



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

**GUERNSEY**

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

**The mark awarded for this assessment will determine your final mark for Module 5D.** 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.assessment5D]**. An example would be something along the following lines: 202021IFU-314.assessment5D. **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 **7 pages**.

## ANSWER ALL THE QUESTIONS

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

Commented [DJ1]: Total 8/10

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 one of the following statements **correctly describes** the sources of Guernsey law?

- (a) Guernsey's laws mirror that of England and Wales.
- (b) Guernsey's law is all set out in statute adopted from England.
- (c) Guernsey's law is based on Norman customary law.**
- (d) Guernsey substantive law is set out in statutes and the historic customary law and complimented by case law from persuasive jurisdictions.

Commented [DJ2]: The correct answer is d

#### Question 1.2

Which of the following types of security can be effectively taken over Guernsey **immovable property**?

- (a) A fixed charge / mortgage.
- (b) A lien.
- (c) A hypothèque by way of bond.**
- (d) A security interest agreement.
- (e) A floating charge

Commented [DJ3]: Correct

#### Question 1.3

Which **two** of the following are **essential requirements** for a valid security agreement pursuant to the Security Interests Law?

- (a) Registration with the Guernsey registry.
- (b) Executed as a deed.
- (c) Identify the secured party.**
- (d) Executed before the Court.
- (e) Be in writing.**

Commented [DJ4]: Correct

#### Question 1.4

Which of the following parties **rank first in priority** in a Guernsey compulsory winding up:

- (a) Trade creditors.
- (b) Local tax creditors.
- (c) Money lent by a sole trader to the company.
- (d) Fees and expenses of the liquidator.
- (e) Fully paid up shareholders.

Commented [DJ5]: Correct

#### Question 1.5

Which one of the following procedures can be used to enforce against real property in Guernsey?

- (a) Saisie.
- (b) Arret de Gages.
- (c) Arret de Personnes.
- (d) Désastre.

Commented [DJ6]: Correct

#### Question 1.6

Which one of the following **is not** a standalone ground for the making of a compulsory winding up order as set out in the Companies Law?

- (a) Passing of a special resolution to wind up.
- (b) Deadlock on board of directors.
- (c) Suspension of business for a year.
- (d) Company is unable to pay its debts as they fall due.
- (e) Failure to hold a general meeting of members under specified provisions of the Companies Law.

Commented [DJ7]: Correct

#### Question 1.7

Which of the following **may not** be appointed as voluntary liquidator of a Guernsey company?

- (a) A director of former director.
- (b) A corporate entity.
- (c) A foreign resident individual.

(d) A shareholder.

(e) None of the above.

Commented [DJ8]: Correct

#### Question 1.8

Which one of the following parties **does not** have automatic statutory standing to make an application for an administration order in respect of a Guernsey company?

(a) A shareholder.

Commented [DJ9]: The correct answer is b

(b) The Registrar of companies.

(c) A director.

(d) A creditor.

(e) None of the above.

#### Question 1.9

Which one of the following **is not** a ground for setting aside a judgment registered under the Reciprocal Enforcement Law?

(a) The courts of the originating country did not have jurisdiction.

(b) The enforcement of the Judgment would be contrary to public policy in Guernsey.

(c) The enforcement of the Judgment would be contrary to public policy in the home jurisdiction.

Commented [DJ10]: Correct

(d) The Judgment was obtained by fraud.

(e) The rights under the Judgment are not vested in the person by whom the application for registration was made.

#### Question 1.10

It is advisable for a creditor to take **which one** of the following steps before commencing a *saisie* action?

(a) Obtain a prohibitory injunction to prevent the debtor from disposing of the realty.

(b) Register an interest in the realty at the *Greffe*.

(c) Advertise in the local Gazette an intention to commence *saisie* proceedings against the debtor.

(d) Exhaust the debtor's personalty (personal property) and register a claim in *Livre des Hypotheques* in the interim.

Commented [DJ11]: Correct

(e) Enter into a security interest agreement with the debtor to ensure that the creditor's interest in the realty is protected.

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

Commented [DJ12]: Total 8.5/10

**Question 2.1 [maximum 5 marks]**

What are the most common forms of security granted over immovable and movable property in Guernsey? Explain the formalities (if any) that the security documents, the secured creditor or the debtor must comply with.

[the most common forms of security granted over immovable property is rentes foncières which is rent payable as a fixed annual sum and redeemable as per the debtor. Another form of security over immovable property is Rente hypothèque which is uncommon but allows the securing a fixed annual sum]. The more common form is Hypothèque conventionnel which is a bond over the property. The bond must be in writing and the debtor must consent to by the to the bond before the Royal Court of Guernsey and thereafter be registered at the registry of the Royal Court known as the Greffe.

Commented [DJ13]: Half mark

Commented [DJ14]: Half mark

Commented [DJ15]: Half mark

The most common forms of security granted over tangible movable property are Lien, Pledge, a landlord's right to priority for unpaid rent (tacite hypothèque), Reservation of title clause and Mortgage.

Commented [DJ16]: Half mark

The most common forms of security granted over intangible movable property are 1) a security interest under the Security Interests (Guernsey) Law, 1993 (Security Interests Law). The security interest can be created by the secured party in terms of a security agreement such as a certificate of title (such as securities); or policy documents eg: a life insurance policy. If the title to the collateral is assigned, express notice in writing of the assignment must be granted to the assignees.

Commented [DJ17]: Half mark

To be valid, a security agreement must be drafted be in writing and identify and be signed by the debtor. It must also identify the secured party and contain provisions regarding the collateral sufficient to enable its precise identification at any time. Furthermore, it must set out the events which constitute default and contain provisions regarding the obligation, payment or performance to be secured and sufficient to enable it to be identified.

Commented [DJ18]: Half mark

Commented [DJ19]: Half mark

Commented [DJ20]: Half mark

2) a security under the Law of Property Law, 1979 (Property Law). This is a set-off agreement and an assignment with a proviso for reassignment which essentially means that any debt from one party is to be set off against any debt from the other party. For an assignment to be effective the assignor must execute it in writing and express written notice of the assignment must be served on the debtor, trustee or other person from whom the assignor would have been able to claim the debt or chose in action.

Commented [DJ21]: Half mark

**Question 2.2 [maximum 5 marks]**

Michael was recently appointed liquidator of Dodge Co Limited, a Guernsey incorporated company. There are two directors of the company, Roger and Novak. The books and records of the company show that Novak paid £5,000 to purchase a car from the company two months prior to the company entering into liquidation. However, the fixed asset register had listed the car as having a value of £20,000.

Identify the issue with this transaction and explain the possible causes of action against the company or directors, as well as the possible remedies for recovery of the difference in value between the value and sale price of the asset.

[the issue with this transaction relates to transactions at an undervalue. There are two main possible causes of action which the liquidator can bring against the company or its directors.

The first action which could be brought is to claim that the director (Novak) of the company committed an equitable wrong in that he knowingly purchased the vehicle for far less than what it was valued at. He had therefore acted in breach of his fiduciary duty by purchasing a company asset at an **undervalue**, further warmer the liquidator must allege that Novak had the knowledge of the actual value of the asset, and it would be impossible to allow him to retain the misappropriated vehicle. It can be said that Novak was a constructive trustee of the company's assets and therefore had a fiduciary duty to protect them rather than purchase the car at an undervalued amount whilst knowing that the company could be placed in liquidation, as the purchase was made a mere two months before the company was wound **up**.

Commented [DJ22]: One mark

The second possibility or action that the liquidator could bring is in terms of the Guernsey customary law Pauline **action**. This action relates to the setting aside of a transaction undertaken to defraud creditors where the debtor, in this instance the company, was insolvent on a balance sheet basis at the time or as a result of this transaction became **insolvent**.

Commented [DJ23]: One mark

Commented [DJ24]: One mark

Commented [DJ25]: One mark – to obtain full marks the answer could have explained the remedies available to a Court in each situation.

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

Commented [DJ26]: Total 12/15

#### Question 3.1 [maximum 7 marks]

Guernsey has not adopted the UNCITRAL Model Law on Cross-Border Insolvency. Explain what methods are available to foreign insolvency officeholders seeking recognition in Guernsey and the limitations of those options.

[Although Guernsey has not adopted the Model Law it does have statutory assistance in the form of the UK Insolvency Act of 1986. Section 426 of the UK Insolvency Act includes Guernsey as one of the jurisdictions in which the Royal Court is able to provide judicial assistance to countries such as England, Wales, Scotland, Northern Ireland, the Isle of Man or Jersey. The assistance is reciprocal in that Guernsey can also be assisted by the aforementioned **territories**.

Commented [DJ27]: One mark

The procedure in terms of section 426 involves the foreign office holder applying to the Royal Court to issue a letter of request seeking assistance of the foreign jurisdiction court in terms of section 426. Their request will then be issued by order of the foreign court. If the request is made in England and Wales the request should be made to the High Court of Justice or certain County **Courts**.

Commented [DJ28]: One mark

It is important to note that the foreign court must be the court with jurisdiction in the insolvency matter and the application is made seeking assistance of their foreign court. The receiving Guernsey court shall assist the requesting court in a variety of circumstances and must consider the weather the assistance will be granted in terms of its own jurisdiction and powers or its own insolvency law or the insolvency law applicable by their requesting court in comparison to matters which fall under its **jurisdiction**.

Commented [DJ29]: One mark – the answer may also have set out that the advantage of section 426 recognition is the ability to use wither the powers of the requesting or domestic court.

The second type of recognition that is available to foreign insolvency office holders is in terms of the Guernsey common law. The common law has been developed in other jurisdictions and the Privy Council have stated that although the common low power does not enable an office holder to do something which they could not do by law which they were appointed, the Court could make an order in favor of foreign liquidators if they have an existing similar right under their own domestic laws and Court within which they were appointed. The order must however be consistent with the substantive law and public policy of **Guernsey**.

Commented [DJ30]: One mark

In most instances Guernsey will cooperate in foreign insolvency proceedings especially when there is a strong enough connection between the officer appointed in the foreign jurisdiction. In the case of *EFG Private Bank (Channel Islands) Limited v BC Capital Group Limited & Ors*<sup>1</sup> the Royal Court set out the principles that it must consider when assessing the nature and extent of the foreign assistance to be provided in the foreign insolvency proceeding and agreed that the principle of universalism applied to the Royal Court. Furthermore, the Court must assist and not frustrate foreign insolvency proceedings to ensure that no party seeks to take an unfair advantage by litigating issues in Guernsey.

A limitation on the power of the foreign recognition was set out in the matter of *X<sup>2</sup>* where although the Royal Court recognized the appointment of an English trustee, it refused to grant the power to obtain information and documents from persons resident in Guernsey which were connected to the bankrupt's **affairs.**

**Commented [DJ31]:** One mark – this answer could have been expanded to explain the limitation of recognition post *Singularis* and perhaps also have mentioned the need for there to be a sufficient connection with the jurisdiction.

### Question 3.2 [maximum 8 marks]

Write a short essay on the method of enforcing creditor's rights against real estate owned by individuals in Guernsey.

[One of the methods of enforcing a creditors right against real estate is in the form of a saisie procedure. This is a procedure that is used for the distribution of real estate of an insolvent person between two or more creditors. This procedure essentially means that we are a creditor commences or joins saisie the creditor has a right for the funds to be paid as transfers from the debtor into the real estate regardless of whether the debt is satisfied. The limitation on this is that the creditor has no further rights against the debtor once the procedure is complete. In practice, it is advisable for the creditor to first exhaust the debtors personally and thereafter register a claim in prior to entering into this saisie **procedure.**

**Commented [DJ32]:** One mark

The saisie procedure is set out in the statutory Saisie Procedure (Simplification) (Bailiwick) Order 1952, however the substantive parts of this procedure is derived from the customary law of Guernsey which was confirmed in the case of *Selwood v Madely*<sup>3</sup>. This procedure is known to be a fairly long procedure which takes about half a year to conclude. This has been deliberately done in order to allow the debtor a long period within which to attempt to settle their existing debts and try to keep their **property.**

**Commented [DJ33]:** One mark

The saisie Procedure is a three-part procedure which consists of a preliminary vesting order, interim vesting order and a final vesting order. A preliminary vesting order may be requested if judgment has been granted in favor of the creditor in order to execute against the debtors property. The order contains strict service requirements which are usually set out at paragraph seven of the **order.** The preliminary vesting order allows the creditor to acquire the right to use, let, possess, receive payment of rent for the property and evict the debtor if necessary. It is important to note that whilst the debtor is still able to sell the real estate, this can only be done with the consent of the creditor who is usually the preliminary vesting order holder.

**Commented [DJ34]:** One mark

The second part of the procedure is the interim vesting order. This extinguishes the debtors right and title to the property. the creditor must produce a statement of account setting out the amounts owed together with the amounts received to show the total amounts due. The debtor will be summoned to a Jurat Commissioner to confirm or dispute the amounts owed to the creditor before concluding a final report declaring the amount owed to the **creditor.**

**Commented [DJ35]:** One mark

<sup>1</sup> Royal Court 34/2013

<sup>2</sup> Royal Court Judgment 36/2015

<sup>3</sup> [2001] RC



The debtor will then be summoned to the Royal Court in order to pay the amount due or if they cannot which is the case in most instances, an interim vesting order is granted. As the property is now under the control of the creditor the duty falls on them to insure, let or maintain the real estate for the benefit of the other creditors. The creditor must then open a register of claims and publish twice in the Gazette Officielle, have number for other creditors to register **claim**.

Commented [DJ36]: One mark

A creditor may apply for a final vesting order if they undertake to discharge all registered creditors' claims which amount cannot be challenged. The creditor must produce a draft martialling report which sets out all the claims and amounts in priorities of their claims. The creditor must then appear in court with the lowest priority claimants in order to confirm the conditions if they would like the property to vest in them in order to satisfy a full higher-ranking claimant or renounce their claim which remove their right to pursue a claim against the **property**. Should the creditor accept the real estate then they are granted a final vesting order. The creditor must then satisfy the claims of all higher-ranking creditors within 15 days or at an agreed time. The final vesting order is automatically registered with the **Greffe**.

Commented [DJ37]: One mark

Commented [DJ38]: One mark – a good answer which might have touched more on the practical limitations of the procedure but contained a very solid summary of the process.

Commented [DJ39]: Total 7/15

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

In July 2016, Andy and Bob incorporated a company (Athletico Ltd) that specialised in selling novelty football T-shirts. Andy and Bob were the company's only members and directors. For the past 18 months, the company has been experiencing financial difficulties. In September 2018, the company's overdraft with Beardsley Bank plc had reached its limit of £250,000. In return for increasing the overdraft limit to £300,000, Beardsley Bank plc demanded security for the additional borrowing and took a bond over the company's property (valued at £100,000). In December 2018, Athletico Ltd borrowed £100,000 from a friend, Barry Homeowner, who also took a bond over the same property.

The business continued to struggle and in February 2019 Andy and Bob were informed by the company's auditor that insolvent liquidation was inevitable, although Andy and Bob disagreed and held out hope that the company's financial prospects would improve. Andy and Bob decided to try and trade their way out of their financial difficulties by having a sale. Unfortunately, the sale failed to increase business and in May 2019 Athletico Ltd was wound up compulsorily. By this time, the company's overdraft with Beardsley Bank amounted to £290,000.

Debbie and Rahid have been appointed as joint liquidators and have discovered several facts:

- in March 2019, Andy and Bob caused the company to repay an unsecured loan of £5,000, which Bob had made to the company some months before;
- in addition to the money owed to Beardsley Bank and Barry Homeowner, the company owes £10,000 to the Guernsey Revenue Service for unpaid tax, £30,000 to employees in wages, and £100,000 to unsecured creditors.

Debbie and Rahid estimate that the total remaining assets of Athletico Limited amount to £440,000. Debbie and Rahid's expenses in acting as liquidators amount to £3,000. Advise Debbie and Rahid, addressing the following:

- (a) the role of the joint liquidators;
- (b) how to pool the assets;
- (c) potential claims against the directors; and

(d) how to manage distributions to creditors.

[(a) the role of the joint liquidators are to ensure that the company is wound up successfully. The joint liquidators can bring or defend civil actions on behalf of the company As well as continue to run the business should it be beneficial for the winding up. They may make capital calls & all receipts and other documents on behalf of the company as well as do any other act related to the winding up of the company or any court authorized act. It must be noted that the joint liquidators can also seek the guidance of the court should they require direction in relation to matters relating to the wine winding up. The joint liquidators must also protect the creditors and act in the best interests of the general body of creditors. They must be in control and supervise the **company**.

**Commented [DJ40]:** One mark – please note the primary function of the liquidators is to collect in and realise the assets of the company for distribution amongst creditors.

(b) in order to pool assets the joint liquidators must apply to the Royal Court for an application to consolidate the assets and liabilities of the company with those of the inextricably linked other company. They must demonstrate that the pooling of assets will be the most cost effective efficient and fair way to proceed as was in the case of *Huelin-Renouf Shipping Limited in liquidation*<sup>4</sup>. The practical effect of pooling of assets is that the court would treat the two companies as a single entity and the joint liquidators would be able to distribute funds to creditors which would in the ordinary course, have been spent on the administration of dual proceedings in trying to wind up two different **companies**.

**Commented [DJ41]:** One mark

(c) the potential claims that exist against the directors is firstly and undo preference which occurred in March 2019 where the company repaid Bob as an unsecured creditor, for a loan that he made to the company. The payment was made two months before the company had gone into compulsory liquidation and therefore fits within the six-month period for any transaction to be made prior to **liquidation**. Furthermore, the transaction can be said to be giving a preference to one of the creditors of the company who is a connected party, and the transaction also has improved Bobs financial position in the company's **liquidation**.

**Commented [DJ42]:** One mark

**Commented [DJ43]:** One mark

The directors also face potential claims of breach of fiduciary duty pursuant to section 422 of the Companies Law. It can be argued that the directors have breached their fiduciary duty by appropriating or misapplying any of the company's assets call by wrongfully trading the company when they knew or ought to have known that there was no reasonable prospect of the company going insolvent by putting all their hopes on one sale which was **unsuccessful**.

**Commented [DJ44]:** One mark. Both misfeasance and wrongful trading re wo clear issue here, however, the answer lacks sufficient detail on both the factual and legal framework analysis to award further marks.

(d) the management of the distribution to creditors is determined by their rank in order of priority. Subject to the payment of secured creditors the liquidators expenses of winding up the company paramount therefore the £3000 fee of the liquidators must be paid first. Next preferential debts must be paid which includes unpaid salaries and unpaid taxes. Next trade creditors must be paid in order of preference and thereafter postponed debts will be paid to creditors. Any surplus available will then be distributed to the unsecured creditors in ranking to the order of priority at the time where their claim was **registered**. ]

**Commented [DJ45]:** Two marks – this is a correct but quite simplistic analysis of the order of priorities. Further detail regarding the secured creditors, level of preferential debts etc would have generated more marks.

**\* End of Assessment \***

**Commented [DJ46]:** Total mark of 35.5/50

<sup>4</sup> (2015) (Unreported, Royal Court, 4th September) (Guernsey Judgment No 46/2015).