

INSOLVENCY
MARCH 2013
EXAMINER'S COMMENTS

QUESTION 1

Application could be made to set aside the Bankruptcy Notice on the basis that an application should be made to set aside the default judgment, and (perhaps) because there was a defect in the Notice. The answer should have considered all possible challenges to such a Notice, including s.41(5). An application for extension of time for compliance with the Notice should be made. There was an issue as to when the Notice was served, which would have started the 21 day period running. The answer should also have referred to the applicable court rules for making an application to challenge the Notice.

QUESTION 2

This question required consideration of s.123 of the Bankruptcy Act. The answer should have detailed the three factors which have to be proved by the transferee, to protect the transaction against the doctrine of relation-back. The question did not require an explanation of that doctrine or a calculation of the relevant dates, which were given as part of the question. Better answers considered whether it was the husband or the wife who bore the onus of proof.

QUESTION 3

An appropriate answer would have considered the voidable transactions provisions of the Corporations Act, and in particular:

- (a) Unreasonable director-related transactions under s.588FDA;
- (b) Uncommercial transactions under s.588FB and/or transactions to defeat creditors under s.588FE(5);
- (c) Unfair preferences under s.588FA;
- (d) The position of a secured lender.

Better answers went on to deal with: time limits; insolvent transactions; presumptions of insolvency and statutory defences under s.588FG.

QUESTION 4

Students were expected to outline the effect of the service of the statutory demand and the options available to the alleged debtor. Consideration should have been given to each of the four statutory grounds available to challenge the statutory demand. Clearly there is a genuine dispute about the existence of the debt, a potential cross-claim, and an argument available in relation to abuse of process. Better answers considered the application which should be made and the evidence necessary in support of such an application.

QUESTION 5

The question required consideration of the elements of an action for breach of director's duty to prevent insolvent trading. This required a statement of what the liquidator would have to prove under s.588G and consideration of the four possible statutory defences in s.588H. Students were also expected to consider the concept of judicial forgiveness under s.1317S. The answer should have included consideration of whether or not the company was insolvent at the time the debt was created, and whether there were reasonable grounds for suspecting that the company was insolvent.