



Institute of Credit Management

**Legal Proceedings and Insolvency
Question Paper, Answers and
Examiner's Comments**

Level 5 Diploma

January 2014

© Copyright of the Institute of Credit Management

Institute of Credit Management

The Water Mill, Station Road, South Luffenham, Oakham, Leicestershire LE15 8NB

Bookshop Tel: 01780 722901. Education Tel: 01780 722909

Switchboard Tel: 01780 722900. Fax: 01780 721333

January 2014

9FIA/PQP/1

continued



Institute of Credit Management

Legal Proceedings and Insolvency questions, answers and examiners' comments

LEVEL 5 DIPLOMA IN CREDIT MANAGEMENT

JANUARY 2014

Instructions to candidates

Answer **COMPULSORY** questions 1 and 2 and any **THREE** other questions

All questions carry equal marks.

Time allowed: 3 hours

You are reminded that, where appropriate, your answers should contain references to statutes and to case law.

COMPULSORY SECTION

Answer **both** questions in this section

Candidates need to follow standard exam practices for this Level 5 assessment paper:

- *Ensure you read the question properly otherwise you are spending time writing an answer to something that has not been asked.*
- *If the question asks for a memo, report or email, ensure you format your answer as requested.*
- *Ensure that you identify which question and which section of a question you are answering i.e., Q1a), Q1b).*
- *Ensure that the examining team can read your handwriting. They cannot award marks if they cannot read the points you are making.*

Answer **both** questions in this section

1. Adam Gunner, a talented footballer with United Albion, was disciplined by his club for the number of red cards he had received in a very short space of time. He was fined £8,800 by United Albion and shortly afterwards transferred to another club. Adam maintained minimum payments each month following a County Court judgment in favour of United Albion, and then repayments stopped.

You work for a debt recovery company and have been instructed by United Albion to recover the outstanding balance of £6,955 from Adam Gunner as they are getting no response from their letters and telephone calls. Your initial search has revealed that Adam is joint owner of the property he now lives in. You note from the client instruction form that there is an Attachment of Earnings order in place. Unfortunately Adam has now also left this employment. The last update states that Adam had not responded to the court and there is an indication that he may now be working in a care home.

TASK

Analyse and evaluate the options available in the above scenario with the emphasis on getting the debt paid. (20 marks)

Question aims

To test the candidate's knowledge in relation to methods of enforcement.

Suggested answer

Application for an Order to Obtain Information

- Request the debtor produces specific documents to the court for inspection
- Set out any specific questions not included in the court form which can be put to the debtor.

Court issue an order

- Require debtor to attend court on a fixed date
- Failure to attend = committal order.
- Personal service
- Complete costs certificate
- Debtor has right to reasonable travel expenses to court
- Failure to attend or answer questions = committal order.
- Personal service
- Complete costs certificate
- Debtor has right to reasonable travel expenses to court.
- Failure to attend or answer questions = Committal Order.
- If successful could obtain current employment status and details of employment, could therefore reinstate the Attachment of Earnings Order.
- Apply to court for a Charging Order. This prevents the disposal of property without first paying off the judgment debt.

Application to court in which judgment obtained

- Form N379
- Made ex-parte on an affidavit
- Details of judgment
- Grounds it is believed the debtor owns the property
- Evidence of ownership.

Charging Order Nisi

Gives notice to the debtor about the order and fixes a date for considering making the order absolute.

- Not made absolute if evidence debtor is insolvent and therefore by granting an order would be to prefer the creditor over the other creditors.
- Once order obtained, creditor can register the charge at the land registry (recommended)
- Having the charge does not give the right to sell the property
- Can leave the charge in place until the debtor sells or can make a fresh application to the court for an order for sale.

Consider

Adam Gunner is 'joint' owner and it could therefore be a family home so order for sale is less likely to succeed. Also consider that you must notify other charge holders and they must also be paid from any likely proceeds. You may end up with not enough left for you and you may also have to pay for any shortfall to other charge holders.

In this scenario, it would be a better option to re-instate the Attachment of Earnings Order.

Good answers will also consider having the charge in place as security whilst agreeing a repayment plan with Adam Gunner using a Tomlin Order.

Total 20 marks

Some very good answers to this question which is encouraging. A point missed by those who scored less for this question was that the emphasis of the question is on 'getting the debt paid'. Candidates that referred their answer to the question scored higher marks.

If candidates mentioned bankruptcy/IVA only were awarded marks where the answer justified by saying unlikely to produce full payment of the debt.

2. Shemar White booked a 'holiday of a lifetime' as a special present for his wife Joanne's 50th birthday. He spent a long time choosing the hotel and destination so that everything would be to Joanne's liking, including a room with a balcony looking out across the bay, the hotel complex with gym, sauna, on-site massage and top class restaurants at a cost of £2,000.

All started to go wrong the moment they arrived. The reception area was dirty, the room had no balcony and the view was of bins at the back of the restaurant. The room was above the kitchen so that noise from staff and equipment was continuous late into the night and starting early morning. The sauna was closed for refurbishment and the gym consisted of a bike and a skipping rope. Shemar was devastated. They were reluctant to stay in the hotel and so moved to another, at their own expense. As soon as Shemar arrived home he emailed you and asked for your advice as to what to do.

TASK

- a) In an email advise Shemar what he could do initially in order to get compensation from the holiday company. (6 marks)
- b) If Shemar is unsuccessful in a) above first, he could take legal action. Explain the court process he would follow. (14 marks)

Total 20 marks

Question aims

- To test the candidates on their ability to assess the suitability of a case for recovery of debt through the courts
- To test the candidate's ability to explain how to prepare for recovery of a debt.

Suggested answer

- a) Set out an email to Shemar advising him that he should write/email the company providing full details of his complaints and the reasons for his dissatisfaction. He should give them the opportunity to respond and deal with his issues.

You should include details of:

- The amount concerned
- Timescale for a response
- Action you propose to take if not satisfied
- Intention to claim for interest
- Intention to claim for costs
- Your contact details.

b) If no satisfactory response is received then he should issue a County Court claim form. The basic steps are:

	Application	
	Service of proceedings	
Pays	Disputes	Ignores
	Allocation to: Small claims Multi-track Fast -track Discovery Hearing	Summary judgment
No further action	Judgment	Enforcement

- Pre-action protocol
- Application for service and service of the claim
- Response to the claim
- Allocation – case tracking
- Discovery, the exchange of information and documents between the parties prior to the hearing
- In court hearing
- Setting down judgment
- Enforcement.

Total 20 marks

Candidates lost marks for not setting out their answer as an email as requested and therefore not providing an appropriate response. Also several candidates did not distinguish between parts a) and b) which made it difficult for the examining team to mark.

Most candidates were aware of 'PARADISE', few gained marks by going on to explain 'response to claim' and hardly any mentioned enforcement following judgment. However, there were also some very good answers to this question.

OPTIONS SECTION

Answer any **three** questions from this section

3. You have recently been appointed credit controller for a small packaging company 'Packing In Ltd' which has suffered some bad debts with customers in liquidation owing payment on several months' invoices. Your first task is to bring some structure and procedure to current processes, with a view to minimising bad debts. The customer base is made up of individual market traders, shop keepers and limited companies. Payment terms are flexible and orders are shipped on request. If things continue as they are, it is likely that Packing In Ltd will become insolvent themselves.

TASK

- a) Referring your answer to the scenario above, explain how you could limit the exposure to potential bad debts from customers. (10 marks)
- b) If nothing is done and Packing In becomes insolvent, what could they do if they want to continue to trade? Include in your answer your suggested route for Packing In Ltd and your reason for it. (10 marks)

Total 20 marks

Question aims

To test the candidates on:

- pre action protocol
- trading terms
- CVA.

Suggested answer

- a) **Ensure the process is in place so that pre-action protocol exists.**
- Outline the terms of trade to your customer including the payment terms so that they know when the invoices should be paid
 - Introduce a collections procedure so that outstanding invoices are chased as soon as they become due
 - Keep records of all chasing
 - Check the customer details e.g. name, address
 - Continual credit monitoring
 - Introduce credit limits
 - Ascertain if the customer has any queries or disputes and resolve them
 - Suspend deliveries at a specific point e.g. at 60 days past due date

This will minimise the number of overdue invoices and amount of debt outstanding should the customer become insolvent.

A strict collections policy will also improve cash flow.

b) Available options to Packing In Ltd

CVA Insolvency Act 1986 Part 1.

Enable companies to reach a compromise with majority of creditors that is binding on all creditors. This is not widely used.

Compromise/arrangements

Good alternative to CVA.

S896 Companies Act 2006.

Provides a statutory basis for the making of a compromise or arrangement between company and its creditors which is subject to obtaining the necessary majority at a meeting of creditors and then sanctioned by the court. This will be binding on all creditors.

Suggested route and reason.

Total 20 marks

Several candidates missed the point of the question suggesting administration orders to trade out of the scenario situation.

A third of candidates scored good marks but other candidates lost marks by not going on to give a 'suggested route and reason'. Again, candidates are advised to read the question carefully and to ensure that their answer has covered everything that has been asked.

Many candidates omitted 'arrangements between company and creditors' and also 'obtaining majority at creditors' meeting', 'sanctioned by court', and 'binding on all creditors'.

4. You are a credit controller for MinAw Ltd and have recently submitted a County Court claim form against one of your customers Dimaryp Ltd for the sum of £8,500 for non-payment of invoices that are 90 days past your payment terms. The invoices relate to services provided. You have followed your standard chase process and despite being told by the purchase ledger clerk on several occasions that payment should be on the *next payment run*, nothing has been received.

TASK

- a) You have a new finance director who has asked you to outline in a memo what considerations were given before commencing the action and the possible routes following the service of proceedings. (13 marks)
- b) While preparing the memo you receive notice from the court that your customer has made a full and final settlement offer into court of £6,000. Discuss the options available to MinAw Ltd. (7 marks)

Total 20 marks

Question aims

To test the candidate's knowledge of different types of judgments.

Suggested answer

a) **Set out as a memo**

Prior to issuing proceedings CRIME should be considered:

Collection – have we tried all practical means of collection?

Resolution – have we resolved all genuine disputes/queries?

Identity – have we fully identified the debtor?

Means – is the debtor worth suing?

Evidence – can we prove the claim?

Service of proceedings:

- Debtor pays – no further action
- Debtor disputes – allocation to a track, then discovery, hearing, judgment
- Debtor ignores – summary judgment.

b) Accept the offer.

Not accept and proceed to trial.

If proceed to trial and the amount awarded is more than the payment into court, then your customer, the defendant, would pay the costs.

However, if the amount awarded is £6,000 or less, you, as claimant, would not be entitled to recover any costs and you must pay the defendants costs since the date of the payment into court.

Total 20 marks

Overall, a well-answered question. However, some candidates lost marks for not setting out their answer as a memo as requested.

5. Billy is a 19 year old trainee accountant. He is doing well in his exams but is having debt problems brought about by trying to 'live up to an image'. He has entered into several phone contracts, selling on the phones to make some quick cash, leaving him with monthly contracts to pay. He has borrowed funds from a 'pay day' loan company and now finds he cannot meet his financial obligations. Although he is good with figures, he believes that he should go for bankruptcy or something similar and has asked for your advice. His debts total £2,000 between four companies.

TASK

- a) Critically appraise the situation. (15 marks)
- b) Submit your recommendations to Billy. (5 marks)

Total 20 marks

Question aims

To test the candidate's knowledge of bankruptcy.

Suggested answer

- a) As a trainee Accountant Billy should think very seriously before considering the bankruptcy route as this would ruin any possibility of achieving the qualification. Accountants may not be bankrupts, ever.

He must therefore consider alternative procedures to get himself out of the predicament.

Informal arrangement

May reach an agreement with creditors but only used for small amounts of debt. The main are:

- Compositions
 - Creditor agreement with debtor to pay a dividend of x pence in the pound in full and final settlement of the debt. Binding under contract law on all parties that agree to it.
- Individual debt rescheduling
 - Creditors may agree on a more formal level an extended payment period to give the debtor some breathing space. The agreement is not legally binding, more of a 'gentleman's agreement' so not security to the debtor position.
- Multiple debt rescheduling
 - Just a rescheduling of debts and not legally binding. Due to complexity of these arrangements they are often made by debt counselling agencies.
- Administration Order
 - Formal arrangement available through County Courts, designed for consumer debt, only applicable where total sum owing not greater than £5,000.
- Debt Relief Orders
 - Unsecured debts below £15,000, assets totalling less than £300 and disposable monthly income less than £50 (relevant for the 12 month period). After 12 months the debtor is set free from debts.

b) **Advice**

Try to negotiate an informal arrangement yourself with the creditor and stick to it.

Borrow the money from a family member and pay them back monthly.

Avoid any formal arrangement as it may adversely affect a future as an Accountant.

Total 20 marks

There were some good answers and nice to see advice being suggested although there was not enough included in the answers provided for high marks to be awarded.

A few candidates missed the point of the question in that if Billy wants to continue to become an accountant, no formal arrangement should be entered into.

6. You work for a paint manufacturer E'Mulsion Ltd making paints to the specification of your customers. Chantilly Properties Ltd specialises in executive lets and placed a large order for several deliveries of the same colour paint for use throughout the apartment building. They owe you £25,000 in overdue invoices for which you have issued a County Court Claim, however, they have responded to that claim with a defence.

Chantilly Properties Ltd claims that each batch of paint which they received was a different shade of colour to what they ordered and are refusing to settle the account. They say the furnishings bought to complement the colour scheme now do the opposite. Unfortunately they did not raise any issues prior to you issuing the claim form.

TASK

Applying your knowledge of the legal process, evaluate routes to judgment on defended claims and summarise a possible outcome. (20 marks)

Question aims

To test the candidate's ability to evaluate routes to judgment on defended claims.

Suggested answer

Counterclaim

- Defend the claim and make a claim against the claimant
- Allege goods are defective
- Rules
- Claim must be fully pleaded
- Set out all the facts and matters relied on
- Give details of contracts and orders
- Show how claim was calculated
- Include interest amount claimed and how it was calculated.

A simple denial will not suffice as a defence.

Reasons must be fully set out.

- All facts etc relied on to support the claim must be set out
- How any counterclaim is calculated must be fully explained
- No genuine dispute court may 'strike out' a defence, likewise, if the court thinks little or no chance of success.

Defendant may complete acknowledgment of service to give 28 days from service to deliver defence.

Summary judgment may be an option if appropriate evidence is available to make an application. Application then puts the burden of proof on the defendant to prove there is a genuine dispute.

Court may give judgment for part and allow the defendant to defend the balance.

If in the view of the court there is a genuine dispute, it will, on hearing the application for summary judgment:

- Allocate the case to the appropriate tract
- Give directions to the parties as to the steps to be taken to bring the matter to a full hearing.

Consider for defective goods.

Does the claimant have evidence that a dispute previously raised. Absence of this does not prevent it being raised in the action but it can cast doubt on the validity of the defence in particular if the claimant has followed the protocol approach.

- What portion of the claim is subject to the defence?
- How significant is the shade difference, if there is one?
- Is any part of the claim admitted?
- Was the paint supplied and delivered?

If defence and counterclaim will need to consider delivery of a reply and defence to the counterclaim.

In this case, it is important to deal formally with the defences and counterclaims as allocated to the Multi Tract.

Evidence - oral, documentary, real
Discovery and inspection
Evidence and trial.

Preparation and presentation of the evidence is a crucial aspect of the conduct of a case.

Total 20 marks

Unfortunately, less than half of candidates who sat this exam, attempted this question and those that did scored poor marks. This provides evidence to the examining team that candidates have very little knowledge of defended actions and in particular 'counterclaim' and 'defective goods' and a poor understanding of this subject area, which is disappointing.

7. Six years ago your company was successful in obtaining a judgment against Mr Soni. The agreement reached was that Mr Soni would pay £40 per month on a judgment debt of £30,000. You have just taken a call from Mr Soni who says that the matter is now time barred and he doesn't have to make any more payments. You are thrown by this statement and so advise Mr Soni that you will look into this and call him back. When you check the notes on his account, it appears that Mr Soni called yesterday for an up-to-date balance and after a few choice words put the telephone down. He could not understand why, after six years of making these payments, there was no reduction on the outstanding account, even though he had not missed a single payment. He demanded to speak with your boss, Miss Oliver.

TASK

- a) Prepare a note to your finance director, Miss Oliver, justifying the balance on the account so that she may call Mr Soni and have all the relevant information available to address his queries. (10 marks)
- b) Consider you are in Mr Soni's position when the judgment is first awarded. What could you try and negotiate instead of agreeing to a Tomlin Order? (10 marks)

Total 20 marks

Question aims

To test the candidate on time limits, enforcement, interest and Tomlin Order.

Suggested answer

- a) Set out as a memo the time limits for bringing an action – Limitation Act.

There is a time limit for suing a debt; normally no action can be taken to recover a debt if more than six years have expired since the debt fell due for payment. There are however, exceptions to this rule.

Agreements made under seal can be sued for up to twelve years.

The six year period can be extended if the debtor makes a part payment or admission of the debt within a six year period. In that event the six years runs from the date of the part payment or acknowledgment of the debt.

Mr Soni is therefore wrong in his statement. He has been making regular monthly payments thereby acknowledging the debt.

The judgment debt is likely to be settled at £40 per month through a Tomlin Order to provide a formal agreement of settlement through a Court Order, although as this judgment debt is for more than £5,000, a Tomlin Order is not necessary for interest to continue to accrue.

The reason the debt does not appear to be reducing is because interest is being added for more than the £40 that is being paid each month. The balance outstanding is actually getting higher rather than reducing. Even after six years of making payments, Mr Soni owes more than the original judgment amount.

Good answers may go on to describe a Tomlin Order which is a court order under which court action is stayed, on terms which have been agreed in advance between the parties and which are included in a schedule to the order.

A further order is needed before the terms of the schedule can be enforced.

b) Advice

If you are going to make this kind of offer it is better to negotiate, if you possibly can that no further interest will be added to the judgment debt, for instance, it may be possible to offer security in place of the interest or agree a date to try to settle in full. If not then interest will start again.

Total 20 marks

Candidates that had prepared for this type of question answered it well, while others who tried to 'guess' did not score many marks at all. Candidates lost marks for not setting out their answer as a memo as requested.

8. Discuss what individual creditors can do in order to improve their prospects of recovery in a Winding Up. (20 marks)

Question aims

To test the candidate's knowledge of Winding Up.

Suggested answer

Answers should include the following:

Actions purely for own benefit must relate to the period before the winding up. After this date any action taken by the creditor must directly or indirectly benefit all creditors.

Creditors should stay up-to-date with the financial standing of their customers, in particular the large ones.

There are **four** common protective actions:

Execution (of court judgment)

Not entitled to retain benefit of the execution on attachment unless it was completed before the commencement of winding-up (S.183 Insolvency Act).

Commencement of winding-up date is dependent on which procedure is used.

- Compulsory = on issue of the petition
- Voluntary = on passing a resolution to wind-up or on receiving notice that a meeting to discuss a resolution for winding-up the company was set.

Execution said to take place when the goods are actually seized and sold or when the charging order is made absolute.

Retention of Title (of goods already supplied but not yet paid for).

Ownership of goods supplied does not pass to the customer until they have been paid for

Clear rules:

- Creditor must be able to identify the goods that were supplied at the premises of the debtor company
- The creditor must show that the clause was actually incorporated into the contract between the parties
- The creditor must show that the ROT clause is legally valid.

Subrogation claims (where loans for wages have been made)

Schedule 6.11 1A, money advance for payment of wages (up to 16 weeks or £800 per employee) can be ranked as preferential. Banks are the most likely beneficiary of this rule.

Taking security

Creditors can take various forms of security over a debtor's property. The main two being:

- Fixed charges
Charges on specific assets such as land, stocks and shares and life policies.
- Floating charges
'Float' over all assets until an event that causes them to crystallise.

Total 20 marks

Unfortunately this question was not popular with candidates who sat this exam and candidates who did attempt this question did not provide good answers.

---o0o---