

**JOINT INSOLVENCY EXAMINATION BOARD**  
**OVERALL COMMENTS ON THE NOVEMBER 2016 SITTING**

**Introductory remarks**

Poor handwriting continues to be an issue. Candidates must appreciate that no marks can be awarded for a word or phrase that is illegible. There is a limit to how long the Examination Team can be expected to spend trying to decipher handwriting that is difficult to read. This issue has meant that candidates have almost certainly lost marks this year.

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

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

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

Candidates need to be reminded that compensating for the inability to deal with a practical situation by "brain dumping" all they can think of which is (or may be) related to the subject of the question is an approach which does not and will not work. This approach is likely to earn some marks, almost by default as mark-worthy points are made at random. However, the Examination Team's experience is that this approach tends to result in candidates regurgitating checklists or similar which show all too clearly that the candidate is not focused on the question and its requirements. The flow of consciousness which is the product of the "brain dumping" approach means that, too often, candidates present pages of script which may not in themselves be wrong but which are either irrelevant to the question or are on point but too comprehensive for the marks on offer. Apart from anything else, this approach wastes valuable time. It is obvious to the Examination Team when a candidate is "brain dumping" and the result is invariably reflected in the award of low holistic marks.

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

# JOINT INSOLVENCY EXAMINATION BOARD

## LIQUIDATIONS

### EXAMINER'S REPORT FOR THE NOVEMBER 2016 SITTING

#### General comments

As ever, some candidates were well prepared and showed a clear knowledge and understanding of Liquidations and this is reflected in some strong scores.

Fewer candidates appeared to run out of time this year, however handwriting continues to be an issue for some.

As with previous years, an inability to apply knowledge to practical issues continues to be a challenge for many candidates. Candidates need to apply the "so what" principle to take their answer that one stage further and gain the marks on offer. Equally easy marks were lost by failing to answer the question asked, e.g. forgetting to state a recommendation. Some candidates still failed to set out their answers as a file note or a letter to clients when the question directed it.

Candidates should also consider the mark allocation available, as this will indicate the level of detail required and therefore the time to allocate to answering that question. This was especially apparent in Q1a, where numerous candidates went into great detail on retention of title ("ROT") and disclaimers, at the expense of considering the other matters and the marks allocated to these.

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

As in previous years, candidates performed well in the numbers question, especially when preparing the Statement of Affairs. However the distribution statement was answered relatively poorly with many candidates not attempting this question at all or over complicating matters.

The introduction of partial licensing necessitated the inclusion of other insolvency procedures, and this was tested in Q3 of this paper. Q3b required candidates to consider corporate insolvency and Q3c personal. This was the worst answered question overall. Candidates performed particularly poorly when considering corporate options but most did reasonably well when considering personal options.

#### Question 1

- a) **Write a file note of the practical and legal steps you need to consider in the Liquidation to resolve the issues you have identified. You should make reference to relevant legislation and case law. (21 marks)**

Candidates were required to set out the practical and legal steps to address a variety of issues in relation to a company that had recently been placed into Creditors Voluntary Liquidation and ceased trading. The issues included the protection of essential supplies, ROT, environmental issues, potential third party funds, contractual licence issues, drawing remuneration and the retirement of one of the office holders.

This question was generally answered well. There were several issues so candidates who provided a few comments on each one tended to score highly.

The question asked for practical steps, and despite this some candidates failed to apply their knowledge to the facts of the question, stating generic advice or even copying out legislation. This was particularly evident when discussing ROT and disclaimers for which very few marks could be awarded (with some answer booklets including numerous pages on ROT alone). Candidates needed to apply their knowledge to the question to gain the marks on offer. Equally quite a few easy marks were missed if candidates failed to include obvious practical comments such as "obtain a copy of the lease" and "obtain an agents valuation".

The ROT issue was based on the Blue Monkey Gaming Ltd case law and very few candidates mentioned this or that the onus was on the supplier to identify the goods.

Many candidates suggested a block transfer for the office holder's cases upon his retirement, despite the question stating this was his last case, therefore the suggestion was impractical.

- b) Set out the issues arising from the EC Regulation on Insolvency Proceedings that you may encounter when dealing with the French distribution centre (4 marks)**

This question was generally answered quite poorly. Candidates failed to apply the facts of the case or state that as the company was in CVL you need a court order to confirm the EC Regs apply and recognise the UK CVL as the main proceedings, or that you would have the ability to appoint a French Liquidator to safeguard the French property.

## **Question 2**

**Write a file note for the Liquidator setting out:**

- a) The duties and powers the Liquidator has to investigate the affairs of the Company (5 marks)**
- b) The actions the Liquidator could take to recover assets for the creditors. (11 marks)**
- c) Who should be included in your Director Conduct Report and on what basis (4 marks)**

Question 2 was based on a company in CVL where the Liquidator's investigations had uncovered various antecedent transactions and overall candidates performed well in this question.

Candidates were comfortable identifying the duties and powers the Liquidator has to investigate the affairs of the company.

In Q2b there were a variety of actions candidates could identify enabling most candidates to achieve a reasonable score, although few identified s213 or s423. Quite a few candidates avoided dealing with the loans secured by floating charges altogether.

Q2c asked candidates to identify who should be included in the Directors Conduct Report and on what basis, with the potential directors holding a variety of roles and responsibilities. Candidates were generally confused as to who should be included and what type of director they were. Many thinking that because Earl was the Financial Controller he was automatically a director, and failing to identify the non-executive director as a de jure director. Similar confusion was demonstrated when deciding whether Mary was a de facto or shadow director.

- d) The steps the Liquidator should take to deal with the letter received from Mary (5 marks)**

To score well on this question, candidates were required to be aware of the *Insolvency guidance paper: - dealing with complaints*, however many of the points in that guidance paper are practical and therefore even if not familiar with this guidance paper candidates could have scored marks for stating practical comments such as "acknowledge the complaint".

Candidates performed poorly on this question, this was disappointing as one would expect them to be familiar with the procedures for dealing with complaints, even if this wasn't an obvious topic to revise for the exam.

## **Question 3**

- a) The consequences on the above matters of the winding up petition being presented and how these can be managed. Make reference to relevant legislation and case law. (12 marks)**
- b) the other options which are available to the Company to enable it to continue trading, and how these would be achieved given the outstanding winding up petition. State which option you would recommend and why (9 marks)**
- c) the options available to Pierre for dealing with the statutory demand served on him personally. Explain how each option could affect his directorship of the Company. State which option you would recommend and why (4 marks)**

Q3a required candidates to consider how various matters impacted a company where a winding up petition had been presented. The matters included the fact that the company wished to continue trading, a Notice of Enforcement had been issued by the landlord and there was a threat of repossession over a freehold store.

This question was answered very poorly. Those who did score marks, generally did so by identifying the consequences of the winding up petition on the company trading e.g. dispositions and validation. The property related matters in particular were not answered well and very few candidates referred to relevant case law.

Q3b required candidates to consider other options available to the director to enable the company to continue trading and was also answered very poorly. The question was also testing candidates knowledge of other corporate insolvency and restructuring options.

Marks were available for identifying that the debt was disputed, thereby enabling the director to apply for an injunction, preventing the petition being advertised and hence the winding up taking place, alongside seeking a settlement with the petitioning creditor, identifying a CVA or Administration. Candidates who did score on this question generally mentioned administration and/or CVA as an option.

Many candidates failed to state a recommendation despite the question clearly requesting this in the requirements.

Q3c required candidates to consider the options for the director who had a statutory demand he couldn't satisfy served on him and was testing candidates' personal insolvency knowledge and its impact on holding a directorship of a company. Most candidates scored reasonably well on this question, identifying the options available.

Candidates who again failed to state a sensible recommendation or explain the impact of each option on Pierre's directorship missed out on marks.

#### **Question 4**

- a) Prepare a Statement of Affairs (11 marks)**
- b) Prepare a distribution statement (3 marks)**

**In preparation for your meeting with Blake and Miranda tomorrow, write a file note explaining:**

- c) the purpose of the statement of affairs (3 marks)**
- cii) the practical steps a Liquidator should take if Blake and Miranda request an early distribution (3 marks)**
- d) State what matters you should consider before accepting an appointment as Members' Voluntary Liquidator to the Company (5 marks)**

This MVL and ethics question related to a sawmill company which the directors wished to wind up solvently. Overall few candidates answered both the written and numbers questions well, instead tending to do well in the numbers and poorly in the written and vice versa.

Q4a and Q4b required candidates to prepare a statement of affairs and distribution statement. The Statement of Affairs was generally done well, with some easy marks available, although the main omission was failing to identify that the pension claim was preferential. Conversely the distribution statement was done poorly with candidates over complicating their answer or failing to even attempt this question.

Q4ci required candidates to set out the purpose of the statement of affairs and was answered fairly, although many failed to consider that this was a MVL so wasted time linking their answer to a CVL.

Q4cii asked candidates to set out the practical steps of an early distribution and was answered very poorly. Candidates failed to focus on practical considerations, for example seeking tax clearance or taking security on the cottage.

Q4d was the ethics question, asking candidates to identify the matters to be taken into consideration before accepting an appointment as Liquidator. This question was answered well with many candidates recognising the need to identify significant professional relationships, and the restrictions if the practice or proposed Liquidator had previously undertaken audit work. Fewer candidates identified obtaining an indemnity from the directors.

## **EXAMINER'S MARK PLAN LIQUIDATIONS**

**NOVEMBER 2016**

### **QUESTION 1**

#### **Requirements**

**(a) Write a file note of the practical and legal steps you need to consider in the Liquidation to resolve the issues you have identified. You should make reference to relevant legislation and case law.** (21 marks)

##### **File note layout**

Cessation of supply from software supplier: Insolvency (Protection of Essential Supplies) Order 2015, s233 applies to IT suppliers of software.

Contact supplier and advise of your appointment

Provide personal guarantee for costs incurred after appointment (nb insolvency related terms in the contract (e.g. higher tariffs) can still be relied on and exercised as company is in CVL)

Calculate how long you will need services for and remember to withdraw undertaking once services no longer required

ROT: *Blue Monkey Gaming Ltd v Hudson & Others [2014]* onus is on the claimants to locate and identify ROT goods. Only obligation on the office holder where a potential claim has arisen is to provide supervised access to alleged owner for purposes of identification and then to adjudicate claim.

Liquidator to consider if Mallera has unequivocally demanded return of goods and revoked express or implied right to sell.

Liquidator to advise Mallera need to identify goods (do they have a local agent?)

Review documentation, establish if valid ROT claim and value, consider contract law jurisdiction, consider if you need the helmets or can return them.

Consider whether original state has changed. If co-mingled goods and not uniquely identifiable, vendors have interest in single bulk as tenants in common, review contract to see if have express contractual provision as to where title rests.

Deposit: Identify whether bank account is overdrawn, if not charity could use tracing argument.

If bank account is overdrawn charity is an unsecured creditor

Consider how charity paid deposit - if by credit or debit card consider claiming under s75 Consumer Credit Act

Consider CDDA if took deposit knowing couldn't provide goods.

Health and safety issue re contaminated waste: Can use s178 to disclaim onerous property.

Consider costs of cleaning up site v value of lease.

Review lease and get lease valued.

Part2A of the Environmental Protection Act 1990, office holder not personally responsible for remediation unless contamination is as a result of any act done or omission made by him that it was unreasonable for a person acting in that capacity to do or make

Licence contract: consider whether value in licence and is it assignable. If so continue to pay and use brand rights to maximise value of stock. Seek premium for assignment of IP rights?

Can use s178 if wish to disclaim onerous contract.

Consider whether you can sell branded goods if in breach or after disclaiming licence agreement.

Consider terms and conditions of ski holiday competition, if can't be withdrawn, winner will be treated as unsecured creditor re the debt as the company became subject to the debt after the date of appointment by reason of an obligation incurred before that date.

Fees: Committee to fix the basis of your remuneration (IR4.127 (3C)) and Liquidator will need to call committee meeting to obtain approval.

Per SIP 9 need to disclose to committee their rights under the insolvency legislation. Liquidator to provide committee members with copy of SIP 9 and R3 Creditor Insolvency Guide.

Liquidator to provide fee estimate (unless already presented at creditors meeting)

When requesting approval of fees Liquidator should provide the following information; work done and why necessary split into common areas of activities; actual costs of the work including any expenses incurred in connection with it, as against the estimate provided; whether the work has provided a financial benefit to creditors, and if so what benefit (or if the work provided no direct financial benefit, but was required by statute).

Also consider complexity, exceptional responsibility, effectiveness and value and nature of assets

Liquidator to chair the committee meeting and all committee members to vote on fee and disbursement resolutions, resolutions passed if majority are in favour

Joint Liquidator retiring: s171 and IR4.108 (call a creditors meeting, 28 days' notice, prepare progress report, consider if Joint needs to be replaced).

**(b) Set out the issues arising from the EC Regulation on Insolvency Proceedings that you may encounter when dealing with the French distribution centre.**

**(4 marks)**

Apply to Court IR7.62 to confirm EC Regs apply and give notice to creditors in EC states (other than UK) (Article 40 and 42). UK CVL is then recognised as main proceeding and governing law automatically covers all assets in France (Article 4) (except for employees and ROT assets).

Do you need to open formal secondary proceedings in France, can only do so if there is an establishment i.e. Skiiz carries out non-transitory activity, evidence suggests it does

If there is an establishment UK Liquidator (i.e. member state liquidator) could appoint French liquidator. This would safeguard French property, governing law would be French (Article 8).

To avoid opening secondary proceedings, give undertaking to French employees to pay them in accordance with French law (Collins v Aikman). French law applies (Article 10)

## QUESTION 2

### Requirements

#### Write a file note for the Liquidator setting out:

**(a) The duties and powers the Liquidator has to investigate the affairs of the Company.**

**(5 marks)**

File note layout

SIP2:

Duty to investigate what assets there are (including potential claims against third parties including the directors) and what recoveries can be made

Investigations to be proportionate to the circumstances of each case, steps and outcomes to be reported clearly

Write to creditors inviting them to bring any relevant matters to your attention; question officers; compare statement of affairs with last audited or management accounts; secure, list and review books and records from last 6 months

Duty to document at the time, initial assessments, investigations and conclusions

s235 duty of directors to co-operate with Liquidator and attend on him to provide information. This would apply to all current and former directors, not Loretta or Hank

s236 allows Court to summon before it any person (i.e. Loretta, Hank and solicitor) capable of giving information or require them to produce property of the company.

[Re Harvest Finance [2014]] if the solicitors have a public duty to comply with the request Court unlikely to award costs under IR9.6 (4)]

s234 obtain court order requiring solicitors to deliver up books and records

**(b) The actions the Liquidator could take to recover assets for the creditors.**

**(11 marks)**

Dixienotes bank transfer: Were the dividends paid out of distributable reserves? If not Dixienotes can be required to pay back under s847 CA06. Could also be a preference under s239

s213 Fraudulent trading, has the Company made that payment as a means of putting assets out of the reach of creditors? S213 has extra-territorial effect and can also be used to bring proceedings against Dixienotes [Jetivia SA v Bilita (UK) Ltd [2015]]

s213 also applies to diversion of cash receipts and assigned book debts

Flat disposal by Loretta/assigned book debt: s238, transaction at an undervalue. Loretta acquired the flat for significantly less than the flat was worth within 2 years of date of liquidation. Loretta is a connected party as the former wife of Hank (s435) so insolvency will be presumed. Defence unlikely to be successful.

S238 also applies to assigned book debt

Under s238, Court can make order restoring the position, but won't prejudice interests of third party who acquired property in good faith and for value. Can therefore pursue Loretta for profit made on sale

Consider if the nightclub is also owned by the company and therefore could sell to realise assets for creditors

Diversion of cash receipts: s239 preference if paying back loan in priority to other creditors, Court can order position to be restored

Book debt and cash diversion: s423 transactions defrauding creditors

Mary loans: s244 extortionate credit transactions, consider whether risk justified interest rate. Loan made within 3 yrs. of liquidation date. Remedy is to set the transaction aside and recover interest

S245. Floating charge is invalid except to the extent of the aggregate of any fresh consideration given for it. Creation must have been within relevant time period. Here is Mary connected, if yes then relevant time is 2 years, if not relevant time is 12 months. However, s245 doesn't apply to June 2014 loan as made over 2 years ago and outside of relevant time

Jan 2015 loan with charge created Feb 2015, consider if charge has been registered. If not registered within 21 days then charge is invalid. Also consider Re Shoelace Ltd 1993

If charge registered consider s245. Mary resigned 30 Jan 2015 so not a de jure director at the time the charge was created/registered. However evidence suggests she is a shadow director therefore she is still a connected person (s249), insolvency is presumed and charge created within relevant time period of 2 years. Remedy is that assets are no longer covered by the security and are all available for the creditors

Can Mary rebut presumption that company wasn't insolvent at the time as company was able to pay debts as they fell due, because of her loans? [Bucci v Carmen Re Casa Estates (UK) Ltd (In Liquidation) [2014]] held that if a company is only able to pay debts by incurring further debt, in any commercial sense it was insolvent.

Inability to pay suppliers: s214 wrongful trading – remedy is for directors to contribute to assets of the company, potentially £250k being the amount the creditors increased by between July and October – could they argue thought business would survive with planned music promotions

Solicitors: s246 Solicitors can't hold a lien over books, papers and records

Wanda in Spain: What are her assets, consider if it's worth pursuing her in Spain?

Take local legal advice

Mary personally liable for debts of the company incurred whilst acting as a director, despite being disqualified from doing so

s212 recover funds from directors for misfeasance

**(c) who should be included in your Director Conduct Report and on what basis.**

**(4 marks)**

Need to consider all directors ("any person occupying the position of director, by whatever name called" (s251)) in 3 yrs. preceding date of appointment

Wanda - de jure director. Properly appointed in accordance with articles of association and registered at Companies House and in the PSC Register

Earl – could argue either de facto or shadow director "person in accordance with whose instructions the directors (Wanda) of the company are accustomed to act" (s251)

Hank - non executive director is a de jure director

Mary - de facto director. Acts as a director and is treated as a director by the board despite a lack of formal appointment. She was also a director in the last 3 years

**(d) The steps the Liquidator should take to deal with the letter received this morning from Mary.**

**(5 marks)**

*Insolvency guidance paper: dealing with complaints*

Follow own internal formal complaints procedure

Acknowledge complaint promptly

Make Mary aware of the steps you are taking to review and respond to her complaint and the likely timetable for your response

Ascertain background facts as quickly as possible and seek additional information from Mary as required  
If you feel the complaint is unjustified, provide Mary with a clear explanation of reasons for that conclusion  
e.g. the relevant legislation affecting your duties as a Liquidator

Notify Mary that she can refer her complaint to the Insolvency Complaints Gateway who will then pass to your authorising body for further enquiries

Notify your internal risk team of the complaint and consider whether your professional indemnity insurer needs notifying

Consider whether the complaint should be reviewed by another insolvency practitioner in your firm or an independent practitioner

## QUESTION 3

### Requirements

Draft a letter to Pierre setting out:

- (a) the consequences on the above matters of the winding up petition being presented and how these can be managed. Make reference to relevant legislation and case law.**

**(12 marks)**

Letter format

Bank account will be frozen once bank hears that winding up petition has been issued, this will prevent Furnichere trading.

Other creditors could become aware of the petition and support it

s127 IA86 states that dispositions of company property (i.e. payments out of the company's bank account) made after the date of the presentation of the petition (31 October 2016) are void unless the court orders otherwise. If wanted to sell Chester store would need to apply to Court for a validation order consenting to the sale. Court would normally approve property sale if no prejudice to creditors i.e. transaction is made in good faith, at arm's length and at fair market value [*Re Wilson v SMC Properties Ltd [2015]*]

Therefore in order to make payments out of the bank account the company or a creditor will need to apply for Court permission to exempt either a transaction or class of transactions

Permission will be granted if the payment is unlikely to have the effect of reducing the assets available to the creditors (*Re Grays Inn Construction*)

The Court will refuse to validate payments in the ordinary course of business if the company is making losses and trading on is unlikely to benefit the creditors (*Re A Company (no 007523 of 1986)*)

Court will agree to pay wages which would have to be paid in any event (*Re Web Electrical*) or to pay a supplier to maintain supplies essential to trading on (*SA and D Wright Ltd [1992]*)

If Furnichere believes company will survive he should apply to Court for a validation order for classes of transactions

If validation order obtained he will need to notify the bank

Winding up petition and/or order doesn't affect rights of secured creditor to repossess the Chester store  
Notice of enforcement: Would want to inform the Liverpool landlord that a winding up petition has been issued.

Under s128 a landlord cannot validly distrain for arrears of rent after the date of petition, 31 October 2016, CRAR regime would apply

Under s183, creditor not entitled to benefit of execution, unless execution completed before commencement of winding-up (presentation of petition)

Pierre needs to check whether he has received this notice from the Manchester landlord, which can be served by post, fax, e-mail, by hand or personal delivery to the tenant or registered office. Notice can only be served if Furnichere is already in rent arrears equal to or exceeding seven days rent. Pierre needs to check the rent arrears position on the Liverpool and Manchester stores.

Confirm whether there are any rent deposits in place that could be used to settle the rent

If the company wanted to settle any arrears they would need permission from the Court under s127

- (b) the other options which are available to the Company to enable it to continue trading, and how these would be achieved given the outstanding winding up petition. State which option you would recommend and why.**

**(9 marks)**

Disputed debt: Company can apply for an injunction restraining the petitioner from advertising the petition  
As the advertisement is a pre-condition for making the winding up order, this will prevent the winding up taking place (IR4.11(1))

Grounds on which Furnichere could apply for an injunction would be debt genuinely disputed, Furnichere able to pay its debts, or there is a counter-claim or set off which would extinguish the debt  
Here, Furnichere states debt is disputed. Furnichere's solicitor should speak to creditor's solicitor to see if a settlement can be reached

CVA: Company could consider a CVA. Company will either need to get creditor to withdraw the petition or persuade the Court to grant an adjournment to the winding up hearing in order to achieve this option  
If creditor agrees to CVA proposal, if petition served but not advertised – petitioner must apply to Court to withdraw petition (IR4.15). If petition served and advertised, petitioner must apply at hearing for petition to be withdrawn (s125).

If the petition has already been advertised, Company could also file witness statement opposing petition not less than 5 business days pre hearing (IR4.18) stating intend to propose CVA

Pierre should consider whether a CVA would be accepted by the creditors, on what terms and whether it would be achievable before he takes any further action

Special Manager: Could apply to Court for Provisional Liquidator to be appointed, and then in turn appoint a Special Manager to trade the business (s177). Candidate should discount this, as not practical given circumstances

Administration: Court could grant administration order instead of winding up order (s125), need to ensure could achieve administration purpose

Recommendation: Candidate to state sensible recommendation

**(c) the options available to Pierre for dealing with the statutory demand served on him personally. Explain how each option could affect his directorship of the Company. State which option you would recommend and why.**

**(4 marks)**

Bankruptcy: If Pierre takes no action and can't pay then he will be made bankrupt. Can't be a director of Furnichere

IVA: Come to an agreement with the landlord. Could still be a director of Furnichere

Debt Relief Order: Applies if you owe less than £20k and don't owe a home. Can't be a director of Furnichere

Consensual: Find alternative funds to settle rent. Pierre would become a creditor of the Company (assuming it enters a form of insolvency)

Recommendation: Candidate to state sensible recommendation

## QUESTIONS 4

### Requirements

In preparation for tomorrow's meeting:

- (a) prepare a statement of affairs for the Company as at 31 October 2016, stating any reasonable assumptions that you make. (11 marks)

**Hornbeam Sawmill Ltd (In MVL)**

Statement of Affairs as at 31 October 2016

### Section A - Summary of Assets

	Note	Book value £'000	ETR £'000	Ref
<b>Fixed charge assets</b>				
Land and buildings	1	355.0	450.0	a
Less due to Bank	9	(50.0)	(50.0)	
Surplus		305.0	400.0	
Intangible assets	4	20.0	25.0	b
Hire purchase assets	3	15.0	15.0	
Less due to HP company	3	(10.0)	(10.0)	
Surplus		25.0	30.0	
<b>Floating charge assets</b>				
Stock	2	50.0	45.0	c
Work in progress	5	75.0	35.0	
Trade debtors	6	200.0	160.0	d
Other debtors	6	40.0	32.0	e
Plant and machinery	3	185.0	252.0	f
Fixtures and fittings	2	30.0	9.0	
Cash in hand		15.0	15.0	
HP asset surplus	3	0.0	5.0	
		595.0	553.0	

### Section B - Summary of Liabilities

<b>Available for preferential creditors</b>		553.0	
Less preferential creditors	10	(14.5)	g
Net property		538.5	
Prescribed Part		0.0	h
<b>Available for floating charge holder</b>			
		538.5	
Less due to Bank		0.0	
<b>Floating Charge Surplus</b>		538.5	
Less unsecured creditors	7,11,12	(331.5)	i
Surplus after creditors paid in full		207.0	
<b>Fixed charge surplus</b>		425.0	j
Shortfall re Bank		0.0	
Shortfall re unsecured creditors		0.0	
<b>Available to members</b>		632.0	
<b>Workings</b>			

Ref	Note
a	Sawmill (£335k) and cottage (£115k)
b	Patent etr £25k (patent legally belongs to the Company if developed in the ordinary course of directors employment). Assume IP is fixed charge, but candidate could treat as floating
c	90% recovery (£50k*90%)
d	80% recovery (£200k*80%)
e	80% recovery (£40k*80%)
f	NBV is net of HP assets (£200k-£15k), ETR specialist kit net of auction costs =£252k (£280k-£28k)
g	Occupational pension
h	Bank paid in full therefore security settled, no Prescribed Part
i	Trade creditors £58k, other taxes and social security £25k, directors loans £79k. Need to include additional liabilities (CCL tax £17.5k (gas) and £17.5k (electricity), plus contract termination charges £29k) redundancy pay £105.5k
j	Brought down figure less HP surplus (£430k-£5k)

**(b) prepare a distribution statement for each shareholder, stating any reasonable assumptions that you make.**

**(3 marks)**

### Hornbeam Sawmill Ltd (In MVL)

#### Distribution Statement

##### Blake

£k

Members surplus 379.2

Total 379.2

#### Assumptions

Blake owns 60% of the Company

Patent belongs to the Company

Assume Company settles Blake's directors' loan of £29k prior to members distribution

##### Miranda

£k

Distribution in specie 115.0

Members surplus 137.8

Total 252.8

#### Assumptions

Miranda owns 40% of the Company

Miranda receives managers cottage valued at £115k as distribution in specie

Assume Company settles Miranda's directors' loan of £50k prior to members distribution

**(c) write a file note explaining:**

- (i) the purpose of the statement of affairs.**

**(3 marks)**

File note layout

Detail the company's assets and liabilities (present, contingent and future) to evidence that the company is solvent and thus supports the Declaration of Solvency

Statutory requirement s89(2)(b) IA86

Provides the Liquidator with details of all the company's assets together with current valuations, and provides details of all liabilities to settle

Calculates the estimated return to the members.

Provides creditor and shareholder details so the Liquidator can obtain details of their claims.

- (ii) the practical steps a Liquidator should take if Blake and Miranda request an early distribution.**

**(3 marks)**

Advertising for claims

Obtaining tax clearance

Carrying out an assessment of the business and make a provision for any debts, liabilities or expenses that haven't been agreed

Assessing any potential health and safety claims

Reviewing the indemnity - if they are emigrating to Australia is it worth anything? Consider taking security over the manager's cottage or obtain an indemnity from a third party

**(d) state what matters you should consider before accepting an appointment as Members' Voluntary Liquidator to the Company.**

**(5 marks)**

Significant Professional Relationships ("SPR") – identify if you or your Firm has any SPR with the Company, the directors or any other connected parties – conflict checks

Can take appointment if practice or proposed Liquidator has previously carried out audit work within the previous 3 years, but consider whether there are any other circumstances that give rise to an unacceptable threat to compliance with the fundamental principles

Identify your client and carry out anti-money laundering checks

Agree engagement letter and fees

Consider obtaining an indemnity from the directors

Confirm that Declaration of Solvency is likely to be substantiated by events (especially if previously been auditor)

Consider whether have sufficient experience and staff to take appointment

**JOINT INSOLVENCY EXAMINATION BOARD**  
**ADMINISTRATIONS, COMPANY VOLUNTARY ARRANGEMENTS AND RECEIVERSHIPS**  
**EXAMINER'S REPORT AND MARK PLAN FOR THE NOVEMBER 2016 SITTING**

**General comments**

There were a number of candidates that did not fully address all parts of the question requirements or who extended them to a subject that they were more comfortable answering, wasting time and effort. Candidates should ensure that they read and understand the requirements before commencing work and focus their response on these areas.

Generally questions that required thought and practical experience were not answered particularly well by a significant proportion of candidates. At the other end of the spectrum it also appeared that the majority of candidates did not open their Insolvency Act and therefore missed out on easy marks available.

As with previous years VAT and corporation tax still present a considerable challenge for candidates with the majority unable to demonstrate even a basic understanding of their impact on financial reports.

**Question 1**

This question focused on the end stages of an administration where exit would be via dissolution.

**(a) Draft an expected final receipts and payments account for the Administration period. (15 marks)**

Generally this part of the question was well answered. The majority of candidates presented their account in an appropriate format and included the key items split between fixed and floating charge assets.

Candidates were required to calculate two employee claims and the majority of candidates successfully established the relevant preferential liability. A few candidates struggled to calculate the employees' weekly wage from an annual salary; dividing this figure by 12 and then 4 rather than using 52 weeks.

Very few candidates stated their assumptions in relation to VAT and on occasion presented a mix of figures including and excluding VAT. Few candidates demonstrated any understanding of the relevance of VAT to the question.

The better candidates identified that as a final receipts and payments account the cash balance at the end of the period should have been nil.

**(b) Assuming that you have completed your distribution, set out the key steps to finalise the Administration. (10 marks)**

This part of the question was not well answered and evidently very few candidates opened their Insolvency Act to detail legal steps to place the company into dissolution. As a result candidates lost valuable marks that available for copy elements from the open book.

Many candidates focused their answer on moving the company into a Creditors' Voluntary Liquidation despite the question stating that a Paragraph 52(1)(b) statement had been made, the administrator was to distribute the prescribed part and the answer in (a) showing that there would be no funds for creditors other than the prescribed part.

Many candidates set out steps to distribute to creditors even though the question requirements had stated that this had been done.

Generally candidates were able to pick up points for more practical aspects of closing an administration however some of the steps were not appropriate at that stage of the process – for example several candidates stated that they would check that the purpose of administration had been achieved - this is something that should be established much earlier in the administration. There were also general points such as 'review file' without any explanation as to what the purpose is – to achieve a mark candidates must state what they are reviewing the file for.

## **Question 2**

This question was split into two areas – part (a) focused on a CVA and part (b) on two relatively complex reservation of title claims.

- (a) **(i) Set out for the Directors how such situations can possibly be resolved without the need for the Company to enter Administration and provide an overview of the process that would typically be followed. (6 marks)**

The majority of candidates identified that a variation could potentially be used to deal with the situation but few candidates demonstrated a good understanding of the process to be followed.

- ii) Explain your key ethical considerations as to whether you could accept the appointment as Administrator. (4 marks)**

Generally candidates understood the key ethical principles that would need to be considered although few stated that being supervisor did not necessarily prevent taking the appointment of administrator.

Several candidates focussed their answer on non-ethical aspects such as money laundering checks and whether the purpose of administration could be achieved.

- (b) **Set out any additional information you would seek from the parties claiming ownership of the goods concerned. Based on the information provided, summarise the extent to which you think the suppliers will have a valid reservation of title claim and, assuming they do, how you would deal with the situation. (15 marks)**

Generally the answers were poor, the better candidates picking up marks for logically thinking through the issues and making practical suggestions as to how the situation could be dealt with. Many candidates appeared to struggle as there was no clear right answer.

Most candidates were able to pick up marks for stating basic information required to establish whether the creditors have a valid claim.

## **Question 3**

- (a) **Set out and explain the key concerns that the Administrator would have and the issues she would face trading the Company in Administration. (15 marks)**

Candidates were required to identify risks from the given scenario of an electroplating business supplying the medical sector. There were a surprising number of candidates that did not identify many of the issues including the existence of acid on site.

The requirements asked for concerns and issues, however many of the candidates produced long lists of questions that, whilst indicating they had some understanding of the problem, did not explain why it was a concern. As an example candidates wrote "Is there insurance in place?" rather than explaining that obtaining insurance in the circumstances may be difficult and that as a consequence it may not be possible to trade.

A number of candidates took the opportunity to cover ethical considerations and IP authorisation requirements which were not required as part of the answer.

Generally the question was not answered well. Most candidates were able to identify a few issues that could be relevant to the circumstances but there were few comprehensive responses.

- (b) **Briefly explain the options available to the funder and/or Administrator in order to recover the debt from Mr Crinkle. (10 marks)**

This part of the question was aimed at testing the candidate's knowledge of debt recovery techniques including the existence of personal insolvency processes. Whilst most candidates were able to state a few options only the better candidates scored highly.

#### **Question 4**

This question required the production of an outcome statement.

#### **Draft an Administration estimated outcome statement, clearly showing the priority of payment. (25 marks)**

Overall candidates were able to demonstrate that they were able to produce a relatively comprehensive outcome statement in an appropriate format.

Whilst most candidates were able to distinguish between fixed and floating charge assets and payments very few were able to prioritise payment in accordance with Rule 2.67(1) [Priority of Expenses]. As a consequence most candidate responses did not include any prioritisation on the outcome statement. Whilst in practice it may be that candidates give little thought to this, as all expenses are normally paid in full, it is an important principle to be aware of especially in relation to priority of corporation tax liabilities.

The calculation of profit was handled well by only a minority of candidates. The majority of candidates were unable to correctly establish the sales price of stock using the provided gross margin percentage. Whilst most candidates understood that the corporation tax liability was calculated by multiplying the profit by the rate, many candidates failed to include the cost of the stock in their profit calculations.

Generally VAT was not handled well with many candidates including a mixture of gross and net figures in the outcome statement. Most candidates also incorrectly prioritised the corporation tax liabilities.

## Question 1a

Receipts and Payments account for period to [end of administration]

Estimated to realise	6 months to 11 August 2016	To end of administration	Cumulative	
	£	£	£	
<b>Secured assets/assets specifically pledged/fixed charge assets</b>				
<b>Asset realisations/ Receipts</b>				
Freehold property	-	250,000	250,000	
<b>Cost of realisations/Payments</b>				
Agent costs – property	-	5,000	5,000	(see workings below)
Legal costs – property	-	10,000	10,000	(see workings below)
Insurance	1,000	250	1,250	Discretion as to whether fixed or floating
Administrator costs - property	-	250		(see workings below)
Irrecoverable VAT	-	4,980		See workings - £nil if VAT recoverable
Fixed chargeholder claims	-	218,870	218,870	See workings - £223,850 if VAT recoverable
	1000	249,000	250,000	
<b>Floating charge assets/assets not specifically pledged</b>				
<b>Asset realisations/Receipts</b>				
Plant and Machinery	50,000	-	50,000	
Office equipment	4,000	-	4,000	
Debtors	35,000	30,000	65,000	
Stock	85,000	-	85,000	
Customer contracts	1,000	-	1,000	
Cash at bank	55,000	-	55,000	
	230,000	30,000	260,000	
<b>Cost of realisations/Payments</b>				
Legal fees	25,000	-	25,000	
Tax advisors	-	1,000	1,000	
Agent fees	15,000	-	15,000	
Administrator's remuneration	30,000	-	30,000	
Administrator costs - balance	-	33,000	33,000	
Insurance		-	-	
Misc disbursements	1,500	-	1,500	
Corporation Tax	-	10,000	10,000	
Total costs	71,500	44,000	115,000	
<b>Preferential creditors</b>	-	(1,741)	(1,741)	
Assets less costs subtotal	157,500	(14,741)	142,759	(needed for prescribed part)
Administrator costs – prescribed part	-	(10,800)	(10,800)	Can appear above prefs (see workings below)
<b>Unsecured creditors</b>				
Prescribed part	-	(20,752)	(20,752)	
Floating chargeholder		(111,207)	(111,207)	
	157,500	(157,500)	-	
Represented by				
VAT receivable	14,300	-	-	
Estate bank account	143,200	-	-	
	157,500	-	-	

SPECIFY VAT ASSUMPTION – GROSS OR NET. If gross as sale of business as a going concern the receipts would not attract VAT.

Fixed chargeholder payment	If VAT Irrecoverable*	If VAT incidental*	Difference (irrecoverable VAT)
Sale proceeds	250,000	250,000	
Legal costs	(12,000) (including VAT)	(10,000)	
Agent costs	(6,000) (2% x proceeds + VAT)	(5,000)	
Insurance	(1,250) (not VAT)	(1,250)	
Administrator costs	(11,880) (55 hours x 180 + VAT)	(9,900)	
Available to charge holder	<u>218,870</u>	<u>223,850</u>	4,980

\*Assumed that VAT is irrecoverable as no VAT charged on property sale. Discretion if candidates have stated that they have assumed that VAT would be recoverable due to 'incidental nature'

#### Administrator's remuneration

To date	355 hours	180 per hour	63,900
Charged			(30,000)
To completion	50	180	9,000
Total expected		(This excludes the remuneration relating to the prescribed part (see below))	<u>42,900</u>
Property related (see above)			9,900
Balance			<u>33,000</u>
			<u>42,900</u>

#### Preferential creditors

Employee	Salary	Weekly	Weeks	Arrears	Arrears Limit to £800	Days	Holiday Outstanding
Mr Arnold	18,000	346	2	692	692	2	138
Miss Beach	28,600	550	3	1,650	800	1	110
					<u>1,492</u>		<u>248</u>
Total Preferential					<u>1,741</u>		Assumed 5 day week

#### Prescribed part

Amount available after preferential creditors		
Receipts	260,000	
Payments	(115,500)	
Preferential creditors	(1,741)	
Amount available for prescribed part	<u>142,759</u>	
First £10,000	50%	5,000
Balance	20%	<u>26,552</u>
Prescribed part		<u>31,552</u>
Cost of distributing prescribed part	(10,800)	(60 hours at £180 per hour)
Amount distributed		<u>20,752</u>

#### Floating charge holder

Available for prescribed part	142,759	See above workings
Prescribed part	(31,552)	See above workings
Available for floating charge holders	<u>111,207</u>	
CHECK: Shortfall from fixed charge		
Bank debt	380,000	
Secured creditor distribution	(218,870)	
Outstanding	<u>161,130</u>	

## **Question 1b**

### **Practical steps**

- Pay any accrued outstanding costs
  - Administrators
  - Professionals; legal and agents
  - Other costs of administration
- Review and finalise any tax matters including PAYE/NI, VAT and Corporation tax
- Ensure all insurance aspects have been dealt with
- Ensure that unclaimed dividends are dealt with
- Ensure forms submitted in relation to the directors' conduct
- Release bond (once end confirmed)
- Ensure that appropriate records are retained in accordance with Regulation 13 (as amended by the IP (Amendment) Regulations 2015).
- Ensure that provisions are in place regarding storage of company and other records
- Close administration bank accounts

### **Procedural steps**

- Dissolution most likely exit
- Establish position regarding discharge from liability
  - If necessary seek approval from committee or secured creditors
- Final progress report prepared
- Notice of end of administration (form 2.32B) completed
- Notice sent to Registrar of companies with final progress report
- 2 copies of notice filed in court
- Court sends one sealed copy to administrator
- Within 5 days administrator sends notice of end of administration to creditors
- Notice can be placed in the Gazette

## **Question 2a) (i) Alternative to administration**

Variation – if proposals provide for such an eventuality.

Could be used to reduce contributions to an affordable level

Process outlined in proposal followed. Typically

- Determine what the Company can afford to pay and for what period
- Compare this to alternative outcome; produce an EOS
- Discuss with significant creditors; secured and unsecured
- Convene a meeting of creditors to consider the variation
- Meeting held and creditors vote; approval % required determined by existing CVA proposal
- If approved new terms take effect
- If rejected then it may be necessary to appoint Administrators
- Notify creditors of outcome

Other alternatives:

- could propose a new CVA; would bind new and 'old' creditors
- Third party funds
- Discretion in proposal to reduce or suspend contributions

### **(ii) Ethics**

Code of ethics: Insolvency Practitioner may normally accept an appointment as administrator or liquidator. However the Insolvency Practitioner should consider whether there are any circumstances that give rise to an unacceptable threat to compliance with the fundamental principles.

Self review threats – any actions as supervisor that would be reviewed by Administrator

Conflict of interest - Dealing with the assets and claims over them; the spare machine could create a conflict. Views/opinion/perception of creditors

## **2b) ROT**

### **General (applicable to both)**

- ROT questionnaire completed
- Proof/copy of ROT clause
- Proof ROT clause incorporated into contract
- Consider course of dealings if terms on post contract documentation
- Confirmation of outstanding balance
- Re Atlantic; are the goods required for the administration
- Explain impact of moratorium
- Seek legal advice in relation to the validity of claims
- Invite creditor to identify goods

#### **(i) Stickle**

Information required/considerations

- Evidence that the motor can be identified; e.g. serial number
- Can the motor be removed without damage to the rest of the unit – if replaced it suggests that this is possible
- Is there any value to settling the outstanding balance – does this result in better realisations
- Obtain a valuation for the compressor with and without the motor
- Whichever way it is considered at least part of the motor has been paid for but not all of it

Motor likely to be easily removed and identifiable, therefore claim likely to be successful

How deal with situation

- Negotiate with creditor in relation to the money paid by the Company – it has effectively paid for the labour and part of the cost of the unit; can the creditor recoup more than their loss?
- Consider settling the outstanding balance if the valuation suggests that it is beneficial to do so.
- Reject the claim if the creditor is unable to establish validity.

#### **(ii) Blencathra**

- Evidence money outstanding
- Details of historic amounts invoiced and paid
- Do any other suppliers supply these packs – if so how can they be identified to the specific supplier
- Type of ROT clause – simple or all monies
  - If all monies – account ever reached zero
  - If simple – how can the packs be identified to specific invoices; appears that this will not be possible if only contains a code
- Establish impact on value of completed packs if screw packs removed; is it appropriate to agree commercial settlement for these items?
- Loose packs of screws in box likely to be easily removed; but cost of doing so may be prohibitive to creditor.
- Assuming clause and claim exists likely to have a valid claim;

Dealing with situation

- Commercial settlement regarding those within boxes due to cost of removal and impact on sales price.
- Potentially agree for the removal of the items at the creditors' cost
- Discuss selling the completed items to the creditor taking account of the ROT claim
- Broker a deal between a purchaser of the entire finished goods and the supplier
- If parts required and cannot agree with Blencathra; are there alternative suppliers

### **Question 3a Concerns regarding trade**

- Environmental; chemicals may pose a contamination risk.
- Health and safety; acid - risk to employees would be high.
- Are there any licences associated with its activities that would affect the ability to trade – e.g. medical sector
- Insurance; may be difficult to obtain in administration;
  - could the existing policy continue
- Warranties; administrator would not normally provide but nature of equipment likely to require them.
- Quality; customers would need to be confident as to quality and disaffected employees could impact on this.
- Loss making; does the prospect of enhanced realisations compensate possible trading losses, is it possible to reduce costs to bring administration trading into profitability or obtain an indemnity from secured creditor
- Achieving a purpose; does the trading support the purpose of administration
- Lack of funding; will the administrator be able to fund trade, via existing lenders, new lenders, suppliers etc.
- Customer contracts;
  - do these terminate on administration?
  - would the customers want to continue trade with the Company?
  - Payment terms; would these need to be changed
  - Does continued trade protect the existing debtor book
- Key employees;
  - are there any key employees that are required for trade
  - The director may be uncooperative; is the MD key/required and what impact would this have
  - will it be possible to retain these given the uncertainty of administration.
  - Would it be necessary to pay arrears
- Key suppliers;
  - would the administrator be able to obtain new supplies,
  - would the supplier require any arrears paying
  - Is reservation of title an issue
  - Would prices remain the same or could they increase affecting possible losses
- Landlord
  - Will there be any issues with the landlord regarding access
  - Will the landlord position affect the possibility of a sale of the business
- Purchaser
  - Is it likely that a purchaser as a going concern will be found
  - Does the increase in value offset the above risks; does it benefit creditors overall?
  - Will a purchaser be willing to take on warranty and environmental risks
  - Will a purchaser want to take on the TUPE liability

### **Question 3b Recovering debt from sole trader**

- Funder likely to own the debt until repaid and debt reassigned to company
- Therefore funder likely to have to take action
- Options
  - Chasing for payment; attempts should be made to obtain payment
  - Consider meeting to discuss the situation and agree settlement
  - Consider instructing collection agents/solicitors
  - Could sell the debt to a third party
  - Could sell the debt as part of a sale of the business
  - Issue a statutory demand
  - Could consider mediation if dispute involved
  - Bankruptcy; debtor could be made bankrupt in which case assets would be realised for their creditors including the Company
  - Court Judgement; the claim could be taken to court; debtor may defend the claim.
  - Enforcement of court judgement
    - Repayment arrangement; could seek court involvement to make debtor provide details of income and expenditure
    - Charging order over property or land could be sought
      - Could seek order for possession and sale

- Attachment of earnings order from court to obtain a deduction from wages if applicable
- Bailiffs; apply to court to have bailiffs attend and seize goods
- Third party debt order; against debtor's bank or another third party who may pay the debtor. Funds held and court decides if funds should be paid to the creditor.

#### Question 4

##### Estimated Outcome Statement

			Book Value £000	Estimated to realise £000
<b>Assets subject to fixed charge</b>				
Trade debtors	See workings (d)		£6,600	5,280
Collection charges	See workings (d)			(104)
Amount due to Bank	Per question		(6,000)	(6,000)
				<u>(824)</u>
Plant and Machinery	90%	3,500	4,500	3,150
Agent costs	6%			(189)
Agent costs - valuation	90%	20		(18)
Administrators' costs	per question x 90%			(9)
				Allocate between fixed and floating
Property	Per question	2,500	1,500	2,500
Agent costs	2%			(50)
Agent costs - valuation	Per question			(15)
Solicitors	Per question			(18)
Administrators' costs	Per question			(15)
Total available to bank				<u>5,336</u>
Amount due to Bank	Per question			(5,500)
Shortfall from debtors	From above			(824)
Shortfall to fixed chargeholder	Carried down to floating charge			<u>(988)</u>
<b>Assets subject to a floating charge</b>				
Plant and Machinery	10%	3,500	500	350
Trading	See workings (a)			3,000
Sale of residual stock	See workings (b)		3,000	240
Director loan account (other debtors)	Per question			25
Cash at bank				- Assumed used prior to appointment (discretion id assumed subject to bank set off)
Floating charge realisations				<u>3,615</u>
Costs associated with QFC appointment	Per question		Priority c	(10)
Statement of affairs	Per question		Priority d	(3)
Corporation tax payable	See workings (c)		Priority f	(19)
Legal fees	Per question		Priority f	(130)
Agent fees - realisation	6%	350.0	Priority f	(21)
Agent fees - valuation	Balance from Fixed	0	Priority f	(2)
Pre-administration costs; Legal	Per question		Priority h	(12)
Pre-administration cost; Administrators	Per question		Priority h	(8)
Administrator's remuneration - floating charge plant			Priority h	(1)
Administrator's remuneration	Per question		Priority h	(150)
Administrator's remuneration - to completion	Per question		Priority h	(30)
Chargeable gain	500	19%	Priority j	(95)
Available for preferential creditors				<u>3,134</u>
<b>Preferential creditors</b>				
Arrears of wages	as average arrears £250 assumed all pref			(75)
Holiday pay				(20)
Pension scheme contributions				(10)
Surplus after preferential creditors				<u>3,029</u>
Prescribed part	Or identification that not relevant as floating charge holder will be paid out			(600)
Available for floating chargeholder				<u>2,429</u>

Floating chargeholder	Shortfall from fixed charge	(988)
		1,441
Prescribed part		600
Available for unsecured creditors		2,041
Pension scheme	8,000	2 S75 double per question
Redundancy	Per question	(16,000)
Notice pay	Per question	(280)
Protective award	Per question	(150)
Trade creditors	Per question	(150)
HMRC	See workings (e)	(8,000)
Other creditors	Per question	(1,080)
		(600)
Overall shrtfall to creditors		(24,219)

Distribution rates		
Secured creditor		100%
Preferential creditors		100%
Unsecured creditors		(21)

#### Workings (a) Trading

##### Profit calculation

Stock cost	2,600	
Margin	35%	
Sales	4,000	
Stock cost	(2,600)	
Direct costs	(1,000)	
profit	400	

##### Realisations for EOS

Sales	4,000	
Direct costs	(1,000)	
	3,000	

Workings (b) Residual stock	p in £	60%	
Total stock	3,000		
Used in trading	(2,600)	(see workings(a))	
Residual	400	60%	240

#### Workings (c) - Tax on profits

Tax on stock			
Profit from above	400		
Loss on residual stock	(160)	Residual cost price – 60p in £	
Taxable profit	240		
Less allowance	(140)	(Per question)	
Taxable	100		
Tax rate	19%		19

#### Workings (d) - Trade debtors

BV	6,600		
Realisation rate	80%		
Collected	5,280	5,280	
Uncollected	1,320		
Charges			
3,000	1%	30	
2,000	3%	60	
280	5%	14	
			(104)
			(104)

Invoice finance	(6,000)	
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#### Workings (e) - HMRC Unsecured debt

Per question	1,300	
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##### Bad debt relief on debtors

Uncollected debts	1,320	
VAT rate	20%	

Net amount	1,100	
VAT	220	(220)
		<hr/> <u>1,080</u>

Assumed that no bad debt relief claimable as a realisation - instead subject to set off.

# JOINT INSOLVENCY EXAMINATION BOARD

## PERSONAL INSOLVENCY

### EXAMINER'S REPORT AND MARK PLAN FOR THE NOVEMBER 2016 SITTING

#### QUESTION 1

(25 marks)

- (a) Explain what enquiries you would make and what records you would keep in the first month following your appointment in order to establish the extent of the property portfolio and the current position regarding each property. (15 marks)
- (b) Describe the practical steps you and your team would take to secure your interest in the property portfolio for the benefit of the bankruptcy estate. (4 marks)

The responses to parts (a) and (b) were generally good. Candidates dealt competently with key issues such as initial HM Land Registry searches, contact with mortgagees and joint proprietors, registration of restrictions, insurance, valuations, security etc. and scored well as a result.

Some candidates however regurgitated checklists of administrative tasks to be undertaken upon appointment (bond, considering staffing levels, setting up files etc) which wasted time and scored few marks. This appears to have had an impact upon the marks for part (c) where a number of candidates appeared to be short of time towards the end of the question.

- (c) Explain the position regarding the payment of rent by tenants of a landlord who has been made bankrupt and what you would say to the tenants who have called. (6 marks)

This part of the question was less well answered. Most candidates correctly identified that rent was, in general, due to the Trustee but some failed to understand that rent would instead be due to the LPA Receiver for those properties where one was appointed.

A small number of candidates commented that rather than requiring the rent to be paid to the Trustee, an IPO would be required, and that tenants should be told to continue to pay the bankrupt. Given that the bankrupt had not surrendered to the proceedings, in practice there would be little likelihood of obtaining and enforcing an IPO in the circumstances, and particularly not in the first month following appointment.

There were also some candidates who thought that the s283A "Use it or Lose it" provisions applied to these properties. It is important that candidates understand and appreciate the properties to which s283A applies. Further, given the recent date of the bankruptcy order and the requirements to consider steps to be taken *in the first month*, such references were not relevant to the question.

#### QUESTION 2

(25 marks)

- (a) Prepare a briefing note for Samuel outlining what steps need to be taken, and when, in order to obtain approval for the basis of his remuneration. Your note should include details of the different bases upon which his remuneration can be calculated. (7 marks)

This section was generally very well answered. Most candidates picked up the essence of the question, noting that fees needed to be approved within 18 months and that the deadline was fast approaching, although some did not stress the urgency. Most were also aware of the basis on which fees could be set and how they should be approved. Only the better prepared and more commercially aware candidates considered the highly practical point that given the timescale and costs of convening a meeting of creditors it could be preferable not to convene a meeting and instead allow the 18 months to expire, thus being remunerated on the scale rate set out in schedule 6 to the Insolvency Rules.

- (b) Clearly stating any assumptions that you have made, prepare an Estimated Outcome Statement and calculate the likely dividend to creditors. (18 marks)

This part of the question was fairly straightforward for a well prepared candidate to obtain a good basic mark but there were more challenging elements. Most candidates set out a well-structured pro-forma and good marks were scored as a result.

A disappointingly low percentage of candidates identified that CGT was payable on the mortgagee's disposal of the investment property, thus missing out on higher level marks. Even fewer candidates then went on to calculate the tax correctly.

Estimates of the likely time costs to complete the case varied widely, with the more inflated amounts indicating a possible lack of understanding of the remaining practical steps to bring the matter to a close.

**QUESTION 3****(25 marks)**

- (a) Based on the information provided to you, prepare a structured list of issues and questions that you would like to discuss with George. (18 marks)**

Part (a) was generally quite well done by those candidates who logically split their responses into areas as guided by the question. Poorer answers were not set out logically and jumped around the areas, meaning candidates didn't expand on their comments sufficiently to show good understanding.

Some candidates approached this as a "day one bankruptcy question" and regurgitated checklists, rather than applying this to a scenario where there were indications that the trustee may have been lax in the work done to date, and so didn't score so highly as a result. Very few candidates commented on the lack of information in the receipts & payments account, or the inconsistencies therein.

A few candidates considered the wider ranging investigation/conduct/ethics aspects, and these candidates therefore picked up good marks and higher holistic marks by so doing.

- (b) Outline the steps which Thomas could take if, following the meeting next week, he remains dissatisfied with the progress of the Bankruptcy and the actions of George. (7 marks)**

Part (b) was less well done on the whole. Most candidates identified the main remedies however many then spent a lot of time stating the insolvency rules relating to the mechanics of convening a meeting of creditors etc.

Few scored higher marks by relating the question practically to discussing what the purpose of taking action would be, i.e. to take control of the case, and to protect assets. Many candidates focused on fee challenges as a remedy, although the facts of the question indicate that the level of realisations were low and therefore fees would be negligible if the trustee continued with his current approach.

**QUESTION 4**

- (a) Set out the ethical and regulatory matters that you would need to consider before accepting any instructions to advise Abigail. (4 marks)**

Almost all candidates were able to comment about ethical issues generally. The majority identified that an ethical issue arises if the debtor is an existing client. Quite a few however referred to the issue in general terms, but without identifying that it actually arises here as Abigail is an existing client of the firm, and did not therefore go further and comment about the risk of a self-review threat.

Few candidates mentioned Anti Money Laundering procedures, and the fact that it would be appropriate to check that these had previously been carried out and, if necessary, carry out new checks.

Only a small handful of candidates identified the crucial point that, unless this advice is being given in contemplation of a formal insolvency appointment, the IP needs to be regulated by the FCA in order to provide advice. This issue is quite a hot topic currently and is causing some practitioners issues in practice so is very relevant for candidates to be aware of.

- (b) Explain the various statutory and non-statutory procedures that might be available to Abigail to resolve her difficulties. (14 marks)**

This section was generally well answered, and all candidates went through the various procedures, statutory or otherwise. Whilst the quality of the discussions varied, it appears overall that all candidates understood the range of potential procedures, which is very encouraging.

Many candidates however went into too much detail about the mechanics of the formal procedures, for example referring to the 2-stage voting process in an IVA, which would have wasted time and gave the impression that they were relying on rote learning, without actually understanding the situation.

- (c) Advise Abigail which procedure is most likely to be applicable to her. You should explain what further information you would require in order to advise her more fully and set out any assumptions which you have made. (7 marks)**

This last section required candidates to nail their colours to the mast and state (with assumptions) which procedure (statutory or otherwise) was most appropriate to Abigail.

There were some very good responses but a surprisingly large number of candidates focussed on the statutory options, and the most common advice given by candidates was to enter into an IVA, which would have been a costly way out.

In practice, given the low level of debt, her position as a company director and her earning capacity, a non-statutory solution would in all likelihood be a better option for her. She has readily realisable assets with which to cope with the most pressing debt, and thereafter the earning capacity and property assets to enable her to deal with the remaining debt in a well-managed, low cost way.

## **EXAMINER'S MARK PLAN**

### **PERSONAL INSOLVENCY**

**NOVEMBER 2016**

#### **QUESTION 1**

**(25 Marks)**

- (a) Explain what enquiries you would make and what records you would keep in the first month following your appointment in order to establish the extent of the property portfolio and the current position regarding each property. (15 marks)
- (b) Describe the practical steps you and your team would take to secure your interest in the property portfolio for the benefit of the bankruptcy estate. (4 marks)
- (c) Explain the position regarding the payment of rent by tenants of a landlord who has been made bankrupt and what you would say to the tenants who have called. (6 marks)

#### **Searches**

Carry out Land Reg searches on any known addresses, a PN1 search to identify any properties in debtor's name and a Land Charges register search

#### **Records to keep**

Keep records of all telephone calls

- Identity of caller
- Property address
- Who they pay rent to
- Do they have a tenancy agreement - If so, request a copy

Create list/database of potential properties

- Address
- Mortgagee
- Ownership – joint or sole
- Sold?
- On market?
- Tenancy and tenant details?

#### **Valuations**

- Carry out Drive by valuations or seek internet values
- Are any already on the market?
- Right Move searches
- Call local agents
- Instruct your own agents to make enquiries on your behalf

#### **Tenants**

- Write to all known properties, either to known tenants or "to whom it may concern"
- Request details of tenancy/copy agreement
- Rental income – amount/frequency/how paid/where to (e.g. which bank account)
- Was deposit paid into a Tenancy Deposit Scheme (TDC)

#### **Tenancy Deposit Scheme**

- Write to the TDS and request if they hold any information regarding tenants/properties of the debtor where deposits are held
- Provide debtor's name and list of properties

#### **Local Housing Authorities**

- Write and request if they hold any information regarding tenants of the debtor who are on housing benefit.
- Provide debtor's name and list of properties

#### **Debtor**

- Attempt to make contact by telephone/email/letter
- Likely that he will contact you if tenants are not paying him rent
- Request that he attends your office for interview
- Remind him of his duty to co-operate and the potential implications for him if he doesn't
- Send him questionnaire requesting full details of all properties

- Freeze any bank accounts – this may bring him to the table
- Contact OR to establish whether he has any plans for a public examination – if so, attend and raise questions
- If not, urgent s366 application
- Obtain/seize debtor's trading records

**Joint Owners**

- Identify any joint owners either from HMLR searches or other info
- Contact them and enquire as to nature of joint ownership – are they actively involved

**Creditors**

- SoS appointment so have to write to creditors within 28 days
- Use this as an opportunity to invite creditors to inform of any known assets
- Petitioning creditor in particular may have obtained information when preparing the petition and in deciding whether debtor is worth pursuing

**Mortgagees**

- Write to mortgagees as per Land Reg search
- Enquire whether they have records of any other properties
- And/or they have additional security (e.g. life policy)
- Request details of LPA Receivers
- Request confirmation of outstanding amount and whether they have all monies/consolidation clauses where they have lent against more than one property
- Write to LPA Receivers to request current position

Instruct Enquiry agent

Use internet research – debtor may have had a website?

**Securing interest in properties**

- Register Restrictions at Land Reg for properties identified as being jointly owned
- Ensure PA(B) and WO(B) registered for any solely owned properties
- Insure all known properties – open cover in first month pending valuations/mortgage amounts
- Write to Mortgagee and ask them to note interest
- Write to LPA Receiver and ask them to note interest
- Instruct agent to attend known properties, and report on security issues and identify any empty properties which may need boarding up, locks changing etc

**Rent**

If LPA Receiver is appointed, rent should be paid to the LPA Receiver

If not, then

- The debtor's share of rent is income generated from bankruptcy assets, and the debtor's share of this income is therefore payable into the bankruptcy estate
- It is potentially arguable (but unlikely) that the debtor's share of rental income is his income from trade, and therefore we are only entitled to the surplus under an IPA or IPO but this is unlikely to be achievable in the first month following appointment

Trustee should seek legal advice if unclear

However, given the lack of co-operation received from the debtor, it is appropriate to ask the tenants to:

- Hold rent to order, or pay to trustee/solicitor
- Do not pay to debtor
- Cancel direct debits
- But if he issues threats etc, call police but don't put themselves in a position of physical danger
- Keep records of any amounts that they do pay to him
- If LPA Receiver appointed, continue to pay LPAR
- If deposit paid into a TDS, seek repayment from TDS on departure
- Take legal advice if unsure

## QUESTION 2

- (a) Prepare a briefing note for Samuel outlining what steps need to be taken, and when, in order to obtain approval for the basis of his remuneration. Your note should include details of the different bases upon which his remuneration can be calculated. (7 marks)
- (b) Clearly stating any assumptions that you have made, prepare an Estimated Outcome Statement and calculate the likely dividend to creditors. (18 marks)

**(25 marks)**

### Briefing Note

Time is of the essence - Appointment was on 28 May 2015 so 18 months expires on 29 November. Therefore, unless the Trustee is to be restricted to taking fees on scale, he must seek approval of an alternative basis immediately

However, the additional costs of calling a meeting may be prohibitive and it may be considered that taking scale is adequate given the amounts involved

Different bases of remuneration (as set out in rule 6.138)

- Time costs
- With fee cap as per SIP 9
- % of assets realised/distributed
- Fixed fee
- Combination of above

Fees fixed by:

- Committee
- Meeting of creditors if no committee
- Court

Timing – effect of rule 6.138(6) – not fixed within 18 months of appointment, then limited to scale as set out in sch 6 to IR86

Assume no creditors committee (committees are rare in bankruptcy cases) - must therefore convene and hold a meeting of creditors before 29 November in order to obtain approval to anything other than scale  
If it is assumed that there is a committee, need a committee resolution before that date.

Estimated Outcome Statement	Notes	£	£
<b>Assets</b>			
Equity		55,000	
<b>Income Payments</b>			
received to date		4,900	
future receipts	1	<u>7,700</u>	
		<u>12,600</u>	
Total asset realisations			67,600
<b>Costs</b>			
Official Receiver's costs (net of deposit)		1,100	
Quarterly bank charges	2	330	
Secretary of State fees	3	11,969	
Legal costs		1,200	
Trustees fees	4	9,315	
Disbursements		300	
Future costs/disbursements			
adverts - meeting, NOID, final meeting		270	
Capital Gains Tax	5	5,012	
Irrecoverable VAT	6	<u>2,217</u>	
		<u>(31,713)</u>	
Available for creditors			35,887
<b>Creditors</b>			
Bank overdraft		1,410	
Credit cards (x3)		17,360	
Utilities		235	

Loan from parents	20,000																
Shortfall to mortgagee	<u>6,400</u>																
	45,405																
Dividend p in £	79.038																
 <b>Note 1</b>	14 payments made, 22 future payments @ £350 = £7,700																
	Last payment August 2018. Total amount £12,600																
<b>Note 2</b>	Appointment May 2015. Charges £22 per quarter starting 1 July 2015:																
	To date, 6 quarterly payments = £132																
	Due to income payments, case will be open until final payment made in August 2018. Therefore assume closure end of 2018.																
	Therefore future bank charges of 9 x £22 = £198																
<b>Note 3</b>	Receipts: 67,600																
	Less. Legals at source 1,200																
	VAT thereon 240																
	<u>(1,440)</u>																
	Receipts into ISA 66,160																
	fee on first £5,200 (see below*) 2,825																
	Balance (66,160-5,200) x 15% 9,144																
	Total 11,969																
	<table border="1"> <thead> <tr> <th>* Band</th> <th>Rate</th> <th>Funds Banked</th> <th>Cumulative fee</th> </tr> </thead> <tbody> <tr> <td>up to £2,000</td> <td>0%</td> <td>2,000</td> <td>-</td> </tr> <tr> <td>£2,000 - £3,700</td> <td>100%</td> <td>3,700</td> <td>1,700</td> </tr> <tr> <td>£3,700 - £5,200</td> <td>75%</td> <td>5,200</td> <td>2,825</td> </tr> </tbody> </table>	* Band	Rate	Funds Banked	Cumulative fee	up to £2,000	0%	2,000	-	£2,000 - £3,700	100%	3,700	1,700	£3,700 - £5,200	75%	5,200	2,825
* Band	Rate	Funds Banked	Cumulative fee														
up to £2,000	0%	2,000	-														
£2,000 - £3,700	100%	3,700	1,700														
£3,700 - £5,200	75%	5,200	2,825														
<b>Note 4</b>	Assume time costs																
	Current = 44 hours x £135 (given in question) 5,940																
	Future - estimate 25 hours x £135 3,375																
	<u>9,315</u>																
	(Alternative assumptions: fixed fee etc)																
<b>Note 5</b>	Sale Price 98,000																
	Purchase price 65,000																
	<u>33,000</u>																
	Less: sale costs (estimate) (4,000)																
	Net Gain 29,000																
	Less: annual exemption (2016/17) (11,100)																
	<u>17,900</u>																
	CGT at 28% (assume higher rate) 5,012																
	CGT will be payable despite the fact that the property was sold by the mortgagee, and the estate received no funds.																
	Given the level of income payments, it is reasonable to assume that his taxable income, plus the gain of £17,900, will take him over the basic rate band and thus CGT is charged at 28%																
	Alternative assumption is lower rate: 18%																
<b>Note 6</b>	As not VAT registered, VAT is irrecoverable.																
	Solicitors fees 1,200																
	trustees fees (as above or alternative estimate) 9,315																
	disbursements - current 300																
	disbursements - future 270																

VAT @ 20%	11,085
	2,217

### QUESTION 3

(25 marks)

- (a) Based on the information provided to you, prepare a structured list of issues and questions that you would like to discuss with George. (18 marks)
- (b) Outline the steps which Thomas could take if, following the meeting next week, he remains dissatisfied with the progress of the Bankruptcy and the actions of George. (7 marks)

#### General

A family member appears to have paid the sum of £5,000 to effectively pay for a Trustee to administer the bankruptcy. Whilst there is nothing in legislation or guidance to prevent this, and there could be a good reason for it, it raises the question of why the debtor/family member would consider it necessary. It also questions whether George has followed ethical guidelines in accepting the appointment

It may be the case that a family member has been listed as a creditor and has therefore "paid" for their own IP to be appointed to brush things under the carpet.

The following issues should be discussed with George:-

#### Surplus Income

Mary appears to have a well paid job, however, there are no income contributions on the R&P.

What steps has the Trustee taken to secure an IPA/IPO?

Debtor is now discharged

It is therefore too late to seek an IPA/IPO now

Was an Income & expenditure questionnaire submitted to the OR, and if so, what surplus if any did that show? Have expenditure levels been reviewed for reasonableness?

The payment of a contribution over a period of 36 months could generate significant funds for the Estate.

#### Bramble Cottage

It would appear that the Trustee has accepted a nominal sum for his interest in Bramble Cottage

But it is not clear if this transaction has actually been completed yet

There is no receipt on the R&P

Payments to HM Land Reg of £44 would equate to the costs of a search and restriction only, and not to a transfer of the property.

Has a restriction been registered at Land Registry?

The SOA states that a 90 day ERRV valuation has been obtained. What is the Trustee's rationale for using this valuation, particularly as there a significant difference, of £100,000 between this and the Home Report valuation?

There is a concern that the Trustee has effectively ignored value of c£90,000 which could have been realised for the benefit of creditors.

The outlay shown on the R&P for the valuation of £45, would suggest the valuation obtained was a desk top or at best a drive by. It is certainly unlikely to have been internal given the low cost, which is concerning in view of the variations in value.

#### Retail Units

There is no mention in the SOA of a valuation having been obtained for these units. There is also no outlay on the R&P.

It is presumed that the units are freehold, as they are displayed as such on the SoA.

Has a restriction been registered at Land Registry?

Who has provided the value of £270,000?

Does the Trustee intend to obtain a valuation and pursue the equity, if any in these units, or if there is no equity, seek a nominal payment?

Are the retail units occupied by tenants, if so, what arrangements are in place regarding the rental income?

There are no receipts on the R&P.

If however the retail units are leasehold, has George obtained a copy lease, and taken advice on its value if any?

#### **Vehicle**

A Range Rover Evoque is likely to be worth a reasonable sum of money and therefore if owned by Mary is an asset which should therefore be realised by the Trustee.

Even if Mary requires a vehicle for her employment this is probably a more expensive vehicle than she needs and thus would most likely be an item of excess value (s308)

In which case George should either sell it and provide her with a vehicle of more reasonable value

Or in practice, invite an offer to purchase your interest for, say, the current value less £2,000 for a reasonable replacement.

Has the Trustee checked with the DVLA to establish who owns the vehicle?

If it is owned/registered in Mary's name, what is its estimated value?

If it is subject to HP or finance, what is the outstanding finance?

If it is owned by Mary, is it needed for work (and thus exempt) or is it an outright asset?

#### **Number plate**

Check with Thomas if he knows what the personalised number plate is to obtain an indication of the value. These are not often cost effective to recover however, you would expect George to ask for a proposal for his interest to be realised.

In practice an internet valuation can be obtained

And the debtor should be invited to find a third party to purchase his interest

What actions has George taken to assess value and realise it?

#### **Other assets/areas for investigation**

It is clear that considerable sums were given by Thomas and members of his family to Mary. £86,000 by Thomas alone. Unsecured creditors are noted as £30,000. It is concerning that this is a round sum figure. Did Mary disclose the sums due to Thomas and his family on her Statement of Affairs or subsequently?

As Thomas has made George aware of the sums due to him, what explanation has Mary provided for how she utilised these funds and what steps has George taken to verify the accuracy of this?

Has the trail of these funds been followed? As a minimum, did George carry out a sweep of the UK Banks to identify any balances held by Mary? Thomas could provide details of accounts into which funds were paid as a start point

Mary appears to spend considerable time in Spain. Has George taken any steps to establish whether Mary has assets in Spain, for example, where does she stay when there? Have appropriate property searches been carried out?

#### **Specific issues/questions on R&P**

There are no Sec of State fees shown, no cheque fees or quarterly banking charges

This suggests that the funds may not have been properly paid into the ISA?

There is no outlay shown for the bond in this case – has it been bonded, (and George settled the cost directly)?

There is no interest on the R&P, even at currently very low rates, there should be a little. Are the funds properly being held in an interest bearing account?

Given the fact that George says he "intends" to accept a nominal amount for Bramble Cottage, is this actually a current R&P or just an estimate?

Has it been reconciled?

Overall, there are concerns that the R&P is either inaccurate or does not reflect what has actually happened to date.

#### **Debtor's Conduct**

Thomas has concerns about the conduct of Mary in taking sums from him and his family which she failed to invest. George should therefore be asked:-

- Whether Mary has been reported to the Insolvency Service for a possible BRU/BRO in relation to her activity prior to the bankruptcy.
- She appears to have taken funds with no intention of repayment.

- Whether George is satisfied with Mary's conduct during the bankruptcy and has therefore allowed her automatic discharge to proceed?
- Alternatively, did he consider making an application to suspend her automatic discharge due to lack of co-operation/disclosure? (she will have been automatically discharged if he didn't)
- If she has not co-operated with him, has he considered an application for her to attend a Private Examination
- Whether criminal proceedings have been brought against Mary. If so, has any Proceeds of Crime Order been made against Mary and if so the date of the order to determine whether the Order or bankruptcy would rank first in relation to sums recovered.

#### **Further steps**

On the face of it, there are issues which appear not to have been addressed by the Trustee for example, the potential equity in Bramble Cottage, an IPA/IPO from Mary as a minimum.

Thomas probably has two priorities; firstly, that control is taken over the situation to ensure that realisations are now maximised going forward for the benefit of creditors, and secondly he will want the conduct of the Trustee and debtor to be addressed.

Thomas should firstly speak directly with the person administering the case, Thomas will have done this during the meeting. Following the meeting Thomas should write to George and based on the information or explanations provided at the meeting, outline the areas of concern that Thomas would like to be addressed, and ask for an urgent response.

If this is not responded to or, if Thomas is still not satisfied with the response, he should consider whether it would be appropriate to secure the appointment of an alternative Trustee.

He would need to secure another Insolvency Practitioner who would consent to Act. Depending on the extent of future asset realisations, it may be necessary for him to be prepared to underwrite the costs of this process. He should therefore obtain indications of cost.

If an IP will consent to Act then Thomas should write to George and request that he call a Meeting of Creditors.

As George was appointed by the Secretary of State, provided that Thomas (and his family) represent more than 25% in value of the creditors the Trustee would be obliged to call a meeting of creditors (s298(4)) to either remove George as Trustee or to form a committee to better oversee his administration

If George refuses, apply to court to force him (s303)

Or he could be removed by the Sec of State (s298(5)) but in practice this is unlikely to be done at the request of a creditor

Whilst replacing the Trustee will give Thomas more confidence that matters are being dealt with it does not address the loss that the creditors may have suffered as a result of George' actions to date.

In the absence of a satisfactory response, Thomas should complain to George's Recognised Professional Body via the Complaints Gateway on the Insol Service website.

Thomas should consider whether it can be demonstrated whether he and the other creditors have suffered a loss as a result of George' actions or lack of them.

It may then be possible to make a financial claim against him/his firm and/or his PI cover

Thomas should also be aware that if his debt has been incurred as a result of fraud, then the debtor will not be discharged from this debt (s281(3))

**QUESTION 4****(25 marks)**

- (a) Set out the ethical and regulatory matters that you would need to consider before accepting any instructions to advise Abigail. (4 marks)
- (b) Explain the various statutory and non-statutory procedures that might be available to Abigail to resolve her difficulties. (14 marks)
- (c) Advise Abigail which procedure is most likely to be applicable to her. You should explain what further information you would require in order to advise her more fully and set out any assumptions which you have made. (7 marks)

**Money Laundering**

Debtor is an existing client of the firm – check what ML checks were carried out to identify client etc  
If necessary, carry out fresh client identity checks

**Potential Conflicts**

Discuss with partner as to what work we have undertaken  
Consider any possible areas of conflict  
Is there any Self Review Threat?

**FCA Licence**

Consider whether we can advise  
Is this in contemplation of an appointment?

**Non statutory****Revise finances & negotiate informal agreement with creditors**

- General review of assets, finances, income & expenditure in order to generate surplus cash or funds in order to meet repayments to creditors.
- Undertake a critical review of expenditure to identify savings.
- Consider whether cash can be generated by disposing of surplus assets. She has premium bonds worth £6,000 that can be cashed in immediately and the funds could be used to pay the most pressing creditors
- Could she sell her car and either use public transport or get a cheaper alternative, in order to liquidate some funds?
- Negotiate payments to creditors from income and/or lump sums (e.g. from relatives or premium bonds).

**Debt consolidation or Remortgage**

- Abigail could obtain a loan to reorganise or clear debts, and swap all existing debt for just one.
- Most obvious route is to remortgage the property to release equity
- Rate of interest is likely to be significantly less than an unsecured loan

**Debt management plan**

- Formal agreement entered into between Debtor and the creditors, brokered by a licensed Debt Management Company (“DMC”)
- Typically she will have to make one periodic payment to the DMC which will then make the individual payments to the creditors.

**Statutory****Debt relief order**

- Formal order made on application to the OR, through an authorised debt adviser
- Debts less than £20k – she meets this
- Assets less than £1,000 – she doesn't meet this
- Plus a vehicle worth less than £1000 – doesn't meet this
- Disposable income less than £50 per month – not clear
- Not subject to any other formal insolvency process – she appears to meet this

Overall, she is not eligible for a DRO

**Individual voluntary arrangement (IVA")**

- Legally binding arrangement with her creditors
- Abigail would make a proposal to creditors offering assets and/or income to her creditors.
- IVA requires involvement of an authorised insolvency practitioner ("IP") firstly as nominee and then as supervisor.
- 75% majority needed

**Bankruptcy**

- Formal court procedure where bankruptcy order is made either following a petition being presented by a creditor,
- Or on Abigail's application to the Adjudicator (i.e. no longer a debtor's petition to the court, from April 2016)
- A trustee in bankruptcy ("TIB") is appointed to realise D's assets and pay creditors.
- Assets vest in trustee
- Abigail must be "unable to pay her debts" in order to make her own application – not clear from the information provided, whether she meets this criteria, although she is "struggling"

**County Court Admin order (rare)****Advice**

She really has very little debt – the student loan is basically a call on her income if she earns more than £25k (or whatever the threshold is for the appropriate student loan)

Her priority would be to avoid any statutory procedure, and in particular Bankruptcy as this would prevent her from acting as a Director, and therefore remove her earning capacity, therefore putting her home and other assets at risk

Statutory procedures are far more expensive and will have an impact on her credit rating

Best Advice = cash in premium bonds, pay off pressing creditors/overdraft and reduce credit cards debts, service the remaining debts from income

Alternative = remortgage, or consolidation if lots of creditors as this might make it easier to manage

**Additional info**

## Assets:

- How has equity been calculated? Would need to see valuation of property and details of mortgage
- Any redemption penalties if sold?

## Income &amp; Expenditure:

- Full disclosure of monthly gross and net income, expenditure and surplus.
- Review of reasonableness of expenditure and what savings could be made

Review profitability of company (to assess her ability to generate income)