

**JOINT INSOLVENCY EXAMINATION BOARD  
NOVEMBER 2011 EXAM (SCOTLAND)  
EXAMINERS' REPORT AND MARKING PLANS**

**GENERAL NOTE**

Some candidates wasted time and lost marks by perpetuating bad habits to which attention has been drawn in the past. No marks are awarded for copying out extracts from the question. Time is wasted by candidates by not planning their answers: extra marks are not awarded for making the same point twice. The quality of handwriting remains an issue: if something cannot be read no marks can be awarded. Finally, some candidates waste time by underlining what they consider key points. Some of the underlining is so carelessly done that it comes perilously close to deleting the answer, therefore running the risk that marks are lost.

**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.

**LIQUIDATIONS (SCOTLAND)**

**NOVEMBER 2011**

**EXAMINER'S REPORT**

**GENERAL NOTE**

19 Candidates sat the exam. Candidates need to read the question and try to address the issues raised. Some candidates appear to have time problems and generally this is caused by the writing of extensive narrative beyond what is being sought. Candidates need to ensure that they fully answer individual questions and whilst it is important that the thinking process behind the answers is demonstrated the provision of extraneous material, particularly regurgitation of legislation, is unlikely to add to the marks obtained.

**QUESTION 1**

- (a) Prepare a statement of affairs of the Society as at 31 October 2011, making and explaining any commercially realistic assumptions. (14 marks)**
- (b) Prepare a Surplus/Deficiency Account for the Society as at 31 October 2011. (4 marks)**
- (c) Set out the advice that you would give to the Society's management board on the practical issues for dealing with the assets and liabilities before any solvent winding up. (4 marks)**
- (d) Set out the problems that a Liquidator would expect to encounter if making a distribution to the Society's members and set out what remedies are available. (3 marks)**

**(25 marks)**

Question 1 was split into four distinct areas. The first, and the section with the greatest marks, dealt with the preparation of a Statement of Affairs. There was no large variance in the marks but candidates who lay out the answer properly will always attract greater marks. Many candidates had good supporting notes but layout was a problem to most.

The second part asked for the preparation of a surplus/deficiency account. Candidates were again generally adequate as regards their answers. The third part dealing with advice was poorly answered with candidates missing the basic point that they were dealing with a Society rather than a limited company. The final part dealt with potential problems and remedies and was poorly answered. Most candidates discussed creditor issues and failed to think laterally and answer in relation to the question asked.

## **QUESTION 2**

- (a) Set out the legal and practical steps that a Liquidator should take during the first week of a Liquidation that follows an Administration, whether or not the Liquidator was the previous Administrator. (6 marks)**
- (b)**
- (i) For each of the items 1) to 5) listed above, set out the issues that the Liquidator should consider and state with reasons what steps he should take. (15 marks)**
- (ii) Calculate and explain the amount that is available for a dividend to creditors. (4 marks)** **(25 marks)**

Question 2 was split into two separate parts with the first requiring candidates to set out legal and practical steps in the first week of a liquidation following on an administration. This was well answered by the vast majority of candidates. The second part, worth 15 marks, had been divided into 5 issues and candidates were asked to set out issues and state with reasons what steps should be taken. Again this was well answered by the majority of candidates. The final part, worth 4 marks, asked for a calculation of dividend and explanation. Again a high percentage of candidates answered this well. Curiously more than one candidate attempted to produce a deficiency statement which was not a requirement of the question.

## **QUESTION 3**

- (a) Set out the steps that Unhappy Limited may take to remove Tom from office as Liquidator of ZeeBee Limited and what Tom should do when faced with this challenge. (12 marks)**
- (b) Set out the steps that Dick should take to resign as Liquidator of the companies to which he is appointed and set out his responsibilities following his resignations. (8 marks)**
- (c) Set out steps that need to be taken to deal with the vacancies of Liquidator occurring as a result of Harry's death. (5 marks)** **(25 marks)**

Question 3 which dealt with how to deal with unhappy creditors, resignation and death of the Liquidator. The question was fairly well answered by the majority of candidates. The question primarily tested candidates' ability to discuss the relevant sections of the Act and Rules in different scenarios.

#### QUESTION 4

- (a) Set out the procedure for calling, and the agenda for, a creditors' meeting in these circumstances. (10 marks)
- (b) Set out how you, as Liquidator, may recover funds in this Liquidation. Explain any potential problems and how they may be overcome. (15 marks)

(25 marks)

**NOTE: Ignore corporation tax**

Question 4 was a two part question. The first dealt with the convening of a meeting of creditors in a particular set of circumstances and the second with recovery of funds. The first section achieved relatively high marks, which is perhaps not unexpected, given this is a core part of liquidation work. Candidates struggled slightly with the second section, with some very good and some very poor scores. The candidates who scored poorly tended not to answer the question which asked for how recovery could be made in this liquidation, but generalised with answers which were totally unrelated to the scenario in question.

## LIQUIDATIONS

NOVEMBER 2011

### EXAMINATION MARKING PLAN

#### QUESTION 1

- (a) Prepare a statement of affairs of the Society as at 31 October 2011, making and explaining any commercially realistic assumptions. (14 marks)

#### Statement of Affairs as at 31 October 2011

Presentation/layout

	Book value	Estimated to realise	
	£	£	£
<b>Assets specifically pledged</b>			
Wooden Village Football Club Rainy Day Fund	75,000	75,000	
Less due to Administrator	(75,000)	(75,000)	0
Cash at bank and in till	9,000		
Less due to raffle winner	(400)		
Less due to local hospital	(1,600)		
c/d to assets not specifically pledged		<u>7,000</u>	
<b>Assets subject to hire purchase</b>			
Coffee machine subject to hire purchase	1,200	100	
Less due to hire purchase company	(1,200)	(1,200)	
Surplus/shortfall to hire purchase company c/d – included in creditors	0	<u>(1,100)</u>	
<b>Assets not specifically pledged</b>			
Investment in Wooden Village Football Club Ltd	120,000	0	
<b>Debtors</b>			
– Freda* (no set off on amount due from Freda against her wages)	100	100	
– ERA 1996)			
- Games Galore Ltd	1,000	1,000	
- insurance prepayment – (may not be recovered in full, candidates should state reasonable assumptions)	900	900	
<b>Memorabilia collection</b>			
– photos and frames	600	1,200	
– display case	400	40	
– football boots (say)	0	500,000	
<b>Fixtures and fittings</b>			
Bar and associated fittings (this is subject to ROT but the ROT creditor likely to fail because bar is attached to building; Administrator unlikely to offer anything to Society for the bar, candidates should state reasonable assumptions)	12,000	0	
Remaining fixtures and fittings:	7,800	780	
Casks, etc 1,000			
Glasses, 800			
Tables and seating 3,000			
Glass washer and fridge (3,000 – 1,200 = 1,800)			
Wide screen TV, 1,200 (say 10% of BV)			

Stocks			
- bar (brewery may give some credit for returned unopened stock, but bar stock is likely to be subject to ROT, candidates should state reasonable assumptions)	5,000	4,000	
- other	7,000	0	
Wooden Building Society Deposit	4,000	4,000	
Cash at bank and in till b/d	7,000	7,000	519,020
<b>Estimated total assets available for preferential creditors</b>			
Preferential creditors – unpaid wages – Freda* (Freda may also be due redundancy and holiday pay – not enough information in the question but candidates may make reasonable assumptions) nb no set off of wages due to Freda and what she owes unless Freda agrees	(500)	(500)	
<b>Estimated surplus as regards preferential creditors</b>			518,520
<b>Estimated total assets available for unsecured creditors</b>			
Other creditors	(30,000)		
Add back pref creditor	500		
Accruals ( <i>include because estimate of what will be owed to actual creditor</i> )	(3,000)		
Additional amount due to Satellite TV Co Ltd under contract (7 months x £1,300)	(9,100)		
Decrease in shortfall to HP company b/d	100		<u>(41,500)</u>
Estimated surplus/(deficiency) as regards creditors			<u>477,020</u>
Issued and called up share capital	(12,000)		
<b>Estimated surplus/(deficiency) as regards members</b>			465,020

**(b) Prepare a Surplus/Deficiency Account for the Society as at 31 October 2011. (4 marks)**

1(b) Surplus Account as at 31 October 2011			
Accumulated surplus at 31 October 2011		199,000	
W/o of Wooden Village FC shares	(120,000)		
Rainy day fund due to Administrator	(75,000)		
Cash due to raffle winner and hospital	(2,000)		
Increase in value of photos and frames	600		
Decrease in value of display case	(360)		
Increase in value of football boots	500,000		
Decrease in value of bar	(12,000)		
Decrease in value of coffee machine subject to HP	(1,100)		
Decrease in value of remaining fixtures and fittings	(7,020)		
Decrease in value of stocks	(8,000)		
Adjustments to creditors			
Increase in TV Satellite creditor	(9,100)		
		266,020	
<i>Nb no balancing figure</i>			
		465,020	
Deficiency per statement of affairs		465,020	

**(c) Set out the advice that you would give to the Society's management board on the practical issues for dealing with the assets and liabilities before any solvent winding up. (4 marks)**

- implications to directors re declaration of solvency IA 1986 s89
- solvency here depends upon sale of football boots for high price . The Society should auction these before liquidation to ensure that good price is obtained, or at least obtain professional advice on their value, otherwise Society may be insolvent. Important to obtain fair value for all assets.
- practicalities of dealing with assets and creditors before liquidation, may be more cost effective

**(d) Set out the problems that a Liquidator would expect to encounter if making a distribution to the Society's members and set out what remedies are available. (3 marks)**

- A problem here seems to be not having names and addresses of all of members – discussion. Include looking at Society's rules. Last resort may be to seek court directions.
- timing of any distribution
  - note problem re unclaimed dividends, cannot be sent to unclaimed divi account, as Industrial and Provident Societies are registered by the FSA. It will be necessary to look at the Society's rules.
  - consider if it is possible to change Society's rules before entering procedure
  - consider alternative to MVL eg scheme of arrangement, would need to look at Society's rules

## QUESTION 2

**(a) Set out the legal and practical steps that a Liquidator should take during the first week of a Liquidation that follows an Administration, whether or not the Liquidator was the previous Administrator. (6 marks)**

- ethical check
- check date of appointment, i.e. date of registration, at Companies House, of notice of move from administration to liquidation (Form 2.25B)
- advertise appointment in Gazette within 14 days (s109) and may also advertise in manner thinks fit
- ensure any assets/company bank accounts transferred from administrator to liquidator
- ensure that there is a liquidation committee. The administration committee becomes the liquidation committee but if there is no committee take steps to form one (ie call meeting of creditors to vote for one) See Rule 4.61.
- if liquidator not previous administrator, he should check to ensure that the committee in administration was properly authorised and constituted
- committee is suspended until liquidator issues certificate of constitution under R4.63
- need to ensure that liquidator has sufficient powers to do what is necessary to carry out the liquidation may need to call committee (or if none, creditors') meeting
- need to ensure that liquidator can take proper remuneration:  
The liquidation committee can approve the liquidator's remuneration and in their absence the liquidator will require to seek the appointment of a court reporter to have his remuneration approved.
- 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, although if he was not the previous administrator he may wish to do so.
- 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)
- ensure adequate insurance in place;
- open IP record;
- if applicable, send s120 notices to Pensions Regulator, Pension Protection Fund and trustees of relevant pension scheme(s);
- notify HMRC on Form VAT 769 of insolvency details

**(b) i. For each of the items 1 to 5 listed above, set out the issues that the Liquidator should consider and state with reasons what steps he should take. (15 marks)**

i. No set off. Liquidation was immediately preceded by Administration and £150,000 became due during the Administration.

ii RCP Ltd: no set off

Although the bank account was in RCP Ltd's name, the Company contractually agreed the position. This agreement requires to be examined but on the basis of present information the monies held are, therefore, trust monies and should be handed to the Liquidator.

Discussion.

iii Happysavers Plc.

Company should take recovery action for all of debt.

(per Globespan administrators successfully seeking administration of E-Clear)

Happysavers Plc may have to repay clients who have not taken holidays through no fault of the client.

Whether the Company is liable for this depends upon the terms with Happysaver Plc.

Discussion.

iv Spanish bank account.– exchange rate will be actual date of converting currency. Assume today's date £1 = Euros1.25;

bank charges likely to be expense of administration (assume standard charges) and so not recoverable from bank.

v Holiday club – nb ABTA/ATOL not relevant as no holidays had been booked.

Holiday Club members who have paid money to the Club and have not received a holiday, will become creditors of the Company. The funds have been paid into the Company's overdrawn bank account.

Discussion:

Liquidator would need to look at terms and conditions of payments. It is likely that there is a contractual relationship between the Company and the Club members: no Quist close type trust (although in the question the directors had not attempted to set up a trust as in *Re Farepack Food & Gifts Ltd* [2006] EWHC 3272

- Express trust – certainty of words, subject matter and objects – re *Kayford* [1975] 1WLR 279. Probably not present here.

The Liquidator should consider whether:

- the directors are guilty of misfeasance because they failed to protect the monies;
- to include these circumstances in any D reports.

**(b) ii. Calculate and explain the amount that is available for a dividend to creditors. (4 marks)**

Opening balance of funds (transferred from administrator)	£300,000
Add: due from HMRC (VAT repayment)	£150,000
Add: due from RCP Ltd	£200,000
Add: due from Happyservices Ltd (90% x £870,000)	£783,000
Spanish bank account: 145,000/1.2 (to nearest hundred)	£128,300
Available for dividend, before Liquidator's costs	£1,561,300

### QUESTION 3

(a) **Set out the steps that the Unhappy Ltd may take to remove Tom from office as Liquidator of ZeeBee Ltd and what Tom should do when faced with this challenge. (12 marks)**

Tom could try to meet with the solicitors and/or the directors Unhappy Ltd to discuss their concerns and to see if he can address the issues without the need to remove him from office.  
The creditor will be aware of Tom's rpb (it will be on the correspondence).

Steps creditor needs to take to remove Tom from office:

Either creditor can

- Report Tom to his rpb (which may withdraw his authorisation as an insolvency practitioner or impose some other sanction(s))
- requisition a meeting of creditors
- can apply to court to have liquidator removed

RPB

If Tom is reported to his rpb he will need to explain his conduct to it.

Requisition creditors' meeting S171(2)(b)

(NB members and contributories have no vote even if liquidator was appointed by them in CVL);

R4.23(1) – meeting must be requisitioned by at least 25% of creditors by value – so creditor must hold this amount or obtain support of those who do

NB 25% excludes those connected to company (directors/shadow directors and their associates, parent/sub/associated company, anyone controlling voting of company; employees (s249(b, s435))

Liquidator can require those requisitioning meeting to deposit funds as security for summoning and holding meeting R7.6(4)

Notice of meeting must state the purpose and draw attention to s174(4)(a) or (b) re liquidator's release.

Requisition must include list of those concurring with the request and amounts of their claims R7.6(2)

If liquidator fails to requisition meeting, creditors can apply to court. R4.26.

Chairman of meeting sends certificate of removal to new liquidator who sends it to the court and the accountant in bankruptcy.

Tom should explain his actions to the meeting.

Application to court

S171(2)

R4.26 Applicant requires to provide in the period at least 14 days prior to the hearing a copy of the application and any evidence to the liquidator.

- court may require a deposit or security for costs

Grounds for removal may include:

- conflict of interests;
- where continuation in office is impractical
- insistence on acting against creditors' wishes
- failure to discharge duties properly
- ill health

In the circumstances of the question, Tom should be given the opportunity to explain his conduct to the court.

If court orders removal of liquidator – court will send him two copies of the order and he sends one to the Accountant in Bankruptcy with notice of ceasing to act. Liquidator must apply to accountant of court for release.



**(b) Set out the steps that Dick should take to resign as Liquidator of the companies to which he is appointed and set out his responsibilities following his resignations. (8 marks)**

Note – for joint appointments, if there is a surviving joint appointee, Dick could resign and leave existing joint appointee in office.

As Dick has to make an application to transfer his sole appointments, it is probably more cost effective to include all appointments in a block transfer application.

Dick may apply to court for block transfer order S74.32A of the Act of Sederunt (Rules of Court of Session 1996).

It is likely that application for a block transfer order will be cheaper and easier than resigning from each appointment.

The court application would usually include the following:

- a schedule setting out: the name of each case; the court with jurisdiction; the case number (if any); and the capacity in which the outgoing office holder was appointed.
- Evidence setting out the circumstances of it being expedient to appoint a replacement office holder and written consent to act of each person who is proposed to be appointed as replacement office holder.

A report with receipts and payments is to be submitted to the creditors' meeting to receive the liquidator's resignation

Rule 4.28(2).

Rule 4.26(5) (procedure on removal of liquidator) there is a requirement for the documents in question to be filed with the Accountant in Bankruptcy.

Dick should ensure an orderly transfer of case files to the succeeding office holder.

Alternatively: resignations from each office:

MVL – s92 Vacancy in office of Liquidator, company in general meeting may fill the vacancy

CVL – s 104 Vacancy in office of Liquidator, creditors may fill the vacancy.

Compulsory – s172 By order of the Court or a general meeting of the company's creditors.

As a small practice consider whether there was any succession planning – Succession Planning Guidance.

**(c) Set out steps, if any, that need to be taken consequent upon the vacancies of Liquidator occurring as a result of Harry's death. (5 marks)**

Deceased office-holders

Death of liquidator:

The most appropriate and cost effective method may be to apply to court for block transfer order. Notice of death to Registrar of Companies (Form 4.18 (Scot)) Rule 4.36. Release from time notice given to the court.

MVL – s92 Vacancy in office of Liquidator, company in general meeting may fill the vacancy

NB if joint appointment, does not need to be a general meeting?

CVL – s 104 Vacancy in office of Liquidator, creditors may fill the vacancy.

Nb if joint appointment, does not need to be a creditors' meeting?

Compulsory – s174 Vacancy in office of Liquidator, creditors may fill the vacancy.

MVL – Notice must be given to the directors, or any one of them, and to the Registrar of Companies Form 4.18(Scot). Rule 4.36 as amended.

CVL – Notice must be given to the liquidation committee or any member thereof, and to the Registrar of Companies using form 4.18(Scot). Rule 4.36.

Liquidator's release is obtained when Registrar receives notice s173(2)

Compulsory – Notice must be given to the court and to the Registrar of Companies using form 4.18(Scot). Rule 4.36.

Liquidator's release is obtained when Registrar receives notice s173(2)

As a small practice consider whether there was any succession planning – Succession Planning Guidance.

**4(a) Set out the procedure for calling, and the agenda for, a creditors' meeting in these circumstances. State any alternative that you, as Liquidator, have for establishing the wishes of the creditors and set out the procedure. (10 marks)**

Procedure for calling a creditors' meeting in a compulsory liquidation: S138 IA 1986  
Note that Interim Liquidator may advertise meeting if court permits. 4.18(4)(b).  
As soon as practical in the period of 28 days beginning with the day on which the winding up order is granted, or such longer period as the court may allow, summon the creditors' meeting.  
Minimum notice period for meetings is 14 days.  
Resolutions may be by correspondence  
No meeting of contributories is required if the company is being wound up due to an inability to pay debts. S138(4).  
If no person is nominated at a meeting of creditors the Interim Liquidator shall advise the court accordingly and the court will appoint the Interim Liquidator or some other person to be Liquidator.  
Liquidation committee – section 142. If no committee the functions are exercised by the Court;

Rules 7.2 and 7.3: meetings

- notice to all creditors
- 14 days notice, specifying purpose
- persons entitled to attend and vote
- purpose, venue, time and date creditors to lodge proxies and unlodged proofs in order to be entitled to vote at meeting.

R7.5(1) Chairman  
S157 and Rule 4.14(Scot) – Attendance at meetings of company's personnel.  
R7.2(1)(Scot) – Venue  
R7.2(2)(Scot) hold between 10.00 and 16.00  
R4.12(Scot) – Resolutions at first meeting

Restriction on what resolutions can be passed at S138 meeting. Rule 7.12(Scot)  
But Liquidation Committee must be formed by general meeting of creditors s142(1)  
Effect of Rule 7.12(4), resolution affecting a person in respect of his remuneration or conduct.

Agenda:

- appoint Liquidator
- establish Liquidation Committee (and explain function of committee to help creditors' decide);
- and, if not established

to determine method by which Liquidator's remuneration to be established.  
Note: may also ask creditors at the meeting for information.

**(b) Set out how you, as Liquidator, may recover funds in this Liquidation. Explain any potential problems and how they may be overcome. (15 marks)**

Before commencing any investigations it is worth considering:

- are the directors sufficiently asset rich to make any recovering actions worthwhile? Need to make enquiries. Note that Peter has gambling debts.
- Consider who are directors, is Mr Big a shadow director?  
Liquidator would need to consider/investigate the following (and for each of these, whether or not they are applicable and why, relating the explanation to the circumstances of the question):
- s214, wrongful trading
- s212, misfeasance
- s242, gratuitous alienations
- s243, unfair preferences
- s206,207 transactions defrauding creditors
- Peter's and Quentin's loan accounts: consider Companies Act 2006, validity of loan and gratuitous alienations s242, transaction at undervalue s238, misfeasance s213.
- Consider whether the dividend was illegal. Need to know whether or not made from distributable profits

- validity of intercompany charge (existing debt) and previous charges, including charges for Mr Big's time and use by Dopey Ltd of Company's lorries

Generally, s234, 235, s236 – discussion

- reuse of company name, s 216/217: directors potentially responsible for all of Company's debts since Sorry Ltd went into Liquidation in 2008.

Consider generally directors' responsibilities under the CA2006 and whether any breach may result in recovering funds.

- accounting records, were they up-to-date if software licence expired pre-liquidation? Consider misfeasance if directors did not maintain in accordance with CA 2006.

Problems/issues include: need to obtain sanction of committee/creditors for pursuing actions;

Consider generally directors' responsibilities under the CA2006 and whether any breach may result in recovering funds.

- accounting records, were they up-to-date if software licence expired pre-liquidation? Consider misfeasance if directors did not maintain in accordance with CA 2006.

Before commencing any investigations it is worth considering:

- are the directors sufficiently asset rich to make any recovering actions worthwhile? Need to make enquiries. Note that Peter has gambling debts.

Consider who are directors, is Mr Big a shadow director?

Consider how finance any litigation. Consider, conditional fee arrangement, what about any adverse costs?

## ADMINISTRATIONS, COMPANY VOLUNTARY ARRANGEMENTS and RECEIVERSHIPS (SCOTLAND)

NOVEMBER 2011

### 2011 EXAMINER'S REPORT

#### QUESTION 1 – BLUEFIN PRODUCTS LIMITED

**Stating appropriate assumptions, prepare a schedule summarising for this case the minimum information that Insolvency Practitioners are required to maintain. (25 marks)**

This question was designed to test candidate's knowledge of requirements under the Insolvency Practitioners Regulations 2005, specifically the minimum information required under Regulation 13 and in doing so also the Security or Caution requirements under Regulation 12.

In general this question was well answered by those candidates who identified that the question required a Regulation 13 Record to be prepared. Weaknesses in answers were around the areas of the distinction between Returns and Reports under the Company Director Disqualification Act; the calculation of bonding and the bond submission requirements; and incorrect treatment of VAT.

A significant number of candidates however failed to demonstrate an understanding of the minimum record requirements, with many simply listing everything that you might expect to find on a case file.

#### QUESTION 2 – TWISOFT LIMITED

**(a) Briefly outline the formal options that the Bank has under its security arrangements to recover its debt. Summarise the comparative financial outcome for the Bank of each option. (15 marks)**

**(b) Set out the key advantages and disadvantages to the Bank of each of its options. (10 marks)**

This question required candidates to demonstrate their knowledge and practical ability to provide advice to a secured lender and demonstrate the financial outcome to the secured lender under each of the options.

Part (a) was not well answered with the majority of candidates failing to demonstrate their knowledge of all formal options that the bank has under its security arrangements. Few of the candidates mentioned formal options that the bank has other than the appointment of an Administrator or Receiver. The question also required a demonstration of the financial outcome under each of the options for the Bank. While it was encouraging that a good understanding of the differences in financial treatment between the options identified was evident, it was disappointing that candidates were unable to modify an Estimated Outcome Statement layout to clearly demonstrate the financial outcome for the Bank as opposed to creditors generally.

Part (b) was well answered with knowledge of the main advantages and disadvantages of each of the options identified by the candidates being demonstrated.

### **QUESTION 3 – SNAX BISCUITS LIMITED**

**For each matter outlined in (i) to (vi) explain what steps the Supervisor may take to deal with each situation. (15 marks)**

This question required candidates to demonstrate their knowledge of legislation together with understanding and practical implementation of CVAs. The question was very poorly answered with all candidates in Scotland scoring lower than 30% overall for this question.

Candidates failed to demonstrate an understanding of the underlying nature of CVAs, the impact of Proposals which are approved and the powers or remedies which are available to Supervisors. Little was demonstrated in the way of understanding of pre and post CVA assets and liabilities. In relation to fees, knowledge of SIP9 was demonstrated well however this did not attract marks as there is a specific Rule in the Insolvency (Scotland) Rules 1986 which deals with requests for information in respect of time spent on a case in CVAs.

**Explain generally what options could be considered to facilitate the investment and any issues likely to arise in the particular circumstances of this case. (10 marks)**

The second part of the question was designed to test candidate's ability to consider theoretical options together with the practical and commercial implications of these in relation to the specific circumstances of this case.

Again this was exceptionally poorly answered with very few options being considered by candidates and virtually no attempts made to link back any options to the specific circumstances of the case in question. A number of candidates went into significant detail of SIP16 issues, again which did not attract marks as this would not be relevant in this case.

### **QUESTION 4 – CLOWDER PRODUCTS LIMITED**

- (a) Explain what arrangements your principal should have in place to deal with the transfer of cases in the event of his death or incapacity. (5 marks)**
- (b) Outline the procedural steps that may be undertaken to deal with the transfer of this case. (10 marks)**
- (c) Prepare a final receipts and payments account for inclusion in a final report to creditors assuming closure on 14 November 2011. (10 marks)**

This question required candidates to demonstrate an understanding of the arrangements and safeguards that an IP should have in place to deal with the transfer of cases due to incapacity or death and then apply that knowledge together with legislative provisions to the transfer of a specific case. Finally the question required candidates to demonstrate their ability to prepare a receipts and payments account.

Generally parts (a) and (b) were not well answered. While most candidates demonstrated in part (a) knowledge that an arrangement should be in place to deal with such matters, very little knowledge beyond that was evidenced. Worryingly, for both part (a) and (b) a significant number of candidates failed to demonstrate an understanding or ability to apply provisions in legislation and arrangements to the case in question. Many candidates referred to provisions which may apply to an IP within a Partnership or where a joint appointment is taken or where the IP is temporarily incapacitated. The question specifically asked about a sole practitioner, with a sole appointment and who has died. Many candidates did not demonstrate an ability to link the provisions for the transfer of Administrator appointments in the legislation to the circumstances of the original appointment in this case.

Part (c) was generally well answered with candidates demonstrating a good knowledge of Receipts and Payments Accounts and an ability to perform most of the calculations. It was disappointing however that only one candidate recognised that the Receipts and Payments Account in this case should show funds being transferred to the new appointee who will continue with the case following the death of the sole practitioner.

**ADMINISTRATIONS, COMPANY VOLUNTARY ARRANGEMENTS and RECEIVERSHIPS NOVEMBER 2011 (SCOTLAND)**

**EXAMINATION MARKING PLAN**

**QUESTION 1 – BLUEFIN PRODUCTS LIMITED**

**Stating appropriate assumptions, prepare a schedule summarising for this case the minimum information that Insolvency Practitioners are required to maintain. (25 marks)**

The name of the insolvency practitioner acting in the case. Richard Jones and Emma Carter

The identifying number or reference issued to the insolvency practitioner by a competent authority or any body recognised under section 391 of the Act. (Any appropriate reference)

The principal business address of the insolvency practitioner. Jones and Carter LLP  
14 The Square  
Leicester  
L23 1HG

The name of - (Any authorising body listed)

any body by virtue of whose rules the insolvency practitioner is entitled to practice; or

any competent authority by whom the insolvency practitioner is authorised.

The name of the person in respect of whom the insolvency practitioner is acting. Bluefin Products Limited

The type of the insolvency proceedings. Administration

***As regards the progress of the administration of the case the following details if applicable***

the date of commencement of the proceedings 13 January 2011

the date of appointment of the insolvency practitioner 13 January 2011

the date on which the appointment was notified to the Registrar of Companies; Sent within 7 days of appointment (receipt of apt document) – so before 20 January 2011

***Bonding arrangements in the case***

***As regards the arrangements for security or caution in the case***

the date of submission of the cover schedule which has the details of the specific penalty sum applicable in the case; Any date between 1 February 2011 and 19 February 2011

the amount of the specific penalty sum;	Heritable property	£1,250,000
	Less standard security holder	<u>£(750,000)</u>
		£500,000
	Debtors	£650,000
	Stock	£100,000
	P&M	£350,000
	Goodwill	£50,000
	Residual P&M	£300,000
	Financed P&M	-
		<b>£1,950,000</b>

the name of the surety or cautioner; (Any appropriate bonding company)

the date of submission to surety or cautioner of a cover schedule with any increase in the amount of the specific penalty sum;	Any date between 1 May 2011 and 19 May 2011														
the amount of any revised specific penalty sum	<table> <tr> <td>Property</td> <td>£1,000,000</td> </tr> <tr> <td>Debtors</td> <td>£(150,000)</td> </tr> <tr> <td>Stock</td> <td>£(20,000)</td> </tr> <tr> <td>Residual P&amp;M</td> <td>£250,000</td> </tr> <tr> <td>Bad debt relief</td> <td>£30,000</td> </tr> <tr> <td></td> <td>£1,110,000</td> </tr> <tr> <td>Revised bond</td> <td>£3,060,000</td> </tr> </table>	Property	£1,000,000	Debtors	£(150,000)	Stock	£(20,000)	Residual P&M	£250,000	Bad debt relief	£30,000		£1,110,000	Revised bond	£3,060,000
Property	£1,000,000														
Debtors	£(150,000)														
Stock	£(20,000)														
Residual P&M	£250,000														
Bad debt relief	£30,000														
	£1,110,000														
Revised bond	£3,060,000														
the date of submission to the surety or cautioner of details of termination of the office held by the insolvency practitioner.	Any date between 1 November 2011 and 19 November 2011														

***As regards the remuneration of the insolvency practitioner***

the basis on which the remuneration of the insolvency practitioner is to be calculated; and	Fixed fee
the date and content of any resolution of creditors in relation to the remuneration of the insolvency practitioner	15/2/11 Any appropriate wording for a fixed fee resolution
Meetings (other than any final meeting of creditors)	15 February 2011
The dates of the date of first meeting of creditors to consider an administrator's proposals;	
the dates and purposes of any subsequent meetings.	

***Disqualification of Directors***

***As regards the insolvency practitioner's duties under section 7 of the Company Directors Disqualification Act 1986[14] to report the conduct of directors***

the date a return under section 7 is due;	Within 6 months from appointment - 12 July 2011
the date a return is submitted to the Secretary of State;	[n/a D1 form is a conduct report]
the date a conduct report is submitted to the Secretary of State; and the date on which any further reports are submitted to the Secretary of State.	11 May 2011
Vacation of office etc. The following details regarding the completion of the case –	Date of final notice: 17 October 2011 Date of vacation of office:17 October 2011
the date of the final notice to, or meeting of, creditors ;	Date of release: 31 October 2011
the date that the insolvency practitioner vacates office; and	
the date of release or discharge of the	

insolvency practitioner (or if there is no final meeting of creditors, the date of the final return of receipts and payments to the Secretary of State).

**Distributions to creditors etc.**

As regards distributions -  
in relation to each payment to preferential or preferred creditors – None

the name of the person to whom the payment was made;

(ii) the date of the payment;

(iii) the amount of the payment;

in relation to each payment to unsecured creditors –

**Workings**

Claims

the name of the person to whom the payment was made;

Bigeye Limited	£3,350,000
Atlantic Gold Limited	£2,100,000
Tunny Finance Limited	£200,000
	£5,650,000

(ii) the date of the payment;

(iii) the amount of the payment; and

Realisations

From (e) above	£3,060,000
Debt collection £500k @ 5%	£(25,000)
Administrators' fees	£(35,000)
Disbursements	£(25,000)
Agent's P&M costs 10% £550k	£(55,000)
Agent's prop costs 5% £2,250k	£(112,500)
Available for distribution	£2,807,500

49.69p in the £

**Answer:**

Creditor	Date of Payment	Amount
Bigeye Ltd	26/09/11	£ 1,664,623.70
Atlantic Gold	26/09/11	£1,043,495.40
Tunny Finance	26/09/11	£ 99,380.52





## QUESTION 2 –TWISOFT LIMITED

- (a) Briefly outline the formal options that the Bank has under its security arrangements to recover its debt. Summarise the comparative financial outcome for the Bank of each option. (15 marks)

Bank has a floating charge that is likely to classify as a Qualifying Floating Charge and therefore could appoint an Administrator.

The Charge pre dates the Enterprise Act, the charges covers all of the assets and therefore the Bank could appoint a Receiver

The bank is able to call up its standard security and seek to enter into possession of the heritable property.

The bank is able to take steps to petition the court for a winding up order.

Main differences in financial impact are:

In REC the Corporation tax on a capital gain is an unsecured debt v ADM where it is payable in priority to the charge holder.

In ADM rates are payable as an expense

A REC may encounter difficulties in recovering overseas assets as receivers not recognised under cross border.

		Call up Std security	Administration	Receivership	Liquidation
<b>Realisations</b>					
Property		2,750,000	2,750,000	2,750,000	2,750,000
Other assets		-	50,000	50,000	50,000
French assets		-	35,000	35,000	35,000
Rent receivable		48,000	48,000	48,000	48,000
		<u>2,798,000</u>	<u>2,883,000</u>	<u>2,883,000</u>	<u>2,883,000</u>
<b>Costs</b>					
Capital gains tax					
Proceeds	2,750,000				
Indexed cost	<u>(650,000)</u>				
Profit	2,100,000				
Rate	<u>30%</u>				
Corp tax	<u>630,000</u>	-	(630,000)		(630,000)
Employees - qualifying liabilities					
Weekly pay	1,450				
Weeks	<u>12</u>				
Pay	17,400				
Pension					
7.5% x £300 x 12	270				
5% x £750 x 12	450				
	<u>18,120</u>	-	(18,120)	(18,120)	(18,120)
Employees - NON qualifying liabilities					
	MM	TS	C		
Weekly pay	750	400	300		
Capped weekly pay	400	400	400		
Redundancy weeks	6	-	7		
Redundancy due	<u>2,400</u>	-	<u>2,100</u>	-	(4,500)
Notice pay	Employees would work their notice			-	-
Rates				-	(24,000)
Not payable by a REC					
Amount available for bank		<u>2,798,000</u>	<u>2,210,880</u>	<u>2,864,880</u>	<u>2,206,380</u>
Unsecured creditors					
HMRC				(630,000)	(630,000)
Employees			(4,500)	(4,500)	
Rates			-	(24,000)	-

Discretion over value inserted for French assets in REC – provided appropriate assumption made.

- (b) Set out the key advantages and disadvantages to the Bank of each of its options.  
(10 marks)

**Call up Standard Security and enter into possession**

**Advantages**

Likely lower cost  
Does not require IP input only solicitors/selling agent  
Corporation tax (on capital gain) is an unsecured creditor  
Captures rent

**Disadvantages**

Only deals with heritable property  
Longer period to gain control of asset (2 months)  
Directors remain in control of company

**REC**

**Advantages**

Primary duty owed to charge holder  
Appointer will control strategy  
No statutory time limit  
Any corporation tax will be an unsecured claim  
Can be appointed whether or not the company is in liquidation  
Can be used to block an appointment of administrator  
Rates not payable

**Disadvantages:**

No moratorium  
Lack of recognition under EC Regs  
More costly than calling up and repossessing due to statutory duties  
REC often requires indemnity from the appointer  
Adverse publicity for bank  
REC has personal liability for employees' qualifying liabilities

## **ADM**

### Advantages:

Easy to appoint

Charge holder can choose who is to be IP

Recognised under EU Regs

Benefit of moratorium

Extensive statutory powers; to trade, manage and sell the business

Flexible exit routes

Viewed more favourably by the media as a rescue procedure

### Disadvantages:

Administrator's duty owed to creditors generally

Prime duty is to achieve para 3 Sch BI IA purpose which may not be consistent with Bank's objectives

12 month time limit

Corporation tax is an expense of the administration

Bank will have little/no control over administration strategy

## **LIQ**

### Advantages:

Recognised under EU Regs

### Disadvantages:

Slower appointment process

Bank will have little/no control over strategy

CT and rates become an expense of liquidation

Nominated IP could be replaced at creditor meeting

Rates payable

### QUESTION 3 – SNAX BISCUITS LIMITED

- (a) For each matter outlined in (i) to (vi) explain what steps the Supervisor may take to deal with each situation. (15 marks)

**(i) Arrears of contributions**

Check terms of the CVA to determine what constitutes default

Take actions specified in the CVA in relation to the default

Notwithstanding the terms of the CVA the Supervisor has the power to present a winding up petition.

**(ii) Repayment of loan accounts**

Check CVA to establish whether this constitutes default of the CVA

Supervisor has limited powers in respect of Preferences and other antecedent transactions

If the proposal provides for discretion request that the situation is remedied – by repayment of the monies to the company

Consider process required to place Company into Liquidation or Administration where 242 and 243 available

Common law rights also available

Take legal advice

**(iii) Unencumbered, redundant P&M**

Check CVA proposal for powers to dispose of these assets.

Take legal advice

If appropriate instruct agents to dispose of the equipment

Termination of the CVA would not break Trust clause

**(iv) Attachment**

Notify HMRC of interest in plant and machinery held on trust for CVA creditors

Post CVA debt so not bound by terms of CVA – therefore attachment likely to be valid for assets not subject to trust clause.

Consider obtaining legal advice over validity of attachment.

If Company placed into Administration moratorium would limit HMRC's ability to complete execution but would not over-ride their claim.

If Supervisor presents winding up petition then as attachment not complete HMRC would have to allow liquidator to deal with assets.

**(v) Fees**

R7.35 request must be made in writing – directors should be informed of this

Directors are entitled to this information (r7.35(2)(a))

Information must be provided within 28 days of receipt of the request

Provided request made in writing the Supervisor should provide:

the total number of hours spent on the voluntary arrangement by the relevant person whether as nominee or supervisor, or both, and any staff assigned to the voluntary arrangement during that period;

for each grade of individual so engaged, the average hourly rate at which any work carried out by individuals in that grade is charged;

the number of hours spent by each grade of staff during that period.

Information to be provided would be up to the last 6 month period of the CVA.

**(vi) Electricity supplier**

Supervisor can apply under s233 for continuation of supplies

Supplier may require personal guarantee from Supervisor

Effective date for avoiding arrears is the date of approval of the CVA and therefore current arrears do not qualify.

Consider powers under the terms of the CVA

Consider whether such costs could be paid out of the CVA estate under the terms agreed by creditors.

Duty is to CVA creditors and therefore consider benefit of applying under this provision

An administrator would be better suited to deal with such matters

- (b) Explain generally what options could be considered to facilitate the investment and any issues likely to arise in the particular circumstances of this case. (10 marks)

***Variation to existing CVA***

If the CVA proposal allows it a variation could be agreed with creditors.

This could be on the basis of a full and final settlement of the CVA debts

This would not resolve the post CVA creditor positions

***Disposal of business by Supervisor***

The CVA may give the Supervisor the power to dispose of the Company's trade and assets

Supervisor would need to take advice on to what extent this power could be exercised for post CVA assets.

Would require consent of HMRC in relation to assets subject to attachment

Additional procedure likely to be required to deal with the appropriation of funds realised

Supervisor may be at risk of liability should the transaction be challenged by a subsequently appointed administrator or liquidator

***Propose new CVA – full and final settlement***

Could bind in both existing CVA creditors and additional creditors

Could deal with attachment

Timing would be an issue due to notice periods and pending action from utilities – however new nominee could request continuation of supply.

***Administration disposal***

Administrator could be appointed quickly and therefore deal with pressing creditor enforcement.

HMRC's rights would have to be addressed through consent or application to court

***Disposal of the trade and assets by the directors***

Risk that transactions could later be challenged by a liquidator

Would require HMRC consent in relation to the assets subject to attachment

Insolvency procedure required to deal with sale proceeds

Does not deal with the CVA - would need to be terminated

***Liquidation***

Problem would be timescales

Centerbind application could be considered

Liquidator could challenge the attachment at the same time



#### QUESTION 4 – CLOWDER PRODUCTS LIMITED

- (a) Explain what arrangements your principal should have in place to deal with the transfer of cases in the event of his death or incapacity. (5 marks)

Officeholder should have a continuity plan in place to safeguard creditor and other stakeholder interests.

Arrangement with another licensed IP to take over cases

Detailed provisions to provide for:

A clear statement of the circumstances upon which the agreement would become operative;

The circumstances in which the nominated successor can decline to act

The extent and frequency of disclosure to the nominated successor of case details and financial information.

The steps to be taken by the nominated successor

Ownership of, or access to, case working papers

Access to practice records

Financial agreements

Professional indemnity insurance arrangements

Arrangements should be reviewed annually

Limited power of attorney for alternative in the event of incapacity

- (b) Outline the procedural steps that may be undertaken to deal with the transfer of this case. (10 marks)

##### ***Initial notifications***

Contact executor of the Administrator

R 2.52(1) Duty of executor to give notice to court specifying date of death

R 2.52(1) Duty of executor to give notice to registrar of companies court specifying date of death

R2.52(1A) provisions (notice by other partner in the firm) do not apply as IP was a sole practitioner.

R2.52(2) Notice of death may also be given by any person

Notice of death results in discharge from liability

Notify RPB

Notify lawyer

Notify agents

##### ***Replacement – individual***

Para 94(1) the directors may replace the administrator

Confirm willingness of alternate IP to accept appointment

Para 94(2) consent of the QFC or if withheld permission of the court

Para 95 In event of directors not taking reasonable steps or right for the court to make replacement then application can be made to court

Court application by Creditors' committee (P91)

Replacement administrator completes Form 2.1B (Scot)

Docs served on parties per any instructions in the Interlocutor

Note filed in the Court if application under P95

Is not possible to make block application for transfer of administration appointments

**Post replacement**

Notice and advertisement of the replacement appointment will be required in the same manner as the original appointment

Replacement notice and advertisement will normally be completed by replacement appointee

Deliver up records to new administrator

Send out final progress report to creditors, court and registrar of companies

Release bond

Prepare hand over note

**(c) Prepare a final receipts and payments account for inclusion in a final report to creditors assuming closure on 14 November 2011. (10 marks)**

	ETR	Note	6 months - 15/02/11 to 14/08/11	3 months - 15/08/11 to 14/11/11	Cumulative - 15/02/11 to 14/11/11
	£		£	£	£
<b>Assets specifically secured</b>					
Heritable property	350,000		-	-	-
Amounts due to	(250,000)		-	-	-
	<u>100,000</u>		<u>-</u>	<u>-</u>	<u>-</u>
<b>Assets not specifically secured</b>					
Goodwill	-		50,000	50,000	100,000
Surplus from book debts	200,000	<b>1</b>	150,000	25,000	175,000
Stock	50,000		40,000	-	40,000
Plant, equipment and motor vehicles	125,000		90,000	-	90,000
	<u>475,000</u>		<u>330,000</u>	<u>75,000</u>	<u>405,000</u>
Administrator's remuneration			(26,500)	(3,750)	(30,250)
Property holding costs			(16,250)	(8,125)	(24,375)
Legal fees			(20,000)	(10,000)	(30,000)
Amount paid to subsequent administrator				(320,375)	(320,375)
			<u>267,250</u>	<u>(267,250)</u>	<u>-</u>

Notes:

1 The Book debt surplus is made up of:

Gross collections	650,000
Less: amount due to Cover Finance	(450,000)
Less: debt collection charges	(50,000)
Amount remitted to Administrator	<u>150,000</u>

	Estimated to realise	Note
	£	
Assets specifically pledged		
Freehold property	350,000	(i)
Amounts due to Yoke Bank	<u>(250,000)</u>	
	100,000	
Assets not specifically pledged		
Surplus from book debts	200,000	(ii)
Stock	50,000	(iii)
Plant, equipment and motor vehicles	<u>125,000</u>	(iii)
	475,000	
Preferential creditors	(50,000)	
	<u>425,000</u>	
Unsecured creditors	(1,750,000)	
Deficit towards creditors	<u><u>(1,325,000)</u></u>	

Notes:

Figures stated net of VAT

## PERSONAL INSOLVENCY (SCOTLAND)

NOVEMBER 2011

### EXAMINERS' REPORT

#### EXAMINATION MARKING PLANS

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

#### QUESTION 1

- (a) **Prepare estimated outcome statements for all four bankruptcy estates, calculating the rate of the dividend available to each class of creditor. (15 marks)**
- (b) **Prepare a file note setting out;**
- **how commissioners are appointed,**
  - **how fees are fixed**
  - **information that should be provided in respect of time and charge out summaries.**

**(10 marks)**

**(Total: 25 marks)**

**NOTES:** You should state such reasonable assumptions as you consider necessary. Ignore VAT and any other taxation arising on either asset realisations or the costs and expenses of the bankruptcies.

In Part (a), candidates were provided with Statement of Affairs for a partnership and the three partners. From this they were advised of the resultant realisations and provided with additional information regarding the Landlord and Creditor's claims that required to be dealt with when completing the Outcome Statements for each Bankruptcy.

Part (b) was to test candidate's knowledge on specific legislation and SIP9 in respect of Commissioners in a Bankruptcy. How they are appointed, how trustees fee are fixed and what information is to be provided in Time and Charge-Out Summaries.

Most candidates answered part (a) reasonably well, although presentation made it difficult to mark in some cases. These were easy marks to pick up. The majority understood the concept of the whole deficit of the Partnership being also a deficit in each of the individual bankruptcies. Not many candidates produced notes at the end that could have provided a few easy marks. One candidate did not attempt this question. The majority of candidates wasted time including statutory costs when it clearly indicated that these were to be ignored.

All candidates answered part (b) well, some in great detail, which in some cases may have had a knock on effect in other questions.

## QUESTION 2

**Identify the actions you expect to have to take in the first week following your appointment when dealing with the assets and the creditors.**

**(25 marks)**

**NOTE. You should state such reasonable assumptions as you consider necessary.**

The main purpose of this question was to test candidates on the practical aspect of dealing with a trading case in the first week of appointment. Included in the question was reference to the word Interim Trustee, however it also advised that Award had been granted. Due to the BAD Act 2007 an Interim Trustee can only be appointed prior to the Award Date. The question setting indicated that you had taken a telephone call from the solicitor acting for the petitioning creditor. The inclusion of the word Interim had been an error. This was considered by the Examiner and Moderator at the marking stage. It was concluded that marking was not affected by this for the majority of candidates, careful consideration was given to candidates that had incurred time over this issue. Some candidates acknowledged that it may have been an error by the solicitor and they would check the Interlocutor when it arrived. They then proceeded on the basis of assuming it was either an Interim Trustee or Trustee appointment and were therefore marked accordingly.

This question was answered well, except for one candidate. In general it was presented well. A lot of candidates did not give enough commercial consideration to the potential purchaser of the business.

## QUESTION 3

**Consider, in the form of a memorandum for your file, the issues that you will need to cover when writing to Ann. You should state the relevant statutory or other authorities applicable to each issue.**

**(25 marks)**

**NOTE: Ignore taxation and any interest payable to creditors.**

The question was concerned with the Insolvency Practitioner acting for a debtor's spouse who had received a letter from her husband's Trustee regarding the equity in the family home which vested in the Sequestered Estate.

Candidates were being tested on the legislation surrounding the Family Home, in respect of Section 40 of BSA 1985 and amendments made by the BAD Act 2007, s39A and advising a debtors spouse the options available to her and the impact each option would have on her and her family.

A third of candidates answered the question well. The remainder did not address all the areas/options sufficiently well or not at all, therefore missed the initial marks in these areas. Only two candidates referred to any Case Law.

## QUESTION 4

**Set out and compare the options available to such an individual.**

**(25 marks)**

Candidates were provided with a one sentence question.

Candidates were given very few details regarding a debtor with Credit Card Debts who wanted to take positive action. The question was testing the Candidates knowledge of the statutory and non-statutory options that may be available to the Debtor.

The candidates that scored well in this question were the ones that included **all** the options available to the Debtor. No marks were awarded for the answer of 'doing nothing' as this is not considered to be a positive action. About a third of Candidates missed out on relatively easy marks because they did not cover all areas. The candidates that used a Table Format to demonstrate the comparatives of each option, did not always make it easy to mark or confirm to the Examiner that the candidate actually understood each option. Very few candidates gave any consideration to the question when answering the question and only 2/3 candidates provided any sort of conclusion.

**PERSONAL INSOLVENCY (SCOTLAND)**

**NOVEMBER 2011**

**EXAMINATION MARKING PLAN**

**QUESTION 1**

**1(a) Prepare estimated outcome statements for all four bankruptcy estates, calculating the rate of the dividend available to each class of creditor. (15 marks)**

	Notes	Royal Oak Furnishings	Matt	Alex	Giles
Leasehold factory and shop		0			
Goodwill		0			
Stock/Plant/Debtors		12,800			
Residential properties			12,000	90,000	0
Other assets			5,000	14,000	2,000
<b>Total realisations carried down</b>		<b>12,800</b>	<b>17,000</b>	<b>104,000</b>	<b>2,000</b>
Legal fees		200	1,100	1,600	200
Property agents		200	800	800	300
Liq's/Tee's expenses		350	1,200	1,200	300
Liq's/Tee's remuneration		6,000	8,500	10,500	4,000
<b>Total costs carried down</b>		<b>6,750</b>	<b>11,600</b>	<b>14,100</b>	<b>4,800</b>
Total realisations brought down		12,800	17,000	104,000	2,000
Total costs brought down		6,750	11,600	14,100	4,800
		6,050	5,400	89,900	-2,800
Balances available for creditors carried down		<b>6,050</b>	<b>5,400</b>	<b>89,900</b>	<b>-2,800</b>
Petitioning Creditor Costs		1,200	800	800	800
		<b>4,850</b>	<b>4,600</b>	<b>89,100</b>	<b>-3,600</b> c/fwd

	Notes	Royal Oak Furnishings	Matt	Alex	Giles	B/fwd
Preferential Creditors (100p in £)		4,000	0	0	0	
Amount available to Ordinary Creditors		850	4,600	89,100	-3,600	
Ordinary Creditors in each Estate		130,800	27,500	68,500	27,000	
Deficiency to Partnership Estate	1 and 3 4	-129,950	129,950	129,950	129,950	
Total Ordinary Creditors			157,450	198,450	156,950	
Deficiency in individual Estates			-	-	-	
			152,850	109,350	160,550	
Dividend						
Preferential		100p	n/a	n/a	n/a	
Ordinary		0.6p	2.9p	44.9p	0.00	
Total Dividend to Partnership ordinary creditors is 48.4p in £	2					
<b>Unsecured creditors</b>						
Trade creditors per S of A		76,000				
Transfer from Partnership to Alex		-4,800		4,800		
HMRC -VAT		24,400				
HMRC - PAYE		6,500				
HMRC - Schedule D			12,700	3,500	5,500	
Finance creditors		13,000				
Finance creditor with guarantee from Alex				7,000		
Bank overdraft		9,700				
Bank account guaranteed by Matt						
Credit cards			14,800	46,200	8,900	
Personal creditors			1,500	7,000	600	
Transfer from Matt to Partnership		1,500	-1,500			
Shortfall to mortgagee					12,000	
Landlord's claim	Note 5	4,500			0	
Total Ordinary Creditors		130,800	27,500	68,500	27,000	

## Notes

1. The partners are jointly and severally liable for all the debts in the partnership.
2. A creditor cannot receive a dividend of more than 100p in the pound
3. The profit sharing ratio is of no consequence.
4. The deficiency in the partnership ranks equally with the ordinary claims of the individual partners.
5. The landlord's claim is included for rent arrears only. He may have an additional claim for dilapidations but there are no clues in the question as to how much this would be.
6. In practice the trustees fees would be restricted to the funds in Giles's Estate



**(b) Prepare a file note setting out;**

- **how commissioners are appointed**
- **how fees are fixed**
- **information that should be provided in respect of time and charge out summaries.**

**(10 marks)**

**A** How Commissioners are appointed

- per S30 of Bankruptcy (Scotland) Act 1985
- At statutory or subsequent meeting of creditors
- From creditors or mandatories
- Minimum 1 to Maximum 5 persons
- Commissioner needs to have their claim lodged and accepted in full/or part.

Identify persons not eligible to act as Commissioner, as per S24(2) (a-c):

- The debtor
- A person holds interest opposed to general body of creditors.
- An associate of debtor or Trustee.

Voting Procedure – If more than 5 creditors want to be Commissioner.

**B** How fees are fixed

The basis for fixing the Trustees remuneration (fees) is governed by S53 of Bankruptcy (Scotland) Act 1985.

It is for the Commissioner to fix the remuneration but if no Commissioner it will be determined by the Accountant in Bankruptcy.

Remuneration calculated by reference to the value of the assets which are realised but there shall in any event be taken into account:

- a. The work which having regard to the value was reasonably undertaken.
- b. The extent of the responsibilities in administering the estate.

Procedure for fixing submitted to Commissioner (or AIB) within 2 weeks after the end of an accounting period.

- Submit his intromissions and where funds available Scheme of Division.
- A claim for the outlays reasonably incurred and his remuneration.

Within 6 weeks after end of accounting period the Commissioner (or AIB) shall audit the accounts and issue a determination fixing the amount of outlays and remuneration.

The Trustee shall make the audited accounts, scheme of division and said determination available to debtor and the creditors.

Appeal Procedure. Not later than 8 weeks after end of accounting period, the Trustee, debtor or any creditor may appeal against the determination

If Commissioners – Appeal to AIB

If AIB – Appeal to Sheriff

The Trustee shall insert in Sederunt Book audited accounts, Scheme of Division and determination re. outlays and remuneration.

**C** Information to be provided

- Reference to SIP 9 should be made.
- Up to date Receipts and Payments should be made available.
- Provide SIP 9 Guidance to Commissioners.
- Proportionally considerations determine level of detail.

Cumulative fee

<10k

Breakdown only if requested

>£10k <£50k First level of breakdown sufficient  
>£50k Provide more detail

- Remuneration included in approval request should exclude VAT.
- Table of time spent and charge out value should be provided for each account, as follows

Classification of Work Hours Function	Partner £	Other Mger £	Ass & Senior £	Total Supp £	Time Hrs £	Cost £	Aver Hrly Rate £
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- Admin & Planning
- Investigations
- Realisation of Assets
- Trading
- Creditors
- Case Specific Matters  
(Specify)

TOTAL HOURS

TOTAL FEES CLAIMED

## QUESTION 2

Identify the actions you expect to have to take in the first week following your appointment when dealing with the assets and the creditors.

(25 marks)

**NOTE.** You should state such reasonable assumptions as you consider necessary.

Nothing should be done (at least as far as the outside world is concerned) until the Interlocutor has been received and reviewed, confirming whether it is an Interim appointment before Award, or Award has been granted.

*Securing the business assets*

### **Attendance at premises and safeguarding assets**

The business appears still to be trading so the trustee ("T") or a member of his staff should attend the shop immediately.

Interview George ("G"), tell him of your appointments and find out what is going on.  
Agent should be instructed to ensure physical control of assets (e.g. changing locks, alarm codes).  
Insurers should be put on notice of appointment.

### **Valuation**

A suitably qualified agent needs to be instructed immediately to prepare an inventory and a valuation of the assets and the business (including any goodwill).

### **Identification of stock and other assets**

Any stock/assets need to be identified which are or may be subject to third party claims to ownership including stock potentially subject to ROT (issue ROT mandates if required) or other claims to ownership such as any equipment belonging to customers brought in for repair.

Where repairs have not started, customers who wish to reclaim their equipment should be allowed to do so.  
Where repairs have started, customers' equipment may be subject to a repairer's lien.

Consider whether or not trading continues (depending on Interlocutor), it might be economic to finish any repairs which are part completed.

### **Possible relevance of s33-tools of trade**

Consideration needs to be given as to the possibility of a claim being made by G that some of the assets at the premises are covered by the provisions tools of trade and do not therefore comprise in the bankruptcy estate.

## **The lease and the landlord**

Urgent contact needs to be made with the landlord (“L”) and a copy of the lease obtained.  
L’s right to irritate Lease due to Sequestration – terms of Lease to be reviewed.  
Consideration of whether premises required will depend on whether you intend to trade/trade to close.  
Advise L you will not be adopting the Lease. You will want to negotiate ongoing payments for any trading period.  
Will Landlord exercise Hypothec/consider value of assets in premises-can they be stored elsewhere

*Trading on or not*

## **Powers of T as regards trading the business(depending on Interlocutor)**

If Interim appointment, cannot close business, unless Debtor agrees- s18(2)(g) deleted from BAD Act 2007.

T should only continue the trade of a bankrupt in order to facilitate the beneficial winding up of that business.

If Award has been granted,

- there is no obligation on T to continue to trade the business and he should only do so if this is practicable, the realisable value of the assets enhanced and the likely dividend to creditors increased.

T should not trade on if a trading surplus is going to be diminished or eliminated by increased costs or the risks of the expected outcome not being achieved are too great.

If Interim Appointment;

T must ensure that separate records are kept of the trading-systems to be set up.

If T is to appoint G to carry on the business for the benefit of creditors, what remuneration/Drawing will George require.

Whatever his decision, T must fully document this so that, if necessary, he can justify his decision at a future time.

Funding available- Bank to be contacted.

Management Accounts – are any available to review/ to aid decision in whether to trade, once Award received.

## **Financial considerations**

Profit/loss and cashflow forecasts need to be prepared to see if trading on would be viable.

T will be guided by the advice from the agent and his valuation and by any information available about the recent trading performance of the business.

If the business has been loss making it is perhaps unlikely that it will miraculously become profitable under T’s direction.

Establish if Trade Debtors due to pay –possibility of using funds to trade/other funding to consider.

## **Utilities**

If trading on is a possibility, contact relevant utilities with meter readings and make arrangements for supplies to continue.

Meter readings to be taken.

## **Third party actions that may frustrate trading on**

L’s intentions need to be established. If T decides to try and trade on and/or sell the business as a going concern, will L be willing to co-operate by, for example, agreeing to an assignment of the lease or the grant of a new lease in order to secure a new tenant and the payment of rent going forward?

If L is uncooperative trading may prove difficult.

It may not be possible to trade on without G’s co-operation so his willingness to help needs to be established.

T must make a judgement as to whether he could trust G were the business to continue as it will almost certainly be uneconomic for T or his staff to be involved to any significant extent in the day to day running of the business.

The willingness or otherwise of Carol (“C”) to help may affect T’s decision.

Any regulatory issues that would prevent trading on need to be identified.

The insurer’s position should be ascertained.

## **Health and safety**

Consideration needs to be given to health and safety.

Enquiries made of G as to whether there are any matters requiring immediate attention.

## **Carol (the employee) (“C”)**

T will need to speak to the C to establish whether she is owed arrears.

If trading on occurs and C agrees to work on, T may agree to pay any arrears owing.

T must ascertain status of C’s contract of employment and take the appropriate advice.

T should not act so as to adopt C’s contract.

If there is no trading on or C is unwilling to work, then she must be made redundant.

Bankruptcy constitutes insolvency for ERA96 purposes so C should be given the forms and guidance she requires to claim amounts due to her.

Even if the business is sold C’s contract of employment will not pass to the purchaser because bankruptcy is a proceeding which is instituted with a view to the liquidation of the George’s assets

and therefore the regulations about relevant transfers and the passing of contracts of employment are disapplied (TUPE 2006 Reg 8(7))

## *Possible purchasers of the business*

Whether trading on or not T may have a short window of opportunity to try and realise the assets for more than break up.

The agent should be instructed to contact Vera Rose urgently in order to gauge the real level of her interest in acquiring the business and assets

Consideration needs to be given to whether there are any other similar businesses in the area which may be interested in the business and assets.

The agent may hold a database of potential local purchasers.

T and G may be aware of potential purchasers.

If trading on is practicable and warranted, this will probably only be for a very limited period to achieve a beneficial winding up of the business.

probably enough to allow time for an informal tender process or similar to be conducted by the agent seeking best and final offers within a short timescale.

for which a short “sales pack” may be required.

The costs of advertising the business for sale and an extensive marketing campaign are unlikely to be warranted.

## **Creditors**

T should give notice to creditors of his appointment (s21(A)/s21(b) and must say whether he proposes to call a meeting of creditors to establish a creditors’ committee.

which in this case may be the thing to do given the creditors’ apparent concerns about how G has been running his business.

T should make early contact with the creditors who have raised concerns to see if what they have to say affects what T may wish to do as regards the business and assets.

## **Consideration of possible alternative ways forward**

Is there Third Party funds available to fund Recall. If so may require to trade on.

Can T get an undertaking from the third party for any trading losses.

### QUESTION 3

Consider, in the form of a memorandum for your file, the issues that you will need to cover when writing to Ann. You should state the relevant statutory or other authorities applicable to each issue.

(25 marks)

**NOTE: Ignore taxation and any interest payable to creditors.**

#### **Primary considerations**

##### **Does Ann wish to acquire Ralph's interest?**

Ann should discuss with Ralph and her family how they ideally wish to go forward and consider matters such as whether they wish to retain the Property or whether circumstances dictate in any event that they should move (eg because with no earnings from Ralph the mortgage cannot be afforded) and how this would affect issues such as the children's education, Ann's employment and Ralph's future employment.

#### **The basic legal position-Bankruptcy Scotland Act 1985 as amended**

**S31**-vesting of Estate at date of Bankruptcy -- 8 June 2010

**S39A**-At the end of 3 years (7 June 2013) the debtors right or interest in the family home(as defined by s40) shall cease to form part of the debtors estate and shall be reinvested in the debtor.(without disposition etc)

**However**, will **not** automatically revert if in that period the Trustee;

- realises right or interest,
- concludes missives,
- sends memo to keeper per s14(4)
- records title in property
- commences proceedings for consent/action for division and sale/vacant possession per s40,
- debtor and trustee enter into agreement-s39A95) – 'do a deal'

So Trustee is not under any time pressure legally yet and would appear to be wanting to do a deal with the Mrs Griffin.

#### **Legal position/Exceptional circumstances**

##### **S40-Power of Trustee re Family Home**

- Before the Trustee sells/disposes of right/interest in the family home he must;
  - obtain relevant consent **or**
  - obtain authority of court

Where the trustee needs court authority, the court will have regard to **all** the circumstances;

a-needs and financial resources of the debtors spouse

b-needs and financial resources of the children

c-interests of the creditors

d-length of period during which family home used as residence by the above a or b;

When considering whether there are circumstances the Court must consider all the circumstances of the case other than the needs of the bankrupt and therefore the fact that Ralph is suffering from depression should not be taken into account.

Although, it might be possible to argue that Ann's interest in looking after Ralph is a consideration.

More needs to be known about Ralph's illness before determining if such an argument might succeed.

The Court would consider the needs of Ann and the children.

Case Law -Gourlay v Gourlay Trustee –could be referred to when writing to the Trustee. Powers of Trustee under s40,Sale of house detrimental to health of debtor and spouse. Application by Trustee was refused in that case.

Although it should be noted that there were extreme circumstances in that case. However it should be noted that the Trustee may not be willing to negotiate.

The needs of the child with behavioural difficulties will be a consideration for the Sheriff- if the Property has had to be adapted in any way to meet the needs of the child and/or leaving the Property would mean additional difficulties being experienced by the child for example by his/her having to move to a new special school or there being no appropriate alternative school available.

Further information is needed about the child's present situation and the effect that leaving the Property would have;

More information is also needed about the education requirements of the other children for example, are they coming up to important examinations that would merit seeking a postponement until the exams are completed.

But it appears, on the information given, the court may postpone granting the application for such period as up to 3 years following the introduction of Home Owner and Debtor Protection (Scotland) Act 2010.

S40(3A)-Also due to this Act the Trustee prior to commencing proceedings to obtain authority of the Sheriff, the trustee must give notice to Local Authority in whose area the home is situated-notice on Form 24.

***If the family wishes to retain the Property, what arguments are there that might reduce the cost of doing so?***

**Ownership of the equity**

There is no evidence to suggest that the Property is owned other than in equal shares as its purchase was funded with what look like joint monies and a joint mortgage.

and there is no information to refute the presumption of 50/50 ownership

Property Search to be obtained to confirm position prior to writing to trustee on Ann's behalf.

**Issue re 2<sup>nd</sup> charge**

Heath Bank will not receive any repayment from the liquidation of Goldbridge and therefore it must look to its second charge over the Property for repayment.

It is noted that Ann is not making any payments towards the second security-Heath Bank Ltd-she should be warned that they could start repossession proceedings.

As the amount is only £6,000 could she use savings/third party funds to discharge this security.

There is no information to suggest that Ann was not aware of this second Security, therefore she must have consented.

**Possible unfair preference- s36**

Further information and evidence about what happened at the time that the charge to Heath Bank was signed will be required in order to see whether a claim for unfair preference could be mounted.

Was security properly registered

Is there any argument for s36(2)(c)-transaction was collusive?

However unlikely, if reciprocal obligation occurred-funds received at same time as security taken. When writing to Trustee request whether he has done any investigation into this issue.

It is highly unlikely that such a claim could be formulated in respect of the mortgage signed in favour of Haywards Building Society.

**Credit for funding the extension**

If Ann had not paid out of her own money for the extension to be built the Property would have been worth £360,000 (£400,000 less 10%) and not £400,000. However she is unlikely to get full credit for this cost.

She should use this as part of her negotiations to reduce amount to be paid for the Trustees interest. You should advise her that it is unlikely that the Trustee would allow this credit. Will need to consider the level of creditors claims.

Case law to consider McMahon V MaMahon Trustee- counterclaim by co-owner for share in increase in value of property. Although it should be noted that this case was settled out of court.

**Other cost that have been or are being met by Ann**

The fact that Ann has met the mortgage interest payments to Haywards Building Society will not give her the right to claim a greater interest in the Property. Unjustified Enrichment to the Estate is not applicable because both co-owners remain living in the Property. Joint And Several debts.

Ann’s payment of the household bills can have no relevance to calculating Ann’s and Ralph’s respective interests in the Property.

**What is the likely cost of acquiring Ralph’s equity?**

**The value of the Property for negotiation purposes**

There is a £30,000 difference in the value of the Property as indicated by Ann’s agent and that instructed by the Trustee.

The two valuations deviate from the average £400,000) by £15,000 or under 4%. This is unlikely to be considered as statistically significant in the context of property valuation.

Unless the Trustee or Ann have good reasons to believe that their own agent is right or the other’s agent is wrong, both should be willing to accept £400,000 as a value for the Property in any negotiations. It might be worth Ann’s trying to persuade the Trustee to use a figure under £400,000 but she is probably unlikely to succeed in doing so.

**Calculation of the value of Ralph’s interest**

Assuming we can agree with Trustee to use the average of the two valuations- £400,000, and Ralph’s interests is as follows:

	<b>Total</b>
	<b>£</b>
Value of Property	400,000
Mortgage to Haywards BS	(280,000)
Heath Bank Ltd	(6,000)
Equity	(114,000)
Ann Share	(57,000)
<b>Ralphs Interest</b>	<b>57,000</b>

**How much is Ann likely to have to offer?**

On the basis of the calculation above the Trustee will be looking to realise £57,000 but Ann should not offer this amount as there are additional costs which the Trustee knows that he would incur if forced to take proceedings

and he has admitted in his report that these could amount to £13,000 (£16,000 - £3,000).

In addition an allowance should be made for notional basic selling costs. say 2%of value ie £8,000

Total Amount £36,000 - but offer less,

As the bankruptcy estate (and hence the creditors) benefit too from an early settlement because they receive a higher dividend than if proceedings are taken and get their money sooner rather than later.

Ann should budget to pay approx. **£30,000- £35,000** for Ralph’s interest.

**Would it be more cost effective for Ann to provide the funds to pay all costs and claims in full?**

**Amount required to pay all costs and claims**

The creditors total £86,000 and there are costs to pay in the bankruptcy of at least £3,000 so Ralph’s interest is £57,000 there are no prospects of creditors being paid in full, even taking account of the funds (£16,000) held currently by the Trustee

Calc offered;

Funds Ingathered to date	£30,000	
Less Costs to date	17,000	(14,000+3,000-if consent given)
Available to creditors	13,000	
Less Creditors Claims	86,000	
<b>Amount required</b>	<b>£73,000</b>	

This does not include the calculation required for Statutory Interest



Unless recall is a priority (and there is nothing to say that this is the case) Ann should concentrate on acquiring Ralph's interest in the matrimonial home and not in paying costs and creditor's claims on full.

### ***How will Ann fund any acquisition of Ralph's interest?***

#### **Obtaining the funding**

Ann must consider whether she would be able to raise the monies to pay £30,000.- £35,000  
Does Ann have any savings, particularly left over from her rich uncle's inheritance (as she only used part of this to pay for the extension), or does she have any more rich relatives to whom she can turn for help  
Are her own finances and earnings such that she is in a position to borrow money on commercial terms or can she combine two or more of these possible sources of funds in order to assemble the required funds.  
Ann needs to consider how she is going to service/repay any additional borrowings taken on by her.  
Does Ann have any other assets that she might sell/use to raise funds?

#### **Legal considerations on the acquisition of Ralph's interest**

There are some issues where Ann may need to seek legal advice.-s40 and s36  
If Ann wishes to buy Ralph's interest in the Property and has the funds to do so she must decide how to proceed in legal terms and should instruct a solicitor to advise her so that her interests are protected when acquiring Ralph's interest.  
How is any offer to be made (e.g. informally or disposition required.)  
Ann could enter into a contract with the Trustee for the sale of Ralph's interest in the Property –making contributions over a period of time-but no title amendment  
Ann could seek to have transferred to her the whole of the legal title so that she becomes sole proprietor of the Property but she may need the agreement of one or both of the secured creditors to do this.  
You should advise her to take her own independent legal advice.

### ***What are the alternatives to acquiring Ralph's interest?***

#### **Possible voluntary sale of the Property**

If Ann does not wish to, or is not in a position to, acquire Ralph's interest in the Property then she could consider agreeing to a voluntary sale of the Property and could agree the way forward with the Trustee and details such as which agents to instruct and which solicitors to use for the conveyancing work.  
If possible Ann should control the process in order to keep costs down and try and ensure the Property is sold at true market value so that the value of her own interest in the Property is maximised.  
The Trustee is under no immediate time pressure from s39A and would appear to be actively trying to deal with property.  
You are not told but it is likely the Trustee would have been corresponding to the Debtor before writing to Mrs Griffen.  
Has Mr Griffen not co-operated?  
The Trustee is under a statutory duty to realise the major asset in the bankruptcy estate and may therefore wish to impose a timetable so that the matter does not drag.  
Ann should agree to keep the Trustee fully informed of progress on a regular basis and of material developments as they occur.  
He will request a signed s40 consent form Mrs Griffen, which she should do if she wishes to avoid Court Action.

#### **Non-cooperation**

Ann could decide to delay and frustrate the Trustee forcing him to take court proceedings- division and sale. She could argue every possible claim so as to try and maximise the value of her interest.  
Prior to commencing court proceedings the Trustee would have to give notice to the Local Authority using Form 24.  
On current information there appear to be no prospects of arguing successfully that Ralph's interest is of no or negligible value or that there are exceptional circumstances that will delay a sale for a material time period. It is therefore looks inevitable that the Trustee will prevail.  
By unnecessarily opposing the Trustee at every turn Ann runs the risk of having a costs order made against her which would be paid from the funds available to her following a sale of the Property thereby depleting (perhaps materially) the amount that she receives.

## QUESTION 4

An individual burdened by credit card debt who wishes to take positive action to sort out his financial affairs now has more options open to him than at any time in history.

Set out and compare the options available to such an individual. (25 marks)

The options for a debtor ("D") are:

### **Non Statutory Debt Solutions**

Take "self help" actions to improve financial position

Negotiate agreements with creditors

Reorganise/consolidate debts (incl. remortgage)

Debt Management Plan

### **Statutory Debt Solutions**

DAS

Mortgage to Rent/Shared Equity

### **Insolvency Solutions**

Trust Deed

Bankruptcy

### **Take self help actions**

#### **-General description**

Actions that can be taken without reference to any creditor that may free up or generate surplus cash in order to meet repayments to creditors.

#### **-On Level of Assets liabilities and income**

No restrictions, just steps that might be taken. For example

Cut up credit cards to discourage further use.

Undertake a critical review of expenditure to identify savings.

Consider whether there is scope for increasing income into the family budget, e.g. by taking an additional job or renting out a room.

Consider whether cash can be generated by disposing of surplus or extraneous assets.

#### **-Comparative features**

No direct costs involved

Can be organised without help of any kind

D should be careful not to overstretch himself or seek to live within an unrealistic or unsustainable budget.

### **Negotiate agreements with creditors**

#### **-General description**

Series of individual agreements entered into by D with his creditors.

Negotiated payments made to creditors from income and/or lump sums (e.g. from relatives or charitable source).

#### **-Assets, liabilities and income**

No restrictions on the extent of D's liabilities.

But unlikely to be manageable where there are more than a handful of creditors and/or the debts are substantial

Unlikely to be acceptable to creditors where D has assets that can be readily be realised to pay down debt.

D must have surplus income each month from which to make the agreed repayments

#### **Comparative features**

Can be organised without help but some professional advice may be required (e.g. from a debt counsellor or CAB to put together a budget).

Possible creditors will agree at some future date to write off balance of debts if D has made every effort to repay what he can.

Flexible, in that D can ask to reduce payments if necessary.

Costs should be lower than a more formal debt solution.

There's no obligation on the creditors to accept D's proposals.

Unless otherwise agreed (unlikely) D remains liable for full extent of the debts, including charges and interest. Proposing an agreement in the first place may alert creditors to the fact that D has financial problems and precipitate a rush to gain advantage.

No protection is afforded D either before an agreement is put in place or afterwards. It is open to an individual creditor to break ranks and take action or seek to gain advantage over others e.g. by obtaining judgment and a charging order against real property.

All the admin (including making agreed payments) will need to be done by D.

Repayments could go on for years.

### **Reorganise/consolidate debts (incl. remortgage)**

#### ***-General description***

D obtains a loan to reorganise or clear debts, and therefore swaps all his existing debt for just one.

#### ***-Assets, liabilities and income***

No restrictions on of the extent of D's liabilities.

Unlikely to be manageable where there are more than a handful of creditors and/or the debts are substantial

D must have sufficient surplus monthly income to meet repayments on new loan.

#### ***-Comparative features***

Only one repayment is made each month

The monthly repayment is usually lower than the aggregate of all the repayments on the existing debts (otherwise there wouldn't be a lot of point in taking this route).

There may be fees or other costs associated with obtaining the new loan.

The loan will need to be sufficient to repay all existing debts - adding a new debt to an existing list of debts may exacerbate D's debt problems.

A poor credit rating and/or the economic climate may make getting a new loan difficult or impossible.

The new loan may have to be secured on real property thereby swapping unsecured debt for secured. D's home may be at risk if he defaults at a future date.

Interest rates may vary making budgeting for repayments difficult.

Especially if secured, the repayments on the new loan may stretch further into the future than would continuing repayments on the existing debts.

Repayments could go on for years.

### **Enter into a debt management plan ("DMP")**

#### ***-General description***

Formal agreement entered into between D and his creditors, brokered by a Debt Management Company ("DMC")

Typically all D will have to do is to make one periodic payment to the DMC which will then make the individual payments to the creditors.

#### ***-Assets, liabilities and income.***

DMP unlikely to be acceptable to creditors where D has assets that can be readily be realised to pay down debt

D must have surplus income from which to make the payments to the DMC.

#### ***-Comparative features***

Enables D to make one affordable monthly payment to his creditors.

DMP may be more likely to be accepted by creditors than would informal agreements.

All negotiations and administration is all carried out by the DMC.

More likely that DMC will be able to persuade creditors to waive interest.

Flexible, in that D can ask to reduce payments if necessary.

There's no obligation on the creditors to accept D's proposals.

There will either be an upfront cost of putting the DMP in place and/or commission payable to the debt management company which may extend (perhaps materially) the time over which D has to make payments.

Most likely payment in full will be sought by creditors, even if this will take years to achieve. DMP could well endure for many years and much longer than. DAS or bankruptcy.

D remains liable for full extent of the debts unless creditors agree to waive part of the debt and/or charges and/or interest

No protection is afforded D either before the agreement is put in place or afterwards

It is open to any creditor to break ranks and take action or seek to gain advantage over others e.g. by obtaining judgment and a charging order against real property.

It may be possible to prevent creditors from "jumping ship" by obtaining written agreement to this effect as part of the DMP

## **Apply for DAS**

### **-General description**

Administered by the AIB, who maintain DAS Register.  
AIB can endorse variations to DPP-Debt Payment Program  
AIB approve money advisors and payment distributors.  
5 Parties involved- D, Creditors, DAS approved money advisor, DAS Administrator(AIB) and payment distributor.  
Must reside in Scotland.

### **-Assets, liabilities and income**

No creditor limit as such but full payment required  
Must have more than one debt(2 years council tax = multiple debt)  
Excludes home –provided mortgage/rent are maintained  
Requires Income after paying essential expenses

### **-Comparative features**

No debt relief – all debts to be paid in full (90% plus admin fee max 10%)  
Allows D to pay off debts over extended period of time.  
Interest and charges frozen from date plan approved.  
If D keeps to payments creditors cannot carry out enforcement action.  
Creditors prevented from taking action if D has intimated intention to apply or has application waiting approval.  
Single regular payment made to an approved payments distributor.  
More debt is recovered than in Insolvency procedures.

## **Mortgage to Rent Scheme/Shared Equity**

### **-General description**

Either Scottish Govt Housing & Regeneration Directorate or Commercial ventures for Mortgage to Rent.  
Helps households who are in danger of becoming homeless due to legal action stay in their home.  
Social or Commercial Landlord purchases property and rents it back to the D.  
Shared Equity – Scottish Government takes a financial stake in debtors home but D still owns property- in effect reduces amount due to principal heritable creditor with an amount due instead to Govt.

### **-Assets, liabilities and income**

There is a limit on the value of the family home.  
Capital Calculation-if assets over £2000-not eligible to apply(£4,000 if over 60)  
No Limit to Liabilities, However if liabilities low the reversion to the debtor is limited to £8,000(£12,000 if over age 60)

### **-Comparative features**

No debt relief as such  
Creditors can still take action

## **Trust Deed**

### **-General Description**

A Trust Deed is a voluntary agreement between a debtor and creditors to repay part of what they owe. A Trust Deed transfers the debtors assets and right to a Trustee. The Trustee will want the Trust Deed to become protected. A protected trust Deed prevents the Creditors from taken further action.

### **-Assets, Liabilities and Income**

No lower or Upper limit on Assets ,Liabilities or Income  
Following the introduction of the Home Owner & Debtor Protection (Scotland) Act 2010, which came into force 15 Nov 2010 there can be two types of protected Trust Deeds;  
-Exclude D's principle place of residence from TD to protect Family Home  
-As before all assets convey to Trustee(except exemptions per BSA)

### **-Comparative Features**

Allows D to make one monthly payment to his Trustee to deal with all his creditors.

The trustee's fees will be taken from the assets and contributions paid by the D

If TD excludes Family Home the Secured Creditor must have given prior consent to the Trustee.

If prior consent is obtained from Secured Creditor then they give up the right to ;

-claim in the PTD

- to do diligence against assets conveyed to the Trustee under the PTD

-cannot petition for Bankruptcy while TD subsists.

Benefits to D;

-provided that D and T deal with matter at outset, no risk of D losing home at instance of T further down line.

-protects D in event that Equity increase(unlikely in short term)

-exclusion viewed as alternative method of bringing certainty to D's position

### **Go bankrupt**

#### **General description**

Formal court procedure where bankruptcy order is made following a petition being presented either by D or by a creditor.

A trustee is appointed to realise D's assets and pay creditors.

Bankruptcy (Sequestration)

Various routes can be considered :

1. Creditor Application. If apparent Insolvency established by the creditor, no info whether creditors have taken Court action in the case.
2. Apparent insolvency but application by Debtor – again no info to suggest action by creditor.
3. LILA Rate 55A(1)– Debtor Application **without** apparent insolvency. Not creditor dependent. Conditions apply, Debtor;
  - Debtors weekly income on date of application does not exceed prescribed amount.
    - Debtor does not own land/house.
    - Total value of debtors assets must not exceed £10,000.
    - Each asset being not more than £1,000.
  - S33 exemptions to vesting apply to LILA once awarded no IPA/IPO expected.
4. Certificate of Sequestration Route
  - Granted by authorised person (CAB/IP etc)
  - Certify that debtor unable to pay debts as and when due.
- Once signed all assets would require to be dealt with as standard sequestration.
  - IP can be appointed (when they sign Certificate of Sequestration).
- Certificate of Sequestration (CFS) comes into effect as part of the HODP Act 2010.
  - 30 day Rule (for application).
5. If Trust Deed fails, debtor can make debtor application

#### **Assets, liabilities and income**

See Above for limit- levels of assets liabilities and income.

If D has surplus income, this will be paid over to Trustee.

Certain assets are statutorily excluded from bankruptcy estate. S33

#### **Comparative features**

Creditors have no choice but to participate in the bankruptcy process – all actions are stayed

Short timeframe - absent any wrongdoings, D will be free of debt and all restrictions in just one year.

Costs of £100 for debtor to petition.

Certain debts cannot be written off through the bankruptcy process.

D's equity in real property is an asset available to repay the debts although this need not necessarily mean selling the property.

Bankruptcy restrictions apply until discharge (e.g. D can't be a director of or manage a company).

D may be subject to BRO if he is found to have acted irresponsibly or dishonestly/non co-operative.

A bankruptcy is a matter of public record

Possible adverse effect on D's employment and/or qualifications.

I would recommend that a meeting is arranged to advise him of the options. By doing so you can establish if there is a family home to deal with, establish the level of liabilities and other factors, so that you can confirm which options are available to him, discussing the criteria for each option. In the end it is the Individuals decision as to what route he takes.