

JOINT INSOLVENCY EXAMINATION BOARD

SENIOR MODERATOR'S COMMENTS ON THE NOVEMBER 2019 SITTING

Introduction

This year's two papers were good tests of candidates' knowledge and skills, and their ability to apply these to resolving practical problems and situations presented to them. A written examination paper will always struggle to replicate real life circumstances, but the two papers presented candidates with situations with which an Insolvency Practitioner should be capable of dealing in his or her daily work or that will be encountered from time to time.

The two papers covered a mix of procedures and subjects. Some subjects were in general tackled well by candidates; for example question 3 on the Corporate Insolvency paper which asked candidates to address different issues arising during an Administration and question 1 on the Personal Insolvency paper dealing with real property in a Bankruptcy. However other questions, on which candidates should have been able to achieve good marks, were often not done well. The average marks on question 1 on the Corporate Insolvency paper (ethical matters) and question 2 on the Personal Insolvency paper (retiring IP and succession planning) were particularly disappointing. In each case there was only a minority of candidates who were able to achieve high marks, and too many presented scripts which suggested a lack of knowledge of the subject being examined.

There were a few subjects examined where candidates fared poorly. Very few candidates dealt well with question 4 part (a) of the Corporate Insolvency paper dealing with taxation. Virtually no candidate identified the principle of marshalling of securities in part (d) of the same question. Also poorly answered was question 3 part (c) in the same paper which asked candidates to say what should be done about company assets in the possession of a former employee.

As ever there were some very good scripts on both papers which attracted good basic and holistic marks, demonstrating that it was possible to do well.

The checklist issue

This is a recurring problem. It is very disappointing that it is necessary to mention it again and to point out that it is probably the issue which results in candidates presenting scripts which are at best marginal and, all too often, are simply not good enough to pass.

As highlighted by the examiners in their individual reports, too many candidates presented scripts which gave the appearance of having been written with the benefit of having committed checklists to memory and little more. It is of course for individual candidates to determine how to learn and recall knowledge, but simply regurgitating a checklist in answer to a question, without having due regard to the facts of the question and the specific wording of the requirements, is rarely if ever the best approach. This approach usually results in time spent writing, sometimes long, paragraphs or bullet point lists for which few or no marks can be given. More importantly it does not demonstrate to the examination team that the candidate has understood the subject or what is required. This scattergun approach can result in some basic marks being awarded but it will always be difficult to award good holistic marks. The importance of these is discussed below.

The examination team has regularly debated the reason why candidates persist in taking the scattergun approach. The answer is that candidates often appear to lack either practical experience in the particular subject or procedure being examined, or they are unable to apply experience and common sense to solving the problem posed. Or both. In such circumstances, under examination conditions, candidates feel that they have little choice but to fall back on what they have learnt in the classroom. But, being an Insolvency Practitioner demands an ability to think and to solve problems, all supported by sound

technical and legal knowledge. It does not demand an ability to trot out checklists, sections, rules, regulations etc. without understanding them and knowing how and when they should be applied.

Answering the question

This is not, or should not, be difficult. Candidates must answer the question asked and not the question that they think has, or should have, been asked. Before starting to write, candidates should take time to ensure that they identify what is being asked of them and not waste time and opportunity by going down blind alleys and presenting irrelevancies.

Holistic marks

This year holistic marks have again played a major part in helping to decide whether candidates should pass or fail a paper. Holistic marks in themselves do not determine whether a script should pass or fail, but are an important indicator of quality both of individual questions and also scripts overall.

At the margins the award of 2 holistic to the answer to a question is an indication that the answer presented is not quite sufficient. It has merit but does not include quite enough relevant information, and/or it does not demonstrate competence in dealing with the question. By contrast the award of 3 holistic marks to the answer to a question is an indication of an acceptable answer. It includes just sufficient relevant information, any examples given are mainly correct and it demonstrates competence in dealing with the question.

The dividing line between being awarded 2 or 3 holistic marks is narrow but vitally important. It is always going to be difficult for the examination team to convince itself that an answer which does not demonstrate understanding and/or does not seek to deal with the question posed, should be awarded more than 2 holistic marks. Answers which adopt the checklist regurgitation approach, without more, are likely to fall into this category. Candidates who present scripts which, across all four questions, have overall been awarded holistic marks in single figures will not pass. Those scripts awarded 10 or 11 holistic marks are invariably borderline and are increasingly at risk of being failed. Across a paper as a whole, candidates must aim to present, on average, 4 acceptable or better answers scoring overall at least 12 holistic marks.

JOINT INSOLVENCY EXAMINATION BOARD

CORPORATE INSOLVENCY (Scotland)

EXAMINER'S REPORT AND MARK PLAN FOR THE NOVEMBER 2019 SITTING

General comments

As with previous years, candidates continue to use a 'scattergun' approach to answer the requirements, often failing to address the specific circumstances of the question. Many candidates took the opportunity to 'dump' information on subjects tangentially connected to the question in the hope of picking up marks. Most answers given appeared superficial showing little understanding of what was being asked.

In a similar vein to the above, many candidates struggled to demonstrate the depth of knowledge and ability to adapt their approach to the situation, focusing on quantity rather than the quality of points. Marks are awarded for explained and good quality points rather than vague answers, and within the mark plan marks may be weighted to account for complexity or importance. As such, candidates should not focus entirely on ensuring that they have listed as many individual points as possible and certainly should not repeat previous points in the hope that markers will miss the duplication.

Candidates should also ensure that they are simply not repeating what is written in the question as part of their answer as this gains no benefit and simply wastes time. Finally, when answering questions, candidates should ensure they place their answer in the relevant section to the question and not rely on the marker to link them where there are different parts to a question.

Question 1

Candidates had to consider whether it was ethically appropriate to accept the position of officeholder for three scenarios and set out the ethical considerations, safeguards that could be put in place and ultimately whether the appointment should be accepted.

Generally, candidates were able to pick up marks for identifying basic matters applicable to all scenarios such as approaching the practitioner's regulator for guidance, documenting decisions and consulting with internal ethics partners.

(a) You are Administrator of Doodah Signs Limited and your proposals, approved by creditors, stated that the Administration would exit into Creditors' Voluntary Liquidation and that you would act as Liquidator. Subsequent to your proposals being accepted you have received a complaint from a relatively small creditor of the company stating that they believe you were negligent in selling the trade and assets on deferred terms, given that the acquiring company has gone into Liquidation leaving the majority of the consideration unpaid. (4 marks)

Part (a) was a situation where an administrator had received a complaint as to their conduct and was considering an appointment in the subsequent liquidation. Out of the three parts of the question, the average mark percentage was the highest, but only one candidate came to the correct conclusion and dealt with the ethics issues raised in question. Most candidates tried to focus on general ethics points rather than applying to the circumstances given.

(b) You were engaged by Molinaro Equipment Limited to undertake an accelerated sales process of its trade and assets in the expectation that the sale would be completed by an Administrator. Despite your best efforts, the Directors were not particularly co-operative during the process and did not allow the business to be marketed widely. The Directors have made an offer for the assets in line with agent valuations, to be concluded immediately following the appointment of an Administrator. If the sale does not complete the business will close and realisations will be significantly lower than if the Directors' offer is accepted. You have consulted with the major creditors and they have agreed that, given the circumstances, a sale to the Directors should be completed. It is proposed that you should act as Administrator. (7 marks)

Part (b) focused on a situation where there was a potential pre-packaged sale of the business and assets of a company and the directors had placed limitations on the ability of the proposed administrator to widely market the business for sale. Whilst generally candidates were able to identify the possibility of a self-review threat no candidates mentioned the relatively recent and high publicity case of VE Interactive. Whilst SIP16 was relevant to the situation most candidates set out in detail its requirements instead of considering the associated ethics of accepting such an imminent appointment.

(c) Deagle 2007 Limited was a tax client of your Firm until it was placed into Members' Voluntary Liquidation with a Partner in a local firm of Insolvency Practitioners acting as Liquidator. Your tax colleagues had assisted Deagle 2007 Limited in relation to the company's corporation tax returns and you prepared the Declaration of Solvency for the Directors based on information the Directors had provided.

At the date of liquidation, the company's Declaration of Solvency stated that it had over £10 million of cash at bank and its only liability was a £1 million intercompany debt. Since the Declaration of Solvency was signed a significant complex liability involving a large number of claimants has been identified in relation to potential mis-selling claims and the Liquidator believes it is necessary to 'convert' the Liquidation to a Creditors' Voluntary Liquidation.

Due to the complexity of the situation, the existing Liquidator does not believe that he has the required expertise available to him and has suggested that you should be appointed in his place.

Your Firm's Managing Partner is keen for you to accept the appointment as it is estimated that, due to its complexity, the Liquidation fees going forward will be in excess of £1 million. (9 marks)

Part (c) asked candidates to consider the appointment as a liquidator in relation to a conversion from an MVL to a CVL where another firm had acted as liquidator. In the circumstances the firm considering accepting the appointment had provided other services to the company and had had some involvement in matters connected to the MVL. No candidate got to the correct conclusion and this question seemed to trouble candidates, who sought to focus on the original engagement rather than think about what they would need to consider and what safeguards they could employ.

Question 2

Part (a)

(a) Set out the key practical tasks specific to these circumstances that you would seek to undertake prior to your appointment. (10 marks)

This question asked candidates to set out the practical considerations before taking the appointment as Administrator of a childcare provider. The aim of the question was to test the candidates' ability to identify areas of risk and provide practical ways of dealing with them.

Most candidates were able to identify general issues applicable to most appointment situations including the importance of health and safety and employee retention. Those candidates that achieved a good mark also identified potential sector specific issues and the impact of regulation.

Generally, the question was well answered but many candidates appeared to simply list out a general checklist rather than apply it to the situation and some candidates wasted time setting out post appointment actions and general, non-practical, points such as checking the qualification to act as an Insolvency Practitioner.

(b) Explain how, in these particular circumstances, the leased property may be dealt with. (10 marks)

Part (b)

The question outlined that there was a leasehold property and that it was uncertain whether the proposed purchaser of the business wished to acquire/retain this. The question asked candidates to set out how the leased premises may be dealt with.

Many candidates assumed that the purchaser wished to stay in the property and did not set out how the property would be dealt with if they decided they did not require it. When answering questions where there are different potential outcomes, in order to achieve a good mark, candidates should consider and outline matters relating to each possible scenario.

As with Part (a), a lot of good practical points on the lease position and the better candidates scored well where they clearly set out the options rather than just note everything they could about leases.

Out of the whole paper, this question averaged the highest mark percentage across both sections with one candidate in particular demonstrating a good understanding of what was being asked and setting this out clearly across both sections.

Question 3

This question was broken down into 4 different parts each testing a different area of the candidates' knowledge. Generally, candidates were able to achieve good marks for parts (b) and (d) however parts (a) and (c) were poorly answered.

Prior to her departure your colleague provided you with a summary of several outstanding matters for you to deal with:

(a) Reservation of title claim

Immediately following the appointment of Administrators, Birdlip (Foods) Limited ("Birdlip") made contact to claim title to goods remaining on site. A stocktake, undertaken on the day of the Administrators' appointment, identified that there were 50 x 25Kg bags of Dark Chocolate and 100 x 25Kg bags of Molasses all unopened and clearly marked with Birdlip's name.

During the course of the Administration and prior to the business sale, half of this stock was used. Oxenton has subsequently used the remaining stock.

Several weeks after the stocktake Birdlip provided information to support its reservation of title claim including a statement showing the following transactions since the start of its trading relationship with the Company as follows:

Total outstanding	£22,750
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Delivery date	Description	Quantity	Value £
01/09/2019	Molasses (25Kg bags)	200	6,000
09/09/2019	Molasses (25Kg bags)	175	5,250
15/09/2019	Dark Chocolate (25Kg bags)	100	11,250
22/09/2019	Molasses (25Kg bags)	250	7,000
28/09/2019	Dark Chocolate (25Kg bags)	100	11,250

Payment date	Amount £
12/09/2019	6,000
20/09/2019	12,000

Birdlip has provided a copy invoice which has the following clause printed on its reverse:

"Notwithstanding delivery and the passing of risk, property in and title to the goods shall remain with the seller until the seller has received payment of the full price of (a) all goods and/or services the subject of the contract and (b) all other goods and/or services supplied by the seller to the buyer under any contract whatsoever."

Birdlip is now chasing for return of their goods. (7 marks)

Part (a)

This was a reservation of title question but only fifty percent of candidates identified that the claim was being made under an 'all monies' clause despite this being clearly sign posted. Candidates failed to demonstrate an understanding as to how this would affect the claim with very few, for example, checking to determine if the account balance had ever reached zero.

Generally, whilst candidates appeared to have a basic knowledge of Retention of Title, there was very little by way of a commercial or practical knowledge shown in how to deal with the circumstances.

(b) Outstanding customer debt

You have received correspondence in relation to a £100,000 debt owed to the Company by Crickley (UK) Limited ("Crickley"). Crickley has written to you in response to a letter chasing for payment of the outstanding amount stating that it is subject to a Company Voluntary Arrangement and therefore will not be paying the outstanding amount. (6 marks)

Part (b)

In this part of the question candidates had to consider how to deal with a response from a debtor stating that the company was subject to a CVA and therefore unable to pay the debt.

On the whole this part was answered well. Most candidates recognised what you would need to do to pursue in the circumstances and identify if pre or post CVA debt.

No candidates mentioned potential ROT or bad debt relief.

(c) Items in the possession of a former Employee

Robert Smith was made redundant by the Administrators. Following this, a letter was sent to Robert requesting the return of certain Company owned items including a laptop (containing customer details), a mobile phone, samples pack and a petty cash float of £235.

Robert has responded stating that he is owed a month's salary, redundancy and notice pay, that he is unwilling to repay any float and that it is his intention to sell the other items to recoup some of his losses. (4 marks)

Part (c)

Candidates were asked to set out how they would deal with an employee that was refusing to return company property, due to amounts owed to him.

The majority of candidates demonstrated an understanding of the powers of an Administrator to demand delivery under Section 234, but no candidate thought to state the obvious and consider that it would be best to attempt to find an alternative and less drastic/costly solution before resorting to court action.

Many candidates identified data protection issues and highlighted that the Administrator should seek to ensure that the employees claims had been dealt with by the RPS.

(d) Accounting information

The Company used a web based accounting system and following the Administrators' appointment the supplier suspended access to the data. Access to the system and data is required so that investigations can be conducted. (3 marks)

Part (d)

This was a situation whereby an IT supplier had suspended access to a company's IT system.

Generally, this was well done as it was relatively easy to lift from the Insolvency Act. Better candidates mentioned a practical approach along with the technical and establishing debt/future payments.

Question 4

The 40-mark question was broken down into 5 different sections and had a numeric bias requiring various calculations.

Overall this question was poorly answered across all sections. The layout across all answers was poor, in particular at part (b).

(a) Briefly explain and quantify the claims that the Liquidator could make either to minimise the amount due to HMRC or to recover funds from HMRC for the estate. (10 marks)

Part (a)

Candidates were required to outline how a liquidator may reduce HMRC's claim or identify recoveries that may be made into the estate from HMRC.

There was no real understanding of this question with only one candidate scoring ok as they attempted to put figures around potential claims and offset. No candidate was however able to demonstrate how potential claims would affect the estate. Clearly this is not a tax exam and therefore only very basic calculations were sought.

(b) Calculate and set out the employee claims, clearly indicating the extent to which they are preferential and the amounts that would be paid by the Redundancy Payment Service. (8 marks)

Part (b)

This was a relatively basic employee liability calculation but was poorly attempted by all candidates. Most candidates couldn't distinguish between RPS and employee claims and how the apportionment works. This may be a symptom of candidates not having exposure to this area through their firms as employee claims will be handled by specialist teams or third parties.

(c) Set out how the existing and any future funds will be disbursed from the estate, making it clear in your answer the priority of entitlement for each creditor and the expected return to each. (10 marks)

Part (c)

This was a numeric question requiring completion of an outcome statement.

As you would expect with outcome statements, the layout was fine and most candidates could get the basics allocated to the correct section, however no candidate could deal with the more complex calculations or identified any potential set offs with RPS and HMRC. There were only some instances of candidates attempting to link their answers in parts (a) and (b) into the calculations.

(d) Explain how your answer to part (c) would differ had the priority agreement stated that Mr Augustine's standard security ranked first. (3 marks)

Part (d)

None of the candidates recognised that this was a question about marshalling of security, but some candidates did manage to pick up marks by stating the obvious fact about payment if the position was reversed.

You subsequently identify that the Company was mis-sold an interest rate hedging product and agree a settlement with the bank concerned. This settlement results in a refund of £300,000 into the estate.

(e) Explain how you would deal with this situation assuming that you distribute funds to creditors on 1 September 2020. (9 marks)

Part (e)

This part of the question introduced a situation where the insolvent estate was effectively returned to solvency due to an unexpected asset realisation. Candidates were required to set out how they would deal with the situation.

Only one candidate clearly set out the position having recognised the company was now solvent and the impact this would have on the claims position.

MARK PLAN

Question 1

GENERAL POINTS

<ul style="list-style-type: none">• Document decisions
<ul style="list-style-type: none">• Regulatory helplines
<ul style="list-style-type: none">• Legal advice
<ul style="list-style-type: none">• Consult ethics partner/compliance department
<ul style="list-style-type: none">• Document decisions
<ul style="list-style-type: none">• Regulatory helplines

PART A

<ul style="list-style-type: none">• Liquidator would review the conduct of the Administrator; self-review threat• Check that the company validly exit into CVL
Safeguards
<ul style="list-style-type: none">• Internal independent review of complaint and situation;• Joint appointment with external IP to review administrator's conduct• Consideration should be given to creditors' choice of IP• There could be additional costs to creditors of using a new IP• Consult with other major creditors• Change of IP within firm not likely to address issue
Conclusion
<ul style="list-style-type: none">• On balance, given the majority of consideration unpaid and therefore on the face of it a potentially valid issue, do not accept the appointment

PART B

<ul style="list-style-type: none">• Administrator would be responsible for reviewing the directors' conduct in the lead up to appointment• There is a potential self-review threat as involved in marketing the business for sale• Obligations in relation to the business sale are set out in SIP 16• VE Interactive – “not necessarily mean they should resign from their appointments [as Administrators]”• Acting for the Company not the directors; ensure advice, etc. was not to the directors personally
Safeguards
<ul style="list-style-type: none">• Different Firm IP for Administration appointment• Internal review of pre-pack prior to completion• Recommend purchaser approaches the Pre-pack pool• Ensure that work undertaken and correspondence with directors regarding responsibilities etc. is documented on file.• Investigations conducted by independent team to those involved in the sale process.
Conclusion
<ul style="list-style-type: none">• Creditors consulted and support transaction• Every effort made by IP; therefore, unlikely to be criticism• Creditors may be prejudiced by a change of IP/strategy• Safeguards can be put in place• Accept appointment

PART C

<ul style="list-style-type: none">• Due to previous relationship there could be a perceived conflict of interest
<ul style="list-style-type: none">• As an existing client there could be a familiarity threat compromising objectivity
<ul style="list-style-type: none">• There is a potential self-review threat relating to the declaration of solvency; would need to establish extent of work but the question suggests that it was just putting information provided into appropriate format. Therefore, may not be a conflict in itself.
<ul style="list-style-type: none">• There could be a self-review threat if the tax work could or should have identified the potential liability.
<ul style="list-style-type: none">• Consider why we were not appointed liquidators in the MVL.
<ul style="list-style-type: none">• Consider if the nature of the liability may be that it couldn't have reasonably been identified or expected.

Question 2

PART A

<ul style="list-style-type: none">• Contact Care Inspectorate/Regulators
<ul style="list-style-type: none">• Health and Safety review
<ul style="list-style-type: none">• Site visit
<ul style="list-style-type: none">• Check DBS records
<ul style="list-style-type: none">• Check qualification records
<ul style="list-style-type: none">• Contact parents to explain situation (potentially)
<ul style="list-style-type: none">• Consider specialist sector assistance
<ul style="list-style-type: none">• Establish first aiders/fire marshals
<ul style="list-style-type: none">• Establish any other key employees
<ul style="list-style-type: none">• Check key processes – e.g. safeguarding/parent pick up
<ul style="list-style-type: none">• Ask director to commence consultation with employees
<ul style="list-style-type: none">• Prepare cash flow and trading account forecast for the expected period of trade
<ul style="list-style-type: none">• Establish landlord position
<ul style="list-style-type: none">• Contact lender to explain situation and strategy (if not already)
<ul style="list-style-type: none">• Discuss funding requirements for trading period with lender
<ul style="list-style-type: none">• Obtain indemnity from purchaser for trading losses
<ul style="list-style-type: none">• Contact open cover insurers to discuss the situation
<ul style="list-style-type: none">• Establish payment terms and whether any service has been paid in advance
<ul style="list-style-type: none">• Establish staff mobilisation plan for site attendance following appointment
<ul style="list-style-type: none">• Ensure potential purchaser bound into purchase
<ul style="list-style-type: none">• Check deliverability of offer – funding, sector expertise etc.

PART B

<ul style="list-style-type: none">• Obtain a copy of the lease
<ul style="list-style-type: none">• Establish rent outstanding
<ul style="list-style-type: none">• Establish if any guarantors to the lease
<ul style="list-style-type: none">○ If there are contact guarantors
<ul style="list-style-type: none">• Seek legal advice on the lease and its ability to be transferred, assigned, terminated for insolvency events
<ul style="list-style-type: none">• Obtain a valuation of the lease
<ul style="list-style-type: none">○ However unlikely to be any value as recent
<ul style="list-style-type: none">• Establish if the purchaser wishes to remain in occupation
<ul style="list-style-type: none">• If wish to stay long term agree a price for the Company's interest in the lease
<ul style="list-style-type: none">• If does not wish to remain
<ul style="list-style-type: none">○ Notify landlord that property not being used
<ul style="list-style-type: none">○ Consider marketing for sale if any value
<ul style="list-style-type: none">○ Discuss situation with guarantor (if any) – consider if they wish to take a lease assignment.
<ul style="list-style-type: none">○ try to agree a surrender with landlord
<ul style="list-style-type: none">○ If no surrender establish any termination terms of lease
<ul style="list-style-type: none">○ Consider exercising any break rights to minimise creditor claim
<ul style="list-style-type: none">• If do wish to remain,
<ul style="list-style-type: none">○ Licence to occupy for a short period
<ul style="list-style-type: none">○ Provide purchaser with the opportunity to agree new lease with the landlord; and
<ul style="list-style-type: none">○ Surrender of lease; or
<ul style="list-style-type: none">○ Provide opportunity to transfer the lease
<ul style="list-style-type: none">○ Agree terms with purchaser and landlord
<ul style="list-style-type: none">○ Ensure licence fee covers relevant costs and current rent

<ul style="list-style-type: none">• Rent arrears will have to be paid before assignment
<ul style="list-style-type: none">• Public liability insurance maintained until property surrendered or fully assigned.
<ul style="list-style-type: none">• Commission a formal review of condition to establish dilapidations
<ul style="list-style-type: none">• Consider advice in relation to dilapidation claims
<ul style="list-style-type: none">• If exit via liquidation, consider disclaimer if lease not surrendered

Question 3

PART A

<ul style="list-style-type: none">• Appears to be an 'all-monies' clause																								
<ul style="list-style-type: none">• Account does not reach zero during course of trade:<table border="1"><thead><tr><th>Date</th><th>Amount</th><th>Bal</th></tr></thead><tbody><tr><td>01/09/2018</td><td>6,000</td><td>6,000</td></tr><tr><td>09/09/2018</td><td>5,250</td><td>11,250</td></tr><tr><td>12/09/2018</td><td>(6,000)</td><td>5,250</td></tr><tr><td>15/09/2018</td><td>11,250</td><td>16,500</td></tr><tr><td>20/09/2017</td><td>(12,000)</td><td>4,500</td></tr><tr><td>22/09/2018</td><td>7,000</td><td>11,500</td></tr><tr><td>28/09/2018</td><td>11,250</td><td>22,750</td></tr></tbody></table>	Date	Amount	Bal	01/09/2018	6,000	6,000	09/09/2018	5,250	11,250	12/09/2018	(6,000)	5,250	15/09/2018	11,250	16,500	20/09/2017	(12,000)	4,500	22/09/2018	7,000	11,500	28/09/2018	11,250	22,750
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22/09/2018	7,000	11,500																						
28/09/2018	11,250	22,750																						
<ul style="list-style-type: none">• Therefore, not necessary to identify goods to particular invoices																								
<ul style="list-style-type: none">• Items clearly marked as being supplied by Birdlip.																								
<ul style="list-style-type: none">• Terms and conditions are on reverse of invoice – post contractual																								
<ul style="list-style-type: none">• May be incorporated into contract through course of dealing.<ul style="list-style-type: none">○ Only trading with supplier for a short period (4 weeks); may not be sufficient to prove course of dealing○ Payments made and therefore likely that invoices containing the clauses have been received by the Company.																								
<ul style="list-style-type: none">• Seek legal advice as to whether this could be considered sufficient course of dealing for the terms to be adequately incorporated.																								
<ul style="list-style-type: none">• Seek further detail as to whether terms incorporated elsewhere																								
<ul style="list-style-type: none">• If no further detail (and subject to legal advice) reject claim on the basis of failure to incorporate the terms.																								
<ul style="list-style-type: none">• If subsequently determined that the claim is valid:																								
<ul style="list-style-type: none">• Administrator may be liable for all stock on site at appointment<ul style="list-style-type: none">○ 50 bags Chocolate @ £112.50 = £5,625																								

<ul style="list-style-type: none"> ○ 100 bags Molasses @ £28.00 = £2,800
<ul style="list-style-type: none"> • Pay for goods used in the administration period (half)
<ul style="list-style-type: none"> ○ 25 bags Chocolate @ £112.50 = £2,812.50
<ul style="list-style-type: none"> ○ 50 bags Molasses @ £28.00 = £1,400 (CORRECT) or ○ 50 bags Molasses @ £30.00 = £1,500
<ul style="list-style-type: none"> ○ If unable to determine by reference to markings, assume FIFO stock to determine price per unit (most recent delivery of Molasses is cheaper than previous)
<ul style="list-style-type: none"> • Check terms of sale contract with Oxenton to establish how stock dealt with
<ul style="list-style-type: none"> • Assuming ROT stock excluded, and indemnity included contact Oxenton to make payment to supplier
<ul style="list-style-type: none"> • May be necessary to enforce indemnity
<ul style="list-style-type: none"> • Possibility that Company will have to pay for stock used by Oxenton and rely on indemnity.
<ul style="list-style-type: none"> • Document decisions
<ul style="list-style-type: none"> • Notify supplier in writing of decision
<ul style="list-style-type: none"> • Goods have not changed form

PART B

<ul style="list-style-type: none"> • Check Crickley's status on companies house
<ul style="list-style-type: none"> • Contact the supervisory of the VA
<ul style="list-style-type: none"> • Obtain a copy of the proposal
<ul style="list-style-type: none"> • Obtain chairman's report
<ul style="list-style-type: none"> ○ Obtain copy of any other reports issued by the supervisor
<ul style="list-style-type: none"> ○ Establish the relevant date
<ul style="list-style-type: none"> ○ Check whether part or all of debt falls within the CVA or is a post CVA liability
<ul style="list-style-type: none"> • If post CVA then
<ul style="list-style-type: none"> ○ Contact Crickley and explain, demand payment

<ul style="list-style-type: none"> ○ Consider enforcement
<ul style="list-style-type: none"> ○ Consider notifying Supervisor if does not pay as could be a term of default.
<ul style="list-style-type: none"> • If any pre-CVA
<ul style="list-style-type: none"> ○ Confirm if a proof of debt has been submitted into the CVA
<ul style="list-style-type: none"> ○ If not submit proof of debt to Supervisor
<ul style="list-style-type: none"> ○ Ensure Supervisors' records updated with Administrators' details
<ul style="list-style-type: none"> • Consider the impact of the CVA on the Administration in terms of remaining term of CVA and commerciality of extending administration.
<ul style="list-style-type: none"> • Consider bad debt relief claim in relation to the debt
<ul style="list-style-type: none"> • Check whether any other rights such as ROT
<ul style="list-style-type: none"> • Consider if it would be appropriate and commercial to challenge the CVA.
<ul style="list-style-type: none"> • Monitor the progress of the CVA and any distributions payable to the company.

PART C

<ul style="list-style-type: none"> • Establish value of equipment and cost of collection
<ul style="list-style-type: none"> • Establish how much employee owed
<ul style="list-style-type: none"> • Establish what is on computer - Data protection issues in relation to contents
<ul style="list-style-type: none"> • Consider whether reasonable to offer to sell equipment to the employee to realise some value and deal with issue.
<ul style="list-style-type: none"> ○ Would require undertaking to wipe and destroy data/software
<ul style="list-style-type: none"> • Consider blocking mobile phone
<ul style="list-style-type: none"> • Write to employee stating:
<ul style="list-style-type: none"> ○ Demand delivery up of items under s234 Insolvency Act 1986 and threaten application to court including an order for costs
<ul style="list-style-type: none"> ○ Company property; cannot be sold, used or otherwise disposed of
<ul style="list-style-type: none"> ○ Confidential information on the items

<ul style="list-style-type: none"> ○ Software licences cannot be used
<ul style="list-style-type: none"> • Unlikely to be cost effective to recover
<ul style="list-style-type: none"> • Provide details of how to claim outstanding liabilities from the RPS
<ul style="list-style-type: none"> • Provide employee details to the RPS if not already done so

PART D

<ul style="list-style-type: none"> • Contact supplier to obtain access
<ul style="list-style-type: none"> ○ Explain needed for investigations
<ul style="list-style-type: none"> ○ In the interests of creditors as a whole, including them
<ul style="list-style-type: none"> • If access refused, consider:
<ul style="list-style-type: none"> ○ Establish what payment the supplier requires for access
<ul style="list-style-type: none"> ○ Make a formal request making reference to S236
<ul style="list-style-type: none"> ○ Consider cost/benefit of s236 application v payment for access
<ul style="list-style-type: none"> ○ Making a Section 236 application.
<ul style="list-style-type: none"> • S233A Insolvency Act 1986
<ul style="list-style-type: none"> • May be necessary for the officeholder to provide a personal guarantee

Question 4

PART A

Bad debt relief claim				
<ul style="list-style-type: none"> • Appears to be VAT registered 				
<ul style="list-style-type: none"> • Debts did not recover full value 				
	Realised	Recovery - per Q	Calculation	Output
Book value	135,000	60%	$135000/60\%=$	225,000
	Realised	Book Value	Calculation	Output
Bad debt	135,000	225000	$225000-135000=$	90,000
	Bad Debt	Net	Calculation	Output
VAT Element	90,000	75000	$90000-(90000/1.2)=$	15,000
<ul style="list-style-type: none"> • £15,000 VAT bad debt relief claim 				
<ul style="list-style-type: none"> • Realisation into the estate (not set off) 				
<ul style="list-style-type: none"> • Debt must be 6 months overdue 				
<ul style="list-style-type: none"> • Output VAT must have been paid 				
<ul style="list-style-type: none"> • Have to retain certain information 				
Terminal loss relief claim				
<ul style="list-style-type: none"> • Losses for final 12 months of trade 				
<ul style="list-style-type: none"> • Carried back against prior 3 years 				
<ul style="list-style-type: none"> • Losses £600,000, profits in last 3 years exceed this 				
<ul style="list-style-type: none"> • Loss can be carried back for relief 				
<ul style="list-style-type: none"> • $£600,000 \times 20\% = £120,000$ reclaim 				
<ul style="list-style-type: none"> • £25,000 of tax not paid 				
<ul style="list-style-type: none"> • Reclaim of £100,000 				

<ul style="list-style-type: none">• Subject to crown set off
<ul style="list-style-type: none">○ PAYE £50,000
<ul style="list-style-type: none">○ RPS claim

PART B

Salary 52,000
Weekly pay 1,000

Stat limit 525

		Total	Pref	Non-pref
Arrears of pay	2 weeks	2,000	800	1,200
Redundancy	see below	2,625	-	2,625
Notice	see below	12,123	-	12,123
Protective Award	see below	13,000	-	13,000
		<u>29,748</u>	<u>800</u>	<u>28,948</u>

	RPS			Residual			
	Total	Pref	Non-pref	Total	Pref	Non-pref	
2x£525	1,050	1050/2000x800	420	630	950	380	570
as left	2,625	-	2,625	-	-	-	-
see below	3,163	-	3,163	8,960	-	8,960	
see below	3,150	-	3,150	9,850	-	9,850	
	<u>9,988</u>		<u>420</u>	<u>9,568</u>	<u>19,760</u>	<u>380</u>	<u>19,380</u>

Redundancy

Age 25
Service 7

Weeks due	Years	Multiplier	
Under 22 years	4	0.5	2
	3	1	3
			<u>5</u>
Capped at weekly limit			2625

Protective Award

More than 20 employees made redundant in last 12 months
Assume maximum award - 90 days (13 weeks)
RPS only pay out up to 8 weeks
Arrears of wages counts within the 8 weeks paid by RPS
Not preferential as forms part of arrears of pay and £800 limi reached

	Total
Weeks	13
Weekly pay	<u>1,000</u>
Total due	13,000
RPO claim	
Weeks (8 - 2 week arrears)	6
Weekly limit	<u>525</u>
Total Paid by RPS	(3,150)
Balance	<u>9,850</u>

Notice Pay

	Claim	Mitigation	Net
Statutory Notice	7 Weeks	3675 7x£525	511.7
Contractual Notice	3 months	13000 £52,000/12 x 3	877.2 (assumed 12 weeks)
			3163.3
			12122.8

PART C

			Total	Fixed	Floating	
Realisations	Per question		385,100	250,000	135,100	
Agents costs			(3,000)	(3,000)		
Legal costs			(2,500)	(2,500)		
Other costs			(300)		(300)	
Current position			<u>379,300</u>	<u>244,500</u>	<u>134,800</u>	
Bad debt relief	From part (a)		15,000		15,000	
Loss relief claim	From part (a)	£120,000 (Gross) - £20,000 CT outstanding - £50,000 (PAYE) - £998.3 (RPS Set off)	40,012		40,012	
Liquidator costs	Per question		(25,000)	(15,000)	(10,000)	Any reasonable allocation
Fixed Charge claim - Trustees of the Fescue Pension scheme			(200,000)	(200,000)		Land Registry registration ranks first
Fixed Charge claim - Mr Augustine			(29,500)	(29,500)		
Available for preferential creditors			<u>179,812</u>	<u>-</u>	<u>179,812</u>	
Preferential creditors	RPS		-	Discharged through crown set off		
	Employee	From part (b)	<u>(380)</u>			
Amount available for prescribed part			179,432			
Prescribed part			<u>(38,886)</u>			
Amount available for floating chargeholder			140,545			
Floating chargeholder		175000-29500	<u>(145,500)</u>			
Shortfall to chargeholder			(4,955)			
Prescribed part			<u>38,886</u>			
Amount available for unsecured, non-preferential creditors			38,886			
HMRC	No claim after part (a)		0			
RPS	No claim after crown set off		0			
Employees			(19,380)			
Suppliers			(50,000)			
Deficit to creditors			<u>(30,493)</u>			
Returns						
Trustees of the Fescue Pension scheme		200,000		100.0%		
Mr Augustine		170,045		97.2%		
Preferential creditors		380		100.0%		
Non-preferential, unsecured creditors				56.0%		
Employees	-56%x-19379.5	<u>10,862</u>				
Total employee		<u>11,242</u>				
Suppliers	-56%x-50000	28,024				

PART D

<ul style="list-style-type: none">• Mr Augustine has a Standard Security and Floating Charge, the Pension scheme a standard security only.
<ul style="list-style-type: none">• Therefore, after payment of the first ranking chargeholder there would only be £54,500 left for the second chargeholder.
<ul style="list-style-type: none">• As the second chargeholder has no floating charge the marshalling principal would be applied
<ul style="list-style-type: none">• As such it would be assumed that the first chargeholder would rely on its floating charge initially allowing the second chargeholder to effectively benefit from the floating charge.
<ul style="list-style-type: none">• The overall result would be the same but the loss in the outcome statement would be suffered by the second ranking chargeholder; in this case the Pension scheme.

PART E

<ul style="list-style-type: none">• The estate is now 'solvent'
<ul style="list-style-type: none">• Not necessary to 'change' insolvency process
<ul style="list-style-type: none">• CVL liquidator can distribute to shareholders
<ul style="list-style-type: none">• Could consider exit into CVA
<ul style="list-style-type: none">• Tax may be payable on the IRHP refund<ul style="list-style-type: none">○ If so account to HMRC for the tax
<ul style="list-style-type: none">• Statutory interest payable on unsecured debts
<ul style="list-style-type: none">• 1 year interest payable on unsecured debts
<ul style="list-style-type: none">• Interest payable at 8% p.a.
<ul style="list-style-type: none">• Employee £15,800 interest = £1,264
<ul style="list-style-type: none">• Suppliers £50,000, interest = £4,000
<ul style="list-style-type: none">• Distribution to shareholders
<ul style="list-style-type: none">• Reassess bonding level

JOINT INSOLVENCY EXAMINATION BOARD

PERSONAL INSOLVENCY (Scotland)

EXAMINER'S REPORT AND MARK PLAN FOR THE NOVEMBER 2019 SITTING

General comments

This was the second year of both the new format of the Personal Insolvency Exam and the use of electronic examinations.

This was a straightforward paper for a well prepared candidate with questions about the family home, implications of the award of sequestration and preparation of a relatively simple cash flow and estimated outcome statement. The only less common question was one about succession planning which should be a genuine consideration for any prospective IP. This topic has been covered in previous years, so any candidate who had followed guidance about completing past papers would have been able to deal with this question.

From an Examiner's perspective the marking of the exam continues to be significantly easier due to the speed of transmission of scripts (hours after sitting the exam) and no issues with legibility of handwriting. The structure of answers continues to be better and there is also less repetition of points in comparison to handwritten scripts.

In terms of overall themes, however, there continues to be a weakness in the advice given about options available to an individual facing difficulty. This is not something that can be answered from a bullet point list of features of each debt solution. Candidates need to show that they properly understand when an option is appropriate and that they can adapt their answers to the scenario given in the question.

In addition in questions requiring calculations, candidates must remember that if they insert a formula in a cell to generate their answer, the Examiner does not have the benefit of seeing this. They must type out their calculations so it is visible to the Examiner. There were a number of scripts where no marks could be given for a wrong figure but where potentially some marks could have been gained if the Examiner had been able to see the candidates thought process.

**Personal Insolvency Exam
November 2019
Examiners' comments**

Question 1

This question explored the steps the Trustee should take to deal with a Family Home occupied by an elderly debtor and her disabled son. The position was further complicated by the level of interest accruing on the equity release plan, which will rapidly reduce the level of equity in the property if no action is taken.

This question was the best answered one in this year's paper and some excellent answers were produced

Requirements

- (a) Set out the steps that you should take to secure your interest in the property. Explain how you would realise your interest in the property taking into account the specific circumstances of the case. (15 marks)**

This is a "textbook" exam question which was generally reflected in the marks. Candidates did well in recognising the initial steps which needed to be taken to protect the Trustee's interest, establish the level of equity in the property and communicate with Mrs Lawrence about the Trustee's interest. Only a few candidates recognised that the rate at which interest was accruing on the security meant that it really was in the creditors' interests that the equity be realised quickly. A few candidates strongly suggested that the Scottish Government Mortgage to Rent Scheme would be suitable here when it clearly wasn't for a number of reasons.

This question is at the extreme end of the circumstances which a Trustee will face when realising equity but does happen in reality. There was a worrying lack of resolve on the part of some candidates to force this issue without justifying why. There were also a few references to reputational issues and press interest. I accept that these are valid concerns however, while they may affect how the IP carries out their role in terms of the number of meetings offered, etc they should not ultimately prevent the Trustee from carrying out their role.

- (b) Explain the steps that you should take if you receive a letter of complaint from Mrs Lawrence regarding your actions. What steps could be taken by Mrs Lawrence if she does not feel that her complaint has been addressed by you? (5 marks)**

Overall this question was answered well with candidates able to make constructive suggestions about responding to the complaint and what Mrs Lawrence could do next.

Total: 20 marks

Question 2

Requirements

This question required candidates to consider the steps which an insolvency practitioner should take in relation to succession planning, a topic which should be considered by all Insolvency Practitioners. The marks in this question were on the whole good.

- (a) Set out the arrangements that an only remaining Authorised Insolvency Practitioner such as Mr Robinson should make regarding succession planning generally. (12 marks)**

Approximately half of candidates were aware of the overall principles that apply in this area and the existence of the Insolvency Guidance paper. Those that weren't aware were still mainly able to offer some practical suggestions about what Mr Robinson should do. Not all candidates recognised that he had an obligation to have a succession plan in place already.

- (b) What additional steps will Mr Robinson need to take in advance of his retirement? (5 marks)**

Some good practical points were made by candidates, here but it was apparent, that few if any had to deal with this in practice since few candidates correctly outlined the process which should be followed for a transfer of multiple cases despite it being set out in the Act.

- (c) Other than retirement, what are the other circumstances in which an Authorised Insolvency Practitioner might cease to act in relation to formal insolvency appointments? (3 marks)**

It was possible to score very highly in this question from a quick review of the circumstances set out in the Act.

Total: 20 marks

Question 3

Requirements

This question required candidates to write to a recently sequestrated debtor to advise him of the consequences of this and the next steps which he could take. All candidates responded in a letter format and made an effort to structure their responses as required.

Write a letter to Mr Mangle. In your letter:

- (a) **Explain to Mr Mangle whether he is obliged to continue to follow the Accountant in Bankruptcy's Agent's instructions to cease trading and close the pub. Explain any implications for Mr Mangle if he fails to do as the Agent has instructed. (2 marks)**

This part of the question was well answered, candidates were in the main able to identify that the Trustee had the power to close the business and that the debtor had a duty to co-operate with them. They were mostly able to identify the consequences of failing to co-operate with the Trustee, though relatively few mentioned that the Trustee could delay granting of the discharge, which in reality is probably the most likely outcome of a lack of co-operation.

- (b) **Set out the consequences for Mr Mangle of an Award of Sequestration having been made against him. (6 marks)**

Similarly answers to this part of the question were good although some could have been more specific to the issues raised in the question. For example, consequences for the premises licence and the impact on where the debtor lives (flat is part of pub leasehold premises). Few if any candidates actually knew what the implications for the premises licence of an Award of Sequestration would be, although some were able to identify the issue and make an educated assessment.

- (c) **In light of his circumstances, set out the options that are available to Mr Mangle, clearly giving your advice as to how he should proceed. As part of providing this advice, set out the practical next steps to be taken. (12 marks)**

The approaches to this part of the question were much more mixed. The candidates who achieved the highest marks were those who were able to take their "IP hats" off and think about advising the debtor. The first step was for the debtor to consider whether the business in its present form is realistically worth saving. Is it actually profitable? The second point of note was that although funds were possibly available, these funds are Mrs Mangle's and there is no obligation to pay them to the Trustee. While Mrs Mangle has funds available that could facilitate a recall this does not mean that she necessarily should. The best answers recognised this and that other alternatives were to secure a transfer of the business to Mrs Mangle for a smaller sum, assuming the agreement of Trustee, landlord and a resolution of the premises licence issue. The other option would be to walk away from the business altogether, seek other employment and accommodation and allow the sequestration to run its course.

A small number of candidates appeared to think that the debtor could continue to trade without the consent of the Trustee which would not generally be best advice.

Total: 20 marks

Question 4

Requirements

This question explored a scenario where a Trustee traded a business for a short period to realise the best value for the stock on the premises. It required the preparation of a cash flow for this 6 week period and an Estimated Outcome Statement for the Partnership. This question had the widest range of marks from very good to poor

- (a) **Assuming that you are going to allow the business to continue trading until it closes permanently on Christmas Eve, prepare a projected weekly cash flow forecast for the six week period beginning today. Show the final balance of funds in hand after trading ceases. State any assumptions that you make. (14 marks)**

The layout of the responses to this question were generally good. Some candidates didn't acknowledge in their responses that there would be a need to settle some expenses incurred after the final day of trading. In addition, a number of candidates appeared not to provide any detailed workings for some more complex figures, for example, income from the sale of stock, PAYE/NIC. It is possible that these have been inserted as a formula in a cell. Candidates should pay attention to the warnings on the Exam software that formulae will not be visible to the Examiner. In these circumstances, no marks can be given to an incorrect answer.

Assuming that the candidates calculated mark-up correctly then it was effective to pay the ROT creditor for the value of stock and sell it. Equally marks were given where the decision was made to ring fence this stock and not sell it. However, there were a number of candidates who failed to recognise that the Duress payment required would only be the value of the stock and that it was not necessary or sensible to pay the full £24,000 to the creditor.

- (b) **Outline the key trading related issues that would need to be addressed if the Pet Emporium is to trade. (6 marks)**

Candidates confined their answers to the issues in the question and marks were generally good.

- (c) **Assuming that the business trades for the six week period, prepare an Estimated Outcome Statement which shows the likely return to the unsecured creditors from the business. State any assumptions that you make. (14 marks)**

Again the layout and responses to this question were good. A pleasing number of candidates identified that there would be a CGT liability on the disposal of the asset, albeit did not always put it in the correct place in the order of distribution. Not all candidates recognised that the overdraft was secured and a number of those who did so, did not then reflect it in the numbers.

- (d) **Comment on the options available to Sarah and Fiona to address their personal positions and your recommendation for what they should each do. (6 marks)**

This part of the question was answered worst. Candidates struggled to assess the position in the question and a number of candidates treated this as an exercise in writing a list of features and benefits of each insolvency process.

Candidates generally correctly identified that the sisters would be jointly and severally liable for the partnership debts. However, some then ignored the partnership debts when commenting on the solvency position of the sisters or in the case of Fiona, her suitability for the Minimal Asset Process.

Few candidates identified the implications for Sarah's employment of a sequestration appointment.

Total: 40 marks

**Personal Insolvency
Mark plan**

QUESTION 1

To secure and realise property (15 marks)

The property is considered to be a Family Home under s113(7)(b) of the BSA 2016 as it is resided in by the debtor and a child of the family. The Trustee needs to take steps to realise his interest in the property within 3 years of the sequestration or take action to prevent the asset re-vesting. The AIB's Notes for Guidance suggest that matters should be progressed in the first year of administration, which is particularly appropriate here due to the interest accruing on the loan.

Obtain a copy of the property search.

Ensure an inhibition has been registered against the property.

Write to Lassiter's Loans to put them on notice of the Trustee's appointment and of the fact that no further advances should be made to Ms Lawrence.

Seek Mrs Lawrence's consent to access being afforded to the property in order that your agent can carry out an internal valuation of the property (you currently have a desk top). Allowing access should be in Mrs Lawrence's interests.

If an internal valuation is carried out, ask your agent to report to you on the extent to which the property has been modified given the son's disabilities and the impact on value.

If access is not granted consider either a drive by valuation (though this will not provide much information about the extent of the alterations) or alternatively, making an application to the Sheriff Court under s215 to allow access to the property for the purposes of an internal valuation.

Once the valuation has been carried out the equity position can be determined. Based on the estimated value of the property it appears that there is sufficient equity to repay all known liabilities.

Ask mortgage company to confirm whether any redemption penalties apply. Equity release plans commonly have significant early redemption penalties which could reduce the amount of equity available upon sale.

A letter should be sent to Mrs Lawrence asking whether she (or more likely a third party) is in a position to either purchase the Trustee's interest in the property or if she is agreeable to the property being marketed for sale voluntarily.

In addition to a third party buying out the interest Mrs Lawrence could also consider whether she can raise additional funds against the property by way of an additional lifetime mortgage. Given the rate that interest is accruing on Lassiter's Loans this is unlikely.

Consideration could also be given to whether a social landlord would purchase the property. However, the value of the property would appear to be too high and the restrictions on the level of equity which can be paid out (£17,040 for over 60's) would make an application to the Scottish Government Mortgage to Rent Scheme inappropriate in this case.

Given Mrs Lawrence's position, a meeting could also be offered, with her and her representatives at which both her and her son's circumstances could be discussed.

Mrs Lawrence could also be asked to provide further information regarding her son's disability in particular any medical reports which set out the extent of his disability and the potential impact of a house move.

If Mrs Lawrence does not respond or responds to advise that she is not in a position to purchase the Trustee's interest / market the property voluntarily, then the Trustee will need to consider taking action to realise his interest.

As the property is a Family home, if the debtor and her son will not consent, the Trustee needs the consent of the Court to sell.

The circumstances of this case present the Trustee with two problems:-

Firstly the property is also occupied by Mrs Lawrence's disabled son.

Secondly the equity release plan has interest accruing at the rate of 6% per annum. Unless house prices are increasing at a similar rate, the equity in the property will erode as interest of approximately £8,000 will be added to the loan over the course of the next 12 months. This will then be compounded.

If the Trustee delays the realisation of his interest in the property, the equity may not be sufficient to enable creditors to be paid in full.

Under section 113 of the BSA 2016

the sheriff, after having regard to all the circumstances of the case including—

(c) the needs and financial resources of any child of the family,

(d) the interests of the creditors, and

(e) the length of the period during which (whether before or after the relevant date) the family home was used as a residence by any of the persons referred to in paragraphs (a) to (c), may refuse to grant the application or may postpone the granting of the application for such period (not exceeding 3 years) as the sheriff may consider reasonable in the circumstances or may grant the application subject to such conditions as the sheriff may prescribe.

There is previous case law *Gourlay vs Gourlay* where the Sheriff refused to grant orders to sell on the grounds that the debtor's spouse was critically ill within the house. That was an extreme case. Conversely in other cases the Sheriff Courts have been willing to evict elderly and infirm debtors residing in a property with their adult children with mental health issues, with appropriate delay for re housing.

Once you have the surveyor's comments on the extent of any reduction in value due to the adaptations and a better understanding of the health condition of Mrs Lawrences' son then take advice from your legal agent on the likelihood of orders being granted and the extent to which implementation may be delayed.

Prior to issuing legal proceedings, s 113 requires the Trustee to serve notice on the Local Authority of their intention to raise action.

If it becomes apparent that legal action will have to be issued, consider attempting to engage with social services at an early stage particularly if the debtor and her son will be reliant upon the Council to re-house them.

Prior to raising any proceedings in relation to the Family Home, the Trustee must secure the approval of the Accountant in Bankruptcy to their proposed strategy. This is done by completing and submitting an Appendix L

Letter of complaint (5 marks)

Mrs Lawrence's letter should be acknowledged promptly and passed to the person within the firm responsible for complaints handling.

A meeting could then be offered to try and resolve any issues. Whether a meeting takes place or not, a written response to the complaint should be issued
Prior to responding consider whether any third party input or input from the Trustee's legal agent is required.

The response should be jargon free and use plain English. If there has been an error in administration an apology should be given and the error addressed. If however, the debtor does simply not understand the position then a clear explanation of the position should be provided.

A debtor has the right to make a complaint through the Insolvency Complaints Gateway which is hosted by the Insolvency Service. The debtor should be advised of this right when the initial response is sent.

The Insolvency Practitioner's authorising body will then consider any complaints referred to them through the gateway.

Mrs Lawrence could also write to the Commissioners (if there are any in this case) or the Accountant in Bankruptcy. Finally if dissatisfied with the actions of the Trustee she could appeal to the Sheriff Court.

If the complaint relates to on-going legal proceedings, Mrs Lawrence should raise any issues as part of those proceedings

Question 2

(a) 12 marks

Insolvency appointments are personal to an insolvency practitioner who has an obligation to ensure that they are properly managed and to have appropriate contingency arrangements in place to cover a change in their circumstances.

Succession Planning is the topic of an Insolvency Guidance Paper.

The over-riding principle is to ensure that the interests of creditors and other stakeholders are not prejudiced.

Insolvency Practitioners must consider on a regular basis the arrangements that are in place to ensure continuity in the event of death, incapacity or retirement.

These arrangements should be reviewed as circumstances dictate, but at least annually.

As Mr Robinson is a sole practitioner he should already have in place a workable continuity agreement. This would involve have discussions with and an arrangement in place with a nominated successor.

If no arrangement is in place or if it needs to be reviewed consider if there is another member of staff at Ramsay & Co who has sufficient expertise and experience to take over the appointments upon Mr Robinson retiring, then arrangements should be made for them to obtain their licence through sitting the JIEB and applying for a licence.

If not, consider whether another qualified IP should be recruited to the practice in order that there can be an orderly handover of cases in advance of retirement.

This will require wider input from Mr Robinson's other partners to consider whether this income stream is one they would want to protect for the future.

If it is neither desirable or possible to retain an IP within the Firm then arrangements would need to be made with a third party IP who would be willing to buy the WIP/assume responsibility depending on value.

An IP is required to lodge a copy of this continuity agreement with both his RPB and also professional indemnity insurers.

A continuity agreement should typically contains:

- i) a clear statement of the circumstances in which the agreement would become operative
- ii) the extent and frequency of disclosure to the nominated successor of case details and financial information
- iii) detailed provision regarding the steps to be taken by the nominated successor when the agreement becomes operative, ownership or access to case working papers, access to practice records and financial arrangements.

In addition, consider putting in place a power of attorney and consider key man insurance to cover any costs in the event of Mr Robinson's death prior to retirement

(b) (5 marks)

In advance of retirement steps should be taken to review the cases and identify any that would be appropriate for closure rather than a transfer.

Based on this review consider whether Mr Robinson could delay or accelerate his retirement within the 2 year time frame proposed.

Consider the practical arrangements for those 2 days per weeks when Mr Robinson will be out of the office in advance of his retirement and how urgent issues will be dealt with.

The proposed recipient of the cases would have to be notified of the proposed transfer and their consents to act obtained.

For Mr Robinson's sequestration cases under section 66 of the Bankruptcy (Scotland) Act 2016, he would make an application to the Accountant in Bankruptcy for the cases to be transferred to a consenting Insolvency Practitioner.

Mr Robinson would advise all persons having an interest that he has made this application (debtor and creditors) and advise them of their right to make representations to AIB.

Mr Robinson should provide the AIB with the proposed replacement Trustee's consent to Act.

The AIB will make a determination as to who shall be the Trustee, but will normally agree to the IP proposed by Mr Robinson unless there are representations made.

The Notes for Guidance for Protected Trust Deeds state that the Trustee may make such arrangements as are appropriate to resign. An appropriately executed Deed of Assumption (signed by existing and replacement Trustees) should be signed.

This should be sent to AIB to update ROI.

If a large number of cases are to be transferred this can be done by way of a schedule to the Deed of Assumption.

Creditors and the Debtors should be advised of any transfer of Trustee by way of a Deed of Assumption by letter to them advising of their right to make representations which Mr Robinson would then have to consider.

If no other IP is appointed at Ramsay & Co, consider whether Mr Robinson ceases to accept new appointments in the 12 months prior to the proposed retirement date

Notify RPB and PI Insurer of intended retirement date.

(c) (3 marks)

An office holder can cease to act on:

- Death;
- Change in personal circumstances, for example, ill health, mental health incapacity, change in firms retirement policy
- because the further discharge of duties is prevented or made impracticable by a conflict of interest
- they cease to be qualified to act under section 49. For example they lose their licence, or their licence is restricted following disciplinary investigation;
- an Interim Trustee may not be appointed at a Meeting of creditors;
- A Trustee may be removed at a Meeting of Creditors or otherwise by AIB

Question 3

(a) Is Mr Mangle obliged to follow the Agents advice? (2 marks)

The Trustee, and the Agent acting on their behalf have wide ranging powers and under Section 109 (5)(a) of the BSA 2016 have the power to close down a business.

Under Section 215 of the BSA 2016 a debtor is under a duty to co-operate with his Trustee and do all such things as the Trustee may require to enable him to carry out his duties.

Failure to comply with this is an offence, which could lead to a fine or imprisonment.

Failure to co-operate could result in the Trustee not granting Mr Mangle's discharge at the end of the first year of bankruptcy as this is no longer an automatic discharge.

Practically it would be very difficult for Mr Mangle to continue to trade without the consent of the Trustee as all of his assets have vested in the Trustee who is likely to take steps to ensure that the pub is closed and the premises/ assets secure.

If he continues to trade without the consent of the Trustee and to incur credit he could be made subject to a BRO which could extend the restrictions of bankruptcy for up to a further 15 years.

(b) What are the consequences for Mr Mangle of an Award of Sequestration having been made (6 marks)

All of his assets vest in the Trustee by operation of law. This will include the credit of £1700 held in his bank account.

Mr Mangle will be subject to the restrictions of bankruptcy until he is discharged. This means that he will be unable to obtain credit of more than £2,000 either solely or jointly without disclosing that an award of sequestration has been made. This would include ordering goods to the value of £2,000 which are not paid for on or before delivery.

In addition, Mr Mangle is unable to trade without the consent of his Trustee and cannot act as a company director.

Mr Mangle is required to provide the Trustee with a full statement of his assets and liabilities.

Mr Mangle is also required to provide the Trustee with details of his Income and Expenditure (whether from the Pub or alternative employment) to allow a DCO to be set. He is then required to pay the DCO for 48 months.

The lease of the pub is likely to be terminable on insolvency. As it appears that no sums are due to the landlord, they may not take immediate steps to terminate the lease.

If the lease is terminated and Mr Mangle does not vacate, the landlord is likely to take steps to obtain possession of the premises leaving Mr and Mrs Mangle with nowhere to live.

If the lease is not terminated by the landlord, the Trustee will review the terms of the lease and take valuation advice. If there is no value in the lease and it is not readily assignable, it is unlikely that the Trustee will have any interest in the lease

If the bank becomes aware of the sequestration (and it is likely that the Trustee will advise them shortly, or they will identify the appointment on the ROI), it will freeze his bank account. Mr Mangle will need to open another bank account without any credit facilities attached to it.

If Mr Mangle cannot continue to trade, he will not be able to draw a salary leaving him without an income.

The terms on which the stock was provided to the pub should be checked but it is likely that the supplier has the right to reclaim the stock upon sequestration in terms of normal retention of title clauses.

The premises licence of the pub will lapse upon the award of sequestration being made. An urgent application would need to be made to transfer the licence to another person if trading is to continue as this has to be done within 28 days of the award of sequestration being made. There may be value in the licence to the Landlord who may wish to take this on in order to ensure that they can re-let the property.

A Trustee in bankruptcy can trade a bankrupt's business, however, it is unlikely that the Trustee would trade a pub. They may consent to the debtor doing this for a short period of time if they are satisfied that losses will not be incurred and the business is properly licenced and insured. This would only be likely to facilitate a recall or sale.

(c) Options and advice (12 marks)

Mr Mangle needs to undertake a thorough review of the pub's trading to establish whether the pub is in fact profitable. Although he has been drawing £1,000 to £1,500 a month, the debt due to HMRC suggests that tax and VAT has not been paid for some time.

Mr Mangle needs to establish whether it is viable for the pub to continue to trade or if future trading will just result in further debts being incurred. He needs to consider whether the proper level of drawing that he would be able to take from the business are enough to live on or if he would be better seeking alternative employment and accommodation elsewhere.

If Mr Mangle is satisfied that it is viable for the pub to continue to trade then he may pursue an application for the recall of his sequestration or he may seek to have a 3rd party, potentially his wife, acquire the business from the Trustee.

Unless there has been an issue with the Bankruptcy Award, Recall would only be granted on the grounds that his debts had been paid in full.

Mr Mangle will however need to enter into discussions with the brewery to establish whether they will allow him to retain the pub if he deals with the sequestration. There may be little point in seeking to recall if the decision has already been made to forfeit the lease.

Similarly, he would need to discuss with the Agent for the Trustee if they would be willing to allow trading to continue to facilitate a recall of the sequestration and if so what information they would require and what the costs would be.

Mr Mangle has only one creditor. It is in his interest to try and make payment of this debt as soon as possible before costs increase.

Mr Mangle should establish if any of the debt due to HMRC is made up of assessments and if so make arrangements to bring his returns up to date to reduce the debt level if possible.

Mr Mangle should explore whether he is able to raise sufficient funds to pay off the liabilities. Although the debt to HMRC is £26,400, he will also need to discharge their petition costs and the Accountant In Bankruptcy's administration fee which may be around £2,000. He therefore needs to be able to raise around £30,000. Current guidance is that statutory interest is not payable in a recall although this is subject to an appeal.

It appears that his wife may be due to inherit a similar sum. He should clarify the timing and amount of this payment and discuss with his wife whether she would be willing to use these funds in this way (see earlier comment re profitability of business).

If she is agreeable he should notify the Trustee of his intention to Recall the sequestration and seek his consent to trade.

He should prepare a recall application for submission to the AIB.

Once all liabilities have been repaid, Mr Mangle could submit his recall petition.

A recall application would require funds of around £30,000. It may be that the value of the lease could be secured for less than this, so for example Mrs Mangle could reach an agreement with the landlord to take on the lease and make payment to the Trustee for the Goodwill value of the business.

When writing to Mr Mangle you should suggest that his wife seek independent advice on the use of her inheritance.

If the business is to continue to trade either with the Trustee's consent to facilitate recall or under the control of a third party is planned, the premises licence will need to be transferred to a third party.

It is likely that Mr Mangle's bank account will be frozen following the Award of sequestration being made. A new bank account without any credit facilities attached to it should therefore be opened.

If Mr Mangle concludes that the pub cannot trade profitably and / or decides that he does not want to continue to trade/put his wife's inheritance at risk he could do nothing and seek paid employment.

If income is sufficient, a DCO could be pursued which would last for 4 years. However, after 1 year (assuming discharge is not delayed) Mr Mangle would be released from his debts.

In this scenario Mr and Mrs Mangle will likely have to find somewhere else to live.

Question 4 (40 Marks)

(a) (14 marks)

The Pet Emporium Partnership

Projected cashflow - trade to a close

Week commencing	13-Nov	20-Nov	27-Nov	04-Dec	11-Dec	18-Dec	After trading ceases	Total
Week number	1	2	3	4	5	6		
	£	£	£	£	£	£	£	£
Income								
Sale of Stock (note 1)	15390	15390	15390	6840	6840	6840		
Collection of Advance animal orders (note 2)						3600		
Rental Income	200	200	200	200	200	200		
	<u>15590</u>	<u>15590</u>	<u>15590</u>	<u>7040</u>	<u>7040</u>	<u>10640</u>		<u>71490</u>
Expenditure								
Payment to ROT creditor (note 3)		9000						9000
Payment to animal supplier					1250			1250
Fresh feed	50	50	50	50	50	50		300
Wages (note 4)	1123	1123	1123	1123	1123	1123	1123	7862
Salary (note 4)			1430				1430	2860
PAYE/NIC (note 4)							4096	4096
Pension (note 4)							412	
Utilities (note 5)			900				346	1246
Rates (note 5)			2000					2000
	<u>1173</u>	<u>10173</u>	<u>5503</u>	<u>1173</u>	<u>2423</u>	<u>1173</u>	<u>7408</u>	<u>29027</u>

Cash inflow/(outflow)	14417	5417	10087	5867	4617	9467	-7408	42463
Opening Balance	425	14842	20259	30345	36212	40829	50296	
Cash inflow/outflow	14417	5417	10087	5867	4617	9467	-7408	
Closing Balance	14842	20259	30345	36212	40829	50296	42888	

Note 1 -Stock sales

Cost of stock in premises	57000	
Retail price with 50% mark up	114000	
Provision for obsolete stock (10%)	11400	
Retail price of saleable stock	102600	
Saleable in first 3 weeks	46170	60% at 75% of sales price assume evenly over 3 weeks
Saleable in second 3 weeks	20520	40% at 50% of sales price assume evenly over 3 weeks

Note 2 -Animal sales

Orders for week before Xmas (week 6)	4800
less deposits already paid	1200
Income	3600

Note 3 - Retention of title

ROT Stock on premises worth £9,000 with cost representing 50% of SP it should normally sell for £18,000.

Based on valuers comments 60% will sell for 75% and 40% for 50% = £11,700. Therefore it is worth paying the supplier £9,000.

Note 4 -Employees

Assume that Trustee will honour the salary and weeks wages in arrears to secure the co-operation of the employees in this 6 week period

Salary = $\text{£}22,000/12 = \text{£}1,833$. Net = $\text{£}1,430$ monthly

Wages $4*40*\text{£}9 = \text{£}1,440$ per week. Net = $\text{£}1,123$ weekly

Assume pay PAYE/NIC for Trustee after trading ceases

2 months for salaried employee = $\text{£}806$

7 weeks for employees = $7*\text{£}317 = \text{£}2219$

Employers' NI 10% of total payments to employees - $\text{£}10,722*10\% = \text{£}1,072$

Total payment in respect of PAYE/NIC = $\text{£}4,097$

Pension assume 3% of gross wages paid after trading ceases - $\text{£} (3,666+10,080)*3\% = \text{£}412$

Note 5 - Overheads

Trustee will pay rates. Provided for the monthly payment made. In reality will pay for the period of occupation which in this case will probably be slightly more than $\text{£}2\text{k}$ assuming full annual cost = $\text{£}20,000$.

Utilities - for cash flow assume that $\text{£}900$ paid in w/c27 November and that after trading ceases a balancing payment is made reflecting the total number of days trading less the payment made to date.

(b) Trading specific issues (6 marks)

- Employees – Notify staff of your appointment, of your proposed plans and confirm the position regarding their wages and arrears.
- ROT creditor – Liaise with creditor regarding his claim. As the stock, once marked up should sell for more than cost, if considered valid undertake to pay him from the proceeds of trading to prevent the uplift of stock
- Open Bank Account and secure credit card facilities probably with the same banking provider to facilitate a swift transfer;
- Brief Sarah on the daily cash reconciliation and reporting that you require
- Frequent review of actual stock sales compared to projection and review of stock disposal/trading strategy as required;
- Ensure animals in the shop are fed/watered/cleaned and cared for appropriately
- plan in advance for alternative care of any unsold animals on Christmas Eve
- Insurance in place (buildings, public liability, employers liability, vehicles and stock)
- Carry out Health and Safety and fire risk assessment;
- Notify Utility providers and obtain meter readings
- Make Tenant aware that rental should be paid to Trustee.
- Ask Tenant to make alternative arrangements for credit card users or ensure controls are in place to segregate cash.
- Make security arrangements including ensuring designating key holders

(c) (14 marks)

**The Pet Emporium Partnership
Estimated Outcome Statement**

	£
Property in city centre	
Sales Proceeds	380000
Due to secured lender (loan and overdraft)	337000
Estimated costs of sale	<u>10600</u>

Disposal of Stock - trading to close

Shop Van (Assume 10% agents fee)

Fixtures and Fittings

Total Realisations

Costs of administration

Trustee's Fees and outlays (VAT recoverable)		20000
Tax liability	Rental income- £1200*.2	240
Tax Liability	Capital Gains tax	27480
AIB Audit Fee		<u>3500</u>

Available for preferential creditors

Preferential creditors

Arrears of wages - assumed paid in cashflow		0
Holiday pay		1863
Occupational Pension Scheme		<u>2500</u>

Available for unsecured creditors**Unsecured creditors - partnership**

Hutch Supplier		
Debt at appointment	24,000	
Less ROT payment	<u>9,000</u>	15,000
Trade creditors		37839
HMRC		
PAYE		14786
City Council - Business Rates		22,154
Employees		
Redundancy	15000	
Pay in lieu of notice	<u>3273</u>	
		<u>18273</u>

Shortfall to creditors of partnership

Creditors of the partnership will receive a dividend of approx

Capital Gains Tax - Calculation

Selling price	380,000
Less value at date inherited	220,000
Less costs of disposal	<u>10600</u>
Taxable Gain	149,400
Annual Exempt Amount (2019/20)	12000
CGT to be paid on	137,400
Assume all at 20%	<u><u>27480</u></u>

(d) (6 marks)

Creditors of Partnership will receive 24p in the £1 from the partnership. There is a shortfall to unsecured creditors of the Partnership of approximately £82,000. Creditors are entitled to claim in full 76p from either sister and then one sister would have a claim against the other. Creditors are not entitled to receive more than 100p in the £1.

Fiona has a potential claim for £80,000. The proceeds of this would allow her to pay her unsecured creditors in full and certainly her half of the residual partnership debt.

However, it is not clear what the likelihood of success, the timing of pay out or what the basis of payment would be.

In the absence of an income and with only a contingent asset, if she is experiencing creditor pressure, Fiona is unlikely to be able to enter the Debt Arrangement Scheme or secure a Protected Trust Deed.

Fiona could make an application for Bankruptcy. She is unlikely to be able to access the Minimal Asset Process due to both the level of her debts (accounting for the partnership debts) and the existence of a contingent asset. Her case would be administered as a full administration and any assets would be required to be realised and her surplus income if any paid to the sequestration for a period of 48 months.

As set out in the AIB's Notes for Guidance a solatium claim (pain and suffering following an injury in Scotland) would not automatically vest in an insolvency, only at the point at which a legal claim was raised in respect of this. It may be possible for Fiona to negotiate with her Trustee who cannot raise such a claim, a split of the proceeds which would enable her to retain some proceeds for her future. The issue with this is that her sister is liable for any shortfall on the partnership debts.

Bankruptcy will protect her from her creditors and discharge her from her debts notwithstanding whether the claim for personal injury is raised/successful.

With significant equity, cash assets and due to the level of her monthly surplus income, it is likely that in insolvency proceedings, Sarah would be in a position to repay more than her debts and should try to avoid insolvency.

She will wish to protect the value in her family home.

An additional consideration for her is her employment as a solicitor as this would be affected by an Award of Bankruptcy against her personally. She would no longer be able to practice as a solicitor.

She has a significant surplus income and cash reserves which could be used to settle the debts of the partnership in full (if required depending on her sister's position) via a DPP under the Debt Arrangement Scheme in around 6 years. This will freeze interest and charges provided that payments are maintained. HMRC are a creditor (due to the shortfall in the partnership) and may object to the DPP due to the property. A DAS would not affect her employment status as a Solicitor

However, given the length of term it is likely that this will pass the DAS Administrators fair and reasonableness test.

Sarah should ensure her personal tax affairs are kept up to date during the DPP to avoid any application of revocation on the grounds that ongoing liabilities are not being maintained.

The Student Loan need not be included within the DPP (it would not be written off in insolvency anyway).

Sarah also has significant equity in her property and it may be that she and her husband are prepared to borrow against the property to settle the debts in full at an earlier stage.

In Summary, Sarah should enter the Debt Arrangement Scheme with possible discretionary conditions depending on her ability to realise assets to accelerate payment.

Unless Fiona expects an early pay out from her claim, she should apply for Bankruptcy and reach an agreement with her Trustee regarding pursuing the claim.