

JOINT INSOLVENCY EXAMINATION BOARD
NOVEMBER 2009 EXAM (ENGLAND)
EXAMINERS' REPORT AND MARKING PLANS

ADMINISTRATIONS, COMPANY VOLUNTARY ARRANGEMENTS and RECEIVERSHIPS

2009 EXAMINER'S REPORT

EXAMINATION MARKING PLANS

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

The paper contained a 20-mark question on employee claims, and a 20-mark question on aspects of a trading Administrative Receivership. There was also a 30-mark question dealing with a Company Voluntary Arrangement and a further 30-mark question dealing with the extension of an Administration and a prescribed part distribution. The paper tested candidates' knowledge of both the practical and theoretical aspects of the syllabus and should have been reasonably straightforward for well prepared candidates with relevant practical experience of the issues arising.

QUESTION 1

This question looked at the potential impact of accrued employee liabilities on a business sale agreement concluded by an Administrator. It required candidates to calculate employee claims for arrears of pay, holiday pay, pay in lieu of notice and redundancy pay and to demonstrate awareness of the likely treatment of such claims by the Redundancy Payments Office under The Employment Rights Act 1996 ("ERA").

Several candidates did not have a good understanding of the issues in particular on part b.

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

A number of candidates failed to spot the "mitigation" and notional tax issues. Also many candidates failed to translate their calculation into the nub of the answer, i.e. what sum needed to be set aside. Too many referred the calculation to the amount the employees might receive under the statutory scheme and/or referred to the preferential and unsecured division of the claims which had no bearing on the outcome. Whilst many candidates managed to still correctly calculate the claim, it showed a lack of awareness of the purpose of the exercise.

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

Apart from a few candidates there was a very disappointing inability to understand what the question asked and to use the information provided in the question. Very few candidates mentioned the current case law demonstrating a lack of awareness of current developments in this area.

QUESTION 2

This question was concerned with the risks generally arising following a decision to trade a company in Administrative Receivership and the main priorities facing the office holder during the first week of his appointment. The question also dealt with an Administrative Receiver's duty to the preferential creditors.

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

This part was generally inadequately answered.

This question was clearly about the risks of trading a company in Administrative Receivership. Many candidates ignored this and referred to the specifics of Revie Engineering Ltd in their answer. Also, many candidates did not "identify the risks". Instead, they listed relevant points without considering how the issues could create risk. Furthermore, the question was not asking candidates to provide a detailed list of areas where a subsequently appointed liquidator could attack the Receiver, yet many candidates provided this nonetheless.

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

Many candidates accumulated marks quickly by providing a list of relevant and succinct points.

However, a number of candidates wasted effort by providing detail that earned them no credit such as:

- The procedure for the Receiver to accept his appointment when it is clear from the question that this has already happened.
- A lengthy description of all the factors that would be considered in determining whether the appointment was valid when "instruct solicitors to advise on the validity of the appointment and charges over the assets" is a sufficient outline.

Some candidates wrote in great detail about exploring the sale of the freehold site for redevelopment whilst ignoring the fact that the priority in the first week would actually be seeing whether the business and assets of the Company could be sold as a going concern.

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

This part was generally poorly answered.

Candidates who scored highly had learned and were able to summarise the content of SIP14.

QUESTION 3

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

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

This part was generally poorly answered.

Many candidates focused only on the on ethical and "material professional relationship" points and went to great lengths to explain all of the different potential reasons why the appointment could not be accepted and how to check for the same. Most candidates mentioned that sufficient knowledge and staff to deal with the case should be considered; also checks to satisfy Money Laundering Regulations. Few candidates discussed the practical considerations e.g. attitude of secured creditors with ability to appoint; attitude of key creditors. Few candidates mentioned consideration of whether a CVA was the most appropriate process and whether there were sufficient assets to cover costs.

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

This part was generally poorly answered.

Candidates generally covered the key statutory requirements of a Supervisor e.g. chairman's report, annual account/report and termination notice. However, few candidates considered the practical requirements from commencement to conclusion in a chronological order. Few candidates discussed the practical considerations of taking into custody and realising the assets e.g. securing, insuring, instructing agents etc. A reasonable proportion of candidates did discuss options in the event of a breach including consultation with creditors as necessary.

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

This part was generally very well answered.

The deferred third party interests in the Bunbury properties under a CVA were correctly handled by the majority of candidates as was the inclusion of the Wilkins Drive property in a CVL only. Realisations from non-property assets in both processes was generally covered well. Many candidates accounted for the CGT liability correctly. The majority of candidates noted that the employee claims would only arise in a CVL. However, a number did include them as preferential claims. Some candidates did not distinguish between costs and creditors and simply referred to all entries as 'liabilities'. Very few candidates included the Law Society and PI costs as 'costs' in a CVL; the majority included them as claims.

QUESTION 4

This question looked at the process for obtaining creditors' approval for an extension of the period of Administration, including the requirements for the Administrator's progress report to creditors. It also involved calculation of the prescribed part and discussion of the options facing the Administrator in dealing with the prescribed part distribution.

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

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

This part was generally very well answered.

A number of candidates demonstrated a thorough awareness of Rule 2.47. Those who failed to demonstrate such awareness lost out on easy marks.

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

This part was generally very well answered.

Many candidates demonstrated their thorough knowledge of most aspects of SIP 9. Few candidates noted that the resolution for remuneration must have been passed and therefore the disclosure requirements were slightly different compared to the requirements when approval for the basis of remuneration is being sought.

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

This part was generally poorly answered

Many candidates did not attempt an answer in full. Many mentioned an application to court which was not relevant. Most candidates failed to set out the thought process behind the relatively simple procedure of obtaining written approval from the secured creditor, which was the only consent required given the facts in this case.

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

This part was generally well answered. Nevertheless, a significant number of candidates did not distinguish between fixed and floating charge payments. Some candidates failed even to distinguish between fixed and floating charge realisations. Some candidates did not show a time period column whilst some others did not prepare a cumulative account.

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

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

This part was generally very well answered although a number of candidates missed out by not stating the additional amount recoverable by the Bank.

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

This part was generally poorly answered Many candidates focussed only on the applicability of s.176A A number of candidates included discussion about different exit routes and their advantages and disadvantages rather than dealing with the prescribed part. Some candidates believed that the administrator had the power to distribute the prescribed part to the unsecured creditors without anything further.

**JIEB ADMINISTRATIONS, COMPANY VOLUNTARY ARRANGEMENTS and RECEIVERSHIPS
NOVEMBER 2009**

EXAMINATION MARKING PLAN

QUESTION 1 - AE Ramsey & Co Ltd

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

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

Question - Table

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

Answer

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

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

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

QUESTION 2 – Revie Engineering Ltd

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

<i>Fundamental risk</i>
Continued trading should only be undertaken in order to enhance the recovery prospects for the secured creditors and is not otherwise prejudicial to the interests of the preferential creditors
The fundamental risk of continued trading is that the actual outcome for creditors is worse than if there had been no continued trading
<i>Supplementary risks</i>
No purchaser found for the business and assets on a "going concern" basis and therefore assets are sold at break up value
The prospect of maximising the value of book debts and/or work-in-progress is not fulfilled
The prospect of realising significant value for goodwill, intellectual property rights or other intangible assets is not fulfilled.
The risk of the company being placed into liquidation which would terminate the receiver's agency
The prospect of mitigating liabilities (e.g. employee liabilities) is not fulfilled
The assumptions underlying the trading forecast prove inaccurate such that profit/loss from continued trading is materially at -ve with the forecast
The level of funding required to support trading evidenced by the cash flow forecast proves inadequate

Valid ROT claims prove more extensive than anticipated
Key suppliers/hauliers fail to support continued trading such that availability of raw materials/other inputs becomes a problem
Key directors/employees leave or fail to cooperate
Major customers fail to support continued trading or require terms which are not acceptable
Bad debts are incurred because of the failure of customers to pay
Unforeseen environmental issues have a detrimental impact on trading
Unforeseen health and safety issues have a detrimental effect on trading
Strike action or lack of cooperation from employees/labour force arising from some grievance or disagreement
The risk that controls over trading fail for some reason
If leasehold property, the rent position and the ability to negotiate terms with the landlord
Problems with production/process which adversely affects product/service standards/quality
Claims arising as a result of continued trading e.g. for product failures
No moratorium against creditor actions & proceedings e.g. repossession of HP/leased assets
Adoption of employee contracts (qualifying liabilities) after 14 days
Termination of contracts on appointment of AR
Termination of licences on appointment of AR
No recognition of AR under EC Regulations
Personal liability for contracts entered into, unless specifically excluded

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

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

Scrutinise contracts and assess impact of appointment/ability to trade
Health and safety audit
Contact major customers to agree terms of trade
Change registered office
Contact key suppliers/creditors to notify appointment and establish terms of dealings

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

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

QUESTION 3 – Ron Greenwood Law LLP

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

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

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

Ensure that chairman's report of the meetings of creditors and members to consider the CVA has been filed in court (within 4 days of the meetings)
Give notice of the result to creditors and members immediately
File a copy of the report with Registrar
Open the administrative records of the Supervisor to include time recording code, estate cash book, diary and IP Record
Open supervisor's bank account and transfer any funds held on the client account
Supervisor to take into his custody all assets included in the arrangement.
Ensure physical security of assets
Instruct agents as appropriate
Arrange insurance cover as necessary
Ensure that the CVA is conducted strictly in accordance with the approved proposals.
Monitor contributions from trading or third parties.
Notify HMRC within 21 days
Comply with duties re occupational pension scheme
Supervisor's annual account and report within 2 months of end of each anniversary to:
The court
The Registrar
The Company
The creditors
The members
The auditors
In the event of a default in complying with the terms of the CVA, check the proposal for the extent of the Supervisors' powers and duties. Consult with creditors if the proposal requires.
Complete the IP Record as far as possible
Agree claims and declare interim dividends in line with the approved proposal
Finalise and pay all costs allowed under the proposal
Settle any tax liabilities
Agree final remuneration
Give notice of intended final dividend and distribute surplus funds to creditors
Within 28 days of completion or termination send Notice that CVA fully implemented or terminated together with Supervisor's final account and report to same parties entitled to annual report
Pay unclaimed dividends as provided in the proposal
Complete IP Record and retain for 10 years
Close administrative records
Specific penalty bonding for value of assets
Obtain court directions on any matters where uncertain

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

See MS Excel file Q3 Greenwood Law LLP (overleaf)

QUESTION 3

RON GREENWOOD LAW LLP

ASSETS

Workings

Answer

Property Assets

	Estimated Value £	3pty Interest	Beneficial Interest £	Mortgages £	Equity £
Clemence Cottage	270,000	0	270,000	-90,000	180,000
Castelo De Keegan, Portugal	380,000	-190,000	190,000	0	190,000
1 Sansom Road, Bunbury	250,000	-125,000	125,000		
2 Wilkins Drive, Bunbury	100,000	0	100,000		
3 Brooking Street, Bunbury	300,000	-150,000	150,000		
	<u>650,000</u>	<u>-275,000</u>	<u>375,000</u>	<u>-205,000</u>	170,000
Woodcock Park Garages	250,000	-125,000	125,000	0	125,000
4 Coppell Road	220,000	0	220,000	-120,000	100,000

CVA £	CVL £
180,000	180,000
190,000	190,000
70,000	170,000
125,000	125,000
100,000	100,000
275,000	0
28,000	66,000
0	14,000
0	12,000

Deferred family interests

Non Property Assets

Vehicles
Equipment
Cash at bank

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

QUESTION 4 – Robson Packaging Ltd

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

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

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

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

Required practice disclosure requirements are per SIP 9
Disclosure requirements depend on whether or not approval has already been obtained for the basis of fixing the Administrator's remuneration. On the facts it is apparent that the basis of the Administrator's remuneration has already been approved.
In that case the following disclosure is required: <ul style="list-style-type: none"> • Report the details of the resolution passed • Report the amount of remuneration drawn to date in accordance with the resolution • Charge out rates to be provided • An account of receipts and payments to date • The total time spent and the charge-out value to date • A narrative explanation of time costs incurred accompanied by a time cost matrix analysing total time spent by grade of staff across categories of work activity
Categories of work activity include: <ul style="list-style-type: none"> • Administration & planning • Investigations • Realisation of assets • Trading • Creditors • Case specific matters
And other categories where appropriate
Where cumulative fees exceed £50,000, proportionality is likely to require amore detailed level of breakdown
Creditors' guide to Administrator's fees

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

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

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

See MS Excel file Q4 Robson Packaging Ltd (overleaf)

QUESTION 4

ROBSON PACKAGING LTD

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

Statement of Affairs	07-Jan-09 to 06-Jul-09	07-Jul-09 to 03-Nov-09	Cumulative
£	£	£	£
	Assets specifically pledged		
250	Goodwill 350	0	350
10	Leasehold property 10	0	10
100	Intellectual property rights 100	0	100
	460	0	460
	Payments		
	Administrator's fees 45		45
	Legal & debt collection fees 20		20
	Distributions		
	Fixed chargeholder 340	55	395
	Funds in hand - Fixed Charge		
	55	0	0
	460	55	460
	Assets not specifically pledged		
40	Factored book debt - surplus 15	40	55
15	Non factored debts 5	15	20
45	Administration trading sales 20	45	65
35	Plant & equipment 35	0	35
240	Plant & equipment – subject to Retention of Title 240	0	240
	Bank interest 10	5	15
735	325	105	430
	Payments		
	Administrator's fees 10	30	40
	Legal & debt collection fees 15	15	30
	Direct labour 60		60
	Other trading costs 35		35
	Sundry expenses 10	5	15
	Funds in hand - Floating Charge		
	195	55	250
	325	105	430
	Total payments and funds in hand		
	325	105	430

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

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

Prescribed part	10,000	50%	5,000
	<u>240,000</u>	20%	<u>48,000</u>
Net Property	<u>250,000</u>		<u><u>53,000</u></u>
Further amount recovered by Bank (£250,000-£53,000)			<u><u>197,000</u></u>

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

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

LIQUIDATIONS EXAMINATION 2009

EXAMINER'S REPORT

EXAMINATION MARKING PLANS

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

General

In some cases candidates wrote all they knew about a topic rather than addressing the specific question. .

QUESTION 1

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

The answers to 1(a) were disappointing: many candidates seemed unsure what the liquidator should do on entry into liquidation from administration.

- (b) (i) Set out the duties of the Liquidator in relation to the pension scheme. (4 marks)**
- (ii) Set out the issues that the Liquidator may encounter because the Company is one of the trustees. (2 marks)**

There was a good general understanding of duties of a liquidator in relation to a pension scheme.

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

While generally familiar with Members Voluntary Liquidations, there was a generally poor understanding of the comparative merits of striking off, which was the main thrust of the question,

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

While there was a good general understanding of wrongful trading, very few mentioned section 214A, Adjustment of Withdrawals.

QUESTION 2

- (a) Draft a letter to Amy on the implications of her agreeing to the proposal (do not set out the detailed procedures). (8 marks)**
- (b) In respect of each of the above matters set out, with reasons, whether or not the Liquidator should include them in reports under section 7(3) of the Company Directors' Disqualification Act 1986 or what further information he would require in order to decide. (12 marks)**

Most candidates showed a reasonable knowledge of directors' duties and responsibilities in the insolvency legislation and of matters that may be reportable under the CDDA. The better answers also mentioned the directors' duties set out in the Companies Act 2006.

QUESTION 3

Set out:

- (a) **the reasons why the appointment of a Liquidation Committee could facilitate the process of this Liquidation. (4 marks)**
- (b) **the formalities of appointing a Liquidation Committee. (3 marks)**
- (c) **a recommended agenda for the first Liquidation Committee meeting. (5 marks)**
- (d) **the reasons whether or not each individual listed is eligible to be a Liquidation Committee member. (18 marks)**

Most candidates had a reasonable knowledge of committees and gave competent answers to parts (a), (b) and (c), although they did not demonstrate that they could apply this knowledge. The answers to 3(d) were weak, despite having recited the rules in 3(a) and (b). Many candidates failed to spot the statute barred debt; showed a lack of understanding of a director's loan account (they were confused between loans to and from the company); and they were confused about whether a shareholder could be on a committee for a CVL. There was also confusion about what constitutes a contingent debt: a significant number of answers suggested that contingent creditors could not claim or be on a committee until the claim crystallised.

QUESTION 4

- (a) **Set out the considerations that the Liquidator should take into account in deciding whether to pursue each of the actions. (10 marks)**
- (b)
 - (i) **Set out, with reasons, what funds the Liquidator may recover for the benefit of creditors. (12 marks)**
 - (ii) **Calculate the amount available for distribution to each class of creditor after payment of costs and expenses, stating any assumptions that you make and indicating the shortfall, if any, to each class of creditor. (8 marks)**

This question was not well answered. Most candidates failed to spot that 1(a) required consideration of s.176ZA and Rules 4.218B – E. (expenses of winding up and requirement for approval or authorisation by floating charge holders). Candidates also struggled with the calculation of amounts available to creditors, in particular the prescribed part.

LIQUIDATIONS 2009

EXAMINATION MARKING PLAN

QUESTION 1

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

- ethical check
- check date of appointment, i.e. date of registration, at Companies House, of notice of move from administration to liquidation (Form 2.34B)
- advertise appointment in Gazette within 14 days (s109)
- ensure any assets/company bank accounts transferred from administrator to liquidator
- review administrator's proposals (and minutes of creditors' meeting, if held) and ensure that CVL was proposed as an exit route; relevant details of the proposed liquidator were provided; creditors were informed of right to nominate alternative liquidator. SchB1 para 49, R2.33.
- if joint liquidators ensure requirements of s231 re joint and several
- ensure that there is a liquidation committee. The administration committee becomes the liquidation committee but if there is no committee take steps to form one (i.e call meeting of creditors to vote for one) (s101)
- ensure that liquidator has sufficient powers to do what is necessary to carry out the liquidation may need to call committee (or if none, creditors') meeting to obtain, eg, Sch 4 powers and to approve remuneration
- need to ensure that liquidator can take authorised remuneration (and category 2 disbursements). Need to obtain sanction of liquidation committee or, if none, call a meeting of creditors to obtain sanction.
- nb on appointment, the liquidator does not have to write to all creditors informing them of his appointment as this will already have been done in the final progress report of the administration.
- review administrators' proposals/actions
- Ensure that the date the administrator is released and the date the liquidator is appointed are included on the bond return (if the liquidation immediately follows on from administration (the "initial procedure") there is no need to apply for a new bond – IP Regs 2005, Reg3 and Sch 2)
- inform insurers

- (b) (i) **Set out the duties of the Liquidator in relation to the pension scheme (4 marks)**

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

(ii) Set out the problems that the Liquidator may encounter because the Company is one of the trustees. (2 marks)

Problems Hardtimes Ltd is a trustee. <ul style="list-style-type: none">• PPF will be a major creditor.
-Liquidator should cause company to resign
Where the Company is trustee of the scheme and enters into liquidation neither the employer nor the liquidator will be 'independent' for the purposes of the independent trustee provisions.
It is likely that there will be a conflict between the liquidator's duties to the employer/company and its creditors and his duties to the pension fund.
Liquidator should draw the matter (and his conflict) to the attention of TPR and cause company to resign as trustee and request TPR appoint an independent trustee in place of the employer as soon as possible.

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

<p>- need to consider how liquidator will be paid as there are no assets in the companies (eg indemnity but who from?)</p> <p>- needs to consider whether or not the companies are actually dormant as advised by the finance director</p> <p>- needs to consider any contingent liabilities, eg have any of the companies entered into any lease/tenancy agreements?</p> <p>- are any of the companies part of a VAT group? Need to de-register</p> <p>- are there any inter-company bank guarantees?</p> <p>- are there any floating charges?</p> <p>Note before a company passes a resolution for winding up it must give written notice to any qualified floating charge holder (if created on or after 15.9.03) and the resolution may only be passed if the floating charge holder has consented in writing or has not replied within 5 days. (IA 1986 s84(2A) & (2B)). This means that the floating charge holder can withhold consent, if it feels that it is being prejudiced in any way (although this is unlikely in an MVL). It would be better to discuss the issue with the bank first and, probably, satisfy the charge pre-MVL.</p> <p>- similarly are there any group corporation tax issues to consider?</p> <p>- is the parent company willing/able to provide guarantees for any debts that may arise?</p> <p>- does the parent company wish to retain the names of any of the subsidiaries?</p> <p>- are there any other intangible assets?</p> <p>Company dissolved after notification to Registrar of final meeting</p> <p>2 years after that company dissolved can be restored and claims still made in that time period but after then no claims (unless personal injury under the Fatal Accidents Act 1976 or the Damages (Scotland) Act 1976 claims may be made at any time)</p> <p>Note Candidates are not expected to provide the procedure for placing into MVL but marks may be awarded in context of answer.</p> <p>MVL - disadvantages</p> <p>Can be costly but there are no assets in these cases, subject to pre-insolvency investigations.</p> <p>Can be tax disadvantages</p> <p>If sign declaration of solvency and not able to pay debts directors may have personal and/or criminal liability. Company will then be placed into CVL.</p> <p>Striking off from register</p> <p>- if the directors do not file any returns to Companies House, the Registrar may eventually remove the company from the register. Note the company may be liable to a fine for not filing returns.</p> <p>Application for Striking off</p> <ul style="list-style-type: none">• Problems re 20 years of liability• May not be as cost effective as think• Any remaining assets pass to the Crown as bona vacantia (although directors should ensure that no assets/liabilities remain)

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

NB Not considering Companies Act 2006 changes introduced in October 2009.

Minimising assets may be done by: dividend, waiver, transfer, purchase of own shares and reduction of capital (this will need court approval).

Also, HMRC ESC 36 but ESC 16 cannot authorise distributions of non-distributable reserves, e.g. share capital, and any such capital may be regarded as bona vacantia and be claimed by the Treasury

ESC C16

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

This is for tax purposes only.

Need to consider concession, granted by the Treasury Solicitor (April 2006) re permitted distributions, when company struck off under Companies Acts and taking advantage of concession C16 and the amount of the distribution is less than £4,000, then as a concession the Treasury Solicitor will waive the Crown's right to any funds, which were distributed to the former members prior to dissolution.

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

A private company (a dormant public company will have to re-register as a private company to take advantage of this procedure) may apply to the Registrar to be struck off if in the previous 3 months:

- it has not traded or otherwise carried on business
- Changed its name
- for value, disposed of property or rights that, immediately before it ceased to be in business or trade, it held for disposal or gain in the normal course of business or trade;
- engaged in any other activity except one necessary or expedient for making a striking off application
- a company may apply for striking off, if it has settled trading or business debts in the previous 3 months.

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

The directors must send copies of the application to be struck off (form 652a) to:

- members
- creditors, including all contingent and prospective creditors
- employees
- managers or trustees of any employee pension fund
- any directors who have not signed the form
- the relevant VAT office, if VAT registered

Any interested party may object to the dissolution.

Reasons for objection include:

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

It is an offence to

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

If all creditors have not been paid (inadvertently – eg if there was a contingent liability – or otherwise), a creditor can apply to reinstate the company

Any parties notified of the striking off may apply to court for the company to be restored within 20 years of dissolution. The court can order restoration if:

- the person was not given a copy of the application
- the application involved a breach of conditions
- for some other reason it is just to do so.

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

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

Discussion and consideration of S214A – “drawings” includes share of profits, salary, repayment of or payment of interest on a loan to a LLP, any other withdrawal

- insolvent within s123 meaning or become insolvent as a result of the transaction (taking into account all other drawings)
- but unless person knew or ought to have concluded after each withdrawal no reasonable prospect of avoiding insolvent liquidation, can't recover
- all members had knowledge that there was the accumulated reserves were in deficit

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

- liquidator needs to assess Gordon's personal wealth to ascertain whether to pursue Gordon personally
- the liquidator should look at the partnership agreement
- also consider wrongful trading, s214, and misfeasance, s212

QUESTION 2

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

- restriction on re-use of company name s216
- “Byalot” is a prohibited name
- Harriet (and George) is a de jure director but is not taking part in the management of the company, they are just acting as nominees
- Edward (and Amy) would be acting as de facto director (or shadow directors?) and so would not be avoiding s216
- see Hawkes v Cuddy [2007] EWHC 1789 (also known as Re Neath Rugby Ltd, Cuddy v Hawkes)
- s217 imposes a personal liability on a director or manager who was formerly a director of a liquidating company.

S.217 is linked to s.216 because contravention of the prohibition in s.216 is a necessary and sufficient condition of personal liability under s.217: but that is the limit of the connection.

S.216 creates a free-standing criminal offence. It concerns the management of companies and is designed to protect persons who deal with companies from those who act as directors of liquidating companies and then seek to carry on business through another vehicle bearing the same or a similar name. i.e. principally to prevent “phoenix companies.”

See R4.228 - 4.230

R4.228 allows a person to carry on the business of the insolvent company using a prohibited name other than through a limited company where the relevant notice is given. The Rule also provides that the prescribed notice may be given before the company enters insolvent liquidation. In cases where the insolvent company is not in insolvent liquidation and also in any case where the acquiring company has not yet adopted a prohibited name, notice can be given where the director of the insolvent company is already a director of the acquiring company.

However, notice under Rule 4.228 must always be given before a director acts in a way that would be prohibited by section 216. The Rule introduces a new prescribed form, Form 4.73, for the provision of the requisite notice to creditors.

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

- consideration/discussion of Companies Act 2006 (s170 – 177) directors' duties
- all directors in the three years preceding the date of liquidation should be sent a questionnaire about their involvement with the company and the reasons for the company's failure
- Frances, a D form would be required. May need more information about the decisions that Frances took and how they were detrimental to the company. Discussion required
- reduction in payment terms – is this a sensible move to aid the company's cash flow or are the directors failing in their (CA 2006) duty to suppliers – evidence of insolvency?
Similarly duty to customers. Discussion required
- dividend to shareholders – was company insolvent at time or did it become insolvent as a result of the dividend? May be an illegal dividend, in which case misfeasance. Should include on D form. Discussion required.
- non-closure of branch. Edward seems to have set aside considerations for the benefit of the company in favour of keeping his brother in business? Discussion required
Cleaning contract – accepting lower price in circumstances when the company was facing cash flow problems, seems to be acting in the best interests of creditors, but consider whether the directors have a (CA 2006 environmental duty) Discussion required
Purchase of flat – likely to be a transaction at undervalue and so is reportable. Discussion required
Customer deposits in overdrawn account – may be evidence of wrongful trading, should have protected customer monies. Report on D Form. Discussion required.
Flip Ltd – see s245, avoidance of floating charge Discussion required.

QUESTION 3

- (a) Set out the reasons why the appointment of a Liquidation Committee could facilitate the process of this Liquidation. (4 marks)**

- generally liquidation committee represents the general body of unsecured creditors and can sanction various acts of the liquidator, including those requiring sanction in Sch 4 and also, eg, remuneration
- liquidator can use liquidation committee as "sounding board" but does not have to accept its advice in relation to particular issues
- liquidator has to report to liquidation committee at intervals on matters that the liquidator considers will be of concern to them (r4.155)
- in this liquidation there are various matters that are of concern to creditors and a liquidation committee will be helpful to the liquidator who will be able to report his findings to them and advise on whether further detailed investigation is required (the liquidator will be able to discuss the likely costs and any assets recoveries of further work)
- the liquidation committee will be able to provide specific sanction (r4.184) for compromise of specific debts

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

- general process required:
- meeting of creditors to vote for 3 – 5 members
- R4.153, issue certificate of constitution
- if chairman of meeting resolving to establish committee is not liquidator, he shall inform liquidator of names, addresses of members
- each committee member must agree to act as member

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

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

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

Burt – is a creditor and is eligible to be a committee member. He would not be able to participate in any discussions about the sale of the business because of his conflict of interest. R4.170. Sanction required.
Brad – is not a creditor as his debt is statute barred. He is not eligible to be a member of the committee. (Unless he has taken action before the debt becoming statute barred eg obtained judgment)
Harrison – is a probably a creditor, but the Liquidator may want to look into the circumstances of how the debt arose (ie. To obtain a proof of debt) before advising on whether Harrison is a creditor or not.
Johnny – a shareholder is eligible to be a member of the liquidation committee but, if there is to be no return to shareholders, it is unclear what his interest is and creditors may not wish to vote for him to become a member.
Reasonably travel costs may be paid for committee members to attend meetings, costs from Bermuda may be too high for the liquidation.

Resolutions can be taken by correspondence. R4.167

Daniel – this is a disputed debt and the Liquidator will need to consider whether the debt will actually materialise. He may need to take advice on Daniel's claim

Piers – has a future debt, which arose pre-liquidation, and which is provable in the liquidation and so he is eligible to sit on the liquidation committee. R11.13

Matt – has a contingent debt, which arose pre-liquidation, and which is provable in the liquidation and so he is eligible to sit on the liquidation committee. Discussion – consider if Matt also a debtor and so set-off may apply. Also timing of any payments made by Matt.

QUESTION 4

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

Two possible actions – against the directors and against the bank

Consider s176ZA - litigation expenses do not have priority over the claims secured by a floating charge assets unless and until approved or authorised under R 4.218B to 4.218E, IR 86.

“Litigation expenses” are expenses, in excess of the aggregate of £5,000, properly chargeable or incurred in the preparation or conduct of any legal proceedings.

Legal proceedings include proceedings brought by a liquidator under sections 212 (delinquent directors etc), 213 (fraudulent trading), 214 (wrongful trading), 238 (transactions at an undervalue), 239 (preferences), 244 (extortionate credit transactions) and 423 (transactions defrauding creditors) of the IA 86.

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

If the liquidator considers that litigation expenses will have to be paid out of floating charge assets, he must provide the floating charge holder and others affected – ie the preferential creditors - with prescribed information (Form 4.74) and seek approval to the amount of the expenses.

Failure by the liquidator to include any prescribed information will result in the request for approval being treated as not having been made. Where the disclosure of any information could be seriously prejudicial to the company's winding up, the liquidator may exclude that information and include a statement to that effect. Alternatively, the liquidator may include the information on terms that it must be kept confidential and that so much of the information as may be kept in court files will not be open to public inspection.

A recipient of a Form 4.74 is required to reply within 28 days of the date of receipt. If the recipient fails to respond at all, or fails to do so after the liquidator has provided at the recipient's request such further particulars as are reasonable, the request for approval will be taken to have been approved on the expiry of the specified time limit. A similar procedure applies where amounts payable to preferential creditors may be reduced by litigation expenses. If there are two or more preferential creditors, approval is taken to be given where the majority in value of those who respond within the time limit approve the specified amount (or a different amount which the liquidator considers sufficient).

The floating charge holder must reply within 28 days of the date of receipt of Form 4.74. If the recipient fails to respond at all, or fails to do so after the liquidator has provided at the recipient's request such further particulars as are reasonable, the request for approval will be taken to have been approved on the expiry of the specified time limit.

A similar procedure applies where amounts payable to preferential creditors may be reduced by litigation expenses. If there are two or more preferential creditors, approval is taken to be given where the majority in value of those who respond within the time limit approve the specified amount (or a different amount which the liquidator considers sufficient).

A similar procedure applies where amounts payable to preferential creditors may be reduced by litigation expenses. If there are two or more preferential creditors, approval is taken to be given where the majority in value of those who respond within the time limit approve the specified amount (or a different amount which the liquidator considers sufficient).

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

In the case of the action against the floating charge holder the liquidator may apply to court for approval of the expenses of litigation.

Consult with liquidation committee, if there is one.

Consider negotiating with the directors.

Consider costs/benefits of taking action.

(b) (i) Set out, with reasons what funds the Liquidator may recover for the benefit of creditors. (12 marks)

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

May be able to recover payments made to creditors at 30.4.09 of £25,000

May be able to recover the directors' loan repayment, £3,000, – if not under s127, as a preference

Before taking any action against the directors, the liquidator should consider whether they have sufficient assets and/or insurance with which to pay any claims.

Can claim £1,000 from High Court Enforcement Officer. A creditor is not entitled to the proceeds of sale unless both seizure and sale were effected before the commencement of the winding up. (s183). In this case they occurred between dates of petition and order.

Landlord

Note Any distraint made after the date of the petition is void (s128), but a distraint may be made after the commencement of a winding up for rent accruing after that time, if the court gives leave. There is no indication here that the court has given leave.

Note S176 (the preferential creditors' priority is retained over any distraint in the 3 months before a winding up order (but only insofar as the other assets are insufficient to meet the preferential claims)) does not apply in the circumstances described. the preferential creditors' priority is retained over any distraint in the 3 months before a winding up order (but only insofar as the other assets are insufficient to meet the preferential claims)

Assuming liquidator realises assets as per Statement of Affairs:

Tools & equipment	£42,000
Motor vehicle	£ 5,000
Receivables	£23,000
Stock	£10,000
Total	£80,000
Add s127 recoveries (25,000 + 3,000) =	28,000
Funds from HC Enforcement Officer =	1,000
Total	£109,000

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

Logical presentation required.			
Funds available to liquidator			£109,000
Costs of liquidation (per question)			(9,060)
Available for preferential creditors			99,040
Less preferential creditors (employees per question)			(11,000)
Net property (s176A)			88,940
Prescribed part			
50% x £10,000	5,000		
Plus (88,940 – 5,000) x 20 % -	16,788		
Prescribed part available to unsecured creditors – but not to Villagetown Bank on its shortfall under its floating charge		21,788	
Funds available to floating charge holder			<u>67,152</u>
Villagetown Bank			(120,000)
Shortfall to Villagetown Bank c/d			(52,848)
Unsecured Creditors – per statement of affairs	(75,000)		
- add creditor instructing High Court Enforcement Officer	(1,000)		
- add voidable dispositions	(28,000)		
- add landlord – assume not included in unsecured creditors	(25,000)		
Total unsecured creditors, excluding shortfall to floating charge holder	(129,000)		
Prescribed part b/d	21,788		
Shortfall to unsecured creditors excluding shortfall to floating chargeholder	(107,212)		
Shortfall to floating charge holder b/d	(52,848)		
Total shortfall to creditors	(160,060)		

PERSONAL INSOLVENCY NOVEMBER 2009

EXAMINER'S REPORT

EXAMINATION MARKING PLANS

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

GENERAL

This paper sought to test candidates' knowledge using typical examples met in practice. There were some very good answers but many candidates provided a script which they appeared to have learnt by heart and therefore failed to address the facts of the question and contained extraneous material.

QUESTION 1

This question focused on the matrimonial home and, in particular, exceptional circumstances which might result in the occupiers' interests prevailing over those of the creditors. There was substantial equity, the property was jointly owned by the bankrupt and his wife, mortgage payments were for interest only, the bankrupt and his wife were divorced and there was no order in ancillary proceedings.

- (1) While most candidates recognised s283A IA86 many did not recognise the time pressures discernible from the facts of the question
- (2) Most candidates recognised that there were 'exceptional circumstances' but many struggled to explain the consequences and the solutions.
- (3) A surprisingly large number of candidates failed to note that there was sufficient equity to pay in full and therefore that annulment was a possibility for the debtor.
- (4) Some candidates wasted time discussing equitable accounting and exoneration issues notwithstanding the terms of the question.

QUESTION 2

The first part of this question asked candidates to explain how they would treat votes in a meeting of creditors to approve or reject an IVA and the second part asked them to explain how they would proceed.

The standard of the answers was rather disappointing.

- (1) Many candidates rejected the vote of a creditor who proposed an unacceptable modification rather than treating it as a rejection of the IVA.
- (2) Only one candidate understood that a secured creditor is entitled to vote (*rule 5.21 IR 86*) but that his vote is left out of the calculation of the requisite majority (*rule 5.23 IR 86*) thereby ensuring he is bound to the extent that he proves to be unsecured.
- (3) Many candidates thought that an email was acceptable.
- (4) Many candidates failed to understand that the landlord's claim was unascertained and should be valued at £1.

QUESTION 3

The first part of this question was put in general terms and asked candidates what preliminary steps should be taken following appointment as trustee in bankruptcy.

The second part of the question asked what realisations might be made and what steps needed to be taken to achieve those realisations. Two definitions recurred in many answers.

- (1) Some candidates failed to spot that the mortgage in favour of the second charge holder constituted a void disposition under *s.284 IA86*.
- (2) Notwithstanding that the bankrupt was described as an antiques dealer some candidates were keen to replace his Queen Anne chair with cheaper item under *s.308 IA86*. Given the terms of the question it was clear that the chair was business stock not “furniture...for satisfying the basic domestic needs of the bankrupt and his family” (*s.283(2)(b)IA86*). Furthermore a notice under this section would have been out of time (*s.309(1)(b)IA86*).

The third part of this question required the preparation of an estimated outcome statement. This was generally well done.

QUESTION 4

This question was generally poorly answered.

The first part asked the candidates to set out the information required to advise the debtor. Many candidates failed to consider the need for valuations of the business and of those that did few considered the desirability of obtaining going and gone concern valuations and apportionments between the lease, the contents and goodwill.

The second part asked for a discussion of the options open to the debtor and how they would affect her, her husband and the business. Many candidates took this as an invitation to display their knowledge of the different sorts of debt solution without considering the situation of the debtor. As a consequence there were many unfocussed and irrelevant answers.

It was also of some concern that no-one understood that the premises licence would be under threat if the debtor entered into a formal insolvency process. As in practice premises licences are a recurring issue which must be addressed at an early stage.

The third part of the question asked candidates to calculate provable debts. This was adequately undertaken but very few considered the landlord or the likelihood that stocks might be subject of retention of title.

PERSONAL INSOLVENCY NOVEMBER 2009

EXAMINATION MARKING PLAN

QUESTION 1

Discuss the issues arising for the parties involved and how they might be resolved.
(20 marks)

	£
House	250,000
Mortgage	<u>60,000</u>
Equity	<u>190,000</u>
50% share	<u>95,000</u>

More than enough equity to pay the one creditor in full

Is annulment an option? Yes even though Mr Beetle is discharged.

An IVA is not an option.

In the circumstances Mr Beetle may not care what happens unless he has some concern for his son

No order has been made in ancillary proceedings so

Re *Haines v Hill* [2007] BPIR 1280 does not apply to put the property beyond the reach of the Trustee.

Write to solicitors acting for the parties

Mrs Beetle is unlikely to want to move although "substantial house" may be too much for her

George's condition is such that the court

- despite general rule that the interests of the creditors outweigh all other considerations s.337(6) IA86

- may take into account George's condition

- and may not give the trustee possession but make some other order - s337(5) IA86

- particularly as the only creditor is HMRC

re *Martin Sklan v White* [2007] BPIR 76

eg Order for possession and sale made but suspended for x years

Trustee in bankruptcy

Needs to have regard to use it or lose it provisions s.283A IA86

- notice to interested parties r.6.237A

- time is tight

Payment of fees may be delayed and potentially renders no fees 283A

HMRC will want to recover its debt but is unlikely to regard the sum as material in the context of its operations

Taxpayer's conduct is important

Possible courses of action

Seek a charge over the property for a sum sufficient to pay costs and creditors in full s.313 IA86

Seek order for possession and sale but be prepared for a suspended order.

See whether agreement can be reached with Mrs Beetle where she moves voluntarily but is given time to do so.

She will need to be represented and the trustees interest protected

Fees and costs will be a problem – approach HMRC

Quality of discussion

QUESTION 2

(a) Set out how you would treat each claim to vote, giving your reasons. (15 marks)

	For	Against	Open	Comment
	£	£	£	
Dave Ltd	5,200			Valid
Ed Trading Co		8,100		Fax is acceptable - valid
Frank			700	Email is not acceptable - invalid
Gregory			9,000	Cannot vote open proxy because of r. 8.6 IR86 - invalid Also no statement of claim
Henry - landlord		1		Unascertained claim - vote for £1 unless reasons to put a higher value on claim
Imago's Bank	0			Creditor entitled to vote but as secured left out of account <i>r.5.23(3)(b)IR86</i>
Jimminy Cricket		13,500		Modification is unlikely to be acceptable therefore treat as a rejection
KC			10,000	May need a proxy depending on his status and will need a statement of claim if his vote is to count
Mr Centipede	50,000			Mr Centipede's claim is quantified and there is an reasonable basis for the costs estimate
Lacewing Ltd				Cannot vote in the absence of proxy authority from Lacewing Ltd
Mantis		3,300		Mantis vote will be valid as received before the vote
	55,200	24,901	19,700	
	55.31%	24.95%	19.74%	

(b) In the light of your answer to (a) discuss how you might proceed. (5 marks)

<p>Adjourn the meeting</p> <ul style="list-style-type: none"> - obtain instructions on open proxies - obtain statements of claim and proxies where outstanding - clarify why Ed Trading Co and Mantis are voting against and establish if there is any room for negotiation - establish whether Jimminy Cricket is prepared to withdraw his modification
--

QUESTION 3

(a) Set out what preliminary steps you should take following appointment as a Trustee in Bankruptcy. (5 marks)

- Bond the case
- Set up Insolvency Practitioners record
- Write to creditors notifying them of appointment and their right to seek a creditors' committee
- Notify bankrupt of your appointment
- Advertise appointment in the Gazette (assume new rules in place)
- Consider local advertisement
- Review Official Receiver's notes, bankrupt's questionnaire and statement of affairs and identify potential recoveries and problem areas
- Locate and secure the assets
- Land Registry search
- Obtain open cover (insurance) on the assets
- Instruct agents for valuation and selling advice
- lodge form VAT 769
- write to bankrupt's solicitors and accountants where appropriate

(b) In the form of a memorandum to Mr Grabbit set out what realisations might be made and what steps need to be taken to achieve such realisations. (17 marks)

- Lottery winnings – after acquired asset s.307 IA86
- write to Mr Papillon claiming the proceeds
 - note he should have notified the trustee s.332(2) IA86
- Collect premium bonds
- Instruct agents to deal with the boat
- Queen Anne chair
- obtain agent's valuation
 - write to Mr Worm for his paperwork supporting ROT ROT clause
 - Did it form part of the contract?
 - Can the chair be identified
 - Consider settling Mr Worm's debt if the chair's value justifies it.
- The Cocoon
- On the stated facts it is probable that Mr Scorpion's charge can be overturned on the grounds that it represents a void disposition (petition dated 29 October 2008) s.284 IA86
 - Mr Scorpion's lending may constitute an extortionate credit transaction s.343 IA86
 - send a notice under s.283A IA86 – r.6.237A
 - obtain a valuation of the property
 - obtain a redemption figure from Zbank and a copy of the mortgage
 - obtain details of Mr Scorpion's lending including amounts lent, date of lending and applicable interest rate(s)
 - obtain a copy of Mr Scorpion's purported second charge
- Form of memorandum and quality of discussion

- (c) Prepare an estimated outcome statement making such assumptions as appear to be necessary. (8 marks)

Andrew Papillon			
Estimated Outcome Statement			
	Notes	£	£
<i>Realisations</i>			
The Cocoon	1	400,000	
less mortgage		<u>290,000</u>	
			110,000
Boat			3,500
Premium bonds			150
Queen Anne Chair	2	5,000	
Mr Worm		<u>2,300</u>	
			2,700
Lottery winnings	3		250,000
Creditor's deposit			400
			<u>366,750</u>
<i>Expenses</i>			
Secretary of state fee	4		62,008
OR's admin fee	5		1,715
Trustee's fees	6		15,000
Trustee's costs			1,000
Agents fees - The Cocoon	7		8,000
Agent's fees - boat and chair			1,275
Solicitor's fees - The Cocoon	8		7,000
Solicitor's fees - lottery winnings			5,000
Petitioning creditors costs	9		2,000
			<u>102,998</u>
Available for creditors			<u>263,753</u>
HMRC		425,000	
Mr Scorpion	10	<u>120,000</u>	
			<u>545,000</u>
Dividend	11		<u>£0.48</u>

Notes

1. Realisation from the house should show only first charge
2. Proceeds from the sale of the Queen Anne chair should be included but Mr Worm's debt may be shown as unsecured
3. Lottery winnings should be shown as an after-acquired asset.
4. Secretary of state fee at 17% on realisations in excess of £2000
5. OR admin fee as laid down in the regulation
6. Trustee's fees estimated
7. Agents fees estimated at 2% of property sale and 15% of chattels
8. Solicitors fees estimated
9. Petitioning creditors costs estimated
10. It is assumed that Mr Scorpion's debt survives but without accrued interest
11. Dividend amount will depend upon treatment of creditors' claims'

QUESTION 4

(a) Set out a schedule of information that you would require in order to advise Mrs Ant properly. (7 marks)

Valuation of business on going and gone concern bases showing allocation between goodwill, lease, contents and stock
Copy of the lease to assess terms and duration – is it assignable?
Details of any deposit made with the landlord
Accounts of the business
Profit and cash forecasts/ business plan
Details of any secured creditors eg Zbank and the brewery
Copy of the will trust
Accounts and valuation of the will trust
Details of Mr Ant's domestic income and monthly expenditure
Details of Mrs Ant's pension fund – any lump sum
Details of any antecedent transactions

(b) Discuss the range of options open to Mrs Ant, the advantages and disadvantages of each option and the effects of implementing those options on her, her husband and her business. (16 marks)

Mrs Ant's creditors total £84,906
Mr Ant's creditors total £16,100
The values of Mrs Ant's assets are unknown
Mr Ant appears to have no assets
Premises licence will be lost if there is a formal insolvency unless it is transferred within 7 days of the relevant date.
Termite Tavern is likely to be Mrs Ant's home
Option 1- Informal arrangement with creditors - remaining in pub
Would avoid formal insolvency but would need agreement from all creditors and sustainable contributions.
Will trust might be a source of funds.
Cheaper than formal insolvency
Probably a non-starter particularly given HMRC attitude.
If HMRC were to remove the content of the pub it would cease trading.
Option 2 – Informal arrangement with creditors - selling pub
Loss of job and home but might be possible to keep creditors at bay while a sale is achieved.
Probably the cheapest option.
Depending on values could end with some funds remaining.
Option 3 – IVA – remaining in pub
Will require contributions from earnings – depends upon forecasts – probably a five year IVA
Would retain home and business
Might retain benefit of the will trust
Would need to make arrangements to protect the premises licence
Interim order would offer shelter from HMRC threatened action.
Option 4 – IVA – sell pub
Lump sum settlement with creditors – depends on values – may all go to secured creditors – may settle creditors in full. Will trust may help.
Would need to make arrangements to protect the premises licence
Interim order would offer shelter from HMRC threatened action and proposal would buy time generally.
Option 5 – Bankruptcy
May be insufficient values in the pub lease and the will trust to avoid bankruptcy. Main problems loss of home and work. Premises licence also a potential problem.
Solution may be to approach brewery – transfer licence and seek to act as managers for the brewery.
Bankruptcy does not prevent an individual from being a Designated Premises Supervisor.
Mrs Ant retains her pension fund
Most creditors will be written off although unpaid fines will survive bankruptcy
General quality of discussion

- (c) On the assumption that a Bankruptcy petition was issued on 28 September 2009 and a Bankruptcy Order was made on 20 October 2009, calculate Mrs Ant's provable debts as at 4 November 2009. You should explain how you have arrived at your calculation. (7 marks)

Mrs Ant		Notes	£
Provable debts			
Credit cards			25,300
Loan from Ybank	Joint and several liability	1	9,300
Loan from will trust	Assumed to be set off against the value of the trust	2	0
Parking fines	not provable	3	0
HMRC			7,600
Zbank	Assumed to be unsecured	4	9,200
Brewery loan	Assumed to be secured	4	0
Brewery supplies			3,200
Other trade creditors			2,500
Belgian Beers Direct		5	1,556
			58,656

Notes

1. Needs to show whole debt and explain joint and several
2. In effect a loan to herself. Trust likely to be of greater value.
3. Parking fines are not provable *r. 12.3 (2) IR86*
4. Security ought to be considered and commented upon with regards to these two debts.
5. Convert at 70p
6. Unsecured creditors may be reduced by valid retention of title claims
7. Any liabilities to the landlord will be included in the bankruptcy debts