



## **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).
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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 - 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.

#### Powers available to a Viscount in respect of a *Désastre*

In respect of the *Désastre* process in Jersey, the debtor's worldwide assets automatically vest in the Viscount (or are declared *en Désastre*). The *Désastre* process is carried out by the Viscount, which includes conducting investigations into the reasons for the insolvency and whether any offences were committed.

The Viscount has a wide range of powers under Articles 26-28 of the Bankruptcy (*Désastre*) (Jersey) Law 1990 ("**Bankruptcy Law**"), including (but not limited to): (a) holding property; (b) bringing or defending any action relating to the property of the debtor whether in Jersey or elsewhere; (c) referring any dispute to arbitration; (d) compromising all debts, claims, and liabilities; (e) selling any property of the debtor; (f) carrying on the business of the debtor as far as is necessary or expedient for the beneficial disposal of the same; (g) borrowing any money and charging any property of the debtor; (h) employing any person to transact any business or do any act required to be transacted or done in the course of administration of a *désastre*, including the receipt and payment of money; (i) exercising any voting rights on shares owned by the debtor; and (j) reporting to creditors. The Viscount also has the power to disclaim onerous property (Article 15) and contract leases (Article 15A).

The Viscount may levy fees for realising the debtor's property (or take an amount equivalent to 12.5% of the assets realised and distributed). When the Viscount has realised the debtor's assets, the Viscount must supply creditors with a report and pay whatever final dividend is due (Article 36).

#### Powers available to a Liquidator in respect of a Winding Up

In respect of a Winding Up, pursuant to Article 149 of the Companies (Jersey) Law 1992 as amended (the "**Companies Law**"), on the appointment of a liquidator the directors cease to be authorized to exercise their powers in respect of the company and those powers may be exercised by the liquidator.

Pursuant to Section 170(1) of the Companies Law, the liquidator in a creditors' winding up may, with the sanction of the court or the liquidation committee (or, if there is no such committee, a meeting of the creditors): (a) pay a class of creditors in full; and (b) compromise any claim by or against the company. Article 170(2) of the Companies Law, the liquidator may, without sanction, exercise any other power of the company as may be required for its beneficial winding up. The liquidator may also disclaim onerous property (Article 171) and disclaim contract leases (Article 172).

In addition, the liquidator has the power to pursue various recovery actions, such as transactions at an undervalue (Article 176), the giving of preferences (Article 176A), wrongful trading (Article 177), fraudulent trading (Article 178) and extortionate credit transactions (Article 179).

**ANSWER:** In addition, the Liquidators powers in a (1) Summary Winding Up will be to realise assets, discharge liabilities and distribute assets; and in a (2) Just and Equitable Winding Up will be specific powers as granted by the Jersey Court, which are likely to



mirror the powers of a SWU or CWU dependent upon whether the company is solvent or insolvent

(2 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.

Jersey does not have a statutory rescue regime to enable a company to be restructured or to trade out of financial difficulty. However, unlike the UK or the US, the majority of companies in Jersey are used for financial structuring and are often special purpose vehicles or holding companies used within the banking, private wealth and funds sectors. As such, the proportion of companies conducting trading business in Jersey is much lower than onshore jurisdictions and, in turn, there is less of a demand for companies to utilise rescue procedures in Jersey. Given that Jersey is an offshore finance centre, there is inevitably likely less demand or pressure from the industry (at least historically) for such a statutory corporate rescue regimes to be implemented.

With that said, the just and equitable winding up process has been used by the Jersey Court to achieve some of the benefits associated with an administration process, such as a form of pre-packaged sale of assets.

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 following three types of mortgages are available in Jersey in respect of immovable property (otherwise known as *hypothec / hypothéque*):

- (1) Firstly, a judicial hypothec (*hypothèque judiciaire*) is created following the Jersey Court granting judgment of a specific sum in favour of a creditor, which is subsequently registered in the Jersey Public Registry. Registration provide the judgment creditor with a hypothec over the immovable property owned by the debtor in Jersey. In that way, an unsecured judgment creditor can become a secured creditor of the debtor (which, in that respect, has some similarities to a final charging order being granted by the UK Court over immoveable property in the UK).
- (2) Secondly, a conventional hypothec (*hypothèque conventionnelle simple*) is created by an express agreement between parties (such as a borrower and lender) in which security is granted over immovable property in accordance with the requirements of Jersey law.
- (3) Thirdly, a legal hypothec (*hypothèque légale*) may be created by operation of law in certain special cases (see, for example, the creation of legal hypothecs under Article 2 of the Social Security Hypothecs (Jersey) Law 2014). However, the creation of a legal hypothec is relatively rare.

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.

Pursuant to Article 4(1) of the Debtor Remission (Individuals) (Jersey) Law 2016, a debtor shall not be eligible for a debt remission order unless:

- (a) *"the debtor is at least 18 years of age on the date on which the application is made;*
- (b) *the debtor has been ordinarily resident in Jersey during the 5 years immediately preceding the date on which the application is made;*
- (c) *the debtor has not been the subject of a debt remission order within the 5 years immediately preceding the date on which the application is made;*
- (d) *the debtor is not bankrupt within the meaning of Article 8 of the Interpretation (Jersey) Law 1954;*
- (e) *the amount the debtor owes in qualifying debts is less than £20,000 or such other amount as may be prescribed;*
- (f) *the value of the assets of the debtor (excluding a motor vehicle with a value not more than £2,000 or such other amount as may be prescribed), does not exceed £5,000 or such other amount as may be prescribed; and*
- (g) *after the deduction of tax, social security contributions and normal household expenses, the debtor's monthly disposable income is less than £100 or such other amount as may be prescribed" (emphasis added).*

Pursuant to Article 4(2) of the Debtor Remission (Individuals) (Jersey) Law 2016, a debtor should not be eligible for a debt remission order unless the debtor acts in good faith.

**ANSWER: Excellent answer (2 marks)**

**Question 2: 9 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*

#### Parties who can be subject to *Désastre*

The persons who can be subject to *Désastre* are set out in Article 4 of the Bankruptcy (*Désastre*) (Jersey) Law 1990 ("**Bankruptcy Law**"). Such persons include a debtor:

- (a) who is, or was, at any time within the period of 12 months immediately preceding the date of the application for *Désastre*, ordinarily resident in Jersey;
- (b) who carries on, or has carried on, at any time within the period of 3 years immediately preceding the date of the application, business in Jersey;
- (c) who has in Jersey immovable property capable of realization at the time of the application;
- (d) who, being a company, is registered under the Companies (Jersey) Law 1991 or has been dissolved pursuant to that Law;
- (e) who is an incorporated limited partnership; or
- (f) who is a limited liability partnership,

whether or not the debtor is present in Jersey at the time of application for a declaration or at the time of the declaration.

#### Parties who can apply for *Désastre*

Pursuant to Article 3(1) of the Bankruptcy Law, an application for a declaration may be made by the following:

- (a) "a creditor of the debtor with a claim against the debtor of not less than such liquidated sum as shall be prescribed by the Minister;

- (b) *the debtor; or*
- (c) *the Commission [i.e. the Jersey Financial Services Commission], in the case of a person who –*
  - (i) *holds or has held a permit under the Insurance Business (Jersey) Law 1996 or the Collective Investment Funds (Jersey) Law 1988,*
  - (ii) *holds or has held a certificate under the Collective Investment Funds (Jersey) Law 1988,*
  - (iii) *is or was registered under the Banking Business (Jersey) Law 1991 or the Financial Services (Jersey) Law 1998, or*
- (d) *is a foundation."*

In the event that a creditor makes such an application pursuant to Article 3(1)(a) of the Bankruptcy Law, such creditor must have a valid claim of at least JEP 3,000.

#### Requirements for an application for *Désastre*

The Court may make a declaration declaring the property of a person to be *en désastre* under Article of the Bankruptcy Law if it considers it just and equitable to do so (Article 6(2)). Accordingly, the Court has a discretion whether or not to make such an order.

In the event that a creditor makes such an application, the Court may also require such creditor to indemnify the Viscount against the costs of the *Désastre* to the extent that it thinks fit (Article 5(2)).

#### The effect of *Désastre* upon the debtor

The effect of *Désastre* upon the debtor are set out in Part 4 of the Bankruptcy Law. Most notably, all the worldwide property and powers of the debtor vest in the Viscount immediately upon the making of a declaration of *Désastre* (Article 8). A moratorium is also available (see Article 10). However, this will not prevent secured creditors from enforcing their existing security.

#### The role of the Viscount

The Viscount is required to adjudicate claims made by creditors (see Part 7 of the Bankruptcy Law for the process for creditors to prove claims).

The Viscount's role in the *Désastre* process is to protect and realise the assets of the debtor for the benefit of the creditors as a whole. As outlined in relation to Question 2.1 above, the Viscount has a wide range of powers Articles 26-28 of the Bankruptcy Law for this purpose (such as bringing or defending proceedings, compromising all claims, selling any property of the debtor, carrying on the business of the debtor as far as is necessary or expedient for the beneficial disposal of the same, borrowing any money). The Viscount also has the power to disclaim onerous property (Article 15) and contract leases (Article 15A).

#### The Viscount's costs

The Viscount may charge fees for carrying out his duties or take an amount equivalent to 12.5% of the amounts realised and distributed. Any money the Viscount receives from the realisation of the debtor's property is first applied to pay the Viscount's fees and emoluments

and all costs, charges, allowances and expenses properly incurred by or payable by the Viscount in the *Désastre* (Article 32(1)(a))

#### Conclusion of the *Désastre*

When the Viscount has realised all of the debtor's property, the Viscount must supply all the creditors of the debtor with a report and accounts relating to the *Désastre* and pay whatever final dividend is due pursuant to Article 36(1) of the Bankruptcy Law.

If the debtor is a company, foundation or incorporated partnership, the Viscount is required to notify the registrar in writing of the date of payment of the final dividend (Article 36(2)-(2A)). Where the debtor is a company, foundation or incorporated partnership, it is dissolved with effect from the date that the registrar receives such a notice and registered (Article 38(2)).

Where the debtor is an individual, the Viscount will apply to the Court for an order discharging the debtor at the expiration of 4 years from the date of the declaration (unless the *Désastre* is reduced or extended by the Court) (Article 40). An individual debtor will be discharged from liability for the debts provable in *Désastre* (see Article 42) once the Court has made an order to that effect pursuant to Article 41 of the Bankruptcy Law.

**ANSWER: Application must show that a debtor is insolvent but has realizable assets. 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

#### The relevant Jersey law that applies

Article 166(1) of the Companies (Jersey) Law 1991 provides that the process for proof of debts as set out in the Bankruptcy (*Désastre*) (Jersey) Law ("**Bankruptcy Law**") applies with modifications:

*"Subject to this Article and Article 165 [costs of creditors' winding up], 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, Part 7 of the Bankruptcy Law is referred to below where relevant with reference to the "liquidator" or "winding up".

#### Advertising for claims and notice periods

The Companies (Jersey) Law 1991 does not prescribe any time period for notices to be published in respect of claims in the winding up. In respect of a creditors' winding up, the general practice is that 60 days' notice is sufficient. Whilst there is no statutory provision mandating that notices be published outside of Jersey, this may be prudent in certain circumstances to minimise the risk of any future challenges by claimants at a later stage.

#### Which debts are provable

Article 29(1) of the Bankruptcy Law provides that "*all debts and liabilities, present or future, or contingent, to which the debtor is subject at the time of the declaration, or to which the debtor becomes subject before payment of the final dividend by reason of any obligation incurred before the time of the declaration, shall be debts provable in the [winding up].*"

#### Interest on debts

In respect of interest on debts, Article 29(2) of the Bankruptcy Law provides that, where a debt bears interest, interest is provable to the date of the winding up. In respect of a debt secured by a hypothec, security interest, or pledge, interest is provable to the date of payment of the claim.

#### Proof of debts and the cost of proving

Pursuant to Article 30(1), "*every creditor shall prove the creditor's debt at the time and in the manner prescribed by the court.*" A creditor shall bear the cost of proving the debt unless the court decides otherwise (Article 30(2)). A creditor who has lodged a proof is also entitled to see and examine the proofs of other creditors at a time fixed by the liquidator pursuant to Article 30(3).

#### Examination of proofs of debts / Adjudication and the process of admitting or rejecting claims

Article 31 of the Bankruptcy Law sets out the process for examining proof of debts and adjudicating proof of debts as follows:

- (a) The liquidator may admit or reject proof of a debt in whole or in part (Article 31(1)).
- (b) Before admitting or rejecting proof of a debt the liquidator shall examine the proof and any statement opposing the admission of the debt, and the liquidator may require further evidence in support of, or in opposition to, its admission (Article 31(2)-(3)).
- (c) The liquidator may reject in whole or part any claim for interest on a debt if the liquidator considers the rate of interest to be extortionate (Article 31(4)).

- (d) If the liquidator rejects proof of a debt in whole or in part the liquidator shall serve notice of rejection in the manner prescribed by the court on the person who provided the proof (Article 31(5)).
- (e) If the liquidator rejects a statement opposing admission of a debt in whole or in part the liquidator shall serve notice of rejection in the manner prescribed by the court on the person who provided that statement (Article 31(6)).
- (f) If a person is dissatisfied with the liquidator's decision to reject a proof of debt or a statement opposing an admission of a debt, such person may request that the liquidator apply to court for that decision to be reviewed (Article 31(7)-(8)).

**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.**

In relation to the fixed and floating charges in favour of Big Bank secured over XYZ's assets, further information will be required in respect of the nature of the security held by Big Bank in Jersey and the terms of security documentation. A search should of the public register of security interests should also be carried out in the first instance.

Generally speaking, in order to enforce its rights to security in Jersey, Big Bank will be required to give written notice of the event of default (i.e. default of payments due on 25 December). Big Bank will also be required to provide 14 days written notice to XYZ in the event that Big Bank wishes to appropriate or sell those secured assets (unless such notice is otherwise agreed to be waived).

If Big Bank holds security over immovable property in Jersey (such as the Jersey store), then this is likely to be by way of a conventional hypothec (which is created by way of an agreement passed before the Court). There are a number of options for Big Bank to enforce security against immovable property.

- (a) Firstly, Big Bank may seek to enforce its debt against XYV pursuant to a procedure known as *Dégrévement*. During this process, a hearing is conducted by *Attournes* in which the creditors of the debtor will be offered the opportunity to acquire a clear and unencumbered title to the immovable property subject to an obligation to pay off all chargeholders. Such an opportunity is offered first to unsecured creditors, then to chargeholders in reverse order of their seniority in the event that there are no willing unsecured creditors. In the event that the value of the immovable property exceeds the value of the charges on that property, then the person who takes the property under this procedure will have no obligation to account to the debtor for the balance.
- (b) Secondly, Big Bank may commence a winding up of XYZ's affairs under the Bankruptcy Law (known as *Désastre*). If a *Désastre* order is made by the Jersey Court, the Viscount will realise the assets of XYZ for the benefit of its creditors. On the sale of the immovable property by the Viscount, security held by Big Bank will be extinguished, but Big Bank will retain preferential rights to the proceeds of sale.



- (c) Finally, it should be noted that XYZ could alternatively surrender its immoveable property to the Jersey Court for a period of time in accordance with a procedure known as *Remise de Biens* in which such property will be realised by the Jersey Court. However, the value of the property must be sufficient to enable the value of the secured interest to be discharged with a balance remaining in order for this procedure to be invoked.

Specific charges over moveable property do not exist as a matter of Jersey law and, accordingly, it is not possible to create floating charges over moveable assets in Jersey. Security in Jersey over moveable property may be created by way of a pledge whereby actual physical delivery of the moveable property is pledged into the creditor's possession. In those circumstances, Big Bank may have direct recourse to the moveable property.

Furthermore, if Big Bank holds a valid "security interest" over *intangible* moveable property in Jersey pursuant to the Securities Interests (Jersey) Law 2012, it may make an application to the Jersey Court to enforce its contractual rights. A "security interest" means "*an interest in intangible movable property, being an interest that, under a security agreement, secures payment or secures the performance of an obligation*" (Article 1A(1)). Pursuant to Article 1, "intangible moveable property" is defined as "*movable property other than goods, and include cash (being cash that is not money) and licences and quotas having commercial value, whether or not they are transferable*".

**ANSWER: the enforcement powers of a secured creditor are not affected by insolvency proceedings over the debtor; secured creditors will have priority over all other creditors in a Desastre and Liquidation scenario (2 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 applies to determine the jurisdiction for opening of main insolvency proceedings in Member States with reference to the debtor's centre of main interests ("**COMI**") and determines the applicable law in respect of those main insolvency proceedings. However, Jersey is not a member of the European Union and, therefore, the Recast EIR is not applicable in Jersey.

However, Jersey officeholders of ABC Limited may apply to the Jersey Court to seek an order that the Jersey Court issue a letter of request addressed to the High Court in England requesting that ABC Limited be placed in administration by the English Court pursuant to Section 426 of the Insolvency Act 1986. This section contains statutory provisions for co-operation between UK Courts exercising jurisdiction in relation to insolvency and is available to Jersey officeholders seeking assistance from the English Courts.

In *Re OT Computers Limited* [2002 JLR Note 10], a Jersey insolvent company sought an order that the Jersey Court issue a letter of request to the High Court in England and Wales to enable an application to be made in England pursuant to Section 426 of the Insolvency Act 1986. In that case, the Jersey Court held that it was within its inherent jurisdiction to issue a letter of request authorising an English court to place an insolvent Jersey company in administration. At [4] of the judgment, the Jersey Court held that:

*"Provided that we are satisfied that it is in the interests of the creditors to issue this Letter of Request, notwithstanding the absence of any insolvency proceedings in Jersey, we have, in our judgment, an inherent jurisdiction to seek the assistance of the English Court".* At [9] of the judgment, the Jersey Court held that it was *"satisfied that it is in the interests of creditors to request that the Company be placed in administration by the English Court, pursuant to the Insolvency Act 1986"*.

This remedy is generally only available where the Jersey company has its management and/or economic activities based in England (see B.MacNeil, N Sanders, M Newman and S Peedom, *Court and out of court restructuring options in Jersey and Guernsey*, 1 June 2016). Given that ABC Limited's COMI is in England, this requirement is very likely to be satisfied.

In *OT Computers*, there was also supporting evidence in the form of an opinion from English leading counsel that if the English Court received such a letter of request from the Jersey Courts, the English Court would be permitted to consider whether to make an administration order in respect of the Jersey insolvent company and was likely to consider it to be an appropriate case to make such an order (see [7]); also see Section 426(5) of the Insolvency Act 1986). Similarly, ABC Limited will also need to seek legal advice in England in relation to Section 426 of the Insolvency Act 1986 and to confirm that this is likely to be an appropriate case for the making of an administration order in the UK.

**ANSWER: Excellent (3 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?

As outlined above, Jersey has no statutory provisions equivalent to an English Administration. In addition, a liquidator's statutory powers in Jersey are restricted to winding up the company's affairs as there is no concept of corporate rescue under Jersey law to enable the company's business to continue to trade.

However, it is possible to effect a reorganisation of an insolvent company's affairs by way of the just and equitable jurisdiction. Whilst this is an evolving area, the Jersey Court has shown a willingness to utilise the just and equitable winding up process to create flexible solutions. For example, a form of pre-packaged sale of the company's assets to a third party was achieved in the case of *In re Collections Group 2013 (2)* JLR N (see Jared Dann, *Getting the Deal Through: Restructuring and Insolvency*, 2018 at Questions 7 and 11 on page 270). In addition, it may also be possible in exceptional circumstances for the Jersey Court to grant the liquidator the power to trade the company in order to sell it as part of a creditor's winding up or a just and equitable winding up (see Jared Dann, *Getting the Deal Through: Restructuring and Insolvency*, 2018 at Question 22 on page 271).

However, given that these are relatively new developments dependent upon the flexibility and discretion of the Jersey Courts, achieving a form of quasi pre-packaged sale of assets by such means inevitably involves an unwelcome degree of uncertainty.

**ANSWER: a practical consideration is that the liquidator's ability to continue to trade in England is restricted to winding up its affairs, however this power can be granted by the Jersey Court (2.5 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 liquidators or administrators are appointed over XYZ in England, then those foreign officeholders would need to seek recognition from the Jersey Court in order to take any steps in respect of Jersey assets of an insolvent company.

Article 49 of the Bankruptcy Law authorises the Jersey Court to extend cooperation to foreign courts of a "relevant" country sending a Letter of Request to that effect. The UK is a "relevant" country within the meaning of Article 49 and, therefore, the Jersey Court may provide assistance to the UK Courts.

Article 49 provides that:

*"(1) The court may, to the extent it thinks fit, assist the courts of a relevant country or territory in all matters relating to the insolvency of a person, and when doing so may have regard to the extent it considers appropriate to the provisions for the time being of any model law on cross border insolvency prepared by the United Nations Commission on International Trade Law.*

*(2) For the purposes of paragraph (1), a request from a court of a relevant country or territory for assistance shall be sufficient authority for the court to exercise, in relation to the matters to which the request relates, any jurisdiction which it or the requesting court could exercise in relation to these matters if they otherwise fell within its jurisdiction.*

*(3) In exercising its discretion for the purposes of this Article the court shall have regard in particular to the rules of private international law.*

*(4) In this Article "relevant country or territory" means a country or territory prescribed by the Minister" (emphasis added).*

Accordingly, the Jersey Court may provide assistance to the UK Courts "if it thinks fit" (Article 49(1)) and may apply Jersey law or the law of the requesting court (Article 49(2)). In exercising its discretion, pursuant to Article 49(1) the Jersey Court may have regard to the Model Law (as incorporated into UK law by the Cross Border Insolvency Regulations 2006 2006/1030 ("CBIR")). Given that XYZ has a branch in Jersey, this indicates that XYZ may have an establishment in Jersey and that, in turn, any proceedings in Jersey would be recognised in the UK as non-main foreign insolvency proceedings under the CBIR.

**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?

Poland is not a "relevant" country for the purposes of Article 49 of the Bankruptcy Law. However, the Jersey Court may still extend assistance to foreign officeholders appointed in foreign insolvency proceedings upon such foreign officeholders making an application in the form of a Letter of Request.

In those circumstances, the Jersey Court will have regard to the customary law and its inherent jurisdiction on the basis of principles of comity and reciprocity (see *Re Royco Investment Company Limited* (en Désastre) (1989) [1994 JLR 236]). The Court will also consider whether there is a sufficient connection between XYZ and the law under which the Polish insolvency representatives were appointed.

For example, in *Re F & O Finance AG* (2000) JLR Note 5a, the Jersey Court provided assistance to the Swiss Court. Whilst Switzerland was not a 'relevant' country for the purposes of Article 49 of the Bankruptcy Law, the Jersey Court held that it had an inherent jurisdiction to assist in foreign insolvencies (see Paul J. Omar, *A Jersey Perspective on Cross-Border Insolvency: Article 49 and Receivers*, Jersey and Guernsey Law Review – June 2013 at paragraphs 4-5 at [https://www.jerseylaw.je/publications/jglr/PDF%20Documents/JLR1306\\_Omar\\_49.pdf](https://www.jerseylaw.je/publications/jglr/PDF%20Documents/JLR1306_Omar_49.pdf)).

Given that Poland is a party to the UNCITRAL Model Law (see [https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border\\_insolvency/status](https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status)), this is also likely to be relevant as the Model Law (without modification) provides foreign officeholders with the right to seek recognition in the Polish courts and to seek the assistance of the foreign court. Assistance in Jersey is more likely to be forthcoming where there is evidence that assistance under a similar request made to the foreign court would be reciprocated (see *In re Montrow Intl Ltd* 2007 JLR N at [49]; Paul J. Omar, *A Jersey Perspective on Cross-Border Insolvency: Article 49 and Receivers*, Jersey and Guernsey Law Review – June 2013 at paragraph 5). As outlined above, the Model Law provides for the recognition of foreign non-main proceedings in circumstances where the company has an "establishment" in that jurisdiction.

**ANSWER: Excellent (3 marks)**

**Question 4: 13.5 out of 15**

**TOTAL: 47 out of 50**

**\* End of Assessment \***