JIEB DECEMBER 2006

ENGLISH EXAMINERS' REPORT

PERSONAL INSOLVENCY – DECEMBER 2006

General comments

Overall candidates frequently wasted time by repeating the content of a question and providing irrelevant answers (such as an explanation of the IVA process in answer to question 1).

Question 1a

A number of candidates failed to explain that a full analysis of costs was required because they exceeded the £10,000 limit in SIP 9 and marks were lost for not providing the detail of what is required by the SIP 9 analysis.

Question 1b

Many candidates failed to state that regulation 36A Insolvency Regulations 1994 gives the debtor the right to information about the trustees fees.

Question 1c

Few candidates made the fundamental point that the debtor could pay in full although many recognised that annulment was a sensible option. Some candidates recommended the introduction of third party funds but then failed to explain why this would be advantageous Most failed to make the point that as he was discharged he could not do an IVA and some candidates said that an IVA was appropriate!

Question 1d

Virtually no-one seemed to have heard of *Wilcock v Duckworth* or recognised that statutory interest would be at 15%

Question 2

Hardly anyone mentioned *re Keenan*

Many candidates did not seem to understand the need to investigate the debtor's wife's claim to more than 50% of the equity or the nature of the agreement with the debtor's wife. Instead they tended to concentrate on varying the proposal to cope with the wife's claim.

Very few candidates understood that the freezing order did not constitute security.

Question 3

Many candidates failed to recognise

- that the capital value of the trust vested in the trustee;
- the effect of *Mountney v Treharne;* or
- the change in the rules relating to lump sums under matrimonial orders.

Some candidates did not understand the effects of bankruptcy on solicitors.

Commentary on the role of Stroudley & Co was poor with candidates suggesting that a complaint should be made to R3 and failing to state that there was an ethical problem.

Question 4a

This was generally reasonably answered although some candidates failed to specify the conditions applying to sanctions.

Question 4b

An astonishing number of candidates failed to appreciate that there were three estates and very few produced adequate answers.

Question 4C

Many candidates failed to spot that HM Revenue & Customs' claim was excessive or that the combined estates were in effect solvent on a balance sheet basis. The question asked for "your strategy" but few candidates provided an answer concentrating instead, on how assets might be realised.

JIEB Personal Insolvency Exam Marking Plan

The marking plan set out below was that used to mark this question. Markers were encouraged to use discretion and to award partial marks where a point was either not explained fully or made by implication. More marks were available than could be awarded for each requirement. This allowed credit to be given for a variety of valid points which were made by candidates.

QUESTION 1

(a) (i)

SIP 9 requires analysis of fees by
- type of work done
- category of fee earner
- rates charged for each fee earner
- hours spent
- average hourly rate

The analysis should be proportionate to the costs incurred
- in the range £10,000 to £50,000 a fee breakdown should be submitted

Discussion

(b)

May apply to the Court –*s.303 (1) IA 86*
Fred may demand information about George's time costs
- to be provided within 28 days of the IP receiving the request - *Reg 36A, Insolvency Regulations 1994*

If no satisfaction could complain to George's licensing body

(c)

Form of letter
Payment in full
Cannot do IVA as discharged
Annulment
Source of funds should be third party eg wife
- this will avoid ad valorem of 17% on realisations in the estate because the IP will not have to bank them in the ISA
- it may also avoid statutory interest of 8%

The power to annul only requires the payment of Bankruptcy debts and expenses – *s.282 (1)(b) IA 86*
Interest falls into neither of these categories

Annulment is at the discretion of the Court however *s282 (1) IA 86*
Case law indicates that where there are sufficient funds in the estate to pay in full including interest then the court may require interest to be paid
– *re Harper v Buchler (No 2) 2005 BPIR 577*
In practice if asked creditors may waive interest
- write to creditors seeking waiver

Advice

Fred to seek information about fees and seek to challenge if appropriate
re Cabletel 2005 BPIR 28
and subsequent practice direction may put
extra pressure on George
fees can be challenged after discharge
Engel v Peri 2002 BPIR 961
- wife or other third party to seek funds – possibly remortgage
  wife to receive separate advice
  Seek legal advice
- does Fred have a claim against George for his inaction?
  Need for speedy action to stop costs accruing
  General discussion

(d)

Protracted Realisations Unit case
Statutory interest (15%) will be substantial but unfair to expect debtor to pay for full period from date of Bankruptcy Order.
Instead only pay interest for period of OR's office and that of the Trustee –
re Wilcock v Duckworth2005 BPIR 682
Statutory interest could be limited to 8% from 1 April 1993
Following recent case *re Harris*
May be difficulty contacting creditors because of the age of the case resulting in the court refusing to annul because payment in full has not been made –
re Gill v Quinn 2005 BPIR 95
Trustee must secure his interest in the property before 31March 2007

Maximum marks for Question 1 20 marks

QUESTION 2

Form of memorandum

IVA could fail because its terms cannot be satisfied 1
- it does not matter if it is not the debtor's fault *re Keenan 1998 BPIR 205*

Mrs Churchward's claim needs to be investigated as it may be spurious
- repairs will not affect the share of equity in the property
- improvements will not necessarily alter the value
- where did the funds come from – Tom's earnings?
- evidence of expenditure
- is the property owned jointly or as tenants in common?
  If the former ownership must be 50:50 but bankruptcy
  severs a joint tenancy. Timing of expenditure will therefore be important

Write to Mrs Churchward obtaining details of claims
Also agreement with Mrs Churchward may be an enforceable contract
Review terms of agreement
Mrs Churchward should have been advised to take independent legal advice
The size of the parties respective beneficial interests fell to be determined on the basis of what the court determined to be fair – *Supperstone v Hurst 2005 BPIR 1231*

A freezing order does not constitute security
- enforcement requires leave of the court
- freezing order might have been spotted as it may have been registered as a restriction – still enforceable even if it has not been registered
- ascertain terms of the Order

Mr Kirtley will be bound by the terms of the arrangement since he would have been entitled if he had had notic of the meeting – *s.260 (2) IA86*
Failure to mention the debt **may** constitute a material irregularity s*262 (1) (b) IA 86*
The Nominee, the creditor or the debtor could apply to the court for directions to summon a further meeting of the debtor's creditors or to revoke or suspend any approval given by the meeting – *s262 (4) IA86*
Alternatively the supervisor may summon a meeting of Creditors to ascertain their views
- if the proposal allows it
- possibly leading to the debtors bankruptcy

Failure to mention the debt may also constitute a false representation – *s262A (1) (b) IA86*
Consider whether the extra debt has a material affect and if so write to creditors convening a meeting
Supervisor could apply to the court for directions -*s263 (4) IA86*

The debt due from Mr Kirtley would probably be set off against the debt due to him under the terms of the proposal matching the bankruptcy provisions – *s323 IA86*
R3 standard terms and conditions include set off
Obtain evidence of the debt from Tom and write to Mr Kirtley
Obtain legal advice

General discussion

Maximum marks for Question 2 20 marks

QUESTION 3

Form of letter

Bill's statement of affairs

	Notes	£
Assets		
Trust fund - say	1	100,000
Pension Fund	2	150,000
		250,000
Liabilities		
Lump sum to wife	3	40,000
Wife's legal costs		17,500
Maintenance arrears	4	3,500
Bill's legal fees		21,500
Credit cards		4,375
Loan		20,000
		106,875

Notes

1. Capital value of Bill's interest is saleable
2. The pension fund would be exempt in bankruptcy
   Might consider whether excessive pension contributions
3. The lump sum is provable in bankruptcy
4. Arrears of maintenance are not provable in bankruptcy

Bill's potential high earnings would allow him to make contributions in an IVA on the figures he could contribute £1400 per month made up as follows:

	£
Net salary	30000
Outgoings	6000
Maintenance	7200
	16800

But as a bankrupt his career as a lawyer may be at risk
Bankruptcy does not deal with all his debts
Needs to avoid early discharge if he is to do an IVA
The transfer of the property to his wife must proceed
- *Mountney v Treharne2002 BPIR 1126*

But it could be attacked by a trustee as a transaction at an Undervalue
there may be special circumstances in this case or it may not be an undervalue
Suggest an IVA with the following estimated outcome
Statement

	Bankruptcy	**IVA**
	£	£
Capital value of trust	100,000	0
Lump sum from pension fund	0	37,500
Contributions from earnings	0	84,000
	100,000	121,500
Costs		
Nominee		3,500
Supervisor		7,500
Secretary of state fee	16,660	
Official Receivers fees	1,625	1,625
Trustee's fees	10,000	2,000
	71,715	106,875
Bankruptcy	103,375	
IVA		106,875
Dividend	**£0.69**	**£1.00**
Creditors		
Lump sum to wife	40,000	
Wife's legal costs	17,500	
Maintenance arrears	3,500	
Bill's legal fees	21,500	
Credit cards	4,375	
Loan	20,000	
	106,875	

Bill should not have petitioned for his own bankruptcy
Bill was wrongly advised by the young assistant career put at risk
certain debts (maintenance arrears and lump sum)
not extinguished by bankruptcy
- trust fund falls into bankruptcy estate
- matrimonial settlement could be challenged by a trustee in bankruptcy
- Bill's duties to co-operate with the Trustee continue despite discharge

The other firm of IPs has an ethical difficulty acting as trustee having wrongly advised Bill
- a fresh trustee should be appointed
Bill may have right of action against other IPs
- cannot extinguish that right
– *Mulkerrins v PWC 2003 BPIR 1357*
Obtain legal advice
In practice expense of action against Trustee and possible
dearth of evidence make an action unlikely
Could complain to regulatory body

General discussion and quality of answer

Maximum marks for Question 3 30 marks

QUESTION 4

Legal Issues

- Who is to trade – Trustee or possibly the bankrupts?
- Sanction to trade
  – *s.314 and Sch 5 part 1 (1) IA 1986*
- permission to allow the bankrupts to manage the farm and the stable and carry on the business – *s.314 (2) IA86*
- possibly employ a special manager *s.370 IA 1986*
- authority to run a local bank account – *Insolvency Regs 1994 reg 21*
  specified bank
  specified limit
  clearly identifiable
  separate account in name of bankrupt
  pay any surplus over the limit into ISA
  account to be closed as soon as he ceases to carry
  on the business of the bankrupt
- employees
  employment contract does not terminate on bankruptcy
  (*Thomas v Williams 1834*)
  TUPE on sale
  dismiss and re-employ
- possible personal liability of the trustee
  - mortgagee may be able to take action as a result of bankruptcy. Therefore keep mortgagee in the picture
  - general duty to maximise realisations

Practical Issues

- profitability of the business
  is it really profitable
- cash flow and borrowing requirements
- maintenance of supplies
  any need to pay arrears
  any change in terms
- will employees continue to work
- management costs of continuing to trade
- Mr and Mrs Starkadder
  will they act as managers?
  Are they reliable?
- Is the property in a reasonable state of repair?
- are there any health and safety, environmental or fire regulation problems?
- funfair cannot be traded owing to lack of planning permission
- insurance
- value of the business

- going concern
- closed

value of other assets

- ROT- the funfair equipment

(i)

animal husbandry

- there probably will be a payment in full so take note of debtor's interests

(ii)

Statements of affairs are as follows

Statements of Affairs			
	Amos	Bathsheba	Joint
Assets			
	£000s	£000s	£000s
Farmhouse and land	1250		
Less charge to Zbank	-750		
	500		
Farm machinery - say			5
Dairy cattle			75
Crops			n/k
Ponies and stallion		55	
Horse lorry		15	
Cash at bank - farm			29
Cash at bank - stable		5	
Funfair equipment			60
	500	75	169
Liabilities			
HM Revenue & Customs	150	150	
Funfair equipment supplier			150
Farm co-operative			40
	150	150	190
Surplus/-Deficiency	350	-75	-21
Transfers between estates	-96	75	21
Surplus after transfers	254	0	0

(iii)

Apply for consolidation order - *Article 14 IPO 1994*

Agents advice needed about the values of

- farm machinery
- dairy herd
- crops
- horses
- funfair equipment

HM Revenue & Customs claim appears to be excessive Upto given total profits of £40,000.
accounts to be finalised and submitted to the Inland revenue

Neighbour's sheep – is there a tenancy and rent to collect?
Does the presence of the sheep affect the value of the land?
Funfair equipment supplier may have valid ROT academic given the likelihood of a payment in full
- it may be preferable to return the equipment to the supplier depending upon the amount of credit given

If bankruptcies remain in place costs will be substantial.IVAs are therefore preferable
if the Starkadders will co-operate

Might also consider annulment

Trustee can be Nominee

Bankruptcy could be retained with IVAs as a fall back
In case of non-co-operation.

Liability to HM Revenue & Customs is likely to be reduced
substantially
- assuming 40% marginal rate the tax liability
would be £16,000.
- adding costs and interest the liability could be nearer £20,000
Total creditors would then be £210,000
- plus statutory interest at 8% simple

Assuming costs of £30,000 and a period of 12 months
before creditors are paid it would be necessary to raise approximately £260,000 if
an IVA were to be proposed.

In a bankruptcy ad valorem on this sum would be £52,843

$$\frac{£260{,}000\text{-}£2{,}000}{0.83} = 310843$$

Less	258000
	52843

Basis of either procedure would probably be sale of some Assets eg funfair
equipment and some land. Possibly a re-mortgage

General discussion

Maximum marks for Question 4 30 marks

ADMINISTRATIONS, COMPANY VOLUNTARY ARRANGEMENTS AND RECEIVERSHIPS PAPER - DECEMBER 2006

GENERAL COMMENTS

The paper tested mainly core subject areas and was thought to be fair and a relatively straight forward by the candidates. This was evident in the overall quality of the answers, which were better structured and more concise than in prior years.

Some candidates tend to write everything they know about a topic, copying out parts of the act and rules, rather than using the information contained in the question to provide their answer and demonstrate their ability to apply their knowledge.

As in previous years, poor handwriting made marking certain scripts difficult and some candidates ran out of time or did not read the requirements carefully.

The range of marks is less “spread” than in previous years, more candidates scored highly although the best scripts did not obtain as high marks.

Question 1a

This part of the question required candidates to produce a receipts and payments account for inclusion in the final progress report.

The majority of candidates produced only a cumulative account instead of a six month period account and a final period account. Candidates were awarded half marks if they only produced one column. Those who recognised the requirement to period account scored very highly achieving nearly full marks.

Some candidates failed to show the estimated to realised statement of affairs figures as required by SIP 7.

Most candidates dealt well with the overall calculation of the preferential claim although some confused the employee preferential claim for arrears of wages and holiday pay with the guarantee payments made by the RPO. Few candidates calculated the split of the preferential dividend between the employees and RPO.
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.

Some candidates attempted unnecessarily to apportion some of the costs of the administration between fixed and uncharged (or "floating charge") assets.

A minority of candidates produced unnecessary notes and other details relevant to the final progress report itself for which there were no marks available.

QuestIon 1b

This part of the question required candidates to list examples of work which would be classified as administration and planning.

In the main candidates were able to list examples of work in accordance with SIP 9 and scored highly, many achieving full marks.

Some 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 2a

This part of the question required candidates to draft a memorandum detailing what further information should be requested from the directors to assist in the drafting of the CVA proposal.

A few candidates did not set out their answer as a memorandum.

Most candidates gave details of the additional information sought. A few candidates thought they needed to recite Rule 1.3 or SIP 3 without practical application to question requirements and gained very few marks.

Some candidates considered that you should request the necessary information to satisfy internal new client procedures and ethics. This information (might be collected at such a meeting) is not required for drafting the clauses/terms of a CVA.

Some candidates queried the source of the funds for the third party investor and the terms of the investment and a requirement to satisfy money laundering checks on the third party investor. The money laundering checks are an internal process and not needed to help draft the CVA.

The terms of the 3rd party investment (commercial terms) would be needed for the CVA proposals.

Question 2b

This part of the question required candidates to draft various clauses for inclusion in the CVA proposals.

Overall this part of question 2 was poorly answered with a number of candidates stating that you would incorporate the relevant liquidation rules for submitting and agreeing claims. However they did not expand or explain what the relevant rules were for inclusion in the CVA.

(i) A few candidates referred to submitting claims for voting purposes at the initial meeting of creditors approving the CVA, (the question asked for claims submission post approval of the CVA for dividend purposes).

(ii) A number were awarded marks for detailing the appeal process available against rejection of claims by the supervisor.

(iii) It was apparent that there was a lack of understanding of the procedures followed. It was clear that the steps of seeking claims from creditors who have not yet proved then issuing NID to proved creditors, issuing dividend cheques/reporting details of progress with the CVA were confused.

(iv) Many candidates incorrectly stated that any returned cheques or unclaimed dividends would be paid to the ISA.

Question 2c

This part of the question required candidates to demonstrate when and for what amount the office holder should bond in a Company Voluntary Arrangement.

This question was disappointingly answered.

Although many candidates were able to show workings of the anticipated asset realisations for bonding purposes they did not demonstrate sufficient knowledge as to the bonding process in voluntary arrangements.

Common mistakes made by candidates were the case should be bonded only when appointed as supervisor after the CVA was approved or that the nominee only needed to bond for a minimum sum.
Some candidates thought the level of bond required was based on the value of distributions made.

Only a few stated that you would bond to the top of the appropriate bordereau level.

Question 3a

This part of the question required candidates to draft a memorandum considering the conduct of each director when deciding to submit a D report or return in a set of specified circumstances.

A number of candidates answered this in general, merely referring to one and/or all of the following (schedule 1 of CDDA/SIP4/SIP2). In addition, numerous candidates referred to the repayment by the director of £20,000 as a preference.

Many candidates did not appreciate the fact that James Turner had died.

Question 3b

This part of the question required candidates to state what supporting documents would be attached to a D report.

This was generally well answered by candidates.

Question 3c

This part of the question required candidates to list what further information would be required regarding James Turner's overdrawn director's loan account.

This was answered poorly by the vast majority of candidates. It appears that most of the candidates focused on whether the director's loan was legal and whether it had been authorised at a board meeting.

There seemed to be lack of understanding as to the claim that the Company may have in James's Turner's estate.

Question 3d

This part of the question required candidates to draft a letter to Edward Turner regarding the restriction on the re-use of the Company name.

This was answered well by the majority of candidates.

Question 4a

This part of the question required candidates to demonstrate their knowledge of the statutory requirements that need to be undertaken within 3 months of appointment as administrator.

This was generally better answered than the other parts of the question although a number of candidates appeared to have stated pre Enterprise Act procedures or a combination of the pre and post Enterprise Act procedures.

Some candidates were side tracked and wrote about practical duties for example trading and the actual appointment process.

Question 4b

These parts of the questions required candidates to discuss the effect of various practical situations encountered during the administration and what action the administrator should undertake.

(i) Many candidates referred to the removal process, an administrator's power to appoint/remove a director, and the director's duties regarding the pension scheme and failed to consider the practical implications regarding the going-concern sale and the director's potential management expertise.

Few candidates 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.

(ii) Although answered better than the other parts, many candidates did not apply the facts given in the scenario and did not consider the practical thought-process needed to adjudicate an ROT clause.

Far too many candidates concentrated on the Re Atlantic guidelines.

(iii) Reasonably answered but a number of candidates failed to apply the question to the facts.

Few candidates 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.

Again far too many candidates concentrated on the Re Atlantic guidelines.

(iv) Generally, the most poorly answered part of the question with evidence of candidates running out of time.

Many candidates focused upon the potential breach of contract and the rules concerning adoption of contracts, personal liability etc.

Most candidates failed to discuss the practical and commercial impact on the business.

JIEB Administrations, company voluntary arrangements and receiverships paper Exam Marking Plan

The marking plan set out below was that used to mark this question. Markers were encouraged to use discretion and to award partial marks where a point was either not explained fully or made by implication. More marks were available than could be awarded for each requirement. This allowed credit to be given for a variety of valid points which were made by candidates.

Question 1

(a) For receipts and payments account please see attached spreadsheet.

Assumptions

There is no prescribed part as the bank's liability has been fully discharged from realisation of the book debts.

The 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
Percentage of prefential to RPO / employee	
RPO pay	1,160.00
Employee claim	240.00
Dividend in respect of arrears of wages	
Dividend to RPO	66,300
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
Employee claim (£60 per week)	12,000

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)

Examples of work classified as administration and planning in accordance with SIP 9 are:

- Case planning
- Administrative set-up
- Appointment notification
- Maintenance of records
- Statutory reporting

Maximum marks for Question 1 20 marks

Question 2

(a)

M E M O R A N D U M

Ref: **TCL**
Date:
From: Mark Webber
To: Charlotte Jade
cc:

TONG CLEANERS LIMITED (PROPOSED COMPANY VOLUNTARY ARRANGEMENT)

Further information required to assist in the drafting of the proposal

A letter should be obtained from the local investor to evidence his willingness to contribute the payment of £250,000 into the arrangement.

In addition the investor should provide evidence that he has sufficient funds available to make the contribution into the arrangement.

The directors should be required to produce a cash flow fore case to evidence the Company's ability to contribute £2,000 per month.

If necessary would the directors be prepared to extend the duration of the arrangement to allow a better return to creditors.

Further details of the new contacts should be provided and specifically the projected revenue to be generated from them.

The directors should confirm whether or not the revenue from these new contracts have been included in the calculation for the cash flow forecast.

Gildersome Limited should be written to in order to confirm confirmation that it would be prepared to waive its claim in the proceedings.

Full creditor listings should be provided.

Statutory accounts for the previous three years should be obtained together with any recent management accounts.

The directors should provide a statement of affairs detailing the assets and liabilities of the Company, together with details of any security held.

Any valuations in support of the statement of affairs values should be provided.

The landlord should be contacted to ascertain whether there are any arrears on the leasehold property or whether there are any dilapidations.

The liquidator should be contacted to ascertain whether the Company's claim has been agreed and the likelihood of a dividend being payable.

The VAT registration number and corporation tax and PAYE references should be obtained.

Whether any enforcement action has been initiated.

(b)(i)

The supervisor shall send a notice to creditors to submit their claim to every known creditor, requiring then to provide details of their claim.

Any creditors 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.

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)

The supervisor must distribute funds to creditors 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 Company 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 the 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.

The payment of the 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.

(b)(iv)

Any 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.

Unclaimed interim dividends can be repaid into the estate for distribution to creditors.

(c)

The appointment as nominee must be included in the bordereau application for December 2006.

The bond level should take into account anticipated realisations into the estate i.e. £298,000 and good practice would to be to bond for the top of the bond bracket.

There is no need to re-bond for the appointment as supervisor.

Maximum marks for Question 2 20 marks

Question 3

(a)

M E M O R A N D U M

Ref: **TF(D)L**
Date: 12 December 2006
From: A Administrator
To: File
cc:

TUNER FOOD (DUDLEY) LIMITED ("THE COMPANY")

A large part of liability is to the crown creditors (£55,000 of £75,000 unsecured creditors).

It appears that the Company has been funding trade from non payment of crown debts.

This is a potential theft offence.

The bank overdraft has been reduced by £5,000 over the last year, on which the directors have a personal guarantee.

This has resulted in the directors being put in a better position than they would have been in the winding up the Company.

However, the bank is not a connected part, and therefore I can only look at transactions six months prior to the commencement of the administration and Company would have to be insolvent at time of preference or become insolvent because of the transaction
.
There is a potential preference to ABC Bank plc however the amount involved is small.

The directors have failed to provide the statement of affairs and have not responded to reminder letters.

This is a technical breach as the directors are required to co-operate with the administrator.

The administrator has the ability to release the directors from their duty to provide the statement of affairs.

This is a minor issue and does not render directors to be unfit in the management of a limited company

James Turner

James Turner has passed away. As such, he will be unable to answer any of my questions.

Although he was a director in name, he appears to have had no active part in business.

According to the Company accounts it appears that James has significantly reduced his overdrawn director's loan account over the last year.

There appear to be no matters of unfit conduct to be reported.

Charlie Turner

Charlie Turner works part time as a florist and is also looking after her three small children.

It would appear that she is a director in name only.

She would however benefit from reduction of bank overdraft and the loan repayments being met on time.

There appear to be no matters of unfit conduct to be reported.

Edward Turner

Edward Turner is an accountant and had sole responsibility for company's financial affairs. Therefore he should have been aware of the Company's insolvency.

He would have made financial decisions regarding which creditors to pay and who not to pay.

It is noted that Edward has failed to provide a statement of affairs but this is a minor issue and does not render him to be unfit in the management of a limited company.

However the failure to pay crown creditors and the potential preference are matters which should be reported.

(b)

Appendices which should be attached when submitting a D1 report:

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

(c)

Further information which should be obtained in respect of the overdrawn director's loan account:

- A statement of assets in James Turner's estate;
- A schedule of liabilities in his estate;
- Whether the overdrawn director's loan account has been included as a creditor;
- On what basis is his estate believed to be insolvent;
- Evidence that James has repaid £20,000 to the company over the last year example copy bank statements;
- A signed copy of the letter signed by James confirming the amount outstanding;
- Details regarding the owed rent;
- Obtain copy board meeting minutes in relation to the lease
- Edward should be contacted for clarification of the facts.

(d)

A Administrator
IP & Co
Town Street
Dudley

E Turner Esq
123 Hill Street
Tong

Dear Mr Turner

Turner Food (Dudley) Limited ("the Company") (In Administration)

I refer to my appointment as administrator of the Company on 1 August 2006 and as such must draw your attention to the provisions of Section 216 and 217 of the Insolvency Act 1986 which are briefly explained below.

The restriction of the reuse of a company name occurs when the Company goes into insolvent liquidation.

As you were a director of the Company at any time in the period of twelve months ending with the day before the Company will be placed into liquidation you are prohibited from using any name by which the Company was known, including any trading names, or a name which is so similar as to suggest an association with that Company.

Your attention is also drawn to Section 217 of the Insolvency Act 1986, which provides, amongst other things, that a person who is involved in the management of a company in contravention of Section 216 of the Insolvency Act 1986 is personally liable for any debts of the company incurred during the period of that involvement.

Please find attached a copy of Rule 4.228 of the Insolvency Rules 1986, the first excepted case. This is applicable as the administration is not a court process and Turner Sandwiches (Dudley) Limited has purchased all of the assets of Turner Food (Dudley) Limited from the administrator.

You may act as a director of Turner Sandwiches (Dudley) Limited as long as within 28 days of the purchase of the assets of the Company notice is given to its creditors stating:

The name and registered number of Turner Food (Dudley) Limited; and

The circumstances in which the business of Turner Food (Dudley) Limited has been acquired by Turner Sandwiches (Dudley) Limited.

As the new company name is a prohibited name, you must disclose the name of the new company i.e. Turner Sandwiches (Dudley) Limited and your name and details of the nature and duration of your directorship of Turner Food (Dudley) Limited.

If you have any further queries in this regard please do not hesitate to contact me.

Your sincerely

For Turner Food (Dudley) Limited
A Administrator
Administrator

Maximum marks for Question 3 30 marks

Question 4

(a)

The statutory requirements to be met within the first three months of appointment:

The case should be bonded for the expected value of realisations into the estate
Give notice of appointment to the Company as soon as reasonably practicable
Give notice of appointment to any administrative receiver 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 distrained as soon as reasonably practicable
Give notice of appointment to any supervisor as soon as reasonably practicable
Send notice of appointment to the registrar within 7 days of appointment
Send section 120 notice to the pension protection fund within 14 days of appointment
Send section 120 notice to the pension regulator fund within 14 days of appointment
Send section 120 notice to the trustees of the pension scheme fund within 14 days of appointment
Forthwith request that the directors submit a statement of affairs and 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 of appointment
If there are cars ensure that the insurance details are lodged with the MID within 14 days of appointment
Decide whether the paragraph 51 meeting is to be held, and if so if it be conducted by correspondence
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 the meeting is to be held it should be held as soon as reasonably practicable and within 10 weeks of appointment.
Creditors must have 14 days notice of the meeting
Prepare the minutes of the paragraph 51 meeting or schedule the resolutions and voting if the meeting conducted by correspondence
Send result of the meeting to court as soon as reasonably practicable
Send result of the meeting to the registrar as soon as reasonably practicable
Send result of the meeting to the creditors as soon as reasonably practicable
Send result of the meeting to the members as soon as reasonably practicable
Ensure that an up to date IP record is maintained.

b(i)

Ascertain why the director wishes to resign although the administrator must not advise director on this matter.

The director should seek independent legal advice.

His resignation does not relieve him of his duty as a director to submit a statement of affairs and the administrator will still be required to report on his conduct when completing the CDDA return.

The director must assist with provision of information required by the administrator.

The administrator should consider whether the director's resignation could affect the sale of the business, if he is a key member of staff.

(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 the 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 so a stock take of the conservatories should be undertaken.

Seek agreement of supplier to use goods if believe valid retention of title claim on the basis of payment of invoice value of goods used.

Obtain legal advice if the validity of the retention of title clause is in doubt or there are concerns regarding the incorporation of the terms.

(iii)

The vans are necessary to continue trading and a moratorium is in place so no steps can be taken to repossess the vans without the consent of the administrator or with the permission of the court.

Each leasing agreement should be reviewed to establish the amount of arrears for each van, and which agreements are in default.

Check whether consolidation clauses exist.

Negotiate with the leasing company for use of the vehicles on payment of ongoing rentals and decide whether to pay for any arrears.

Explain to the leasing company that you are seeking buyer for business, which could provide continued longer term lease security and therefore it would be in their interest to help you in the short term.

(iv)
Arrange a meeting with the customer. Establish whether the customer is satisfied with product and price and that the only reason for resourcing is the uncertainty of supply. Explain to the customer that there are interested parties who wish to purchase the business and therefore hope for going concern sale, which would secure future supply. Offer to keep the customer informed of the progress in sale negotiations and offer a discount during period of trade.
Maximum marks for Question 4 30 marks

JIEB Liquidation Examiner's Report 2006

General Comments

Many candidates were ill-prepared for this examination.

In the examination candidates are provided with Butterworths Insolvency Law Handbook ("Butterworths") as a quick reference source and aide memoire. Significant numbers were either unfamiliar with the insolvency and associated legislation or the contents of Butterworths and how to use it. Consequently candidates lost easy marks, especially in question 1. For example, marks were lost by not recognising the issue, or where to look up, set-off (Insolvency Rules 1986 Rule 4.90).

Another common problem was that many candidates were unable to distinguish between different types of entity – for example between registered and unregistered companies and limited liability companies. Many candidates did not recognise the differences between a limited liability partnership and a limited liability company.

A number of answers indicated a lacked basic accounting knowledge. Some candidates clearly found question 2, the preparation of a receipts and payments account, distribution statement and estimated outcome statement, difficult. Several misinterpreted the balance sheet in question 4, treating the Profit and Loss Reserve Account as a creditor.

There was a tendency for some candidates not to answer the question set but rather to set out all they knew about a topic, for example in question 4 rather than provide specific advice some candidates wrote all they knew about members' voluntary liquidations. This meant that candidates spent a lot of time and effort but gained relatively few marks.

The better candidates showed that they had good technical and practical insolvency knowledge.

Question 1

Background

This question posed a range of unrelated problems that an insolvency practitioner may face. Candidates were required to:

a. decide whether or not, and in what amounts, proxies should be admitted for voting in a section 98 meeting.
b. calculate the amounts receivable/allowable for dividend by a Company in liquidation following from an administration.
c. explain the implications, to the bank manager, of a petition being presented to one of the bank's customers.
d. explain a liquidator's duties on ascertaining that the Company has an occupational pension scheme and to set out the problems the liquidator may encounter if the Company is a Trustee of the scheme.
e. set out how funds may be recovered from members of a Limited Liability Partnership and the factors the liquidator would need to consider before taking any steps.

Objectives

The question tested candidates' familiarity with insolvency and other legislation and aimed to test the candidates' knowledge of

a. assessing and adjudicating proxy votes
b. set off (Rule 4.90) and its application when a liquidation immediately follows an administration
c. the implications of transactions occurring post petition and pre-winding up order
d. the reporting requirements imposed on a Liquidator by the Pensions Act 2004 (to the Pension Protection Fund, The Pensions Regulator and to the scheme's Trustees)
e. wrong doing and prior transactions provisions, as applied to Limited Liability Partnerships. In particular section 214A.

Comments

a. Most candidates were able to determine the amounts for which proxies for a creditors' meeting are admissible.
b. Candidates either did not attempt to answer question 1(b) or answered it incorrectly.
c. About half of the candidates were unable to advise the bank on the implications to it of a petition presented to one of its customers. Few referred to section 127.
d. Many candidates did not attempt to answer question 1(d) and only a few candidates knew the notification requirements.
e. A few of the better candidates answered 1(e) well. However, many candidates were unable to distinguish between a company and a limited liability partnership: candidates were unaware of the difference between members and directors of a limited company and members of a limited liability partnership and the implications for recovering funds.

Question 2

Background

Question 2(a) required candidates to prepare a reasonably straight forward receipts and payments account. 2(b) and (c) required the preparation of an estimated outcome statement and distribution statement respectively.

Objectives

A receipts and payments account is a basic financial statement that is required to accompany almost all reports that a liquidator has to make. Question 2(a) tested candidates' knowledge of how to set out a receipts and payments account and of Statement of Insolvency Practice 7, Preparation of Insolvency Office Holders' Receipts and Payments Accounts. 2(b) and 2(c) further tested the candidates' ability to present clear financial information about a liquidation, in the form of estimated outcome and distribution statements.

Comments

Some candidates scored reasonably well in this question but, given that the requirements were reasonably straight forward, the results were disappointing. A receipts and payments account is just a record of the cash transactions and some candidates made the answer much more complicated than was expected. Some used a fixed/floating charge presentation but were not penalised for doing so. They were, however, penalised if they then included items under the wrong heading or arbitrarily split costs between fixed and floating charge assets.

Several candidates seemed not to have enough time to answer this question and lost easy marks either by laying out skeletons without inserting any figures at all or by half doing one or two of the more complicated points rather than writing down the easy points in the right places.

With some exceptions, candidates struggled with the estimated outcome statement. Many found the calculation of the prescribed part difficult and a significant number ignored it. Other candidates seemed to guess the formula, incorrectly. Some candidates used the incorrect starting figure but gained some marks for following the correct calculation.

With only a handful of exceptions, candidates either did not attempt, or had given up, preparing a distribution statement. This is either because there was no time or because candidates did not know how to.

Question 3

Background

Question 3(a) required candidates to explain how to secure the assets of a French branch of an English registered company and set out the problems a liquidator is likely to encounter. Question 3(b) required candidates to explain how an Australian company, operating in England, may be placed into liquidation.

Objectives

This question tested candidates' knowledge of how to deal with assets of an English company when located abroad and of assets of foreign entities located in England.

Comments

Candidates found question 3(a) difficult. Many recognised that the EC Regulations on Insolvency Proceedings 2000 applied although only the better candidates recognised the problems arising as a consequence of the EC Regulations. Many listed practical concerns and they gained some marks for this. Many candidates assumed that retention of title and property in France was subject to English insolvency law, but these are subject to local laws which a quick glance at the headings in the EC Regulations, contained in Butterworths, would have confirmed.

Some candidates launched into long explanations of how to place a company into creditors' voluntary or compulsory liquidation, without mentioning the EC Regulations, and did not gain any marks.

The answers to question 3(a) were disappointing. Some candidates correctly recognised that the EC EC Regulations applied. A handful of candidates recognised that the Australian company was an unregistered company in England and Wales in accordance with section 220 and that an alternative approach would be for it to be wound up under section 221.

Question 4

Background

Question 4(a) required candidates to advise a husband and wife how to realise the capital in their business as they wished to retire. Candidates were required to compare the advantages and disadvantages of a members' voluntary liquidation with any other method of realising capital. Question 4(b) required candidates to compare two offers for the assets, once the Company has entered members' voluntary liquidation.

Objectives

Question 4(a) tested candidates' ability to answer a common question that arises in practice and how to set out clear advice.

Question 4(b) tested candidates' knowledge of how assets may be distributed in a members' voluntary liquidation – in cash, in specie and in shares (section 110 scheme).

Comments

Many candidates did not seem to have read question 4(a). What was required was advice on how best to proceed and not a detailed explanation of the members' voluntary liquidation procedure (although some marks were awarded for this). The alternative means of realising the investment would be by distributing the assets out of the Company and allowing (or applying for it) to be dissolved, or struck off, the register at Companies House, with a discussion on the problems arising in relation to the distribution of capital. The better candidates achieved this but many selected creditors' voluntary liquidation as an alternative, despite the solvent balance sheet. A significant number of candidate thought that the Profit and Loss account balance was a liability and so suggested a creditors' voluntary liquidation as an alternative, with a small minority suggesting compulsory liquidation!

Candidates scored well in 4(b) for the procedure for dealing with a section 110 scheme and the rights of dissenting minorities. Several candidates recognised that in this case the sanction for the section 110 scheme would not be obtained if the minority shareholder voted against the special resolution and some raised the problem of how creditors would be paid.

JIEB Liquidations marking plan – December 2006

The marking plan set out below was that used to mark this question. Markers were encouraged to use discretion and to award partial marks where a point was either not explained fully or made by implication. More marks were available than could be awarded for each requirement. This allowed credit to be given for a variety of valid points which were made by candidates.

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 (R4.70) for the purpose of entitlement to vote; and (b) there has been lodged, by the time and date stated in the notice of the meeting, any proxy requisite for that entitlement (R4.67).
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 R8.2(3). 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 R8.2(3), 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 (R4.70) for the purpose of entitlement to vote.
If the Chairman is in doubt whether a proof 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 proof is sustained. (R4.70(3)).
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. R4.70(3)
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 R4.67(3)
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. R4.70 again.

(b)

Warmseat Inc's claim. Warmseat purchased debts post administration and pre-liquidation. Warmseat was a creditor pre-administration.
Set off not available see R4.90(2)(d)(v): 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 members?

[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 membership, 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 membership -

  (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 membership'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 membership 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 membership, and

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

7) For the purposes of this section a limited liability membership 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 membership 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 awarded for this question 20 marks

QUESTION 2

(a)		
This receipts and payments account is in a non-statutory format for presentation to the creditors' meeting. SIP 7 applies and it is intended that the		
Receipts	**£**	**£**
Freehold property – sale proceeds	235,000	
Less ABC Solicitors' fees	(3,300)	
Less ABC Solicitors' disbursements	(250)	
Due to Cornish 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	
Agents' fees	1,350	
Liquidator's fees (1)	15,000	
Specific bond	220	
Legal fees and disbursements	2,900	
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 amount is not reflected in the receipts and payments account.		

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 4.68, 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 Cornish 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 Cornish 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)			
	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
Cornish Bank			(200,000)
Surplus to Devon Bank			21,450
Leasehold property		nil	32,000
Costs			
Solicitors' fees and disbursements	(1,400)		
Liquidator	(5,000)		(6,400)
Surplus to Devon 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
Devon 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
Reconciliation (not part of marking scheme)			
Balance per R & P		*139, 565*	
Less due to Devon Bank		*(70,000)*	
Further liquidator's fees		*(10,000)*	
Arrears of wages		*(35,000)*	*24,565*
Available for prescribed part		*13,651*	
Available for unsecured creditors after prescribed part		*10,914*	*24,565*

(c)			
Layout			
Cornish Bank			
	Freehold property – net proceeds	221,450	
	Due to Cornish Bank	(200,000)	
	Surplus for second charge holder		21,450
Devon Bank			
	Surplus from Cornish 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 Devon Bank	(70,000)	
Preferential creditors		35,000	35,000
Unsecured creditors			
	Prescribed part – distribution fund for unsecured creditors	13,651	
	Surplus from floating charge	10,914	24,565
Maximum marks awarded for this question			20 marks

QUESTION 3

(a)(i)

i. Secure assets of French branch

Needs to apply for court confirming the CVL for the purposes of the EC Regulation on Insolvency. (Form 7.20)

(EC Regulation on Insolvency Proceedings
Insolvency Rules 1986, Chapter 10 R7.62)

Note credit may be given for explanation of liquidation procedure/entry into liquidation procedure (CVL/Court) but only if recognise the entry route (ie EC regs)

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 English 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."

Where a parent and is subsidiary have registered offices in different member states it is only possible to rebut the presumption that the subsidiary's COMI is where the registered office is situated if "factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which location at that registered office is deemed to reflect."

Practical issues – include physically securing assets, insurance, employing French agents to deal with property, ROT (subject to local laws).

(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

Practical problems of securing assets, language difficulties, etc

(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 England & Wales as the accounting function is in London.

- 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 England & Wales if establish that COMI is in England & Wales.

(b)

[Letter format]

Dear …

<u>Boomerang Pty Ltd ("the Company")</u>

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 England 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 s22,223 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 Scottish assets/employees/liabilities) will be able to be dealt with by an English 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*}
Re 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.

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) (if don't mention BRAC but mention principle then award marks)
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 English court but the IP appointed would still need to be licensed).
Note credit may be given for explanation of liquidation procedure/entry into liquidation procedure (CVL/Court) but only if recognise the entry route (ie EC regs and/or unregistered company)

Maximum marks awarded for this question 30 marks

QUESTION 4

(a)

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 but insolvency related issues may be mentioned)
Note Candidates are not expected to provide the procedure for placing into MVL but marks may be awarded in context of answer.

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 but insolvency related issues may be mentioned))
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 upto £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

(b)

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 in accordance with R4.148A - fixed by members in general meeting and on a time basis or as a percentage of realisations.
If not fixed under R4.148A, R 4.148B allows liquidator to take remuneration on the realisation scale set out in Sch 6.
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 liabile 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.
Practical discussion about issues

Maximum marks awarded for this question 30 marks