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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. (D)
- (e) The Official Receiver. ✗

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. (D)
- (c) There was any other valuable consideration given for the charge.
- (d) The Official Receiver deems it fit to cancel the charge. ✓

Question 1.3

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

- (a) Within 30 days. ✓ (D)

(b) Within 28 days.

(c) Within 21 days.

(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

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 creditor can:

- Realise the charged asset (i.e. sell the charged asset and use the proceeds to settle the debt owed);
- Surrender the charged assets to the bankruptcy trustee for the benefit of creditors; or
- Have the charged asset valued and prove for the balance due after deducting the amount of the 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?

Section 254 of the Insolvency Act provides for an automatic discharge of a bankrupt after three years except under circumstances set out in subsection 2 below if:

1. The bankrupt trustee or creditor has objected and the objection has not been withdrawn by the end of the three-year period;
2. The bankrupt has to be publicly examined, on request by a creditor or the bankruptcy trustee has not completed examination; or
3. An objection by a creditor or the bankruptcy trustee to the discharge has been raised.

On being discharged, a bankrupt is released from all debts provable in the bankruptcy except debts incurred by fraud, fraudulent breach of trust, or amounts payable under the Matrimonial Causes Act or the Children's Act.

Release from a previous bankruptcy proceeding

Question 2.3 [maximum 4 marks]

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

The objectives of administration are to maintain the company as a going concern, to achieve a better outcome for the company's creditors as a whole than would likely be the case if the company were liquidated and to realise the property of the company in order to make a new distribution to one or more secured or preferential creditors. The Act now provides the company with the opportunity to operate as a going concern compared to previously where the only option was to engage in the sale and realisation of its assets.

recover money

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.

There are two types of liquidation:

- i) voluntary liquidation (here the company or its members by resolution resolve to liquidate the company) and
- ii) liquidation by the Court (involuntary liquidation). The court may also on its own motion decide to liquidate a company if in the opinion of the court it is just and equitable to do so.

Voluntary liquidation

- A company may be liquidated voluntarily if a) the company in a general meeting – has passed a resolution providing for its voluntary liquidation when the fixed period for the duration of the company by the articles expires, or on the occurrence of an event upon which the articles provide that the company is to be dissolved, or b) if the company resolves by special resolution that it can be liquidated voluntarily.
- Before passing a resolution for voluntary liquidation, the company must give notice of the resolution to the holder of any qualifying floating charge in respect of the company's property.
- Voluntary liquidation can either be a) a members' voluntary liquidation or b) a creditors' voluntary liquidation.

Members voluntary liquidation

- The company in a general meeting must appoint one or more authorised insolvency practitioner(s) to act as liquidator. On the appointment of a liquidator all the powers of directors cease, except in so far as the company in general meeting, or the liquidator, sanctions their continuance.
- If the liquidation continues for a period of 12 months or more the liquidator must convene a general meeting of the company within three months and thereafter every three months after the end of each subsequent 12-month period. The liquidator is required lay before the meeting an account of the liquidator's acts and dealings and of the conduct of the liquidation during the preceding year.

Creditors voluntary liquidation

- A company must convene a meeting of the company's creditors not later than the 14th day after the meeting at which the resolution for voluntary liquidation is to be proposed.
- The directors of the company are required to prepare a statement setting out the financial position of the company to be laid before the creditors' meeting.
- Creditors may if they think appropriate, appoint a liquidation committee of not more than five persons at the creditors' meeting or at any subsequent meeting. The company may also appoint a number of persons not exceeding five to be members of the committee where such a committee has been established. However creditors may resolve that persons appointed by the company are disqualified from being such members.
- The directors of the company are required to make a solvency declaration within five weeks immediately before the passing of the resolution for voluntary declaration stating that they have made a full inquiry into the company's affairs and that they have formed the opinion that the company will be unable to pay its debts in full, together with interest at the official rate, within such period as may be specified in the declaration.
- On a company's voluntary liquidation, the company's property is to be applied in satisfaction of the company's liabilities equally and without preference. Thereafter, it is to be distributed among the members according to their rights and interest in the company unless the company's articles provide otherwise.
- If for any reason there is no liquidator or the liquidator is unable to act, the Court may appoint one. The acts of a person appointed by the Court as a liquidator of a company are valid despite

in vol. liquidation

Creditors liquidation

any defect in the person's appointment. Further, only an authorised insolvency practitioner is eligible for appointment.

Involuntary liquidation

- An 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 stator demand and a verifying affidavit in the prescribed Form 32E and Form 32D respectively:
 - i) the company or its directors,
 - ii) creditors
 - iii) shareholders or
 - iv) an administrator of the company.

✓ The Attorney General may also apply to the Court if it appears that it would be in the public interest for the company to be liquidated.

- In a liquidation ordered by the Court any disposition of the company's property and any transfer of shares, or alteration in the status of the company's members is deemed to be void. Additionally any attachment, sequestration, distress or execution instigated against the assets of the liquidation is also considered void unless the court has authorised.
- On the making of a liquidation order, the Official Receiver shall conduct an investigation to discover why the company failed and generally to investigate the promotion, formation, business, dealings and affairs of the company. The Official Receiver shall then make a report to the Court as he/she considers appropriate and such reports shall be evidence of the matters stated in it until the contrary is proved.
- The liquidator ensures that the assets of the company are realised and distributed to the company's creditors or if there is a surplus, distribute the surplus to the persons entitled to it. If the liquidator is satisfied that the liquidation of the company is complete, the liquidator convenes a final meeting of the creditors. Those present at the meeting consider the liquidator's report of the liquidation and if satisfied, approve the minutes. The final report is filed with the Official Receiver and the company's name is struck off from the Register of Companies.

8/15
429
430
Not mandatory
Procedure for meetings? Timelines?
Gazettement?

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 4.1 [maximum 15 marks]

You have been approached by the directors of Eat it All Limited (the company) to advise on their options in light of the company's recent financial problems. The directors disclose the following to you:

- the company has not been doing well for the past three years and the directors know the company is, and has been, insolvent;
- the company has outstanding loans owed to certain creditors, and 20% of these loans are secured while 80% are unsecured;
- the company recently dismissed three of its seven directors for the misappropriation of funds;

- one of the company's assets was sold to the spouse of one of the main shareholders at a value lower than market price;
- during the last nine months the company sold some assets to pay certain creditors who had threatened to sue the company;
- as a result of its insolvency, the company was in the process of transferring (but this has not yet been completed) one of its most valuable assets to a newly incorporated company (a special purpose vehicle (SPV)) owned by its parent company; and
- the directors have provided you with an independent business review report by a top audit firm that shows that the company is viable and can return to profitability if certain structural changes are adopted. The directors inform you that they have shared this report with the company's main creditors who are owed 80% of its total debts and who have shown their willingness to discuss any proposals from the company. The remaining creditors were unwilling to engage the directors.

The directors have asked you to advise them on the best course of action for the company and the various options available to them.

In advising the Directors I would note the following to them first:

1. They are at risk of Director liability where a company is or has been in financial difficulty they need to evaluate 1) what can they do to keep the company in business without committing an offence or incurring personal liability and 2) at what stage must they cease trading. If they have known that the company was insolvent and they carried on trading – they are at risk or wrongful trading. Should a liquidator discover that the directors ought to have known that there was no reasonable prospect that the company would avoid being placed in insolvent liquidation then the liquidator may make an application to court and the court may declare the person to be liable to make such contribution to the company's assets as the court considers appropriate. However no order can be made if the court is satisfied that the director took steps to avoid potential loss to the company's creditors as the person ought reasonably to have taken. Where an order is made the court may also disqualify the person from being or acting a director of a company for up to 15 years. Thus the Directors are encouraged to take steps to put the company on a sound financial footing.
2. It seems that the directors that were dismissed for misappropriation of funds are at target of Fraudulent trading. If in the course of liquidation it appears that any business of the company has been carried on with the intent of defrauding creditors (directly or indirectly) and the liquidator believes that such persons had knowledge and participated – the court may order that the person make such contributions to the company's assets as the court considers fair and reasonable. Additionally such persons could be preventing from acting as directors for up to 15 years. Fraudulent trading is a criminal offence and the offence is applicable whether or not the company has been liquidated or is in liquidation and could result in up to 10 years imprisonment.
3. The asset that was sold below market value the main shareholder's spouse would be considered an Impeachable transaction. Since it was below market value this is an undervalue transaction since the company did not receive fair or market value. A court may issue an order for a clawback, which would see the unfairly advantaged party ordered to reverse the disposition.

fraudulent

they know

4. The assets that were sold to certain creditors during the last nine months could also be seen as impeachable transactions. These could be attacked as either preference transactions or extortionate credit transactions. Where a company enters into transactions that prefer certain creditors over others and give them an advantage over creditors, a preference is deemed to arise. A preference is deemed to have occurred if it offers the beneficiary a better position than they would have been in had the company been liquidated. The directors must determine if - when they sold the assets - the company was distressed or insolvent as these transactions could be attacked as preference. A transaction is deemed extortionate if it occurs within the last three years before a company's insolvency. It is considered extortionate if the company has made exorbitant payments without any valuable return or grossly contravened the ordinary principles of fair dealing.
5. I would advise the company to halt the transference of its most valuable asset to the SPV as this would definitely be attacked as a preference transaction. The directors would most certainly be attacked for directors liability both wrongful and fraudulent.
6. As the company has had an independent business review which shows that the company is viable and can return to profitability (if certain structural changes are adopted) this advice seems at odds with the directors initial advice that the company "is and has been insolvent". Nonetheless it provides an opportunity for the company to pursue several options in order to address its financial distress. It may enter administration which seeks to 1) maintain the business as a going concern 2) achieve a better outcome for the company's creditors as a whole than in liquidation and 3) realise the property of the company in order to make a distribution to one or more secured creditors. This would allow the company a moratorium against any aggressive creditors for legal action (it seems the company has such). However this process is costly and although a negative is that the company must set aside 20% of the proceeds for unsecured creditors - it seems most of the company's creditors at 80% are actually unsecured.
7. However since 80% of the creditors are supportive of proposals to resolve the financial distress the company could consider a company voluntary arrangement (CVA) - which would be a way to deal with the dissenting 20% creditors. Here for the plan to be adopted it is approved if it is 1) passed by a majority of the members of the company present (either in person or by proxy) at the meeting of the company and 2) by a majority (in number and value) of the members of each group of creditors present at the meeting or 3) if, despite not being approved by a majority of the members in 1) it is approved by a majority (in number and value) of the members of each of the classes of creditors referred to in 2). Here it would have to establish whether the secured creditors would be in a position no worse off than if the company was in liquidation, would receive no less from asset sales or would be paid in full from the proceeds of their assets. Should the answer be affirmative to the secured creditors then their rights would be protected and their vote would be forthcoming. It is not clear whether the 20% who do not want to discuss the plan's proposals are secured or not. The CVA would have to accommodate the secured creditor's rights/issues. A CVA is defined in the Insolvency Act to mean a composition or arrangement proposed by the directors of a company which sets out the solutions that the directors propose be adopted change the fortunes of a financially distressed company. A company can apply for a moratorium at the same time it applies for a CVA.
8. Alternatively the company may follow a procedure under the Companies Act to pursue a scheme of arrangement. Under these arrangements a company may make a compromise or arrangement with its members or creditors. This could address any kind of internal reorganisation, merger or demerger as long as the necessary approvals have been obtained. Here the threshold for approving a scheme is high at 75% of either the creditors or class of creditors or the members or a class of members. Given that already 20% of creditors appear unwilling to discuss any proposal it appears that the company will have a lot of convincing to

Not really

only if floating charge assets are realised

but issues against directors may stay process

do here. Also there would be no moratorium available which would leave the company vulnerable to disgruntled creditors attacking the company as it seeks to gain approval from other creditors. From the points I raised in 1-5 there appear a number of valid attacks any creditor could bring against the company.

*** End of Assessment ***

