



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 5C

CAYMAN ISLANDS

This is the **summative (formal) assessment** for **Module 5C** 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 5C. 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.assessment5C]**. An example would be something along the following lines: 202021IFU-314.assessment5C. **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]

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**.

The Grand Court of the Cayman Islands has jurisdiction to make winding up orders in respect of:

- (a) a company incorporated in the Cayman Islands.
- (b) a company with property located in the Cayman Islands.
- (c) a company carrying on business in the Cayman Islands.

(d) any of the above.

Commented [BT1]: Correct. 1 mark

Question 1.2

Which of the following is **not** available in the Cayman Islands?

- (a) Appointment of a receiver.
- (b) Court-supervised liquidation.
- (c) Official liquidation.

(d) Deed of Company Arrangement.

Commented [BT2]: Correct. 1 mark

Question 1.3

In a voluntary liquidation:

(a) the company may cease trading where it is necessary and beneficial to the liquidation.

(b) the company must cease trading except where it is necessary and beneficial to the liquidation.

(c) the company must cease trading if it is necessary and beneficial to the liquidation.

(d) the company may cease trading unless it is necessary and beneficial to the liquidation.

Commented [BT3]: Correct. 1 mark

Question 1.4

Select the **correct answer**.

When a winding up order has been made, a secured creditor:

- (a) may enforce their security with leave of the court.
- (b) may enforce their security with leave of the court provided the liquidator is on notice of the application.
- (c) may enforce their security without leave of the court.
- (d) may not enforce their security until the liquidator has adjudicated on the proofs of debt.

Commented [BT4]: Correct. 1 mark

Question 1.5

Select the **correct answer**.

In a provisional liquidation, the existing management:

- (a) continues to be in control of the company.
- (b) continues to be in control of the company subject to supervision by the court and the provisional liquidator.
- (c) may continue to be in control of the company subject to supervision by the provisional liquidator and the court.
- (d) is not permitted to remain in control of the company.

Commented [BT5]: Correct. 1 mark

Question 1.6

Select the **correct answer**.

Once a provisional liquidator is appointed:

- (a) no action may be commenced against the company without leave of the court.
- (b) no existing action may be continued against the company without permission of the provisional liquidator.
- (c) legal proceedings may be commenced or continued against the company without leave of the court.
- (d) no action may be commenced against the company.

Commented [BT6]: Correct. 1 mark

Question 1.7

Which of the following is **not** a preferential debt ranking equally with the other four?

- (a) Sums due to company employees.
- (b) Taxes due to the Cayman Islands government.

(c) Amounts due to preferred shareholders.

Commented [BT7]: Correct. 1 mark

(d) Sums due to depositors (if the company is a bank).

(e) Unsecured debts which are not subject to subordination agreements.

Question 1.8

Select the **correct answer**.

Any payment or disposal of property to a creditor constitutes a voidable preference if it:

(a) occurs in the six months before the deemed commencement of the company's liquidation, or at a time when it is unable to pay its debts and the dominant intention of the company's directors was to give the applicable creditor a preference over other creditors.

(b) occurs in the six months before the deemed commencement of the company's liquidation and at a time when it is unable to pay its debts and the dominant intention of the company's directors was to give the applicable creditor a preference over other creditors.

Commented [BT8]: Correct. 1 mark

(c) occurs in the six months before the deemed commencement of the company's liquidation and at a time when it is unable to pay its debts, or the dominant intention of the company's directors was to give the applicable creditor a preference over other creditors.

(d) occurs in the six months before the deemed commencement of the company's liquidation, or at a time when it is unable to pay its debts, or the dominant intention of the company's directors was to give the applicable creditor a preference over other creditors.

Question 1.9

Select the **correct answer**.

In order for a proposed scheme of arrangement to be approved:

(a) 50% or more representing 75% or more in value of the creditors must agree.

(b) 50% or more representing more than 75% of the creditors must agree.

(c) more than 50% representing more than 75% of the creditors must agree.

(d) more than 50% representing 75% or more in value of the creditors must agree.

Commented [BT9]: Correct. 1 mark

Question 1.10

Select the **incorrect statement**.

A company may be wound up by the Grand Court if the:

(a) company passes a special resolution requiring it to be wound up.

(b) company does not commence business within a year of incorporation.

(c) company is unable to pay its debts.

(d) board of directors decides it is "just and equitable" for the company to be wound up,

Commented [BT10]: Correct. 1 mark

(e) company is carrying on regulated business in the Cayman Islands without a license.

Commented [BT11]: 10/10 for question 1.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

Explain the extent to which it is possible to register security over an asset in the Cayman Islands.

[The Cayman Islands has ownership registers for real estate, ships, aircraft, motor vehicles and intellectual property. These registers are centrally managed and therefore mortgages and charges can be registered. A third party purchasing any of these assets will be deemed to have notice of the registered interest and will therefore acquire the assets subject to the secured creditor's interest.

Commented [BT12]: 3 marks

There is no public security registration regime for other assets. However, Section 54 of the Companies Law requires that security interests be entered in the register of mortgages and charges of a debtor company. The register must be maintained at the company's registered office in the Cayman Islands. Failure by a company to register the mortgages and charges does not, in and of itself, invalidate any security interests.

A creditor must take adequate steps to ensure that it has sufficient control over an asset to prevent a third party from purchasing it. The creditor should therefore review the register of mortgages and charges prior to making a loan.

Under the conflict of law rules in Cayman Islands, the location of the asset will determine the relevant law governing the priority and perfection of security interests.]

Question 2.2 [maximum 4 marks]

Explain the legal basis for the Cayman Islands Grand Court's power to assist foreign bankruptcy proceedings and the circumstances in which such powers may be exercised.

[Section 240 of the Companies Law defines a foreign bankruptcy proceeding to include proceedings for the purpose of reorganising or rehabilitating an insolvent debtor.

Commented [BT13]: 4 marks

In Cayman Islands, there are no threshold tests for the grant of assistance, nor are there automatic rights based on the centre of main interests (COMI) of the debtor. Instead foreign representatives must satisfy the court that it is appropriate for the court to exercise its discretion by granting the relief sought in the foreign representative's application.

The Grand Court has power to recognise and grant assistance to foreign proceedings and representatives by providing the following forms of ancillary reliefs (see *Section 241* and *In re China Agrotech Holdings Ltd (FSD 157 of 2017 (NSJ))*): (a) recognising the right of a foreign representative to act in the Islands; (b) staying the commencement or continuance of legal proceedings against a debtor; (c) staying enforcement action against a debtor; (d) requiring production of information to the foreign representative; and (e) ordering handover of property to the foreign representative.

The Grand Court's power to assist foreign bankruptcy proceedings is guided by the need to ensure economic and expeditious administration of the debtor's estate, consistent with the: (a) just treatment of all claim holders, where every domiciled, in accordance with principles of

natural justice; (b) protection of claim holders in Cayman Islands against prejudice and inconvenience in the processing of claims in foreign proceedings; (c) prevention of preferential or fraudulent dispositions of property in the debtor's estate; (d) distribution of the estate among creditors substantially in accordance with the statutory order of priority; (e) recognition and enforcement of security interests created by the debtor; (f) non enforcement of foreign taxes, fines and penalties; and (g) comity - mutual recognition and cooperation concerning legal decisions.]

Question 2.3 [maximum 3 marks]

Outline the legal framework for the recognition of foreign judgements in the Cayman Islands.

[The Caymans Islands has not entered into any international treaties for reciprocal recognition or enforcement of foreign judgements. The Foreign Judgements Reciprocal Enforcement Law (1996) revision provides a statutory mechanism for recognition or enforcement of foreign judgements. However, the law has limited applicability, having only been extended to judgements from Superior Courts of Australia.

Enforcement of foreign judgements is therefore usually achieved by commencing a new action, under the Grand Court Rules, based upon the foreign judgement as an unsatisfied debt or other obligation. Monetary and non-monetary judgements are enforceable at common law (see *Bandone vs Sol Properties 2008 CILR 301*).

The mandatory requirements for enforcement of a foreign judgement at common law are that: (a) the judgement is final; (b) the foreign court has jurisdiction over the debtor; (c) the foreign judgement was not obtained by fraud; (d) the foreign judgement is not contrary to public policy of the Caymans Island; and (e) the foreign judgement was not obtained contrary to the rules of natural justice.

Once a local judgement has been obtained, the full range of domestic enforcement remedies are available.

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

Question 3.1 [maximum 9 marks]

In the absence of a statutory prohibition on insolvent trading, the Cayman Islands is ill-equipped to deal with directors who wilfully disregard the interests of creditors.

Critically discuss this statement and indicate whether you agree or disagree with it, providing reasons for your answer.

[There is no statutory provision requiring a company director's to commence insolvency proceedings upon the debtor becoming distressed or insolvent. The Companies Law does not contain a prohibition on wrongful trading (that is continuing to trade whilst insolvent).

Directors can, however, be made personally liable to the company for any losses which they cause to the company if they act in breach of their fiduciary duty to act in the best interests of the company. For example, directors may be liable if they cause the company to incur further debts when they knew or ought to have known that there was no reasonable prospect of the company avoiding an insolvent liquidation.

In *Prospect Properties Vs McNeill (1990-91) CILR 1717*, the Grand Court held that where a company is insolvent the directors' duty to act in the best interests of the company requires

Commented [BT14]: 3 marks

them to have regard to the best interests of its creditors. It is in the best interests of the creditors to be paid and it is in the best interest of the company to be safeguarded against being put in a position where it is unable to pay.

When a company is in official liquidation, the official liquidator can pursue claims against the directors on behalf of the company for breach of their fiduciary duty.

Section 147 of the Companies Law deals with fraudulent trading and provides that, if the business of a company is carried on with intent to defraud creditors, or for any fraudulent purpose a liquidator may apply for an order requiring any persons who were knowingly parties to such conduct to make such contributions to the company assets as the Court thinks proper.

Pre-insolvency transactions can be challenged if they constitute a voidable preference, a disposition at an undervalue, or fraudulent trading and dispositions. Property dispositions and transfers of shares made after the presentation of a winding up petition will also be void if, the Court makes a winding up order, unless Court orders **[otherwise.]**

Commented [BT15]: 7 marks. Answer might have been further enhanced by specific reference to statutory provisions.

Question 3.2 [maximum 6 marks]

Receivers have a limited role to play in a Cayman Islands insolvency scenario. Discuss.

[Receivership plays a prominent role in Cayman Islands insolvency in circumstances where a secured creditor is involved. Receivership is a self-help remedy only available to secured creditors on the terms set out in the security instrument.

Receivership is not expressly provided for in the Companies Law and Company Winding up Rules. The Grand Court Rules contemplate that receivers may be appointed by the Court for purposes of collecting money (e.g. rents) or to carry out some other act for example execution of a contract or a document of title. Order 30 of the Grand Court Rules governs appointment and duties of receivers generally. Order 45 states that receivers may be appointed to enforce court orders for payment of money.

There is no statutory requirement to register the appointment of a receiver in Caymans Island, and the appointment of a receiver must be in accordance with the terms of the security document in order to be valid. Receivers can be appointed without court involvement, pursuant to rights in the security instrument,

The typical powers of a receiver, include the power to take possession of, sell and/or manage the secured property, the power to exercise all voting rights pertaining to the secured property, and the power to receive and retain all dividends and interest accruing in respect of the secured property. The receiver will typically realise the value of the charged asset and repay the creditor the amount of its unpaid debt.

The receiver owes its primary duty to the appointing secured creditor, with additional duties owed to the security provider and any other party with an interest in the equity of **[redemption.]**

Commented [BT16]: 4 marks. Don't forget SPCs.

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

Black Pearl Ltd is a company registered in the Cayman Islands. It operates a fleet of pirate-themed cruise ships across the Caribbean. It was founded by the wealthy Sparrow family over 75 years ago. The family continues to own and manage the business.

In recent years, Black Pearl has been rapidly expanding its cruise ship operations. However, the unexpected slump in worldwide tourism at the start of 2020 due to Covid-19 has badly affected Black Pearl's revenues.

Within weeks Black Pearl is going to default on its loan repayments to Monster Mortgage (Monster). Monster has lent Black Pearl USD 100 million (USD 40 million of which is secured by a mortgage over four of Black Pearl's cruise ships).

Black Pearl has already failed to pay various service providers for several months (tender vessels, food and beverage suppliers, utilities, engineers and mechanics). The payment of utilities is particularly important to the ongoing repair and maintenance of the fleet of vessels at Black Pearl's dry dock facility in Little Cayman.

To make matters worse, Black Pearl has recently lost arbitration proceedings in London in relation to the construction of a new fleet of ships and been ordered to pay damages of USD 50 million to Jolly Roger Inc. It will not be able to satisfy that award.

You are a Cayman Islands-based insolvency professional and have been approached to provide advice on the following:

- (a) What action can Monster take to protect itself?
- (b) What action can Jolly Roger Inc take against Black Pearl?
- (c) What action can the unsecured trade creditors take against Black Pearl?
- (d) Does the Cayman Islands Court have jurisdiction over Black Pearl?
- (e) Is there a legal route via which Black Pearl can protect itself and seek to restructure?
- (f) Following on from (e) above and assuming there is a legal route via which Black Pearl can protect itself and seek to restructure, can the Sparrow family continue to run Black Pearl during this process?
- (g) Assuming that the Cayman Islands Court has jurisdiction, what factors will the court take into consideration before approving any proposed restructuring?

[(a) Monster can appoint a receiver to take possession of, and manage or sell the four Black Pearl cruise ships over which it has a secured interest, so as to pay Monster its unpaid debt of USD 40 million. In addition, Monster can file a petition under Section 94 of the Companies Law for the official liquidation of Black Pearl, in respect of unsecured debt of USD 60 million.]

Commented [BT17]: 2 points.

(b) Jolly Roger, in possession of foreign judgement against Black Pearl, can commence a new action in the Caymans Island based upon the foreign judgment as an unsatisfied debt or obligation. Once a local judgment is obtained Jolly Roger can have access to the full range of domestic enforcement remedies including appointment of receivers.]

Commented [BT18]: 2 marks

(c) Unsecured trade creditors can file a petition under Section 94 of the Companies Law for the official liquidation of Black Pearl. Alternatively they may also apply to Court to appoint a provisional liquidator and seek an arrangement or compromise with Black Pearl.]

Commented [BT19]: 2 marks

(d) The Grand Court has jurisdiction over Black Pearl because Black Pearl is registered in the Caymans Island, has property located in the Islands (the dock facility in Little Cayman and is carrying on business in the Islands.]

Commented [BT20]: 1 mark

(e) Yes, Black Pearl can file a court application for appointment of a provisional liquidator, in order to restructure and present a compromise or arrangement to its creditors (Section 104(3)).

Commented [BT21]: 1 mark. Coupled with a scheme under section 86. And thereby achieve a moratorium under section 97.

(f) Yes, the Sparrow family may be allowed by court, in a "light touch" provisional liquidation, to continue control of the company subject to supervision by the provisional liquidator and the Grand Court.

Commented [BT22]: 1 mark.

(g) Court will consider whether: (i) the company is, or is likely to become, unable to pay its debts within the meaning of section 86; and (ii) the company intends to present a compromise or arrangement to its creditors (a scheme of arrangement).

Commented [BT23]: Section 104

Commented [BT24]: 1 mark. Detail required on how the meeting, voting and sanctions process works.

Commented [BT25]: 10 marks for question 4.

*** End of Assessment ***

Commented [BT26]: Total marks for this candidate = 41