

LEGAL PROFESSION ADMISSION BOARD

SEPTEMBER 2013

INSOLVENCY

Time: Three Hours This paper consists of **five** questions.

Candidates are required to attempt any **four** questions.

No question is compulsory.

All questions are of equal value.

If a candidate answers more than the specified number of questions, only the first **four** questions attempted will be marked.

All questions may be answered in one examination booklet.

Each page of each answer must be numbered with the appropriate question number.

Candidates must indicate which questions they have answered on the front cover of the first examination booklet.

Candidates must write their answers clearly. Lack of legibility may lead to a delay in the candidate's results being given and could, in some circumstances, result in the candidate receiving a fail grade.

This examination is worth 80% of the total marks in this subject.

Permitted Materials: This is an open book examination. Candidates may refer to any books and any printed or handwritten material they have brought into the examination room.

As some instances of cheating, plagiarism and of bringing unauthorised material into the examination room have come to the attention of the Admission Board, candidates are warned that such conduct may result in instant expulsion from the examination and may result in exclusion from all further examinations.

This examination should not be relied on as a guide to the form or content of future examinations in this subject.

Question 1

You are instructed as the solicitor for Dave Bowman to advise him in relation to a Creditor's Petition which is listed for Hearing in the Federal Court in 14 days time. Through a combination of instructions and inspection of the court file you ascertain the following:

- (a) The Bankruptcy Notice was based upon a default judgment in the District Court for \$100,000;
- (b) The Bankruptcy Notice was served on Dave by substituted service in the middle of a period of four months when Dave was out of Australia for business reasons;
- (c) While Dave did owe the money claimed in the District Court, he had a cross-claim back against the plaintiff/creditor which in value exceeded the \$100,000 judgment;
- (d) Dave asserts that he is able to pay all of his debts, but he is not paying this one on principle because he says that the plaintiff/creditor really owes him money.

Advise Dave what the creditor has to prove to obtain a sequestration order against his estate and what should be done. Your answer should cover the relevant law and explain that law to Dave as a lay client.

(20 marks)

Question 2

You are instructed as the lawyer for the Trustee of the Estate of Frank Poole, against whom a sequestration order was made on Monday 3 June 2013. The date of the commencement of Frank's bankruptcy is Friday 1 March 2013. The Trustee tells you that he has discovered that Frank has been engaged since 2003 in speculative trading in small cap mining shares. The Trustee also tells you that he has become aware of the following dispositions of property:

- (a) On 1 February 2009 Frank transferred his half interest in the matrimonial home to his spouse for \$500,000. At that time the value of the house was said to be worth \$1,500,000;
- (b) Within one month of starting his speculative share trading, Frank transferred a factory owned by him into the name of his brother. In 2005 the brother sold that factory at auction to an arm's length purchaser for value.

Advise the Trustee in relation to attacking the transfer of the half share in the house and the transfer of the factory. Your answer should make reference to the applicable law and explain the law to the Trustee who is an insolvency professional but not a lawyer by qualification.

(20 marks)

(Question 3 follows)

Question 3

Monolith Pty Limited ("Monolith") has been served with a statutory demand by its former tax advisors who provided it with tax advice. Monolith comes to you for legal advice about what to do in relation to the statutory demand. The directors of Monolith are not lawyers and need legal advice given to them in plain English. You are instructed that Monolith sacked its former tax advisors because the directors of Monolith had concerns about the accuracy and quality of the tax advice, and about the high level of charging for that advice. Further, Monolith tells you that part of the advice was wrong and Monolith thus incurred penalty tax obligations to the Australian Taxation Office. You ascertain that while the former advisors have served a tax invoice for legal fees, Monolith and its former advisors have agreed to go to mediation in two months' time over the size of the bill.

Advise Monolith what to do about the Statutory Demand. Your advice should include an explanation of the relevant law.

(20 marks)

Question 4

A liquidator was appointed to Europa Pty Limited ("Europa") by order of the Federal Court made on Monday 3 June 2013. The application which resulted in the winding up order was filed on Monday 1 April 2013. The liquidator seeks your legal advice in relation to challenging the following dispositions which he has uncovered:

- (a) The sale of a half share in Europa's factory on 1 June 2010 to a family trust controlled by the spouses of the directors of Europa. The half share was worth \$1 million at the time of the transfer, but it was transferred for \$200,000;
- (b) Payment of a bonus of \$100,000 to each of the three directors of Europa on 1 May 2010;
- (c) Payment of 100% of a debt due to a creditor (the brother of one of the three directors) on 1 January 2010;
- (d) A loan of \$100,000 at a rate of 18% per annum made by one of the directors to the company on 1 June 2004, at a time when the company had financial difficulties and could not obtain bank finance.

Advise the liquidator in relation to each of the above transactions. Your advice should explain the law in terms which can be understood by a non-lawyer.

(20 marks)

(Question 5 follows)

Question 5

Heywood Floyd was the sole director of Jupiter Plumbing Pty Limited until it was wound up in insolvency. Jupiter has had cash flow difficulties for years, but Heywood's father has been near death several times over that period, and Heywood had expected to receive a substantial inheritance if he died. Besides doing plumbing work, Heywood has spent a lot of time juggling creditors and making payments designed to keep those who have complained loudest off his back. He had been employing his son, who is studying for an MBA, as the financial controller of the business.

When Heywood's father rallied yet again, he decided to borrow \$500,000. He didn't use any of this money to pay existing debts. He used the loan to expand the business in the hope that it would become more profitable. At that time he also appointed his son as a director. Unfortunately the business continued to go downhill financially and that money was effectively lost.

Advise the liquidator in relation to a possible damages claim against both directors. Advise the liquidator what he needs to prove to win, and what matters either director might raise in opposition to such a claim. Your advice should explain the relevant law in plain English.

(20 marks)

END OF PAPER