INSOL INTERNATIONAL

FOUNDATION CERTIFICATE IN INTERNATIONAL INSOLVENCY LAW

Module 5D Guidance Text

Guernsey

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CONTENTS

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IN INTERNATIONAL INSOLVENCY LAW

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1. INTRODUCTION TO INTERNATIONAL INSOLVENCY LAW IN GUERNSEY

Welcome to **Module 5D**, dealing with international insolvency law in **Guernsey**. This Module is one of the elective module choices for the Foundation Certificate. The purpose of this guidance text is to provide:

- a general overview, including the background and history, of insolvency law in Guernsey;
- a relatively detailed overview of Guernsey's insolvency system, dealing with both corporate and consumer insolvency; and
- a relatively detailed overview of the rules relating to international insolvency and how they are dealt with in the context of Guernsey.

This guidance text is all that is required to be consulted for the completion of the assessment for this module. You are not required to look beyond the guidance text for the answers to the assessment questions, although bonus marks will be awarded if you do refer to materials beyond this guidance text when submitting your assessment.

Please note that the formal assessment for this module must be submitted by **11 pm (23:00) BST (GMT +1) on 31 July 2024**. Please consult the Foundation Certificate in International Insolvency Law website for both the assessment and the instructions for submitting the assessment. Please note that no extensions for the submission of assessments beyond 31 July 2024 will be considered.

For general guidance on what is expected of you on the course generally, and more specifically in respect of each module, please consult the course handbook which you will find on the web pages for the Foundation Certificate in International Insolvency Law.

2. AIMS AND OUTCOMES OF THIS MODULE

After having completed this module you should have a good understanding of the following aspects of insolvency law in Guernsey:

- the background and historical development of insolvency law in Guernsey;
- the various pieces of primary and secondary legislation governing Guernsey insolvency law;
- the operation of the primary legislation in regard to liquidation and corporate rescue;
- the operation of the primary and other legislation in regard to corporate debtors;
- the rules of international insolvency law as they apply in Guernsey;
- the rules relating to the recognition of foreign judgments in Guernsey.

After having completed this module you should be able to:

- answer direct and multiple-choice type questions relating to the content of this module;
- be able to write an essay on any aspect of Guernsey insolvency law; and
- be able to answer questions based on a set of facts relating to Guernsey insolvency law.

Throughout the guidance text you will find a number of self-assessment questions. These are designed to assist you in ensuring that you understand the work being covered as you progress through text. In order to assist you further, the suggested answers to the self-assessment questions are provided to you in **Appendix A**.

3. AN INTRODUCTION TO GUERNSEY

The Bailiwick of Guernsey comprises the Islands of Guernsey, Alderney, Sark, Herm, Brecqhou, Jethou and various other small (mainly uninhabited) islands situated in the English Channel, off the coast of Normandy, France.

Guernsey itself is a leading international financial centre which has attracted several hundred financial services firms which provide an extensive range of financial products and services at the very highest standards to a worldwide client base. Guernsey's financial sector encompasses expertise including banking, fiduciary services, funds, insurance and asset management. These businesses are supported in turn by excellent infrastructure including multi-jurisdictional law firms, global accountancy practises and first-rate actuarial firms. Businesses in this sector are regulated by the Guernsey Financial Services Commission (the GFSC).

Guernsey has an established global reputation for being well-regulated, co-operative and transparent, reinforced by external organisations such as the International Monetary Fund (IMF), the Organisation for Economic Co-operation and Development (OECD) and the Financial Stability Board (FSB) continually placing Guernsey in the top tier of international financial centres globally. Finance is a significant driver in Guernsey's economy with almost 23% of the 30,000 people employed in Guernsey working within the finance sector, which itself is responsible for 40% (the single largest contributor) of Guernsey's GDP.

Guernsey is a common law jurisdiction. Until 1204 Guernsey formed part of the Duchy of Normandy and while it still has an historic influence over the island, the Royal Court of Guernsey (the Royal Court) looks mainly to case law from other common law jurisdictions for assistance.

Guernsey is not part of the United Kingdom (UK); it is a dependency of the British Crown with its own legislative assembly called the States of Deliberation. The United Kingdom government is responsible for the Island's defence and international relations. As a result, United Kingdom Acts of Parliament do not generally extend to Guernsey and, in the last 10 years, the United Kingdom has gradually acknowledged that Crown Dependencies should be consulted before entering into international treaties, conventions or agreements on their behalf. Acts of

Parliament that are extended to Guernsey are done through a consensual process, by way of "Orders in Council", or by way of primary legislation passed by the States of Deliberation.

4. LEGAL SYSTEM AND INSTITUTIONAL FRAMEWORK

4.1 Sources of Guernsey law

As set out above, because Guernsey is not part of the United Kingdom, a different system of law is in operation. The analysis below addresses the three principal sources of Guernsey law: customary law, legislation and case law.

4.1.1 Customary law

As a result of Guernsey's historical links to the Duchy of Normandy, the early customary law of Guernsey was based, to a large extent, on Norman French legal principles. In certain fields, reference is still made to customary law and therefore to the authors of the ancient commentaries on Norman French law, the *Coutumes*. References to old Norman French principles as applied in Guernsey tend to appear in matters before the courts concerning property transactions, inheritance issues and guardianship matters.

Customary law can only be altered by legislation, however. The courts of Guernsey can only develop existing customary law, they cannot alter fundamental aspects of it.

4.1.2 Legislation

Primary legislation in Guernsey is called a "Law" (as opposed to an "Act", such as in the UK) and, as set out above, each Law requires Royal sanction which is given by way of Order in Council. In order to expedite the legislative process, most recently enacted Laws contain enabling provisions to allow the States of Deliberation to amend Laws without the interference of the Privy Council.

Secondary legislation in Guernsey is called an 'Ordinance' and can be passed by the States of Deliberation without Royal sanction. Other forms of secondary legislation are known as statutory instruments or regulations and, again, may be passed and brought into force locally. It should be noted that UK legislation is not directly applicable in Guernsey.

4.1.3 Case law

While Guernsey has a wealth of case law, not all of it has been formally reported, nor is it as comprehensive as larger jurisdictions such as England and Wales. Where appropriate, the Royal Court derives assistance from common law authority and will first look to Jersey, and then England and Wales, but also other Commonwealth jurisdictions such as Australia, New Zealand and South Africa. Accordingly, Guernsey law is often influenced by the common law of other Commonwealth jurisdictions.

The influence of foreign law (particularly English) upon the Guernsey courts was highlighted in the Court of Appeal case of *Helmot v Simon,*[1] whereby Sumption, JA stated as follows:

> "In Guernsey, the English common law has persuasive authority in areas not governed by Guernsey statutes or Guernsey customary law. How persuasive it is will depend on whether there are local considerations, social or legal, which point in a different direction. However, Guernsey is not, in legal terms, an island. It is fair to say that with comparatively minor exceptions the law of tort and the law of damages have for many years been built up on the model of the English common law, and English authorities have generally been applied. The use of English authority on issues where the underlying conditions in the two jurisdictions are broadly comparable is highly desirable in the interests of legal certainty. The immense volume of civil and criminal litigation in England is bound to provide more nuanced answers to a wider range of legal problems than the rather smaller corpus of decisions generated within the Bailiwick".

The common law relies on a system of precedent. It was held in the Court of Appeal case of *Morton v Paint*[2] that UK House of Lords (now the Supreme Court) decisions "carry considerable weight and it would only be in rare cases that the Guernsey Courts would not follow such a decision."

Further, decisions of the English Court of Appeal are treated with "due respect" but the Guernsey courts "are not bound by them and are free to review them and to depart from them if they are considered to be wrong or not appropriate in the particular circumstances of Guernsey".

It is also accepted that the Guernsey courts may look to other foreign laws for solutions, though laws unique to Guernsey should be considered in view of their unique development. In the Privy Council decision in *Vaudin v Hamon*,[3] Lord Diplock stated as follows:

> "Thus, although as this Board has pointed out in *La Cloche v. La Cloche* (1870) LR 3 PC 125, it is proper to look at related systems of law, and commentators on them, in order to elucidate the meaning of terms, the particular legal provision under examination in any case, in this case the Guernsey law as to prescription, must in the end be interpreted in the light of its own terminology, context and history."

While the jurisprudence is frequently sourced from England and Wales, there are many statutes that have no equivalent in Guernsey. In cases where common law has been superseded by statute in England (or other equivalent jurisdiction) but such statute has not been introduced in whole or in part in Guernsey, the Guernsey courts are able to consider how its common law has evolved in the absence of domestic statutory intervention.

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1 (2009-10) GLR 465, at para 13.
2 [1996] 21 GLJ 61.
3 [1974] AC 569.

The leading case is *Morton v Paint* (referred to above) in which the Court of Appeal held that the Guernsey common law had evolved to produce a solution equivalent to that of the English Occupiers' Liability Act 1957 without equivalent legislation ever having been enacted in Guernsey. The Court of Appeal was influenced by Australian case law which had itself developed without domestic legislation into the Australian equivalent of the 1957 Act. The Court of Appeal held that:

> "[i]t would not be appropriate to leave Guernsey law in the state reached by English law nearly 40 years ago [prior to the enactment of the 1957 Act] which was justly criticised as something of a blot on English jurisprudence and requiring urgent reform. For the Guernsey Courts to cling to obsolete English common law which ceased to be authoritative in England and Wales nearly 39 years ago would not be in the interests of those who live in Guernsey or their visitors."

In deciding whether Guernsey common law should evolve in this way, the Court of Appeal referred to the "five aids to navigation" set out by Lord Lowry in the English House of Lords case of *C (a minor) v Director of Public Prosecutions*.[4] The five aids are as follows:

(a) If the solution is doubtful, the judges should beware of imposing their own remedy;

(b) Caution should prevail if Parliament has rejected opportunities of clearing up a known difficulty or has legislated whilst leaving the difficulty untouched;

(c) Disputed matters of social policy are less suitable areas for judicial intervention than purely legal problems;

(d) Fundamental legal doctrines should not be lightly set aside; and

(e) Judges should not make a change unless they can achieve finality and certainty.

4.1.4 Insolvency-related legislation - the Companies Law

The customary law of insolvency, which remains largely applicable in the case of personal insolvency, involves a procedure known as *désastre*. The origins of Guernsey insolvency law generally are thus not to be found in principles derived from English law.

However, in the case of corporate insolvency there has been a departure from the customary law regime into a statutory regime which finds its present embodiment in various parts of the Companies (Guernsey) Law, 2008 (the Companies Law). There is no separate "Insolvency Law" (that is, no separate statute containing a codified regime to deal with the insolvency of companies), although there have been recent and substantial reforms of the Companies Law insolvency framework in accordance with The Companies (Guernsey) Law, 2008 (Insolvency) (Amendment) Ordinance, 2020 (the Ordinance) and The Companies (Guernsey) (Insolvency

[4] [1996] AC 1.

Rules) Regulations, 2022 (the Insolvency Rules) (the Ordinance and Insolvency Rules together being the Insolvency Reforms). These reforms were enacted on 1 January 2023 and provide for a more detailed insolvency regime covering key areas such as: independency in the appointment of voluntary liquidators to insolvent companies, increased reporting requirements and protection for creditors in all processes and the creation of a statutory offence in relation to transactions at an undervalue undertaken by a company in the run-up to insolvency.

The Companies Law is modelled on principles found in English law and its statutory basis derives much of its content from analogous UK provisions.

However, in *Flightlease Holdings (Guernsey) Limited v Flightlease (Ireland) Limited*,[5] Lieutenant Bailiff Southwell held that Guernsey companies law finds its roots in English companies law and that English principles should be adopted to supplement Guernsey common law or statute where compatible with Guernsey principles of company law; he stated:

> "The concept of a limited company was imported into Guernsey law from English law; since its importation into Guernsey law in the 1880s, it has naturally been *appropriate to look to English law to help in the solution of problems concerning companies which are not covered by Guernsey statutes or customary law… Guernsey, as a significant centre for financial services of many kinds, needs to develop its commercial laws in ways which provide just solutions in the relatively complex situations which arise*… English law provides, in my judgment, a more developed system of insolvency law for use by analogy, than the relatively undeveloped solutions in similar situations in Scots law." [Emphasis added]

In the field of company law generally (as distinct from issues more specifically related to corporate insolvency), care must still be taken as to the extent of such regard to English law. In the recent case of *Carlyle Capital Corporation Ltd v Conway*,[6] Lieutenant Bailiff Marshall QC observed:

> "It is well-known that the concept of a limited company was imported into Guernsey law from English law. As the Guernsey legislation has been modelled on the English legislation, *it is helpful to look at English law decisions in analogous cases, both for help in resolving any problems not directly covered by Guernsey statute or customary law… and for useful examples as to interpreting Guernsey legislation where this has been copied in identical terms from an English statute… English law decisions are persuasive, but no more, especially in the latter situation, because the context of Guernsey law and circumstance may well provide good reason for a different result.* Where the Guernsey legislation is not in identical terms – and in this case it often is not – the assistance to be derived from English cases on similar but different enactments is much reduced." [Emphasis added]

[5] (Royal Court) 2009 -10 GLR 38.
[6] (Royal Court 4.9.17) Judgment No 38/2017.

In *Montenegro Investments*[7] the Bailiff dealt with an application by the administrators of a company for sanction of a scheme of arrangement. The Bailiff observed as follows:

> "English decisions in insolvency matters are of assistance in this jurisdiction, especially when they are interpreting legislative provisions which our legislature have chosen to copy in identical terms. However, they are not binding on the Royal Court and we are not required to follow them in every case. In my view, the Royal Court when dealing with insolvency matters has to be aware that our statutory regime and the regulations thereunder are not as prescribed as English legislation. In some instances the local legislation provides the basic framework or bare bones of an insolvency procedure whilst leaving the Royal Court greater scope and flexibility in deciding how to apply its powers in any particular situation. *Where it is appropriate to do so, the Court may adopt a pragmatic approach to applications and adjust its procedures in order to deal with issues as and when they arise during the course of any insolvency,* as long as it is at all times mindful of the powers bestowed on it by the legislature and always acts within the limitations and constraints of the legislation."[8] [Emphasis added]

This element of court involvement and control, to a greater extent than would be familiar in an English context (though not in a French context), is a common theme in many aspects of Guernsey law.

The need to avoid inappropriate recourse to English law principles was demonstrated by the decision of the Deputy Bailiff in *In re Amazing Global Technologies Ltd (in liquidation)*[9] in which a liquidator applied for discharge and release. There was at that time no express statutory provision for the discharge and release of a liquidator[10] (unlike the position of an administrator). An attempt was made to rely on the general wording of section 426 of the 2008 Law, which relates to applications by a liquidator to the court for directions. The Applicants were "inviting the Court to fill that gap in the Guernsey statute and doing so principally by reference to the position in English law on the basis that Guernsey liquidators are generally English-qualified insolvency practitioners who might expect to secure their release in this way".[11]

The Deputy Bailiff pointed to a number of differences between the English corporate insolvency regime and that operating in Guernsey. He noted, for example, that the Guernsey process of liquidation culminates in a process whereby a court-appointed Commissioner examines the accounts and arranges a creditors' meeting (an echo of the *désastre* procedure, where a Commissioner is appointed to examine the claims of creditors). He concluded: "In my judgment, these differences indicate that the English law insolvency regime cannot be compared like for like with the Guernsey law regime under the 2008 Law." He refused the application.

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7 2013-14 GLR 345.

8 *Idem*, para 19.

9 (Royal Court) unreported 11.6.12 Judgment 29/2012.

10 Such a power was subsequently introduced into the 2008 Law by The Companies (Guernsey) Law, 2008 (Amendment) Ordinance, 2015, s 400A relating to voluntary liquidations and s 426A relating to compulsory liquidations.

11 (Royal Court) unreported 11.6.12 Judgment 29/2012, para 43.

He went on to observe that the 2008 Law had been enacted comparatively recently and that the Report by the Commerce and Employment Department submitted to the States of Deliberation for debate prior to its enactment had expressly stated under the heading "Insolvency Law Review":

> "The current Companies Law deals with corporate insolvency. The Department intends to bring forward proposals to amend corporate insolvency and also to amend the law relating to personal insolvency."[12]

The Deputy Bailiff observed that:

> "Those proposals are still awaited. The provisions on corporate insolvency in the 2008 Law are a consolidation of the provisions that existed prior to its enactment… I would be cautious about purporting to develop an area of the law where the States of Deliberation have been informed that a Department of the States of Guernsey intends to bring forward proposals for amendment. If the Liquidator, or indeed anyone else, wishes to advocate that something along the lines of the English law regime for release and consequential discharge is the right way forward, an appropriate approach to the Commerce and Employment Department may be more fruitful than these applications to this Court."[13]

Whilst there have been substantial reforms to the corporate insolvency framework since the Deputy Bailiff's comments, further developments are still awaited in respect of the law relating to personal insolvency.

4.2 Institutional framework

4.2.1 The courts of Guernsey

The Royal Court is the principal court of first instance in Guernsey (equivalent to the High Court in England). It has unlimited civil jurisdiction in Guernsey and is divided into five "divisions". For the purposes of insolvency law, the relevant division is known as the "Ordinary Division". This is the usual court for all commercial and civil litigation, with exclusive jurisdiction in respect of claims over GGP 10,000. A decision by the Royal Court is not binding on a future Royal Court on the same issue, but earlier decisions by the Royal Court are generally very persuasive.

The Royal Court has two full-time judges, the Bailiff (who is the President of the Royal Court and is Guernsey's leading citizen) and the Deputy Bailiff who sits full time as a judge in the Royal Court. There is also a tier of Lieutenant Bailiffs, who sit as judges of the Royal Court. These include pre-eminent lawyers and judges from other jurisdictions, principally England, or retired Guernsey judges, who are appointed by the Bailiff for the duration of his tenure.

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[12] *Idem*, para 53.
[13] *Idem*, para 55.

Another feature in the Royal Court are the "jurats"; these are Guernsey's professionally-elected standing jury who sit to determine matters of fact in civil and criminal trials. The jurats are elected by the States of Election and may be up to 16 in number. In civil trials, jurats will typically sit as a group of three (there must be a minimum of two jurats sitting) and are directed by the judge as to the matters of fact that they need to determine. A judge of the Royal Court now has the power to elect (usually upon agreement of the parties) to sit with or without jurats to determine matters of fact. Interlocutory applications, however, are regularly determined by a judge sitting alone.

The Guernsey Court of Appeal hears appeals from the Royal Court. Permission to appeal is required in some circumstances (for example in interlocutory matters). The Court of Appeal's decisions are binding on the Royal Court but, again, it cannot bind itself although its decisions are treated as being very persuasive. The Court of Appeal is scheduled to sit for a week every quarter, generally hearing both civil and criminal appeals during that week. There are no jurats in the Court of Appeal, rather it sits as a "three-man" bench and makes its decisions as a majority. Judges of the Court of Appeal comprise of the Bailiff (who is president of the Court of Appeal), the Bailiff of Jersey and a number of leading English Queen's Counsel who are recognised leaders in their field of law.

Appeals from the Court of Appeal are made to the Judicial Committee of the Privy Council in London. The Privy Council hears appeals not just from Guernsey but from Commonwealth jurisdictions around the world. Its judgments are, effectively, advice to the Crown and all judgments are delivered in the form of Orders in Council which bind the jurisdiction in question. Decisions of the Privy Council on appeals from the Court of Appeal are binding on the Court of Appeal and Royal Court, but decisions of the Privy Council on appeals from other jurisdictions are persuasive authority on the common law where relevant circumstances in Guernsey do not differ markedly from those in other jurisdictions. The Privy Council cannot bind itself, however. The judges presiding over the Privy Council are the same judges sitting in the United Kingdom Supreme Court (formerly the House of Lords) and are considered to be the most senior lawyers in the United Kingdom. There is, in effect, no appeal as of right to the Privy Council from the Court of Appeal and in nearly all cases leave to appeal from either the Court of Appeal or the Privy Council is required.

As Guernsey is not part of the European Union, unlike the United Kingdom (at the time of writing), a party to proceedings has no recourse to the European courts once all domestic court routes have been exhausted. The only two exceptions to this are:

(a) appeals to the European Court of Justice in Luxembourg, in relation to cases involving the free movement of goods and the European Customs Union, as those parts of the EU Treaties do apply to Guernsey (and the other Crown Dependencies) under Protocol 3 of the Treaty of Accession between the United Kingdom and the European Economic Community in 1973; and

(b) in relation to cases where a breach of human rights is alleged, in which case an appeal may be taken to the European Court of Human Rights in Strasbourg.

4.2.2 Efficiency of court system

Guernsey is generally well regarded as a jurisdiction in terms of the efficiency and sophistication of its courts system. The Island's role as an international financial centre dictates that a sufficient level of professional advice and institutional support be in place to sustain the finance industry.

In recent years, the Royal Court has demonstrated its ability to deal with complex insolvency issues with creativity and efficiency despite the lack of sophisticated insolvency legislation. A number of examples are set out below.

4.2.2.1 Pre-packaged sales

The term "pre-packaged sale" refers to an arrangement under which the sale of all or part of an insolvent company's business or assets is negotiated by the directors with a purchaser prior to the appointment of an administrator or liquidator. The insolvency practitioner then facilitates the sale immediately upon, or shortly after, appointment. "Pre-packs" are a controversial subject. It is imperative that the administrator or liquidator acts with objectivity and professionalism so as not to bring both themselves and the profession into disrepute. They must be able to demonstrate that they are acting in the interests of the creditors as a whole.

A series of Guernsey Insolvency Practice Statements (based closely on UK Statements of Insolvency Practice) (GIPS) were introduced in 2017. While GIPS have no force of law, they provide a framework for good practice in insolvency proceedings in a number of areas. One of those areas is pre-packaged sales of businesses (GIPS 5).

Historically, the Royal Court has only sanctioned one pre-pack in Guernsey in *Esquire Realty Holdings Limited*.[14] In doing so, it made it clear that it had been comforted by the parties' compliance with the UK SIP16 (as it was then). In his judgment, the Bailiff stated that any pre-pack in Guernsey should follow the SIP16 regime in the future. For this reason, GIPS 5 very closely follows SIP16.

The guidance makes it clear that a practitioner must clearly differentiate between any pre-appointment role in which they provide advice to the company and the functions and responsibilities of the administrator or liquidator following their formal appointment. The nature of these two distinct roles must be explained to the directors and creditors.

Very detailed guidance is given as to how an insolvency practitioner should conduct himself / herself, including the need to:

(a) Make it clear to directors / parties connected with the purchaser that it is not his role to advise them;

(b) Keep a detailed record of the reasoning behind the decision to undertake a pre-packaged sale;

[14] 17.04.2014 Royal Court (unreported).

(c) Keep a detailed record of the alternatives considered;

(d) Obtain valuations from independent valuers and / or advisors carrying adequate professional indemnity insurance; and

(e) Market the company appropriately. Very high level advice is given which interestingly includes the suggestion that online communication should be included by default and any decision not to engage in such marketing should be justified.

The GIPS assist both office-holders and creditors to better understand the insolvency process and should raise standards without unnecessarily increasing costs.

4.2.2.2 Pooling of assets

The consolidation of assets and liabilities of distinct entities within a group is rare and only likely to happen where such assets are so inextricably co-mingled that it would not be practicable to separate them. In an insolvency context, the amalgamation of group assets would offend the basic principle that a creditor can only enforce his debt against the assets of the liable entity. However, this is a problem with which the Guernsey courts have been faced in recent years, in the absence of codified rules to guide it.

In *In the matter of Huelin-Renouf Shipping Limited in liquidation*[15] the joint liquidators applied to the Royal Court seeking to consolidate the assets and liabilities of a Guernsey company with those of a related Jersey company, having concluded that this was "the most cost-effective, efficient and fair way to proceed".[16] The court granted the relief sought by the joint liquidators, noting that that "the affairs of both companies have been completely intertwined to the extent that the Guernsey company had to be wound up once the Jersey company was placed into liquidation."[17]

In treating the two companies as a single entity (which was also duly permitted by the Jersey court) the joint liquidators were able to distribute significant funds to creditors which would otherwise have been exhausted in the process of trying to unravel the transactions of the two companies.

4.2.3 Other insolvency institutions

There is no official receiver or other insolvency regulator in Guernsey. Equally, there is no system of licensing for insolvency practitioners. To date, there has been no need for either but as the level of sophistication in insolvency appointments increases, so has the need for expanded legislation and scrutiny upon appointment-takers.

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15 (2015) (Unreported, Royal Court, 4th September) (Guernsey Judgment No 46/2015).
16 Such pooling being contingent upon the Jersey Court also sanctioning the proposed consolidation.
17 (2015) (Unreported, Royal Court, 4th September) (Guernsey Judgment No 46/2015), para 5.

4.2.3.1 ARIES

The Association of Restructuring and Insolvency Experts (ARIES) is a member of INSOL International and was formed in the Channel Islands as a professional body for those practising, or interested in, restructuring and insolvency. It offers membership to, *inter alia*, solicitors and advocates, accountants and financial advisors, business turnaround consultants, trustees and others with an interest in the fields of insolvency and restructuring.

ARIES aims to "provide a forum for professionals to meet and discuss current technical, legal and regulatory issues facing the industry and provide opportunities for networking with business recovery and insolvency specialists in the Channel Islands. "ARIES also seeks to assist "with the development of sound practices, facilitating the exchange of knowledge amongst members and to liaise with those within the wider financial industry."

Self-Assessment Exercise 1

Question 1

Identify the various sources of Guernsey law, and provide a brief summary of each.

Question 2

Consider some of the cases in which the Royal Court of Guernsey has been guided by, or adopted legal principles of foreign jurisdictions. In your view, what are the reasons for this and does such an approach provide clarity or confusion as to how a case might be dealt with by the court?

Question 3

Write a short overview of some of the insolvency-related applications brought before the Royal Court of Guernsey in recent years where there has been no codified law or established common law to provide explicit guidance, yet the court has nevertheless dealt with the application. Consider whether the approach adopted was fair and reasonable in the circumstances.

For commentary and feedback on self-assessment exercise 1, please see APPENDIX A

5. SECURITY

Common forms of security can be distinguished between moveable and immovable property, each of which is discussed in greater detail below.

5.1 Immovable property

Immovable property is defined as property that cannot be moved from one place to another and which follows or is associated with the land. Parcels of land are by their nature immovable, as are all those things attached to the land such as:

(a) houses and other buildings including mills, presses and glasshouses; and

(b) trees, shrubs and other produce of the land until such time as they are separated from it.

Personal effects that have become permanently attached to immovable property also form part of that immovable property. Other property classified as immovable includes the usufruct of real estate, servitudes of the land, actions leading to a claim on immovable property, *rentes foncières* (that is, perpetual ground rents payable as a fixed annual sum and redeemable at the will of the debtor) and all things that are situated outside Guernsey and which are classified as immovable according to the law of the land in which they are situated.

Other than *rentes foncières*, security over real estate in Guernsey is taken as a *hypothèque* (that is, a legal right over the debtor's property in favour of the creditor), by either:

(a) *Rente hypothèque*, securing a fixed annual sum; or

(b) *Hypothèque conventionnel* (bond).

In practice, *rentes hypothèque* are almost unknown and the bond has become the dominant form of security over real estate. The bond is a personal obligation to create a charge over the corpus of the debtor's assets (but in practice focused on immovable property) by acknowledging the debt to the creditor and (if appropriate) including a covenant to repay the sum with interest. The bond can be either a:

(a) General charge: A general charge confers priority to the creditor over all other claimants to the immovable property belonging to the debtor at the time the bond is registered; or

(b) Specific charge: A specific charge confers priority to the creditor only over the immovable property specified in the bond.

Bonds are classified as movable property in Guernsey and do not confer any legal title in the immovable property owned by the debtor at the date the bond is registered. However, any successor in title of that immovable property is, by virtue of the bond's prior registration, on notice of the creditor's claim and becomes guarantor to the creditor of the bond. Therefore, the

successor will be made party to any enforcement proceedings to either make good the value of the claim or surrender the property to the enforcement proceedings.

However, any successor in title who was a *bona fide* purchaser for value at arm's length more than three years before commencement of proceedings, can limit his liability to the price paid by him for the property to the defaulting debtor. In addition, a successor in title to immovable property acquired by the debtor after the bond's registration date is not held to be on notice and is, therefore, not subject to the rule which would otherwise make him guarantor.

Bonds are subject to a prescription period under Guernsey law (similar to limitation in the UK) of six years from the date on which the claim falls due. For an on-demand bond, the six years runs from the date on which the demand is made. However, for a bond in which periodic payments are payable with effect from the time of the advance, each payment will interrupt the running of the prescription period.

A bond must be in writing and must be consented to by the debtor before the Royal Court of Guernsey sitting as a contract court (Contract Court) before being registered at the registry of the Royal Court (*Greffe*).

Documents (other than a testamentary disposition) consented to before the Contract Court do not need to be signed by the parties. However, this is frequently required by a creditor.

Following ratification by the Contract Court, the:

(a) bond is assessed for document duty of 0.5% of the secured amount, the fees of the Contract Court and registration fees;

(b) document duty and fees are paid; and

(c) bond is registered in the *Greffe*, and available for public inspection to anyone wishing to conduct a search against the debtor.

5.1.1 Effects of non-compliance

A bond which is not ratified by the Contracts Court is invalid. Non-registration of the bond at the *Greffe* will render the security ineffective.

5.2 Movable property

Security may be taken over moveable property in Guernsey, with such property being either tangible or intangible in nature.

5.2.1 Tangible movable assets

The most common forms of security over tangible movable property are:

(a) **Lien**. This is the right to retain another's property if an obligation is not discharged;

(b) **Pledge**. This is a bailment or deposit of personal property with a creditor to secure repayment for a debt or engagement;

(c) **A landlord's right to priority** for unpaid rent which is secured by movable property on the demised premises (*tacite hypotheque*);

(d) **Reservation of title** clause;

(e) **Mortgage** (for example, over a ship and aircraft).

5.2.2 Intangible movable assets

There are two common forms of security over intangible movable property. First, there is a security interest under the Security Interests (Guernsey) Law, 1993 (Security Interests Law). This can be created by a security agreement over any intangible movable property (other than a lease). The security interest can be created by the secured party being in possession of, under a security agreement:

(a) certificates of title (such as securities); or

(b) policy documents (such as a life insurance policy).

If title to collateral is assigned, express notice in writing of the assignment must be given to the assignees.

To be valid, a security agreement must:

(a) be in writing;

(b) be dated;

(c) identify and be signed by the debtor;

(d) identify the secured party;

(e) contain provisions regarding the collateral sufficient to enable its precise identification at any time;

(f) specify the events which constitute default; and

(g) contain provisions regarding the obligation, payment or performance to be secured, sufficient to enable it to be identified.

Failure to comply with any of these requirements does not necessarily render the security agreement void, but takes it outside of the scope of the Security Interests Law.

Second, a security under the Law of Property (Miscellaneous Provisions) (Guernsey) Law, 1979 (Property Law). This is a set-off agreement and an assignment with a proviso for reassignment. It relates to agreements under which, in respect of mutual dealing between them, any debt from one party is to be set off against any debt from the other. In this case, unless the parties have expressly or by implication agreed differently, the only action which can be taken in relation to what would otherwise be those mutual debts, is in respect of the balance due after the set-off.

The legal right to a debt or other chose in action can be assigned to a third party. For an assignment to be effective:

(a) the assignor must execute it in writing; and

(b) express notice in writing of the assignment must be served on the debtor, trustee or other person from whom the assignor would have been able to claim the debt or chose in action.

Failure to comply with any of these requirements does not necessarily render the assignment void.

5.3 The *pari passu* principle

The *pari passu* principle of distribution generally applies on a company's insolvency. Therefore, subject to any preferential payments, all creditors participate in the common pool of assets in proportion to the size of their admitted claims.

The *pari passu* principle only applies:

(a) to provable debts payable to the general body of creditors;

(b) within each separate class of preferential, ordinary and postponed creditors (see below, *Order of priority on a liquidation*).

The principle does not affect the rights of:

(a) secured creditors;

(b) suppliers of goods under agreements reserving title; or

(c) creditors for whom the company holds assets on trust (as these assets do not belong to the company).

5.4 Order of priority on a liquidation

Subject to the payment of secured creditors, a liquidator must apply the company's assets in the following order of priority:

(a) **Expenses of the winding-up** - This includes the liquidator's fees, costs, charges and other expenses reasonably incurred in the winding-up proceedings.

(b) **Preferential debts** - This includes rent due to landlords, salaries, unpaid income tax and unpaid social security contributions. Rent due to a landlord has priority among preferential debts. Other classes of preferential debt rank equally among themselves, unless the company's assets are insufficient to meet them, in which case they are paid *pari passu*. A preferential creditor has no priority to a secured creditor.

(c) **Ordinary debts** - These include trade creditors.

(d) **Postponed debts** - Two categories of creditor are postponed until the claims of all other creditors for valuable consideration in money or money's worth are satisfied (Partnership (Guernsey) Law 1995 *(*Partnership Law*)*):

- a creditor who lends money to a sole trader or firm on the terms that the rate of interest payable on the loan varies with the profits of the business; and
- sellers of the goodwill of a business in consideration of a share of the profits.

(e) **Surplus** - Any surplus is distributed among the contributories according to their rights and interests in the company under the articles of association (including any holders of fully paid shares). Every shareholder who is liable to contribute to the assets of the company in the event of it being wound up is a contributory.

Secured creditors' assets do not form part of the body of assets available for distribution to creditors on liquidation.

5.5 Order of priority in an administration

The administration regime does not involve distributing a company's property. It is instead designed as a mechanism to collect in and realise the company's property under the protection of the administrator. However, it may be possible for an administrator to persuade the court to allow distributions. In this case, the order of priorities is likely to be the same as in a liquidation.

5.6 Secured creditors

With regard to immovable property, secured creditors are entitled to be repaid from the realisation of the property to which their security relates. Claims are prioritised so that the earliest charge *registered* (in time) will prevail subject to any agreement as to subordination.

Claims by unsecured creditors are ranked in order of priority at the time when their claim is registered in the enforcement proceedings but after all secured creditors have been paid.

Secured creditors who have a security interest granted under the Security Interests Law are entitled to the proceeds of sale of the collateral. The secured creditor must apply the proceeds of sale in the following order:

(a) costs and expenses of the sale;

(b) discharge of any prior security interest;

(c) discharge of all monies properly due in respect of the obligation secured by the security agreement;

(d) payment, in order of priority, of secured parties whose security interests were created after his own and on whose behalf he was holding possession of documents or exercising control of collateral;

(e) payment of the balance to debtor or, where he is insolvent, to the Sheriff or other proper person.

5.7 Register of securities

As set out above, all bonds in respect of real property must be registered in the *Greffe*, and available for public inspection. There is no register of charges in respect of Guernsey companies and as such, save for those in relation to bonds, there are no local law requirements in respect of perfecting security by registration.

Self-Assessment Exercise 2

You are asked to supply materials to ABC Limited, a relatively new company with a short trading history. You are cautious, and wish to ensure that you are paid in full for the goods that you supply, but you acknowledge that the full purchase price cannot realistically be paid up front. How can you protect yourself should ABC limited become unable to pay its debts?

For commentary and feedback on self-assessment exercise 2, please see APPENDIX A

6. INSOLVENCY SYSTEM

6.1 General

As set out above, the majority of Guernsey's corporate insolvency law is set out in the Companies Law. However, the insolvency law specific to certain corporate entities is instead contained in

the legislation applicable to them. For example, the insolvency law provisions in relation to limited partnerships are contained in the Limited Partnerships (Guernsey) Law 1995. Likewise, provisions relating to the winding-up of trusts and foundations can be found in the individual law relating to each.

Guernsey's corporate insolvency regime is designed to be creditor-friendly due to the nature of the Island's finance industry. For example, there is no moratorium against the claims of secured creditors afforded by the administration regime in Guernsey.

Insolvency office holders in Guernsey are, unless appointment voluntarily by shareholders, officers of the court. Liquidators and administrators are required to swear an oath of office on appointment. As such, the supervisory role of the Royal Court is significant in Guernsey insolvency law.

As set out above, as the level of complexity in insolvency matters arising in the jurisdiction has increased, so has the need of the court to adapt and find solutions. In many cases, the court has played a vital role in adopting appropriate precedent from other jurisdictions and blending it with the flexibility of the Guernsey statute to create practical solutions. The Royal Court has demonstrated itself to be capable and reliable in insolvency matters.

Guernsey's personal insolvency law is less defined by statute and finds its origins in customary law. Whilst a form of bankruptcy is available, it is infrequently used and the quasi-enforcement mechanisms of *saisie* and *désastre* are more common. The personal insolvency system is in need of modernisation and reform to make rehabilitation of debtors more straightforward.

6.2 Personal / consumer bankruptcy

6.2.1 Saisie

A *Saisie* is the procedure used for the distribution of realty (only) of an insolvent person between 2 or more creditors. Where the creditor commences / joins *saisie*, the creditor has a right for these funds to be paid as transfers from debtor to realty. Regardless of whether the debt is satisfied, the creditor has no further rights against the debtor and, in particular, no right against the debtor's personalty. It is therefore advisable for the creditor to: (i) to exhaust debtor's personalty before considering *saisie*; and (ii) register a claim in *Livre des Hypotheques* in the interim.

6.2.1.1 Procedure

The procedure for a *Saisie* has most recently been revised by the *Saisie* Procedure (Simplification) (Bailiwick) Order 1952 (the *Saisie* Order), however the substantive law remains rooted in customary law as confirmed in *Selwood v Madely*.[18] *Saisie* proceedings are designed to be deliberately long (around six months) in order to allow the debtor maximum opportunity to pay off debts and consequently keep their property. The procedure is split into three stages:

[18] [2001] RC.

Preliminary Vesting Order;

(a) Interim Vesting Order; and

(b) Final Vesting Order.

6.2.1.2 Preliminary Vesting Order (PVO)

If a judgment has been granted in favour of the creditor, leave is automatically granted to execute against the debtor's personalty. An application for a PVO amounts to leave to purse debtor's realty. A creditor can also apply for registration in *Livre des Hypotheques*, either in addition to or instead of the PVO.

A PVO can be sought upon granting of judgment, which occurs without notice, or subsequent to the judgment by summonsing the debtor. It is important to note that there are strict service requirements at paragraph 7 of the Order. A PVO will be granted unless there is compelling reason to the contrary, for example where the debtor can prove that there is realistic payment prospects or has a valid appeal.

The effect of a PVO is that the debtor retains ownership of realty; however the creditor acquires the right to use, let, possess, and receive payment of rent of the realty. Should they choose to do so, the creditor may also evict the debtor and / or their family. It is common for the eviction proceedings to be commenced at the same time as obtaining the PVO, which is primarily because court has power under the Stay of Evictions (Amendment) Law, 1954 to postpone eviction by up to six months, and creditors are eager to avoid delays where possible. During the process of the PVO, the debtor is still able to sell the realty, but can only do so with the consent of the PVO holder and the secured creditors.

6.2.1.3 Interim Vesting Order (IVO)

The IVO extinguishes the debtor's right and title in the realty. In the process of an IVO, the debtor will be summonsed before the Jurat Commissioner to ascertain whether there is a dispute of the amount claimed.

During the hearing, the creditor will produce a statement of account to include the amount due less sums received (for example, rent) to reduce the debt. The Commissioner will then make a finding in the event that the debtor disputes the statement. A report declaring the amount payable to the creditor will then be signed by the Commissioner.

The debtor will then be summonsed before the Royal Court once again, known as *Plaids d'Heritage*. The purpose of this is for the debtor to pay the amount due in the report. If the debtor does not pay, for example because they have found a buyer for the realty, then an IVO is granted at the hearing. The IVO has the effect of vesting the realty in the creditor as trustee for all claimants against the realty. Moving forward, the creditor then has to insure, let or maintain the realty for the benefit of the other creditors. The debtor no longer has any interest in the property following the issuance of an IVO.

The creditor then has the responsibility of opening a register of claims. The creditor is required to publish twice in the *Gazette Officielle*, with the second publication marking the start of a 28-day period for which the publications must remain open. Every creditor who registers a claim will then be summoned by the creditor in order for the creditor to marshal all received claims. A creditor may also apply for a Final Vesting Order if the creditor unconditionally undertakes to discharge all registered creditor's claims. A creditor who chooses to obtain an FVO at this stage cannot challenge the amount of a registered claim, as set out in *Moulin Huet Holdings v Moulin Huet Hotels*.[19]

A draft marshalling report is to be prepared by the creditor, in which the amount and priority of all claims is set out. All creditors will then appear before the Commissioner in order to authenticate each claim, and a fixed date for termination of the proceedings before the Royal Court is selected. It should be kept in mind that liability of guarantors is treated as secondary under Guernsey law. The creditor must exhaust all options against the principal debtor, otherwise a claim under guarantee will be premature and therefore not accepted.

6.2.1.4 Final Vesting Order (FVO)

If they choose to do so, the creditor can summons each registered claimant to appear before the *Plaids d'Heritage* and the creditor will then appear with each registered creditor, starting with the lowest priority. Each registered creditor is asked to elect if they wish for the realty to vest in them on the condition that they pay in full all higher ranking claimants, or if they wish to renounce their claim to the realty. If the registered creditor renounces his claim, he loses the right to pursue a claim in any form at all. There will come a point where the realty is enough to pay creditor's debts and those above him.

The creditor who chooses to accept realty is granted the FVO. He must then pay all higher ranking creditors within 15 days or such other time limit as ordered. If the FVO creditor defaults, higher ranking creditors can claim against that creditor or seek rescission of FVO in favour of next ranking creditor who will accept the realty.[20] An FVO acts as a conveyance of realty and is automatically registered with *Greffe*. In the case of *Pirito v Curth*[21] the court rejected the plaintiff's arguments that there would substantial injustice by allowing the FVO creditor to retain the whole proceeds of sale even where this would give a substantial windfall to the FVO creditor. The protection available to the debtor was to postpone the IVO in order to sell the property and discharge the debt. Although not legally obliged to do so, banks will often pay surplus sale proceeds back to the debtor as a goodwill gesture.

[19] [1995] RC.
[20] *C & D Holdings v Brewbuck* [1982] RC.
[21] [2004] RC (on appeal from COAld).

6.2.2 Enforcement

6.2.2.1 Arrets

Arret conservatoire

An *arret conservatoire* applies to the seizure of a tangible asset of personalty, for example funds in a bank account. The Guernsey Court of Appeal case of *Culture Farms Inc v Achates Trust*[22] confirmed that:

> "there is no doubt about the power of the Royal Court to freeze and, if necessary, seize the assets of a debtor so as to preserve them for the creditor…"

The Court of Appeal also noted that:

> "the absence of assets within the jurisdiction is no bar to the exercise of the power to grant a Mareva injunction…[however] the quintessential feature of an arrest order is the seizure of a tangible asset…no funds in the bank account, nothing there to seize. The arrest order is, in its historical tradition, a means to assist creditors to have available their prospective judgment. It is not a device…to achieve assistance by way of injunctive relief…"

The *arret conservatoire* has to an extent been eclipsed by the adoption of the Guernsey equivalent of the English Mareva and Anton Pillar orders, but can still be used where the creditor wishes to arrest a particular tangible thing, for example, a yacht or car. The key difference is that an arrest works *in rem* (against the thing) whereas the injunctive relief works *in personam* (against or affecting a specific person). Thus it is not necessary for the court to have jurisdiction over the person against whom proceedings are being raised for the court to be able to grant an *arret conservatoire*.

An *arret conservatoire* will be made *ex parte* (similar to an injunction) and will normally be granted where the:

(a) claimant has a cause of action against the defendant who is to defend substantive proceedings;

(b) defendant has property in Guernsey capable of being arrested; and

(c) court has good grounds to believe property will otherwise be removed from Guernsey.

If the IVO is granted, the Sheriff will arrest the debtor's personalty up to the required value, and will subsequently obtain an undertaking from the debtor to not dispose of the arrested goods, pending the outcome of substantive proceedings. The applicant will then require the debtor to

[22] *Achates Trust Limited v Culture Farms Inc and Activator Supply Company Inc* (1989) 7.GLJ.60.

confirm *arret conservatoire* and apply for leave for a sale / realisation of the assets. The debtor is then able to contest the application.

An *arret conservatoire* covers goods on debtor tenant's premises, including those not owned by tenant (for example, hire purchase goods) under the doctrine of *tacit hypothecation* (subject to the true owner proving ownership of the goods).

Arret execution

A judgment of this kind automatically grants the creditor authority to proceed against personalty of debtor. Following judgment, the creditor will deliver a copy of the judgment to HM Sheriff, who will then arrest goods from the debtor to the value ordered under the judgment. In instances where two debtors are jointly and severally liable to pay a debt, any proceedings and *arret* may be taken against any one of the debtors only.[23]

Arret de gages

An *arret de gages* is an arrest of wages and is equivalent of Attachment of Earnings Order. Consequently, an *arret de gages* is only available against those in employment. The order will state rate of deduction to be applied by the employer to the wages of the debtor, but is limited to half of their gross annual earnings.

Arret de personnes

An *arret de personnes* concerns the imprisonment of persons for default in payment of penalty, by trustee / fiduciary of sum ordered by a court, in payment to creditors from the debtor's wages, or where otherwise liable to imprisonment. There must be a maximum six weeks or, if earlier, until payment made, where the court is satisfied that the debtor has the means to pay but has neglected to do so. An *arret de personnes* is not applicable where the debtor does not have the means to pay the debt.

The court may order arrest of the debtor if the court has been given reason to believe that he is intending to leave the island. This may, however, be difficult to achieve in practice and it is not clear if this method is ECHR compliant. It is important to note that imprisonment as a result of an *arret de personnes* does not clear the debtor of the debt in question.

6.2.3 Preferences

The *Loi ayant rapport aux débiteurs et à la renunciation* 1929 (Law relating to debtors and renunciation) contains provisions nullifying preferences given within three months of an application for a declaration of insolvency. Any transaction during the relevant period with a view to giving a creditor preference over others shall be deemed void, save where the creditor received no notice of the declaration of insolvency application.

[23] As provided in *Castle Finance v Fallaize & Fallaize* [1975].

6.2.4 *Désastre*

Unlike bankruptcy, *désastre* does not discharge a debtor from liabilities. The *désastre* procedure can be instituted whenever HM Sheriff has insufficient proceeds to satisfy the debt and also knew of other unsatisfied claims / judgments.[24] In *désastre* proceedings, the court will order the arresting creditor, debtor and other creditors to appear before the Jurat Commissioner to establish claims and preferences. Following this, the debtor will be declared *en désastre* and a subsequent notice will be published in the *Gazette Officielle*.

Costs of *désastre* are prioritised before preferred debts. After the costs of *désastre* proceedings, secured creditors and rent due, four categories of preferred debt rank equally:[25]

(a) wages;

(b) holiday pay;

(c) unpaid income tax; and

(d) unpaid social security contributions.

Désastre is a quick / cost-effective method of enforcing judgments, but is not an insolvency process.

6.2.5 *Licitation*

Licitation is a method used by creditors to enforce a judgment against realty in *saisie* proceedings, where realty is jointly owned. In situations where property is held in undivided half shares, the creditor can become co-owner of half of the share and thereafter apply to have property sold or find another other co-owner to buy out the creditor.

Self-Assessment Exercise 3

Consider the *saisie* process and explain the potential disadvantages to creditors of this type of enforcement procedure?

For commentary and feedback on self-assessment exercise 3, please see APPENDIX A

[24] *Re Pagliarone* [1983] RC.
[25] The Preferred Debts (Guernsey) Law 1983.

6.3 Corporate insolvency

6.3.1 Compulsory liquidation

6.3.1.1 Objective

Under sections 406 to 418 of part XXIII of the Companies Law, a company may be wound up by the court and a liquidator appointed. The liquidator's role is to collect and realise the company's assets and to distribute dividends according to a statutory order of priority.

6.3.1.2 Initiation and process

The process is commenced by way of an application to the court seeking an order that the company be wound up. A supporting affidavit must set out all of the reasons why the company should be put into liquidation (and, for instance, why administration is not a feasible alternative in the circumstances).

The company, any director, member or creditor, or any other interested party can make the application. In certain limited circumstances, the Guernsey Financial Services Commission (GFSC), or the States of Guernsey Commerce and Employment Department, can make an application.

There is no explicit obligation to initiate proceedings, although directors' fiduciary duties may require them to consider doing so where the company has no prospect of avoiding an insolvent liquidation (as noted above, a failure to do so could result in a finding of wrongful trading or, at worst, fraudulent trading).

An application for an order for the compulsory winding-up of the following companies will not be heard unless a copy of the application is served on the GFSC at least seven days before the application hearing:

(a) a supervised company or a company engaged in a financial services business; and

(b) a company of any other class or description prescribed by the GFSC.

A liquidator must also send a copy of the compulsory winding-up order to the Registrar of Companies within seven days after being appointed. The Registrar of Companies publicises the fact that the company has been placed into liquidation. It is also good practice for the liquidator to contact all known creditors (though not a requirement).

If a company has been placed into compulsory liquidation and the liquidator has realised the company's assets, the liquidator must apply for the appointment of a court commissioner to examine his accounts and distribute the funds derived from the company's assets. The commissioner must both:

(a) arrange a creditors' meeting to examine and verify the financial statements and the creditors' claims and preferences; and

(b) fix a date for distribution of the company's assets.

6.3.1.3 Substantive tests

The court can wind up a company if the:

(a) company has, by special resolution, resolved to be wound up;

(b) company does not commence business within one year beginning on the date of its incorporation;

(c) company suspends business for a year;

(d) company has no members;

(e) company is unable to pay its debts as they fall due;

(f) company has failed to comply with a direction of the Registrar of Companies to change its name;

(g) company has failed to hold a general meeting of its members under specified provisions of the Companies Law;

(h) company has failed to send its members a copy of its accounts or reports under specified provisions of the Companies Law; or

(i) court is of the opinion that it is just and equitable that the company should be wound up.

A company is deemed unable to pay its debts if either:

(a) a statutory demand for payment of a due debt of more than GGP 750 has been served on the company and the debt remains outstanding for 21 days after the demand has been made; or

(b) the court is otherwise satisfied that the company fails to satisfy the solvency test (see paragraph 6.5.1.2 below).

6.3.1.4 Supervision and control

The court and liquidator supervise the procedure. On hearing a compulsory winding-up application, the court may grant the application (on such terms and conditions as it considers appropriate), dismiss the application, or make such other orders as it thinks fit.

On the making of a compulsory winding-up order, the court will appoint a liquidator nominated by the applicant or, where no person has been nominated, make such appointment as it thinks appropriate. The liquidator can:

(a) bring or defend civil actions on behalf of the company;

(b) carry on the business of the company to the extent beneficial for winding-up the company;

(c) make capital calls (that is, demand money promised by an investor);

(d) sign all receipts and other documents on behalf of the company;

(e) do any other act relating to the winding-up; and

(f) do any court-authorised act.

A liquidator of a company can seek the court's directions in relation to any matter regarding the winding-up.

6.3.1.5 Protection from creditors

There is no statutory moratorium on creditors' claims on the making of a compulsory winding-up order. However, a creditor can apply to the court on the making of an application (that is, before the winding-up order is made) for an order restraining an action or proceeding pending against the company.

6.3.1.6 Length of procedure

The Companies Law contains no provision as to the length of liquidation. In practice, the court does not impose time frames.

6.3.1.7 Conclusion

The key points regarding compulsory liquidations are as follows:

(a) On the appointment of a liquidator, **all powers of the company's directors cease**, except to the extent the court or the liquidator agree to their continuance. Any person who subsequently purports to exercise powers of a director is guilty of an offence.

(b) On the making of a compulsory winding-up order **the company must cease to carry on business** except so far as is necessary for the beneficial winding-up of the company. The company's corporate state and powers continue until its dissolution.

(c) **Any transfer of a company's shares made after the commencement of a winding-up is void**, unless it is a transfer made to or with the approval of the liquidator.

(d) **A liquidation has no statutory effect on contracts of employment**. However, a liquidator is likely to terminate employment contracts as part of the winding-up and commencement of the winding-up may have the effect of automatically terminating contracts.

(e) **A company is dissolved at the end of a liquidation**. Within 15 days from the day of final distribution of the company's assets, the liquidator must apply to the court for an order declaring that the company is dissolved.

(f) On dissolution, **the company cannot undertake any business or contract debts or obligations**. Any member of a company who causes the company to do so is personally liable in respect of any debt or obligation undertaken. A company that has been dissolved following liquidation cannot be restored.

6.3.2 Voluntary liquidation

6.3.2.1 Objective

Under sections 391 to 405 of Part XXII of the Companies Law, the members of a solvent or insolvent company can decide that it should be wound up and appoint a liquidator. The liquidator's role is to collect and realise the company's assets and to distribute dividends according to a statutory order of priority. Unlike a compulsory liquidation, a voluntary liquidation is an out-of-court process.

6.3.2.2 Initiation

A company can be voluntarily wound up if either:

(a) the period (if any) fixed by the memorandum or articles for the duration of the company expires; or

(b) an event (if any) occurs on which the memorandum or articles provide that the company should be dissolved.

A company must pass an ordinary or special resolution that it be wound up voluntarily, with the winding-up commencing on the passing of the resolution. Crucially, the Insolvency Reforms now also require the board of directors to consider solvency at the time of commencement of the winding-up. Section 391A of the Ordinance allows a board, within five weeks of the commencement of a voluntary winding-up, to give a solvency statement in the prescribed form. If it does so, the procedure remains as it was previously with any legal person capable of appointment as liquidator and with little creditor engagement in the process. A copy of any declaration made must be filed with the Registrar of Companies within a period of 30 days after it is made. If a liquidator is appointed on the basis that a solvency declaration is made but it subsequently becomes apparent that the company is not solvent, then the liquidator must convene a meeting of creditors of the company pursuant to section 398A of the Ordinance at which he must seek sanction to continue in force, or at which an alternate liquidator may be appointed by the creditors or seek sanction of the court to continue.

If, however, the board cannot or does not give the declaration from the outset, then the company must appoint an independent liquidator and that liquidator must now call at least one meeting of creditors within 28 days of his appointment, unless it is apparent that there are no assets available in the liquation for distribution to creditors.

In either a solvent or insolvent voluntary winding-up, the company will by ordinary resolution appoint a liquidator and fix his remuneration. If no liquidator is appointed the court can, on the application of any member or creditor, appoint a liquidator. The company should deliver a copy of the resolution that the company be voluntarily wound up to the Registrar of Companies within 30 days of the resolution. The registrar then gives notice of the fact that the company has passed a special or ordinary resolution for the voluntary winding-up.

6.3.2.3 Supervision and control

The liquidator realises the company's assets and discharges the company's liabilities. Having done so, he distributes any surplus among the members according to their respective entitlements. A voluntary liquidator is not controlled by the court.

A company being voluntarily wound up can, by special resolution, delegate to its creditors the power to:

(a) appoint a liquidator; and

(b) enter into any arrangement regarding the powers to be exercised by the liquidator and the manner in which they are to be exercised. A creditor or shareholder of a company which has entered into such an arrangement can, within 21 days from completion of the arrangement, apply to the court for an order that the arrangement be set aside. The court can set aside, amend, vary or confirm the arrangement.

A member of a company can also apply to the court for directions concerning any aspect of the winding-up. If a resolution for a voluntary winding-up has already been passed, the court can still make an order that the company be compulsorily wound up. This application is unusual but might be made by a creditor who wishes the process to be supervised by the court.

6.3.2.4 Protection from creditors

There is no statutory moratorium on creditors' claims on the making of a voluntary winding-up order or on the passing of a resolution to voluntarily wind up. Unsecured creditors can prove in a liquidation, although they are only paid once all claims have been proved and the final dividend declared. Secured creditors can also enforce their security.

6.3.2.5 Length of procedure

The Companies Law contains no provision as to the length of liquidation. However, after one year from the date of a voluntary winding-up, and in each further year, the liquidator must summon a general meeting if the winding-up is not complete. At the meeting, the liquidator

should set out an account of his acts and dealings, and of the conduct of the winding-up during the preceding year.

6.3.2.6 Conclusion

From the commencement of a voluntary winding-up the company ceases to carry on business unless beneficial for winding-up the company. The company's corporate state and powers continue until dissolution.

On the appointment of a liquidator, all powers of the directors cease, except to the extent that the company (by ordinary resolution) or the liquidator approves their continuance. Any person who subsequently purports to exercise any powers of a director is guilty of an offence. The rules in relation to contracts are the same as in a compulsory liquidation.

As soon as the company's affairs are fully wound up, the liquidator should both:

(a) prepare an account of the winding-up, giving details of the liquidation and the disposal of the company's property, among other things; and

(b) call a general meeting to present and explain the account.

After the meeting, the liquidator must give notice to the Registrar of Companies of the holding of the meeting and its date. The Registrar of Companies publishes the notice along with a statement that the company will be dissolved. The company is dissolved three months after the notice is delivered.

On dissolution, the company cannot undertake any business or contract debts or obligations. Any member of a company who causes the company to do so is personally liable in respect of any debt or obligation undertaken. A company that has been dissolved following liquidation cannot be restored.

Self-Assessment Exercise 4

Question 1

Who can make an application for a compulsory winding-up and in what circumstances can the court grant the order?

Question 2

Outline the procedure for making an application for a compulsory winding-up.

Question 3

What are the consequences of not making an application for a compulsory winding-up?

Question 4

You are the appointed liquidator of XYZ Co. Limited, which has just entered into compulsory liquidation. You determine that the company has realisable assets of GGP 100,000, with the following debts:

- Liquidator's fees: GGP 25,000
- Lawyers and accountants' fees: GGP 20,000
- Unpaid employee wages: GGP 25,000
- Trade creditors: GGP 40,000
- Unpaid rent: GGP 10,000

Explain how the respective creditors rank and how much each category of creditors will receive from the available funds.

For commentary and feedback on self-assessment exercise 4, please see APPENDIX A

6.4 Receivership

There is no system of receivership in Guernsey, save in respect of Protected Cell Companies (PCCs). However, this is beyond the scope of this Course.

6.5 Corporate rescue

6.5.1 Administration

Administration is the primary form of corporate rescue procedure in Guernsey. While other rescue procedures are available as in other offshore jurisdictions (such as schemes of arrangement), the administration process is the most utilised process in Guernsey where the intention is to save the company as a going concern.

An administration order can be made by the court under sections 374 to 390 of Part XXI of the Companies Law or the purpose of achieving either:

(a) the survival of the company and the whole or any part of its undertaking as a going concern; or

(b) a more advantageous realisation of the company's assets than would be effected on a winding-up.

An administration order must specify the purpose for which it is made.

6.5.1.1 Initiation

An application must be made to the court, supported by an affidavit seeking an order that the company be placed into administration and setting out the reasons why it should be placed into administration. The application can be made by all or any of the following parties, together or separately:

(a) the company;

(b) the company's directors;

(c) any member of the company;

(d) any creditor of the company, including any contingent or prospective creditor;

(e) The GFSC, in respect of supervised companies and companies engaged in financial services businesses;

(f) a liquidator, in the case of a company in respect of which the court has made an order for winding-up or which has passed a resolution for voluntary winding-up;

(g) an incorporated cell company; or

(h) a protected cell company.

Notice of an application for an administration order should, unless the court orders otherwise, be served on:

(a) the company;

(b) the GFSC, in respect of supervised companies and companies engaged in financial services businesses;

(c) each incorporated cell, in the case of an incorporated cell company; and

(d) any persons as the court may direct, including any creditor.

Notice of an application for an administration order should also be delivered to the Registrar of Companies at least two clear days before making the application, or as soon as reasonably practicable before the application. If short notice is given, the court asks for an explanation of the urgency of the matter. The Registrar of Companies then gives notice of the application in such manner and for such period as he thinks fit.

If an administration order is made, the administrator should:

(a) immediately send notice of the order to the company;

(b) immediately send a copy of the order to the Registrar;

(c) within 28 days after the making of the order, send notice of the order to:

(i) all the company's creditors;

(ii) the company's incorporated cells, if the order is in respect of a protected cell company;

(iii) the company's incorporated cell company, if the notice is in respect of an incorporated cell;

(iv) the GFSC, in the case of a supervised company or a company engaged in financial services business; and

(d) send a copy of the order to such other persons as the court may direct within such time as the court may direct.

Every invoice, letter and other document issued by a company in administration must state that the company is in administration and the name of the administrator. The Registrar of Companies will also publicise the fact that a company has been placed into administration.

6.5.1.2 Substantive tests

The court can grant an administration order if it both:

(a) is satisfied that the company does **not satisfy, or is likely to become unable to satisfy, the solvency test** (see below);

(b) Considers that the making of an order may achieve either:

(i) the **survival of the company** as a going concern;

(ii) a **more advantageous realisation of the company's assets** than would be effected on a winding-up.

A company satisfies the statutory solvency test if the:

(a) company is able to pay its debts as they become due. A company is deemed unable to pay its debts if either:

(i) His Majesty's Sergeant has served on the company a written demand for payment of a due debt of more than GGP 750 and the debt remains outstanding for 21 days after the demand has been made; or

(ii) the court is satisfied that the company is otherwise unable to pay its debts;

(b) value of its assets is greater than the value of its liabilities. In determining whether this is the case, the directors can rely on valuations of assets or estimates of liabilities that are reasonable in the circumstances, and must have regard to both:

(i) the company's most recent accounts; and

(ii) all other circumstances that the directors know, or ought to know, affect the value of the company's assets and liabilities.

6.5.1.3 Consent and approvals

An administration order can only be made by the court.

6.5.1.4 Supervision and control

The administrator takes into his custody or control all of the property to which the company is, or appears to be, entitled. The administrator manages the company's affairs, business and property in accordance with any court directions.

The administrator can do all things necessary or beneficial for the management of the company's affairs, business and property. The administrator can apply to the court for directions in relation to:

(a) the extent or performance of any function; and

(b) any matter arising in the course of his administration.

The administrator is deemed to act as the company's agent in performing his functions.

6.5.1.5 Protection from creditors

During the period between the presentation of an application for an administration order and the making of such an order, or the dismissal of the application (and during the period for which an administration order is in force):

(a) no resolution can be passed or order made for the company's winding-up; and

(b) no proceedings can be commenced or continued against the company except with the court's leave (or, if an administration order is in force, with the administrator's leave). Rights

of set-off and secured interests, including security interests and rights of enforcement, are unaffected.

On the making of an administration order, any extant application for the company's winding-up is dismissed.

Previously, there was no formal requirement for an administrator to engage with creditors beyond sending notice to them of the administrator's appointment (assuming they had not been involved in the application process itself), albeit in practice engagement was much higher in certain circumstances.

Pursuant to the Insolvency Reforms administrators are now required to provide an explanatory statement to creditors of the aims and process for the appointment and hold an initial meeting of creditors. It is anticipated that these meetings will act as a forum for further explanation of the statement and may also provide an opportunity for creditors to ask questions and possibly consider the formation of an informal committee, or the agreement of some *ad hoc* reporting protocol with the office holders. The meeting may only be dispensed with where there are no assets available for distribution to creditors.

6.5.1.6 Length of procedure

The Companies Law does not state how long an administration order can remain in force. The court can therefore make an administration order on any terms as it thinks fit, though courts rarely impose time frames on administration orders.

6.5.1.7 Effect on employees

An administration has no statutory effect on contracts of employment. Further, the commencement of an administration does not automatically terminate contracts and the company will continue to incur tax liability as it would have had it not been placed into administration.

6.5.1.8 Discharge

The administrator can apply to the court for the administration order to be discharged and should apply for the administration order to be discharged if it appears that either:

(a) the purposes specified in the order have been achieved or are incapable of being achieved; or

(b) it would be desirable or beneficial to discharge or vary the order.

The court can grant or dismiss the application, adjourn the hearing conditionally or unconditionally, or make an interim or any other order it thinks fit. The court can further discharge an administration order on application by a creditor or member, or the GFSC, in any of the following circumstances:

(a) the company's affairs, business and property are being or have been managed by the administrator in a way which is unfairly prejudicial to the interests of its creditors or members generally;

(b) any actual or proposed act or omission of the administrator is, or would be, prejudicial; or

(c) it would otherwise be desirable or beneficial for an order to be made.

Within seven days of a court order discharging an administration order, the administrator must send a copy of the order to the Registrar of Companies. On the discharge of an administration order, the company may be released from any procedure or placed into liquidation.

The Insolvency Reforms introduced the ability for companies to be dissolved at the end of administration directly rather than through a liquidation. Administrators may also make distributions to unsecured creditors out of administration without the need for a subsequent liquidation. It is anticipated that this will improve efficiency and save costs in certain circumstances to the benefit of creditors.

6.5.2 Schemes

6.5.2.1 What is a scheme?

A scheme of arrangement (a Scheme) is a court-sanctioned arrangement between a company and its members or creditors (or any class of them) pursuant to sections 105 to 112 of the Companies Law. A Scheme could be used for reorganisation or restructuring, provided that the relevant parties are in agreement and the court is sufficiently satisfied that it is appropriate in the circumstances.

In an insolvency context, a Scheme can provide a useful mechanism for formulating an arrangement between a class of creditors and may be used in conjunction with an administration to obtain a moratorium on proceedings against the company.

6.5.2.2 What is the process?

The process for obtaining sanction of the court for a Scheme is broadly the same as that in the UK. The steps to be taken are as follows:

Application

The company files an application with the court to convene a meeting of the members of the company (or a class of members) for the purpose of considering and voting on the proposed Scheme.

Notice

Notice of the meeting must be sent to each creditor or member and must be accompanied by a statement explaining the effect of the Scheme and any material interests of the directors of the company. Every notice summoning the meeting that is given by advertisement must either include such a statement or state where and how creditors or members entitled to attend the meeting may obtain copies of such a statement.

Meeting

At the court-convened meeting of creditors / members, a majority in number representing not less than 75% in value of the members (or class thereof) present and voting (in person or by proxy) must approve the Scheme before it can be sanctioned by the court.

Court sanction

A further application is then made to the court seeking sanction of the agreed Scheme. In exercising its discretion, the court may consider whether:

(a) the interests of different creditors or members are such that they should be treated as belonging to a different class thereof;

(b) each creditor / member (or class thereof) was properly represented by those attending the convened meeting, and whether the majority is acting in good faith in the interests of the creditor / member (or class thereof) and not oppressively towards the minority; and

(c) the Scheme is such that an intelligent and honest man might approve.

Once sanctioned by the court, the Scheme becomes binding on all creditors / members (including secured and preferential creditors).

6.5.2.3 What are the advantages of a Scheme?

A scheme can provide the following advantages to a company and its creditors and / or members:

(a) it can be a cost-effective means of avoiding outright insolvency procedures such as administration or liquidation (which are typically expensive) where a company is in financial difficulty;

(b) the business is able to continue trading in an attempt to secure financial stability;

(c) directors are given time to re-organise and restructure the company without the threat of creditor action;

(d) the process avoids the need for a detailed investigation of the affairs of the company (for instance, by an administrator or liquidator);

(e) if the Scheme is agreed, the directors will not be vulnerable to personal liability for wrongful / fraudulent trading, having taken prudent measures to avoid insolvency; and

(f) members are more likely to receive an increased return on their investment and creditors a higher sum in repayment of their debt, than would otherwise be the case in an administration or liquidation.

6.6 Directors' duties

6.6.1 Why are they important in distressed situations?

Directors owe duties to the company they serve. In the normal course, they exercise those duties with reference to the interests of the company's members as a whole.

When the company is "in the zone of insolvency", the actions (or inaction) of directors have potential to prejudice the position of the company's creditors. In those circumstances, directors still owe their duties to the company but must discharge them predominantly with the interests of creditors in mind.

The scrutiny applied to that shift in focus becomes sharpest when a company has failed and been placed into liquidation pursuant to Part XXIII of the Companies Law. In certain circumstances, a liquidator may seek orders from the court that an officer must account for (or contribute towards) any losses suffered by the company as a consequence of the director's conduct either prior to, or after the company became insolvent.

6.6.2 What are they?

Directors owe both fiduciary and non-fiduciary duties to the company. The fiduciary duties of a director include to:

(a) act *bona fide* in the best interests of the company;

(b) act for proper purposes / not to act for improper or collateral purposes;

(c) exercise independent judgement; and

(d) avoid conflicts of interest.

Whether a director has fulfilled his fiduciary duties to the company will be tested (predominantly) subjectively, that is to say, it is contingent upon the director's state of mind.

A directors' duty of skill and care, however (which is a non-fiduciary duty), is measured both objectively and subjectively. In determining the scope of the duty, a court will consider:

(a) the director's actual knowledge, skill and experience (subjective test); and

(b) the knowledge, skill and experience that may be expected of someone fulfilling that director's role (objective test).

A director's duty of care and skill cannot be diminished on the basis of the director's actual knowledge and experience (as was once the position at common law), but instead, the bar can only be raised where a director has such experience and skill that one would have expected him to have acted differently in the circumstances.

6.6.3 Potential actions available

6.6.3.1 Preferences

A liquidator may apply to the court for an order to set aside a transaction entered into by a company if (a) it was entered into at a time when the company was insolvent or (b) the company becomes insolvent as a result of the transaction. Any payment made within six months (or two years in the case of a "connected party") immediately preceding the application for a compulsory winding-up (or a resolution for voluntary winding-up) is vulnerable to be set aside.

A company is deemed to have given a preference to a person where:

(a) "that person is one of the company's creditors or is a surety or guarantor for any of the company's debts or other liabilities"; and

(b) the company "does anything, or permits anything to be done, which improves that person's position in the company's liquidation".

It is also important to consider whether the company was (and ultimately the directors as decision makers were) influenced by the necessary "desire" to prefer. In practice, establishing a desire to prefer will be a factual exercise to show that the company was influenced by an intention to produce the result of putting one or more creditors in a better position than the general body of creditors.

Any transaction with a "connected party" during the reference period which would constitute a preference is presumed to be outside of the ordinary course of business and made with the requisite desire to prefer.

If a preference has been given, the court has wide-ranging powers to make any order it thinks fit to restore to the position of the company to where it would have been absent the preference. The range of possible orders includes making directors personally liable.

6.6.3.2 Transactions at an undervalue

While there is no codified law relating to transactions at an undervalue (as there is in the UK), similar actions may be available to liquidators under Guernsey's customary law.

One possibility is to claim that the directors committed an equitable wrong, that is, establish that the recipient of the company's assets had knowledge that the directors were acting in breach of their fiduciary duties (by selling company assets at an undervalue) and that the knowledge was such that the recipient's "conscience" was so affected that it would be impermissible to allow them to retain the misappropriated asset. As such, a claim may be founded by suggesting the recipient was a constructive trustee of the company's assets.

Another possibility may be for a liquidator to bring a customary law Pauline action. In essence, a Pauline action is concerned with setting aside a transaction undertaken to defraud creditors where the debtor was insolvent at the time or as a result of the transaction.

The critical elements to such an action would be that the debtor:

(a) must have been insolvent on a balance sheet basis at the time of the transaction; and

(b) carried out the transaction with the intention of defrauding creditors.

A Pauline action has been held in Jersey to be an action *personnelle mobilière*, for which the limitation period for bringing a claim in Guernsey is six years. There have been two Guernsey cases decided on principles akin to the Pauline action, the remedy for which is restitutionary in nature meaning that, if the action is successfully established, the transfer of assets is set aside such that the assets become available to satisfy the creditor's claim. There is no entitlement to compensation.

6.6.3.3 Misfeasance / breach of fiduciary duty

Pursuant to section 422 of the Companies Law, where in the course of the winding-up of a company it appears that any director (a) has appropriated or otherwise misapplied any of the company's assets, (b) has become personally liable for any of the company's debts or liabilities, or (c) has otherwise been guilty of any misfeasance or breach of fiduciary duty in relation to the company, the liquidator (or any creditor or member of the company) may apply to the court for an order against the director in his personal capacity. Any claim must be brought within six years from the date of breach.

As noted above, the test for a breach of fiduciary duty is a subjective one. In the case of *Carlyle Capital Corporation Limited (in Liquidation) and others v Conway and others*, HH Marshall LB, held that:

> "There is no fiduciary duty to make an objectively 'right' decision"

and

> "… a decision (whether right or wrong) reached by directors cannot be a breach of fiduciary duty if they have honestly made it in what they consider to be the interests of the company, and that therefore a claim for breach of fiduciary duty

> will only lie where it is shown that the directors did not honestly consider their action to be in the best interests of the company".

If a claimant is successful in proving misfeasance or a breach of duty, the court may order the delinquent director to (a) repay, restore or account for such money or property, (b) contribute sums towards the company's assets, or (c) pay interest upon such amount, at such rate and from such date; as the court thinks fit in respect of the default, whether by way of indemnity or compensation or otherwise.

6.6.3.4 Wrongful trading

Where a company has gone into insolvent liquidation at some time before the commencement of the winding-up of the company, and a director knew or ought to have concluded that there was no reasonable prospect of the company avoiding going into insolvent liquidation, the liquidator (or any creditor or member of the company) may apply to the court for a declaration that the director shall be liable to contribute to the company's assets.

It will, however, be a defence for a director to demonstrate that he took every reasonable step to minimise the loss to creditors, and such action was taken at the appropriate time.

In practical terms, wrongful trading is often the greatest fear for directors in times of financial distress. A company may, in the course of its life, find that it fails one or both limbs of the solvency test. That failure should not, however, be an automatic trigger for an insolvency process and there are circumstances where the reasonable belief and prospect of an improvement, restructuring or turn around dictate that trading should continue.

The sanction against wrongful trading is not designed to punish the honest director who takes a reasonable decision to continue a company's life with the long term benefit of creditors in mind. It is intended to punish those that carry on with no reasonable expectation of improvement and in doing so increase the net deficiency in the company's assets in the subsequent insolvency.

6.6.3.5 Fraudulent trading

Pursuant to section 432 of the Companies Law, if any business of a company is carried on with intent to defraud creditors, or for any fraudulent purpose, every person who is knowingly a party to the carrying on of the business in that matter is guilty of an offence.

If in the course of the winding-up of a company it appears that any business of the company has been carried on with intent to defraud creditors, the liquidator may apply to the court for an order that the director contribute to the company's assets. The director may also be criminally liable. The phrases "with intent to defraud creditors" and "for any fraudulent purpose" require a finding of actual dishonesty. If a company continues to carry on business and to incur debts at a time when there is, to the knowledge of the directors, no reasonable prospect of the creditors ever receiving payment on those debts, it can be inferred that the company is carrying on business with intent to defraud.

Self-Assessment Exercise 5

Question 1

In what circumstances is the court able to grant an administration order?

Question 2

What are the advantages of having a Scheme sanctioned by the court, as opposed to other forms of corporate rescue / winding-up procedures?

Question 3

In what circumstances might a director be made personally liable for the debts of an insolvent company?

For commentary and feedback on self-assessment exercise 5, please see APPENDIX A

7. CROSS-BORDER INSOLVENCY LAW

Guernsey is not a signatory to the UNCITRAL Model Law on Cross-Border Insolvency 1997 and is not a member of the European Union (and so Regulation (EC) 1346/2000 on Insolvency proceedings (Insolvency Regulation) does not apply). However, the Royal Court has a long history of providing assistance to overseas insolvency officeholders in appropriate circumstances.

Recognition of a case can essentially be divided into two types; the UK Insolvency Act 1986 and Common law.

7.1 UK Insolvency Act 1986

Firstly, section 426 of the UK Insolvency Act 1986 has been extended to Guernsey by the Insolvency Act 1986 (Guernsey) Order, 1989. As a result, the Royal Court is able to provide judicial assistance to the courts of England and Wales, Scotland, Northern Ireland, the Isle of Man or Jersey in insolvency matters. Equally, Guernsey officeholders are entitled to seek assistance in those jurisdictions that have chosen to elect Guernsey as the specified country for incoming requests.

The procedure under section 426 (using England as the sample country in which recognition is required) involves the following steps:

- The Guernsey office-holder makes an application ("Representation") to the Royal Court (under its inherent jurisdiction);

- The Royal Court issues a letter of request ("Request") seeking assistance of the English court under section 426;
- The Request will be issued by order of the foreign court;
- In England and Wales, requests should be made to the High Court of Justice and certain county courts;
- The foreign court must be the court with jurisdiction in insolvency matters;
- An application is then made seeking assistance of the English court "for the order as sought in the Request" ("Application").

The Request is authority for the English court to apply either its own insolvency law (or the insolvency law of Guernsey) and, in case, its own jurisdiction and powers.

Section 426(5) states that the receiving court "shall assist" the requesting court and the UK courts have granted assistance in a wide variety of circumstances. However, the obligation to assist is not mandatory and the receiving court must consider whether the assistance may properly be granted in accordance with:

(a) its own general jurisdiction and powers (for example, to grant injunctive relief or appoint receivers);

(b) its own "insolvency law" (as defined in section 426(10)); or

(c) the insolvency law applicable by the requesting court to comparable matters falling within its jurisdiction.

If the assistance can be properly granted in accordance with the law to be applied, then it should be. If not, then it should be withheld.

There is very little case law in this area in Guernsey but given the commonality of legislation in this area with England and Wales, guidance can be taken as to the application of the section and its limits from the extensive English jurisprudence.

7.2 Common law

The second type of recognition is under the common law. This is an area that has been subject to substantial development in other jurisdictions in recent decisions, particularly that of the Privy Council in *Singularis.*[26]

[26] *Singularis Holdings Limited v PriceWaterhouseCoopers* (2014) [2014] UKPC 36, where the Privy Council dismissed an appeal against the Court of Appeal of Bermuda's refusal to order an auditor to release information it held on a company which had been wound up in the Cayman Islands.

The extent and nature of the jurisdiction was set out by the Privy Council in *Singularis* as follows:

(a) The common law power does not enable the officeholder to do something which they could not do by the law under which they were appointed. The court could make an order against persons in its own jurisdiction in favour of foreign liquidators, provided they have a similar right under domestic law of the court which appointed them.

> ''There is a principle of the common law that the court has the power to recognise and grant assistance to foreign insolvency proceedings. Second, that power is primarily exercised though the existing powers of the court. Third, those powers can be extended or developed from existing powers through the traditional judicial law-making techniques of the common law. Fourth, the very limited application of legislation by analogy does not allow the judiciary to extend the scope of insolvency legislation to cases where it does not apply. Fifth, in consequence, those powers do not extend to the application, by analogy "as if" the foreign insolvency were a domestic insolvency, of statutory powers which do not actually apply in the instant case."

(b) The order sought must be consistent with the substantive law and public policy of the assisting state.

However, the broad position remains that Guernsey will co-operate in foreign insolvency proceedings, particularly where there is a sufficient connection between an officeholder appointed in the jurisdiction where the company is incorporated or individual domiciled and the company or individual has submitted to the jurisdiction of the court by which the appointment was made. Although the Royal Court still retains discretion under the common law, where there is a sufficient connection the court will typically grant the relief sought, albeit the availability of "*as if*" type relief is tempered so that the Guernsey court cannot grant relief unless it has a common law power to do so.

7.2.1 Recent decisions of the Royal Court

In *EFG Private Bank (Channel Islands) Limited v BC Capital Group Limited & Ors*[27] the Royal Court set out for the first time the principles which it should consider when assessing the nature and extent of its obligation to provide "active assistance" to foreign insolvency proceedings.

In this case, an action was brought by EFG Private Bank in respect of assets held in accounts in Guernsey on behalf of various BVI hedge funds. The hedge funds were in liquidation, with BVI joint liquidators appointed. In the United States (US or USA), two civil complaints had been brought against Mr Nikolai Battoo regarding an allegedly fraudulent scheme which he used to mask losses suffered by various investment portfolios (such losses being the result of the Madoff Ponzi scheme). Monies invested as part of that scheme were alleged to have been transferred to the accounts in Guernsey.

[27] Royal Court, 34/2013.

The US Commodity Futures Trading Commission (the CFTC) consequently appointed a Receiver over Mr Battoo's assets (and those of his related entities) and Bahamian liquidators were appointed over the defendant entities in the US proceedings (both appointments having been recognised by the Royal Court). A stay of the Guernsey proceedings was sought together with the transfer of the Guernsey-held assets to the BVI for the purpose of advancing the liquidations. Both the US Receiver and the Bahamas liquidators opposed the application on the basis that Guernsey was the appropriate forum to determine the issue of title to the funds held in the Guernsey accounts.

The duty of the Royal Court to provide assistance to those conducting foreign insolvency proceedings was a key point for consideration by the Deputy Bailiff, particularly in view of the concept of universalism in insolvency matters (which suggests that domestic courts should seek to administer insolvent entities in the spirit of international comity).

The Deputy Bailiff considered that, in fact, he must treat the stay and repatriation elements of the application as being necessarily linked, since granting a stay would be of little consequence unless the BVI liquidators had unfettered access to the Guernsey-based assets (as any distribution would then need to be approved by the Guernsey court).

The Deputy Bailiff ultimately agreed with the Joint liquidators that the principle of universalism applied to the Royal Court and, in doing so, set out useful guidance for assessing the nature and scope of the Royal Court's ability to provide active assistance to a foreign insolvency. Importantly, the Deputy Bailiff suggested that the role of the Royal Court is to assist (and not to frustrate) foreign insolvency proceedings. As such, it should ensure that no party seeks to take an unfair advantage by litigating issues in Guernsey. Ultimately, the discretion of the court must be exercised judicially, with a view to achieving fairness and justice as between all parties.

In the matter of X (a bankrupt)[28] the Royal Court considered an application for recognition of the appointment of an English trustee in bankruptcy and her rights, as such, to collect funds and assets of the bankrupt in Guernsey and to obtain information from third parties. In doing so, the applicant sought to utilise powers available to her (pursuant to statute) in the requesting jurisdiction that had no equivalent in Guernsey statute.

The court ultimately granted the application for recognition but refused the application for a power to obtain information and documents from persons resident in Guernsey connected to the affairs of the bankrupt.

It is important to note that it was open to the applicant in *Re X* to seek letters of request from the English courts pursuant to section 426 of the Insolvency Act 1986 (as extended to Guernsey) asking the Royal Court to recognise her English statutory powers of examination in Guernsey. It is well established that the Guernsey court would have granted that recognition. The applicant opted not to do so for reasons of procedural inconvenience and, instead, sought recognition under common law principles.

[28] Royal Court Judgment 36/2015.

The Lieutenant Bailiff considered whether there was any English or Guernsey statutory power that provided the Guernsey Court with jurisdiction to make such an order. She concluded that there was no statutory basis and then considered whether such a power could be found at common law based on the doctrine of "modified universalism" in insolvency, whereby a court has a common law power to assist foreign winding-up proceedings so far as it can.

Consequently, Lieutenant Bailiff Marshall considered in detail the decision of the Privy Council in *Singularis* which (as referred to above) considered the reverse position, where the court of Bermuda had granted a liquidator appointed by the Cayman court a power to obtain information that would have been available to a Bermuda-appointed liquidator but was not available under the Cayman insolvency regime it was seeking to support. The Privy Council held unanimously in that case that the Bermudan court should not have made the order, because it was improper to allow the Cayman liquidator to obtain a greater power than they were entitled to in the jurisdiction of the insolvency.

The Privy Council then went on to consider whether, if Cayman insolvency procedure had contained such a provision, the Bermudan court would have also had the power in circumstances where (i) the Cayman company could not have been wound up in Bermuda and (ii) Bermudan insolvency law only applied to companies wound up in Bermuda. The majority held that the common law doctrine of modified universalism provided such a power: if an identical power had been available in the statutory insolvency regimes of both jurisdictions, it would have been a logical extension of the Bermudan court's right and duty to assist the Cayman court that it make that power available in respect of the Cayman insolvency, notwithstanding the territorial limits of the underlying Bermudan statute.

The minority held that no such power existed and were concerned about the development of a power to require information from private individuals beyond the recognised categories. These were described by Lord Mance:[29]

> "In reality, far from displaying uninhibited willingness to develop appropriate remedies requiring the provision of information, courts have in my view been careful to confine such remedies to situations where there is a recognisable legal claim to protect, based either on a title or right to property or on some wrongdoing supported by appropriate evidence. Thus: (i) A court has jurisdiction to protect identifiable property rights, which would include ordering a person shown to be likely to have property belonging to the company to deliver it up or disclose its whereabouts. (ii) A sustainable case of wrongdoing is the basis for the well-established jurisdiction to order the disclosure of information by or in conjunction with the making of an asset freezing (formerly Mareva) order or a search (Anton Pillar) order. (iii) The legal principle recognised in *Norwich Pharmacal* is that persons innocently mixed up in wrongdoing could be expected to disclose a limited amount of information and documentation about it to assist the victims."

[29] *Idem*, para 137.

In *Re X* the Lieutenant Bailiff considered if the decision to recognise (or not) the use of the foreign power to examine third parties in Guernsey could be distilled to a simple question of whether that power was "inconsistent with Guernsey law or public policy." She concluded that the issue was wider and that it was also necessary to establish "that the power *prima facie* existed, and then to consider whether it in fact could not exist, or should not be exercised, because of apparent inconsistency with either the law or public policy of the assisting court's jurisdiction."

The Lieutenant Bailiff in *Re X* held that, following *Singularis*, there was no common law basis on which the Guernsey Court could grant an English trustee in bankruptcy a power to obtain information in circumstances where an analogous statutory power did not exist in Guernsey. She sided with the minority in *Singularis* and doubted the ability of a court to require third parties to provide information to an officeholder:

> "There is another consideration which I am troubled on, and which also inclines me to hold that no such power exists. This is that a power to take the step of requiring third parties, possibly under a threat of sanctions in relation to contempt of court, to provide information to an officeholder in relation to the affairs of another person, is a pretty draconian power and so far as I can see it can be found to exist generally only in the context of statutory powers, whether they are express statutory powers as in the English Companies/Insolvency Acts, or by strong necessary implication, as ancillary to otherwise existing statutory powers. It therefore seems to me that to find some kind of hidden general common law/customary law type power in this area is taking the kind of "step leap" that Lord Mance said should not be taken, and is one that is rather contra-indicated by the history of Guernsey Law."

Self-Assessment Exercise 6

Question 1

Consider the decision of the Privy Council in *Singularis* and explain the extent and nature of the common law powers of recognition. How has the Royal Court approached the provision of assistance to foreign Courts?

Question 2

Read section 426 of the UK Insolvency Act 1986. Consider the following questions:

a) What legislative framework does section 426 establish to authorise cross-border cooperation between the Guernsey Court and the courts of other jurisdictions? Does it specify how that cooperation and coordination is to be achieved?
b) What other forms of cooperation, aside from the application of section 426, may assist cross-border cooperation and coordination in international insolvency cases?

For commentary and feedback on self-assessment exercise 6, please see APPENDIX A

8. RECOGNITION OF FOREIGN JUDGMENTS

8.1 Statutory registration of foreign judgments

The Judgments (Reciprocal Enforcement) (Guernsey) Law 1957 (the Reciprocal Enforcement Law) creates a right for certain foreign judgments to be registered in the Royal Court in Guernsey. If so registered, judgment will have effect as if it were granted by the Royal Court from date of registration. The procedure for such registration is set out in the Judgments (Reciprocal Enforcement) (Guernsey) Rules 1972 (as amended).

Reciprocating jurisdictions include: England and Wales, Scotland, Northern Ireland, Isle of Man, Jersey, Israel, Italy and the Netherlands; however, it does not include the USA. If an applicant wants to register a judgment from a reciprocating country, then they must use the 1957 Law.

To be eligible for registration under the Reciprocal Enforcement Law the Judgment must:

(a) have been obtained in a reciprocating country (of which England is one);

(b) be a judgment of a superior court having jurisdiction (other than a judgment given on appeal from a court which is not a superior court);

(c) be final and conclusive as between the parties to it;

(d) be for a sum of money payable, and not relating to taxes or other similar charges, fines or other penalties;

(e) be unsatisfied and capable of execution in the country of the original court;

(f) not be in respect of a matrimonial cause, or in respect of proceedings in connection with administration of the estates of deceased persons, insolvency, winding-up of companies, lunacy or guardianship of infants; and

(g) not be more than six years old.

A court is deemed to have *in personam* jurisdiction if the:

(a) debtor submitted to jurisdiction of the original court voluntarily;

(b) creditor was a plaintiff or counterclaimed in original proceedings;

(c) creditor agreed (for example, by contract / trust instrument) to the jurisdiction of the original court;

(d) debtor was resident in the original country or a company has its principal place of business there; or

(e) creditor had its place of business in the original country and proceedings concerned a transaction through that office.

Conversely, the original court will not be deemed to have had original jurisdiction if proceedings were in respect of immeubles outside the original country or were contrary to an arbitration clause or some other agreement as to form of dispute resolution to be adopted. An application for registration of a judgment may be made *ex parte*. The application must be supported by an affidavit, exhibiting a certified and sealed copy of the judgment, deposing that:

(a) the judgment creditor is entitled to enforce the judgment;

(b) the judgment has not been satisfied or, if satisfied in part, the amount outstanding;

(c) the judgment can be enforced by execution in the country of origin;

(d) if the judgment were registered, the registration would not be, or be liable to be, set aside under the Reciprocal Enforcement Law; and

(e) specifying the amount of interest due up to the time of registration.

The Court can require the judgment creditor to provide security for the costs of the application and any application to set aside the registration. The Order giving leave to register the judgment must state the period within which an application may be made to set aside the registration and a notice that execution on the judgment will not be permitted until after the expiry of that period. Where the judgment debtor is not in Guernsey, the period within which the judgment may be set aside will be calculated according to his whereabouts. That period may be extended on application.

Notice of the registration must be served on the judgment debtor. The leave of the Court is not required where the judgment debtor is out of the jurisdiction, save where substituted service is required. If no application to set aside the registered judgment is made within the specified timeframe, a further application must be made to the Court, *ex parte*, for leave to enforce the registered judgment. The manner of enforcement must be specified in the Act of Court (the order). That application must be supported by proof of service of the notice of registration. If an application to set aside the registered judgment is made, it must be supported by an affidavit.

A registered judgment **shall** be set aside if the Court is satisfied that:

(a) it is not a judgment to which the Reciprocal Enforcement Law applies, or it was registered in contravention of the provisions of the Law; or

(b) the courts of the originating country did not have jurisdiction; or

(c) the judgment debtor did not receive notice of the proceedings in sufficient time to enable him to defend the proceedings and he did not appear; or

(d) the judgment was obtained by fraud; or

(e) the enforcement of the judgment would be contrary to public policy in Guernsey; or

(f) that the rights under the judgment are not vested in the person by whom the application for registration was made.

Further, a registered Judgment **may** be set aside if the Court is satisfied that the matter in dispute in the proceedings in the original court had, prior to the date of the judgment, been the subject of a final and conclusive judgment by a court having jurisdiction.

8.2 Common law enforcement of foreign judgments

Where the 1957 Law does not apply (for example, the judgment is not from a reciprocating country, such as the USA), then common law will apply subject to conditions. The foreign court granting judgment must be of competent jurisdiction, and the Royal Court will apply conflict of laws rules to assess whether or not this is the case.

Under common law, a foreign judgment is regarded as a debt, meaning that the creditor must sue on the debt and subsequently apply for summary judgment. In the case of *Emanuel v Symon*[30] it was held that the Royal Court will enforce a judgment in following circumstances, namely if the defendant:

(a) is resident in the foreign jurisdiction;

(b) selected the foreign jurisdiction in which the judgment was issued as the forum for dispute with the plaintiff;
(c) voluntarily appeared in the court of foreign jurisdiction; or

(d) contracted to submit to judgment jurisdiction.

A foreign judgment is only impeachable if:

(a) the foreign court had no jurisdiction (for example, default judgment *in absentem*);[31]

(b) the judgment was obtained by fraud of the party seeking judgment;

(c) enforcement of the judgment would be contrary to public policy; or

(d) proceedings by which the judgment was obtained are contrary to natural justice.

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30 [1908] 1 KB 302.
31 Per Dicey & Morris Rule 43.

In conclusion, if the defendant has submitted to a foreign jurisdiction and the judgment cannot be impeached on any of above grounds, then the defendant probably has no defence hence why most such claims proceed to summary judgment.

Self-Assessment Exercise 7

What are the requirements for registration of a foreign judgment under The Judgments (Reciprocal Enforcement) (Guernsey) Law 1957 and in what circumstances might a registered judgment be set aside?

For commentary and feedback on self-assessment exercise 7, please see APPENDIX A

9. INSOLVENCY LAW REFORM

On 31 March 2017, the States of Deliberation approved proposals for the reform of Guernsey insolvency law by way of amendment to the Companies Law.

The approved amendments cover, *inter alia*, the following key areas:

(a) the introduction of creditors' committee procedures in the administration process;

(b) the introduction of the ability for administrators to make distributions to unsecured creditors out of administration without the need for a subsequent liquidation;

(c) creating the ability for companies to be dissolved at the end of administration directly rather than through a liquidation;

(d) to introduce formal objectives for the compulsory winding-up of companies;

(e) to introduce a requirement for independence in the appointment of voluntary liquidators to insolvent companies;

(f) to increase reporting requirements and protection for creditors in the voluntary winding-up process where the company is insolvent;

(g) to allow inquorate final general meetings of companies in voluntary liquidation to take place to remove a barrier to closure where members are not engaged;

(h) a power to create a rules committee that in turn is given formal power to prescribe rules relating to the process by which debts should be proved in liquidation;

(i) a formal removal of the requirement for a company to have its accounts audited post winding-up;
(j) the introduction of a procedure whereby liquidators may disclaim onerous assets.

(k) the introduction of a formal procedure for dealing with unclaimed dividends in insolvent companies by way of a statutory scheme to receive and administer such funds;

(l) the introduction of a power for the Royal Court to wind up the affairs of a foreign registered entity carrying on business in Guernsey;

(m) the creation of a wider body of insolvency rules, together with a committee for their review, to govern procedural matters in insolvency and to keep up to date with developments;

(n) a mandatory requirement for office holders to report delinquent conduct by officers and former officers;

(o) the creation of a statutory offence in relation to transactions at an undervalue undertaken by a company in the run up to insolvency;

(p) the creation of a statutory ability for liquidators to seek to overturn extortionate credit transactions; and

(q) the creation of a statutory power for liquidators (currently only administrators have such a power) to require the production of a statement of affairs together with a strengthening of office holders information-gathering powers.

10. USEFUL INFORMATION

The following links are useful for obtaining further insight into the insolvency regimes and practices in Guernsey.

- **ARIES**: http://www.aries-ci.org/

  As noted above, the Aries website provides useful information regarding insolvency and restructuring in Guernsey and is aimed at professionals with an interest in this field.

- **Guernsey Legal Resources**: http://www.guernseylegalresources.gg/

  Here you can review legislation (such as the Companies Law), judgments (both reported and unreported), Law Journals and Practice Directions.

- **Guernsey Royal Court Website**: http://www.guernseyroyalcourt.gg/

  The Royal Court website provides useful information regarding the Guernsey judicial system, the legal framework and the (often unique) procedures for commencing legal proceedings and seeking to enforce against debtors in Guernsey.

APPENDIX A: COMMENTARY AND FEEDBACK ON SELF-ASSESSMENT EXERCISES

Self-Assessment Exercise 1

Question 1

Identify the various sources of Guernsey law, and provide a brief summary of each.

Question 2

Consider some of the cases in which the Royal Court of Guernsey has been guided by, or adopted legal principles of foreign jurisdictions. In your view, what are the reasons for this and does such an approach provide clarity or confusion as to how a case might be dealt with by the Court?

Question 3

Write a short overview of some of the insolvency-related applications brought before the Royal Court of Guernsey in recent years where there has been no codified law or established common law to provide explicit guidance, yet the Court has nevertheless dealt with the application. Consider whether the approach adopted was fair and reasonable in the circumstances.

Commentary and Feedback on Self-Assessment Exercise 1

Question 1

You should have identified and summarised the customary law of Guernsey (based largely on Norman French legal principles), legislation and common law.

Question 2

You should look to the judgments in cases such as *Helmot v. Simon;Morton v Paint; Vaudin v. Hamon; Flightlease Holdings (Guernsey) Limited v. Flightlease (Ireland) Limited; and Carlyle Capital Corporation Ltd v Conway*.

The Guernsey Court has often referred to the laws of other jurisdictions (including Jersey, England & Wales and commonwealth jurisdictions such as South Africa and Australia) for guidance, where its own laws do not provide a clear and established means of dealing with a particular case. This approach assists in providing some clarity as to how the Court will approach a particular dispute, as a much broader library of case law is likely to contain similar or analogous facts and legal issues.

Question 3

You should have addressed the Court's decisions in *Esquire Realty Holdings Limited* and *In the matter of Huelin-Renouf Shipping Limited in liquidation.*

Both of these cases demonstrate the Royal Court's willingness and ability to deal with complex insolvency matters in an efficient manner. In considering whether the decisions reached were fair and reasonable, you ought to have thought about whether there was any other practical method of dealing with the applications which would have achieved a similarly favourable result for the body of creditors as a whole.

Self-Assessment Exercise 2

You are asked to supply materials to ABC Limited, a relatively new company with a short trading history. You are cautious, and wish to ensure that you are paid in full for the goods that you supply, but you acknowledge that the full purchase price cannot realistically be paid up front. How can you protect yourself should ABC limited become unable to pay its debts?

Commentary and Feedback on Self-Assessment Exercise 2

You should consider the various forms of security available and the types of clauses that might be included in any agreement entered into with ABC Limited (such as a retention of title clause so that the goods supplied can be returned to you in the event of non-payment / insolvency). You should also think about how can you enforce your security and where you will rank in an insolvency process.

Self-Assessment Exercise 3

Consider the *saisie* process and explain the potential disadvantages to creditors of this type of enforcement procedure?

Commentary and Feedback on Self-Assessment Exercise 3

You should highlight the risks associated with the *saisie* procedure where more than one creditor wishes to participate, since there can be only one "winner". Because the property is offered to each creditor in turn (starting with the lowest ranking creditor) any creditor who wishes to take the security must take the whole property. If the creditor does opt to take the property, they must pay off everybody's claim which has priority to their own within 15 days of the hearing (which will almost certainly not provide sufficient time for the property to be sold). A creditor who chooses not to take the property will walk away with nothing.

In choosing to become involved in the *saisie* procedure at all, any low-ranking creditor that does not take the property will lose his right to enforce against the debtor's movable property for all time.

Therefore, unless a creditor *knows* that he has the highest ranking security, or that there is plenty of equity in the property, engaging in *saisie* proceedings is a risk.

Self-Assessment Exercise 4

Question 1

Who can make an application for a compulsory winding-up and in what circumstances can the Court grant the order?

Question 2

Outline the procedure for making an application for a compulsory winding-up.

Question 3

What are the consequences of not making an application for a compulsory winding-up?

Question 4

You are the appointed liquidator of XYZ Co. Limited, which has just entered into compulsory liquidation. You determine that the company has realisable assets of GGP 100,000, with the following debts:

- Liquidator's fees: GGP 25,000
- Lawyers and accountants' fees: GGP 20,000
- Unpaid employee wages: GGP 25,000
- Trade creditors: GGP 40,000
- Unpaid rent: GGP 10,000

Explain how the respective creditors rank and how much each category of creditors will receive from the available funds.

Commentary and Feedback on Self-Assessment Exercise 4

Question 1

An application can be made by the company, any director, member or creditor, or any other interested party. In certain limited circumstances, the Guernsey Financial Services Commission (GFSC) or the States of Guernsey Commerce and Employment Department can make an application.

When considering whether to grant an order, the Court will consider the points detailed at paragraph 6.38.

Question 2

You should explain that the procedure is, broadly, as follows:

1. Make an application to the court seeking an order that the company be wound up, accompanied by an affidavit explaining why the company should be placed into liquidation;
2. If required, serve a copy of the application on the GFSC at least seven days before the application hearing;
3. Hearing of the application; and
4. Appointed liquidator to send a copy of the compulsory winding-up order to the Registrar of Companies within seven days of being appointed. The Registrar of Companies publicises the fact that the company has been placed into liquidation.

Question 3

As noted at paragraph 6.34, there is no explicit obligation to initiate proceedings, but directors' fiduciary duties may require them to consider doing so where the company has no prospect of avoiding an insolvent liquidation. A failure to do so could result in a finding of wrongful trading or fraudulent trading.

Question 4

The creditors will rank as follows and receive the amounts indicated:

- Liquidator (GGP 25,000) and lawyers and accountants' fees (GGP 20,000);
- Employees (GGP 25,000) and unpaid rent (GGP 10,000); and
- Trade creditors (GGP 20,000, being GGP 0.50 per pound owing)

Self-Assessment Exercise 5

Question 1

In what circumstances is the Court able to grant an administration order?

Question 2

What are the advantages of having a Scheme sanctioned by the Court, as opposed to other forms of corporate rescue / winding-up procedures?

Question 3

In what circumstances might a director be made personally liable for the debts of an insolvent company?

Commentary and Feedback on Self-Assessment Exercise 5

Question 1

As detailed at paragraph 6.5.1.2, the court can grant an administration order if:

- the company does not satisfy, or is likely to become unable to satisfy, the solvency test; and
- Considers that the making of an order may achieve either a) the survival of the company as a going concern and b) a more advantageous realisation of the company's assets than would be effected on a winding-up.

Question 2

You should identify the advantages listed at paragraph 6.5.2.3 of this module.

Question 3

Paragraph 6.6 of this module details the duties of directors of a Guernsey company in an insolvent situation and also the possible causes of action that may be available to recover assets from delinquent directors and others.

It should be noted that the remedies against directors may take the form of either specific claims pursuant to the statutory offences but also in respect of potential breaches of duty. You should seek to understand when the interests of creditors take precedence and how that should influence decision making.

Self-Assessment Exercise 6

Question 1

Consider the decision of the Privy Council in *Singularis* and explain the extent and nature of the common law powers of recognition. How has the Royal Court approached the provision of assistance to foreign Courts?

Question 2

Read section 426 of the UK Insolvency Act 1986. Consider the following questions:

a) What legislative framework does section 426 establish to authorise cross-border cooperation between the Guernsey Court and the courts of other jurisdictions? Does it specify how that cooperation and coordination is to be achieved?

b) What other forms of cooperation, aside from the application of section 426, may assist cross-border cooperation and coordination in international insolvency cases?

Commentary and Feedback on Self-Assessment Exercise 6

Question 1

You should explain the limits placed on recognition and assistance post *Singularis* and the need for there to be an equivalent power in the home jurisdiction. Refer to the decision of the Royal Court *EFG Private Bank (Channel Islands) Limited v BC Capital Group Limited & Ors* and *Re X* to demonstrate the extent of assistance that has been given by the Royal Court.

Question 2

a) You should comment on the section 426 letter of request procedure and, in particular, highlight the circumstances in which co-operation can be achieved (as noted at paragraph 7.12).

b) You should detail the common law procedure for recognition in insolvency matters.

Self-Assessment Exercise 7

What are the requirements for registration of a foreign judgment under The Judgments (Reciprocal Enforcement) (Guernsey) Law 1957 and in what circumstances might a registered judgment be set aside?

Commentary and Feedback on Self-Assessment Exercise 7

You should refer to the criteria for registration at paragraph 8 above and the factors for the court to consider in determining whether such a judgment must (or might) be set aside.

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