

JOINT INSOLVENCY EXAMINATION BOARD - SCOTLAND

OVERALL COMMENTS ON THE NOVEMBER 2017 SITTING

Please note that overall comments will follow.

JOINT INSOLVENCY EXAMINATION BOARD

LIQUIDATIONS

MARK PLAN FOR THE NOVEMBER 2017 SITTING - SCOTLAND

Please note there is not an Examiners' Comments for the Liquidations 2017 sitting.

JIEB 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 meeting of creditors within 28 days of when she formed the opinion that the company was insolvent s95

Send notices to creditors by post not less than 7 days before the meeting

Advertise the meeting in 2 newspaper and the Gazette

Provide details free of charge such information concerning the affairs of the company as they may require (R7.26 IR(S) 86)

Ensure all creditor information is up to date and ensure all files are up to date and accounts reconciled for passing to new liquidator

Mary to prepare statement of affairs, 4.4 (Scot) to be laid before the meeting of creditors

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

Mary can't be the liquidator due to ethical considerations

- 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)**

Directors signed Declaration of Solvency in error (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) 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 would need to demonstrate they were unaware of the additional claim.

Would need to consider if Mary gave the directors proper advice, did they have a meeting, Engagement Letter, liabilities properly explained e.g. 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 an unfair 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:**
- (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)**

Per ICofE an IP is required to comply with the fundamental principles; integrity, objectivity, professional competence and due care, confidentiality and professional behaviour and consider threats to these
Potential conflict? Mary is the Chairman's sister-in-law. However this isn't considered a close or immediate family member by the ICofE

However, the ICofE 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 queried if failed to review books and records adequately and identify Karbeca claim

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

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

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

Selling car at potential undervalue – potential gratuitous alienation s242.

Query whether sold for adequate value

S242 preconditions met - Occurred 2 years within date of insolvent liquidation.

If unconnected party insolvency at transactions date required to be proven; if connected party insolvency is presumed

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

S242(4) remedy – reduction or 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, "misfeasance or breach of any fiduciary or other duty in relation to both the company or carrying out their functions as liquidator" (s212(2))

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

S212 remedy is to repay, restore, account for money or property with interest, or pay compensation (s212(3))

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))

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 vacated the property, business rates liability falls on landlord from date of vacation

Take legal advice

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

Liable only for period from when liquidator vacated

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 vacation is tenants the tenants/liquidator. Provide with details of Liquidator.

Submit statement of claim 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 the property was vacated by the tenant on 30 May 2017 and spillage occurred on 15 October 2017, but has the lease been renounced/irritated?

Notify Scottish Environmental Protection Agency (SEPA) that liability falls on company in liquidation. But is there a risk that SEPA comes after the landlord as the one with funds

Commission an environmental report to establish what the cause of the spillage was.

Obtain details of what has happened, speak 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 or would it be unsecured?

Boardill

Need to establish the current status of the winding up

Need to establish if sub tenant not paying rent or Boardill not passing on?

Review lease - If sub tenant not paying, confirm who liability for rent falls on? Take legal advice

Issue Notice to get sub tenant to pay head landlord directly, if do this then have to accept subtenant remains in place

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

Demand outstanding rent

Froxwell

Contact Liquidator to establish what 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 H&S and other responsibilities don't fall on landlord

Ensure property is insured

Consider exercising landlord's hypothec over moveable assets in premises

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 be an expense of the administration and would be entitled to rent, however per 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 copy of the lease, but if not review check if it has been registered (if it is over 20 years)

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 QLTR

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

Ensure IT systems are now working

Debt Payment Programme (Deanland)

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

Consider and take legal advice on what other options are available to you – eviction,
Identify if there is a deposit and consider if it could be used to offset arrears
Consensual options - consider renegotiating rental amounts so tenant can pay, .

Question 3

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

The reference to Court Reporter fees suggests no committee therefore a note will require to be submitted to Glasgow Sheriff Court who will appoint a reporter to fix the liquidator's fees

A statement in line with SIP9 should be prepared to provide to the reporter.

Once Court approved fees, write to creditors advising of recourse for objection

14 days to submit objections to Court (I(S) R 86 4.34

If no objections, fee can be drawn I(S)R 86 4.32

- b) **EOS and Distribution Statement (see separate sheet) (15 marks)**

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

Distribute dividend

Deal with unclaimed dividends (consign with the Accountant of Court)

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 resolution from the creditors to destroy company records

Reconcile and close bank accounts

Call final meeting (R4.31), giving at least 28 days' notice

Prepare final report

Issue final report to creditors

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

File copy of final account (4.17 (Scot)) at Court, Companies House and AIB

Terminate bond

Company dissolved 3 month after 4.17 (Scot) lodged

Question 4

- a) **Explain: The considerations you should take into account when deciding whether to pursue the above actions, including 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 I(S)R 4.67

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 bank's overall position, can offset "damages" against Bank's claim IRHP recoveries would be taxable

Bank's are reviewing IRHP claims so have to follow set procedure, contacting all customers at risk – not affecting relationships

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, may but not obliged to, consult with creditors, 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))

Practical chances of recovering assets from Simon

Samhote

Seek approval of Floating Charge Holder

S176ZB - 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 s (preference), because these funds do not fall within the reach of a floating charge

Consider negotiating with defendant to increase offer

b) 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 (IA 86 s246ZD)

4c 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) 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

4d 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 - SCOTLAND

General comments

Whilst candidates seem to have a good understanding of the fundamental aspects of insolvency and are at ease noting the basics, anything with a practical element or a slight element of complexity i.e. calculation of contributions in the CVA, seems to be an issue. Whilst the understanding of the basics and the legislation is an absolute must for an IP, candidates should be skilled in dealing with more complex areas of insolvency and demonstrate a practical application.

As with previous papers, 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. Candidates should take time to read the question in full and ensure they are providing an answer which is relevant to the circumstances.

There is still a tendency for candidates to regurgitate what is in the question for which no credit is awarded. Time would be better spent in applying the circumstances of the question to the candidates answer.

Candidates should also remember to answer the question being asked and not refer back to previous sections where they may have included the information.

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 not well answered with the majority of candidates forgetting to include basic obligations in relation to notifying the relevant parties of the appointment and notices. Some candidates generally lost easy marks for not mentioning the basics like notification period and the parties that are notified.

(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 showed they could prepare the basics of an outcome statement in an appropriate format. However, no candidate managed to calculate the CVA contributions using the basic information provided and struggled on holiday pay, related party transactions and prescribed part calculations in general.

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 basics of the SIP but didn't expand on duties or requirements in relation to the SIP.

Again, candidates listed the basics of the role of a committee in relation to investigations but failed to expand on this and apply to the question.

- (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 all bar one candidate made no effort to suggest a potential claim value.

Candidates were able to deal with the HMRC and Dorking information well however struggled on all other aspects and transferring the information provided into a relevant answer.

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. Once candidate scored full marks.

- (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.

Marks were awarded for noting basic points however no candidate went into any detail on how they would deal with each scenario in practice.

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)**

Most candidates were able to list the obligations in relation to the SIP. Where candidates struggled and forgot to apply these to the circumstances of the questions.

- (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 only identify a relevant few points i.e. refusing to act in situations where the IP has been unable to market the business for sale and therefore did not score well in this question.

- (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.

JOINT INSOLVENCY EXAMINATION BOARD
ADMINISTRATIONS, COMPANY VOLUNTARY ARRANGEMENTS AND RECEIVERSHIPS
MARK PLAN FOR THE NOVEMBER 2017 SITTING - SCOTLAND

JIEB 2017 ACVAR MARKING GUIDE

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 floating charge						
Fixed assets		3,000	60%	1,800	0	
Stock		1,000	25%	250	0	Any reasonable assumption
Debtors		1,250	80%	1,000	0	
Amounts due from related parties	a	300		100	0	
Cash at bank		50		50	0	Any reasonable assumption for CVL, exc in CVA
Contributions	b	n/a		0	3,600	
Total realisations		5,600		3,200	3,600	
Costs						
Liquidator				(70)	n/a	Any reasonable assumption
Nominee				n/a	(15)	Any reasonable assumption
Supervisor				n/a	(30)	Any reasonable assumption
Agents Costs	5% assumed			(90)		
Legal & professional				(35)	(10)	Any reasonable assumption
Amount available after costs		5,600		3,005	3,545	
Preferential creditors - employees	c	(60)		(60)	(29)	
Amount available after preferential creditors		5,540		2,945	3,516	
Prescribed part				(592)	n/a	Calc or recognition that floating chargeholder will be paid in full
Amount available to floating chargeholder				2,353	3,516	
Floating chargeholder				(2,300)	n/a	
Amount available after floating charge				53	3,516	
Prescribed part				592	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 th £				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%	2,500	2,500	2,500		
GP	5,500	5,500	5,500		
Original overheads	(4,500)	(4,500)	(4,500)		
Overhead stafper q	500	500	500		
Other overhead savings	200	200	200		
Net profit	1,700	1,700	1,700		
Bank loan	(300)	(300)	(300)		
Bank interest	(100)	(100)	(100)		
Cash generation	1,300	1,300	1,300		
b/f	50	300	300		
Available cash	(1,050)	(1,300)	(1,300)		
cash to be retained	300	300	300		
Profit	75%	(1,275)	(1,275)	(1,275)	(3,825)
Contribution		(1,050)	(1,275)	(1,275)	(3,600)
				Total	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%	500	1,250	
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 floating 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 19th or 22nd 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 Barnvelder'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 Debtor Contribution 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

SIP 16 area	Application to circumstances
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"> • Explain role to the directors • Not to advise the directors personally
Efforts made to consult with major or representative creditors and the upshot of any consultations.	<ul style="list-style-type: none"> • Obtain a list of creditors and associated balances and discuss with major ones. • May be landlord in these circumstances
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"> • Inform the directors that such an application can be made and that the results would be included in the initial letter to creditors.
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"> • Ensure all decisions are documented on the file • Consider the potential impact of the situation becoming known: <ul style="list-style-type: none"> ○ Can customers cancel contracts – in construction; normally yes. ○ 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"> ▪ Gazoo requires a lot of work in a short space of time. ○ Liquidated damages and impact on recovery of debtor ○ Consider the likelihood of staff refusing to work should the situation become known. ○ Is any funding available to provide assurances to staff that they will be paid? ○ Could the projects be paused if staff refused to work? • Establish if any funding available to trade in administration • Document why the business be traded in administration
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"> • A valuation of the plant and equipment should be obtained from a RICS qualified valuer. • Appropriately qualified person to consider the contracts and recoverability of the work in progress.
Valuation of goodwill will have to be explained	<ul style="list-style-type: none"> • Very little value allocated to goodwill • Consider instructing a goodwill valuation • Obtain recent financial trading information and forecasts to help establish any inherent value in the business.

Consider trading in administration/why not possible so that can be marketed post appointment	<ul style="list-style-type: none"> • Prepare a cash flow to establish funding requirements • Consider potential value that could be achieved • Consider the impact of administration on customers, employees and suppliers
Security obtained for payment	<ul style="list-style-type: none"> • Seek debenture/chattel mortgage/ROT to secure any deferred payments • Seek Personal Guarantee off the directors for deferred payments.
Viability statement	<ul style="list-style-type: none"> • Explain that a viability statement, if prepared would be circulated to creditors following any sale.
Marketing essentials	
Broadcast – 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"> • Online; • Firm contacts; • Competitors • Customers - Main contractors; • Suppliers; • Acquirers in the market (if any)
Justify the marketing strategy – 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.
Independence - 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
Publicise rather than simply publish - 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>
Connectivity - 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.
Comply or explain – 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 SCOTLAND
PERSONAL INSOLVENCY
EXAMINER'S REPORT FOR THE NOVEMBER 2017 SITTING

This year the paper examined dealing with a partnership and individual sequestrated estates, steps which should be taken to identify and protect assets, preparing a weekly cashflow and providing advice to the business owner and finally, a number of practical issues to be dealt with following a sequestration appointment.

These questions were straightforward and with the exception of Partnerships all topics have been examined recently. Only question 3 required candidates to put themselves in the position of being anything other than an appointed insolvency practitioner.

There were some issues with time management or exam technique where questions were not completed or sections left completely unanswered. It was evident in those papers that candidates had spent too long on other sections providing very detailed responses where the mark allocation did not merit it. Candidates should be encouraged to attempt every part of every question as often initial marks can be achieved through a few cogent points which will make the difference between a marginal fail/pass.

A small number of papers were difficult to mark this year due to presentation and responses to some questions were bordering on incoherent. Although candidates seem to spend time making notes on how they will approach the question this isn't always reflected in the answers then written. Candidates should take the time to plan their answers and think about what they are going to say before they start writing. This avoids the marker having to hunt through disjointed scripts to award marks and will mean higher holistic marks can be given.

It was pleasing that there was at least one excellent script which confidently dealt with all of the issues in the context of the question with an accurate and relevant response set out in a succinct and organised manner.

Question 1

This question explored your appointment as Trustee in the estate of two individuals who it transpired were trading in partnership. The first part of the question required candidates to identify that the Trustee was not appointed to the Partnership and could not, at this stage, deal with the assets of the Partnership.

Thereafter candidates were asked to describe the process by which funds are distributed in partnership and individual Estates. The final part of the question asked candidates about Financial Education, a topical issue, not previously examined.

Overall, this question was the least well answered in the paper, for a variety of reasons. There were 3 parts to the question and a number of candidates did not attempt either section (b) or (c). Others seemed to have issues with understanding or responding to the question being asked and therefore more than half of candidates had one section where they scored 0 or only half a mark. This inevitably reduced the average mark on this question.

Requirements

- (a) Set out the legal issues that arise following your appointments as Trustee of Tom and of Helen, how these issues could be resolved and the actions that you would need to take following your appointment to identify and deal with the assets of the bankruptcy estates. (16 marks)**

Most candidates were able to identify that the partnership is a separate legal entity and the Trustee of the individual partners was unable to deal with the assets of the partnership. Not all candidates seemed to be aware or understand the concept that the partners would be jointly and severally liable for the partnership debts.

Most candidates were able to suggest what should happen to secure the appointment of a Trustee to the partnership. However, few answers were clear about the basis on which they were commenting on the actions they would take ie were they appointed as Trustee to the partnership or not.

There were a number of issues in the question to be addressed however, some candidates appeared to answer this section with no regard for the context of the question. There was an unfortunate reappearance of responses which included opening a file on the computer system and opening a sederunt book which are simply not relevant.

- (b) Explain the process by which dividends are paid in a partnership estate and associated individual estates, with particular reference to the interaction between the partnership estate and the associated separate estates. (4 marks)**

This was very poorly answered, a number of candidates focusing on the process for the agreement of claims, and submission of a Scheme of Division to the AIB. A few candidates were able to make relevant practical points.

- (c) Explain how you would determine whether a course of Financial Education was appropriate for Tom or Helen and if it was, what this would entail. (5 marks)**

This was generally well answered with the majority of candidates recognising that the answer was mainly set out in the legislation.

Question 2

This question asked candidates to describe the steps they would take in a creditor petition case, where limited information was available, to firstly secure the co-operation of the debtor and secondly to identify and secure assets.

Requirements

Set out the steps you would take, and the powers available to you generally, to

- (a) secure Robert's co-operation. (5 marks)**

Part (a) of this question was generally well answered. Candidates whose answers included both practical suggestions and reference to the legislation scored best.

- (b) identify any assets owned by Robert, explaining how you might secure those assets to prevent their dissipation (20 marks).**

There was a wide range of marks on this question from excellent to poor. The best answers recognised that Robert had not co-operated to date and therefore explained how information was going to be obtained. Statements such as write to Policy company or insurer are meaningless unless it is explained where you are going to obtain this information.

Question 3

This question presented a scenario where a small hotel owner was being pursued by HMRC for an unrelated debt. The first part of the question required an 8 week cash flow to be prepared the second part of the question asked candidates to consider what the Hotel owner should do. This was the only question in the paper which required candidates to consider a scenario where they were not an appointed officeholder.

The cash flow itself was fairly straightforward and while potentially time consuming was generally well answered. However, the second part of the question which required candidates to consider the wider position that Jean was in was less well answered and demonstrated a lack of understanding/awareness of these issues in practice. This is concerning as having the ability to understand an individual's options in these circumstances is a key skill of an insolvency practitioner.

Requirements

- (a) **Prepare a weekly cash flow forecast for the 8 week period beginning on Monday 13 November 2017 and ending on the proposed date of completion of the sale to Mr Harris. Clearly state any assumptions that you have made. (18 Marks)**

All candidates managed to prepare a weekly cash flow for the 8 week period required and generally these were well laid out and easy to mark. There was some confusion with candidates about what the cash flow is intended to measure – ie cash movement in the period and not profit or loss, however, overall presentation was good.

The income section of the cash flow was well done with good marks achieved, other than for a small number of candidates who overly complicated matters by making up assumptions which were not required.

In the expenditure side, no candidates correctly calculated the wages/PAYE position. While some did better than others a large number incorrectly included PAYE/NIC as a weekly expense, which shows a lack of basic commercial knowledge for practitioners advising businesses.

Higher marks could have been achieved through finishing the cash flows properly by showing both the cash movement in the period and the closing cash balance, both relevant numbers for discussion with HMRC. Finally, workings would have been useful to support some numbers although on the whole these were provided.

- (b) **Explain, in the circumstances, what Jean should do. (7 Marks)**

Some candidates didn't really seem to appreciate the urgency of the position which Jean found herself in, with a charge for payment having been served, if no payment was made within 14 days then HMRC would be entitled to petition for sequestration. The question didn't say when the charge was served or whether it had already expired.

A small number of candidates, perhaps those with practical experience, were able to make meaningful suggestions about proposals to be made to HMRC. Many recognised the opportunity to apply for a moratorium but few could meaningfully discuss the considerations around the timing of this.

Question 4

This question presented a series of issue that had been identified following a sequestration appointment and asked candidates to set out how they would deal with them.

Requirements

Clearly stating any assumptions that you make, and making reference to relevant case law and statute, set out the issues that arise, the actions you would take and what further information you would need to obtain in order to address the matters of which you have become aware.

This question was the best answered in the paper with most candidates successfully being able to identify the issues which had to be addressed and how to deal with them.

The main area which caused problems was that some candidates did not recognise that assets in Arthur's father's will could not be dealt with directly by the Trustee and explained at length the steps the Trustee would take to deal with the property.

Some candidates were also confused about the status of the business which had ceased to trade, suggesting amongst other things that a cash flow and profit and loss account be prepared.

Only one candidate recognised the need to consider the overall asset and liability position in the context of significant potential asset realisations.

JOINT INSOLVENCY EXAMINATION BOARD

PERSONAL INSOLVENCY SCOTLAND

MARK PLAN FOR THE NOVEMBER 2017 SITTING - SCOTLAND

JIEB 2017 PERSONAL INSOLVENCY MARKING GUIDE

Question 1

- a) Set out the legal issues that arise following your appointments as Trustee of Tom and of Helen, how these issues could be resolved and the actions that you would need to take following your appointment to identify and deal with the assets of the bankruptcy estates. (16 marks)

Trading Partnership – Legal Status

1. From the information provided, it is clear that Tom and Helen have traded in partnership – see partnership tax return, partnership accounts, employees position. Also specific reference to the partnership within their bankruptcy applications.
 2. **Main issue is that the partnership is a distinct legal persona. You have at this time only been appointed to the individual estates and as Trustee of the individuals do not have locus to deal with anything to do with the partnership.**
 3. Assets of the partnership do not vest in the individual estates. Assuming that the partnership is insolvent, the individual Estates would only be entitled to any the balance on the Partners capital accounts as a postponed debt once all other creditors had been paid.
 4. Creditors of the partnership are entitled to claim in the Estates of the individual debtors.
 5. Further, the debtors appear to be continuing to trade the partnership
 6. What is the legal status of the partnership?
 - a. Both partners are bankrupt – it is assumed that Tom and Helen are the only partners, but this should be clarified;
 - b. The Partnership Act 1890 - partnership is automatically dissolved on the bankruptcy of one or more partners unless the Partnership Agreement provides otherwise – need to check the Partnership Agreement;
 7. Urgently clarify the financial position of the partnership. There is a presumption that it is insolvent and the debtors have simply failed to complete an application for Sequestration.
 8. If the partnership is not insolvent, consider whether the appointment of a Judicial Factor should be made to deal with the partnership affairs.
 9. AIB guidance suggests that if all partners of the Firms have been sequestered, the firm is apparently insolvent and either the partners are creditors of the Partnership or if the Partnership is dissolved by the sequestration of a partner, it would be open to the Trustee to petition for the bankruptcy of the Partnership with concurrence of a qualified creditor.
 10. In practical terms it may be quicker if a debtor application for sequestration is made by the Partnership.
 11. You should consider whether there would be any conflict of interest which would prevent you from accepting the appointment as Trustee of the Partnership when already Trustee of the individual partners.
- Trading Partnership – practical issues** (assuming you can act)
12. There are some other urgent matters to be dealt with relating to the partnership, if a sequestration appointment is made and the Trustee has control and the ability to take decisions regarding the partnership
 - a. Employees – status etc
 - b. ROT
 - c. Risk issues associated with potentially dangerous chemicals in store (fertilizer etc)
 - d. Perishable stock
 - e. Carry out fire risk assessment for the trading premises.
 13. Need to decide quickly whether to continue to trade, primarily in order to deal with perishable items of stock
 14. Is there a lease agreement in place between the Partnership and Tom and Helen consider whether rent up to date. Do the individual estates have a claim to the value of stock under landlord's hypothec.

15. Take control of cash

Other issues

16. Other less urgent matter, but still needs dealing with, is the mum's occupation of the flat
- a. Obtain and review STA
 - b. Obtain title search to confirm ownership
 - c. Valuation of property
 - d. What is happening to rent?
 - e. Mortgage? Is it being paid? From rent?
 - f. Equity?
 - g. 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.
 - h. What are your agent's marketing recommendations for this property, consider whether to be marketed as a whole and with vacant possession.
 - i. Put property on Open cover insurance.

10. Review the partnership trading accounts. These should assist in establishing and identifying any further partnership assets which would not fall into the individual bankruptcy estates.

- b) **Explain the process by which dividends are paid in a partnership estate and associated individual estates, with particular reference to the interaction between the partnership estate and the associated separate estates. (4 marks)**

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

- 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
- A claim on an individual partner's estate in relation to a shortfall in the partnership can only be made by the creditor (not the Trustee of the Partnership) as title to sue a partner on his obligation as a guarantor is with the individual creditor
- The Trustee of the Firm can claim in the Individual Estates if there is a sum due to the Firm by the individual on their capital account. Any 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;
- Any creditor of the partnership cannot receive more than 100p in the £1 through dividends from the partnership and individual estates.
- Conversely if there was a surplus in the partnership after payment of the unsecured creditors this would be distributed to the individual partner estates up to the value of the sum due to the partners on their capital accounts.

- c) **Explain how you would determine whether a course of Financial Education was appropriate for Tom or Helen and if it was, what this would entail. (5 marks)**

Financial Education

There are some circumstances where the Act states that the Trustee must require the debtor to complete a course of Financial Education these are:-

- Where in the period of 5 years prior to the Award, the debtor had been sequestrated, signed a Trust Deed or was subject to a Debt management plan;
- Where the debtor is under investigation for a Bankruptcy Restriction Order;
- The Trustee considers that the debtor's behaviour before or during the sequestration would suggest that they would benefit from the education; or
- The Debtor voluntarily agrees to complete the education.

The Trustee cannot insist on a course of Financial Education if the debtor has already completed one in the 5 years prior to the award of sequestration or if their health would prevent them completing it.

The Trustee should identify this requirement in the first 6 months from award (assuming that the debtor can be found in this period).
Under Regulation, Financial Education consists of various Financial capability modules developed by Money Advice Scotland.
The AIB will notify MAS that the debtor has to complete the courses which can then be accessed on line or if internet access is not available, paper copies can be provided.
The debtor will receive a completion certificate.
Failure to complete the Financial Education, if requested is reason why a debtor would not be provided with their discharge from sequestration.

Question 2

Set out the steps you would take, and the powers available to you generally, to

a) secure Robert's co-operation. (5 marks)

To secure co-operation

Robert has a duty to co-operate with the Trustee as set out in section 215 of the Act. Initially you would write to Robert at all addresses provided in the petition confirming your appointment and what you required him to do, initially to contact you to arrange to meet to discuss his sequestration.
You would also attempt to contact Robert on any telephone numbers available whether provided by the petitioning creditor, online, etc.
If this correspondence was returned or if you had other reason to believe he was no longer at this address, instruct a reputable enquiry agent to locate the bankrupt.
If correspondence not responded to quickly consider service by Sheriff Officer and request a report of their observations at the address.
Depending on the issues emerging in this case, consider appropriateness of visiting the debtor's home address.
Consider obtaining orders under the following sections of the Act
S215 – order from the Sheriff to co-operate with the Trustee;
S118 – Private Examination – order from the Sheriff to allow the Trustee to examine the debtor or their spouse;
S119 – Public Examination order from the Sheriff to allow the same examination to take place in open Court, potentially where there is considerable creditor interest.

The powers in the latter two sections are used relatively infrequently, as the Court process can be expensive and the Trustee needs to consider the cost effectiveness of the process, how it would be funded, and whether information can be obtained by other means.

Failure to co-operate with the Trustee would be grounds for refusing to grant Robert's discharge and he will be made aware of this when the Trustee's report is distributed to creditors recommending the refusal of his discharge as the first year anniversary approaches.

Failure to co-operate with the Trustee is also a ground for making an application to the AIB for a Bankruptcy Restriction Order. However, in practical terms withholding the debtor's discharge will have the same effect.

General Enquiries/Powers

1. Speak to petitioning creditor's solicitor or petitioning creditor directly to request information on the nature of the debt, activities of the debtor and his assets or any other information that may assist.
2. Visit any trading premises identified establish nature of business and assess/value any assets.
3. Consider s118/119 application for anyone else (spouse, business partner etc.) who may have knowledge
4. Write to HMRC request copy tax returns (if any).
5. Notify that any repayments due should be paid to the Estate.
6. Identify any sources of income declared on tax returns.

7. Credit rating agency search – to identify credit card, bank accounts etc and thereafter make enquiry of these financial institutions.
8. Obtain and review copy bank statements to see whether these reveal any further accounts or assets, for example rental/dividend income, payments to policy companies, receipts from solicitors, payments to insurers.
9. Internet search – social media, etc to identify whereabouts/trading/employment/assets any press comment about the debtor's activities/whereabouts.
10. 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.
11. Write to any accountant identified from Tax returns and advise them of your appointment.
12. Under section 108 of the Act, the Trustee is entitled to have access to and make a copy of any document relating to assets, or the business or financial affairs of the debtor. An application can be made to the Sheriff for an order to enforce compliance with this section of the Act.
13. Write to solicitors identified through Bank statements/property searches and make enquiries regarding transactions they acted in or funds held by them.
14. Check the Register of insolvencies for details of any prior insolvency appointments and contact previous insolvency practitioner if appropriate.
15. If insurers identified on Bank statements write to them requesting details of assets insured.

Real Property

1. Carry out property searches on any property identified in the petition or identified in your subsequent investigations.
2. Carry out a name search in the areas linked to the debtor or his trading activities.
3. The inhibition registered at the time of Award should prevent any transfer of title, assuming that the correct searches are done by the solicitor.
4. Obtain valuations, initially drive by or desk top to establish the value of any heritage identified.
5. Write to secured lenders to note your interest, confirm the value of any security and enquire if any repossession proceedings are underway.
6. If assets of value are identified, notify open cover insurers.
7. Search will identify any joint owners, write to these to note your interest in property ask for details of other assets.
8. If properties are identified, check with Local Council whether debtor is a registered landlord and if so what other properties he owns.

Bank accounts

1. Write to high street banks
2. Enclose copy of Award of sequestration
3. Request information regarding any accounts in debtor's name – entitled to information pursuant to s108
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)

Other

- i) Write to DVLA to confirm ownership of any vehicles identified;
- ii) Consider writing to lenders identified on credit search to advise of your interest in any mis sold PPI;

Act gives Trustee powers to challenge a number of antecedent transactions which could have taken place prior to the appointment but generally when the debtor was insolvent, for example, gratuitous alienations s98, unfair preferences s99, recall of an order for payment of a capital sum on divorce s100 or excessive pension contributions s101.

There is no requirement to have the co-operation of the debtor to do so. The outcome of a successful challenge would be a decree for reduction or a restoration of the property to the Estate or such other remedy as the Sheriff considered appropriate.

In relation to the anonymous callers you should, if they call again ask them to provide any further details that they are willing to regarding assets owned by the debtor and their

activities. You should not however, put them in a position where they compromise themselves or their safety by obtaining additional information or evidence. Trustee has power under section 109 of the Act to preserve and realise the Estate, should your investigations show that these are necessary, for example, to trade or close down a business, to bring or defend legal proceedings or to grant security; Section 78 of the Act also gives the Trustee the power to take title to an asset should this be necessary.

b) Identify any assets owned by Robert, explaining how you might secure those assets to prevent their dissipation (20 marks).

General Enquiries/Powers

16. Speak to petitioning creditor's solicitor or petitioning creditor directly to request information on the nature of the debt, activities of the debtor and his assets or any other information that may assist.
17. Visit any trading premises identified establish nature of business and assess/value any assets.
18. Consider s118/119 application for anyone else (spouse, business partner etc.) who may have knowledge
19. Write to HMRC request copy tax returns (if any).
20. Notify that any repayments due should be paid to the Estate.
21. Identify any sources of income declared on tax returns.
22. Credit rating agency search – to identify credit card, bank accounts etc and thereafter make enquiry of these financial institutions.
23. Obtain and review copy bank statements to see whether these reveal any further accounts or assets, for example rental/dividend income, payments to policy companies, receipts from solicitors, payments to insurers.
24. Internet search – social media, etc to identify whereabouts/trading/employment/assets any press comment about the debtor's activities/whereabouts.
25. 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.
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28. Write to solicitors identified through Bank statements/property searches and make enquiries regarding transactions they acted in or funds held by them.
29. Check the Register of insolvencies for details of any prior insolvency appointments and contact previous insolvency practitioner is appropriate.
30. If insurers identified on Bank statements write to them requesting details of assets insured.

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9. Carry out property searches on any property identified in the petition or identified in your subsequent investigations.
10. Carry out a name search in the areas linked to the debtor or his trading activities.
11. The inhibition registered at the time of Award should prevent any transfer of title, assuming that the correct searches are done by the solicitor.
12. Obtain valuations, initially drive by or desk top to establish the value of any heritage identified.
13. Write to secured lenders to note your interest, confirm the value of any security and enquire if any repossession proceedings are underway.
14. If assets of value are identified, notify open cover insurers.
15. Search will identify any joint owners, write to these to note your interest in property ask for details of other assets.
16. If properties are identified, check with Local Council whether debtor is a registered landlord and if so what other properties he owns.

Bank accounts

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Other

- iii) Write to DVLA to confirm ownership of any vehicles identified;
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Question 3

Prepare a weekly cash flow forecast for the 8 week period beginning on Monday 13 November 2017 and ending on the proposed date of completion of the sale to Mr Harris. Clearly state any assumptions that you have made. (18 Marks)

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
		£	£	£	£	£	£	£	£
Income									
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
Expenditure									
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	84,864
Closing Balance	27,991	38,482	44,973	48,863	70,454	93,139	98,824	102,364	

Costs

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 wages 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	6601.196

b) Explain, in the circumstances, what Jean should do. (7 Marks)

FCA License issue – can we advise her? Is our advice being given in contemplation of an insolvency appointment. This depends on the remainder of Jean's assets and liabilities. We may also have an FCA licence.

The cash flow shows that the business will generate cash of c£85,000 in the next 8 weeks.

The opportunity to generate this cash in flow and to protect the sale at £850,000 means that it is clearly in Jean's interests to continue trading in the short term. If a sale can be completed then after paying HMRC she would have c£310,000 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. 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 valuers 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 Jean'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 Jean.

We need to understand when the charge for payment was served. Once a 14 day charge for payment has expired without payment being made, HMRC could petition for Jean's sequestration. The Sheriff would grant warrant to cite Jean, and in view of the trading business may secure the immediate appointment of an Interim Trustee.

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£50,000 could be made in week 5;
- (d) Assure them that the cashflow shows that ongoing PAYE/NIC could be made.
- (e) Explain how the CGT liability on sale will be dealt with by Jean.

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

Moratorium on diligence consider applying for a moratorium on diligence. Form 29 – to AIB Notice of Intention to apply. Would provide a 6 week period to consider her options.

Depending on whether WTC has been granted this may or may not be effective. If the petition is already in Court it is unlikely that this would prevent sequestration

Options if cannot negotiate with HMRC

Apply for a DPP under the Debt Arrangement Scheme. On basis that weekly payments can be made to the payment distributor as set out on the cash flow with a variation made when the sale completes.

HMRC as major creditor may object and it would depend on the outcome of the Fair and reasonableness test.

DAS is possible option and it would see creditors paid in full.

TD unlikely to be suitable firstly as it is an insolvency option and HMRC are likely to prevent it becoming protected. Trustee would also need to consent to trade to facilitate the sale. A Trustee's involvement would likely lead the purchaser to attempt to reduce the price/withdraw.

Question 4

Clearly stating any assumptions that you make, and making reference to relevant case law and statute, set out the issues that arise, the actions you would take and what further information you would need to obtain in order to address the matters of which you have become aware.

Leasehold premises

Obtain a copy of the lease. Review level of rent, any leasehold premium paid and the landlord's rights on insolvency.

There appears to be 9 months arrears of rent. 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 but consider that the arrears would need to be addressed before the landlord would agree to any assignment.

Either you or your agent should 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 are goods on the premises it is likely that the landlord could claim a right of hypothec over these for arrears of rent (but not loss of future rent or dilapidations).

Based on the value of any potential lease premium, sums due to the landlord and the value of any assets on the premises agree your strategy in relation to the lease.

Assuming that there is no value in the lease for the estate, advise the landlord in writing that the Trustee will not be adopting the terms of the lease.

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

When visiting the premises, you or your agents should obtain meter readings.

Transfer of business and customer details

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

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 as Arthur had ceased to trade prior to the transfer.

The transfer of the tools, stock and customer details would appear to be a gratuitous alienation under Section 98 of the B Act 2016. As the transfer took place in February 2017 this is within the relevant time for challenge. An agent should be instructed to value the items that were transferred, including work in progress and any goodwill attached to the business.

Once the agent's report is obtained, seek payment from Nathan. If payment is not forthcoming consider whether it would be commercially viable, for example the costs which will be incurred and the prospects of recovery from Nathan 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

Carry out initial on line valuation and instruct agent to verify the current value of the vehicle. If the vehicle is worth £7,000, it will be considered to vest in the Trustee.

The Trustee should seek Arthur's proposals to acquire the vehicle via a third party making payment. If Arthur has no proposal to make then the Trustee should arrange to uplift and sell.

The Trustee could consider applying certain funds towards the purchase of a reasonable replacement, or reducing the sum requested to realise his interest depending on Arthur's circumstances. For example, if he requires a vehicle for employment and having one would secure a DCO.

Premium Bonds

Notify NS&I of the making of the Award of Sequestration 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 sequestration in case the bonds win. Consider whether commercially it is worthwhile cashing in the bonds prior to closure.

Endowment policy - the policy vested in the Trustee when Warrant to Cite the debtor was granted. As the transfer took place after this date it is void.

Contact the endowment policy provider to advise of the sequestration 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.

Invite Arthur to buy out the Trustee's interest in the Policy, failing which it should be surrendered at an appropriate 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.

- i) 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 s101 BA 2016.

If Income is being drawn down from the pension then it while it will not vest in the Trustee (unless it is unapproved) it should be included in the calculation of the debtor's Income and Expenditure for the purposes of calculating whether he is in a position to pay a DCO.

Inherited property

Any property which Arthur inherits following the death of his father will form part of the sequestrated estate through acquirenda.

We know that Arthur's father owned at least the property Arthur is living in. Establish whether his father made a will. If he did, obtain a copy to establish whether Arthur inherited the property (and any other assets) and who the Executors are.

The simplest way to obtain details of the Executor/will is to ask Arthur depending on the extent to which he is co-operating. An Executor would need to apply for confirmation prior to distribution or, if Arthur's father died intestate an application would need to be made to the Court to appoint an Executor. Caveats lodged at the relevant Sheriff Court would alert the Trustee to either application.

If Arthur is a 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 Executors 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 funeral expenses of his father, the costs of Executory and any outstanding liabilities of his father.

The Trustee should make enquiries to establish whether there was any equity in the property and also the value of any other assets which Arthur might inherit. This would include carrying out a property search on the Property to establish if it was solely owned by Arthur's father prior to his death and whether there was any security over it. 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), in the absence of a spouse/civil partner will pass to Arthur as his sole child pursuant to the Succession Scotland Act (1964).

The Trustee should also establish whether Arthur's mother left him any assets when she passed away a number of years ago.

Liabilities of the bankruptcy estate

Take steps to establish the level of creditor claims. We are aware that the landlord is due arrears of rent, former customers may have claims for uncompleted work and there will probably be liabilities for former suppliers/utility providers to the shop. It is also possible that there would be sums due to former Employees.

Possible assets include, the inheritance, the value in the policy, a future DCO and the value of business assets potentially alienated. The asset realisation process/strategy will be influenced by the value of creditors' claims and whether Arthur may have the ability to recall the sequestration process.

DCO – A DCO must be set within 6 weeks of the Award of sequestration even if the amount of the DCO is zero. Arthur's income will include benefits and possibly pension income. While a contribution cannot be taken if income is exclusively benefits, the benefits should be included in the DCO calculation.

Consider whether Arthur would benefit from attending Financial Education.

Also consider whether the transfer of the assets of the business potentially at undervalue and the attempted transfer of the policy would require you to make an application for a BRO to the AIB.