company solicitors and auditors notified of appointment
Meet with directors/management team; notify suspension of powers and request SoA
Address employees and unions
Any creditors exercising diligence etc notified of appointment
Security of assets
Adequate insurance of assets confirmed; environmental risk assessment
Vital documentation secured
Freeze bank accounts and take control of cash
Cancel credit cards
Review physical security arrangements in respect of premises and assets
Control of trading
Incoming and outgoing mail controlled; appointment notified on letters, invoices, websites etc
Review of direct debits and standing orders and decide if any should continue
Arrange stock take; establish ROT position and claims handling procedures
Establish cut off and controls over purchase orders and goods inwards and over sales and goods outwards
Establish utility readings and arrange basis for continued supply
Prepare trading cash flow; identify funding requirement
Sale of business and assets
Agents instructed re identification, inventory and valuation of assets
Advertise business/assets for sale
Produce a sales memorandum
Scrutinise contracts and assess impact of appointment/ability to trade
Health and safety audit
Contact major customers to agree terms of trade
Change registered office
Contact key suppliers/creditors to notify appointment and establish terms of dealings

(c) State the duties of a Receiver to the preferential creditors. (4 marks)

Duty to pay preferential debts out of the assets coming into the hands of the receiver in priority to any claims for principal or interest in respect of debentures secured by a floating charge
Where at the time of appointment the company is not in the course of being wound up
Duty to distinguish on a proper interpretation of the charging document(s) which assets are subject to a standard security and which are subject to a floating charge – the process of categorisation
To take legal advice about proper categorisation if in doubt
In respect of the costs of realising assets, to allocate such costs between the standard security and bond and floating charge assets appropriately exercising professional judgement with independence of mind and integrity, maintaining a proper balance between the classes of creditor
Where no payment is to be made to the preferential creditors then receiver should write to them explaining why he is unable to make a payment
Where there will be a distribution to them, the receiver should provide adequate information to enable them to calculate their claims
In the case of employee preferential claims, the receiver should calculate such claims and provide the employee with the calculation and such further explanation as he may require
The receiver should pay preferential debts as soon as practicable after funds become available and the amount of the preferential debts has been ascertained
This may entail a payment in full or on account before all claims have been agreed whenever it is practicable to do so
When funds are inadequate to pay preferential debts in full the receiver should disclose: The asset realisations categorised as subject to the bond and floating charge, and The costs allocated against those assets
If, for administrative convenience, arrangements are made for a liquidator to pay the receivership preferential claims, these arrangements are at the receiver's risk.

Question 3 – Ron Greenwood Law LLP

(a) Outline the matters that you should consider and the steps that generally you should take before agreeing to act as a Nominee. (5 marks)

Ensure no ethical or other reasons preventing acceptance of appointment
Arrange an initial meting with the directors. Explain the different roles of nominee and supervisor and the need to maintain independence.
Explain that duty of nominee to perform independent review of the proposal cannot be fettered by any instructions of the directors. Directors to seek independent legal advice where appropriate.
Consider whether CVA is the most appropriate procedure for dealing with the entity's problems. Consider if moratorium required.
Ensure there are sufficient assets to fund the costs and expenses of the CVA, including fees. Decide whether to seek approval to fees on the basis of time costs as on a percentage of realisations/distributions
Note details of all registered charges giving the right to appoint an AR/Administrator. Discuss options with charge holders and obtain agreement in principle
Where Crown debts are significant, consider preliminary consultation with HMR&C VAS to discover likelihood of support for CVA proposal
Consider preliminary talks with key suppliers/customers. Review contracts to see if they terminate on insolvency
Confirm details of any creditors who have threatened/commenced legal proceedings
Consider the position of any landlords and tenants as necessary
Consider with the directors any necessary redundancies; follow appropriate consultation and liaison with unions/employee reps
Keep a file note of all matters discussed with the directors. A copy of the file note or a letter of advice should be sent to the directors
Ensure the directors hold a board meeting to resolve on a CVA and to instruct your firm
Issue an engagement letter; obtain signed acknowledgement.
Where possible obtain and advance of funds to cover fees and Disbursements to the commencement of the CVA
Sufficient knowledge and staff to deal with the case
MLR identification checks carried out

(b) Outline the legal and practical steps that a Supervisor should take generally during his tenure of office from commencement to the conclusion of a CVA. (10 marks)

Ensure that chairman's report of the meetings of creditors and members to consider the CVA has been filed in court (within 4 days of the meetings)
Give notice of the result to creditors and members immediately
File a copy of the report with Registrar
Open the administrative records of the Supervisor to include time recording code, estate cash book, diary and IP Record
Open supervisor's bank account and transfer any funds held on the client account
Supervisor to take into his custody all assets included in the arrangement.
Ensure physical security of assets
Instruct agents as appropriate
Arrange insurance cover as necessary
Ensure that the CVA is conducted strictly in accordance with the approved proposals.
Monitor contributions from trading or third parties.
Notify HMRC within 21 days
Comply with duties re occupational pension scheme

Supervisor's annual account and report within 2 months of end of each anniversary to: The court The Registrar The Company The creditors The members The auditors
In the event of a default in complying with the terms of the CVA, check the proposal for the extent of the Supervisors' powers and duties. Consult with creditors if the proposal requires.
Complete the IP Record as afar as possible
Agree claims and declare interim dividends in line with the approved proposal
Finalise and pay all costs allowed under the proposal
Settle any tax liabilities
Agree final remuneration
Give notice of intended final dividend and distribute surplus funds to creditors
Within 28 days of completion or termination send Notice that CVA fully implemented or terminated together with Supervisor's final account and report to same parties entitle to annual report
Pay unclaimed dividends as provided in the proposal
Complete IP Record and retain for 10 years
Close administrative records
Specific penalty bonding for value of assets
Obtain court directions on any matters where uncertain

(c) Draft a statement comparing the estimated outcome of the proposed CVA and Creditors' Voluntary Liquidation. (Assume that the incidental costs of realising jointly owned property are borne entirely by the LLP). (15 marks)

See MS Excel file Q3 Greenwood Law LLP see overleaf

QUESTION 3
RON GREENWOOD LAW LLP

ASSETS

Workings

Property Assets	**Estimated Value** £	**3pty Interest**	**Beneficial Interest** £	**Mortgages** £	**Equity** £	**CVA** £	**CVL** £
Clemence Cottage	270,000	0	270,000	-90,000	180,000	180,000	180,000
Castelo De Keegan, Portugal	380,000	-190,000	190,000	0	190,000	190,000	190,000
1 Sansom Road, Bunbury	250,000	-125,000	125,000				
2 Wilkins Drive, Bunbury	100,000	0	100,000				
3 Brooking Street, Bunbury	300,000	-150,000	150,000				
	650,000	-275,000	375,000	-205,000	170,000	70,000	170,000
Woodcock Park Garages	250,000	-125,000	125,000	0	125,000	125,000	125,000
4 Coppell Road	220,000	0	220,000	-120,000	100,000	100,000	100,000
Deferred family interests						275,000	0
Non Property Assets							
Vehicles					66,000	28,000	66,000
Equipment					14,000	0	14,000
Cash at bank					12,000	0	12,000

COSTS	**CVA**	**CVL**
Estimated costs of the CVL/CVA	-60,000	-120,000
CGT - Greenwwod Law LLP	-82,000	-82,000
CGT - Deferred family interests	-56,000	0
Law Society intervention	0	-100,000
PI run off cover	0	-150,000
Est Total Assets less Costs	770,000	405,000
CLAIMS		
Unsecured loans etc	-700,000	-700,000
Employee claims	0	-110,000
	-700,000	-810,000
Dividend prospects - p in £	110.00	50.00

Question 4 – Robson Packaging Ltd

(a) For the purpose of seeking an extension of the Administration:

(i) Outline the main contents of your report to creditors (5 marks);

A progress report for the period since the last progress report (if any) or the date the company entered administration
Details of the court and the court reference number
Details of the company, the address of its registered office and registered number
Details of the administrator
Details of the administrator's appointment and appointor
Any changes in office holder
In the case of joint administrators, their functions (Para 100)
Details of any extensions to the initial period of appointment
Progress during the period
A receipts and payments account Stating what assets have been realised and what payments have been made to creditors and others In the form of an abstract showing receipts and payments during the period of the report
Details of any assets that remain to be realised
Any other relevant information for the creditors
Details of time costs and fees drawn
Estimated amount of net property and prescribed part

(ii) Set out in principle the information you are required to disclose in relation to your remuneration (5 marks);

Required practice disclosure requirements are per SIP 9 (Scotland)
Disclosure requirements depend on whether or not approval has already been obtained for the basis of fixing the Administrator's remuneration. On the facts it is apparent that the basis of the Administrator's remuneration has already been approved.
In that case the following disclosure is required: • Report the details of the resolution passed • Report the amount of remuneration drawn to date in accordance with the resolution • Charge out rates to be provided • An account of receipts and payments to date • The total time spent and the charge-out value to date • A narrative explanation of time costs incurred accompanied by a time cost matrix analysing total time spent by grade of staff across categories of work activity
Categories of work activity include: • Administration & planning • Investigations • Realisation of assets • Trading • Creditors • Case specific matters And other categories where appropriate
Where cumulative fees exceed £50,000, proportionality is likely to require amore detailed level of breakdown
Creditors' guide to Administrator's fees

(iii) Outline the alternative steps you would take to obtain the requisite creditor approval of the proposed extension (5 marks);

Where an administrator requests an extension of the period of administration by consent of the creditors, his request shall be accompanied by a progress report
Consent may be either written or signified at a creditors meeting
Anything required or permitted to be done at a creditors' meeting may be done by correspondence between the administrator and the creditors – i.e. by circulating a postal resolution in lieu of a physical meeting of creditors
Consent means: Of each secured creditor, and Creditors whose debts amount to more than 50% of the company's unsecured debts (but disregarding debts of any creditor who does not respond to an invitation to give or withhold consent)
But where the administrator has made a statement under Par 52(1)(b) (i.e. insufficient property to make a distribution to unsecured creditors other than by virtue of the prescribed part) consent is only required from the secured, and the preferential creditors if a distribution is being made to them.
In this case only the consent of the secured creditor is required
In these circumstances a simple written communication from the secured creditor consenting to the proposed extension is all that is required

(iv) Draft your account of receipts and payments in compliance with the Rules and required best practice (8 marks)

ROBSON PACKAGING LTD

(a)(iv) Administrator's Receipts and Payments Account

Statement of Affairs £		07-Jan-09 to 06-Jul-09 £	07-Jul-09 to 03-Nov-09 £	Cumulative £
	Assets not specifically pledged			
250	Goodwill	350	0	350
10	Leasehold property	10	0	10
100	Intellectual property rights	100	0	100
40	Factored book debt - surplus	15	40	55
15	Non factored debts	5	15	20
45	Administration trading sales	20	45	65
35	Plant & equipment	35	0	35
240	Plant & equipment – subject to Retention of Title	240	0	240
	Bank interest	10	5	15
735		785	105	890
	Payments			
	Administrator's fees	55	30	85
	Legal & debt collection fees	35	15	50
	Direct labour	60		60
	Other trading costs	35		35
	Sundry expenses	10	5	15
		195	50	245
	Distributions			
	Floating chargeholder	340	55	395
	Funds in hand - Floating Charge	250	0	250
	Total payments and funds in hand	250	0	250

(b) Assuming that the ROT claim is ultimately resolved in favour of the Company, and there are no further receipts and payments to the conclusion of the Administration

(i) Calculate the amount of the prescribed part and the further amount recovered by the Bank; (2 marks)

Prescribed part	10,000	50%	5,000
	635,000	20%	127000
Net Property	645,000		132,000
Further amount recovered by Bank (£250,000-£132,000)			118,000

(ii) Discuss the options open to the Administrator for dealing with the prescribed part. (5 marks).

Administrator may not make a distribution to a creditor who is neither secured nor preferential unless the court gives permission (Para 65(3))
This applies to the prescribed part to which the unsecured creditors are entitled under s.176A
S.176 A will not apply if: The company's net property is less than the prescribed minimum and The administrator thinks that the cost of making a distribution to unsecured creditors would be disproportionate to the benefits Neither of which are applicable in this case OR The court dis-applies s176A on the application of the Administrator on the grounds that the costs are disproportionate to the benefits
Either seek the permission of the court to make the distribution of the prescribed part to the unsecured creditors in the Administration
Alternatively, convert the administration to CVL under Para 83 Schedule B1
If the Administrator's proposals did not contain conversion to CVL as an exit route from Administration, first seek an amendment to the proposals by passing a resolution of the creditors

LIQUIDATIONS (SCOTLAND) NOVEMBER 2009

EXAMINER'S REPORT

EXAMINATION MARKING PLANS

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GENERAL

Candidates need to read the question, try to address the issues raised and avoid including extraneous material.

QUESTION 1

Question 1 was split into four distinct areas. The first dealing with the Liquidator's duties following movement from Administration to Liquidation. There was a wide variance in the quality of the answers provided which indicates that candidates were either aware of the requirements or were totally unaware of the differences from a "normal" liquidation. The second part dealt with pension scheme issues and was generally answered competently. The third part dealt with dormant subsidiaries where MVL's were well understood but the comparisons with striking off less so. The final part dealt with an insolvent LLP and candidates generally answered this poorly and tended not to directly address the question, i.e. consideration of the claw back provisions of S214A

QUESTION 2

Question 2 required candidates to firstly provide advice on proposals, which was designed to test knowledge on the restrictions on the use of company names. Several candidates gave excellent answers but a similar number were very vague and seemed to miss the point of the question. The second part sought discussion on a number of matters which may be required for a Report on Directors under CDDA 1986. Candidates generally score well on questions which are subdivided into Segments and this was the case in this instance.

QUESTION 3

Question 3 which dealt with liquidation committees was generally well answered with a good understanding of the criteria for eligibility.

QUESTION 4

Question 4 was a mixture of narrative and computation testing candidates commercial abilities regarding potential actions, a separate part on recoveries and then a calculation of sums available to categories of creditor. The first part of the question was not well answered with a large number of candidates treating the answer as a non narrative question despite the question asking that the candidate "sets out the considerations." The second part of the question, first section, dealing with recoveries was reasonably answered though some candidates were very vague or too short in their answers. The second part of the section which was computational was divided between those who made a reasonable attempt at answering and others who did not appear to appreciate what was being sought. Many candidates had a poor understanding of the calculation of the prescribed part.

LIQUIDATIONS NOVEMBER 2009

EXAMINATION MARKING PLAN

QUESTION 1

(a) Set out the legal and practical steps that the Liquidator should take during the first week of the Liquidation. (4 marks)

- check date of appointment, i.e. date of registration, at Companies House, of notice of move from administration to liquidation (Form 2.25B)
- ensure any assets/company bank accounts transferred from administrator to liquidator
- ensure that there is a liquidation committee. The administration committee becomes the liquidation committee but if there is no committee take steps to form one (i.e. call meeting of creditors to vote for one)
- need to ensure that liquidator has sufficient powers to do what is necessary to carry out the liquidation may need to call committee (or if none, creditors') meeting to obtain, e.g., Sch 4 powers
- need to ensure that liquidator can take proper remuneration. Need to obtain sanction of liquidation committee or, if none, seek appointment of Court Reporter.
- NB on appointment, the liquidator does not have to write to all creditors informing them of his appointment as this will already have been done in the final progress report of the administration.

(b) (i) Set out the duties of the Liquidator in relation to the pension scheme
(ii) Set out the problems that the Liquidator may encounter because the Company is one of the trustees. (5 marks)

Liquidator's duties in relation to the occupational pension scheme (liquidators are not required to decide whether a scheme is eligible for the PPF to consider):

- Within 14 days of the date of liquidation or the liquidator becoming aware of the pension scheme, send notification of the liquidation to the Pension Protection Fund (PPF), the Pensions Regulator (TPR) and the Scheme trustees (s120. 121.126. 127. 129 Pensions Act 2004 and Regs 2,3,4,5 of the PPF (Entry Rules) Regs 2005). A form is provided by the PPF but it is not necessary to use the form. Separate notices are required for each pension fund, if there is more than one.
- The PPF has now established an internet service and, instead of the above, the liquidator can now electronically inform the PPF of any pension scheme and the PPF will then arrange for TPR and trustees to be informed, if relevant. If the PPF cannot find the relevant company in its database, it will inform the liquidator and the liquidator must then inform the PPF in writing as above.
- The liquidator also needs to notify details under s22 Pensions Act 1995?
- *If the PPF decides that the scheme should enter assessment, the liquidator needs to inform the PPF whether or not he considers that the scheme can be rescued (s122, 123 and 148 Pensions Act 2004 and Regs 6,9,11 of the PPF (Entry Rules) Regulations 2005)*
- If he considers the scheme can be rescued – the liquidator should issue a "withdrawal notice" to the PPF. The scheme continues or winds up outside the PPF.
- If the liquidator is uncertain whether or not the scheme can be rescued he issues an "uncertain" notice to the PPF.
- If the liquidator considers that the scheme cannot be rescued, he must issue a scheme failure notice to the PPF. The scheme will continue through the PPF assessment period.

ii. Problems Hardtimes Ltd is a trustee.

- PPF will be a major creditor.

Liquidator should cause company to resign.

Where the Company is trustee of the scheme and enters into liquidation neither the employer nor the liquidator will be "independent" for the purposes of the independent trustee provisions.

It is likely that there will be a conflict between the Liquidator's duties to the employer/company and its creditors and his duties to the pension fund.

Liquidator should raw the matter (and its conflict) to the attention of TPR and cause company to resign as trustee and request TPR appoint an independent trustee in place of the employer as soon as possible.

(c) Set out, with reasons, the matters to consider before deciding which procedure to recommend. (6 marks)

- need to consider how liquidator will be paid as there are no assets in the companies
- needs to consider whether or not the companies are actually dormant as advised by the finance director
- needs to consider any contingent liabilities, eg have any of the companies entered into any lease/tenancy agreements?
- are any of the companies part of a VAT group? Need to de-register
- are there any inter-company bank guarantees?
- are there any bank charges

Note before a company passes a resolution for winding up it must give written notice to any qualified floating charge holder (if created on or after 15.9.03) and the resolution may only be passed if the floating charge holder has consented in writing or has not replied within 5 days. (IA 1986 s84(2A) & (2B)). This means that the floating charge holder can withhold consent, if it feels that it is being prejudiced in any way (although this is unlikely in an MVL). It would be better to discuss the issue with the bank first and, probably, satisfy the charge pre-MVL.

- similarly are there any group corporation tax issues to consider?
- is the parent company willing/able to provide guarantees for any debts that may arise?
- does the parent company wish to retain the names of any of the subsidiaries?
- are there any other intangible assets?

Company dissolved after notification to Registrar of final meeting
2 years after that company dissolved can be restored and claims still made in that time period but after then no claims (unless personal injury under the Fatal Accidents Act 1976 or the Damages (Scotland) Act 1976 claims may be made at any time)
Note Candidates are not expected to provide the procedure for placing into MVL but marks may be awarded in context of answer.

MVL - disadvantages

Can be costly but there are no assets in these cases, subject to pre-insolvency investigations.
Can be tax disadvantages
If sign declaration of solvency and not able to pay debts directors may have personal and/or criminal liability. Company will then be placed into CVL.

Striking off from register

- if the directors do not file any returns to Companies House, the Registrar may eventually remove the company from the register. Note the company may be liable to a fine for not filing returns.

Application for Striking off

- Problems re 20 years of liability
- May not be as cost effective as think
- Any remaining assets pass to the Crown as bona vacantia (although directors should ensure that no assets/liabilities remain)

Problems can arise if there was a contingent liability – which may not have been thought to have been significant but which becomes significant over time.

NB. Not considering Companies Act 2006 changes introduced in October 2009
Minimising assets may be done by: dividend, waiver, transfer, purchase of own shares and reduction of capital (this will need court approval).
Also, HMRC ESC 36 but ESC 16 cannot authorise distributions of non-distributable reserves, e.g. share capital, and any such capital may be regarded as bona vacantia and be claimed by the Treasury

ESC C16

Returns of capital to shareholders by a company which is then dissolved under Section 652 or Section 652A of the Companies Act 1985 is treated for tax purposes as an income distribution within Section 209, ICTA 1988.

Provided certain assurances are given to the Inspector before the event, HMRC may regard, for tax purposes, the distribution as being a return of capital made under a winding up so that Section 209(1) applies. ' … references in the Corporation Tax Acts to distributions of a company shall not apply to distributions made in respect of share capital in a winding up.' (s.209(1) ICTA 1988) The value of the distribution is then treated as capital receipts of the shareholders for the purpose of calculating any chargeable gains arising to them on the disposal of their shares in the company.

The assurances required are that –

- The company
- does not intend to trade or carry on business in future, and
- intends to collect its debts, pay off its creditors and distribute any balance of its assets to its shareholders (or has already done so), and
- intends to seek or accept striking off and dissolution.
- The company and its shareholders agree that –
- they will supply such information as is necessary to determine, and will pay, any Corporation Tax liability on income or capital gains, and
- the shareholders will pay any Capital Gains Tax liability (or Corporation Tax in the case of a corporate shareholder) in respect of any amount distributed to them in cash or otherwise as if the distribution had been made in a winding up.

Subject to a concession, granted by the Treasury Solicitor:

"Permitted Distributions
It has been recognised that it would be unreasonable for the Treasury Solicitor to expect that a company is put into formal liquidation when that would be uneconomic, especially bearing in mind that HM Revenue and Customs Extra Statutory Concession C16 permits a distribution for tax purposes without the company having to incur the costs of a formal liquidation. It is therefore been agreed with HM Treasury that if:

9.1 a company has been struck off under either Section 652A of the Companies Act 1985, **and**

9.2 the shareholders have taken advantage of the extra statutory concession C16, and

the amount of the distribution is less than £4,000, then
as a concession the Treasury Solicitor will waive the Crown's right to any funds, which were distributed to the former members prior to dissolution."

I.e. only safe to use ESC 16 if distributing up to £4,000.

A <u>private company</u> (a dormant public company will have to re-register as a private company to take advantage of this procedure) may apply to the Registrar to be struck off if in the previous 3 months:
- it has not traded or otherwise carried on business
- Changed its name
- for value, disposed of property or rights that , immediately before it ceased to be in business or trade, it held for disposal or gain in the normal course of business or trade;
- engaged in any other activity except one necessary or expedient for making a striking off application
- a company may apply for striking off, if it has settled trading or business debts in the previous 3 months.

A company cannot apply if it is subject to an insolvency procedure or a s425 Scheme of Arrangement.

The directors must send copies of the application to be struck off (form 652a) to:
- members
- creditors, including all contingent and prospective creditors
- employees
- managers or trustees of any employee pension fund
- any directors who have not signed the form
- the relevant VAT office, if VAT registered

Any interested party may object to the dissolution.
Reasons for objection include:
- the company has broken any of the conditions of its application (eg it has traded) during the 3 month period
- the directors' have not informed interested parties
- any of the declarations on the form are false
- some form of action is being taken, or is pending, to recover money owed
- other legal action against company
- directors wrongfully traded or committed a tax fraud or other offence

It is an offence to
- apply when company ineligible for striking off
- provide false/misleading statements
- not copy application to all relevant parties within 7 days
- not withdraw application if company becomes ineligible

If all creditors have not been paid (inadvertently – e.g. if there was a contingent liability – or otherwise), a creditor can apply to reinstate the company
Any parties notified of the striking off may apply to court for the company to be restored within 20 years of dissolution. The court can order restoration if:
- the person was not given a copy of the application
- the application involved a breach of conditions
- for some other reason it is just to do so.

The Secretary of State can apply for restoration if it is in the public interest

(d) Set out what remedy or remedies the Liquidator may have against Gordon for his failure to inform his co-directors of the negligence claim. (4 marks)

- consideration of claw back provisions – see s214A
- S214A – "drawings" includes share of profits, salary, repayment of or payment of interest on a loan to a LLP, any other withdrawal
- insolvent within s123 meaning or become insolvent as a result of the transaction (taking into account all other drawings)
- but unless person knew or ought to have concluded after each withdrawal no reasonable prospect of avoiding insolvent liquidation, can't recover
- all members had knowledge that there was the accumulated reserves were in deficit

All members potentially liable but Gordon concealed problem from his partners and he seemed to be responsible for it and so the liquidator may have reasonable grounds to claim against Gordon

- liquidator needs to assess Gordon's personal wealth to ascertain whether to pursue Gordon personally
- the liquidator should look at the partnership agreement

QUESTION 2

(a) Draft a letter to Amy on the implications of her agreeing to the proposal (do not set out the detailed procedures). (8 marks)

- restriction on re-use of company name s216
- "Byalot" is a prohibited name
- Harriet (and George) is a de jure director but is not taking part in the management of the company, they are just acting as nominees
- Edward (and Amy) would be acting as de facto director (or shadow directors?) and so would not be avoiding s216
- see Hawkes v Cuddy [2007] EWHC 1789 (also known as Re Neath Rugby Ltd, Cuddy v Hawkes)

- s217 imposes a personal liability on a director or manager who was formerly a director of a liquidating company.
S.217 is linked to s.216 because contravention of the prohibition in s.216 is a necessary and sufficient condition of personal liability under s.217: but that is the limit of the connection.
S.216 creates a free-standing criminal offence. It concerns the management of companies and is designed to protect persons who deal with companies from those who act as directors of liquidating companies and then seek to carry on business through another vehicle bearing the same or a similar name. i.e. principally to prevent "phoenix companies."
See R4.80 - 4.82

R4.80 allows a person to carry on the business of the insolvent company using a prohibited name other than through a limited company where the relevant notice is given. The Rule also provides that the prescribed notice may be given before the company enters insolvent liquidation. In cases where the insolvent company is not in insolvent liquidation and also in any case where the acquiring company has not yet adopted a prohibited name, notice can be given where the director of the insolvent company is already a director of the acquiring company.

However, notice under Rule 4.80 must always be given before a director acts in a way that would be prohibited by section 216. The Rule introduces a new prescribed form, Form 4.32, for the provision of the requisite notice to creditors.

(b) In respect of each of the above actions set out, with reasons, whether or not the Liquidator should include them in Reports under section 7(3) of the Company Disqualification Act 1986 or what further information he would require in order to decide. (12 marks)

- all directors in the three years preceding the date of liquidation should be sent a questionnaire about their involvement with the company and the reasons for the company's failure
- Frances, a D form would be required. May need more information about the decisions that Frances took and how they were detrimental to the company. Discussion required
- reduction in payment terms – is this a sensible move to aid the company's cash flow or are the directors failing in their (CA 2006) duty to suppliers – evidence of insolvency?
Similarly duty to customers. Discussion required
- dividend to shareholders – was company insolvent at time or did it become insolvent as a result of the dividend? May be an illegal dividend, in which case misfeasance. Should include on D form. Discussion required.
- non-closure of branch. Edward seems to have set aside considerations for the benefit of the company in favour of keeping his brother in business? Discussion required
Cleaning contract – accepting lower price in circumstances when the company was facing cash flow problems, seems to be acting in the best interests of creditors, but consider whether the directors have a (CA 2006 environmental duty) Discussion required
Purchase of flat – likely to be a transaction at undervalue and so is reportable. Discussion required
Customer deposits in overdrawn account – may be evidence of wrongful trading, should have protected customer monies. Report on D Form. Discussion required.
Flip Ltd – see s245, avoidance of floating charge Discussion required.

QUESTION 3

(a) Set out the reasons why the appointment of a Liquidation Committee could facilitate the process of this Liquidation.

- generally liquidation committee represents the general body of unsecured creditors and can sanction various acts of the liquidator, including those requiring sanction in Sch 4 and also, e.g., remuneration
- liquidator can use liquidation committee as "sounding board" but does not have to accept its advice in relation to particular issues
- liquidator has to report to liquidation committee at intervals on matters that the liquidator considers will be of concern to them (r4.44)
- in this liquidation there are various matters that are of concern to creditors and a liquidation committee will be helpful to the liquidator who will be able to report his findings to them and advise on whether further detailed investigation is required (the liquidator will be able to discuss the likely costs and any assets recoveries of further work)
- the liquidation committee will be able to provide specific sanction (Sched 3 Part 1) for compromise of specific debts

(b) Set out the formalities of appointing a Liquidation Committee. (3 marks)

- meeting of creditors to vote for 3 – 5 members
- R4.42, issue certificate of constitution
- if chairman of meeting resolving to establish committee is not liquidator, he shall inform liquidator of names, addresses of members
- each committee member must agree to act as member

(c) Set out a recommended agenda for the first Liquidation Committee meeting. (5 marks)

- liquidator's explanation of process of liquidation and role of committee
- liquidator to give committee members a copy of SIP 15
- liquidator to explain the liquidator' duty to investigate and to make available a copy of SIP 2
- to discuss concerns raised by creditors at creditors' meeting
- to sanction any Sch 4 powers of liquidator (that liquidator considers necessary)
- to sanction basis of liquidator's remuneration. Liquidator to explain how he takes remuneration (he should already have provided members with a copy of A creditors' guide to liquidator's fees, as required by SIP 9
- to agree reporting intervals with members
- any other areas of concern for members

(d) Set out the reasons, whether or not each individual listed is eligible to be a committee member . (18 marks)

Burt – is a creditor and is eligible to be a committee member. He would not be able to participate in any discussions about the sale of the business because of his conflict of interest.
Brad – is not a creditor as his debt is statute barred. He is not eligible to be a member of the committee. (Unless he has taken action before the debt becoming statute barred e.g. obtained decree)
Harrison – is a probably a creditor, but the Liquidator may want to look into the circumstances of how the debt arose (i.e. To obtain a proof of debt) before advising on whether Harrison is a creditor or not.
Johnny – a shareholder is eligible to be a member of the liquidation committee but, if there is to be no return to shareholders, it is unclear what his interest is and creditors may not wish to vote for him to become a member.

Reasonably travel costs may be paid for committee members to attend meetings, costs from Bermuda may be too high for the liquidation.
Resolutions can be taken by correspondence.
Daniel – this is a disputed debt and the Liquidator will need to consider whether the debt will actually materialise. He may need to take advice on Daniel's claim ….
Piers – has a future debt, which arose pre-liquidation, and which is provable in the liquidation and so he is eligible to sit on the liquidation committee.
Matt – has a contingent debt, which arose pre-liquidation, and which is provable in the liquidation and so he is eligible to sit on the liquidation committee.

QUESTION 4

(a) Set out the considerations the Liquidator should take into account in deciding whether to pursue each of the actions. (10 marks)

Two possible actions – against the directors and against the bank
Consider Rule 4.66 – order of priority in liquidation. – Legal fees do not have priority over the claims secured by a floating charge assets in Scotland.

Normal legal Fee's would rank as an expense. Taxation of fee's may be required but it is not mandatory in a CVL

Legal proceedings include proceedings brought by a liquidator under sections 212 (delinquent directors etc), 213 (fraudulent trading), 214 (wrongful trading), 242 (gratuitous alienations), 243 (unfair preferences), 244 (extortionate credit transactions) and 423 (transactions defrauding creditors) of the IA 86.

They also include any other proceedings, including arbitration or other dispute resolutions procedures, which the liquidator has power to bring in his own name for the purposes of preserving, realising, or getting in any of the assets of the company, or otherwise to bring or defend in the company's name. Negotiations intended to lead or leading to a settlement or compromise of any action, proceeding or procedure are included as well.

A liquidator intending to utilise funds which would be paid to the floating charge holder should discuss fully the position with the holder of the floating charge and receive written approval to the agreed action. This should inter alia deal with the amount of costs which are approved.

SIP 2 Considerations. Duty to investigate

Where amounts payable to preferential creditors may be reduced by legal outlays. If there are two or more preferential creditors, approval is taken to be given where the majority in value of those who respond approve the specified amount (or a different amount which the liquidator considers sufficient).

The floating charge holder/prefs will need to be convinced that the action will not diminish their return.

Consider whether directors are able to contribute should actions be successful

Consult with liquidation committee, if exists, or major creditors

Danger of Liquidator becoming personally liable for costs

In the case of the action against the floating charge holder the liquidator should seek legal advice initially

Is floating charge challengeable under S245 (1A) 1986

(b) (i) Set out, with reasons and list, what funds the Liquidator may recover for the benefit of creditors. Briefly summarise the procedural and practical considerations. (12 marks)

- look at payments made since the date of the petition and consider avoidance of property dispositions (s127) ie any dispositions of property after petition date may be void but court can validate payments
- unlikely to recover payments for new building supplies £7,000
- vehicle costs, £1,000
- funds deposited in overdrawn bank account (see Hollicourt), £16,000
- wages £20,000

May be able to recover payments made to creditors at 30.4.09 of £25,000
May be able to recover the directors' loan repayment, £3,000, – if not under s127, as a preference
Can claim £1,000 from Sheriff Officers. A creditor is not entitled to the proceeds of sale unless both attachment and sale were effected before the commencement of the winding up. In this case they occurred between dates of petition and order.
Landlord
The exercising of hypothec by the landlord after the date of commencement of the winding up is ineffective. But can exercise a Right of Security over Assets. Cannot exercise over assets owned by third party

Assuming liquidator realises assets as per Statement of Affairs:

Tools & equipment	£42,000
Motor vehicle	£5,000
Receivables	£23,000
Stock	£10,000
Total	£80,000

Add s127 recoveries (25,000 + 3,000) = 28,000
Funds from Sheriff Officers = 1,000
Total £109,000

(b) (ii) Calculate the amount available for distribution to each class of creditor after payment of costs and expenses, stating any assumptions you make and indicating the shortfall, if any, to each class of creditor. (8 marks)

Funds available to liquidator			£109,000
Costs of liquidation (per question)			(9,060)
Available for preferential creditors			99,940
Less preferential creditors (employees per question)			(11,000)
Net property (s176A)			88,940
Prescribed part			
50% x £10,000	5,000		
Plus (88,940 – 5,000) x 20 % -	16,788		
Prescribed part available to unsecured creditors – but not to Villagetown Bank on its shortfall under its floating charge		21,788	
Funds available to floating charge holder			67,152
Villagetown Bank			(120,000)
Shortfall to Villagetown Bank			(52,848)
Unsecured Creditors – per statement of affairs	(75,000)		
- add creditor instructing Sheriff Officers	(1,000)		
- add voidable dispositions	(28,000)		
Prescribed part b/d	21,788		
Shortfall to unsecured creditors			82,212

PERSONAL INSOLVENCY (SCOTLAND) NOVEMBER 2009

EXAMINER'S REPORT

EXAMINATION MARKING PLANS

The marking plans are set out below after each examiner's report. Markers are encouraged to use discretion and to award partial marks where a point is either not explained fully or made by implication. The marking plan is also adapted to give credit for valid points made by candidates. Inclusion of extraneous material often causes candidates to lose time that should be spent addressing the questions that were asked, and may adversely affect the holistic score.

QUESTION 1

Candidates were provided with details of attendees at the first meeting of creditors and asked who could attend the meeting, how each claim should be dealt with for voting purposes, and to prepare a detailed aide memoire of the steps required to conclude involvement with the sequestration following the election of a replacement trustee.

Not all candidates were sure if a debtor is entitled to attend a meeting of creditors and a number of assumptions were made regarding creditor claims when all that was being asked was a commentary on the information provided in the question. Similarly, there were differing views about how to deal with the creditor with the contingent claim, press reporter and CPI student. Many responses displayed a practical approach by suggesting that the other creditors could be consulted and a view taken in the best interests of allowing the process to continue.

Commenting upon each claim for voting purposes seemed to cause difficulty when dealing with the postponed creditor, the one who had paid a deposit for services not provided, and the one with a contingent claim. There was further misunderstanding regarding the difference between discharging and valuing a security when there is a secured claim. For the avoidance of doubt, a creditor cannot discharge a standard security at a meeting. Most candidates were able to deal with the more straightforward issues in a competent and concise manner.

The question also sought the steps that the trustee who had been replaced would take in order to conclude his involvement and there was a good display of knowledge in terms of transferring information to the replacement trustee, dealing with court, preparing a final receipts and payments account in order to deal with outlays/remuneration, seek a certificate of discharge and deal with the cautioner. Several candidates spent time dealing with the tasks that the replacement trustee would undertake and it was disappointing that several answers were vague in terms of chronological order and specific actions when most of this question could have been copied directly from the legislation.

Handwriting was a challenge to read on many scripts.

QUESTION 2

This was the only computational question in the exam and candidates were asked to prepare a cash forecast for the nine month period from 1 January 2010 to 30 September 2010. The principal thrust of a computational question is to determine if candidates have a logical and practical approach rather than necessarily arriving at the same end product as the model answer. Where sensible assumptions had been made which did not detract from the overall framework and a fair answer provided, but different from the model answer, marks were still awarded.

Many candidates sought to undertake complicated calculations for various income types when careful thought/planning after reading the question would have allowed a more practical approach. Most forgot to include the December 2009 function income and shop purchases in the January 2010 figures.

The question anticipated a positive cash position each month in terms of supporting the decision to continue trading in order to improve the prospects of a sale yet a number of candidates calculated a substantial overdraft from the outset which, one would have thought, might have suggested an error in the calculations.
In a computational question, marks are given for layout and showing totals both for each month and category.

QUESTION 3

The question listed information regarding Fantastic Fun, a large funfair operating near Perth. A commentary was required about how the trustee might address the various issues in order to ensure ongoing trading pending assessment of the financial position and identifying a buyer.

In general terms, the question drew responses which demonstrated both knowledge and experience and there were numerous opportunities to score marks. Layout, ordered thinking and prioritising issues attracted further marks. Most candidates dealt with issues such as the franchise, staff, retention of title and security of stock/premises in an acceptable manner.

Some candidates appeared to be agitated at the prospect of not having access to every set of keys whereas others were more sanguine and simply suggested changing locks. Many were keen to embark upon instant court action to secure co-operation whereas the reality is that such an approach takes time/resources and the question centred around immediate action/decision points. Curiously, few candidates suggested looking at existing financial information/reporting whilst others thought that the garage would not have a right of lien over the van if the trustee required it for trading activities.

Most candidates highlighted the risks for a trustee in continuing to trade and detailed the principal areas of concern.

The number of issues created lengthy answers with more than an element of repetition for those who did not provide an answer by key topic.

The quality of grammar was poor with numerous colloquial expressions spoiling an otherwise good answer.

QUESTION 4

Candidates received information regarding the sequestrated estate of a partnership and the two partners therein, with slightly different details for each partner. The first part of the question dealt with recall and the answers showed that many candidates were able to quote legislation but had little practical experience. Marks were awarded where there was a clear chronological and logical progression through the recall process.

There seemed to be some confusion about the timing of paying creditors compared with obtaining a court interlocutor and some answers included jargon and references without taking into account the fact that the question specified that the person requesting the information had no detailed knowledge of the recall process. In terms of quoting the relevant sections of the legislation, candidates were able to show that they knew the general thrust of what was required.

The majority of candidates assumed that the house in Boat of Garten was the matrimonial home. This was not noted in the question and, for example, the house could have been a holiday home, investment property or tenanted to a third party. The result of making such assumption was that candidates spent time answering the question somewhat narrowly as if immediate steps should be taken to pursue Mrs Kite on the basis that a gratuitous alienation had occurred. Most candidates dealt capably with issues such as a property search, independent valuation, insurance and secured indebtedness.

Again, based upon the assumption that the house at Boat of Garten was the matrimonial home, candidates spent considerable energy dealing with section 40 of the Bankruptcy (Scotland) Act 1985. The gratuitous alienation aspect and negotiating options should have featured more often in the notes for the Principal i.e. rather than writing about the gratuitous alienation in the previous section of the answer.

The question anticipated candidates referring to the validity, or otherwise, of creditors' claims received and how a trustee might obtain further information in order to prepare the written causes of insolvency. The other return pertinent to the question is a report to the accountant in bankruptcy (only one candidate referred to appendix K) and providing a list of the issues that a trustee would consider when preparing such submission in terms of either a Bankruptcy Restriction Order or a Bankruptcy Restriction Undertaking. Also, there was some confusion about the line of reporting and, for example, some candidates suggested incorrectly that the trustee would submit a report direct to the local sheriff court.

PERSONAL INSOLVENCY (SCOTLAND) NOVEMBER 2009

EXAMINATION MARKING PLAN

QUESTION 1

(a) Explain who is entitled to attend the meeting and why. (3 marks)

The meeting is the statutory meeting of creditors and thus all creditors with a valid unsecured claim are entitled to attend, as are their authorised representatives.

The trustee, and the clerk to the meeting if the trustee does not take the minutes, must also attend the meeting.

Creditors' views/consent to the attendance of the Press and the CPI student should be sought. If creditors reject the wish for either party to attend, such party is excluded from the meeting.

The debtor has no specific entitlement to attend the meeting but may do so if creditors agree.

(b) Set out how each claim is dealt with for voting purposes. (8 marks)

Valuation of creditors' claims (section 22 of the Bankruptcy (Scotland) Act 1985 and schedule 1 thereto):

(i) The Euro claim should be converted into Sterling at the rate of exchange as at the date of sequestration. Details can be obtained from a newspaper, bank, internet site etc.

(ii) Rhino Lending plc, the secured creditor, is entitled to vote in respect of the net amount of his claim after deducting the value of the security held, less the actual expenses of realisation, unless the secured creditor chooses to exercise the option to surrender his security after which he may rank and vote the full amount of the claim. The security valuation is the figure provided by the creditor.

(iii) The debtor's father is a postponed creditor, as defined by section 51(3) of the Bankruptcy (Scotland) Act 1985, because he made a loan to the debtor in consideration for a share of profits in his business. Postponed creditors are not allowed to vote (section 24(3)).

(iv) The debtor's brother-in-law could be provided with a claim form to complete but in practical terms it is likely that the invoice, as long as it appears to be valid and unpaid, would be accepted as proof of debt.

(v) The employee can submit a claim to the Redundancy Payments Office for unpaid entitlements and rank in the sequestration for any residual sum due. However, until a claim is submitted to the RPO, the employee can vote for the full amount of the claim against the former employer.

(vi) Henry Hippo is claiming retention of title and is required to deduct the value of the items subject to retention of title and thus would be in a position to vote in respect of the net claim. The value of the items is the cost shown on the related supplier invoice.

(vii) The young lady can claim £500 because she has paid this sum. Her vote will represent this amount. She can complete a claim form at the meeting or the trustee can waive such requirement.

(viii) The creditor awaiting the CD is an ordinary creditor for £5,000. If he can provide supporting documentation for this sum, this would represent his voting ability.

(ix) Elephant Safaris will be considered a contingent creditor in respect of the claim for damages (schedule 1 refers). Contingent claims require to be valued by the trustee, or where there is no trustee by the sheriff on the application of the creditor. A valuation by the trustee may be appealed to the sheriff by the creditor. Unless a valuation has been made, a contingent creditor may not rank or vote. For practical purposes it is suggested that the trustee will agree a figure with Elephant Safaris for voting purposes at the meeting.

(c) Prepare a detailed aide memoire of the steps you will be required to take in order to conclude your involvement with the sequestration. (9 marks)

In order to conclude the original trustee's involvement with the case, the following steps should be undertaken:

(i) Prepare a minute of the meeting.

(ii) Submit the minute together with a report in accordance with section 25(1)(a) of the Bankruptcy (Scotland) Act 1985, using form 18.

(iii) The following productions must be submitted to the court together with annex G of the accountant and bankruptcy's guidance notes:

- a copy of the letter to creditors providing notice of the statutory meeting
- a copy of the list of creditors with whom notice was served,
- a copy of the certificate of posting of notice to creditors,
- a copy of the minute of the statutory meeting.

(iv) The debtor, a creditor, the original trustee or the accountant in bankruptcy may within four days after the date of the statutory meeting make a summary application to the sheriff by virtue of section 25(1)(b) of the Bankruptcy (Scotland) Act 1985 detailing the grounds for objecting to any matter relating to the election of the replacement trustee.

(v) If there are no timeous objections, the sheriff shall declare the elected person to be the trustee in the sequestration and make an order appointing him as such.

(vi) If there is a timeous objection, the sheriff shall give all parties an opportunity to be heard in court. The sheriff's declaration and decision on this matter will be final and no expense incurred when an objection to the election of the replacement trustee falls to the debtor's estate.

(vii) Within fourteen days of the statutory meeting of creditors, the chairman of the meeting i.e. the original trustee must supply the accountant with a signed copy of the minute of that meeting in accordance with schedule 6, paragraph 16 of the Bankruptcy (Scotland) Act 1985.

(viii) Within fourteen days of the statutory meeting of creditors, the chairman of the meeting i.e. the original trustee must supply the accountant with a signed copy of the minute of that meeting in accordance with schedule 6, paragraph 16 of the Bankruptcy (Scotland) Act 1985.

(ix) The original trustee shall on the appointment of the replacement trustee handover to him everything in his possession which relates to the sequestration including the statement of assets and liabilities and a copy of the statement prepared under section 23(d) and the written comments, and the original trustee shall thereupon cease to act in the sequestration.

(x) Within three months of the appointment of the replacement as trustee, the original trustee must submit his accounts and any claim for outlays to the accountant in bankruptcy.

(xi) The accountant in bankruptcy shall audit and fix determination and outlays of the original trustee and notify the original trustee accordingly.

(xii) Upon receiving a copy of the accountant in bankruptcy's determination the original trustee may apply to the accountant in bankruptcy for a certificate of discharge. If he does, the original trustee shall send notification of an application to the debtor, to all known creditors and to the replacement trustee. He shall also inform the debtor that:

(a) The debtor, the replacement or any creditor may make written representation relating to the application to the accountant in bankruptcy within a period of fourteen days after such notification.
(b) The audited accounts of his intromissions available for inspection at the office of the original trustee and that a copy of such accounts have been sent to the replacement trustee for insertion in the sederunt book and the affect of a certificate of discharge which is discharging the original trustee from any liability, other than liability arising from fraud, to the creditors or to the debtor in respect of any act or omission of the original trustee in exercising the functions conferred on him by the Bankruptcy (Scotland) Act 1985.

(xiii) Upon expiry of the period mentioned above, the accountant in bankruptcy after considering any representations made to him shall:

(a) Grant, or refuse to grant, the certificate of discharge.

(b) Notify the original trustee, the debtor, the replacement trustee and all creditors who have made such representations accordingly.

(xiv) The original trustee, the replacement trustee, the debtor or any creditor who has made representations may within fourteen days after the issuing of the determination noted above, appeal to the sheriff and if the sheriff determines that a certificate of discharge, which has been refused should have been granted he shall order the accountant in bankruptcy to grant it.

(xv) The decision of the sheriff in appealing under the above section shall be final.

(xvi) Upon receipt of his certificate of discharge, the original trustee shall cancel a specific bond of caution for the sequestration.

QUESTION 2

Prepare a cashflow forecast for each of the 9 months of anticipated trading, stating any assumptions that you make. (20 marks)

See overleaf

The Robert Rat Country Club
Cashflow forecast
9 Month period ending 30 September 2010

RECEIPTS		January	February	March	April	May	June	July	August	September	Total
Member subscriptions	300 x £900	135,000	135,000								270,000
	300 x £900	22,500	22,500	22,500	22,500	22,500	22,500	22,500	22,500	22,500	202,500
New members : subs		9,000	8,250	7,500	6,750	6,000	5,250	4,500	3,750	3,000	54,000
New members : joining fees		5,000	5,000	5,000	5,000	5,000	5,000	5,000	5,000	5,000	45,000
		171,500	170,750	35,000	34,250	33,500	32,750	32,000	31,250	30,500	571,500
Green fees		3,000	3,000	3,000	9,000	9,000	9,000	9,000	9,000	9,000	63,000
Functions :	Gross income (1 month lag)	36,000	12,000	12,000	12,000	24,000	24,000	24,000	30,000	30,000	204,000
	Direct staff costs	(2,400)	(2,400)	(2,400)	(4,800)	(4,800)	(4,800)	(6,000)	(6,000)	(6,000)	(39,600)
	Food costs (1 month lag)	(7,200)	(2,400)	(2,400)	(2,400)	(4,800)	(4,800)	(4,800)	(6,000)	(6,000)	(40,800)
		26,400	7,200	7,200	4,800	14,400	14,400	13,200	18,000	18,000	123,600
Shop	Sales receipts	10,000	10,000	10,000	20,000	20,000	20,000	15,000	15,000	15,000	135,000
	Purchases	(10,000)	(5,000)	(5,000)	(5,000)	(10,000)	(10,000)	(10,000)	(7,500)	(7,500)	(70,000)
		-	5,000	5,000	15,000	10,000	10,000	5,000	7,500	7,500	65,000
Total net cash receipts		200,900	185,950	50,200	63,050	66,900	66,150	59,200	65,750	65,000	823,100

PAYMENTS

	January	February	March	April	May	June	July	August	September	Total
Rent	55,000	55,000	55,000	55,000	55,000	55,000	55,000	55,000	55,000	495,000
Rates	12,000			12,000	12,000	12,000	12,000	12,000	12,000	84,000
Utilities	-	-	20,000	-	-	10,000	-	-	10,000	40,000
Insurance	5,150	5,150	5,150	5,150	5,150	5,150	5,150	5,150	5,150	46,350
Greenkeeping costs	450	450	450	1,350	1,350	1,350	1,350	1,350	1,350	9,450
Tractor finance	1,200	1,200	1,200	1,200	1,200	1,200	1,200	1,200	1,200	10,800
Repairs to fabric	1,320	360	360	240	720	720	660	900	900	6,180
Repairs to equipment	150	150	150	450	450	450	450	450	450	3,150
Administration staff	4,000	4,000	4,000	4,000	4,000	4,000	4,000	4,000	4,000	36,000
Other administration costs	2,500	2,500	2,500	2,500	2,500	2,500	2,500	2,500	2,500	22,500
Trustee supervision fees	5,000	5,000	5,000	5,000	5,000	5,000	5,000	5,000	5,000	45,000
Total cash payments	86,770	73,810	93,810	86,890	87,370	97,370	87,310	87,550	97,550	798,430
Net monthly cash surplus/(deficit)	114,130	112,140	(43,610)	(23,840)	(20,470)	(31,220)	(28,110)	(21,800)	(32,550)	
Opening bank balance	-	114,130	226,270	182,660	158,820	138,350	107,130	79,020	57,220	-
Closing bank balance	114,130	226,270	182,660	158,820	138,350	107,130	79,020	57,220	24,670	24,670

Principal assumptions

existing members who pay within two month do so equally in each of the two months

joining fees are paid in the month that the member joins

December 2009 function income is received in January 2010

QUESTION 3

Detail the steps, including how you would deal with the issues noted above, that you would take in order to ensure ongoing trading pending assessment of the financial position of Fantastic Fun and identifying a buyer. (30 marks)

Partners

(i) Meet the partners on site as soon as possible and explain the basis of appointment. Advise them that you are acting on behalf of the general body of creditors and that they no longer have any locus over trading activities. Uplift keys.

(ii) Discuss current trading activities in order to assess issues such as: retaining all/some partners to help trading; identifying current risks/concerns with business; key areas of cash generation; staff requirements/performance; sensitivity of closing some parts of activity and naming possible buyers.

(iii) Advise the partners of their right to consider recall of sequestration should they have sufficient security/financial means.

(iv) Advise the partners that they may wish to seek independent legal advice.

(v) Obtain mobile telephone number, or other contact details, for the partner in London. Contact the partner and advise him of the situation.

(vi) Undertake personal identification checks on each partner: Money Laundering Regulations.

Staff

(i) Meet all staff at convenient location and advise of situation as soon as possible.

(ii) Establish wage arrears position and explain to all staff the provisions of the Employment Rights Act 1998: advise of basis of calculation of unpaid entitlements.

(iii) Determine position with regard to management/supervision of staff and establish lines/methods of effective reporting. Organise staff transportation to/from work.

(iii) Ensure that staff required to maintain ongoing trading are willing to remain and if a financial incentive is required. Is there a Union to address?

(iv) Determine if any staff are not on payroll e.g. casual, self employed or agency.

(v) Review staffing levels and once position understood, advise staff of redundancy in writing.

(vi) Establish a timetable for regular staff updates.

(vii) Hold any wrongful dismissal or other staff legal issue in abeyance (if possible) until overall situation regularised.

Suppliers

(i) Contact suppliers and advise of position. Confirm in writing that future supplies will only be paid for if signed by trustee or an authorised representative thereof. Provide copy signatures and obtain agreement for basis of future supplies.

(ii) Review any retention of title claims. Place goods to one side and request supplier to provide details of claim e.g. terms and condition of trade, purchase order, invoices and payment history. Consider effect on ability to continue trading activities effectively.

(iii) Contact utilities regarding ongoing service of electricity, telephone and gas if required. Take meter readings.

Insurance

(i) Advise firm's insurance broker of appointment and confirm adequate cover is in place for assets, employer's liability, public liability and third party liability.

(ii) Determine if any premium arrears exist and negotiate/discuss payment thereof.

(iii) Advise trustee's insurance broker to liaise with the firm's broker in terms of premiums and ongoing suitability of cover.

Security

(i) Tour premises. Identify any physical risks to property/assets and prepare action plan.

(ii) Change locks on doors/gate if appropriate and appoint responsible key holder(s).

(iii) Advise police and notify burglar alarm company as appropriate.

(iv) Consider appointment of security personnel to tour the premises at night and/or maintain daytime security.

Licences/Health & Safety

(i) Determine what licences are required in order to operate the business. Investigate whether these require to be transferred/assigned to the trustee and if so, the process to follow.

(ii) Obtain copies of all licences and certificates held by the business and check with appropriate authorities what should be held. Confirm with law agent if necessary.

(iii) Ascertain which assets are suitable to be used for trading activities in terms of health and safety, repair and environmental issues: only using those assets which are safe and close all rides that are unsafe. Obtain details of the company who undertakes the calibration/safety tests and obtain a quote for required work.

(iv) If appropriate and cost effective, arrange certification of attractions with non current certificates.

Financial information

(i) Determine what accounting records are maintained: by who and how often. Form a view as to their accuracy and ongoing use.

(ii) Obtain and review most recent annual accounts and subsequent sets of management accounts.

(iii) Clarify basis for showing reliable financial performance.

(iv) Prepare financial forecast and consider what level of third party support may be required to continue trading.

(v) Consider if the financial information is sufficient and how trading activities will benefit creditors e.g. compared with closure. Document decision.

Property/Council

(i) Contact the council and obtain a copy of the lease. Inspect for unusual or onerous requirements.

(ii) Advise the council that the lease is not being adopted and explain/agree the basis of continued occupation. Ask if council aware of any issues/contraventions relating to Fantastic Fun and that might impact upon trustee's decision to continue trading activities.

(iii) Determine arrears of rent/rates and discuss with council how these will be deal with whilst trustee is in control.

(iv) Consider asking a surveyor to value the lease.

(v) Repair the step, or otherwise protect the position, and instruct review for other similar points.

Assets/moveables

(i) Determine if an asset register exists. If not, consider preparing one.

(ii) Check which assets are owned/leased and identify those required for ongoing trading.

(iii) Check outstanding liability of assets subject to finance and assess whether payment required of either arrears and/or ongoing liability in order to retain those assets deemed to be required. Liaise with each finance company as necessary, particularly the one financing the roller coaster.

(iv) Instruct independent valuation of moveable assets and adjust insurance cover as appropriate.

Sale of assets

(i) Consider the best method of marketing the business by discussing with the partners, law agent and other appropriate adviser.

(ii) Commence preparation of draft sales particulars: financial content, promotional content, background and future aspirations.

(iii) Appoint selling agent and ensure that accounting figures and projections are available.

(iv) Consider press release in order to heighten awareness of potential sale.

Vehicles

(i) Obtain copy finance agreements.

(ii) If the leases are in the name of individual partners, advise partners that they will be responsible for ongoing monthly payments. Consider necessity of having vehicles in terms of negotiating with partners.

Financial control

(i) Establish a system to record all cash transactions.

(ii) Open new bank account.

(iii) Establish signatories and arrange transfer of cash from previous account (if a credit balance was held).

(iv) Determine previous direct debits/standing orders and establish replacement ones where necessary to support continued trading. Cancel all existing credit card arrangements.

(v) Create system for regular financial reporting with suitable template to reflect financial performance by each key operating area and creditor accrual.

(vi) Instigate stock control procedures for all stock types.

(vii) Ensure proper recording/reporting procedure for wrist band sales.

Restaurant/Franchise

(i) Obtain copy of franchise agreement and review terms.

(ii) Meet with franchisee and explain situation. Determine if suitable to continue arrangement and consider potential costs of cancellation and liability if allow to continue.

(iii) Determine if any franchise arrears exist. If arrangement is to continue, arrange basis for collecting rent and dealing with franchisor obligations.

QUESTION 4

(a) Write a letter to the law agent advising him of the legal and practical steps that you consider are required. (12 marks)

Dear Solicitor

Sequestration of Mr Hawk "the debtor"
Your client: Mrs Hawk

I refer to my recent telephone conversation with you during which you indicated that Mrs Hawk would like to stop the debtor's sequestration and is in a position to provide sufficient funds to arrange for recall of sequestration. In this regard, you will be aware that the debtor was sequestrated on 1 November 2009 and my principal was appointed to act as trustee. During our conversation you asked me to outline the main legal and practical steps involved in obtaining recall and I have pleasure in doing so.

Recall of sequestration is governed by sections 16 and 17 of the Bankruptcy (Scotland) Act 1985 "the Act" and a petition for recall may be presented to the sheriff court that has jurisdiction over Mr Hawk by:

- the debtor;
- any creditor;
- any other person having an interest (notwithstanding that he was a petitioner or concurred in the debtor's application for sequestration
- the trustee, or
- the accountant in bankruptcy.

Thus, the debtor can instigate the process under his own hand in conjunction with support from Mrs Hawk.

The first legal step is that the petitioner serves a copy of the petition for recall together with a notice stating that the recipient of the notice may lodge answers to the petition with fourteen days of the service of the notice upon:

- the debtor;
- any person who was a petition or concurred in the application/petition;
- the trustee, and
- the accountant in bankruptcy

At the same time as service is being made, the petitioner is required to publish a notice in The Edinburgh Gazette stating that a petition has been presented under section 16 of the Act and that any person having an interest may lodge answers to the petition within fourteen days of the publication of such notice.

A petition for recall may be presented:

(a) within ten weeks of the date of award of sequestration i.e. ten weeks from 1 November 2009;

(b) at any time if the petition is presented on any of the grounds mentioned in paragraphs a to c of section 17 of the Act i.e. the debtor has paid his debts in full or has given sufficient security for their payment;

(c) if a majority in value of the creditors reside in a country other than Scotland and it is more appropriate for the debtor's estate to be administered in that other country or

(d) one or more other awards of sequestration of the estate or analogous remedies have been granted.

Given our telephone conversation and the circumstances that are understood to prevail in this case, options (a) and (b) seem appropriate in this situation. In practical terms, if one assumes option (b), Mr Hawk will be expected to identify all known creditors as at date of sequestration and Mrs Hawk will arrange settlement thereof. Each creditor will be advised to the trustee when Mr Hawk completes his Statement of Affairs and Mrs Hawk will want to receive a copy of this document so that all parties are working from the same source. On the basis that Mrs Hawk has a bank account in her own name i.e. it is not a joint account that the bank may have frozen when advised of Mr Hawk's sequestration, she should pay each creditor as soon as possible and obtain a signed receipt from each one to confirm that the debt has been paid in full. The trustee will be asked by court to confirm that he is satisfied that all creditors have been paid and hence, will want to see each receipt as will the court.

Mr Hawk is liable on a jointly and several basis for the Sneaky Snakes deficit and thus, Mrs Hawk will have to settle such deficit and lodge a claim for 50% thereof in the sequestration of Mr Kite. Thus, a similar process of identifying/paying creditors will be required for Sneaky Snakes.

This process is simpler that providing security for payment i.e. evidencing that Mrs Hawk has assets that can be made available because it is more difficult to satisfy both a court and the trusts about value, timing of release of monies and certainty of creditor payment.

Notwithstanding that a recall petition has been presented, the sequestration process continues as if the petition had not been presented, until recall is granted. This means that Mr Hawk is required to co-operate with the trustee and, as noted above, provide all information regarding his assets and liabilities. The statement of assets and liabilities will form part of the documentation submitted to court and needs to be completed as fully as possible. The trustee is then is a position to report to court that the debtor has been fully co-operative and there is no reason to object to the recall process.

You should be aware that upon recalling an award of sequestration, the sheriff:

(a) shall make provision for payment of the outlays and remuneration of the trustee by directing that such payments shall be made out of the debtor's estate or by requiring any person who was a party to the petition for sequestration or as the case may be, the debtor, to pay the whole or any part of the said outlays and remuneration;

(b) may direct that payment of the expenses of a creditor who was a petitioner or concurred in the debtor's application for sequestration, shall be out of the debtor's estate;

(c) may make any further order that he considers necessary or reasonable in all of the circumstances of the case.

These provisions mean that Mrs Hawk will be responsible for identifying and settling all of these costs in addition to paying the creditor liabilities.

As you might appreciate, recall is designed to have the effect of restoring the debtor, and any other person affected by the sequestration, to the position they would have been in, at least as far as is practicable, if the sequestration had not been awarded in the first place.

It is also instructive to know that recall of an award of sequestration does not:

(a) affect the interruption of prescription caused by the presentation of the petition for sequestration, or the submission of a claim by a creditor under section 22 or 48 of the Act;

(b) invalidate any transaction entered into before recall by the trustee whilst acting with a person in good faith;

(c) affect a bankruptcy restriction order which has not been annulled under section 56(j)(1)(a) of the Act. This will not have taken place given the speed at which the proposed recall process has been identified.

On the basis that Mrs Hawk pays all known creditor liabilities for her husband and Sneaky Snakes, together with the costs of recall, there is no reason to doubt that recall will be achieved but, for the avoidance of doubt, where the sheriff considers that it is inappropriate to grant recall he may order that the sequestration shall continue subject to such conditions as he thinks fit. Thus, in practical terms it is advisable to ensure that the recall process is handled efficiently and effectively without any steps being taken that might antagonise court.

The sheriff may make such order in relation to the expenses in a petition for recall as he considers appropriate which means that the solicitor dealing with the recall process is likely to expect to be paid by Mrs Hawk and will want to ensure that all outlays are captured for recharge.

The timetable for recall is difficult to judge because it depends upon issues that are not wholly within Mrs Hawk's control e.g. dealing with all creditors and settling each claim, dealing wit/settling the trustee's costs, preparing court documents and organising a court appearance, and ensuring Mr Hawk's co-operation.

I trust that this summary is helpful to your understanding of the process of recall but if you have any queries, please do not hesitate to contact me.

Yours faithfully

I M A Practitioner

(b) Outline the key steps that you would you take in order to validate Mr Kite's comments and safeguard the position as far as the sequestrated estate is concerned. (6 marks)

It appears that a gratuitous alienation may have occurred in favour of the debtor's spouse, Mrs Kite: Section 34 of the Bankruptcy (Scotland) Act 1985 refers. The transaction can be challenged by the trustee because the debtor appears to have transferred the property to his wife for undervalue and:

- the debtor's estate has been sequestrated, and
- the transaction to place on the relevant date i.e. less than five years prior to the date of sequestration.

In order to validate Mr Kite's comments the following steps are advisable:

(a) determine from the debtor what documentation was created in order to establish the transfer i.e. is there a letter or comment in a birthday card, or was a solicitor instructed to transfer title. If the latter, the debtor should be invited to advise which solicitor was instructed and write to such solicitor for clarification of what was instructed and what has occurred as a result.

(b) a property search should be undertaken in order to ascertain the date of purchase of the heritable property by Mr Kite. This will detail the recorded title position i.e. has title been transferred to Mrs Kite and if so, when, and how was title held immediately prior to transfer. The property search will also reveal details of any standard securities. The trustee will need to ascertain if any exist that pre-date the transfer. If so, the trustee will wish to contact the standard security holder(s) and determine if agreement had been given to transferring title. If no agreement had been given and no title transferred, the trustee's task of recovering the property is likely to be easier. The search will also show if a standard security has been registered subsequent to the transfer and in such circumstances the trustee will want to enquire of the security holder(s) who borrowed the money.

(c) if a standard security existed as at date of transfer, determine the amount of borrowings in case it transpires that there was no value in the transfer.

(d) an independent valuation of the property should be obtained as at 7 April 2009 i.e. the date of transfer, and as at date of sequestration.

(e) details of insurance cover should be obtained and the trustee should advise his insurance broker as a precautionary measure meantime.

The trustee may care to consider registering a Notice of Litigiosity in order to protect the position lest Mrs Kite tries to sell the property before the trustee's enquiries/actions have been completed.

Once the checks noted above have been undertaken, the trustee should write to Mrs Kite in order to obtain her confirmation of the debtor's comment, and to ask if she has any other information to provide. Such letter will advise of the benefit of Mrs Kite seeking independent legal advice on the basis that if an asset has been transferred to her for undervalue, the trustee will seek recovery for the benefit of the sequestrated estate.

Safeguarding the estate would also involve advising Mrs Kite that if the trustee's enquiries show that there has been a transaction at undervalue, there would be benefit to all parties in agreeing a basis for providing value to the estate without recourse to potentially expensive court action.

(c) Explain to your principal the options available to Mrs Kite before he meets with her. (6 marks)

Inter-Office Memo
To : Principal
From : Assistant
Date : 4 November 2009
Subject : Sequestration of Mr Kite / heritable property transfer

The debtor was sequestrated on 1 November 2009 and initial enquiries reveal that he transferred his one half ownership of his house in Boat of Garten to his spouse on the occasion of her 50th birthday on 7 April 2009. At that time she held title to the other half. I have obtained an independent valuation which reflects that the total net equity as at 7 April 2009 was £80,000. Thus, one half i.e. £40,000 has been transferred to Mrs Kite. No consideration was received by the debtor because he advises that it was a birthday gift. Clearly, the transfer of the debtor's one half interest in the heritable property was made during the five year period preceding the date of sequestration. Thus, it appears that a gratuitous alienation has occurred and consideration is required regarding how to deal with this. The debtor's wife is scheduled to visit the office to meet you in order to discuss matters. I have met with her in the office briefly and she was tearful because she thought she would have to leave the house immediately. I told her that this was not the case and there were options that she needs to discuss them with you.

In anticipation of your meeting with Mrs Kite in early course I note below my thoughts on the options.

If considered appropriate, the trustee could raise court proceedings in order to challenge the gratuitous alienation under section 34 of the Bankruptcy (Scotland) Act 1985 and seek either a decree for reduction i.e. invalidate the transfer and restore the one half share of the property to the sequestrated estate, or request an alternative option that the court shall consider appropriate e.g. a cash settlement. If legal proceedings are instigated:

- the debtor's spouse may lodge defences if she can establish that at the time of the alienation, or at any time after the alienation, the debtor's assets were greater than his liabilities ; or

- the alienation was made for adequate consideration ; or

- the alienation was a birthday, Christmas or other conventional gift or was a gift made for charitable purposes to a person who is not an associate of the debtor, and having regard to all of the circumstances was reasonable for the debtor to make.

Given the fact that the debtor was sequestrated on 1 November 2009 and the deficiency shown on his Statement of Affairs is £95,000, I do not think that a gift of £40,000 was reasonable. Legal proceedings may well prove successful.

Should the Mrs Kite agree that the transfer of the debtor's interest in the heritable property to her was for nil value and it can be shown that the debtor was insolvent at that time (and was not solvent at any time thereafter) title to one half of the property would revert to the sequestrated estate and steps could be taken to obtain value for the equity. This can be achieved by returning title to the previous position and selling, but Mrs Kite may well fight such approach with consequent legal costs, time delay in receiving cash and introducing the speculation of court action.

Obtaining a lump sum in settlement of the debtor's potential net reversion on any interest or reaching another settlement which produces the same net financial result to the estate is another option which you may care to explore with Mrs Kite. This option has several possibilities. For example:

1. the debtor's spouse could provide funds to the estate immediately in respect of the equities, or a negotiated sum close thereto

2. the property could be refinanced either during or at the end of the sequestration process with Mrs Kite's written agreement. This could be considered as part of the government's mortgage to rent scheme. If this option is adopted, the agreement will need to address what will happen should it not prove possible to raise the necessary finance.

3. the debtor could approach a friend or another family member to purchase the debtor's agreed net equity interest.

4. with the debtor and his spouse's written agreement, the property could be placed on the open market for sale. After settlement of any secured borrowings and the cost of marketing and realisation, one half of the monies remaining would be passed to the sequestrated estate.

If none of these options are of interest to Mrs Kite then, as noted above, trustee can apply to court for an action of division and sale. Such application to court is likely to include an action of ejection against the person(s) occupying the property.

In determining whether to grant authority under section 40 of the Bankruptcy (Scotland) Act 1985 the court must have regard to all of the circumstances of the case including:

- the needs and financial resources of the debtor's spouse.

- the needs and financial resources of any child of the family.

- the interests of creditors and the length of period during which the family home was used as a residence by the debtor's spouse and any child of the family.

As you will be aware, the court is not required to take into account the needs of the debtor.

Whilst it is up to Mrs Kite to seek independent legal advice, she is likely to be told that the court may:

- refuse to grant the application (which is the speculation content of any court action as far as the trustee is concerned.

- postpone the granting of the application for such period as it may consider reasonable in the circumstances, or

- grant the application subject to such conditions as the sheriff may prescribe.

When you meet the debtor's spouse's it would make sense to re-iterate to her that she will not be asked to leave the property immediately upon speaking with you and that she should consider all of the information provided by the trustee: which I am happy to confirm to her in writing after your meeting.

Current legislation requires a trustee to deal with heritable property within three years of an award of sequestration. This aspect of the case may not be deemed to be heritable property because it is not in the debtor's name but good practice suggests that this time period should be respected. Thus, if an early meeting with Mrs Kite does not produce a definitive and agreed plan of action, the trustee has time on his side to consider Mrs Kite's comments and those likely to be received from her legal adviser.

(d) State with reasons how this information, together with any other relevant enquires that you deem appropriate, may influence your written causes of insolvency and any other return that you might submit to the accountant in bankruptcy? (6 marks)

The creditors mentioned in the question will be treated like any other liability and each one invited to submit a claim in the prescribed form to the trustee, together with suitable supporting documentation. It may be worthwhile reviewing each claim because it may be that section 61 of the Bankruptcy (Scotland) Act 1985 (the Act) is applicable (extortionate credit transactions) failing which they will rank equally with other unsecured claims.

Written causes of insolvency are submitted to the accountant in bankruptcy in accordance with section 20 of the Act and are privileged. It would be expected that full disclosure of the reasons for insolvency will be made to the accountant in bankruptcy and the trustee's comments may be influenced by what the debtor declares in the Initial Questionnaire. Due regard will also be given to the size, ageing and frequency of the type of claim mentioned in the questionnaire. If a trustee is concerned about how creditor liabilities were established and the conduct of the debtor in relation thereto, he may also seek views from individual creditors either by telephone or in writing. Any additional evidence will be retained by the trustee in the case file.

The trustee may also wish to prepare a submission to the accountant in bankruptcy on the prescribed bankruptcy restriction submission form, Appendix K, suggesting that either a Bankruptcy Restriction Order “BRO” or a Bankruptcy Restriction Undertaking “BRU” is considered.

In such case the trustee is required to provide the accountant in bankruptcy with a detailed report and supporting evidence for a BRO/BRU, and the AIB must be satisfied that sufficient grounds and evidence are to hand prior to accepting the submission either to substantiate a court application for a BRO or negotiating a BRU with the debtor.

An application for a BRO/BRU is made to the sheriff court that has jurisdiction over the debtor and can only be made during the period that a debtor is undischarged from his bankruptcy, unless permission is granted by a sheriff for a late application. Only the accountant in bankruptcy is entitled to submit a RO application to court.

Prior to acceptance of a BRO submission, the accountant in bankruptcy must have assessed that it is in the public interest to ask the court to impose a BRO on the debtor. Thus, the trustee will be required to consider and comment upon the following with respect to the debtor’s conduct:

- failure to keep proper records of transactions and/or failure to produce such records to the accountant in bankruptcy and/or the trustee.
- making a gratuitous alienation
- creating an unfair preference
- making an excessive pension contribution, or contributions
- failure to supply goods or services which have given rise to a creditor’s claim e.g. taking deposits
- trading when the debtor had no reasonable prospect of being able to pay his debts
- incurring a debt before sequestration which the debtor knew he could not repay
- failure to provide a satisfactory account for property losses to the sheriff, accountant in bankruptcy or the trustee
- excessive gambling or other extravagance which may have affected his liability position in a material way
- neglecting his business affairs in such a way that it contributed to, or increased his debts
- indulging in activities that represent either fraud or breach of trust
- failing to co-operate with either the accountant in bankruptcy or the trustee