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SUMMATIVE (FORMAL) ASSESSMENT: MODULE 7B

KENYA

This is the **summative (formal) assessment for Module 7B** of this course and must be submitted by all candidates who selected this module as one of their elective modules.

The mark awarded for this assessment will determine your final mark for **Module 7B**. In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in **Microsoft Word format**, using a standard A4 size page and an 11-point Arial or Avenir Next font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[studentID.assessment7B]**. An example would be something along the following lines: 202223-336.assessment7B. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentID” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
6. The final submission date for this assessment is **31 July 2023**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2023**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
7. Prior to being populated with your answers, this assessment consists of **9 pages**.

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph in yellow. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

Which one of the following parties **may not** make an application for the bankruptcy of an individual:

- (a) A creditor.
- (b) A combination of creditors.
- (c) A supervisor of an individual voluntary arrangement. ✓
- (d) The debtor.
- (e) The Official Receiver. ✗

⓪

Question 1.2

Choose the **incorrect** statement:

A bankruptcy trustee may not cancel a charge created by a bankrupt if –

- (a) Money was actually advanced or paid in good faith.
- (b) The actual price or value of property sold or transferred was paid.
- (c) There was any other valuable consideration given for the charge.
- (d) The Official Receiver deems it fit to cancel the charge. ✗

⓪

Question 1.3

How long after his appointment should the liquidator of a company convene a creditors' meeting?

- (a) Within 30 days. ✓
- (b) Within 28 days.
- (c) Within 21 days.

⓪

(d) Within 14 days.

Question 1.4

Which one of the following officeholders **has no power** to challenge a transaction at an undervalue in terms of section 682 of the Insolvency Act:

- (a) An administrator.
- (b) A liquidator in a creditors' voluntary liquidation.
- (c) A liquidator in a compulsory liquidation. ①
- (d) An administrative receiver. ✓

Question 1.5

Which one of the following **may not** appoint or make an application for the appointment of an administrator:

- (a) A creditor.
- (b) The Official Receiver. ✓ ①
- (c) Directors.
- (d) A qualifying floating charge holder.

Question 1.6

Which one of the following powers / functions **are not** bestowed upon an administrator:

- (a) Power to sell charged assets. ✗
- (b) Power to borrow money. ①
- (c) Power to hire or fire directors.
- (d) Power to disclaim onerous contracts. ✓

Question 1.7

Within how many days of the company entering into administration must the administrator hold an initial meeting of the company's creditors?

- (a) Within 14 days.
- (b) Within 30 days.
- (c) Within 60 days. ①
- (d) Within 70 days. ✓

Question 1.8

Within how many days is a supervisor of an individual voluntary arrangement (IVA) required to file his report on the IVA?

- (a) Within 7 days.
- (b) Within 14 days.** ✓ (1)
- (c) Within 21 days.
- (d) Within 28 days.

Question 1.9

Which of the following **may not** make a proposal for a company voluntary arrangement (CVA):

- (a) Creditors.** ✓ (1)
- (b) Directors.
- (c) Liquidator (where the company is in liquidation).
- (d) Administrator (where the company is in administration).

Question 1.10

Which one of the following **oversees a company** voluntary arrangement:

- (a) A director.
- (b) Official Receiver.
- (c) Receiver.
- (d) Liquidator.
- (e) Monitor.** ✓ (1)

Q1 = 8/10 marks ✓

QUESTION 2 (direct questions) [10 marks in total]

Question 2.1 [maximum 2 marks]

What are the options available to a secured creditor in the event of bankruptcy under the Insolvency Act?

[The secured creditors have three options in the event of bankruptcy under the Insolvency Act and those three options are provided for under sections 226 and 228 of the Insolvency Act. Thus, the three options available to the secured creditors are;

- 2
1. To realise the charged asset by way of sell of the charged asset and channel the proceeds of the sale to liquidate the debt owed by the bankrupt
 2. To surrender the charged properties to the bankruptcy trustee for the collective benefit of all the creditors
 3. To have the charged property valued and prove for the balance due after deducting the amount of the initial valuation]

Question 2.2 [maximum 4 marks]

What are the grounds for the automatic discharge of a bankrupt? Does the automatic discharge have exceptions and if so, what are these exceptions?

[The automatic discharge of a bankrupt falls within the purview of section 254 of the Insolvency Act. Therefore, the bankrupt will be automatically discharged after three years except under the circumstances set out under Section 254 (2) of the Insolvency Act and these circumstances are as follows;

- 3
1. The bankruptcy Trustee or a creditor has objected and the objection remains un-withdrawn by the lapse of the three year period ✓
 2. The process of publically examining the bankrupt on the request of the creditor or the bankruptcy trustee has not been completed ✓
 3. Where there is an objection by a creditor or the bankruptcy trustee to the automatic discharge. ✗

In the nutshell the preceding are the exceptional grounds to the automatic discharge of the bankrupt.]

→ Where there is a previous bankruptcy proceeding ongoing which has not been discharged

Question 2.3 [maximum 4 marks]

What are the objectives of the administration procedure under the Insolvency Act?

[Administration is not expressly defined under the Insolvency Act however; the effect of administration is placing the insolvent company under the management of an Administrator with the view of turning around the company so that it is rescued from going into liquidation. The statutory objectives of the administration is set out under section 522 of the Insolvency Act and are as follows,

- 4
- 3
1. To maintain the company as a going concern ✓
 2. To achieve a better outcome for the company's creditors as whole than would likely to be the case if the company underwent liquidation ✓ and ✓
 3. To realise the property of the company in order to make a distribution to one or more secured or preferential creditors.] ✓

not and

QUESTION 3 (essay-type question) [15 marks]

Please select only one of the following questions below. Please delete the questions you choose not to answer.

Question 3.1 [maximum 15 marks]

Discuss the process of voluntary and involuntary liquidation in a winding-up.

[The liquidation of a company can either be voluntary or involuntary. Thus, voluntary liquidation is invoked by the company through its Directors making a solvency declaration within five weeks preceding the passing of the special resolution for a voluntary liquidation stating that they have made a full inquiry onto the affairs of the company and they have formed the opinion that the company will be able to pay its debts in full, together with interest at the official rate, within such period as maybe stated in the declaration of solvency. Thereafter, the company should give a Notice of the Resolution to the holder of any qualified charge of the company's property. Once Notice is given and after seven days from the date of the Notice, the company will pass a special resolution that the company be liquidated. Within 14 days from the date of passing of the resolution the company is mandated to publish a notice setting out the resolution as follows,

→ qualified in floating charge

1. Once in the Kenya Gazette ✓
2. Once in at least two newspapers with wide circulation in the area where the company's principal place of business is located and ✓
3. On the company's website. ✓

It is worth of note that failure by the company to comply with the preceding publications may lead each officer of the company to suffer conviction to a fine not exceeding KES 500,000.00. Furthermore, the Kenyan insolvency regime requires that within 14 days after the date on which the resolution for liquidation is passed the company must lodge with the Registrar of companies a copy of the declaration of solvency. The procedure in creditors' voluntary liquidation is that the company must convene a meeting of its creditors not later than 14th day after the meeting at which the resolution for a voluntary liquidation is to be proposed. The company is enjoined to send Notices of the creditors' meeting to the creditors not less than seven days before the meeting day and ensure that notice of the creditors' meeting is published in the like manner as stated above.

- Failure which fine

On the other hand, involuntary liquidation is usually at the instance of the Court. Thus, the court may liquidate the company if;

1. The company has by special resolution resolved that the company be liquidated by the court ✓
2. If the company does not commence its business within 12 months from its incorporation or suspends its business for a whole year.

- inability to pay debt

The application for the liquidation by the court may be made by the following persons and is to be made in the prescribed Form 32C and accompanied by a statutory demand and verifying affidavit in the prescribed Form 32E and Form 32 D. once a judgment has been made, the liquidation order is to be issued by the court in the prescribed form.]

incomplete

QUESTION 4 (fact-based application-type question) [15 marks]

Please select only one of the following questions below. Please delete the questions you choose not to answer.

Question 4.2 [maximum 15 marks]

High Def Co Limited (the company) is engaged in the manufacturing of spoons. The company has a total of 10 secured creditors with an outstanding debt of KES 5 billion in aggregate. The company also has outstanding unsecured debts of KES 100 million, including employees who are owed KES 10 million in unpaid wages. As a result of prevailing bad market conditions, the company's fortunes took a turn for the worst and the company is unable to pay its debts. One of the secured creditors, 1M Bank, approaches you to advise on the steps to be taken and, in addition, you are informed of the following:

notice is before prescribed form of resolution
app. IP
Dir passes Final Resol by
7/15
cannot to creditors meeting
leg. Strit
Dir Finan Strit = 161 credit
regard to Governance

- that one of the secured creditors has filed a liquidation petition in Court that has not yet been dispensed with and no order has yet been made;
- that 1M Bank has discovered that the directors have known for 12 months that the company is unable to pay its debts;
- the company has in the last six months paid-off some of its unsecured creditors; and
- part of the securities that 1M Bank holds relate to charges over land.

[The question seeks to render advice to one of the secured creditors and 1M Bank on the steps to be taken premised on the facts of the question. The following facts are clear from the question at hand,

1. High Def Co Limited has a total of 10 secured creditors with an outstanding debt of KES 5 Billion in aggregate
2. The unsecured debts of KES 100 Million including the employees
3. The company is unable to pay its debts and the Directors have known for 12 months that the company is unable to the debts
4. The company has paid unsecured creditors in the last six months.

In light of the foregoing narrative, I opine that the Directors of High Def Co Limited by carrying on business while knowing the insolvent state of the company engaged in fraudulent trading.
Thus, fraudulent trading simply refers to the situation where the business has been carried on with the intention to defraud the creditors. Therefore, the advice to the creditors is that since there is already a liquidation petition before court, the Directors must be probed for fraudulent trading and if found wanting the court can order them to make a contribution to the company's assets in addition to being prosecuted in criminal proceedings.

Furthermore, the payment to the unsecured creditors over the secured creditors is act of preference by the Directors. Preference is deemed to arise if the directors of the company offer a creditor or creditors a better position than they would have been in had the company being liquidated and that includes preference payments as the case at hand. Therefore, preferences pay outs maybe reversed by the court once it is established that the Directors advantaged one creditor over the others. The advice to the creditors is that this is a proper case for challenging the payments made to the unsecured creditors in the last six months and if proved the payments can be set aside.

On the other hand since 1 M bank holds security over land, it can pursuant to the Lands Act appoint its own Receiver over the charged land in order to secure its interest. The advice to 1M bank is that they should seek the appointment the Administrative Receiver.

9/15
A
15

Administration petition ?

No moratorium in liquidation ?

Priority of claims
wrongful trading

* End of Assessment *