



**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]:** Incorrect. The answer was 'd'.

#### **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.
- (d) Sums due to depositors (if the company is a bank).
- (e) Unsecured debts which are not subject to subordination agreements.

Commented [BT7]: Incorrect. Answer was 'c'

#### 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.
- (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.

Commented [BT8]: Correct. 1 mark

#### 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]: Incorrect. The correct answer was 'd'.

#### 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]:** 7/10 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 have ownership registers for the following assets:

- real estate
- ships
- aircraft
- motor vehicles and
- intellectual property

As it has been explained in the Guidance Text, there is no public security registration regime in the Cayman Islands for other assets. So, in this cases, mortgages and charges can be registered, and the third-party purchaser of those assets will be deemed to have notice of any such interest and will acquire the asset subject to the secured creditor's interest.

**Commented [BT12]:** 1.5 marks. A more detailed understanding is required for full marks, drawing a clearer distinction between the effects of registering on the public registers versus the register of mortgages.

### 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.

**Commented [BT13]:** 3.5 marks. Reference to section numbers of the Companies Act would have secured full marks.

The Grand Court's powers to make orders in support of foreign insolvency proceedings, are provided for in Part XVII of the Companies Law.

The Cayman Islands have great discretion when it comes to assist foreign bankruptcy proceedings, since there are no threshold tests for the grant of assistance, nor are there automatic rights based on the COMI of the debtor.

Instead, the foreign representatives must persuade the Cayman Islands court that it is appropriate for the court to exercise its discretion by granting the relief sought by the foreign representative.

The forms of ancillary relief that the Grand's Court can provide are the following:

- recognising the right of a foreign representative to act in the Islands on behalf of, or in the name of, a debtor;
- enjoining the commencement or staying the continuation of legal proceedings against a debtor;
- staying the enforcement of any judgment against a debtor;
- requiring a person in possession of information relating to the business or affairs of a debtor to be examined by and to produce documents to its foreign representative; and
- ordering the hand-over – to a foreign representative- of any property belonging to a debtor.

However, we have to bear in mind that there is a criteria upon which the Court's discretion must be exercised, based on the assurance of an economic and expeditious administration of the debtor's estate:

1. the just treatment of all holders of claims, wherever they are domiciled, in accordance with established principles of natural justice;
2. the protection of claim holders in the Cayman Islands against prejudice and inconvenience in the processing of claims in foreign proceedings;
3. the prevention of preferential or fraudulent dispositions of property in the debtor's estate;
4. the distribution of the estate among creditors substantially in accordance with the statutory order of priority;
5. the recognition and enforcement of security interests created by the debtor;
6. the non-enforcement of foreign taxes, fines and penalties;
7. 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.

As it has been developed in the Guidance text, The Cayman Islands has not entered into any international treaties for the reciprocal recognition or enforcement of foreign judgments, neither has the UK extended its ratification of any such treaties to the Cayman Islands by Order in Council.

Commented [BT14]: 3 marks

In circumstances where the country from which the judgment originates assures substantial reciprocity of treatment regarding the enforcement of Cayman Islands Judgments, the Foreign Judgments Reciprocal Enforcement Law (1996 Revision) does provide a statutory scheme for recognition and enforcement of foreign 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).

These are the requirement in order the foreign judgments to be enforceable:

- (a) They must be final;
- (b) They must be a money judgment; and
- (c) made after the 1996 Law was extended to the relevant foreign country.

To complement 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.

Such actions are conducted under the regular procedural regime for litigation in the Cayman Islands (that is, The Grand Court Rules).

Under the common law, both Money and non-money judgments (including declaratory judgments) are enforceable.

Under the common law, the mandatory requirements for enforcement of a foreign judgment are the following:

- a) the judgment is final;
- b) the foreign court had jurisdiction over the debtor;
- c) the foreign judgment was not obtained by fraud;
- d) the foreign judgment is not contrary to public policy of the Cayman Islands; and
- e) the foreign judgment was not obtained contrary to the rules of natural justice.

**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.

As indicated in the Guidance Text, there is no statutory provision that directly addresses the insolvent trading in the Cayman Islands.

In my view, it is important to expressly regulate the liability of administrators in the context of insolvency proceedings, specifying which actions are outside their sphere in such cases.

In this way, fraudulent actions can be avoided (whether derived from the directors' bad faith, or from their desperate situation), such as obtaining new credit by putting the company further into debt without control, or prioritising the payment of some creditors over others without any criteria.

This stems from the stressfulness of an insolvency situation, where directors may be tempted to carry out further indebtedness of the company, or to prioritise some creditors over others as a matter of preference.

**Commented [BT15]:** 3 marks. Candidate could have earned more marks by referring to the case law and to sections 99, 135, 145, 146, 147 Companies Act.

**Question 3.2 [maximum 6 marks]**

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

From my point of view, and in line with the previous section, it is important in insolvency proceedings that there is an insolvency administrator to supervise all acts of disposition of the debtor's assets. This ensures that there is an independent body appointed by the judge to ensure that all payments made by the company are indispensable for business continuity and that the company is not being subjected to further indebtedness.

It also controls that no assets are taken out of the company, and that the order of payment to creditors is followed according to their status.

To sum up, the receiver plays a key role when it comes to insolvency proceedings, since it acts as an independent liquidator, protecting the company's assets and safeguarding the interests of creditors.

**Commented [BT16]:** 2 marks. Much more reference is needed to Guidance Text (GCR, SPCs etc)



**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?

In order to achieve some breathing space, BLACK PEARL should file for a provisional liquidation pursuant to Section 104(3) of the Companies Law in order to obtain a moratorium against any proceedings continuing or being commenced against the company.

**Commented [BT17]:** The question is asking what Monster can do. 0 marks.

(b) What action can Jolly Roger Inc take against Black Pearl?

In this case we have to bear in mind that the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards was extended by the UK Government to the Cayman Islands in 1980 in order to promote the use of arbitration in this jurisdiction and facilitate the enforcement of foreign arbitral awards.

In this case, JOLLY ROGER could enforce its claim.

**Commented [BT18]:** 1 mark. Also the Arbitration Law.

(c) What action can the unsecured trade creditors take against Black Pearl?

An unsecured creditor has the right to file a winding-up petition in respect of a debtor company.

**Commented [BT19]:** 1 mark. Section 92–94 and also PL pursuant to section 104.

(d) Does the Cayman Islands Court have jurisdiction over Black Pearl?

**Commented [BT20]:** 1 mark.

The Grand Court has jurisdiction to make (winding up) orders in respect of companies which are either:

- a) incorporated in the Cayman Islands;
- b) incorporated elsewhere but subsequently registered in the Cayman Islands;
- c) or in respect of a foreign company which –

- has property located in the Islands;
- is carrying on business in the Islands;
- is the general partner of a limited partnership; or
- is registered under Part IX (a so-called “overseas company”).

As BLACK PEARL is a company incorporated in the Cayman Islands, it would have jurisdiction over this company.

(e) Is there a legal route via which Black Pearl can protect itself and seek to restructure? BLACK PEARL could file for a scheme of arrangement coupled with a provisional liquidation.

As it has been explained in the Guidance Text, in the Cayman Islands it is only possible to obtain a court ordered stay if the company is in liquidation.

The above means that if breathing space from creditors is required to effect the scheme, BLACK PEARL will need to present a winding-up petition to the Grand Court and apply for an order appointing provisional liquidators prior to filing the scheme petition.

This application under section 104(3) can be made by BLACK PEARL on an *ex parte* basis on the ground that the company is or is likely to become unable to pay its debts as they fall due and the company intends to present a compromise or arrangement.

Commented [BT21]: 2 marks. Scheme under section 86. Moratorium under section 97.

(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?

If the company is in provisional liquidation, 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 or, on the contrary, the powers can remain largely with the directors (this process is referred to locally as “light touch”).

Commented [BT22]: 1 mark

(g) Assuming that the Cayman Islands Court has jurisdiction, what factors will the court take into consideration before approving any proposed restructuring?

At the convening hearing, the Court will check issues of class composition, any jurisdictional issues, the adequacy of the scheme documentation and notice. As explained in the Guidance Text, 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.

It will also have to check that the necessary majorities for the approval have been obtained. 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.

Commented [BT23]: 2 marks.

Commented [BT24]: 8 marks for question 4.

\* End of Assessment \*

Commented [BT25]: Total marks for this candidate = 28