

JOINT INSOLVENCY EXAMINATION BOARD
NOVEMBER 2010 EXAM (ENGLAND)
EXAMINERS' REPORT AND MARKING PLANS

GENERAL NOTE

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

EXAMINATION MARKING PLANS

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

ADMINISTRATIONS, COMPANY VOLUNTARY ARRANGEMENTS and RECEIVERSHIPS

2010 EXAMINER'S REPORT

QUESTION 1

This question, set within the context of a Company Voluntary Arrangement was split into two parts. In the first part candidates were required to locate the section of the Act dealing with Small Company Moratoriums and apply the eligibility requirements to the case. The second part of the question asked candidates to determine the level of creditor claims that should be admitted to vote at a meeting of creditors.

Part (a) of the question was generally answered well and candidates demonstrated an understanding of where the relevant sections of the Act were located. Generally candidates did not appear to have a good understanding in relation to creditor claims and had difficulty answering part (b).

(a) Your principal asks you to prepare points for a letter to management outlining:

(i) A brief summary of the steps that a company needs to take in order to obtain court protection through a Voluntary Arrangement Moratorium.

This part of the question was generally very well answered with the majority of candidates able to locate and copy the relevant sections of the Act. A number of candidates wasted valuable time providing unnecessary detailed information about the process and the contents of a CVA proposal.

(ii) The relevant eligibility requirements for a CVA moratorium and how these would be applied in the above circumstances. For this purpose assume that the CVA was filed in court on 29 October 2010. (10 marks)

A large proportion of candidates correctly stated the quantum of the small company conditions, however the majority of candidates incorrectly stated that these applied where the amount concerned was 'less than'.

Very few candidates applied the conditions to the facts stated in the case and there was general misunderstanding as to how the balance sheet test is applied.

(b) Set out in note form your advice to the Chairman of the meeting in respect of each claim. (10 marks)

This question was generally poorly answered with candidates failing to state basic relevant factors that would affect how the claims would be admitted.

(i) Bayou finance limited

The principles that apply to leased assets were not applied by the majority of candidates; many incorrectly applied the rules relating to secured creditors.

A small number of candidates recognised that Rule 11.13 should be applied to discount the claim and those that attempted the calculation typically did so correctly. Such candidates scored highly on this section of the question.

(ii) Adam Brookes

A surprising number of candidates failed to state that the creditor was a connected party and as such achieved a low mark for this part of the question.

(iii) Loch Estates Ltd

Generally candidates did not demonstrate an understanding as to how landlord claims would be dealt with. Candidates that appreciated that there were 2 parts of the claim; a liquidated and an unliquidated element scored highly.

QUESTION 2

This was a question regarding reservation of title claims and candidates were required to assess, based on the facts available, whether such a claim was valid. The second part of the question dealt with the procedure for creditors should they disagree with the decision of an Administrator

Generally this question was poorly answered with relatively few candidates able to demonstrate an understanding of reservation of title and apply basic principles to the facts set out in the question.

(a) For each supplier outline the matters to be considered when assessing the validity of the claim, whether you consider their reservation of title claim is valid and any practical suggestions for dealing with the claim. (12 marks)

(i) Massa Ltd

The answers to this part of the question were generally adequate with the majority of candidates able to identify that where goods had been incorporated into a product there could only be a valid claim if they had not changed form and were easily removable.

(ii) Prost Ltd

The answers to this part of the question were generally poor with very few candidates familiar with the concept of a tenancy in common.

(iii) Gubby Ltd

Few candidates demonstrated an understanding of the implications of a 'simple' clause on the identification of the goods. In addition few candidates made reference to the clause pertaining to cover the proceeds of sale. Overall the answers to this part of the question were poor.

(b) Draft a note outlining what legal and practical steps suppliers may generally take should they disagree with any decision regarding the validity of their reservation of title claim. Explain how an Administrator should deal with this situation. (8 marks)

Many candidates did not answer the question; instead detailing the procedure for a creditor with a valid reservation of title claim who wished to take possession of their goods. Notwithstanding this, many candidates were able to pick up marks by stating the Re: Atlantic guidelines.

QUESTION 3

This question was set within a proposed pre-packaged administration. Candidates were required to outline the contents of a sales memorandum, the ethical and practical considerations of accepting an appointment and the relevant Statement of Insolvency Practice disclosures.

- (a) **Set out the main sections that should be included in a sales memorandum and list the main contents to be included within each section. (15 marks)**

This question required candidates to provide a summary of matters that would be included within a sales memorandum. A small number of candidates outlined the contents of a sales contract.

Generally candidates answered this question well and some scored particularly highly.

- (b) **Following a period of marketing the business for sale you conclude that the offer from the incumbent management team would represent the best outcome to creditors.**

- (i) **Outline and explain the main matters for consideration before you could accept the appointment as Administrator of the Company. (7 marks)**

Generally the answers to this question were adequate.

Candidates' answers to this part of the question tended to concentrate on either the fundamental ethical principles or the practical and competence aspects of accepting an appointment. Candidates that identified both of these aspects scored very highly.

- (ii) **Outline the disclosure requirements of an Administrator following a disposal of the business to the directors under a 'pre-packaged' sale and list the matters that should be disclosed to creditors following such a sale. (8 marks)**

The majority of candidates answered this question well identifying that SIP 16 was relevant and outlining the majority of the disclosure requirements.

Relatively few candidates mentioned that SIP 13 was also relevant; the question stated that the disposal was to the existing directors of the insolvent company.

QUESTION 4

This question mainly comprised a weekly Administration cash flow forecast to determine the level of funding required from a secured creditor.

Candidates were also asked to calculate the financial impact of continuing to trade on the estate and outline the personal implications to an office holder where a trading loss is incurred.

Overall candidates performed very well in part (a) of the question but generally the answers to part (b) were poor.

- (a) **Prepare a weekly cash flow forecast for the 4 week trading period, showing the expected weekly trading receipts, payments, bank balance and funding required from Pippin Bank plc. Show also the trading transactions that will fall outside the trading period and the total outcome. (20 marks)**

This question was generally answered well with some candidates scoring highly.

The majority of candidates understood that the invoice discounting facility would generate a % of the weekly sales but many failed to appreciate that receipts from the residual percentage would fall into the period following the 4 weeks. Many candidates did not include VAT in their calculation of available funds.

Few candidates demonstrated an understanding of the basics of VAT failing to recognise that it was payable on purchases and receivable on sales.

Candidates generally failed in their calculations to appreciate that the stock not subject to ROT was to be used before paying for other supplies.

- (b) **Prepare a note for your principal outlining**

- (i) **The financial impact on the estate of continuing to trade the business during this period assuming that the costs of monitoring the ongoing trade will be £20,000 per week. (4 marks)**

The majority of candidates correctly identified the net cash flow from part (a) was relevant and deducted the monitoring costs. Many candidates also correctly mentioned the positive impact on asset value in a going concern scenario.

This part of the question required candidates to identify that there was an opportunity cost of utilising the stock within trading, however the majority of candidates missed this point.

- (ii) **The potential personal risks that trading at a loss may have to an Administrator. (4 marks)**

A proportion of candidates incorrectly quoted Section 212; Misfeasance instead of Paragraph 75 of the Act. Many candidates also wrote about the general duty of care of an administrator which was irrelevant to the question.

- (iii) **Steps that ought to be considered to minimise the risk to the Administrator associated with trading at a loss. (2 marks)**

Generally candidates did not score well in this part of the question. Many answers focussed on actions that could be taken by an Administrator to avoid making a loss in the first place rather than those that minimise the risk to the office holder when he/she does make a loss.

**JIEB ADMINISTRATIONS, COMPANY VOLUNTARY ARRANGEMENTS and RECEIVERSHIPS
NOVEMBER 2010**

EXAMINATION MARKING PLAN

QUESTION 1

(a) Your principal asks you to prepare points for a letter to management outlining:

(i) A brief summary of the steps that a company needs to take in order to obtain court protection through a Voluntary Arrangement Moratorium.

Directors submit to Nominee

Document setting out the terms of the proposed voluntary arrangement.

Statement of affairs containing particulars of its creditors, debts, liabilities and its assets as may be prescribed and such other information as may be prescribed.

Any other information necessary to enable the Nominee to comply with the requirements to submit a statement to the directors under para 6(2) which the Nominee requests

The Nominee submits to the directors a statement in the prescribed form indicating in his opinion:

- The VA has a reasonable prospect of being approved and implemented
- The company is likely to have sufficient funds available to it during the proposed moratorium to enable it to carry on its business and
- Meetings of the company and its creditors should be summoned to consider the proposed voluntary arrangement

Directors must file in court:

- The CVA document
- A Statement of Affairs
- A Statement the company is eligible for a moratorium
- A statement from the Nominee that he has given his consent to act
- The Nominee's statement to the directors (above)
- Court fee, currently £30

Moratorium comes into force upon filing of the documents in court.

(ii) The relevant eligibility requirements for a CVA moratorium and how these would be applied in the above circumstances. For this purpose assume that the CVA was filed in court on 29 October 2010. (10 marks)

Company does not fall into any of the ineligible categories under Para 2(2)

Company would be ineligible if:

- In Administration
- Being wound up
- Administrative Receiver appointed
- A Voluntary Arrangement in effect
- Provisional liquidator appointed
- Moratorium in force for the company at any time during the period of 12 months ending with the day of filing and
 - No voluntary arrangement had effect at the time at which the moratorium came to an end or
 - A voluntary arrangement which had effect at any time in that period has come to an end prematurely
 - An administrator appointed under paragraph 22 of Schedule B1 has held office in the period of 12 months ending with the date of filing
 - A voluntary arrangement in relation to the company which had effect in pursuance of a proposal under section 1(3) has come to an end prematurely and, during the period of 12 months ending with the date of filing an order under Section 5(3)(a) has been made

Company does not fall into other exclusions

- Capital market arrangement
- Public private partnership
- Liability under an arrangement

Company is eligible if it meets the qualifying conditions

- In the year ending with the date of filing OR
- In the financial year of the company which ended last before that date

Qualifying conditions are met by a company if in that period it satisfies 2 or more of the requirements for being a small company specified in Section 382 Companies Act 2006

Qualification conditions:

- Turnover no greater than £6.5million
- Balance sheet total no greater than £3.26m
- No more than 50 employees

Balance sheet total is based upon total assets excluding liabilities

	Nov-10		Mar-10	
Turnover test <= £6.5m	7,900	No	5,550	Yes
Balance sheet total (total assets excluding liabilities) <=£3.26m	6,700	No	2,750	Yes
Employees <= 50	40	Yes	52	No
Eligible	No (1 of 3)		Yes (2 of 3)	

As company meets the requirements in the last financial year it will qualify under Section 3(1) and 3(2)

Not part of a bigger group

(b) Set out in note form your advice to the Chairman of the meeting in respect of each claim. (10 marks)

(i) Bayou finance limited

Lombard North Central v Brook; Re Durham Counters Ltd
 Proxy forms can be received up to the time of the meeting
 Submission of written details of claim before or at meeting
 As there is a termination clause, the insolvency in itself is not a breach of contract.
 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 £36,500 less standard discount
 Standard discount calculated by reference to Rule 11.13 applying to dividends:

$$\frac{x}{1.05^n}$$

Calculation of claim for voting:

Payment no	Payment	Reduction	Amount provable
1	10,000	1.05	9,523.81
2	10,000	1.1025	<u>9,070.29</u>
			18,594.10
	Rent arrears		10,000.00
	Termination charges		6,500.00
			<u>35,094.10</u>
	Total claim for voting		<u>35,094.10</u>

(ii) Adam Brookes

Submission of written details of claim before or at meeting
 Votes calculated according to the amount of the creditor's debt as at the date of the meeting.
 As an individual no requirement to submit proxy form
 Section 249 states that a person is connected with a company if he is a director or shadow director of the company or an associate of such a director
 Section 435 states a person is an associate of an individual if that person is the individual's husband or wife.
 As Mr Brookes remains married to the director he is a connected party
 Connected party votes excluded from simple majority required to vote in favour of the arrangement.
 Admit to vote for £7,500.
 Include £7,500 in the voting for the required excess of 75% but exclude from the 50% vote

(iii) Loch Estates Ltd

Dilapidations unliquidated
 Rule 1.17(3) debt valued at £1 unless Chairman agrees to put a higher value on it.
 No evidence upon which chairman can conclude that a higher value should be placed on the dilapidations.
 Chairman not obliged to speculate or investigate
 Rent arrears liquidated
 Allow to vote for £25,000

QUESTION 2

(a) For each supplier outline the matters to be considered when assessing the validity of the claim, whether you consider their reservation of title claim is valid and any practical suggestions for dealing with the claim. (12 marks)

(i) **Massa Ltd**

Invoice post contract
All monies clause
ROT clause incorporated into contract through prior course of dealing
Contract valid whether verbal or written
Sole supplier and therefore no doubt regarding supply
Amount of money owed is greater than the value of the stock
Goods can be easily removed without damage
600 units sold – no claim over these goods
Valid ROT claim over £14,000 of stock
Agree to pay for goods incorporated into the finished products
Seek discount for costs saved in having to remove stock from products

(ii) **Prost Ltd**

Raw material
Owners In common
Irvine Limited owed more than goods cost £2,500 v £1,000
Patrese Limited are also owed more than the cost of their stock
Allow Patrese Limited to recover 1 tonne (2/3 of stock) of product
Or require agreement between Patrese and Irvine before anyone removes anything/interpleader application if necessary
Moulded goods
Moulded items changed form.
Goods would have to be damaged to recover the materials
No valid claim on WIP and Finished goods

(iii) **Gubby Ltd**

Simple clause
Incorporated into contract
Goods identifiable as having been supplied by Gubby Limited
Model 4565A - Necessary to identify items to unpaid invoices therefore reject claim over 300 units.
Models 3333B and 6667Q valid claim over 750 and 250 units respectively
Sold goods - no reservation of title claim
Proceeds of sale clause likely to be considered a registerable charge
No charge registered and therefore remaining claim is unsecured, non-preferential.
Accept ROT claim for £6,500 and pay for the goods required as a cost of the administration

(b) Draft a note outlining what legal and practical steps suppliers may generally take should they disagree with any decision regarding the validity of their reservation of title claim. Explain how an Administrator should deal with this situation. (8 marks)

Suppliers to provide reasons why they disagree with decision
Administrator consider taking legal advice
Administrator should consider commercial negotiation
Administrator consider mediation
Administrator to provide reasons in writing
Under Paragraph 43 of the Act consent of Administrator or permission of court required to institute legal proceedings/Moratorium in place
When creditor applies to administrator for leave, administrator should act:

- Quickly
- Without using the moratorium as a bargaining position
- In the interests of the general body creditors
- Providing reasons for decisions

Court and administrator should consider Re Atlantic guidelines

- Balance interests of creditors as a whole against the interests of the applicant
- If significant loss would be caused to applicant by refusal leave normally granted
- If substantially greater loss would be caused to the general body of creditors out of all proportion to the loss of the applicant then leave may be refused

Onus on applicant for leave to make out case
Court will consider all relevant matters including conduct of parties
Application for permission will not adjudicate on disputes
Court has broad discretion
If permission granted then supplier able to take action specified by court
If permission not granted then supplier cannot take action until moratorium has ended.
Applicant may have the ability to appeal against the court's decision

QUESTION 3

- (a) Set out the main sections that should be included in a sales memorandum and list the main contents to be included within each section. (15 marks)

Contents page
Disclaimer <ul style="list-style-type: none">No liability for inaccuraciesAgent of companyConfidentialityContents of the document are the responsibility of managementAny relevant Financial Services Marketing Act (FSMA) disclosures and disclaimers
Terms of reference
Executive summary <ul style="list-style-type: none">Summary of the other sections within the memorandumKey points for interested parties - summary of the opportunity
Background information <ul style="list-style-type: none">Company historyNature of the business – its products or servicesLocationSummary of reasons for the financial positionActions taken to address the situationGroup structure
Market information <ul style="list-style-type: none">Relevant market statistics showing trendsPosition of the company within the marketRoute to market (distribution channels etc.)CustomersCompetitorsSWOT analysis
Financials <ul style="list-style-type: none">Historic financial results<ul style="list-style-type: none">Profit and loss account, balance sheet and cash flowAnalysis of key areas where appropriateExplanation and commentaryForecasts<ul style="list-style-type: none">Summary of management forecastsKey assumptionsKey sensitivities and analysisProfit and loss account, balance sheet and cash flowSummary of prospects for and improvements in the businessProfit bridge from historic financials to forecasts to show expected improvements and additional costs.Funding<ul style="list-style-type: none">Existing funding structurePosition of existing funders – willingness to supportAny additional funding identified that may be available
Assets <ul style="list-style-type: none">Details of key assetsValuations obtainedInformation regarding any intellectual propertyFurther investment requirementsProperty<ul style="list-style-type: none">Freehold v leaseholdLease termsRent arrearsIntellectual property

Suppliers/creditors
Creditor positions

	ROT issues
	Key suppliers
Employees	
	Organisational chart
	Management team CVs
	List of employees and their relevant TUPE information
	Any claims outstanding
	Pension scheme
	Type of scheme in place
	Terms of scheme
Next steps	
	Timetable
	Contact names/numbers/email for further information
	Any further information available
	Process
Appendices – providing more detailed information than that contained in the body of the document	
Other relevant points	
	Warranties provided
	Any matters relevant to insurance
	Regulatory matters/permits
	Health and Safety history

(b) Following a period of marketing the business for sale you conclude that the offer from the incumbent management team would represent the best outcome to creditors.

(i) Outline and explain the main matters for consideration before you could accept the appointment as Administrator of the Company. (7 marks)

General penalty bond in place
Ensure qualified to act
That the Administration can achieve the statutory purpose
IP should ensure that he is satisfied that the following matters have been considered:
Obtaining knowledge and understanding of the entity, its owners, managers and those responsible for its governance and business activities.
Acquiring an appropriate understanding of the nature of the entity's business, the complexity of its operations, the specific requirements of the engagement and the purpose, nature and scope of the work to be performed.
Acquiring knowledge of relevant industries or subject matters.
Possessing or obtaining experience with relevant regulatory or reporting requirements.
Assigning sufficient staff with the necessary competencies.
Using experts where necessary.
Complying with quality control policies and procedures designed to provide reasonable assurance that specific engagements are accepted only when they can be performed competently.

Consider threats to fundamental principles

fundamental principles

Integrity

Objectivity

Professional competence and due care – IP should only accept an insolvency appointment when they have sufficient expertise

Confidentiality

Professional behaviour

Threats

Self-interest threat – financial or other interest in the entity

Self-review threats – reviewing previous judgements made by an individual within the practice needs to be re-evaluated by the IP

Self-review threats – review nature of advice and the client advised in relation to the pre-appointment work. Consideration of nature and role of negotiations for pre-pack sale

Advocacy threats - individual within the practice promotes a position or opinion to the point that subsequent objectivity may be compromised

Familiarity threats – close relationship with company

Intimidation threats – may occur when an Insolvency Practitioner may be deterred from acting objectively by threats, actual or perceived.

Consider any relevant safeguards to ensure fundamental principles not breached

Consideration should always be given to the perception of others when deciding whether to accept an insolvency appointment

Attitude of secured creditors

Attitude of unsecured creditors

Ability to pay fees

Identification of clients known (money laundering)

Appropriate engagement terms agreed

(ii) Outline the disclosure requirements of an Administrator following a disposal of the business to the directors under a 'pre-packaged' sale and list the matters that should be disclosed to creditors following such a sale. (8 marks)

Statement of Insolvency Practice 16 – Pre-packaged sales in administration

- The source of the administrator's initial introduction
- The extent of the administrator's involvement prior to appointment
- Any marketing activities conducted by the company and/or the administrator
- Any valuations obtained of the business or the underlying assets
- The alternative courses of action that were considered by the administrator, with an explanation of possible financial outcomes
- Why it was not appropriate to trade the business, and offer it for sale as a going concern, during the administration
- Details of requests made to potential funders to fund working capital requirements
- Whether efforts were made to consult with major creditors
- The date of the transaction
- Details of the assets involved and the nature of the transaction
- The consideration for the transaction, terms of payment, and any condition of the contract that could materially affect the consideration
- If the sale is part of a wider transaction, a description of the other aspects of the transaction
- The identity of the purchaser
- Any connection between the purchaser and the directors, shareholders or secured creditors of the company
- The names of any directors, or former directors, of the company who are involved in the management or ownership of the purchaser, or of any other entity into which any of the assets are transferred
- Whether any directors had given guarantees for amounts due from the company to a prior financier, and whether that financier is financing the new business
- Any options, buy-back arrangements or similar conditions attached to the contract of sale

Statement of Insolvency Practice 13 – acquisition of assets of insolvent companies by directors

- Whether the purchaser and was independently advised
- The date of the transaction
- Details of the assets involved and the nature of the transaction
- The consideration for the transaction and when it was paid
- The name of the counterparty
- The nature of the counterparty's connected party relationship with the vendor

QUESTION 4

- (a) Prepare a weekly cash flow forecast for the 4 week trading period, showing the expected weekly trading receipts, payments, bank balance and funding required from Pippin Bank plc. Show also the trading transactions that will fall outside the trading period and the total outcome. (20 marks)

		01-Nov-10 £	08-Nov-10 £	15-Nov-10 £	22-Nov-10 £	Period after £	Totals £
Receipts							
Sales		250,000	200,000	150,000	300,000	0	900,000
VAT	'@17.5%	43,750	35,000	26,250	52,500	0	157,500
Total sales		293,750	235,000	176,250	352,500	0	1,057,500
Invoice discounting	'@70%	205,625	164,500	123,375	246,750	317,250	1,057,500

Payments							
Overheads		25,000	25,000	25,000	25,000	0	100,000
VAT on overheads		4,375	4,375	4,375	4,375	0	17,500
Staff net wages		12,000	12,000	12,000	12,000	0	48,000
PAYE / NI		0	0	0	0	24,000	24,000

Suppliers							
Stock required	Sales @ 75%	187,500	150,000	112,500	225,000	0	675,000
Existing stock	200,000						
Non RoT	65%						
	130,000	(130,000)					(130,000)
ROT stock	70,000	(57,500)	(12,500)				(70,000)
Cost of new stock		0	137,500	112,500	225,000	0	475,000
VAT		10,063	26,250	19,688	39,375	0	95,375
Stock total cost for cash flow		67,563	176,250	132,188	264,375	0	640,375

VAT							
VAT payable		43,750	35,000	26,250	52,500	0	157,500
VAT receivable							
VAT on overheads		4,375	4,375	4,375	4,375	0	17,500
VAT on stock purchases		0	24,063	19,688	39,375	0	83,125
VAT on ROT stock		10,063	2,188	0	0	0	12,250
		14,438	30,625	24,063	43,750	0	112,875
Net cash payment						44,625	

Funding requirement							
Net		96,688	(53,125)	(50,188)	(59,000)	248,625	183,000
Cumulative		96,688	43,563	(6,625)	(65,625)	183,000	
Funding requirement				(6,625)	(65,625)		

(b) Prepare a note for your principal outlining

- (i) The financial impact on the estate of continuing to trade the business during this period assuming that the costs of monitoring the ongoing trade will be £20,000 per week. (4 marks)**

Calculation as shown below
Uplift in value of assets due to going concern disposal
Stock has an opportunity cost of use in administration trading
Carry back of administration trading tax loss
Reduction in employee claims
Protection of the book debts

PROFIT CALCULATION

Method 1		£
Cash from trading		183,000
Monitoring costs		(80,000)
Stock used		130,000
		<u>27,000</u>
 Method 2		 £
Sales		900,000
Cost of sales		
ROT	70,000	
Other stock used	130,000	
other materials	<u>475,000</u>	
		<u>(675,000)</u>
		225,000
 Wages and salaries		 (72,000)
Other costs		(100,000)
Monitoring costs		<u>(80,000)</u>
		<u>27,000</u>

(ii) The potential personal risks that trading at a loss may have to an Administrator. (4 marks)

Could be challenged under Paragraph 75 of Sch B1 Misfeasance (Section 212 does not apply)

Unlike s212 not required to be in liquidation

Application can be made by OR, Administrator, Liquidator, Creditor or Contributory

Trading at a loss could be considered:

- a breach of fiduciary duty, or
- a misfeasance, or
- misapplication of property of the company

Administrator may be required to:

- Repay, restore or account for the money or property
- Pay interest
- Contribute a sum by way of compensation

Not appropriate to apply to court to review reasonable decisions

Risk to administrator in this case appears to be £27,000 (or loss calculated in (i))

Losses rank ahead of administrator's remuneration

Paragraph 74 Challenge to administrator's conduct of company

Complaint to regulatory body

(iii) Steps that ought to be considered to minimise the risk to the Administrator associated with trading at a loss. (2 marks)

Indemnity from the bank/appointor

Cash backed underwriting loss by parties interested in acquiring the business

Underwriting of losses by customers or suppliers

Documenting trading decision and rationale

Consultation with key affected creditor classes

Professional advice regarding valuation of business/assets

Consultation with committee if formed

LIQUIDATIONS EXAMINATION

2010 EXAMINER'S REPORT

GENERAL

This year some candidates had clearly prepared well for the examination, but a significant minority of candidates seemed to have been ill-prepared and consequently produced poor answers.

QUESTION 1

Using the information provided in the draft balance sheet and associated notes, and stating any assumptions:

- (a) prepare a statement of affairs for the Company as at 31 October 2010, making and explaining estimates of any contingent or prospective liability at a level that you regard as commercially realistic. (12 marks)**
- (b) prepare a deficiency account for the Company as at 31 October 2010. (5 marks)**
- (c) suggest, with reasons, what options are available to the Company. (3 marks)**

Question 1 required a statement of affairs, deficiency account and a brief analysis of what options would be available to the Company: the purpose being to test a candidate's ability to assess the solvency of an entity, to show where the shortfall had arisen and to demonstrate to the various classes of creditors what surplus/shortfall they should expect. The question was relatively straightforward and many answers were disappointing: 44% of candidates failed to achieve half marks. Most candidates were able to set out what assets were available (which were largely taken from the question without further calculation) but had more difficulty in calculating the liabilities and some were uncertain about the ranking of the prescribed part. Presumably as a consequence of not being able to complete the statement of affairs and deficiency account, most candidates did not attempt part (c), the analysis of the options available to the Company.

QUESTION 2

- (a) Set out the steps that you should advise directors and members to take to procure a Statutory Declaration of Solvency and a members' resolution for placing a company into Members' Voluntary Liquidation. (7 marks)**
- (b) Set out the problems of an early distribution to members in a Members' Voluntary Liquidation. (3 marks)**

Question 2(a) required setting out the advice to directors and members of a Company to procure a Declaration of Solvency and a resolution to place a Company into members' voluntary liquidation and 2(b) required a brief discussion of the problems of making an early distribution to members. These were generally well answered although some candidates set out all that they knew about members' voluntary liquidations, which was not required.

- (c) **Assuming that this Company enters Members' Voluntary Liquidation set out the issues that the Liquidator will need to settle before making a distribution to members. (5 marks)**
- (d) **Set out the amounts that should be paid to each of the members, distinguishing the types of payment. (5 marks)**

Some candidates found parts 2(c) and (d) more difficult: they were required to set out the issues to be settled before making a distribution to members and the amounts to be paid to each member. Very few candidates attempted to calculate the amount due under the lease in accordance with Rule 11.13. In this question, and others, some candidates answered out of order (eg answering part (c) before part (a)). Generally, the sub-sections of questions are set out in a logical order to assist candidates in their analyses and answering them out of order may not help in maximising marks.

QUESTION 3

- (a) **Set out the issues that the Liquidator should address with respect to the employees and the types of employee related claims and expenses that will arise in the Liquidation. (20 marks)**
- (b) **Set out what points the Liquidator should include in the letter dismissing employees. (6 marks)**

Question 3(a) and (b) was generally well answered, candidates were required to set out the employee issues, claims and expenses that may arise in a Liquidation and what should be included in a dismissal letter from the Liquidator to the employees. Most candidates were able to identify the claims that employees would have in a Liquidation. Few mentioned the need to notify JobCentrePlus of potential redundancies; some suggested that the employees should be made redundant and re-employed. The issue of consultation was not dealt with well, often ignored completely, and some candidates suggested that the Liquidator would be personally liable for the protective awards.

- (c) **Set out with reasons, what employee related issues that may affect the sale price of the business. (4 marks)**

3(c) was generally poorly answered, it required a consideration of employee-related issues that may affect the sale price of the insolvent business. Few discussed the provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (Regs 4, 7 and 8) providing that it is likely that there is no relevant transfer in a creditors' voluntary liquidation.

QUESTION 4

- (a) **State the options that are available to Risky Finance Plc and state, with reasons, what immediate action(s) you recommend. (6 marks)**

Question 4(a) required candidates to advise a creditor of a Company where wrongdoing seemed to be occurring; they could not ascertain from the question whether or not the Company was insolvent. Some candidates discussed the various courses of action for the creditor and recognised a petition for a Provisional Liquidator was probably the most feasible option. Some candidates seemed not to have read the question correctly and ignored that they should have been advising the creditor and not the Company.

- (b) (i) **If a Liquidator is appointed to a company subject to a winding up order, set out the Liquidator's reporting requirements in relation to the company and the directors. (3 marks)**

4(b)(i) required candidates to set out a Liquidator's reporting requirements for a Company subject to a winding up by the court. Some candidates were unaware that, in these circumstances, Liquidators do not complete D-Forms.

- (ii) Set out the issues that the Liquidator has to consider in relation to each of the properties and set out the steps that you recommend the Liquidator should take to preserve the value of the estate for the creditors. (21 marks)**

4(b)(ii) was a relatively straightforward question that required candidates to set out the issues that the Liquidator faced in relation to two properties in a Liquidation, and the actions to be taken to preserve the value of the estate. This was poorly answered. Generally, candidates did not know how to approach this question: many discussed the valuation of the properties and, while a short paragraph suggesting obtaining alternative valuations may have been appropriate, several pages on everything a candidate knows about valuations was not. Some recognised that the properties may be disclaimed (fewer explained the process) but few grasped the urgency of the problem of dealing with contaminated land. Few candidates discussed the circumstances when rent would be an expense of the Liquidation.

LIQUIDATIONS

2010 EXAMINATION MARKING PLAN

QUESTION 1

Using the information provided in the draft balance sheet and associated notes, and stating any assumptions:

- (a) prepare a statement of affairs for the Company as at 31 October 2010, making and explaining estimates of any contingent or prospective liability at a level that you regard as commercially realistic. (12 marks)

Statement of Affairs as at 31 October 2010

	Book value £'000	Book value £'000	Estimated to realise £'000
Assets specifically pledged			
<i>Assets subject to fixed charge</i>			
Investment in subsidiary	300	0	
Freehold land and buildings	2,000	1,500	
Less due to Towncity Bank Plc (2,500 + 700)	(3,200)	(3,200)	
Deficit to Towncity Bank on fixed charge c/d	<u>(900)</u>	<u>(1,700)</u>	
Production line	800	480	
Less due to Zog Finance Ltd	(800)	(800)	
Deficit to Zog Finance Ltd c/d	<u>0</u>	<u>(320)</u>	
<i>Assets subject to floating charge</i>			
Other machinery and equipment			
Subject to hire purchase	550	220	
Less due to hire purchase company	(500)	(500)	
Surplus (shortfall) to hire purchase company c/d	<u>50</u>	<u>(280)</u>	
Not subject to hire purchase (2,000 – 550)	1,450		
Less subject to retention of title claim	(400)		
	<u>1,050</u>	420	420
Office fixtures and fittings	600	10	10
Motor vehicles	100	30	
Less subject to hire purchase	(100)	(100)	
(Shortfall) to hire purchase company c/d	<u>0</u>	<u>(70)</u>	
Inventories			
Inventories – raw materials ((2,200 – 1,760) x 50%)	2,200	220	220
- work in progress ((100 – 90) x 50%)	100	5	5

- finished goods and goods for resale ((800 – 720) x 50%)	800	40	40
Receivables			
Trade debtors (3,500 – 2,900 – 400) x 70%, say	3,500	140	140
Due from subsidiary	1,100	0	
Prepayments	200	0	
Deferred tax asset	400	0	
Cash at bank	200	200	200
Estimated total assets available for preferential creditors	10,050		1,035
Preferential creditors – unpaid wages (included in other creditors in accounts)	(180)	(180)	(180)
Estimated surplus as regards preferential creditors	9,670		855
Estimated prescribed part of net property available to unsecured creditors and excluding shortfall to floating charge holder 50% of £10,000 = £5,000 20% of £855,000 less £10,000 = £171,000 Total prescribed part = £176,000 (Note this does not exceed maximum of £600,000) (This calculation has excluded estimated costs of realisation and liquidation)			<u>176</u>
Estimated total assets available for floating charge holder (855 – 176)			679
Debts secured by floating charge b/d			(1,700)
Surplus/ (Deficit) to floating charge creditor			<u>(1,021)</u>
Estimated prescribed part of net property where applicable (brought down)			176
Deficit to Zog Finance Ltd b/d	(320)		
Deficit to hire purchase creditor on machinery & equipment b/d	(280)		
Deficit to HP creditor on cars b/d	(70)		
Trade creditors	(8,000)		
Add back ROT creditor	400		
Adjustment for Euro Exchange rate:	5		
In September (45,000) and on Friday (40,000) = 10,000			
Other taxes and social security	(400)		
Other creditors (200 less 180 preferential)	(20)		
Warranty claims: one years' sales claims are £500,000 x 4 = 2,000,000 (of which <i>already provided 200,000</i>)	(2,000)		
Other accruals (200 less 200)	0		
Pension deficit	(500)		(11,185)
Deficit to unsecured creditors entitled to participate in prescribed part of net property			<u>(11,009)</u>
Surplus/(Shortfall) to floating charge holder b/d			<u>(1,021)</u>
Deficit to unsecured creditors			(12,030)
Issued and called up share capital		(100)	
Share premium		(100)	
Revaluation reserve		(300)	(500)
Estimated deficiency as regards members			<u>(12,530)</u>

(b) prepare a deficiency account for the Company as at 31 October 2010. (5 marks).

Reserves at 31 10 10		(300)
Decrease in value of:		
Investment in subsidiary	(300)	
Land and buildings	(500)	
Production line	(320)	
Plant & machinery subject to HP	(330)	
Plant & machinery not subject to HP and not subject to ROT	(630)	
Motor vehicles	(70)	
Office fixtures & fittings	(590)	
Raw materials	(1,980)	
WIP	(95)	
Finished goods	(760)	
Goods subject to ROT	(400)	
Trade debtors	(3,360)	
Due from subsidiary	(1,100)	
Prepayments	(200)	
Deferred tax	(400)	(11,035)
Adjustments to creditors		
ROT creditor	400	
Adjustment re Euro exchange rate	5	
Adjustment re warranty claims	(1,800)	
Accruals and deferred income	200	(1,195)
Deficiency per statement of affairs		(12,530)

(c) suggest, with reasons, what options are available to the Company. (3 marks)

Company is insolvent as defined by s123 (both on a cash flow and balance sheet basis)
 It is not feasible for the Company to continue to trade as its major customer is insolvent
 Options – the directors can take steps to place the Company into CVL, s98
 - CVL, takes at least 14 days to put into place and, if creditors are pressing may need to place the Company into CVL more quickly using s166 (Centrebind)
 - the directors/shareholders/creditor(s) can petition the Court for the Company to be wound up but this is likely to be more expensive than CVL
 - note that the floating charge holder will need to be notified of the shareholders' resolution to wind up (5 days' notice) and may object.
 - floating charge holder may prefer administration
 - as there is likely to be a distribution of the prescribed part, sanction of the court will be necessary in administration or the exit route could be CVL so the distribution of the prescribed part can take place.

QUESTION 2

- (a) **Set out the steps that you should advise directors and members to take to procure a Statutory Declaration of Solvency and a members' resolution for placing a company into Members' Voluntary Liquidation. (7 marks)**

a. Declaration of solvency

Ensure that the directors are aware of the consequences of signing a declaration of solvency. As it is an oath a false statement is perjury.

The directors have to declare that they have made a full enquiry into the Company's affairs and, having done so, have formed the opinion that the Company can pay its debts in full, together with interest (see s189) within such period, not exceeding 12 months, from the passing of the resolution, as may be stated in the statutory declaration. S89(4)

The declaration of solvency has to be accompanied by a statement of assets and liabilities s89(2)

It is important to ensure that proper enquiry/due diligence into the statement of assets and liabilities is carried out.

If possible, and especially if the Company has been recently trading, the statement of assets and liabilities should be based on audited accounts (balance sheet).

Consider arranging an audit of the Company's accounts.

If this is not possible, carry out a detailed reconciliation of the latest management accounts (balance sheet and profit and loss account) with the last audited accounts.

The directors have to be confident of the values placed on the assets. Discuss with the directors whether or not formal valuations are necessary.

The directors have to be confident that all liabilities: present, future and contingent (and including those in tort) are included in the statement of assets and liabilities.

Review

- minutes of Company and board meetings
- memorandum and articles
- correspondence with Company solicitors
- correspondence with Company's insurers/brokers
- records of meetings/correspondence with trade unions/employee reps/employees
- accident book
- correspondence and risk assessments with Health and Safety executives (retain these files)
- the Asbestos Register for each non-domestic property (includes the common parts of blocks of flats) and retain. (If there is no register for every property, instruct an agent to produce for the properties with no register either a Register or a statement that the duty to maintain the Register rests with an identified party).

to assess whether there are any contingent or other liabilities.

Consider the type of industry(ies) that the Company has operated in since incorporation.

Has the Company entered into any lease or taken an assignment of any lease of property or guaranteed the performance by another party of the covenants contained in the lease?

Write to lease companies or third parties for details if necessary.

Has the Company given any product guarantees? (If so consider taking out run-off product insurance).

Has the Company given any cross guarantees in respect of group liability (including VAT group registration)?

Has any other group Company given any indemnity for the Company's liabilities?

Are there any current or pending legal actions?

- Arrange with the directors, the date, time and place of the meeting of the board of directors for the purpose of making a Declaration of Solvency and convening a meeting of members.
- Discuss with the directors the date, time and place of the members' meeting. This must be held within 5 weeks of the swearing of the Declaration of Solvency.
- Where necessary, book the venues for the meetings by telephone and confirm in writing. S89(2)
- Form 4.70

Review articles to ascertain the quorum for board and Company meetings. Make a file note.

Obtain from the directors a complete list of the names and addresses/email addresses of all current registered members of the Company.

Any communications under the IA 1986 must be in writing and any Companies Act 2006 notifications should be sent by post as well. R12.4

Consider whether the Companies Act notices should additionally be sent electronically

The Companies Act 1985 (Electronic Communications) Order 2000

CA 2006 s308, 309, 333, 1143, 1148

Sch 4, 5

CA 2006 s333(2)

The resolutions to be placed before the members will need to be prepared for the Board meeting to consider:

- Special resolution to place Company into liquidation
- Ordinary resolution to appoint a liquidator
- Ordinary resolution to approve liquidators' remuneration (Where an agreement to limit fees has been reached, this needs to be expressed in the resolution ie that the basis of remuneration is on time costs basis, however where such time costs exceed the figure agreed, the liquidators will not seek to recover any sum in excess of the limit. The effect of this resolution is that where the time costs are less than the agreed limit, it is only possible to recover the time recorded and NOT the limit agreed).
- Special resolution sanction of liquidators' powers under Sch 4 Part 1 IA 1986
- If there is to be a s110 scheme - special resolution to enable the liquidators to exercise any powers necessary to achieve this.

If required, special/extraordinary resolution for distribution in specie (check that the articles allow this) S165

- Consider whether the Company should change its name (this may be necessary if a group Company and the group may wish to retain the name) (check articles).

Confirm with client who is to be the chairman of the Board meeting.

Arrange for the following to be completed and signed by the directors:

- Minutes of Board meeting

Notice to members of resolutions to wind up and to appoint a liquidator (and any other resolutions). IA 89(3)

At the Board meeting the directors should swear the Declaration of Solvency before a justice of the peace or commissioner for oaths or practising solicitor. Form 4.70

Deliver Statutory Declaration and Declaration of Solvency to Registrar within 15 days of Resolution to wind up.

S84(2A) does not apply as there is no floating charge

If Company is an authorised (or former authorised) deposit taker send notice to shareholders to the FSA and to scheme manager established under s212(1) of the FSMA 2000. R4.72

R4.1(1)(b)

At the same time, send to each registered member at least 14 clear days (but check articles to ensure that 21 days notice is not required) before the date of the general meeting: S84

CA 2006 s291

- notice of general meeting
- proxy 8.5
- covering letter

Check articles to ensure requirements for voting, notice, etc are satisfied. Make a file note. CA 2006 S307(5)

Ensure that there is a file note on the reasons for convening general meeting at short notice

Send to each registered member:

- notice of general meeting
- form of agreement of members to short notice of general meeting
- All members can sign one agreement or each can sign a separate form)
- Where shares are held jointly, all holders should sign
- Proxy Form 8.5
- covering letter
- Ensure that the consent of a majority in number of the members who hold shares giving them the right to attend and vote at the general meeting and who together hold at least 95% (for a public Company) or 90% if a private Company – but check articles which may be based on CA 1985 or 1948 and may still be 95%) of such shares is obtained to the convening of the meeting at short notice.

Send notice of general meeting to any of the Company's personnel whom you consider should be told of, or be present at, the meeting. This should be sent to all directors including those who are not registered members.

Ensure that the following are prepared at least one working day before the general meeting:

- proposed liquidators' consents to act
- copy of the proposed liquidators' bonds R12.8(1)
- draft minutes of the general meeting (including the resolutions to be taken)

- copy of the special and ordinary resolutions to be considered at the meeting and for eventual filing with the Registrar
- copy of the special and ordinary resolutions to be considered at the meeting and for eventual filing in the Gazette
- attendance register
- certificate of appointment made out in the names of the proposed liquidators

(Ensure the certificate of appointment specifies whether the joint liquidators act jointly or severally. The members' meeting must determine to what extent acts that they are required or authorised to do by statute are to be done by one or more or all of them. This may be done either as part of the resolution of appointment or by way of a separate resolution.)

S231

Form 4.28 (joint) Form 4.27(sole)

- copy of the Declaration of Solvency Form 4.70
- copy of the directors' report on the affairs of the Company (if required)
- summary of proxies given by the members of the Company – to be completed by the close of business on the last day prescribed for members' proxies.
- check articles to ensure that a proxy attending the meeting has the same voting rights as the member
CA 2006 s285

form of indemnity

Ensure chairman has been provided with the proposed liquidators' consents to act.

R 4.139(2)

Form 4.27

Form 4.28

Ensure that every person attending the meeting is provided with:

- a copy of the Declaration of Solvency which must have been sworn before the members' meeting
- a copy of the directors' report on the affairs of the Company (if required) Form 4.70

When votes are taken ensure that there are sufficient majorities (special resolution – 75% and ordinary resolution – 50% of those members entitled to vote at the meeting, either personally or by proxy) CA 2006 S282, 283

Obtain signature of the chairman of the meeting on the following documents:

- attendance register
- summary of proxies
- minutes of general meeting
- copy of the special and ordinary resolutions passed by the meeting and for filing with the Registrar
- copy of the special and ordinary resolutions passed by the meeting and for publication in the Gazette

Arrange for a copy of the special and ordinary resolutions for publication in the Gazette be attested at the meeting by a chartered or certified accountant or by a solicitor or chartered secretary.

The Chairman of the meeting should certify the appointment of the liquidator. The certificate should be sent to the liquidator and kept as part of the liquidation records.

R 4.139(3)

Form 4.27

Form 4.28

The winding up is deemed to have commenced at the time of the passing of the resolution for voluntary winding up. S86

On the appointment of the liquidator all the powers of the directors cease, except so far as the company in general meeting or the liquidator sanctions their continuance S91(2)

(b) Set out the problems of an early distribution to members in a Members' Voluntary Liquidation. (3 marks)

main issue is whether the liquidator is sure that he has identified and reserved for all liabilities;
liquidator also needs to be sure that he has identified and reserved for all expenses of the liquidation;
liquidator needs to obtain indemnity from shareholders who may be reluctant to give and/or may not have the resources to back an indemnity in which case the liquidator may require a third party to provide an indemnity

- (c) **Assuming that this Company enters Members' Voluntary Liquidation set out the issues that the Liquidator will need to settle before making a distribution to members. (5 marks)**

- ascertain all liabilities: present, future and contingent
 The lease has one year to run:
 Calculate liability, Debt payable at a future time: R11.13:

2 payments of £25,000 due on 25 December 2010, 25 March 2011

Assume date of liquidation = 3 November

For each £25,000 the admitted proof shall be reduced by $1/(1.05)^n$

$25 \text{ } 12 \text{ } 10 = 25,000 \times 1/(1.05)^0.167$
 $= 25,000 \times 1/1.008 \text{ } 24,801$

$25 \text{ } 3 \text{ } 11 = 25,000 \times 1/(1.05)^0.46 = 25,000 \times 1/1.022 = \text{£}24,461$

Total admitted proof = £49,262

- distinguish between claims of members, as members and as creditors

Dividend on preference shares:
 Total preference shares = 600,000 of £1
 Dividend not paid = 5% x 600,000 = £30,000

- (d) **Set out the amounts that should be paid to each of the members, distinguishing the types of payment. (5 marks)**

	£'000	£'000	
Proceeds from sale of pharmacies		3,000	
Cars at valuation (less belonging to Mr Mill)		120	
Less:			
Liabilities			
Trade payables	(200)		
Adjustment for directors' loan accounts (which must be paid to the liquidator as creditors):			
Mrs Kant	(20)		
Mr Kant	(10)		
Mr Hume	(30)		
Mr Mill (payment for car)	10		
Leasehold premises	(49)		
Other current provisions (assume all payable)	(30)		
Corporation tax	(50)		
Receivables			
Due from Mrs Hume	10	(369)	
		2,751	
Preference share dividend		(30)	
Available for distribution to preference and ordinary shareholders (in cash and in specie)		2,721	
Repayment of preference shares at par (200 + 100 + 200 + 100)		(600)	
Available for distribution to ordinary shareholders		2,121	
Dividend per share = 2,121,000/400 = £5,302.50			
Each shareholder has 100 shares, value of distribution = £530,250			

Mr Kant receives:			
Preference share dividend	10,000		
Preference share capital at par	200,000		
Cash distribution (530,250 – 40,000)	490,250		
Car – <i>distribution in specie</i> *	40,000		740,250
Mrs Kant receives:			
Preference share dividend	5,000		
Preference share capital at par	100,000		
Cash distribution (530,250 – 20,000)	510,250		
Car <i>distribution in specie</i> *	20,000		635,240
Mr Hume receives:			
Preference share dividend	10,000		
Preference share capital at par	200,000		
Cash distribution (530,250 – 50,000)	480,250		
Car <i>distribution in specie</i> *	50,000		740,250
Mrs Hume receives:			
Preference share dividend	5,000		
Preference share capital at par	100,000		
Cash distribution (530,250 – 10,000)	520,250		
Car <i>distribution in specie</i> *	10,000		644,250
* The cars have been shown as a distribution in specie but it is acceptable to show the directors paying for their cars pre-liquidation provided that the additional cash (40,000 + 20,000 + 50,000 + 10,000 = 120,000) is included in the amount to be distributed amongst the shareholders.			

QUESTION 3

- (a) **Set out the issues that the Liquidator should address with respect to the employees and the types of employee related claims and expenses that will arise in the Liquidation. (20 marks)**

Issues

Contact/email JobCentre Plus re possible redundancies

Consultation generally re redundancy for 20 or more employees

If > 100 employees – at least 90 days

If < 100 employees – at least 30 days

Trade Union and Labour Relations (Consolidation) Act 1992

- duty to consult appropriate representative of the employees with a view to reaching agreement
- to avoid/reduce the number, mitigate consequences of the dismissals
- specific consultation re redundancy of selected employees (regardless of location) .
- consultation is in respect of “establishment”

Employer disclosure requirements

- reasons for proposals
- how many/which employees to go
- total number of employees of that description
- how employees will be selected for redundancy
- proposed procedure including time period
- how redundancy payments to be calculated

Discussion of practicalities

Failure to consult – trade union or employee rep can complain to Employment Tribunal and can be awarded up to 90 days pay as protective award. If not paid individual employee can enforce by complaining to Employment Tribunal

- need to minimise protective awards

Haine v Sec of State [2009] EWCA Civ 626:

- protective award provable in liquidation
- obligation to consult pre dates liquidation and so protective award claims provable even if not yet heard by Employment Tribunal (see also Unite v Nortel Networks UK Ltd [2010] EWHC 826)
- insolvency per se is not special circumstance

- consider whether trade union or need to elect employee reps

- calculation of amounts owed (detailed calculations not required), but issues to consider include: whether employees paid **minimum wage** in which case the shortfall will fall part of their claim for arrears of wages (see below)

- consider position of directors and/or shareholders as employees

Sec of State v Neufield [2009] EWCA Civ 280:

- a controlling director/shareholder can be an employee as long as company is not a sham
- need to look at contract with company and whether he did it and whether what he agreed to do points to a contract of employment

If no written contract: need to decide whether there was a contract and the terms and the conduct of the director and/or shareholder.

- consider whether the directors are personally liability for unpaid NI

Claims

Need to distinguish the types of claims the employees may have

There are two main types of employee claims to consider:

- preferential and
- unsecured

In addition certain debts are guarantee by Sec of State.

Preferential claims – see IA 1986, s 386 and Sch 6 Category 5

Unsecured claims – include claims for wrongful or unfair dismissal or redundancy pay (but in practice will be able to recover these from the Sec of State)

Also consider whether employees have other claims eg arrears of expenses, which will be unsecured

Guaranteed debts - Of these claims some will be guaranteed by virtue of the Employment Rights Act 1996 s 182 – 189.

ERA 1996 s183(3) provides – an employee of an insolvent employer whose employment is terminated may have a right to claim from he Sec of State certain debts due to him from his employer.

Note that the employee’s claim is subrogated to the Sec of State to the extent of the payment made.

-any arrears of pay in respect of one or more (but not more than eight) weeks;

- any amount which the employer is liable to pay the employee for the period of notice required by ERA 1996 s86(1) or (2) for any failure of the employer to give the period of notice required by ERA 1996 s86(1) any holiday pay in respect of a period or periods of holiday not exceeding six weeks in all; and to which the employee became entitled during the 12 months ending with the appropriate date;

- any basic or compensatory award of compensation for unfair dismissal (or any award made under a designated dismissal procedures agreement (not exceeding the basic award for unfair dismissal to which the employee would be entitled but for the agreement));

- any reasonable sum (as defined by ERA 1996 s 184(4)) by way of reimbursement of the whole or part of any fee or premium paid by an apprentice or articled clerk (ERA 1996 s184 as amended)

'arrear of pay' include –

- (i) a guarantee payment;
- (ii) any payment for time off under ERA 1996 Part VI, or the Trade Union and Labour Relations (Consolidation) Act 1992 s169 (payment for time off for carrying out trade union duties etc);
- (iii) remuneration on suspension on medical grounds under ERA 1996 s64 and remuneration on suspension on maternity grounds under s 68; and
- (iv) remuneration under a protective award made under the Trade Union and Labour Relations (Consolidation) Act 1992 s189 (ERA 1996 s184(2)(d)

'holiday pay' is defined by ERA 1996 s184(3)

"holiday pay" – need to consider Working Time Regs as to how much holiday can carry forward and also consider any contractual obligations.

The debt in question must be due at the 'relevant date':

- (a) in relation to arrears of pay (not being remuneration under a protective award made under the TULRA 1992 s189 and to holiday pay, the date on which the employer became insolvent;
- (b) in relation to such an award and to a basic award of compensation for unfair dismissal, whichever is the latest of:

- (i) the date on which the employer became insolvent;
- (ii) the date of the termination of the employee's employment; and
- (iii) the date on which the award was made;
- (c) in relation to any other debt to which the section applies, whichever is the later of the dates mentioned in sub-paras (i) and (ii) of para (b) (ERA 1996, s185)

ERA 1996 s 166 also provides that the employee may be able to recover from the Sec of State certain other payments which cannot be recovered from the company.

Also the employee will have a right to have pension contributions made up (Pensions Schemes Act 1993, s24)

Expenses

Consider whether the liquidator may need to pay arrears of those keeping on as expense of liquidation

Consider whether the liquidator has the funds to pay on-going wages as expenses of the liquidation

If employees were paid less than the minimum wage – the liquidator will have to pay at least the minimum wage

Practical issues, including

- obtain copy of contracts; meet workforce; obtain payroll details, including all information required for PPF.
- Arrange for P45s to be issued to staff.

(b) Set out what points the Liquidator should include in the letter dismissing employees. (6 marks)

- employees should register with JobCentre Plus asap
- reason for dismissal is redundancy because the Company is unable to pay its debts
- make it clear that Company (and not liquidator) is dismissing them
- complete RP1s asap and send to liquidator for checking (good practice)
- explain what the employee can claim for: arrears, redundancy, pay in lieu of notice (mitigated by anything earned during notice period) – see 3a above (but no double marks for explanation if given in 3a)
- explain that if employee has claims, other than arrears of wages and those associated with redundancy – eg expense claims – explain that these claims are treated different and request details of claim in writing (or enclose proof of debt)
- specify date of dismissal
- request return of all company property

(c) Set out with reasons, what employee related issues that may affect the sale price of the business. (4 marks)

- no TUPE under EC rules and so may increase sale price
- an existing (and skilled) workforce may be important to a buyer (a prospective purchaser may wish to ascertain whether workers with key skills are available)
- existence of protective awards, prospective employer will not be liable for these
- although prospective employer is not liable to pay pre-insolvency debts of employees, if he wishes to retain the workforce he may wish to
- workforce may be disgruntled

QUESTION 4

- (a) **State the options that are available to Risky Finance Plc and state, with reasons, what immediate action(s) you recommend. (6 marks)**

Concern that the assets may be at risk and you do not know whether or not company is insolvent:

[You are acting for finance company] advise:

- issue petition for winding up
 - apply to court for provisional liquidator to be appointed
 - possibly apply to court for administration [but if wrongdoing administration is probably not appropriate and may take too long to put in place, also you do not know at this stage whether or not the Company is insolvent.
 - if suspect fraud/money laundering report this to SOCA (regardless of whether appointed or not)
- other options – CVA and CVL – would require the co-operation of the directors (in any case CVA would take too long) and you do not know at this stage whether or not the Company is insolvent
- Given the urgency of the situation taking steps, such as talking to the directors, is unlikely to assist the creditor that you are advising (and may be tipping off)

- (b) (i) **If a Liquidator is appointed to a company subject to a winding up order, set out the Liquidator's reporting requirements in relation to the company and the directors. (3 marks).**

Note: there is no requirement to report under CDDA (D forms) in court winding up.

Should report findings of wrongdoing to OR

- no requirement to investigate criminal conduct but if it comes to liquidator's attention that criminal offence may have occurred he should report to Sec of State (IA s218(3)).

Liquidator should also report to SOCA under Money Laundering Regs (or through MLRO).

- liquidator must be prepare an annual progress report to be sent to members, creditors and the Registrar of Companies within 2 months of the end of the year (unless extended by the court)
- there is no requirement to file progress reports in court
- the progress report must cover the period of one year commencing on the date on which the liquidator is appointed, and every subsequent period of one year.

The report should include:

- details of the court proceedings and number;
 - the company name, address, number and registered office, or the bankrupt's name, as the case may be;
 - details of the office holder's name, address, date of appointment and any changes of office holder;
 - details of the basis fixed for the remuneration of the office holder (or if not fixed at the date of the report, the steps taken during the period of the report to fix it);
 - if the basis has been fixed, the remuneration charged during the period of the report, irrespective of whether it was actually paid during that period (except where it is fixed as a set amount, in which case it may be shown as that amount without any apportionment for the period of the report);
 - if the report is the first to be made after the basis has been fixed, the remuneration charged during the periods covered by the previous reports, together with a description of the work done during those periods, irrespective of whether payment was actually made during the period of the report;
 - a statement of the expenses incurred by the office holder during the period of the report, irrespective of whether payment was actually made during that period;
 - details of the progress during the period of the report including a receipts and payments account;
 - the receipts and payments account be in the form of an abstract showing receipts and payments for the period of the report and where the liquidator ceased to act, a statement of the prescribed part paid under section 176A;
 - details of any assets that remain to be realised;
 - a statement of the creditors' or members' rights to request further information and their right to challenge the office holder's remuneration and expenses.
 - any other relevant information for the creditors;
- report for final meeting (final progress report) must be sent to creditors 8 weeks before final meeting

(ii) Set out the issues that the Liquidator has to consider in relation to each of the properties and set out the steps that you recommend the Liquidator should take to preserve the value of the estate for the creditors (21 marks)

Liquidator will need to ascertain whether there is a **value** in each of the properties (and other assets)

Consider debtors - Downturn Ltd

Consider whether future income (and therefore value). What are the implications of collecting rent?

Consider whether there is any rent deposit

Liquidator will need to ensure that the value of assets (properties) is preserved and so will need to consider:

- insurance
- health & safety
- fire risk (consider who is responsible)
- security of site
- environmental issues/contaminated land

Liquidator will need to consider expenses of the liquidation

- are there sufficient funds?

- will the costs of preserving the value of the assets be covered by the realisations?

- related to this – timescale – how quickly will the liquidator be able to realise the assets and what costs are being incurred?

- will costs be incurred regardless of timescale (eg in respect of contaminated land)

- consider eligibility for empty property rates:

s 45, Local Government Finance Act 1988: owners of empty non-domestic properties are liable to pay non-domestic rates if certain conditions apply but The Non-Domestic Rating (Unoccupied Property) (England) Regulations 2008 SI2008/386 Reg 4(k) provides that s45 does not apply to properties owned by companies being wound up, which means that companies in liquidation do not have to pay rates if the property is unoccupied.

In a liquidation if the property is retained or the liquidator makes use of the property for the benefit of the liquidation, the rent is an expense of the liquidation:

See Goldacre (Offices) Ltd v Nortel Networks (UK) Ltd [2009] EWHC 3389 (Ch) – a case that considered rent in administration – the judge (in paras 5 – 8) examined the liquidation expenses principle (also referred to as the salvage principle) (considering the judgment in Toshoku and In Re Lundy Granite Co., ex p. Heaven (1871) 6 Ch App 462)

Note – candidates need not refer to the case by name but should be aware of the consequences of the decision.

Liquidator will need to ascertain the liabilities at the relevant date (date of petition)

- valuing claims

Disclaim freehold

Leasehold – market

- environmental issues likely to be very expensive and so likely that liquidator will need to disclaim the freehold

Contaminated land is likely to expose the liquidator to criminal liability under Health & Safety legislation and the liquidator will want to disclaim as soon as reasonably possible

Consider timing issues re disclaimer – what liabilities will be incurred (including criminal sanctions) while waiting for disclaimer to come into effect?

- write to council re- empty property

- disclaim freehold (s178 and details...)

- F10.2 ,

- Notice of disclaimer 4.53 – sufficient detail for property to be easily identified

- Office holder authenticates certificate (no filing in court)

- Copy of notice to Land Registry

- Copy of notice to registrar (form F10.2)

- Within 7 business days of date of disclaimer send notice to every person who claims an interest in disclaimed property or is under any liability in respect of the disclaimed property (other than obligation that the disclaimer brings to an end)

- Keep record of

who sent notice to

nature of interest in disclaimed property claimed by each recipient

date on which office holder sent notice

date sent notice to land registry

date on which notice of disclaimer sent to registrar

Sch 2, 244ff, 387ff

Tenant: collect rent/implications of collecting rent

Take steps to sell the leasehold interest

PERSONAL INSOLVENCY NOVEMBER

2010 EXAMINER'S REPORT

GENERAL

For the most part, questions one and three were generally answered well. Questions two and four were poorly answered. The examiner draws particular attention to the general note applicable to all papers.

QUESTION 1

Set out the:

- (a) shortcomings of the creditors' meeting described above. (7 marks)**
- (b) criticisms that could be made of Mr Rhodes. (9 marks)**
- (c) remedies available to Dr Grace. (4 marks)**

This question asked candidates to assimilate facts about a first meeting of creditors in an IVA and to describe the shortcomings of the meeting, the criticisms that could be made of the IP concerned and the remedies open to an aggrieved creditor.

Many candidates scored well on this question. Most correctly identified that on a correct analysis of the voting, the IVA should not have been approved. However, the way in which candidates arrived at this conclusion varied considerably and the explanation of the two stage voting process was often confused.

Most candidates identified the inadequate disclosure in the nominee's report. However, many candidates wasted time by listing all the requirements of SIP 3 rather than applying this knowledge to the specifics of the question. Correctly, many candidates referred to the unusual situation concerning the house but went on to assume that this was a transaction at undervalue. Nothing in the question justified this. Many candidates made good points about the possibility of income contributions and the inadequate enquiry into the third party funds, but few candidates made reference to the family trust and the fact that the debtor may have an interest in the trust itself and any other assets in it.

Very few candidates picked up the fact that the debtor was an IFA or considered the effect of the IVA on his business and his ability to continue to trade. Virtually no-one considered whether there were any business assets or liabilities that had not been disclosed.

Most candidates correctly identified that the aggrieved creditor could seek to overturn the IVA by applying to court. Far fewer candidates recognised that the creditor had remedies open to him in relation to the IP.

QUESTION 2

Draft a letter to Mrs Greig setting out how the estate might be dealt with and your advice as to the way forward. (20 marks)

NOTE: Ignore points arising from the Administration of Estates Act 1925.

This question asked candidates to write a letter of advice to a widow whose husband had accumulated debts without her knowledge.

Overall the standard of answers was poor with many candidates failing to address the question by setting out a well ordered letter of advice. Instead, many candidates chose to write down all that they know about dealing with insolvent estates and associated topics.

Any acceptable answer had to conclude that the deceased's estate was insolvent. Too many candidates failed to appreciate that, on the husband's death, his interest in the property passed to his widow by survivorship to her. Consequently, some candidates concluded, improbably, that the estate was solvent.

Most candidates identified the relevance of the Administration of Insolvent Estates of Deceased Persons Order. However, many concentrated too much on the risk that creditors would initiate an insolvency process rather than advising the widow. The steps that could be taken under IA86 s421A were mentioned by most candidates, but the purposes and effects of the section were not well explained. It was too often seen as being inevitable that a formal process would be required: the consequence was that many candidates considered that the widow would lose her home and car. With proper advice, neither was likely.

QUESTION 3

- (a) **Set out Mr Barrington's potential assets and explain the steps that you would take to maximise realisations, commenting where appropriate on the likelihood of success. You should state such reasonable assumptions as you consider necessary and identify any applicable statutory provisions. (22 marks)**
- (b) **Prepare a receipts and payments account assuming that the realisations identified by you under (a) have all been made. Calculate the rate of dividend to each class of creditor. (8 marks)**

This question asked candidates to describe the steps that they would take to realise the assets of a bankrupt builder and to prepare a receipts and payments account.

A number of candidates scored very well on this question. However, in general candidates scored on the more obvious points and failed to explain how asset realisations would be affected by the nature of the bankrupt's former business. For example, too few candidates considered the peculiarities of collecting debts due to an insolvent builder. Most were content simply to write a second letter demanding payment and then involve an agency or solicitors.

The quality of the receipts and payments accounts presented by candidates varied vastly but was, in general, very disappointing. To complete this task candidates needed to think beyond the facts of the question and apply their wider knowledge, for example when assessing the likely levels of the trustee's remuneration or calculating the Secretary of State's administration fee. Too often the figures presented were simply not credible in the context of the question or were calculated using a wrong statutory scale.

QUESTION 4

- (a) Compare and contrast the treatment of capital gains tax in an IVA and in a bankruptcy. (3 marks)**
- (b) Prepare a receipts and payments account as at today's date. You should state such reasonable assumptions as you consider necessary. (7 marks)**
- (c) Set out in the form of a memorandum to your insolvency manager the issues that should be considered and the steps that should now be taken. You should state such reasonable assumptions as you consider necessary. (20 marks)**

In part (a) candidates were first asked to compare and contrast the treatment of capital gains tax in IVAs and bankruptcies. In parts (b) and (c) candidates were asked to prepare a receipts and payments account and to identify the actions that needed to be taken by the supervisor of a failing IVA. All three parts of the question were generally very poorly answered.

In part (a) three easy marks were available, but very few candidates appeared to have any knowledge of CGT. Most restricted their answers to a few random comments which scored few if any marks.

The general quality of the receipts and payments accounts presented was very poor. Virtually all candidates failed to appreciate different rates of VAT would apply over the two years covered by the account.

The key to answering part (c) lay in candidates knowing some of the key provisions of the R3 standard conditions for IVAs. Candidates appeared to have little knowledge of these. The result was that most could do no more than write down a few random ideas for what might happen when an IVA is failing. Very few candidates presented a coherent action plan for what the supervisor should do. A lot of time was wasted, and no marks were gained, by candidates who went beyond what was required and explained about trust clauses or compared the financial outcomes under IVA and bankruptcy.

PERSONAL INSOLVENCY NOVEMBER

2010 EXAMINATION MARKING PLAN

QUESTION 1

(a) Set out the shortcomings of the creditors' meeting described above. (7 marks)

Venue for the meeting is inappropriate.

The nominee must fix a venue convenient to creditors.

Meeting was in the evening and not between 10.00 and 16.00

Mrs Jessop and George Jessop are both Associates of the debtor.

They are entitled to vote for the IVA but their votes must be disregarded in when determining whether any resolution is invalid under r5.23(4).

The Council's proxy is valid but Mr Rhodes should not use it to vote for the IVA because to do so would be in breach of r8.6 (proxy holder with financial interest).

Mr Rhodes should not have used the vote of Trumpers to vote in favour of the IVA because by so doing he was putting himself in a position to receive remuneration out of the estate.

Even discounting the votes of the Council and Trumpers, the IVA is approved under a vote properly conducted under r5.23(1)

Mrs Jessop	170,000	
George Jessop	280,000	
Total votes for	450,000	89%

Dr Grace	55,000	
Total votes against	55,000	11%

but those voting against exceed 50% of the creditors who are not associated to Mr Jessop and therefore resolution approving the IVA is invalid and the IVA should have been rejected.

(b) Set out the criticisms that could be made of Mr Rhodes. (9 marks)

Mr Rhodes as chairman of the meeting

Unfamiliar with the requirements as to voting and of the requirement to hold the meeting between 10.00 and 16.00

Ignorant of the need for the chairman to prepare a report of the meeting and to give creditors notice of the result of the meeting within 4 business days of the meeting being held.

Does not know that the majority required to approve the proposal is three quarters or more in value of those who vote and not a majority in excess of three quarters.

Should not have exercised the Council's or Trumpers's vote.

Mr Rhodes as nominee

Nominee's report covers only the bare minimum required by statute

and ignores the requirements placed on a nominee following *Greystoke v Hamilton Smith* and SIP3.

But it goes beyond what is required by concluding that the IVA has an "excellent" rather than "reasonable" prospect of being approved and implemented.

Nominee's report silent on the nominee's considerations of whether Mr Jessop has misrepresented his position.

For example no disclosure about what enquiries have been made into or conclusions reached about the ownership of the London house

and whether there is a family trust from which Mr Jessop might benefit

or whether Mr Jessop really does have no other assets

or whether Mr Jessop's business as a financial adviser is an asset

or why there appear to be no liabilities disclosed relating to that business

or whether Mr Jessop is going to be able to continue to act as a financial adviser having entered into an IVA

or whether the combined incomes of Mr Jessop and his wife would enable contributions to be paid to the Supervisor

or whether the claims lodged by the two associated creditors are genuine.

Or what the attitudes of the major creditors are
or what the attitude of Mr Jessop has been during the process
Unsafe to conclude that IVA has reasonable prospects when it relies upon £30,000 being paid by an unknown person at an unspecified future date when it is not known whether the person concerned has been independently advised
It's unusual for HMRC not to have voted so were they given notice?
Trumpers are a creditor for a significant sum unlikely to be related to Mr Rhodes's work as Nominee. Mr Rhodes should have considered whether there is a conflict of interest in his acting as Nominee and either concluded that there is not and disclosed all relevant facts in the Nominee's report or declined to act.

(c) Set out the remedies available to Dr Grace. (4 marks)

Dr Grace could take bankruptcy proceedings against Mr Jessop
Dr Grace can seek to challenge the meeting's decision under s262 (1)(a) because of the deficiencies in the proposal and Nominee's report
and under s262(1)(b) because of the irregularities at the creditors' meeting.
Dr Grace has 28 days to do this.
The Court can revoke or vary the approval of the IVA.
The Court can award costs against Mr Rhodes (eg *Harmony Carpets v Chaffinlaird and Smurthwaite v Simpson Smith & Anor*)
The Court can direct that a further meeting of creditors be held but may decline to do so if it is clear that any fresh meeting will vote down the IVA.
If HMRC were to vote in favour at a fresh meeting then the IVA could be approved so the Court may order such a meeting to take place
but the deficiencies in the proposal and IVA are such that the Court may require Mr Jessop to reconsider his proposal and Mr Rhodes to submit a revised nominee's report.
Dr Grace should consider complaining to Mr Rhodes's RPB
and to the senior partner of Trumpers.
Generally Dr Grace should seek legal advice on his position.

QUESTION 2

Draft a letter to Mrs Greig setting out how the estate might be dealt with and your advice as to the way forward. (20 marks)

NOTE: Ignore points arising from the Administration of Estates Act 1925.

Setting out in letter format and setting out facts and advice in a logical manner
Considered whether there is a conflict because the son is a good friend of the senior partner of Larwood & Co but this does not prevent advice being given now or Larwood & Co acting in a formal capacity if that becomes necessary
Mr Greig's interest in the property passed to Mrs Greig on his death under the survivorship rules.
On the face of it the estate has assets of £3,000 (car) and liabilities of £35,800 (creditors £33,200 plus funeral bill of £2,600) and is therefore insolvent.
The assets in the trust pass to the children and are not assets in Mr Greig's estate.
Mr Greig's debts did not "die with him"
Mrs Greig must either therefore consider ways of funding the shortfall or take steps formally to have the estate declared insolvent.
She could consider taking legal advice.
Mrs Greig can petition as Executrix for an insolvency administration order under the Administration of Insolvent Estates of Deceased Persons Order 1986
A creditor also can petition for such an order.
It's not possible to present a petition for bankruptcy against a deceased individual or for an IVA to be put in place.
The Insolvency Act and Rules applying to bankruptcies apply when orders are made under the AIEDPO with certain modifications.
Where a petition for an administration order is made within 5 years of death and immediately prior to death the deceased was beneficially entitled to a property interest as joint tenant (IA86 s421A) the Court can order that the surviving joint tenant should repay to the deceased's estate an amount not exceeding the value lost to the estate.
This means that Mrs Greig would be at risk of having to repay the shortfall of £32,800 plus all the costs and expenses of the trustee's administration.
The Court has wide discretion about what to Order and must take all the circumstances into account but unless there are exceptional circumstances the Court must assume that creditors' interests outweigh all other considerations.
The amount that Mrs Greig is at risk of having to find could be reduced if the trustee were successful in breaking the trust over the policy proceeds so that the £20,000 fell into the estate but there is insufficient information at present to determine if he would succeed.
In any event it could be easier for the trustee simply to seek an order under s421A and not concern himself with trying to break the trust.
Practically if Mrs Greig is ordered to repay money to the estate under s421A she has no means of doing so and her home could therefore be at risk.
Mrs Greig will also lose the use of the car
If Mrs Greig decides to petition under the AIEDPO she need not pay the funeral bill as such costs are payable out of the insolvent estate prior to paying the creditors.
Because of the costs that would be incurred by going down the AIEDPO and the risks to her home Mrs Greig should consider whether there is an alternative solution.
Mrs Greig's children have offered to help so are they able to advance the funds to pay the creditors perhaps using the money from the life policy or with Mrs Greig's help arranging matters so that funds can be raised on the security of her property
One possibility in the longer term might be for Mrs Greig to sell up and move to a smaller property.
A firm of solicitors may need to be instructed to administer the estate if Mrs Greig can't.
The creditors (especially the Gas bill) will need to be paid quickly.
Mrs Greig's children should take their own advice
Advice:
Establish if family funds are available to meet shortfall and to avoid going through the formal AIEDPO procedures at all costs as it will be quicker, easier and less traumatic and above all far cheaper than getting a trustee involved under AIEDPO.
In particular S of S fees will be avoided and any risk to Mrs Greig's home will be avoided.
Possibly offer the available funds as a dividend to creditors in full and final settlement
Mrs Greig will need to pay the gas bill, perhaps using her savings

Need to instruct someone to administer the estate if Mrs Greig is not competent to do this and find the funds to pay them but whoever is appointed need not be an insolvency practitioner
Suggest a firm other than Parks are instructed as they clearly did not think through what the position really is and appear to be fee conscious.

QUESTION 3

- (a) **Set out Mr Barrington's potential assets and explain the steps that you would take to maximise realisations, commenting where appropriate on the likelihood of success. You should state such reasonable assumptions as you consider necessary and identify any applicable statutory provisions. (22 marks)**

Mr B's beneficial interest in the matrimonial home vests in the trustee
An up to date valuation is required and up to date mortgage redemption figures.
If no insurance is in place, this needs to be arranged and a restriction registered at HM Land Registry.
Send s283A letter/notice.
Jointly owned so presumption of 50/50 ownership.
On the current figures the interest is worth £87,000 ($£400,000 - £150,000 - £76,000 = £174,000$ divided by 2 = £87,000).
Mrs B could seek to claim exoneration from the second charge which if successful would mean Mr B's interest being worth £49,000 ($£400,000 - £150,000 = £250,000$: divided by 2 = £125,000 - £76,000 = £49,000).
Whether she will succeed in her claim depends on the facts and the intentions of Mr and Mrs B at the time the borrowings were taken out but the trustee may be able to argue that Mrs B benefited from the business loan as Mr B's income derived from his business and that this was used to support the family.
Write to Mrs B to see if she wishes to acquire Mr B's interest but if not seek her agreement to the property being sold.
If no agreement, take proceedings seeking orders for possession and sale of the property.
The balance of the monies due for the chattels (£8,000 plus VAT) needs to be accounted for without delay after deduction of costs of £2,000 plus VAT.
Consider whether the sale was for full value and if not consider effects of IA86 s284
Debtors totalling £230,000 have not replied to initial letters and need to be written to again probably by agents experienced in dealing with contract/building debts.
Enlist Mr B's help given his knowledge of the contracts
Likelihood of claims for breach of contract and/or the costs of completing the work and/or snagging defects.
The £15,000 debt said to have been paid does not appear in the draft receipts and payments account and funds need to be located or the R&P to date amended.
Given that Mr Barrington was a builder, are there any retentions to collect?
Is there any VAT bad debt relief that can be claimed?
Debt assignment to the Waugh Brothers took place within six months of the date of presentation of the petition and had effect of putting the Waughs in a better position than would otherwise have been the case and is therefore liable to be attacked as a preference under s340.
Trustee will need to establish that Mr B was influenced by the desire to refer (s340(4)) in order to succeed.

Proceedings could be taken against the Waughs to restore the position but very likely to be hotly defended
Trustee would need to ensure that the Waughs are in a position to repay the money.
Pension fund is potentially subject to s342A because the fund increased from £50,000 to £370,000 in the year when Mr B was undertaking the contract that led to his bankruptcy.
Trustee can take proceedings for an order under s342B to recover excess contributions.
Sanction to proceed will need to be sought
Mr B appears to have surplus household income of £1,300 per month and therefore the trustee should seek to agree an IPA under s310A or if unsuccessful apply for an IPO under s310
Time is tight because the bankruptcy order was made nearly 1 year ago therefore IPA needs to be agreed quickly failing which an application for an IPO must be made before discharge.
IPO/IPA can be for up to three years.
Consider whether any loss relief claims can be made to recover tax paid in previous years

- (b) Prepare a receipts and payments account assuming that the realisations identified by you under (a) have all been made. Calculate the rate of dividend to each class of creditor. (8 marks)

	£	Note
Receipts		
Plant & machinery	18,000	
Interest in property	49,000	1
Excess pension contributions	315,000	2
Income payments order/agreement	36,000	3
Proceeds of preference	35,000	4
Debtors	61,000	5
Deposit on petition	430	
Interest on ISA account (net)	500	6
Total receipts	514,930	
Payments		
Official Receiver's costs	1,715	
Agents' costs re plant & machinery	2,000	
Agents' fees re debtors	9,200	7
Agents fees re property	500	8
Legal fees re excess pension contributions, preference and property	25,000	9
Secretary of State administration fee	80,000	10
Petitioner's costs	1,200	
Trustee's remuneration	45,000	11
Trustee's disbursements	750	12
Distribution to unsecured creditors (83p in the £)	349,565	13
		14
Total payments	514,930	

Notes:

1. Assumes that Mrs B's claim to exoneration succeeds in full
2. Assumes that Mr B's normal annual pension contributions are small at £5,000 p.a and therefore all the 2008 contributions over this are recovered ($£370,000 - (£50,000 + £5,000) = £315,000$)
3. Neither an IPA nor an IPO would absorb all Mr B's surplus income. It ought though to be possible to seek an IPO/IPA for £1,000 per month. Over 36 months = £36,000
4. Assume preference recovered in full
5. Assume 20% is recovered from debtors excluding the one debtor already paid and the Waugh Brothers debt ($£280,000 - £15,000 - £35,000 = £230,000 \times 20\% = £46,000$. Add debt already received of £15,000 = £61,000.
6. A modest amount of interest (under £500) would have been earned
7. Assume 20% of book debt realisations (excl £15,000 already received). $£46,000 \times 20\% = £9,200$.
8. Assume valuation only.
9. Assume preference and excess pension contributions claims are both contested
10. Assume all realisations paid into ISA gross $£514,930 - £2,000 = £512,930 \times 17\% = £87,198$ but the max fee charged cannot exceed £80,000
11. Estimate but anything less than this is below OR's scale rate
12. To include disbursements incurred up to 3 November 2010
13. Creditors ranking for dividend are £421,000 (£667,000 as per question less Mrs B's claim of £55,000 (deferred) less Y Bank £150,000 (secured) less Z bank £76,000 (also secured) plus Waugh Bros additional claim of £35,000).
14. $£349,565$ paid against claims of £421,000 = 83p in £.

QUESTION 4

- (a) Compare and contrast the treatment of capital gains tax in an IVA and in a bankruptcy. (3 marks)

CGT as a creditor	
Bankruptcy	IVA
CGT on disposals made up to the day before the day of the making of the bankruptcy order is an unsecured claim in the bankruptcy estate	CGT is assessed tax being assessed each tax year. CGT arising on a disposal in the tax year during which the IVA is approved is, like income tax, a claim in the IVA (subject to any provision in the IVA changing this)
CGT as a cost/expense	
Bankruptcy	IVA
CGT arising on disposals made during the bankruptcy is payable as a cost of the bankruptcy	Proposal usually provides that CGT arising on the disposal of an asset by the S is a cost of the IVA
The CGT can arise on a disposal by a secured creditor or a receiver and manager as well as on a disposal by the TIB	If such a provision is not there it is likely that HMRC will try and introduce it as a modification.
The CGT is payable under IR86 r6.224(p) prior to any remuneration of the trustee in excess of that payable under IR86 Schedule 6	If the proposals are silent, the CGT is payable by the debtor outside the IVA
S = Supervisor TIB = Trustee in bankruptcy	

- (b) Prepare a receipts and payments account as at today's date. You should state such reasonable assumptions as you consider necessary. (7 marks)

	£	Note
Receipts		
Monthly contributions	63,000	1
Rent of Hambledon House	24,000	2
	87,000	
Payments		
1st dividend to creditors	37,720	3
Supervisor's remuneration	13,050	4
VAT on Supervisor's remuneration	2,104	5
	52,874	
Balance at bank	34,126	
Notes		
1. 21 payments from November 2008 to July 2010 @ £3,000 each		
2. 8 quarter days between Oct 2008 and Nov 2010 @ £3,000 each		
3. Funds at end of 1 st year should be 12 x contributions @ £3,000 = £36,000 plus 4 x rental receipts @£3,000 = £12,000. Total £48,000.		
Supervisor's remuneration @15% = £7,200 plus VAT (15%) of £1,080 = £8,280.		
Requirement to keep £2,000 back at all times		
Funds available for distribution £48,000 – (£8,280 + £2,000) = £37,720		

<p>4. Funds received at end of second year are the same as those received as at today's date. 1st year receipts were £48,000 therefore 2nd year receipts were £87,000 - £48,000 = £39,000. Supervisor's remuneration in 2nd year therefore £39,000 x 15% = £5,850. Total remuneration to date £7,200 + £5,850 = £13,050</p>
<p>5. VAT on 2nd year remuneration at 17.5% = £1,024. Total VAT on remuneration therefore £1,080 + £1,024 = £2,104</p>
<p>Assumptions: Rental income from Hambleton House is an asset in the IVA All receipts received by the supervisor on the due dates Supervisor's remuneration drawn annually (either that or no 1st year remuneration drawn prior to 1/1/09 or 2nd year remuneration drawn prior to 1/1/10 (ie before the dates of VAT rate changes)) Dividend for 2nd year not yet paid. No interest received on funds held by the Supervisor</p>

(c) Set out in the form of a memorandum to your insolvency manager the issues that should be considered and the steps that should now be taken. You should state such reasonable assumptions as you consider necessary. (20 marks)

<p>Mr Stewart is not complying with some of his obligations under the IVA because the monthly contributions for Aug to Nov 2010 have not been received, the equity in 100 Trent Bridge Way has not been realised within 18 months of the approval of the IVA (this should have been done by 5/4/2010) and he is <u>probably</u> behind in submitting his VAT returns The IVA is subject to the R3 standard terms and conditions and therefore the procedures relating to breach of the IVA needs to be followed</p> <p>Possibly call Mr Stewart in for a meeting to discuss the way forward but in any event a letter must be sent without delay to Mr Stewart reminding him of his obligations under the IVA and detailing the breaches identified by the Supervisor. The letter should require Mr Stewart to remedy all the breaches forthwith and telling him that if he does not do this a Notice of Breach will be issued. Mr Stewart can remedy two breaches by paying the 4 outstanding monthly contributions and by ensuring that the missing VAT return is submitted A check should be made to establish whether, at the time the IVA was put in place, Mrs Stewart acknowledged that Mr Stewart's interest in 100 Trent Bridge Road would need to be realised and whether any provisions were agreed as to how this was to be achieved The refusal by Mrs Stewart to co-operate with a remortgage constitutes a breach by Mr Stewart and a letter should be written to Mrs Stewart pointing this out and the possible consequences of her continued refusal ie breach of the IVA, possible termination of the IVA and possible bankruptcy of Mr Stewart If the three breaches are not rectified immediately then a Notice Of Breach must be issued to Mr Stewart formally identifying the breaches and requiring him within 1 month to remedy the breaches and to explain why they have happened. If Mr Stewart complies fully with the Notice of Breach, then the IVA continues but the Supervisor must report the breaches to the creditors. If Mr Stewart does not comply fully with the Notice of Breach in the time allowed the Supervisor must call a meeting of creditors to resolve whether the Supervisor should issue a Certificate of Termination to bring the IVA to an end, the Supervisor should issue a petition for Mr Stewart's bankruptcy to vary the terms of the IVA, or to take no action. If the creditors so resolve, the Supervisor must issue the Certificate of Termination and/or a bankruptcy petition as soon as practicable and notify Mr Stewart and the creditors. The Supervisor should send his annual report now advising creditors of the breaches and the steps the Supervisor is taking to have these remedied. The Supervisor should pay the dividend that he is bound to do but should make provision for future costs before doing so.</p>
