GENERAL NOTE

Some candidates wasted time and lost marks by perpetuating bad habits to which attention has been drawn in the past. No marks are awarded for copying out extracts from the question. Time is wasted by candidates by not planning their answers: extra marks are not awarded for making the same point twice. The quality of handwriting remains an issue: if something cannot be read no marks can be awarded. Candidates should also be reminded to include all workings in the separate answer booklet(s) for each question.

EXAMINATION MARKING PLANS

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

JIEB LIQUIDATIONS EXAMINATION

NOVEMBER 2011

EXAMINER’S REPORT

General

There was a wide range of results: there were some excellent scripts indicating that some candidates had worked hard. Candidates need to read the question and try to address the issues raised. Some candidates appear to have time problems and generally this is caused by the writing of extensive narrative beyond what is being sought. Candidates need to ensure that they fully answer individual questions and whilst it is important that the thinking process behind the answers is demonstrated the provision of extraneous material, particularly regurgitation of legislation, is unlikely to add to the marks obtained.

QUESTION 1

(a) Prepare a statement of affairs of the Society as at 31 October 2011, making and explaining any commercially realistic assumptions. (14 marks)

(b) Prepare a Surplus/Deficiency Account for the Society as at 31 October 2011. (4 marks)

(c) Set out the advice that you would give to the Society’s management board on the practical issues for dealing with the assets and liabilities before any solvent winding up. (4 marks)

(d) Set out the problems that a Liquidator would expect to encounter if making a distribution to the Society’s members and set out what remedies are available. (3 marks)

(25 marks)

Question 1a and 1b required candidates to prepare a statement of affairs and surplus/deficiency account for an Industrial and Provident Society. The question suggested that the resulting statement of affairs may show a surplus but no marks were lost if a candidate presented a deficiency. Question 1c required candidates to set out advice (to the management board in the question) on practical issues for dealing with assets and liabilities before a solvent winding up. Question 1d asked for anticipated problems and remedies when making a distribution to the Society’s members.

Candidates were divided almost equally between those who were able to produce a reasonably clear statement of affairs and those who could not. Not all of those who produced a statement of affairs prepared a surplus/deficiency account and only a handful of candidates recognised that a “balancing figure” will not arise...
when the statement of affairs is produced on the same date as the balance sheet date. Candidates who attempted 1c and 1d before 1a and 1b tended to gain few marks as they were unable to relate their answers to the circumstances of the question.

QUESTION 2

(a) Set out the legal and practical steps that a Liquidator should take during the first week of a Liquidation that follows an Administration, whether or not the Liquidator was the previous Administrator. (6 marks)

(b)(i) For each of the items (1) to (5) listed above, set out the issues that the Liquidator should consider and state with reasons what steps he should take. (15 marks)

(b)(ii) Calculate and explain the amount that is available for a dividend to creditors. (4 marks) (25 marks)

Question 2a required a summary of the legal and practical steps that a Liquidator should take in the first week of a Liquidation that follows an Administration. Question 2b(i) required candidates to assess various situations (ie whether there was an asset or liability and in what amount), to set out the issues to be considered and the steps the Liquidator should take. Question 2b(ii) required candidates to set out the amount available for dividend as a result of the assessments in question 2a.

This question was generally well answered. Candidates found 2(b)(i) the most difficult and some did not attempt to assess all of the situations presented. The stronger candidates, gaining the most holistic marks, answered the question well: setting out the actions required as opposed to just quoting the relevant rule and not stating a recommended course of action. Several candidates incorrectly stated that set-off applied in 2(b)(i)1; there was a wide range of marks for 2(b)(i)2, a number of candidates scored 4 or 5 out of 5 but many missed the point that there was a trust and only repeated their point on set-off from 2(b)(i)1. There was a wide range of scores for 2(b)(i)3. The answers to 2(b)(i)4 were surprising: a large numbers of candidates thought that it was possible to write to a bank and ask them to transfer money at an historic exchange rate. There were some very good answers to 2(b)(i)5 but many missed the point or only discussed action against the directors.

Part 2b(ii) was generally well answered either consistently treated items as they had been set out their answer to 2b(i) or calculating them correctly.

QUESTION 3

(a) Set out the steps that Unhappy Limited may take to remove Tom from office as Liquidator of ZeeBee Limited and what Tom should do when faced with this challenge. (12 marks)

(b) Set out the steps that Dick should take to resign as Liquidator of the companies to which he is appointed and set out his responsibilities following his resignations. (8 marks)

(c) Set out steps that need to be taken to deal with the vacancies of Liquidator occurring as a result of Harry’s death. (5 marks) (25 marks)

Question 3a required candidates to set out the steps to be taken by a creditor who wished to remove an office holder from office as Liquidator, and also what the Liquidator could do in these circumstances. Question 3b required candidates to set out the steps to be taken when an insolvency practitioner, who is retiring, wants to resign as Liquidator in various Liquidations. Question 3b required candidates to set out the steps that need to be taken to deal with various vacancies of Liquidator as a consequence of the Liquidator’s death.

The question was not well answered: candidates did not seem to have prepared for this topic and seemed not to know how they should frame their answers. Only a handful of candidates discussed block transfers in Chapter 1A to Part 7 of the Insolvency Rules 1986.
QUESTION 4

(a) Set out the procedure for calling, and the agenda for, a creditors’ meeting in these circumstances. State any alternative that you, as Liquidator, have for establishing the wishes of the creditors and set out the procedure. (10 marks)

(b) Set out how you, as Liquidator, may recover funds in this Liquidation. Explain any potential problems and how they may be overcome. (15 marks)

NOTE: Ignore corporation tax

Question 4a required candidates to set out the procedure for a Liquidator who wished to call a creditors’ meeting in a winding up by the court, taking into account the circumstances of the question. This part was reasonably well answered but the weaker candidates did not relate their answer to the question and some gave an answer for a Voluntary Liquidation rather than a Compulsory Liquidation.

Question 4b required candidates to consider various misdemeanors by the directors of a company that is now in Liquidation, including wrongdoing and prior transactions under the Insolvency Act 1986. Although there were some good answers to this part, other candidates’ answers were less coherent. There seemed to be some confusion about remedies, for example candidates discussed wrongful trading but then stated that the remedy was “to claim for misfeasance” (rather than stating that there may also be an action for misfeasance and then discussing the separate remedies for both wrongful trading and misfeasance).

Although candidates recognised that the dividend was illegal, few mentioned the Companies Act test was distributable reserves.
1(a) Prepare a statement of affairs of the Society as at 31 October 2011, making and explaining any commercially realistic assumptions. (14 marks)

Statement of Affairs as at 31 October 2011

<table>
<thead>
<tr>
<th>Presentation/layout</th>
<th>Book value</th>
<th>Estimated to realise</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Assets specifically pledged</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wooden Village Football Club Rainy Day Fund</td>
<td>75,000</td>
<td>75,000</td>
</tr>
<tr>
<td>Less due to Administrator</td>
<td>(75,000)</td>
<td>(75,000)</td>
</tr>
<tr>
<td>Cash at bank and in till</td>
<td>9,000</td>
<td>-</td>
</tr>
<tr>
<td>Less due to raffle winner</td>
<td>(400)</td>
<td>-</td>
</tr>
<tr>
<td>Less due to local hospital</td>
<td>(1,600)</td>
<td>-</td>
</tr>
<tr>
<td>c/d to assets not specifically pledged</td>
<td></td>
<td>7,000</td>
</tr>
<tr>
<td><strong>Assets subject to hire purchase</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Coffee machine subject to hire purchase</td>
<td>1,200</td>
<td>100</td>
</tr>
<tr>
<td>Less due to hire purchase company</td>
<td>(1,200)</td>
<td>(1,200)</td>
</tr>
<tr>
<td>Surplus/shortfall to hire purchase company c/d – included in creditors</td>
<td>0</td>
<td>(1,100)</td>
</tr>
<tr>
<td><strong>Assets not specifically pledged</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Investment in Wooden Village Football Club Ltd</td>
<td>120,000</td>
<td>0</td>
</tr>
<tr>
<td><strong>Debtors</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Freda* (no set off on amount due from Freda against her wages – ERA 1996)</td>
<td>100</td>
<td>100</td>
</tr>
<tr>
<td>- Games Galore Ltd</td>
<td>1,000</td>
<td>1,000</td>
</tr>
<tr>
<td>- insurance prepayment – (may not be recovered in full, candidates should state reasonable assumptions)</td>
<td>900</td>
<td>900</td>
</tr>
<tr>
<td><strong>Memorabilia collection</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- photos and frames</td>
<td>600</td>
<td>1,200</td>
</tr>
<tr>
<td>- display case</td>
<td>400</td>
<td>40</td>
</tr>
<tr>
<td>- football boots (say)</td>
<td>0</td>
<td>500,000</td>
</tr>
<tr>
<td><strong>Fixtures and fittings</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bar and associated fittings</td>
<td>12,000</td>
<td>0</td>
</tr>
<tr>
<td>(this is subject to ROT but the ROT creditor likely to fail because bar is attached to building; Administrator unlikely to offer anything to Society for the bar, candidates should state reasonable assumptions)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Remaining fixtures and fittings:</td>
<td>7,800</td>
<td>780</td>
</tr>
<tr>
<td>Casks, etc 1,000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Glasses, 800</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tables and seating 3,000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Glass washer and fridge (3,000 – 1,200 = 1,800)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wide screen TV, 1,200</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(say 10% of BV)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Stocks</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- bar (brewery may give some credit for returned unopened stock, but bar stock is likely to be subject to ROT, candidates should state reasonable assumptions)</td>
<td>5,000</td>
<td>4,000</td>
</tr>
<tr>
<td>- other</td>
<td>7,000</td>
<td>0</td>
</tr>
<tr>
<td>Wooden Building Society Deposit</td>
<td>4,000</td>
<td>4,000</td>
</tr>
<tr>
<td>Cash at bank and in till b/d</td>
<td>7,000</td>
<td>7,000</td>
</tr>
</tbody>
</table>

Total: 519,020
Estimated total assets available for preferential creditors
Preferential creditors – unpaid wages – Freda*
(Freda may also be due redundancy and holiday pay, pay in lieu of notice – not enough information in the question but candidates may make reasonable assumptions)
nb no set off of wages due to Freda and what she owes unless Freda agrees

Estimated surplus as regards preferential creditors

Estimated total assets available for unsecured creditors

Other creditors
Add back pref creditor
Accruals (include because estimate of what will be owed to actual creditor)
Additional amount due to Satellite TV Co Ltd under contract (7 months x £1,300)
Decrease in shortfall to HP company b/d
Estimated surplus/(deficiency)as regards creditors

Issued and called up share capital

Estimated surplus/(deficiency) as regards members

(b) Prepare a Surplus/Deficiency Account for the Society as at 31 October 2011. (4 marks)

1(b) Surplus Account as at 31 October 2011

Accumulated surplus at 31 October 2011 199,000
W/o of Wooden Village FC shares (120,000)
Rainy day fund due to Administrator (75,000)
Cash due to raffle winner and hospital (2,000)
Increase in value of photos and frames 600
Decrease in value of display case (360)
Increase in value of football boots 500,000
Decrease in value of bar (12,000)
Decrease in value of coffee machine subject to HP (1,100)
Decrease in value of remaining fixtures and fittings (7,020)
Decrease in value of stocks (8,000)
Adjustments to creditors
Increase in TV Satellite creditor (9,100)

NB no balancing figure 266,020
Deficiency per statement of affairs 465,020

(c) Set out the advice that you would give to the Society’s management board on the practical issues for dealing with the assets and liabilities before any solvent winding up. (4 marks)

- implications to directors re declaration of solvency IA 1986 s89
- solvency here depends upon sale of football boots for high price. The Society should auction these before liquidation to ensure that good price is obtained, or at least obtain professional advice on their value, otherwise Society may be insolvent. Important to obtain fair value for all assets.
- practicalities of dealing with assets and creditors before liquidation, may be more cost effective.
- NB relate to circumstances in question.
(d) Set out the problems that a Liquidator would expect to encounter if making a distribution to the Society’s members and set out what remedies are available. (3 marks)

A problem here seems to be not having names and addresses of all of members – discussion. Include looking at Society’s rules. Last resort may be to seek court directions.
- timing of any distribution
- note problem re unclaimed dividends, cannot be sent to unclaimed dividend account, as Industrial and Provident Societies are registered by the FSA. It will be necessary to look at the Society’s rules.
- consider if it is possible to change Society’s rules before entering procedure.
- consider alternative to MVL e.g. scheme of arrangement, would need to look at Society’s rules.
- nb relate to circumstances in question.

2(a) Set out the legal and practical steps that a Liquidator should take during the first week of a Liquidation that follows an Administration, whether or not the Liquidator was the previous Administrator. (6 marks)

- ethical check
- check date of appointment, i.e. date of registration, at Companies House, of notice of move from administration to liquidation (Form 2.34B).
- advertise appointment in Gazette within 14 days (s109) and may also advertise in manner thinks fit (R4.106A).
- ensure any assets/company bank accounts transferred from administrator to liquidator.
- ensure that there is a liquidation committee. The administration committee becomes the liquidation committee but if there is no committee take steps to form one (ie call meeting of creditors to vote for one) See Rule 4.174A.
- if liquidator not previous administrator, he should check to ensure that the committee in administration was properly authorised and constituted.
- committee is suspended until liquidator issues certificate of constitution under R4.176.
- need to ensure that liquidator has sufficient powers to do what is necessary to carry out the liquidation may need to call committee (or if none, creditors’) meeting.
- need to ensure that liquidator can take proper remuneration:
  If a liquidation immediately follows administration in accordance with para 83, and the administrator becomes the liquidator, remuneration will be taken as authorised under R2.106 in the administration (R4.127(5A));
  If the liquidator is not the previous administrator he should ensure take steps to obtain the appropriate authorisation.
- n.b. on appointment, the liquidator does not have to write to all creditors informing them of his appointment as this will already have been done in the final progress report of the administration, although if he was not the previous administrator he may wish to do so.
- review administrators’ proposals/actions
- Ensure that the date the administrator is released and the date the liquidator is appointed are included on the bond return (if the liquidation immediately follows on from administration (the “initial procedure”) there is no need to apply for a new bond – IP Regs 2005, Reg3 and Sch 2)
- ensure adequate insurance in place;
- open IP record;
- if applicable, send s120 notices to Pensions Regulator, Pension Protection Fund and trustees of relevant pension scheme(s);
- notify HMRC on Form VAT 769 of insolvency details
(b)(i) For each of the items 1) to 5) listed above, set out the issues that the Liquidator should consider and state with reasons what steps he should take. (15 marks)

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>i. No set off. R4.90(3)(b): liquidation was immediately preceded by Administration and £150,000 became due during the Administration.</td>
<td></td>
</tr>
<tr>
<td>ii RCP Ltd: no set off - See Re F2G Realisations Ltd (in liquidation), Gray and others v G-T-P Group Ltd [2010] EWHC 1772: Although the bank account was in RCP Ltd’s name, the Company holds the beneficial interest over the account as it was entitled to call for the monies (except in specified circumstances) without any withholding, deduction or set-off. It is a floating charge but has not been registered at Companies House and so the charge is void against the Liquidator. (In F2G Ltd - the floating charge did not fall within the definition of security over financial collateral (which does not have to be registered where certain conditions are met). The monies held are, therefore, trust monies and should be handed to the Liquidator. If Liquidator has to go to court to recover monies can take costs from funds? Barclay Applegate order? Discussion.</td>
<td></td>
</tr>
<tr>
<td>iii Happysavers Plc. Company should take recovery action for all of debt. (per Globespan administrators successfully seeking administration of E-Clear) Happysavers Plc may have to repay clients who have not taken holidays through no fault of the client. Whether the Company is liable for this depends upon the terms with Happysaver Plc. Discussion.</td>
<td></td>
</tr>
<tr>
<td>iv Spanish bank account.– exchange rate will be actual date of converting currency. Assume today’s date £1 = Euro1.25; bank charges likely to be expense of administration (assume standard charges) and so not recoverable from bank. v Holiday club – nb ABTA/ATOL not relevant as no holidays had been booked. Holiday Club members who have paid money to the Club and have not received a holiday, will become creditors of the Company. The funds have been paid into the Company’s overdrawn bank account. Discussion: Liquidator would need to look at terms and conditions of payments. It is likely that there is a contractual relationship between the Company and the Club members: no Quist close type trust (although in the question the directors had not attempted to set up a trust as in Re Farepack Food &amp; Gifts Ltd [2006] EWHC 3272 - Express trust – certainty of words, subject matter and objects – re Kayford [1975] 1WLR 279. Probably not present here. The Liquidator should consider whether: - the directors are guilty of misfeasance because they failed to protect the monies; - to include these circumstances in any D reports.</td>
<td></td>
</tr>
</tbody>
</table>

(ii) Calculate and explain the amount that is available for a dividend to creditors. (4 marks) (25 marks)

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Opening balance of funds (transferred from administrator)</td>
<td>£300,000</td>
</tr>
<tr>
<td>Add: due from HMRC (VAT repayment)</td>
<td>£150,000</td>
</tr>
<tr>
<td>Add: due from RCP Ltd</td>
<td>£200,000</td>
</tr>
<tr>
<td>Add: due from Happyservices Ltd (90% x £870,000)</td>
<td>£783,000</td>
</tr>
<tr>
<td>Spanish bank account: 145,000/1.2 (to nearest hundred)</td>
<td>£128,300</td>
</tr>
<tr>
<td>Available for dividend, before Liquidator’s costs</td>
<td>£1,561,300</td>
</tr>
</tbody>
</table>
3(a) Set out the steps that Unhappy Limited may take to remove Tom from office as Liquidator of ZeeBee Limited and what Tom should do when faced with this challenge. (12 marks)

<table>
<thead>
<tr>
<th>Steps creditor needs to take to remove Tom from office:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Either creditor can</td>
</tr>
<tr>
<td>- report Tom to his RPB (which may withdraw his authorisation as an insolvency practitioner or impose some other sanction(s))</td>
</tr>
<tr>
<td>- requisition a meeting of creditors</td>
</tr>
<tr>
<td>- can apply to court to have liquidator removed</td>
</tr>
</tbody>
</table>

RBP

- If Tom is reported to his RPB he will need to explain his conduct to it.  

Requisition creditors’ meeting S171(2)(b)

- (nb members and contributories have no vote even if liquidator was appointed by them in CVL);  

R4.114 – meeting must be requisitioned by at least 25% of creditors by value – so creditor must hold this amount or obtain support of those who do

Nt 25% excludes those connected to company (directors/shadow directors and their associates, parent/sub/associated company, anyone controlling voting of company; employees (s249(b, s435))

Liquidator can require those requisitioning meeting to deposit funds as security for summoned and holding meeting R4.61

Notice of meeting must state the purpose and draw attention to s173(2) re liquidator’s release.  

Requisition must include list of those concurring with the request and amounts of their claims R4.57

If liquidator fails to requisition meeting, creditors can apply to court. R4.115

Chairman of meeting sends certificate of removal to registrar, if no new liquidator appointed, or to new liquidator (who sends certificate to registrar R4.117

Tom should explain his actions to the meeting.

Application to court

S171(2)

R4.120 – court can dismiss application if thinks no significant cause, but won’t dismiss it without giving applicant an opportunity for an ex-parte hearing (7 days notice)

- court may require a deposit or security for costs

Grounds for removal may include:

- conflict of interests;
- where continuation in office is impractical
- insistence on acting against creditors’ wishes
- failure to discharge duties properly
- ill health

In the circumstances of the question, Tom should be given the opportunity to explain his conduct to the court.

If court orders removal of liquidator – court will send him two copies of the order and he sends one to Registrar with notice of ceasing to act.  Liquidator must apply to Sec of State for release.

3(b) Set out steps that need to be taken to deal with the vacancies of Liquidator occurring as a result of Harry’s death. (5 marks)

(25 marks)

Note – for joint appointments, if there is a surviving joint appointee, Dick could resign and leave existing joint appointee in office.  

As Dick has to make an application to transfer his sole appointments, it is probably more cost effective to include all appointments in a block transfer application.

Dick may apply to court for block transfer order (R7.10C) – Part 7 of Ins Rules Ch1A, R7.10A – R7.10D) and Ch2 and R7.11

Reason: R7.10B(b) – retires or R7.10B(c) – ill health.

It is likely that application for a block transfer order will be cheaper and easier than resigning from each appointment.
Application procedure per R7.10C, including
  - a schedule setting out: the name of each case; the court with jurisdiction; the case number (if any); and
  the capacity in which the outgoing office holder was appointed.
  - Evidence setting out the circumstances of it being expedient to appoint a replacement office holder and
  written consent to act of each person who is proposed to be appointed as replacement office holder.
A report with receipts and payments is to be submitted to the creditors’ meeting to receive the liquidator’s or
trustee’s resignation (Rules 4.108).

Provision is made for the procedure to be followed where there is an ongoing challenge to the outgoing office-
holder’s remuneration. The resignation will be effective from the acceptance of the resignation (Rules 4.108,
4.108A.). However, release can only be considered and effected once any challenge to remuneration has been
resolved (Rules 4.108A). There are consequential amendments to Rules 4.109, 121, 122.,
Rule 4.116 (procedure on removal of liquidator) there is a new requirement for the documents in question to be
filled with the registrar of companies as well as with the court. This is on account of the importance of the
documents.

Action following application for block transfer order:

R7.10D: (3)

Dick must ensure that a sealed copy of every order transferring any case to the High Court and of every order
which is made on a substantive application is lodged with the court having jurisdiction over each case affected
by such order for filing on the court file relating to that case.

Dick should ensure an orderly transfer of case files to the succeeding office holder.

Alternatively: resignations from each office:
MVL – s 92 Vacancy in office of Liquidator, company in general meeting may fill the vacancy
CVL – s 104 Vacancy in office of Liquidator, creditors may fill the vacancy.
Compulsory – s 136 Functions of OR in relation to office of liquidator. S136(3) The OR is, by virtue of his office,
liquidator during any vacancy.

As a small practice consider whether there was any succession planning – Succession Planning Guidance.

3(c) Set out steps that need to be taken to deal with the vacancies of Liquidator occurring as a result
of Harry’s death. (5 marks)

Deceased office holders – Rules 4.132, 4.133, 4.145

Death of liquidator:
The most appropriate and cost effective method may be to apply to court for block transfer order – Part 7 of Ins
Rules Ch1A, R7.10A – R7.10D) and Ch2 and R7.11.

See R7.10C for who may apply, includes replacement office holder and any person holding office jointly.

MVL – s 92 Vacancy in office of Liquidator, company in general meeting may fill the vacancy

CVL – s 104 Vacancy in office of Liquidator, creditors may fill the vacancy.

Compulsory – s136 Functions of OR in relation to office of liquidator. S136(3) The OR is, by virtue of his office,
liquidator during any vacancy.

MVL – personal representatives must give notice of Harry’s death to company’s directors and to Registrar
R4.145(1) or notice may be given by Tom or Dick (as they are qualified IPs and partners of Harry) R4.145(2) or
by any person if he delivers the notice with a copy of the death certificate R4.145(2)

CVL – personal representatives must give notice to any creditors’ committee and to registrar or by Tom or Dick
(as they are qualified IPs and partners of Harry) or by any person if notice accompanied by death certificate
R4.133

Liquidator’s release is obtained when Registrar receives notice s173(2)

Compulsory – personal representatives must give notice to OR R4.132(1) or by Tom or Dick (as they are
qualified IPs and partners of Harry) or by any person if notice accompanied by death certificate R4.132

The OR will notify court of death for purpose of fixing liquidator’s release R4.132(4)

As a small practice consider whether there was any succession planning – Succession Planning Guidance.
4(a) Set out the procedure for calling, and the agenda for, a creditors’ meeting in these circumstances. State any alternative that you, as Liquidator, have for establishing the wishes of the creditors and set out the procedure. (10 marks)

Procedure for calling a creditors’ meeting in a compulsory liquidation:
Note standard contents for gazetting defined in R13.13 and the “standard contents” provision is contained in the new Rules 12A.33 to 12A.35. But may be additional requirements in Act/Rules
Standard contents for advertising in other than gazette: these notices are discretionary on the part of the insolvency office-holder. The provisions are contained in new Rules 12A.38 to 12A.41. Provisions allow for fact that may be other than in paper format. See Rule 12A.41(1)
Minimum notice period for meetings now 14 days.
R 12A.22-12A.27 re facilitating attendance at meetings
remote attendance at meetings;
use of websites to communicate
provisions have been inserted into new Part 12A to allow creditors’ and liquidation committee meetings to be attended by remote means.
Liquidation committee – see a Chapter 12 of Part 4 (companies winding up – the liquidation committee);
R4.54: general power to call meetings

- notice to all creditors
- 14 days’ notice, specifying purpose and that proofs and proxies to be lodged no later than noon on business day before meeting
- Gazette notice (standard contents)
- may be advertised in such other manner as convenor thinks fit and as well as standard contents must state:
who summoned meeting, if by creditor state this and s of IA under which summoned, purpose, venue, time and date creditors to lodge proxies and unlodged proofs in order to be entitled to vote at meeting.

R4.55 – Chairman
R4.58 – Attendance at meetings of company’s personnel (note change to 14 days notice)
R4.60 – Venue
R4.61 – Expenses of summoning meetings
Could apply to court for an order to call meeting by advertisement only, given number of creditors.
R4.63 – Resolutions (at meetings)
Alternative:
R4.63A – Resolutions by correspondence (nb does not apply to any resolution which the Act requires to be passed at a meeting)
But Liquidation Committee must be formed by general meeting of creditors s141(2)
S246A May have remote attendance at meetings
Agenda:
- establish Liquidation Committee (and explain function of committee to help creditors’ decide);
- and, if not established to determine Liquidator’s remuneration and
Note at this stage it is probably not feasible to seek authority to use powers under Sch 4, for example to bring legal proceedings under s213, 214, 238, 239, 242, 243 or 423 as authority must be specific.
Note : may also ask creditors at the meeting for information.
4(b) Set out how you, as Liquidator, may recover funds in this Liquidation. Explain any potential problems and how they may be overcome. (15 marks)

NOTE: Ignore corporation tax

Before commencing any investigations it is worth considering:
- Are the directors sufficiently asset rich to make any recovering actions worthwhile? Need to make enquiries. Note that Peter has gambling debts.
- Consider who are directors, is Mr Big a shadow director? Liquidator would need to consider/investigate the following (and for each of these, whether or not they are applicable and why, relating the explanation to the circumstances of the question):
  - s214, wrongful trading
  - s212, misfeasance
  - s238, transactions at undervalue
  - s239, preferences
  - s423, transactions defrauding creditors
- Peter’s and Quentin’s loan accounts: consider Companies Act 2006, validity of loan and transaction at undervalue s238, misfeasance s212
- Consider whether the dividend was illegal. Need to know whether or not made from distributable profits
  - validity of intercompany charge (existing debt) and previous charges, including charges for Mr Big’s time and use by Dopey Ltd of Company’s lorries
Generally, s234, 235, s236 – discussion, role of OR
- reuse of company name, s 216/217: directors potentially responsible for all of Company’s debts since Sorry Ltd went into Liquidation in 2008.
Consider generally directors’ responsibilities under the CA2006 and whether any breach may result in recovering funds.
- accounting records, were they up-to-date if software licence expired pre-liquidation? Consider misfeasance if directors did not maintain in accordance with CA 2006.
Problems/issues include: need to obtain sanction of committee/creditors for pursuing actions;
Consider how finance any litigation. Consider, conditional fee arrangement, what about any adverse costs?
Generally consider other routine issues that Liquidator would do to recover funds, including writing to bank and debtors to recover monies. Also, seeking opinion on whether there is any equity in HP assets.
Write to debtors
ADMINISTRATIONS, COMPANY VOLUNTARY ARRANGEMENTS and RECEIVERSHIPS

2011 EXAMINER’S REPORT

GENERAL

This year’s paper highlighted that many candidates lack basic presentation skills for financial statements, in particular outcome statement and receipts and payments accounts. In addition many candidates did not appear to know their way around the Act and Rules failing to pick up easy marks available for identifying and applying relevant sections.

Candidates should also be reminded that general presentation skills, in particular legible handwriting is vital to ensure that marks can be awarded.

QUESTION 1

Stating appropriate assumptions, prepare a schedule summarising for this case the minimum information that Insolvency Practitioners are required to maintain. (25 marks)

Candidates were required to prepare a schedule of information as outlined in Regulation 13 of the Insolvency Practitioner Regulations, commonly known as the Insolvency Practitioner or IP Record.

Whilst the question set out the majority of the information required to complete this schedule candidates were also required to make assumptions based upon the fact stated in the case that all matters had been properly dealt with. In this respect marks were awarded where dates stated in answers were within the statutory timescales.

To score highly it was necessary for candidates to calculate the specific penalty bond level and identify that during the course of the case it would have been necessary to increase it. There was also a basic distribution calculation.

A number of candidates performed well on this question setting out clearly and concisely the information required. The better performing candidates attempted the calculations required in relation to bonding and distributions.

A disappointing proportion of candidates identified that the question related to the Regulation 13 record but simply listed the headings contained within it. Failure to apply the facts of the case to the question resulted in marks being missed for items as simple as stating the company name.

Instead of focusing on the Regulation 13 record and applying the case facts, a few candidates took the opportunity to generally list items of information that could be found on insolvency case files.

QUESTION 2

(a) Briefly outline the formal options that the Bank has under its security arrangements to recover its debt. Summarise the comparative financial outcome for the Bank of each option. (15 marks)

In this question candidates were asked to advise a lender on their options for enforcing their security over a company in particular Administration, Administrative Receivership and Fixed charge/LPA receiver. It required the demonstration of an understanding of the financial implications of each option particularly in relation to corporation tax and employee liabilities.

Overall candidates’ performance in the question was adequate and the better candidates were able to achieve a high mark.

The majority of candidates identified Administration as an option and a high proportion recognised that a receiver may also be appointed in the circumstances. Few candidates identified that the 2002 debenture would probably confer the right to appoint an Administrative Receiver. Few candidates identified other options such as dealing with the property as mortgagee in possession.
Most candidates attempted the estimated outcome statement but a high proportion wasted valuable time in attempting to calculate funds available for unsecured creditors. Many candidates also ignored the notes to the question, attempting to include office holder and other costs within their calculations.

Generally the principle regarding the ranking of non-domestic rates and corporation tax within each option was well understood. The same cannot be said for employee liabilities with only the best candidates attempting a calculation of qualifying and non-qualifying liabilities.

The majority of candidates understood the relevance of the overseas assets and the impact on the ability of an insolvency practitioner to recover these under the various options. Marks were awarded where appropriate assumptions were stated.

(b) Set out the key advantages and disadvantages to the Bank of each of its options. (10 marks)

This part of the question was generally well answered with many candidates able to recall the advantages and disadvantages of each option. Notwithstanding this, a proportion of candidates did not apply their knowledge to the facts of the question detailing the advantages and disadvantages from a director rather than bank perspective.

QUESTION 3

Candidates were presented with a scenario of a failing CVA and asked to outline what action should be taken in the circumstances. In addition part of the question asked candidates to outline options in the context of an external party willing to invest in the business.

This question was the most poorly answered question within the paper.

(a) For each matter outlined in (i) to (vi) explain what steps the Supervisor may take to deal with each situation. (15 marks)

(i) The majority of candidates provided an acceptable answer to this part of the question, although there was a tendency to leap to the conclusion that the Company was already in default rather than refer back to the terms of the CVA.

(ii) Answers tended to focus on rectifying the breach via repayment of the loan by the directors. Few candidates recognised that, due to limitations in the Supervisor’s powers, it may be necessary for an alternative insolvency process.

(iii) The majority of candidates answered this part of the question well identifying that the Supervisor should seek to dispose of the assets. Most also stated that the Supervisor would have to refer to the terms of the CVA to establish whether they had this power or if not seek a variation in its terms.

(iv) Generally candidates failed to recognise that some of the assets subject to the distraint were held on trust by the Supervisor.

(v) Most candidates were able to pick up marks in this part of the question but several candidates did not appear to know where to find the relevant Insolvency Rules.

(vi) Candidates appeared to understand the limitations of being a Supervisor and therefore were able to answer this part adequately.

(b) Explain generally what options could be considered to facilitate the investment and any issues likely to arise in the particular circumstances of this case. (10 marks)

Page 13 of 44(4,4),(997,995)

This question stated that it was the business that the external party wished to invest in (rather than the Company), opening up the potential options for dealing with the situation.

The question was poorly answered with candidates concentrating on varying the terms of the CVA with few identifying that there could be other solutions such as Administration. Candidates would have been given credit both for explaining any option that could achieve the result and, if after applying the facts it was not a realistic solution, outlining why not.

Overall candidates found this part of the question challenging with several making no attempt.
QUESTION 4

Candidates were required to understand how cases could be transferred between Insolvency Practitioners and be able to prepare a final receipts and payments account for the case.

(a) **Explain what arrangements your principal should have in place to deal with the transfer of cases in the event of his death or incapacity.** (5 marks)

Whilst many candidates knew there was guidance paper covering succession planning very few candidates were aware of its contents.

A large proportion of candidates did not attempt this part of the question but those that did were typically able to pick up a few marks by making logical points. A proportion of those candidates attempting the question explained that the practitioner should always take joint appointments, which is rarely practical for a sole practitioner.

(b) **Outline the procedural steps that may be undertaken to deal with the transfer of this case.** (10 marks)

To achieve a good mark in this part of the question candidates had to be aware of and be able to locate the relevant provisions within the Act and Rules. Very few candidates were able to do this at all and many of those that did chose to use their own, sometimes incorrect wording rather than that contained within the Act.

Many candidates who attempted the question also lost out on a significant proportion of the marks since they concentrated on the provisions for dealing with the transfer of one case rather than also identifying that the bulk transfer provisions could be used. In practical terms, most such situations would use these bulk transfer provisions and there appeared to be a general lack of awareness that this was possible.

Frustratingly many candidates who did locate and list some of the provisions ignored the facts of the case detailing how the procedure could be used to transfer the case to another practitioner within the office and many answers discussed incapacity rather than death.

(c) **Prepare a final receipts and payments account for inclusion in a final report to creditors assuming closure on 14 November 2011.** (10 marks)

Many candidates demonstrated a lack of basic understanding as to the required format of a receipts and payments account. Generally candidates did not appreciate the requirement to split out the receipts and payments into the relevant reporting periods resulting in the loss of easy marks.

Most candidates were able to pick up marks by transferring basic numbers to their answer and many successfully calculated remuneration and debtors. This was the best answered part of the question however it was disappointing that many candidates lacked the basic knowledge of what a receipts and payments account comprises.
Stating appropriate assumptions, prepare a schedule summarising for this case the minimum information that Insolvency Practitioners are required to maintain. (25 marks)

<table>
<thead>
<tr>
<th>Regulation 13 Record (IP record)</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>The name of the insolvency practitioner acting in the case.</td>
<td>Richard Jones and Emma Carter</td>
</tr>
<tr>
<td>The identifying number or reference issued to the insolvency practitioner by a competent authority or any body recognised under section 391 of the Act.</td>
<td></td>
</tr>
<tr>
<td>The principal business address of the insolvency practitioner.</td>
<td>Jones and Carter LLP 14 The Square Leicester L23 1HG</td>
</tr>
<tr>
<td>The name of - Any body by virtue of whose rules the insolvency practitioner is entitled to practice; or any competent authority by whom the insolvency practitioner is authorised.</td>
<td>Any authorising body listed</td>
</tr>
<tr>
<td>The name of the person in respect of whom the insolvency practitioner is acting.</td>
<td>Bluefin Products Limited</td>
</tr>
<tr>
<td>The type of the insolvency proceedings.</td>
<td>Administration</td>
</tr>
</tbody>
</table>

**As regards the progress of the administration of the case the following details if applicable**

| the date of commencement of the proceedings | 13 January 2011 |
| the date of appointment of the insolvency practitioner | 13 January 2011 |
| the date on which the appointment was notified to the Registrar of Companies: | Sent within 7 days of appointment (receipt of apt document) – so before 20 January 2011 |

**Bonding arrangements in the case**

**As regards the arrangements for security or caution in the case**

| the date of submission of the cover schedule which has the details of the specific penalty sum applicable in the case: | Any date between 1 February 2011 and 19 February 2011 |
| the amount of the specific penalty sum; |  |
| Freehold property | £1,250,000 |
| Less fixed charge holder | £(750,000) |
| £500,000 |
| Debtors | £650,000 |
| Stock | £80,000 |
| P&M | £350,000 |
| Goodwill | £50,000 |
| Residual P&M | £300,000 |
| Financed P&M |  |
| £1,930,000 |  |
the name of the surety or cautionser;
the date of submission to surety or cautioner of a cover schedule with any increase in the amount of the specific penalty sum; Any date between 1 May 2011 and 19 May 2011

<table>
<thead>
<tr>
<th>the amount of any revised specific penalty sum</th>
<th>Revised</th>
<th>Change</th>
</tr>
</thead>
<tbody>
<tr>
<td>Property</td>
<td>1,500</td>
<td>1,000</td>
</tr>
<tr>
<td>Debtors</td>
<td>500</td>
<td>(150)</td>
</tr>
<tr>
<td>Stock</td>
<td>80</td>
<td>-</td>
</tr>
<tr>
<td>P&amp;M</td>
<td>350</td>
<td>-</td>
</tr>
<tr>
<td>Goodwill</td>
<td>50</td>
<td>-</td>
</tr>
<tr>
<td>Residual P&amp;M</td>
<td>550</td>
<td>250</td>
</tr>
<tr>
<td>Bad debt relief</td>
<td>25</td>
<td>25</td>
</tr>
<tr>
<td></td>
<td>3,055</td>
<td>1,110</td>
</tr>
</tbody>
</table>

Revised bond £3,055

Bad debt relief claim workings:

| Irrecoverable debt         | 150    |
| VAT element                | 1.2    |
| Net                        | 125    |
| VAT                        | 25     |

HMRC not a creditor therefore should be recoverable

the date of submission to the surety or cautionser of details of termination of the office held by the insolvency practitioner. Any date between 1 November 2011 and 19 November 2011

As regards the remuneration of the insolvency practitioner

the basis on which the remuneration of the insolvency practitioner is to be calculated; and Fixed fee

the date and content of any resolution of creditors in relation to the remuneration of the insolvency practitioner 15 February 2011

Any appropriate wording for a fixed fee resolution
Meetings (other than any final meeting of creditors)  
the dates of the date of first meeting of creditors to consider an administrator’s proposals;  
the dates and purposes of any subsequent meetings.  
15 February 2011

**Disqualification of Directors**

As regards the insolvency practitioner’s duties under section 7 of the Company Directors Disqualification Act 1986[14] to report the conduct of directors:

<table>
<thead>
<tr>
<th>Event</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>the date a return under section 7 is due;</td>
<td>Within 6 months from appointment - 12 July 2011</td>
</tr>
<tr>
<td>the date a return is submitted to the Secretary of State;</td>
<td>[n/a D1 form is a conduct report]</td>
</tr>
<tr>
<td>the date a conduct report is submitted to the Secretary of State; and</td>
<td>11 May 2011</td>
</tr>
<tr>
<td>the date on which any further reports are submitted to the Secretary of State.</td>
<td></td>
</tr>
</tbody>
</table>

**Vacation of office etc.**

The following details regarding the completion of the case –

<table>
<thead>
<tr>
<th>Event</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>the date of the final notice to, or meeting of, creditors;</td>
<td>17 October 2011</td>
</tr>
<tr>
<td>the date that the insolvency practitioner vacates office; and</td>
<td>17 October 2011</td>
</tr>
<tr>
<td>the date of release or discharge of the insolvency practitioner (or if there is no final meeting of creditors, the date of the final return of receipts and payments to the Secretary of State).</td>
<td>31 October 2011</td>
</tr>
</tbody>
</table>

**Distributions to creditors etc.**

As regards distributions -

<table>
<thead>
<tr>
<th>Event</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>in relation to each payment to preferential or preferred creditors –</td>
<td>None</td>
</tr>
<tr>
<td>the name of the person to whom the payment was made;</td>
<td></td>
</tr>
<tr>
<td>(ii) the date of the payment;</td>
<td></td>
</tr>
<tr>
<td>(iii) the amount of the payment;</td>
<td></td>
</tr>
</tbody>
</table>
in relation to each payment to unsecured creditors –

the name of the person to whom the payment was made;

(ii) the date of the payment;

(iii) the amount of the payment; and

Workings

Claims

Bigeye Services Limited 3,350
Atlantic Gold Limited 2,100
Tunny Finance Limited 200

Realisations

From (e) above 3,055
Debt collection £500k @ 5% (25) [Albacore]
Administrators’ fees (35)
Disbursements (25)
Agent’s costs 10% £550 (55)
Agent’s costs 5% £2,250 (112.5)

Available for distribution 2,802.5

49.6p in the £

Answer:

<table>
<thead>
<tr>
<th>Creditor</th>
<th>Date of Payment</th>
<th>Amount*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bigeye Services Ltd</td>
<td>26/09/11</td>
<td>£1,661,659</td>
</tr>
<tr>
<td>Atlantic Gold</td>
<td>26/09/11</td>
<td>£1,041,637</td>
</tr>
<tr>
<td>Tunny Finance</td>
<td>26/09/11</td>
<td>£ 99,204</td>
</tr>
</tbody>
</table>

*Rounding acceptable

in relation to each return of capital

the name of the person to whom the return of capital was made;

(ii) the date of the payment; and

(iii) the amount of capital returned or the value of any assets returned.

None

Statutory Returns

As regards any returns or accounts to be made to the Secretary of State, the Registrar of Companies or the Accountant in Bankruptcy –

as regards each interim return or abstract of receipts and payments;

(i) the date the return or abstract is due;

(ii) the date on which the return is filed; and

Sent within 1 month of the period covered by the report:

Due date: 12 August 2011
Date filed: any date between 13 July 2011 and 12 August 2011

(b) as regards any final return or abstract of receipts and payments

(i) the date that the return or abstract is due; and

Due date: 16 November 2011
Date filed: any date between 17 October 2011 and 16 November 2011
(ii) the date on which the return is filed.

<table>
<thead>
<tr>
<th>Time recording</th>
</tr>
</thead>
<tbody>
<tr>
<td>Records of the amount of time spent on the case by the insolvency practitioner and any persons assigned to assist in the administration of the case.</td>
</tr>
</tbody>
</table>

Other statutory information

Money Laundering/Know your customer
Appointment document
Records of meetings
QUESTION 2

(a) Briefly outline the formal options that the Bank has under its security arrangements to recover its debt. Summarise the comparative financial outcome for the Bank of each option. (15 marks)

<table>
<thead>
<tr>
<th>Bank has a debenture that is likely to classify as a Qualifying Floating Charge and therefore could appoint an Administrator.</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Charge pre dates the Enterprise Act, the charges covers all of the assets and therefore the Bank could appoint Administrative Receivers.</td>
</tr>
<tr>
<td>The bank charges are likely to confer the ability to appoint a Fixed Charge Receiver.</td>
</tr>
<tr>
<td>Possible for a FXR to be in office alongside an ADM if the ADM agrees.</td>
</tr>
</tbody>
</table>

Main differences in financial impact are:

- In ADR and FXR the Corporation tax on a capital gain is an unsecured debt v ADM where it is payable in priority to the charge holder.
- In FXR employee liabilities are not limited to qualifying liabilities.
- In FXR and ADR rates are not payable until agency terminated.
- FXR appointed over the property and therefore does not have the capacity to deal with the other assets under the charge.

An ADR may encounter difficulties in recovering overseas assets as receivers not recognised under cross border.

Bank could deal with the property as mortgagee in possession.
<table>
<thead>
<tr>
<th></th>
<th>Administration</th>
<th>Administrative Receivership</th>
<th>Fixed Charge Receiver</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Realisations</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Property</td>
<td>£2,750,000</td>
<td>£2,750,000</td>
<td>£2,750,000</td>
</tr>
<tr>
<td>Other assets</td>
<td>£50,000</td>
<td>£50,000</td>
<td></td>
</tr>
<tr>
<td>French assets</td>
<td>£35,000</td>
<td>£35,000</td>
<td></td>
</tr>
<tr>
<td>Rent receivable</td>
<td>£48,000</td>
<td>£48,000</td>
<td>£48,000</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>£2,883,000</td>
<td>£2,883,000</td>
<td>£2,798,000</td>
</tr>
</tbody>
</table>

**Costs**

- **Capital gains tax**
  - **Proceeds**: £2,750,000
  - **Indexed cost**: (650,000)
  - **Profit**: £2,100,000
  - **Rate**: 30%
  - **Corp tax**: £630,000

- **Employees - qualifying liabilities**
  - **Weekly pay**: £1,450
  - **Weeks**: 12
  - **Pay**: £17,400
  - **Pension**:
    - 7.5% x £300 x 12: £270
    - 5% x £750 x 12: £450
  - **Total**: £18,120

- **Employees - NON qualifying liabilities**
  - **Weekly pay**: 750 400 300
  - **Capped weekly pay**: 400 400 300
  - **Redundancy weeks**: 6 - 7
  - **Redundancy due**: 2,400 - 2,100 -
  - **Notice pay**: Employees would work their notice - -
  - **Rates**
    - **Amount available for bank**: £2,210,880 £2,864,880 £2,775,380

**Discretion over value inserted for French assets in ADR – provided appropriate assumption made.**
(b) Set out the key advantages and disadvantages to the Bank of each of its options.
(10 marks)

<table>
<thead>
<tr>
<th>Fixed Charge Receiver</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Advantages</strong></td>
</tr>
<tr>
<td>Lower cost</td>
</tr>
<tr>
<td>Fixed Charge Receiver does not need to be a qualified IP</td>
</tr>
<tr>
<td>Limited statutory duties</td>
</tr>
<tr>
<td><strong>Disadvantages:</strong></td>
</tr>
<tr>
<td>Can only deal with assets subject to fixed charge</td>
</tr>
<tr>
<td>Trading on not usually possible</td>
</tr>
<tr>
<td>Fixed Charge Receiver may require indemnity from the appointor</td>
</tr>
<tr>
<td>No power to enforce co-operation of directors</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Administrative Receivership</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Advantages</strong></td>
</tr>
<tr>
<td>Primary duty owed to charge holder</td>
</tr>
<tr>
<td>Appointor will control strategy</td>
</tr>
<tr>
<td>No statutory time limit</td>
</tr>
<tr>
<td>Any corporation tax will be an unsecured claim</td>
</tr>
<tr>
<td>Can be appointed whether or not the company is in liquidation</td>
</tr>
<tr>
<td>Can be used to block an appointment of administrator</td>
</tr>
<tr>
<td>Can trade the business</td>
</tr>
<tr>
<td><strong>Disadvantages:</strong></td>
</tr>
<tr>
<td>No moratorium</td>
</tr>
<tr>
<td>Lack of recognition under EC Regs</td>
</tr>
<tr>
<td>More costly than FXR due to statutory duties</td>
</tr>
<tr>
<td>ADR often requires indemnity from the appointor</td>
</tr>
<tr>
<td>Adverse publicity for bank</td>
</tr>
<tr>
<td>Possible loss of agency could impact upon trading strategy and asset realisations</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Administrator</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Advantages:</strong></td>
</tr>
<tr>
<td>Easy to appoint</td>
</tr>
<tr>
<td>Charge holder can choose who is to be IP</td>
</tr>
<tr>
<td>Recognised under EU Regs</td>
</tr>
<tr>
<td>Benefit of moratorium</td>
</tr>
<tr>
<td>Extensive statutory powers; to trade, manage and sell the business</td>
</tr>
<tr>
<td>Flexible exit routes</td>
</tr>
<tr>
<td>Viewed more favourably by the media as a rescue procedure</td>
</tr>
<tr>
<td>Can trade the business</td>
</tr>
<tr>
<td>Ability to challenge antecedent transactions to enhance realisations.</td>
</tr>
<tr>
<td><strong>Disadvantages:</strong></td>
</tr>
<tr>
<td>Administrator’s duty owed to creditors generally</td>
</tr>
<tr>
<td>Prime duty is to achieve para 3 Sch B1 IA purpose which may not be consistent with Bank’s objectives</td>
</tr>
<tr>
<td>12 month time limit</td>
</tr>
<tr>
<td>Corporation tax is an expense of the administration</td>
</tr>
<tr>
<td>Bank will have little/no control over administration strategy</td>
</tr>
<tr>
<td>Significant reporting requirements; possible increase in costs.</td>
</tr>
</tbody>
</table>
QUESTION 3

(a) For each matter outlined in (i) to (vi) explain what steps the Supervisor may take to deal with each situation. (15 marks)

(i) Arrears of contributions

Check terms of the CVA to determine what constitutes default
Take actions specified in the CVA in relation to the default
Notwithstanding the terms of the CVA the Supervisor has the power to present a winding up petition

(ii) Repayment of loan accounts

Check CVA to establish whether this constitutes default of the CVA (or an assumption that the circumstances are a default)
Supervisor has limited powers in respect of Preferences and other antecedent transactions
If the proposal provides for discretion request that the situation is remedied – by repayment of the monies to the company
Consider process required to place Company into Liquidation or Administration where sections 212 238 and 239 available
Take legal advice

(iii) Unencumbered, redundant P&M

Check CVA proposal for powers to dispose of these assets.
Obtain valuations
If appropriate instruct agents to dispose of the equipment
Termination of the CVA would not break Trust clause unless CVA provides otherwise
Establish if there are any other proprietary interests (e.g. HP)

(iv) Distraint

Check CVA to establish whether this constitutes default of the CVA (or an assumption that the circumstances are a default)
Notify HMRC of interest in plant and machinery held on trust for CVA creditors
Post CVA debt so not bound by terms of CVA – therefore distraint likely to be valid for assets not subject to trust clause.
Consider obtaining legal advice over validity of distraint.
If Company placed into Administration moratorium would limit HMRC’s ability to complete execution but would not over-ride their claim.
If Supervisor presents winding up petition then as distraint not complete HMRC would have to allow liquidator to deal with assets.
Contact HMRC to discuss situation
Establish what assets the distraint covers/obtain a copy of notice
(v) **Fees**

Under r1.55 (NEW RULES) request must be made in writing – directors should be informed of this.

Directors are entitled to this information (r1.55(2)).

Information must be provided within 28 days of receipt of the request.

Provided request made in writing the Supervisor should provide:

- the total number of hours spent on the voluntary arrangement by the relevant person whether as nominee or supervisor, or both, and any staff assigned to the voluntary arrangement during that period;
- for each grade of individual so engaged, the average hourly rate at which any work carried out by individuals in that grade is charged;
- the number of hours spent by each grade of staff during that period.

Information to be provided would be up to the last 6 month period of the CVA.

(vi) **Electricity supplier**

Supervisor can apply under s233 for continuation of supplies.

Supplier may require personal guarantee from Supervisor.

Consider obtaining an indemnity from directors.

Effective date for avoiding arrears is the date of approval of the CVA and therefore current arrears do not qualify.

Consider powers under the terms of the CVA.

Consider whether such costs could be paid out of the CVA estate under the terms agreed by creditors.

Duty is to CVA creditors and therefore consider benefit of applying under this provision.

An administrator would be better suited to deal with such matters.

<table>
<thead>
<tr>
<th>General applicable to each</th>
</tr>
</thead>
<tbody>
<tr>
<td>Establish company proposals to remedy any breaches</td>
</tr>
<tr>
<td>Supervisor may apply to court for directions</td>
</tr>
<tr>
<td>Take legal advice</td>
</tr>
<tr>
<td>Inform creditors of breach</td>
</tr>
</tbody>
</table>
(b) Explain generally what options could be considered to facilitate the investment and any issues likely to arise in the particular circumstances of this case. (10 marks)

**Variation to existing CVA**

If the CVA proposal allows it a variation could be agreed with creditors. This could be on the basis of a full and final settlement of the CVA debts. This would not resolve the post CVA creditor positions.

Likelihood of approval considering historic breaches

**Disposal of business by Supervisor**

The CVA may give the Supervisor the power to dispose of the Company’s trade and assets. Supervisor would need to take advice on to what extent this power could be exercised for post CVA assets. Would require consent of HMRC in relation to assets subject to distress. Additional procedure likely to be required to deal with the appropriation of funds realised.

Supervisor may be at risk of liability should the transaction be challenged by a subsequently appointed administrator or liquidator.

**Propose new CVA – full and final settlement**

Could bind in both existing CVA creditors and additional creditors. Walking possession is likely to be regarded as “security”, so HMRC’s rights over the assets can only be modified with its consent.

Timing would be an issue due to notice periods and pending action from utilities – however new nominee could request continuation of supply.

Likelihood of approval considering historic breaches

**Administration disposal**

Administrator could be appointed quickly and therefore deal with pressing creditor enforcement. HMRC’s rights would have to be addressed through consent or application to court.

Impact on contracts with customers may have to be considered.

**Disposal of the trade and assets by the directors**

Risk that transactions could later be challenged by a liquidator and very unlikely that a well-advised purchaser would buy assets subject to the CVA trust.

Would require HMRC consent in relation to the assets subject to distraint.

Insolvency procedure required to deal with sale proceeds.

Does not deal with the CVA – would need to be terminated.

**Liquidation**

Problem would be timescales.

Centerbind application or provisional liquidation could be considered.

Liquidator could challenge the distraint at the same time.
QUESTION 4

(a) Explain what arrangements your principal should have in place to deal with the transfer of cases in the event of his death or incapacity. (5 marks)

Officeholder should have a continuity plan in place to safeguard creditor and other stakeholder interests.

Arrangement with another licensed IP to take over cases

Detailed provisions to provide for:

- A clear statement of the circumstances upon which the agreement would become operative;
- The circumstances in which the nominated successor can decline to act.
- The extent and frequency of disclosure to the nominated successor of case details and financial information.
- The steps to be taken by the nominated successor

Ownership of, or access to, case working papers
Access to practice records
Financial agreements
Professional indemnity insurance arrangements

Arrangements should be reviewed annually
Lasting power of attorney for alternative in the event of incapacity
Joint bank account signatures

(b) Outline the procedural steps that may be undertaken to deal with the transfer of this case. (10 marks)

**Initial notifications**
Contact personal representative of the Administrator
R 2.124(1) Duty of personal representative to give notice to court specifying date of death
R2.124(3) Notice of death may be given by any person producing to the court the death certificate
Notice of death sent to registrar of companies
Notice of death results in discharge from liability
Notify RPB
Notify lawyer
Notify agents

**Replacement - individual**
Para 94(1) the directors may replace the administrator
Confirm willingness of alternate IP to accept appointment
Para 94(2) consent of the QFC or if withheld permission of the court
Para 95 In event of directors not taking reasonable steps or right for the court to make replacement then application can be made to court
Court application by Creditors’ committee (p91)
Replacement administrator completes Form 2.2B
Docs served not less than 5 days before hearing on:

- Company;
- Person proposed administrator
Affidavit of belief completed and filed if application under p95

**Replacement - block**

R7.10C – application may be made by:

- any person who is proposed to be appointed as the replacement office-holder
- any creditor in a case subject to the application;
- the recognised professional body or recognised body by which the outgoing office-holder is or was authorised; or
- the Secretary of State

An applicant (other than the Secretary of State) must give notice of the application to the Secretary of State at least 5 business days before the hearing of the application.

The application must contain a schedule setting out—

(a) the name of each case,
(b) the identity of the court having jurisdiction when the application is made,
(c) the case number (if any), and
(d) the capacity in which the outgoing office-holder was appointed.

The application must be supported by evidence—

(a) setting out the circumstances which gave rise to it being expedient to appoint a replacement office-holder; and
(b) exhibiting the written consent to act of each person who is proposed to be appointed as replacement office-holder.

Where all the cases in the schedule under paragraph are in a county court or more than one county court the application may be made to a district judge of a convenient county court having insolvency jurisdiction

Application may be considered without hearing

Court will make order of transfer or other such order

**Post replacement**

The applicant must ensure that a sealed copy of every order transferring any case to the High Court and of every order which is made on a substantive application is lodged with the court having jurisdiction over each case affected by such order for filing on the court file relating to that case

Any appointment made under this block transfer Rule must be notified to

- the Secretary of State as soon as reasonably practicable
- the creditors, and
- such other persons as the court may direct,
- in such manner as the court may direct.

Deliver up records to new administrator
Send out final progress report to creditors, court and registrar of companies
Release bond
Prepare hand over note
(c) **Prepare a final receipts and payments account for inclusion in a final report to creditors assuming closure on 14 November 2011. (10 marks)**

<table>
<thead>
<tr>
<th>ETR</th>
<th>Note</th>
<th>6 months - 15/02/11 to 14/08/11</th>
<th>3 months - 15/08/11 to 14/11/11</th>
<th>Cumulative - 15/02/11 to 14/11/11</th>
</tr>
</thead>
<tbody>
<tr>
<td>£</td>
<td>£</td>
<td>£</td>
<td>£</td>
<td>£</td>
</tr>
</tbody>
</table>

**Assets specifically pledged**

<table>
<thead>
<tr>
<th></th>
<th>£</th>
<th>£</th>
<th>£</th>
</tr>
</thead>
<tbody>
<tr>
<td>Freehold property</td>
<td>350,000</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Amounts due to</td>
<td>(250,000)</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>100,000</strong></td>
<td>-</td>
<td>-</td>
</tr>
</tbody>
</table>

**Assets not specifically pledged**

<table>
<thead>
<tr>
<th></th>
<th>£</th>
<th>£</th>
<th>£</th>
</tr>
</thead>
<tbody>
<tr>
<td>Goodwill</td>
<td>-</td>
<td>50,000</td>
<td>50,000</td>
</tr>
<tr>
<td>Surplus from book debts</td>
<td>200,000</td>
<td>150,000</td>
<td>25,000</td>
</tr>
<tr>
<td>Stock</td>
<td>50,000</td>
<td>40,000</td>
<td>-</td>
</tr>
<tr>
<td>Plant, equipment and motor vehicles</td>
<td>125,000</td>
<td>90,000</td>
<td>-</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>475,000</strong></td>
<td><strong>330,000</strong></td>
<td><strong>75,000</strong></td>
</tr>
</tbody>
</table>

**Administrator's remuneration - fixed element** 2 (10,000) (10,000)

**Administrator's remuneration - % basis** 2 (16,500) (3,750) (20,250)

**Property holding costs** 3 (16,250) (8,125) (24,375)

**Legal fees** 4 (20,000) (10,000) (30,000)

**Amount paid to subsequent administrator**

<table>
<thead>
<tr>
<th>£</th>
<th>£</th>
</tr>
</thead>
<tbody>
<tr>
<td>(320,375)</td>
<td>(320,375)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>£</th>
<th>£</th>
</tr>
</thead>
<tbody>
<tr>
<td>267,250</td>
<td>(267,250)</td>
</tr>
</tbody>
</table>

**Notes:**

1 **The Book debt surplus is made up of:**

- Gross collections 650,000
- Less: amount due to Cover (450,000)
- Less: debt collection charges (50,000)
- **Amount remitted to Administrator** 150,000

2 **Administrators' remuneration**

Discretion over timing of payment as not specified in question
3. Property holding costs

<table>
<thead>
<tr>
<th></th>
<th>Period 1</th>
<th>Period 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>Weekly</td>
<td>625</td>
<td>625</td>
</tr>
<tr>
<td>Number of weeks</td>
<td>26</td>
<td>13</td>
</tr>
<tr>
<td></td>
<td>16,250</td>
<td>8,125</td>
</tr>
</tbody>
</table>

4. Legal fees

Discretion over timing of payment as not specified in question

Notes:
Figures stated net of VAT
PERSONAL INSOLVENCY

NOVEMBER 2011

EXAMINER’S REPORT

GENERAL

The questions in this paper met with mixed results. Generally candidates presented good answers where the topic examined lent itself to textbook learning. Candidates fared much less well where the subject was essentially a practical one or where commercial considerations were relevant. Very few candidates demonstrated that they have any knowledge of partnership insolvency.

Too often this year candidates paid insufficient attention to the requirements of the question or to the information contained in it. The result was that time was wasted presenting pages of answer that could never gain any marks or dealing with issues which, on the facts, did not exist. Once again some candidates failed to appreciate that the date of insolvency is relevant to deciding which statutory provisions to use. As in past years a few candidates could not be awarded marks because of illegible handwriting.

QUESTION 1

Requirements

Explain the actions and the decisions that you will need to take in the first week following your appointment in relation to the assets and creditors in George’s bankruptcy estate.  

(25 marks)

NOTE. You should state such reasonable assumptions as you consider necessary.

Candidates were asked to assimilate facts about a bankrupt sole trader and to explain what they would do when appointed as trustee immediately upon the bankruptcy order being made.

The key lay in recognising that decisions needed to be made as to whether or not to trade on and how, if at all, to try to effect a sale of the business. Many candidates identified these but failed to appreciate the need for urgency, describing courses of action that could never be appropriate to a small business in a bankruptcy. Too often candidates suggested methods of sale only relevant to disposals of much larger businesses in corporate insolvencies.

The requirements of the question narrowed the areas to be discussed to the actions and decisions that would need to be taken in the first week in relation to the assets and creditors. Too many candidates wrote at length about the broad subject of bankruptcy and by doing wasted time and gained no marks. Topics discussed by candidates included setting up case files, staffing requirements, reconciling ISA bank accounts, the general powers and duties of a trustee, the bankrupt’s obligations to his trustee, bankruptcy restrictions orders, investigating antecedent transactions, redirecting the bankrupt’s post and private/public examinations. Whilst some of these touch on assets and creditors and others are matters which might be dealt with shortly after appointment, none has any relevance to what candidates were being asked to explain.

Most candidates were able to identify the potential issues in relation to the landlord. Far fewer candidates picked up on the existence of disgruntled creditors and their relevance to the decision as to how the trustee might proceed in the short term. There were a number of references to issues that could only ever be relevant to a corporate insolvency (Companies House, charges registers etc).
QUESTION 2

An individual burdened by and unable to pay off credit card debts who wishes to take positive action to sort out his financial affairs now has more options open to him than at any time in history.

Requirements

Set out and compare the options available to such an individual. (25 marks)

This question asked candidates to set out and compare the options available to someone burdened by credit card debts. The key to approaching the question successfully lay in planning and in appreciating that, given the number of options available, writing extensively about familiar topics to the detriment of others was unlikely to gain candidates good marks.

It was pleasing that, in general, candidates were able to identify most of the options, to compare the different procedures and to set down the main features of each. However, some were clearly more confident when dealing with the familiar topics of bankruptcies and IVAs. Too many took the opportunity to write down far more than was necessary on these two topics, failing to appreciate that marks were likely to be awarded evenly across the options.

QUESTION 3

(a) Prepare estimated outcome statements for the liquidation of the Partnership and for each of the bankruptcy estates. (22 marks)

(b) Calculate the rate of the dividend available to each class of creditor in each estate. (3 marks)

(Total: 25 marks)

This question gave candidates financial information about an insolvent partnership and the estates of three bankrupt partners. Candidates were asked to prepare estimated outcome statements and to calculate the dividends available in each estate.

The question explored candidates’ knowledge of the rules dealing with the allocation of costs where some of the estates cannot pay their own and with the provision which allows the liquidator of a partnership to lodge claims for a shortfall in the partners’ sole estates.

There were very few candidates who demonstrated that they knew how to allocate costs across estates in a partnership scenario. Most candidates either ignored the issue altogether or presented answers that suggested that they had no idea how to approach the subject. The same is true of the liquidator’s claim in the sole estates; very few candidates showed that they knew that this was even possible, and those that did rarely calculated the amount of the claims correctly.

The result was that candidates had to rely on the basics of preparing estimated outcome statements in order to gain any marks. Some easy marks were gained by candidates who were able to prepare the template for such statements and to insert those figures that did not rely upon knowledge of partnership insolvency. However, a worrying number of candidates still demonstrated an inability to present a coherent outcome statement. Too many candidates seemed to be unable to differentiate between the costs of and the claims against an estate, often treating these as indistinguishable.

Many candidates invented costs when to do so was unnecessary. The question gave four costs figures (one for each estate) and made it clear that these were “the total costs and expenses (including the Secretary of State’s administration fee on realisations to date and your [i.e. the trustee’s] remuneration”. Despite this, candidates inserted all sorts of additional costs into their outcome statements, giving the impression that they were not reading or understanding the information presented to them.
QUESTION 4

Consider, in the form of a memorandum for your file, the issues that you will need to cover when writing to Ann. You should state briefly the relevant statutory or other authorities applicable to each issue.

(25 marks)

NOTE: Ignore taxation and any interest payable to creditors.

Question four asked candidates to assimilate facts about a bankruptcy and the property lived in by the bankrupt and his family. Candidates were asked to prepare to advise the non-bankrupt spouse (the wife) about her position and how she might proceed.

Many candidates were able to explain about the exoneration claim potentially available and dealt well with the equitable accounting for improvements to the property paid for by the wife. Candidates were less successful in explaining fully the concept of exceptional circumstances and how this might apply given the facts in the question.

At times candidates missed out on marks because they forgot that they were being asked to advise the wife. Too often candidates approached the question as if they were the trustee. Considerations such as whether the wife wished to acquire her husband’s interest at all or could afford to do so were often not explored. Candidates often stopped short of providing full advice; for example having calculated the value of the bankrupt’s interest few went on to deal with the possibility that the wife may be able to strike a deal at a lower price.

Far too many candidates advised that the wife should take issue over the costs of the bankruptcy. The question said “…the costs and expenses of the bankruptcy, including the trustee’s remuneration (which is paid up to date), have been £14,000”. Some candidates incorrectly took this to mean that the trustee’s remuneration itself was £14,000 and proceeded to explain, sometimes at length, how this could be challenged. There was nothing in the question that should have led candidates to conclude that the trustee’s remuneration was excessive and it is worrying to see that so many candidates thought that challenging the trustee over his remuneration was likely to be a good idea at the same time as negotiating with him over the property.
QUESTION 1

Explain the actions and the decisions that you will need to take in the first week following your appointment in relation to the assets and creditors in George’s bankruptcy estate. (25 marks)

NOTE. You should state such reasonable assumptions as you consider necessary.

| Nothing should be done (at least as far as the outside world is concerned) until the certificate of appointment has been received. |
| Securing the business assets |
| Attendance at premises and safeguarding assets |
| The business appears still to be trading so the trustee (“T”) or a member of his staff should attend the shop immediately. |
| Interview George (“G”), tell him of your appointments and find out what is going on. |
| Agent should be instructed to ensure physical control of assets (e.g. changing locks, alarm codes). |
| Insurers should be put on notice of appointment. |
| Valuation |
| A suitably qualified agent needs to be instructed immediately to prepare an inventory and a valuation of the assets and the business (including any goodwill). |
| Identification of stock and other assets |
| Any stock/assets need to be identified which are or may be subject to third party claims to ownership including stock potentially subject to ROT or other claims to ownership such as any equipment belonging to customers brought in for repair. |
| Where repairs have not started, customers who wish to reclaim their equipment should be allowed to do so. |
| Where repairs have started, customers’ equipment may be subject to a repairer’s lien. |
| Consider whether or not trading continues, it might be economic to finish any repairs which are part completed |
| Possible relevance of IA86.s283(2) |
| Consideration needs to be given as to the possibly of a claim being made by G that some of the assets at the premises are covered by the provisions of s283(2) and do not therefore comprise in the bankruptcy estate. |
| The lease and the landlord |
| Urgent contact needs to be made with the landlord (“L”) and a copy of the lease obtained. |
| L’s right to distrain against the assets comprised in the bankruptcy estate survives the making of the BO (IA86.s347(1)) for rent that has accrued in the six months prior to the BO. |
| Therefore it may be necessary for T to give an undertaking to L to pay the 6 month’s rent out of the net proceeds of sale of the goods over which L could distrain. |
| Trading on or not |
| Powers of T as regards trading the business |
| T should only continue the trade of a bankrupt in order to facilitate the beneficial winding up of that business. |
| There is no obligation on T to continue to trade the business and he should only do so if this is practicable, the realisable value of the assets enhanced and the likely dividend to creditors increased. |
| T should not trade on if a trading surplus is going to be diminished or eliminated by increased costs or the risks of the expected outcome not being achieved are too great. |
| If trading on is proposed then sanction to do so will need to be obtained from the Secretary of State (IA86.s302(2), IA86.s314(1) and IA86.Sch 5 Pt 1.Para 1) and consideration given to the need to apply to the Secretary of State for authorisation to use a local bank account (IReg86. reg 21). |
| Sanction is not required to sell the assets including the goodwill. |
| T must ensure that separate records are kept of the trading (I.Reg 1994 Reg 26) |
| If T is to appoint G to carry on the business for the benefit of creditors, T will need to obtain the permission of either the Court or the Secretary of State (IA86 s314(2) and (3)). |
| Whatever his decision, T must fully document this so that, if necessary, he can justify his decision at a future time. |
**Financial considerations**
Profit/loss and cashflow forecasts need to be prepared to see if trading on would be viable. T will be guided by the advice from the agent and his valuation and by any information available about the recent trading performance of the business. If the business has been loss making it is perhaps unlikely that it will miraculously become profitable under T’s direction.

**Utilities**
If trading on is a possibility, contact relevant utilities with meter readings and make arrangements for supplies to continue.

**Third party actions that may frustrate trading on**
L’s intentions need to be established. If T decides to try and trade on and/or sell the business as a going concern, will L be willing to co-operate by, for example, agreeing to an assignment of the lease or the grant of a new lease in order to secure a new tenant and the payment of rent going forward?
If L is uncooperative, possibly disclaim the lease.
It may not be possible to trade on without G’s co-operation so his willingness to help needs to be established.
T must make a judgment as to whether he could trust G were the business to continue as it will almost certainly be uneconomic for T or his staff to be involved to any significant extent in the day to day running of the business.
The willingness or otherwise of Carol (“C”) to help may affect T’s decision.
Any regulatory issues that would prevent trading on need to be identified.
The insurer’s position should be ascertained.

**Health and safety**
Consideration needs to be given to health and safety.
Enquiries should be made of G as to whether there are any matters requiring immediate attention.

**Carol (the employee) (“C”)**
T will need to speak to the C to establish whether she is owed arrears.
If trading on occurs and C agrees to work on, T may agree to pay any arrears owing.
T must ascertain status of C’s contract of employment and take the appropriate advice.
T should not act so as to adopt C’s contract.
If there is no trading on or C is unwilling to work, then she must be made redundant.
Bankruptcy constitutes insolvency for ERA96 purposes so C should be given the forms and guidance she requires to claim amounts due to her.
Even if the business is sold C’s contract of employment will not pass to the purchaser because bankruptcy is a proceeding which is instituted with a view to the liquidation of the George’s assets and therefore the regulations about relevant transfers and the passing of contracts of employment are disapplied (TUPE 2006 Reg 8(7))

**Possible purchasers of the business**
Whether trading on or not T may have a short window of opportunity to try and realise the assets for more than break up.
The agent should be instructed to contact Vera Rose urgently in order to gauge the real level of her interest in acquiring the business and assets.
Consideration needs to be given to whether there are any other similar businesses in the area which may be interested in the business and assets.
The agent may hold a database of potential local purchasers.
T and G may be aware of potential purchasers.
If trading on is practicable and warranted, this will probably only be for a very limited period to achieve a beneficial winding up of the business probably enough to allow time for an informal tender process or similar to be conducted by the agent seeking best and final offers within a short timescale.
A short “sales pack” may be required.
The costs of advertising the business for sale and an extensive marketing campaign are unlikely to be warranted.

**Creditors**
T should give notice to creditors of his appointment (IA86.s296(4)) and must say whether he proposes to call a meeting of creditors to establish a creditors’ committee.
In this case this may be the thing to do given the creditors’ apparent concerns about how G has been running his business.
T should make early contact with the creditors who have raised concerns to see if what they have to say affects what T may wish to do as regards the business and assets.

**Consideration of possible alternative ways forward**
In the (perhaps unlikely) event that the business is sufficiently profitable and cash generative after meeting all costs and G’s cost of living to provide surplus cash, one option might be for G to propose an IVA although G appears to have alienated at least some of his creditors so creditor support for an IVA may not be universal.
**QUESTION 2**

Set out and compare the options available to such an individual. (25 marks)

<table>
<thead>
<tr>
<th>The options for a debtor (“D”) are:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Take “self help” actions to improve financial position</td>
</tr>
<tr>
<td>Negotiate agreements with creditors</td>
</tr>
<tr>
<td>Reorganise/consolidate debts (incl. remortgage)</td>
</tr>
<tr>
<td>Enter into a debt management plan</td>
</tr>
<tr>
<td>Apply for a debt relief order</td>
</tr>
<tr>
<td>Make a proposal for an individual voluntary arrangement</td>
</tr>
<tr>
<td>Go bankrupt</td>
</tr>
<tr>
<td>Other possibilities</td>
</tr>
</tbody>
</table>

**Take self help actions**

**General description**

Actions that can be taken without reference to any creditor that may free up or generate surplus cash in order to meet repayments to creditors.

**Assets, liabilities and income**

No restrictions, just steps that might be taken. For example:

- Cut up credit cards to discourage further use.
- Undertake a critical review of expenditure to identify savings.
- Consider whether there is scope for increasing income into the family budget, e.g. by taking an additional job or renting out a room.
- Consider whether cash can be generated by disposing of surplus or extraneous assets.

**Comparative features**

No direct costs involved

Can be organised without help of any kind

D should be careful not to overstretch himself or seek to live within an unrealistic or unsustainable budget.

**Negotiate agreements with creditors**

**General description**

Series of individual agreements entered into by D with his creditors.

Negotiated payments made to creditors from income and/or lump sums (e.g. from relatives or charitable source).

**Assets, liabilities and income**

No restrictions on the extent of D’s liabilities.

Unlikely to be manageable where there are more than a handful of creditors and/or the debts are substantial.

Unlikely to be acceptable to creditors where D has assets that can be readily be realised to pay down debt.

D must have surplus income each month from which to make the agreed repayments.

**Comparative features**

Can be organised without help but some professional advice may be required (e.g. from a debt counsellor or CAB to put together a budget).

Possible that creditors will agree at some future date to write off balance of debts if D has made every effort to repay what he can.

Flexible, in that D can ask to reduce payments if necessary.

Costs should be lower than a more formal debt solution.

There’s no obligation on the creditors to accept D’s proposals.

Unless otherwise agreed (unlikely) D remains liable for full extent of the debts, including charges and interest.

Proposing an agreement in the first place may alert creditors to the fact that D has financial problems and precipitate a rush to gain advantage.

No protection is afforded D either before an agreement is put in place or afterwards. It is open to an individual creditor to break ranks and take action or seek to gain advantage over others e.g. by obtaining judgment and a charging order against real property.

All the admin (including making agreed payments) will need to be done by D.

Repayments could go on for years.

**Reorganise/consolidate debts (incl. remortgage)**

**General description**

D obtains a loan to reorganise or clear debts, and therefore swaps all his existing debt for just one.

**Assets, liabilities and income**

No restrictions on the extent of D’s liabilities.

Unlikely to be manageable where there are more than a handful of creditors and/or the debts are substantial.

D must have sufficient surplus monthly income to meet repayments on new loan.
**Comparative features**

Only one repayment is made each month.

The monthly repayment is usually lower than the aggregate of all the repayments on the existing debts (otherwise there wouldn’t be a lot of point in taking this route).

There may be fees or other costs associated with obtaining the new loan.

The loan will need to be sufficient to repay all existing debts - adding a new debt to an existing list of debts may exacerbate D’s debt problems.

A poor credit rating and/or the economic climate may make getting a new loan difficult or impossible.

The new loan may have to be secured on real property thereby swapping unsecured debt for secured. D’s home may be at risk if he defaults at a future date.

Interest rates may vary making budgeting for repayments difficult.

Especially if secured, the repayments on the new loan may stretch further into the future than would continuing repayments on the existing debts.

Repayments could go on for years.

**Enter into a debt management plan ("DMP")**

**General description**

Formal agreement entered into between D and his creditors, brokered by a Debt Management Company ("DMC")

Typically all D will have to do is to make one periodic payment to the DMC which will then make the individual payments to the creditors.

**Assets, liabilities and income.**

DMP unlikely to be acceptable to creditors where D has assets that can be readily be realised to pay down debt.

D must have surplus income from which to make the payments to the DMC.

**Comparative features**

Enables D to make one affordable monthly payment to his creditors.

DMP may be more likely to be accepted by creditors than would informal agreements.

All negotiations and administration is all carried out by the DMC.

More likely that DMC will be able to persuade creditors to waive interest.

Flexible, in that D can ask to reduce payments if necessary.

There’s no obligation on the creditors to accept D’s proposals.

There will either be an upfront cost of putting the DMP in place and/or commission payable to the DMC which may extend (perhaps materially) the time over which D has to make payments.

Most likely payment in full will be sought by creditors, even if this will take years to achieve. DMP could well endure for many years and much longer than. IVA or bankruptcy.

D remains liable for full extent of the debts unless creditors agree to waive part of the debt and/or charges and/or interest

No protection is afforded D either before the agreement is put in place or afterwards.

It is open to any creditor to break ranks and take action or seek to gain advantage over others e.g. by obtaining judgment and a charging order against real property.

It may be possible to prevent creditors from "jumping ship" by obtaining written agreement to this effect as part of the DMP.

**Apply for a debt relief order ("DRO")**

**General description**

Formal order made under which D gets protection and, later, relief from his debts.

Procedure initiated by an application made by D via an approved intermediary.

No Court involvement as the application is to the Official Receiver ("the OR").

The Court may become involved as any person may apply to Court if he is dissatisfied with any act, omission or decision of the OR DRO application cannot be initiated when if D is an undischarged bankrupt, subject to a bankruptcy petition, interim order, BRO or BRA, is in an IVA or has been subject to a DRO in the previous 6 years.

**Assets, liabilities and income**

The value of D’s property must not exceed £300, not counting (with a few changes) in that figure D’s property which would be excluded in a bankruptcy, his debts must not exceed £15,000 and he cannot have surplus income of more than £50 a month.

**Comparative features**

DRO brings into effect a moratorium which protects D from being pursued by the creditors whose debts are listed in the DRO.

Limited timeframe - the moratorium lasts for one year following which D is discharged from all the debts listed in the DRO.

Only a small fee is payable so costs are low.

The DRO can be terminated if D gives wrong or incomplete information or fails to co-operate.

If DRO is terminated early, D is not discharged from his debts.

Generally D is subject to obligations, duties and restrictions similar to those that would be imposed on him in a
bankruptcy (e.g. D can’t be a director of or manage a company).
A DRO is a matter of public record.
The Secretary of State can apply for a debt relief restrictions order or accept a debt relief restrictions undertaking which have essentially the same effects as BROs and BRUs.

**Make a proposal for an individual voluntary arrangement (IVA")**

**General description**
Legally binding arrangement between D and his creditors under which D makes available his assets and/or income to his creditors.
Process is initiated by D who makes a proposal to his creditors.
IVA requires involvement of an authorised insolvency practitioner ("IP") firstly as nominee and then as supervisor.

**Assets, liabilities and income**
No limits on levels of assets, liabilities or income.
Lack of regular flow of surplus income may make IVA unattractive to creditors.
It may be possible to get the agreement of creditors to specified assets being excluded, especially those that would be included in a bankruptcy.

**Comparative features**
High threshold of creditor approval required (75% of those voting must be in favour and not more that 50% of non associated creditors voting against but if approved IVA binds all creditors whether in favour or not.
Interest on debts is frozen.
Individual payments to creditors are replaced by one periodic payment to the supervisor of the IVA.
The balance of D’s debts is written off on successful completion of the IVA.
Limited timeframe – usually between three and five years.
Debts that would not be discharged via bankruptcy unlikely to be included in and therefore expunged via IVA.
Statutory involvement of an IP and the IVA process means costs are relatively high (although creditors usually bear the costs incurred after the IVA is in place).
IVA will need to conform to Consumer IVA Protocol.
Creditors will almost certainly require the value of D’s equity in real property to be made available to repay the debts although this need not necessarily mean selling the property.
If D’s circumstances change, it may be difficult to get the creditors to agree to revise the terms of the IVA.
Failure of an IVA often leads to bankruptcy.
An IVA is a matter of public record.
Possible adverse effect on D’s employment and/or qualifications.

**Go bankrupt**

**General description**
Formal court procedure where bankruptcy order is made following a petition being presented either by D or by a creditor.
A trustee in bankruptcy ("TIB") is appointed to realise D’s assets and pay creditors.

**Assets, liabilities and income**
No limits on levels of assets liabilities and income.
If D has surplus income, this will probably have to be paid over to TIB.
Certain assets are statutorily excluded from bankruptcy estate.

**Comparative features**
Creditors have no choice but to participate in the bankruptcy process – all actions are stayed
Short timeframe - absent any wrongdoings, D will be free of debt and all restrictions in just one year.
Costs are high but, other than petition costs, are effectively borne by the creditors.
Certain debts cannot be written off through the bankruptcy process.
D’s equity in real property is an asset available to repay the debts although this need not necessarily mean selling the property.
Bankruptcy restrictions apply until discharge (e.g. D can’t be a director of or manage a company).
D may be subject to BRO if he is found to have acted irresponsibly or dishonestly.
A bankruptcy is a matter of public record
Possible adverse effect on D’s employment and/or qualifications.

**Other possibilities**
Apply for an administration order under the County Courts Act 1984.
(a) Prepare estimated outcome statements for the liquidation of the Partnership and for each of the bankruptcy estates. (22 marks)

<table>
<thead>
<tr>
<th></th>
<th>Notes</th>
<th>Royal Oak Furnishings</th>
<th>Matt</th>
<th>Alex</th>
<th>Giles</th>
</tr>
</thead>
<tbody>
<tr>
<td>Credit balance from OR</td>
<td></td>
<td>12,800</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Residential properties</td>
<td></td>
<td>12,000</td>
<td>90,000</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Other assets</td>
<td></td>
<td>5,000</td>
<td>14,000</td>
<td>2,000</td>
<td></td>
</tr>
<tr>
<td><strong>Total realisations</strong></td>
<td></td>
<td><strong>12,800</strong></td>
<td><strong>17,000</strong></td>
<td><strong>104,000</strong></td>
<td><strong>2,000</strong></td>
</tr>
<tr>
<td>Total costs and expenses</td>
<td>Note 1</td>
<td>7,700</td>
<td>15,800</td>
<td>33,200</td>
<td>12,300</td>
</tr>
<tr>
<td>Balance after deducting each estate's own costs</td>
<td>Note 1</td>
<td>5,100</td>
<td>1,200</td>
<td>70,800</td>
<td>-10,300</td>
</tr>
<tr>
<td>Reallocation of costs - stage 1</td>
<td>Note 1</td>
<td>-5,100</td>
<td></td>
<td>5,100</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>0</td>
<td>1,200</td>
<td>70,800</td>
<td>-5,200</td>
</tr>
<tr>
<td>Reallocation of costs - stage 2</td>
<td>Note 1</td>
<td>0</td>
<td>-1,200</td>
<td>-1,200</td>
<td>2,400</td>
</tr>
<tr>
<td></td>
<td></td>
<td>0</td>
<td></td>
<td>69,600</td>
<td>-2,800</td>
</tr>
<tr>
<td>Reallocation of costs - stage 3</td>
<td>Note 1</td>
<td>0</td>
<td>0</td>
<td>-2,800</td>
<td>2,800</td>
</tr>
<tr>
<td></td>
<td></td>
<td>0</td>
<td>0</td>
<td>66,800</td>
<td>0</td>
</tr>
</tbody>
</table>

Balances available for creditors (carried down)
<table>
<thead>
<tr>
<th>Notes</th>
<th>Royal Oak Furnishings</th>
<th>Matt</th>
<th>Alex</th>
<th>Giles</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Unsecured creditors</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Petitioning creditor</td>
<td></td>
<td>56,000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other trade creditors</td>
<td></td>
<td>44,400</td>
<td></td>
<td></td>
</tr>
<tr>
<td>HMRC - PAYE</td>
<td></td>
<td>6,500</td>
<td></td>
<td></td>
</tr>
<tr>
<td>HMRC - Schedule D</td>
<td></td>
<td>22,700</td>
<td>23,500</td>
<td>15,500</td>
</tr>
<tr>
<td>Bank overdraft</td>
<td></td>
<td>22,700</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Credit cards and loans</td>
<td></td>
<td>16,800</td>
<td>38,700</td>
<td>18,800</td>
</tr>
<tr>
<td>Personal creditors</td>
<td></td>
<td>13,900</td>
<td>18,900</td>
<td>5,100</td>
</tr>
<tr>
<td>Transfer of invoices from Partnership to Alex</td>
<td></td>
<td>-4,800</td>
<td>4,800</td>
<td></td>
</tr>
<tr>
<td>Transfer of liabilities from Matt to Partnership</td>
<td></td>
<td>3,000</td>
<td>-3,000</td>
<td></td>
</tr>
<tr>
<td>Shortfall to mortgagee</td>
<td></td>
<td></td>
<td>12,000</td>
<td></td>
</tr>
<tr>
<td>Landlord's claim</td>
<td>Note 2</td>
<td>4,500</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total unsecured claims (carried down)</td>
<td></td>
<td>132,300</td>
<td>50,400</td>
<td>85,900</td>
</tr>
<tr>
<td>Balances available for creditors (brought down)</td>
<td></td>
<td>0</td>
<td>0</td>
<td>66,800</td>
</tr>
<tr>
<td>Add dividend received from estate of Alex</td>
<td>Note 3</td>
<td></td>
<td></td>
<td>40,976</td>
</tr>
<tr>
<td>Deduct additional Sec of State administration fee</td>
<td>Note 4</td>
<td></td>
<td></td>
<td>6,966</td>
</tr>
<tr>
<td>Preferential creditors - employees' holiday pay</td>
<td></td>
<td></td>
<td>4,000</td>
<td></td>
</tr>
<tr>
<td>Total unsecured creditors (brought down)</td>
<td></td>
<td>30,010</td>
<td>0</td>
<td>66,800</td>
</tr>
<tr>
<td>Add proof from liquidator of the partnership</td>
<td>Note 5</td>
<td>136,300</td>
<td>136,300</td>
<td>136,300</td>
</tr>
<tr>
<td>Unsecured claims ranking for dividend</td>
<td></td>
<td>132,300</td>
<td>186,700</td>
<td>222,200</td>
</tr>
</tbody>
</table>
Notes to Part (a)

Note 1
Procedure as laid down in IPO94 Sch4 Pt II s175
Each estate bears its own costs to the extent it is able to do so
If there is a shortfall in the joint estate, this is met equally by the sole estates (not relevant in this question) (s175(3))
If there is a shortfall in a sole estate, this is paid out of the joint estate (as per stage 1) (s173(4))
If after applying s175(3) and s175(4) there is still a shortfall in any estate, this is paid equally by the other estates (as per stage 2) (s175(5))
And so on until all costs are reallocated (as per stage 3) (s175(6)) or all estates are exhausted

Note 2
The landlord's claim is included for rent arrears only. He may have an additional claim for dilapidations but there are no clues in the question as to how much this might be.

Note 3
Dividend rate in Alex's estate is:

<table>
<thead>
<tr>
<th>Assets</th>
<th>Claims</th>
<th>Div rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>66,800</td>
<td>222,200</td>
<td>30.06</td>
</tr>
</tbody>
</table>

The amount payable by the trustee of Alex to the liquidator of the partnership is:

<table>
<thead>
<tr>
<th>Liquidator's claim</th>
<th>Div rate</th>
<th>Payable to liquidator</th>
</tr>
</thead>
<tbody>
<tr>
<td>136,300</td>
<td>30.06</td>
<td>40,976</td>
</tr>
</tbody>
</table>

Note 4
An additional amount will be payable by way of Secretary of State's administration fee on the receipt by the liquidator of the dividend paid by the trustee of Alex. The fee will be 17% of the amount of the dividend received.

Note 5
The shortfall in the liquidation of the partnership is:

<table>
<thead>
<tr>
<th></th>
<th>£</th>
</tr>
</thead>
<tbody>
<tr>
<td>Balance available for creditors after costs</td>
<td>0</td>
</tr>
<tr>
<td>Deduct preferential creditors - employees' holiday pay</td>
<td>-4,000</td>
</tr>
<tr>
<td>Deduct unsecured creditors</td>
<td>-132,300</td>
</tr>
<tr>
<td>Amount of each of the proofs to be lodged by the liquidator in each of the three bankruptcies</td>
<td>-136,300</td>
</tr>
</tbody>
</table>
(b) Calculate the rate of the dividend available to each class of creditor in each estate. (3 marks)

Part (b)

<table>
<thead>
<tr>
<th></th>
<th>Royal Oak Furnishings</th>
<th>Matt</th>
<th>Alex</th>
<th>Giles</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assets available to pay preferential creditors</td>
<td>34,010</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Preferential creditors</td>
<td>4,000</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Preferential dividend (p in £)</td>
<td>100.00</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Assets available to pay unsecured creditors</td>
<td>30,010 0 66,800 0</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Unsecured creditors</td>
<td>132,300 186,700 222,200 187,700</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Unsecured dividend (p in £)</td>
<td>22.68 0.00 30.06 0.00</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
QUESTION 4

Consider, in the form of a memorandum for your file, the issues that you will need to cover when writing to Ann. You should state briefly the relevant statutory or other authorities applicable to each issue. (25 marks)

NOTE: Ignore taxation and any interest payable to creditors.

<table>
<thead>
<tr>
<th>Primary considerations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Does Ann wish to acquire Ralph’s interest?</td>
</tr>
<tr>
<td>Ann should discuss with Ralph and her family how they ideally wish to go forward and consider matters such as whether they wish to retain the Property, or whether circumstances dictate in any event that they should move (e.g. because with no earnings from Ralph the mortgage cannot be afforded), and how this would affect issues such as the children’s education, Ann’s employment and Ralph’s future employment.</td>
</tr>
</tbody>
</table>

**The basic legal position**

IA86 s 335A and s283A

The Trustee was appointed just over one year ago and therefore IA86 s335A(3) is now relevant because in the absence of exceptional circumstances after one year from the Trustee’s appointment the interests of the creditors outweigh all other considerations.

At the same time the trustee has three years to realise his interest under IA86 s283A so he is not under any time pressure legally.

**Exceptional circumstances**

When considering whether there are exceptional circumstances the Court must consider all the circumstances of the case other than the needs of the bankrupt (IA86 s335A(2)(c).

Therefore the fact that Ralph is suffering from depression should not be taken into account.

It might be possible to argue that Ann’s interest in looking after Ralph is an independent consideration merits a finding of exceptional circumstances as in *re Bremner (1999)* where the bankrupt was elderly and in poor health.

More needs to be known about Ralph’s illness before determining if such an argument might succeed.

The Court must consider the needs of Ann and the children (IA86 s335A(2)(b)(i)-(iii)) but the disruption caused by having to leave the Property would not in itself be seen as exceptional circumstances (*re Citro (1991)*).

The needs of the child with behavioural difficulties may constitute exceptional circumstances if the Property has had to be adapted in any way to meet the needs of the child and/or leaving the Property would mean additional difficulties being experienced by the child for example by his/her having to move to a new special school or there being no appropriate alternative school available.

Further information is needed about the child’s present situation and the effect that leaving the Property would have but it appears, on the information given, that at a minimum it ought to be possible to obtain a postponement of the execution of any possession order to enable suitable alternative arrangements to be made.

More information is needed about the education requirements of the other children for example, are they coming up to important examinations that would merit seeking a postponement of the execution of any possession order until the exams are completed.

Ultimately, if exceptional circumstances are proved such that the Trustee is denied possession, he will probably seek place a charge under IA86,s313.

**If the family wishes to retain the Property, what arguments are there that might reduce the cost of doing so?**

**Ownership of the equity**

There is no evidence to suggest that the Property is owned other than in equal shares as its purchase was funded with what look like joint monies and a joint mortgage and there is no information to refute the presumption of 50/50 ownership as laid down in *Stack v Dowden (2007)*.

**Possible exoneration from 2<sup>nd</sup> charge**

Heath Bank will not receive any repayment from the liquidation of Goldbridge and therefore it must look to its second charge over the Property for repayment.

Ann should consider whether she would succeed in mounting a claim to be exonerated from the secured debt to Heath Bank.

Consider *re Pittortou (1985)* which set out the principle that where a charge is to secure a debt of one joint owner (“the debtor”), the other joint owner is entitled to have the debt settled as far as is possible from the equitable interest of the debtor.
See also *Judd v Brown (1998)* and *Bateman v Williams (2009)*

On the facts Ann had nothing to do with Goldbridge and it appears that any earnings by Ralph from Goldbridge were matched (or perhaps even exceeded) by Ann’s own contribution to the household finances. If Ann can show that the giving of the charge to Heath Bank was for Ralph’s purposes the presumption will be that Ann’s and Ralph’s intention was that exoneration would apply and therefore that the amount due under the second charge should be paid from Ralph’s share of the equity in the Property after paying the debt to Haywards Building Society.

**Possible undue influence arguments**

It may be possible for Ann to show that she should be relieved of any obligation to pay the debt to Heath Bank because of undue influence.

This may be following *Barclays Bank v O’Brien (1994)* because of a failure by Heath Bank to ensure that Ann understood what she was signing.

Alternatively following *Royal Bank of Scotland v Etridge (No 2) (2001)* because Ann placed her trust and confidence in Ralph and the transaction was one which was not likely to have occurred in the light of the relationship between them.

Further information and evidence about what happened at the time that the charge to Heath Bank was signed will be required in order to see whether a claim for undue influence could be mounted.

It is highly unlikely that such a claim could be formulated in respect of the mortgage signed in favour of Haywards Building Society.

**Credit for funding the extension**

If Ann had not paid out of her own money for the extension to be built the Property would have been worth £360,000 (£400,000 less 10%) and not £400,000.

Therefore she is entitled to a credit as against Ralph and the Trustee of either one half of the costs actually incurred by her (£34,000) or one half of the amount by which the Property has increased in value (£40,000), whichever is the lower. See *re Gorman (1990)*.

Ann is therefore entitled to a credit of half of £34,000, i.e. £17,000.

**Other cost that have been or are being met by Ann**

The fact that Ann has met the mortgage interest payments to Haywards Building Society will not give her the right to claim a greater interest in the Property.

Occupation rent considerations are not applicable because both co-owners remain live in the Property.

Ann’s payment of the household bills can have no relevance to calculating Ann’s and Ralph’s respective interests in the Property.

**What is the likely cost of acquiring Ralph’s equity?**

**The value of the Property for negotiation purposes**

There is a £30,000 difference in the value of the Property as indicated by Ann’s agent and that instructed by the Trustee.

The two valuations deviate from the average £400,000) by £15,000 or under 4%. This is unlikely to be considered as statistically significant in the context of property valuation.

Unless the Trustee or Ann has good reasons to believe that their own agent is right or the other’s agent is wrong, both should be willing to accept £400,000 as a value for the Property in any negotiations. It might be worth Ann’s trying to persuade the Trustee to use a figure under £400,000 but she is probably unlikely to succeed in doing so.

**Calculation of the value of Ralph’s interest**

Assuming (1) that for the purposes of negotiation that the value of the Property is £400,000, (2) that Ann’s claim to be exonered in respect of the second charge is accepted, and (3) that she is given credit for the increase in the value of the Property arising from adding the extension, Ann’s and Ralph’s interests are as follows:

<table>
<thead>
<tr>
<th></th>
<th>Total</th>
<th>Ann</th>
<th>Ralph</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Value of Property</strong></td>
<td>400,000</td>
<td>200,000</td>
<td>200,000</td>
</tr>
<tr>
<td>Mortgage to Haywards BS</td>
<td>(280,000)</td>
<td>(140,000)</td>
<td>(140,000)</td>
</tr>
<tr>
<td>Charge to Heath Bank</td>
<td>(16,000)</td>
<td></td>
<td>(16,000)</td>
</tr>
<tr>
<td>Adjustment for extension</td>
<td></td>
<td>17,000</td>
<td>(17,000)</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>104,000</td>
<td>77,000</td>
<td>27,000</td>
</tr>
</tbody>
</table>
How much is Ann likely to have to offer?

On the basis of the calculation above the Trustee will be looking to realise £27,000 but Ann should not offer this amount as there are additional costs which the Trustee knows that he would incur if forced to take proceedings and he has admitted in his report that these could amount to £13,000 (£16,000 - £3,000).

In addition an allowance should be made for basic selling costs. Therefore Ann could pitch her offer such that whilst she paid less than £27,000, the bankruptcy estate (and hence the creditors) benefit too from an early settlement because they receive a higher dividend than if proceedings are taken and get their money sooner rather than later.

Ann should budget to pay between £17,000 and £23,000 for Ralph's interest.

Would it be more cost effective for Ann to provide the funds to pay all costs and claims in full?

Amount required to pay all costs and claims

The creditors total £86,000 and there are costs to pay in the bankruptcy of at least £3,000 so even were the Trustee to defeat all Ann’s claims and establish that Ralph’s interest is £52,000 (50% of the equity of £104,000) there are no prospects of creditors being paid in full, even taking account of the funds (£16,000) held currently by the Trustee.

Unless annulment is a priority (and there is nothing to say that this is the case) Ann should concentrate on acquiring Ralph’s interest, not in paying costs and claims on full.

How will Ann fund any acquisition of Ralph’s interest?

Obtaining the funding

Ann must consider whether she would be able to raise the monies to pay c£20,000.

Does Ann have any savings, particularly left over from her rich uncle’s inheritance (as she only used part of this to pay for the extension), or does she have any more rich relatives to whom she can turn for help?

Are her own finances and earnings such that she is in a position to borrow money on commercial terms or can she combine two or more of these possible sources of funds in order to assemble the required funds?

Ann needs to consider how she is going to service/repay any additional borrowings taken on by her.

Does Ann have any other assets that she might sell/use to raise funds?

Legal considerations on the acquisition of Ralph’s interest

There are some issues (e.g. exceptional circumstances and exoneration) where Ann may need to seek legal advice.

If Ann wishes to buy Ralph’s interest in the Property and has the funds to do so she must decide how to proceed in legal terms and should instruct a solicitor to advise her so that her interests are protected when acquiring Ralph’s interest.

How is any offer to be made (e.g. informally or by using part 36 procedure)

Ann could enter into a contract with the Trustee for the sale of Ralph’s interest in the Property to her or take an assignment of Ralph’s beneficial interest in the Property.

Ann could seek to have transferred to her the whole of the legal title so that she becomes sole proprietor of the Property but she may need the agreement of one or both of the secured creditors to do this.

What are the alternatives to acquiring Ralph’s interest?

Possible voluntary sale of the Property

If Ann does not wish to, or is not in a position to, acquire Ralph’s interest in the Property then she could consider agreeing to a voluntary sale of the Property and could agree the way forward with the Trustee and details such as which agents to instruct and which solicitors to use for the conveyancing work.

If possible Ann should control the process in order to keep costs down and try and ensure the Property is sold at true market value so that the value of her own interest in the Property is maximised.

The Trustee is under no immediate time pressure from IA86 s 283A but is under a statutory duty to realise the major asset in the bankruptcy estate and may therefore wish to impose a timetable so that the matter does not drag.

Ann should agree to keep the Trustee fully informed of progress on a regular basis and of material developments as they occur.

Non-cooperation

Ann could decide to delay and frustrate the Trustee forcing him to take proceedings for orders for possession and sale. She could argue every possible claim so as to try and maximise the value of her interest.

On current information there appear to be no prospects of arguing successfully that Ralph’s interest is of no or negligible valuable or that there are exceptional circumstances that will delay a sale for a material time period.

It is therefore looks inevitable that the Trustee will prevail.

By unnecessarily opposing the Trustee at every turn Ann runs the risk of having a costs order made against her which would be paid from the funds available to her following a sale of the Property thereby depleting (perhaps materially) the amount that she receives.