



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.
- (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]: 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]: 8/10 marks 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.

[Although there is no public security registration regime in the Cayman Islands, it does have ownership registers with regards to real estate, ships, aircraft, motor vehicles and intellectual property. These ownership registers are in the form of mortgages or charges which can be registered over the immovable or movable property. Section 54(1) and (2) of the Cayman Islands Companies Law (hereinafter referred to as the Companies Law) stipulates that:

"Every limited company shall keep at its registered office in writing on one or more sheets, whether bound or unbound, a register of all mortgages and charges specifically affecting property of the company, and shall enter in such register in respect of each mortgage or charge a short description of the property mortgaged or charged, the amount of charge created and the names of the mortgagees or persons entitled to such charge.

Commented [BT12]: 2.5 marks. Further clarity between the different features and consequences of central ownership registers and registers of mortgages and charges required for full marks.

(2) If any property of the company is mortgaged or charged without such entry as aforesaid being made, every director, manager or other officer of the company who knowingly and wilfully authorises or permits the omission of such entry, shall incur a penalty of one hundred dollars."

Therefore any future purchaser of the assets will be deemed to have knowledge of any mortgage or other interest registered prior to the purchase thereof as well as any creditor must ensure that it has sufficient control over its asset and review a companies register of mortgages and charges before it may approve granting credit to a prospective purchaser.]

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 legal basis within which the Cayman Islands Grand Courts power exists, comes from the Company's Law part XVII. In terms of section 241, the court may make orders ancillary to a foreign bankruptcy proceeding for the following purposes:

241(1)(a) recognising the right of a foreign representative to act in the Islands on behalf of or in the name of a debtor;

(b) enjoining the commencement or staying the continuation of legal proceedings against a debtor;

(c) staying the enforcement of any judgment against a debtor;

(d) requiring a person in possession of information relating to the business or affairs of a debtor to be examined by and produce documents to its foreign

representative; and
(e) ordering the turnover to a foreign representative of any property belonging to a debtor.

The Court in its determination as to whether it shall grant an ancillary order under section 241 must assess the criteria which will best assure an economic and expeditious administration of the debtors estate in the following circumstances in which such powers may be exercised:

242(1) (a) the just treatment of all holders of claims against or interests in a debtor's estate wherever they may be domiciled;

(b) the protection of claim holders in the Islands against prejudice and inconvenience in the processing of claims in the foreign bankruptcy proceeding;

(c) the prevention of preferential or fraudulent dispositions of property comprised in the debtor's estate;

(d) the distribution of the debtor's estate amongst creditors substantially in accordance with the order prescribed by Part V;

(e) the recognition and enforcement of security interests created by the debtor;

(f) the non-enforcement of foreign taxes, fines and penalties; and

(g) comity.

In order to retain its transparency and ensure creditors or interested parties are notified, when a company is made the subject of a foreign bankruptcy proceeding, a publication of such proceeding must be filed with the Registrar and published in The Gazette (section 243(1) of the Companies Law. The notice contains prescribed particulars followed by the company's liquidator or directors (section 243(2) and any liquidator or director who fails to publish the notice within 14 days will be liable for an offence (section 243(3).]

Commented [BT13]: 4 marks

Question 2.3 [maximum 3 marks]

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

[the legal framework for the recognition of foreign judgements in the Cayman Islands is based on statute and common law. The Foreign Judgments Reciprocal Enforcement Law (1996 Revision) forms the basis of the legal framework for recognition of foreign judgements in the Cayman Islands. Section 3 of the Foreign Judgements Act states:

3. (1) The Governor, if he is satisfied that in the event of the benefits conferred by this Part being extended to judgments given in the superior courts of a foreign country, substantial reciprocity of treatment will be assured as respects the enforcement in such country of judgments given in the Grand Court, may, by order, direct that to foreign countries

(a) this Part shall extend to that foreign country; and
(b) such courts of that foreign country as are specified in the order shall be deemed superior courts of that country for the purposes of this Part.

Furthermore, a foreign judgement can be recognised at common law level if it meets the following requirements:

- (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.

There is however a six-year limitation period which applies to the enforcement of a foreign judgement under both the common law and the 1996 revision. The six year period commences on the date of judgement or the date of the last appeal judgement.]

Commented [BT14]: 2 marks. Mention of Australia and the lack of international treaty obligations required to secure full marks.

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 respectfully disagree with the above mentioned statement as directors have a duty to co-operate and liquidators have the power of private examination of relevant persons in terms of section 103 of the Companies Law. In terms of section 103(5) the court may order that the director swear an affidavit in answer to written interrogatories or attend an oral examination by the official liquidator or in some instances both.

In terms of section 103(7)(a) the Court may make an order against the director. Furthermore the court has the power in terms of section 145 of the companies law to reverse or void any payment or disposal of property if it is found that the dominant intention of the company's directors was to give the applicable creditor a preference over other creditors. The test for voidable preference was explained in the case of *Weaving Macro Fixed Income Fund Ltd (in Liquidation)* [2016 (2) CILR 514].

Should a director be found to have conducted fraudulent trading in terms of section 147 of the Companies Law, then the director may be held personally liable for any losses which the company may have suffered as a result of their breach of their fiduciary duty to act in a company's best interests which includes acting in the best interests of creditors as was the case in *Prospect Properties v McNeill* [1990-91 CILR 171]. Directors can be prosecuted and the official liquidator may pursue a claim against the director for breach of their fiduciary duty.

Therefore although in some instances the Grand Court may vest powers with directors which is known as the "light touch" approach, there are most certainly ramifications should it be found that a director has breached it's fiduciary duty.]

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

Question 3.2 [maximum 6 marks]

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

[Although the appointment of receivers are not specifically mentioned in the Companies Law, they most certainly have a role to play in the winding up of a company and can be appointed

by the Court. Order 30 of the Grand Court Rules is concerned with the appointment of a receiver and states:

(1) An application for the appointment of a receiver may be made by summons or motion.

(2) An application for an injunction ancillary or incidental to an order appointing a receiver may be joined with the application for such order.

(3) Where the applicant wishes to apply for the immediate grant of such an injunction, he may do so ex parte on affidavit.

(4) The Court hearing an application under paragraph (3) may grant an injunction restraining the party beneficially entitled to any interest in the property of which a receiver is sought from assigning, charging or otherwise dealing with that property until after the hearing of a summons for the appointment of the receiver and may require such a summons, returnable on such date as the Court may direct, to be issued.

Receivers are usually appointed by the court for the purposes of collecting money or to carry out other duties which assist the court (Order 45). In segregated portfolio companies receivers specifically provided for two for fool the purpose of either closing down of a business attributed to the segregated portfolio or the distribution of segregated portfolio assets. It is also important to note that an application for a receiver halts any other suit, action or other proceeding against a segregated portfolio company.

A receiver may also be appointed by a creditor. this is usually done by a creditor in order to secure it's instrument. Should a charging document space specifically provide for the appointment of a receiver then the receiver may be appointed without any court order and will derive its powers as set out in the charge document. The receiver will primarily realize the value of the charged asset and also or recover the debt owed to the creditor.

Therefore it is clear that although or receivers are not specifically defined in the main Companies Law of the Cayman Islands, they play an important role in assisting other interested parties such as the Court and/or creditors, in the liquidation of a [company.]

Commented [BT16]: 4.5 marks.

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

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

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

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

Black Pearl has already failed to pay various service providers for several months (tender vessels, food and beverage suppliers, utilities, engineers and mechanics). The payment of

utilities is particularly important to the ongoing repair and maintenance of the fleet of vessels at Black Pearl's dry dock facility in Little Cayman.

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

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

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

[(a) Monster may take action against the Black Pearl by securing its USD 40 million by way of filing a notice of the security with the centrally maintained registers. they do not need a court application for the secured amount. The rest of the unsecured amount may be proven in the liquidation by furnishing the proof of debt which states the particulars of the security and the value of the security.]

(b) Jolly Roger must file a bankruptcy petition with the Grand Court as Black Pearl is unable to satisfy the award. the petition must contain the details of Black Pearls financial affairs as well as the fact that Jolly Roger has obtained final judgment against Black Pearl for not less than KYD 40 and has served on them in the Islands, a bankruptcy notice in writing and the Black Pearl has not, within seven days after the service of notice, paid such amount.]

(c) the unsecured creditors may file a winding up petition against Black Pearl.]

(d) Yes, the Court does have jurisdiction over Black Pearl due to the fact that the company was registered in the Cayman Islands.]

(e) Yes, Black Pearl may apply to the court with an application for restructuring such as a scheme of arrangement with an order for provisional liquidation. This would allow the company to either restructure or be placed into provisional liquidation. However, the most important aspect of this proceeding is the fact that it would then place a moratorium on creditors' claims and give the company time to assess whether it can be restructured or not.]

(f) Yes, the Sparrow family can continue to run Black Pearl during this process due to the light touch provisional liquidations. This allows existing management to continue to be in control of the company subject to the supervision of the provisional liquidator as well as the Grand Court.

Commented [BT17]: 1 mark. If Monster is already secured, it can enforce its security upon default irrespective of whether insolvency proceedings are on foot. It will have to prove for the unsecured balance in the insolvency.

Commented [BT18]: 0 marks. This question is calling for an answer that deals with the New York Convention and Arbitration Act.

Commented [BT19]: 1 mark. Because they have standing by virtue of the unpaid debt. Or apply for PL.

Commented [BT20]: 1 mark

Commented [BT21]: 2 marks. Sections 86, 104(3) and 97.

Commented [BT22]: May be allowed. ½ mark.

(g) The court must be satisfied that issues of class composition, any jurisdictional issues, and the adequacy of the scheme documentation notice is all in order before it may choose to grant or approve the scheme of arrangement in terms of Order 102, Rule 20 of the Grand Court Rules. An application must be made to the Grand Court for an Order that the meetings of creditors or members be convened for the approval of the scheme. Furthermore, the scheme proposals must be either approved or rejected at the meetings and if approved an application is then made to the grand court to obtain approval/sanction.]

Commented [BT23]: 2 marks.

Commented [BT24]: 7.5 marks for question 4.

*** End of Assessment ***

Commented [BT25]: Total marks for this candidate = 34.5