



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: 202021FU-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.

One of the most common form of security over immovable property is legal mortgage over certain types of property which must be created by deed and validly executed. The Register of Land must be updated. A mortgage taken over a movable property, commonly used as security over ships and aircraft, needs to be registered on the respective vessel or aircraft registry. With respect to shares of a company, a mortgage over the shares is created by an agreement to creates a mortgage whereby name of the secured creditor is written in the register of members as the holder if the shares and the deposit of the relevant share certificate with the secured creditor.

An ownership registers exists for real estate as provided in the Registered Land Law, for ships as provided in the Maritime Authority Lay, aircraft as provided in the Civil Aviation Authority Law and Mortgaging of Aircraft Regulation, for motor vehicles and intellectual property as provided by the Cayman Islands Intellectual Property Office.

The registers are centrally maintained and provide for registration of mortgages and charges for such properties. This ensure that in a case where a third party purchases the registered asset, the asset is subject to the secured creditor's interest. For other assets there is no public security registration regime nor publicly searchable registers, therefore before making a loan, a creditor must ensure to check the company register of mortgages and take the necessary steps to make sure it has control over the asset and enable to prevent its purchase by third party. In addition, pursuant to section 54 of the Companies Law, a company shall keep with its registered office an internal updated register of all mortgages and charges which records details of each security interest created by it including a short description of the property mortgaged or charged, the amount of charge created, and the names of the chargees or persons entitled to such charge. The register is available for inspection only by the member of the company and creditors.

Commented [BT12]: 3 marks.

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.

Pursuant to Part XVII of the Companies Law, which provides for international co-operation in insolvency proceedings, including reorganisation or rehabilitation proceedings, the Grand Court has the powers, upon an application of a foreign representative, to make orders in support of foreign insolvency proceedings (ancillary to the foreign bankruptcy proceedings) and has a statutory jurisdiction to recognise and assist foreign representatives appointed in the company place of incorporation. It is noted that the Cayman Islands has not adopted the UNCITRAL Model Law (but does follow most of its principles) nor the EU legislation. It is for the Court's discretion, if satisfied that it is appropriate to exercise its discretion, to assist the foreign representative by way of relief.

Commented [BT13]: 4 marks.

Section 241 provides for ancillary orders to a foreign representative, who has been appointed to a debtor in the course of a foreign bankruptcy proceeding, for the purpose of recognition of his right to act in the Cayman Islands on behalf of the debtor; a stay of proceedings or the enforcement of a judgment against the debtor; examination and production of documents to, the foreign representative; and turnover of the debtor's assets to the foreign representative. Prior to exercising its powers and granting the ancillary orders, the Court must assure that the administration of the debtor's estate is economic and expeditious as well as consistent with the fair treatment of all creditors pursuant to the established principles of natural justice; the protection of local creditors against prejudice and inconvenience in the processing of claims in foreign proceedings; the prevention of preferential or fraudulent dispositions of the debtor's assets; the distribution to creditors in accordance with the statutory order of priority; the recognition and enforcement of security interests; the non-enforcement of foreign taxes, fines and penalties; and comity.

In addition, pursuant to the Foreign Bankruptcy Proceedings (International Co-operation) Rules, 2018 (FBPR) a foreign representative can be recognised and seek the Court's assistance, such as granting an order for examination of relevant persons and a stay or preventing the commencement of legal proceedings.

With regards to protocols, there are no legislation for protocols between the Court and foreign courts, however pursuant to Order 21 of the Companies Winding Up Rules 2018 (CWR) an official liquidator in Cayman can enter into an international protocol with a foreign office holder to promote orderly administration of the liquidation estate and avoid duplication of work and conflict between the official liquidator and the foreign officeholder. Only when the Court and the foreign court or authority have approved the protocol, the same shall take effect and become binding upon them.

In a case where the insolvency proceedings are not subject to section 241, the Court has a common law power to recognise and assist foreign representatives, for instance the Court will be based on common law cross-border insolvency principles to recognise foreign attempts to effect restructuring for example when the company is subject to reorganisation proceedings in USA.

The following are reforms which have been adopted in relation to foreign proceedings and the Court's power to assist foreign bankruptcy proceedings: in the Practice Direction No. 1 of 2018 the Cayman Islands adopted the JIN Guideline in cross board insolvency and restructuring cases, for Cooperation in Cross-Border Insolvency Matters which were shaped to enhance communication between courts and insolvency representatives. Also, in the Practice Direction No. 2 of 2019 the Cayman Islands adopted the JIN Modalities for Court-to-Court Communication

Finally, an interim relief in the absence of substantive proceedings in the Cayman Islands pursuant to section 11 A of the Grand Court Law, the Court can appoint a receiver in relation to foreign proceedings if "the proceedings have been or are to be commenced in a court outside of the Islands; and are capable of giving rise to a judgment which may be enforced in the Islands under any Law or at common law".

Question 2.3 [maximum 3 marks]

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

The Cayman Islands has not entered into any international treaties for the reciprocal recognition or enforcement of foreign judgments, nor is part of the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, except

Commented [BT14]: 3 marks

for the Recognition and Enforcement of Foreign Arbitral Awards which was extended to Cayman by the UK.

Section 3 (1) of the Foreign Judgments Reciprocal Enforcement Law (1996 Revision) (FJREL), provides for a statutory scheme for recognition and enforcement of foreign judgments in cases where the Governor is satisfied that the foreign country exercises and assures a substantial reciprocity of treatment of judgments from the Cayman Court. Pursuant to the FJREL a judgment creditor can apply for its judgment to be registered in the Court and thereafter is deemed to have the same force and effect as Judgment of the Cayman Court. It is noted that to date the FJREL extends only to the enforcement of Judgments from Australia. Order 71 of the Grand Court Rules provides *inter alia* for the registration of the foreign judgment in Cayman, the application to the Court, notice and filing. Pursuant to section 3(2) the foreign judgement must be final, money judgment and been given after the FJREL was extended to the foreign country, in order for it to be registered and enforceable in Cayman.

In most cases, when applicable, and given the limitations as noted above, foreign Judgments will be recognised and enforceable in Cayman pursuant to the common law. The common law recognition and enforcement path is achieved by the judgment foreign plaintiff/ creditor bringing a new action in the Cayman FSD Court against the debtor for an unsatisfied debt or other obligation. The foreign judgment can be for money and non-money judgments where the principle of comity applies. This procedure is being conducted pursuant to the Grand Court Rules. A foreign judgment is valid and enforceable at a common law if the following requirements in regards to the foreign judgment are met: it is final, it was given by a court with jurisdiction over the debtor, it was not obtained by fraud nor contrary to the rules of natural justice, it is not contrary to Cayman public policy and is not statute-barred by Cayman limitation periods of six years from the date of the judgment or the last judgment in case of an appeal.

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.

Commented [BT15]: 9 marks

In the Cayman Islands, a wrongful trading is not considered a statutory offence pursuant to the Companies Law, there are no specific insolvent trading provisions, and the directors of the insolvent company are not obliged to file for insolvency. In general, the directors of a company owe their duties to the company, rather than to the shareholders or creditors. However, once the company is insolvent/ potentially insolvent, the directors must have regard to the creditors' interests when they perform their duties.

Notwithstanding the above, directors can be personally liable to the company for any losses which they caused to the company if they act in breach of their fiduciary duty to act in the best interest of the company. Namely, in a circumstances where the directors know/should know that there is little prospect for the company to be able to pay its debts when due and that the company should be placed in insolvent liquidation, i.e there is no prospect of the company avoiding insolvency, the directors can be personally liable for any further losses incurred by the company if they fail to take any reasonable steps to minimise the loss/potential loss to the creditors.

In addition, directors must have regard to that company's creditors when exercising their duties when one company within a group of companies is insolvent/ doubtful solvency. In this case the directors must ensure they avoid conflict of their duties to the solvent companies within the group

Set out below, examples which explain how the Cayman Islands deals with directors who fail to comply with their duties and willfully disregard the interest of creditors. It is also noted that the Companies Law deals with avoidance of property, which for the purpose of this questions can be conducted by the directors of the company who willfully disregard the interest of creditors . Such provisions are detailed below:

- section 147, fraudulent trading, if the liquidator finds out that the company's business has been carried on with the intention to defraud its creditors, or for any other fraudulent purpose, he can apply to Court for an order which declare that any persons who were knowingly party to such behavior are liable to make such contribution to the company's assets as the Court may order.
- section 99, disposition of property post commencement of the winding up, which are void, unless the Court otherwise orders. In this case the liquidator can apply to Court for relief or return of the asset
- section 145, voidable preference- any payment or disposal of property to a creditor is void if it occurred within 6 months before the commencement of the winding up and when the company was already unable to pay it debts and the main intention of the director was to give preference to a specific creditor. It is noted that the test of dominate intention may not be classed as voidable preference if for instance it was done in good faith and to achieve a different purpose than preferring a creditor. In this case the liquidator can apply to Court to the return of the asset.
- section 146,avoidance of dispositions made at undervalue. Transaction in property which is made at an undervalue and with the intention of willfully defeating an obligation owed to a creditor, i.e the intention to defraud is voidable if the liquidator apply to the Court for the same.

In addition to the above, the Companies Law provides wide range of powers to the liquidator to deal with directors and take action against directors who breach their fiduciary duties. Such powers are:

- in official liquidation, the official liquidator has the powers to pursue claims against the directors for breach of their fiduciary duty.
- in official liquidation once appointed, the official liquidator replaces the directors. One of its powers is to investigate directors and require them to provide statements of the company's affairs supported by affidavit and with the Court permission to compel certain person such as former director to submit to oral examination. Sections 101 and 103. In addition, the transfer or delivery to the liquidation estate any property or documents belong to the company.
- in provisional liquidation, pursuant to section 104(2) an application by creditors, shareholder or CIMA on the ground *inter alia* to prevent management mismanagement of the company's affairs by the directors; and in the case of light touch provisional liquidation, the existing management can continue to be in control but subject to the supervision of the provisional liquidator and the Court. In other case the provisional liquidator powers replace the directors, depends on the fact of each case.

Common law- as discussed in the case of prospect v McNeill, the Court determined that in a case where the company is insolvent the duty of the directors to act in the best interest of the company forced them to have regard to the interest of the creditors. The interest of creditors is to be paid, whereas the company's interest is to be safeguarded against a position where it cannot pay. Also as provided in Pantone 485 "Upon insolvency or uncertain solvency the Directors must therefore have regard to what is in the best interests of the general body of

creditors. In this context, there are no prescribed statutory duties; duties are determined by reference to the common law".

It is noted that even with the provisions provided by the Companies Law, the Court has its discretion as to whether an act by a creditor was done in a good faith or not. In addition, a director can defend himself if he can show that:

- he acted in good faith, in particular against claims for breach of fiduciary duties.
- he reasonably believed that when the company continued with its operations, even when the company was insolvent, could lead to a higher return to creditors than an immediate termination of operations.

Given the above, I think that even in the absence of statutory prohibition on insolvent trading, the Cayman Island, due to the various provision and powers the Companies Law provides the liquidator, is more than able to deal with director who willfully disregard the interest of creditors.

Question 3.2 [maximum 6 marks]

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

Commented [BT16]: 6 marks.

The Companies Law nor the Winding up Rule do not specifically deal with receivers or receivership appointments; however, receivership does offer an alternative to other forms of recovery in a case of insolvency. The various available options, such as a receivership appointment by way of Court Order or appointment pursuant to a contractual security arrangement, and the receiver's role in each of them are set out below:

Receivers appointed by way of security document- the appointment of a receiver pursuant to a contractual security agreement is not govern by specific statutory provisions under the Cayman Islands Law. In this scenario there is no court involvement appointment, the receiver is not supervised by the Court, and he usually owes its duties to the creditor. The receiver's appointment is pursuant to the rights specified in the security agreement, for instance the charging document will specifically provide for the appointment of a receiver over the charged asset if the debtor defaults. The powers granted to the receiver to deal with the secured assets are the ones set out in the charge document and are limited to the specific purpose they were granted. The powers will generally include the power to take possession of the secured asset, the right to sale the secured asset and subsequently repay the realised value of the secured asset to the secured creditor, the powers to exercise any voting rights with respect to the secured assets, and the power to receive and retain payments, interests of dividends with respect to the secured asset. The effect of its appointments is mainly to take charge of the secured asset for the benefit of the security provider. For instance, in a case of a share mortgage, there will be a suspension of any shareholder's rights attached to the secured shares and the same will be taken over by the receiver. It is noted that the receiver's fundamental duties are first owed to the secured creditor who appointed the receiver and other duties owed other parties whom interest is in the equity of redemption. The receiver must exercise his duties in good faith and in line with the terms of the security document.

Receivers appointed pursuant to the Cayman Islands Grand Court Rules (GCR)- the GCR's view is that receivers can be appointed over an asset for the purpose of collecting money such as rents and also, for instance, to carry out other acts, such as the execution of contracts or document of title. The appointment of a receiver can take place by way of an order by the Grand Court of the Cayman Islands which governed by Order 30 of the GCR which provides also for the duties of the receiver in general (duties such as service of the appointment order, submission of report on the account to the Court, seeking further directions from the Court when applicable and necessary, for example powers of investigation). Once appointed, the receiver will have the powers granted to him by the appointment order which can include the

power to manage a specific asset or the powers over the entire company. In addition, pursuant to rule (2), the order can include such directions, as the Court thinks fit, for the providing of security by the receiver (notwithstanding the security, if the receiver is already insured the Court may waive the requirement for additional security).

Pursuant to Order 51 of the GCR, the Court can appoint a receiver by way of equitable execution, when the Court deems it to be just and equitable to do so. In this type of appointment, the receiver has the right to identify, investigate and recover the specified asset over which the applicant proved that he has any equitable interest to the satisfaction of the Court. It is noted that this power is a result from sections 11 (1) of the Grant Court Law and also discuss in the case of TMSF v Merrill Bank.

Pursuant to Order 45 of the GCR, a receiver may be appointed to enforce a judgment or court order for the payment of money. In general, a receivership is a useful tool for enforcement of a judgment debt in order to secure a potential dissipation of assets quickly as opposed to winding up and the appointment of official liquidator.

Another option available under the Companies Law is the appointment of a receiver over a Segregated Portfolio (SP). The Companies Law provides for the registration of a Segregated Portfolio Company (SPC) and the establishment of segregated portfolio(s) which has its own legal entitlement to its assets and liabilities, separate the SPC. Note that the segregated portfolio does not constitute a legal entity separate from the SPC. Notwithstanding the winding up of SPC is limited to a liquidation of the whole SPC and not for the SP, an option for the appointment of a receiver over a SP is available pursuant to sections 224-225 of the Companies Law. The purpose of the appointment of a receiver is to achieve and facilitate the safeguarding, investigation, and realisation of assets of the portfolio. Pursuant to section 226 the receiver's rule is to achieve the purpose described above and he shall have all the functions and powers of the direction in respect of the SP assets. As may be required, he can also apply to the Court for further powers not expressly in section 224. The receiver is an agent of the SP without personal liability except in a case of fraudulent, acting in bad faith and similar. The receiver is entitled to attend and vote at the SPC meetings. Also, in addition to the investigation into the manner of the SP's assets, he may be allowed to investigate the general assets without the need for appointment of a liquidator over the SPC as a whole.

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?

Commented [BT17]: 15 marks

Answer (a)

Monster is a lender who also holds a legal title, security in the form of a mortgage over four of Black Pearl (BP)'s cruise ships. Although BP retains the possession of the four cruise ships, once it defaults, Monster will be permitted to take possession and exercise its power to sale the four cruise ships or to appoint a receiver to realise them (if it was not holding legal title, it would have been considered an equitable mortgage which is bounded by the mortgage agreement which may contain a power of attorney, for instance to transfer the property in the case of a default, otherwise Monster will need to apply to the Court for specific performance). If the mortgage is also a fixed charge, in the event of insolvency the secured/ charged assets are not assets of the debtor and BP cannot sell it without Monster's consent. Note that the fixed charge must be in writing and in general, created by deed. If the charging document specifically provides for this, Monster can appoint a receiver over BP's charged assets if it defaults and the appointed receiver will act pursuant to the powers detailed in the charge document, for instance, selling the assets.

A mortgage, taken over a movable property, commonly used as security over ships, needs to be registered on the respective vessel registry. An ownership registers exists for ships is provided in the Maritime Authority Lay. Monster needs to file a notice of its security with the centrally maintained register. In this case if a third party purchases the cruise ships, he buys it subject to Monster's security interest. Monster can also review BP's register of mortgages and ensure its security interest has been entered (section 54).

Monster has a security over part of the assets of BP. Pursuant to sections 142 of the Companies Law and Order 17, Rule 1 of the Companies Winding-Up Rules (CWR), Monster can enforce its security without the leave of the Court. In our scenario BP is not yet in insolvency proceedings, however even if it was, a secured creditor can enforce its security after the company is placed in official or provisional liquidation as the winding up order does not stay a secured creditor's rights. Monster's debt in the amount of USD100 million is more than its security which is in the amount of USD40 million. Pursuant to sub rule (2), Monster can submit a proof of debt for the unsecured amount once BP placed in liquidation. Once BP is in

liquidation, Monster needs to submit a proof of debt which states the particulars of the security held by it and the value which he puts on the security.

Pursuant to sections 94(b) Monster, as a creditor (for its unsecured debt), can file an application to the Court for the winding up of BP. Monster can apply for winding up on the ground of (section 92(d)) BP is unable to pay its debts. In our scenario it says that "within weeks BP is going to default" which means that it is not yet defaulted, therefore this ground may be dismissed by the Court. Also, in order to claim that BP is unable to pay its debts, Monster first would need to serve BP with a demand requiring it to pay the debt and BP has 21 days to do the same, or Monster can prove and satisfy the Court that BP will not be able to pay its debt and the Court will grant the application (in Weaving Macro, the future cash flow has been considered).

Answer (b)

Jolly Roger (JR) has an order for damages, as a consequence of arbitration proceeding, which was granted in the UK court, i.e foreign arbitral award. Although Cayman has not entered into any international treaties for the reciprocal recognition or enforcement of foreign judgement, the UK has extended to the Cayman Islands the application of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, which meant that award granted in states party to the New York Convention are enforced in Cayman. Pursuant to the Arbitration Law 2012, any arbitral awards from any foreign state can be enforced in Cayman.

JR can seek to enforce its foreign award, and have it executed against BP in Cayman pursuant to the Arbitration Law or the Foreign Arbitral Awards Enforcement Law 1997. Pursuant to section 72 of the Arbitration Law 2012, an arbitral award, is enforceable as if it was a Cayman judgment, with the leave of the Court. The arbitral award is recognised as binding and once the party apply to the Court, the award shall be enforced pursuant to the Foreign Arbitral Awards Enforcement Law.

Pursuant to Order 73, Rule 31 of the Grand Court Rules, JR can enforce its damages award by filing an *ex parte* application, supported by the arbitration agreement and the UK award, to the Court to enter a judgment on the same terms as the award granted by the UK court.

JR can seek recognition of its judgment pursuant to the Foreign Judgment Reciprocate Enforcement Law (note that to date the provisions of this law only included judgments granted in the Superior Court of Australia). The recognition procedure is provided in Order 71 of the Grand Court Rules. JR can enforce its foreign judgement in the Cayman Island since the judgement is final, it is a money judgment and was granted after 1996. Note that this

In addition, JR can enforce its foreign judgments pursuant to the common law given the judgment is final, the London Court had jurisdiction over BP, it was not obtained by fraud, not contrary to the public policy and the rules of natural justice. Pursuant to rule 45 JR can also appoint a receiver to enforce its payment judgment. Note that the limitation period to apply for enforcement is 6 years.

Given JR is an award creditor, it can also petition to wind up BP on the grounds that BP is unable to pay its debt and use the unsatisfied judgment as evidence of BP's inability to pay its debt as it falls due.

Answer (c)

The unsecured creditors have the right to file a winding-up petition in respect of BP. First, they should serve the company with a statutory demand to pay its debt within 21 days. If BP fails to satisfy the statutory demand, the unsecured creditors can file a winding-up petition.

Once BP is in liquidation, the unsecured creditors will need to submit a proof of debt which includes the total amount of its claim prior to the commencement of the liquidation and details of the claim.

Contracts- If a liquidator is appointed, it has no statutory powers to disclaim onerous contract and failure to comply with such contract will be subject to the consequences of breaching a contract. With regards to essential contract and supply of utilities, given that the utilities is important to the ongoing repair and maintenance of the fleet of vessels, pursuant to section 148, a request can be made by the liquidator to the utility supplier to continue the supply of the electricity, and the utility supplier can make it a condition to supply the electricity only if the liquidator personally guarantees the payment of any such charges in respect of that supply. However, outstanding payments prior to the date of the liquidation cannot be part of the condition to supply the utilities.

In addition, unsecured creditor who is owed a liquidated debt can bring proceedings in the Court if the debt is undisputed. The creditor can seek summary judgment against the debtor.

Provision liquidation- creditors can apply to appoint a PL pursuant to section 104 (2) of the Companies Law, however, they will need to demonstrate, *inter alia*, that the appointment is necessary to prevent mismanagement by the directors.

Answer (d)

Pursuant to section 91 of the Companies Law, the Grand Court of the Cayman Islands has jurisdiction to make a winding up order, *inter alia*, in respect of an existed company which was incorporated and registered under the Companies Law or also company that was incorporated elsewhere but registered in the Cayman Islands. In our scenario, BP is registered in the Cayman Islands and was founded by the Sparrow family (assuming in Cayman), therefor the Court has jurisdiction over BP.

With respect to the enforcement of the foreign judgement granted in favour of JR, the applicable court that will hear the application is the Financial Services Division (FSD) of the Grand Court of the Cayman Islands

Answer (e)

In Cayman Islands, there is no legislative framework that addresses informal work-outs, however, in practice informal work-outs are being used, with success, when necessary and agreed by the relevant parties.

In order to protect itself and achieve some breathing space from its creditors, BP can seek to place itself in a provision liquidation and obtain a moratorium against any proceedings continuing or being commenced.

Pursuant to section 104(3) BP can make an ex parte application to the Court to appoint a provisional liquidator for the purpose of presenting a compromise or arrangement to its creditors (scheme of arrangement) on the ground that it is unable to pay its debts pursuant to sections 93. BP will file the ex parte summons on the basis that whilst it is experiencing financial difficulties and is unable to pay its debts, it intends, with the assistance of the provisional liquidator, to further develop and propose a viable restructuring plan with its creditors to restructure the financial indebtedness of BP.

Once a provisional liquidator is appointed, this will give BP the protections of an automatic stay pursuant to section 97 and no action or proceedings can be commenced or proceed without the permission of the Court. It is noted that prior to filing a scheme petition, BP needs to file a winding up petition and apply to appoint a provisional liquidator.

The main restructuring tool, as stated above, is a scheme of arrangement pursuant to section 86 of the Companies Law. This is a court approved compromise or arrangement between BP and its creditors. The scheme can be for, inter alia, the restructuring of BP debt/liabilities or modifying its shareholders/creditors' rights for distribution.

BP will need to follow the steps provided for the approval of the scheme pursuant to Order 102 rule 20 of the Grand Court Rule and Practice Direction 2/2010. The steps are as follows: application to the Court for an order that a meeting of creditors be convened for the approval of the scheme; the scheme proposal has been discussed between the parties at the meeting and the outcome of the discussions; seek the Court's approval of the scheme if approved by the creditors.

A voluntary liquidation is not an option unless BP prove that it is solvent and a specific event has occurred, on the occurrence of which its memorandum of articles of association (M&A) provide that the company shall be wound up.

Answer (f)

As long as BP is not in provisional liquidation, the Sparrow family, which is the existing management, will continue to manage the company. Once a provisional liquidator is being appointed, it is for the Court discretion to determine which powers will remain with the existing directors, i.e the Sparrow family, and which powers to grant to the provisional liquidator. The appointment order will specify whether and to what extent, the management or the provisional liquidators will manage the business of BP during the restructuring. In certain circumstance, the Court can decide that the directors' powers/ control over the management of the company will be completely replaced by the provisional liquidator. It is for the Court discretion (after a provisional liquidator has been appointed) whether the existing management retains its powers. When the powers remain mostly with the directors, this process is referred as "light touch".

Answer (g)

Before approving any proposed restructuring such as scheme of arrangement pursuant to sections 104(3), the Court needs to be satisfied, pursuant to sections 93, that BP is or is likely to become unable to pay its debts whether by neglecting to pay or secure a sum claimed by a creditor by a statutory demand or unsatisfying a judgment against it.

In its application, BP will need to satisfy the Court that the purpose for applying for the appointment of provisional liquidator is to allow the company to negotiate and promote a compromise or arrangement with its creditors and to demonstrate the benefits of the proposed restructuring for the company's creditors. BP can assert that notwithstanding the present financial difficulties faced by it, BP believes that the company and it will be able to continue as a going concern if a restructuring of a specific debt can be negotiated, proposed, and implemented by way of a proposed restructuring, such as scheme.

The court will also consider if BP has already taken steps to engage with its creditors with a view to developing the terms of the proposed restructuring. BP will need to demonstrate it believes that a winding up of the company is not in the best interests of the creditors of the company, and believe that the commencement of any official liquidation process would have a prejudicial impact on the value of the assets of the company and will likely result in a materially worse outcome for the creditors, for instance that upon a winding up of BP, Monster, the unsecured creditor will make zero return.

Another factor which may assist with the Court determination to approve a restructuring is if a meeting took place between BP and its creditors during which the parties discussed proposals to restructure the company and based on those discussions, it appeared that all of the

creditors were agreeable to a debt restructuring to enable the BP to continue as a going concern. (See e above).

After filing the application pursuant to sections 104(3), if the application is ex parte, the Court when granting the application, usually require an *inter partes* date to ensure that creditors have the opportunity to be heard in front of the Court.

At the convened hearing the Court will consider issues such as jurisdiction, creditors classes composition and a quality of the scheme documents. The Court must be satisfied that the documents, supporting, and exhibits are completed and provide sufficient details in order for the creditors to consider the proposed scheme. Over 75% in value and majority of creditors need to approve the scheme.

*** End of Assessment ***

Commented [BT18]: Total marks for this candidate = 50/50!