



**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.

#### ANSWER :

The Cayman Islands does have ownership registers for real estate,2 ships,3 aircraft,4 motor vehicles and intellectual property.5 These registers are centrally maintained and mortgages and charges can be registered.

In the Cayman Islands, security may be taken over immovable and movable assets. Immovable property : Mortgage (legal or equitable), fixed charge. Movable property : Mortgage (legal or equitable, fixed charge, floating charged, pledge, lien.

Commented [BT12]: 1.5 marks. For full marks, more detail should have been included from the Guidance Text.

### 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.

#### ANSWER :

The Cayman Islands has not implemented the UNCITRAL Model Law,although regard is had to the principles.The criteria upon which the Court's discretion will be exercised is set out at section 242 of the Companies Law. The Grand Court's powers to make orders in support of foreign insolvency proceedings,are provided for in Part XVII of the Companies Law.

Commented [BT13]: 4 marks

The Grand Court can provide the following forms of ancillary relief :

(a)recognizing the right of a foreign representative to act in the Islands on behalf of, or in the name of, a debtor ;(b) to join the agreement or to continue the formation of legal proceedings against a debtor ;(c)to continue the implementation of any consideration against a debtor ;(d) Requiring a person in capacity of information relating to the business or affairs of a duty to be examined by and to produce documents to its foreign representative; and (e) order the hand-over – to a foreign representative - of any property lending to a debt.

In determining whether to make these ancillary orders,the Grand Court is guided by matters which will best assure an economic and expeditious administration of the debtor's estate,consistent with:

(a)the justice of all holders of claims, whether they are domestic, in accordance with established principles of natural justice ;(b) the protection of claims holders in the Cayman Islands against trial and opinion in the processing of claims in foreign proceedings ;(c) the prevention of prior or mandatory disposition of property in the treaty's state; (d) the distribution of the estate among creditors substantially in accordance with the statutory order of priority; (e) the recognition and enforcement of security interests created by the debtor; (f) the non-

enforcement of foreign taxes, fines and penalties; (g) comity (mutual recognition and co-operation concerning legal decisions)

**Question 2.3 [maximum 3 marks]**

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

**ANSWER :**

1. Statute:

The Foreign Judgments Reciprocal Enforcement Law (1996 Revision) does provide a statutory scheme for recognition and enforcement of foreign judgments in circumstances where the country from which the judgment originates assures substantial reciprocity of treatment regarding the enforcement of Cayman Islands Judgments. However, to date the provisions of the Law have only been extended to judgments from the Superior Courts of Australia. This procedure is governed by Order 71 of the Grand Court Rules.

2. Common law:

Given the limited application of the Foreign Judgments Reciprocal Enforcement Law (1996 Revision), the enforcement of foreign judgments is usually achieved by commencing a new action in the Cayman Islands based upon the foreign judgment as an unsatisfied debt or other obligation.

At common law there are 5 requirements: (1) the judgment is final; (2) the foreign court had jurisdiction over the debtor; (3) the foreign judgment was not obtained by fraud; (4) the foreign judgment is not contrary to public policy of the Cayman Islands; and (5) the foreign judgment was not obtained contrary to the rules of natural justice.

3. Limitation:

A six-year limitation period applies both for common law enforcement and under the 1996 Law. The period runs from the date of the judgment or, when there have been appeals, the date of the last judgment.

**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.

**ANSWER :**

I disagree with this view.

Cayman Islands still have some instruments to deal with those directors.

1. There is no statutory obligation to file for insolvency and the Companies Law does not contain a prohibition on wrongful trading (that is, continuing to trade whilst insolvent).

**Commented [BT14]:** 2.5 marks. Mention of treaty obligations (or lack thereof) necessary to secure full marks.

**Commented [BT15]:** 6 marks. Some good points here. Specific reference might also have been made to sections 99, 135, 145, 146 Companies Act.

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.

In *Prospect Properties v McNeill* the Grand Court held that where a company is insolvent, the directors' duty to act in the best interests of the company requires them to have regard to the interests of its creditors. It is in the interest of the creditors to be paid and it is in the 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 (in the company's name) for each of their practical students.

2. Preferences and void payments are governed by Part XVII of the Bankruptcy Law.

Any conveyance, transfer, charge or payment made by a debtor in favour of any creditor, with a view of giving such creditor a preference over the other creditors, must, if a provisional order takes effect within six months, be deemed fraudulent and void as against the Trustee.

Any disposition, made by any trader unable to pay his debts, of his stock-in-trade or things in action relating to his business, otherwise than in the ordinary course of business, shall, if a provisional order or an absolute order takes effect within six months, be deemed fraudulent and void as against the Trustee, except in the following circumstances:

(a) if the dispositions were made and executed with the assent of 75% in number and value of the creditors;

(b) the same were made and executed after not less than 21 days' notice in the Gazette and in a newspaper circular in the Islands of the intention of the trader to make such disposition.

3. Section 147 of the Companies Law deals with fraudulent trading.

If the business of a company was 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's assets as the Court thinks proper.

### Question 3.2 [maximum 6 marks]

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

Commented [BT16]: 6 marks

#### ANSWER :

I think this view is too narrow. In Cayman Islands insolvency scenario, although receivers are not explicitly mentioned in the statutory provisions dealing specifically with insolvency, they still have many roles to play. They are very important players in Cayman Islands insolvency scenario.

1. The main relevance of receivers in an insolvency context, is that receivership may offer an alternative course of action for certain creditors. Receivers can be appointed without any court involvement pursuant to rights in a security instrument. For example, a holder of a fixed or floating charge can, if the charging document specifically provides for it, appoint a receiver over the company's charged assets if a debtor defaults. The receiver will act under the powers set out in the charge document, which will typically include a right of sale. The receiver will generally realise the value of the charged asset and repay the creditor the amount of its



unpaid debt. In this scenario, the receiver is not supervised by the court and usually owes its duties to the creditor rather than the debtor company.

## 2. Grand Court Rules.

Receivers are not explicitly mentioned in the statutory provisions dealing specifically with insolvency (namely the Companies Law and CWR); however, the Grand Court Rules (GCR) do contemplate that receivers may be appointed by the Court for the purposes of collecting money (for example, rents) or to carry out some other act (for example, the execution of a contract or a document of title).

Order 30 GCR governs the appointment and duties of receivers generally. Order 45 GCR (which deals with enforcement of judgments and orders generally) states that receivers may be appointed to enforce court orders for the payment of money. Order 51 GCR also provides for the appointment of receivers by way of equitable execution.

3. Receivers and receivership orders are specifically provided for by statute in respect of a particular type of Cayman Islands legal entity, namely the Segregated Portfolio Company.

An SPC is essentially a regular company which remains a single entity but which is permitted to create separate portfolios for different assets and liabilities. Each portfolio is ring-fenced (by status) from the assets and liabilities contained in other ports.<sup>102</sup> These conventions are identified by the words "Segregated Portfolio" or "SP" after their name. If the Grand Court is satisfied that the SP's assets attributable to a particular portfolio of the company are likely to be insufficient to discharge the claims of creditors in respect of that portfolio, it may make a receivership order in respect of that portfolio.

During the period of a receivership order, the receiver relieves the directors of their functions and powers in respect of the business of the SP.

### **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?

**ANSWER :**

(a) Monster may present a bankruptcy petition to the Grand Court against Black Pearl. Monster is entitled to enforce its mortgage over four of Black Pearl's cruise ships without the leave of the Grand Court and without reference to the liquidator. Monster's mortgage right in a liquidation are superior to the rights of all other parties.

Commented [BT17]: 2 marks

(b) Jolly Roger Inc may present a bankruptcy petition to the Grand Court against Black Pearl because Black Pearl will not be able to satisfy the award. In Cayman, a company may be wound up by the Grand Court if the company is unable to pay its debts. A company is deemed to be unable to pay its debts if execution of other process issued on a judgment, decree or order obtained in the Court in favour of any creditor in any proceedings instituted by such creditor against the company, is returned unsatisfied in whole or in part.

Commented [BT18]: 1 mark. The key is the New York Convention and the Arbitration Law.

(c) They may present a bankruptcy petition to the Grand Court against Black Pearl because Black Pearl is unable to pay its debts. In Cayman, a company may be wound up by the Grand Court if the company is unable to pay its debts. A company is deemed to be unable to pay its debts if it is proved to the satisfaction of the Court that the company is unable to pay its debts.

Here, Black Pearl cannot be able to satisfy the award in the London case. Thus, it is proved to the satisfaction of the Court that the company is unable to pay its debts.

The debts in their class may can be seem as preferential debts. Per section 141 of the Companies Law, in the case of an insolvent company the following debts are paid in priority to all other debts: (a) sums due to employees; (b) taxes due to the Cayman Islands government; (c) sums due to depositors (if the company is a bank); (d) unsecured debts which are not subject to subordination agreements. These preferential debts rank equally. If available funds are insufficient to satisfy them in full, they abate in equal proportions.

Commented [BT19]: 1.5 marks

(d) Yes.  
The Grand Court has jurisdiction to make (binding up) orders in respect of companies which are respectively : (a) incorporated in the Cayman Islands ; (b) incorporated elsewhere but substantially registered in the Cayman Islands; or (c) in respect of a foreign company which - (i) has property located in the Islands ; (ii) is carrying on business in the Islands ; (iii) is the general partner of a limited partnership; or (iv) is registered under Part IX (a so-called "overseas company").

Commented [BT20]: 1 mark

Here, Black Pearl registered in the Cayman Islands and carrying on business in the Islands. So, the Cayman Islands Court have jurisdiction over Black Pearl.

(e) Sure. The method is to meet a scheme with creditors.

Black Pearl can try to obtain a moratorium against any proceedings continuing or being commenced against them by putting them into provisional liquidation pursuant to Section 104(3) of the Companies Law. At the time of making the application, Black Pearl will explain to the court the purpose of the application, which will be the appointment of JPLs in order to allow for the negotiation and promotion of a compromise or arrangement with its creditors or members.

Commented [BT21]: 2 marks. Which triggers a moratorium under section 97.

A scheme is a court approved compromise or arrangement entered into between a company and its creditors or members. The power derives from section 86 of the Companies Law.

(f) Generally, the Sparrow family would continue to run Black Pearl during this process. It depends on if it is in provisional liquidation.

If the company is not in provisional liquidation, existing management will continue to manage the company. Upon the appointment of provisional liquidators, the Grand Court will determine which powers will remain with the directors and which will be vested in the provisional liquidators. Sometimes directors may be relieved of control entirely.

Commented [BT22]: 1 mark

(g) The procedure for obtaining approval for a scheme of arrangement is governed by Order 102, rule 20 of the Grand Court Rules (GCR) and Practice Direction 2/2010. After the filing of a scheme petition, there is a three-stage process for schemes: (a) An application must be made to the Grand Court for an order that meetings of creditors or members be confirmed for the purpose of introducing the scheme (the "convening hearing"); (b) The scheme proposals are discussed at meetings held in accordance with the existing bearing order and are either approved or rejected (the "scheme meetings"); (c) If approved at the scheme meetings, an application is then made to the Grand Court to obtain approval/sanction of the scheme (the "administration bearing").

Commented [BT23]: 3 marks

1. Convening hearing. The Grand Court must be satisfied that the scheme document and supporting explanatory statement contain all the information reasonably necessary to enable the scheme creditors (and / or shareholders, as applicable) to make an informed decision about the proposed scheme.

2. Scheme meetings. The Grand Court must confirm the scheme proposals are approved or rejected. In order for a proposed scheme to be approved, a majority in number (that is, over 50%) representing over 75% in value of the creditors (or class of creditors, or members or class of members, as the case may be), present and voting either in person or by proxy at the meeting, must agree to the compromise or arrangement.

If the necessary majorities are obtained, the scheme can proceed to the sanction hearing (see below). In this way, a debtor can "cram down" creditors (force missing credits to accept the scheme of arrangement) with an accepting class, provided the threshold is agreed.

3. The Court will be concerned with compliance with the convening orders, whether the majority fairly represent the class, whether the arrangement (having regard to the alternatives) is such that an intelligent, honest member of the class convened, acting in his own interest, might reasonably approve it.

Commented [BT24]: 11.5 for question 4.

4.

**\* End of Assessment \***

**Commented [BT25]:** 41.5