

INSOLVENCY WINTER 2013

EXAMINER'S COMMENTS

QUESTION 1

Candidates should have identified that the following matters could be raised in opposition to the creditor's petition:

- (a) An application could be made to satisfy the default judgment in the District Court, and the bankruptcy court could go behind the judgment;
- (b) Evidence could be obtained to prove that the Bankruptcy Notice had never come to the notice of Dave by substituted service;
- (c) Evidence could be put on concerning the cross-claim which could wipe out the original default judgment;
- (d) Evidence could be obtained concerning solvency.

Candidates were required to set out the documents which should be created, and the rules of court which should be complied with, in order to oppose the petition. One common mistake made by candidates was to assert that an application could be made to set aside the Bankruptcy Notice. The act of bankruptcy had already been committed, so it was too late to move to set aside the Bankruptcy Notice. However, any arguments, to the effect that the Notice was invalid, could be raised in opposition to the petition.

QUESTION 2

Candidates were required to discuss Sections 120 and 121 of the Bankruptcy Act 1966. Good answers discussed each relevant sub-section of those Sections and told the trustee of the matters which would have to be proved, and the defences which could be raised.

A few students made the mistake of eliding sections of the Corporations Act concerning voidable dispositions, with the Bankruptcy Act provisions regarding void dispositions. Presumably this was done because of time pressure of the exam.

QUESTION 3

Candidates were required to consider the four statutory grounds for moving to set aside a statutory demand. Once again, good answers had to advise the client what application to make and what documents had to accompany such application.

QUESTION 4

Candidates should have identified the following void dispositions:

- (a) An uncommercial transaction, or possibly a transaction defined to defeat creditors;
- (b) An unreasonable director-related transaction;
- (c) An unfair preference;
- (d) An unfair loan.

Candidates were expected to explain the elements of each voidable disposition, the relevant time periods, and whether or not it had to be an insolvent transaction. Defences should have been outlined.

QUESTION 5

This question concerned the duty to prevent insolvent trading by directors. The position of each director had to be considered separately. The elements of insolvent trading had to be set out and explained, as well as any possible defences. Finally, if the defences failed, consideration had to be given to the judicial discretion of forgiveness. A mistake made by some candidates was to say that the forgiveness provision was a “*defence*”. It is not. It only comes into play if the defences have failed.

On the whole, the standard of answers to all questions was very pleasing, given that quite difficult concepts had to be explained under exam conditions and time constraints. All candidates took on board that what was required was plain English explanations of the law as it affected the client, not an academic journal article or a High Court judgment. A few annoying mistakes must be eliminated from future legal writing:

- (a) “*Advice*” is a noun and “*advise*” is a verb;
- (b) Courts deliver a “*judgment*” not a “*judgement*”;
- (c) Evidence is given by an “*affidavit*” not by an “*affadavit*”.