



**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**.

**Commented [DB1]:** This is third assessment where I have had to ask you to read and comply with the instructions!

## ANSWER ALL THE QUESTIONS

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

Commented [DJ2]: Total 10/10

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 [DJ3]: Correct

#### 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 [DJ4]: 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 [DJ5]: 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 [DJ6]: 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 [DJ7]: 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 [DJ8]: 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 [DJ9]: 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.

(b) The Registrar of companies.

Commented [DJ10]: Correct

(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 [DJ11]: 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 [DJ12]: 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 [DJ13]:** Total 7/10

**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.

**Moveable Property**

The most common forms of security over tangible moveable property are:

- Lien
- Pledge
- A landlord's right to priority
- A reservation of title clause
- Mortgage

**Commented [DJ14]:** Half mark – Unfortunately the answer does not consider intangible moveable assets and security interests taken over them. This is an important aspect of Guernsey law.

**Immovable Property**

The most common forms of security over immovable property (other than rentes foncieres – ground rents payable as a fixed annual sum) are:

- Rente hypothecque – a secured fixed annual sum
- Hypothecque conventionnel – a bond

**Commented [DJ15]:** Half mark

In practice, rentes hypothecque are rare and the bond is the dominant form of security over real estate in Guernsey. A bond can either be a general charge or a specific charge. A general charge gives priority to the creditor over all other claimants to the immovable property belonging to the debtor at the time the bond is registered. A specific charge gives the creditor priority over the immovable property specified in the bond only.

**Commented [DJ16]:** Half mark

**Formalities**

*Bonds*

Bonds must be in writing and must be consented to by the debtor before the Royal Court (sitting as the Contract Court) before being registered at the registry of the Royal Court.

*Signatures*

Notably, documents (other than a testamentary disposition) consented to before the Contract Court do not need to be signed by the parties. However, it is usual practice for signatures to be required by a creditor.

**Commented [DJ17]:** Half mark. I would have liked to see reference here to the document duty payable

**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.

### Issues

The issue with this transaction is that it is a potential transaction at an undervalue as the car was sold to one of the directors of the Company for less than its value. The directors, as either parties to the transaction or acting for the company on the transaction are potentially in breach of their fiduciary duties as directors. By selling off company assets for less than their value, they are not acting in the best interests of the company. As the car was sold to a director, there is a potential issue of a conflict of interest. We do not know much else on the facts, but if Novak was placed ahead of other creditors because of receiving an asset from the company (the car) worth £20,000, this could also be construed as a potential preference.

Commented [DJ18]: One mark

Commented [DJ19]: One mark

### Causes of Action

There are two possible causes of action that can be taken here. First, is that by completing the transaction at an undervalue, the directors committed an equitable wrong. Novak, as the recipient of the car at a price far below the value of the car could be found to be a constructive trustee of the company's asset – the car.

Commented [DJ20]: One mark

Second, it may be possible for the appointed liquidator to bring a Pauline action to set aside the transaction provided that the company was insolvent at the time of the transaction and the transaction was completed with the intention of defrauding creditors. We know that the company entered liquidation two months after the transaction took place and we do not have evidence on whether the directors acting on behalf of the company had intent to defraud creditors. However, if successful, the remedy for a Pauline action is that the car would become available to the company as if the transaction had not taken place – the proceeds of which the sale of the car (at full market value) could be used to satisfy the creditors' claims in the liquidation. The company would not be entitled to compensation.

Commented [DJ21]: One mark

Due to the potential breach of fiduciary duties, the directors could also potentially face claims of misfeasance under s.422 of the Companies Law. If the liquidator were to bring a claim for misfeasance, the court may order the director or directors to do the following: (1) repay, restore or account for the sums or property; (2) contribute towards the company's assets; and/or (3) pay interest on any sums as the court sees fit and at such rate that the court sees fit.

Commented [DJ22]: One mark

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

Commented [DJ23]: Total 4/15

#### 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.

In Guernsey there are two methods in which officeholders can seek recognition.

First, under the section 426 of the UK Insolvency Act 1986, office holders are able to apply to the Royal Court of Guernsey for an order requesting judicial assistance from the courts of England and Wales, Scotland, Northern Ireland, the Isle of Man or Jersey in insolvency matters under the Insolvency Act 1986 (Guernsey) Order 1989. Equally, office holders in Guernsey are entitled to seek assistance in the noted jurisdictions that have chosen to elect Guernsey as a specified country for incoming requests in relevant insolvency processes.

Commented [DJ24]: One mark

Commented [DJ25]: The question asks what assistance foreign office holders can seek in Guernsey and so the answer should reflect that those in reciprocating jurisdictions may ask their domestic Courts to seek assistance via letters of request from the Royal Court.

Applications under s.426 are limited due to the lack of case law in this area however, given the commonality of legislation in this area with the jurisdiction of England and Wales, guidance can be taken from extensive English jurisprudence.

**Commented [DJ26]:** The answer does not give sufficient detail of the process or the powers that may be afforded under the recognition – i.e. the ability to use with domestic or foreign powers.

Second, officeholders can seek recognition under the common law. The Privy Council in the case of *Singularis* set out the extent of the jurisdiction as a power which does not allow the officeholder to do something which they are unable to do by the law under which they are appointed. The court highlighted this jurisdiction as “a principle of the common law that the court has the power to recognize and grant assistance to foreign insolvency proceedings”. The Court also set out that the power is exercised primarily through the existing powers of the court and such powers can be extended or developed from common law. The limitations of this power are that the application of legislation by analogy is rare, and therefore does not allow the judiciary to extend the scope of insolvency legislation to cases where it does not apply.

**Commented [DJ27]:** One mark

Officeholders can also seek recognition where the order sought is consistent with the substantive law and public policy of the assisting state. The position remains that Guernsey will co-operate in foreign insolvency proceedings where there is a connection between the officeholder appointed in the jurisdiction where the relevant company/individual is incorporated/domiciled and the company/individual to the jurisdiction of the court where the appointment of the officeholder was made.

**Commented [DJ28]:** One mark

### 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.

**Commented [DJ29]:** No discussion here of recent cases in this area which would have seen more marks awarded.

In order to enforce their rights against real estate owned by individuals in Guernsey, creditors can use four main methods.

**Commented [DJ30]:** This section closely resembles the guidance text.

#### 1. Arrets

An arret is a form of execution derived from customary law. The types of arret include:

- Arret conservatoire: this is used by creditors to freeze assets pending the determination of a claim.
- Arret execution: this is used by creditors to arrest the assets of a judgment debtor pending sale, towards the satisfaction of a judgment debt.
- Arret de gages: this is used by creditors to arrest wages. This is said to be a Guernsey form of attachment of earnings order.
- Arret de personnes: this is used by creditors to arrest a person to increase the chances of a debt being paid. Although this relief/process remains available, in practice it is rarely used and has not been used for many years.

The arret conservatoire has been superseded by the adoption of the Guernsey equivalent of the English Mareva and Anton Pillar orders. However, the arret conservatoire can still be used where a creditor wishes to arrest a particular tangible asset – e.g. a vehicle. The key difference is that an arret works against the asset whereas the injunctive relief works against or affecting a specific individual, rather than the asset. As such, in order for the court to grant an arret conservatoire, it is not necessary for the court to have jurisdiction over the individual subject to proceedings.

#### 2. Desastre



In contrast to bankruptcy, Desastre does not discharge a debtor from any liabilities. This procedure can be used where HM Sheriff has insufficient proceeds to satisfy a debt and is also aware of other unsatisfied claims and/or judgments. In Desastre proceedings, the court will order the arresting creditor, debtor and other creditors to appear before the 'Jurat Commissioner' in order to establish any relevant claims and/or preferences. Following this process, the debtor will be declared 'en desastre' and a notice will be published in the Gazette Officielle, notifying the public.

### 3. Preferences

Creditors are able to apply to nullify a preference given within three months of an application for a declaration of insolvency. Any transaction during this period which gives a creditor preference over others shall be deemed void under the law relating to debtors and renunciation. The exception to this rule is where the creditor in receipt of the preference received no notice of the declaration of insolvency application.

### 4. Licitation

Licitations are used to enforce a judgment against real estate in saisie proceedings (proceedings for the seizure and ultimate realisation of real estate) where real estate is jointly owned. Where real estate is held in undivided half shares, the creditor is able to become a co-owner of the half of the share and apply to have the property sold or apply to find another co-owner to buy out the creditor from their share of the property.

## 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.

**Commented [DJ31]:** One mark only awarded for this answer as licitation is relevant. The only method of enforcing against an individual's real estate in Guernsey is via the Saisie process. The answer should have considered that process in detail.

**Commented [DJ32]:** Total 4/15

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.

The role of the joint liquidators is to collect and realise the company's assets and distribute assets according to a statutory order of priority in order of the following:

1. Expenses of the winding up
2. Preferential debts
3. Ordinary debts
4. Postponed debts
5. Surplus remaining will be paid to contributories (shareholders liable to contribute to the assets of the company in the event of a winding up) depending on their shareholding interest in the company.

The repayment of an unsecured loan to Bob for £5,000 may be a potential preference claim. If successful, the liquidators can apply to make the transaction void. The directors also continued to trade and take on new liabilities, These actions may constitute a breach of fiduciary duty and the liquidators could bring a claim against the directors to account for the amounts owed by the company to the bank.

The principle of pari passu of distribution applies on a company's insolvency and on liquidation. As a result of this principle, notwithstanding any preferential payments, all creditors participate in the common pool of assets in proportion to their size of their admitted claims. The rights of secured creditors, suppliers of goods with rights to reservation of title and creditors for whom the company holds assets on trusts are not affected by the principle of pari passu.

The principle of pari passu only applies to proveable debts payable to the general body of creditors who fall within each separate class of preferential, ordinary and postponed creditors as per the order of priority on a liquidation:

On the facts, the priority of distributions to creditors after any assets in the liquidation have been realised and if any proceeds are remaining will be as follows. First, to Guernsey Revenue Service and employees as they sit as a preferential creditors. Unsecured creditors will be paid last, if there are any proceeds remaining from the realisation of the company assets.

\* End of Assessment \*

Commented [DJ33]: One mark

Commented [DJ34]: Half mark – this is correct but the criteria for the giving of a preference should have been considered against the fact pattern and further detail given.

Commented [DJ35]: One mark – again the answer lacks an y real detail fo the factors involved in bringing a claim and their relation to the facts. No mention is made of wrongful trading which is a relevant consideration.

Commented [DJ36]: One mark – whilst this is an accurate summary, the answer does not give any consideration to the facts and is not sufficiently detailed to secure further marks.

Commented [DJ37]: Half mark. This answer is not fully correct. The first priority will go to fees and expenses of the liquidation. No consideration is given to the existence of secured debts and the impact. There is insufficient detail here.

Commented [DJ38]: Total mark awarded 25/50