



## **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.**
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 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 - incorrect

### 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 - incorrect

#### **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 - incorrect

**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: 7 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.

During *Désastre*, the Viscount has wide powers supporting their role to realise the assets of the debtor to the benefit of the creditors. These powers include, *inter alia*, to dispose of and litigate in respect of the property vested in the Viscount, compromise debts, claims and liabilities and make arrangements with creditors, carrying on business for beneficial winding up, borrow money, pay creditors and pursue amounts recoverable relating to antecedent transactions.

During summary winding up proceedings, a liquidator has the required powers to realise and distribute assets and discharge liabilities. A liquidator has wider powers in a creditors' winding up, including the power to pay creditors, disclaim onerous property and pursuing antecedent transactions under the applicable laws. In a just and equitable winding up, the powers of the liquidator will be determined by the court. In general, a liquidator must realise assets to ensure a *pari passu* distribution between creditors, with any remaining balance being distributed to shareholders.

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.

Most companies registered in Jersey are not traditional trading companies, but rather special purpose vehicles, holding companies or other group companies utilized for financial structuring and other finance related purposes. As a result, the demand for corporate rescue and turnaround procedures which are typically associated with trading companies are quite low. It further bears mentioning that the Jersey Court has allowed the utilization of a just and equitable winding up to affect the *quasi* pre-packaged sale of assets, which is traditionally a mechanism used during corporate rescue or administration. Considering this, there is no pressing practical need for the establishment of a corporate rescue and turnaround procedure in Jersey.

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**.

The 3 (three) varieties of mortgages (or hypothecs) available in Jersey in respect of immovable property are:

- (a) a judicial hypothec, which is registered in the Jersey Public Registry against an immovable property following the granting of a judgment for a specified amount;



- (b) a conventional hypothec, which is created by agreement between parties regarding the granting and taking of security which is then passed as a contract before the Jersey Court; and
- (c) a legal hypothec, which arises by the operation of law in certain circumstances.

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 is available to an individual who has assets worth less than JEP 5,000, a monthly disposable income of less than JEP 100 and debts of less than JEP 20,000 who acted in good faith whilst incurring the debts.

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* proceedings can be instituted against a company registered or dissolved under Companies (Jersey) Law 1991 ("Companies Law"), including incorporated Limited Partnership or a Limited Liability Partnership. Individuals who are resident in Jersey for 12 (twelve) months or carried on business within 3 (three years) immediately preceding the application or owns immovable property at the date of the application can be subject to *Désastre*.

The application can be made either by the debtor, a creditor with a valid claim of at least JEP3,000 or, in the case of regulated business activities, the Jersey Financial Services Commission. A debtor must, to the belief of the applicant, be insolvent and own realisable assets for an application to succeed. If the applicant is a creditor, they must indemnify the Viscount for the costs and liabilities incurred during the *Désastre*.

Pursuant to a successful application all assets of the debtor located worldwide automatically vests in the Viscount, who must realise the assets for the benefit of the creditors. A moratorium exists against the exercise of remedies by creditors as well as the institution and continuation of legal proceedings against the person or property of the debtor. The Viscount must investigate to determine why the debtor became insolvent and to determine whether any offences were committed. The Viscount has wide ranging powers enabling him to deal with the proceedings. They may, *inter alia*, dispose of and litigate in respect of the property vested in them, compromise debts, claims and liabilities and make arrangements with creditors, disclaim onerous property and contract leases and pursue amounts recoverable relating to antecedent transactions.

In exchange for their services, the Viscount may either levy fees as they arise or levy a fee equivalent to 12.5% of the value of the amounts realised and distributed during the proceedings. The Viscount's costs are paid before that of other creditors, save for secured creditors whose rights are preserved, from amounts liquidated.

In the case of an individual debtor, *Désastre* usually endures for a period of 4 (four) years, which can either be shortened or lengthened through the appropriate procedures. In the case of a company, the Viscount must file the required forms to dissolve the company with the Registrar of Companies upon conclusion of the *Désastre*. A debtor who is the subject of *Désastre* can be rehabilitated by the Court through an order of discharge, in which case the debtor will cease to be liable for claims proven in the proceedings but remain liable for debts incurred during the *Désastre*.

ANSWER: Excellent (7 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

The Companies (Jersey) Law 1991 ("the Companies Law"), article 166, determines that the claims of creditors in a creditors' winding up is governed by the Bankruptcy (*Désastre*) (Jersey) Law 1990 ("the Bankruptcy Law"). The Bankruptcy Law will thus regulate the rights of secured and unsecured creditors, debts provable, time and manner of proving debts, admission and rejection of proof of debts and order of payment.

Although there is no statutorily prescribed time period in respect of advertisements for claims the publication of notices, it is generally accepted that if published, 60 days is an acceptable notice period. There is similarly no statutory requirement for the publication of notices in respect of claims outside of Jersey. In order to avoid later challenges by creditors coming forward, a liquidator should carefully consider whether this is necessary and, if so, attend to it.

Save for debts or liabilities incurred prior to the commencement of the Bankruptcy Law and which would not have been provable without the introduction of the aforesaid law, all debts and liabilities, present or future, or contingent, existing at the commencement of the winding up, or to which the debtor becomes subject before payment of the final dividend by reason of any obligation incurred before the commencement of winding up, shall be regarded as provable debts. Debts shall be proven at the time and in the manner prescribed by the Jersey Court, with the creditor seeking to prove the claim carrying the costs thereof.

If a debt bears interest, the interest will be provable up to the date of the winding up. In the case of secured claims, interest will be provable up to date of payment.

Creditors who lodged a claim shall be entitled to examine the proofs lodged by other creditors. The liquidator shall examine the proofs received and any statement against the admission of such claims. Further evidence regarding the admission or rejection of the claims may be required.

The Liquidator may wholly or partially admit or reject any claim or claim for interest. If a proof is rejected, the liquidator must serve a notice of such rejection on the creditor who submitted same. If a statement opposing a proof is rejected, the liquidator must serve a notice of such rejection on the person providing same. These notices must be served in the manner prescribed by the court. Upon receipt of such a notice and if the recipient is dissatisfied and wishes to have the liquidator's decision reviewed by the court, he/she must, within the prescribed time period, request the liquidator to apply for a date for review of the decision by the court.

**ANSWER: Excellent (8 marks)**

**Question 3: 15 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.**

Should insolvency proceedings be pursued, scenario secured creditors rank ahead of all other creditors in a *Désastre* or liquidation. A secured creditor with security of immovable property may apply to Court for a *Désastre* and one with security over movable property may apply to enforce its contractual rights through application in the Jersey Courts. If the store in Jersey is a separate legal entity Big Bank can alternatively, outside of an insolvency process, exercise the power of enforcement once a notice of default has been served on the Jersey company.

**ANSWER:** the power of enforcement is exercisable once an event of default has occurred and written notice has been given to the grantor; if security is over Jersey immovable property then Big Bank can also apply to Court in Jersey for a *Dégrevement*; the enforcement powers of a secured creditor are not affected by insolvency proceedings over the debtor (1 mark)

##### **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"))?

Jersey is not a member of the EU and, as a result, the Recast EIR is not applicable within its territory, and it will not be possible to place ABC Limited under English Administration.

Insolvency or enforcement proceedings will have to be instituted in accordance with the laws applicable in Jersey.

**ANSWER:** the Jersey Court may still have regard to ABC's COMI and may place ABC in Administration under English law; 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; the Jersey Court has demonstrated flexibility and has recognised the office of Administration before, despite not having such a process locally (1 mark)

**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?

Corporate rescue proceedings, which would usually be utilised in these types of scenarios, are not readily available in Jersey. The Jersey court has historically shown a willingness to utilise creative solutions to overcome the lack of corporate rescue proceedings in the country. Under a just and equitable winding up the courts have previously allowed liquidators to affect a *quasi* pre-packaged sale of assets during such a winding up. Upon the commencement of liquidation, trade is usually restricted to the extent necessary to wind up the debtor. However, the liquidator can apply under a just and equitable winding up for the specific power to continue trading to sell the company to avoid this hurdle.

**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?

If the Jersey store was a branch of XYZ Limited ("XYZ") and XYZ had placed under English Administration, the appointed officeholder could approach the Jersey Courts for assistance under section 49 of the Bankruptcy Act (which serves as a co-operation provisions in cross-border cases) or based on the common law and principles of comity. Under article 49, the Jersey Court has a discretion to grant assistance to foreign officeholders from a relevant territory (which included the United Kingdom) whilst having regard to the UNCITRAL Model Law on Cross Border Insolvency and private international law. The application will be considered upon receipt of a Letter of Request from the English Courts.

**ANSWER:** the English Administration should impact the worldwide assets of XYZ including those assets located at the Jersey store; however recognition of office holders may be required in Jersey using Article 49 (2 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?

In this instance, section 49 of the Bankruptcy cannot be utilised as Poland is not a "relevant" country as referred to therein. However, the Jersey courts may still provide assistance based on common law principles of private international law and the principles of comity and co-

operation. Although Jersey is not a signatory to the Model Law, the Court will have regard to the provisions thereof when considering a request for recognition in Jersey. In the matter of *Re Royco Investment Company Limited (en Désastre)* the Jersey Court provided recognition to a foreign representative based on the principles of comity.

**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: 9 out of 15**

**TOTAL: 41 out of 50**

**\* End of Assessment \***