



**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. 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.

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]: 9/10 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.

There is not a centralized register for securities assets in the Cayman Islands. Security must be registered if it is over the real state, ships, aircraft, motor vehicles, and intellectual property. For that reason, a secured creditor over another sort of assets, different to described, have to ensure that has sufficient control to prevent the sale of each secured asset to a third party.

Commented [BT12]: 2 marks. More details required for the additional mark.

Nonetheless, a creditor may register its security on the Register of Mortgages and Charges, but it does not create a priority. In any case, the location of assets will determine applicable rules regarding preference and perfection of security interests.

### Question 2.2 [maximum 4 marks]

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

The Cayman Islands has not implemented the UNCITRAL Model Law on Cross-border Insolvency. Nonetheless, the Cayman Islands Grand Court has the discretion to grant some reliefs that could comprise some ancillary orders as recognizing the right of a foreign representative to act in the Islands on behalf of, or in the name of, a debtor; staying the enforcement of any judgment against a debtor; among others.

Commented [BT13]: 3.5 marks

To exercise the discretionary power, the Cayman Islands Grand Court must follow some criteria to ensure economic and expeditious administration of the debtor's state. It implies "just treatment of all holders of claims, wherever they are domiciled, in accordance with established principles of natural justice; the protection of claim holders in the Cayman Islands against prejudice and inconvenience in the processing of claims in foreign proceedings; the prevention of preferential or fraudulent dispositions of property in the debtor's estate; the distribution of the estate among creditors substantially in accordance with the statutory order of priority; the recognition and enforcement of security interests created by the debtor; the non-enforcement of foreign taxes, fines and penalties; comity (mutual recognition and co-operation concerning legal decisions)" (section 243, Companies Law)

Commented [BT14]: s.242

In addition, the Cayman Islands does not provide legislation for protocols. However, a liquidator could reach protocols with foreign representatives to ensure the orderly administration of an estate of a company in official liquidation, avoidance of duplication of work, and avoidance of conflict between the official liquidator and the foreign representative.

Finally, every creditor will be treated in equal conditions, because the Cayman Islands legislation is pro creditors.

### Question 2.3 [maximum 3 marks]

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

The requirements for the recognition of foreign judgments depend on whether where the country from which the judgment originates assures substantial reciprocity of treatment regarding the enforcement of Cayman Islands Judgments, an event in which applies Order 71 of the Grand Court Rules. If that requirement does not fulfill, then will be applicable The Grand Court Rules (or the regular procedural regime for litigation), as follow:

**Commented [BT15]:** 2 marks. Candidate demonstrates some understanding but lack of clarity prevents the award of full marks.

Order 71 of the Grand Court Rules or Law of 1996	The Grand Court Rules (Common Law)
The foreign judgment must be: final; A money judgment; and Made after the 1996 Law was extended to the relevant foreign country.	In contrast to recognition pursuant to Order 71 of the Grand Court Rules, any money and no-money judgment are enforceable pursuant to common law. The mandatory requirements to enforce a judgment are: (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 the 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.

I agree with the statement. Although there is not a statutory prohibition in that sense, the Cayman Islands has a mechanism to deal with the directors' liability when they acted disregarding the creditors' interest. For instance, directors are liable when they caused damages breaking their fiduciary duties. The guide mentions the case of *Prospect Properties v McNeill* (1990-91) in which the Grand Court held that directors must act for benefit of the debtor and its creditors. In addition, the official liquidator may pursue claims against a director for breaking their fiduciary duties.

According to Christopher Smith, KRyS Global, directors owe common law and fiduciary duties ordinary to the company, not specifically to creditors neither shareholders; nonetheless, that general rule changes when the company is insolvent or potentially insolvent. In those cases "*Directors can be personally liable for losses incurred by the company if they incur additional liabilities when they knew or should have known that there was no reasonable prospect of the company avoiding insolvent liquidation.*"

However, is not common the use of those actions in the Cayman Islands, reason by which the Government is implementing changes in their regulation (Smith, KRyS Global).

**Commented [BT16]:** 6 marks. Some good points here. Specific reference might also have been made 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.

**Commented [BT17]:** 4 marks. More detail would have earned more marks.

The receiver is not an administrator of the insolvency state as it functions in the United Kingdom regulation. In the Cayman Islands' regulation, receivers are appointed by creditors or, for instance, holders of a floating charge, and grant to the receivers' powers to enforce or realize the security or make payments according to creditor's instructions. In this scenario, receivers are not supervised by the Grand Court. Their duties and appointment forms are regulated on Order 30 of the Grand Court Rules.

On the other hand, a receiver may be appointed by the Gran Court for Segregated Portfolio Company (or SP) when it deems that a particular portfolio of the company is likely to be insufficient to discharge the claims of creditors in respect of that portfolio. The management will be with the purpose of orderly distribution of the segregated portfolio assets.

Thus, indeed, receivers have a limited role to play in an insolvency scenario, because it depends on the main purpose of their appointment and their functions are limited to the creditors' interests or the judicial order, depending on the case.

**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?

Monster could foreclose its mortgage by USD 40 million over 4 Black Pearl's cruise ship. Monster may begin an executive proceeding against Black Pearl to recover the USD 60 MM remaining. In that last case, foreclosure has to be done by the time of the beginning of a liquidation proceeding (section 99, Companies Law).

**Commented [BT18]:** 1 mark. Sort of right. When Peal defaults, Monster can enforce its security at any time and is not subject to the liquidation proceeding, if any. It will have to prove for the unsecured balance in the liquidation.



In addition, pursuant to section 94 of the Corporate Law, Monster may request the beginning of a liquidation proceeding under Official Liquidation arguing that: 1) Black Pearl is a foreign company registered in the Cayman Islands; and 2) is not able to pay its debts (section 92 y 93), case in which Monster have to prove that. On the other hand, Monster may request for the beginning of a scheme of the arrangement, and in this scenario, Black Pearl's consent will be required.

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

In the same way that Monster, Jolly Roger Inc could begin a foreclose proceeding, but foreclose have to be done by the time of the beginning of a liquidation proceeding (section 99, Companies Law). On the contrary, if foreclose will not be finished by the date of the beginning of the insolvency proceeding, Jolly Roger Inc will not retain the assets of Black Pearl.

In any case, Jolly Roger Inc may request also a beginning of an official liquidation proceeding according to sections 92 and 93 of the Companies Law or a scheme of arrangement. In that last case, Black Pearl's consent will be required.

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

They may request for a beginning of an official liquidation proceeding according to sections 92 and 93 of the Companies Law or a scheme of arrangement. In that last case, Black Pearl's consent will be required.

If the creditors have secured, they could foreclose their collateral even if Black Pearl is admitted to an insolvency proceeding.

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

Yes, the Cayman Islands Court has jurisdiction over Black Pearl, because it is a company registered in the Cayman Islands (section 93, Companies Law).

**(e) Is there a legal route via which Black Pearl can protect itself and seek to restructure?**

Pursuant to the Cayman Islands' law, Black Pearl has no obligation to begin an insolvency proceeding. In addition, the Cayman Islands law has no provisions for recovery proceedings as Chapter 11 of the US law. It only has liquidation proceedings as voluntary, provisional, and official.

For purposes of keeping Black Pearl as an ongoing concern, it may pursue a scheme of the arrangement, by which Black Pearl may restructure its debts. In that case, it may request for a provisional liquidation and apply a stay to prevent foreclose proceedings against the debtor (also known as a moratorium, pursuant to section 104(3), Companies Law). Black Pearl could argue that during the provisional liquidation will be pursuing an agreement with some of all of its creditors that after all may be approved by the Grand Court.

Black Pearl could agree on debt for equity or pre-packaged sales.

**(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?**

**Commented [BT19]:** 0 marks. This question is asking the candidate to reference the New York Convention and the Arbitration Law.

**Commented [BT20]:** 1 mark. Or apply for PL.

**Commented [BT21]:** 1 mark.

**Commented [BT22]:** 2 marks. Yes, which triggers a moratorium under section 97.

The administration could preserve its functions just if Black Pearl does not request provisional liquidation, because if it requests it, the Grand Court will appoint provisional liquidators. Nonetheless, the Grand Court could determine if will remain some powers to **directors**.

**Commented [BT23]:** 1 mark. Light touch.

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

Order 102, rule 20 of the Grand Court Rules and Practice Direction 10/20, governs the proceeding to obtain the approval of the arrangement. Pursuant to these rules, Black Pearl must request for convening hearings and in these meetings, creditors and the debtor will discuss the scheme proposals. The Grand Court will approve the final scheme proposal if all classes voted to accept the scheme of arrangement and in each class have voted more than 50% representing 75% in value of the creditors (or members) of that **class**.

**Commented [BT24]:** 2 marks

#### REFERENCES

Christopher Smith, KRYS Global. Insolvency and directors' duties in the Cayman Islands: overview. November 1, 2016. Available on [https://uk.practicallaw.thomsonreuters.com/7-607-6325?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/7-607-6325?transitionType=Default&contextData=(sc.Default)&firstPage=true)

**Commented [BT25]:** 8 marks for question 4.

**\* End of Assessment \***

**Commented [BT26]:** Total marks for this candidate = 34.5