

# LEGAL PROFESSION ADMISSION BOARD

SEPTEMBER 2009

## INSOLVENCY

**Time: Three Hours**

This paper consists of **six** questions.

Candidates are required to attempt any **five** 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 **five** 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.

**Permitted Materials:**

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

**As some instances of cheating and of bringing unauthorised material into the examination room have come to the attention of the Admission Board, candidates are warned that such conduct will 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

"The judgment is never conclusive in bankruptcy. It does not always represent itself as the relevant debt of the petitioning creditor, even though under the general law, the prior existing debt has merged in a judgment. But the Bankruptcy Court may accept the judgment as satisfactory proof of the petitioning creditor's debt. In that sense that court has a discretion. It may or may not so accept the judgment. But it has been made quite clear by the decisions of the past that where reason is shown for questioning whether behind the judgment or as it is said, as the consideration for it, there was in truth and reality a debt due to the petitioning creditor, the Court of Bankruptcy can no longer accept the judgment as such satisfactory proof. It must then exercise its power, or if you will, its discretion to look what is behind the judgment: to what is its consideration. It is not the law, in my opinion, that whether in any case the Court of Bankruptcy will consider whether there is satisfactory proof of the petitioning creditor's debt is a mere matter of its own discretion." (Barwick C. J. *Wren v Mahony* [1972] HCA 5 at paragraph 16)

**Discuss with reference to section 52 (1) (c) of the Bankruptcy Act.**

**(20 marks)**

### Question 2

On 1 January 2009 a sequestration order was made against the estate of Mr Taylor and he consequently became bankrupt on that date. The commencement of the bankruptcy occurred on 1 October 2008.

On 1 January 2004, five years before becoming bankrupt, Mr Taylor transferred several parcels of land to his nephew as a gift. Although the market value of the parcels of land was \$600,000, Mr Taylor transferred the parcels of land as a gift because he was very close to his nephew and to whom he had a great affection and love, as did his nephew towards Mr Taylor.

At the time of the transfer to his nephew, Mr Taylor was suffering from a short term liquidity problem but was able to borrow funds on the security of his assets to enable him to pay his debts when they fell due. There is no suggestion that Mr Taylor did not keep proper books and records.

**The Trustee in bankruptcy seeks your advice on whether the transfer of parcels of land from Mr Taylor to his nephew is void against the Trustee pursuant to section 120 of the *Bankruptcy Act*.**

**(20 marks)**

**(Question 3 follows)**

### Question 3

“The remedies available pursuant to sections 588FDA and 588FF of the *Corporations Act* are equally available under sections 180-183 of the *Corporations Act*.”

**Discuss.**

**(20 marks)**

### Question 4

Katherine conducted a modelling agency, as a sole trader, from commercially leased premises in Surry Hills. The landlord, Trendy Locations Pty Ltd, had agreed to accept \$10,000 per month payable in advance from Katherine and executed a lease to that effect. Katherine paid all the expenses of the modelling agency from an overdraft account which she had taken out with the International Bank. That overdraft was limited to \$40,000.

As at 1 January 2009 Katherine was overdrawn on the overdraft that had a debit of \$50,000. Subsequently, the International Bank dishonoured a cheque drawn by Katherine for \$10,000 to Trendy Locations Pty Ltd for her monthly rental. In consequence, Trendy Locations Pty Ltd threatened Katherine that should she default on her rental obligations her monthly lease would be terminated and that it would re-enter the premises and take possession.

As at 1 February 2009 Katherine was insolvent but was determined to trade out of her difficulties. She entered in to an agreement with the International Bank to bank all her takings from the modelling agency with the Bank allowing the Bank to deduct \$10,000 per month in permanent reduction of her overdraft. She also gave the International Bank a bill of sale over her car, a 2008 pink Mini Cooper, for all indebtedness under her overdraft. The Bank promptly registered its interest in the car under the Registration of Interests in Goods Act. In return the International Bank promised to honour all cheques payable to Trendy Locations Pty Ltd for rent in priority to cheques to other creditors of the modelling agency.

On 1 March 2009 Katherine purchased photographic equipment for \$10,000 from Cameras Galore Pty Ltd. The photographic equipment was for a forthcoming trip to Columbia with an agency model for a fashion shoot to promote a newly created travel magazine that Katherine believed would be a large commercial success. She paid all her rent with Trendy Locations Pty Ltd up to 1 May 2009 by cheque drawn on the overdraft with the International Bank. She also drew a cheque to pay for the trip to Columbia for the model and herself with Central American Travel Pty Ltd.

On 1 April 2009 Katherine flew to Columbia with the model for the photographic shoot. While in Columbia she fell in love with a suspected drug runner, Jose, and her relationship was the subject of salacious press reports in Australia. The travel magazine refused to pay for the photographs claiming Katherine's relationship with Jose compromised the marketing campaign for the magazine.

**(Question 4 continues)**

**(Question 4 continued)**

On 21 April 2009 Katherine redeemed her return ticket to Sydney with Central American Travel Ltd for \$2,000. On 1 May 2009 the model returned to Sydney but Katherine remained behind with Jose in Columbia. Repeated texts to her mobile phone by agency models looking for work went unanswered.

The International Bank received \$50,000 including an amount of \$20,000 for sale of the car that was subject to the bill of sale for Katherine's overdraft.

Trendy Locations Pty Ltd has terminated Katherine's lease and on 1 June 2009 obtained an order for possession of the commercial premises where Katherine carried on the modelling agency and judgment for \$10,000 for rent up to the date of judgment. In addition, the model claims she has not been paid by Katherine for her work in Columbia.

**Can any of Katherine's creditors present a petition on 1 July 2009 seeking a sequestration order against Katherine's estate? If so, whom, and on what basis?**

**(20 marks)**

**Question 5**

In December 2008, the auditors of Kasam Ltd (the “**company**”) informed the directors that they had qualified the audit reports of the company for the financial years 2007 and 2008, and were unable to complete financial statements for the 2008/2009 financial year. The directors then retained Trusty & Accurate, chartered accountants, to investigate.

Trusty & Accurate undertook investigations and prepared reports between February and March 2009. Importantly, a question arose as to whether the company might have an action against Trusty & Accurate for failing to investigate its affairs with due diligence. Trusty & Accurate were paid for their services; the last payment for about \$40,000 being made on 17 March 2009. This payment raised an issue as to whether Trusty & Accurate had received a preferential payment. On 22 March 2009, Bean, a member of Trusty & Accurate, was appointed provisional liquidator to the company following a resolution of the directors.

**Two of the creditors of the company are unhappy with the appointment of Bean and seek your advice as to whether he can be removed. You are required to give reasons in support.**

**(20 marks)**

**(Question 6 follows)**

### **Question 6**

Stubbs Pty Ltd (the “**company**”) was served by Aroma Trading Ltd with a statutory demand in the amount of \$18,500.00 (the “**demand**”). The stated basis for the demand was said to be for non-payment of invoices which arose in consequence of goods having been supplied to the company by Aroma. Most of the goods that had been supplied to the company were on-sold to third parties.

Prior to being served with the demand, the company had sent numerous letters to Aroma Trading Ltd complaining about the quality of goods which had been supplied to it, and about the amounts claimed in the invoices. In particular, in that correspondence, the company alleged that it had been overcharged and that most of the goods it had received were so deficient in quality that when the company on-sold them, they had been returned by purchasers with a demand for credit or a refund. In one case a third party had threatened to sue the company for its loss of profits arising from the fact that it was unable to sell the goods supplied by the company. The company estimates that it has been overcharged by Aroma and that it has goods awaiting return to Aroma to the value of \$16,000.00.

**The company seeks your advice as to what it may do in the circumstances. In your answer you should analyse the relevant grounds available to set aside the demand and the procedure involved.**

**(20 marks)**

**END OF PAPER**