

**JOINT INSOLVENCY EXAMINATION BOARD
NOVEMBER 2012 EXAM (ENGLAND)
EXAMINERS' REPORTS AND MARKING PLANS**

GENERAL NOTE

All of the papers require candidates to demonstrate commercial awareness and an ability to identify solutions to practical issues that may arise both in advisory (non-formal) work and as office holders in formal insolvency proceedings. Knowledge of insolvency law and regulations, relevant business law and numeracy skills are also very necessary but are not sufficient alone to gain good marks in the examinations. Too many candidates attempted to deal with practical questions by simply citing the law and / or by setting out whatever they knew on the general subject matter and so did not demonstrate an ability to apply these in a practical context. Across the papers and particularly in ACVAR and Personal Insolvency, too many candidates did not appear to have the relevant practical experience.

In all papers, some candidates did not read the question sufficiently carefully and/or did not adequately plan their answers. These candidates often wrote lengthy irrelevancies which do not earn marks.

The importance of presentation has been highlighted in previous reports. Candidates should be aware that poor presentation and illegible handwriting will adversely affect the holistic marks and their prospects for passing the examinations.

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 other 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.

JIEB LIQUIDATIONS EXAMINATION

NOVEMBER 2012

EXAMINER'S REPORT

QUESTION 1

- (a) Set out the purposes of a statement of affairs and a deficiency account in anticipation of a Creditors' Voluntary Liquidation (4 marks)**

- (b) Draft a letter to the directors of the Company and prepare, as an appendix to the letter, the Company's statement of affairs and deficiency account as at 5 November 2012. The letter should explain in easy to understand terms how the statement of affairs and deficiency account have been prepared and the realistic assumptions made. (21 marks)**

(25 marks)

NOTE: Ignore VAT

Question 1 was aimed at testing candidates' understanding of a statement of affairs and deficiency account. It required candidates to set out the reasons for their preparation in anticipation of a creditors' voluntary liquidation. Candidates were then required to draft a letter to the directors, explaining in easy to understand terms a statement of affairs and deficiency account.

This question was generally poorly answered. While many candidates did know the purposes of a statement of affairs and deficiency account, several considered that the only reason for the preparation of a statement of affairs was because it was a statutory requirement. Some candidates were confused between a balance sheet and a statement of affairs.

There was confusion over the presentation of both the statement of affairs and deficiency account. Few candidates prepared a profit and loss account for the period, 30 September – 5 November, nor an adjusted balance sheet at 5 November as a basis for preparing the statement of affairs, which would have given the directors a clearer view of the Company's position. There was also confusion as to which dates to include in the headings to the statement of affairs and deficiency account and in the column headings: some candidates simply did not put any dates at all.

Some candidates did not attempt to prepare the figures and consequently were unable to provide an explanation of them.

QUESTION 2

In the circumstances of this Company, explain the steps that the Liquidator should consider to maximise funds available for creditors. Discuss how you would expect the Liquidator to proceed, making such further and realistic assumptions as you consider appropriate. (25 marks)

This question required candidates to consider various transactions and other activities that had occurred in a company, before entering into a creditors' voluntary liquidation that was immediately preceded by an administration. Candidates had to consider how to maximise funds available for creditors.

The better candidates provided thoughtful and structured answers: they discussed each specific event in the question and how funds may be recovered, including identifying fraudulent trading, transactions at undervalue and wrongful trading (although fewer candidates discussed this). Candidates gained marks by discussing the question's directors, including the possibility of shadow directors and whether they had financial resources to make it worthwhile for the liquidator to pursue them for funds. On the other hand, there were also some really poor scripts which lacked structure and obvious strategy. Some candidates set out their knowledge of wrongdoing and prior transactions but failed to gain marks if they did not relate their answer to the specific events in the question.

QUESTION 3

- (a) Set out the authorisations that the Liquidator required in respect of remuneration (4 marks)**
- (b) Making and stating any reasonable and realistic assumptions, set out how you, as Liquidator, must disclose in the annual progress report the remuneration that you have taken (8 marks)**
- (c) Prepare a receipts and payments account for the progress report to 25 October 2012, in accordance with standard practice, and include relevant notes (10 marks)**
- (d) You understand that one creditor intends to challenge the expenditure that you have incurred on solicitors' and agents' fees. Set out how you, as Liquidator, should respond to such a challenge (3 marks)**

(25 marks)

NOTE: Ignore VAT

This was a straightforward question testing candidates' knowledge and understanding of SIP 9, Remuneration of Insolvency Office Holders, and SIP 7, Presentation of Financial Information in Insolvency Proceedings. Also tested was how a creditor may challenge a liquidator's expenses.

While some candidates scored well, this question was generally poorly answered. Some candidates were unsure about the authorisation the liquidator to obtain remuneration and how it should be disclosed in the annual progress report. Many candidates did not present the trading receipts and payments and the sale of the Bates Hotel transactions in accordance with SIP 7.

QUESTION 4

- (a) Using the circumstances of the Company as an example:
- i. Set out what steps your manager should have taken before giving advice to John and Abigail (9 marks);
 - ii. Set out what steps should be taken before accepting appointment as Liquidator to this Company (5 marks);
 - iii. Set out whether or not you would accept appointment as Liquidator of this Company. (4 marks)
- (b) Set out the steps that a Liquidator of a company in a Creditors' Voluntary Liquidation should take if a winding up petition is issued against it. Your answer should explain what the effect would be if the petition was issued before the date of the voluntary winding up and also what the effect would be if it was issued after the date of voluntary winding up. (7 marks)

(25 marks)

This question required candidates to consider what steps should be taken before giving advice to a potential client; what an insolvency practitioner should consider before accepting appointment as Liquidator and whether appointment should be accepted in the particular circumstances of the question.

Most candidates discussed the insolvency ethical guidelines and the better candidates related them to the specific circumstances of the question. Some candidates recognised that client identification procedures should be carried out; few specifically mentioned the R3 Money Laundering guidance. Not all candidates discussed the relevant aspects of SIP 8, including ensuring that directors are aware of their responsibilities, obtaining written instructions from the company and considering whether the liquidator was being asked to act in contravention of SIP 8. Many candidates did not mention that an insolvency practitioner must know the business of the company before recommending a course of action.

The final part of the question required candidates to set out the effect of a winding up petition on a creditors' voluntary liquidation, if the petition is issued both before and after the date of voluntary winding up. Several candidates were unable to explain the effect.

The better candidates provided structured and thoughtful answers. Again the weaker candidates failed to gain marks through a lack of structure and did not relate their answers to the circumstances of the question.

JIEB LIQUIDATIONS NOVEMBER 2012

EXAMINATION MARKING PLAN

QUESTION 1

1(a) Set out the purposes of a statement of affairs and a deficiency account in anticipation of a Creditors' Voluntary Liquidation (4 marks)

Statement of Affairs:

- helps creditors understand the state of the Company's finances states what assets are available to each class of creditor, what each class of creditor is owed and the estimated return to each class of creditor (and the members);
- in addition to showing the estimated outcome for each class of creditor, the statement of affairs shows the outcome for the creditors and members as a whole;
- indicates whether or not a company is insolvent on a balance sheet basis (and may show that it is also insolvent on a cash flow basis) (IA1986 s123) and, consequently, why a statutory declaration of solvency has not been made (IA1986 s90);
- Required by IA1986 s99(1)(a)
- SIP 8, para35(g) requires an explanation of the contents of the Statement of Affairs;*

Deficiency Account:

- required by SIP 8, para35(e)(x);*
- explains to creditors/members an analysis of the deficiency in the statement of affairs and the deficiency/surplus in a company's last balance sheet; including any trading loss/profit between last balance sheet and statement of affairs;
- may indicate where the loss arose;
- indicates areas that may require further investigation

(b) Draft a letter to the directors of the Company and prepare, as an appendix to the letter, the Company's statement of affairs and deficiency account as at 5 November 2012. The letter should explain in easy to understand terms how the statement of affairs and deficiency account have been prepared and the realistic assumptions made. (21 marks)

NOTE: Ignore VAT

Letter format:

Heading and date:

Report to the Directors of Moles Limited

Statement of Affairs and Deficiency Account at 5 November 2012

subheadings as appropriate

Explanation of how estimated balance sheet at 5 11 12 has been arrived at:

- explain profit and loss account 1 10 12 – 5 11 12;
- adjustments to book value, write down of book value of debts re Yippy Ltd; change to cash at bank;

Explanation that starting point for statement of affairs is balance sheet at 5 11 12

Explanation that statement of affairs is prepared on a cash basis, compared to balance sheet on accruals basis

For each asset, explanation of how statement of affairs estimate has been estimated

With relevant asset(s) if appropriate, explanation of what secured creditors and why their claims have priority

Explanation of preferential creditors: why they receive priority and how figure is arrived at

Explanation and, if appropriate, analysis of unsecured creditors (NB no prescribed part because charge registered in 2000)

Explanation that deficiency account shows how the loss to creditors, since the last balance sheet arises.

Explanation that deficiency account may indicate areas for investigation of any liquidator appointed, if any unusual losses are highlighted.

Advise that Company should not continue to trade

Moles Limited Statement of Affairs as at 5 November 2012

	Book value 30 Sept 2011	Book value 31 Oct 2011 (see workings)	Estimated to realise	
	£	£	£	£
Assets specifically pledged				
Assets subject to fixed charge				
Freehold property subject to fixed charge	300,000	300,000	330,000	
Due to Village Bank Plc under its fixed charge	(220,000)	(220,000)	(220,000)	
Surplus for unsecured creditors	80,000	80,000	110,000	
Assets subject to floating charge				
Plant and equipment subject to asset financing	10,000	10,000	5,000	
Due to Town Finance Plc	(50,000)	(50,000)	(50,000)	
Surplus/(Shortfall) to Town Finance Plc c/d	(40,000)	(40,000)	(45,000)	
Trade and other receivables	100,000	113,000		
Write downs due to insolvency: (deduct £20k prepayments/accrued income, deduct £50k Yippy Ltd (in administration); remainder collect, say, 80% (approx.)			31,200	
Plant and equipment, not subject to asset financing	130,000	130,000	13,000	
Fixtures and fittings	10,000	10,000	1,000	
Motor vehicles	30,000	30,000	3,000	
Stocks	20,000	14,000		
Adjustments due to insolvency less Zola Limited's ROT claim	(8,000)	(8,000)	6,000	
Cash at Village Bank Plc (or may deduct from Village Bank Plc)	10,000	16,000	16,000	
Estimated total assets available for preferential creditors				
Preferential creditors		(15,000)	(15,000)	
Estimated total assets available for prescribed part creditors			55,200	
Prescribed part creditors		Not applicable		
Estimated total assets available for floating charge creditors			55,200	
Town Finance Plc b/d			(45,000)	
Shortfall to Town Finance Plc c/d			10,200	
Village Bank Plc b/d			0	
Surplus on fixed charge b/d			110,000	
Estimated total assets available for unsecured creditors				120,200
Unsecured creditors – trade	(630,000)	(684,000)		
- add back ROT claimant 8,000	8,000	8,000	(676,000)	
HMRC, VAT	(100,000)	(102,000)		
- HMRC, PAYE/NI	(30,000)	(34,000)		
- Accruals (costs actually incurred and invoices not yet received)	(20,000)	(20,000)		
Directors' loans	(40,000)	(40,000)	(196,000)	
			(872,000)	(872,000)
Estimated deficiency as regards creditors				(751,800)
Issued and called up share capital	10,000	10,000	(10,000)	
Revaluation reserve	30,000	30,000	(30,000)	
Profit and loss account	(560,000)	(582,000)		
Estimated surplus/(deficiency) as regards members	(520,000)	(542,000)		(791,800)

Moles Limited: Deficiency Account at 5 November 2012

Accumulated deficit to members per balance sheet		(542,000)
Less share capital	(10,000)	
Less revaluation reserve	(30,000)	(40,000)
Increase in value of land and buildings	30,000	
Decrease in value of assets subject to asset finance	(5,000)	
Decrease in value of receivables	(81,800)	
Decrease in plant and equipment not subject to asset finance	(117,000)	
Decrease in fixtures and fittings	(9,000)	
Decrease in motor vehicles	(27,000)	
Change in stocks (ROT creditor)	(8,000)	
Change in creditors (ROT creditor)	8,000	(209,800)
Deficiency per statement of affairs		(791,800)

Workings**Moles Limited – Profit and Loss Account 1 October 2012 – 31 October 2012**

Sales	<i>i</i>		20,000	
Opening stock		20,000		
Purchases	<i>iv</i>	10,000		
Cost of sales	<i>v</i>	(16,000)		
Closing stock (balance)		14,000		
Gross profit			4,000	
Net wages	<i>x</i>	(15,000)		
PAYE/NI	<i>xi</i>	(4,000)		
Net loss			(15,000)	
Adjustment for error in previous period	<i>ix</i>		(7,000)	
Transfer to Accumulated P &L			(22,000)	

Moles Limited - Balance Sheet at 30 September 2012 and adjustments to 5 November 12

	B/S at 30 Sept 12 £		Adjustments £		B/S at 5 Nov 12 £
Fixed assets					
Freehold property	300,000		0		300,000
Current assets					
Trade and other receivables	100,000				
Sales		<i>i</i>	20,000		
VAT on Sales		<i>ii</i>	4,000		
Receipts		<i>iii</i>	(11,000)	13,000	113,000
Plant and equipment	140,000		0	0	140,000
Fixtures and fittings	10,000		0	0	10,000
Motor vehicles	30,000		0	0	30,000
Inventories	20,000				
Purchases		<i>iv</i>	10,000		
Cost of sales		<i>v</i>	(16,000)	(6,000)	14,000
Cash at Village Bank Plc	10,000				
Receipts from debtors		<i>iii</i>	11,000		
Payments to creditors		<i>vi</i>	(5,000)	6,000	16,000
Creditors: amounts falling due within one year					
Trade creditors	(670,000)				
Purchases		<i>iv</i>	(10,000)		
VAT on purchases		<i>viii</i>	(2,000)		
Accounting error		<i>ix</i>	(7,000)		
Payments to creditors		<i>vi</i>	5,000	(14,000)	(684,000)
HMRC - VAT	(100,000)		(2,000)	(2,000)	(102,000)
HMRC – PAYE/NI	(30,000)	<i>xi</i>	(4,000)	(4,000)	(34,000)
Accruals	(20,000)				(20,000)
Employees		<i>x</i>	(15,000)	(15,000)	(15,000)
Town Finance Plc	(30,000)				(30,000)
Total assets less current liabilities	(240,000)				(262,000)
Creditors: amounts falling due after one year					
Directors' loans	(40,000)				(40,000)
Town Finance Plc	(20,000)				(20,000)
Village Bank Plc	(220,000)				(220,000)
Net liabilities	(520,000)		(22,000)		(542,000)
Share capital	10,000				10,000
Revaluation reserve	30,000				30,000
Profit and loss account	(560,000)	<i>s</i> <i>i,</i> <i>iv,</i> <i>v,</i> <i>ix,</i> <i>x</i>	(22,000)		(582,000)
	(520,000)				(542,000)

QUESTION 2.

In the circumstances of this Company, explain the steps that the Liquidator should consider to maximise funds available for creditors. Discuss how you would expect the Liquidator to proceed, making such further and realistic assumptions as you consider appropriate. (25 marks)

Generally, when setting out to recover funds and assets in a liquidation consider:

- ascertaining what property (see s436 for definition of property) the company beneficially owns at the commencement of liquidation (statement of affairs/balance sheet/company's books and records, administrator's reports etc) and taking steps to collect them in – eg writing to debtors, writing to bank, taking steps to protect physical assets and selling for best price, etc.

At the commencement of the Liquidation assets will be transferred from the Administrator to the Liquidator, but the Liquidator still needs to ascertain whether there is any property that the Administrator has accounted for all Company property.

- ascertaining that claims on assets are legitimate or otherwise (ROT, liens, HP/leased assets, etc);
- ascertaining whether funds can be obtained from directors/officers/previous administrator if the company has suffered depletion of assets/losses before the commencement of liquidation through their actions prior to the commencement of the liquidation; (SIP 2 investigation, powers under s234, getting in the company's property; s235, duty to cooperate with office holder; s236 inquiry into company's dealings, etc);

[Consider: Part IV ch X, malpractice before and during liquidation; penalisation of companies and officers; investigations and prosecutions: especially s212, misfeasance; s213, fraudulent trading; s214, wrongful trading; s216/217, reuse of company name and personal liability for debts following contravention; s238 – 245, transactions at undervalue (s238), preferences(s239), extortionate credit transactions (s244 and also s423 transactions defrauding creditors) and avoidance of certain floating charges(s245).

These issues may be discussed in relation to specific circumstances of question – see below]

- ensuring costs of liquidation are minimised (SIP9); including considering necessity to disclaim onerous property (s178 – 182)

Generally, if pursuing directors/officers for funds, need to ascertain whether or not they have assets/means to pay (e.g. D&O insurance) any claims that the liquidator may make.

e.g. Does Johnson have sufficient funds? He has an expensive divorce settlement and large drawings from the company?

Generally, need to ascertain who are/were the directors at relevant times: consider was Douglas a shadow director (s251)?

Generally – search at Companies House re company structure, directors, shareholders;

Generally - Look at minutes of Board, management meetings.

Generally, need to ensure that liquidator has necessary authority to pursue claims. Need sanction of liquidation committee/creditors to bring or defend any action or other legal proceeding (Sch 4, para 4).

Liquidator may wish to discuss with liquidation committee/creditors what actions he is considering taking recovering funds as a result of pre-insolvency depletion of assets. (Note requirements of SIP 2 also have to give a copy of it to liquidation committee).

Generally, also consider whether to negotiate a settlement with directors rather than taking court action – consider costs of action(s), as well as time costs of liquidator, and likely recoveries.

The directors may have breached duties under CA 2006, s170 -177: generally, act within powers, act for benefit of company, exercise independent judgment; act with reasonable care, skill and diligence, duty to avoid conflicts of interest, duty not to accept benefit from third parties, duty to declare an interest in transaction or arrangement.

The Company, acting through the Liquidator, may be able to launch a claim for the losses caused.

Directors have to ensure accounting records are kept (CA 2006 s386) – ought to be an audit trail to see what is happening.

Sales of land to Polkz Ltd for £25 million. Consider:

- a director of the company, Angus, is a major shareholder in Polkz Ltd; (is this an associate – s435(6)(a)). Need to ascertain precisely the extent of Angus's control of Polk Ltd;
- if Polkz Ltd is an associate of Angus, then it is also "connected" with the company – s249(b)

- possible that at least one of the sales was a transaction at undervalue – need to consider circumstances of bid

- ascertain when transactions occurred: relevant time – 240(1)(a) – transaction at undervalue can only occur if within 2 years of onset of insolvency to connected person or within 6 months to non-connected person.
- also need to ascertain that the company was insolvent at the relevant time or became insolvent as a result of the transaction (s240(1)(b)). Relevant time in this case is the date of administration (s240(3)(d))

Consider also whether preference, s239

- need to ascertain Polkz Ltd's assets;

- discuss with committee/creditors; authority to take legal proceedings

- defences s238(5)

- remedy: s241(1) – various including, require property/proceeds to be transferred from Polkz Ltd to company, court can make any order;
- if sold on to bona fide purchaser, property will not be recoverable (s241(2)).

Sales of parcels of land to purchasers in Far East.

Consider S423 – transaction defrauding creditors

This is likely to be fraudulent trading (s213) as the directors would have known that the land was unlikely that planning permission would be obtained.

Also Companies Act 2006 s993 - criminal liability for fraudulent trading and also court can impose liability on relevant directors.

Remedy – s213(2) – on application of liquidator, court can make any persons who were knowingly parties to the carrying on of the business liable to make such contributions to the company's assets as it thinks proper.

Conversion of part of headquarters into a Health Club

– consider wrongful trading, s214 and misfeasance, s212.

Which directors? Individuals or board? Decision to start a health club taken by Board, need to ascertain whether the board monitored the development and/or whether it delegated/became the responsibility of one or more individual directors.

Defences: s214(3) - took every step to minimise loss to creditors (assuming that he knew that there was no reasonable prospect that the company would avoid going into insolvent liquidation);

S214(4) – note in reaching decisions, etc – test higher of reasonably diligent person having general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions of the director and the general knowledge, skill and experience that that particular director has.

Discussion referring to specific issues raised.

Was there any prospect of paying creditors, including large debt to HMRC?

Remedy: s215

Debts due from directors

Collect debts due from directors:

- possible misfeasance, IA 1985 s212

- liquidator should write to directors to recover

- CA 2006, s197, loans to directors permitted if shareholder approval obtained, various exceptions to shareholder approval including if loan < £10,000 (s207). Civil penalties. (NB assume Company is not listed, otherwise additional rules apply). Also, if public company cannot make a quasi-loan or enter into a credit transaction, or make any loan, quasi-loan or credit transaction, or arrange for the assignment to it of any such transaction, or arrange for any other person to undertake any of the above in return for some benefit from the company or its holding company

Exceptions CA 2006, s 204 – 209

Consider especially financial circumstances of directors – did Douglas use funds to pay for his divorce settlement? Costs of pursuing claims.

Salaries and fees of directors

Were these too high, given that the company was in financial difficulties? Should they have been taking any salaries/fees at all?

Need to establish when debts arose and financial position of the Consider wrongful trading.

Company at the time and when insolvency was recognised.

Dividend

Were there sufficient distributable profits? otherwise illegal.

CA 2006 s851, 852 – restrictions in common law or by articles on distribution;

CA 2006, s829 – definition of distribution;

CA 2006, s830 – profits available for distribution = accumulated realised profits (so far as not previously distributed or capitalised) less accumulated, realised losses (so far as not previously written off in a reduction or reorganisation of share capital)

CA 2006, s853 – realised profits = profits in accordance with GAAP

CA 2006, s847 - A shareholder who knows or has reasonable grounds to believe that a distribution (or part of it) contravenes the statutory rules will be liable to repay it (or the portion of it that is unlawful).

Liquidator will need to take steps, on behalf of the Company, to recover the funds.

QUESTION 3

3(a) Set out the authorisations that the Liquidator required in respect of remuneration (4 marks) Ignore VAT

Legal requirements:

R4.127 sets out basis/bases on which remuneration may be fixed (time, percentage of assets, set amount or combination).

See in particular R4.127(1), (3A) and (3B)

R4.127(3C) – the liquidation committee determines which basis/bases of remuneration and, if applicable, to fix percentage of assets and fix set amount.

R4.127(4) – in arriving at determination liquidation committee has to have regard to:

- complexity or otherwise of case;
- if liquidator has responsibility of exceptional kind;
- effectiveness with which liquidator carrying out/ought to carry out duties;
- value and nature of assets.

R4.127(5) – if no committee, or committee does not make requisite determination, the basis may be fixed by meeting of creditors.

R4.127(7) – if basis not fixed, and liquidator has tried to obtain authority of liquidation committee and creditors, liquidator may apply to court. Must be within 18 months of appointment.

R4.127(6) – if not basis not fixed within 18 months by liquidation committee or creditors: liquidator entitled to remuneration on Sch 6 scale rate (R4.127A)

R4.129A – if basis of fees fixed by liquidation committee and the liquidator considers rate or amount insufficient or basis inappropriate, the liquidator may call meeting of creditors and request rate or amount be increased or basis changed by the meeting.

R4.127B(1) &(2) – fees for realising assets for chargeholder:

- must take fees from fixed charge realisations;
- basis = realisation scale Sch 6 on assets realised

(NB liquidator does not have to use this provision, as he can come to agreement with fixed charge holder re fees)

R4.127B(3)&(4) – fees for realising floating charge assets:

(no floating charge assets in this case)

R4.130 – liquidator may apply to court for an order changing it or increasing its amount or rate, if considers basis fixed by liquidation committee or creditors is insufficient or inappropriate;

- must give 14 days' notice to
- committee or, if none, to one or more creditors as court may
- direct.

NB Practice Statement on Remuneration [2004] BCC 912 applies

SIP 9, paras 9 -12, information to be provided when seeking the basis for fees

- sufficient supporting information for approving body to make informed judgement that basis sought is appropriate;
- nature and extent of information depends upon stage that approval is sought;
- if part/all time costs basis: provide details of minimum units of time used and charge rate of all various grades of staff;
- provide details of any work subcontracted that could be done by liquidator/staff;

If work already carried out:

- details of proposed charge in period, what has been achieved and how it was achieved, sufficient to enable the progress of the case to be assessed and whether charge is reasonable in the circumstances;
- if proposed charge is calculated on time cost basis, disclose details of time spent and average charge-out rates, in larger cases split by grades of staff and analysed by appropriate activity.
- Details of any work that has been sub-contracted that could otherwise be carried out by liquidator/staff.

SIP 9, Appendix – para 3, 4, 5 – narrative on what information to be provided.

Also note that rates may increase.

(b) Making and stating any reasonable and realistic assumptions, set out how you, as Liquidator, must disclose in the annual progress report the remuneration that you have taken. (8 marks)

Legal requirement: R4.49C(5) – matters to be included in progress report set out in R4.49B(1)(b)-(j). (2) &(3).

R4.49B(1)(d) – progress report includes details of the basis fixed for the remuneration of the liquidator under R4.123 (or if not fixed at the date of the report, the steps taken during the period of the report to fix it);

R4.49B(1)(e) – if basis is fixed: a statement of remuneration charged in period of report (subject to rule re set amount) and where report is first to be made after basis has been fixed the remuneration charged during the periods covered by the previous reports including a description of the things done by the liquidator during those periods. Irrespective in either case of whether payment was made during that period.

R4.49B(3) – where basis of remuneration is a set amount under R4.127(2)(c) it may be shown as that amount without any apportionment to the period of the report

Extract from progress report – *note headings as appropriate:*

Liquidator’s remuneration

Basis of remuneration

The basis of the liquidator’s remuneration was fixed by [the Company’s creditors in general meeting][the Liquidation Committee] on [date]. The meeting approved that the basis should be a fixed fee of £40,000 in respect of the continued trading of Ancient Hotel and that all other work be remunerated on a time cost basis.

Additional remuneration

The Liquidator received £6,000 from a major creditor in order to investigate alleged wrongdoing by the Company’s directors.

Remuneration

A Creditor’s Guide to Liquidator’s Remuneration is available for download at [web address] or a paper copy may be obtained, free of charge, by writing a request to the Liquidator at [liquidator’s address].

An analysis of the time costs incurred is: [*appropriate assumptions, re split of work*]

	Hours	Partner	Snr Manager	Manager	Assistant	Total Hours	Time Cost	Av Hourly Rate
Classification of work function [<i>Realistic assumptions re division of time</i>]								
Administration and planning								
Investigations								
Realisation of assets								
Trading Creditors								
Case specific matters								
(Specify the matters)								
Total hours		50	82	210	200	542		
Total fees claimed (£)		14,000	22,500	48,500	27,500	112,500		

In the period £112,500 was drawn in respect of time costs and the fixed fee of £40,000 for trading Ancient Hotel was drawn.

The work has been divided into the following task headings and sub-categories:

Administration and planning

Includes case planning, case set-up, notification of appointment, statutory reporting, maintenance of case files and insolvency records, cashiering and accounting

Investigations

Includes investigating on the company's affairs and statutory reporting of directors

Realisation of assets

Includes identifying and securing assets, disposal of unsecured assets, collection of debts, stocks, property issues and VAT and tax matters.

Creditors

Includes set up of creditor records, creditor communications, preferential, unsecured and employee claims

Charge out rates

The table below sets out the charge out rates for the separate categories of staff who worked on this liquidation.

	2011 Hourly rate £	2012 Hourly rate £
Partner	300	350
Senior Manager*	250	300
Manager	200	250
Assistants**	100	150

* Time to be charged excludes 30% spent, in 2011, on trading Ancient Hotel

** Time to be charged excludes 50% spent, in 2011, on trading Ancient Hotel

Notes as appropriate

Creditors' right to request information

Any secured creditor or unsecured creditor with the support of at least 5% in value of the unsecured creditors or, with leave of the Court, may, in writing, request the Liquidator to provide additional information regarding remuneration or expenses to that already supplied within this report. Such requests must be made within 14 days of receipt of this report, in accordance with R4.49E.

Creditors' right to challenge Remuneration and/or Expenses

Any secured creditor or, unsecured creditor with the support of at least 10% in value of the unsecured creditors or, with leave of the Court, may apply to the Court for one or more orders (in accordance with R4.131(1)), reducing the amount or the basis of remuneration which the Liquidator is entitled to charge or otherwise challenging some or all of the expenses incurred.

Such applications must be made within 8 weeks of receipt by the applicant(s) of the progress report detailing the remuneration and/or expenses being complained of, in accordance with R4.131(1B) .

	Total hours	2011 Hourly rate £	Total hours	2012 Hourly rate £
Partner	30	300	20	350
Senior Manager*	42	250	40	300
Manager	80	200	130	250
Assistants**	50	100	150	150

Total Cost 2011	Total Cost 2012	Total Cost
9,000	5,000	14,000
10,500	12,000	22,500
16,000	32,500	48,500
5,000	22,500	27,500
		112,500

* Time to be charged excludes 30% spent, in 2011, on trading Ancient Hotel

** Time to be charged excludes 50% spent, in 2011, on trading Ancient Hotel

(c) Prepare a receipts and payments account for the progress report to 25 October 2012, in accordance with standard practice, and include relevant notes (10 marks)

NB – R & P should be prepared in accordance with SIP 7, note paras 1 & 2 – including clear and informative, interests of readers in mind; assist creditors and others in exercising their rights.		
Note para 3 – key compliance standards and para 4 - 13 form and presentation of accounts.		
	£	£
Receipts and Payments Account		
Cash at 25 October 2011		5,000
Proceeds of sale of Bates Hotel - net amount paid to Liquidator (see note)		20,000
Bates Hotel furniture and equipment	27,000	
Less auctioneer's fees	(2,000)	
Net amount paid to Liquidator		25,000
Stock		10,000
Book debts	90,000	
Less paid to debt collection agency	(5,000)	
Net amount paid to Liquidator		85,000
Ancient Hotel – consideration		160,000
Property rights/patents		1
Insurance refund		5,000
Refund of commissions		2,000
Goodwill		1
Bank interest, gross		500
Total receipts		310,502
Payments		
Trading deficit, Bates Hotel (<i>see note</i>)	(11,000)	
Legal fees	(40,000)	
Agents' fees	(16,000)	
Telephone and stationery	(1,600)	
Creditors' meeting called pursuant to section 98 approved by creditors and paid to Liquidator	(2,500)	
Liquidator's fixed fee for trading Ancient Hotel	(40,000)	
Liquidator's fee for time	(112,500)	
Postage and mail redirection	(1,000)	
Statutory advertising	(100)	
Liquidator's staff train fares to various Company premises	(1,000)	
Liquidator's staff fuel costs to various Company premises	(1,200)	
Insurance of assets	(1,000)	
Bank charges	(400)	
Total payments		(228,300)
Balance		£82,202
Cash held on interest bearing account at Village Bank Plc		£82,202

Note – Sale of Bates Hotel

Proceeds of sale of Bates Hotel	300,000	
Less auctioneer's fees	(3,000)	
Less solicitor's fees	(4,000)	
Less paid to fixed charge creditor	(273,000)	
Net amount paid to Liquidator		20,000

[SIP 7 Other presentational matters

14. Realisations by or on behalf of the office holder should be shown gross, with the costs of realisation shown separately as payments.

15. Realisations by or on behalf of the office holder of assets subject to charges should be shown as above with the amounts accounted for to the chargeholder shown separately as payments.

16. When assets subject to charges are sold by or on the instructions of the chargeholder (or other person with a legal right to do so), the net amount received should be shown in the account (even if "nil") with the gross realisation(s), costs of realisation and the amount retained by the chargeholder shown separately by way of note.]

Note –Trading account: Bates Hotel

	£	£
Trading: Ancient Hotel (may make reasonable assumptions re split of costs to show fuller trading account)		75,000
Receipts		
Payments		
Employees	50,000	
Other trading costs	36,000	(86,000)
Trading loss		(11,000)

Plus relevant explanation per SIP 7.

[SIP 7 Trading under office holder’s control

18. A separate trading receipts and payments account should be provided, and the balance should be shown as a single item in the main receipts and payments account. The office holder should also provide, by way of note or in the accompanying report, details of:

- a) The assets in existence upon appointment (e.g. stock and work in progress) that have been used in trading.
- b) Any uncollected debts and unpaid liabilities in respect of trading.
- c) Trading assets (e.g. stock and work in progress) still to be realised.]

(d) You understand that one creditor intends to challenge the expenditure that you have incurred on solicitors’ and agents’ fees. Set out how you, as Liquidator, should respond to such a challenge. (3 marks)

Liquidator has to consider the creditor’s application plus any supporting documentation sent to court under R4.131(3). Liquidator will need to justify the expenditure incurred:

- necessity to employ solicitors and agents;
- actual costs paid

Procedure:

Application may be made to the court by any secured creditor, or any unsecured creditor with either the concurrence of at least 10% in value of the creditors (including that creditor) or the permission of the court. R4.131(1)

Application may be made on the grounds that the expenses incurred by the liquidator is or are, in all the circumstances, excessive, or in the case of the basis, inappropriate. R4.131(1A)

The application must be made either within 8 weeks (subject to any order of the court extending this period) or, in a case where the liquidator has sent notice of a meeting to receive his resignation, 4 weeks of the applicant receiving

- the liquidator’s progress report

in which the incurring of the expenses in question is first reported.

R4.131(1B), R4.49E(5), R4.108, R4.49D

The court may, if it thinks no sufficient cause is shown for a reduction, dismiss the application, but before it does so it must give the applicant at least 5 business days’ notice to attend a hearing (but without notice to any other party). R4.131(2)

If the application is not dismissed the court must fix a venue for it to be heard. R4.131(2)

The applicant must send to the liquidator a notice stating the venue and accompanied by a copy of the application and any supporting evidence at least 14 days before the hearing. R4.131(3)

If the court considers the application well founded, it must make one or more of the following orders:

- that the remuneration be reduced;
- the basis be at a reduced rate or amount in respect of the period(s) after the period covered by the report;
- changing the basis of the remuneration in respect of the period(s) after the period covered by the report;

- some or all of the remuneration or expenses be treated as not being expenses of the liquidation;
- the liquidator, or his personal representative, pay to the company the amount of the excess of remuneration or expenses or such excess as the court may specify;

any order that it thinks just R4.131(4)

Unless the court orders otherwise, the costs of the application must be paid by the applicant and not out of the estate.R4.131(5)

Talk to creditor to resolve

QUESTION 4

(a) Using the circumstances of the Company as an example:

(i) Set out what steps your manager should have taken before giving advice to John and Abigail (9 marks);

Need to identify who client is: directors (as individuals) or company and need to explain this to client. They both cannot be the client.

If company is client need to explain that directors may wish to take independent advice (and vice versa)

Check that there is no conflict of interest in dealing with client. Check firm's existing client list; may wish to email partners/senior staff to ascertain whether or not they have had any dealings with Company and/or its directors

SIP 8 – if material professional relationship in last 3 years, may act as an adviser but only after careful consideration of the implications of so acting in light of ethical guidelines (SIP 8, para 6)

(Insolvency Code of Ethics refers to “significant” professional or personal relationships – where no safeguards can be put in place and appointment should not be taken).

As there is a “business relationship”, need to carry out identity checks in accordance with Money Laundering Regulations 2007 (and also Proceeds of Crime Act 2002, as amended, and Terrorism Act 2000, as amended). Consider CCAB Guidance.

Consider R3 Money Laundering Guidance:

“Where practitioners are providing services outside of formal insolvency proceedings, they should identify those parties entering into a contractual relationship with them. For example, where work is to be carried out for one party (e.g. a creditor or investor) in respect of a debtor, or investee entity, and both parties sign the letter of instruction, both parties should be identified. Where instructions letters are received from groups of creditors or investors, it will normally be sufficient to identify those parties who act on behalf of the group and enter into a contract with the practitioner (i.e. sign the letter of instruction), such as the agent or trustee.”

In the circumstances, identity checks will be carried out on each of the directors and the company (“Know Your Client”)

Should not accept any money (cash or otherwise) until identity checks have been satisfactorily completed.

Firm's policy may be, for example, to provide free advice at initial appointment/first hour (money laundering checks still required);

Or may require payment up front.

Policy should be explained to client, including policy on fees.

Consider whether the behaviour of John and/or Abigail lead the manager to suspect money laundering or any other criminal activity involving the proceeds of crime? eg how is the offer of money made? If so, the manager should immediately report John and Abigail to his money laundering officer (if there is one) or, if none, to SOCA.

Consider circumstances of case: manner of directors approaching IP, directors seem to have funds to pay liquidator.

Note cannot discuss suspicions with directors because of possibility of tipping off.

Also manager must consider Insolvency Code of Ethics issued by all RPBs:

Consider fundamental principles of objectivity, integrity, professional competence and due care, confidentiality and professional behaviour.

Needs to take steps to identify threats with compliance with fundamental principles, evaluate threats and respond in appropriate manner.

General discussion.

For example, offer of [fairly large amount of] money:

- for immediate advice and
- to carry out a speedy liquidation

should raise concerns, the manager should question Abigail and John about this and document his discussion.

At all times he should be assessing any threats to his/his firm's integrity.

Consider types of threats that may occur:

- self-interest (e.g. accepting fees without full enquiry; is the manager keen to progress his career?);
- self-review;
- advocacy;

- familiarity;
- intimidation

Discussion

Manager should not give advice before fully understanding the business and knowing what it does
Generally, the manager should discuss the various options available to an insolvent company – including administration, compulsory and voluntary liquidation, CVA as well as possible informal arrangements.
He may advise on a particular course if he gives reasons.

(ii) Set out what steps should be taken before accepting appointment as Liquidator to the Company (5 marks);

Consider whether CVL is the most appropriate procedure, if wrongdoing is suspected would a compulsory winding up be more appropriate?

Consider R3 Money Laundering Guidance (and CCAB Guidance):

In cases such as appointments made at a creditors' meeting in a voluntary liquidation, the practitioner should commence his identification procedures on appointment and complete them as soon as is reasonably practicable (within 5 working days is considered a reasonable period). Much of the necessary information may be obtainable from the practitioner who assisted with convening the meeting, for example, by providing certified copies of the necessary documentation.

Some identification work may already have been carried out.

Consider also whether suspect money laundering and whether should report to money laundering officer/SOCA. Consider whether there are sufficient funds for the liquidation: offer of £20,000 should not be accepted if there are "strings" attached. Liquidator must be impartial to perform his statutory duties and to act in the best interests of the creditors,

Consider whether there are appropriate staff to carry out the work.

Consider [ICAEW ethical guidelines] and types of threats that may occur:

- self interest
- self-review;
- advocacy;
- familiarity;

intimidation

Consider safeguards against threats – e.g. will the insolvency appointment be conducted in an independent, open manner?

SIP 8, paras 4, 5, 6 – if assisting in convening s 98 meeting, IP should ensure that directors are aware of their responsibilities and should obtain written instructions from Company's board of directors which clearly define the matters on which IP is to advise.

If receive instructions which would require to act in a manner materially contrary to SIP 8, he should only accept those instructions after careful consideration of the implications of acceptance in that particular case. Where the directors act contrary to SIP 8, it may be necessary to show that the directors' actions were undertaken either without his knowledge or against his advice.

An IP should not agree to act unless he is satisfied that he is competent to provide the level of advice needed by the company in question, or is able to recommend where to obtain the appropriate level of advice if he himself is not able to provide it (SIP 8, para 7)

iii Set out whether or not you would accept appointment as Liquidator of this Company (4 marks).

Consider who will vote for liquidator: R4.63, R4.64, 4.67, R4.70. Consider ethics of each type of creditor eligible to vote. Can Liquidator be appointed without support of directors, associated companies? Floating charge may not be valid (s245 IA 1986) and so bank may be unsecured creditor

Accept or not? Discussion: impartiality of liquidator (especially whether there is a significant professional relationship because of Taylor. Also consider Taylor's behaviour towards clients - entertainment may be within ambit of Bribery Act 2012?; Other considerations may include: powers of directors cease (s103); availability of funds.

- (b) Set out the steps that a Liquidator of a company in a Creditors' Voluntary Liquidation should take if a winding up petition is issued against it. Your answer should explain what the effect would be if the petition was issued before the date of the voluntary winding up and also what the effect would be if it was issued after the date of voluntary winding up. (7 marks)**

Post appointment

Liquidator should approach the petitioning creditor to see if he will withdraw the petition and to ascertain creditor's concerns. May need to pay petitioning creditor's reasonable costs.

Liquidator should ascertain wishes of creditors through committee, if there is one, or for example by consulting major creditors

The court will need to be satisfied for the reason for a compulsory winding up rather than a CVL, and how the creditors will be better served by a compulsory winding up. The court will make a winding up order against the wishes of the majority of creditors only if there is a special reason to override their wishes but would disregard the wishes of creditors who are closely associated with the management of the company. The CVL liquidator may wish to make a witness statement whether he considers the interests of the creditors are served by keeping the company in CVL, but he may not oppose the petitioner.

If a contributory presents the petition, the court will need to be satisfied that the rights of the members are being prejudiced by the continuation of the voluntary liquidation.

Re Lubin, Rosen and Associates Ltd (1975) 1 AELR 577; Re Falcon R J Developments (1987) 3 BCC 146; Re Rhine Film Corporation Limited (1986) 2 BCC 98949

Once a winding up order has been passed, the commencement of the winding up is deemed to be the time of the passing of the resolution to wind up in the CVL.

Unless the court directs otherwise, on proof of fraud or mistake, all proceedings taken in the voluntary winding up are deemed to have been validly taken. (s129(1))

Once a winding up order has been made the CVL liquidator must vacate office as the OR becomes liquidator.

The CVL liquidator must obtain his release from the Secretary of State (R4.136, R4.122 applies)

Pre-appointment

If petition before CVL liquidation, liquidator should ascertain whether petitioning creditor will withdraw petition. It may be necessary to offer to pay the petitioning creditors' reasonable costs, from the Company's funds.

The petitioner may withdraw the petition not less than 5 business days before the hearing. The court must be satisfied that the petition has not been advertised, that the company consents to the withdrawal and that the petitioner has received no notices in relation to the petition.

There may be a lengthy period between the presentation of a petition and the hearing

If the petitioning creditor will not withdraw the petition, the IP should inform the directors and creditors of the position. He may wish to present a witness statement, The CVL liquidator may wish to make a witness statement whether he considers the interests of the creditors are served by keeping the company in CVL, but he may not oppose the petition.

Until the winding up petition is heard, the CVL liquidator should take all steps necessary to preserve the company's assets. No sales of assets or investigative work should be carried out (Re Tony Rowse NMC Ltd [1996] BCC 196) (Note commencement of winding up is date of petition)

ADMINISTRATIONS, COMPANY VOLUNTARY ARRANGEMENTS and RECEIVERSHIPS

2012 EXAMINER'S REPORT

QUESTION 1

- (a) **Set out in a file note to your manager the optimal strategy for dealing with the remaining assets of the Company. Include for each asset the Administrator's initial considerations, further information required and how the asset may be realised. Detailed procedural steps are not required. (15 marks)**
- (b) **Prepare an estimated outcome statement as at the date of your appointment. Make and state such reasonable assumptions that you consider necessary. (10 marks)**

Part (a) of this question sought to examine whether candidates could identify and address practical issues relating to realisation of various assets.

A basic calculation was included for candidates to establish whether a long leasehold property should be marketed for a long or short period. Very few candidates calculated the uplift in net realisations resulting from a possible longer marketing period - many approached the realisation strategy on the basis that all assets should be sold as soon as possible without any obvious regard to the benefit to creditors.

The interaction of Administration and other procedures was not well understood and very few candidates identified that in this case it may be appropriate for the Administrator to consent to the appointment of a Fixed Charge Receiver. Several candidates wasted time in detailing arguments that would be made in court to avoid such an appointment when the question made it clear that there should be no adverse consequence to the Administration.

The sale of the business was answered well and most candidates gained marks by commenting on how the situation may be dealt with. The practical aspects of this, including the application to court, negotiation and ensuring funding was in place were answered well by many candidates.

The debt collection process of was generally understood however a large proportion of candidates did not apply this to the facts of the case. A number of candidates failed to recognise that some of the debt was not yet due, suggesting that recovery action such as a winding up petition be issued immediately.

There appeared to be a general misunderstanding as to the effect of existing liens on an Administrator with the majority of candidates effectively stating that the moratorium allowed the Administrator to ignore its existence.

Whilst in part (b) a number of candidates scored very highly there was also a high proportion that struggled to properly present an Estimated Outcome Statement. The primary difficulties arose around the presentation of the business sale and what would constitute a fixed and floating charge realisation.

The question required candidates to "make and state such reasonable assumptions". A worrying proportion of candidates failed to include any costs within the Estimated Outcome Statement and a proportion stated "assuming no costs". It may have been that these candidates were unsure as to the differences between an Outcome Statement and a Statement of Affairs but by not including specific costs lost valuable marks. Some candidates may have also missed out on marks due to not stating the rationale within their answer or by using a generic title of 'costs'.

QUESTION 2

- (a) **Outline the matters that may be relevant when determining where the Company's Centre of Main Interests lies and what action may be taken to minimise the risks of a successful challenge. (10 marks)**
- (b) **Explain the implications of Wales being recognised as the Company's COMI and how this may affect an overseas practitioner should they be appointed in Secondary proceedings. (5 marks)**
- (c) **Prepare a note outlining to the overseas practitioner the purpose of a creditors' committee, who can be a member and the role, responsibilities and powers that it has in an Administration. (10 marks)**

In part (a) candidates were able to outline matters relevant to determining COMI but a disappointing proportion failed to apply any of these matters to the fact of the case. For example many candidates identified that the registered office of a company is a relevant factor but failed to state that in this case this was in Spain. Candidates generally recognised that an application to court may be appropriate to minimise risks.

A few candidates scored highly on part (b) but the majority of candidates struggled to score well and quite a number did not attempt to answer it at all.

As should be expected candidates were able to score well in part (c) however many did go off topic into the procedure of appointment, wasting valuable time.

QUESTION 3

- (a) **Explain what difficulties, specific to these circumstances, you are likely to face when trading the Company in Administration and how you may deal with these challenges. (10 marks)**
- (b) **Prepare a trading cash flow forecast for the next 4 weeks assuming that maximum production is maintained for this period and that the business is closed at the end of the period. (15 marks)**

**NOTE: Ignore VAT
Ignore PAYE and NI**

Part (a) tested candidates' ability to identify and explain practical issues that an Administrator could face when trading a business that supplied medical equipment worldwide. Candidates picked up marks in relation to reservation of title, rent and employees but typically missed issues relating to warranties, product liability and its international trade.

There was a tendency by some candidates to write everything they knew about pensions; wasting valuable time outlining the notification requirements. There was a liberal scattering of phrases such as "seek legal advice" and "meet with landlord". It is not sufficient to write such phrases; candidates must explain why.

A small number of candidates answered part (b) of the question very well gaining maximum marks and most candidates were able to pick up marks for slotting some of the basic numbers into the cash flow.

Only a few candidates identified that production capacity would impact on the ability to service sales and a proportion showed the calculation but still included the sales (with the workings showing negative stock). A disappointing number of candidates recognised the fact that there was a reservation of title claim in their answer.

The quality of presentation was disappointing and it was clear that some candidates struggled with the basic presentation of a cash flow. Workings and assumptions were not included on many scripts which, together with the poor presentation made it difficult to award marks. A significant proportion of candidates had not read the question properly including VAT and PAYE/NI within their answers.

QUESTION 4

- (a) Outline the key differences in procedure and documentation of an Administrators' CVA compared to a directors' CVA. (5 marks)
- (b) Explain how the Chairman of the meetings should deal with each of the above claims for voting purposes. (15 marks)
- (c) Outline the procedure for ending an Administration following the acceptance of a CVA. (5 marks)

NOTES: Weekly pay for NI = £430 per week
Job seekers' allowance = £71.00 per week
Exchange rate at date of meeting \$1.54 to £
Exchange rate at date of Administration \$1.65 to £

In part (a) most candidates were able to identify differences between a director and Administrator CVA process. On occasion, the presentation of these answers made it difficult to award the marks, for example including a bullet point "No consent to act" would only achieve a mark if it was presented in the context that this applied to a director CVA but not an Administration CVA, not just part of a single long list.

Generally candidates struggled to answer part (b). Despite the question stating that 2 meetings had been called; one for the Administration proposals and one for the CVA very few candidates identified that there were 2 meetings.

Many candidates attempted to calculate the employee claim although the quality of these calculations was low highlighting a lack of basic knowledge.

A number of candidates wasted time outlining the proxy rules relating to voting when the question was specific to claims. The rules relating to the date of debt and translation of overseas currencies were well understood however a worrying number of candidates appeared to think that shareholders could vote as creditors.

Part (c) tested candidates' ability to summarise the provisions within the open text book and as such a number of candidates achieved full marks. The majority of answers were however extremely poor considering a substantial part of the answer could be found in the Act. Very few candidates identified that the question did not state the entrance route of the Administration and assumed it was an out of court appointment whereas marks were available both in and out of court entrance routes.

EXAMINATION MARKING PLAN

QUESTION 1

- (a) **Set out in a file note to your manager the optimal strategy for dealing with the remaining assets of the Company. Include for each asset the Administrator's initial considerations, further information required and how the asset may be realised. Detailed procedural steps are not required. (15 marks)**

Leasehold

Review insurance situation

Identify if there is a rent deposit

Marketing strategy:

- Rent arrears £12,500
- 3 month restricted period total expected realisations = £150,000 - £25,000 (rent arrears + 1 quarter rent) = £125k.
- 6 month = £200,000 - £37,500 (6m + arrears) = £162,500.

Therefore market for longer period.

Risk is Goldacre and possible payment of rent if valuation does not hold at £200k.

Administrator must establish other holding costs such as insurance, utility and security.

Instruct agents to market the property for sale

Obtain EPC certificate

Instruct solicitors to undertake necessary searches and prepare for sale

Attempt to negotiate with business purchaser to occupy site to have an income stream whilst marketing.

Obtain copy of the lease

Freehold

Consent of Administrator or permission of court required for appointment of fixed charge receiver

Court would apply re Atlantic

Does not appear to impede the purpose of the Administration

Discuss with lender reason for wishing to appoint receiver

Administrator should consider consenting to avoid costs of applications to court

Monitor performance of the receiver

Obtain security documentation to check that lender has the relevant powers

Sale of business

Obtain a professional recommendation from agents.

Establish an appropriate allocation of the sale proceeds

Explain to Lewis Limited the duty of the administrator in relation to allocation of proceeds according to fixed and floating for the protection of preferential and non-preferential unsecured creditors.

Negotiate with Lewis to establish an appropriate allocation of the offer

Seek to negotiate an increase to Liberg's offer

If other offer is considered to be appropriate consider application to court to release the security.

Discuss with Innis Bank whether it would be prepared to convey the property as mortgagee, overreaching Lewis' charge

Establish purchaser's proposed terms of payment/proof of funding

Debtors

Obtain/secure supporting documentation for all debts

Ensure debtors have correct details for payment of debt.

NatNews

Establish the method of payment and if necessary contact the customer to ensure paid to the administrators.

Wait to see whether customer pays and if not then review strategy.

MK Fuel

Establish from the directors the reason for non-payment

Consider if there is mutuality of dealing in relation to the creditor and debtor

Contact the customer to chase for payment and to identify issues

Likely that the debt will be settled less the contra position (£18,000 - £7,000)

Consider taking legal action

Leased vehicles

Check the nature of the hire agreements to ensure that the company has no interest in them.

General points

Seek legal advice

Tax review

Lien

the statutory moratorium triggered by the commencement of administration prohibits any steps being taken to enforce any security over the company's property, except with the consent of the administrator or the permission of the court

Moratorium does not remove the rights of creditors in relation to liens - s248(1)(b)(i) IA 1986, a creditor with a valid, enforceable lien is deemed to be a secured creditor in the insolvency of the Company

Court would consider Re: Atlantic

Establish if the goods were provided to the creditor - to have a valid enforceable legal lien, the lien holder must be in lawful possession of the goods over which it claims the lien

Obtain copies of any contract or terms of sale to establish if there is a contractual lien

A debenture holder is subject to the rights of a contractual general lien exercised when the lien holder lawfully acquired actual possession of the goods

Contact the person claiming a lien

Person claiming lien must give a definite amount or give the particulars from which the exact amount due can be calculated. The lien will be extinguished if the holder demands a sum in excess of that which is properly due.

At common law the lien extends only to charges properly due in relation to the improvement or repair of goods

No common law lien for storage charges - if storage charges are wrongly included in the sum which the garage identifies as required to settle the lien, the lien may be extinguished and the creditor lose right to retain goods.

If valid lien and as value less than debt consider agreement to creditor selling vehicle.

- (b) Prepare an estimated outcome statement as at the date of your appointment. Make and state such reasonable assumptions that you consider necessary. (10 marks)

Phelps crisps limited - in administration

Estimated outcome statement

£

Fixed charge assets

Motor vehicles	7,000
Owed to garage	<u>(12,000)</u>
	<u>(5,000)</u>

Leasehold property	200,000
Rent arrears	(12,500)
Rent during marketing period	<u>(25,000)</u>
	162,500

Assumed takes 6 months to sell - mark awarded for any reasonable assumption

Agent's costs	(6,000)
Administration costs	(5,000)
Legal costs	(5,000)
Holding costs	(2,000)
Innis Bank plc	<u>(275,000)</u>
	<u>(130,500)</u>

Any reasonable assumption - this example assumes 3% of sales proceeds

Any reasonable assumption

Any reasonable assumption

Any reasonable assumption

[Other fixed charge - candidate may assume that no benefit to administration estate if fixed charge receiver deals with. Calculation required in any case for security shortfalls.]

Freehold property	1,800,000
Agent's costs	(54,000)
Administrators' or receivers' costs	(20,000)
Legal costs	(20,000)
Holding costs	(5,000)
Torres Bank	<u>(1,500,000)</u>
Available to 2nd chargeholder	201,000
Innis Bank plc	<u>(130,500)</u>
Available to chargeholder	70,500
Lewis Snax Limited	<u>(500,000)</u>
	<u>(429,500)</u>

Any reasonable assumption - this example assumes 3% of sales proceeds

Any reasonable assumption

Any reasonable assumption

Any reasonable assumption

(taken from above)

	If candidate assumes lower offer	If candidate assumes higher offer	
Goodwill	35,000	135,000	If candidate assumes higher offer then should assume allocation as provided by agent lower: £200k-£100k-£50k-15k higher £300k-£100k-£50k-15k
Deficit towards Lewis Snax Ltd from above	(429,500)	(429,500)	
	<u>(394,500)</u>	<u>(294,500)</u>	

Floating charge assets

Plant and Machinery	150,000	150,000	(£50,000 + £100,000 (agent valuation))
Stock	75,000	75,000	(£50,000 + £25,000)
Office equipment	15,000	15,000	
Trade debtors	31,000	31,000	Reasonable assumption - NatNews: £20,000 + MK: (£18,000 - £7,000 set off)
Agent's costs	(24,000)	(24,000)	Any reasonable assumption (assumed 10% here)
Administrators costs	(40,000)	(40,000)	Any reasonable assumption
Legal costs	(20,000)	(20,000)	Any reasonable assumption
Bonding	(1,000)	(1,000)	Any reasonable assumption
Insurance	(3,000)	(3,000)	Any reasonable assumption
Disbursements	(300)	(300)	Any reasonable assumption
Any reasonable cost category	[]	[]	Any reasonable assumption
Available for preferential creditors	<u>182,700</u>	<u>182,700</u>	

As the company was formed in 2005 assumed all post enterprise charges

Assumption that the balance of the disposal relates to goodwill and therefore fixed charge

Explaining assumption

Preferential creditors

Employees	(25,000)	(25,000)	
	<hr/>	<hr/>	
	157,700	157,700	
Prescribed part			
50% of £10,000	5,000		
20% of remaining	29,540	(34,540)	(34,540)
	<hr/>	<hr/>	
Available to floating chargeholders	123,160	123,160	
Floating chargeholder	(394,500)	(294,500)	From above
Shortfall to floating chargeholder	(271,340)	(171,340)	
Prescribed part	34,540	34,540	
Non-pref creditors			
Creditors	(743,000)	(743,000)	
Employees	(140,000)	(140,000)	
Garage	(5,000)	(5,000)	(shortfall on vehicle value)
	<hr/>	<hr/>	
Deficit towards unsecured, non preferential creditors	(853,460)	(853,460)	
Shortfall to floating chargeholder	(271,340)	(171,340)	
	<hr/>	<hr/>	
	(1,124,800)	(1,024,800)	
Dividend p in £			
Preferential creditors	100	100	
Non-preferential	3.9	3.9	

QUESTION 2

- (a) **Outline the matters that may be relevant when determining where the Company's Centre of Main Interests lies and what action may be taken to minimise the risks of a successful challenge. (10 marks)**

To receive marks candidates must apply where possible the facts of the case to their comment.

COMI is the place of command and control – location where conducts the administration of the business on a regular basis and ascertainable by third parties
Must be a physical presence – there is in this case
Company's reg office presumed to be the COMI in the absence of proof – therefore in this case would suggest Spain.
Domicile of creditor irrelevant
COMI is to be ascertained at the date on which "a request to open insolvency proceedings is lodged
Not temporary
Ascertainable by third parties – company is registered in both jurisdictions
Command and control of a holding company is not sufficient to demonstrate
Press announcements regarding move would be considered and in this case such an announcement has been made
Where board meetings are held- recent one in UK suggesting COMI there
Letter to suppliers/creditors informing them of move
New HQ
Register HMRC – clearly registered in UK
Where negotiations conducted or operations located.
Open bank account in UK
UK resident directors
Where the finance and support functions are based
All relevant facts explained in a witness statement
Administration order application to court
Notice of application to overseas creditor
Seek legal advice
Document decisions

- (b) **Explain the implications of Wales being recognised as the Company's COMI and how this may affect an overseas practitioner should they be appointed in Secondary proceedings. (5 marks)**

All members states must recognise the Administration as main proceedings
No other main proceedings may be opened
All powers Administrator has in UK can be used in other EU states where there are assets or interests
Secondary proceedings may be opened in Spain if there is an establishment in that country – there is in this case
Secondary proceedings may be opened by the officeholder of the main proceedings or by other persons or authorities according to the law of the country in which the opening of the proceedings is requested
Overseas practitioner will be limited in dealing with the assets in that territory; Spain
Secondary proceedings must be winding up proceedings and may preclude trading and rescue.
There will have to be cooperation and information sharing

- (c) **Prepare a note outlining to the overseas practitioner the purpose of a creditors' committee, who can be a member and the role, responsibilities and powers that it has in an Administration. (10 marks)**

Role

The function of the committee is to assist the office holder in discharging his functions and act in relation to him in such a manner as may be agreed from time to time

The purpose of the committee is to represent the interests of the creditors as a whole, assisting the office holder generally and acting as a sounding board to obtain views on matters pertaining to the administration.

Members

Between 3 and 5

Must be a creditor

Not undischarged bankrupt

If corporate act through a representative

Not subject to Bankruptcy restriction order/undertaking

Not disqualified director

Members must consent

Responsibilities

Fix basis of administrator's remuneration
 Approve the drawing of Category 2 disbursements
 Review adequacy of the administrator's security (r 12.8)
 Determine the release of an administrator appointed by the company, directors or the holder of a floating charge
 Responsibility to only deal with the purchase of assets of the company in good faith and at arms-length.
 Agree or otherwise to the appointment of a replacement member of the committee
 Receive notice of the Administrator intention to resign
 Attend meetings
 Sanction certain actions
Powers
 Apply to the court for the administrator to be replaced following the death, resignation or removal of a court appointed administrator - Sch BI para 91 IA
 Request that costs (ie agents/ legal fees) be determined by the court
 ADM furnish committee with information relating to the exercise of his functions
 Require the attendance of the administrator giving seven days' notice in writing.
 Receive reasonable travelling costs for attending committee meetings (but not if meeting held within six weeks of a previous meeting unless summoned by the administrator)
 Power to apply to court for disclosure of confidential documents
 Require the administrator to convene a meeting of committee

QUESTION 3

(a) Explain what difficulties, specific to these circumstances, you are likely to face when trading the Company in Administration and how you may deal with these challenges. (10 marks)

General

Licences – medical sector may require licences and certification

- Seek specialist advice

Warranties – customers are likely to require warranties

- Establish current level of warranty claims
- Consider whether such claims could be insured or underwritten by a third party
- Ensure customers aware that no warranties to be provided.

Product liability – consequences of product failure are significant

- Discuss with insurance specialists to ensure that adequate cover obtained.

Worldwide – dealing with overseas customers could present:

- Language difficulties
 - Establish in house capability
- Differences in legal and regulatory systems
- Problems recovering debts

Pension scheme

- Likely to be a large creditor so it may be prudent to discuss strategy with trustees/PR

Appointment

- By bank therefore may be hostile and hence relationship with management may be strained.
- Consider obtaining indemnity from appointor

Employee cooperation will be required

ROT

Administrators may not have the right to use the stock; risk of conversion

Obtain independent legal advice that the Administrator may rely on

Assuming valid negotiate to use stock and pay for what is used

May be necessary to make ransom payments if alternatives cannot be sought

Production

Insufficient capacity to meet FeCalc orders

- ensure that customers accept that orders may not be fulfilled or fulfilled late

Sales

- Customers may cancel orders when Administration known
- Get confirmation of orders from customers; including ones where management have confirmed

May be difficult sourcing supplies due to bespoke nature of components.

Other costs

Rent

- Re Goldacre Administrator may be liable for full quarter
- Not required to pay on the due date
- Negotiate with landlord to pay on less onerous terms (e.g. weekly, monthly and reduced amount).

Haulier – may be owed money and therefore may seek to enforce lien. Cannot do this whilst moratorium in force however may be prudent to obtain confirmation that goods will be delivered without problem.

Clavicle Systems Limited – not subject to Section 233 so therefore must come to a commercial agreement with the supplier. Due to the criticality of the supply it is likely that the supplier will require payment in full of the arrears.

Cash flow – payment on delivery means that cash flow may be difficult to manage on a day to day basis. Try to negotiate terms with suppliers.

- (b) Prepare a trading cash flow forecast for the next 4 weeks assuming that maximum production is maintained for this period and that the business is closed at the end of the period. (15 marks)

Patella Limited - In Administration

Cash flow

		Week 1	Week 2	Week 3	Week 4	After or discretionary timing	Total
	<i>Working</i>	£	£	£	£	£	£
Sales	3	210,000	210,000	150,000	120,000		690,000
Direct costs							
Direct Labour	5	(60,000)	(60,000)	(60,000)	(48,000)		(228,000)
Materials	4	(35,000)	(60,000)	(60,000)	(48,000)		(203,000)
Distribution	5%	(10,500)	(10,500)	(7,500)	(6,000)		(34,500)
Overheads							
Rent						(50,000)	(50,000)
							Discretion over timing of payment as case law does not dictate payment only liability.
Salaries		(30,000)	(30,000)	(30,000)	(30,000)		(120,000)
Pension scheme						(34,800)	(34,800)
							Discretion over timing as long as assumption stated
Utilities		(5,000)	(5,000)	(5,000)	(5,000)		(20,000)
Clavical systems Limited		(6,000)					(6,000)
		<u>63,500</u>	<u>44,500</u>	<u>(12,500)</u>	<u>(17,000)</u>	<u>(84,800)</u>	<u>(6,300)</u>
Bank account							
b/f		-	63,500	108,000	95,500	78,500	-
c/f		63,500	108,000	95,500	78,500	(6,300)	(6,300)

WORKINGS

1. Finished goods stock

b/f total cost	96,000	8	4	-	-	8
cost per unit	12,000					
units	<u>8</u>					
production		10	10	10	8	38
Sales (see below)		(14)	(14)	(10)	(8)	(46)
c/f		<u>4</u>	<u>-</u>	<u>-</u>	<u>-</u>	<u>-</u>

2. Sales volumes

Units on order	14	18	9	5	46
Sales	(14)	(14)	(10)	(8)	(46)
Units to fulfil	<u>-</u>	<u>4</u>	<u>(1)</u>	<u>(3)</u>	<u>-</u>

3. Sales income

Units sold (<i>see working 2</i>)	14	14	10	8
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Sales

cost	12,000	210,000	210,000	150,000	120,000
uplift	25%				
price	<u>15,000</u>				

4. Component costs

cost per unit	12,000
material element	50%
material cost	<u>6,000</u>

Number produced (<i>see working 1</i>)	10	10	10	8
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Total component cost	6,000	60,000	60,000	60,000	48,000
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Less material not subject to ROT	(25,000)	-	-	-
Payments to suppliers	<u>35,000</u>	<u>60,000</u>	<u>60,000</u>	<u>48,000</u>

1

5. Direct labour costs

Number produced (<i>see working 1</i>)	10	10	10	8
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per unit	6,000	60,000	60,000	60,000	48,000
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6. Pension scheme

Direct labour (<i>see working 5</i>)	60,000	60,000	60,000	48,000
Salaries	30,000	30,000	30,000	30,000
	<u>90,000</u>	<u>90,000</u>	<u>90,000</u>	<u>78,000</u>

Pension	10%	9,000	9,000	9,000	7,800	34,800
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QUESTION 4

- (a) Outline the key differences in procedure and documentation of an Administrators' CVA compared to a directors' CVA. (5 marks)

Process

Normally set up meetings of the proposals and CVA close to each other – proposals must be first
Can be the same meeting provided the relevant majorities are considered for the resolutions.
Administrator responsible for ensuring all creditors in the SOA and any other creditors aware of receive notice.

Administrator responsible to sending notices to members

Documentation

Administrators' proposals

- Specify CVA as exit route
- Discharge from liability based upon approval of CVA
- Proposals for if the CVA is not accepted

CVA

- Nature and amount of preferential creditors disclosed
- Administrator's estimate of prescribed part
- Administrators' estimate of net property
- Whether and if so why the administrator intends to make an application to court under s176A
- Deal with Administrator liabilities
- Report to court and comments on proposal not required
- No notice to intended nominee
- No consent to act

- (b) Explain how the Chairman of the meetings should deal with each of the above claims for voting purposes. (15 marks)

(i) **Bismark Palm Oil limited**

- Votes calculated at date of Administration for both meetings
- Cannot vote including the £40,000 due from the administration
- Provided Bismark still registered for VAT their claim should be gross of VAT - £96,000.
- Admit £96,000 for voting purposes

(ii) **Mr Hesper**

- Should mitigate notice – if possible establish if any occurred
- As a former employee connected and therefore must exclude vote for CVA purposes when establishing whether more than one half of creditors approve.

		NI Fund £	Total contract £	To vote £
DOB	12-Jan-68			
Start	01-Dec-05			
End	07-Sep-12			
Age	44			
Length of service	6			
Notice	12	6	12	
Pay	1,000	430	1,000	
Notice claim*		<u>2,580</u>	<u>8,918</u>	6,338
Redundancy weeks		7.5	52	
Weekly pay		<u>430</u>	<u>1,000</u>	
		<u>3,225</u>	<u>52,000</u>	48,775
Total claim				<u>55,113</u>
*Notice claim:				
		DTI	Contractual	
Gross claim		6,000	12,000	
Job Seekers (£71.00 x 6, x 12)		<u>(426)</u>	<u>(852)</u>	
		5,574	11,148	
Notional tax	20%	<u>(1,115)</u>	<u>(2,230)</u>	
Net claim		<u>4,459</u>	<u>8,918</u>	
Limit to statutory £430 <i>balance</i>	2,580	2,580	6,338	
Allow to vote for £55,113				
(iii) Stewartia Inc				
<ul style="list-style-type: none"> ▪ Can vote for full value of claim whether or not they are to be paid in full. ▪ Claim calculated as of date of Administration ▪ Allow to vote for 300,000/1.65 = £181,818 				
(iv) Mega Decker Group Limited				
<ul style="list-style-type: none"> ▪ Shareholders cannot vote at meeting for Administrators' proposals ▪ Decision of CVA creditors' meeting has effect even if shareholders vote against ▪ Votes calculated according to their rights in the articles – review articles 				
(v) Baldcypress Limited				
Administrators' proposals				
<ul style="list-style-type: none"> ▪ HP creditors are entitled to vote for the amount due and payable to them at the date the company entered administration. ▪ Creditor can therefore vote for £30,000 in relation to the proposals 				

CVA

- Lombard North Central v Brook; Re Durham Counters Ltd
- Should be permitted to vote for total amount falling due under the agreements less a standard discount for accelerated receipt.
- No deduction for valuation of the asset
- Allow to vote for £270,000 less standard discount
- Standard discount calculated by reference to Rule 11.13 applying to dividends:

$$\frac{X}{1.05n}$$

Check that payments allowed and included within the CVA
Payment under the CVA does not affect voting rights

(c) Outline the procedure for ending an Administration following the acceptance of a CVA. (5 marks)

Statutory procedure

If in court

For in court appointments court hearing required – paragraph 79 Schedule B1

Appointment ceases from date and time endorsed by court

If out of court paragraph 80

Appointment ceases when 2.32B filed at Companies House

Obtain discharge from liability

File notice that purpose achieved in form 2.32B in

- Court (2 copies)
- Companies house

Court endorses form 2.32B with date and time

Send copy to creditors and those notified of appointment within 5 days; or

Gazette notice undertaking to provide copy of notice and date administration ended

Sealed copy to administrator

Final progress report to date administrator ceases to act under R2.100 including a summary:

- Administrators' proposals
- Amendments or deviations from proposals;
- Steps taken during administration and
- The outcome
- Including matters under rule 2.47

Practical procedure

Distribute funds as appropriate:

- Administrator fees
- Professional costs
- Deal with and administration liabilities as appropriate

Close administration bank accounts

Review and finalise any tax matters including PAYE/NI, VAT and Corporation tax

Hand over any residual assets in accordance with the CVA terms

IP record completed

Bond released

Complete firm's checklist

PERSONAL INSOLVENCY

NOVEMBER 2012

EXAMINER'S REPORT

Overall comments

To gain good marks candidates needed to do far more than demonstrate knowledge of the law. All questions included scenarios requiring candidates to demonstrate practical awareness and an ability to develop common sense solutions. It is disappointing that many candidates were unable to do more than set out, not always correctly, the law and regulations that they had covered in their study or training courses. Many candidates appeared to have little if any experience of or training in how to deal with practical issues in personal insolvency.

Question 1

- (a) **Explain the steps that you should take as regards the assets and liabilities, and the other issues which may need to be addressed by you, in order to get to the point where you are able to declare an early first and final dividend to the creditors. (22 marks)**
- (b) **Explain the position as regards Mr Corvedale's discharge from Bankruptcy in the event that he continues not to co-operate and you vacate office as Trustee and obtain your release without filing any report under the Court order of 5 July 2012. (3 marks)**

In Part A candidates gained good marks for knowing the statutory steps that a trustee needs to take in the lead up to declaring a dividend. However, candidates often failed to appreciate that, because of the large number of creditors and the likely small level of the dividend, the statutory steps taken by the trustee would need to be tempered by a pragmatic approach if the available funds were not to be dissipated in costs. Almost all candidates failed to identify this as an issue.

Many candidates' answers were weak when identifying the necessary practical solutions. For example, candidates were told that the bankrupt had not surrendered to the proceedings and had disappeared without trace. Too often candidates simply set out a bankrupt's duties and the penalties for non-compliance, rather than consider what the trustee should actually do in the circumstances. Many candidates simply regurgitated what they had learned in the classroom about the interaction between a trustee and a bankrupt. Suggestions such as "speak to the bankrupt" or "write to the bankrupt and ask him to produce a statement of affairs" were common, despite the fact that his whereabouts were unknown. Candidates also showed a lack of practical experience when considering what should be done about the uncooperative mortgagee.

In Part B, few candidates were able to explain what happens in a bankruptcy if something needs doing after a trustee has obtained his release. Most candidates did not recognise the role of the Official Receiver as trustee ex-officio. Some thought it wrong for the trustee to have left office before the bankrupt was discharged, even suggesting that to do so was negligent.

Question 2

- (a) **Set out in tabular form Miss Yates's and Mr Tower's financial positions and their income and expenditure, both before and after the agreed reductions are made, and comment on these. (15 marks)**
- (b) **Prepare a note for the forthcoming meeting, setting out your considerations and advice as to how Miss Yates and Mr Tower should proceed. (10 marks)**

(25 marks)

Note: You should state what further information you will require and any assumptions that you have made.

The scenario given to candidates is very typical of real life situations and a well prepared candidate should have been able to identify the key issues and advise accordingly. The answers showed that many candidates do not have the ability to manipulate and present figures in a coherent manner.

For part A the figures given to candidates were straightforward and the adjustments to be made going forward were largely identified in the question. Many candidates were able, with reasonable accuracy, to set out the current position, both as regards assets and liabilities and income and expenditure. However, the quality of presentation varied widely and certain aspects were not well dealt with. There were unrealistic assumptions made about the motorbike, unnecessary calculations for interest and an inability to account properly for joint debts. The position going forward was even less well dealt with. Some candidates thought it appropriate to combine the couple's financial positions, not appreciating that both were going to have to be advised as individuals and the solutions for each might be different. Not all candidates recognised that the key lay in the couple sharing responsibility for the living costs. Some candidates identified this as an issue but then failed to reflect this in their figurework.

In part B candidates fared less well. To some extent this was as a result of candidates not getting to grips with the issues in part A. However, all too often candidates fell back on regurgitating their book-learned knowledge without going on to apply this to the situation at hand. Most candidates did correctly identify that one party would be best served by going into an IVA. The solutions suggested for the other party were far more varied with some candidates ducking the issue and failing to provide any advice at all.

Question 3

Write a memorandum to the Trustee. Set out your analysis of each of the issues that you have identified and advise on the steps to be taken in relation to these in the next month. Where relevant, refer to the statutory and other authorities that support what you say.

(25 marks)

In this question candidates needed to approach each of the largely self-contained issues with the law about overlapping bankruptcies firmly in mind. Far too many candidates were unaware of the existence of the relevant statutory rules. Where candidates did mention the relevant provisions, they often failed to apply them properly, giving the impression that reference had been made to them for the first time in the heat of the exam. Too many candidates proceeded on the wholly incorrect premise that the later trustee simply took over from the earlier and had a right to claim everything. Only a minority of candidates demonstrated they really understood how the provisions need to be applied and correctly identified those assets which would be affected by them and those which would not.

Some candidates incorrectly thought that a bankrupt was not able to carry on a trade at all and wasted time setting out the possible consequences. Others considered whether it would be viable for the trustee to trade on, failing to appreciate that, on the facts of the case, there were unlikely to be any assets of value which vested in the trustee. Candidates went 'by the book' setting out the generic steps an insolvency practitioner might take without considering the facts in the question. Most did not appreciate that the practical way forward was for the trustee simply to check that there really was nothing there, disclaim the lease and walk away.

The difficulties that are encountered when trying to dispose of a minority shareholding in a small private company were lost on most candidates. Too many demonstrated a lack of basic understanding of company law by confusing dividend/income and shares/capital. Some missed the point altogether by advising that the trustee would be able to force the company to pay an immediate dividend or would be able to dispose of the shareholding for full value straight away.

Candidates also struggled with the bankrupt's inheritance under his mother's will. A number thought that the assets in the mother's estate vested directly in the trustee. This gave candidates the chance to demonstrate all they know about securing property, failing to recognise that this was all irrelevant. Some did not understand the role of an executor and/or thought that the bankrupt's interest in the will arose on the grant of probate, leading candidates to waste time explaining the rules about acquired assets.

Question 4

Write a letter to Miss Stanway. Advise how she should proceed in relation to each of the three issues raised by her. Explain in your letter how, now or in the future, Miss Stanway can compel the Trustee to provide information and explanations about the three issues and what she might do if she is dissatisfied with what she is told.

(25 marks)

Candidates were required, in effect, to come up with an action plan in the form of an advice letter and the emphasis was very much on asking candidates to explain what should actually be done. Too many were unable to do this. The fact that the question was slanted from the viewpoint of someone other than the trustee seemed to throw some candidates.

There were only three issues with which candidates needed to deal. Some candidates scored reasonable marks making basic points about the freehold property and the bankruptcy costs, but too many were unable to go on to provide the advice that was required. In general candidates dealt less well with the neighbour's claim. Whilst most correctly identified the deadlines set out in the Rules, many failed to appreciate that the clock was already ticking and therefore the bankrupt had to take steps urgently to protect her right to challenge the trustee's decision.

JIEB PERSONAL INSOLVENCY NOVEMBER 2012

EXAMINATION MARKING PLAN

QUESTION 1

- (a) Explain the steps that you should take as regards the assets and liabilities, and the other issues which may need to be addressed by you, in order to get to the point where you are able to declare an early first and final dividend to the creditors. (22 marks)

Preliminary

Take possession of the computer and the books and records.

Review the 20 boxes of records for evidence of further assets liabilities and/or lines of enquiry.

Given the nature of the bankruptcy it would be prudent to interrogate the computer to gain access to the information which it holds.

It may be necessary to employ a specialist agent to do this.

Assets

Potential leads and enquiries

Follow up any information obtained from the records/computer that may lead to further asset realisations.

Consider whether there would be anything to be gained by tracing the whereabouts of the bankrupt ("B").

If the answer is "yes" (as seems probable) appoint tracing agents to locate B.

Consider seeking an order under IA86.s371 for redirection of B's post.

Make enquiries of creditors as to the whereabouts of B.

Once located, engage with B in order to elicit information from him.

B's lack of co-operation to date suggests that the powers under IA86.s363 and/or s366 may need to be invoked and B summoned to appear before the Court to answer questions under oath.

Possibly consider whether this is a case where the Official Receiver ("the OR") should be asked to apply under IA86.s290 for B to be publicly examined.

The mortgagee("M")

M has an obligation to account to T as the person interested in the equity of redemption.

If not already done, write to M reminding them of this and of their obligations to deliver any property in their possession (ie any surplus) to T and that they are persons able to give information concerning B's property and therefore liable to be summoned to appear before the Court under IA86.s366.

Make it clear to M that if action under s366 becomes necessary, a costs order will be sought against them.

On receipt of the information from M review this for any evidence of a sale at an undervalue and/or excessive cost/charges for example by T obtaining his own valuation and if necessary challenge M about these.

T should ensure that, if appropriate, he receives a proof from M for any shortfall.

T's duties to the OR

The OR has a duty to investigate B's conduct and affairs (under IA86.s289)

T has an obligation to provide information to the OR (under IA86.s305)

T must therefore report to OR (insofar as OR is not already aware of them) any matters discovered by T that would be relevant to the OR for the purpose of carrying out his duties including the potential commission of offences by B such as non-disclosure of property (IA86.s353) or concealment of property (IA86.s354)

This may be a case where prosecution of B may occur or where the Secretary of State seeks a BRO/BRU.

T may be asked to provide information and/or give formal evidence in the form of a witness statement.

T may have to give oral evidence at trial.

T must make sure that he carefully preserves B's books and records.

Creditors

Notices to creditors and/or advertisements

If the notices advertising T's appointment did not also ask creditors to prove their debts. T must do this before declaring the dividend (IR86 r11.2.1A).

Such a notice should be placed in the London Gazette and, given the circumstances of the case, in the two local papers in which T's appointment was advertised.

The notice in the advert has to give a date by which debts must be proved and state that T intends to declare a dividend within 2 months of the last date for proving (IR86.r11.2(1C)).

Therefore T should only advertise once he is sure that he can meet the deadlines

which will probably only be the case when all investigations and work seeking out claims has been concluded.

Seeking out creditors

As well as placing adverts for claims T has an obligation to identify potential creditors using all information sources available to him.

T should review:

books and records

information from computer papers handed over to T by the OR
papers received following advertising of T's appointment
results of investigations made by T
his own files to identify creditors such as the landlord and M
organisations likely to creditors because of the nature of
the case (e.g. HMRC and the utilities).

Agreement of claims

Process needs to be planned carefully because of the large number of claims.

Absent any material further realisations, the dividend rate will be very low (probably under 10p in the £) and therefore consideration should be given to setting parameters for agreeing claims with (for example) all claims which are under a certain amount and where credible supporting documentation has been provided being agreed without enquiry or (for example) claims lodged which are within a set percentage of what is shown on the records being accepted without further work.

Such an approach can be justified on the grounds that it will not be cost effective to spend time arguing about or trying to reconcile modest unexplained discrepancies.

On the information available it is not possible to say what the parameters to be set for dealing with claims in this way may be.

Potential creditors who have not lodged proofs should be asked to do this (without issuing formal notice to do so)

Proofs received should be admitted, in whole or in part, by T. If a proof is rejected in its entirety or in part, T must explain to the creditor concerned why this is (IR86 r6.104)

T will have to deal with any appeals against rejection that may be made by creditors under IR86.r6.105 although given the probable low level of dividend it is perhaps unlikely that invoking this Court based appeal process will be cost effective for creditors.

T must have regard to IR86.r6.108 to 6.114 when quantifying claims.

Credit for stock returned to suppliers

As the OR's agents returned stock to suppliers T must ensure that credit for this has been given by the creditors concerned when submitting their proofs of debt.

T will need to ask the agents to provide information about what was returned to whom and what was scrapped and should review the actions of the agents.

Given the nature of the stock it is highly unlikely that any sensible criticism can be made of the agents' action. Similarly, there will be no point in formally considering Retention of Title issues as the cost of doing so and the likely minimal realisable value of any stock recovered would make this an uneconomic exercise.

Statutory matters

It is unclear how long T's administration will last but he will have to attend to the usual statutory matters principally the provision of progress reports to creditors under IR86.6.78A the first of which must be sent out within 2 months after 23 March 2013.

T will periodically have to review the level of his specific penalty sum and maintain his IP record with the information required under IP Regs 2005 sch 3 and carry out periodic (6 monthly) reviews of the case.

and keep the financial records required of T by the Insolvency Regulations 1994.

Prior to declaring the dividend

Before declaring the dividend, T must give notice of his intention to do so to all creditors of whose addresses are known to him and who have not proved their debts.(IR86.r11.2(1))

The notice must specify a date by which proofs must be lodged (not less than 21 days from the date of the notice) (IR86 r11.2(2))

and state that T intends to pay a dividend within 2 months of the final date for proving.(IR86 r11.2(3))

Within 5 business days of the last date for proving T must deal with all proofs not yet dealt with (IR86.r11.3(1))

T has discretion as to whether to deal with proofs received after the last date for proving.(IR86.r11.3(2))

Prior to declaring the dividend T must determine whether there are any extant appeals against his decisions on proofs.

If there are any such appeals T may postpone or cancel the dividend (IR86.r11.4)

If there are such appeals T may not declare the dividend without permission from the Court (IR86.r11.5(2)).

If there are no such appeals, T must declare the dividend within the two months period stated in the notice to creditors (IR86.r11.5(1)).

Prior to fixing the amount of the dividend T must make provision for all the costs and expenses of the bankruptcy, including all costs and expenses to closure and reconcile his account with that held by the Secretary of State.

- (b) Explain the position as regards Mr Corvedale's discharge from Bankruptcy in the event that he continues not to co-operate and you vacate office as Trustee and obtain your release without filing any report under the Court order of 5 July 2012. (3 marks)

B will remain an undischarged bankrupt until further order of the Court.
 B has not complied with all (or any) of his obligations, and shows no signs of doing so B will have to apply to Court if he wants his discharge
 but it is most unlikely that the Court would accede to any application (whenever made) to be discharged before he has complied and the Court has a report confirming the position.
 The Court order suspending B's discharge ordered that a report would be required from T but if T has left office and obtained his release he is not in a position to submit a report
 This task would fall to the OR as *trustee ex officio* but it is likely that the OR would seek information from, and the opinion of, T before submitting a report to the Court.

QUESTION 2

- (a) Set out in tabular form Miss Yates's and Mr Tower's financial positions and their income and expenditure, both before and after the agreed reductions are made, and comment on these. (15 marks)

Note: You should state what further information you will require and any assumptions that you have made.

Current financial positions Estimated present position – assets and liabilities			
£	Miss Y	Mr T	
Assets			
Equity in the flat	15,000	15,000	
Motorcycle		10,000	
Cash at bank		1,800	
Cash ISA		10,900	
Total assets	15,000	37,700	
Liabilities			
Credit cards etc	49,000		
Debt as second cardholder		27,000	
Motorcycle loan		10,000	
Keystone Bank overdraft	7,500		
Total liabilities	56,500	37,000	
(Deficiency)/surplus	(41,500)	700	

Further information required and assumptions made

Assumption made that Miss Y and Mr T each have a 50% interest in the flat.

Assumption made that the flat value and mortgage are as they were in March 2011, but up to date valuation and mortgage figures will be required.

Assumption made that the value of the motorbike is equal to the amount of the outstanding loan but a proper valuation is required.

Assumption made that the loan on the motor bike is unsecured but whether this is right needs to be confirmed.

It needs to be established whether the monies advanced by Miss Y's and Mr T's parents are secured on the flat

or are unsecured debts

or whether they were gifts to Miss Y and Mr T and therefore not debts at all.

Assumption made that Mr T is jointly and severally liable for the £27,000 outstanding on the credit cards where he is named as joint cardholder. ("the Joint Debts")
Confirmation of Mr T's investments will be required.

Estimated present position - income and expenditure

£ (monthly)	Miss Y	Mr T
Income		
From employment	2,200	2,000
Total income	2,200	2,000
Expenditure		
Household expenses	1,940	
Other expenditure	460	800
Minimum repayments on credit cards etc	1,470	
Motorcycle loan		420
Total expenditure	3,870	1,220
Monthly (deficiency)/surplus	(1,670)	780

Further information required and assumptions made

All information is as given by Miss Y and Mr T at the initial meeting but evidence, particularly of income, will be required.

Confirmation is required that all debts have been disclosed.

The monthly amounts paid by Miss Y are at the average minimum payment of 3% of outstanding balances.
 $3\% \times £49,000 = £1,470$.

Comments on the present position

Miss Y's and Mr T's assets are largely fixed and illiquid whilst their liabilities are repayable in the short term.

Miss Y is insolvent on a balance sheet basis

and she has insufficient income to meet her monthly obligations including the minimum payments on her twelve debts

and therefore cannot pay her debts as they fall due.

Mr T is not technically insolvent as he has an excess of assets over liabilities even after factoring in the Joint Debts.

and he has surplus monthly income.

But, the monthly income and expenditure gives a false picture

because Mr T is not contributing his fair share of the household expenses

or helping to meet the repayments on the Joint Debts.

Taken together, there is a monthly income shortfall of £890 against what is required to meet the current combined expenditure obligations.

This situation has to be corrected as Miss Y and Mr T are living beyond their means.

Estimated future position – income and expenditure

£ monthly (revised)	Miss Y	Mr T
Income		
From employment	2,200	1,700
Total income	2,200	1,700
Expenditure		
Household expenditure	820	820
Other expenditure	140	130
Minimum repayments on credit cards etc	1,065	
Minimum repayments on credit cards etc for which Mr T is jointly and severally responsible		405
Motorcycle loan		420
Total expenditure	2,025	1,775
Monthly surplus/(deficiency)	175	(75)

Further information required and assumptions made

Mr T's income is reduced by 15% (£300) to £1,700 for the foreseeable future.

Reductions in expenditure are made in accordance with indications made at the first meeting, viz:

household expenditure is reduced by £300 to £1,640 and Mr T is responsible for paying half this.

Miss Y's other expenditure is revised by reducing the sports club membership from £80 to £0 and pubs, clubs and restaurants from £300 to £60.

Mr T's other expenditure is revised by reducing the sports club membership from £150 to £0, gadgets from £200 to £0 and pubs clubs and restaurants from £400 to £80.

Again only minimum payments are made to repay the debts of £49,000 incurred by Miss Y but Mr T takes responsibility for paying one half of the minimum repayments on the Joint Debts ($£27,000 \times 3\% \times \frac{1}{2} = £405$).

No provision is made for any repayment by Miss Y of her overdraft with Millstone Bank.

Comments on the estimated revised position

Making the economies that have been identified of £1,290 (£300 + £80 + £240 + £150 + £200 + £320), offset by a decrease in Mr T's income of £300, improves the monthly position by £990, turning a monthly combined shortfall of £890 into a combined monthly surplus of £100.

With Mr T paying his fair share of the outgoings (including a contribution to repaying the Joint Debts), combined with his drop in income, means that he now has a small monthly deficiency of £75.

On the other hand, being relieved of the burden of paying virtually all the outgoings and now only paying her fair share means that Miss Y has spare income each month of £175.

Crucially none of the changes in income and expenditure has any effect on the present positions as regards assets and liabilities and Miss Y's excess of liabilities over assets of £41,500 remains.

(b) Prepare a note for the forthcoming meeting, setting out your considerations and advice as to how Miss Yates and Mr Tower should proceed. (10 marks)

(25 marks)

Advice as to way forward**Preliminary advice as to the general position**

On the figures as presented it might be possible for Miss Y and Mr T to move forward without taking any steps as regards their debts as they have enough income to meet the current monthly repayments. But a combined monthly surplus of £100 is very small and does not allow for future increases in expenditure, for example:

Increases in mortgage rates (only fixed until March 2013)

General increases in the cost of living

Unexpected/emergency expenditure

Changes in terms and conditions on credit cards and loans

Any requirement or agreement to service/repay Miss Y's overdraft at Millstone Bank.

Also by accepting the status quo it will, even with Mr T's help, take Miss Y many years to repay her credit card and loan debts as the majority of the monthly repayments will go to meet accruing interest with only small (initially very small) inroads being made into the underlying debt.

Steps taken by Miss Y to resolve her own affairs may work contrary to Mr T's interests and/or vice versa

It is possible that you will end up concluding that the same practitioner will be unable to act for both Miss Y and Mr T and that one of them will need to obtain separate advice

Advice for Miss Y

The options available

Miss Y has to take positive action to deal with her debts.

The total debt is too high and there are too many creditors for informal agreements to work.

Debt consolidation is not possible because of the extent of her indebtedness.

She does not meet the entry criteria for doing a DRO.

A DMP may be possible but would tie her into repayments for years as any debt forgiveness would be unlikely – in effect this would be little different in monetary terms from accepting the status quo.

The two options appear to be going bankrupt or proposing an IVA.

The effect on Miss Y's credit record would be similar under either process.

Neither would relieve Mr T of his liability for the Joint Debts.

IVA

An IVA would be a "straightforward consumer IVA" and subject to the IVA Protocol and Standard Conditions as Miss Y has a regular income and several lines of credit from a number of creditors.

An IVA would stop interest running on her debts which would enable the £1,065 (as revised) currently being paid each month by her to keep her many debts under control to go to repaying her debts rather than just keeping pace with interest as it accrues.

Over 5 years that could provide more than enough money to meet the costs of the IVA and to pay creditors a substantial part of their debts or even pay them in full.

Miss Y could try offering to repay only a proportion of her debts but given her income that would probably be unacceptable to creditors.

Miss Y's only asset is her interest in the flat. Under the protocol this would be realised in the final year of the IVA

but it may not be necessary to realise it at all.

Bankruptcy

An option available to Miss Y but a step too far unless creditors decline to accept an IVA proposal.

Bankruptcy would release Miss Y from her debts

but her income is such that an IPO or IPA would be put in place requiring her to pay money towards her debts of an amount similar to that which would be required in an IVA

Payment would though only be over 3 years as opposed to 5 years in an IVA.

It looks unlikely that creditors would be paid in full in a bankruptcy meaning that annulment would be unattainable.

Advice for Mr T

It is unclear whether Mr T will need to enter into a formal agreement and he may maintain his opposition to doing so.

But Mr T cannot insulate himself from Miss Y's financial difficulties because of his liability for the Joint Debts and because his income would be taken into account when calculating the monthly payment to be made by Miss Y into an IVA or under an IPO/IPA in a bankruptcy.

Key to his decision is whether he can reach a workable arrangement on all of the Joint Debts for example by interest being frozen

or by getting the creditors concerned to agree to his paying half the debt back over time.

If Mr T can reach sensible agreements a formal insolvency process may not be required.

Mr T should consider whether he can sell his motorcycle, repay the related loan and acquire a cheaper form of transport to get to work.

This could reduce his monthly expenditure freeing up more income.

He also has savings that can be used as part of any agreement he may reach.

Mr T has to consider whether a formal (or even informal) procedure would have any effect on his employment as an accountant

but he must realise that what his friends might think is unlikely to be relevant.

QUESTION 3

Write a memorandum to the Trustee. Set out your analysis of each of the issues that you have identified and advise on the steps to be taken in relation to these in the next month. Where relevant, refer to the statutory and other authorities that support what you say.

(25 marks)

The 2009 bankruptcy (“BY1”)

Mr Sharp (“B”) is undischarged from BY1 so IA86 ss334 and 335, and IR86 rr6.225 to 6.228 are or may be relevant.

Notice of the making of the BO in the recent bankruptcy (“BY2”) should be given to Mr Fox as soon as possible.

Under IA86.s334(3) any property still held by Mr Fox that derives from a claim made by him under the after acquired assets provisions (IA86.s307) or the proceeds thereof still held by him are assets in BY2 as are any monies still held by Mr Fox which derive from payments made under an IPO made in BY1.

Mr Fox should be put on notice that he holds any such assets for T

but Mr Fox will be able to recover his costs of realisation on these assets (IA86.s335(3)).

Enquiries should be made of Mr Fox about why B has not obtained his discharge in BY1 and to obtain any other information that may assist T when dealing with B in BY2.

Green Dragon Motors (the Business”)

The Business started in 2011 after the making of the BO in BY1 and therefore falls to be dealt with in BY2.

By not trading in his own name B has run and continues to run the risk of being in breach of IA86.s360 unless he has disclosed his status and name to those dealing with him.

Given what is known to date it is perhaps unlikely that the Business will turn out to be substantial but to ascertain exactly what the position is an urgent inspection is needed by agents to schedule and value the assets and to report to T and get copies of any accounts so that the T can determine what is going on and whether there is any potential liability for T under, e.g. health and safety or employment legislation.

It remains to be seen but it is probable that most if not all of the equipment at the Business would be treated as being used by B in his business so would not form part of B’s bankruptcy estate following IR86 s283(2)

It sounds as if there will be little if any stock.

As the lease will almost certainly be disclaimed (see below) there seems no benefit in T getting involved with in the business.

The lease at Keystone Industrial Estate (“the Lease”)

There are arrears of rent

and the landlord is going to have a claim against B for the damage done to the garage

and there is no demand for units on the industrial estate.

Subject to anything the agents may say to the contrary the Lease is of no value and onerous and T should disclaim it as quickly as possible.

The effect of disclaimer will be to determine (as from the date of disclaimer) the rights interests and liabilities of B and the BY2 estate in the Lease (IA86.s315(3)(a))

It will also discharge T from all personal liability as from the date of his appointment.(IA86.s315(3)(b))

but will not affect the Landlord’s rights (IA86.s315(3))

and the Landlord will be able to claim any loss or damage as a bankruptcy debt (IA86.s315(5)).

For the disclaimer to be effective, notice of it must be served by T on anyone who claims to be a mortgagee or underlessee

And nobody must, within 14 days, have made an application to have the Lease vested in them.(IA86.s317)

Notice must be filed in Court (IR86.r6.178(3)(a))

And with the Land Registry (IR86.r6.178(3)(b)).

T must keep records of his dealings in relation to the disclaimer (IR86.r6.181A).

The Flat

The Flat was acquired long before BY1 so it would have been an asset that vested in Mr Fox on his appointment.

T will have no interest unless Mr Fox has already dealt with the Flat and as a result ownership has been returned to B.

According to B papers were signed by him and Mr Fox soon after Mr Fox's appointment at a time when there was negative equity in the Flat.

Were these to re-vest the Flat in B perhaps using IR86.r6.237CA and/or a transfer of the legal interest on form TR1

Write to Mr Fox about his dealings with the Flat and ask for information and copies of the relevant papers.

If Mr Fox has not done anything with the Flat it will still vest in him until he takes one of the steps listed in IA86.s283A(3)

but if he does not do this by 17 December 2012 (3 years from the making of BY1) the flat will re-vest in B.

If this happens T should use the after acquired assets rules to claim the flat for the benefit of BY2.

Undertake a search at the Land Registry including historical searches to try and find out what happened.

If the Flat vests in T there would appear to be an asset worth on paper an estimated £17,000 to be realised

but this should be checked by instructing agents to value the Flat

and writing to the mortgagee for details of how much is owed.

Shares in Rudgate Limited

Shares were acquired post BY1 so, unless claimed by Mr Fox as after acquired were not an asset in BY1.

If Mr Fox has claimed the shares as an after acquired asset (under IA86.s307) and is still holding them or the proceeds of disposing of them, these are held by Mr Fox for T and BY2.

Write to the Secretary of Rudgate asking him to amend the register of members to note T's interest in the shares

or otherwise ask the Secretary what formalities are required in order to ensure that T's interest is noted and ask the Secretary to ensure that any dividends paid on B's shareholding are sent to T.

Obtain the original share certificates for safe keeping.

Acquire a copy of Rudgate's current Articles of Association and establish what these say about registering and transferring shares and a copy of any shareholder agreement

Rudgate is a private company so there are almost certainly going to be restrictions or hurdles in the way of an easy disposal of B's shareholding.

T will need advice on the value of B's shareholding and the Articles may prescribe who does this and on what basis.

T should bear in mind that B's shareholding is a small minority holding in a small private company and therefore any value is likely to be significantly discounted.

T may also need legal assistance with registering and/or disposing of the shares.

It's quite likely that the shares will have to be offered first to the existing shareholders and as there is only one (Mr King holding 90%) perhaps a quick, cost-effective deal involving a simple transfer may be possible.

B's mother's will

B's mother ("M") died after the start of BY1 but before the bankruptcy order was made in BY2.

Mr Fox would appear to have no interest in the estate as claiming this now as an after acquired asset in BY1 is not possible as it's already vested in T as an asset in BY2.

As probate has yet to be obtained and there is a property involved no distribution from the mother's estate is likely in the next month.

B should be asked to hand over the correspondence which he has received but ignored.

T should write to the executor (with copies of the BO and T's certificate of appointment) to ensure that T's interest is noted and that he (T) is kept fully informed of progress.

T should enquire of Mr Fox why he was showing an interest in the estate. If this was for a reason other than in relation to the after acquired assets rule, then T should establish what this is.

Payments to "Fox Associates – Clients' Account"

Mr Fox should be asked to clarify whether the payments being made by B to Mr Fox's firm's clients' account relate to an IPA or IPO and if they don't, to what they relate.

BY1 started in December 2009 and allowing for the IPA/IPO being put in place at the latest possible time (December 2010), payments for a three year period may only be part way through.

If there is an IPO in force then T will be able to claim any monies still held by Mr Fox representing past payments and any future payments for BY2 (IAs334(2) and (3) and s335(2)).

Accordingly T should claim any such monies when writing to Mr Fox.

Income and expenditure

Sketchy details held need to be confirmed and B should be asked to complete a formal account supported by evidence.

If B's monthly surplus income really is c£20 then it will most likely not be cost-effective to set up an IPA or apply for an IPO.

Much may depend upon whether the £110pm is still payable to Mr Fox

If the payments to Fox Associates are no longer being made, or they can now be stopped, there may be enough surplus income to warrant setting up an IPA/IPO.

Does B receive any dividends from his shareholding in Rudgate?

QUESTION 4

Write a letter to Miss Stanway. Advise how she should proceed in relation to each of the three issues raised by her. Explain in your letter how, now or in the future, Miss Stanway can compel the Trustee to provide information and explanations about the three issues and what she might do if she is dissatisfied with what she is told.

(25 marks)

Preliminary points

Miss Stanway ("Miss S") has a right to ask the Court to intervene in the conduct of the bankruptcy by the Trustee ("T").

But it is essential for Miss S has the prospect of a surplus that is being put at risk if she is to have locus.

There is a need for urgency where time limits exist

and any proceedings bring with them costs and the risk of adverse costs.

There is a need for Miss S to be reasonable in giving T the opportunity to explain before she takes any action.

Miss S can lodge a complaint with T's RPB which may put some pressure on T but will not be a substitute for legal action

and will not in itself remedy the matters about which Miss S complains.

Miss S could consider making an application for T's removal.

Whilst Miss S could take up the issues with T, she would be better advised to instruct a solicitor and the correspondence with T may best be conducted by the solicitor rather than Miss S herself.

At some point it may be helpful for Miss S to seek a meeting with T.

It is not possible for Miss S to propose an IVA (She is discharged) or to seek an annulment (lack of funds).

Financial position

Position according to Miss S

In round terms selling the Property for £280k with selling costs of say £5k - £10k would realise £60k - £65k after paying off the mortgage of £210k.

Creditors are £17k and statutory interest accrued over the 18 months since bankruptcy is about £2k.

Assuming reasonable bankruptcy costs of say £10k there would be a healthy surplus for Miss S of £31k - £36k.

Effect of T's actions

Any one of the three issues identified by Miss S (lower asset realisation, additional claim and increased costs) has the potential to deplete or eliminate altogether the surplus.

Selling the property for £240k would mean no surplus.

Increasing the amount of claims admitted by including the neighbour's claim (£22k) plus statutory interest on this (c£3k)

would reduce the surplus to c£11k at best

The figures as regards the bankruptcy costs are not known, but any increase will eat into Miss S's surplus.

Any combination of two or more of the three issues will eliminate any hope of a surplus for Miss S.

The Property

Legal position of T

The Property is solely owned by Miss S.

Therefore on T's appointment both the legal and beneficial interests vested in him.

It is therefore for T to make all the decisions about the sale of the Property.

That said, T has a duty to obtain the best price reasonably achievable.

The duty is owed to creditors, but also to M S if there is a reasonable prospect of a surplus.

T must have regard to the obligations to communicate placed on him by the Insolvency Guidance Paper on Family Homes in Bankruptcy ("the IPG").

What should Miss S do?

Miss S should ask the estate agent to confirm that the new price quoted of £240k is not simply an error on the part of the agent.

Assuming it isn't, Miss S should ask the agent and T why the asking price is so much lower than the agent's very recent recommendation and obtain an independent valuation for the Property from a local firm of chartered surveyors.

If her own valuation evidence obtained supports Miss S's contention that T is selling the Property at an undervalue, she should write immediately to T:

disclosing her valuation evidence

and expressing concern about the apparent sale at an undervalue

Miss S should ask why T has acted without reference to her because of her financial interest in the outcome

Subject to what she learns and the explanations she receives, and if T appears to be acting unreasonably,

Miss S should consider making an application under IA86.s303 challenging T's conduct although Miss S should be aware of the possible cost consequences of making an application and having it dismissed.

Theoretically, Mrs S would have a right to claim damages if T persists and sells at an undervalue but this would be hard to prove and any action may not be cost-effective.

If £240k is the right value for the Property, the equity on paper is £30k. Can Miss S now afford to make an offer (which would be under £30k) to buy T's interest?

The neighbour's claim

Right to receive information

Under IR86.r6.101. Miss S has a right to inspect the proofs lodged with and held by T and a right to take copies of the proofs by virtue of IR86.r12A.52

Miss S should, urgently, ask T to send her a copy of the proof and all supporting documentation.

An unliquidated tort claim is a bankruptcy debt (IA86.s382) and T is required to estimate the amount of any such claim (IA86.s322(3)) but there can be no claim for legal costs unless by agreement or order of a Court.

Miss S should ask T to explain how he has estimated the neighbour's claim.

Challenging T's treatment of the neighbour's claim

Is the claim out of time pursuant to the Limitation Act 1980 although the six year time clock will have stopped running at the commencement of Miss S's bankruptcy. Subject to any Limitation Act points and to what she learns on receiving the information sought, Miss S should write to T setting out her side of the story about the dispute with the neighbour and making it clear that she is exercising her right (under IR86 r6.105(2)) to challenge T's decision on the proof.

Miss S needs to be alert to IA86.r605(2) which only gives her 21 days starting from when she became aware of T's decision which was on 24 October 2012, 14 days ago.

Miss S should not wait to receive the information sought before seeking T's agreement to the time limit being extended whilst the issue is being investigated.

The Court can extend the time limit (IR86.r12A.55(2)) either before or after the event but Miss S should not rely on this. If T will not agree to an extension, Miss S should immediately issue a precautionary application in Court

The bankruptcy costs

Right to receive information

Miss S is entitled to ask for and to receive information about the time spent by T and his staff (IReg94. reg36A).

T must provide this within 28 days of receiving the request from Miss S.

Miss S should ask T what fee he proposes to charge (as T may intend not to seek to recover all his costs).

Miss S should also seek information about the other costs incurred to date and to be incurred by T.

SIP9 requires office holders, in cases where creditors are paid in full with interest, to provide information not just to those approving remuneration but to the beneficiaries of any surplus in accordance with the principles and standards in the SIP. Therefore, Miss S should ask T to provide her with all the information that he has provided to creditors.

T may dispute that there will be a surplus for Miss S and, therefore, that the SIP is relevant to her.

Challenging T's remuneration

If, following receipt of the information requested, Miss S remains dissatisfied about T's remuneration and the bankruptcy costs, she should seek further explanations from T as to the work carried out and its value to the estate.

Once Miss S is in a position to reach a conclusion on the evidence, she should write to T setting out details of her concerns.

Miss S should bear in mind that it is for the creditors to fix the basis and, if thought appropriate, the amount of T's remuneration

but in due course Miss S will be entitled under IR86.r6.78B to receive a draft of T's final report to creditors.

If following receipt of the draft report Miss S can make an application to Court under IR86.r6.142 on the grounds that T's remuneration and/or expenses are, in all the circumstances, excessive.

Miss S will need the Court's permission to apply (IR86.r6.142.2A)
and permission will only be granted if Miss S can show that there is (or would be but for T's remuneration and expenses) a surplus to which Miss S is or would be entitled.
Miss S will only have 8 weeks in which to apply (IR86.r6.142.1C)