

**INTRODUCTORY CERTIFICATE IN INSOLVENCY LAW AND PRACTICE IN THE CAYMAN ISLANDS 2023**

**Formative Assessment (Practice Examination) Date: 9 – 10 November 2023**

**Time limit: 24 hours (from 13:00 on 9 November to 13:00 on 10 November 2023)**

**EXAMINERS**

**Mr John Royle Mr Mark Russell Mr Nicholas Fox Ms Corinne Celliers**

**Ms Cassandra Ronaldson Mr Adam Crane Ms Gemma Lardner Ms Jennifer Fox**

**Ms Jennifer Colegate Mr Tony Heaver-Wren Mr Paul Smith Mr Spencer Vickers**

**Mr Benjamin Tonner**

**MODERATORS**

**Mr John Royle Mr Nicholas Fox Ms Cassandra Ronaldson**

**Mr Spencer Vickers Dr David Burdette**

**It is imperative that all candidates read and take cognisance of the examination instructions on the next page.**

**All candidates are expected to comply with ALL the instructions.**

**INSTRUCTIONS**

1. This assessment paper will be made available at **13:00 (1 pm) Cayman time on Thursday 9 November 2023** and must be returned / submitted by **13:00 (1 pm) Cayman time on Friday 10 November 2023**. Please note that assessments returned late will not be accepted.

2. All assessments must be submitted electronically in Microsoft Word format, using a standard A4 size page and an 11-point Avenir Next font (if the Avenir Next font is not available on your PC, please select the Arial font). This document has been set up with these parameters – **please do not change the document settings in any way**. **DO NOT** submit your assessment in PDF format.

3. No limit has been set for the length of your answers to the questions. Please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case). Candidates who include very long answers in the hope it will cover the answer the examiners are looking for, will be appropriately penalised.

4. You must save this document using the following format: **studentID.FormativeAssessment**. An example would be something along the following lines: 202223-336.FormativeAssessment. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentID” with the student number allocated to you). Do not include your name or any other identifying words in your file name.

5. The assessment can be downloaded from your student portal on the INSOL International website. The assessment must likewise be returned via your student portal as per the instructions in the Course Handbook for this course. **If for any reason candidates are unable to access their student portal, the answer script must be returned by e-mail to** **david.burdette@insol.org** **prior to the deadline for the submission of the assessment**.

6. Enquiries during the time that the assessment is written must be directed to David Burdette at **david.burdette@insol.org** or by WhatsApp on +44 7545 773890 or to Brenda Bennett at **brenda.bennett@insol.org** or by WhatsApp on +27 66 228 2010. Please note that enquiries will only be responded to during UK office hours (which are 9 am to 5 pm GMT, or 11 am to 7 pm SAST).

7. While the assessments are open-book assessments, it is important to note that candidates **may not receive any assistance from any person** during the 24 hours that the assessment is written. **Answers must be written in the candidate’s own words; answers that are copied and pasted from the text of the course notes (or any other source) will be treated as plagiarism and persons who make themselves guilty of this will forfeit the assessment and disciplinary charges will follow**. When submitting their answers, candidates will be asked to confirm that the work is their own, that they have worked independently and that all external sources used have been properly cited. **If you submit your assessment by e-mail, a statement to this effect should be included in the e-mail**.

8. Once a candidate’s assessment has been uploaded to their student portal (in line with the instructions in the Course Handbook), a confirmatory e-mail will be auto-generated confirming that the assessment has been uploaded. If the confirmatory e-mail is not received within five minutes after uploading the assessment, candidates are requested to first check their junk / spam folders before e-mailing the Course Leader to inform him that the auto-generated e-mail was not received.

9. If for any reason the submission / upload portal for your assessment is not available (ie it shows the deadline for the assessment has already passed), please e-mail your assessment to **david.burdette@insol.org**.

10. **The model answer to this practice assessment will be uploaded to the course web pages once the closing date for submission has passed at 1 pm Cayman time on Friday 10 November 2023**.

11. You are required to answer this paper by typing the answers directly into the spaces provided (indicated by text that states [Type your answer here]). For multiple-choice questions, please highlight your answer in yellow, as per the instructions included under the first question.

**ANSWER ALL THE QUESTIONS**

**QUESTION 1**

Questions 1.1 – 1.20 are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph **in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question. Each of the 20 questions count 1 mark.

**Question 1.1**

Choose the **correct** statement:

Which of the following IS NOT a relevant country for an individual to be qualified to act as official liquidator in the Cayman Islands?

1. Canada
2. Australia
3. Northern Ireland
4. South Africa

**Question 1.2**

Choose the **correct** statement:

What is the lookback period for an Insolvency Practitioner’s independence in accordance with the Insolvency Practitioner Regulations?

1. 3 years from commencement of the liquidation
2. 3 years from the date of the winding up order
3. 3 years from the date of a special resolution
4. None of the above

**Question 1.3**

Select the **correct** statement:

To whom does a privately-appointed receiver owe their primary duties?

* 1. The debtor.
	2. The appointing creditor.
	3. Other creditors.
	4. All of the above.

**Question 1.4**

Choose the **correct** statement:

Which of the following is a ground for making a statutory receivership order in respect of a segregated portfolio?

1. It is just and equitable that an order be made.
2. The assets are or are likely to be insufficient to discharge the claims of the segregated portfolio’s creditors.
3. The shareholders in respect of the segregated portfolio have passed a resolution to appoint a receiver.
4. All of the above.

**Question 1.5**

Choose the **correct** statement:

When an official liquidator is appointed over a company, what is the lookback period for challenging a secured parties security as a voidable preference?

1. Within the six (6) months immediately preceding the commencement of the winding up.
2. Within the six (6) months immediately preceding the granting of a winding up order.
3. Within the two (2) years immediately preceding the commencement of the winding up.
4. Within the two (2) years immediately preceding the granting of a winding up order.

**Question 1.6**

Choose the **correct** statement:

Which sections of the Companies Act governs the voluntary winding up of a company?

1. Sections 111-115.
2. Sections 116-130.
3. Sections 123-130.
4. Sections 123-133.

**Question 1.7**

Choose the **correct** statement:

Which of the following IS NOT considered a ground for the voluntary winding up of a company:

1. If the company resolves by special resolution that it be wound up voluntarily.
2. If the company resolves by ordinary resolution that it be wound up voluntarily because it is unable to pay its debts as they fall due.
3. If the company resolves by ordinary resolution that it is just and equitable that the company should be wound up.
4. When any duration or period of the company fixed by its memorandum or articles of association expires.
5. If any event of winding up, as set by the memorandum or articles of association, occurs.

**Question 1.8**

Choose the **correct** statement:

In accordance with her orders of appointment, an official liquidator engages a Cayman attorney to provide legal advice concerning a potential claim against the company’s former auditor. The legal advice is received, along with the attorney’s invoice for their fees incurred. Upon the liquidators’ review of the attorney’s invoice, she considers that the fees charged are excessive. Whilst there is an engagement letter in place, there was no budget set or amounts otherwise agreed in respect of the liquidator’s fee expectations. What option is available to the liquidator to contest the fees charged?

1. There is no recourse. The official liquidator should have agreed the fees when instructing the attorneys.
2. The terms relating to legal fees are a matter for the liquidation committee to set (if one is constituted) and for the ultimate approval of the court.
3. The official liquidator can apply to have the fees taxed.

**Question 1.9**

Choose the **correct** statement:

Which of the below statements is true in relation to an insolvent liquidation estate?

1. Ordinary creditor claims are always paid *pari passu*, regardless of any contractual terms validly entered into by the creditor and company regarding the priority of payment, prior to the company’s liquidation.
2. The official liquidator must convene meetings of both creditors and contributories during the liquidation.
3. Official liquidators are not required to provide their reports to the contributories, even when a contributory request a copy of the official liquidators’ reports.
4. The official liquidators do not need to settle the list of contributories.

**Question 1.10**

Choose the **correct** statement:

Which of the following statements most accurately describes the circumstances in which Cayman Islands Monetary Authority (CIMA) may appoint a controller of a licensed entity?

1. Where CIMA identifies evidence indicating that the entity's management have been engaged in negligent activities.
2. Where CIMA identifies serious concerns regarding the solvency or lawfulness of a licensee or registrant's business.
3. Where CIMA considers that the entity is insolvent.
4. Where CIMA concludes that the entity has failed to pay requisite fees to the relevant regulatory authorities.

**Question 1.11**

Choose the **correct** statement:

If a creditor seeks to appeal a decision of the official liquidator in relation to its proof of debt, when must any application to the court appealing that decision be made?

1. Within 30 days of becoming aware of the official liquidator's decision.
2. Within three (3) months of becoming aware of the official liquidator's decision.
3. Within 14 days of the date on which the creditor received the official liquidator's notification under O.16, r.6 of the Companies Winding Up Rules.
4. Within 21 days of the date on which the creditor received the official liquidator's notification under O.16, r.6 of the Companies Winding Up Rules.

**Question 1.12**

Choose the **correct** statement:

Which of the following WILL NOTconstitute the commencement of the winding up of an exempted limited partnership (ELP)?

1. Order of the Court upon presentation of a winding up petition.
2. The proposal of a resolution for the winding up of the ELP.
3. Expiry of the period fixed for the duration of the partnership.
4. The automatic wind up date.

**Question 1.13**

Choose the **correct** statement:

Which of the following activities, if undertaken by a limited partner, may constitute participation in the conduct of the business of the exempted limited partnership (ELP), jeopardising its limited liability?

1. Calling a meeting of the partners.
2. Presenting a winding up petition.
3. Acting as guarantor for the ELP.
4. None of the above.

**Question 1.14**

Choose the **correct** statement:

The Court may make an order for the appointment of provisional liquidators at any time:

* 1. Before a winding up order is made.
	2. Before a winding up petition is filed.
	3. After a winding up petition has been filed but before a winding up order is made.
	4. After a company has been struck off.

**Question 1.15**

Choose the **correct** statement:

Who may apply for the appointment of provisional liquidators to a corporate debtor?:

* 1. The company and its creditors.
	2. The Cayman Islands Monetary Authority (CIMA) and the company.
	3. The company and its contributories.
	4. All of the above.

**Question 1.16**

Choose the **correct** statement:

To be sanctioned, a creditor’s scheme:

1. Must apply to all of the company’s creditors.
2. Must also take account of shareholder interests.
3. Must have extraterritorial affect.
4. Must provide a better outcome than liquidation.

**Question 1.17**

Choose the **correct** statement:

From which country can judgments of certain courts be registered and enforced within the Cayman Islands under the Foreign Judgments Reciprocal Enforcement Act (1996 Revision)?

1. Canada
2. Australia
3. England
4. All countries within the Commonwealth

**Question 1.18**

Choose the **correct** statement:

In general, a foreign money judgment will not be recognised and enforced in the Cayman Islands as a debt against the judgment debtor if:

1. The judgment is subject to an appeal.
2. The judgment was obtained in a court of law which had jurisdiction over the judgment debtor, but the judgment debtor elected not to participate.
3. The judgment was in respect of taxes, fines or penalties.
4. All of the above.

**Question 1.19**

Choose the **correct** statement:

In a personal bankruptcy, which of the following actions does not amount to an “act of bankruptcy”?

(a)  That the debtor has, in the Islands or elsewhere, made any conveyance or transfer of his property or any part thereof, or created any charge thereon, which would under any law relating to bankruptcy, be void as a fraudulent preference if he were adjudged bankrupt.

(b)  That the debtor has presented a bankruptcy petition against himself.

(c)  That the debtor has, in the Islands or elsewhere, made a fraudulent conveyance, gift, delivery or transfer of his property or any part thereof.

(d) That execution issued outside the Islands against the debtor on any legal process for the obtaining payment of any sum of money has been levied by seizure and sale of his goods or enforced by delivery of his goods.

**Question 1.20**

Choose the **correct** statement:

In a personal bankruptcy, which of the following debts is not a preferential debt, payable in priority to other debts, and ranking equally between themselves?

(a)  Wages of any workman in respect of services rendered to the debtor during four months next preceding the date of the provisional order.

(b) Rental payments due to the debtor’s landlord at the date of the provisional order.

(c)  Salary of any servant in respect of services rendered to the debtor during four months next preceding the date of the provisional order, not exceeding one hundred dollars.

(d)  Public taxes imposed by law due from the debtor at the date of the provisional order not exceeding in the whole one year’s taxes.

**\*\* END OF QUESTION 1 \*\***

**QUESTION 2 FOLLOWS ON THE NEXT PAGE / . . .**

**QUESTION 2 – LIQUIDATION**

**Where appropriate, refer to the fact pattern below when answering the questions that follow. Please note that not all questions relate to the fact pattern.**

Seven Mile Master Fund (the Master Fund) is a Cayman Islands incorporated hedge fund. Its capital was raised through investments by two feeder funds, Seven Mile Feeder Fund (also incorporated in the Cayman Islands) (the Cayman Feeder) and Seven Mile (US) Feeder Fund (incorporated in Delaware, USA) (the US Feeder).

On 1 October 2023, the US Feeder received several redemption requests from its investors. As 100% of the US Feeder’s assets were invested into the Master Fund, a corresponding redemption request was made by the US Feeder to the Master Fund to allow the US Feeder to pay its own investor redemptions. It can be assumed that all redemption requests were properly made and effected in accordance with the companies’ governing documents.

Contrary to the Master Fund’s investment objectives, it had invested most of its capital into a real estate project in Panama, which is not expected to generate any returns until at least 1 January 2025. Unable to satisfy the redemption claim in full as it fell due, the Master Fund’s directors (two based in Panama and a non-executive Cayman Islands resident director) recommended that the Master Fund be placed into voluntary liquidation. A resolution to this effect was passed by the Master Fund’s shareholder on 22 October 2023 and a voluntary liquidator was appointed on the same day. Despite requests from the voluntary liquidator, none of the Master Fund’s directors are willing to provide a Declaration of Solvency.

During the liquidator’s enquiries, it has been established that the Master Fund transferred US$ 900,000 into a bank account held in the name of one of the Panama based directors on 5 October 2023. This account is held with Trusted Bank Corp in the USA. The Master Fund’s directors based in Panama are no longer responding to the voluntary liquidator’s requests for information and the Cayman Islands resident director claims he has access to very few of the Master Fund’s records.

The liquidator has been in office for 18 days and is considering next steps as regards the liquidation strategy.

**Question 2.1**

The investors in the US Feeder wish to consider appointing a US-based practitioner as either a Joint Voluntary Liquidator or Joint Official Liquidator of the Master Fund and the Cayman Feeder.

Draft a memo to the investors of the US Feeder, outlining:

* who can act as a Voluntary Liquidator of the Master Fund / the Cayman Feeder; and
* who can act as a Joint Official Liquidator of the Master Fund / the Cayman Feeder. **(4)**

The Master Fund and Cayman Feeder are incorporated in the Cayman Islands. Presuming that they are both limited companies:

* One or more voluntary liquidators must be appointed for the purposes of winding up the companies’ affairs and distributing their assets pursuant to section 119 of the Companies Act (2023 Revision) (“CA”). Pursuant to section 119 (2)(a) of the CA, persons designated as liquidators in the companies’ memoranda or articles of association will become such liquidators automatically from the commencement of the winding up. If no such person is designated or is unwilling or unable to act, the directors shall convene a general meeting for the purpose of appointing a liquidator. There are no qualification requirements to be appointed as a voluntary liquidator of a Cayman Islands incorporated company. Pursuant to section 120 of the CA, any person can act as a voluntary liquidator, including a director or officer of the company.
* Pursuant to Regulation 4 of the Insolvency Practitioner’s Regulations 2018 (as amended) (IPR), an official liquidator must be a “qualified insolvency practitioner” or possess such other qualifications as the Court considers appropriate for the winding up of a company. A person is a “qualified insolvency practitioner” if they are:
1. Licensed to act as an insolvency practitioner in England and Wales, Scotland, Northern Ireland, the Republic of Ireland, Canada, Australia or New Zealand; or
2. Qualified as a professional accountant by an approved institute (as determined by the Cayman Islands Society of Professional Accountants), is in good standing with such institute, has a minimum of 5 years’ relevant experience, and is credited with not less than 2,500 chargeable hours of relevant work.

The insolvency practitioner must also:

1. Be resident in the Cayman Islands and hold (either personally or through a business entity) a trade and business licence authorising him to carry on business as a professional IP;
2. Be independent (within the meaning of regulation 6(2), part 2 of the IPR); and
3. Hold professional indemnity insurance of at least US$10m in respect of each and every claim and US$20m in the aggregate with a deductible of not more than US$1m in respect of the negligent or non-performance of their duties.

A foreign practitioner qualified to act as an IP may be appointed in addition to a “qualified insolvency practitioner” as long as they meet the independence and insurance requirements.

 **Question 2.2**

The Master Fund proceeds into official liquidation, following a successful Court Supervision application. Given the Panamanian real estate project isn’t expected to generate any liquidity for at least 12 months, the respective estates of the Master Fund, Cayman Feeder and US Feeder are currently impecunious and devoid of liquid assets. At the first meeting of stakeholders of the Master Fund convened pursuant to Order 8 of the Company Winding Up Rules, a liquidation committee (LC) was formed comprising of five (5) members. The LC have heard that litigation funding, conditional fee arrangements and contingency fee agreements are all now permissible in the Cayman Islands. The LC are keen for the Liquidators to consider claims against, *inter alia*,the investment manager, Panamanian directors and Trusted Bank Corp, but are aware external funding will likely be required in order to instigate any investigations / claims.

Draft a memo to the liquidation committee outlining the following:

* The types of litigation funding arrangements permitted in Cayman;
* What a conditional fee arrangement is as opposed to a contingency fee agreement;
* What the maximum success fees are permitted under a conditional fee arrangement;
* What the maximum percentage of recoveries are permitted under a contingency fee agreement; and
* What practical information you think a potential litigation funder will need in order to consider whether or not they will provide funding to the estate. **(5)**

Pursuant to the Private Funding of Legal Services Act 2020 (PFLSA), the following litigation funding arrangements are permitted in the Cayman Islands:

1. **Third Party Funding Agreements –** a contractual agreement with a third party funder (normally a stakeholder or commercial funder) who agrees to fund the litigation subject to the agreed terms.
2. **Conditional Fee Agreements –** payment to the lawyer is conditional on success of the claim, they will be paid an hourly rate plus a success fee if the claim succeeds and nothing if it doesn’t succeed. Pursuant to section 4 PFLSA, the maximum success fee permitted cannot exceed 100% of normal hourly rates.
3. **Contingency Fee Agreements (**permitted pursuant to s3 PFLSA) **–** payment to the lawyer is on the basis of a percentage of recoveries if the claim succeeds and nothing if it doesn’t succeed. Pursuant to Regulation 8 of the Private Funding of Legal Services Regulations 2021, the maximum percentage must not exceed 33.3% of the total amount awarded or value of property recovered. This can be increased to 40% by application to the Cayman Islands Courts.

A litigation funder is likely to require:

1. A case summary with counsel’s opinion on the prospects of success of each of the relevant actions;
2. Costs estimate for the actions and details of the terms of retainer with lawyers and senior counsel;
3. Any potential milestones for settlement of the relevant actions; and
4. The likely quantum of recoveries and likelihood of recoverability as against the opponents taking into account their solvency and available assets, especially the Panamanian directors and investment manager.

**Question 2.3**

The voluntary liquidator of the Master Fund is considering whether to take legal action against the Panama-based director who received US$900,000 into their bank account, including to obtain a freezing injunction. Assuming that the action is brought in the Cayman Islands (and that appropriate jurisdiction is established), provide advice to the voluntary liquidator on whether a receiver in aid of the freezing injunction should be sought at the same time, including reference to any additional evidence that may be necessary. **(5)**

An application to appoint a receiver in support of the mandatory powers of the freezing injunction can be made to allow receivers to take possession of and preserve the US$900,000 in the US Bank Account. The Court has previously held that it will only be appropriate to appoint a receiver in circumstances in which an injunction is insufficient on its own and in cases where there is a measurable risk that, if a receiver is not appointed, a defendant will act in breach of the injunction or otherwise seek to ensure that his assets will not be available to satisfy any judgment which may in due course be made against him (*see JSC BTA Bank v Ablyazov (No.3) [2010] EWCA Civ 1141.*)

We would require further information on any further assets of the Panamanian director which the liquidators may be seeking to preserve and whether any of those assets are held in a transparent manner, if held transparently a receivership order may well not be necessary. Assuming that the action is solely in connection with recovery of the US$900,000, it is held in a bank account in the director’s name, any application for a freezing injunction would also be issued against Trusted Bank Corp in the USA seeking an interim order to prohibit the Bank from acting on the instruction of the Panamanian director to remove the assets from the bank account pending final order. There is no reason to believe on current instructions that Trusted Bank Corp would act otherwise than in accordance with the Mareva injunction such that it would be insufficient on its own. If it did so, the liquidators would have a potential cause of action against it for recovery of the US$900,000.

**Question 2.4**

The Master Fund has proceeded into Official Liquidation, following a supervision application by its joint voluntary liquidators (JVLs).

Gamboa Leverage LLC (“Gamboa”) has written to you in your capacity as one of the JOLs, providing details of its alleged fixed charge security over the Panamanian real estate project. Gamboa are claiming they are owed US$ 5m in respect of leverage provided to the Master Fund to assist with completion of the real estate project, in return the Master Fund granted a fixed charge. The monies and security were provided by Gamboa on 1 July 2023. You have recovered as part of your investigations to date a valuation report which provides the “as is” value in the region of US$ 3m and a “completed project” value of US$ 20m. The governing law of the security contract is the Cayman Islands. For the purposes of this question, assume that the fixed charge is valid.

Draft an internal file note outlining the options available to Gamboa, where it will rank in order of priorities within the liquidation in respect of their secured creditor claim, what would happen to any shortfall or surplus upon a sale of the real estate project and whether Gamboa can appoint a Receiver if they so wished. **(5)**

As the real estate project assets are subject to a valid fixed charge in favour of Gamboa, it ranks in priority to all other creditors and the relevant assets do not form part of the liquidation estate and cannot be dealt with by the JOLs without the express consent of Gamboa. Gamboa can:

1. proceed to enforce its security in accordance with the terms of the security contract without reference to the JOLs (section 142(1) CA) and without the leave of the Grand Court. Depending on the type of security taken in respect of the assets and the terms of the security, Gamboa could take possession of the property or seek to appoint a privately appointed receiver over the property pursuant to the terms of the security. The powers of any receiver appointed pursuant to the charge would be as provided for within the charge;
2. apply to appoint a Court appointed receiver, subject to meeting the conditions contained within s 72 of the Land Act and subject to enforcement considerations in Panama;
3. elect to permit the JOLs to sell the property on its behalf, in such circumstances the JOLs costs in the care, preservation and realization of the property will be recoverable in priority to the payment to Gamboa. Subject to appraisal of the costs and timescales involved, the consent of Gamboa and to the sanction of the Court, the JOLs could seek to complete the Panamanian real estate project to maximise value in and likely recoveries from the liquidation estate for the benefit of all creditors. It appears that this would potentially result in a return of an additional US$17m to the liquidation estate for the benefit of creditors and given the Gamboa monies were purportedly advanced to complete the project, may not result in the JOLs incurring significant further funds in doing so, however, this would need to be explored.

In any event, Gamboa would continue to rank ahead of all other creditors, and any surplus in the amount recovered from the real estate project could be used for the benefit of the liquidation estate once Gamboa’s debt and security has been discharged. If the assets were sold at a shortfall of US$2m, Gamoba can claim any shortfall on the amount of its security as an unsecured creditor in the liquidation and will need to submit a proof of debt which should state particulars of the security and the value placed on the security. It will rank for the unsecured portion of its debt pari passu with other unsecured creditors.

**Question 2.5**

Gamboa has elected to enforce its security rights by way of the appointment of a fixed charge receiver over the real estate project. However, before Gamboa completes the process, a number of the investors of the Cayman Feeder provide you with credible evidence that the ultimate beneficial owners of Gamboa are the same two Panamanian directors of the Master Fund. The investors believe the purported security was a front and a mechanism to transfer ownership of the potentially valuable real estate project to the Panamanian directors for no consideration and away from the legitimate interests of investors. Upon a detailed review of the Master Funds bank statements obtained from Trusted Bank Corp you cannot locate the receipt of the purported US$5m supposedly loaned to the Master Fund by Gamboa.

What remedies / actions / investigations would you propose to take given this new evidence? **(max 6)**

Given the credible evidence that the ultimate beneficial owners of Gamboa are the same two Panamanian directors of the Master Fund, and the fact that the security was granted in July 2023, only 3 months prior to the company entering liquidation, this could give rise to:

1. A claim that the security is invalid pursuant to section 145 CA if the Court can be satisfied that it was made:
	1. at a time when the Master Fund was unable to pay its debts;
	2. with a view to giving such creditor a preference over the other creditors; and
	3. within the 6 months immediately preceding the commencement of the winding up.

Limb 2 would appear to be satisfied as pursuant to s145(2), as the security was provided to a related party of the Master Fund it will be deemed to have been made with a view to giving Gamboa a preference. As Gamboa is controlled by the two individuals who are directors and therefore exercise significant influence over the Master Fund in making financial and operating decisions they it is likely to be deemed a related party pursuant to s145(3). Limb 3 is satisfied as the security was entered into within the 6 months immediately preceding the commencement of the winding up on 22 October 2023.

1. Further and in the alternative, a claim pursuant to s146 CA that the security granted to Gamboa is voidable at the instance of the liquidator on the basis that it was made (i) with intent to defraud; and (ii) at an undervalue. Albeit this would not result in automatic invalidation of the security and a prerequisite is showing an intention to defraud.
2. Potential actions against the directors and/or Gamboa for fraud, breach of fiduciary duty and unjust enrichment for misappropriating the assets to defraud creditors in the face of insolvency.

Urgent proceedings should be commenced against the directors and Gamboa seeking injunctive relief to restrain Gamboa seeking to enforce the purported security by appointment of a fixed charge receiver and for a Mareva to preserve the fixed charge assets of the Master Fund and the directors assets, pending final determination of proceedings as referred to above. This could be accompanied by an application to appoint a receiver to aid in a freezing injunction. Given its previous actions, there there appears to be a measurable risk that, if a receiver is not appointed, Gamoa will act in breach of the injunction or otherwise seek to ensure that the fixed charge assets will not be available to satisfy any judgment which may in due course be made against it.

Investigations should urgently be carried out into the two Panamanian directors of the Master fund, Gamboa and the circumstances surrounding the purported loan and security. Compilation of evidence should be urgently gathered from the Company’s books, records and accounts. Pursuant to sections 101 and 103 of the CA, the JOLs could also apply to the Court for statements of affairs or an order for delivery up of documents/answers to interrogatories or for oral examination of any relevant persons in aid of obtaining information on the parties generally and to support its claims:

1. as to the Master Fund’s financial position as at 1 July 2023 to ascertain whether it can be proven that it was unable to pay its debts at the relevant time. The relevant test for insolvency is that set out in section 93 CA, on a cash flow basis.
2. an intention to defraud.

**Question 2.6**

As soon as the company’s affairs are fully wound up, the liquidator is required to make a report and an account of the winding up. Summarise the form and content of the report. **(5)**

Pursuant to CWR Order 22 Rule 1, as soon as the affairs of the Master Fund have been completely wound up the JOLs shall:

1. publish the JOLs final report and accounts in accordance with Order 10, Rule 3; and
2. apply to the Court for an order under section 152 that the Master Fund be dissolved.

Pursuant to Order 22 Rule 1 (2) the final report shall contain:

1. Notice of the date upon which their application for an order for dissolution will be heard by the Court; and
2. A statement of the fact that any creditor may appear and be heard on the application.

Pursuant to Order 10 Rule 2 every liquidators report shall contain a description and analysis of:

1. the steps taken in the liquidation generally;
2. a discrete matter which, in the opinion of the JOLs is or ought to be of particular concern to the Master Fund’s creditors and/or contributories;
3. a discrete matter which by its nature ought to be kept confidential.

It shall report on:

1. any matters upon which the JOLs are asked to report by the liquidation committee;
2. any matters on which the JOLs are asked to report by the Court;
3. any matters on which the JOLs seek the direction of the Court;

The report shall provide information necessary to provide the Master Funds creditors with the information necessary to enable them to make an informed decision on the Master Fund’s financial position and prospects of recovery (CWR O. 22 r. 1(3))

**Question 2.7**

Set out the form and content of an application for a supervision order. **(8)**

An application for a supervision order must be made by the company’s voluntary liquidator in accordance with section 124 CA which must contain a statement that the voluntary liquidator did not receive, within 28 days of the commencement of the liquidation, a declaration of solvency in the prescribed for signed by all of the company’s directors.

Pursuant to CWR Order 15 Rule 2 (2) and (3) the application shall be made by petition and shall contain:

1. particulars of the company’s incorporation;
2. particulars of the method by which the company was put into voluntary liquidation;
3. particulars of the persons who are or were directors of the company on the date on which its voluntary liquidation commenced;
4. a statement that the voluntary liquidator did not receive within 28 days of the commencement of the liquidation, a declaration of solvency in the prescribed form signed by all of the company’s directors;
5. if the voluntary liquidator is a qualified insolvency practitioner, a statement that the voluntary liquidator consents to being appointed as official liquidator; or
6. if the voluntary liquidator is not a qualified insolvency practitioner or is unable to comply with the independence requirements of the IPR or is unwilling to be appointed as official liquidator, the name and address of a qualified insolvency practitioner nominated for appointment as official liquidator.

Every petition must be presented within 35 days of the date upon which the liquidation is deemed to have commenced.

Unless the voluntary liquidator is a qualified insolvency practitioner who is willing and properly able to accept the appointment as official liquidator, the voluntary liquidator must give notice of the petition to the company’s members by whatever means is provided in its articles of association for giving notice of a general meeting of the company.

**Question 2.8**

Following the commencement of the voluntary liquidation, the Cayman Feeder submits a redemption request to the Master Fund for the entirety of its investment in the Cayman Feeder. Assuming that the redemption was made in accordance with the Master Fund’s governing documents, how will the Cayman Feeder’s redemption request be treated in terms of the priority? It should be assumed that the voluntary liquidators applied to the court for the liquidation to continue under the supervision of the court pursuant to section 124(1) of the Companies Act. **(5)**

In order for redemption proceeds to be classed as a provable debt the redemption must be complete as prescribed by the Master Fund’s governing documents prior to the commencement of the liquidation. As the redemption request was received after the commencement of the liquidation of the Master Fund, it amounts to an accrued right on behalf of the Cayman Feeder to redeem its shares which will rank behind the claims of ordinary unsecured creditors. Such a claim falls to be considered pursuant to section 37 (7) CA which deals with shareholder claims.

The Privy Council decision of *Michael Pearson (as additional liquidator of Herald Fund SPC (in official liquidation) v Primeo Fund (in official liquidation) [2017] UKPC 19* confirmed that unpaid redemption proceeds which were completed prior to the commencement of the liquidation in accordance with the company’s governing documents are provable debts in a liquidation under s139 CA. The law in respect of the priorities between the two types of claim is not settled it is however clear that both rank behind ordinary unsecured creditors. In obiter dictum the Privy Council considered that completed redemption claims would rank in priority to or pari passu with shareholder claims.

**Question 2.9**

Following the introduction of the restructuring regime by the Companies (Amendment) Act 2022, on what basis (if any) can a company still seek the appointment of provisional liquidators? **(2)**

Pursuant to s104(2) CA an application for the appointment of a provisional liquidator may be made on the grounds that:

1. there is prima facie case for making a winding up order; and
2. the appointment is necessary in order to (i) prevent the dissipation or misuse of the company’s assets; (ii) prevent the oppression of minority shareholders; or (iii) prevent mismanagement or misconduct on the part of the company’s directors.

Pursuant to section 104 (3) of the CA a company may make an application for the appointment of provisional liquidators under section 104(1) of the CA and on such application the Grand Court may appoint a provisional liquidator if it considers it appropriate to do so.

**\*\* END OF QUESTION 2 \*\***

**QUESTION 3 FOLLOWS ON THE NEXT PAGE / . . .**

**QUESTION 3 – CORPORATE RESCUE**

**Where appropriate, refer to the fact pattern below when answering the questions that follow.**

Maritime Sea Ventures Ltd (the Company), incorporated in the Cayman Islands, is the parent entity of a group which is engaged in international maritime transportation. Through its subsidiaries, it owns and operates a fleet of cargo ships in Singapore. With government support during the COVID-19 pandemic, it was able to remain financially stable, however a general decline in global shipping demand, soaring inflation and higher operating costs has caused the Company to default on several of its secured and unsecured loans.

The Company is on the verge of insolvency and its directors are considering the corporate rescue options available to it. One of the Company’s creditors, BlueWave Financial, has threatened to issue a statutory demand, adding to the mounting pressure the directors are experiencing, including the potential liability they may face if they continue to conduct business whilst the Company is unable to meet its liabilities.

The Company’s management has initiated discussions with potential investors interested in injecting new capital into the Company, however the negotiations are ongoing and have not yet reached any conclusion. BlueWave Financial, a steadfast unsecured creditor, has indicated it will not be satisfied unless it receives full repayment of its debt, together with contractual interest.

**Question 3.1**

Considering the fact that Maritime Sea Ventures (MSV) is on the verge on insolvency, broadly evaluate the restructuring options that are presently available to the company. **(3)**

MSV should speak to an insolvency practitioner for advice as soon as possible to discuss potential restructuring options.

1. MSV could seek an informal workout with its creditors in respect of the liabilities on which it has defaulted by entering into payment plans or seeking to restructure its debts, beginning with BlueWave Financial on the basis that it agrees not to proceed to issue a statutory demand. It would be prudent to enter into standstill agreements to obviate the risk of enforcement action from creditors if it proceeds on this basis but the directors will need to be cognizant of their duties and not continuing to trade whilst insolvent.
2. MSV could file a petition to have a restructuring officer appointed pursuant to 91B(1) CA on the grounds that it is likely to become unable to pay its debts and intends to present a compromise or arrangement with its creditors. It must have credible evidence of a restructuring proposal with reasonable prospects of success (see *Oriente Group Limited [FSD 231 of 2022*]). Section 91L CA allows a scheme of arrangement within a restructuring officer regime.
3. MSV could propose a scheme of arrangement to its creditors pursuant to section 86 CA outside of the restructuring officer regime, this could be done if there is a low risk of creditor enforcement and if there is no significant English law governed debt and therefore no need to attempt to overcome the “rule in gibbs”.

**Question 3.2**

When does the statutory moratorium accompanying a restructuring petition come into effect and what is its effect? **(3)**

Pursuant to 91G CA, the moratorium takes effect as soon as a restructuring petition is presented pursuant to 91B. The effect of the moratorium is that no suit, action of other proceedings, other than criminal proceedings, shall be proceeded with or commenced against the company, no resolution passed for the company to be wound up and no winding up petition presented against the company, without the leave of the Court and subject to such terms as the Court may impose. This allows the company some breathing space to seek approval of a restructuring proposal by its creditors.

**Question 3.3**

Once appointed, when must the restructuring officers (ROs) file their first report to the Court, and what should this report contain? **(4)**

Once appointed, the restructuring officers must report to the Court and every creditor and contributory within 28 days of their appointment (CWR O1.A, r.8). This is to protect stakeholders against prolonged and expensive restructuring attempts which may prove unsuccessful. The report must include details of:

1. The steps taken in the restructuring and the further steps intended to be taken in the restructuring generally;
2. The financial position of the company at the latest practicable date;
3. The work done by or on behalf of the restructuring officer and the amount of remuneration claimed by that restructuring officer;
4. Such other information which is required in order to provide the contributories and creditors with a proper understanding of the company’s affairs, financial position and proposed restructuring; and
5. Such other matters as the Court may direct.

**Question 3.4**

What is the “appropriate comparator” for creditor schemes (the fundamental test for the scheme being viable), and how is it applied? **(4)**

Class composition is a common dispute in case law surrounding contested schemes of arrangement. The decision as to whether it is appropriate for creditors or members of the company to vote together as a group or whether they need to be split into different classes is therefore highly significant and will determine whether the scheme is likely to be approved. If a group of dissenting creditors or members can successfully claim that they should be in a class of their own this will mean the scheme will not be approved as each class much vote in favour for the scheme to be sanctioned by the Court.

The Cayman Islands law on class composition in a scheme of arrangement derives from the case of re *Euro Bank Corp, 2003 CILR 205* which applies the law as stated by Chadwick LJ in the English Court of Appeal case of *re Hawk Insurance Company Limited [2001] EWCA Civ 241* (citing Sovereign Life Assurance Co (in liquidation) v Dodd [1892] 2 QB 573). A class must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest, having regard to what is surrendered and obtained pursuant to the proposed scheme, when measured against liquidation. This is referred to as the “appropriate comparator” and is codified in Practice Direction 2 of 2010 para 3.2. Normally the company will try to obtain agreement with the stakeholders in each class once class composition has been determined to ascertain whether the scheme is likely to come into effect (subject to Court sanction).

**Question 3.5**

What information must be provided to shareholders / creditors in advance of the vote on a scheme? What is the minimum period between the dispatch of scheme documents and the extraordinary general meeting (EGM) and why? **(max 6)**

The shareholders or creditors should be sent:

1. the scheme documentation which will set out the proposed claims for the purpose of the scheme and the reasons the company considers such classes to be appropriate and will usually include a brief summary of the rights creditors or members have prior to the effectiveness of the scheme and an analysis of how those rights will be impacted by the scheme. This will allow them to make an informed decision about the merits of the proposed scheme.
2. Any supplementary documents to which the scheme documentation refers;
3. Proxy forms;
4. Voting instructions for use by custodians;
5. A timetable of principal events including the latest time for transmission to custodians or clearing houses of voting instructions for the Court meeting, the latest time for lodging forms of proxy for the Court meeting, the date of the Court meeting and the date of the hearing of the petition to sanction the scheme and the anticipated date upon which the scheme, if sanctioned, will become effective.

The applicant must satisfy the Court that the scheme documentation will provide the shareholder or creditor (which means the person having the ultimate economic interest) with all the information reasonably necessary to enable them to make an informed decision about the merits of the proposed scheme (Practice Direction 2/2010 para 3.7). If the proposed scheme relates to shares or debt instruments which are listed on a stock exchange, the applicant must file evidence which sets out the relevant listing rules and practice and explains the steps which have been or will be taken to comply with such listing rules or practice. The Court will always require to know whether the proposed explanatory memorandum or proxy statement requires the approval of the relevant stock exchange and, if so, whether such approval has been obtained. (Practice Direction 2/2010 para 3.9)

The current practice of the Court is to allow 21 to 28 days between dispatch of the Scheme documents and the Scheme Meeting so that sufficient time is given to allow the members or creditors to consider them to allow them to make an informed decision before the scheme meeting at which the vote on the scheme will occur (Practice direction 2/2010 para 3.6).

**\*\* END OF QUESTION 3 \*\***

**QUESTION 4 FOLLOWS ON THE NEXT PAGE / . . .**

**QUESTION 4 – GENERAL QUESTIONS**

**The questions below deal with secured parties and receivership, exempted limited partnerships (ELP’s) and consumer insolvency**

**Question 4.1**

The receivership regime for segregated portfolios lacks key protections for stakeholders that would otherwise exist in a company liquidation. Indicate whether you agree or disagree with this statement, and explain why. **(5)**

I agree that the key protection available to shareholders of a company do not exist for members of a segregated portfolio for the following reasons:

1. Members who have been unfairly prejudiced cannot issue a petition on just and equitable grounds. Whilst the Segregated Portfolio Company itself may be wound up in accordance with the winding up process in the CA a bespoke statutory receivership regime (found at section 224 to 228 CA) applies to individual SPs. Whilst the procedure is similar to the winding up procedure for companies, the applicant seeking a receivership order can only rely on insolvency and must show that the business of the SP as a whole should be brought to an end. This leaves members of a SP without a remedy for unfair prejudice. The only potential remedy would be to seek to wind up the entire SPC which would not prove successful (*see ABC Company (SPC) v J & Co. Ltd*).
2. The test for insolvency is a modified balance sheet insolvency test rather than a cash flow test in the case of a liquidation and it may be difficult for members of an SP to have sufficient information to support a balance sheet insolvency test. This does lead to the flexible nature of the test.
3. There is no comprehensive statutory remuneration regime for receivers, however, it is likely that the Court will have reference to the guidance in the IPR (*see Lea Lily Perry v Lopag Trust Reg (Grand Court 20 April 2020, unreported*), para 23©.
4. There is no requirement to a receiver to apply to the Court for sanction for certain actions as there is in the case of a liquidation and the receiver has broad powers pursuant to section 226 (1) CA. The receiver is however permitted to apply to the Grand Court for directions as to the extent or exercise of any power.

**Question 4.2**

What laws govern the liquidation and dissolution of exempted limited partnerships (ELPs) and what prevails in the event of a conflict? **(3)**

The principal statutes governing the formation and operation of the Cayman Islands ELPs are the Partnership Act (2013 Revision) and the Exempted Limtied Partnership Act (2021 Revision) (ELP Act). The ELP Act expressly provides that the principles of common law and equity applicable to partnerships will apply to an ELP. Part V of the Companies Act and the CWR apply, with modifications, to the court ordered winding up and dissolution of ELPs, and to a limited extent to a voluntary winding up. Where there is a conflict, the ELP Act will take priority over the CA (ELP Act s 36(3)).

**Question 4.3**

In the event that an automatic wind up date is triggered by the death or removal of the general partner (GP), the exempted limited partnership (ELP) will be wound up 90 days after notice is given to limited partners. What, if anything, can limited partners do to prevent the winding up? **(3)**

Pursuant to Section 36 (9) of the ELP Act, unless the partnership agreement provides otherwise, if a new qualifying general partner is not elected within 90 days after the service of notice of an event of withdrawal the ELP shall be wound up in accordance with the partnership agreement or the orders or directions of the Court. The requisite majority of limited partners (as per the ELP Agreement or a simple majority) could therefore appoint a new qualifying general partner within 90 days to prevent the winding up. They could also have incorporated provisions into the ELP Agreement which provides that the ELP will not be wound up in accordance with section 36 (9) ELP Act.

**Question 4.4**

When may a consumer debtor be discharged, and what is the effect of a discharge? **(4)**

Following the public examination of the debtor the Trustee will make a report as to the state of the debtor’s affairs and the conduct of the debtor before and during the bankruptcy (s67 Bankruptcy Act (Cap 7) (1997 Revision) (BA)). After filing of the Trustee’s report the debtor may apply at any time for an order for discharge pursuant to s 68(1) BA. The Trustee or any creditor may oppose the discharge and may show cause why it should be refused, postponed or made subject to conditions.

The Court may grant the discharge unconditionally or conditionally or it may suspend or refuse the discharge, taking into account the report of the Trustee. Discharge will be refused if the debtor is convicted of an offence under the BA or any other offence connected with his bankruptcy, unless for special reasons the judge otherwise determines. The discharge, if made, releases the debtor from their debts (subject to conditions set out by the Court and subject to the caveat that it must not release a bankrupt from any liability incurred by means of fraud) (s71 BA).

 **TOTAL MARKS: [100]**

**\*\*\* END OF ASSESSMENT \*\*\***