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**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 5C**

**CAYMAN ISLANDS**

This is the **summative (formal) assessment** for **Module 5C** of this course and must be submitted by all candidates who **selected this module as one of their elective modules**.

**The mark awarded for this assessment will determine your final mark for Module 5C**. In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

**INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT**

**Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.**

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.

2. All assessments must be submitted electronically in **Microsoft Word format**, using a standard A4 size page and an 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.

3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).

4. You must save this document using the following format: **[studentID.assessment5C]**. An example would be something along the following lines: 202223-336.assessment5C. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentID” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked**.

5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words**.

6.The final submission date for this assessment is **31 July 2024**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2024**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.

**ANSWER ALL THE QUESTIONS**

**QUESTION 1 (multiple-choice questions) [10 marks in total]**

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph **in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

**Question 1.1**

Select the **correct answer**.

Once an application for a restructuring officer is filed:

1. No action may be commenced against the company without permission of the court.
2. No action may be continued against the company without permission of the provisional liquidator.
3. No action may be continued against the company without permission of the restructuring officer.
4. No action may be commenced against the company.

**Question 1.2**

Which of the following is **not** available to a corporate debtor in the Cayman Islands?

1. Appointment of a receiver.
2. Court-supervised liquidation.
3. Official liquidation.
4. Deed of Company Arrangement.

**Question 1.3**

Select the **correct answer**.

In a voluntary liquidation:

1. The company may cease trading where it is necessary and beneficial to the liquidation.
2. The company must cease trading except where it is necessary and beneficial to the liquidation.
3. The company must cease trading if it is necessary and beneficial to the liquidation.
4. The company may cease trading unless it is necessary and beneficial to the liquidation.

**Question 1.4**

Select the **correct answer**.

The Grand Court of the Cayman Islands has jurisdiction to make winding up orders in respect of:

1. A company incorporated in the Cayman Islands.
2. A company with property located in the Cayman Islands.
3. A company carrying on business in the Cayman Islands.
4. Any of the above.

**Question 1.5**

Select the **correct answer**.

In a provisional liquidation, the existing management:

1. Continues to be in control of the company.
2. Continues to be in control of the company subject to supervision by the court and the provisional liquidator.
3. May continue to be in control of the company subject to supervision by the provisional liquidator and the court.
4. Are prohibited from having any control of the company.

**Question 1.6**

Select the **correct answer**.

When a winding up order has been made, a secured creditor:

1. May enforce their security with leave of the court.
2. May enforce their security without leave of the court.
3. May enforce their security with leave of the court provided the liquidator is on notice of the application.
4. May not enforce their security until the liquidator has adjudicated on the proofs of debt.

**Question 1.7**

Select the **correct answer**.

Any payment or disposal of property to a creditor constitutes a voidable preference if:

1. It occurs in the six months before the deemed commencement of the company’s liquidation and at a time when it is unable to pay its debts and the dominant intention of the company’s directors was to give the applicable creditor a preference over other creditors.
2. It occurs in the six months before the deemed commencement of the company’s liquidation, or at a time when it is unable to pay its debts and the dominant intention of the company’s directors was to give the applicable creditor a preference over other creditors.
3. It occurs in the six months before the deemed commencement of the company’s liquidation and at a time when it is unable to pay its debts, or the dominant intention of the company’s directors was to give the applicable creditor a preference over other creditors.
4. It occurs in the six months before the deemed commencement of the company’s liquidation, or at a time when it is unable to pay its debts, or the dominant intention of the company’s directors was to give the applicable creditor a preference over other creditors.

**Question 1.8**

Which of the following **is not** a preferential debt ranking equally with the other four?

1. Sums due to company employees.
2. Taxes due to the Cayman Islands government.
3. Sums due to depositors (if the company is a bank).
4. Unsecured debts which are not subject to subordination agreements.
5. Amounts due to preferred shareholders.

**Question 1.9**

Select the **incorrect statement**.

A company may be wound up by the Grand Court if:

1. The company passes a special resolution requiring it to be wound up.
2. The company is unable to pay its debts.
3. The company is carrying on regulated business in the Cayman Islands without a license.
4. The company does not commence business within six months of incorporation.

**Question 1.10**

Select the **correct answer**.

In order for a proposed creditor scheme of arrangement to be approved:

1. 50% or more in number representing 75% or more in value of the creditors must agree.
2. More than 50% in number representing 75% or more in value of the creditors must agree.
3. 50% or more in number representing more than 75% of the creditors must agree.
4. More than 50% in number representing more than 75% of the creditors must agree.

**QUESTION 2 (direct questions) [10 marks]**

**Question 2.1 [maximum 4 marks]**

Does the Cayman Islands Grand Court have the power to assist foreign bankruptcy proceedings? If so, what is the source of that power and in what circumstances may it exercise it?

**Companies Act (2023 Revision) (“Companies Act”) and Foreign Bankruptcy Proceedings (International Cooperation) Rules 2018 (“FBPR”)**

The Cayman Islands Grand Court (“**Court**”) has the power to assist foreign bankruptcy proceedings. The source of this power is contained in Part XVII (International Co-Operation) of the Companies Act and supplemented by the FBPR.

A foreign representative is defined in section 240 of the Companies Act as “*a trustee, liquidator or other official appointed in respect of a debtor for the purposes of a foreign bankruptcy proceeding.*”[[1]](#footnote-1) Under section 241, upon “*the application of a foreign representative the Court may make orders ancillary to a foreign bankruptcy proceeding*”[[2]](#footnote-2). The purpose of the orders include, *inter alia*:

1. recognising the foreign representative’s right to act in the Cayman Islands on behalf of or in the name of a debtor[[3]](#footnote-3);
2. requiring a person who is in possession of information which relates to the debtor’s business or affairs to be examined by and produce documents to its foreign representative[[4]](#footnote-4); and
3. ordering the turnover of any property which belongs to the debtor to the foreign representative[[5]](#footnote-5).

**Court’s discretion**

The Court has discretion when determining whether to grant an ancillary order under section 241. The criteria which the Court shall exercise its discretion is set out in section 242. The Court “*shall be guided by matters which will best assure an economic and expeditious administration of the debtor’s estate, consistent with*”[[6]](#footnote-6), *inter alia*:

1. protecting claim holders in the Cayman Islands against prejudice and inconvenience in the processing of claims in the foreign bankruptcy proceeding[[7]](#footnote-7); and
2. preventing preferential or fraudulent dispositions of the debtor’s estate[[8]](#footnote-8).

It should be noted that in *Picard and Bernard L. Madoff Investment Securities LLC (in liquidation) v Primeo Fund (in liquidation)*[[9]](#footnote-9), Justice Jones stated that even *“if the foreign proceeding is recognized…this court could still decline to provide assistance if the order…would be likely to produce or contribute to an economic result which is inconsistent with the policy objectives of the Cayman corporate insolvency law.* [emphasis added]”[[10]](#footnote-10) Therefore even if the Court recognises foreign proceedings, it can still not provide assistance if it is contrary to the policy objectives of Cayman Islands corporate insolvency law.

**Example of assistance by the Court - examination of “*relevant person*”**

By way of example, as set out above, the foreign representative can apply for an order which requires a person who is in possession of information relating to the debtor’s business or affairs to be examined by and produce documents to the foreign representative[[11]](#footnote-11). The Companies Act limits the persons whom an order may be made (i.e. to the debtor itself and the “*relevant person*”[[12]](#footnote-12) as defined in the Companies Act). This means that the foreign practitioner does not have additional powers to that of a local Cayman Islands liquidator (regardless of what additional powers they would have in their own jurisdiction)[[13]](#footnote-13). Previously, there was uncertainty over the persons against whom a foreign representative, recognised in the Cayman Islands, could examine[[14]](#footnote-14). However, the updated FBPR brings the procedure in line with those available to official liquidators under section 103 of the Companies Act.

The FBPR is primarily concerned with the terms and process of recognising in the Cayman Islands a foreign representative and seeking the assistance of the Court[[15]](#footnote-15). Just as the Court has jurisdiction to issue a letter of request for the purpose of seeking a foreign court’s assistance in obtaining evidence from a relevant person who is resident outside the jurisdiction (as per section 103(7)(b))[[16]](#footnote-16), a foreign court may request assistance in the Cayman Islands under the Evidence (Proceedings in Other Jurisdictions) (Cayman Islands) Order 1978 by issuing a letter of request. Order 70 of the Grand Court Rules (2023 Revision) governs the procedure of how a letter of request is given effect and provides that such an application may be made *ex parte* and must be supported by an affidavit[[17]](#footnote-17) exhibiting the letter of request. The Court may, on receipt of the letter of request, make an order, *inter alia*, for the examination of parties to be called to produce information and documents[[18]](#footnote-18).

**Notice of foreign bankruptcy proceedings**

If a company is incorporated under Part II or registered under Part IX of the Companies Act and is made the subject of a foreign bankruptcy proceeding, notice shall be filed with the Registrar and published in the Gazette[[19]](#footnote-19). Such notice shall contain the prescribed particulars and be filed by the company’s liquidator or its directors (if no liquidator has been appointed) within 14 days of the date upon which the foreign bankruptcy proceeding commenced[[20]](#footnote-20). A failure to comply with this requirement means that the liquidator or director commits an office and is liable on summary conviction to a fine of KYD10,000[[21]](#footnote-21).

**Question 2.2 [maximum 3 marks]**

Outline the legal framework for the recognition of foreign judgements in the Cayman Islands.

In cross-border matters, the approach taken by the Cayman Islands Grand Court is a cooperative one to ensure the company is wound up properly and creditors’ interests are protected (wherever they are located).[[22]](#footnote-22) To date, the Cayman Islands “*has not entered into any international treaties for the reciprocal recognition or enforcement of foreign judgments, neither has the UK extended its ratification of any such treaties to the Cayman Islands*”[[23]](#footnote-23). Further, the Cayman Islands is not a signatory to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.

Notwithstanding the above, statute and common law provide the legal framework for the recognition of foreign judgments in the Cayman Islands. It should be noted that a judgment creditor has 6 years to enforce under both statute and common law. The 6-year limitation period runs from the judgment date or, the date of the last judgment (where there have been appeals).[[24]](#footnote-24)

Foreign Judgments Reciprocal Enforcement Law (1996 Revision) (“**Enforcement Law**”)

The Enforcement Law “*provides a statutory regime for recognition and enforcement of foreign judgments*”[[25]](#footnote-25). However, this is only where there is “*substantial reciprocity of treatment*”[[26]](#footnote-26) regarding the enforcement of judgments from the Cayman Islands in that country. To date, the Enforcement Law has only been extended to judgments from the Superior Courts of Australia and its External Territories.[[27]](#footnote-27) Order 71 of the Grand Court Rules (2023 Revision) (“**Grand Court Rules**”) governs this procedure.

Section 3(2) of the Enforcement Law states that a judgment from a foreign country’s superior court (other than a judgment which is given on appeal from a court which is not a superior court) shall be a judgment to which the Enforcement Law will apply if it is:

1. final and conclusive as between the parties[[28]](#footnote-28);
2. a money judgment[[29]](#footnote-29); and
3. made after the Enforcement Law was extended to that foreign country[[30]](#footnote-30).

Common law

As can be seen from above, the Enforcement Law is limited at present given that it only applies to judgments from the Superior Courts of Australia and its External Territories. In light of this, enforcing foreign judgments in the Cayman Islands is usually by way of commencing a new action. This new action is based upon the foreign judgment being an unsatisfied debt or other obligation[[31]](#footnote-31). Such litigation will be governed by the Grand Court Rules. Unlike the Enforcement Law, the common law can enforce both money and non-money judgments. *Bandone v Sol Properties[[32]](#footnote-32)* confirmed that *in personam* judgments may be recognised and enforced.

To enforce a foreign judgment at common law, it is mandatory the foreign judgment is final, the foreign court had jurisdiction over the defendant, and the foreign judgment was not obtained by fraud or by methods contrary to natural justice and is not contrary to public policy in the Cayman Islands.[[33]](#footnote-33)

Once judgment has been obtained in the Cayman Islands, the domestic enforcement remedies as set out in Order 45 of the Grand Court Rules will be available, including appointing a receiver[[34]](#footnote-34).

**Question 2.3 [maximum 3 marks]**

Is it possible for a creditor to register its security over an asset in the Cayman Islands? If so, how, and what is the effect of it doing so, if any?

A creditor can take security over an asset in the Cayman Islands. This can be in the form of, for example, a mortgage, charge, lien or pledge. It is prudent for a creditor to ensure that the company which grants it security follows the appropriate formalities, including, for example, a directors’ resolution approving the security being granted (subject to any of the company’s articles)[[35]](#footnote-35).

It is possible for a creditor to register its security over an asset in the Cayman Islands.

Land, ships, aircraft, motor vehicles and intellectual property

In the Cayman Islands, there are ownership registers which are centrally maintained for:

1. Land[[36]](#footnote-36);
2. Ships[[37]](#footnote-37);
3. Aircraft[[38]](#footnote-38);
4. Motor vehicles[[39]](#footnote-39); and
5. Intellectual property[[40]](#footnote-40).

Where the asset in question is one of the above, a creditor’s mortgage or charge over that asset “*can be noted on the register*”[[41]](#footnote-41). Filing notice of the security with the relevant centrally maintained register will register the security. The effect of registration is that a third-party buyer will be deemed to have notice of any interest that is already registered at the time of their purchase, and will therefore acquire the asset subject to the creditor’s interest (as the holder of the registered mortgage or charge, whichever is applicable).[[42]](#footnote-42) The other effect of registration is that it will give the secured creditor priority over non-registered creditors[[43]](#footnote-43).

Other immovable property

There is no public security registration system for other types of immovable property or for charges over a company’s assets (other than the company’s internal register of mortgages and charges). It would therefore be prudent for a creditor to investigate in advance whether the asset is already encumbered[[44]](#footnote-44) and to ensure they exercise sufficient control over the asset in order to prevent a third party from purchasing it[[45]](#footnote-45). In light of this, it would be commercially sensible for a lender to review the debtor company’s register of mortgages[[46]](#footnote-46) and ensure that it is clear before advancing any loan and that such register is updated with details of the charge after the loan is granted.[[47]](#footnote-47)

Under section 54 of the Companies Act (2023 Revision), a company shall keep at its registered office in writing “*a register of all mortgages and charges specifically affecting property of the company, and…a short description of the property mortgaged or charged, the amount of charge created and the names of the mortgagees or persons entitled to such charge*.”[[48]](#footnote-48) In the event that the company fails to do this, every director, manager or other officer who knowingly and wilfully authorises or permits this omission shall incur a penalty of KYD100.[[49]](#footnote-49) Section 54(3) states that the register of mortgages shall be open to a creditor’s inspection at all reasonable times. In the event such inspection is refused, any officer refusing the inspection, and every director and manager who authorises or knowingly and wilfully permits such refusal shall incur a penalty of KYD4 for every day during which such refusal continues. In addition, the Judge may, compel an immediate inspection of the register by way of order.[[50]](#footnote-50)

Effect of non-compliance

In the Cayman Islands, there is no statutory regime which requires security interests to be perfected.[[51]](#footnote-51) Non-compliance with the requisite formalities does not automatically render the security given void. However, there is a risk that the company who gave the security will not be bound by it and that a third party will acquire the asset which will be free of the creditor’s security interest (or acquire a higher ranked security interest over the relevant asset)[[52]](#footnote-52). It would therefore be prudent for a creditor to register their interest as set out above.

**QUESTION 3 (essay-type questions) [15 marks in total]**

**Question 3.1 [maximum 6 marks]**

Receivers have no role to play in a Cayman Islands insolvency scenario. Discuss.

A receiver in the Cayman Islands “*is essentially a temporary custodian of assets*.”[[53]](#footnote-53) This essay will discuss the suggestion that receivers have no role to play in a Cayman Islands insolvency scenario.

**Receivers have no role to play in a Cayman Islands insolvency scenario**

Privately appointed receiver

When a borrower faces financial difficulties in the Cayman Islands, a creditor has a range of enforcement, restructuring and insolvency options available to them. In the event that the borrower has granted security over the shares or assets and undertakings of a Cayman Islands company and the security document is governed by Cayman Islands law, receivership may be the most appropriate enforcement action for the secured creditor.[[54]](#footnote-54) A receiver who is privately appointed (i.e. by a secured creditor pursuant to the secured creditor’s right in the relevant security document) is one of two types of receivership, with the other being a court appointed receiver (see below).

Under Cayman Islands law, there are no specific statutory provisions which determine how the receiver should be appointed and the appointment of a receiver, to be valid, must be made in accordance with the terms of the security document. Further, a creditor is not required to obtain a court order and there is no statutory requirement to register the receiver’s appointment with the court. Such a “*streamlined approach allows for efficient asset realization and the recovery of outstanding debts*.”[[55]](#footnote-55) The receiver’s powers will relate solely to the asset which was granted as collateral and set out in the relevant security documents. Further, the receiver’s primary duties will be owed to the secured party (although secondary duties owed to other parties such as the borrower can arise).[[56]](#footnote-56) Despite this, the receiver will act in their capacity as an agent of the security provider which ensures that the secured party is not liable for any acts or omissions of the receiver during the receivership.[[57]](#footnote-57) The receiver is obliged to take the necessary steps to obtain the best price which is reasonably obtainable for the secured asset.

Distinction between receivership and liquidation

A distinction can be drawn between a receivership and liquidation. The appointment of a privately appointed receiver has the effect of taking away control of the asset from the security provider[[58]](#footnote-58). A receiver will act principally in the secured creditor’s interest and not in the interest of the general body of the debtor’s creditors (as is the case of a liquidator in a liquidation). A receivership is not a collective procedure - instead it is “*a contractual self-help remedy only available to secured creditors…a secured creditor can enforce its security…and obtain repayment (full or partial) of the debt owed*. [emphasis added]”[[59]](#footnote-59)

Secured creditors rank in priority to all other creditors in the event of an official liquidation or provisional liquidation (or during a company restructuring officer appointment). Secured creditors can realise the security outside of any liquidation (or restructuring process)[[60]](#footnote-60). The interest of the secured creditor in the secured property will prevail over all other claims and this means that such secured property cannot be sold without the consent of the secured creditor, whether within or outside of an insolvency[[61]](#footnote-61). In light of the above, it can therefore be argued that a privately appointed receiver plays a role which is outside of a Cayman Islands insolvency scenario. A privately appointed receiver does not affect any liquidation of the security provider nor has a role to play in relation to the liquidation.

**Receivers have a role to play in a Cayman Islands insolvency scenario**

Court appointed receiver

Notwithstanding the above, receivers do have a role to play in a Cayman Islands insolvency scenario. The Grand Court of the Cayman Islands can appoint a receiver “*in all cases in which it appears to the court to be just and convenient to do so*”[[62]](#footnote-62). A receiver may be appointed by the court “*to liquidate assets and distribute the proceeds to creditors or shareholders according to their rights*”.[[63]](#footnote-63) One of the most common uses of receivers is in aid of enforcing a judgment[[64]](#footnote-64).

The receiver will be an officer of the court (and not the agent of the applicant who sought the court’s appointment of the receiver).[[65]](#footnote-65) The scope of a receiver’s authority and power will be set out in the court order appointing the receiver – the applicant should therefore consider carefully the aim of the receivership and ensure that the powers are in the court order[[66]](#footnote-66). The court order therefore allows a great degree of flexibility.[[67]](#footnote-67)

Equitable execution

A receiver can be appointed by way of equitable execution under Order 51 of the Grand Court Rules. *Scotiabank (Cayman Islands) Limited v Treasure Island Resort (Cayman) Limited*[[68]](#footnote-68) (“***Treasure Island***”) is an example of where a receiver was appointed. In *Treasure Island*, a receiver sought an order declaring that he was authorised to dispose of the secured assets of a company which was to be shortly the subject of a winding-up petition. The plaintiff bank held security for a loan it had advanced to the defendant company (by way of a charge and debenture over the company’s assets). The court confirmed that the receiver had a right to dispose of the assets secured by the debenture and charge and held, *inter alia*:

1. “*the plaintiff bank had acquired an overriding statutory legal and beneficial interest… secured by the statutory charge which included the power to appoint a receiver. The power to sell the property became vested in the receiver on his appointment, before the winding up of the company was even mooted and a sale under that power…took precedence over any powers which would arise on the commencement of the winding up.*”[[69]](#footnote-69); and
2. Section 162 of the Companies Law (2004 Revision) gave “*priority to certain preferential liabilities…to be paid out of property subject to a charge or debenture where the assets…available for payment of general creditors were insufficient to meet the liability.*” The receiver, in the spirit of this section undertook (and was permitted) to meet the liabilities of any employees’ claims (including pensions) out of the assets subject to the receivership in priority to the debt due to the plaintiff.[[70]](#footnote-70)

As can be seen from *Treasure Island*, a receiver can therefore play a role in a Cayman Islands insolvency scenario where, for example, a secured creditor asserts that they have a beneficial interest in a company’s asset(s) and the winding up of that company is imminent. The sale of the asset(s) takes precedent over any powers that can arise on the commencement of a winding up. The receiver can also (similar to a liquidator) meet the liabilities of any employees’ claims out of the assets which are the subject of the receivership (in priority to the debt secured).

Segregated Portfolio Companies (“**SPCs**”)

Another example of how receivers have a role to play in a Cayman Islands insolvency scenario is in relation to SPCs.

A statutory receivership regime applies in relation to the individual portfolios of the SPC.[[71]](#footnote-71) Under the Companies Act (2023 Revision), the court may make a receivership order if, in relation to an SPC, the court is satisfied that:

1. “*the segregated portfolio assets attributable to a particular segregated portfolio of the company…are or are likely to be insufficient to discharge the claims of creditors in respect of that segregated portfolio*”[[72]](#footnote-72) (this is analogous to that of a liquidator)[[73]](#footnote-73); and
2. the receivership order would ensure the orderly closing down of the business of the SPC[[74]](#footnote-74) and the distribution of the SPC’s assets to those entitled.[[75]](#footnote-75)

*Re Obelisk Global Fund SPC*[[76]](#footnote-76) considered the test for making a receivership order. The test was more than simply an assessment of the values of the assets and liabilities – it was in fact whether the assets are or were likely to be in the reasonably near future when assessed against the liabilities (prospective and contingent liabilities) held in a manner where they may be used to discharge creditor claims.[[77]](#footnote-77)

An application for a receivership order in respect of a segregated portfolio of an SPC may be made by those listed in section 225(1) and includes a creditor of the company in respect of that segregated portfolio.[[78]](#footnote-78) Similar to insolvency proceedings, once an application has been made for a receivership order (and for the duration of it), “*no suit, action or other proceedings shall be instituted against the segregated portfolio company in relation to the segregated portfolio in respect of which the receivership order was made except by leave of the Court*”[[79]](#footnote-79). Another similarity to a liquidation is that once the receivership order is granted, the functions and powers of the directors will cease in relation to the business of the SPC.[[80]](#footnote-80)

**Conclusion**

Whether a receiver has a role to play in a Cayman Islands insolvency scenario will depend on the specific situation. A privately appointed receiver has no (direct) role to play in a Cayman Islands insolvency scenario as the function of the receiver in this situation is to realise the secured asset on behalf of the secured creditor. On the other hand, a court appointed equitable receiver, as demonstrated by *Treasure Island*, plays a role akin to a liquidator and can meet the liabilities of any employees’ claims out of the assets which are the subject of the receivership (in priority to the debt secured). Further, in terms of SPCs, a receivership order can be made if the court is satisfied that, *inter alia*, the receivership order would ensure the orderly closing down of the business of the SPC[[81]](#footnote-81) and the distribution of the SPC’s assets to those entitled.[[82]](#footnote-82) This is similar to a liquidation scenario.

**Question 3.2 [maximum 9 marks]**

In the absence of a statutory prohibition on insolvent trading, is it possible for court appointed liquidators of an insolvent company, or creditors of such a company, to hold its former directors accountable by either seeking financial damages against those directors and / or by seeking to “claw back” any payments that those directors should not have made? If so, please explain the possible options.

In the Cayman Islands, there is no statutory obligation to file for insolvency. There is also an absence of a wrongful trading remedy[[83]](#footnote-83) under the Companies Act (2023 Revision) (“**Companies Act**”), i.e. there is no prohibition on a company continuing to trade whilst it is insolvent.[[84]](#footnote-84) Notwithstanding this, a court appointed liquidator or the company’s creditors can still hold the former directors accountable in numerous ways. The commencement of a company’s liquidation does not release directors from any liabilities for previous actions – the liability is unaffected by the liquidation and will continue until the company is dissolved.[[85]](#footnote-85)

**Directors’ duties and obligations**

In the Cayman Islands, there is no statutory codification of directors’ duties, obligations and liabilities to the company. The duties are based on the English common law, statute and regulation.[[86]](#footnote-86) Under the common law, a director owes the company two types of duties: fiduciary duties and duties of skill, care and diligence. The fiduciary duties means that an “*individual director must act in good faith in their dealings with or on behalf of the company and exercise the powers and fulfil the duties of the office honestly*”[[87]](#footnote-87) and this includes a duty to act in good faith and duty to exercise powers which are in the company’s interest.

If a director acts in breach of their fiduciary duty to act in the company’s best interests, the director can be made personally liable to the company for any losses caused to the company.[[88]](#footnote-88) Harre J held in *Prospect Properties Limited (in liquidation) v McNeill and J.M. Bodden II[[89]](#footnote-89)* (“***Prospect Properties***”) that when a company is insolvent, it was an “*imperative part of the directors’ duty to the company itself to consider the interests of the creditors.*”*[[90]](#footnote-90)* At this stage, the company’s interests and that of its creditors are almost indistinguishable. *Prospect Properties* made clear that it is in the interest of creditors to be paid and in the company’s interest to be safeguarded against being in a position where it was unable to pay.[[91]](#footnote-91) The directors in *Prospect Properties* were found to have failed in their fiduciary duty - the transaction in question was not reasonably incidental to the carrying on of the company’s business and was not *bona fide* and it did not benefit or promote the company’s prosperity.[[92]](#footnote-92)

In the event that a company is in official liquidation, the former directors of the company can be pursued by the official liquidator on behalf of the company (in the company’s name) for any breach of their fiduciary duties[[93]](#footnote-93) pre-liquidation. Therefore, despite the lack of statutory prohibition on insolvent trading in the Cayman Islands, former directors of an insolvent company can still potentially be held personally liable for a pre-liquidation transaction.

**Companies Act**

In addition to the above where financial damages can be sought personally against the former directors, the insolvency regime within the Companies Act contains various sections which enables a court appointed liquidator to hold the former directors accountable by “clawing back” payments that those directors should not have made. The key provisions are:

Section 99 - Avoidance of property dispositions, etc.

Section 99 provides that any disposition of the company’s property and any transfer of shares or alteration in the status of the company’s members which are made after the commencement of the company’s winding up is void (unless the court otherwise orders).[[94]](#footnote-94) The commencement of the winding up is deemed to be the date when the petition was filed (rather than the date of the order)[[95]](#footnote-95).

The liquidator can seek appropriate relief from the court to require the repaying of any funds or the return of the asset(s) to the company.[[96]](#footnote-96) Only transactions made after the filing of the petition are caught by section 99. For transactions not caught by section 99 (i.e. made before the filing of the petition), they may be caught by the “claw-back” provisions set out in section 145 and section 146.

In light of the above, repayment of funds or the return of the asset(s) transferred after the filing of the petition is possible if the liquidator makes such an application under section 99.

Section 145 – Voidable preference

Section 145(1) states that every dealing with property or payment in favour of a creditor at a time when the company was not able to pay its debts with the intention of giving that creditor preference over the other creditors “*shall be voidable upon the application of the company’s liquidator if made, incurred, taken or suffered within six months immediately preceding the commencement of a liquidation*. [emphasis added]”[[97]](#footnote-97) A payment which is made to a related party of the company is deemed to have been made with the intention of giving such creditor a preference.[[98]](#footnote-98) Section 145(3) states that a creditor is treated as a “related party” if the creditor “*has the ability to control the company or exercise significant influence over the company in making financial and operating decisions*.”[[99]](#footnote-99)

Giving a preference to a creditor over other creditors means putting that creditor in a better position than they would otherwise have been[[100]](#footnote-100). Liquidation is a collective insolvency procedure and the principle which underlines it is that the insolvent debtor’s available assets are to be distributed amongst the creditors fairly – if the insolvent debtor were to be able to determine for itself how it would apply its assets, this would be contrary to the basic principle of liquidation (and to the interests of the creditors as a whole).[[101]](#footnote-101)

If the dominant intention of transaction was for another purpose (such as in good faith to pay an essential service provider of the company), the transaction might not be classified as a voidable transaction (even if the unintended consequence of the transaction was to prefer the creditor in question).[[102]](#footnote-102)

The Privy Council case of *Skandinaviska Enskilda Banken AB (Publ) (Appellant) v Conway and another (as Joint Official Liquidators of Weavering Macro Fixed Income Fund Ltd) (Respondents) (Cayman Islands)[[103]](#footnote-103)* (“***Weavering***”) considered voidable preferences under section 145(1). *Weavering* was an appeal from the Court of Appeal of the Cayman Islands concerning certain share redemption payments made by the company to the appellant bank. The central issue was whether the payments constituted unlawful preferences over the other creditors. The respondents were the liquidators who brought the proceedings in their capacity as joint official liquidators[[104]](#footnote-104). The Privy Council upheld the decisions of the lower courts that redemption payments made shortly before the collapse of the fund were voidable preferences which had to be repaid.[[105]](#footnote-105) It was held, *inter alia*, that the restitution of the money to the assets available for the liquidators’ distribution amongst the company’s creditors was necessary for completing the process of undoing the unfair advantage which the bank obtained at their expense. The common law therefore imposed an obligation on the bank to repay the money, with a corresponding right to rank as a creditor for the amount owed to it (but only upon repayment)[[106]](#footnote-106).

A disposition which is set aside as a preference is voidable upon a liquidator’s application. The liquidator may ask the court to order the creditor in question to return the asset and to prove in the liquidation the amount claim[[107]](#footnote-107) (similar to *Weavering*).

As can be seen from above, section 145 is a provision in which payments that should not have been made by the director(s) can be “clawed back” during the liquidation process.

Section 146 - Avoidance of dispositions made at an undervalue

Section 146(2) states that every disposition of property that is made at an undervalue by or on behalf of the company which is intended to defraud creditors shall be voidable at the instance of the official liquidator.[[108]](#footnote-108) “Undervalue” is defined in section 146(1)(e) as the provision of no consideration for the disposition or a consideration in money or monies worth which is significantly less than the value of the property that is subject to the disposition[[109]](#footnote-109).

The official liquidator has the burden of establishing the intention to defraud creditors.[[110]](#footnote-110) Section 146 is therefore another option that the official liquidator potentially has in undoing any transactions that should not have been made. An application seeking to have the disposition set aside must be made within 6 years of the date of the relevant disposition[[111]](#footnote-111).

It should be noted that section 146(5) does however offer a transferee protection (protection that is not available in section 238 of the English Insolvency Act 1986, the English equivalent). If a disposition is set aside on the grounds of being made at undervalue and the Court is satisfied that the transferee has not acted in bad faith then:

1. “*the transferee shall have a first and paramount charge over the property, the subject of the disposition, of an amount equal to the entire costs properly incurred by the transferee in the defence of the action or proceedings*”[[112]](#footnote-112); and
2. “*the relevant disposition shall be set aside subject to the proper fees, costs, pre-existing rights, claims and interests of the transferee (and of any predecessor transferee who has not acted in bad faith)*.”[[113]](#footnote-113)

The disposition at undervalue would be unwound, but the transferee will benefit from a form of indemnification in respect of its “properly incurred” costs.[[114]](#footnote-114)

Section 147 – Fraudulent trading

A liquidator can pursue former directors and officers of a company for fraudulent trading. If, in the course of the company’s winding up it appears that any of the company’s business was carried out with the intention to defraud creditors or for any fraudulent purpose, the liquidator may apply to the Court for a declaration[[115]](#footnote-115) under section 147(1). Any person who was knowingly a party to the carrying on of the business in such manner are liable to make such contributions (if any) to the company’s assets as the Court thinks proper.[[116]](#footnote-116)

Therefore, notwithstanding the fact that there is no statutory provision for wrongful trading in the Cayman Islands, the fraudulent trading provision under section 147 means that any person (including a director) may, upon the liquidator’s application, be ordered to contribute to the company’s assets in the event that the business of the company was carried out with the intention to defraud creditors or for fraudulent purposes.

**Conclusion**

On a practical point, it should be noted that there “*are strikingly few decisions regarding the operation of Section 146…It remains to be seen whether Section 146 (or indeed Cayman’s fraudulent trading provision, Section 147) will come out of the shadows over the next few years*”[[117]](#footnote-117). Therefore, even though these two provisions are in place to hold directors to account, it remains to be seen when either section 146 or section 147 are before the court how the court will decide these matters.

Despite this, it is prudent for the directors who are responsible for the day-to-day management of the company to review the company’s position regularly. If they come to the view (or are advised) that there is no realistic prospect of resolving the company’s financial difficulties, they must put the company into liquidation, otherwise they would be at risk of breaching their fiduciary duties[[118]](#footnote-118) and being potentially personally liable too. As shown above, the insolvency laws of the Cayman Islands are flexible enough to deal with transactions pre- and post-petition and to try and put the company (to the extent possible) back in the position it would have been in had the transactions not been made.

**QUESTION 4 (fact-based application-type question) [maximum 15 marks in total]**

Punk Lizard is a company registered in the Cayman Islands. It operates liveaboard diving cruises across the Caribbean. Punk Lizard was founded by the Kraken family over 70 years ago. The family continues to own and manage the business.

Punk Lizard’s revenues are down in recent years, due to some well publicised safety issues. The business has only managed to stay afloat with the assistance of a very large loan from Turtle National Bank (TNB). TNB has lent Punk Lizard USD 900 million (USD 450 million of which is secured by a mortgage over half of Punk Lizard’s fleet).

The market for liveaboard diving remains strong, and financial forecast for Punk Lizard is relatively bright, however Punk Lizard has immediate solvency issues. It cannot afford to pay the ongoing costs associated with maintaining its fleet (electricity, maintenance, insurance, staff costs, rum etcetera) and it has fallen behind on the monthly repayments to TNB.

To make matters worse, Punk Lizard commissioned Harland & Wolff (H&W) to build five more dive boats shortly before the (lack of) safety issue hit the news. Punk Lizard has failed to pay for the H&W boats. H&W has secured an arbitration judgment from the ICC in London for USD 150 million. The award is payable within 28 days.

You are a Cayman Islands-based insolvency professional and have been approached to provide advice on the following:

1. What action can TNB take to protect its interests? (2 marks)
2. What action can H&W take to protect its interests? (2 marks)
3. What action can the unpaid employees take against Punk Lizard? (3 marks)
4. Does the Cayman Islands Court have jurisdiction over Punk Lizard? (1.5 marks)
5. Is there a legal route via which Punk Lizard can protect itself and seek to restructure? (3 marks)
6. Following on from (e) above, can the Kraken family continue play a part in running Punk Lizard during any restructuring process? (1 mark)
7. What factors will the Cayman Islands court take into consideration before approving any proposed restructuring? (2.5 marks)

**Question 4(a)**

Turtle National Bank (“**TNB**”) has lent Punk Lizard USD 900 million. TNB is a secured creditor of USD 450 million which is secured by a mortgage over half of Punk Lizard’s fleet and an unsecured creditor in relation to the remaining USD 450 million.

Punk Lizard has fallen behind on the monthly repayments to TNB. Despite Punk Lizard’s financial difficulties, TNB (as a secured creditor over half of Punk Lizard’s fleet), is in a stronger position than other creditors. TNB, to protect its interest (in relation to the secured USD 450 million) can realise its security. As there is a mortgage over half of Punk Lizard’s fleet and Punk Lizard has defaulted, TNB will be permitted to take possession (of the half of the fleet that is secured) and exercise its power of sale in respect of the (half) fleet (as mortgagee in possession). Alternatively, TNB may appoint a receiver to realise the half of the fleet that is secured[[119]](#footnote-119).

Further to section 142(1) of the Companies Act (2023 Revision), even if a winding up order is made against Punk Lizard by another creditor, TNB will be entitled to enforce its security without leave of the court and without reference to any appointed liquidator.[[120]](#footnote-120) Unlike Chapter 11 proceedings in the USA, there is no stay on enforcement by a secured creditor in the Cayman Islands.[[121]](#footnote-121) In the Cayman Islands, secured creditors rank in priority to all other creditors. Secured creditors can realise their security outside of the liquidation (official or provisional) or restructuring process[[122]](#footnote-122).

Given that the debt owed to TNB is more than the value of its security, TNB’s secured claim is “*under-secured*”[[123]](#footnote-123). As a result, after any realisation of Punk Lizard’s (half) fleet, TNB would have an unsecured claim against Punk Lizard for the balance. As an unsecured creditor, TNB has the right to file a winding-up petition in respect of Punk Lizard. In the liquidation, TNB “*may prove in the liquidation for the unsecured balance*”[[124]](#footnote-124) of USD 450 million. According to Order 17, rule 1(3) of the Companies Winding Up Rules (2023 Consolidation), the proof of debt submitted by TNB (as a secured creditor) “*shall state particulars of the security held by the creditor and the value which the secured creditor puts on the security*.”[[125]](#footnote-125)

**Question 4(b)**

Harland & Wolff (“**H&W**”) have secured an arbitration judgment from the ICC in London for USD 150 million which is payable within 28 days (“**Arbitration Judgment**”). The United Kingdom is a contracting state to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“**New York Convention**”). The Cayman Islands implemented the New York Convention via the Foreign Arbitral Awards Enforcement Act (1997 Revision) (“**Enforcement Act**”). This means that arbitral awards made in any state that is a party to the New York Convention can be recognised and enforced in the Cayman Islands under the Enforcement Act[[126]](#footnote-126).

H&W, to protect its interests, can obtain leave from the Grand Court to enforce the Arbitration Judgment against Punk Lizard (i.e. the arbitral award debtor). This is subject to sections 6 and 7 of the Enforcement Act. Section 6 requires H&W, in seeking to enforce the Arbitration Judgment, to produce a duly authenticated or certified copy of the Arbitration Judgment[[127]](#footnote-127) and the original or a duly certified copy of the arbitration agreement[[128]](#footnote-128). According to section 7, enforcement of the Arbitration Judgment shall not be refused except in certain cases, such as the invalidity of the arbitration agreement under its governing law[[129]](#footnote-129). There is nothing from the fact pattern to suggest that the Arbitration Judgment cannot be enforced. Once the Arbitration Judgment has been recognised by the Grand Court and becomes enforceable, H&W, as the arbitral award creditor, will be able to enforce the Arbitration Judgment as if it was a Grand Court judgment. This will enable H&W to enforce the award using domestic enforcement procedures such as a charging order or receivership by equitable execution[[130]](#footnote-130).

Alternatively (or in addition to obtaining leave from the Grand Court to enforce the Arbitration Judgment), H&W, as arbitral award creditor, can wind up Punk Lizard as soon as the Arbitration Judgment is issued. In *Re China Hospitals Incorporated*[[131]](#footnote-131), Kawaley J held that “*[a]fter an award has been obtained, there is a strong public policy imperative requiring courts to enforce arbitration awards*.”[[132]](#footnote-132) Applying *Re China Hospitals Incorporated* to the fact pattern, if Punk Lizard, as an arbitral award debtor, does not or cannot satisfy the Arbitration Judgment, it would be permissible to wind up the company on public policy grounds.

As an alternative to all the above, H&W could serve a statutory demand[[133]](#footnote-133) on Punk Lizard. This will place pressure on Punk Lizard to engage in payment discussions with H&W and avoid the need and cost of either obtaining leave of the Grand Court to enforce the Arbitration Judgment via the Enforcement Act or preparing a winding-up petition.

H&W would have to assess how much time it has and the cost implications of all three options detailed above.

**Question 4(c)**

The unpaid employees of Punk Lizard are unsecured creditors. However, they are a special class of unsecured creditors because in a liquidation, some of their outstanding entitlements will be paid in priority to claims held by other unsecured creditors[[134]](#footnote-134).

Schedule 2 of the Companies Act (2023 Revision) (“**Companies Act**”) describes the categories of preferred debts. Category 1 lists salaries, wages and gratuities due from the company to an employee which have been accrued in the 4 months immediately preceding the commencement of the company’s liquidation. Section 141 of the Companies Act states that the debts described in Schedule 2 “*shall be paid in priority to all other debts*”[[135]](#footnote-135) and such preferential debts shall “*rank equally…and be paid in full*” unless there are insufficient funds to satisfy these which will mean “*they shall abate in equal proportions*”[[136]](#footnote-136). In an official liquidation, only the liquidation expenses are paid ahead of the preferential debt (including the sums due to employees)[[137]](#footnote-137).

The unpaid employees, as unsecured creditors of Punk Lizard, could:

1. obtain and enforce judgment on their claim (which could disrupt any restructuring efforts). It should be noted that the Grand Court does have jurisdiction to stay a writ of action brought by a creditor (pending the outcome of any restructuring of the company’s debt)[[138]](#footnote-138); or
2. disrupt Punk Lizard’s restructuring efforts (if any) by filing a winding-up petition against the company if the debt is undisputed. Given that the debts due to employees are quite easily quantifiable, it is unlikely that the debts will be disputed. It should be noted that even though an unpaid creditor of an insolvent company is entitled to a winding-up order *ex debito justitiae*, the Grand Court retains discretion in granting the winding-up order, and it might adjourn or even dismiss the petition if other creditors oppose the winding up due to a proposed restructuring[[139]](#footnote-139).

**Question 4(d)**

From the fact pattern, “Punk Lizard is a company registered in the Cayman Islands.” Section 91 of the Companies Act (2023 Revision) (“**Companies Act**”) states that the court has jurisdiction to make a winding up order in respect of:

1. an existing company;
2. a company incorporated and registered under the Companies Act;
3. a body incorporated under any other law; and
4. a foreign company which —
5. has property located in the Cayman Islands;
6. is carrying on business in the Cayman Islands;
7. is the general partner of a limited partnership; or
8. is registered under Part IX of the Companies Act[[140]](#footnote-140).

In light of the above, the Cayman Islands court has jurisdiction over Punk Lizard.

**Question 4(e)**

There is a legal route via which Punk Lizard can protect itself and seek to restructure. The Companies Act (2023 Revision) (“**Companies Act**”) offers distressed companies an effective procedure to protect itself from creditor enforcement action[[141]](#footnote-141) and to restructure. Under section 91B(1) of the Companies Act, Punk Lizard may present a petition to the court to appoint a restructuring officer on the grounds it:

1. is or is likely to become unable to pay its debts; and
2. intends to present a compromise or arrangement to its creditors[[142]](#footnote-142) (“**Restructuring Petition**”).

Punk Lizard is unable to pay its debts. A Restructuring Petition may be presented by the directors of Punk Lizard without a members’ resolution or without an express power in the articles of association.[[143]](#footnote-143) A winding up petition is not required to be filed by Punk Lizard.

Under section 91G(1)(a) of the Companies Act, after the presentation of a petition for the appointment of a restructuring officer under section 91B (but before an order appointing the restructuring officer is made), an automatic stay comes into effect.[[144]](#footnote-144) This is a legal route via which Punk Lizard can protect itself from creditor action. It should be noted that notwithstanding the presentation of a petition for the appointment of a restructuring officer, a secured creditor such as Turtle National Bank (whether over the whole or part of the distressed company’s assets) will be entitled to enforce their security without the leave of the Court or without reference to the restructuring officer.[[145]](#footnote-145)

The Restructuring Petition has to be in Form Number 2A of the Companies Winding Up Rules (2023 Consolidation) (“**CWR**”) and needs to be supported by:

1. an affidavit sworn by or on the authority of Punk Lizard’s board of directors which contains, *inter alia*, “*a statement of the reasons why the company's directors believe that the appointment of a restructuring officer and the moratorium would be in the best interests of the company and, in appropriate circumstances, its creditors*”[[146]](#footnote-146); and
2. an affidavit sworn by the person(s) nominated for the appointment as restructuring officer and containing the matters specified in Order 3, rule 4 which relates to the nominated restructuring officer’s consent to act.[[147]](#footnote-147)

Once the Restructuring Petition has been presented, it must be advertised in accordance with Form Number 3A of the CWR (unless the court orders otherwise).[[148]](#footnote-148)

Order 1A, rule 1(6) of the CWR states that, unless the court otherwise directs, the Restructuring Petition for appointing the restructuring officer will be heard within 21 days of the filing of the petition for the appointment.[[149]](#footnote-149) Order 1A, rule 1(6) enables a debtor company such as Punk Lizard to seek relief quickly and effectively. It also protects creditors from a debtor company who uses the statutory moratorium without progressing the Restructuring Petition or without any *bona fide* intention to actually restructure the company.[[150]](#footnote-150) Upon hearing the Restructuring Petition, the court may, *inter alia*, make an order to appoint a restructuring officer.[[151]](#footnote-151) Section 91G(1)(b) of the Companies Act states that at any time when an order for appointing a restructuring officer is made, until the order appointing the restructuring officer has been discharged, the automatic stay continues.[[152]](#footnote-152) If the restructuring of Punk Lizard is successful, an application to discharge the order appointing the restructuring officer can be made under section 91E(3)(b) of the Companies Act. Equally, if the restructuring is unsuccessful, an application can also be made under section 91E to discharge the appointment order.

**Question 4(f)**

The Kraken family owns and manages Punk Lizard. Whether the Kraken family continue to play a part in the running of Punk Lizard during any restructuring process depends on the specific situation. Assuming a restructuring officer is appointed, this will allow for a scheme of arrangement (“**Scheme**”) within the restructuring proceedings[[153]](#footnote-153). A Scheme is a court sanctioned compromise or arrangement between the company and its creditors or members[[154]](#footnote-154) and does not automatically remove or restrict the powers of the directors[[155]](#footnote-155). The board of directors’ powers may be affected by the appointment of a restructuring officer - the court will determine in the order appointing the restructuring officer which powers are to be retained by the directors (if any)[[156]](#footnote-156). The Court could adopt the “light touch” approach whereby the directors (i.e. the Kraken family) continue to manage Punk Lizard’s affairs simultaneously with the restructuring officer appointed in place.[[157]](#footnote-157) There could be oversight by the restructuring officer of the management/Kraken family if they remain in control of Punk Lizard[[158]](#footnote-158).

**Question 4(g)**

Order 102, rule 20 of the Grand Court Rules (“**GCR**”) and Practice Direction 2/2010 governs the procedure to obtain approval for a Scheme of Arrangement (“**Scheme**”). A Scheme is a court sanctioned compromise or arrangement between Punk Lizard and its creditors[[159]](#footnote-159). After filing the Scheme petition, there is a three-stage process[[160]](#footnote-160):

1. an application for an order from the court that meetings of creditors be convened to approve the Scheme (“**Convening Hearing**”);
2. the Scheme proposed is discussed at meetings which are held according to the Convening Hearing order and are voted on (“**Scheme Meetings**”); and
3. If the Scheme Meetings approve the proposal, an application is then made to the court to obtain approval of the Scheme (“**Sanction Hearing**”).[[161]](#footnote-161)

The Convening Hearing will see the court deal with issues including any jurisdictional issues and the adequacy of any documents in relation to the Scheme. The court must be satisfied that the Scheme documents and any supporting explanatory statements contain all the necessary information to assist the Scheme creditors in making an informed decision as to the proposed Scheme.[[162]](#footnote-162)

At the Scheme Meetings, a vote takes place to approve the Scheme. If the required majorities are reached, the Scheme will progress to the Sanction Hearing. Notwithstanding the Scheme having the necessary support of the creditors, the court must still sanction the Scheme before it can bind all of Punk Lizard’s creditors, Punk Lizard itself and its contributories (if applicable)[[163]](#footnote-163). At the Sanction Hearing, the Court will consider whether:

1. It was reasonable to approve the Scheme (i.e. whether an intelligent, honest member of the class which was convened who was acted in their own interest might reasonably have approved the Scheme);
2. At the Scheme Meeting, whether each class was fairly represented;
3. The majority had acted *bona fide*;
4. All the relevant notice periods were met; and
5. The resolutions were passed by the requisite majority[[164]](#footnote-164).

**\* End of Assessment \***

1. Companies Act (2023 Revision), section 240 [↑](#footnote-ref-1)
2. Ibid., section 241(1) [↑](#footnote-ref-2)
3. Ibid., section 241(1)(a) [↑](#footnote-ref-3)
4. Ibid., section 241(1)(d) [↑](#footnote-ref-4)
5. Ibid., section 241(1)(e) [↑](#footnote-ref-5)
6. Ibid., section 242(1) [↑](#footnote-ref-6)
7. Ibid., section 242(1)(b) [↑](#footnote-ref-7)
8. Ibid., section 242(1)(c) [↑](#footnote-ref-8)
9. 2013 (1) CILR 164 [↑](#footnote-ref-9)
10. Ibid., 180 [↑](#footnote-ref-10)
11. Companies Act (2023 Revision), section 241(1)(d) [↑](#footnote-ref-11)
12. Ibid., section 103(1) [↑](#footnote-ref-12)
13. Colin Wilson, Mitchell Mansfield, Michael Chan, Ivan Chong and David Prager, Kroll, “INSOL International, Technical Paper Series 55 - Cross-border Investigations and Comity: A Toolkit for Insolvency Practitioners and Restructuring Advisors”, <https://www.kroll.com/-/media/kroll-images/pdfs/cross-border-investigations.pdf>, p 10, published in February 2023, accessed on 3 June 2024 [↑](#footnote-ref-13)
14. Stephen Leontsinis, Collas Crill, “Are you ready? Rule changes of relevance to insolvency practitioners in the Cayman Islands”, <https://www.collascrill.com/articles/rule-changes-of-relevance-to-insolvency-practitioners-in-the-cayman-islands/>, published on 19 January 2018, accessed on 3 June 2024 [↑](#footnote-ref-14)
15. Ibid. [↑](#footnote-ref-15)
16. Companies Act (2023 Revision), section 103(7)(b) [↑](#footnote-ref-16)
17. Grand Court Rules (2023 Revision), Order 70, rule 2(1) [↑](#footnote-ref-17)
18. Colin Wilson, Mitchell Mansfield, Michael Chan, Ivan Chong and David Prager, Kroll, “INSOL International, Technical Paper Series 55 - Cross-border Investigations and Comity: A Toolkit for Insolvency Practitioners and Restructuring Advisors”, <https://www.kroll.com/-/media/kroll-images/pdfs/cross-border-investigations.pdf>, p 11, published in February 2023, accessed on 3 June 2024 [↑](#footnote-ref-18)
19. Ibid., section 243(1) [↑](#footnote-ref-19)
20. Ibid., section 243(2) [↑](#footnote-ref-20)
21. Ibid., section 243(3) [↑](#footnote-ref-21)
22. Benjamin Tonner KC, “INSOL International, Foundation Certificate in International Insolvency Law, Module 5C Guidance Text, Cayman Islands, 2023/2024”, p 69 [↑](#footnote-ref-22)
23. Ibid., pp 69-70 [↑](#footnote-ref-23)
24. Ibid., p 71 [↑](#footnote-ref-24)
25. Jalil Asif KC and Pamella Mitchell, Kobre & Kim (2017), “Cayman Islands”. In: Patrick Doris (contributing editor), Gibson, Dunn & Crutcher LLP, “Enforcement of Foreign Judgments 2018”. [Online]. Law Business Research, p 16. Accessed on 3 June 2024. Available from: <https://kobrekim.com/assets/Uploads/PDFs/GTDT-Enforcing-Foreign-Judgments-2018-Cayman-Islands2.PDF> [↑](#footnote-ref-25)
26. Foreign Judgments Reciprocal Enforcement Law (1996 Revision), section 3(1) [↑](#footnote-ref-26)
27. Jalil Asif KC and Pamella Mitchell, Kobre & Kim (2017), “Cayman Islands”. In: Patrick Doris (contributing editor), Gibson, Dunn & Crutcher LLP, “Enforcement of Foreign Judgments 2018”. [Online]. Law Business Research, p 16. Accessed on 3 June 2024. Available from: <https://kobrekim.com/assets/Uploads/PDFs/GTDT-Enforcing-Foreign-Judgments-2018-Cayman-Islands2.PDF> [↑](#footnote-ref-27)
28. Foreign Judgments Reciprocal Enforcement Law (1996 Revision), section 3(2)(a) [↑](#footnote-ref-28)
29. Ibid., section 3(2)(b) [↑](#footnote-ref-29)
30. Ibid., section 3(2)(c) [↑](#footnote-ref-30)
31. Benjamin Tonner KC, “INSOL International, Foundation Certificate in International Insolvency Law, Module 5C Guidance Text, Cayman Islands, 2023/2024”, p 70 [↑](#footnote-ref-31)
32. 2008 CILR 301 [↑](#footnote-ref-32)
33. Guy Manning, Andrew Pullinger and Shaun Tracey, Campbells (2022), “Cayman Islands”. In: Chambers, Global Practice Guides, “Enforcement of Foreign Judgments 2022”. [Online]. Chambers, p 9. Accessed on 3 June 2024. Available from: <https://www.campbellslegal.com/wp-content/uploads/2022/08/Cayman-Islands-Chapter-Enforcement-of-Judgement-2022.pdf> [↑](#footnote-ref-33)
34. Grand Court Rules (2023 Revision), Order 45 rule 1(1)(d) [↑](#footnote-ref-34)
35. Ross McDonough and Guy Cowan, Campbells (2015), “Cayman Islands”. In: Global Legal Group, “The International Comparative Legal Guide to: Corporate Recovery & Insolvency 2015”, 9th Edition. [Online]. Global Legal Group, p 55. Accessed on 3 June 2024. Available from: <https://www.campbellslegal.com/wp-content/uploads/2015/07/ICLG-to-Corporate-Recovery-Insolvency1.pdf> [↑](#footnote-ref-35)
36. Registered Land Law [↑](#footnote-ref-36)
37. Maritime Authority Law [↑](#footnote-ref-37)
38. Civil Aviation Authority Law and Mortgaging of Aircraft Regulations [↑](#footnote-ref-38)
39. The Department of Vehicle and Drivers’ Licensing [↑](#footnote-ref-39)
40. Cayman Islands Intellectual Property Office pertaining to intellectual property rights in the Cayman Islands [↑](#footnote-ref-40)
41. Ross McDonough and Guy Cowan, Campbells (2015), “Cayman Islands”. In: Global Legal Group, “The International Comparative Legal Guide to: Corporate Recovery & Insolvency 2015”, 9th Edition. [Online]. Global Legal Group, p 55. Accessed on 3 June 2024. Available from: <https://www.campbellslegal.com/wp-content/uploads/2015/07/ICLG-to-Corporate-Recovery-Insolvency1.pdf> [↑](#footnote-ref-41)
42. Ibid. [↑](#footnote-ref-42)
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