

Insolvency Law Examination

September 2008

Examiner's Comments

Question 1:

Many students failed to discuss whether the trusts assets in their entirety would be available to the Official Trustee in Bankruptcy appointed on the acceptance of Short's debtor's petition. A substantial number of students failed to identify preferences to Shystress and Posh College under section 122 of the Bankruptcy Act. Consequently they failed to analyse whether Posh College had a valid defence of good faith and the ordinary course of business to any claim by the Trustee in Bankruptcy.

Question 2:

Surprisingly a significant number of students failed to identify departing or remaining away with an intent to defeat or delay creditors within section 40(1) (c) as an available act of bankruptcy within section 44(1) of the Bankruptcy Act. Hardly any students considered section 124 of the Bankruptcy Act and whether Continental Travel obtained a good receipt from Erica when she was allowed to redeem her airline ticket to return to Australia.

Question 3:

Hardly any students discussed the difference between an "insolvent transaction" as described in section 588C of the Corporations Act and the undercapitalization of Illustrious Pty. Ltd. by an "uncommercial transaction" as described in section 588FB (1) of the Corporations Act. The relevant case to consider was *Demondrille Nominees Pty. Ltd. v Shirlaw*. A significant section of students were unfamiliar with *Re Suco Gold* or the principles espoused in the case despite Illustrious Pty. Ltd. being a corporate trustee. Only a bare majority of students raised charges over personal chattels and the case of *Re Trendent Industries* when analyzing the contract with Stalin Ltd.

Question 4:

A substantial number of students failed to recognise the *Associated Alloys Case* on the issue of whether the trust was a charge and thought the reversioning of title clause was automatically a preference and could not be a valid security. Far too many students did not apply sections 588FA, 588FC and 588FE (2) of the Corporations Act with *Re Emmanuel (No. 14) Pty. Ltd.* to the direction to pay Metal Works Ltd. \$100,000. Not many students stated that it was an indicator of insolvency that the capital of 2 Bob Pty. Ltd. could only be restored by successful litigation or mentioned *Hymix Concrete v Garritty*. Most students were aware of *Kinsela's case* but some did not raise the

liquidator's power to take proceedings on behalf of the corporation for breach of director's duties under section 598 of the Corporations Act.

Question 5:

This question was well done by most students. However there was not that much discussion on the differences of opinion between Barwick C.J. and Menzies J. on when a Court exercising bankruptcy jurisdiction will go behind a judgment debt. The better students mentioned the judgment of Justice Deane in *Re Sarina* and Sir Harry Gibbs in *Re Ferguson*.

Question 6:

This question was answered competently with many students confining their answer to presumptions of insolvency as proof for the making of a winding up order in an application under section 459 P of the Corporations Act. Not many students considered the policy basis for such presumptions is the difficulty an unsecured creditor has in proving the commercial realities of the company in their entirety and it is the commercial reality of that particular unsecured creditor's debt that creates the presumption of insolvency under section 459 C (2) (a) of the Corporations Act. A substantial proportion of students did not discuss the wider implications of insolvency as described in section 95A of the Corporations Act particularly proof of insolvency by the liquidator in avoiding insolvent transactions in recovery proceedings under section 588FF and any evidential assistance offered by section 588E of the Corporations Act.

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