70/100

a)

The test on prorthy insolvency is defined under s95A as ‘anable to pay debts as and when they fall due.’ It is based on the CL cash flow test. [tick]

Here, HTA is overdue on its payments. This is important as the ‘commercial reality of the light of all circumstances must be taken account. Southern Cross. G states that the trouble of payment is due to a shortfall in income. This suggests that CCCLtd is not actually insolvent, but rather experiencing a ‘temporary lack of liquidity.’ Re Timbuk. [tick] Of course, further information would be needed in terms of exactly how many debts are overdue. (G says CCLtd is having trouble meeting other debts as well) and also another relevant consideration is the financial industry which CCCltd operates. However, this is a harder argument to make as in the financial sector insolvency is very serious and is likely not accepted as industry practice. (Sandell, Lewis) [tick]

On balance, it would seem HTA is not insolvent. Bank contract probably tips it over – would be insolvent

b)

A liquidator is appointed – there is a presumption of insolvency under s459C for HTA.

The purchase of the fleet of cars by CCLtd for MTA may be a voidable transaction due to it being an uncommercial transaction. (s588FB(1)) [tick] The test is to look at the benefits and detriments. Here, there is a presumption of insolvency, and yet HTA sold the fleet of cars at a substantial discount. This is clearly detrimental to HTA and cannot be explained by normal business practices. Indeed no reason was given as to whey they were sold so cheap. [tick]

The transactions must fall within relevant timeframe. Commercial transaction is within 2 years before RBD. S588FE(3). This appears satisfied. [tick]

Defences?

Under s588FG, the court will not order voidable transaction if CCCltd received no benefit, or was in good faith or had no reasonable grounds. [tick]

The test is subjective for good faith. (Dowrey)

Here🡪 clearly not satisfied. The common practice of the board of CCLtd to retain control of BTA and to provide direction. [tick]

Objection: reasonable grounds? (Dowey)

Also not satisfied.

Therefore, voidable breach. [tick]

c)

The share purchase constitutes financial assistance from HTA buying shares in CCLtd (S260A)

Timing: not in issue since FA can be provided before or after share are acquired (S260A(2)) [tick]

Materially prejudicial to company/shareholder interests?

Here, the circumstances are analogous to ASIC v Adler since by ‘looking at the whole transaction’ the selling of the fleet was a severe depletion of HTA Pty’s financial resources. (Burton) [tick] On the other hand, this can be distinguished by the fact that the price paid by CCLtd was not excessive, but rather it was below market price. In this sense, it is more likely that it was not materially preduiced. (S260A) [tick]

Materially predjudical to CCLtd’s ability to pay creditors?

Arguably yes, as over the past 12 months CCLtd has been experiencing a down-turn in profits, and a freeze has been put on employees. However, without an accurate idea of the actual financial situation of CCLtd, this ground cannot be determinately made out. [tick]

Common law consideration?

The test in Burton argues in favour of FA, esp of such as the case of Adler, the fleet’s actual market value is substantially less thatn the amount paid. However, in this case, the market value of the fleet was substantially more, which points to the conclusion that it did not constitute FA. Thus, the casual connection between PA and the sale of the fleet, while present (Belmont) does not point to FA. [tick]

Shareholder approved? S260B

While it would seem that s260A is satisfied, it it is not, there must be shareholder approval. Given that the shareholders of STA constitue CCLTd, directors, and employees of CCLtd, it is almost certain that the transaction will be approved.

Exemptions

The purchasing of a fleet is not in the ‘ordinary course of business’ of a fiancnail company such as CCLtd (s260C)

While CCCltd is a financial institution, and thus many be exempt under s 260(2), it is not clear exactly what they are doing.

Exemptions will not apply. [tick]

Consequently, it would appear on balance that CCCLtd’s transactions did not constitute a FA. [tick]

Invalidity Factors

The share purchase may still be invalid if there was a failure to notify ASIC of the issue. 254X.

S254D does not apply to CCLtd. [tick]

d)

Is CCLtd liable as a director?

A company is a separate legal entity. CCCLtd is not an actual director due to appointment because a company cannot be appointed a director.

However, CCCLtd may be liable as a shadow director if it satisfies the requisite element of control. In standard chartered Bank, the court held that directors under control satisfies this requirement. The facts state that it is common practice of CCCLtd’s board to review activities and accounts of HTA. [tick] The board also provides direction to HTA, and revenue to its financial accounts. This is distinct from the control of large suppliers to distributors, even though there is a similar relationship between CCCLtd and HTA, (Buzzell) as there is an active degree of control. [tick]

Thus, CCCLtd is a shadow director under s9 and is potentially liable. [tick]

S588G?