JOINT INSOLVENCY EXAMINATION BOARD

NOVEMBER 2008 EXAM (SCOTLAND)

EXAMINERS' REPORT AND MARKING PLANS

ADMINISTRATIONS, COMPANY VOLUNTARY ARRANGEMENTS and RECEIVERSHIPS NOVEMBER 2008 (SCOTLAND)

EXAMINER'S REPORT

QUESTION 1

This question required candidates to provide advice to a Bank on the powers of a receiver, how to realise value in the heritable subjects of the company that was to be placed into receivership and from property held in a related company over which the Bank only had a standard security.

A large number of candidates used the question as an invitation to copy Schedule 2 of the Insolvency Act 1986 without reference to the relevant practical issues that would concern the Bank. The candidates that employed this strategy limited themselves to less than a quarter of the available marks. Those candidates who made some attempt to address the numerous practical considerations in dealing with, and realising value from, property scored the higher marks.

It was concerning the number of candidates who advised the Bank to appoint a receiver to the related company despite it only holding a standard security over one of the heritable subjects.

QUESTION 2

As with the 2007 examination, it was encouraging that candidates in Scotland did not, comparatively, score less well with the CVA question despite this not being a common procedure.

Most candidates struggled with the preparation of the engagement letter to the directors. Whilst this may be symptomatic of many firms having standard styles, candidates must be comfortable with the contents of these documents rather than simply "filling in the blanks" when engaging new clients. It was particularly disappointing that only one candidate consider practical matters such as the quantum and payment of fees.

Part B of the question required the drafting of amendments to deal with the practicalities of a breach of the arrangement. It was clear from the quality of the answers to this part of the question that few candidates had practical experience of drafting such provisions and this was reflected in the poor scoring in this section of the question.

As one would have expected, candidates scored well in Part C, although a number of candidates would have achieved higher marks had they been aware of the differences between the procedures, and timings, in calling a meeting of creditors in a CVL and CVA.

A large number of candidates only provided one word answers to Part D ("Accept" or "Reject"). No marks were awarded unless candidates explained the reasoning behind their decisions. Those candidates who did provide this information generally scored well.

QUESTION 3

This question required candidates to demonstrate knowledge of the effects an administration appointment has on employees, to calculate the value of net property and the appropriate exit routes from administration.

The initial letter to employees was very poorly attempted with candidates failing to identify the practical and legal matters that are required to be notified to employees on appointment. As with Part A of Question 2 this maybe as a result of the majority of firms having standard letters which only require the insertion of company and employees' names.

The second part of this question was intended to examine candidates' knowledge of the TUPE Regulations, and in particular the changes that were introduced in 2006. While most candidates understood the basic principles of a protective award, few appreciated this was a joint and several liability of both the transferor and transferee or the practicalities of how an administrator would seek to mitigate the liability on the estate.

Part C was very well answered. It is clear candidates now appear comfortable with the obligations placed upon an insolvency practitioner under the Pensions Act 2004.

Historically candidates have been most comfortable with numerical questions and have used these as an opportunity to pick up marks. This year's examination was no different with the majority of candidates scoring well, although only handful of candidates dealt appropriately with the attachment.

The final part of the question was intended to test candidates' knowledge of how an administration may be brought to an end with reference to the particular circumstances of the case. Most candidates failed to identify there would be a return to the unsecured creditors and therefore sought to end the administration immediately through paragraph 79 of Schedule B1. Those candidates who addressed paragraphs 83 and 84 scored the higher marks. Surprisingly only one candidate in Scotland made any attempt to deal with the administrator's discharge.

QUESTION 4

Despite "pre-packs" being highly topical, it was disappointing that only one candidate achieved more than half marks, with the majority scoring considerably lower.

Part A sought to test candidates understanding of the legal, regulatory and practical issues surrounding a proposed "pre-pack" sale to the directors. The majority of candidates made an adequate attempt at addressing the legal and regulatory issues; however, very few demonstrated either their experience, or knowledge, of the practical implications for both the administrator and the directors.

The second part of the question asked candidates to prepare an estimated outcome statement on two bases: an administration and a receivership of the company. In the main candidates failed to appreciate the implications of when the floating charge was created and the impact this would have on the recovery to the, *prima facie,* secured creditor.

A large number of candidates either did not appreciate the difference in the treatment of corporation tax as an expense of the process between administration and receivership, or chose to ignore it all together.

ADMINISTRATIONS, COMPANY VOLUNTARY ARRANGEMENTS and RECEIVERSHIPS NOVEMBER 2008 (SCOTLAND)

EXAM MARKING PLAN

QUESTION 1
Glasgow Property Development Limited

Write a letter to the Bank detailing the statutory powers of a Receiver, your strategies for dealing with all of the properties listed above and any issues that may have an impact on the Bank's recovery. (20 marks)

Letter style
The bank may appoint a receiver in this case
On the assumption its bond and floating charge is valid
Statutory powers
A receiver's power will be included in the floating charge
Supplemented by Schedule 2 to the Insolvency Act 1986 and the Companies Acts
Power to sell the properties subject to the rights of the standard security holders
Power or agree and pay any preferential creditors
Power to take possession to take possession of the company's property
Power to appoint a solicitor or accountant to assist the receiver in discharging his functions
Power to effect and maintain insurances
Power to appoint any agent
Power or carry on the business of the company or part of it
General
Primary duty of care to the appointing bank
Appointing bank will agree the fees of the receiver
Arrange appropriate funding with the appointing bank to undertake essential work
Rates will not be payable as an expense of the receivership
Any corporation tax on any chargeable gain will rank as unsecured and therefore not payable as an expense of the receivership
Properties owned by the Company and subject to Scotia standard securities
Obtain legal advice on the validity of the standard securities
Obtain formal valuations of each of the properties
Ensure appropriate insurance is put in place
Agree with Scotia who will realise the value in the properties (i.e. the receiver or the Bank under its standard security)
Appoint marketing agents
Advertise the properties for sale as appropriate
Consider costs of completing the renovation work compared to any potential upside from realisations
Discuss with Scotia whether it is appropriate to delay sale of the properties given prevailing market conditions
Determine with whom the equity on the properties lies (i.e. will there s return to any class of creditor or than the standard security holder) and the impact this may have on the realisation strategy
Should Scotia wish to delay realising the value in the properties can rental income be derived from these
Engage with the local authority to gain an understanding of the health and safety issues
Rectify the health and safety breaches to ensure the receiver is not personally liable
Property owned by the Company subject to Ecosse's standard security
Engage legal agents to review the validity of Ecosse's standard security
Contact Ecosse to determine its intentions
Should Ecosse wish the receiver to realise the value in this property agree appropriate fee
Fee should not form part of the fee arrangement with Scotia
Have valuation undertaken to determine if equity in this property to Scotia under its bond and floating charge
Consider seeking an inhibition over the property to ensure the Company's interest is protected
Property owned by Scotland Developers Limited
Receiver of the Company has no locus to deal with this property
Scotia could call up its standard security

Or it could seek the appointment of a liquidator or administrator
Calling up its standard security could be more beneficial due to rates and corporation tax issues
If Scotia calls up its standard security, the rental income will vest in it
Scotia should have the lease reviewed to determine the impact its strategy may have on value and current rental stream
Scotia should instruct a valuation of this property
Scotia should have its interest noted on any insurance policies
A review of Scotland should be undertaken to determine its solvency
A dialogues should be entered into with Scotland to determine if it is in Scotia's best interest to call up its standard security or keep the status quo
Scotia is a catholic creditor
It will therefore need to consider the interests of the other creditors when determining its strategy

QUESTION 2
Logistica Consulting Ltd

(a) List the main issues that you would cover in your letter of engagement to the directors dealing with your respective duties and obligations. (5 marks)

Directors to confirm no knowledge of a material professional relationship within the previous three years or any other reason affecting objectivity why the appointment should not be accepted
The procedure within the Nominees' firm for handling complains
The principal members of the Nominees' staff who will be engaged on the assignment
The Nominees' fees and terms of payment
An explanation of the essential procedural steps to obtain approval for, and to implement, a CVA
An outline of the essential contents of a fully compliant CVA Proposal
Emphasise that whilst Nominee may assist with preparation of the Proposal, the directors remain responsible for its accuracy
The importance of full disclosure of the company's assets and liabilities and any other material matters and the consequences of not making full disclosure including the winding up of the company
That it is a criminal offence to make false representations for purpose of obtaining creditors' consent to a CVA
That when finally drafted the Proposal should be thoroughly re-checked by the directors for accuracy and any alterations or amendments notified to the Nominee
That the role of the Nominee is to critically examine the Proposal and to bring to the attention of creditors any matters which he considers relevant but which are not included in the Proposal.
The importance of cooperation both before and after implementation of the CVA without which the company may be subject to winding up proceedings instituted either by creditors or by the Supervisor
Directors to sign duplicate of letter of engagement to serve as a letter of instruction for the Nominee to commence his work

(b) Draft appropriate amendments to the Proposal for discussion with the directors dealing with any breach of the arrangement by the Company and the consequences of such breach. (5 marks)

The Supervisor shall retain sufficient funds to enable him to present a winding-up petition, in the event of failure of the CVA
However no petition shall be presented unless a resolution approving such a course of action is passed at a creditors meeting summoned to consider such a resolution; and the requisite majority necessary shall be a majority in excess of three quarters in value of the creditors present in person or by proxy and voting on the Resolution.
Except that if the Supervisor shall in his discretion conclude that a situation or urgency has arisen or circumstances developed which leads him to conclude that a Petition should be presented forthwith, then he shall be entitled to proceed with such Petition without first calling a meeting of creditors

The CVA will be deemed to have failed if :
The Company fails to pay a voluntary contribution within (say) 7 days of the due date
The Company fails to comply with any of its other obligations or is prevented from so doing, or:
A winding-up Order is made against the Company; an Administrative Receiver is appointed over the Company; an Administration Order is made in relation to the Company.
False or misleading information was contained in any document supplied by the Company or its Directors for the purposes of obtaining the CVA
All monies paid to the Supervisor shall be held by the Supervisor upon trust for the Creditors of the Company bound by the Arrangement. The subsequent Liquidation or Administration of the Company or the Appointment of a Receiver shall not, unless the Court otherwise determines, terminate the Trust hereby created and any implied termination is hereby negated.

(c) Assuming that your Nominee's report to court on the Proposal is favourable, list the steps for summoning the meetings to consider the Proposal. (5 marks)

The members and creditors' meetings should be summoned for the time, date and place specified in nominees' report to court
Ensure the date; time and venue are convenient for creditors, having regard to their location.
The meeting must be held between 10.00am and 4.00pm on a business day.
The meetings may be held on the same day or where not on the same day must be within 7 days of each other
In either case the creditors meeting must be held in advance of the company meeting
The meetings must be held not less than 14 days and not more than 28 days from the date of the Report being filed in court.
Confirm venue booking.
The minimum notice period of fourteen days excludes the day of sending the notice and the day of the meeting.
Notice of the creditors' meeting must be given to all creditors of whose claim the person summoning the meeting is aware.
Accompanying the notice of the meeting should be
Copy director's proposal
Copy or summary S of A
Comments on the proposal
Forms of proxy
Complete certificate of posting.
Convenor of meeting may request attendance by directors and officers on not less than 14 days notice.

(d) Briefly state how you would deal with each of the following claims for the purposes of voting on the Proposal. (5 marks)

(i) Twelve special proxies voting in favour of the Proposal from employees with claims for accrued holiday pay totalling £20,000;

Accrued holiday pay is a liquidated debt at the date of the meeting
Preferential creditors are entitled to vote at a meeting in respect of a CVA in relation to a liquidated debt
The claims totalling £20,000 should therefore be admitted for voting purposes

(ii) Eight general proxies for the chairman from trade creditors and suppliers totalling some £80,000;

A proxy holder shall not vote in favour of any resolution which would directly or indirectly place him in a position to receive any remuneration out of the insolvent estate, unless the proxy specifically directs him to vote in that way.
Since the chairman of the creditors' meeting is the nominee, he should not admit these claims to vote if he or an associate is the proposed supervisor.

(iii) A special proxy from a landlord voting against the Proposal claiming the cost of unspecified dilapidations amounting to £30,000;

This represents a debt for an unliquidated amount or whose value is not ascertained.
For voting purposes the debt shall be valued at £1 unless the chairman agrees to put a higher value on it.
It has been held that the treatment of unspecified dilapidations in this manner is the correct treatment.

(iv) A special proxy from a supplier voting against the Proposal for an outstanding debt of £25,000. The supplier is validly claiming retention of title in respect of goods with an estimated re-sale value of £15,000; and

For the purposes of entitlement to vote, there is no statutory provision in CVA proceedings requiring a seller of goods under a retention of title agreement to deduct from his claim the estimated value of any rights arising under that agreement
A secured creditor is entitled to vote only in respect of the balance of his debt after deducting the value of his security as estimated by him.
Retention of title does not amount to "security" (see S 248 IA 86)
The claim for £25,000 should therefore be admitted for voting for the full amount.

(v) A special proxy from Indigo Bank Plc for £160,000 being the outstanding balance of a loan granted under the Small Firms Loan Guarantee Scheme, which provides a government guarantee to the lender covering 75 per cent of the loan. The Company has provided no security for this loan. The proxy is in favour of the Proposal.

There is to be left out of account a creditor's vote in respect of any claim or part of a claim where the claim or part is secured
"Security" means (Scotland) any standard security, floating charge, lien or other security
The government guarantee of the Bank's lending in this case does not amount to security.
The claim for £160k should therefore be admitted for voting for the full amount.

QUESTION 3
Arrowstorm (Tyres) Ltd

(a) Set out the main points you would have included in your initial letter to all employees explaining the effect of your appointment on their employment. (5 marks)

You are the appointed administrator, the Company having entered administration under Part II IA 1986 on 20 October 2008
As administrator you act as agent of the Company and as an officer of the court
The appointment does not of itself mean that the Company is either going into liquidation or ceasing to trade immediately.
The purpose of administration is to facilitate the rescue of the Company but if that is not reasonably practicable to implement the next best alternative in the interests of the creditors generally
Your appointment as administrator did not bring contacts of employment to an end
Neither the administrator nor his firm have either become the employer or adopted contracts of employment
Employees remain employees of the Company exactly as they did before the appointment.
The Company is continuing to trade under the supervision of the administrator to whom all decisions affecting the Company must be referred for approval.
During the period of the administration, wages and salaries are paid out of funds coming into the hands of the administrator from the Company's continued trading and any sale of its assets.
If the Company terminates employment contracts, any claims arising will be dealt with in accordance with the law.
The Employment Rights Act 1996 provides for certain claims of employees to be paid out of Government funds.
If employment contracts are terminated, assistance will be given to ensure that claims under the Act are made as promptly as possible.

(b) Outline the potential consequences for the Company of a failure to consult adequately about a prospective business transfer. (3 marks)

An employee is entitled to complain to a tribunal about inadequate consultation and to make a claim for compensation (a "protective award") against either or both of the transferor and transferee.
The tribunal may award such sum not exceeding 13 weeks' (90 days') pay as it thinks just and equitable having regard to the seriousness of the failure
The transferor and transferee are joint and severally liable for the failure to adequately consult about the transfer with affected employees
Where an award is made against a transferee, it will have a right of recourse against the insolvent transferor
Whether such a liability should be treated as an unsecured debt or as an administration expense is not completely beyond doubt (now clarified in Haine & Sec of State v Day June 2008 – provable debt in liquidation proceedings)
In practice the administrator will normally require that as part of the sale and purchase agreement, that the transferee indemnifies the transferor against any such liability

(c) State your statutory obligations in relation to the pension scheme. (2 marks)

Where an *occupational pension scheme* has been identified
Give Notice of the appointment of an administrator within 14 days of appointment or within 14 days of the date on which you became aware of the pension scheme to:
The Pension Protection Fund
The Pensions Regulator, and
The trustees or managers of the pension scheme
Confirm as soon as reasonably practicable whether or not the a scheme rescue has been possible

(d) Estimate the amount of the net property and prescribed part for the purposes of the Administrator's proposals to creditors. (10 marks)

ARROWSTORM (TYRES) LTD	Receipts & Payments to date £	Anticipated Receipts & Payments £	Projected Outcome £
ASSETS SPECIFICALLY PLEDGED			
Freehold and leasehold properties	420,000	0	420,000
Goodwill	47,500	0	47,500
Gross Realisations	467,500	0	467,500
Realisation Expenses			
Administrator's and legal and professional costs	-	(46,750)	(46,750)
Trading loss	-	(8,250)	(8,250)
Net Realisations	467,500	(55,000)	412,500
Fixed charge holder - Magenta Bank Plc		(412,500)	(412,500)
	467,500	(467,500)	-
ASSETS NOT SPECIFICALLY PLEDGED			
Plant and equipment	325,000		325,000
Stock and WIP	33,000	-	33,000
Book Debts	-	24,500	24,500
Cash at bank - set off applied	-	-	-
Gross Realisations	358,000	24,500	382,500
Payments			
Administrator's and legal and professional costs	-	(38,250)	(38,250)
Trading loss		(6,750)	(6,750)
HMR&C distraint		(23,000)	(23,000)
Corporation tax	-	(12,500)	(12,500)
Available for preferential creditors	358,000	(56,000)	302,000
Arrears of wages and pension contributions		(3,000)	(3,000)
Net property	358,000	(59,000)	299,000
Prescribed part set aside for unsecured creditors	-	(62,800)	(62,800)
Available for floating charge holder	358,000	(121,800)	236,200
Floating charge holder - Magenta Bank Plc	-	(236,200)	(236,200)
	358,000	(358,000)	-
Explicit statement that unoccupird business rates not payable as an expense			

(e) Draft provisions for inclusion in the Administrator's proposals dealing with how the Administration shall end and also how the Administrator shall be released from office. (10 marks)

In order that the purpose of the administration may be fully achieved it will be necessary to remain in office as administrator to ensure that all outstanding matters following the sale of the business and assets are concluded.
Following these events it is proposed to finalise distributions to the secured and preferential creditors.
This will then only leave the distribution of the prescribed part set aside under Section 176A for the unsecured creditors.
However, an administrator does not have a general power to make a distribution to unsecured creditors and may only do so if the court gives permission
If no such application is made by the administrator in this case, then as soon as he is satisfied that he has fully discharged his duties as administrator and that the purpose of the administration has been fully achieved, he would propose to implement the provisions of Paragraph 83 of Schedule B1 to the Act whereby on the registration of a notice sent to the Registrar of Companies, his appointment as administrator shall cease to have effect and the Company will automatically be placed into creditors voluntary liquidation.
The liquidator for the purpose of the winding up shall be:- (a) a person nominated by the creditors of the company in the prescribed manner and within the prescribed period, or (b) if no person is nominated under paragraph (a), the administrator
The administrator confirms that as part of his proposals he seeks nomination as liquidator in the subsequent winding up of the Company. Creditors may nominate a different person as the proposed liquidator provided that the nomination is made after the receipt of the proposals and before the proposals are approved.
Alternatively if an application is made by the administrator in this case seeking the court's permission for him to make a distribution to unsecured creditors, then as soon as he is satisfied that he has fully discharged his duties as administrator and that the purpose of the administration has been fully achieved, he would propose to implement the provisions of Paragraph 84 of Schedule B1 to the Act. Under these provisions, on the registration of a notice sent to the Registrar of Companies, his appointment as administrator ceases to have effect, and at the end of three months the Company will automatically be dissolved.
Where an administrator sends such a notice of dissolution to the Registrar of Companies, he must also file a copy of the notice with the court and send a copy to each creditor of the Company, and on application by any interested party the court may suspend or disapply the automatic dissolution of the company.
The administrator proposes to seek the consent of the secured and preferential creditors to his prospective discharge as administrator by a resolution passed pursuant to Paragraph 98 of Schedule B1 to the Act. It is proposed that the date of discharge should coincide with the date on which the appointment as administrator ultimately ceases to have effect. This will be the date that the Notice of move from administration to CVL, or Notice of move from administration to dissolution, is registered by The Registrar of Companies.

QUESTION 4
Advanced Bio Power Ltd

(a) Draft a briefing note for your meeting with the directors outlining:

(i) the nature of a "pre-pack" sale;

It is an asset realisation strategy in the context of impending or actual insolvency.
An arrangement under which the sale of all or part of a company's business or assets is negotiated with a purchaser prior to the appointment of an administrator, and the administrator effects the sale immediately on, or shortly after, his appointment.
It frequently involves the sale of a business back to the incumbent management team but may equally involve a sale to a non-connected third party.

(ii) the advantages and disadvantages of such sale in achieving realisations compared with alternative strategies;

It can be the best way of extracting value from a difficult situation.
This is particularly so when the value of a company's business can be significantly diminished very quickly due to damage to reputation and loss of customers through negative publicity or loss of key staff following the commencement of a formal insolvency process
This is often the case with "people businesses" or regulated businesses that are difficult or impossible to trade in insolvency.
It can also be used where there is a lack of available funds to keep the business trading whilst the Administrator looks for potential buyers
The main disadvantage centres on the perception held by many unsecured creditors that businesses/assets have not been openly marketed and that had such marketing been undertaken, a better price would have been obtained for creditors.
Unsecured creditors are generally not consulted and are presented with a fait accompli. Consequently the process is often seen as opaque and suspicious.
The concern amongst unsecured creditors is heightened when the existing management is connected with the purchase.
Often results in increased realisations in respect of goodwill
May reduce, or eliminate, an administrator's trading risk

(iii) any insolvency law or required practise provisions which moderate or control the conduct of such transactions by insolvency office holders; and

In a series of cases the courts have held that were the circumstances of the case warrant it, the administrator has the power to sell assets without the prior approval of the creditors or the permission of the court. (T&D Industries Plc; Transbus International Ltd; DKLL Solicitors)
An administrator's conduct is subject to challenge on the basis that his actions unfairly harm the interests of creditors/members (P 74)
His conduct is also subject to challenge on the grounds of misfeasance (P 75)
In order to avoid the risk of such challenges the administrator should ensure that any exercise of his power is in good faith in furtherance of the purpose of administration.
The administrator must perform his functions in the interests of the company's creditors as a whole P3(2)
Where the objective is to realise property in order to make a distribution to secured or preferential creditors, the administrator has a duty to avoid unnecessarily harming the interests of the creditors as a whole (P3(4)).
IPs are regulated by codes of practice of their professional bodies and if judged to have acted improperly, will be subject to disciplinary proceedings.
SIP 13 makes clear that an IP should not assist a client in conduct which will undermine public confidence in insolvency procedures or assist directors in any conduct which amounts to misfeasance.
Sip 13 sets out steps that IPs should take to ensure that all transactions are conducted on a fully arm's length basis and that documentation should be retained to provide such evidence.
Whilst SIP 13 is directed to acquisitions by directors its principles apply equally to acquisitions by other parties.

(iv) the matters to be addressed by the prospective Administrator in discussion with the directors to establish the suitability of the "pre-pack" sale presently envisaged by the board. (15 marks)

Administrators' duties
The administrator has a duty to perform his functions in the interests of the company's creditors as a whole (Para 3(2) Sch B1).
He also has a duty to avoid unnecessarily harming the interests of the creditors as a whole (Para 3(4) Sch B1).
He must be able to demonstrate that the outcome of a pre pack sale is consistent with these duties.
Value issues
This will likely entail demonstrating that he has obtained the best price reasonably attainable for the Company's assets in all the circumstances.
He will therefore need to establish:
The extent of marketing activities already carried out by the company
The extent of marketing activities that can feasibly be carried out by the administrator.
Any valuations obtained of the business and the underlying assets.
The alternative courses of action for dealing with the company's affairs and their estimated financial outcomes.
Whether it is appropriate to trade the business and offer it for sale as a going concern during the administration
The working capital requirements of the business to enable continued trading and potential funders of that requirement.
The desirability or otherwise of consultation with the company's major creditors including secured creditors.
Precise details of the assets intended to be subject to the prepack sale.
Consequently what assets are intended to be excluded from the sale
The consideration for the sale, terms of payment and any condition of the contract that could materially affect the consideration
The impact of TUPE, if any, on the proposed terms of the sale
The identity of the proposed purchaser and any connection between the purchaser, the directors shareholders or secured creditors of the company
Whether any directors have given guarantees for amounts due from the company to a prior financier and whether it is proposed that that financier is financing the new business.
Any options, buy-back arrangements or similar conditions attached to the contract of sale.
The timetable for the proposed sale and how it is intended to manage the company's affairs in the interim including the availability of funding for essential payments
New co issues
The prospective purchaser should be advised to seek its own independent professional advice.
Nevertheless the administrator will want to satisfy himself as to the financial viability of the purchaser
To satisfy himself that there is a real prospect that a prepack sale to the proposed purchaser can be concluded
Where all or part of the consideration for the sale is on deferred payment terms, or
Where the rationale or justification for the prepack hinges on the continuity of the underlying business in order to optimise the realisable value of assets or mitigate liabilities (e.g. collectability of debts; assignment of leasehold obligations)
The administrator will therefore want to see evidence of adequate funding being put in place by the purchaser to sustain future operations
That it has obtained the necessary licences, permissions and registrations allowing it to trade
That where a similar name is being adopted, that directors of the company who will be directors of the purchaser and who are key to the future success of the purchaser are independently advised in relation to S 216 IA (prohibited names).
That any practical issues or difficulties affecting trading that may arise on the discontinuance of old co and commencement of new co are anticipated and planned for (e.g. consultation with transferring employees; termination of essential equipment leases)
Taxation implications

(b) Prepare an estimated outcome statement assuming that the "pre-pack" sale envisaged is completed promptly following your appointment as Administrator. (12 marks)

ADVANCED BIO POWER LTD	Administration Estimated Outcome £	Administrative Receivership Estimated Outcome £
ASSETS SPECIFICALLY PLEDGED		
IPR	1,000,000	1,000,000
Leasehold	300,000	300,000
	1,300,000	1,300,000
Realisation Expenses		
Pre-appointment consultancy fees	(20,000)	(20,000)
Administrator's fees	(50,000)	(50,000)
Legal & professional fees	(25,000)	(25,000)
Administrator's disbursements	(5,000)	(5,000)
Net Realisations	1,200,000	1,200,000
Fixed Charge holder - Banco Verde Esmeralda	(2,200,000)	(2,200,000)
Shortfall c/d	(1,000,000)	(1,000,000)
ASSETS NOT SPECIFICALLY PLEDGED		
Plant & machinery	800,000	800,000
Office fixtures, fittings & furniture	30,000	30,000
Stock of consumables	70,000	70,000
Surplus of factored book debts (750k-690k)	60,000	60,000
Book Debts (not assigned)	40,000	40,000
R&D Tax credit - £50k set off	–	–
	1,000,000	1,000,000
Payments		
Pre-appointment consultancy fees	(20,000)	(20,000)
Administrator's fees	(50,000)	(50,000)
Legal & professional fees	(25,000)	(25,000)
Administrator's disbursements	(5,000)	(5,000)
CT on IPR @ 30%	(300,000)	0
Available for preferential creditors	600,000	900,000
Preferential creditors	0	0
Available for floating charge holder	600,000	900,000
Floating charge holder - Banco Verde Esmeralda	0	(1,000,000)
Available for unsecured creditors	600,000	0

(c) Calculate the estimated recovery for BVE if, by having registered its floating charge at the time of granting the loan, BVE were able to appoint an Administrative Receiver to conclude the "pre-pack" sale to Newco. (3 marks)

Unsecured creditors		
Banco Verde Esmeralda	(1,000,000)	(100,000)
Unsecured loans	(1,650,000)	(1,650,000)
HMR&C £90k PAYE + £80k VAT - R&D £50k	(120,000)	(120,000)
Trade & expense creditors	(230,000)	(230,000)
HMR&C -CT £300k	–	(300,000)
	(3,000,000)	(2,400,000)
Deficiency as regards the creditors	(2,400,000)	(2,400,000)
Summary of estimated recovery for Banco Verde Esmeralda		
Outstanding indebtedness	(2,200,000)	(2,200,000)
Less recovered under:		
Fixed Charge	1,200,000	1,200,000
Floating Charge	–	900,000
Unsecured creditor dividend	200,000	0
Estimated shortfall to Banco Verde Esmeralda	(800,000)	(100,000)

LIQUIDATIONS (SCOTLAND) NOVEMBER 2008

EXAMINER'S REPORT

General Comments

General presentation was improved from past years. Comments are restricted as only ten candidates sat this paper.

Candidates generally kept to the specifics of the question. The level of digression from the question asked was substantially less than previously seen. This may be due to the questions being set in a more sectional manner but the level of improvement generally reflects on the candidates addressing and recognising the technical specifics of the question. Candidates must not ignore the obvious simple answer. The questions are not set to trick, but to examine basic understanding of matters involved in aspects of the liquidation process. The examiner cannot allocate marks on a presumption that because a candidate ignores the very basic points and answers the more complex that the candidate actually knows the basics. Candidates also need to look at the number of marks available in each section of a question and appreciate that they require to provide an answer which is related to the available marks.

In percentage terms question 1 gained the highest number of marks. Questions three and four had slightly lower percentages with question 2 having the poorest answers.

A number of candidates simply failed to attempt parts of questions. This leads to a total loss of marks. It is not possible for the examiner to determine whether the non attempt is due to lack of any knowledge or whether time constraints have meant the candidate has run out of time.

QUESTION 1

The question posed a range of unrelated issues that an IP may face.

Question 1(a)(i) tested candidates' familiarity with the requirements of converting a members' voluntary liquation to a creditors' voluntary liquidation. The following section 1(a)(ii) was concerned with the ethical issues in taking an appointment. Candidate's answers in both sections were generally well presented and soundly based.

Question 1(a)(iii) was again ethically based though candidates generally failed to recognise that there were self investigation issues and also creditors' interest to protect.

Question 1 (b) dealt with a creditor's nomination with potentially disruptive directors. Candidates generally failed to discuss in any detail the varying options which were possible. The answers tended to be restricted to continuing the liquidation where other possible solutions were available.

QUESTION 2

The main part of the question was a traditional statement of affairs and deficiency statement. Consideration had to be given to whether the company was insolvent assuming it was, to set out the liquidation procedures.

The answers to the statement of affairs were generally good, though weaker candidates did not appear to know how to set out the statement. Several candidates failed to disclose book values as well as realisable values. The deficiency statement was poorly answered and it appeared that some candidates had no practical exposure to this area.

Part (c) dealing with basic insolvency test was generally well answered with candidates identifying the issues.

Part (d) sought either a members' appointment in a CVL or a court appointment with powers. The answers were mixed with candidates either identifying the issues or alternatively missing the point completely.

QUESTION 3

The thrust of this question was to have the candidate address the processing of claims and the subsequent processing of these to a dividend. A variety of claim types were incorporated and candidates were asked to address how they would treat those claims.

The majority of candidates provided well structured answers though two candidates seemed to have little practical knowledge of this area.

QUESTION 4

The question was divided into three distinct parts.

The first part asked candidates to write to the directors setting out their responsibilities as regards past actions and also the recommended future course of action. The stronger candidates scored well in this section and clearly cross matched the question with statute.

The second part asked the candidate to consider what steps you would take, as Liquidator, to maximise returns. As in the first part the stronger candidates were able to relate the issues raised and apply statutory solutions.

The third and final part asked candidates to consider funding issues. This was not well answered with several candidates not attempting the question.

LIQUIDATIONS NOVEMBER 2008

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) Set out, with reasons, the steps that you, as Liquidator, should now take in the context of your statutory and professional obligations. (6 marks)

Steps to be taken as Liquidator - statutory obligations
S95(1) states that if at any time the Liquidator forms the opinion that the Company is unable to pay its debts and the interest payable thereon(s189), within the period stated in the Declaration of Solvency(s89),
-hold a creditors meeting within 28 days (s95(2)(a))
- send notices of the creditors' meeting to creditors by post not less than 7 days before the day on which the meeting is to be held (s95(2)(b))
- advertise the creditors' meeting in the Gazette and once at least in 2 newspapers circulating in the relevant locality in which the company's principal place of business within Great Britain was situated (s95(2)(c)) and if the place of business was situated in different localities at different times during the 6 months (s95(7)) immediately preceding the day on which were sent the notices summoning the company meeting at which it was resolved that the company be placed into MVL, then the advertising requirements apply to these localities as well (s95(5)). If no place of business in GB, then reference to localities replaced by registered office (s95(6)).
- during the period before the day on which the creditors' meeting is to be held, furnish creditors free of charge with such information concerning the affairs of the company as they may reasonably require. (s95(2)(d))
- make out a statement of affairs (s95(3)(a)), verified by affidavit (s95(4))
- lay the statement of affairs before the creditors' meeting (s95(3)(b))
- attend and preside at the creditors' meeting (s95(3)(c))
The Liquidation becomes a CVL from the day on which the creditors meeting under s95 is held (s96)

Whether or not to remain as Liquidator - Ethical considerations
Should you become liquidator? Consider (discussion required):
- self interest threat
- self review threat
- integrity, objectivity, professional competence and due care principles
CVL following MVL can have serious consequences for directors – they may be fined or be criminally liable if make a declaration of solvency without having reasonable grounds that the company will be able to pay its debts with interest within the period specified (s89(4)). If the Liquidator was also advising the directors about the declaration of solvency, the directors may have an action against the Liquidator as advisor in these circumstances.
The discussion should have regard to the ethical guidance.
Extract from draft ethical guide **Conversion of Members' Voluntary Winding-up into Creditors' Voluntary Winding-up**
Where an *Insolvency Practitioner* has accepted appointment as liquidator in a members' voluntary winding up and is obliged to summon a creditors' meeting because it appears that the company will be unable to pay its debts in full within the period stated in the directors' declaration of solvency, the *Insolvency Practitioner*'s continuance as liquidator will depend on whether he or she believes that the company will eventually be able to pay its debts in full or not.
- If the company will not be able to pay its debts in full and the *Insolvency Practitioner* has previously had a significant professional relationship with the company or a personal relationship with a director, former director or shadow director thereof, the *Insolvency Practitioner* should not accept nomination under the creditors' winding up.
- If the company will not be able to pay its debts in full but the *Insolvency Practitioner* has had no such significant professional or personal relationship, the *Insolvency Practitioner* may accept nomination by the creditors and continue as liquidator with the creditors' approval, subject to giving careful consideration to principles referred to in this Code.

- If the *Insolvency Practitioner* believes that the company will eventually be able to pay its debts in full the *Insolvency Practitioner* may accept nomination by the creditors and continue as liquidator. However, if it should subsequently appear that this belief was mistaken, the *Insolvency Practitioner* should then resign, and may not accept re-appointment, if he or she has previously had a [material][significant] professional relationship with the company or a personal relationship with a director, former director or shadow director.

(a) (ii) Discuss, with reasons, the issues that you will consider with regard to your position as liquidator designate. How, if at all, would your answer differ if your appointment were to be jointly with an insolvency practitioner from another firm? (5 marks)

Discussion required around ethical principles and conceptual framework:
Any ethical decisions about accepting appointment should be taken in the context of the 5 main principles:

- integrity
- objectivity
- professional competence and due care
- confidentiality
- professional behaviour

The conceptual framework helps IPs identify the threats to the fundamental principles and determine whether or not there are any safeguards that may be available to offset them. There are 5 categories of threats:
(a) Self-interest threats, which may occur as a result of the financial or other interests of a practice or an *Insolvency Practitioner* or of an immediate or close family member of an *individual within the practice*;
(b) Self-review threats, which may occur when a previous judgement made by an individual *within the practice* needs to be re-evaluated by the *Insolvency Practitioner*;
(c) Advocacy threats, which may occur when an *individual within the practice* promotes a position or opinion to the point that subsequent objectivity may be compromised;
(d) Familiarity threats, which may occur when, because of a close relationship, an *individual within the practice* becomes too sympathetic to the interests of others; and
(e) Intimidation threats, which may occur when an *Insolvency Practitioner* may be deterred from acting objectively by threats, actual or perceived.
In this case, the main principles to consider are integrity and objectivity. If you accept the appointment can you be independent and objective in the appointment as liquidator.
Here there is a self interest threat. The work in the department is slow and you need the fees.
There is also a familiarity threat. The personal relationship between one of the directors and the tax partner – may affect your judgement when carrying out your responsibilities as Liquidator (eg in filing D returns, pursuing the directors for wrongdoing, prior transactions)
You need to consider what safeguards are available to counter the threats, Safeguards specific to an appointment may include:
(a) Involving and/or consulting another *Insolvency Practitioner* from within the *practice* to review the work done.
(b) Consulting an independent third party, such as a committee of creditors, a licensing or professional body or another *Insolvency Practitioner*.
(c) Involving another *Insolvency Practitioner* to perform part of the work, which may include another *Insolvency Practitioner* taking a joint appointment where the conflict arises during the course of the appointment.
(d) Seeking directions from the court.

An *Insolvency Practitioner* should exercise judgment to determine how to best deal with an identified threat. In exercising this judgment, an *Insolvency Practitioner* should consider what a reasonable and informed third party, having knowledge of all relevant information, including the significance of the threat and the safeguards applied, would reasonably conclude to be acceptable. This consideration will be affected by matters such as the significance of the threat, the nature of the work and the structure of the *practice*.
Whether the *Insolvency Practitioner* takes or continues an appointment will depend on what threats there are and whether, in that event, the introduction of safeguards would overcome those threats. Sometimes, though, the mere perception of risk or conflict will tend to undermine confidence in the practitioner's objectivity, and so make acceptance or continuation unwise.
The *Insolvency Practitioner* must not only be satisfied as to the actual objectivity which he or she can bring to their judgement, decisions and conduct, but also must be mindful of how they will be perceived by others.
Where a threat cannot be eliminated, an *Insolvency Practitioner* should evaluate the significance of such threat. If the threat is other than trivial, safeguards should be considered and applied as necessary to reduce them to an acceptable level, where possible. In considering the significance of any particular matter, qualitative as well as quantitative factors should be taken into account.

An Insolvency Practitioner will encounter situations where no safeguards can mitigate a threat. Where this is the case, an *Insolvency Practitioner* should conclude that it is not appropriate to accept an *insolvency appointment.*
Discussion of above – consideration of whether or not a joint appointment with a liquidator from another firm will ameliorate any problems in the light of the ethical guidance.

(a) (iii) Discuss, with reasons, whether or not you may accept the appointment as Liquidator. (4 marks)

Betterdays Ltd
Discussion of role of the Liquidator and whether he should, effectively, investigate himself.
Consideration of ethical principles/guidelines
Discussion whether a joint appointment may ameliorate the problem.
Need to protect interests of creditors – will a joint liquidation be more expensive than just a sole appointment?
So don't accept appointment?

(b) Set out the steps that you, as Liquidator, may take to ensure a maximum return for creditors. Discuss the relative merits of any alternative courses of action. (5 marks)

Options (discussion required)
- The winding up order has been granted and unless a defect in the process can be shown it cannot be challenged.
- the Liquidator may propose a CVA (s1(3)(b)). The Liquidator will normally act as nominee and may then proceed to call meetings of members and creditors under s3(2).
- the court may by order stay or sist all proceedings in the winding up (s5(3)(a)). The court shall not make an order (s5(4)) for 28 days from the date of the meeting when the Liquidator must report the result of the meeting to the court, creditors, and members and to allow any member to appeal if the results of the members' and creditors' meetings were different (s4A).
- the court may give such directions with respect to the conduct of the winding up as it thinks appropriate for facilitating the implementation of the CVA. (s5(3)(b))
- The most likely option is that the Liquidator will seek court powers in terms of Schedule 4 part II to carry on the business. As he was appointed as Interim liquidator by a creditor no powers will have been sought or granted at an earlier stage.
The Liquidator, given the apparent views of the Directors as regards his appointment, will need to ensure a number of matters prior to proceeding.
- consider trading on to complete orders but this will need support of:
(a) customers
(b) suppliers
How would ongoing trading be financed?
Can the orders be completed the working machines?
Consider eventual intentions. Will customer acquire the machines? If so, why trade at all.
Could machines be sold to third party with the possible benefit of the orders, thus enhancing value?
The other machines are both faulty, requiring extensive repairs, and should be ignored as regards the assessment of immediate action.

QUESTION 2

Using the information provided in the draft balance sheet, profit and loss account and associated notes, and stating any assumptions made by you,

(a) Prepare a statement of affairs for the Company as at 31 October 2008, making and explaining estimates of any contingent or prospective liability at a level that you regard as commercially realistic. (9 marks)

Statement of Affairs as at		
Presentation/layout		
	Book value	**Estimated to realise**
	£'000	£'000
Assets specifically pledged		
Freehold land and buildings – out of town	600	700
Freehold land and buildings – city centre	170	200
Less due to Towncity Bank Plc	(1,615)	(1,615)
Deficiency carried down	(845)	(715)
Motor vehicles	100	45
Less due to hire purchase company	(130)	(130)
Deficiency carried down	(30)	(85)
Assets not specifically pledged		
Fixtures and fittings		
Greenhouses (etr = (500 – 100) x 20%)	500	80
Assets subject to ROT	200	
Less due to ROT creditor	(200)	nil
Remaining fixtures and fittings	300	nil
Stocks (W/down 75% = 0, 25% x 50%)	1,005	125
Debtors	50	25
Prepayments	40	nil
Deferred tax asset	70	nil
Cash at bank and in hand	15	15
Estimated total assets available for preferential creditors	1,980	245
Preferential creditors – unpaid wages	(50)	(50)
Estimated surplus as regards preferential creditors	1,930	195
Estimated prescribed part of net property where applicable (to carry forward)	nil	nil
Estimated total assets available for floating chargeholders		
Debts secured by floating charges	nil	nil
Estimated prescribed part of net property where applicable (brought down)	nil	nil
Estimated total assets available for unsecured creditors	1,930	195
Trade creditors	(1,165)	(1,165)
Add back ROT creditor	200	200
Other taxes and social security	(820)	(820)
Accruals and deferred income (155 less accrued preferential wages of 50 = 105 (incl 100 in respect of Christmas Club deposits)	(105)	(105)
Agents fees to be added to creditors	(2)	(2)

Cash deposits held by agents and to be returned to customers	20			
Less fees to be returned to customers	(20)	0	0	
Shortfall to Towncity Bank brought down		(845)	(715)	
Deficiency to HP creditor		(30)	(85)	
Estimated deficiency as regards creditors		(837)	(2,497)	
Issued and called up share capital		(100)	(100)	
Share premium		(100)	(100)	
Estimated deficiency as regards members		(1,037)	(2,697)	

Using the information provided in the draft balance sheet, profit and loss account and associated notes, and stating any assumptions made by you, (4 marks)

(b) Prepare a deficiency account for the Company as at 31 October 2008. (4 marks)

EITHER

2(b) Deficiency Account as at		
Shortfall of shareholders' funds per balance sheet	(1,035)	
Increase in value of property	130	
Decrease in value of:		
Motor vehicles	(55)	
Greenhouses	(420)	
Remaining non-ROT fixtures and fittings	(300)	
Stocks	(880)	
Debtors	(25)	
Write back of prepayments	(40)	
Write back of deferred tax	(70)	
Increase in creditors because of agents' fees	(2)	
Estimated deficiency as regards members	(2,697)	

OR

Equity shareholders' funds per balance sheet	(835)	
Increase in value of property	130	
Decrease in value of:		
Motor vehicles	(55)	
Greenhouses	(420)	
Remaining non-ROT fixtures and fittings	(300)	
Stocks	(880)	
Debtors	(25)	
Write back of prepayments	(40)	
Write back of deferred tax	(70)	
Increase in creditors because of agents' fees	(2)	
Less back share capital and share premium (100 + 100)	(200)	
Estimated deficiency as regards members	(2,697)	

(c) State, with reasons and in the light of the tests laid down by the Act, whether or not you consider the Company to be insolvent. (4 marks)

Tests in Act
IA 1986 s123(1)(e) – "If it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due."
Examples of lack of cash – s123(1)(a) and (b)
(a) debts > £750
Charges for payment, or other process, issued on a judgment, decree or order of any court in favour of a creditor is returned unsatisfied in whole or in part. Examples from question.
IA 1986 s123(2) – A company is also deemed unable to pay its debts if it is proved to the satisfaction of the court that the value of the company's assets is less than the amount of its liabilities, taking into account its contingent and prospective liabilities.
Examples from question.
Mention – going concern compared to break up basis (accruals v cash basis)
How does this company pass these tests?
Refer to balance sheet in question
Link balance sheet to statement of affairs
Mention various creditors who are pressing, etc
d. Assuming that the Company is insolvent and that Liquidation is the best option. Set out, with reasons, the procedure that you recommend in this case. (3 marks)
About 75 % of the stock will only last 2 weeks. It is, therefore, appropriate to take action to protect the stock, ie not to allow the value of the assets to fall.
CVL possibly the fastest route: S166 The Liquidator may convene a meeting of members at short notice (if permitted by the memorandum and articles of the Company) to protect the stock and to try to sell it before the plants die. (The creditors meeting must be called and held no later than 14 days after the members meeting and with not less than 7 days' notice – s98).
S166 states that the powers of the Liquidator shall not be exercised except with the leave of the court. Leave of the court is NOT required in relation to the power of the Liquidator:

- to take into his custody or control all the property to which the Company is or appears to be entitled;
- to dispose of perishable goods and other goods the value of which is likely to diminish if they are not immediately disposed of; and
- to do all such other things as may be necessary for the protection of the Company's assets.

S166 restricts the powers of the Liquidator until the creditors' meeting because of possible abuse of his position, following the decision in re Centrebind Ltd, Re [1967] 1 W.L.R. 337. A person appointed Liquidator by the members in a creditors' voluntary winding up is liquidator until the creditors do something about it, though the meeting of members which appointed him was called at short notice (to which the members agreed) and the statutory first meeting of creditors has not been held. A person so appointed moved to stay proceedings on a distress levied on the company. His locus standi was challenged, but held, that he was Liquidator.
The Liquidator must attend the s98 meeting of creditors and report to it an any exercise by him of his powers (s166(4)).
Could consider the appointment of provisional liquidator to protect assets, and seek court approval as required to sell assets.

QUESTION 3

(a) Set out the procedure generally for paying a dividend to creditors (8 marks).

The legislation regarding submission of claims, adjudication and payment of dividends is contained in the Bankruptcy (S) Act 1985, Sections 48-50 and section 52-53.
The Liquidator will previously have invited claims from creditors. A creditor shall submit a claim in the form required by Rule 7.30 (Form 4.7)
Together with an account or voucher which constitutes prima facie evidence of the debt (Rule 4.15)

The Liquidator may dispense with the above requirement in respect of any debt or any class of debt.

In anticipation of paying a dividend the Liquidator should:

- Give notice to non claiming creditors to submit details of their debts and any claims to priority (by a fixed date not less then 14 days after the notice)
- Make provision for overseas claimants who may not be able to submit in time
- Must deal with all outstanding creditors' proofs by admitting, rejecting them (in whole or in part) or by making such provision as he thinks fit (R11.3(1)).

Adjudication of claims (S49 B(S) Act
Where funds are available to pay a dividend the Liquidator, shall, not later than 4 weeks before the end of the accounting period, accept or reject each claim.
The Liquidator shall record in the sederunt book his decision on each claim specifying:
The amount of claim accepted
The category of debt, and value of any security
If he is rejecting the claim, his reasons therefore.

Where a claim is rejected the creditor shall be notified forthwith together with the reasons for rejection.

The Liquidator needs to invite creditors to prove and to accept or reject proofs
A creditor proving in the immediately preceding administration is deemed to have proved in the liquidation but it is unlikely that the administrator will have formally proved the debts (except for voting purposes). In this case the administrator did not pay the prescribed part and so it can be assumed that the debts have not yet been proved.

Where a claim is rejected it is normal practice for the Liquidator to discuss the issue with the creditor in the first instance.
If agreement cannot be reached the creditor can, within 14 days of the rejection, appeal to the Court. S49(6) (B(S)A 1985

The Liquidator needs to consider:

- The quantum of the claim.
- All debts are provable – whether present or future, certain or contingent, ascertained or sounding only to damages (R12.3).
- Certain debts are not provable – see R12.3(1)(b) - including any obligation arising under a confiscation order made under s1 Drug Trafficking Offences Act 1986, or parts 2,3 or 4 of the Proceeds of Crime Act 2002.
- Certain claims are not provable until all other claims have been paid in full, including interest. Including claims arising under s382(1)(a) of the Financial Services and Markets Act 2000. Any claim which is to be postponed.

The Liquidator needs to establish whether the claim is preferential, non-preferential or secured. In this case the preferential and secured creditors have been paid.
The Liquidator must review proofs for details of any security held. A secured creditor in calculating his claim, where the security has been realised, shall deduct the amount received, less realisation expenses when submitting his claim. (Schedule 1 Para 5 (B(S)A 1985.)
Note special provisions and date for proving of certain debts is date of administration rather than liquidation

- Mutual credit and set off
- Periodic payments (eg rent) (R4.92)

Foreign currency debts must be converted at the exchange rate prevailing at the close of business on the date of commencement.

- Interest on claims

A creditor is entitled to claim for the principal debt and any interest due to the date of commencement. (Schedule 1 Para 1 (B(S)A 1985.

Before paying any dividend, seek confirmation from the creditor that the claim received is that creditor's final claim.

The cost of proving a debt remains the responsibility of the creditor.

The liquidator must allow access to the proofs in his possession to any creditor or contributory or their agents. R

The liquidator is not obliged to deal with any proof lodged out of time, but may do so at his/her discretion. Record reasons for any decisions made.

Before declaring dividend, give notice of intention to do so to all creditors who have not proved their debts. The notice should specify the last date for proving, which should be at least 21 day from that of the notice. The notice would specify an intention to declare a dividend (specified as interim or final) within the period of 4 months from the last date of proving. .

Record the notices sent to creditors for the file by way of a certificate of postage. This will help in case of a future dispute. .

Agree final claims and list them.

The Liquidator must apply the property of the company pari passu (s107) ie equally amongst the creditors in proportion to their claims (subject to rights of preferential and secured creditors).

(b) Set out how you would resolve the outstanding matters before agreeing and admitting creditors' claims for dividend in this Liquidation. Calculate the amount available to pay a dividend, state any assumptions that you make. (12 marks)

The Liquidator needs to pay any unpaid administration expenses. See Sch B1, para 99, "The former administrator's remuneration and expenses shall be —

(a) charged on and payable out of property of which he had custody or control immediately before cessation…"

These will be paid before the expenses of the liquidation, out of the funds handed to the liquidator by the administrator.

The Liquidator needs to decide what are the administration expenses (as opposed to claims in the liquidation). *How far should the liquidator agree expenses?* The Liquidator should consult with the previous administrator.

The Liquidator needs to take care to establish whether a particular amount demanded is an expense or a claim, in accordance with the Rules.

The Liquidator needs to ensure that Liquidation expenses are paid, or provided for, in the correct priority R4.66 & 4.67.

Office rent and rates not an expense because lease not adopted – will be a claim in the Liquidation.

At the date of Liquidation there are five ordinary shareholders each holding 4,000 £1 shares with 60 pence paid.

Liquidator should make a call for the 40 pence per share unpaid. (s165(4)) – no sanction required for CVL liquidator to make call.

Amount available for dividend		
Surplus from administration		£750,000
Less administration expenses:		
i Administrator's outstanding fees	£15,000	
ii unpaid electricity	£2,000	
v unpaid factory rent	£10,000	
Smithjones – expense of administration?	£18,000	
Less liquidation expenses:		
iii Liquidation costs (5,000 + 20,000)	£25,000	
vi tax on interest at 20% (say 6 months interest) £1,100 x 6 x 20%	£1,320	£(26,320)
Call on shares 4,000 x 40 pence		£1,600

(c) Explain how the Italian creditor's claim should be dealt with. (2 marks)

Italian creditor
Euros 50,000 should be translated to £ at date of liquidation. ie £1 = Euros 0.74 (B(S)A S49(3)

When writing to Italian creditor need to include appropriate notices with headings in Italian, as required by EC Insolvency Regulations

(d) For each outstanding claim, calculate the amount which should be accepted by you, as Liquidator, or the further information required to calculate the amount. State your reasons and, where applicable, give calculations. (8 marks)

vii The Company had issued 20,000 5% cumulative preference shares. At the date of Liquidation, the dividend for 2008 was outstanding but had not been declared.
Arrears of preference dividend are not payable on winding up, unless they have been declared, or are conferred expressly or by necessary implication by the articles.
viii One preference shareholder has written to you claiming that he is owed £120,000 comprising £110,000 which he lent to the Company in 2002 and £10,000 preferential dividend which was not paid for 2008.
Unsecured creditor for £110,000.
Smithjones Ltd
£10,000 owing pre-administration will be set off against the £13,000 debit balance at the date of administration. If the £18,000 arose during the administration – it is either an expense of the administration or a claim in the liquidation.

QUESTION 4

(a) Write a letter to the directors setting out their responsibilities in relation to the Company both as regards the past events described above and the recommended future course of action in the light of the present circumstances. (12 marks)

General issues

- *CA 2006 – include responsibilities*
- overriding duty as a director is to act in the best interests of the company and its creditors. Failure to do so may expose you to claims of misfeasance or breach of duty.
- At any time when you knew or ought to have concluded that insolvent liquidation is unavoidable, you have an obligation to take such action as appropriate to protect the interest of creditors. Failure to do so renders you liable to claims for wrongful trading under section 214 of the Insolvency Act 1986.
- Transactions at undervalue and preferences, as defined by the Insolvency Act 1986, may be set aside by any liquidator. To this end you should protect the assets for the benefit of the creditors and incur such expenditure as is necessary for this purpose.
- No deposits should be accepted unless banked in a separate bank account held on behalf of the depositors.
- No further payments should be made to any outstanding creditors.
- No further credit should be taken and any goods or services required must be paid for immediately and certainly before the date of the proposed liquidation.
- Delivery of all further goods or services ordered previously, and no longer required, should not be accepted.
- No disposal of the company's goods should be made to any creditor or customer who is owed money by the company and who will claim a set-off.

No disposal of the company's assets should take place. This does not include stocks that are sold in the ordinary course of business.

- Credit cards issued to directors and senior personnel should no longer be used.
- All assets of the company should be properly insured and the appropriate premiums dealt with.
- If the company's bank account is overdrawn, no further funds should be paid in.
- No creditor claiming retention of title to goods previously supplied by him should be permitted to remove any goods pending the appointment of a liquidator (unless the validity of the claim has been ascertained). As a compromise, the sale proceeds of the goods concerned should be paid into a separate bank account pending liquidation.
- No other creditor should be permitted to receive goods previously supplied by him under any circumstances

A strategy of continued trading may only be carried out if you do not incur further credit.
No goods of the company should be despatched on carriers who are owed money by the company
Dealings with any creditor should only be continued with caution. Attempts should be made to ensure that no lien, set-off, etc could occur
A sale of the business may constitute a transaction at undervalue if it is sold for less than its full market value. Also, if a sale of business is to a connected person, it is especially important that any sale be at fair value.
The directors have a duty to take every step to minimise the loss to creditors and so the board of directors will have to consider any offers for the business.

Specific issues

(3) The only assets appear to be £15,000 in the Company's bank account and debtors of £50,000.
(5) Trade creditors are owed at least £3,500,000.

This indicate insolvency.
(9) Unknown to the directors, since November 2007 Henry had obtained further credit from key suppliers by giving them false accounting

This requires further investigation. Need to look at list of creditors, balance sheet/statement of affairs. Otherwise possible criminal offence? Also, consider misfeasance (s212)?
(9) Unknown to the directors, since November 2007 Henry had obtained further credit from key suppliers by giving them false accounting
Consideration of practical issues.

(b) Assuming that the Company is wound by the court on 10 October 2008. Discuss what steps you, as Liquidator, may take to increase the amount available to creditors. Your discussion should compare remedies available. (12 marks)

Discussion must relate to specific issues in question.
(1). Since its inception the Company has paid £20,000 per month for use of various plant and equipment, including a JCB, which Leo owns.

Is the hire charge in (1) a market rate?
Also consider in (1) whether there has been:
Wrongful trading (s214)?
Preference (s243)?
Misfeasance (s212)?
(2) The Company also pays the sub-contractors directly, even though Leo, through his business as a sole trader, is responsible for hiring them. Leo charges a management fee of £5,000 per month for arranging the sub-contractors. The sub-contractors are currently owed £100,000.

From the information in (2) consider
Wrongful trading (s214)?
Transaction defrauding creditors (s213)?
Misfeasance (s212)?
In (2) also consider
Who is the contract with?
Is the company responsible for the sub-contractors?
Are the sub-contractors employees?
(4) The Company has never prepared financial or management accounts and it is difficult to distinguish what work Leo does on his own account and what work he does for the Company.
(4) The Company has never prepared financial or management accounts and it is difficult to distinguish what work Leo does on his own account and what work he does for the Company.

Molly has responsibility for the accounts but all directors should "ascertain" what the financial position is – s214.
(6) Stephen loaned the Company £40,000 in August 2005, for which he received 20% interest per annum. He had no security for the loan which was repaid in January 2008.

Consider:
Extortionate credit transaction (s244)?
Wrongful trading (s214)?
Preference (s243)?
(7) Inspection of the bank statements reveals:

- *that Molly and Stephen draw £1,000 per month each in salaries and Leo draws £5,000 per month salary.*

A total dividend of £500,000 was paid in August 2008.

Consider here that Molly and Stephen draw modest salaries but this may not be sufficient to protect them from actions for wrongful trading (Re Produce Marketing).
Leo – higher salary – also may have had more knowledge of financial position
Was the Company able to pay a dividend? i.e. Were there realisable profits out of which to pay a dividend?
(8)It appears that during the last year some of the Company's cash receipts and some Company cheques were paid directly into Leo and Molly's personal bank account. They maintain that the payments were made to finance the hiring of labourers, hire purchase payments for the machinery and other payments for the benefit of the Company.

(8) requires further investigation.
Need to look at list of creditors, balance sheet/statement of affairs.
Otherwise possible criminal offence?
Also, misfeasance (s212)?
Fraudulent trading (s213)?
Transactions defrauding creditors (s213)?

(9) Unknown to the directors, since November 2007 Henry had obtained further credit from key suppliers by giving them false accounting

Henry has committed a criminal offence
Was Henry a shadow director?
The Company may also be liable for fraudulent trading (s213)
It could be appropriate to attribute knowledge of fraud to a company, even though a person with knowledge of the fraud had acted dishonestly, in breach of his duty to his principal and employer and in circumstances in which he would not have passed on his knowledge to his employer.
(10). On 26 September2008 a creditor, for £25,000, petitioned for the winding up of the Company. Since that date the following amounts have been paid out of the Company's bank account:

Creditors	*£165,000*
Wages	*£100,000*
Happy Garages	*£5,000*
Leo	*£70,000*

The amount paid Happy Garages was for repairing Leo's daughter's damaged car which her uncle had given her as a 21st birthday present in July. The £70,000 paid to Leo comprised his £5,000 monthly management fee plus £65,000 for work done on tendering, unsuccessfully, for a large contract.

Dispositions of funds made after the commencement of the winding up (which is the date of the petition) is void unless the court orders otherwise (s127).
It may be possible to apply to court for validation of the £165,000 paid to creditors and the £100,000 paid in wages.
The amount paid to Happy Garages is a personal expense and will need to be repaid by Leo's daughter.
The £70,000 paid to Leo will need to be carefully looked at.
Compare remedies

(c) Discuss the problems associated with funding the steps discussed in b. (6 marks)

Are there assets/funds available to pay for investigation and any subsequent legal actions?
Actions commenced by liquidators, including for wrongful trading, are not actions owned by the company i.e. actions which are bestowed on the office-holder by legislation.
the liquidator will be able to seek indemnity from company assets there are likely to be other claims on company assets which will enjoy priority over his or her right to indemnity.
costs associated with the fighting of cases can come within the term "winding up expenses" in r.4.66(1)(a)
Need the consent of the preferential and/or floating charge holder to use realisations for litigation costs and the liquidator's expenses which are incurred in the preparation of, or during the course of any legal proceedings, if this affects their recoveries.
Problem of champerty – if someone funds action and wants "fruits of action". This may be champertous, see Ward v. Aitken and Others' Re Oasis Merchandising Services Limited [1995] B.C.C. 911.
Liquidator could be insured for adverse costs.

PERSONAL INSOLVENCY (SCOTLAND) NOVEMBER 2008

EXAMINERS REPORT

QUESTION 1

Candidates were invited to write to a local solicitor detailing the main changes to personal insolvency legislation in 2008. Candidates were also asked to list the information required in order to ascertain if a LILA sequestration would be possible and, on the basis that it is, outline the plan of action required in order to secure an award of sequestration.

A number of candidates explained bankruptcy legislation which had been in existence before 2008, for which no marks were awarded, and few candidates made much reference to either the BRO/BRU regime or IPO/IPA process. Items such as the abolition of the summary administration procedure, the 28 day period for heritable property to be conveyed in order to avoid vesting, and the ability of a trustee to ignore certain duties if not cost effective were largely overlooked. Issues such as the increased credit limit, either singly or by way of a series of linked transactions, was mentioned infrequently.

However, most candidates noted the increased involvement of the accountant in bankruptcy, LILA, one year discharge and the reduction in court of session involvement. Candidates were able to list the type of information required in order to consider the suitability of a LILA application although not many mentioned the asset limit. The answers provided showed that there is a good level of knowledge about how to secure an award of sequestration under the LILA process.

The difficulty with narrative questions is that handwriting can become difficult to read and candidates find themselves repeating points, whilst becoming relatively non-specific as the answer progresses. This can often suggest general rather than detailed knowledge of a subject.

QUESTION 2

A substantial amount of financial information was provided and candidates were requested to prepare three estimated statements of affairs together with supporting notes. Marks were awarded for layout and clarity of thought. The question was deemed to be fairly straightforward.

Most candidates realised that a general provision might be appropriate for book debts and, whatever the provision level, as long as an explanatory note was provided, the position was accepted. Generally, the notes were sufficiently detailed for the partnership but significantly less for each partner and, for example, more candidates could have mentioned the independent valuation of heritable property and investment portfolio. It was disappointing to note that many were not aware that each partner was jointly and severally liable for the whole partnership deficit which hampered the completion of a statement of affairs for each partner.

In general terms, the marks achieved were fairly high and there was good evidence that candidates have practical experience of preparing a statement of affairs.

QUESTION 3

The question gave background information regarding Dr Crown, a matrimonial settlement and various transactions in which the debtor had been involved. Given the wide-ranging nature of the questions the Mark Plan catered for a variety of answers. The answer anticipated a focus on the divorce decree because, without it being challenged successfully, many of the subsequent issues would not arise. Many candidates ignored the existence of the divorce decree but were able to link their approach to issues such as the pension fund and villa in Malaga and hence, whether the divorce decree was worthy of challenge. A number of candidates were rather quick to repossess and sell the car without first taking steps to establish ownership and the circumstances behind the contention that the car mentioned in question was the one previously owned by the debtor.

Candidates were able to quote numerous offences from bankruptcy legislation. The question was designed to test knowledge regarding a false statement of assets, gratuitous alienations/unfair preferences and failure to include a material fact in a statement of assets and liabilities. There was no evidence in the question that the debtor had proved uncooperative in terms of answering queries from the trustee yet many candidates were keen to suggest the debtor should be pursued for information by both private and public examination: with nobody mentioning the potential cost of such approach.

The narrative question tended to generate many pages of poor handwriting and the quality of grammar did little to assist the presentation of many scripts.

QUESTION 4

A number of points were provided regarding Mr Slick who appeared to be solvent but was suffering from creditor pressure. The question suggested that Mr Slick might have had previous dealings with a partner of the firm in which the candidate was employed and sought views on the ethical issues that should be considered should a formal insolvency appointment be required.

It was surprising how many candidates referred to a firm's internal checklists/policies and assumed that this was an acceptable answer, particularly where the contents of such checklists were not provided in the answer. That said, candidates displayed knowledge of material professional relationships and conflicts of interest reasonably well.

A large number of marks were available when comparing/contrasting the advantages and disadvantages of formal insolvency proceedings and non formal proceedings, but a number of candidates simply listed points without saying whether they were positive or negative. The question anticipated candidates suggesting a Debt Arrangement Scheme in order that Mr Slick could retain his property, but marks were awarded to candidates where other solutions were offered with suitable supporting reasons. Again, marks were awarded where candidates showed lateral thinking in dealing with refinancing the matrimonial home and using the pension fund. It was interesting to note that some candidates thought DAS and trust deed processes were informal arrangements.

There was clear evidence that candidates were aware of the various aspects that should be considered when advising an individual with debt problems and, in general terms, the question was handled well.

PERSONAL INSOLVENCY (SCOTLAND) NOVEMBER 2008

EXAM MARKING PLAN

QUESTION 1

Write a letter to the solicitor regarding the main changes in order that he may advise his client. (14 marks)

(a)

Insolvency Practitioner
Anytown

November 2008

J Bloggs
Solicitor & Co
Anytown

Dear Mr Bloggs

The financial affairs of Mr Jones

I refer to our recent telephone conversation and note that you wish clarification of the main changes to bankruptcy legislation which came into effect from 1 April 2008. The legislation has been updated by the Bankruptcy and Diligence etc. (Scotland) Act 2007 "the Act" and the principal amendments cover the following:

1. A debtor is discharged automatically from all debts covered by bankruptcy legislation after one year instead of the previous three year period, unless there is a successful court application by the trustee to extend the period before discharge.

2. The minimum amount for a creditor's debt to be used as a basis to petition for bankruptcy has increased from £1,500 to £3,000. The limit for self sequestration remains at £1,500.

3. The family home will revert to the debtor if the trustee does not commence steps to sell it, or otherwise deal with it, within three years of sequestration.

4. Student loans are not written off at the end of the bankruptcy.

5. There is a new simplified route into bankruptcy for individuals with low income and low assets "LILA".

6. A debtor now submits an application to the office of the accountant in bankruptcy "aib", who has become an officer of court, instead of the sheriff court should he wish to be sequestrated. If you assist the debtor in preparing the application it is unlikely to result in a fee for your firm unless payment is received from the debtor in advance.

7. Creditors will use a sheriff court (not court of session) to present a petition, and have an obligation to prove to court that they have taken every step to ensure the person being pursued has received debt advice information.

8. The court of session is only involved in unusual issues e.g. actions of reduction on suspension. Recall is a sheriff court matter.

9. The summary administration procedure has been abolished.

10. There is no requirement to hold a statutory meeting of creditors when a trustee is appointed and thus, the term “permanent trustee” is abolished.

11. There is a power to impose either a Bankruptcy Restriction Order or a Bankruptcy Restriction Undertaking, lasting between two and fifteen years, on debtors who pose a risk to public or commercial interest (further information on this matter is provided below).

12. An Income Payment Arrangement and an Income Payment Order can last a maximum of three years, and were introduced as a means of recovering contributions to the sequestrated estate (see below for further information).

13. A trustee can ignore certain duties laid down by the Act if he does not consider such duties beneficial to the bankruptcy process.

14. A 28 day period has been introduced to allow ongoing heritable property transactions i.e. at date of sequestration, to settle before any remaining heritable property rests in the sequestrated estate.

15. The maximum credit that a debtor can take without advising the credit granter has increased from £250 to £500, or £1,000 for a series of small ones that do not exceed £500 in any one transaction.

Income Payment Order/Agreement “IPO” and “IPA”

Section 32 of the Bankruptcy (Scotland) Act 1985 provides that the debtor’s income, other than income arising from the estate which is vested in the trustee, belongs to the debtor. The Act now provides for the trustee to apply to the sheriff for an IPO requiring the debtor to pay a contribution to the sequestrated estate.

A contribution can be sought for a single amount or for regular payments and rather than applying to court, the debtor is encouraged to sign an IPA. The level of contribution should take into account the debtor’s income, reasonable living expenses and ongoing obligations.

Contributions would not be expected if the debtor is unemployed or in receipt of State benefits. A contribution is only calculated if the debtor is in remunerative employment from which a payment can be made.

The IPA should be in written format and signed by both the trustee and the debtor. An IPA cannot be entered into after the date of the debtor’s discharge.

Should it be considered that the debtor has sufficient disposable income to pay a contribution but does not agree to an IPA, an application can be submitted to court for an IPO on the prescribed from: Form 5. The application must be made prior to the debtor’s discharge unless authorised by the sheriff.

If an IPO is made by a sheriff and will detail the period for which it is effective. Such period may be after the date of the debtor’s discharge but no longer than three years after the date the order was made.

An IPO may specify that a third person can pay the trustee a specified proportion of the money due to the debtor by way of income e.g. the debtor’s employer.

If either the debtor or the third party fail to comply with the terms of an IPO, they are committing an offence and subject to penalties imposed by the sheriff.

In the event of there being any change to a debtor’s circumstances that require an amendment to an IPO, the trustee must apply to the court to either vary or recall the IPO using the prescribed form: Form 5

The trustee must consider the costs of arranging and collecting IPO monies such that the exercise provides a net benefit to the estate and is cost effective.

Bankruptcy Restriction Undertaking and Order "BRU" and "BRO"

If the trustee considers that the debtor has been either dishonest or blameworthy in a way that occasioned the bankruptcy, he can report the debtor to the aib. The legislation lists various debtor actions which a trustee can consider when preparing a report. If the aib considers it appropriate, the aib submits an application to court and request that a BRO is issued.

If the BRO is granted, certain restrictions will be imposed upon the debtor for the period stated in the BRO and can continue after the debtor's discharge. The sheriff decides how long the restriction will last: between 2 and 15 years depending upon the severity of misconduct.

If the debtor acknowledges that his conduct was inappropriate, he may agree to a BRU, which has the same result as a BRO but does not require court intervention. A BRU may be for a shorter period of time than a BRO, which may persuade a debtor to agree to one.

If the debtor is subject to either a BRO or a BRU and does not comply with the restrictions imposed, he will be guilty of an offence. If he is found guilty by a court he may be subject to a fine, imprisonment or both.

If you have any further queries, please do not hesitate to contact me.

Yours sincerely

A Practitioner

(b) On the basis of your view that LILA may be the best way forward for Mr Jones, prepare notes in advance of the meeting outlining the information that will be required in order to ascertain if LILA is suitable. (4 marks)

LILA sequestrations are subject to the Bankruptcy (Scotland) Act 1985 (Low Income Low Assets Debtors etc.) Regulations 2008 "the regulations" which came into force on 1 April 2008.

In order to ascertain if the debtor can take advantage of the LILA regime, it will be necessary to ascertain the level of his income. Recent payslips are likely to be required to evidence the income level over the last 12 weeks. In calculating weekly income, a person's gross income is considered, with no account taken of social security benefits, tax credits, or any such income received.

The regulations state that the weekly earned income for the purposes of a LILA application is prescribed as the amount of the current national minimum wage and is based on a forty hour working week.

The regulations also state that a person in receipt of an income-related benefit, an income-based jobseekers allowance, or working tax credit shall be treated as having no income for the purpose of LILA determination.

Ensure Mr Jones has liabilities in excess of £1,500.

For LILA purposes, the person must not own any heritable property and this will require to be checked with Mr Jones. Any other assets must be valued at less than £10,000 with no single asset worth more than £1,000. The valuation is undertaken by the person with an aib checking process in operation. Ascertain if Mr Jones is currently subject to sequestration, or has been sequestrated in the last 5 years, or has signed a trust deed that has not become protected.

Ensure Mr Jones is provided with the Debt Advice Information Package brochure.

(c) On the basis that a LILA sequestration proceeds, outline the plan of action which will require to be followed in order to secure an award of sequestration. (2 marks)

The applicant completes Form 9 (debtor application without concurrence) together with Form 12 (statement of assets and liabilities for debtor application).

The applicant can nominate an insolvency practitioner, should such person consent to act [considered unlikely].

The forms are submitted to the aib together with the relevant fee (currently £100). The fee is non refundable if the application is either withdrawn or fails.

Upon receipt of the application, and once satisfied that all requirements have been met, the aib will provide Form 17 (statutory declaration of low income and low assets) to the applicant for completion and return within twenty-one days. If the applicant fails to return the completed Form 17 or fails to answer any other questions posed, the aib may refuse to grant the application.

QUESTION 2

Prepare an estimated statement of affairs and supporting notes, where applicable, for each estate for presentation to the known creditors.

Sequestration of Indian Surprise (a firm)

Trustee's estimated statement of debtor firm's affairs as at 16 September 2008 (date of sequestration)

	Notes	£	£
Assets			
Moveable items, as detailed in independent valuation dated ……			16,000
2 vans, owned by Indian Surprise, as detailed in independent valuation dated …..			15,400
2 vans, subject to HP and as detailed in independent valuation		9,100	
Less: Faraway Finance		(12,600)	
Shortfall to liabilities below		(3,500)	
Other vehicles:			
Audi, independently valued at		16,000	
Mercedes, independently valued at		22,000	
		38,000	
Less: Mumbai Money	1	(40,000)	
Shortfall to liabilities below		(2,000)	
Book debts, estimated to realise	2		14,400
Stock wet and dry, as valued	2		-
Total assets			45,800
Liabilities			
Preferred creditors			
Former employees' entitlements for arrears of wages	3	10,750	
Former employees' holiday pay	3	13,600	
			(24,350)
Estimated surplus as regards preferred creditors			21,450
Ordinary creditors			
Trade creditors		100,000	
Rent arrears, less deposit		44,600	
HMR&C: PAYE/NIC		54,400	
HMR&C: VAT		87,500	
Retention of title creditor	4	2,700	
Former employees: claims for payment in lieu of notice	3	10,800	
Former employees: redundancy pay claim	3	8,500	
Faraway Finance: from assets above		3,500	
Mumbai Money: from assets above	1	2,000	
			(314,000)
Estimated deficiency	5		£(292,550)

Submitted by:

Insolvency Practitioner CA
address
Date

Notes:

1. It is assumed that any profit arising from the sale of the Mercedes would be offset against any loss that arise upon the realisation of the Audi rather than reverting to the business.

2.

	£
Book debts recorded in the business records	18,000
Less: provision for doubtful debts, say, 20%	(3,600)
Estimated to realise	£14,400

The stock is wholly perishable and has no resale value following closure of the restaurant.

3. a) Arrears of wages:

Arrears of wages can be claimed for eight weeks. Each person's claim is restricted to £330 per week, with an £800 preferential limit per person.

	£
18 employees x 1 week at £325	5,850
14 employees x 2 weeks at £175	4,900
	£10,750

b) Holiday pay

Accrued holiday pay is preferential in its entirety. Any payments made by the Redundancy Payment Office will be restricted to £330 per week and the employee will have a residual preferred claim in the sequestration for the balance. For the purposes of the estimated statement of affairs it has been assumed that all holiday pay claims are valid.

c) Payment in lieu of notice

Notice pay represents financial compensation and is afforded an ordinary ranking. It is restricted to £330 per week after deduction of any earnings, unemployment benefits or tax, notional tax and NIC.

		RPO	Employee
		£	£
20 employees x 1 week at £300 each	£6,000	£6,000	-
12 employees x 1 week at £400 each	4,800	3,960	£840
	£10,800	£9,960	£840

Payments made by the Redundancy Payments Office will be restricted to £330 per week and the employee will have a residual ordinary claim in the sequestration for the balance.

d) Redundancy monies

Redundancy payments are afforded an ordinary ranking and are restricted to £330 per week, in terms of the element payable by the Redundancy Payments Office.

	£
4. Balance due to ROT creditor	4,700
Less: anticipated sale value of goods, assumed to equate to original cost	(2,000)
Net claim	£2,700

5. The estimated deficiency is subject to asset realisations and the cost of the sequestration process.

6. In accordance with section 20(1) of the Bankruptcy (Scotland) Act 1985, the trustee considers that there will be sufficient assets to enable a dividend to creditors in accordance with their legal ranking.

Sequestration of Mr Miah

Trustee's estimated statement of debtor's affairs as at 16 September 2008 (date of sequestration)

	Notes	£	£
Assets			
Heritable property, at independent valuation	1	280,000	
Less: secured borrowings		(265,000)	
Potential equity available		15,000	
Whereof, one half share to debtor			7,500
Total assets			7,500
Liabilities			
Net deficiency arising from trading operations of Indian Surprise (a firm)	2	292,550	
Personal liabilities		22,000	
			(314,550)
Estimated deficiency			£(307,050)

Notes

1. The heritable property was valued by AB Surveyors on under instruction from the trustee.

2. The deficit is detailed in the estimated statement of affairs for Indian Surprise (a firm) and is a business in which the debtor was one of the two partners and is jointly and severally liable for all business liabilities.

3. The estimated deficiency is subject to asset realisations and the cost of the sequestration process.

4. In accordance with section 20(1) of the Bankruptcy (Scotland) Act 1985, the trustee considers that there will be sufficient assets to enable a dividend to creditors in accordance with their legal ranking.

Submitted by:

Insolvency Practitioner CA
address

Date

Sequestration of Mr Patel

Trustee's estimated statement of debtor's affairs as at 16 September 2008 (date of sequestration)

	Notes	£	£
Assets			
Heritable property, at independent valuation	1	600,000	
Less: secured borrowings		(240,000)	
Potential equity available		360,000	
Whereof, 60% to debtor			216,000
Investment portfolio, market value as at 16 September 2008			110,000
Total assets			326,000
Liabilities			
Net deficiency arising from trading operations of Indian Surprise (a firm)	2	292,550	
Personal liabilities		45,000	
			(337,550)
Estimated deficiency			£(11,550)

Notes

1. The heritable property was valued by AB Surveyors under instruction from the trustee.

2. The investment portfolio is shown at the market value of each investment as at date of sequestration.

3. The deficit is detailed in the estimated statement of affairs for Indian Surprise (a firm) and is a business in which the debtor was one of two partners and is jointly and severally liable for all business liabilities.

4. The estimated deficiency is subject to asset realisations and the cost of the sequestration process.

5. Should Mr Patel be called upon to realise assets as above, he will be in a position to submit a claim for one half of the value of the partnership liabilities he has settled, in the sequestration of Mr Miah and receive a dividend accordingly.

Submitted by:

Insolvency Practitioner CA
address

Date

QUESTION 3

(a) How would you treat the amounts due to Mrs Pawn and the debtor's brother in the event that you are in a position to pay a dividend to creditors? (2 marks)

The sum due to Mrs Pawn would be treated as an ordinary claim in the sequestration.

If there were sufficient funds to settle all creditors' claims and pay statutory interest, the trustee would require to review the court documentation in order to ascertain if the rate of interest applied is greater or less than the statutory level, currently 8%, and apply the amount specified in the documentation.

The sum due to the debtor's brother would have an ordinary ranking in the sequestration if it was shown to be a normal commercial advance.

However, if the trustee's enquiries show that it was a loan to the debtor in consideration of a share of the profits in his business, it will be a postponed claim under section 3 of the Partnership Act 1890.

(b) Assuming that what Mr Castle tells you is true, consider and set out the investigations and recovery action you might take. (20 marks)

Divorce decree

Under the Family Law (Scotland) Act 1985, the court can make an order for payment of a capital sum or make various property transfer orders.

If on the date of making the order, the debtor was absolutely insolvent or was rendered so by implementation of the order and within five years after the making of the order his estate is sequestrated, the trustee can apply for recall of the order.

The court can recall the order and order the former spouse to repay the capital sum (£30,000) or return the property transferred. Where such property has been sold, the court may order payment of all or part of the proceeds of sale.

In making an order, the court must have regard to all the circumstances including the financial and other circumstances of the former spouse.

Investigations would include:

- obtain copy of the divorce decree
- determine valuation of property (at date of transfer)
- ascertain redemption figure from secured lender (at date of transfer)
- review any related policy values and assignations
- determine if the decree rendered debtor insolvent or if he was insolvent at the time e.g. review bank accounts, trading accounts, tax returns etc.

If investigations show value has been transferred and it still exists, a law agent may be instructed to opine on the position and then, subject to agreement to the trustee's view, instigate legal action for recovery.

If successful, a copy of the decree recall if the divorce order requires to be inserted in the sederunt book.

The trustee would be expected to take steps to recover the lump sum paid to the debtor's former spouse and seek to recover the debtor's share in the former matrimonial home. This can be achieved by returning title to the previous position, obtaining a lump sum in settlement of the debtors' potential net reversionary interest or reaching another settlement which produces the same net financial result to the sequestrated estate. For example, if the debtor's former spouse cannot pay value for the debtor's net reversionary interest, by re-financing the property, other options include:

1. She could approach a friend or family member to purchase the debtor's share of the property for fair value.

2. With the debtor's and his former spouse's approval, the property can be placed on the open market for sale. The net sale proceeds, after settlement of the secured borrowings and the costs of marketing and realisation, would be split between the debtor and his former spouse in accordance with the title position.

3. Should the relevant consent not be obtained for selling the property on the open market, the trustee can apply to court for an action of division and sale which entails obtaining the relevant authority of the court to sell and is likely to include an action of ejection against the persons occupying the family home in order that it can be sold.

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

   - The needs and financial resources of the debtor's former spouse;
   - The needs and financial resources of any child of the family;
   - The interests of creditors and the length of period during which the family home was used as a residence by the debtor's former spouse or any child of the family.

   The court is not required to take into account the needs of the debtor.

   The court may

   - Refuse to grant the application;
   - Postpone the granting of the application for such period as it may consider reasonable in the circumstances; or
   - Grant the application subject to such conditions as it may prescribe.

Monthly maintenance payment/income payments agreement

Should the debtor fail to adhere to the terms of the Income Payment Agreement, the trustee can apply to court for an Income Payment Order and the sheriff must allow for aliment for the debtor and the debtor's relevant obligations. Relevant obligations include any obligation or aliment owed by him and any obligation of his to make a periodical allowance to a former spouse.

If after making allowance for the above the sheriff determines that the debtor's income is in excess of the total amount so allowed, the sheriff will fix the amount of the excess in order for it to be paid to the trustee by means of an Income Payment Order.

Therefore, a monthly maintenance payment to the former spouse would be permitted throughout the sequestration process. Any arrears due at date of sequestration would form a claim in the sequestration although the debtor would not be discharged from such obligation at conclusion of the process.

Pension fund

Since the implementation of sections 11 and 12 of the Welfare Reform and Pensions Act 1999, pensions approved by HMRC no longer vest in the trustee for sequestrations awarded after 29 May 2000.

Unapproved pension schemes vest in the trustee although there are provisions for a trustee and the debtor to reach an arrangement that the unapproved pension will not vest if the pension is the debtor's only or main pension, or the debtor makes an application to court for an exclusion order in relation to all or part of such pension. Thus, the trustee should clarify whether or not the pension has been approved by HMRC, and liaise with the scheme provider/trustees as appropriate.

Section 16 of the Welfare Reform and Pensions Act 1999 allows the trustee to seek a court order to recover excessive contributions. Such contributions are defined as those made for the purpose of putting assets beyond the reach of creditors. This approach is also supported by section 36 of the Bankruptcy (Scotland) Act 1985 and thus, the trustee requires to determine the amount of and source of funds paid into the pension fund, particularly with reference to the debtor's income and expected expenditure pattern during the period that contributions were made. This can be achieved by obtaining details from the debtor, his accountants, HMRC and the pension scheme provider.

Villa in Malaga

The villa is understood to be worth in the region of £130,000. The following steps should be undertaken:

- Obtain the title documents.
- Ascertain if there are any secured borrowings.
- Establish if the property is occupied by a tenant.
- Instruct a Spanish agent to undertake an independent valuation.
- Once the trustee is satisfied that the asset is owned by the debtor and there will be a reversion to the sequestration, this would form part of the court challenge to the divorce decree. On the basis of a successful challenge and the issue of a court order in favour of the trustee such that the villa is returned by the estate, the trustee would instruct a Spanish agent to undertake the marketing and realisation programme.

Ferrari

The following steps require to be undertaken:

- Obtain a copy of the most recent annual accounts.
- Ask the debtor if he owns the vehicle.
- Obtain the log book, licence, insurance documents and MOT certificate.
- If the debtor does not provide ownership details, write to the DVLA for a vehicle search.
- If it transpires that the vehicle is owned by the debtor and there is equity available, arrange for it be uplifted and sold.

Antique table

It appears that both an unfair preference and a gratuitous alienation have occurred in favour of the debtor's mother.

An unfair preference refers to a transaction entered into by the debtor which has the effect of creating a preference in favour of a creditor to the prejudice of the general body of creditors. The provision of the antique table in settlement of the debt due to the debtor's mother of £16,000 is likely to constitute an unfair preference. The act makes specific exceptions for the following transactions:

- A transaction in the ordinary course of trade or business.
- A payment in cash for a debt which when it was paid, had become payable, unless the transaction was collusive for the purpose of prejudicing the general body of creditors.
- The transaction whereby the parties thereto undertake reciprocal obligations unless the transaction was collusive for the purpose of prejudicing the general body of creditors.
- The granting of a mandate by a debtor authorising an arrestment to pay over the arrestment funds or part thereof to the arrestor where there has been a decree for payment of a warrant for summary diligence and the decree warrant has been preceded by an arrestment on the dependents on the action or followed by an arrestment in execution.

An unfair preference may be challenged if the date when the preference became completely effectual was not earlier than six months before date of sequestration.

Before court proceedings are contemplated, the trustee will wish to ascertain:

- What evidence is there to prove the debtor owned the table?
- Was full title to the table vested in the debtor originally?
- What evidence is there to support the contention that a gift occurred?
- What is the value of the table i.e. an independent valuation may be required?
- Where is the table located?
- What is the insurance position?
- What is the debtor's mother's response to the situation e.g. is she happy to return the table upon request?
- When was the table "gifted" to the debtor's mother?

If these enquiries demonstrate that that the table has value and requires to be returned to the sequestrated estate, the trustee may wish to engage a law agent and progress legal proceedings.

If the court is satisfied that the transaction is an unfair preference within section 36 of the Bankruptcy (Scotland) Act 1985, it shall grant decree of reduction or for such restoration of the property to the debtor's estate, or such other redress as may be appropriate.

As well as creating a preference in favour of his mother, the debtor has transferred to a creditor an asset at undervalue and thus, a gratuitous alienation is also likely to have occurred. Section 34 of the Bankruptcy (Scotland) Act 1985 deals with gratuitous alienations and the transaction can be challenged by the trustee because:

- The debtor provided the table to his mother for undervalue (assuming this can be demonstrated).
- The debtor's estate has been sequestrated.
- The transaction took place on a relevant date i.e. less than two years prior to date of sequestration.

The trustee is in a position to raise court proceedings to challenge the gratuitous alienation, seeking either decree for reduction of the transfer and restoration of the debtor's state of the shareholding or alternatively, other redress as the court shall consider fit e.g. a cash settlement.

The debtor's mother may lodge defences to this action if she can establish that:

- Immediately or at any time after the alienation, the debtor's assets were greater than his liabilities; or The alienation was made for adequate consideration; or

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

Prior to instigating court proceedings, the trustee will wish to consider if there is evidence that the debtor's mother has financial resources, or access to cash, if legal proceedings are successful.

If Mr Castle is in a position to provide specific details regarding the table, an independent valuation should be obtained.

In order to maximise the reversion to the estate and in view of the lengthy costs of instigating legal proceedings, the trustee is likely to consider negotiating with the debtor's mother for a settlement representing the value of the table as at date of sequestration.

Mr Knight

Details and supporting documentation regarding the debt due to Mr Knight should be obtained e.g.:

- What evidence is there of payment by the debtor and receipt by Mr Knight?
- Can the debtor offer an explanation for the payment?
- What is Mr Knight's position e.g. was he aware of the debtor's overall financial situation and how well does he know him?
- Is Mr Knight in a position to repay the debt if there is a successful recovery action?
- What response has Mr Knight provided to a request for the monies to be returned?
- Is a challenge likely to be successful given the defences available under section 36(2) of the Bankruptcy (Scotland) Act 1985?

If it is considered that payment of the debt constitutes an unfair preference, steps should be taken to recover the funds following the procedure detailed above.

(c) Summarise the offences committed by the debtor and detail what action might be taken against him. (8 marks)

The offences committed by the debtor are:

Bankruptcy (Scotland) Act 1985	Nature of offence
Section 67(1)	Making a false statement on assets relating to business or financial affairs.
Section 67(4 & 5)	Falsification of a document/failure to report a falsification.
Section 56B and 67(6)	Gratuitous alienation and/or unfair preference by a person who is absolutely insolvent.
Section 19(3)	Failure to omit or mis-state a material fact in his statement of assets and liabilities.
Section 56B(k)	Gambling or other extravagant behaviour that may have caused/increased his debts.

The following process is anticipated in order to deal with the debtor's potential offences:

- A letter should be sent both by first class post and recorded delivery, requesting the debtor to comment.
- If no contact is made, approval should be obtained from the accountant in bankruptcy and/or the commissioner(s) for sheriff officers to serve a letter on the debtor requesting that he attends a meeting with the trustee.
- The trustee may request the debtor in terms of section 44 of the Bankruptcy (Scotland) Act 1985 to appear before him and to give information relating to his assets/dealings with them and his conduct in relation to his business or financial affairs generally.
- If the trustee considers it necessary, he may apply to the sheriff for an order requiring the debtor to attend a private examination before the sheriff and if the debtor fails, without reasonable excuse or to comply with the order, he will be guilty of an offence and liable to a fine, imprisonment or both.
- The trustee may apply to the sheriff for an order for a public examination under section 45 of the Bankruptcy (Scotland) Act 1985. If the debtor fails without reasonable excuse he will be liable to a fine, imprisonment or both.

- With regard to the debtor's offences, the trustee can complete a suspected offences report. This is a privileged document and is sent to the accountant in bankruptcy. The accountant in bankruptcy, should she consider it appropriate, will report the relevant offences to the Lord Advocate. If the debtor is found guilty of any offence, depending on the severity thereof, he may be liable to a fine, imprisonment or both.

It is noted that Mr Castle has commented that the debtor lost a lot of money as a result of gambling. If the trustee considers that the debtor has been dishonest or blameworthy in some way either before of during the sequestration, he can report the debtor's misconduct to the accountant in bankruptcy who may, if she considers it appropriate, submit an application to court and request that a Bankruptcy Restriction Order "BRO" is issued against the debtor.

If a BRO is granted, certain restrictions will be imposed upon the debtor for the period stated in the BRO and may well continue after discharge. The sheriff decides how long the restrictions will last: between two and fifteen years depending upon the severity of the misconduct.

The following are examples of behaviour considered to be dishonest or blameworthy which have been evidenced by the debtor:

- Selling assets for undervalue.
- Giving away assets.
- Paying creditors in preference to others.
- Gambling/making rash speculations and being unreasonably extravagant.

Contact should be made with the debtor to advise that the trustee is considering applying for a BRO. If the debtor acknowledges that his conduct was inappropriate, he may agree to a Bankruptcy Restriction Undertaking "BRU" which has the same effect but does not require court intervention. A BRU may be for a shorter period of time than a BRO.

If the debtor is subject to a BRO or a BRU and does not comply with the restrictions, he will guilty of an offence and if following prosecution, is found guilty, he is subject to a fine, imprisonment or both.

QUESTION 4

(a) Set out the ethical issues you should consider before contemplating acceptance of any appointment in this case. (5 marks)

The following matters should be considered prior to considering acceptance of a formal appointment in this case:

Is Mr Slick a client of the firm?

Has Mr Slick received the Debt Information and Advice Pack?

Does Mrs Slick require separate/independent advice? If so, she will require to be referred to someone else.

Has the insolvency practitioner or the tax partner had a material professional relationship with him during the previous three years? This may be as a result of acting for him or relying on him for financial services advice.

Has the insolvency practitioner, the tax partner, or any partner in the firm, had a professional relationship with the debtor or a connected person in the three year period prior to appointment [which might be seen to impair objectivity]?

Did the tax partner or the insolvency practitioner have an interest in the debtor's financial affairs prior to the instruction?

Will acceptance of the appointment give rise to a conflict with any other current insolvency, or are there any issues which might indicate that the appointment should not proceed e.g. have you acted for the creditor who has served the charge for payment?

Have client identification procedures been undertaken? In order to comply, the debtor would be required to provide photographic identity e.g. a passport or photo driving licence together with the residential identification e.g. a recent utility bill or bank statement.

(b) Compare and contrast the advantages and disadvantages of formal insolvency proceedings and non formal means of dealing with Mr Slick's debts and state with reasons which course of action you consider would be most beneficial to Mr Slick. (25 marks)

Having reviewed the information available, it appears that neither Mr Slick nor Mrs Slick is technically insolvent because the overall financial position is described as follows:

	Mr £	Mrs £
Assets		
Potential value of heritable property	400,000	400,000
Less: secured borrowings	(180,000)	(180,000)
Potential equity	220,000	220,000
Whereof, one half each	110,000	110,000
Liabilities		
Credit cards and loans	60,000	-
Bank overdraft	2,000	2,000
Total liabilities	(62,000)	(2,000)
Net surplus	£48,000	£108,000

A summary of their respective disposable income is as follows:

	Mr	Mrs	Total
	£	£	£
Monthly earnings after deduction of tax and NIC	2,650	1,250	3,900
Less: monthly outgoings (pro rata)	(1,291)	(609)	(1,900)
Disposable income	£1,359	£ 641	£2,000

Note

The above calculation of disposable income does not allow for payment of the monthly loan repayments, the hire purchase of the couple's cars or any contribution that they make towards their children's university costs. Ignoring principal repayments, credit card and loan interest may approximate £1,000 per month and is likely to cost about £500 each per month: thus utilising the balance of their joint net monthly income. The overall position leaves little room for manoeuvre.

The principal options available to Mr Slick, as follows:

- Remortgage/ Refinancing exercise
- Debt repayment plan
- Sequestration
- Trust deed with a view to becoming protected
- Debt arrangement scheme

1. Remortgage/refinance

   Household income of £3,900 per month after deduction of tax and national insurance means that, on the basis that approximately one third of gross income is deducted for tax and national insurance, the annual household income approximates £60,000.

   Lending procedures should allow three times a couple's joint annual income which approximates £180,000. Although the couple may not be in a position to remortgage with their current lender, they may be in a position to obtain a second secured loan in order to deal with their borrowings. There is equity in the house sufficient to raise, say, £70,000. The interest rate would be lower which might allow capital to be repaid more quickly.

   The risk is higher in terms of losing the house if mortgage payments are not maintained, but because a creditor due more than £3,000 can petition for sequestration, such risk is already in focus. A key advantage of refinancing is to consolidate the debts into one figure/one lender. The challenge may be to find a lender who is happy to advance monies to a couple with high liabilities and in the current economic climate. Research would be required on the status of each creditor's debt, the value of the house, the attitude of Mr & Mrs Slick, the availability of finance, the stability of income flow, and the speed with which a refinancing against the house could be achieved. In order to assist raise funds, Mr Slick could consider the availability of a lump sum from his pension fund.

   A variation on this process is the mortgage to rent scheme but it may not be the most suitable course of action for Mr Slick given the other options available.

   The ages of Mr & Mrs Slick are likely to be relevant in terms of remortgaging or entering the mortgage to rent scheme, and this aspect will require careful review with prospective providers of finance.

2. Debt repayment plan

The debtor could approach a local Citizens Advice Bureau, an approved money advisor or a licensed insolvency practitioner in order to discuss/progress a debt repayment plan. This would entail a letter being sent to all creditors requesting confirmation of the outstanding balance, seeking creditors agreement to freeze interest and arranging payment over as long as is required to settle all debts.

This is an informal procedure and thus there is no protection from creditors who may choose to withdraw from the debt repayment plan at any time and thereafter enforce debt recovery proceedings. Further, once creditors are aware of the overall position, they may wish to instigate their own action in order to recover their debt and improve their recovery option generally.

3. Sequestration

As Mr Slick has been served with a charge for payment and is apparently insolvent in terms of section 7 of the Bankruptcy (Scotland) Act 1985. Thus, he is in a position to present an application for sequestration to the accountant in bankruptcy. Once sequestration was awarded, the trustee would take action to procure sufficient funds from Mr Slick's estate to enable a distribution to creditors.

Although the debtor would only be bankrupt for one year, the trustee could obtain an Income Payment Agreement or Income Payment Order for a period of up to three years from the date of the sequestration order.

On the basis that disposable income of £1,325 is noted above, it is considered that an allowance could be made for the finance for the car, possibly £300 (£150 each) for contributions to his children's education and thus an income payment agreement/order might be sought for £700. This would result in up to £25,200 being collected.

Although the pension is excluded from the sequestration process, the debtor is over fifty years old and is in a position to obtain a tax free lump sum and release this voluntarily to the sequestrated estate as an additional contribution.

A deficit to creditors would remain, together with statutory interest and provision for the costs of the sequestration process. This could be paid by releasing equity of, say, £25,000/£30,000 from the dwellinghouse. Clearly, this requires the co-operation of Mrs Slick.

In order to find this payment, Mrs Slick could obtain a personal loan now in order to provide payment for sufficient equity to the trustee in order to remove his interest. Alternatively, a friend or family member could be approached to provide sufficient funding or the trustee could agree a figure and wait until the IPO/IPA period has expired such that Mrs Slick's salary can augment Mrs Slick's salary in terms of borrowing capacity.

This approach takes longer to achieve than refinancing as far as creditors are concerned and introduces trustee/sequestration costs. However, it helps to preserve the house position, offers breathing space to Mr and Mrs Slick, and stops creditors from taking further action. It may have a detrimental effect on Mr Slick's ongoing employment in the financial services industry and Mrs Slick's ability to gain consumer credit in the short term.

If equity cannot be released, the property could be sold. The formal consent of the debtor and his spouse is required in order to undertake this task. If such consent is not forthcoming, the trustee would be in a position to apply to the court for an action of division and sale and the ejection of the occupants.

4. Trust deed

If a trust deed was signed it would be anticipated to last for three years. The debtor would not be discharged until after expiry of the three year period, unless all creditor liabilities and trust deed costs were paid before then.

Contributions during a three year trust deed period would be calculated in the same manner as under sequestration and it would be preferable to secure an Income Payment Agreement or Income Payment Order. The trustee would be in a position to liaise with the debtor regarding the voluntary release of funds from the pension fund.

Although the property would be dealt with in a similar manner as sequestration, if the debtor, his spouse, a friend or a family member were unable to provide funding and/or the debtor and his spouse refused to provide their relevant consent to sell the property on the open market, the trustee does not have the power to apply to court for an action of division and sale and for the ejection of the family. The trustee would require to submit a bankruptcy petition to the local sheriff court and the trustee in bankruptcy could progress court proceedings in order to obtain vacant possession and sell the property. Much will depend upon the attitude of Mr and Mrs Slick to the steps necessary to release sufficient funds form the house.

5. Debt arrangement scheme "DAS"

Mr Slick could be referred to an approved money advisor with a view to entering a DAS. Once the DAS has been approved and registered in the register of insolvencies, creditors are not in a position to charge interest on their outstanding debt.

In general terms, Mr Slick's proposal would be that the DAS runs for seven and a half years and Mr Slick pays a monthly contribution of £700 or for a shorter period of time, if Mr Slick obtains a tax free lump sum from his pension fund and adds it to the funds available for distribution.

On the agreed terms, the approved money advisor will provide the funds to the payment distributor who will arrange payment of a dividend on a pro-rata basis to creditors, under deduction of his agreed fee.

The DAS will not impact upon Mr Slick's interest in the heritable property.

Conclusion

In view of the various advantages and disadvantages of each procedure, as detailed on the attached schedule, I tend to the view that the Mr Slick should consider a DAS. Although, it is noted that he will be paying a contribution for 7½ years, interest is frozen and thus it is the most effective way of repaying his debts compared with refinancing over a longer period and creating a further secured debt over his home. He is allowed to remain in the family home and, whilst a sequestration or trust deed is for a shorter period, the house equity will require to be accessed and hence, further borrowings created.

Options available to Mr Slick	Advantages	Disadvantages
Remortgage/Refinance	Not registered in the register of insolvencies. Credit rating not affected. Annuity from pension may help defray increased mortgage costs.	Costly and may be difficult to achieve in current climate. Increase in essential monthly expenditure. Mortgage repayment term might be in excess of 10 years.
Debt Repayment Plan	A specified timescale is agreed for repayment of debts. Pension excluded unless offered voluntarily.	It is an informal arrangement i.e. creditors not obliged to adhere to the plan. Creditors are not obliged to freeze interest. Creditors can withdraw from the plan at any time.
Sequestration	Mr Slick would be discharged after 1 year under normal circumstances. Pension excluded unless offered voluntarily. A contribution can be agreed and paid for specific period and then equity released from the house at the end of the process.	Recorded in the register of insolvencies. Recorded with credit agencies for up to 15 years. All debts are frozen, except secured debts. Interest at 8% payable on creditors' claims. If equity is not dealt with at outset of process, it could increase and Mr Slick may have difficulty addressing the position. Court approval can be sought if formal consent not forthcoming from Mr Slick or his spouse regarding sale of house. May be subject to IPO. May be subject to BRO.

Trust Deed	A contribution can be agreed prior to signing the trust deed and paid for a specific period. Equity can only be agreed at outset and released at the end of the trust deed. Pension excluded unless offered voluntarily. Less state intervention e.g. in terms of fee approval. Seen as a more proactive process.	Recorded in the register of insolvencies. Recorded with credit agencies for up to 15 years. All debts are frozen, except secured debts. Interest at 8% payable on creditors' claims. If equity is not dealt with at outset of process, it could increase and Mr Slick may have difficulty addressing the position. Discharge usually after 3 years. May have to sequestrate if cannot agree a deal to release equity in house to trust deed estate. Further cost incurred and lower dividend outlook.

Debt Arrangement Scheme	No impact on property. Specified repayment period which can be varied by agreement with creditors. Interest is frozen. Pension excluded unless offered voluntarily.	Repayment period is considerably more than other insolvency procedures. Need to use a Money Adviser, AiB and a Debt Payment Distributor i.e. cumbersome.