

## JOINT INSOLVENCY EXAMINATION BOARD

### OVERALL COMMENTS ON THE NOVEMBER 2017 SITTING

#### Introductory remarks

It is perhaps to be expected that, on any paper, there will be a bunching of marks somewhere in the middle of the overall range. There is no reason why scripts scoring marks somewhere in the middle should not be good enough to pass. There are no quotas or pass rates: if a script is good enough to be given a pass, then that is what will happen.

The problem this year was that too many candidates presented uninspiring, marginal scripts. Candidates are playing with fire by doing this. There is no safety in numbers: by presenting an “average” script a candidate runs the real risk of failing the paper concerned. This year, more than in recent years and particularly on the Liquidations and ACVAR papers, the Examination Team was called upon to make a judgement as to where in the midst of a host of scripts the pass mark should be set. The inevitable result was that too many candidates failed papers by just a very few marks. Others could be considered fortunate to have been awarded a pass.

The only way for candidates to avoid their scripts being embroiled in the pass/fail decision is to present a script that is clearly pass-worthy. This may be self evident, but too few candidates seem to be able or willing to do this. Candidates will not be able to do this if they are unable to tackle “numbers questions” with confidence, set down the relevant law and show good practical knowledge in solving the problem set in the question. Trying to pass a paper without having the ability to have a go at getting all 100 marks available is asking for trouble.

The reasons why candidates struggle to present pass-worthy scripts are numerous and have all been set out in the Examiners’ reports in recent years. The Examination Team makes no apologies for repeating them this year. The paragraphs which follow below repeat, in large part verbatim, the introductory remarks which were made in relation to the 2016 sitting. They are as apposite now as they were a year ago.

Poor handwriting was again an issue. Candidates must appreciate that no marks could be awarded for a word or phrase that is illegible. There is a limit to how long the Examination Team could be expected to spend trying to decipher handwriting that is difficult to read. With the advent of Computer Based Exams in 2018 this will no longer be an issue, but poor handwriting has meant that candidates have almost certainly lost marks this year.

In too many case candidates do not refer to relevant case law, even when the requirements specifically ask them to do this. Candidates are not expected to have an encyclopaedic knowledge of the names of decided legal cases, but should be able to augment their answers by referring to the legal case(s) that support what they are saying.

Again this year some candidates did not take sufficient care to ensure that they complied with the exact requirements of the question. This was particularly true of those requirements which were more specific in nature. If, for example, a requirement asks a candidate to make a recommendation as to a course of action or to opine on an issue, that is what should be done. Candidates who sit on the fence or who shy away from making a decision are losing marks by not answering the question and, in addition, are likely to present scripts which attract lower holistic marks.

The inability of too many candidates to apply their knowledge of the law and best practice to solving a practical problem remains a real issue. Candidates who can do this to good effect invariably present scripts that earn good marks, but they are in a minority. Too many candidates present scripts that show they know the applicable law but which fall short when applying this to the facts of the question. Candidates know that in the region of 40% of the total marks available in any paper will be awarded for the application of knowledge to practical situations. Not being able to do this means that they are putting themselves at a material disadvantage. It is also the case that, when considering the award of holistic marks for a question, the Examination Team will give greater weight to those points made which demonstrate that the candidate is taking a rounded approach to tackling the problem posed rather than those points which simply lay down the basic rules without going on to apply them.

Candidates need to be reminded yet again that compensating for the inability to deal with a practical situation by “brain dumping” all they can think of which is (or may tangentially be) related to the subject of the question is an approach which does not and will not work. This approach is likely to earn some marks, almost by default as mark-worthy points are made at random. However, the Examination Team’s experience is that this approach tends to result in candidates regurgitating checklists or similar which show all too clearly that the candidate is not focused on the question and its requirements. The flow of consciousness which is the product of the “brain dumping”

approach means that, too often, candidates present pages of script which may not in themselves be wrong but which are either irrelevant to the question or are on point but too comprehensive for the marks on offer. Apart from anything else, this approach wastes valuable time. It is obvious to the Examination Team when a candidate is “brain dumping” and the result is invariably reflected in the award of low holistic marks.

Candidates who aspire to pass a paper should be aiming to present a script which earns twelve or more holistic marks. Ultimately the main determinant of whether a script passes or fails is not how many holistic marks it has been awarded but the Examination Team’s assessment as to whether or not it is good enough. However, holistic marks are becoming an increasingly potent indicator of the quality of a script. A script that has been awarded twelve holistic marks contains four answers that, on average, have been marked as being acceptable. Candidates should be aware that scripts attracting fewer than twelve holistic marks are increasingly unlikely to be considered pass-worthy.

## JOINT INSOLVENCY EXAMINATION BOARD

### LIQUIDATIONS

#### EXAMINER'S REPORT FOR THE NOVEMBER 2017 SITTING

##### **General comments**

Similar to previous years, a good number of candidates were well prepared and showed a clear knowledge and understanding of Liquidations. Good exam technique; reading the question, watching your timing and looking at the question mark allocation available also enabled better candidates to perform well.

This paper again placed an emphasis on practical application of facts, and candidates who failed to apply their theoretical insolvency knowledge to the facts in the question or answer the question asked, scored poorly despite writing pages of script.

Candidates should also remember to consider the mark allocation available. This indicates the level of detail required, and minimises time wasted answering a question for which there are limited marks available. Where questions, such as Q2, have several sub sections despite being allocated 25 marks, candidates should be aware that the marks will be spread across all parts of the question so should avoid concentrating on only one sub section at the expense of others. This was also especially apparent in Q3a, where numerous candidates went into great detail on obtaining fee approval, despite only being able to score a maximum of 3 marks.

The numbers question was answered well with many candidates gaining high marks. The ethics question was answered less well with a notable number of candidates incorrectly treating a sister-in-law as a close or immediate family member.

Other insolvency procedures were tested in Q2 of this paper, where the candidates were presented with various mini scenarios. These were dealt with satisfactorily.

Similar to last year there was very little mention of relevant case law even when specifically asked for, and those candidates that did mention case law consequently gained higher marks.

**Liquidations  
November 2017  
Mark Plan  
Question 1**

- a) Set out the legal and practical steps Mary needs to take to move the Company into Creditors' Voluntary Liquidation (6 Marks)**
- b) Assuming the Company is placed into Creditors' Voluntary Liquidation, identify the consequences this will have for the Directors and Shareholders of the Company (6 marks)**
- c) Assuming you are appointed Liquidator in the Creditors' Voluntary Liquidation:**
  - i) Making reference to the relevant provisions in the Insolvency Code of Ethics, state the ethical issues that you are likely to identify when conducting your investigation into Mary's involvement with the Company. Explain what duty you would have in relation to each of the issues you identify (8 marks);**
  - ii) Identify the actions you could take as Liquidator to recover assets for the creditors (5 marks)**

This question dealt with a company in Members' Voluntary Liquidation ("MVL") which following the discovery of additional liabilities is insolvent. Candidates were required to set out the legal and practical steps to move the company into Creditors Voluntary Liquidation ("CVL") and identify the consequences of, and issues this scenario would cause, for the directors, shareholders and MVL Liquidator. Ethics were also examined by considering the MVL Liquidator's conduct and the threats to the fundamental principles in the Insolvency Code of Ethics.

This question was generally answered well apart from the Ethics part. Candidates were most comfortable when asked to set out the procedural aspects of the move from MVL to CVL. Marks were lost in Q1b by some candidates failing to answer the question in relation to both directors **and** shareholders.

With regards to the ethics question, a notable number of candidates incorrectly treated Mary's relationship as sister-in-law to the Chairman as a close or immediate family member with numerous mentions of s435 and the definition of an "associate". Very few candidates mentioned that you would have a duty under SIP1 to report Mary to her RPB.

## Question 2

**Write a file note to prepare for your meeting with the Directors. Set out, in relation to each matter, the key points that arise from the information that you have received and the advice that you propose to give (25 marks)**

This question was based on a property holding client of your firm which had a variety of tenants in financial difficulty. The question covered various types of insolvency procedures and scenarios.

Although a 25 mark question, the question itself was split into six sub sections, so candidates who provided a few comments on each one tended to score highly.

Q2 (more than others) required candidates to apply their knowledge of the law to the scenarios laid out, and candidates who failed to do so but instead just regurgitated relevant legislation missed out on marks.

Despite the question clearly stating that the Company was an existing client of the firm, some candidates wasted time talking about anti-money laundering and client identification checks prior to giving advice. Some candidates also wrote out the ethics checklist addressing the question as if the client itself was insolvent and about to enter into an insolvency procedure, when there was no suggestion this was the case.

Many candidates also missed out on easy marks by failing to include practical comments such as “ensure lease validly disclaimed” and “submit proof of debt to the Liquidator”. Albeit, generic advice scores very few marks with candidates needing to apply the “so what” principle to take their answer that one stage further and gain the marks on offer.

Most candidates identified the point about empty property rates relief exemption for Stumblemead and that the rates liability falls on the liquidator following disclaimer. Equally most candidates addressed the basic IVA points, but few mentioned the impact of the Interim Order.

### Question 3

- a) **You would like to recover your time costs in full. Explain how you would obtain the necessary fee approval (3 marks)**
- b) **Assuming you are successful in obtaining approval to recover your time costs in full, prepare an Estimated Outcome Statement for the Company as at 31 October 2017. You should calculate the estimated dividend for each class of creditor (15 marks)**
- c) **Set out the steps that will be required to close the case following the declaration of the dividend (7 marks)**

This question required candidates to consider how they would obtain fee approval where they have exceeded their initial fee estimate, prepare an Estimated Outcome and Distribution Statement, and finally, set out the steps to close a compulsory liquidation.

This question was answered well with the combination of a question on fee approval for which candidates were well prepared, and 15 marks available for numbers, another area candidates traditionally perform well in.

Numerous candidates went into great detail on obtaining fee approval, where there were only 3 marks allocated in the marking plan. In some cases this then appeared to cause timing issues when answering the other parts of the question, particularly Q3c which was an opportunity for candidates to apply their case closure checklist and therefore gave candidates the opportunity to score well.

In terms of the Estimated Outcome and Distribution Statement most candidates missed the mark for repaying the petitioner's deposit and few captured that part of the rent claimed was a liquidation expense rather than an unsecured claim. Some also incorrectly treated the US tax claim as preferential.

#### Question 4

**Draft a briefing note for the Risk Partner. Explain:**

- a) The considerations you should take into account in each individual case when deciding whether to pursue the possible action identified. Make references to relevant case law (14 marks)**
- b) What sources of funding could be available to realise value from the potential claims (3 marks)**
- c) The steps that would need to be taken to protect you from litigation risk (3 marks)**
- d) What an Insolvency Practitioner's bond is and how a claim is made against it (5 marks)**

This question covered the issues to be considered when deciding whether or not to pursue various claims together with a question on the Insolvency Practitioner's bond.

Although there were some very good answers, many candidates did not read the question properly especially in Q4a where instead of stating the considerations to take into account when deciding to pursue the actions listed, candidates wrote in detail about the specific wrongdoing that they had been told had occurred. Clearly, in addition to wasting time, no marks could be awarded for these answers. Also despite requiring candidates to refer to relevant case law, very few did.

Of those candidates that did answer the question, most recognised the ethical issue for the Liquidator of Tiddleton and many recognized that there would be practical difficulties of recovering assets from Simon in Hidor.

Only the better candidates recognised that the Liquidator does not have to follow the views of the Committee in Traystone if it is in the best interests of the creditors not to do so. Not all candidates realised that the PPF would need to be consulted in Swiftom.

Questions Q4b and Q4c were generally well answered. Most candidates found it easy to pick up marks discussing the Insolvency Practitioner's bond in Q4d, but many did not know or mention that the claim is paid into the insolvent estate.

## JIE 2017 LIQUIDATIONS MARKING GUIDE

### Question 1

#### a) Set out the legal and practical steps Mary needs to take to move the Company into Creditors' Voluntary Liquidation (6 Marks)

Mary to convene a deemed consent or decision procedure to seek a nomination from the creditors for a liquidator in the CVL (S95 IA86 & IR6.11). Mary can't be the liquidator due to ethical considerations

Can use deemed consent procedure to appoint CVL liquidator. Decision date must be within 28 days after the date Mary formed the opinion that the company couldn't pay debts in full (IR6.11(5))

Within 7 days of forming opinion that Company is unable to pay debts in full with interest as and when they fall due (S95(1A) IA86), Mary to prepare a statement of affairs to be included with the notice verified by statement of truth (IR6.2 & S95(4A) IA86), and provide to creditors. Statement of affairs to be delivered to Registrar of Companies 5 business days after completion of decision procedure or deemed consent. Practically, the Statement of Affairs should be produced urgently given the implications for the Company.

Require decision by decision procedure for fees and disbursement approvals

Include notice inviting creditors to decide whether to form a creditors committee, together with nominations for membership, identification and contact details for existing liquidator and statement that if no person is nominated then the existing liquidator will be the liquidator (IR6.11(4)) (although note here that Mary can't be the liquidator due to ethical considerations)

Provide notice of decision procedure to creditors not less than 14 days before the decision date (IR6.11). If any creditor has requested a hard copy document ensure these are sent

Mary to review post daily to check whether any creditors have requested a physical meeting and whether the thresholds (10% of creditors by number, by value or 10 individual creditors) for doing so have been met (IR15.6(2)). If physical meeting held should be gazetted (IR15.13)

Take into account SIP6 guidelines including that information should be presented in a transparent, consistent and useful manner. Requests for additional information should be viewed upon their individual merits

#### b) Assuming the Company is placed into Creditors' Voluntary Liquidation, identify the consequences this will have for the Directors and Shareholders of the Company (6 marks)

The Directors signed Declaration of Solvency in error. However it is their responsibility to thoroughly review financial position of company and when satisfied prepare statement of affairs and sign statement of truth that assets and liabilities accurately recorded and sufficient assets to pay all creditors in full with interest within 12 months.

S89(4) IA86 if declaration of solvency signed by Directors without having reasonable grounds for the opinion that the company was able to pay debts in full, then Directors could be liable to a fine and/or imprisonment

If company wound up within 5 weeks of declaration being made then it is presumed Directors had no grounds for their opinion. Here it is longer than 5 weeks, so Directors would need to demonstrate they were unaware of the additional claim.

Would need to consider if Mary give the Directors proper advice, did they have a meeting, Engagement Letter, liabilities properly explained to them e.g. they had to include contingent, future and unquantified liabilities.

CVL Liquidator has duty to report on conduct of directors (potentially could be disqualified).

Shareholders likely to have to pay back distribution. If Shareholders refuse could be attacked as a preference.

Shareholders will receive no shareholder distribution due to insufficient funds.

Is there an indemnity in place, if yes can you call on it?

**c) Assuming you are appointed Liquidator in the Creditors' Voluntary Liquidation:**

- iii) Making reference to the relevant provisions in the Insolvency Code of Ethics, state the ethical issues that you are likely to identify when conducting your investigation into Mary's involvement with the Company. Explain what duty you would have in relation to each of the issues you identify (8 marks);**

Per Insolvency Code of Ethics (ICoE) an IP is required to comply with the fundamental principles; integrity, objectivity, professional competence and due care, confidentiality and professional behaviour and also consider threats to these.

Potential conflict? Mary is the Chairman's sister-in-law. This isn't considered a close or immediate family member by the ICoE.

However, the ICoE requires you to "consider what a reasonable and informed third party; having knowledge of all relevant information, including the significance of the threat, would conclude to be acceptable."

Potential threats to objectivity and integrity include familiarity threat "when because of a close relationship, an individual within the practice [Mary] becomes too sympathetic or antagonistic to the interests of others"

Also advocacy threat when "an individual within the practice [Mary], promotes a position or opinion to the point that subsequent objectivity may be compromised"

If Mary prepared the statement of affairs – self review threat

Professional competence of Mary should be queried if she failed to review books and records adequately and identify Karbeca claim

Did Mary declare her family relationship with the Chairman to the Company prior to accepting the appointment?

For use of Mary's friend to sell the classic car, were appropriate safeguards put in place? Did she exercise professional competence and due care in appointing friend?

SIP1 duty to report another IP to RPB for all of the above

- iv) Identify the actions you could take as Liquidator to recover assets for the creditors (5 marks)**

Selling car at potential undervalue S238 IA86.

Query whether sold to a bona fide third party for value and therefore buyer was ignorant?

S238 IA86 preconditions met – transaction occurred within 2 years of date of insolvent liquidation.

If sold to an unconnected party, then insolvency at transaction date required to be proven; if connected party insolvency is presumed

Here Company was unable to pay its debts as they fell due (claim would have existed at time car sold)

Could you argue benefitted the Company at the time? (S238 (5)(a) IA86)

S238 IA86 remedy – restore position by requiring car to be returned if connected party, or Mary and/or agent to make up any shortfall in sales proceeds

Misfeasance s212 applies to liquidators as well as directors, "misfeasance or breach of any fiduciary or other duty in relation to both the company or carrying out their functions as liquidator" (S212(2) IA86)

Here could apply to Mary's inadequate investigations of books and records prior to making distribution, sale of car and allegations re preparing statement of affairs

S212 IA86 remedy is to repay, restore, account for money or property with interest, or pay compensation (S212(3) IA86)

Would need to make this application before Mary obtains her release or would need to apply to court for permission to bring action (S212(4) IA86)

Professional negligence claim against Mary and/or friend who sold car – may be covered by professional indemnity insurance.

## Question 2

Write a file note to prepare for your meeting with the Directors. Set out, in relation to each matter, the key points that arise from the information that you have received and the advice that you propose to give (25 marks)

File note layout

### **Business rates (Stumblemead)**

If tenant is in liquidation and lease has been disclaimed business rates liability falls on landlord from date of disclaimer i.e. from 31 October 2017.

Liquidator has right to disclaim onerous leases S178 IA86. Take legal advice to ensure lease validly disclaimed. S179 IA86 – where a leasehold is disclaimed this does not take effect until a copy has been served on every person claiming as under-lessee or mortgagee and no application is made under s181 IA86 which has to be done within 14 days

Mitigate losses by getting new tenant in, liability as occupier of the property will then fall on them

Empty non domestic properties are entitled to 3 months rates relief exemption, therefore if still empty can apply for relief

Write to Council and inform them that liability up to 30 October 2017 is tenants. Provide with details of Liquidator. Period 1 April to 6 April 2017 will be an unsecured claim, 7 May 2017 to 30 October 2017 arose whilst company was in liquidation and will therefore be subject to empty property business rates relief.

Submit proof of debt to Liquidator for any unpaid rent, dilapidations, rent due to end of lease and any other associated costs

### **Environmental issue (Stumblemead)**

Who has the liability? Here lease was disclaimed on 30 October 2017 and spillage occurred on 15 October 2017. Notify Environment Agency (EA) that liability falls on company in liquidation. But is there a risk that EA comes after the landlord as the one with funds?

Obtain details of what has happened by speaking to Liquidator. Take legal advice to assess liability of landlord. Consider if insurance in place to cover any costs. If end up paying for any liability can you recover from Liquidator as an expense?

### **Boardill**

If petition not issued can consider taking enforcement action under CRAR, however CRAR doesn't apply to premises with any domestic usage so will need to establish usage

Need to establish if sub tenant is not paying rent or Boardill is not passing on? Review lease - If sub tenant not paying, confirm who liability for rent falls on? Take legal advice to confirm position. Issue Notice to get sub tenant to pay head landlord directly, if you do this then you have to accept subtenant remains in place

Review documentation to establish if have deposit or guarantee you can enforce against?

Demand outstanding rent

If petition issued, can't take legal action (S128 IA86) against Boardill, so will have an unsecured claim

Company will need validation order S127 IA86 if pay rent to landlord or negotiate consensual solution, or else risks payment could be challenged

### **CRAR Pre-Petition (Froxwell)**

S184 IA86 Funds would have been held by Enforcement Officer for 14 days following sale, during which they should have received notice of winding up petition being issued. Upon confirmation of winding up order funds would have been forwarded onto Liquidator.

Contact Liquidator to establish what their intention is with the property, can you agree a deal for them to pay rent if they need the property?

Should submit an unsecured claim for any arrears

Confirm Health & Safety and other responsibilities don't fall on the landlord. Ensure property is insured.  
Establish strategy to exit lease and obtain new tenant

### **Trymeade**

Contact former Administrators to obtain copies of correspondence and query who now owns the lease?

Did Trymeade occupy the property during the administration – if so would this be an expense of the administration and would be entitled to rent, however Re WW Realisations Administrators should have written to the Company asking claims be submitted, failing which their claim would be time barred – was any correspondence received?

Company should hold a copy of the lease, but if not, review Land Registry for copy (if more than 7 year term should be registered at Land Registry)

Administrators don't have power to disclaim leases, and they cannot be assigned without landlord consent, as Trymeade is dissolved, the lease must have passed bona vacantia to the Crown

The Company will have issues re-letting the property, if the lease is still in the name of Trymeade or the Crown. Consider applying to Treasury Solicitor and invite the Crown to disclaim the lease or agree terms to surrender the lease

Review terms of lease, is it terminable on an insolvency event? Take legal advice

Ensure IT systems are now working

### **IVA (Deanland)**

Review report and identify what tenant is proposing in terms of rental arrears, consider if IVA proposal is acceptable. Here, as have 30% of debt, they need your vote to approve IVA (need 75% in value of voting creditors to approve IVA). Submit proof of debt to enable you to vote

The Interim Order will prevent you taking legal action to evict the tenant without court permission, and is normally in force until the date of the decision to consider the IVA proposal

Consider and take legal advice on what options are available to you – eviction, does lease allow occupation if tenant is subject to IVA

Identify if there is a deposit and consider if it could be used to offset arrears

### Question 3

e) **You would like to recover your time costs in full. Explain how you would obtain the necessary fee approval (3 marks)**

Request for approval to be made to body who fixed the basis, here the creditors (IR18.24)

Need to explain:

- 1) why fee estimate exceeded
- 2) additional work to be undertaken
- 3) hourly rate or rates liquidator proposes to charge for each part of additional work
- 4) time anticipates additional work will take
- 5) whether liquidator thinks will need to seek further approval
- 6) reasons why it will be necessary to seek further approval

Convene decision by decision procedure – will require one valid vote to enable decision to be approved

Upload notice of decision procedure to website, will need to ensure that Liquidator has given notice to creditors that case website will be updated without further notice, given this is a transitional case. But as will need one valid vote consider contacting key stakeholders to ask them to vote. Remember to send any hard copy documents to creditors if requested

Decision date must be at least 14 days from the date the notice is uploaded to the website (IR15.2)

Resolution to be approved before remuneration drawn

- f) Assuming you are successful in obtaining approval to recover your time costs in full, prepare an Estimated Outcome Statement for the Company as at 31 October 2017. You should calculate the estimated dividend for each class of creditor (15 marks)

**Rasaria Limited (In Compulsory Liquidation)**  
**Estimated outcome Statement as at 31 October 2017**

	Notes	As at 31 Oct 17	ETR	Total
		£	£	£
<b>Receipts</b>				
Book debts	a	82,500	33,750	116,250
Bank interest		800	-	800
Petitioner's deposit	b	1,350	(1,350)	-
Cash at Bank		3,250	-	3,250
Plant and machinery		114,300	-	114,300
Motor vehicles		4,800	-	4,800
Shares and investments from sale of US subsidiary		50,000	-	50,000
		<b>257,000</b>	<b>32,400</b>	<b>289,400</b>
<b>Payments</b>				
Cheque fees and bank charges		520	-	520
Secretary of State fees	c	39,593	5,063	44,655
Liquidator's fees		16,000	25,000	41,600
Winding up administration fee		2,520	-	2,520
Legal fees		49,500	5,000	54,500
Agents fees		15,000	-	15,000
Rent	d	-	8,640	8,640
		<b>123,733</b>	<b>43,703</b>	<b>167,435</b>
Less preferential distribution		-	10,040	10,040
Less prescribed part distribution	e	-	28,393	28,393
Less distribution to secured creditor		-	83,532	83,532
<b>Represented by</b>		<b>133,268</b>	<b>-</b>	<b>-</b>
<b>Workings</b>				
Notes				
a 25% of £135,000				
b Need to repay petitioner costs IR4.218 (3)(g).				
c All additional realisations subject to 15% deduction				
Secretary of State fees		£		
First £2k	0%	-		
Next £1700	75%	1,275		
Next £1500	50%	750		
Next £396k	15%	37,569		
Remainder	1%	-		
<b>Total realisations</b>		<b>39,593</b>		
<b>Max £80k</b>				
d Liquidator needs to pay for period of occupation as an expense				
e Prescribed part		£		
Net property		121,965		
50% of first £10k		5,000		
20% of balance		23,393		
<b>Total</b>		<b>28,393</b>		

**Rasaria Limited (In Compulsory Liquidation)**  
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Motor vehicles		4,800	-	4,800
Shares and investments from sale of US subsidiary		50,000	-	50,000
		<u>257,000</u>	<u>32,400</u>	<u>289,400</u>

**Payments**

Cheque fees and bank charges		520	-	520
Secretary of State fees	c	39,593	5,063	44,655
Liquidator's fees		16,600	25,000	41,600
Winding up administration fee		2,520	-	2,520
Legal fees		49,500	5,000	54,500
Agents fees		15,000	-	15,000
Rent	d	-	8,640	8,640
		<u>123,733</u>	<u>43,703</u>	<u>167,435</u>

Less preferential distribution		-	10,040	10,040
Less prescribed part distribution	e	-	28,393	28,393
Less distribution to secured creditor		-	83,532	83,532

<b>Represented by</b>		<u>133,268</u>	<u>-</u>	<u>-</u>
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**Workings**

**Notes**

a	25% of £135,000	
b	Need to repay petitioner costs IR4.218 (3)(g).	
c	All additional realisations subject to 15% deduction	
	<u>Secretary of State fees</u>	£
	First £2k	0% -
	Next £1700	75% 1,275
	Next £1500	50% 750
	Next £396k	15% 37,568
	Remainder	1% -
	Total realisations	<u>39,593</u>
	<i>Max £80k</i>	
d	Liquidator needs to pay for period of occupation as an expense	
e	Prescribed part	£
	Net property	121,965
	50% of first £10k	5,000
	20% of balance	<u>23,393</u>
	Total	<u>28,393</u>

## Rasaria Ltd (In Compulsory Liquidation) Distribution Statement

	Notes	Unsecured £	Preferential £	Secured £	Rejected £	Expense £
Kinubala	a	(7,500)				
<u>Mr Beaufort</u>						
Arrears of wages	b	835	800			
Holiday pay	c		654			
Pension contributions	d		436			
Stat redundancy pay	e	11,163				
Notice pay	f	4,823				
US tax demand	g	10,080				
<u>Landlord</u>						
Arrears	h	16,500				
Debt payable at a future time	i	135,750				
Less liquidators expense	j	0				8,000
Interest on arrears	k	1,320				640
Dilapidations	l	35,000				
Legal fees	m				5,500	
Small creditors	n	43,000				
The MoneeBank PLC				750,000		
Preferential claims			8,150			
Trade creditors		155,450				
HMRC		25,375				
Unsecured employee claims		72,165				
		<b>503,960</b>	<b>10,040</b>	<b>750,000</b>	<b>5,500</b>	<b>8,640</b>
Distribution		28,393	10,040	83,532		
P/£		6	100	11		

### Notes

- a Reduce Kinubala's trade creditor claim for value of goods returned
- b Arrears of wages: £545 x 3 = £1,635 of which £800 is preferential
- c Holiday pay: (545/5 = £109 per day x 6 days = £654) All preferential
- d Pension: 8 weeks x (545\*0.1) = £436. All preferential
- e Statutory redundancy: Mr Beaufort is 54 yrs old with 17 years service. (1 week for each year between 22 and 41yrs old and 1.5 yrs for 41yrs plus) = (4 x 1 week) + (13 x 1.5 weeks) = 23.5 weeks @£475 (capped) = £11,491.50 Because he was made redundant in March 2016 weekly amount is capped at £475 pw
- f Notice pay: 2 weeks notice plus extra week for each year you've worked if employed for 2 years (capped at 12 weeks at £475pw) (12 x £475 = £5,700) less Jobseeker's Allowance (12 x £73.10)
- g Debt not preferential. Use exchange rate at relevant date being the date the company went into liquidation i.e winding up order (\$1:£0.60) (IR 14.21). *Gov of India v Taylor* doesn't apply as US is party to the OECD Convention on Mutual Administrative Assistance in Tax Matters
- h IR14.22 - Pre appointment rental arrears for period prior to 27 Feb 2016
- i Arrears due for period 1 April 2016 to 24 September 2017 (end of lease). No need for discounting as no payments due at the date of the declaration of the dividend
- j Liquidation expense: Premises occupied for 32 days at £250 per day for period 28 Feb to 31 March 2016 (date lease disclaimed)
- k IR14.23 - Interest of 8% on pre appointment arrears only i.e until 10 March 2016. Interest is contractual therefore allowable. Also allowable on post appointment administration expense arrears
- l Assume dilapidations are reasonable
- m IR14.5 - Creditors must bear own costs to prove own debts
- n IR14.3 - No need for proof if less than £1k claim, assume no objections to claims received

**g) Set out the steps that will be required to close the case following the declaration of the dividend (7 marks)**

Distribute dividend with Notice stating no further dividends to be paid (IR14.36)

Deal with unclaimed dividends (pay over to ISA 6 months following issuing of dividend cheques)

Ensure all assets realised and no liabilities outstanding (trading (e.g. outstanding rent per Qu) and professional costs)

Draw final fees

Tax clearance (PAYE, NIC, VAT and corporation tax)

Obtain authority from Official Receiver to dispose of company records. Once authority received arrange for records disposal (Insolvency Regulations 1994 Reg16(1))

Reconcile and close ISA bank account

No requirement for final meeting (Insolvency Rules 2016)

Prepare final account (IR16 18.14) and upload to case website within 14 days of the made up date (remember to send hard copies to those requested)

Final account to be accompanied by Notice under IR7.71(2) that company's affairs are fully wound up, creditors have rights to request information from Liquidator, creditors have right to challenge Liquidators remuneration and expenses and object to release of Liquidator

File notice of ceasing to act with Pensions Regulator, PPF and Pensions Trustees

File copy of final account at Court and Companies House together with Notice confirming no objections to release have been received (S146 IA86) and IR7.71). Notice also to be sent to Secretary of State (IR7.71(3))

Terminate bond

Two months after you cease to act, close the case website

#### **Question 4**

**Draft a briefing note for the Risk Partner. Explain:**

**c) The considerations you should take into account in each individual case when deciding whether to pursue the possible action identified. Make references to relevant case law (14 marks)**

Briefing note layout

#### **All claims**

Liquidator has duty to act in best interests of creditors

Cost v benefit analysis (to include possible exit routes and associated costs if litigation doesn't proceed as hoped)

Legal merit (prospects of success) and suitable legal expertise and experience

Recoverability of any claim

Alternatives to instigating legal action (settlements, mediation, assignment of claim for value)

Insurance e.g. D&O in place? Source of funds and include the insurer in the defence process

Can you fund any potential security for costs ruling?

Re Premier Motor Auctions Limited (in Liquidation) v PwC LLP – a claimant company's insolvency will not of itself provide the defendant with sufficient grounds successfully to argue that there is reason to believe that the claimant company would be unable to pay their costs if ordered to do so; an ATE policy issued from a reputable insurance company will likely defeat an application for security for costs as long as there is no real threat that the policy will be avoided

Litigation expenses (i.e. if unsuccessful and get costs awarded against the company) have priority over all other expenses, so risk remuneration won't be paid IR6.42 (4)

Liquidator no longer needs sanction from creditors committee or court before causing the company to commence or defend legal proceedings

#### **Tiddleton**

For IRHP claim, need to consider the Bank's overall position, any damages can be offset against the Bank's claim, so may still be no additional recovery for other creditors

IRHP recoveries would be taxable

Banks are reviewing IRHP claims and have to follow set procedures contacting all customers at risk, therefore Bank may contact Tiddleton in first place

Consider risk to objectivity and integrity (self interest) re taking action against Bank

If IRHP claim should be pursued, consider if you can appoint another IP to the case (not on Bramber panel) to pursue and/or class action

#### **Swiftome**

PPF approval: PPF expects to be consulted when it is a significant stakeholder. Must keep PPF informed of progress and consulted if key decisions are required. (Nov 2015 PPF Guidance Note)

IPs to have considered prospects of success (legal opinion to assess chance of success at 60%+), target has resources to pay, worst case costs analysis, funding, expertise of chosen legal advisors, strategic aspects of the claim. (Nov 2015 PPF Guidance Note)

#### **Traystone**

Liquidator commencing litigation in face of creditor opposition Re Longmeade Ltd (in liquidation) (2016) and Re Greenhaven Motors

This is essentially a commercial decision for the Liquidator to take, Liquidator should act in best interests of the company and all those who have an interest in the estate. Liquidator may but not obliged to, consult with creditors, but should normally give weight to reasoned views of majority of creditors

### **Hidor**

Acting on instructions of bankrupt – personal liability for relevant debts falls on person acting on the bankrupt's instructions i.e. Simon (CDDA86 s15 (1)(b)(II))

What are the practical chances of recovering assets from Simon

### **Samhote**

IR6.45 if insufficient fixed charge assets (or uncharged assets) to fund litigation expenses need approval from floating charge creditor. IR6.46 must make request in writing, or can apply to Court (IR6.48) in certain circumstances

S176ZB IA86 - Application of proceeds of Liquidators claim (proceeds of successful action or consideration received for successful sale of a potential action) not to be treated as part of the company's net property i.e. are not available to satisfy floating charge holder and will go to unsecured creditors. Desire to improve returns to unsecured creditors where an insolvent estate would otherwise be unable to fund such claims (SBEEA S119)

Floating charge holder will benefit to the extent it has an unsecured creditor shortfall, and can participate in the unsecured distribution. Re Yagerphone Ltd 1935 – as an unsecured creditor the charge holder would be able to participate in the distribution of funds obtained through S239 IA86 (preference), because these funds do not fall within the reach of a floating charge

Consider negotiating with defendant to increase offer

### **d) What sources of funding could be available to realise value from the potential claims (3 marks)**

Creditor funding

Litigation and CFA funding

Portfolio funding

WIP funding

Case funds (need to be careful not to place creditor funds at risk)

Assign the claim (SBEEA S118 and S246ZD)

### **e) The steps that would need to be taken to protect you from litigation risk (3 marks)**

Sanction from creditor body or court (although no longer legally required), but PPF must approve if significant stakeholder

Creditor engagement

Fully document all decisions

Insurance

Consultation with fellow IPs/Risk Partner

Take legal advice on the merits of the case

### **h) What an Insolvency Practitioner's bond is and how a claim is made against it (5 marks)**

#### **What a bond is**

An insolvency practitioner will not be qualified to act in relation to a company or individual unless there is in force security (a bond) for the proper performance of the practitioner's functions.

The bond makes the surety (the insurer who issued the bond) jointly liable with the insolvency practitioner for losses in relation to the insolvent estate caused by the fraud or dishonesty of the insolvency practitioner (whether acting alone or in collusion), (IP Reg 2005 Sch2 Part 2.1(b)(i))

or the fraud or dishonesty of any person committed with the connivance of the insolvency practitioner. (IP Reg 2005 Sch2 Part 2.1(b)(ii))

A bond comprises two main elements of cover, a general penalty sum (also referred to as an enabling bond)

The general bond provides cover up to an amount of £250,000, and is generally renewed every 12 months.

The bond, or a copy of it, is lodged with the insolvency practitioner's authorising body and can be called upon if the insolvency practitioner fails to obtain specific penalty sum cover in respect of an insolvency appointment, or where the specific penalty sum cover obtained is insufficient.

Specific penalty sum cover is required in respect of each insolvency appointment generally for an amount not less than the estimated value of the insolvent's asset.

Where the estimated assets are worth less than £5,000, the specific penalty sum cover must be at least £5,000. The maximum amount of specific penalty sum cover for any one case is £5 million

Where appointments are taken jointly with another insolvency practitioner all appointed office-holders must have their own cover for the full value (subject to the limits referred to above) of the insolvent's assets.

#### **How to make a claim**

To make a claim against the bond; the beneficiary of the bond is the insolvency practitioner's authorising body on behalf of the creditors of the defrauded estate.

In practice the authorising body generally assigns the benefit of the bond to another insolvency practitioner who is appointed office-holder in place of the practitioner whose bond is the subject of a claim and pursues a claim against the bond on behalf of creditors.

Once a claim is made it is paid into the estate as an asset, subject to the usual order or priority of costs and fees of the proceedings

In the event that the cover provided by the specific penalty sum is insufficient to meet all claims arising out of any case, claims can be met from the general penalty sum until that is also exhausted

Where a claim is agreed and paid, the fraudulent insolvency practitioner remains jointly and severally liable with the surety for the losses

**JOINT INSOLVENCY EXAMINATION BOARD**  
**ADMINISTRATIONS, COMPANY VOLUNTARY ARRANGEMENTS AND RECEIVERSHIPS**  
**EXAMINER'S REPORT AND MARK PLAN FOR THE NOVEMBER 2017 SITTING**

**General comments**

This year's paper included a relatively high number of marks for knowledge of Statement of Insolvency Practices and 'best practice' however there was a surprising number of candidates that failed to demonstrate even a basic understanding of these. Conversely questions that required practical and commercial application were better answered. Whilst the aim is for the JIEB examinations to test practical application of knowledge, candidates must have a good understanding of the fundamental aspects of insolvency and therefore there must be balance between these elements.

Generally, it appeared that many candidates struggled to tailor their answer to the particular circumstances or had a pre-prepared answer that they were unable to deviate from. This was particularly evident in the SIP 16 question where many of the answers simply listed the post pre-packaged sale disclosure obligations.

Whilst quality of handwriting continued to be a general issue due to the move away from pen and paper this will not be an issue for any subsequent papers.

**Question 1**

This was a CVA question with a focus on preparation of an outcome statement and calculation of contributions into the arrangement.

- (a) Given these circumstances set out the legal and best practice obligations relating to the pension scheme. (5 marks)**

Generally, this question was well answered with the majority of candidates aware of their obligations in relation to notifying the relevant parties of the appointment and s122 notices. Candidates generally lost easy marks by not detailing the scheme's rights as a creditor of the company.

- (b) Making appropriate assumptions prepare a comparative outcome statement for inclusion within the CVA proposal clearly outlining the expected return to the unsecured creditors. (20 marks)**

Most candidates successfully demonstrated their ability to prepare an outcome statement in an appropriate format and calculate CVA contributions using the basic information provided. Overall candidates achieved a high mark on this question.

**Question 2**

This question presented candidates with information relevant to the investigations by an administrator.

- (a) Set out your key obligations in relation to investigating the affairs of the Company and the role of the committee in relation to this. (10 marks)**

This question tested candidates' knowledge of the relevant Statements of Insolvency Practice. Many of the candidates' answers focused on the reporting on the conduct of directors and failed to include other relevant aspects of the SIP.

Generally, candidates seemed to have little knowledge or understanding as to the role of a committee in relation to investigations and instead detailed the formalities of appointment and other their other roles.

- (b) Set out the key areas of investigation that you have identified from the information provided and where relevant provide an estimate of the quantum of any potential claim and key steps you would take to pursue the matter. (15 marks)**

The majority of candidates could identify several areas for investigation but quite a high proportion made no efforts to suggest a potential claim value. Similarly, most candidates correctly identified that there were connected parties involved and outlined the associated impact on the potential claim.

A small number of candidates spent time outlining potential actions for which there was no or little evidence in particular Transactions Defrauding Creditors claims. Whilst mentioning such a claim in the correct context would have resulted in a mark, general regurgitation of the Act simply wasted time for no reward.

### Question 3

- (a) **Set out your key considerations as to whether you could accept the appointment as Administrator. (5 marks)**

Most candidates considered the key aspects relevant to the situation in particular ethics and capability.

- (b) **Set out the key matters you would consider and information you would seek from the Company to determine whether it would be possible to appoint administrators in the UK. (5 marks)**

For this part of the question candidates were required to state the factors that would be considered for the purposes of determining the COMI of the company. Generally, the concepts appeared to be well understood.

The majority of candidates failed to consider any other criteria required to place the company into administration, namely those specified by Paragraph 11 of Schedule B1 to the Act (insolvency and purpose)

- (c) **Assuming a UK administrator is appointed explain how they would approach the three matters including potential methodologies they may apply to determine an appropriate realisable value. (15 marks)**

Many candidates appeared to struggle with this part of the question, which required some practical consideration as to how the 3 situations would be dealt with. The better candidates, however achieved a high mark demonstrating a good understanding of the particular issues associated with the situation.

This part of the question covered a small area of personal insolvency and generally candidates demonstrated a good knowledge as to how equity in a matrimonial home would be determined.

### Question 4

- (a) **Set out your obligations in relation to Statement of Insolvency Practice 16 for the period leading up to the appointment of administrators and explain how you would apply them in these particular circumstances. (15 marks)**

It appeared that the majority of candidates were not familiar with the contents of SIP 16 and could not articulate what activities the proposed Administrator should undertake prior to their appointment. Many candidates were able to list the post appointment obligations disclosure requirements in relation to a pre-packaged sale but they were unable to state the pre-appointment obligation from where it derived. For example, many candidates stated that the names and qualifications of any valuer used should be disclosed, rather stating that the proposed administrator should advise the company that valuations should be undertaken by independent and qualified valuers. Many of the answers were a simple list of bullet point disclosure items and in therefore missed the question requirements.

- (b) **Explain how you would deal with the situation should the directors refuse consent for you to market the business for sale. (5 marks)**

Most candidates could identify a relevant few points but very few considered the possibility of refusing to act in situations where the IP has been unable to market the business for sale.

- (c) **In the absence of any other offer, outline your key considerations and concerns when assessing the offer from the directors. Where appropriate provide alternative suggestions as to how the offer could be structured in the best interests of creditors. (5 marks)**

This part of the question was generally answered well and candidates were able to demonstrate good commercial awareness as to how offers could be structured.

**ADMINISTRATIONS, COMPANY VOLUNTARY ARRANGEMENTS AND RECEIVERSHIPS**  
**November 2017**  
**Mark Plan**

**Question 1**

**PART A**

As the largest creditor consider early dialogue/consultation.  
Defined benefit scheme – therefore Pension Protection Fund involvement  
S120 notification issued by the IP to the

- PPF
- tPR
- Trustees

Within 14 days of insolvency event or becoming aware of the scheme.

Insolvency event for CVA is submission of report to court stating meetings should be summoned

Written or electronic

IP confirm if scheme can be rescued (s122)

- If yes - withdrawal notice issued
- Unable as out of office - ceasing to act notice
- IP issue failure notice

PPF has creditor rights – circulate all notices to them  
Establish outstanding contributions to the scheme.

- RP15 form completed
- Details of amounts outstanding input on RPS spreadsheet
- Emailed to RPS

## PART B

### Astralorp Limited

#### Estimated Outcome statement

	Workings	Book Value	Liquidation	CVA	
Assets subject to a fixed charge					
Fixed assets		3,000	60% 1,800	-	
Legal costs			(15)	-	Any reasonable assumption
Agents costs	5% assumed		(90)	-	Any reasonable assumption
Liquidators' costs			(20)	-	Any reasonable assumption
Amounts due to bank		(2,300)	(2,300)	-	
Shortfall on fixed charge		700	(625)	-	
Assets subject to a floating charge					
Stock		1,000	25% 250	-	
Debtors		1,250	80% 1,000	-	
Amounts due from related parties	a	300	100	-	
Cash at bank		50	50	-	Any reasonable assumption for CVL, exc in CVA
Contributions	b	n/a	0	3,600	
Total realisations		2,600	1400	3,600	
Costs					
Liquidator			(50)	n/a	Any reasonable assumption
Nominee			n/a	(15)	Any reasonable assumption
Supervisor			n/a	(30)	Any reasonable assumption
Legal & professional (inc agents)			(20)	(10)	Any reasonable assumption
Amount available after costs		2,600	1,330	3,545	
Preferential creditors - employees	c	(60)	(60)	(29)	
Amount available after preferential creditors		2,540	1,270	3,516	
Prescribed part			(257)	n/a	Calc or recognition that floating charge holder will be paid in full
Amount available to floating charge holder			1,013	3,516	
Floating charge holder			(625)	n/a	
Amount available after floating charge			388	3,516	
Prescribed part			257	n/a	
Amount available for unsecured, non-preferential creditors			645	3,516	
Unsecured creditors					
Pension		(6,500)	(6,500)	(6,500)	
Trade creditors		(3,000)	(3,000)	(3,000)	
Direct Employees (per question)			(1,500)	(1,500)	
Indirect Employees (per question)			(200)	(200)	
Remaining employees - direct	(£1,500k = 50%)		(1,500)	-	
Remaining employees - indirect	(£200k = 40%)		(300)	-	
Related parties	d		(1,800)	(1,800)	Discretion if suggested excluded from CVA
Net deficit to unsecured creditors			(14,155)	(9,484)	
unsecured p in the £			4.4	27.0	

## Workings

### a. Related party asset

Total amount	300
Assumed subject to set off	<u>(200)</u>
Amount	<u>100</u>

Assumed fully recoverable.

### b. Contributions

	Yr 1	Yr 2	Yr 3		
t/o	15,000	15,000	15,000		
materials	(7,000)	(7,000)	(7,000)		
Original payroll	(5,000)	(5,000)	(5,000)		
Payroll saving 50%	<u>2,500</u>	<u>2,500</u>	<u>2,500</u>		
GP	5,500	5,500	5,500		
Original overheads	(4,500)	(4,500)	(4,500)		
Overhead sta per q	500	500	500		
Other overhead savings	<u>200</u>	<u>200</u>	<u>200</u>		
Net profit	1,700	1,700	1,700		
Bank loan	(300)	(300)	(300)		
Bank interest	<u>(100)</u>	<u>(100)</u>	<u>(100)</u>		
Cash generation	1,300	1,300	1,300		
b/f	50	300	300		
Available cash	<u>(1,050)</u>	<u>(1,300)</u>	<u>(1,300)</u>		
cash to be retained	300	300	300		
Profit 75%	(1,275)	(1,275)	(1,275)	(3,825)	
Contribution	(1,050)	(1,275)	(1,275)	Total (3,600)	limited to available cash
Discretion if used cumulative profit:					
Cum profit (75%)	(1,275)	(2,550)	(3,825)		
Cum cash available	(1,050)	(2,350)	(3,650)	(3,650)	

### c. Holiday pay

Per balance sheet				-60
	Savings	Entire workforce		
Direct staff	50%	2,500	5,000	
Indirect staff	40%	<u>500</u>	<u>1,250</u>	
Total payroll		<u>3,000</u>	<u>6,250</u>	48%
Estimated holiday pay for dismissed employees				-28.8

Assumed holiday pay outstanding proportional to estimated total workforce payroll.

### d. Related party liabilities

Total	(2,000)
Set off	<u>200</u>
	<u>(1,800)</u>

## Question 2

### PART A

#### Obligations re investigations

Statement of Insolvency Practice 2

To address

- concerns regarding the way in which the business was conducted,
- how trading was controlled,
- whether proper decisions were made at the time, and
- whether assets have been sold at an under-value or otherwise dissipated

Duty

- Identify assets and what recoveries can be made
- Report on the conduct of directors
- Report any criminal (or similar) offences to the relevant authority

#### Requirements

- Proportionate to the circumstances of the case
- Report on steps taken and outcome
- Report in a timely manner
- An office holder should document, at the time, initial assessments, investigations and conclusions, including any conclusion that further investigation or action is not required or feasible, and also any decision to restrict the content of reports to creditors
- The office holder should base any conduct report on information coming to light in the ordinary course of their enquiries and is not required to carry out investigations specifically for the purpose of fulfilling their statutory reporting obligations.

Key steps

- Locate and secure records
- Request Statement of Affairs from directors
- Invite creditors to provide information
- Seek information from directors and key staff members
- Make an initial assessment as to whether further investigations required
- Determine the extent of the investigations in the circumstances of each case, taking account of the public interest, potential recoveries, the funds likely to be available, either from within the estate and/or from other sources, to fund an investigation, and the costs involved
- Creditors should be given information regarding investigations, any action being taken, and whether funding is being provided by third parties
  - include within the first progress report a statement dealing with the office holder's initial assessment, whether any further investigations or action were considered, and the outcome;
  - include within subsequent reports a statement dealing with investigations and actions concluded during this period, and those that are continuing

#### Role of Committee

- Invite members to provide information relating to their concerns regarding the way in which the business was conducted.
- Consult with them where appropriate regarding recovery action
- Committee may have to agree remuneration in relation to investigations
- Report to the committee on progress and outcomes

## PART B

### Validity of floating charge (s245)

- Floating charge granted 30 June 2017; approx. 4 months prior to insolvency
- Assumed unconnected party – would need to check; companies house
- Void except to the extent that new funds provided – need to establish what the nature of this funding is and whether additional funds provided.
- Balance changed by £50k over the period.
- If an overdraft then likely that the facility will have revolved and new funds effectively provided. If to secure an existing loan then the floating charge unlikely to be valid.
- Unlikely to have a claim but floating charge may not be valid
- Obtain copy of charge

### Wrongful trading

Net liabilities:

	at 30/06/2017 appointment		
	£'000	£'000	
Assets	500	550	
Liabilities	<u>(750)</u>	<u>(650)</u>	Excluding employees
Net liabilities	<u>(250)</u>	<u>(100)</u>	

Loss during the period (150)

- The Company reported a break-even profit position for 2017 and therefore the £100,000 net liabilities as at June 2017 must have related to a previous trading period. Given that it survived the following year it would be difficult to pursue this loss.
- Loss to be pursued is the £150,000 being the reduction in net assets between 1 July and appointment.
- Would need to establish point of insolvency; copy management accounts etc.

### Preference – Dorking limited

- £50,000 repayment of debt
- Paid in the last 6 months
- Connected party as common control; desire presumed, 2 year look back period so in relevant period.
- Not all creditors treated the same
- Likely to have been balance sheet insolvent at the time; creditors £650,000 and current BV of assets £500,000. Company was trading at breakeven and had lost major contract so likely to become unable to pay debts.
- Claim £50,000
- Potential misfeasance action against the directors alongside a preference claim against Dorking limited
- Actions:
  - Establish whether insolvent at the time; management accounts, forecasts etc.
  - Establish reason for repayment
  - Write to Dorking requesting repayment
  - Consider legal action against director and Dorking

### Preference – granting of fixed charge

- Within 6 months so applies whether connected or not.
- Insolvent at the time? (see above)
- Likely to be unconnected party so would have to prove 'desire to prefer'
- May be justifiable if provided the opportunity to resolve the trading position; company continued for several months after
- Review correspondence relating to the grant of this charge
- Potential claim is effectively that the charge is not valid and therefore any fixed charge realisations would not be paid to the charge holder

### **Pension scheme – non-payment of contributions**

- Pension contributions to be paid by 19<sup>th</sup> or 22<sup>nd</sup> of the following month (Cheque v electronic)
- Action - Report to the pensions regulator

### **Reduction in stock**

- Discuss with the director reason for reduction; could be claims;
  - Transaction defrauding creditors?
  - Transaction at an undervalue/gift
  - Theft?
  - Reasonable explanation; stock write off, etc.
- Review company records to establish what happened to stock

### **Other/General**

- Trading at the expense of the crown – CDDA reporting
- Consider legal advice (specifics as to what seeking advice on required)

### Question 3

#### PART A

- Director/Shareholder is a personal client of the firm.
- Has there been a significant professional relationship?

#### ***Insolvency Code of Ethics***

Self-interest threats: which may occur as a result of the financial or other interests of a practice or an Insolvency Practitioner or of a close or immediate family member of an individual within the practice;

- The contact is an existing client and therefore there may be concerns about damaging the existing relationship.
- Consider when the firm acted for him and whether the firm is continuing to act for him

Self-review threats: which may occur when a previous judgement made by an individual within the practice needs to be re-evaluated by the Insolvency Practitioner;

- It does not appear that the firm has done any work for the entity. However, this should be checked as tax advice may have involved work relating to the Company.

Advocacy threats: which may occur when an individual within the practice promotes a position or opinion to the point that subsequent objectivity may be compromised;

- Check that the firm has not undertaken work that may create such a threat

Familiarity threats: which may occur when, because of a close relationship, an individual within the practice becomes too sympathetic or antagonistic to the interests of others; and

- Consider the nature of the relationship between the firm, its partners/employees and Mr Barnevelder.

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

- Consider if there is any suggestion of such threats, e.g. threatening to move personal tax elsewhere

The IP should consider what a reasonable and informed third party, having knowledge of all relevant information, including the significance of the threat, would conclude to be acceptable.

Can safeguards be put in place?

**Capability** -Does the firm have the relevant expertise required

**Resources** - Can the firm staff the assignment given that the appointment is imminent

#### PART B

Portugal and UK are part of EC

EC Regs and Uncitral Model Law: it is presumed that a corporate debtor's COMI is the location of the company's registered office, unless there is proof to the contrary (*article 3, Insolvency Regulation and article 16(3), Model Law*).

- Information should be sought in relation to:
- the place where the debtor company has its central administration;
- Where the bodies responsible for the management and supervision of a company are located
- where the management decisions of the company are taken from.
- Size of relative operations
- who are the company's creditors/customers and where are they based?
- under what law does it contract with creditors/customers – obtain copy contracts
- where do its banking relationships take place?
- where do customers contact/ correspond with the company – UK telephone number, email address, postal address?

- where is its head office – are there any head office functions in Portugal?
- from where does it conduct business – what address is on correspondence
- where are its employees based – obtain a list of employees together with their location and role
- where are directors based – UK resident but establish how much time he spends in each location.
- where are shareholders based – UK resident but establish how much time he spends in each location.
- where is its management based – establish split of time?
- where do board meetings take place – obtain minutes?
- where are administrative and accounting functions carried out – establish where IT, finance, marketing, HR is located.
- where are the majority of its assets based – obtain a list
- where are the main bank accounts of the company based?
- Where are the annual accounts filed?
- Where are the auditors based?
- Have there been any 'shifts' in COMI in the last 3 months
- Establish where tax is paid and where it is registered for tax (CT, VAT etc.)

### **Other matters**

- Achieve a purpose
- Insolvent/likely to become insolvent
- Not already in an insolvency procedure (e.g. in Portugal)
- Consider secondary proceedings if necessary

## **PART C**

### **Compine seeds**

- Administrator would have the shares in the subsidiary to sell
- Control and influence within the entity is limited to those that the shareholder would have.
- Unlikely to be any significant time pressure on sale if truly independent of the Company and self-sufficient.
- Therefore, could be marketed widely for sale – to customers, competitors, suppliers, other employees, financial buyers etc.
- Mr Barnvelde's brother treated like any other interested party. Need to benchmark any offer.
- If difficulties obtaining information to allow a sale it may be necessary to consider the appointment of new directors.
- Connected party so would have to make relevant disclosures.
- Price would have to reflect market value:
- Obtain an independent, RICS qualified valuation of the tangible assets
- Obtain or prepare forecasts to establish future expected profitability
- Consider valuation methods:
  - Discounted cash flow
  - Multiple – establish if any similar businesses sold recently and the multiple obtained
  - Balance sheet
- Establish what changes have occurred since 2010 to establish to what extent the £300,000 cost reflects current value (unlikely given 7 years passed)
- Approach
  - Contact possible interested parties
  - Consider advertising online and/or in trade press
  - Consider appointing a sales agent if specialised sector or to obtain wider audience
  - Obtain NDAs
  - Provide information to all parties under NDA
  - Seek offers
  - Obtain proof of funding
  - Agree sale terms

### **Director loan account**

- Duty to maximise realisations
- Initially write demand for repayment
- Consider any proposals for repayment
- If cannot pay over reasonable period consider the alternative outcome of bankruptcy

- Director's share of property equity is £60,000 less £30,000 = £30,000
- Consider whether there are issues that would affect realising this asset in bankruptcy; e.g. dependents.
- Consider if a 50% split is appropriate and whether the spouses share should be discounted
- Costs of bankruptcy significant but potential Income Payments Agreement/Order to increase realisations
- Determine what other assets the director may have – potential enquiry agent.
- Consider offers that provide a comparable outcome to bankruptcy
- If no offers consider petition for bankruptcy

## **Patent**

- Inventions in the course of employment normally belong to the company
- Recording of inventor does not confirm ownership
- Check terms of Son's employment
- Review company records relating to the creation of the patent and party registering it.
- Check that any value associated with it is on the company's balance sheet.
- Establish what party paid the costs associated with development and registration
- Establish if any tax claims made in relation to its development
- If accounts audited or prepared by accountants consider seeking information from them in relation to how it had been treated historically.
- Write to son stating ownership of the patent is the Company's
- Consider commercial settlement – will he buy it off the administrator?
- Value it based upon profit the invention will generate discounted for possible uncertainty.
- Consider specialist valuation agent if necessary
- If dispute there could be a significant adverse impact on value.
- Consider court application to determine/confirm legal ownership.
- Consider arbitration
- Consider injunction if son attempts to use or licence it.
- Establish where patent registered
- Once ownership established market the asset for sale.

**Question 4**

**PART A**

<b>SIP 16 area</b>	<b>Application to circumstances</b>
Differentiate clearly the roles that are associated with an administration that involves a pre-packaged sale, that is, the provision of advice to the company before any formal appointment and the functions and responsibilities of the administrator following appointment.	<ul style="list-style-type: none"> <li>• Explain role to the directors</li> <li>• Not to advise the directors personally</li> </ul>
Efforts made to consult with major or representative creditors and the upshot of any consultations.	<ul style="list-style-type: none"> <li>• Obtain a list of creditors and associated balances and discuss with major ones.</li> <li>• May be landlord in these circumstances</li> </ul>
The insolvency practitioner should ensure that any connected party considering a pre - packaged purchase is aware of their ability to approach the pre-pack pool	<ul style="list-style-type: none"> <li>• Inform the directors that such an application can be made and that the results would be included in the initial letter to creditors.</li> </ul>
An insolvency practitioner should keep a detailed record of the reasoning behind both the decision to undertake a pre-packaged sale and all alternatives considered.	<ul style="list-style-type: none"> <li>• Ensure all decisions are documented on the file</li> <li>• Consider the potential impact of the situation becoming known:               <ul style="list-style-type: none"> <li>○ Can customers cancel contracts – in construction; normally yes.</li> <li>○ Are there alternative suppliers or is the company’s continuation and on time installation vital to the successful delivery of the construction project?                   <ul style="list-style-type: none"> <li>▪ Gazoo requires a lot of work in a short space of time.</li> </ul> </li> <li>○ Liquidated damages and impact on recovery of debtor</li> <li>○ Consider the likelihood of staff refusing to work should the situation become known.</li> <li>○ Is any funding available to provide assurances to staff that they will be paid?</li> <li>○ Could the projects be paused if staff refused to work?</li> </ul> </li> <li>• Establish if any funding available to trade in administration</li> <li>• Document why the business be traded in administration</li> </ul>
The insolvency practitioner should advise the company that any valuations obtained should be carried out by appropriate independent valuers and/or advisors, carrying adequate professional indemnity insurance for the valuation performed.	<ul style="list-style-type: none"> <li>• A valuation of the plant and equipment should be obtained from a RICS qualified valuer.</li> <li>• Appropriately qualified person to consider the contracts and recoverability of the work in progress.</li> </ul>
Valuation of goodwill will have to be explained	<ul style="list-style-type: none"> <li>• Very little value allocated to goodwill</li> <li>• Consider instructing a goodwill valuation</li> <li>• Obtain recent financial trading information and forecasts to help establish any inherent value in the business.</li> </ul>

Consider trading in administration/why not possible so that can be marketed post appointment	<ul style="list-style-type: none"> <li>• Prepare a cash flow to establish funding requirements</li> <li>• Consider potential value that could be achieved</li> <li>• Consider the impact of administration on customers, employees and suppliers</li> </ul>
Security obtained for payment	<ul style="list-style-type: none"> <li>• Seek debenture/chattel mortgage/ROT to secure any deferred payments</li> <li>• Seek Personal Guarantee off the directors for deferred payments.</li> </ul>
Viability statement	<ul style="list-style-type: none"> <li>• Explain that a viability statement, if prepared would be circulated to creditors following any sale.</li> </ul>
<b>Marketing essentials</b>	
<b>Broadcast</b> – the business should be marketed as widely as possible proportionate to the nature and size of the business – the purpose of the marketing is to make the business’s availability known to the widest group of potential purchasers in the time available, using whatever media or other sources are likely to achieve this outcome.	<p>Advertise anonymous company;</p> <ul style="list-style-type: none"> <li>• Online;</li> <li>• Firm contacts;</li> <li>• Competitors</li> <li>• Customers - Main contractors;</li> <li>• Suppliers;</li> <li>• Acquirers in the market (if any)</li> </ul>
<b>Justify the marketing strategy</b> – the statement to creditors should not simply be a list of what marketing has been undertaken. It should explain the reasons underpinning the marketing and media strategy used.	Document rationale and reasons for not using any relevant media and rationale for approach.
<b>Independence</b> - where the business has been marketed by the company prior to the insolvency practitioner being instructed, this should not be used as a justification in itself to avoid further marketing. The administrator should be satisfied as to the adequacy and independence of the marketing undertaken.	Not applicable
<b>Publicise rather than simply publish</b> - marketing should have been undertaken for an appropriate length of time to satisfy the administrator that the best available outcome for creditors as a whole in all the circumstances has been achieved. Creditors should be informed of the reason for the length of time settled upon.	<p>3 week period until cash flow issue;</p> <p>Document reason for timescale; Bank will not advance funding to cover requirements past this point</p> <p>Document reasons for not trading in administration</p>
<b>Connectivity</b> - include online communication alongside other media by default. The internet offers one of the widest populations of any medium. If the business is not marketed via the internet, this should be justified.	Explain if online marketing not used.
<b>Comply or explain</b> – particularly with sales to connected parties where the level of interest is at its highest, the administrator needs to explain how the marketing strategy has achieved the best available outcome for creditors as a whole in all the circumstances.	Document strategy and associated rationale.
General Advising the company not the directors	Ensure clear to the directors your responsibilities

## PART B

- Explain SIP 16 and associated duties
- Explain directors' duties; acting in the best interests of creditors
- Explain process in terms of:
  - Initially using an anonymous project name to contact possible interested parties;
  - Confidentiality letters agreed and signed prior to release of company name
  - Potential release of anonymous information to establish level of interest before release of detailed information/company information.
- Will management consent to contacting parties not within the categories that they have concerns about; e.g. PE investors?
- Consider and investigate whether the directors have valid concerns and the possible impact
- Closure and loss of business a real risk to the directors if offer cannot be benchmarked
- Consider early QFC appointment if co-operation not forthcoming.
- Consider ceasing to act.

## PART C

- How does the offer values compare to the P&M, goodwill valuations; is it better than a break-up value?
- How does the WIP/debtor offer compare to recoverable values should the company cease trading?
- Receipt of WIP/debtor monies should at least be matched to the timing of receipt of those funds?
- Risk of non-payment may be great – security and guarantees required.
- Taking into consideration both the offer and payment risk is it commercially better than selling the assets on a break up basis?
- Is the acquirer viable and therefore capable of paying any agreed price – how is it to fund the payroll?
- What impact does the payment of the TUPE transfer and payroll payment have on the creditors of the company.
- Legal advice would be required in relation to occupation of the site;
- Likely to require payment up front for rent as this would form an expense of the administration
- Can a sublease be granted?
- Many be necessary to grant a licence to occupy
- Administrator would look for a shorter period than 12 months
- Assess viability over period of any deferred terms

Overall: does the offer represent the best value in the circumstances and facilitate achieving the purpose of administration.

## JOINT INSOLVENCY EXAMINATION BOARD

### PERSONAL INSOLVENCY

#### EXAMINER'S REPORT FOR THE NOVEMBER 2017 SITTING

##### Question 1

Part (a) of the question required candidates to identify and set out the legal issues arising following appointment as trustee in bankruptcy of a husband and wife who had been and still were trading a fruit and vegetable shop, and how to resolve them. The first part of the question was generally poorly answered. Very few candidates identified that the husband and wife were trading in partnership and therefore failed to address the most important issue, being that no formal insolvency procedure was in place to deal with the former partnership.

Most candidates thought that a Trustee of two individual partners could deal with partnership assets. Even when candidates identified that the Trustee had not been appointed over the partnership assets, many of the answers showed that candidates had only a limited grasp of the practical steps required to be undertaken in such circumstances.

Some candidates clearly did not understand what legal entity a partnership is, for instance stating that the trustee could make a call on shares or referred to the Trustee taking steps to place the partnership into CVL. Consequently, most candidates scored very poorly on this part of the question.

An additional area of concern was that many candidates considered the shop and the flat above it to be a family home, when there was no evidence of this being the case. Candidates therefore wasted time in referring to case law regarding how a beneficial interest in a property should be determined and referred to the need for the trustee to deal with the property within three years and consider if there were any exceptional circumstances that might prevent possession being taken.

Candidates also wasted time through writing out detailed checklists relating to ROT and employees. It was evident, not just in this question, that candidates would regurgitate checklists without giving any thought to the relevance of that checklist to the facts of the question. In this question candidates needed to consider whether the Trustee had the power to deal with the ROT creditor. Very few candidates raised this point but many did provide a detailed explanation of how to deal with an ROT claim. Candidates also wasted time by discussing the need to seeking sanction to trade and appointing a special manager, none of which gained any marks.

Part (b) required candidates to set out the processes by which expenses and dividends were paid in partnership and separate bankruptcy estates.

On the whole, this part of the question was well answered, with some candidates gaining very high marks, particularly those who could direct themselves to the relevant parts of the open book. A few candidates misdirected themselves by discussing the dividend payment process such as advertising for and adjudicating on claims.

##### Question 2

The question was in general answered reasonably well with most candidates being aware of the statutory powers available to a Trustee in Bankruptcy and referring to certain practical points. Part (a) therefore scored well. A point that many candidates failed to understand properly is the difference between a public examination, which the OR initiates, and a private examination that the Trustee can apply for directly.

Certain points in part (b) were scored by most candidates such as Land Registry and Companies House searches, contacting creditors, writing to banks and statutory powers of redirecting mail and search or seizure. Higher marks were missed by many for not expanding on what could be done with the information to identify assets, such as reviewing tax returns and copy bank statements for evidence of assets. Candidates also wasted time in discussing how you would realise assets when the question asked how you should identify and secure assets.

Finally a common criticism is that answers were not well structured. The lack of detail in the scenario resulted in many candidates writing everything that they could think of, repeating themselves and answering elements of part (a) in part (b) or vice versa. Credit was still given if the points were put under the wrong section.

### Question 3

Generally part (a) was answered well by those candidates who set out the cash-flow in a sensible column / table format and outlined their assumptions. Common areas of inconsistency were whether or not 'week 1' included costs – due to arrears. Many candidates excluded costs from week one on the basis that cash flow was 'in an IVA' however the question didn't state this. PAYE assumptions varied, from when paid, monthly or weekly, and the rate, however even when not calculated exactly to match the marking guide, those candidates that outlined their workings and assumptions generally did well. A common error was only including cost of sales for drink and food specifically, and not recognising that the function income also needed a relevant cost of sale.

Part (b) was generally poorly answered, many candidates either ran out of time or only put only a few points. Many candidates also went into a lot of detail regarding the possibility of an IVA being entered into and wasted time discussing the ability to continue trading when the question made it clear that the decision to sell the business had already been made. Those that did well were the candidates that recognised that a formal process was not needed, with negotiation, communication and avoiding bankruptcy key.

### Question 4

This was a relatively straightforward, realistic question with a mix of legal and commercial issues. The overall standard of the answers was however disappointing. It was apparent that a number of candidates had failed to read the question and the requirements. A substantial minority wasted time talking about making an application for a BRO on the basis that they considered that the bankrupt had been guilty of misconduct although this was not relevant to the question. Candidates also failed to appreciate that the bankrupt had ceased to trade and referred to the Trustee taking steps to run the business.

At least half of candidates' answers indicated that they had no understanding of the nature of the rights that arise on an inheritance. Similarly, quite a few candidates answers were very vague when attempting to set out what is comprised in the estate, and what is not.

Most candidates discussed the issue of replacing assets of excess value, but far too many did not mention that this applies only to excluded assets, and/or wrongly defined the conditions for exclusion. Notions of what amounted to the "reasonable" cost of a car ranged widely.

Whilst candidates referred to sections of the Insolvency Act 1986 to state what constitutes a transaction at undervalue, a number failed to then apply the facts of the question to their answer and state why the transfer of the business by the Bankrupt to his son could be subject to challenge as a transaction at undervalue.

Many candidates did not seem to recognise the practical difficulties in tracing assets or bringing claims. Whilst quite a few candidates recognised the potential for a recovery from the Bankrupt's son, answers often failed to set out the relevant remedies and advised simply that the Trustee should "require" the son pay.

The better candidates spotted the potential for annulment however generally candidates failed to adequately address the overall strategy for dealing with the estate.

### **Question 1**

#### Trading Partnership

1. From the information provided, it is clear that Tom and Helen have traded in partnership – see tax returns, employees, etc and specific reference to the partnership within their bankruptcy applications
2. **Main issue is that the proceedings are not currently covered by the IPO1994, and therefore the Trustee is not appointed to deal with anything to do with the partnership**
3. What is the legal status of the partnership?
  - a. Both partners are bankrupt
  - b. Unless there is contrary provision under a Partnership Agreement, pursuant to the Partnership Act 1890 a partnership is automatically terminated on the bankruptcy of one or more partners.
  - c. In this case both partners are bankrupt causing the dissolution of the partnership.
  - d. The Employees will have been dismissed upon dissolution of the partnership.
4. **Unless the partnership is wound up, the Trustee has no power to take decisions regarding the partnership or to deal with its assets.**
5. As both partners are bankrupt they have no power to deal with the partnership assets following dissolution of the partnership.
6. **Trustee should consider whether to make an application to court either for directions under s303 or under IPO1994 to wind up the partnership and consolidate the proceedings, so that he is appointed to wind up the affairs of the partnership.**
7. **Whether or not such an application would be warranted depends on whether or not the freehold premises are a partnership asset. If not, as the stock is perishable / potentially subject to ROT and, given the nature of the business, the partnership is unlikely to have significant debtors which may mean that such an application is not warranted.**
8. As a partnership does not have its own legal personality it cannot own property. Property can be registered in the names of the partners who hold it for the partnership (s20 PA 1890).
9. In order to establish whether the property is an asset of the partnership, the following enquiries should be made:
  - i. review the partnership accounts to establish whether the freehold property is included as an asset of the partnership;
  - ii. Tom and Helen should be asked to confirm whether the freehold property is held by them personally or as an asset of the partnership;
  - iii. Obtain a copy of the AST for the flat to identify the landlord and to whom the rent was paid. Is the rental income included in the accounts of the partnership?
  - iv. How was the purchase of the freehold property funded? Through partnership profits or by Tom and Helen personally?
10. If the Trustee does get appointed to wind up the affairs of the partnership, he will have to deal with the following immediately:
  - a. ROT
  - b. Risk issues associated with potentially dangerous chemicals in store (fertilizer etc)
  - c. Perishable stock
  - d. Carry out fire risk assessment for the trading premises.
11. If the freehold property is an asset of the bankruptcy estates of Tom and Helen, the mum's occupation of the flat will need to be reviewed.

- a. Obtain and review STA
- b. Valuation of property
- c. What is happening to rent?
- d. Mortgage? Is it being paid? From rent?
- e. Equity?
- f. Does the flat have a separate entrance? Check to see whether access to the flat will be impacted if the shop is closed and secured.
- g. Ensure that the property is insured
- h. Register a restriction at the Land Registry to protect the Trustee's interest

Starting position – each estate bears its own costs, and should therefore pay its expenses out of assets in the usual order of priority, then

- v. If the funds in the partnership are insufficient to fully pay the expenses of the partnership, then the unpaid balance is apportioned equally between the separate estates and paid as an expense of those estates
- vi. If the funds in a separate estate are insufficient to fully pay the expenses of that estate, then the unpaid balance forms part of the expenses of the *joint* estate only (at that stage)
- vii. If, after the above apportionments, any estate still has insufficient funds to pay its expenses, the unpaid balance is apportioned equally between the other estates
- viii. And so on until all expenses are paid or no funds are left

- Once expenses as set out above, dividends are paid in each estate, out of the available funds
- If there is a shortfall in the partnership estate, this shortfall ranks as an unsecured claim in each separate estate, ranking *pari passu* with the separate estate non-pref creditors
- Trustee/liquidator of the partnerships makes this claim on behalf of the partnership creditors
- Dividend to partnership is an asset to be distributed to partnership creditors
- If there are pref creds in the partnership, these are paid first as usual
- Then a dividend is paid to the non-prefs

Mark Plan:

### To secure co-operation

1. Instruct a reputable enquiry agent to locate the bankrupt
2. Once the bankrupt's current address is established, write setting out all of the information/ documentation that the bankrupt is required to provide or alternatively visit the property.
3. If a response is not received, make application to court for the private examination of the bankrupt – s366
4. If he fails to attend, issue warrant for arrest – s364
5. Establish whether OR has or intends to apply for a public examination pursuant to s290. If the OR intends making such an application, the Trustee can attend and ask questions.
6. And/or if the OR intends to apply for the suspension of automatic discharge under s279.
7. If not, make own application to suspend discharge

### General Enquiries/Powers

1. Review handover documentation from OR
2. Write to petitioning creditor and any other known creditors to request information on assets or any other information that may assist
3. Consider s366 application for anyone else (spouse, business partner etc.) who may have knowledge
4. Search & seizure of property – s 365. Need to know address (or past address) and be able to persuade the court that an order under s365 is appropriate. Alternatively a freezing order could be obtained if assets are identified and at risk of dissipation / transfer.
5. Write to HMRC/Application for production of documents from HMRC – s369 – get copy tax returns (if any)
6. Identify any sources of income declared on tax returns.
7. Redirection of post (need address first) – explain process – s371
8. Credit rating agency search – to identify credit card, bank accounts etc and thereafter make enquiry of these financial institutions.

9. Obtain and review copy bank statements etc to see whether these reveal any further accounts / assets or potential creditors.
10. Internet search – social media, google etc
11. Companies House search – directorships/shareholdings etc, might give property addresses or details of share ownership. If shareholdings are identified, write to the company secretary to advise that the shares have vested in the Trustee and arrange for them to be transferred into the Trustee's name.
12. If you become aware of solicitors / accountants who were instructed prior to the making of the bankruptcy order, request their files.
13. If you become aware of a vehicle that is potentially owned by the bankrupt (through an enquiry agent's investigation etc), carry out a search at the DVLA to establish whether the bankrupt is the registered keeper.

#### Real Property

1. Carry out PN1 search at H M Land Registry
2. Review bankruptcy title of proceedings/petition to see if any property is referred to
3. Obtain Office Copy Entries for any properties identified
4. Register restrictions (or check PA (B) and WO(B) registered if solely owned)
5. Notify any mortgage companies with charges registered of the Trustee's interest.

#### Bank accounts

1. Write to high street banks
2. Enclose copy BO, Cert of Appt
3. Request information regarding any accounts in debtor's name – entitled to information pursuant to s366 and will make application if bank is unwilling to provide information
4. Request bank to freeze account, not allow withdrawal of funds
5. Request copy statements – review to identify potential assets (e.g. via direct debits)
6. Instruct agent to search for any pension or other policies can be located.

See spreadsheet overleaf

**Maycomb Manor**

**Cash Flow forecast - 8 week period beginning 13 November 2017**

Week		1	2	3	4	5	6	7	8
Commencing		13/11	20/11	27/11	4/12	11/12	18/12	25/12	1/1
Number of Functions planned		3	3	3	3	5	5	3	3
		£	£	£	£	£	£	£	£
<b>Income</b>									
Drink	Functions	4,500	4,500	4,500	4,500	7,500	7,500	4,500	4,500
	Bar	1,000	1,000	1,000	1,000	1,000	1,500	1,500	1,500
Food	Functions	9,000	9,000	9,000	9,000	15,000	15,000	9,000	9,000
	Restaurant	3,000	3,000	3,000	3,000	3,000	4,500	4,500	4,500
Rooms		3,500	3,500	3,500	3,500	5,600	5,600	3,500	3,500
Total Income		21,000	21,000	21,000	21,000	32,100	34,100	23,000	23,000
Merchant Service Charges		350	350	350	350	350	350	350	350
Cash In		20,650	20,650	20,650	20,650	31,750	33,750	22,650	22,650
<b>Expenditure</b>									
Drink suppliers		1,100	1,100	1,100	1,100	1,100	1,700	1,800	1,200
Food Suppliers		3,600	3,600	3,600	3,600	3,600	3,600	5,400	5,850
Overheads				4,000				4,000	
Wages	Core	4,500	4,500	4,500	4,500	4,500	4,500	4,500	4,500
	Additional shifts	459	459	459	459	459	765	765	459
Drawings		500	500	500	500	500	500	500	500
PAYE/NIC					6,601				6,601
Cash Out		10,159	10,159	14,159	16,760	10,159	11,065	16,965	19,110
Opening Balance		17,500	27,991	38,482	44,973	48,863	70,454	93,139	98,824
Cash In		20,650	20,650	20,650	20,650	31,750	33,750	22,650	22,650
Cash out		10,159	10,159	14,159	16,760	10,159	11,065	16,965	19,110
Cash Movement		10,491	10,491	6,491	3,890	21,591	22,685	5,685	3,540
Closing Balance		27,991	38,482	44,973	48,863	70,454	93,139	98,824	102,364
<b>Costs</b>									
Drink		1,100	1,100	1,100	1,100	1,700	1,800	1,200	1,200
Food		3,600	3,600	3,600	3,600	5,400	5,850	4,050	4,050
Wages	Additional shifts	459	459	459	459	765	765	459	459

## Assumptions

Additional payments are due to be made in w/c 13 November for shifts worked in previous week at similar level

PAYE/NIC is paid in the first week of the second month following the wages payment. Assume it remains at a similar level

As the higher Xmas wages will not be settled until the beginning of February.

Weekly average net wages	4,959
Per month	21489
Tax	6601.1961

Assumed that Mrs Finch not included within PAYE/NIC (though would accept reasonable alternative assumption)

Drink suppliers will be due monies in Week 1 at a similar level to previous

Food Suppliers payments in week 1 and 2 will be required at a similar rate

FCA License issue – can we advise her? Question says she is considering an IVA, so the advice is being given in contemplation of appointment, so OK

The cash flow shows that the business will generate cash of c £84,864 in the next 8 weeks.

The opportunity to generate this cash flow and to protect the sale at £850,000 means that it is clearly in debtor's interests to continue trading in the short term.

If a sale can be completed then after paying HMRC she would have c£250,000 from the sale (less sale costs) and a further £864,864 from trading available to her to settle the small amount of trade suppliers and current PAYE and VAT debt that has accrued in the final weeks of trading. CGT may arise on the sale. The liability will need to be determined. We don't know whether these will transfer to the Purchaser, if the business is being Transferred as a Going Concern.

If the business is to cease trading then it is likely that the sale at the current price will collapse and if the agents are correct then the hotel is likely to sell for c£300,000 less which means that after costs the proceeds of sale would not cover her debts. We don't know anything about debtor's other assets and whether this would make her insolvent, but it is clear that it is in her interests to continue.

Our Firm appears to have been involved in the quantification/negotiation of the outstanding debt due. It is important to understand the extent of discussions to date with HMRC and what proposals have been made previously and either accepted/rejected or kept to by the debtor.

The IP should make contact with HMRC to ensure that they are aware that the debtor is taking advice and taking steps to deal with the situation.

We need to understand if a Statutory Demand has been served. If it has, this could lead to a bankruptcy petition being presented. Once presented, for the sale to proceed a validation order would need to be obtained from the Court.

The first step would be to attempt to secure an early meeting with HMRC to

- (a) Update them on progress of the sale, preferably providing evidence of the offer and the Purchasers funding and make them aware that the debt will be repaid in full at completion
- (b) Offer them an irrevocable mandate in relation to the sales proceeds;
- (c) Offer to make interim payments towards their debt, supported by the weekly cashflow. For example, the cashflow shows that a payment of c£40,000 could be made during week 5;
- (d) Assure them that the cashflow shows that ongoing PAYE/NIC could be made.
- (e) The debtor could also investigate other options of raising finance such as borrowing the funds needed to pay HMRC.

Once HMRC have instigated enforcement action it can be difficult to persuade them to delay or stall it.

IVA? – unlikely to be necessary. Will HMRC agree anyway? It may however prevent HMRC from enforcing, particularly if an interim order process is used

Most likely – settlement agreement with HMRC to trade, make payments from cash flow, and settle in full on sale of property.

Undertake to pay any CGT arising on the sale.

### **Leasehold premises**

Obtain a copy of the lease.

The Trustee needs to deal with the Landlord's query. In order to confirm position:-

Instruct agent to advise on whether the lease has any value and could be assigned at a premium. Ask agent to attend premises and establish whether there are any fixtures / fittings in the premises belonging to the bankrupt and if there are, whether they have a realisable value.

If there is no value in the lease, consider disclaimer pursuant to Section 315 IA86.

Send landlord a proof of debt form so that he can claim for arrears of rent and any dilapidations.

### **Transfer of business and customer details**

Seek delivery up of any books and records relating to the period when the business was traded by the bankrupt.

Customers who paid in advance but did not have their computer repaired should be sent a proof of debt form.

Where tools have been transferred to Nathan, these would not be classed as exempt assets under s283 IA86 as the bankrupt had ceased to trade prior to the transfer.

The transfer of the tools, stock and customer details would appear to be a transaction at undervalue pursuant to s339 IA86. As the transfer took place in February 2017 this is within the relevant time for challenge pursuant to s341 IA86. The Trustee will have to consider the likely value of any transaction at undervalue claim (including the value of any goodwill) and take agent's advice if appropriate.

Once the agent's report is obtained, seek payment from Nathan. If payment is not forthcoming consider whether it would be commercially viable to issue proceedings in light of the agent's valuation.

### **Divorce**

Obtain a copy of the financial settlement Order made in the divorce proceedings.

Review the Order to check that all assets referred to in it were dealt with.

### **Motor vehicle**

Instruct agent to verify the current value of the vehicle and whether there is any HP on it. If the vehicle is worth £7,000, it will be worthwhile uplifting the vehicle and realising the same. The bankrupt is no longer trading so it is likely that the vehicle will be classed as exempt. If not, the vehicle could be claimed as an item of excess value pursuant to section 308.

### **Premium Bonds**

Notify NS&I of the making of the bankruptcy order and ask that they note the Trustee's interest.

Check whether there have been any unclaimed winnings.

Given the low value of the premium bonds, retain the bonds until the closure of the bankruptcy in case the bonds win. Consider whether commercially it is worthwhile cashing in the bonds prior to closure of the bankruptcy.

**Endowment policy** - the policy vested in the Official Receiver as first Trustee upon the bankruptcy order being made. As the transfer took place after the making of the bankruptcy order it is void.

Contact the endowment policy provider to advise of the bankruptcy order and that the transfer to Arthur's son is void. The Trustees' interest in the policy should be noted.

The Trustee should establish:-

- is the policy still assigned to the mortgagee. If it is, it will need to be re-assigned.
- check the terms of the financial settlement in the divorce proceedings to see whether Arthur's ex-wife has any interest in this policy
- establish maturity value to see whether the policy should be allowed to mature rather than being surrendered or sold at this stage. Check whether premiums are paid up to date.

### **Pension policy**

Arthur is now 60. Check the terms of the policy to establish when Arthur can draw down on the pension.

Write to the pension provider to:

- i) check whether it is an HMRC approved pension which would mean it falls outside of the bankruptcy estate. Arthur cannot be compelled to draw down on the pension (*Horton v Henry*) even if he is entitled to do so.
- ii) if it is an unapproved pension, it will vest in the bankruptcy estate. Prior to surrendering the policy ask whether Arthur would want to make payment to the Trustee in order to retain his pension.
- iii) if the pension is approved, ask for details of contributions made into the pension by Arthur to establish whether any contributions could be challenged as excessive pursuant to s342A IA 86.

Check whether Arthur is drawing his pension. If he is, request details of his income and expenditure for the purposes of considering whether an IPA could be entered into / an IPO pursued.

### **Inherited property**

Establish whether his father made a will. If he did, obtain a copy to establish whether Arthur inherited the property (and any other assets).

The Trustee will also need to obtain a copy of the grant of probate and details of any executor / personal representatives.

If Arthur is the beneficiary under the will, until Arthur's father's estate is fully administered, Arthur does not own or have any interest in any specific asset in the hands of the executor. A legatee's right is limited to having the estate duly administered by the personal representatives in accordance with the law (*Commissioner of Stamp Duties (Queensland) v Livingstone* [1965] AC 964 and to receive any residue of the estate (see below).

Arthur's inheritance will be subject to any testamentary / funeral expenses of his father and any outstanding liabilities of his father. The Trustee should therefore make enquiries to establish whether there was any equity in the property and also the value of any other assets which Arthur might inherit. The Trustee should ascertain whether there is likely to be a residue available once the estate liabilities have been settled.

If Arthur's father did not leave a will, then the property (and any other assets) will pass to Arthur as his sole child pursuant to the Administration of Estates Act 1925.

The Trustee will need to serve Notice of After Acquired property pursuant to s307 of any assets devolving upon Arthur within 42 days of the Trustee becoming aware that the property had devolved upon Arthur.

Once the property has been claimed pursuant to s307 a restriction should be registered against the title giving notice of the Trustees' interest.

The bankrupt resided at the property at the date of the bankruptcy order. If the property is claimed by the Trustee as after acquired property, Section 283A could apply. Take legal advice concerning the applicability of s283a and the steps that would need to be taken to ensure that the property is realised within 3 years of the date of the bankruptcy order

### **Liabilities of the bankruptcy estate**

Take steps to establish the level of creditor claims as this may influence the asset realisation process and whether Arthur could ultimately seek to annul the bankruptcy order pursuant to Section 282(1)(b).

If the liabilities are relatively modest, the debtor should be allowed a period of time in which to explore his options and put forward any proposals for the discharge of the liabilities of the bankruptcy estate prior to the asset realisation process commencing.