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**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 8E**

**SINGAPORE**

This is the **summative (formal) assessment for Module 8E** 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 8E**. 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 or Avenir Next 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.assessment8E]**. An example would be something along the following lines: 202223-336.assessment8E. **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**

Which of the following is not a type of winding-up under the Insolvency Restructuring and Dissolution Act (the IRD Act)?

1. Court-ordered winding-up.
2. Creditors’ voluntary winding-up.
3. Members’ voluntary winding-up.
4. Director’s voluntary winding-up.

**Question 1.2**

**Who may apply** to court to place a company into judicial management?

1. The debtor company’s creditors.
2. The debtor company.
3. The debtor company’s directors.
4. Any of the above.

**Question 1.3**

Which of the following is the **least** relevant consideration for determining if a foreign company has a substantial connection with Singapore, so as to be eligible to be wound up under the IRD Act?

1. Many of the company’s creditors are located in Singapore.
2. The company’s key employees and business are located in Singapore.
3. Singapore law is the governing law of the company’s contracts.
4. Singapore has adopted the UNCITRAL Model Law on Cross-Border Insolvency.

**Question 1.4**

When will a scheme of arrangement be effective?

1. When a majority in number representing 75% in value of each class of creditors votes in favour of the scheme.
2. When the results of the voting are advertised in the Government Gazette and a local English daily newspaper.
3. When the Court order sanctioning the scheme is lodged with the Registrar of Companies.
4. When notice of the Court order sanctioning the scheme is issued to all secured creditors of the company.

**Question 1.5**

Which of the following is not a requirement in making an application to the Court for a moratorium under section 64 of the IRD Act?

1. The applicant must provide a detailed draft of the proposed scheme of arrangement.
2. The applicant must provide a list of its top 20 unsecured creditors.
3. The applicant must advertise the application in the Government Gazette and a local English and Chinese daily newspaper.
4. The applicant must show evidence of support from its creditors on the proposed scheme of arrangement.

**Question 1.6**

Which of the following is not a prior transaction which may be adjusted under the IRD Act when a company is in liquidation or under judicial management, and occurs during the relevant period?

1. A contract entered into at fair value.
2. A dividend payment.
3. A payment to a creditor to discharge a debt.
4. The creation of a floating charge.

**Question 1.7**

Which of the following is **not** regarded as an act of an insolvency practitioner?

1. Acting as a nominee for a voluntary arrangement.
2. Acting as a scheme manager.
3. Acting as a liquidator.
4. Acting as a judicial manager.

**Question 1.8**

A bankruptcy application may be made against a debtor, if at the time of the application, the debt amount is not less than \_\_\_\_\_\_\_\_\_\_.

1. S$10,000.
2. S$15,000.
3. S$20,000.
4. S$25,000.

**Question 1.9**

U Pte Ltd (U) is currently unable to pay its debts as they fall due, and it seems unlikely that U can satisfy any future debt in full. P, the sole director of U, decided to continue the business in the hope of revitalising the company and continued taking up new loans and purchased new inventory on credit. Which of the following is correct?

1. For P to be liable for wrongful trading, she must have intended to put U’s assets out of reach of U’s creditors.
2. For P to be liable for wrongful trading, she must first have been convicted of a criminal offence.
3. For P to be liable for wrongful trading, she must or ought to have reasonably known that U was unable to meet its debts in full.
4. For P to be liable for wrongful trading, a majority of U’s creditors must pass a resolution stating that P has traded wrongfully.

**Question 1.10**

Who may apply to court to place a company into **liquidation**?

1. A creditor of a company.
2. A shareholder of a company.
3. A judicial manager.
4. Any of the above.

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

**Question 2.1 [maximum 4 marks]**

State four powers of the liquidator in a compulsory winding up.

Section 144 of the Insolvency Restructuring and Dissolution Act (IRD Act)[[1]](#footnote-1) stipulates various powers of a liquidator in compulsory winding up. These powers include the power to:

1. Carry on the business of the company as necessary for the beneficial winding up of the company.
2. Make any compromise or arrangement with creditors or other persons claiming to be creditors.
3. Institute and defend any action and legal proceedings for an on behalf of the company; and
4. Appoint an agent or any other professional including solicitors and accountants to assist the liquidator in the liquidator’s duties.

The exercise of the above powers is subject to the authorisation of the committee of inspection and judicial control. Creditors and contributories may seek judicial intervention in that regard.

**Question 2.2 [maximum 2 marks]**

Name two objectives of judicial management.

Section 89(1) of the IRD Act provides that a judicial manager must perform their function to achieve the purposes of judicial management which include:

1. the survival of the company, or the whole or part of its undertaking, as a going concern; and
2. a more advantageous realisation of the company’s assets or property than on a winding up.

**Question 2.3 [maximum 4 marks]**

Briefly set out the steps in which the company commences a voluntary creditors’ winding-up.

A voluntary creditor’s winding up is applicable where a company is unable to pay its debts and the directors are unable to provide a declaration of solvency. The following steps are involved:

1. Members meeting: A meeting of the members is convened to pass a resolution for the winding up of the company where the directors have established that the company is insolvent. According to Section 126(1) of the IRD Act, the winding up commences when the resolution is passed.
2. Notice to creditors for a creditors meeting: A notice is then sent out to creditors inviting them for a creditor’s meeting to consider and approve the proposal for winding up. The creditors then vote on the proposal.
3. Appointment of liquidator: Once the proposal is approved, a liquidator is appointed as proposed by the directors and agreed upon by the creditors. If the creditors opt for an alternative liquidator, the creditors choice will then be so appointed.
4. Winding up of the affairs of the company: The Liquidator realises the available assets of the company, makes a distribution, convenes the final meeting of the company and the company proceeds to dissolution.

**QUESTION 3 (essay-type question) [15 marks]**

**Question 3.1 [maximum 8 marks]**

Write a brief essay on

(i) rescue financing; and

(ii) wrongful trading

under the IRD Act.

**Rescue financing**

The introduction of rescue financing, in Singapore was one of the measures designed to enhance the reputation of Singapore as an international restructuring hub. Corporate recovery is largely dependent on access to finances for rehabilitation and restructuring of distressed businesses. The provisions of the IRD Act on rescue financing largely borrow from the US Chapter 11 bankruptcy regime.

Section 67(9) of the IRD Act defines rescue financing as financing necessary for the survival of a company that obtains the financing as a going concern or financing that is necessary to achieve a more advantageous realization of the assets of a company that obtains the financing, than on a winding up of that company.

One key feature of rescue financing is the super priority status which makes rescue financing more attractive as the exposure for lenders is significantly reduced. Under the Act, the Court is empowered, on application by the company[[2]](#footnote-2) under a scheme of arrangement or the Judicial Manager[[3]](#footnote-3) in Judicial Management to make an order that the debt arising from rescue financing:

1. is to be treated as part of the costs and expenses of winding up (should the company subsequently be wound up).
2. is to have priority over preferential and unsecured debts (should the company subsequently be wound up).
3. is to be secured by a new security interest over unsecured property, or a subordinated security interest (where the property is already subject to security); or
4. is to be secured by a new security interest over already-secured property, of the same priority or a higher priority than the existing security interest.

Thus, for post-commencement lending (rescue finance) to rank in priority above preferential claims, it must be sanctioned by court vide court order.

The Courts in granting the above remedies will require the applicant to prove that are unable to obtain rescue financing from any other source unless in the manner sought. In ***Re Attilan Group Ltd [2018] 3 SLR 898***[[4]](#footnote-4), the Singapore High Court declined to grant priority ranking status to rescue financing on the application of the company citing the need for applicants to first take reasonable steps to raise finance on a non-priority basis (and producing evidence of such efforts), before seeking priority rescue funding.

It can be argued that the discretion of court in granting a super priority status poses a challenge in accessing rescue financing as stringent conditions must be met and the grant of super priority status is not guaranteed. Therefore, lenders may shy away from incurring costs in litigation by the company or judicial manager to acquire the super priority status before advancing funds.

Additionally, Section 70 of the IRD Act provides for Cross-Class Cram-Down which essentially allows the Court to approve a restructuring plan approved by a majority even if there are dissenting creditors, provided the plan does not discriminate unfairly between 2 or more classes of creditors, and is fair and equitable to each dissenting class. This provision allows companies to access rescue financing through restructuring efforts without the need to have unanimous approval from creditors.

In conclusion, rescue financing is essential for the recovery of distressed business. The provisions of the IRD Act allowing the Judiciary to create super priority ranking of such financing and cram down dissenting creditors have established Singapore as a major restructuring hub, comparable to established jurisdictions such as the US.

**Wrongful trading**

The concept of wrongful trading aims at promoting good governance by holding directors accountable for their actions and inaction during financial distress of a Company.

The IRD Act[[5]](#footnote-5) sets out the criteria for and liabilities accruing from wrongful trading. Under Section 239 (12) of the IRD Act, a company trades wrongfully if the company, when insolvent, incurs debts or other liabilities without reasonable prospect of meeting them in full or the company incurs debts or other liabilities that it has no reasonable prospect of meeting in full and that result in the company becoming insolvent.

The responsibility of establishing wrongful trading lies with the Court. An application for a declaration that certain persons were involved in wrongful trading can be made by the judicial manager of the company or the liquidator of the company or the Official Receiver or any creditor or contributory of the company, with the permission of the judicial manager or the liquidator or the Court[[6]](#footnote-6). The IRD Act also allows an interested party to apply to the court for a declaration as to whether a particular course of conduct or transaction would constitute wrongful trading.

The Court would hold a person personally liable for all or any of the debts or other liabilities of the company if that person knew that the company was trading wrongfully or if such a person as an officer of the company, ought, in all the circumstances, to have known that the company was trading wrongfully.[[7]](#footnote-7) In practice, the actual liability would be based on the actual loss suffered by the creditors due to wrongful trading.

One of the defenses that is available to directors and officers in cases of wrongful trading is if they can demonstrate that they took reasonable steps to minimize the potential loss to creditors of the company.

A person may be relieved from personal liability if the person acted honestly and having regard to all the circumstances of the case, the person ought fairly to be relieved from the personal liability.

Any person found liable for wrongful trading shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $10,000 or to imprisonment for a term not exceeding 3 years or to both.[[8]](#footnote-8)

In conclusion, the provisions on wrongful trading promote good governance by placing a responsibility on directors to establish early warning signs of financial distress and take necessary steps to preserve the value of the business for the benefit of the creditors. Additionally, the penalties are deterrent to acts of directors and officers of the company which would otherwise be detrimental to the creditors.

**Question 3.2 [maximum 7 marks]**

Write a **brief essay** in which you discuss the similarities and differences between judicial management and liquidation. Explain some factors you would consider when advising your client on electing between either option.

Judicial management and liquidation are processes under the IRD Act which deals with financially distressed companies. There are several similarities between the two processes as well as differences as discussed below.

The similarities that apply to both judicial management and liquidation can be grouped based on:

1. **Purpose:** The purpose of both judicial management and liquidation is to assist creditors of a corporate in financial distress to recover amounts owing to them from the assets of the company where the company is unable to pay off its debts and liabilities when they fall due.
2. **Appointment:** In both processes, the Court and creditors have power to appoint the officeholder. A Judicial Manager may be appointed by a by a judicial management order made by the Court under section 91 of the IRD Act or by the creditors of the company under section 94(11)(e) of the IRD Act. A Liquidator may similarly be appointed by Court on application of the Company, the directors or creditors or appointed by the creditors at a creditors’ meeting for a creditor’s voluntary liquidation.
3. **Control of the company:** In both judicial management and liquidation the control of the company goes away from the directors and the affairs and business of the company are managed by either the judicial manager or the liquidator.
4. **Moratorium:** There is protection for the company once any of the two processes is commenced. In Judicial Management, once a company makes an application for a judicial management order or lodges a written notice of the appointment of a Judicial Manager, there is an automatic moratorium barring any petition for winding up, creditors’ actions to enforce securities, enforcement of any orders or decrees and commencement of legal action without the consent of the officeholder or court.[[9]](#footnote-9) Similarly, in liquidations, once a winding up order has been made or a provisional liquidator has been appointed, no action or proceeding may be proceeded with or commenced against the company except by the permission of the Court.[[10]](#footnote-10)
5. **Role of creditors:** In both cases, the creditors of the company play in a role in the appointment process. In Judicial Management, creditors can apply to court for an appointment, like the case in liquidations.
6. **Officeholders:** Both officeholders i.e., the Judicial Manager and the Liquidator must be licensed insolvency practitioners. However, where a Judicial Manager is appointed by Court or by the Minister for entities in the regulated sectors, that person need not be a licensed insolvency practitioner.[[11]](#footnote-11)

The differences between Judicial Management and Liquidation can be classified based on:

1. **Purpose:** The purpose of judicial management is business rescue and is three-fold in order of priority of objectives, i.e., the survival of the company, or the whole or part of its undertaking, as a going concern; the approval of a compromise or an arrangement between the company and any such persons or a more advantageous realization of the company’s assets or property than on a winding up.[[12]](#footnote-12) If a Judicial Management is successful, the company continues to exist. On the other hand, liquidation is a terminal procedure whose only aim is to realize available assets and wind down the affairs of the company. At the end of liquidation, the company is dissolved, and it ceases to exist.
2. **Mode of appointment:** In Judicial Management, the officeholder, Judicial Manager, is appointed by the Court on the application of the company, its directors, or creditors.[[13]](#footnote-13) In a liquidation, the appointment can be made by the court on the application of creditors or shareholders or compulsorily by the court.
3. **Automatic moratorium:** In Judicial Management, there is an automatic moratorium upon the making of an application for a judicial management order or upon lodging the notice of appointment of interim judicial manager. On the other hand, in liquidations, there is no automatic moratorium, however, legal proceedings are generally halted.
4. **Outcomes:** In a Judicial Management, the likely outcome is a successful restructuring or failure to which the company is placed under liquidation. On the contrary, the only outcome of a liquidation is the realisation of assets and the company ceasing to exist.
5. **Status of the company:** In a Judicial Management, the company continues as a going concern while in a liquidation, subject to realisation, the company is dissolved and ceases to exist.
6. **Timeframes:** Judicial Management is temporary as it is intended to turnaround the business within 180 days after which it automatically lapses unless extended by the Court.[[14]](#footnote-14) On the other hand, a liquidation continues until the assets are realised and distribution made to creditors with no statutory time limits.

Some of the key factors a party needs to consider when electing which procedure to invoke in a distress scenario are:

1. **The viability of the business:** Where a client is optimistic about the prospects of business restructuring then Judicial Management would be ideal. On the contrary, where a business has no prospect of resuscitation then a liquidation would be ideal to realise value for the creditors.
2. **Availability of rescue financing:** The decision to pursue either a judicial management or liquidation will depend on the availability of funding to finance the restructuring process. Where funding is available, judicial management is ideal and where there are no prospects of rescue financing, it is advisable to pursue liquidation to avoid throwing good money after bad money.
3. **Interest of stakeholders**: In both processes, the voices of creditors play a critical role and thus a client must consider where the value lies for the creditors and shareholders in determining which process to pursue. Where value lies in the business continuing as a going concern, the judicial management would be an ideal option.
4. **Timeframes involved**: Having noted that Judicial Management is time bound with a limit of 180 days subject to court extension, it will be important for a client to consider whether the financial distress can be handled within the prescribed period or whether a liquidation would be more considering no time limits apply.

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

Using the facts below for each section, answer the following questions.

Oldway Pte Ltd (Oldway) and Swift Pte Ltd (Swift) are music instrument suppliers. Oldway manufactures high-quality pianos, while Swift makes hand-built custom guitars. Both Oldway and Swift would sell their instruments to various retailers in Singapore and are renowned for creating high-quality instruments and preserving the traditional style of manufacturing musical instruments.

In March 2023, Oldway was experiencing serious supply chain issues, caused in part by severe wildlife poaching reducing the supply of ivory for Oldway to manufacture its piano keys. Oldway was not able to pay one of its creditors, Spruce Pte Ltd (Spruce), a supplier of piano wood, the S$500,000 for the most recent delivery of piano wood to Oldway. After issuing a warning, Spruce issued a statutory demand against Oldway for the sum of S$500,000.

Martinus, one of Oldway’s directors, remembered that a year ago, Spruce had delivered a bad cargo of rotten wood, causing some pianos to collapse and caused about S$750,000 in losses. Out of goodwill, Oldway had not commenced legal action against Spruce to maintain their business relationship. Martinus was wondering if the time was nigh to sue Spruce.

**Question 4.1 [maximum 3 marks]**

Briefly describe the process in which Spruce would apply to Court for the winding-up of Oldway on the basis that the statutory demand went unsatisfied. Would Oldway be able to resist the winding-up application?

Spruce as a creditor of Oldway is eligible to make an application to Court for the winding up of Oldway under Section 124(1)(c) of the IRD Act. The petition must be supported by an affidavit and must state the grounds of winding up i.e., an unsatisfied statutory demand and details of the debt owed. The winding up of Oldway will be deemed to have commenced at the time of the making of the application for the winding up.[[15]](#footnote-15)

According to the Singapore Judiciary Guidelines on Winding Up[[16]](#footnote-16), Spruce will need to follow the steps below:

1. Payment of deposit of $10,400 to the Official Receiver.
2. File an originating application according to Form CIR-12, including payment receipt for (a) above and a supporting affidavit. Spruce may nominate a licensed insolvency practitioner to be appointed as liquidator.
3. Serve the application on Oldway, at least 7 days before the hearing, any other creditor, the Official Receiver and the nominated liquidator, if any.
4. At least 7 days before the hearing, advertise in the Government Gazette and in one local English daily newspaper.

The outcome of the hearing of a winding up application may be:

1. The granting of a winding up order.
2. The Court may dismiss the winding up application.
3. The Court may adjourn the hearing.

Once the Court issues a winding up order, no action may be commenced or continued against the company without the court's permission and any disposition of the company’s property, and any transfer of its shares shall be void unless the court orders otherwise.

Once served with the application and the hearing notice, Oldway may file an affidavit opposing the winding up application on grounds of a counter claim against Spruce arising from the delivery of bad cargo of rotten wood one year ago. Additionally, Oldway may apply to set aside the statutory demand, potentially delaying or preventing the winding-up application.

According to Section 6 of the Limitation Act 1959[[17]](#footnote-17), any claim under contract can be brought up to after 6 years therefore Oldway’s claim against Spruce is actionable and is a valid ground to set aside the statutory demand and oppose the winding up.

**Question 4.2 [maximum 5 marks]**

Oldway and Spruce eventually entered into a settlement agreement, and Oldway was not wound up. However, its financial woes were far from over. A new instrument manufacturer, JazzGPT Pte Ltd (Jazz), had entered the market and had a hot start. Jazz harnessed the power of technology, using artificial intelligence to programme the instruments’ blueprints and 3-D printing to manufacture the envisioned product. As such, Jazz was able to produce instruments at a staggering 100 times the rate of Oldway and Spruce and sell its products at a fraction of the price. Many experts, during blind reviews, have also admitted that the sound quality of Jazz’s instruments was indistinguishable from traditionally-made instruments. Most musicians started turning to Jazz.

Hence, Oldway’s sales continued to plummet and it soon faced a financial crisis. At a board meeting, Martinus decided that it was in the best interests of Oldway to place itself under judicial management.

Briefly describe (i) what Oldway must demonstrate to the court in order to obtain a judicial management order; and (ii) the effect of a judicial management order.

Judicial Management is a rescue procedure aimed at supporting restructuring efforts by providing a shield for the company. For Oldway to be placed under Judicial Management, it must demonstrate to the Court the following:

1. **Inability to pay debt:** Oldway must provide evidence to demonstrate that it is or is likely to become unable to pay its debts when they fall due.[[18]](#footnote-18)
2. **Likely effect of Judicial Management order:** Oldway must demonstrate that a Judicial Management order would be likely to achieve one or more of the purposes of judicial management[[19]](#footnote-19) i.e., the survival of the company, or the whole or part of its undertaking, as a going concern; the approval of a compromise or an arrangement between the company and any such persons or a more advantageous realization of the company’s assets or property than on a winding up.

If Oldway is successful in obtaining a judicial management order, the effect of the same would be that:

1. The affairs, business and property of the company will be managed by a judicial manager appointed by the Court.[[20]](#footnote-20)
2. The following actions cannot be undertaken without the consent of Court or the Judicial Manager:[[21]](#footnote-21)
   1. No order may be made, or resolution passed for the winding up of Oldway.
   2. No receiver or manager may be appointed over any property or undertaking of Oldway.
   3. No other proceedings may be commenced or continued against Oldway.
3. Any receiver, or receiver and manager, must vacate office and any application for the winding up of the company must be dismissed.[[22]](#footnote-22)

**Question 4.3 [maximum 3 marks]**

Oldway was placed under judicial management on 30 June 2023 and Messrs Buckman and Berryland of Pacific Advisory Services Pte Ltd were appointed as the joint and several judicial managers of Oldway (Judicial Managers). Mayer, one of Swift’s directors, genuinely wanted to assist Oldway in its restructuring, as Mayer wanted to uphold the traditional way of manufacturing musical instruments. Mayer wanted to know how Swift could aid Oldway financially but ensure that any financial aid given would be granted priority in the event that Oldway was wound up.

What are the considerations a Court will take in granting super-priority of Swift’s financial assistance, and what would the effect of such an order be?

The intention of Swift to offer financial assistance to Oldway to support its restructuring efforts during Judicial Management amounts to rescue financing. For Swift’s financial assistance to obtain super priority, the Judicial Managers will make an application to Court for the grant of orders that the new financing is granted super priority. The Courts in determining the application will consider several factors including:

1. The ability of the company to obtain rescue financing from any other source other than Swift which would not require super priority ranking. The IRD Act[[23]](#footnote-23) provides that the Court will only grant the orders sought if the company would not have been able to obtain the rescue financing from any person unless the debt arising from the rescue financing is given the priority.
2. Impact on existing secured creditors. The Court will consider whether the creation of an additional security interest to cover the rescue financing affects the interests of existing secured creditors and whether such creditors will be adequately protected if the rescue financing is granted.[[24]](#footnote-24)
3. Justification for the financing. In ***Re Attilan Group Ltd [2018] 3 SLR 898,***[[25]](#footnote-25)the Court emphasized that for rescue financing to be granted priority, the applicants must demonstrate that the financing is necessary for the company’s operations and that the terms are fair and reasonable.

If the application is considered favourably and an order granting super priority issued, the effect of court order would be that:

1. The financing provided by Swift, if Oldway is wounded up, is treated as part of the costs and expenses of winding up and thus rank in priority.[[26]](#footnote-26)
2. If Oldway is wound up, Swift’s financial assistance is to have priority over all the preferential debts and all other unsecured debts.[[27]](#footnote-27)
3. The financial assistance offered by Swift is secured by property of Oldway, either that is already securing a debt or one that has not been offered as security.

**Question 4.4 [maximum 4 marks]**

Initially, Oldway’s Judicial Managers contemplated proposing a scheme of arrangement with Oldway’s creditors to restructure its debts. Upon investigating Oldway’s books, the Judicial Managers noticed, in particular, the following transactions:

1. A legal bill of S$25,000 paid on 10 April 2023 to a law firm, for work done in relation to advising Oldway on its restructuring and liquidation options.
2. On 11 April 2023, Oldway made a partial repayment of S$100,000 to Martinus’ childhood best friend, Clarence, for a loan in the sum of S$600,000 which Clarence had given Oldway in May 2022. There are no written records documenting the terms of this loan.
3. On 15 April 2023, Oldway sold to Martinus’ daughter a Steinway piano at the price of S$200,000. Oldway had purchased this Steinway piano on 15 September 2022 for S$1,000,000 for the purposes of placing it as the centrepiece of Oldway’s showroom.

You act for the Judicial Managers, who have asked you for advice in relation to the recovery of Oldway’s assets.

Based on the above set of facts, the payments are impeachable transactions by virtue of being an extortionate credit transaction, unfair preference and a transaction at an undervalue respectively during the relevant time and when Oldway was unable to pay its debts or likely to become unable to pay its debts.

First, the Judicial Managers may attempt to recover the fees paid to a law firm on grounds that the transaction leading to the raising of the legal bill was an extortionate transaction. The IRD Act defines an extortionate transaction as a transaction where the terms of it require grossly exorbitant payments to be made (whether unconditionally or in certain contingencies) in respect of the provision of the credit or it is harsh and unconscionable or substantially unfair.[[28]](#footnote-28) In order for the Judicial Managers to recover the sums paid to the law firm, they must prove that the bill of S$25,000 was substantially unfair in relation to the advisory work on the liquidation and restructuring options and that the transaction was entered into within 3 years before the commencement of the judicial management[[29]](#footnote-29), in which case the payment was made just two months before Oldway entering Judicial Management. If the Court is convinced, the Court may order that the law firm pays Oldway any sums paid to the law firm by virtue of the transaction or grant an order directing that accounts be taken between Oldway and the law firm.[[30]](#footnote-30) The Judicial Managers shall recover the assets by execution of the court orders.

Secondly, regarding the partial repayment of S$100,000 to Clarence, a friend of the Director of Oldway, the provisions of the IRD Act on unfair preferences apply. An unfair preference is considered to be given when the company does anything or suffers anything to be done which (in either case) has the effect of putting that person into a position which, in the event of the company’s winding up, will be better than the position that person would have been in if that thing had not been done.[[31]](#footnote-31) By making a partial payment of about 17% to an unsecured creditor, since there is no documentation of the loan terms, Oldway improves the position of a creditor who is a connected party, a close relation to the director, in the event of a liquidation by reducing the exposure. The Judicial Managers can apply to court for the impeachment of this transaction and will need to prove that it was made within the relevant time, i.e., within the period starting 2 years before the commencement of the judicial management,[[32]](#footnote-32) that Oldway was insolvent and that Oldway was motivated by the desire to prefer Clarence. On successful application, the Court may make an order restoring the position to what it would have been if Oldway had not given that unfair preference[[33]](#footnote-33) thus aiding recovery of Oldway assets.

Thirdly, Section 224 of the IRD Act provides that while a company is under judicial management, and has at the relevant time i.e., in the case of a transaction at an undervalue, within the period starting 3 years before the commencement of the judicial management[[34]](#footnote-34), the Judicial Manager may apply to Court for an order to restore the company to a position that it would have been if the transaction at an undervalue was not entered into. A transaction at an undervalue is further defined in the IRD Act as a transaction where the company enters into a transaction for a consideration the value of which, in money or money’s worth, is significantly less than the value, in money or money’s worth, of the consideration provided by the company.[[35]](#footnote-35) Based on the facts above, the third transaction where Oldway sells to Martinus’ daughter a Steinway piano purchased at S$1,000,000 for S$200,000 only two months before Oldway is placed under Judicial Management qualifies for a transaction at an undervalue capable of being impeached. To recover this asset, the Judicial Manager will therefore need to make an application to Court seeking a reversal of the transaction and a return of the piano with proof that the transaction was entered at an undervalue within the relevant time. The likely outcome is that the Court will order Martinus’ daughter to return the piano to Oldway. The Judicial Manager should be prepared to deal with any objection by Martinus’ daughter on grounds that the transaction was entered into in good faith or with reasonable belief that it would benefit Oldway.

**\* End of Assessment \***

1. Insolvency, Restructuring and Dissolution Act 2018 (No. 40 Of 2018) s 67 accessed at <https://sso.agc.gov.sg/Acts-Supp/40-2018/> on 6 June 2024. [↑](#footnote-ref-1)
2. *Idem, s 67.* [↑](#footnote-ref-2)
3. *Idem, s 101.* [↑](#footnote-ref-3)
4. Accessed at <https://lawgazette.com.sg/feature/high-court-refuses-priority-rescue-financing-status-in-first-case-on-singapores-new-dip-financing-regime/> on 6 June 2024 [↑](#footnote-ref-4)
5. IRD Act, s 239. [↑](#footnote-ref-5)
6. *Idem, s 239(5).*  [↑](#footnote-ref-6)
7. *Idem, s 239(1).*  [↑](#footnote-ref-7)
8. *Idem, s 239(6).*  [↑](#footnote-ref-8)
9. *Idem, s 95.* [↑](#footnote-ref-9)
10. *Idem, s 133.* [↑](#footnote-ref-10)
11. *Idem, s 91(3)(g).* [↑](#footnote-ref-11)
12. *Idem, s 89(1).*  [↑](#footnote-ref-12)
13. *Idem, s 91.* [↑](#footnote-ref-13)
14. *Idem, s 111.* [↑](#footnote-ref-14)
15. *Idem, s 126 (2).*  [↑](#footnote-ref-15)
16. Accessed at <https://www.judiciary.gov.sg/civil/company-winding-up> on 16 June 2024 [↑](#footnote-ref-16)
17. Limitation Act 1959 accessed at <https://sso.agc.gov.sg/Act/LA1959?ProvIds=P12-#pr6-> on 17 June 2024 [↑](#footnote-ref-17)
18. IRD Act, s 91 (1) (a). [↑](#footnote-ref-18)
19. *Idem, s 91(1) (b)* [↑](#footnote-ref-19)
20. *Idem, s 91(2)* [↑](#footnote-ref-20)
21. *Idem, s 96(4)* [↑](#footnote-ref-21)
22. *Idem, s 96(1)* [↑](#footnote-ref-22)
23. *Idem, s 67(1)(b)*  [↑](#footnote-ref-23)
24. *Idem, s 67(1)(d)* [↑](#footnote-ref-24)
25. Accessed at <https://lawgazette.com.sg/feature/high-court-refuses-priority-rescue-financing-status-in-first-case-on-singapores-new-dip-financing-regime/> on 6 June 2024 [↑](#footnote-ref-25)
26. IRD Act, s 67 (1) (a). [↑](#footnote-ref-26)
27. *Idem, s 67(1)(b).* [↑](#footnote-ref-27)
28. *Idem, s 228(3) (b.)* [↑](#footnote-ref-28)
29. *Idem, s 228 (2).* [↑](#footnote-ref-29)
30. *Idem, s 228 (4).* [↑](#footnote-ref-30)
31. *Idem, s 225(3)(b).* [↑](#footnote-ref-31)
32. *Idem, s 226 (b).* [↑](#footnote-ref-32)
33. *Idem, s 225 (b).* [↑](#footnote-ref-33)
34. *Idem, s 226 (1)(a).* [↑](#footnote-ref-34)
35. *Idem, s 224(3)(b).* [↑](#footnote-ref-35)