JIEB DECEMBER 2006

SCOTTISH EXAMINERS' REPORT

PERSONAL INSOLVENCY (SCOTLAND) – DECEMBER 2006

General comments

Three of the four questions were narrative in nature which seemed to prompt large amounts of writing without sufficient prior planning of content, resulting in repeated statements and incoherence. The quality of English and knowledge of grammar was as disappointing as the quality of writing. In general terms however, there was a generally sound level of technical and practical knowledge when dealing with the questions posed.

Question 1

Required candidates to detail the items included in a form of record together with the documents they might expect to find in a sederunt book. The question also asked candidates to offer suggestions for sources of information to replace sederunt book items in the event of it being lost.

The majority of candidates answered the question fairly comprehensively although most candidates wanted to retain copies in the sederunt book rather than originals. Also, some answers included references to liquidation and administration, whilst others displayed confusion between the form of record (which appears at the front of the sederunt book and whose contents are detailed in the Insolvency Practitioners Regulations) and the contents of the sederunt book in terms of valuations, interlocutors, circulars etc. Candidates displayed good practical knowledge regarding the potential sources of locating copy documentation for the sederunt book.

Question 2

The question asked candidates to list the steps that might be taken in order to protect a debtor's interest in heritable property and detail steps the permanent trustee might undertake in order to realise the debtor's interest in such heritable property. The question centred around section 40 of the Bankruptcy (Scotland) Act 1985, and a good understanding of this section and the related considerations was demonstrated.

A number of candidates quoted certain landmark legal cases surrounding the section 40 process and whilst early action is encouraged regarding disposal of heritable property, the question was not designed to elicit responses such as abandoning the property, selling it for nominal value and trying to avoid dealing with the spouse. Also, it was surprising how many candidates suggested rushing to record title without noting the potential risks associated with such action. The majority of candidates displayed practical suggestions for dealing with the various considerations which tend to arise when the section 40 process is followed, and whilst virtually every candidate noted that the accountant in bankruptcy would be involved in the process in the absence of commissioners, it was remarkable how many candidates referred to the accountant in bankruptcy in the masculine.

Question 3

Candidates were invited to prepare an estimated statement of affairs for a partnership and the two partners thereof together with an estimated statement of outcome for each sequestration. A substantial amount of information was provided in the question with candidates being required to undertake various calculations in order to produce the correct figures. The partnership estimated statement of affairs was more complicated and a number of candidates became confused with some of the calculations such as former employee entitlements and retention of title goods uplifted by a supplier. Perhaps the lack of time precluded attention to detail such as layout, full description and detailed notes which one would expect to find attached to an estimated statement of affairs by way of explanation.

Not all candidates were aware that the partnership deficit would rank as an unsecured claim in each partner's sequestration and several candidates displayed a wish to settle preferred creditors before costs and outlays of the sequestration process, including the trustee's fee. Despite the large amount of information included in the question, some candidates sought to add more items when preparing the estimated statements of outcome and although some of the standard outlays were estimated fairly wildly, marks were given for knowing that such outlays were required in the first instance.

The first part of the question was handled more competently than the second part.

Question 4

The question detailed the general situation of an individual who was seeking personal insolvency advice. It was hoped that candidates would identify and deal with issues such as the matrimonial home, pension, divorce decree, trust fund, royalties and advice provided from another insolvency adviser. The question was designed to be fairly general in terms of the options available rather than requiring a specific answer because insufficient information was provided in the question to be definitive.

Most candidates spotted the key issues and were able to provide an explanation of the issues although the more unusual items such as the trust fund and royalty income were dealt with superficially by the majority.

Many answers contained a substantial amount of jargon and technical references which are unlikely to have been particularly helpful to the recipient of the letter being drafted. Few answers contained an income/expenditure summary in order to calculate a contribution and an estimate of the assets/liabilities position, and almost nobody mentioned the option of the debt administration scheme which came into effect in December 2004.

PERSONAL INSOLVENCY (SCOTLAND) – Mark plan

QUESTION 1

(a)(i)
The information on the form of record is as follows:

1. **Details of the insolvency practitioner acting in the case:**

Full name of insolvency practitioner.
Insolvency practitioner's number.
Principal business address of the insolvency practitioner.
The regulated professional body.

2. **Details of the insolvent:**

The name of the person in respect of whom the insolvency practitioner is acting.
The type of insolvency proceeding.

3. **Progress of administration:**

The date of commencement of the proceedings.
The date of the appointment of the insolvency practitioner: warrant to cite, interim trustee/award, permanent trustee/act and warrant.
The date upon which the appointment was notified to the accountant in bankruptcy.

4. **Bonding arrangements in the case:**

The date of submission of the cover schedule which has details of the specific penalty sum.
The amount of specific penalty sum.
The name of the surety or cautioner.
Date of submission to surety or cautioner of a cover schedule with any increase in the amount of the specific penalty sum.
The amount of any revised specific penalty.
Date of submission to the surety or cautioner of details of termination of the office held by the insolvency practitioner.

5. **Matters relating to remuneration**

The basis on which the remuneration of the practitioner is to be calculated.
The date and content of any resolution of creditors in relation to the remuneration.

6. **Meetings (other than any final meeting of creditors)**

The date of the statutory meeting in a sequestration.
The date and purpose of any subsequent meetings.

7. **Vacation of office etc.**

The date of the final notice to creditors or of the final meeting of creditors.
The date that the insolvency practitioner vacates office.
The date of release or discharge of the insolvency practitioner.
The date of the certificate of discharge issued by the accountant in bankruptcy.

8. **Distributions to creditors**

Details of each payment to preferred creditors.
Details of each payment to unsecured creditors.

9. **Statutory returns**

As regards any returns to accounts made to the accountant in bankruptcy:
For interim returns or receipts and payments account: due date and date of submission.
With regard to the final return or receipts and payments account: due date and date submitted.

10. **Time recording**

Details of the amount of time spent on the case by the insolvency practitioner and any person assigned to assist in the administration of the case
Details of the system on which the time records for the insolvency practitioner and his staff are maintained.

(ii)

Sederunt book contents

1. Petition for sequestration
2. First court order (warrant to cite if not at instance of debtor).
3. Court order awarding sequestration (is not petition at debtor's instance).
4. Debtor's signed statement of assets and liabilities.
5. Debtor's completed supplementary questionnaire.
6. Statement of affairs.
7. Certificate of summary administration, if applicable.
8. Gazette notices.
9. Circular to creditors informing of statutory meeting and a certificate of posting.
10. Circular to creditors enclosing revised statement of a debtor's affairs (if applicable) and certificate of posting.
11. Minute of statutory meeting of creditors.
12. Act and warrant.
13. Inventory and valuation.
14. Trustee's account of intromissions, scheme of divisions, determinations of remuneration and outlays.
15. Circular to creditors and debtor intimating fixed remuneration and certificate of posting.
16. Entries relevant to lodgement of claims by creditors.
17. Certificate of specific penalty.

Other documents to be inserted (as appropriate):

1. Notice of sheriff requesting removal of certificates of summary administration.
2. Copy court order withdrawing certificates of summary administration.
3. Request to court to appoint new interim trustee.
4. Copy order recalling or refusing to recall the award of sequestration.
5. Copy court order protecting the occupancy rights of a non entitled spouse.
6. Entry relative to the granting of a certificate of discharge of the interim trustee.
7. Copy decree of reduction of a gratuitous alienation
8. Copy decree of recall of an order for payment of a capital sum on divorce.
9. Copy decree for reduction of an unfair preference.
10. Record of debtor's evidence at an examination, duly subscribed.
11. Copy record of whole examination.
12. Adjudication on claims.
13. Entry relevant to the sheriff's decision on any appeal against the permanent trustee's adjudication on claims.
14. Copy order by sheriff deferring the debtor's automatic discharge.
15. Receipt from debtor of any reversions.
16. Entry relative to court's decision to any application to secure defects in procedure.
17. Copy of decree arbitral.
18. Entry relative to compromise with regard to any claim of whatsoever nature made against or on behalf of the sequestrated estate.
19. Entry recording a recommendation that an offer of composition should be placed before the creditors.

20. Entry relevant to permanent trustee's determination on whether an offer of composition has been accepted or rejected.
21. Copy court order approving the offer of composition and discharging the debtor and the permanent trustee.
22. Copy of decree of recall of aforementioned order.
23. Copy of decree of reduction of order discharging the debtor.
24. Minutes of meetings of creditors (non statutory).
25. Minutes of meetings of commissioners.
26. Minutes of matters agreed by commissioners without a meeting.
27. Such other entries and insertions as may be necessary to provide a full record of the sequestration process.

(b)

Sources would include:

1. Blank form of record available from accountant in bankruptcy and Insolvency Practitioners Regulations 1990 (not 2005 as not in force when sequestration commenced)

2. Copy interlocutors may be available from court and if court proceedings have ensued, perhaps the law agent retained a copy of the relevant order(s).

3. Receipts and payments accounts, scheme of division, claims adjudications and comments on causes of insolvency will have been submitted to the accountant in bankruptcy. Copies can be obtained. If commissioners have been elected, they may have copies.

4. Copies of receipts and payments account, act and warrant etc. may also be filed in the correspondence file.

5. The act and warrant may be available from parties to whom it has been sent for a specific reason e.g. secured lender or insurance policy provider.

6. If there has been a property transaction, the act and warrant will be available from the purchasing agent as it is filed with the deeds.

7. Debtor, creditors or commissioners (if elected) may have retained copies of circulars, minutes, etc.

8. Trustee's internal records/system e.g. IPS should be able to produce receipts and payments accounts, scheme of division, claims adjudication, etc.

9. File copies of Edinburgh Gazettes.

10. Cautioner/Institute can provide copy of initial bordereaux and any changes thereto.

11. Valuation agents can provide copy valuations.

12. Trustee's law agent may have copies of court documents etc., if one was used.

13. Keeper of the Register of Inhibitions and Adjudications and the Land Registry can provide copy entry details.

14. If there are insurable assets, the insurance provider will have details of the assets and their potential value.

Maximum marks for Question 1 20 marks

QUESTION 2

(a)

1. Instruct a property search and confirm ownership position. Identify all secured creditors.

2. Obtain copies of the title deeds, or details thereof: probably from Highland Bank plc.

3. Ensure that the property is insured, either with the existing insurer or an insurer of the permanent trustee's choosing.

4. Update caution level as appropriate.

5. Write to the debtor's spouse advising of the sequestration and of her occupancy rights as an entitled spouse.

6. Write to each secured creditor advise of position and record permanent trustee's interest.

7. Enquire what insurance cover the secured creditor(s) maintain, if any. Consider adequacy.

8. Determine if any insurances e.g. endowments/life assurance policies are secured on the house. If so, record permanent trustee's interest therein.

9. Check title position in respect of survivorship clause. If there is one, determine when it was created.

10. Consider recording notice of title. Copy to be filed in sederunt book.

11. Instruct an independent valuation.

(b)

1. The powers of the permanent trustee to sell the debtor's family home are regulated by section 40 of the Bankruptcy (Scotland) Act 1985.

2. Ensure that the spouse has been invited to seek independent legal advice.

3. The family home is defined in section 40 as being any property in which, immediately proceeding the date of sequestration, the debtor had, whether alone or in common with any other person, a right or interest, being property which was occupied at that time as a residence by the debtor and his spouse or by the debtor's spouse or former spouse (in any case whether with or without a child of the family) or by the debtor with a child of the family.

4. In order to realise the debtor's potential net reversionary interest in the property, the permanent trustee has the following options:

   (a) the debtor, after he has obtained his discharge, or at any time his spouse or a friend or family member could pay value for the debtor's net reversionary interest in the property and if appropriate assume full liability for the mortgage or

   (c) the debtor and his spouse could consider the Scottish Executive "Mortgage to Rent" scheme or a similar scheme.

   (d) if the relevant consent is not forthcoming, the permanent trustee could apply to court for an action of division and sale.

5. Relevant consent means: where the family home is occupied by the debtor's spouse or former spouse, the consent of the spouse or former spouse; and where the debtor resides in the house with a child of the family and no spouse, the relevant consent means the consent of the debtor. Once obtained, the consent should be filed in the sederunt book.

6. The endowment policy should be considered and the trustee should write to the insurance

provider to obtain confirmation of the policy holders and the potential surrender/encashment value.
7. If appropriate, consideration could be given to the mortgage being converted from an "interest only" facility to a "repayment" facility in order that the debtor's share of the policy proceeds are released to the trustee for the benefit of creditors.
8. The debtor's spouse could also be invited to provide her share of the policy proceeds as part payment of the debtor's interest in the property.
9. If the foregoing options are not possible and the relevant consent is not forthcoming and the permanent trustee is required to apply to the court for authority to sell, the court is required to have regard to all of the circumstances of the case including:
(a) the needs and financial resources of the debtor's spouse or former spouse
(b) the needs and financial resources of any child of the family
(c) the interests of the general body of creditors
(d) the length of the period during which the family home was used as a residence by the debtor's spouse or former spouse or any child of the family.
10. The court may refuse to grant the application or may postpone the granting of the application for a period, not exceeding 12 months, as it may be considered reasonable in the circumstances, or the court may grant the application subject to such conditions as it may prescribe.
11. Authority to sell may be of little use unless the permanent trustee has vacant possession and hence, additional court authority may be required.
12. The permanent trustee will wish to obtain approval from either the accountant in bankruptcy or the commissioners before embarking upon a legal process.
13. Copy of the court order should be filed in the sederunt book.
14. In this instance, the family home is subject to a standard security. The holder of the standard security is not affected by section 40 and therefore, if the permanent trustee is having trouble obtaining the relevant consent and the mortgage falls into arrears, the possibility of the security holder calling up the security and selling the house should be explored.
15. If the permanent trustee decides to sell the property, he should advise the secured creditor of such a decision (section 39).
16. The inhibition should be renewed with the Registrar of Inhibitions and Adjudications
Considerations likely to feature in court's thought process
1. The debtor has a large family, one of whom is at a crucial stage in the education process. It is also noted that the debtor suffers from depression.
2. As the court has complete discretion in terms of section 40 and is required to consider all of the circumstances of the case it may be that the court will defer the granting of an order and possibly refuse to grant an order unless suitable alternative accommodation can be obtained for the family, in the same area. The costs would require to be considered.

3. There are several cases which may be relevant to the position:

   (a) Salmon's trustee v Salmon: the application was suspended for four months to allow a child to complete his exams.

   (b) Gourlay's trustee v Gourlay: the court refused to grant the application because the debtor had had a stroke and caring for her husband had affected his wife's health. The court considered that moving house would put additional strain on the debtor's wife.

   (c) Ross v Gena Hamilton Rankin: The sheriff granted the order sought by the trustee because the wife's consent was not forthcoming. The fact that there were two young children was not considered to have an impact on the decision.

4. The debtor's spouse may also be in a position to seek compensation of the fact that she has been paying the mortgage since the cessation of the debtor's business. The relevant case law in relation to this matter is McMahon's trustee v McMahon 1997 in which a similar situation arose.

Maximum marks for Question 2 20 marks

Question 3

(a) (i)

SEQUESTRATION OF TONGUE N'GROOVE
INTERIM TRUSTEE'S ESTIMATED STATEMENT OF AFFAIRS OF TONGUE N'GROOVE a firm) AS AT 12 NOVEMBER 2006
(date of award of sequestration)
(date of sequestration: 12 October 2006)

	Note	£	£
Assets			
Office furniture and computer equipment, estimated by partner to realise			4,300
Motor vehicles	1		8,000
Furniture stock	2		35,400
Book debts	3		49,600
Total assets			97,300
Liabilities			
Preferred creditors			
Former employees' claims for arrears of wages	4	6,150	
Former employees' claims for accrued holiday pay	5	2,400	
			(8,550)
Estimated surplus as regards preferred creditors			88,750
Ordinary creditors			
Trade creditors		110,000	
Unpaid rent of premises		10,000	
Former employees' claims for arrears of wages	4	5,400	
Former employees' claims for notice pay	6	15,600	
Former employees' claims for redundancy	7	9,750	
Retention of title creditor	8	2,000	
VAT		3,600	
PAYE and NIC	9	11,040	
			(167,390)
Estimated deficiency	10		£(78,640)

Notes to estimated statement of affairs for Tongue'n Groove

1.	Range Rover Vogue, estimated to realise	£18,000
	Mercedes E320, estimated to	22,000
		£40,000
	Less: due to Fast Finance Scotland Limited	(32,000)
	Potential surplus	£ 8,000

As the finance company holds both agreements, it is anticipated that the potential surplus available on the Range Rover Vogue will be offset against the potential shortfall on the Mercedes E320, in order to mitigate the recovery by the finance company. Thereafter, depending upon the terms of the agreement, the surplus may be retained by the finance company (but considered unlikely).

In order to secure the surplus, the permanent trustee may decide to sell the vehicles privately and if so, should advise the finance company prior to undertaking any action and obtain agreement to this proposal.

For the purposes of this answer, the surplus is shown as reverting to the sequestration.

2.	Stock, as valued by local auctioneer	£38,000
	Less: retention of title claim	(2,600)
	Value of stock in hand	£(35,400)

3.	Book debts recorded in the business records	£62,000
	Less: provision for bad and doubtful debts @ 20%	(12,400)
	Recoverable book debts	£49,600

4. Arrears of wages

Wages may be claimed up to the current maximum weekly limit of £290. The former employees' total claim would be as follows:

Details	Total	Preferred	Ordinary
	£	£	£
Six employees at £425 per week for 4 weeks	10,200	4,800	5,400
Two employees at £225 per week for 3 weeks	1,350	1,350	-
	£11,550	£6,150	£5,400

5. Holiday pay

Holiday pay is preferential in entirety and thus the sum of £2,400 will be ranked accordingly.

6. Notice pay

Detail	Amount
	£
Five employees at £1,650	8,250
Three employees at £2,450	7,350
	£15,600

Notice pay will be restricted to £290 per week after mitigation of the claim by deduction of any earnings received during the notice period or unemployment benefits received/receivable.

7. Redundancy pay is afforded an ordinary ranking in its entirety.

8. Retention of title creditor

Creditor's claim	£4,600
Less: goods received under retention of title claim	(2,600)
Net claim in sequestration	£2,000

9. PAYE

September 2006	£4,600
October	4,600
November: 12 days = 12 ÷ 30 x £4,600 =	1,840
	£11,040

Although the Bankruptcy (Scotland) Act 1985 indicates that claims should be calculated as at the date of sequestration which in this instance will be 12 October 2006, in cases where a creditor has petitioned and trade has continued until the award of sequestration it is usual practice to include all debts up to the date of award.

10. The estimated deficiency is subject to asset realisations and the costs of the sequestration process.

11. The trustee considers that there will be a dividend to all classes of creditor.

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12 November 2006

(a) (ii)

SEQUESTRATION OF DONALD TONGUE

INTERIM TRUSTEE'S ESTIMATED STATEMENT OF DEBTOR'S AFFAIRS
AS AT 12 NOVEMBER 2006
(date of award of sequestration)
(date of sequestration: 12 October 2006)

	Notes	£	£
Assets			
Matrimonial home	1		72,000
Investment portfolio			22,000
Total assets			94,000
Liabilities (ordinary)			
Personal liabilities		18,000	
Joint and several potential net deficiency arising from the trading activities of Tongue n'Groove (a firm)	2	78,640	
			(96,640)
Surplus	3		£(2,640)

Notes

1. Matrimonial home valued at £310,000
   Less: secured borrowings (220,000)

   Potential equity 90,000

   20% share to spouse (18,000)
   80% share to debtor £(72,000)

2. Donald Tongue and Hamish Groove being the whole partners of Tongue'n Groove (a firm) are jointly and severally liable for all partnership liabilities. In this regard, an estimated statement of affairs has been prepared for the partnership and a net deficiency of £78,640 is reflected.

3. The net deficiency is subject to asset realisation and the costs of the sequestration process.

4. The trustee considers that there will be a dividend to all creditors.

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(a) (iii)

SEQUESTRATION OF HAMISH GROOVE

INTERIM TRUSTEE'S ESTIMATED STATEMENT OF DEBTOR'S AFFAIRS AS AT 12 NOVEMBER 2006
(date of award of sequestration)
(date of sequestration: 12 October 2006)

	Note	£	£
Assets			
Matrimonial home	1		2,500
Total assets			2,500
Liabilities			
Personal liabilities		12,000	
Joint and several potential net deficiency arising from the trading activities of Tongue n'Groove (a firm)	2	78,640	
			(90,640)
Net deficiency	3		£(88,140)

Notes for sequestration of Hamish Groove

1. Matrimonial home valued at £120,000
   Less: secured borrowings (115,000)

   Potential equity £5,000

   Whereof, one half to debtor £2,500

2. Donald Tongue and Hamish Groove being the whole partners of Tongue'n Groove (a firm) are jointly and severally liable for all partnership liabilities. In this regard, an estimated statement of affairs has been prepared for the partnership and a net deficiency of £78,640 is reflected.

3. The net deficiency is subject to asset realisation and the costs of the sequestration process.

4. The level of assets suggests that there will be no dividend to any class of creditor.

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12 November 2006

(b) (i)

SEQUESTRATION OF TONGUE N'GROOVE (a firm)

ESTIMATED STATEMENT OF OUTCOME

	£	£
Asset realisation proceeds as indicated in estimated statement of affairs dated 12 November 2006		97,300
Less: provision for sequestration expenses		
Bond of caution	50	
Statutory advert: The Edinburgh Gazette	30	
Court dues	20	
Petitioning costs, say	500	
Trustee's remuneration	7,500	
Scottish Executive:		
Registering award	18	
Registering act and warrant	18	
General supervision fee	110	
Audit fee: 17.5% of fees and outlays	1,448	
Audit of sederunt file	26	
		(9,720)
Projected funds available for distribution to preferred creditors		87,580
Preferred creditors		(8,550)
Available for distribution to ordinary creditors		£79,030

The preferred creditors will be paid in full and the sum of £79,030 is sufficient to enable a dividend of approximately 47p in the £ to ordinary creditors whose claims total £167,390.

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(b) (ii)

SEQUESTRATION OF DONALD TONGUE

STATEMENT OF ESTIMATED OUTCOME

	£	£	£
Asset realisation proceeds as indicated in estimated statement of affairs dated 12 November 2006			94,000
Less: provision for sequestration expenses			
Bond of caution		50	
Statutory advert: The Edinburgh Gazette		30	
Court dues		20	
Petitioning costs, say		500	
Trustee's remuneration		4,000	
Scottish Executive:			
Registering award		18	
Registering act and warrant		18	
General supervision fee		110	
Audit fee: 17.5% of fees and outlays		1,448	
Audit of sederunt file		26	
			(6,220)
Projected funds available for distribution to creditors			£87,780
Creditors:			
Business creditors	167,390		
Less: expected dividend from the sequestration of Tongue n'Groove	(79,030)		
		88,360	
Add: Personal creditors		18,000	
Total creditors			£(106,360)

The sum of £87,780 is sufficient to enable a dividend of approximately 82p in the £ to ordinary creditors whose claims total £106,360.

Note:

If Donald Tongue is called upon to pay a dividend to partnership creditors, as suggested above, he will be in a position to submit a claim in Hamish Groove's sequestration for one half of the monies paid.

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(b) (iii)

SEQUESTRATION OF HAMISH GROOVE

STATEMENT OF ESTIMATED OUTCOME

	£	£
Asset realisation proceeds as indicated in estimated statement of affairs dated 12 November 2006		2,500
Less: provision for sequestration expenses		
Bond of caution	50	
Statutory advert: The Edinburgh Gazette	30	
Court dues	20	
Petitioning costs, say	500	
Trustee's remuneration	4,000	
Scottish Executive:		
Registering award	18	
Registering act and warrant	18	
General supervision fee	110	
Audit fee: 17.5% of fees and outlays	1,448	
Audit of sederunt file	26	
		(6,220)
Projected deficiency to creditors		£(3,720)

There are insufficient funds to enable a dividend to an ordinary creditors whose claims total £90,640.

Note:

The partnership position of Tongue'n Groove (a firm) is ignored because the debtor has insufficient assets to pay a dividend to any class of creditor.

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Sequestrations of Tongue'n Groove (a firm) and of Donald Tongue and Hamish Groove, the whole partners therein

Summary of projected dividend distributions

	Tongue'n Groove (a firm) Preferred Creditors	Tongue'n Groove (a firm) Ordinary Creditors	D Tongue - Personal Creditors	H Groove - Personal Creditors	Total
	£	£	£	£	£
Creditor position	**8,550**	**167,390**	**18,000**	**12,000**	**205,940**
Anticipated dividends					
Sequestration of Tongue'n Groove (a firm)	(8,550)	(79,030)	-	-	(87,580)
Sequestration of Donald Tongue	-	(72,924)	(14,856)	-	(87,780)
Sequestration of Hamish Groove	-	-	-	-	
Total anticipated dividend	(8,550)	(151,954)	(14,856)	-	
Equivalent p in £	100p	91p	82p	nil	

Maximum marks for Question 3 30 marks

QUESTION 4

I M A Practitioner

Insolvency Towers
1 Bank Row
Anytown
AY2 7UP

13 December 2006

Will Power Esq
1 Anystreet
Anytown
AY1 5PL

Dear Mr Power

Your financial affairs

I refer to our recent consultation regarding your financial affairs and, as agreed, set out below various options available in order to address your financial affairs. This letter also explains some of the issues pertinent to your affairs and how they relate to the principal options available to you.

The principal options can be summarised as follows:

1. Do nothing. If you follow this option, it may be that a creditor, perhaps your former spouse's solicitor, will instigate debt collection proceedings against you and if a petition for your sequestration is submitted to court, you will be sequestrated.

2. Negotiate an informal arrangement with creditors only once all assets and liabilities have been identified and assessed, coupled with your ability to pay a reasonable sum toward reduction of your creditors.

3. Consider the Debt Arrangement Scheme as a means of protecting assets and providing a sufficiently lengthy time period to pay creditors from your ongoing earnings. This is a matter for discussion with the local Citizens Advice Bureau who have trained personnel in this regard.

4. Sign a trust deed. A trust deed is a form of personal insolvency and has the effect of conveying all assets and liabilities to a trustee. The trustee will realise all assets for best value and communicate with the creditors in order to quantify each liability and explain the trust deed process.

   Typically, a trust deed lasts for three years, although the time period can vary. During such period, the trustee seeks to realise any assets and collect contributions from your earnings such that he can pay a dividend to creditors.

5. Apply to court to be sequestrated. Sequestration is a formal insolvency proceeding and lasts for three years, although there is a provision for the sequestration to be extended under appropriate circumstances. Also, the sequestration period can be less if the liabilities can be settled earlier.

From the information provided, you do not meet the criteria to present a petition for your sequestration. Apparent insolvency has not been constituted because you do not appear to have been served with a statutory demand for payment of a debt, or a charge for payment (typically served on you by sheriff officer).

The issues raised from our consultation are addressed below.

You have not advised the level of the lump sum. It may be that it took into account the one half share of the house transferred in December 2005 i.e. £(270,000 – 70,000) ÷ 2 = £100,000. Thus, if the lump sum and solicitor's fees approximate £100,000, there may not be an issue. However, my suspicion is that the lump sum and agreement to pay your former wife's legal fees was in addition thereto. Accordingly, my comments below proceed on the basis that these are extra payments. Thus, the divorce decree will be challenged and may well cause concern to your former spouse.

Divorce settlement

Section 35 of the Bankruptcy (Scotland) Act 1985 deals with recalling an order for payment of a capital sum on divorce.

The section applies where:

(a) the court has made an order for the payment by a debtor (the word used to describe someone who has been sequestrated) of a capital sum after the transfer of property by him, and;

(b) on the date of the making of the order, the debtor was absolutely insolvent or was rendered so by implementation of the order and;

(c) within five years of the making of the order, the debtor's estate is sequestrated or he grants a trust deed.

Where this section applies the court, on an application brought by a permanent trustee in bankruptcy or trustee acting under a trust deed, may make an order for the recall of the divorce decree and repayment to him of the whole or part of any sum already paid or, as the case may be, for the return to the applicant of the whole or part of any property already transferred under that order. If the property has been sold, payment to the trustee for all or part of the proceeds of sale would normally be appropriate.

As part of the process of issuing an order, the court has regard to all the circumstances of the case, including the financial and other circumstances of the person against whom the order would be made. This means that if you were to be subject to formal insolvency proceedings by either sequestration or a trust deed, the trustee would be entitled to petition court for your financial interest in the house to be returned to you. Further, your wife would be responsible for payment of any legal fees incurred by her.

Heritable property: former matrimonial home

I note that the heritable property was valued in November 2005 at £270,000. There were secured borrowings of £70,000 thus creating potential equity of £200,000, one half of which would have reverted to you.

On the basis that you received no value for the transfer, a gratuitous alienation seems to have occurred i.e. the transfer of property for undervalue. Your interest is £100,000 and requires to be recovered for the general body of creditors.

Under both trust deed and sequestration proceedings, a gratuitous alienation is challengeable by the trustee. The transaction can be challenged if the alienation has the effect of favouring:

(a) a person who is an associate of the debtor, for a period of five years prior to the date of sequestration/granting a trust deed, or

(b) any other person within a two year period prior to the date of sequestration/granting a trust deed.

An associate includes a spouse or former spouse.

If a gratuitous alienation is challenged successfully, the court shall grant decree of reduction or for such restoration of property to the debtor's estate or other redress as may be appropriate, unless the person seeking to uphold the alienation can establish that:

(a) immediately or at any other time after the alienation, the debtor's assets were greater than his liabilities, or

(b) that the alienation was made for adequate consideration, or

(c) that the alienation was a birthday, Christmas or other conventional gift.

It is likely that the insolvency practitioner would challenge the transaction and seek restoration of the property such that you became joint titleholder again. Considerations here are:

(a) with both your and your former spouse's consent, the property could be placed on the open market for sale. The sale proceeds would be utilised to settle the marketing and realisation expenses and the secured borrowings. Thereafter the net equity would be allocated equally to your estate with the other half reverting to your ex-wife.

Your former wife may have a claim in respect of mortgage payments made by her since you relinquished title to the property

(b) you or your former spouse may be aware of a friend or relative who is in a position to provide value for your potential net reversionary interest in the property and upon receipt of such value, your trustee's interest in such property would be removed

(c) if options (a) or (b) are not appropriate a permanent trustee under sequestration proceedings can apply to court for authority to sell the property and obtain vacant possession. This option is not available under trust deed proceedings. When considering the request for authority, the court has due regard to all circumstances which include, but are not limited to:

(i) the needs and financial resources of your former spouse

(ii) the needs and financial resources of any child of the family

(iii) the interests of creditors

(iv) the length of the period during which the property has been the family home.

The court may grant the application subject to such conditions as it may prescribe, refuse to grant the application or may postpone the granting of the application for such period (not exceeding twelve months) as it may consider reasonable. For example, a child may be about to sit important exams and the court may decide that residency should remain until such exams are complete.

<u>Pension</u>

Where a debtor has entitlement to a pension, including any lump sum element, as a result of his employment i.e. an occupational pension scheme, such pension is exempt from vesting in the trustee (in both sequestration and trust deed proceedings) as stated in section 3(2a) of the Bankruptcy (Scotland) Act and supported by section 91 of the Pensions Act 1995.

Following the implementation of sections 11 and 12 of the Welfare Reform and Pensions Act 1999, personal pensions no longer vest in the permanent trust deed if the pension has been approved by H M Revenue & Customs.

Unapproved personal pensions continue to vest in a trustee although there are provisions to allow the trustee to reach agreement with the debtor that an unapproved scheme will not vest where it is the debtor's sole or main pension, or the debtor makes an application to court for an exclusion order in relation to part, or all, of the pension.

A trustee could consider challenging excessive contributions to an approved scheme in order to seek their return. For example, a person may have earned £30,000 and contributed that sum to a pension scheme approximately three months before formal insolvency proceedings incept. In such a case, the trustee would contend that the contribution was excessive in relation to income.

In order that the type of scheme may be clarified, it would be helpful if you could provide the policy documentation for review, together with details of contributions over the last two years.

Contribution from ongoing income to your estate

It is my understanding that your gross annual salary is £45,000, which provides an estimated £30,000 net of tax and national insurance: equating to £2,500 per month. You have advised that you contribute £500 each month toward household expenses and thus the potential contribution that you might be in a position to pay as follows:

	£	£
Monthly net income		2,500.00
Monthly expenses:		
Contribution to household expenses	500.00	
Maintenance	700.00	
Estimated other monthly expenses, say	800.00	(2,000.00)
Potential disposable income for payment of a contribution		500.00

Please advise me if the sum allocated to other monthly expenses is appropriate and if you consider that the suggested contribution sum is affordable.

Other potential assets

Subject to the correct legal documentation being in place, the trust fund does not form part of your estate unless your step-mother pre-deceases you.

The monthly annuity will be receivable by your sequestration/trust deed, because it is not required to meet your essential monthly commitments as is the annual gift from your Aunt.

Further information regarding the royalties would be required in terms of advising you of their treatment. For example:

(a) When did you create the invention?

(b) Where are the original patent/copyright documents retained?

(c) Have all patent/copyright fees been paid up-to-date?

(d) Please provide a copy of the royalty agreement/arrangements together with details of the patent adviser and any legal adviser/financial adviser/accountant that may have been used.

(e) What can influence the level and frequency of royalties?

(f) Is the patent sellable?

One suspects that you should consider the royalty income flow as part of your estate for the general body of creditors.

Potential outcome

Your creditors, assuming that the divorce decree is challenged and set aside are:

Name of creditor	£
Student loan	20,000
Solicitor's fees	25,000
Credit cards	15,000
Arrears of maintenance	3,500
	£63,500

This analysis assumes that the divorce decree is annulled in order to remove the lump sum payment and the obligation to pay your former wife's legal fees.

You may have sufficient income/assets in order to enable full settlement to creditors together with interest at 8% per annum and the costs of the sequestration process.

In order to settle the liabilities noted above, your annual income would require to be reviewed annually in terms of contributions.

The potential income to the estate during a three year sequestration/trust deed period would be as follows:

Source of income	£
Contribution (36 x £500 per month)	18,000.00
Royalties (36 x £220 per month)	7,920.00
Annual gift from Aunt (3 x £2,300)	6,900.00
	£32,820.00

The assets which may require to be realised are:

(a) the royalties and/or

(b)your interest in the house – if the property transfer was challenged successfully, value would be obtained, say £100,000 for your interest in the property. If at conclusion of the sequestration/trust deed there were surplus funds remaining after settlement of the creditors and the administration costs, the surplus would be paid to you. Alternatively, your wife or someone else might purchase sufficient of your interest, say up to £40,000, in order that all creditors are paid in full together with statutory interest and costs of the process.

Conclusion

My inclination is to suggest a trust deed in order to regularise matters, remove creditor pressure and allow an element of flexibility in dealing with the house.

I would also suggest that you consult with the Law Society to ascertain what impact, if any, there will be on your ability to practice law.

The next step is for us to meet and explore your options. I trust that these thoughts are helpful meantime and look forward to hearing from you in order that a meeting may be arranged at a mutually convenient time.

Yours sincerely

I M A Practitioner

Maximum marks for Question 4 30 marks

ADMINISTRATIONS, COMPANY VOLUNTARY ARRANGEMENTS AND RECEIVERSHIPS PAPER – SCOTLAND DECEMBER 2006

GENERAL COMMENTS

Overall the balance of paper was thought to be fair by the candidates and as with most years individual candidates experienced problems in certain questions.

The reduction to four compulsory questions has provided greater focus to the candidates and the separation of the elements of the Requirement into separate parts with marks allocated also appears to have worked in the candidates favour. Answers were generally more concise than in prior years, allowing candidates to demonstrate their knowledge and their practical application of that knowledge in an easier format than writing lengthy letters or very detailed memoranda.

As might be expected in Scotland, Question 2 on CVAs was done less well although one candidate achieved just over half marks. Further comments on this particular question are detailed below.

There is still evidence that candidates treat the question as an invitation to write everything they know about a topic, copying out parts of the act and rules too, rather than using the information contained in the question to provide their answer and demonstrate their ability to apply their knowledge.

The range of marks is less "spread" than in previous years and the overall quality higher.

Question 1

One candidate scored full marks in this question and one came very close to doing so.

This question sought to have candidates demonstrate their knowledge of the preparation of a final progress report in an administration. The major issue was candidates failing to recognise the need to account in a three column format, one for each of the accounting periods during the administration and a total column. Candidates were awarded half marks if they only produced one column.

Candidates generally showed the estimated to realised or statement of affairs figures for illustrative purposes. Most candidates dealt well with the calculation of the preferential claim although marks were lost by failure to show the detailed calculation in workings.

A particular concern overall was the lack of demonstration of where to gross and net-off amounts (CID facility and bank debt, stock and RoT are obvious examples). I would also suggest that candidates need to understand the way in which a CID facility operates and the legal position of amounts due under such arrangements.

Only one candidate mentioned the Prescribed Part at all in their answer and no candidates commented that there was no need for a Prescribed Part, for which half a mark would have been awarded.

Part 2 on the SIPs 9, "Classification of Time" was well done. Candidates who scored maximum marks on this tended to know the categories concerned where other candidates tried to put down specifics that may be included within the sub-headings. Marks were awarded here where the comments were sufficiently specific to show that the candidates did know what they were talking about.

Question 2

Question 2 required an understanding of the principals underlying a CVA and was generally not well done with only one candidate getting over half marks. This is perhaps not surprising as, noted above, CVAs are uncommon in Scotland. However, it is an important part not only of the syllabus but of the armoury of an IP and it is an area where candidates must improve their understanding of the principals behind a CVA.

Very few candidates used the information given to them in the question in establishing the further information required from the directors but rather took an opportunity to copy Rule 1.3.

Part B was an opportunity for the candidates to demonstrate their understanding of the principals behind a CVA. This was poorly done with candidates confused between a liquidation (or indeed the bankruptcy) process. Marks were awarded where the candidates intended to apply the liquidation rules. However, further information was required as to how this may be dealt with in a CVA proposal. Part 2B concerning "Unclaimed Dividends" was very poorly done with only one candidate understanding that the funds belonged to the Company and would not be consigned to court, as in a liquidation.

Part C on bonding was generally well done as regards the calculation of the amount. However, only one candidate demonstrated knowledge that the bond would be required as nominee and that there would be no need to re-bond as supervisor. No candidates indicated that they would bond to the top of the bracket for premium purposes.

Question 3

This question required the application of a set of specified circumstances for consideration on reporting adversely on directors. The question was reasonably well done with most of the major points being readily identified by the majority of candidates. However, candidates lost marks for not identifying an appropriate view of the possible preferences and linking this to the guarantee issue.

There was some evidence that some candidates tackled this question last as there did seem to be signs of time pressure.

Part B on "Appendices" was generally well done. The information on the loan account was either relatively well attempted or poorly attempted. There seemed to be lack of understanding as to which way the loan was operating on the part of some candidates and a lack of understanding as to the claims that the company may have in the deceased director's director's estate.

Part D on the "Restriction of the Re-use of the Company Name" was generally well attempted with candidates recognising the issue. Several candidates used it as an opportunity to copy out Rules 4.78 to 4.82 rather than demonstrate the practical issues of this being an exempt case , and of the Newco giving notice to creditors.

Question 4

This question concerned a number of practical applications following an administration appointment. Part A, which related to a listing of the statutory requirements in the first 3 months, was well done. Most candidates picked up points for recognising the need for notice to the pension protection fund, the pension regulator and the trustees of the scheme and the timing requirements for the holding of a meeting and the follow-on filings required.

Part B on the "Director Wishing to Resign" most candidates used this as an opportunity to demonstrate their knowledge of company law rather than the practical issues arising. In these circumstances, candidates who scored well recognised the potential importance of the director to a business and, possibly, to the sales process. Only one candidate identified the need for the director to be advised to have his own independent legal advice and for clarity that the administrator must not advise the director on this matter.

The next part on "Retention of Title" was generally well done although it was obvious which candidates had practical experience of dealing with RoT. The same is true on the part of the "Repossession of the Vans", although few candidates mentioned consolidation clauses and a need to understand the position by "Van" and by "Agreement". Only one candidate seemed to be aware of the wider commercial issue which is that a longer term security could be achieved by the lessor should he agree to leave the vans in place while a sale of the business was sought.

The final part on "Re-tendering of Contacts" was generally poorly done with evidence of candidates running out of time.

ADMINISTRATIONS, COMPANY VOLUNTARY ARRANGEMENTS AND RECEIVERSHIPS PAPER – SCOTLAND DECEMBER 2006 - Markplan

Question 1

(a)

There is no prescribed part as the bank's liability has been fully discharged from realisation of the book debts
Preferential arrears of wages is limited to £800 per employee

		Period 30/01/06 to 29/07/06 £'000	Period 30/07/06 to 12/12/06 £'000	Total £'000
ETR	Fixed charge receipts			
500	Book debts	450.00	0.00	450.00
	Total realisations	450.00	0.00	450.00
	less			
	CJM at date of administration	100.00	0.00	100.00
	CJM interest and charges	5.00	0.00	5.00
	CJM administration fee	25.00	0.00	25.00
		130.00	0.00	130.00
	Surplus available from fixed charge realisations	320.00	0.00	320.00
	Uncharged assets			
0	Licensing agreement	250.00	0.00	250.00
15	Computer equipment	15.00	0.00	15.00
500	Stock	300.00	0.00	300.00
0	Tax rebate	40.00	0.00	40.00
	Total uncharged asset realisations	605.00	0.00	605.00
	Payments			
	Costs of order	7.50	0.00	7.50
	Retention of title claims	175.00	0.00	175.00
	Administrators fees	55.00	70.00	125.00
	Administrators fees - tax	0.00	15.00	15.00
	Administrators disbursements	2.00	0.50	2.50
	Legal fees	0.00	50.00	50.00
	Bond	1.00	0.00	1.00
	Stat advertising	1.50	0.00	1.50
	Insurance	5.00	0.00	5.00
	Preferential dividend to RPO	0.00	124.00	124.00
	Preferential dividend to employees	0.00	26.00	26.00
	Total payments	247.00	285.50	532.50
	Surplus from uncharged assets	358.00	-285.50	72.50
	Surplus to be passed to liquidator			392.50

Arrears of wages

Weekly pay per employee	350	
Total arrears per employee	1,400.00	
Preferential element per employee	800.00	0.50
Percentage		
RPO pay	1,160.00	1.0
Employee claim	240.00	

Dividend in respect of arrears of wages

Dividend to RPO	66,300	1.0
Dividend to employee	13,700	

Holiday pay

Weekly holiday pay per employee	350
Total arrears per employee	700

Dividend in respect of holiday pay

RPO claim (£290 per week)	58,000	0.5
Employee claim £60 per week)	12,000	0.5

Calculation of total administrator's time costs

	Hours	Rate	Cost
Partners	50	300.00	15000.00
Managers	250	200.00	50000.00
Administrators	300	150.00	45000.00
Assistants	150	100.00	15000.00
	750	187.50	125000.00

(b)

Case planning and case review
Administrative set-up
Appointment notification
Maintenance of records
Statutory reporting and compliance

Maximum marks for Question 1 — 20 marks

Question 2

(a)
Style
Letter to evidence willingness of local investor to contribute £250,000
Evidence that he has the funds available
Cashflow to be provided to show company able to contribute £2,000 per month
If necessary would extend arrangement to allow a better dividend to creditors
Details of new contracts and revenue generated from them
Has these new contracts been included in the calculation for the cash flow
Will Gildersome Limited waive their claim in the proceedings
Statutory accounts to be provided specify
Full statement of affairs detailing assets and liabilities
Any valuations to be evidenced in writing
Any arrears on the leasehold property or dilapidations
The likely outcome of the liquidation
Whether the claim has been agreed in the liquidation
Full list of creditors
Details of any enforcement action initiated
Reference numbers for VAT and IR

(b)(i)
The supervisor shall send a notice to submit claims to every creditor
Applying Rules 4.15- 4.17 as an alternative
Requiring them to provide details of their claim
Any creditor shall submit his claim in writing to the supervisor in the required form or one similar.

Any creditor shall submit his claim in writing to the supervisor by the required deadline

(b)(ii)
The supervisor may call for any document or other evidence to be produced to him, where he thinks it necessary, for the purpose of substantiating the whole or any part of the claim.

Unless resubmitted claim submitted for voting purposes will stand

Comments on an appeal process of some kind and time limit

Any other sensible points that fit with the philosophy of a CVA
The supervisor may, if he thinks necessary, require a claim to be verified by affidavit.
A claim may be admitted for dividend either for the whole of the amount claimed by the creditor, or for part of that amount.
If the supervisor rejects a claim in whole or in part, he shall prepare a written statement of his reasons for doing so and send it to the creditor

(b)(iii)
Must distribute when sufficient funds available or in accordance with the terms of the proposal
No more than X months before declaring a Dividend to Creditors, the Supervisor shall give notice of his intention to do so to all such Creditors whose addresses are known to him and who have not submitted their claims.
The notice sent out to Creditors shall specify a date ("the Last Date for Submitting Claims") up to which claims may be lodged.
The Last date for Submitting Claims shall be the same for all creditors, and not less than 21 days from the date of the notice.
The Supervisor shall give notice of the Dividend to all Creditors who have submitted their claims

The notice shall include the following particulars:

(a) amounts realised from the sale of the assets subject to the Arrangement and / or amounts paid by the Debtor to the Supervisor under the Arrangement;

(b) payments made by the Supervisor during the course of the Arrangement;

(c) provision (if any) made for unsettled claims, and funds (if any) retained for particular purposes;

(d) the total amount to be distributed, and the rate of Dividend;

whether, and if so when, any further Dividend is expected to be declared.
The dividend may be distributed simultaneously with the notice declaring it.
Payment of Dividend may be made by post, or arrangements may be made with any Creditor for it to be paid in another way, or held for his collection.

Marks awarded for logical points on how funds will be paid out

(b)(ii)

Unclaimed dividends remaining at the end of the Arrangement should be paid back to the Company.
Once the unclaimed dividend has been paid to the Company, the Creditor must claim it from the Company and no other person.
Unclaimed interim dividends can be repaid into the estate for distribution to creditors

(c)

Bond as nominee bordereau for December
For anticipated realisations into the estate ie £298,000
Bond to top of bracket
No need to rebond for supervisor appointment

Maximum marks for Question 2 20 marks

QUESTION 3

Issues
Liability to crown debtors

Large part of liability is to the crown creditors £55,000 of £75,000 unsecured creditors
Appears funding trade from non payment of crown debts
Potential theft offence
Payment of bank loan
Bank loan being paid on time
However this was in accordance with contract
Unlikely be seen as a preference as no desire to prefer
Bank overdraft
Potential preference
Bank overdraft has been reduced by £5000 over the last year
On which the directors have a personal guarantee
Putting the directors is a better position than in winding up
Bank is not a connected party
Therefore can only look back at six months prior to administration
Company would have to be insolvent at time of preference or become insolvent because of the transaction
Although is amount small to be immaterial
Statement of affairs
The statement of affairs has not been submitted despite being chased
This is a technical breach as required to co-operate with administrator
However administrator has ability to director from duty to provide
Minor issue and does not render directors to be unfit in the management of a limited company
JT
JT has passed away
He will be unable to answer the questions of the administrator
Although a director in name appears to have had no active part in business
According to the accounts it appears that JT has significantly reduced his overdrawn director's loan account over the last year.
Although benefited from reduction of personal guarantee and loan outweighed by monies introduced to Company
No matters of unfit conduct to be reported
CT
CT works part time as a florist
And is also a mum to their children
She appears to be director is name only
She would benefit from reduction of personal guarantee and loan being met on time
No matters of unfit conduct to be reported
ET
ET accountant and had sole responsibility for company's financial affairs
Therefore should have been aware of company's insolvency
Would have made financial decisions regarding which creditors to pay and who not to pay
Has failed to provide SOA but minor issue and does not render ET to be unfit in the management of a limited company but should be noted
However possible theft offence and preference should be reported

(b)

Statement of affairs
Or if none submitted an estimate of the financial position of the company
Copy of administrator's proposals
Copy accounts as available, last statutory accounts and any other draft management or interim
A summary of asset realisations, unrealised assets yet to be dealt with and claims notified
Dividend prospects
Aged creditor analysis
Directors' Questionaires

(c)

Statement of assets in JT's estate
What liabilities are in his estate
Has the overdrawn director's loan account been included as a creditor
On what basis is his estate insolvent
Evidence that JT has repaid £20,000 to the company over the last year example copy bank statements
A signed copy of the letter signed by JT confirming the amount outstanding
Information regarding the owed rent
Obtain copy board meeting minutes in relation to the lease
Speak with ET regarding the issue for clarification of the facts

(d) Restriction of reuse of company name

The restriction of the reuse of a company name applies when Turner Food (Fort William) Limited goes into insolvent liquidation
and as you have been a director of this company in the 12 months prior to liquidation
The company name is prohibited if it is so similar to suggest an association with the insolvent company
The first excepted case as set out in Rule 4.78-4.82 applies as this is not a court process
And Turner Sandwiches (Fort William) Limited has purchased all of the assets of Turner Food (Fort William) Limited from the administrator
However you may act as a director of Turner Sandwiches (Fort William) Limited
without being personally responsible of the debts of the new company as long as Turner Food (Fort William) Limited:
Within 28 days of the purchase
Gives notice to the its creditors of stating
The name and registered number of Turner Food (Fort William) Limited
The circumstances in which the business of Turner Food (Fort William) Limited has been acquired by Turner Sandwiches (Fort William) Limited
As the new company name is a prohibited name
You must disclose the name of the new company i.e. Turner Sandwiches (Fort William) Limited
Your name and details of the nature and duration of your directorship of Turner Food (Fort William) Limited

Maximum marks for Question 3 30 marks

Question 4

(a)
Bond case Give notice of appointment to company as soon as reasonably practicable Give notice of appointment to any receiver as soon as reasonably practicable Give notice of appointment to petitioner as soon as reasonably practicable Give notice of appointment to any provisional liquidator as soon as reasonably practicable Give notice of appointment to any enforcement office as soon as reasonably practicable Give notice of appointment to any person who has commenced diligence as soon as reasonably practicable Give notice of appointment to supervisor as soon as reasonably practicable Send notice of appointment to the registrar within 7 days Send section 120 notice to the pension protection fund Send section 120 notice to the pension regulator Send section 120 notice to the trustees of the scheme Request directors submit statement of affairs forthwith When received file in court and with the registrar Advertise appointment in local paper as soon as reasonably practicable Advertise appointment in Gazette as soon as reasonably practicable File VAT 769 within 21 days If cars ensure insurance details are lodged with the MID within 14 days Decide whether the paragraph 51 meeting to be held, and if so if can be conducted to post Prepare administrator's proposals and send as soon as reasonably practicable and within 8 weeks to registrar Prepare administrator's proposals and send as soon as reasonably practicable and within 8 weeks to creditors Prepare administrator's proposals and send as soon as reasonably practicable and within 8 weeks to members If meeting to be held to be held as soon as reasonably practicable and within 10 weeks Creditors must have 14 days notice of the meeting Prepare minutes of meeting Send result of meeting to court Send result of meeting to registrar Send result of meeting to creditors Send result of meeting to members Ensure IP record is up to date Notice of appointment to creditors Notice of appointment to Keeper of Register of Inhibitions
(b)(i)
Ascertain why the director wishes to resign Although the administrator must not advise director on this matter Director should seek independent legal advice Resignation does not relieve duty of director to submit SOA Still will require to report on director's conduct when completing CDDA return Director must assist with provision of information required by the administrator Would the director's resignation affect the sale of the business If he is a key member of management Total 5.0, limited to a maximum of
(b)(ii)
The stock is required to complete the order book Was the vendor terms and conditions include a retention of title clause Was the retention of title clause brought to the attention of the Company Where were the terms and conditions recorded for example was there a specific customer agreement If the terms and conditions were recorded in an invoice this is post contractual document

Although if there has been a lengthy trading relationship a retention of title clause which only appears on a invoice might be accepted as part of the contract because Over the course of the relationship the Company must have become aware of the term Review documentation to ascertain whether an all monies clause Where all goods supplied by the vendor remain their property until all monies due to the vendor have been paid Vendor will need to be able to identify its products Prepare a stock take of the conservatories Seek agreement of supplier to use goods if believe valid retention of title claim On basis of payment of invoice value of goods used Obtain legal advice if validity of clause in doubt or there are concerns regarding incorporation of the terms
(b) (iii)
Vans are necessary to continue trading Moratorium in place So no step can be taken to repossess the vans without the consent of the administrator or with the permission of the court Review each leasing agreement Establish the amount of arrears for each van Establish which agreements are in default Check whether consolidation clauses exist Negotiate for use on payment of ongoing rentals Decide whether to pay for any arrears Explain that seeking buyer for business Which could provide continued longer term lease security Therefore in their interest to help you short tem
(**b) (iv**)
Arrange a meeting with the customer Establish whether customer is satisfied with product and price And only reason for resourcing is the uncertainty of supply Explain that there are interested parties who wish to purchase the business therefore hope for going concern sale Which would secure future supply Offer to keep informed of progress in sale negotiations Offer discount during period of trade
Maximum marks for Question 4 30 marks

JIEB Liquidations Scotland Examiner's Report 2006

General Comments

1 General presentation was fairly good and the quality of writing of candidates has improved from past years. Comments are restricted as only seventeen candidates sat this paper.

2 Candidates generally kept to the specifics of the question. However, candidates are still digressing from the questions asked and as a result miss obvious points and also gain no marks for irrelevant points. This was common in question 4 where candidates wrote all they knew about members' voluntary liquidations, which was not the question asked. Candidates must not ignore the obvious simple answer. The questions are not set to trick, but to examine basic understanding of matters involved in aspects of the liquidation process. The examiner cannot allocate marks on a presumption that because a candidate ignores the very basic points and answers the more complex that the candidate actually knows the basics. Candidates also need to look at the number of marks available in each section of a question and appreciate that they require to provide a full enough answer to obtain marks in line with the available marks.

3 It is apparent from the papers that candidates failed to distinguish between different types of entity – for example between registered and unregistered companies and limited liability companies. Some candidates failed to recognise the difference between a limited liability company and a limited liability partnership.

Question 1

The question posed a range of unrelated problems that an IP may face. The question tested candidates' familiarity with insolvency and other legislation (most contained in Butterworths).
Part (a) which dealt with proxies was generally well answered.
Part (b) was not well answered and candidates did not pick up the issue of dates or the inability to offset debts.
The answer to part (c) was mixed with some candidates' recognising the date of charge and the introduction of new money.
Part (d) was generally well answered with candidates appreciating the basics but often failing to expand their answer to the detail of the notification process.
Answers to part (e) were poor and some candidates failed to attempt any answer. There was an apparent lack of appreciation of Limited Liability Partnerships and the implications for recovering funds.

Question 2

The question was to prepare a receipts and payments account and thereafter prepare an estimated outcome statement and distribution statement.

Candidates answered the first part well and clearly demonstrated a firm grasp of basics. Some candidates discussed approval of fees and disbursements, which given that they had already been paid, was an irrelevance. Two candidates also mentioned VAT with one candidate actually carrying out VAT calculations. Again given that the figures were the actual transactions it is difficult to understand why the candidates should introduce this unnecessary complication.

The second and third parts of the question were not well answered and candidates generally appeared to be unaware of what an estimated outcome statement is, and also how to lay out a distribution statement. Several candidates made no attempt at the distribution statement.

Question 3

The thrust of this question was to look at cross border issues, firstly relating to a Scottish registered company with a French trading arm, and secondly an how an Australian company, operating in Scotland and England may be placed into liquidation.

The first part of the question caused a number of candidates' problems as they failed to identify that the EC Regulations on Insolvency Proceedings 2000 applied. Only a few candidates recognised the problems arising though marks were also given to those who listed practical concerns. Candidates who simply advised how to place a company in liquidation, without mentioning the EC Regulations, failed to gain marks.

The second part of the question was poorly answered with the majority of candidates failing to recognise that the Australian company was an unregistered company in Scotland and accordingly could be wound up in accordance with Section 220 or Section 221. Whilst this may not be common in practice candidates must be able to identify the nature of the entity which they are advising.

Question 4

The question dealt with an advice situation on how a husband and wife are to realise the capital in their business. The second part was to consider how those assets could be distributed in a members' voluntary liquidation.

Several candidates answered the first part of the question by detailing the MVL process rather than giving the advice sought. Whilst some marks were awarded for this candidates did failed to answer the question. Comparison questions have been poorly answered and candidates appear unable to list pros and cons in a straightforward manner.

The majority of candidates recognised that part 2 of the question related to Section 110. The dissenting shareholder reference should have guided candidates in that direction. Candidates who missed this point scored poorly.

JIEB Liquidations Scotland Examiner's Markplan

QUESTION 1

(a)

Answer should be in note form:

Dear [Chairman]

I attach a summary of the proxy votes that have been received for the section 98 meeting of creditors. A creditor may only vote at the creditors' meeting if (a) he has duly lodged a proof of the debt claimed to be due to him from the company, and the claim has been admitted by the chairman of the meeting (R7.9(2) for the purpose of entitlement to vote; and (b) there has been lodged, before or at the, any proxy requisite for that entitlement (R7.16(2).

SIP 8, para 25, requires that when advising on the validity of proxies, I should bear in mind that I have a personal interest as I have been appointed liquidator at the shareholders' meeting and am seeking to retain office at the creditors' meeting. Where circumstances demand, I will indicate whether you should take advice on the validity of proxies from an independent source, for example, from the company's solicitors.

I draw you attention to the following proxies:

Any Supplies Ltd proxy is not signed

The proxy must be signed and as it is from a company and there should also be written authority that the proxy holder is entitled to vote. See R7.20. E.g. It may be signed by a director or by an employee who should have a letter of authority signed by a director.

SIP 8 para 24 "Proxies which are incorrectly completed in a material way will be invalid. There is a requirement for proxies to be signed by the principal or by a person authorised by him, in which case the nature of the authority must be stated. Proxies which are unsigned or which do not explain the authority under which they are signed will, therefore, be invalid.

Broken Supplies Ltd Proxy not valid.

SIP 8 para 24 Proxies which are unsigned or which do not explain the authority under which they are signed will, therefore, be invalid……..the identity of the creditor and the proxy holder, the nature of the proxy holder's authority and any instructions given to the proxy holder are clear.

See R7.20, the solicitor should have the written authority of Broken Supplies Ltd.

Brow Ltd

A creditor may only vote at the creditors' meeting if he has duly lodged a proof of the debt claimed to be due to him from the company, and the claim has been admitted by the chairman of the meeting (S49B(S)Act) for the purpose of entitlement to vote.

If the Chairman is in doubt whether a claim should be admitted or rejected, he shall mark it as objected to and allow the creditor to vote, subject to his vote being subsequently declared invalid if the objection to the claim is sustained.

It is unclear what proof of debt has been submitted. SIP 8 para 28 Creditors may submit proofs at any time before voting, even during the course of the meeting itself. The admission or rejection of proofs for voting purposes, provided it identifies both the creditor and the amount claimed by him with sufficient clarity.

The amount for which the chairman should be advised to admit the proof for voting purposes should normally be the lower of:

- the amount stated in the proof and
- the amount considered by the company to be due to the creditor.

In this case you are seeking re-appointment as liquidator and your interests may create a conflict, and the Chairman may wish to be advised independently.

Hapless Ltd

Disputed debt as above.

But – a creditor shall not vote in respect of a debt for an unliquidated amount, or any debt whose value is not ascertained, except where the chairman agrees to put upon the debt an estimated minimum – see Sched 1(3) B(Scot) A

Money Co Ltd

Discretion of Chairman – if there is proof that £250 k is due accept that, amount. Otherwise, admit for £150k and mark as objected to.

(b)

Warmseat Inc's claim. Warmseat purchased debts post administration and pre-liquidation. Warmseat was a creditor pre-administration.

Set off not available : set off is not available against any debt which has been acquired by a creditor by assignment or otherwise, pursuant to an agreement between the creditor and any other party where that agreement was entered into "during an administration which immediately preceded the liquidation."

Thespian Ltd's claim. Thespian was a creditor pre-administration. Loss of profits claim of £102,000 arose post-administration but pre-liquidation (but contract must have been pre-administration, Feb 05).
First claim. Whether set-off can be considered depends upon the contract but may be considered because it arose pre-administration. £102,000 is a damages claim.
Loss of profits claims of £53,000 must have been a contract with the administrator (February 2006).

(c)

- S245 – avoidance of certain floating charges
  - Charge invalid if within 12 months of winding up (2 years if connected person) unless
  - "new money" ie the bank advanced cash
  - Also, even if not new money, the time at which the charge was created the company was not insolvent (within s123) or becomes insolvent as a consequence of the transaction
- Also, whether or not there is a charge, the bank should be aware of s127 – dispositions of property post petition and bank should not allow any further drawings from overdraft. (see Hollicourt)

(d)

a. 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.
   - 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.

   b. Problems if Independent Ltd is a trustee.
      - PPF will be a major creditor.
      - Liquidator should cause company to resign.

(e)(i) Possible routes to recovering funds:

Wrongful trading (s214)
Adjustment of withdrawals (clawback provisions) (s214A)
Misfeasance

Which partners?

[Out of a total of 23 members, there are 2 designated members (including "managing member"), a management committee (including the "managing member" but not the other designated member)]

Designated members (Mr Blue & Mr Green)-generally designated members have the same role and function as directors or officers in company legislation.

Managing member (Mr Blue)

Management committee (Mr Blue, Mr Red, Mr Yellow)

Other members (including Mr Black)

- There is no obligation on an LLP member to contribute anything on its winding up.
- The membership agreement may make provision for some or all of the members to contribute, but it does not have to do so.
- The wrongful trading provisions apply - at some time before the commencement of the winding up of the LLP, that person knew or ought to have concluded that there was no reasonable prospect that the LLP would avoid going into insolvent liquidation, and

took every step with a view to minimising the potential loss to the LLP's creditors as (assuming him to have known that there was no reasonable prospect that the LLP would avoid going into insolvent liquidation) he ought to have taken

the facts which a member of LLP of a LLP ought to know or ascertain, the conclusions which he ought to reach and the steps which he ought to take are those which would be known or ascertained, or reached or taken, by a reasonably diligent person having both—

(a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that member of LLP in relation to the LLP, and

(b) the general knowledge, skill and experience that that member of LLP

Who do wrongful trading provisions apply to?
- the members of the management committee (Mr Blue, Mr Red, Mr Yellow) should have had the knowledge, etc
Mr Green was a designated member – but wasn't a member of the management committee – but he may be expected to ascertain the information.
Other members – they had received the accounts showing that a balance sheet deficit – maybe they were liable?
More likely all of the above may be open to:

- **Clawback provisions** contained in s214A IA 1986.
  In 2 year period, ending with start of liquidation, if the member withdrew property of the limited liability partnership, whether in the form of a share of profits, salary, repayment of or payment of interest on a loan to the limited liability membership or any other withdrawal of property, and

  it is proved by the liquidator to the satisfaction of the court that at the time of the withdrawal he knew or had reasonable ground for believing that the limited liability partnership -

  (i) was at the time of the withdrawal unable to pay its debts within the meaning of section 123, or

  (ii) would become so unable to pay its debts after the assets of the limited liability membership had been depleted by that withdrawal taken together with all other withdrawals (if any) made by any members contemporaneously with that withdrawal or in contemplation when that withdrawal was made.

  Where this section has effect in relation to any person the court, on the application of the liquidator, may declare that that person is to be liable to make such contribution (if any) to the limited liability partnership's assets as the court thinks proper.

The court shall not make a declaration in relation to any person the amount of which exceeds the aggregate of the amounts or values of all the withdrawals referred to in subsection (2) made by that person within the period of two years referred to in that subsection.
The court shall not make a declaration under this section with respect to any person unless that person knew or ought to have concluded that after each withdrawal referred to in subsection (2) there was no reasonable prospect that the limited liability partnership would avoid going into insolvent liquidation.
For the purposes of subsection (5) the facts which a member ought to know or ascertain and the conclusions which he ought to reach are those which would be known, ascertained, or reached by a reasonably diligent person having both:

(a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that member in relation to the limited liability partnership, and

(b) the general knowledge, skill and experience that that member has.

7) For the purposes of this section a limited liability partnership goes into insolvent liquidation if it goes into liquidation at a time when its assets are insufficient for the payment of its debts and other liabilities and the expenses of the winding up.

a. - 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 only £100 in accumulated reserves.
- Not given any information about on-going profits/cash flow

All members potentially liable

(e) (ii) Factors a liquidator needs to consider

- All members potentially liable but liquidator needs to show that an individual member had knowledge that the LLP had cash flow problems – all had been sent the management accounts and so should any of them have been taking further drawings or could they rely upon the managing committee?
- The designated members should have had this knowledge – or ought to have ascertained it.
- The members of the managing committee should have had this knowledge
- Not given any information about on-going profits/cash flow.
- Need to know the value of individual members’ assets, in order to assess whether it is worth pursuing any of them.

Maximum marks for Question 1 20 marks

QUESTION 2

Receipts	**£**	**£**
Freehold property – sale proceeds	235,000	
Less ABC Solicitors' fees	(3,300)	
Less ABC Solicitors' disbursements	(250)	
Due to Wick Bank	(200,000)	
Net proceeds received by liquidator		31,450
Leasehold property – sale proceeds	32,000	
Less ABC Solicitors' fees	(1,300)	
ABC Solicitors' disbursements	(100)	
Net proceeds received by liquidator		30,600
Book debts		20,000
Insurance refund		4,440
Bank interest		60
Sale of plant and machinery - proceeds	55,000	
Less auctioneers' fees	(5,500)	
Net proceeds received by liquidator		49,500
Frozen fish stock		21,000
Furniture and fittings - proceeds	45,000	
Less remitted to managing director	(42,000)	
		3,000
VAT refund		1,100
		161,150
Payments		
Bank charges	40	
Net wages	295	
HM Revenue & Customs	90	
Waste disposal	120	
Insurance of assets	550	
Statutory advertising	400	
Stationery and postage	80	
Legal fees and disbursements	2,900	
Agents' fees	1,350	
Liquidator's fees (1)	15,000	
Specific bond	220	
Disbursements	540	
		21,585
		139,565
Note		
(1) The liquidator was paid £3,000 by a major creditor to investigate aspects of the activities of the company's directors		

This is an alternative receipts and payments account. It has been prepared showing gross realisations as receipts and the deducted costs as payments, as would be the case on Form 4.5(Scot), which is submitted to the Registrar of Companies.

Receipts	**£**	**£**
Freehold property – sale proceeds from X	235,000	
Leasehold property – sale proceeds from Y	32,000	
Book debts	20,000	
Insurance refund	4,440	
Bank interest	60	
Sale of plant and machinery at auction to various parties	55,000	
Frozen fish stock	21,000	
Furniture and fittings - proceeds	45,000	
VAT refund	1,100	413,600

Payments		
ABC Solicitors' fees for sale of freehold property	3,300	
ABC Solicitors' disbursements for sale of freehold property	250	
Paid to Wick Bank in respect of freehold property	200,000	
ABC Solicitors' fees for sale of leasehold property	1,300	
ABC Solicitors disbursements for sale of leasehold property	100	
Auctioneers' fees in respect of sale of plant and machinery	5,500	
Remitted to managing director in respect of proceeds of painting	42,000	
Bank charges	40	
Net wages	295	
HM Revenue & Customs	90	
Waste disposal	120	
Insurance of assets	550	
Statutory advertising	400	
Stationery and postage	80	
Agents' fees	1,350	
Liquidator's fees (1)	15,000	
Specific bond	220	
Legal fees and disbursements	2,900	
Disbursements	540	(274,035)
		139,565

Note

(1) The liquidator was paid £3,000 by a major creditor to investigate aspects of the activities of the company's directors, this amount is not reflected in the receipts and payments account.

Workings

	£	**£**	**£**	
Freehold property				
Gross proceeds		235,000		
ABC Solicitors costs	3,300			
ABC Solicitors disbursements	250			
Paid to Wick Bank	200,000			
Net proceeds			31,600	
Leasehold property				
Gross proceeds		32,000		
ABC Solicitors costs	1,300			
ABC Solicitors disbursements	100			
Net proceeds			30,600	
Total received from ABC Solicitors				62,050
Auction sale				
Proceeds		55,000		
Auctioneer's costs	5,500			
Total received from auctioneer				49,500
Liquidator's fees		15,000		
Specific bond		200		
Disbursements		540		
Liquidator's fees and disbursements per question			15,740	

b. Estimated Outcome Statement

	Receipts/ Payments	Estimated Future Movements	Estimated Outcome
	£	£	£
Fixed Charge			
Freehold property	235,000	nil	235,000
Costs			
Solicitors' fees and disbursements	(3,550)	nil	
Liquidator	(10,000)	nil	(13,550)
			221,450
Wick Bank			(200,000)
Surplus to Thurso Bank			21,450
Leasehold property		nil	32,000
Costs			
Solicitors' fees and disbursements	(1,400)		
Liquidator	(5,000)		(6,400)
Surplus to Thurso Bank			25,600
Floating Charge			
Book debts	20,000	nil	
VAT refund	1,100	nil	
Bank interest	60	nil	
Insurance refund	4,440	nil	
Plant and machinery	55,000	nil	
Frozen fish stock	21,000	nil	
Furniture and fittings	45,000	nil	146,600
Costs			
Liquidator		(5,500)	
Auctioneers' fees		(5,500)	
Remittance to director		(42,000)	
Legal fees & disbursements		(2,900)	
Other costs of realisation (Bank charges (40)+ Net wages (295) + HMRC (90) + waste disposal (120) + insurance (550) + agents' fees (1,350)		(2,445)	58,345
Available for preferential creditors			88,255
Preferential creditors - employees		(35,000)	(35,000)
			53,255
Prescribed part			
Net property = £53,255			
£10,000 x 50%		5,000	
£43,255 x 20%		8,651	
Available for unsecured creditors			13,651
Available for floating charge holder			39,604
Thurso Bank (70,000 – 25,600 – 21,450)			(22,950)
Available for liquidation			16,654
Liquidation costs			
Liquidator's fees		(4,500)	
Liquidator's costs and disbursements (Stat advert (400) + stat & postage (80) + specific bond (220) + disbursements (540))		(1,240)	
			(5,740)
Available for unsecured creditors			10,914

c. Layout

Wick Bank			
	Freehold property – net proceeds	221,450	
	Due to Wick Bank	(200,000)	
	Surplus for second charge holder		21,450
Thurso Bank			
	Surplus from Wick Bank (second fixed charge)	21,450	
	Leasehold property – net proceeds	25,600	
	Balance available under floating charge after preferential creditors and prescribed part	22,950	
	Due to Thurso Bank	(70,000)	
Preferential creditors		35,000	35,000
Unsecured creditors			
	Prescribed part – distribution fund for unsecured creditors	15,720	
	Surplus from floating charge	22,950	38,670

Maximum marks for Question 2 — 20 marks

QUESTION 3

i. Secure assets of French branch

Needs to apply for court confirming the CVL for the purposes of the EC Regulation on Insolvency. The application must be in writing and verified by affidavit by the liquidator (using the same form) and shall state:

- Name of applicant
- Name of company and its registered number
- Date of resolution for voluntary winding up
- The application is accompanied by relevant documents
- That the EC Regulation will apply to the company and whether the proceedings are main, territorial or secondary

File two copies of the application in court, together with one copy of:

- Resolution for voluntary winding up
- Evidence of appointment as liquidator (e.g. certificate of appointment)
- Copy of the statement of affairs

It is not necessary to serve the application on, or give notice of it to any person.

When the court has confirmed the CVL, give notice forthwith to (EC Ins Reg Art 40):

- Any EC State liquidator in relation to the company (there is not one in this case)
- Creditors in EC States (other than UK).

Proceedings opened under the Regulation will be recognised without any formality in all EC states, subject only to normal public policy considerations (articles 16 and 26).

Main proceedings (see below) will become immediately effective in all EC states as long as no territorial proceedings have been opened there. (Article 17)

Subject to the same condition, the office holder appointed in main proceedings (see below) will immediately be able to exercise his powers in other EC states and even the office holder in territorial proceedings (see below) will be able to act to recover assets removed to another EC state after the proceedings for which he was appointed were opened. At all times the office holder must comply with the general law of the EC state in which he intends to take action, but a certified copy of his appointment (with an appropriate translation) is all that he will need to be able to act. (Art 18, 19)

Certain specified judgements of the court which has opened insolvency proceedings will also be recognised without formality and fall to be enforced in accordance with the Brussels Convention. (Art 25)

The liquidation will be main proceedings and secondary proceedings may only be opened if the main proceedings in the other EC country have already commenced. Secondary proceedings must be winding up (or administration for better realisation of assets purpose). If French creditors attempt to instigate insolvency proceedings in France (they will be secondary proceedings and must be liquidation). The Scottish liquidator may even want to step in and instigate secondary proceedings.

Note ECJ decided in Parmalat/Eurofoods decision the ECJ said the court with jurisdiction to open the "main" insolvency proceedings was the one where the "centre of the main interests" of the debtor company was situated. Normally, "centre of main interests" would be the place where the registered office was located, which in Eurofood's case was Dublin. "The mere fact that its economic choices are or can be controlled by a parent company in another member state is not enough to rebut the presumption linked to the place of the registered office."

Ii Problems the liquidator may encounter

The opening of secondary proceedings.

Effect of secondary proceedings

While the office holder in the main proceedings will be entitled to exercise all the powers he has under the laws of the EC state of the main proceedings, his powers will be curtailed if there are secondary proceedings (and so the liquidator will need to consider if he wants to instigate secondary proceedings).

If there are secondary proceedings these must be recognised by all member states. For example, if there is a UK company in liquidation which has a branch in France, secondary proceedings may be commenced in France in respect of the French branch and will be restricted to the French assets and French law will apply.

The liquidator may also encounter problems in relation to the various exclusions to the general rule as to which law applies:

The national law of the state in which the proceedings are opened is the applicable law and it is that law that determines the conditions for the opening, conduct and closure of the proceedings. Article 4.2 contains a non-exhaustive list of the matters to be determined by the law of the proceedings.
The national law does not apply to:

Set off, reservation of title,

Contracts relating to immovable property,

rights and obligations in relation to payment or settlement systems or financial markets,

Employment contracts and relationships

Effect of insolvency proceedings on debtor's rights in immovable property, ships or aircraft subject to registration in a public register

Community patent, trade mark or similar rights

Voidness, voidability or unenforceability of detrimental acts

iii. discuss the options available to the Liquidator in relation to the Irish subsidiary

- this is a separate company – it is an investment
- also look at its COMI, it could be regarded as being in Scotland as the accounting function is in Scotland.
- could have a solvent sale of shares (note the Financial Collateral Arrangement Regs don't apply because there's no floating charge)
- could put it into administration (or another insolvency procedure) in Ireland
- could put it into administration (or another insolvency procedure) in Scotland if establish that COMI is in Scotland.

b.

[Letter format]
Dear …

Boomerang Pty Ltd ("the Company")

Your company has serious financial difficulties and you have rightly concluded that close down is your only option.
The Company in registered in Australia and, therefore, is unregistered in Scotland within the meaning of the IA 1986 s2201(1).
S221(5) provides that an unregistered company may not be wound up voluntarily, except in accordance with the EC regulations.
One reason an unregistered company may be wound up if, as is likely in this case, it is unable to pay its debts (s224(2)). See also s222,223 and 224.
S426(1) court orders made by an insolvency court in the UK are strictly enforceable in all parts of the UK (and so any English assets/employees/liabilities) will be able to be dealt with by a Scottish liquidator.
The making of a winding up order in any part of the UK freezes any proceedings in any other part of the UK, as well as that part in which the order was made, to the extent that a locally made winding up order would do so (s426(1)).
There a positive obligation on courts of the UK to assist each other and also courts of "any relevant country or territory" (including Australia) s426(4), (11)
A court in the UK can, if so requested by another court in the UK or relevant territory, apply either its own *law* (Re BCCI SA; Re BCCI Oversees Ltd [1993] BCC 787) "in relation to comparable matters falling within its jurisdiction." This remedy is discretionary , and the court is required to have regard to the rules of private international law.
[*Australian statutes provide specifically for assistance of UK by bankruptcy courts – not tested*}

R Latrefreers Inc [2001] BCC 174: Court of Appeal reviewed case law and principles concerning the operation of jurisdiction to winding up foreign companies under s221:
- presence of assets test
- sufficient connection test (indicated that this was a more suitable test to apply that the assets test because the presence of assets in England belonging to company is no longer regarded as essential)

Core requirements for jurisdiction to be exercisable:

- sufficient connection with England & Wales which may, but does not necessarily have to, consist of assets within the jurisdiction
- - must be a reasonable possibility if a winding up order is made, of benefit to those applying for the winding up order
- One or more persons interested in the distribution of assets of the company must be persons over whom the court can exercise a jurisdiction.
- (Persuasive in Scotland)

CVL as alternative to court winding up

S221(4) was examined in Re TXU Europe German Finance BV & TXU Europe Ireland One [2005] BPIR 209. A CVL of an unregistered company can take place in England provide that the COMI is shown to be located there at the date of the passing of the resolution for winding up. Orders of confirmation of each CVL were therefore made by the court under IR7.62 (as amended).

The EC regulations on insolvency, art 3(1) provides that the courts of the member state within the territory of which the centre of the debtor's main interests (COMI) is situated shall have jurisdiction to open insolvency proceedings.

Re BRAC Rent- a-Car International Inc [2003] EWHC (CH) 128, the debtor company was incorporated in Delaware, USA and its registered address was in UK, It had never trade in US and its operations conducted almost entirely in UK (on of its three directors was in UK)

Court concluded COMI was in England.

The Court noted that the emphasis on COMI as sole criterion for purpose of determining jurisdiction to open proceedings, plus statement in Recital 14 to the effect that the Regulation applies only to proceedings where the COMI is located seemed to lead to the logical conclusion that "the only test for the application of the Regulation in relation to a given debtor is whether the COMI is in a relevant member state and not where a debtor which is legal person is incorporated and so court had jurisdiction to make admin order.

[Note: The UK adopted Uncitral in April 2006 (Australia had not adopted it at this date but is likely to?). Those countries (through the courts) that have signed up to Uncitral will recognise the other's insolvency procedures depending upon where the COMI is located (ie to collect the Australian debts, an Australian insolvency practitioner may apply to the Scottish court but the IP appointed would still need to be licensed).

Maximum marks for Question 3 30 marks

QUESTION 4

MVL - advantages
Liquidator deals with assets and liabilities and takes responsibility
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)
Can be tax advantages (question says to ignore tax)
Note Candidates are not expected to provide the procedure for placing into MVL

MVL - disadvantages

May be costly but costs can be minimised if work planned and done pre-liquidation.

Much of the sale of assets and payment of liabilities, for example, could be done pre-liquidation, so that the liquidator only has to distribute the cash.

A liquidator is unlikely to want to trade the business, and so if there is to be a sale as a going concern (compared to a piecemeal sale of the assets), it will be better to sell pre-liquidation

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.

Distributions in specie – need to check that permitted by articles for either procedure. If not permitted by the articles there will need to be an extraordinary resolution of the members permitting such a distribution (this will be required whether or not the company is in MVL).

If Mrs Rowers wishes a distribution in specie and Mr Rowers wants cash – it is sensible to obtain an extraordinary resolution to do this and this may be done within or outside an MVL.

Note any distributions outside the MVL can only be realised profits – from the question it seems that the profit and loss account represents realised profits of £720,000 and (undistributable) share capital of £10,000.
Can be tax disadvantages (question says to ignore tax)
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.

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."

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

A private company (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 – eg 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

Other issues
(b) Statutory provisions
i.**Ship plc offer: s110 reconstruction**
sanction of special resolution of company conferring a general authority on the liquidator, or an authority in respect of any particular arrangement
the liquidator may receive in compensation or part compensation for the transfer or sale, shares, policies or other like interests in the transferee company for distribution among the members of the transferor company
the liquidator with the sanction of a special resolution may also participate in the profits of or receive any other benefit from the transferee company
a sale or arrangement is binding on the members of the transferor company
if the liquidator elects to purchase the members interest the purchase money must be paid before the company is dissolved and be raised by the liquidator in such manner as may be determined by special resolution
if an order is made within a year for the winding up of the company by the court, the special resolution is not valid unless sanctioned by the court
dissenting members cannot prevent a reconstruction from going ahead but they cannot be forced to become a member of the transferee company
in practice, it is necessary for a scheme of reconstruction to make express provision for inactive shareholders to be protected by a "trust" to hold the new shares on their behalf

Dissenting shareholder

a member who did not vote in favour of the special resolution may express his dissent from it in writing, addressed to the liquidator and left at the company's registered office within 7 days of the passing of the resolution

such a dissenting member may require the liquidator either to abstain from carrying the resolution into effect or to purchase his interest at a price to be determined by agreement or by arbitration

Liquidator's remuneration

The liquidator may take remuneration as fixed by members in general meeting.

If not fixed by the Members the Liquidator would be able to seek court approval, but this is very unlikely in practice.

In practice the liquidator may be paid outside the liquidation, from the shareholders/directors.

ii Steamer Ltd offer: Cash plus Distributions in specie

It is doubtful whether a liquidator has any power to distribute assets in specie unless authority to do so is given by the company's articles or by a resolution to that effect passed by the company in general meeting.

Articles commonly provide that the liquidator may distribute assets in specie with the sanction of an extraordinary resolution. If the articles do not contain such a provision, it is suggested that the distribution in specie is sanctioned by a special resolution, i.e. with the same formality as would be required to change the articles.

If making distributions in cash as well as in specie (with or without cash), to avoid subsequent disputes, the company should pass a resolution:

- specifically sanctioning such an arrangement and
- detailing the method by which the asset is to be valued for this purpose.

The resolution sanctioning a distribution in specie should be passed at the same meeting as the winding up resolution to avoid the need to hold a separate meeting for the purpose.

Taxation and duty consequences should be considered carefully before any distribution in specie is made. The taxation position of both the company and the shareholders affected will have to be taken into account.

Distribution without being certain all creditors' claims are fully covered are highlighted in AMF International Ltd, Re [1995] 2 B.C.L.C. 529. The liquidator made a distribution to the shareholder and subsequently found that a creditor had not been paid (a landlord where the lease had been disclaimed by the liquidator) A new liquidator was appointed and admitted the creditor's claim but there were no funds available in the liquidation. The former liquidator was held to be personally liable and had to pay, under s213, the admitted proof (less that which had already been paid)

Dissenting shareholder

If permitted by articles and there has been a proper vote, there is probably not much a dissenting shareholder can do about a distribution in specie. May apply to court under CA 1985 s.

Liquidator's remuneration

See above.

Maximum marks for Question 4 30 marks