



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 5E

JERSEY

This is the **summative (formal) assessment** for **Module 5E** on 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 5E. 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: **[studentnumber.assessment5E]**. An example would be something along the following lines: 202021IFU-314.assessment5E. **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 “studentnumber” 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.**
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6. The final submission date for this assessment is **31 July 2021**. The assessment submission portal will close at **23:00 (11 pm) GMT on 31 July 2021**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
7. Prior to being populated with your answers, this assessment consists of **9 pages**.

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 court would be most appropriate in pursuing enforcement for a claim of £5,000 in Jersey?

- (a) Royal Court.
- (b) Court of Appeal and Privy Council.
- (c) Petty Debts Court.**
- (d) None of the above.

ANSWER: c - correct

Question 1.2

Debtors that can become subject to *Désastre* in Jersey under the Bankruptcy (*Désastre*) (Jersey) Law 1990, include the following:

- (i) A dissolved company that was registered in Jersey under the Companies (Jersey) Law 1991.**
- (ii) An individual who was ordinarily resident in Jersey until 18 months before, but has had no connection to Jersey since that time.
- (iii) An incorporated Limited Partnership.**
- (iv) An individual who has never been ordinarily resident in Jersey or carried on business in Jersey, but owns movable property in Jersey.

The answer is:

- (a) (i), (ii), (iii) and (iv).
- (b) (i), (iii) and (iv).
- (c) (ii) and (iv).
- (d) (i) and (iii).**

ANSWER: d - correct

Question 1.3

Which party **cannot** make an application for *Désastre* under the Bankruptcy (*Désastre*) (Jersey) Law 1990?

- (a) The Viscount.
- (b) The Jersey Financial Services Commission.
- (c) A creditor with a claim of at least £3,000.
- (d) The Debtor.

ANSWER: a - correct

Question 1.4

Which statutory processes provide a moratorium against action being brought by non-secured creditors?

- (i) Summary Winding Up.
- (ii) Creditors' Winding Up.
- (iii) Just and Equitable Winding Up.
- (iv) *Désastre*.
- (v) *Dégrévement* or Realisation.
- (vi) Debt Remission Order.
- (vii) *Remise de Biens*.
- (viii) Compromises or Arrangements.

The answer is:

- (a) (i), (ii), (iii), (iv), (vi), (vii) and (viii).
- (b) (i), (ii), (iii) and (iv).
- (c) (i), (ii), (iii), (vii) and (viii).
- (d) All of the above.

ANSWER: a - correct

Question 1.5

Which liquidation processes under Part 21 of the Companies (Jersey) Law 1991, as amended, are available in respect of solvent companies?

- (i) Summary Winding Up.
- (ii) Creditors' Winding Up.
- (iii) Just and Equitable Winding Up.

The answer is:

- (a) (i) only.
- (b) (i) and (ii).
- (c) (i) and (iii).
- (d) All of the above.**

ANSWER: d - correct

Question 1.6

Which one of the following statements **is correct**?

- (a) Jersey is part of Britain, the UK and the EU.
- (b) Jersey is part of Britain and the EU but not the UK.
- (c) Jersey is part of Britain but not the UK and not the EU.**
- (d) Jersey is not part of Britain, or the UK or the EU.

ANSWER: c - correct

Question 1.7

Which of the following statements **are correct**?

Jersey is an attractive destination for international finance, due in part to its:

- (i) Low tax regime.
- (ii) Political independence.
- (iii) Rapidly expanding economy.
- (iv) Legal and regulatory infrastructure.

The answer is:

- (a) (i), (ii), (iii) and (iv).
- (b) (i), (iii) and (iv).
- (c) (i), (ii) and (iii).

(d) (i), (ii) and (iv).

ANSWER: d - correct

Question 1.8

What type of mortgage can be granted in Jersey, following judgment of the Jersey Court, to allow an unsecured creditor to obtain security over immovable property owned by a debtor?

(a) A conventional hypothec.

(b) A judicial hypothec.

(c) A pledge.

(d) A legal hypothec.

ANSWER: b - correct

Question 1.9

In which statutory processes is it typical for an independent professional Insolvency Practitioner to be appointed?

(i) Summary Winding Up.

(ii) Creditors' Winding Up.

(iii) Just and Equitable Winding Up.

(iv) *Désastre*.

(v) *Dégrévement* or Realisation.

(vi) Debt Remission Order.

(vii) *Remise de Biens*.

(viii) Compromises or Arrangements.

The answer is:

(a) (i), (ii) and (iii).

(b) (ii) and (iii).

(c) (i), (ii), (iii), and (viii).

(d) All of the above.

ANSWER: b - correct

Question 1.10

What other responsibilities are overseen by the office of the Viscount, besides insolvency functions?

(a) Coroner.

(b) Data Protection.

(c) Farming and fishing.

(d) Prison services.

ANSWER: a - correct

Question 1: 10 out of 10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

Describe the powers that are available to a Viscount in respect of a *Désastre* and a Liquidator in respect of a Winding Up.

In *Désastre*, the Viscount of the Royal Court of Jersey is appointed by the Royal Court to administer the bankrupt's estate for the benefit of creditors. The Viscount controls the procedure and is responsible for the realisation and distribution of the debtor's assets and will conduct investigations to identify which insolvency occurred and whether any offences were committed – although the Royal Court retains general supervisory jurisdiction over the Viscount's conduct. All the assets of the debtor (worldwide) are declared *en désastre* and automatically vest in the Viscount, subject to any security obligations.

The Viscount has wide ranging powers, including the power: (i) to bring, institute or defend actions in respect of property vested in the Viscount; (ii) to compromise debts, claims and liabilities; (iii) to make compromise or other arrangements with creditors; (iv) to dispose of property; (v) to carry on the business as far as is necessary or expedient for its beneficial disposal; (vi) to borrow money; (vii) to pay creditors; (viii) to disclaim onerous property and contract leases; and (ix) to pursue recovery in respect of antecedent transactions (e.g. transactions at an undervalue, preferences, wrongful trading, fraudulent trading; extortionate credit transactions and excessive pension contributions). Additionally, the Viscount has the power to summon any person who has (or is suspected to have) any property, document or information relating to the company's activities and to require that person to produce any document.

If the debtor is a company, and the *Désastre* process has completed, the Viscount will file any necessary forms with the Registrar of Companies to dissolve the company.

In a Winding Up, broadly the role of a liquidator is to realise assets to enable a *pari passu* distribution amongst creditors according to their status, with any surplus (after payment of creditors in full, together with accrued interest) being distributed to shareholders.

In a summary winding up, on the appointment of a liquidator the powers of the directors cease and those powers may then be exercised by the liquidator (see Article 149 of the Companies (Jersey) Law 1991 as amended (the "**Companies Law**")).

In a just and equitable winding up, the liquidator's powers will be determined by Order of the Royal Court (and are likely to be similar to either a summary winding up or creditors' winding up, depending on whether the company is solvent or insolvent (see Article 155(4) of the Companies Law).

In a creditors' winding up, the liquidator's powers are wide ranging and include the power: (i) with the sanction of the Royal Court or the liquidation committee (or if none, a meeting of the creditors), to pay a class of creditors in full or compromise any claim by or against the company; (ii) to exercise any other power of the company as may be required for its beneficial winding up; (iii) to settle a list of contributories, make calls, and summon general meetings of the company for the purpose of obtaining sanction by special resolution or for any other purpose the liquidator may think fit; and (iv) to pay the company's debts and to adjust the rights of contributories between themselves (see Article 170 of the Companies Law). Additionally, pursuant to Article 171 of the Companies Law, the liquidator shall have the power to disclaim onerous property; and pursuant to Articles 176 to 179, pursue transactions at an undervalue, preferences, wrongful trading, fraudulent trading, extortionate credit transactions. The

liquidator may also require any person who has (or is suspected to have) any property, document or information relating to the company's activities and to require that person to produce any document (see Article 180 of the Companies Law).

Moreover, the Companies Law sets out a number of general duties, which include an obligation to report possible criminal offences relating to the company (see Article 184 of the Companies Law), and in a creditors' winding up, to investigate the assets of the company.

ANSWER: Excellent answer (3 marks)

Question 2.2 [maximum 2 marks]

Briefly describe the practical reasons why Jersey may not have a statutory or customary corporate rescue and turnaround procedure equivalent to an English administration or US Chapter 11.

There is no statutory or customary corporate rescue procedure equivalent to administration under English law or Chapter 11 under the US Bankruptcy Code. Principally, the reason for the lack of rescue culture is as a result of the fact that Jersey is an offshore jurisdiction and finance centre, which has a very different business landscape to a typical onshore jurisdiction.

There are a significantly more companies registered in Jersey than people. Typically, Jersey companies are used for financial structuring and other finance-related purposes (e.g. banking, private wealth and funds) and are often structured as special purpose vehicles, holding companies or other group companies, rather than the typical 'trading' businesses found onshore.

In Jersey, there are high numbers of managed, solvent liquidations and there is less need for the rescue and turnaround processes more typically associated with onshore, traditional trading business.

ANSWER: Excellent answer (2 marks)

Question 2.3 [maximum 3 marks]

Describe the three varieties of mortgage available in Jersey in respect of **immovable property**.

There are three types of mortgage (or *hypothèque*) pursuant to which security over immovable property may be granted:

- (i) a judicial hypothec (or *hypothèque judiciaire*): This type of hypothec is created by the registration of an obligation (e.g. a promissory note, bond or judgment debt) (by consent or otherwise) ("*billet*"), acknowledging the debt or obligation for a defined sum, with the Jersey Public Registry. The instrument creating the debt or obligation is not itself registered, rather the *billet* acknowledges the source of the indebtedness;
- (ii) a conventional hypothec (or *hypothèque conventionnelle simple*): This type of hypothec is created by passing a contract setting out the arrangement in respect of the granting and taking of security, entered into between two or more parties, before the Jersey Court. Once the contract is passed before the Court, the contract is registered in the Jersey Public Registry, and is available for public inspection; and
- (iii) a legal hypothec (or *hypothèque légale*) is relatively rare and arises by operation of law, and are priorities granted in specific circumstances to protect the rights of certain

individuals (e.g. a wife's claim to dower is protected by a legal hypothec, coming into being as at the date of her husband's death).

ANSWER: Excellent answer (3 marks)

Question 2.4 [maximum 2 marks]

Describe the restricted circumstances in which a Debt Remission Order is available for a Jersey resident under the Debtor Remission (Individuals) (Jersey) Law 2016.

A Debt Remission Order (or "**DRO**") under the Debtor Remission (Individuals) (Jersey) Law 2016 is a statutory out-of-Court summary bankruptcy process for individuals with debts of less than JEP 20,000.

A DRO is available upon the application of the debtor to the Viscount of Jersey in restricted circumstances, including where the applicant has: (i) assets worth less than JEP 5,000 (excluding a motor vehicle with a value not more than JEP 2,000); (ii) less than JEP 100 of disposable income on a monthly basis, after deduction of tax, social security contributions and normal household expenses; (iii) debts of less than JEP 20,000; and (iv) acted in good faith whilst incurring the debts. The relevant debtor individual must: (i) be over 18 years old; and (ii) resident in Jersey within the 5 years immediately preceding the date on which the application is made; and (iii) not be bankrupt within the meaning of Article 8 of the Interpretation (Jersey) Law 1954.

The statute sets out the circumstances in which a debtor will be held not to have acted in good faith, including: within one year prior to the date of the application giving a preference to a person, incurring a debt knowing that he would be unable to the date or being reckless to such ability, etc.

ANSWER: Excellent answer (2 marks)

Question 2: 10 out of 10

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

Question 3.1 [maximum 7 marks]

Write a short essay on the *Désastre* process under the Bankruptcy (*Désastre*) (Jersey) Law 1990. In your essay, you should refer to at least the following:

- The parties who can be subject to *Désastre*
- The parties who can apply for *Désastre*
- Requirements for an application for *Désastre*
- The effect of *Désastre* upon the debtor
- The role of the Viscount
- The Viscount's costs
- Conclusion of the *Désastre*

Désastre is a court initiated insolvency process under the Bankruptcy (*Désastre*) (Jersey) Law 1990 (the "**Bankruptcy Law**"). The purpose of *Désastre* proceedings is to facilitate the orderly and fair distribution of the debtor's assets by treating the claims of all unsecured creditors equally and rateably (i.e. *pari passu*). It is the most common way that a creditor may take enforcement action against a debtor in Jersey.

An application for a declaration declaring the property of a debtor to be *en désastre* may be made in respect of the property of the following debtors: (a) a person (i) who is or was ordinarily resident in Jersey at any time within the period of 12 months; or (ii) who carries on, or has carried on, business in Jersey at any time within the period of 3 years, immediately preceding the date of the application, or (iii) has immovable property in Jersey, capable of realisation at the date of the application; (b) a company, registered under the Companies (Jersey) Law 1991 (the "**Companies Law**") or has been dissolved pursuant to the Companies Law; (c) an incorporated liability partnership; or (d) a limited liability partnership (see Article 4 of the Bankruptcy Law). For the avoidance of doubt, Article 4(2) of the Bankruptcy Law, provides that no application may be made in respect of the property of a deceased person.

For these purposes "debtor" (in respect of an application) means a person who is insolvent and "insolvency" means the inability of a debtor to pay his or her debts as they fall due (see Article 1 of the Bankruptcy Law). Unlike other jurisdictions, it is not necessary for the liabilities to exceed the assets, or, in respect of a company, there to have been any failure to pay a statutory demand. It is necessary for the debtor to have realisable assets.

An application for a declaration may be made by: (a) a creditor with a claim of at least JEP 3,000 against the debtor; (b) the debtor; or (c) the Jersey Financial Services Commission (the "**Commission**") in respect of regulated business activities (see Article 3(1) of the Bankruptcy Law). An application for a declaration may not be made by any creditor which has agreed not to make such application; or any creditor whose only claim is for repossession of goods (see Article 3(2) of the Bankruptcy Law).

The application must be made in the prescribed form and, save for any application made by the Commission, must be accompanied by a verifying affidavit (see Articles 3(3) and (4) of the Bankruptcy Law). It is necessary to confirm in the application, amongst other things, that the debtor is insolvent and that it has realisable assets.

The making of a declaration is a discretionary remedy. As a matter of practice, the Royal Court will usually make a declaration unless there are significant factors or circumstances which weigh against doing so (see Article 6(1) and (2) of the Bankruptcy Law, in the case of an application made by a creditor or debtor, the Royal Court "after considering an application and the affidavit... may make a declaration" and in respect of an application made by the Commission, the Royal Court "may make a declaration if it considers it just and equitable to do so"). The Royal Court will not make a declaration in certain specified circumstances (see Article 5 of the Bankruptcy Law). In the case of an application by a creditor, the Royal Court may require the creditor to indemnify the Viscount against the costs, to the extent that it thinks fit (see Article 5(2) of the Bankruptcy Law).

Upon the making of a declaration, subject to certain limited exceptions, all the property and powers of the debtor (including all property belonging to or vested in the debtor at the date of the declaration, and the capacity to exercise and to take proceedings for exercising all such powers in or over in respect of any property as might have been exercised by the debtor for the debtor's own benefit at the date of the declaration) shall vest in the Viscount (see Article 8 of the Bankruptcy Law). By way of example, property held by the debtor in trust for any other person (see Article 8(3) of the Bankruptcy Law) are excluded from the assets vested in the Viscount.

The debtor owes duties of cooperation and assistance to the Viscount (see Article 18 of the Bankruptcy Law).

The Viscount controls the procedure and is responsible for the realisation and distribution of the debtor's assets and will conduct investigations to identify which insolvency occurred and whether any offences were committed – although the Royal Court retains general supervisory jurisdiction over the Viscount's conduct.

The Viscount has wide ranging powers, including the power: (i) to bring, institute or defend actions in respect of property vested in the Viscount; (ii) to compromise debts, claims and liabilities; (iii) to make compromise or other arrangements with creditors; (iv) to dispose of property; (v) to carry on the business as far as is necessary or expedient for its beneficial disposal; (vi) to borrow money; (vii) to pay creditors; (viii) to disclaim onerous property and contract leases; and (ix) to pursue recovery in respect of antecedent transactions (e.g. transactions at an undervalue, preferences, wrongful trading, fraudulent trading; extortionate credit transactions and excessive pension contributions). Additionally, the Viscount has the power to summon any person who has (or is suspected to have) any property, document or information relating to the company's activities and to require that person to produce any document.

The Viscount's fees and expenses are paid in priority to other creditors from the amounts liquidated (other than secured creditors, whose priority is preserved) including certain 'preferential debts' such as wages and general unsecured creditors (see Article 31 of the Bankruptcy Law). The Viscount may levy fees as they arise or take amounts equivalent to 12.5% of the amounts realised and distributed.

If the debtor is a company, once the debtor's assets have been realised and all claims concluded (e.g. via the proof of debt process and adjudication), the Viscount will supply all creditors with a report and accounts and pay a final distribution. The Viscount will then make all necessary filings with the Registrar of Companies stating that the final distribution has been

paid. The company will be dissolved once the notice has been registered (see Article 36 of the Bankruptcy Law).

ANSWER: A personal Désastre lasts four years, but it is possible to shorten or lengthen the term. Good answer (6.5 marks)

Question 3.2 [maximum 8 marks]

Write a **short essay** describing in detail the creditor claims process in respect of a Creditors' Winding Up. In your essay, you should refer to at least the following:

- The relevant Jersey law that applies
- Which areas are covered under the relevant Jersey law
- Advertising for claims and notice periods
- Which debts are provable
- Interest on debts
- Proof of debts and the cost of proving
- Examination of proofs of debts
- Adjudication and the process of admitting or rejecting claims

Part 21 (Winding Up of Companies), Chapter 4 (Creditors' winding up) of the Companies (Jersey) Law 1991 (the "**Companies Law**") concerns creditors' winding up proceedings.

Article 166 of the Companies Law provides that "*in a creditors' winding up the same rules prevail with regard to the respective rights of secured and unsecured creditors, to debts provable, to the time and manner of proving debts, to the admission and rejection of proofs of debts, to the order of payment of debts and to setting off debts as are in force for the time being with respect to persons against whom a declaration has been made under the Désastre Law with the substitution of references to the winding up for references to the désastre and references to the liquidator for references to the Viscount*". Accordingly, in a creditors' winding up, the provisions of the Bankruptcy (*Désastre*) (Jersey) Law 1990 (the "**Bankruptcy Law**") dealing with creditors' claims apply (including the manner in which debts are proved and the admission and rejection of proofs of debt). The process for providing claims in *Désastre* and accordingly, as noted above, in a creditors' winding up is set out at Part 7 of the Bankruptcy Law.

Pursuant to the Bankruptcy (*Désastre*) Rules 2006 (the "**Rules**") provides that following their appointment, the liquidator is required to publish a notice in the Jersey Gazette and such other way as the liquidator may think fit advising creditors of the company to file a statement of claim, which contains full particulars of the creditor's claim, by a specified date, being a date that is not less than 40 and not more than 60 days after the start of the creditor's winding up. There is no statutory provision for publishing a notice for potential claims outside of Jersey. However, a liquidator should consider the circumstances of the liquidation in determining whether this would be a prudent course of conduct in order to avoid any subsequent challenge by a creditor.

Pursuant to Article 29 of the Bankruptcy Law, all debts and liabilities, present or future, or contingent, to which the debtor is subject at the start of the creditors' winding up or becomes subject prior to the payment of the final distribution by reason of any obligation incurred before the start of the creditors' winding up are provable in the creditors' winding up.

Also pursuant to Article 29 of the Bankruptcy Law, where an unsecured debt accrues interest, interest to the start of the creditors' winding up is provable as part of the debt. Where a secured debt accrues interest, any interest accrued to the date of payment of the debt is provable and payable from the sale proceeds of the secured assets to the extent that they are sufficient to pay the interest.

For the sake of completeness, Article 29 of the Bankruptcy Law also provides that, where a debt is contingent or does not have a certain value, the creditor must make an estimate of its value.

If a creditor of a company wants to recover its debts in a creditors' winding up, it must make a claim by way of a 'proof of debt', in accordance with the Companies Law. A creditor must prove their debt at the time and in the manner prescribed by the Jersey Court and, unless the Jersey Court orders otherwise, must bear the costs of proving the debt (see Article 30 of the Bankruptcy Law). A creditor may from time to time withdrawn or amend its proof of debt and each such amendment shall be subject to the same formalities as the original proof (see Article 30(4) of the Bankruptcy Law).

Every creditor that has lodged a proof is entitled to see and examine the proofs of other creditors at a time fixed by the liquidator, and the liquidator is required to publish notice of this in the Jersey Gazette and in such other manner as the liquidator thinks fit (see Article 30 of the Bankruptcy Law and Rule 5 (Inspection of Claims) of the Rules). The debtor, a creditor or other interested person may oppose the admission of a claim – to do so, such person must lodge with the liquidator a statement in writing setting out the grounds upon which the admission of the claim is opposed, within one month of the expiry of the period for filing proofs of debt (see Rule 6 (Opposition to Claims) of the Rules).

The liquidator must then adjudicate claims. Before admitting or rejecting the proof of a debt, the liquidator is required to examine the proof and any statement opposing the admission of the debt and may require further evidence in support of, or in opposition to, the admission of the debt (see Article 31(2) and (3) of the Bankruptcy Law). Pursuant to Rule 4 (Evidence of Claims), any evidence must be given at the time and in the form determined by the liquidator.

The liquidator may admit or reject proof of a debt in whole or in part and may reject in whole or in part any claim for interest on a debt if the liquidator considers the rate to be extortionate (see Article 31(1) and (4) of the Bankruptcy Law). If a claim or a statement opposing the admission of a debt is rejected (in whole or in part), the liquidator must serve notice of rejection on the creditor or person who provided that statement (as applicable) (see Article 31(5) and (6) of the Bankruptcy Law). The notice must specify the reason for the decision (see Rule 7 (Viscount's decisions) of the Rules). If dissatisfied, the creditor may request that the liquidator apply to the Jersey Court to review the decision (see Article 31(7) and (8) of the Bankruptcy Law).

ANSWER: Excellent (8 marks)

Question 3: 14.5 out of 15

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

XYZ Limited is a major high-street retailer registered in England with stores throughout England and a store in Jersey. Like many retailers, XYZ has struggled in recent times due to the change in shopping habits of the British public. Sales have fallen as customers increasingly look for cheaper alternatives online and XYZ is struggling to meet its ongoing rent commitments at its many stores. The majority of XYZ's stores have been loss making for some time, including its store in Jersey. XYZ's secured lender, Big Bank PLC, has become increasingly concerned at the situation. Big Bank has the benefit of fixed and floating charges over XYZ's assets.

In December 2018, Big Bank confirmed that it would no longer continue to provide financial support and would not allow a further extension of facilities in order to meet the rental payments which were due on 25 December.

Using the facts above and the additional facts below, answer the questions that follow.

Question 4.1 [maximum 3 marks]

Big Bank has obtained legal advice in England in relation to its rights as secured creditor. You have been approached in Jersey to comment on Big Bank's rights. **Please draft a note in which you set out your comments.**

It is not clear from the above fact pattern whether Big Bank has obtained Jersey law governed security over XYZ Limited's ("XYZ") assets and property in Jersey.

XYZ's assets and property in Jersey appears to include: the lease of XYZ's Jersey store and the goods / products sold by XYZ's Jersey store, and possibly intangible movable property (including for example, XYZ's licences / other intellectual property (e.g. XYZ branding)). It appears that XYZ has rental payments due from which it may be assumed that there is no immovable property (i.e. real estate) in Jersey.

The goods / products sold in XYZ constitute tangible 'movable' property – as a matter of Jersey law, the only method of creating security over such assets is by way of pledge. To pledge property, there must be physical delivery of the property to Big Bank. I would not expect this transfer to have taken effect (prior to any enforcement by Big Bank) (i.e. such security does not appear to have been perfected). As a matter of customary law, Big Bank should have an implied right of sale when XYZ (as grantor) is in default and Big Bank should review the terms of the pledge document to determine whether there is an express power of sale.

Any intellectual property belonging to XYZ may be subject of security granted in favour of Big Bank by way of security interest under the Security Interests (Jersey) Law 2012.

In each case, Big Bank may enforce its security following an event of default; and following written notice of such default having been served on XYZ (as grantor). If Big Bank wishes to appropriate or sell the collateral the subject of security (e.g. the goods / products in XYZ Jersey store) it must give XYZ 14 days' written notice in advance – XYZ may waive its right to notice of appropriation or sale (or such notice period may be reduced).

As a matter of Jersey law, where property is situated outside of Jersey, security granted under the law where the property is situated will generally be recognised.

ANSWER: the enforcement powers of a secured creditor are not affected by insolvency proceedings over the debtor; if security is over Jersey immovable property (e.g. a mortgage over a building) then Big Bank can apply to Court in Jersey for a Desastre or Degrevement; if

security is over movable property then Big Bank may apply to Court in Jersey to enforce its contractual rights; secured creditors will have priority over all other creditors in a Desastre and Liquidation scenario (1.5 marks)

Additional facts:

The directors of XYZ identify a party who is interested in acquiring the business of XYZ. Following a brief period of negotiation conducted with the oversight of a proposed Administrator (and with the approval of Big Bank), the directors of XYZ begin the process of placing XYZ into Administration in England, in order to allow a “pre-packaged” sale of the business to occur.

Question 4.2 [maximum 3 marks]

The Jersey store is owned by a separate Jersey company, ABC Limited, but ABC’s centre of main interest (COMI) is considered to be in England. Will it be possible to place ABC under English Administration (following the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast) (“the Recast EIR”))?

The Recast EIR do not apply in Jersey, although it may influence decisions in Jersey.

Whether it is possible for ABC to enter into administration (in England) is a question of English law. The Recast EIR was imported into English law, following the BREXIT transition period, but in a significantly amended form (pursuant to the Insolvency (Amendment) (EU Exit) Regulations 2019 (the “**Exit Regulations**”). I would expect the English Court to have jurisdiction to place ABC into administration, on the basis that its centre of main interests (or “COMI”) is in England.

Alternatively, the English court may place ABC into administration upon the application of the Jersey Court under Section 426(4) of the UK Insolvency Act 1986. See, by way of example, *Re OT Computers Limited (2002) JU 29, 2002 JLR N10* - in that case, the Jersey Court exercised its inherent jurisdiction to make such request.

ANSWER: it would be necessary to demonstrate that an English Administration would achieve a better outcome for the debtor and creditors than a local process, with emphasis on the proposed pre-packaged sale (2 marks)

Question 4.3 [maximum 3 marks]

If it is not possible to place ABC under English Administration, are there alternative Jersey insolvency processes that will allow a pre-packaged sale to occur? Are there any potential problems in achieving a sale as a going concern?

There is no equivalent to an English administration as a matter of Jersey law – however, the Jersey Court has adopted creative and flexible solutions to effect a *quasi* pre-packaged sale of assets (as would be typically associated with an English administration process).

For example, just and equitable winding-up has been used to place companies into a winding up where they are insolvent but have assets to sell in a *quasi* pre-packaged sale of assets (see, for example, *Re Collections Group [2013] JRC 096*).

In a just and equitable winding-up a liquidator’s ability to continue to trade a company (in this case ABC) is restricted to winding-up its affairs – unlike an English administrator, whose role, amongst other things, it to rescue the business as an ongoing concern – although the power

to allow the liquidator to trade ABC in order to sell it may be specifically granted by the Jersey Court.

A potential problem in achieving a sale as a going concern in the context of a just and equitable winding-up arises as a result of the fact that a creditor (in this case Big Bank) may not make the application for winding up (which would need to be made by a director or shareholder, or in certain circumstances, the Chief Minister or the JFSC). It would therefore be necessary for Big Bank to engage with ABC, its directors and/or XYZ as shareholder to make the application, which may not be forthcoming (either at all or on a timely basis).

ANSWER: Excellent (3 marks)

Question 4.4 [maximum 3 marks]

Would the approach be different if the Jersey store was a branch of XYZ as opposed to a separate Jersey company? How might Article 49 of the Bankruptcy Law be used?

As a matter of English law, a branch forms part of the same legal person as the company. I would therefore expect XYZ to be placed into English administration in order to effect a pre-packaged sale.

If XYZ was placed into an English administration, I would expect the English administrator to seek recognition and/or the assistance of the Jersey Court – in order, amongst other things, to capture the assets and/or goods of XYZ's branch in Jersey.

Article 49 of the Bankruptcy Law provides that the Jersey Court may assist the court of relevant country or territory in all matters relating to the insolvency of a person (including a company), and when doing so may have regard to the provisions of the UNCITRAL Model Law on Cross-Border Insolvency, and sets out the requirements for cross-border insolvency assistance and the rules of private international law. For these purposes, the United Kingdom is a territory or country prescribed as falling within the scope of Article 49 of the Bankruptcy Law.

The administrator, in its capacity as officeholder, may request that the English Court send a Letter of Request to the Jersey Court for assistance and pursuant to Article 49(2) of the Bankruptcy Law, a request from the English Court (in this scenario) will be sufficient authority for the Jersey Court to exercise, in relation to the matters to which the Letter of Request relates, any jurisdiction which it or the English Court could exercise in relation to these matters if they otherwise fell within its jurisdiction.

The Jersey Court is likely to recognise the appointment of the administrator on the basis that there is a valid connection between the XYZ and English law (being the law under which the foreign representative is appointed) – XYZ having its COMI in England. Although the Jersey Court will still retain discretion under customary law, where there is sufficient connection (as would be the case here), the Jersey Court will typically grant the relief sought.

The extent of the assistance offered by the Jersey Court under Article 49 of the Bankruptcy Law is discretionary. The Jersey Court also has discretion whether to apply Jersey law or English law (as the foreign law of the requesting country). The Jersey Court has demonstrated flexibility and has recognised the office of administrator – notwithstanding that this process does not exist as a matter of Jersey Law.

To the extent the administrator requires the transfer of XYZ's assets to it, the Jersey Court is likely to require the interests of Jersey creditors to be protected by an undertaking or court order.

ANSWER: Excellent (3 marks)

Question 4.5 [maximum 3 marks]

What if XYZ Limited was a Polish company with Polish stores and a store in Jersey, but all other details remain the same (and assume that Poland has an Administration process the same as in England)? Would the UNCITRAL Model Law on Cross-Border Insolvency or the Recast EIR assist with recognition in Jersey?

Jersey is not a signatory to the UNCITRAL Model Law on Cross-Border Insolvency, nor is it a member of the EU and as such the Recast EIR is not applicable – I would therefore not expect the Polish administrator to have recourse to the Jersey Court for recognition and/or enforcement of the Polish administration pursuant to such legislation; nor has Jersey entered into any treaties or conventions with Poland in respect of cross-border insolvency (or any other foreign jurisdiction).

The Polish administrator may apply to the Jersey Court via the Polish Court, for recognition of his appointment in the form of a Letter of Request. Poland is not a 'relevant' jurisdiction under Article 49 of the Bankruptcy Law, but the Jersey Court may agree to assist under pre-existing customary law and its inherent jurisdiction to extend assistance under principles of comity and co-operation on a case-by-case basis.

However, notwithstanding that the Polish administrator is not from a relevant country or territory, the Jersey Court may recognise and/or assist the Polish administrator (in the conduct of the Polish Administration) on the basis of common law principles and on the grounds of comity – and the Jersey Court has a long history of providing such assistance to overseas insolvency officeholders.

ANSWER: the Jersey Court retains discretion and will consider amongst other things treatment of creditors and protection of interests of Jersey creditors and will want to ensure consistency with Jersey law (2 marks)

Question 4: 11.5 out of 15

TOTAL: 46 out of 50

*** End of Assessment ***