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**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**](mailto: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**](mailto:david.burdette@insol.org) or by WhatsApp on +44 7545 773890 or to Brenda Bennett at [**brenda.bennett@insol.org**](mailto: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)**

MEMORANDUM

To: US Feeder Investors

From: Advisor

Date: 9 November 2023

RE: Seven Mile Master Fund (In Liquidation) / Master Fund

You have advised me that you are investors in Seven Mile (US) Feeder Fund (the US Feeder) which is incorporated in Delaware, USA. US Feeder has in turn invested all its funds in Seven Mile Master Fund (the Master Fund or the Cayman Feeder), a Cayman Islands incorporated hedge fund which is now in voluntary liquidation. You have requested my advice on the following two (2) matters:

1. who can act as a Voluntary Liquidator of the Master Fund / the Cayman Feeder; and
2. who can act as a Joint Official Liquidator of the Master Fund / the Cayman Feeder

**Qualifications to act as a Voluntary Liquidator**

In accordance with Section 120 of the Companies Act of the Cayman Islands, there are no statutorily prescribed qualifications for a person who may act as the Voluntary Liquidator of a Cayman Islands incorporated company. It therefore means that anyone, including a director of the company could perform such a role. A foreign practitioner may also serve as a voluntary liquidator or joint voluntary liquidator.

**Qualification to act as a Joint Official Liquidator**

In contrast with the office of a Voluntary Liquidator, it is mandatory for an Official Liquidator to be a *“qualified insolvency practitioner”.* Such a person must meet the requirements of the Insolvency Rules Committee or otherwise be deemed by the Court to possess appropriate qualifications for the winding-up of a company.

The Insolvency Practitioners Regulations (IPR), reg 4. Pt 2 stipulates that the following persons are deemed as qualified insolvency practitioners:

1. persons who are licensed insolvency practitioners (IPs) in England and Wales, Scotland, Northern Ireland, The Republic of Ireland, Australia, New Zealand, or Canada; or
2. persons who are qualified professional accountants with membership with the Cayman Islands Society of Accountants (CISA) or another institute approved by CISA. Such persons must be in good standing with CISA and/or their institute, with not less than five years’ relevant experience and 2,500 chargeable hours of relevant work.

The IPR also imposes further requirements to be appointed by the Court as an Official Liquidator, including:

1. Cayman Islands residency and licenses individually or through your firm to carry on business as a professional insolvency practitioner.
2. Being independent of the entity as mandated by regulation 6(2), part 2 of the IPR.
3. Possession of professional indemnity insurance (PII) of “*up to a limit of at least US$10 million in respect of each and every claim and at least US$20 million in the aggregate, with a deductible of not more than US$100,000*”

In certain cases, it may be necessary to appoint Joint Official Liquidators. Persons who meet the foregoing criteria may be appointed as Joint Official Liquidators. It is permissible for a foreign practitioner, who does not meet the residency requirement, to be appointed as a Joint Official Liquidator. Such persons must however meet the independence and PII 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)**

MEMORANDUM

To: Liquidation Committee - Seven Mile Master Fund (In Liquidation)

From: Advisor

Date: 9 November 2023

RE: External Liquidation Funding

Liquidation Funding

In the Cayman Islands, the Private Funding of Legal Services Act 2020 (PFLSA) recognises three (3)

types of funding arrangements as follows:

I. Third-party funding agreements – where a third-party contracts to fund all or part of the client’s legal costs for an agreed compensation.

II. Conditional fee agreements – These are “no win, no fee” arrangements wherein a base hourly rate which is less than the attorney’s standard rate is (initially) paid to the attorney and should the cased be won, it would trigger a “success fee”. Where the case is lost, no additional fee would be payable.

III. Contingency fee agreements – The are usually “damages-based” agreements where an agreed percentage of the damages awarded is paid to the attorney as fees

Maximum Success Fees and Contingency Fees

The maximum success fee permitted under the PFLSA is an amount equivalent to 100% of the standard charge out of the attorney.

The PFLSA Regulations caps the contingency fees to 33.3% of the damages awarded. However, in appropriate circumstances an application may be made the courts to increase this to 40%.

Conditional Fee Arrangement versus Contingency Fee Arrangement

Typically, in a strict contingency agreement the attorney would earn no fees where the case is lost as there is no damages on which to calculate such fees. This is in contrast to the conditional fee arrangement where the attorney would still have earned their fees at the agreed based rate.

On the flip side, while the maximum success fees payable under a conditional fee agreement is 100% of the normal hourly rate, subject to the 33.3% (40%) cap on the damages, it is quite permissible for the attorney to earn more than the equivalent of their fees based on their standard hourly rate. In essence while the number of hours is relevant in a conditional fee agreement, it is of no moment in the contingency fee agreements as it is not factored in the determination of the compensation for the attorney.

Consideration for Litigation Funder

It must be noted that the PFLSA required that conditional agreements and contingency agreements must be in writing and executed by the client. The agreement must have appropriate provisions for a cooling-off period, and deal with the impact on costs.

While Third-party funding arrangements are also expected to be in writing, there are no prescribed parameters for fee and its it left up to the stakeholders and the commercial funders to agree on the arrangements.

It should also be borne in mind that in cases where the agreement is to be executed by an official liquidator or others in a similar fiduciary capacity, the Court’s approval is required.

**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)**

Although the Master Fund is in voluntary liquidation, given that the directors have not indicated any willingness to sign a Declaration of Solvency, the voluntary liquidator would ultimately need to apply for a Supervising Order for the liquidation to continue.

It should be pointed our that even if the directors do file a Declaration of Solvency, the Voluntary Liquidator could still apply for a Supervising Order, particularly on the following grounds;

* Seven Mile Master Fund is insolvent using cash flow test and is unable to pay its debts;
* The Court’s supervision of this cross- border insolvency would facilitate “*a more effective, economic or expeditious liquidation of the company in the interest of the contributories and creditors*”[[1]](#footnote-2)

Once the liquidation is under the Supervision of the Court, the Voluntary Liquidation become an Official Liquidator and move to use the provision of Section 145 of the Companies Act to make the transaction with the Panamanian director voidable. Specifically, as this is a transaction with a related party it would be “***deemed to have been made with a view to giving such creditor a preference.”.*** No additional evidence would have to be put forward save the evidence of the timing of the funds transferred.

This would provide the support for an application for a Freezing Order against the Panamanian Director, and it would also make sense to petition for the appointment of a Receiver over the Panamanian director.

**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)**

FILE NOTE RE: Seven Mile Master Fund (In Official Liquidation)

The Cayman Island is a creditor friendly jurisdiction, by preserving the rights if secured creditors and treating local and foreign creditors equally. It should however be pointed out that foreign taxes, fines and penalties are not enforceable in the Cayman Islands. There are also certain preferential claims, particularly from employees and the CI governments that are given a statutory priority in the scheme (waterfall) of distribution.

Under Caymanian law, the applicable Scheme of Distribution is as follows:

1. Fixed charge creditors;
2. Preferred creditors;
3. Floating charge creditors, e.g. Debenture holders;
4. Winding-up expenses;
5. Ordinary unsecured creditors (who are not existing of former shareholders);
6. Non-provable debts;
7. Statutory interest on proved debt;
8. Subordinated creditors;
9. Statutory interest of subordinate debts; and
10. Shareholders.

Should the JOLs realise the property in its current condition for say the estimated market value of $3 million, that would not be sufficient to extinguish the $5 million indebtedness to Gamboa. Given that there would also be some fees and expenses that would have to be paid from the $3 million proceeds, there would be a deficit of in excess of $2 million.

This $2 million+ balance would now rank as an ordinary unsecured claim against Seven Mile Master Fund (In Liquidation).

If say it was possible to complete the real estate project (by January 2025) and this the property is sold for $20 million, assuming the liability to Gamboa remained at $5 million, then when it is sold the say $15 million “surplus” would flow to the liquidation estate of the Master Fund under the direction of the JOLs.

The appointment of Joint Official Liquidators does not impact on the right of a secured creditor like Gamboa, and they would therefore be well withing their rights to appoint a Receiver, in this case its would likely be a fixed charge receiver over the real estate in Panama.

It would be then Receiver who would have the option to sell the real estate in Panama. If the property is sold for the $3 as indicate above, there would be a deficit as regards the secured creditor, in which case there would be no funds available after the Receivers and distributed the fund in his custody. On other hand if the property were to be sold for the $20 million, the Receiver would have to account for the surplus and hand it over to the JOLs.

**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)**

In certain circumstances a Liquidator (and other interested parties) may wish to challenge pre-insolvency (antecedent) transactions. Sections 145 and 146 of the Companies Act provide 2 such possible grounds, namely Voidable Preference and Avoidance of Dispositions Made at an Undervalue.

Given the information available to the JOLs and our own preliminary assessment which does not support the position that valuable consideration was given for the security over the real estate in Panama and the allegations the Panamanian directors are connected with Gamboa, it would be necessary for us to conduct some investigations into the antecedence of the transaction.

At this junction the most critical step would be to challenge the validity of the security and ultimately the appointment of the Receiver. This could be done under Section 145 of the Companies Act which deals with Voidable Preference and in particular giving a charge to a related party would be *“deemed to have been made with a view to giving such a creditor a preference”.*

It would be relevant that the purported transaction, in July 2023, would have occurred withing the immediately preceding six months of the commencement of the liquidation, in October 2023.

The JOLs are vested with statutory investigative powers under Section 102 of the Companies Act, in particular the power to investigate the causes of failure of a company.

There also have powers to “*assist …the Royal Cayman Island Police Service to investigate the conduct of*”[[2]](#footnote-3) *“persons who are or have been directors or officers of the company[[3]](#footnote-4).*

The Gooch case is useful for this insightful comment by the judge, which forcefully established that as an officer of the Court a liquidator must *“make himself thoroughly acquainted wit the affairs of the company, and to suppress nothing, and to conceal nothing which has come to his knowledge in the course of his investigations, which is material to ascertain the exact truth in every case before the Court.”[[4]](#footnote-5)*

**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)**

The Form and Content of the Liquidators Report and Account is governed by Section 127 of the Companies Act and the Companies Winding Rules, Order 10, Rule 2 which in summary requires description and analysis of the following:

* Tasks undertaken and how the winding-up has been conducted, in particular how the company’s property has been disposes of
* Any peculiar or discreet matter that would be of the company’s creditors and/or contributories;
* Any discrete matter for which Court direction was sought or had required to be reported on;
* Any discrete matter that the Liquidation Committee has requested to be reported on;
* Any discrete matter which necessitates it be kept confidential.

As regards the Official Liquidator Final Report, he is specially expected to also include in this report:

1. Notice of the hearing date in Court for the Dissolution Order; and
2. Formal notification to creditors and or members, as applicable, of their entitlement to appear and be heard on the application.

**Question 2.7**

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

If a DOS is not filed withing the prescribed time (28 days of commencement), the Liquidator must make an application for it to be continued under the Supervision of the Court within 7 days thereafter; i.e. it must be filed within 35 days of the deemed commencement of the liquidation. In these circumstances a CWR Form 22 must be filed stating that a supervising petition has been presented to the Court in accordance with section 124 of the Companies Act.

The mandatory petition for the Supervising Order must state the following:

* The company’s incorporation details;
* The method by which the company entered voluntarily liquidation’;
* The directors on record as of the commencement of the liquidation;
* A statement that the directors did not submit to the voluntary liquidation a duly executed declaration of solvency in the prescribed form;
* A statement of consent to being appointed as the official liquidator, where the voluntary liquidator meets the requirements.
* The name and address of a proposed official liquidator where the voluntary liquidator in not qualified or is unwilling to act in that capacity or does not meet the independence requirement of IPR.

It must be noted that that were the voluntary liquidator is willing and qualifies to act as the official liquidator, the judge may dispense with the hearing if it is demonstrated that

1. Notice of the petition has been given to the creditors and members if it appears to the liquidator that the company may be solvent; and
2. There is no indication of objection from any creditor or shareholder (in applicable) to the voluntary liquidator transitioning to an official liquidator.

In the absence of the foregoing conditions, an hearing will have to be held in open court. It is incumbent of the Voluntary Liquidator to apply to fix a date, and

1. Notify the creditors and shareholders if applicable;
2. Advertise the hearing at least once in a nationally circulating newspaper and where applicable in a newspaper in another country where business is conducted and there are likely to be creditors.

Any creditor or member who wishes to be heard upon who should be appointed as official liquidator is required to give not less than three (3) days’ notice (before the hearing date) of such an intention. They would have to file and serve their supporting affidavit indicating their nominee for Official Liquidator.

**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)**

It may be presumed that Cayman Feeder would be an accredited investor in the Master Fund for which there was some speculative element. Therefore, the nature of the investment by the Cayman Feeder in the Master Funds would give rise to an equity (shareholders) claim and in the absence of any contrary information this claim would rank pari passu with the claim from US Feeder. Such claims are at the bottom of the distribution waterfall and would rank below the following as applicable in the liquidation of the Master Funds:

1. Fixed charge creditors;
2. Preferred creditors;
3. Floating charge creditors, e.g. Debenture holders;
4. Winding-up expenses;
5. Ordinary unsecured creditors (who are not existing of former shareholders);
6. Non-provable debts;
7. Statutory interest on proved debt;
8. Subordinated creditors;
9. Statutory interest of subordinate debts; and
10. Shareholders (Cayman Feeder and US Feeder).

**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)**

In accordance with Section 104 (2) of The Companies (Amendment) Act (2022 Revision), the

following are the prescribed grounds upon which creditors or contributories may petition the Court

for the appointment of a Provisional Liquidator:

a. There exists a credible prima-facie case to support a winding up order such that the Court would be satisfied that the Prima-Facie Hurdle has been met;

b. There is sufficient cause that necessitates (the Necessity Hurdle) the appointment of a provisional liquidator to in particular:

i. Prelude or minimise and risk of dissipation or misuse of the company’s assets;

ii. Preclude the oppression of minority shareholders; or

iii. Preclude the company’s directors from acts of misconduct or mismanagement before the affairs of the company can be investigated.

**\*\* 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)**

With the amendments to the Companies Act in August 2022, specifically section 91B(1), it is now permissible for a company in Maritime Sea Ventures Ltd to petition the Court to appoint a Restructuring Officer on the following ground:

i. It is or is likely to become unable to pay its debts. and

ii. It intends to present a compromise or arrangement to its creditors, i.e. the Restructuring Petition.

The Company could also utilise the provisions of Section 104(3) of the Companies Act to appoint a

Provisional Liquidator to propose a restructuring. To do so it must demonstrate to the Grand Court

that such an appointment is appropriate.

Section 86 of the Companies Act permits a company that is experiencing or is likely to experience

some financial distress that may preclude it from paying its debt and/or may require it to present a

compromise to its creditors and/or some financial restructuring with its members, to do so via a

Scheme of Arrangements (Scheme). The Scheme is a court approved compromise or arrangements,

which binds all creditors once all the classes of creditors have voted in favour with the requisite 75%

or more majority. It has a “cram-down” on dissenting creditors and/or members.

Importantly, there is some form of accommodation on both sides and it there is likely to be

dissenting creditors(s) which necessitate a mechanism to “cram-down” the terms of the Scheme on

all the affected creditors. A Scheme would not be necessary where there was already unanimous

agreement[[5]](#footnote-6).

There are two broad purposes for a Scheme of Arrangements, namely:

i. Preserving the life of the company through debt restructuring; or

ii. Adjusting the company’s ownership to facilitate its rehabilitation and the preservation of the business.

The circumstance facing the Company are such that its directors have good grounds

for either a Restructuring Officer or a Provisional Liquidator to propose a Scheme of Arrangement it

its creditors with inability to pay its debt and need to restructure in a situation where it is likely to

have a dissenting creditor in form of Blue Wave Financial. The situation would also lend itself to the

incorporation of a Member’s Scheme as well given the negotiations for new capital.

**Question 3.2**

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

A Cayman Island registered company may petition for the appointment of a Restructuring Officer which triggers an automatic stay of proceedings and offers the “breathing space” while the scheme process is in progress.

The stay commences immediately upon the issuance of the order appointing the Restructuring Officer. There can be no continuance of or new proceedings without leave of the Court.

**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)**

It is mandatory that within 28 days of their appointment, Restructuring Officers must report to the Court as this is a closely supervised court driven process. The report of ROs must address in a comprehensive manner:

1. The tasks and procedures undertaken in the restructuring this fare and what further tasks or procedures the RO intend to take to facilitate the restructuring;
2. The financial state of affairs or financial position of the company as at the latest practical date.
3. Pertinent information that would allow contributories and creditors (and if applicable the Authority (CIMA)) to assess for themselves the company’s affairs, financial position and proposed restructuring. For example, details of the company’s assets and liabilities and its operating results and prospects in the short to medium term.
4. The remuneration being claimed by the ROs and their team for the work done to date.
5. Any other matter that the Court has directed that the ROs report on.

These are the broadly the requirements contained in Companies Winding-Up Rules, Order 1A, Rule 8.

**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)**

That creditors would be better off than in the winding-up of the insolvent company is the “appropriate comparator” for a creditor scheme. Ultimately, the court would have to be satisfies that a reasonable person would agree to it as the payments and recovery under the scheme would be better than the estimated distribution to each class of creditors if the company was liquidated.

**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 most important documents that has to be provided to shareholders and/or creditors in advance of their vote on a scheme is the Scheme document which has been approved by the Court. The Court approved Scheme documents would confirm the composition of the classes of creditors and or members. It would also include all the pertinent information that the affected creditors and or members would require to make an informed decision on whether they should support or oppose the Scheme.

To facilitate the foregoing the company would have sought at least the following orders at a Convening Hearing on the Scheme:

1. That the class(es) of creditors and/or members of the are as proposed by the company or otherwise ordered by the Court;
2. That the company is permitted to convene a Scheme Meeting with the approved class(es) of creditors or members;
3. How the meeting is to be convened and conducted to facilitate the vote on the Scheme; and
4. The designated Chairman for the Scheme Meeting and requirement for that person to report to the Court the results of the vote on the Scheme.

By convention, the Court would normally allow between 21 and 28 days to elapse between the dispatch of the Scheme Document and the Scheme Meeting. It therefore follows that the minimum

period between the dispatch of the Scheme document and the extraordinary general meeting (EGM) is 21 days.

**\*\* 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)**

While some have postulated that *“the receivership regime for segregated portfolios lacks key protections for stakeholders that would otherwise exist in a company liquidation*”, I am of contrary view.

Whist there are some distinctions between the receivership regime for segregated portfolios and liquidation regime for companies, at the heart of both mechanism is the same outcome and the courts would have held that the function of the receiver of segregated portfolio is analogous to that of a liquidator of the entire company[[6]](#footnote-7)

Furthermore, the grounds upon which the Court will grant a Receivership Order for a segregated portfolio aligns with the grounds on which a winding-up order would be granted; namely:

1. The SPs are or are likely to be insufficient to discharge the claims of the SP’s creditors. While this is a balance test of solvency and not a cash-flow test as would be used with respect to a petition to wind-up a company, it is nonetheless clear evidence that the insolvency of the SP; and
2. The receivership of the SP facilitates the orderly closing down of the SPs business and the distribution of its assets to the relevant stakeholders. Likewise the liquidation of company facilitates and orderly process with a prescribed mechanism for the distribution to the stakeholders.

The receivership of SP ring-fences the assets for its specific stakeholders and none other, must the same was as the liquidation of company ring-fences the assets for the benefit of the stakeholders of the company in accordance with any security held and the ranking of creditors in accordance with the scheme of distribution that is prescribed by sections 140 and 141 of the Companies Act.

It must also be borne in mind that in accordance with the Companies Act s 224(4)(a) the winding up of a SPC precludes the granting of a Receiving Order for a particular SP. In these circumstances, the Liquidator of the SPC is obligated to treat with the assets of the SPC in accordance with each SP’s structure and therefore there will in effect be multiple concurrent liquidation being overseen by the liquidator[[7]](#footnote-8).

**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 liquidation and dissolution of an ELP is governed by the Exempted Limited Partnership Act (2021 Revision (the ELP Act) along with Part V of the Companies Act and the provision of the Companies Winding-Up Rules as modified. This may also be initiated through a Court order.

It must be borne in mind that he liquidation of an ELP is done in two phases. Initially there is the winding-up phase which is followed thereafter by the dissolution phase.

The winding-up phase will be triggered by one of the following:

1. The passage or a winding-up resolution which is usually evidenced by a yes vote from all the general partners and at least two-thirds of the partners (unless the partnership agreement stipulated otherwise;
2. An automatic winding-up date, in circumstanced where the general partner has served a notice of withdrawal, and a new eligible general partner has not been elected within ninety days thereof;
3. The expiration of period designated for the life of the partnership;
4. The occurrence of a prescribed trigger event stipulated in the partnership agreement; or
5. By an order of the Court upon the presentation of a winding-up petition

It should be noted that the provisions of the ELP Act will trump the provisions in the Companies Act should there be any conflict.

**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)**

It is mandatory for an ELP to have a general partner in light of section 4(2) of the ELP Act. This imposes on the GP “unlimited liability” should the ELP become insolvent, and its assets are not sufficient to discharge all its liabilities. In these circumstances of this case, the limited partners, before the expiration of the 90 days period, would have to elect a qualified general to continue the business of the ELP, otherwise it would have to be wound-up.

**Question 4.4**

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

Pivotal to consumers debtor being able to obtain a discharge from bankruptcy, is the Trustee’s Report following the close of the public examination of the debtor. Specifically, Section 67 (1) of the Bankruptcy Law make the following pronouncement:

*“It shall be the duty of the Trustee…to make a report as to the state of the*

*debtor’s affairs and as to the conduct of the debtor both before and during the*

*bankruptcy, and he shall note particularly any matters which in his judgment*

*might constitute offences under this Law, or any law relating to bankruptcy or*

*which would justify the Court under this Law in refusing, suspending or*

*qualifying an order for the debtor’s discharge.”*

Once the Report has been filed by the Trustee, the debtor is at liberty to apply for a discharge.

The primary effect of discharge of a consumer debtor from bankruptcy is that they are released from the burden of their debt. However, this discharge may be condition and the Court most impose conditions which could include some further payments towards their debts. Furthermore, it is not possible to get a discharge from any liability that was incurred by fraudulent means.[[8]](#footnote-9)

**TOTAL MARKS: [100]**

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

1. INSOL International and RISA Cayman, Introductory Certificate in Insolvency Law and Practice in the Cayman Island Couse Handbook 2023 p 69. [↑](#footnote-ref-2)
2. Companies Act, Section 102(2) (a) [↑](#footnote-ref-3)
3. “Companies Act, Section 101 (3) (a) [↑](#footnote-ref-4)
4. Gooch’s Case 1872, 7 Ch App 207, applied in Cayman Islands in *In the Matter of Citrico International Limited* [2004-05 CILR 435] [↑](#footnote-ref-5)
5. In re Universal Tours (Grand Coort: Harre CJ), 29 December 1994. [↑](#footnote-ref-6)
6. In the Matter of JP SPC 1 and JP SPC 4 15-April-2013 [↑](#footnote-ref-7)
7. Companies Act, s 223 [↑](#footnote-ref-8)
8. Bankruptcy Law, s 71. [↑](#footnote-ref-9)