



**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 8F**

**NEW ZEALAND**

This is the **summative (formal) assessment** for **Module 8F** of this course and is compulsory for 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 8F.** 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.assessment8F]**. An example would be something along the following lines: 202021IFU-314.assessment8F. **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) BST (GMT +1) 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] 7/10**

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**

**Select the correct answer: 1**

If a creditor is dissatisfied with the Official Assignee or Liquidator's decision in respect of its proof of debt, the creditor may:

- (a) challenge the decision through an application to the ITS or MBIE.
- (b) apply to the Official Assignee or Liquidator for the decision to be reversed or modified.
- (c) bring court proceedings for a money judgment in respect of the debt.
- (d) apply to the court for the decision to be reversed or varied.**

#### **Question 1.2**

Which of the following **is not** a collective insolvency process: **1**

- (a) Receivership.**
- (b) Liquidation.
- (c) Deed of company arrangement.
- (d) Voluntary administration.

#### **Question 1.3**

**Select the correct answer: 1**

Voluntary administration **is not** used for the following reason(s):

- (a) Maximisation of the company's prospects of trading through and/or continuing in existence.
- (b) To enable a Deed of Company Arrangement to be entered into for the benefit of creditors.
- (c) To minimise tax liability by giving the Inland Revenue Department preferential status.**
- (d) Enable the company to be administered in such a way to provide a better return to creditors than they would otherwise receive by way of an immediate liquidation.

#### Question 1.4

Select the correct answer: 1

A receiver:

- (a) is an agent of the secured creditor that appointed the receiver.
- (b) owes a duty of care to unsecured creditors.
- (c) is an agent of the company and not of the secured creditor that appointed the receiver.
- (d) is an agent of the company until the appointment of a liquidator to the company.

#### Question 1.5

Select the correct answer: 0

Company A goes into liquidation. It has a secured creditor who has security over all present and after-acquired property, including accounts receivables and inventory. There are insufficient amounts to meet all creditor claims. Which of these claims would be last in priority?

- (a) PAYE owed to the Inland Revenue. [PAYE is preferential to a limited degree under Schedule 7 of the Companies Act 1993, particularly where the security is over accounts receivables and inventory]
- (b) Employee claims.
- (c) The Liquidator's costs and expenses.
- (d) Costs of the creditor who applied to put the company into liquidation.
- (e) The secured creditor.

#### Question 1.6

Select the correct answer: 0

Assuming attachment has occurred, a financing statement:

- (a) creates a security interest which gives a creditor priority over other creditors.
- (b) is registered by the debtor on the Personal Property Securities Register to perfect a security interest. [usually registered by the creditor]
- (c) is the only way perfection of a security interest can effected.
- (d) will determine the order of priority between competing security interests, based on time of registration.

### Question 1.7

Select the correct answer: 0

Liquidators in New Zealand:

- (a) can only be appointed by the Court as they are officers of the Court. [can be appointed by others, including shareholders and board]
- (b) can be appointed by creditors at a Watershed meeting.
- (c) act as agents for the appointing creditor. [Liquidators act as agent of the company]
- (d) protect the interests of all creditors of the company. [Liquidators only protect the interests of unsecured creditors]

### Question 1.8

Select the correct answer: 1

A voluntary administrator must convene and hold a first meeting of creditors within how many business days of his appointment?

- (a) 3 business days.
- (b) 8 business days.
- (c) 12 business days.
- (d) 24 business days.
- (e) 45 business days.

### Question 1.9

Select the correct answer: 1

Secured creditors in New Zealand:

- (a) have absolute rights ahead of other unsecured creditors.
- (b) stand outside the liquidation or administration of a company.
- (c) have exclusive rights to appoint a receiver.
- (d) have 10 working days within which they must elect to enforce their rights under the voluntary administration regime.

### Question 1.10

Select the correct answer: 1

A monetary debt judgment obtained from an Australia High Court may be enforced in New Zealand under the:

- (a) Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.
- (b) Reciprocal Enforcement of Judgments Act 1934.
- (c) Trans-Tasman Proceedings Act 2010.
- (d) common law.

### QUESTION 2 (direct questions) [10 marks] 9.5/10

#### Question 2.1 [maximum 5 marks] 5

Name the different types of voidable transactions that can be avoided by a liquidator and indicate whether the company needs to have been insolvent at the time of the transaction, or become insolvent upon entering into the transaction.

Insolvent transaction, which results in a creditor receiving more than they otherwise would have in a liquidation – insolvent at the time of the transaction

Charge over any property or undertaking of a company – becomes insolvent upon entering into the transaction

Transactions at undervalue that were entered into the specified period (generally 2 years) prior to liquidation. It is not a requirement to demonstrate that the company was either insolvent or became insolvent upon entering the transaction, merely that the transaction was within the specified period and entered into at an undervalue as it diminishes the pool of assets for creditors.

Transactions with a related person, including with a director, relatives or a related company for either excessive or insufficient consideration, and in these transactions, the period in which a liquidator can avoid these transactions is for 3 years prior to liquidation. Similarly, there is no requirement for a liquidator to establish that the company was either insolvent or became insolvent as a result of this transaction.

Charges entered into with related parties, including a director, relatives or related company that is controlled by the same director, a relative or a related company) where the assets of the other company are insufficient to meet the debts of the company in liquidation. Again, the security or charge does not automatically have to demonstrate that the company was either insolvent or became insolvent by virtue of the security/charge.

[Excellent!]

#### Question 2.2 [maximum 3 marks] 2.5

In what way can receivership come about in New Zealand? In whose interests does the receiver act? From where does the receiver derive his powers?

In New Zealand, receivership generally occurs over secured property, and can be appointed by either a court order, or pursuant to a security agreement (i.e. a mortgage). Once the receiver is appointed, they take the management and control of the subject property out of the hands of the grantor of the security and into the control of then receiver. Whilst a receiver may be appointed over the secured property, directors will remain in control of the broader company.

Generally, and unless the document states otherwise, the receiver generally acts as an agent of the grantor company, however the receiver must still be cognizant of the duties that they owe not only to the grantor company, but also to other stakeholders. The receiver derives their powers from both the Security Agreement, and the Receiverships Act.

**Great answer:** A court appointed receiver will have powers and obligations under the Receiverships Act, and, will be subject to any other directions under the Court order.

**Question 2.3 [maximum 2 marks] 2**

Name the options available to a creditor who has obtained a judgment outside of New Zealand and who wishes to enforce the judgment in New Zealand. What role does the New Zealand court play in this process?

Judgments that are obtained outside of New Zealand are generally enforceable as a result of a number of statutes that have been enacted in New Zealand. These methods are:

1. enforcement under the Trans-Tasman Proceedings Act 2010 (for judgments from Australia);
2. Enforcement pursuant to common-law;
3. Enforcement pursuant to the Reciprocal Enforcement of Judgments Act 1934; and
4. Enforcement pursuant to the Enforcement of Commonwealth Judgments Under Senior Courts Act 2016.

All of the above options require New Zealand courts to register the foreign judgment, and in the case of the common-law, by issuing summary proceedings in the New Zealand jurisdiction once the final judgment from the foreign jurisdiction has been obtained. Essentially, the court has a central role in the enforcement of any foreign judgment.

**QUESTION 3 (essay-type questions) [15 marks in total] 12/15**

Voluntary administrations have not received significant traction in New Zealand. Discuss the potential reasons for this, having regard to the process and New Zealand's commercial context. In what circumstances would you advise a company to consider voluntary administration? Name 2 considerations that would influence this advice and explain why.

New Zealand's voluntary administration process provides a process to allow for businesses to attempt to maximise their ongoing prospects, or to at least keep part of the business ongoing. The voluntary administration process is a rescue oriented approach, at least initially. The voluntary administration process in New Zealand along with its effectiveness will be discussed in the following.

## Voluntary Administration

The New Zealand voluntary administration process has been largely modelled on the Australian voluntary administration process which has, on a general review, been largely successful.

The purpose of voluntary administration is twofold. Firstly, and foremostly, the main purpose is to save the business by way of a reorganisation or restructure, and such a process can also be applied across the whole of the business, or only on part of the business depending on the current state of the business, and its viability and continues to trade under a deed of company arrangement. In the event that this is not successful, the second purpose is to provide a way for the maximisation of returns to creditors so that they receive a better return than if the company was to enter into immediate liquidation.

## Voluntary Administration Process

Voluntary administrators may be appointed by a number of persons, including the board of the company,<sup>1</sup> by the interim liquidator or a liquidator if the company is already in liquidation;<sup>2</sup> a secured creditor that holds a charge over the whole or a substantial part of the company's property;<sup>3</sup> or by the court.<sup>4</sup>

Following on from the appointment of the administrator, the administration period has now commenced.<sup>5</sup> Importantly, the period of administration can only end in one of three ways, being the time at which the deed of company arrangement is agreed on or executed by the company and the deed administrator;<sup>6</sup> or where the creditors resolve to bring the administration to an end before the watershed meeting;<sup>7</sup> or where the creditors eventually resolve to put the company into liquidation at the watershed meeting.<sup>8</sup> The Court also has a discretionary power to end the administration where the court is satisfied that the company is solvent,<sup>9</sup> or conversely, where liquidation is inevitable.<sup>10</sup> The administration can also end where a certain number of events that were required to take place have not occurred including failing to convene a watershed meeting during the convening period or the company fails to enter into the deed of company arrangement within the specified time.<sup>11</sup>

Following the commencement of the administration period, the appointed administrator takes control of the business (i.e. the day-to-day management) and any property owned by the company.<sup>12</sup> A moratorium also comes into effect from the appointment of an administrator, but will end at the watershed meeting (which will be discussed below).<sup>13</sup> Then moratorium is intended to prevent creditors receiving preferential treatment the company disposing of property during the administration and allows the administrator to focus on their role and duties without concerns over any enforcement or other action that may be taken against the company. Some exceptions apply to the moratorium, including allowing secured creditors to

<sup>1</sup> *Companies Act* ss239H(1)(a) and 239I(1).

<sup>2</sup> *Companies Act* s239H(1)(b) and (c).

<sup>3</sup> *Companies Act* s239H(1)(d).

<sup>4</sup> *Companies Act* s239H(1)(e).

<sup>5</sup> *Companies Act* s239D.

<sup>6</sup> *Companies Act* s239E(1)(a).

<sup>7</sup> *Companies Act* s239E(1)(b).

<sup>8</sup> *Companies Act* s239E(1)(c).

<sup>9</sup> *Companies Act* s239E(2)(f).

<sup>10</sup> *Companies Act* s239E(2)(a).

<sup>11</sup> *Companies Act* s239E(2)(b)-(e).

<sup>12</sup> *Companies Act* s239U.

<sup>13</sup> *Companies Act* s239ABE.



take limited action early on during the moratorium, or where enforcement action is already in progress by secured creditors, or where charges are applied to the perishable property. Creditors also follow the general rules in the Companies Act for proving their claims.

### Administrator's role and duties

The administrator has a varied role and numerous duties during their appointment during the administration.<sup>14</sup> The administrator also has an indemnity for their liabilities incurred and remuneration, and the administrator importantly does not have the personal liability for their appointment,<sup>15</sup> other than those specifically set out in the Act, and in accordance with their duties.<sup>16</sup>

The administrator is also required to call two separate meetings, being the first creditors meeting and the watershed meeting.<sup>17</sup> First, the first creditors meeting is to be held within 8 days after appointment, and allows for creditors to determine if a creditors committee will be appointed, or whether to replace the administrator.<sup>18</sup> The watershed meeting must be convened during the convening period, being 20 working days after the appointment of administrator.<sup>19</sup> The watershed meeting is the meeting of creditors, as convened by the administrator where the future of the company is determined, including whether the deed of company arrangement should be entered into.<sup>20</sup>

### Lack of Use in New Zealand?

There appears to be a generally reluctance to utilise the voluntary administration process in New Zealand. On the face of the purpose of voluntary administration, it may not make sense as to why companies would proceed to liquidation. However, when you consider that for a small to medium enterprise (SME), which is the most common type of entity in New Zealand, it becomes apparent that the main reason for this is that the costs of voluntary administration is quite high, given the complexity of the process and the procedural requirements. For a SME, the liquidation process is likely to high and the company, which ultimately is already likely to be facing financial difficulties, cannot sustain the costs of the voluntary administration process, and as such the directors or board are more likely to have to accept the inevitable and proceed to liquidation.

Similarly, unlike other jurisdiction, no preference is given to the New Zealand Inland Revenue Department (i.e. the NZ tax authority). Again, in many insolvency processes, the tax authority within the relevant jurisdiction are often significant creditors of businesses, but like employees are provided with preference above other creditors in terms of recovery. Given that a creditor can't necessarily appoint an administrator (unless it holds charges) the Inland Revenue will seek liquidation as part of their enforcement strategies.

### When to use Voluntary Administration

Voluntary Administration is a very useful tool for businesses who may be facing financial difficulties. If I was in the process of advising a company with a large asset base, and a

<sup>14</sup> Companies Act s239U.

<sup>15</sup> Companies Act s239ADL.

<sup>16</sup> Companies Act s239 ACY, ACZ, ACZA, ACZB,

<sup>17</sup> Companies Act s239AJ.

<sup>18</sup> Companies Act s239AN.

<sup>19</sup> Companies Act s239AT.

<sup>20</sup> Companies Act s239AS.

number of components to the business, then voluntary administration would certainly be a recommendation for a number of reasons. Firstly, whilst the company would have financial difficulties, it is likely that with a large asset base, the company could sustain the costs of the voluntary administration process, and by having a diverse business base, it is likely that the business would be able to be restructured within the voluntary administration process to the company's benefit, and ultimately to benefit of creditors. As an advisor, it is important to consider that the business may still be viable, whether it is the whole of the business or only part of the business which gives rise to the real benefits of the administration process.

It would also favour the voluntary administration process given the fact that a moratorium comes into existence during the voluntary administration process, this would assist the business greatly in dealing with its creditors. Where some business are facing difficulty, the voluntary administration process can buy them time by virtue of the moratorium, allowing a business with genuine prospects to revive itself and pay creditors. Despite the foregoing, the ultimate factor for recommending voluntary administration is where the company has good prospects of being a going concern after voluntary administration, but most importantly, where the directors wish for the company to continue. If the directors and the board are not invested in the ongoing nature of the business, then it is likely that voluntary administration is not a good use of resources where the business is likely to end up being liquidated anyway.

What about secured creditor support? Consider who they are, what security they have over the assets. It is important to have a feel for how resistant a secured creditor, with security over substantially all of the creditor's assets, will react (ideally, conversations may occur with the secured party to ascertain support, though this is obviously not going to be appropriate in every case!)

#### **QUESTION 4 (fact-based application-type question) [15 marks in total] 14/15**

Mr Strong was born in the UK but has travelled between the United Kingdom and New Zealand for most of his adult life as he has family and business interests there. He rented while he lived in the UK. He has bank accounts in both the United Kingdom and New Zealand.

He worked in the UK for a number of years, but decided he wanted to return to New Zealand. He sold his business in the UK and moved back to New Zealand. About two years later, proceedings were issued in the United Kingdom pursuant to a guarantee against Mr Strong. The creditor obtained judgment for GBP 500,000 and subsequently petitioned for Mr Strong's bankruptcy in the United Kingdom. Ms Finder was appointed trustee of the bankrupt estate.

Mr Strong had GBP 5,000 in his bank account in the United Kingdom. Other than that, Ms Finder was unable to uncover any other assets in the United Kingdom that could be realised for the benefit of creditors. She did discover, however, that Mr Strong owned some property in New Zealand.

Mr Strong had stopped working for about a year before he moved back to New Zealand.

#### **Question 4.1 [maximum 8 marks] 8**

What options are available to Ms Finder to recover property belonging to Mr Strong located in New Zealand? What factors would be relevant in deciding what option to use and how Ms Finder decides to proceed?

There are a number of options available for Ms Finder to utilise in attempting to recover property.

Firstly, Ms Finder could make applications to the High Court under the Insolvency (Cross-border) Act 2006, which is based off the UNCITRAL Model Law. Ms Finder could make application for recognition of her role as an officeholder. Given the issues surrounding his current domicile, I would not recommend trying to rely on this as a means of recognition.

Ms Finder could make an application for enforcement under the Reciprocal Enforcement of Judgments Act 1934, which would allow the judgment to be registered. There is an ability to challenge any such registration, but the debtor would most likely not succeed as the judgment appears to have been obtained properly, although it is arguable if it is contrary to public policy based on the limited information provided.

She could also seek recognition under common law, and would then be subject to the New Zealand law. This would most likely assist Ms Finder with locating property held by Mr Strong and could utilise the New Zealand enforcement procedures including obtaining his assets or other items located in New Zealand. However, given that the debtor was resident in New Zealand at the time of judgment, this is unlikely to be accepted by the court.

As a further option, and if the above options are not successful, Ms Finder could also make an application under the *Senior Courts Act 2016*, which allows for the UK judgment to be registered in New Zealand. However, this process provides notification to the debtor meaning that it is likely that there could be challenges brought by the debtor depending on how and why the judgment was obtained or any other circumstance that the debtor believes is appropriate. It would be recommended to only use this as a last resort due to potential costs and complexities.

Excellent

#### Question 4.2 [maximum 7 marks]

##### Question 4.2.1 [maximum 4 marks] 3

What options are available to Ms Finder to:

- (a) find out further information about Mr Strong's affairs in New Zealand, if she believes she has insufficient information; and
- (b) assuming she has reliable information about concealed assets in New Zealand, what steps could she take to protect those assets?

As set out in the seminal decision of *Williams v Simpson*, the best option for Ms Finder to find out further information about Mr Strong's assets, she could seek search and seizure orders. Further, Ms Finder could undertake further searches of the PPS register to determine if there is any security affecting Mr Strong. Ms Finder could also seek to register security over the property of Mr Strong, including such steps as a caveat over the property

Good answer.

Ms Finder can ask the Court for assist either at common law, or, under the UNCITRAL model law for assist with finding out more information to assist her with ascertaining Mr Strong's financial affairs in NZ. Under the UNCITRAL model, she could apply to the Court for interim relief in the context of an application for recognition of the bankruptcy proceeding in the UK, in NZ (see Article 19, Chapter 2).

**Commented [AH1]:** Assume you mean the underlying judgment debt? The bankruptcy order, being non-monetary, cannot be registered.

An application under Article 19 for interim relief would allow the Court to grant the specified orders at 19(1) which include staying executing, entrusting the affairs of the bankrupt to the foreign representative, or any of the orders at 21(c) or (d) (prohibition against disposal of assets or granting powers to examine witnesses or obtain information about the affairs of the bankrupt). As you have identified, obtaining information is critical to assessing whether the bankruptcy proceeding would qualify as a foreign proceeding.

**Question 4.2.2 [maximum 3 marks] 3**

If Ms Finder sought to have her appointment recognised under the Insolvency (Cross-border) Act 2006 in New Zealand, do you think she would be successful? Provide reasons for your answer.

Ms Finder could make an application under the Insolvency (Cross-Border) Act 2006 for recognition directly to the High Court.<sup>21</sup> Ms Finder would need to show that the centre of Mr Strong's main interests was the UK in accordance with the definition of foreign main proceedings. Ms Finder would be unable to do so given that, prima facie Mr Strong appears to have his centre of main interests within New Zealand. Thus, the proceedings would not be registered as foreign main. Further, an application could be made for the proceedings to be recognised as foreign non-main proceedings, however as Mr Strong has only had a previous link to the UK. Given this, the only real alternative for Ms Finder to have the proceedings recognised, at least in terms of realising assets is similar to that of the *Williams v Simpson*, where the foreign representative was granted relief pursuant to Schedule 1 Article 8, effectively on the basis of good faith and global uniformity.

**\* End of Assessment \***

**Question 1: 7/10**  
**Question 2: 9.5/10**  
**Question 3: 12/15**  
**Question 4: 14/15**

**Total: 42.5/50**

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<sup>21</sup> *Insolvency (Cross-border) Act 2006 Sch 1, Art 9.*