



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.

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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.
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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 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.

[Introductory Note: Since the commencement of this course, the Citation of Acts of Parliament Law, 2020 (Law 56 of 2020) was brought into force in the Cayman Islands with a commencement date of 3 December 2020. Pursuant to this legislation, existing Laws and laws passed after the commencement date are now referred to as "Acts". As such, all references to legislation in this assessment below will now be referred to as "Acts".]

In the Cayman Islands, the following ownership registers are centrally maintained to enable mortgages and charges to be registered and, in turn, put third parties on notice of such interests:

Commented [BT12]: And give the registered person priority.

- (a) the Land Register in relation to real estate pursuant to the Registered Land Act (2018 Revision).
- (a) the Shipping Registry in relation to ships pursuant to the Merchant Shipping Act (2021 Revision) and Maritime Authority Act (2013 Revision);
- (b) the Register of Aircraft Mortgages in relation to aircraft pursuant to the Civil Aviation Authority Act (2015 Revision) and the Mortgaging of Aircraft Regulations, 2015;
- (c) the Register of Motor Vehicles and Drivers in relation to motor vehicles pursuant to the Traffic Act (2011 Revision); and
- (d) the Registrar of Design Rights in relation to intellectual property pursuant to the Design Rights Registration Act (2016 Revision) (also see various laws referred to at <https://www.ciipo.ky/laws/>).

Whilst there is no public security registration scheme in relation to companies, limited companies are required to keep a register of all mortgages and charges specifically affecting property of the company at their registered office pursuant to Section 54 of the Companies Act (2021 Revision) (the "**Companies Act**"). Such a register is open to inspection by any creditor or member of the company at all reasonable times (see Section 54(3) of the Companies Act) and, therefore, is a means of putting third parties on notice. However, the register does not create priority of interests and creditors will need to take steps to ensure that they have sufficient control over an asset. Whilst a director, manager or other officer of the company may incur a penalty for knowingly and wilfully authorising or permitting the omission of a mortgage or charge pursuant to Section 54(2), such an omission would not invalidate any security interest.

Commented [BT13]: 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 Section 241 of the Companies Act, the Grand Court has the power, upon the application of a foreign representative, to make certain orders ancillary to a foreign bankruptcy proceeding. For the purposes of Part XVII (International Co-operation) of the Companies Act, Section 240 provides that:

- (a) "debtor" means "a foreign corporation or other foreign legal entity subject to a foreign bankruptcy proceeding in the country in which it is incorporated or established";
- (b) "foreign bankruptcy proceeding" includes "proceedings for the purpose of reorganising or rehabilitating an insolvent debtor"; and
- (c) "foreign representative" means "a trustee, liquidator or other official appointed in respect of a debtor for the purposes of a foreign bankruptcy proceeding".

Given that the Cayman Islands has not implemented the provisions of the UNCITRAL Model Law, there is no automatic relief available following the recognition of foreign main proceedings. However, Section 241(1) of the Companies Act provides that the Grand Court may make orders ancillary to a foreign bankruptcy proceeding for the purposes of:

"(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."

In *Picard v Primeo Fund* [2014] 1 CILR 379, the Court of Appeal held that there was no general power to make any order the Grand Court thought appropriate and any such ancillary orders could only be made for the purposes set out in Section 241(1)(a)-(e).

Section 242 of the Companies Act provides that in "determining whether to make an ancillary order under section 241, the Court shall be guided by matters which will best assure an economic and expeditious administration of the debtor's estate, consistent with —

- (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*
- (d) comprised in the debtor's estate;*
- (e) the distribution of the debtor's estate amongst creditors substantially in*
- (f) accordance with the order prescribed by Part V;*
- (g) the recognition and enforcement of security interests created by the debtor;*
- (h) the non-enforcement of foreign taxes, fines and penalties; and*
- (i) comity"*

The relevant procedure for a foreign representative making an application for recognition pursuant to Section 241(1)(a) of the Companies Act or for such other relief in Sections 241(1)(b)-(e) of the Companies Act is set out in the Foreign Bankruptcy Proceedings (International Co-operation) Rules, 2018 ("FBIR 2018"). Prescribed forms are appended to the FBIR 2018 (including a draft recognition order).

Finally, official liquidators in the Cayman Islands of a company in liquidation are under a duty "to consider whether or not it is appropriate to enter into an international protocol with any foreign officeholder" pursuant to Order 21, r.2(1) of the Companies Winding Up Rules, 2018 ("CWR"). Any such protocols take effect when approved by the Grand Court in the Cayman Islands and the foreign Court (Order 21, r.2(3) of the CWR). Furthermore, Practice Direction No. 1 of 2018 makes it clear that the American Law Institute/International Insolvency Institute Guidelines and The Judicial Insolvency Network Guidelines for Communications and Cooperation between Courts in Cross-Border Insolvency Matters may be adopted in the Cayman Islands with appropriate modifications (see paragraph 2).

Commented [BT14]: 4 marks

Question 2.3 [maximum 3 marks]

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

There are two main methods in which a foreign judgment may be recognised in the Cayman Islands, namely the Foreign Judgments Reciprocal Enforcement Act (1996 Revision) (the "FJRE Act") and the common law.

Commented [BT15]: 3 marks

Firstly, Section 3(1) of the FJRE Act provides for statutory recognition and enforcement of foreign judgments in the Grand Court in circumstances where the foreign country giving such judgment assures substantial reciprocity of treatment of judgments of the Grand Court. In circumstances where the FJRE Act applies, Section 3(2) provides that a foreign judgment will be enforceable if:

- (a) it is final and conclusive as between the parties;
- (b) there is payable thereunder a sum of money (excluding taxes or other charges of a like nature); and
- (c) it is given after the operation of the order directing that the FJRE Act shall extend to that foreign country.

This legislation is, however, limited in its application as it has currently only been extended to the courts of Australia (see the Foreign Judgments Reciprocal Enforcement (Australia and its External Territories Order) 1993, which was published in the Gazette on 28 June 1993).

Secondly, a foreign judgment may be enforceable at common law by bringing a new action in the Financial Services Division of the Grand Court based upon the foreign judgment. Once a judgment of the Grand Court is obtained, all domestic remedies will be available (see Order 45 of the Grand Court Rules in respect of the enforcement of judgments and orders generally).

Both monetary and non-monetary foreign judgments may be enforced by common law. In **Bandone v Sol Properties** [2008] CILR 301, Henderson J held at [22] that:

"...The ability to enforce directly foreign judgments and orders made in personam is no longer confined in the Cayman Islands to judgments for a debt or a definite sum of money. Of course, enforcement of a foreign in personam non-money judgment requires that the judgment be final and conclusive and of such a nature that the principles of comity require this court to enforce it: see Miller v. Gianne (2007 CILR 18, at para. 65)...."

In order for a foreign judgment to be enforceable at common law, the following requirements must be satisfied:

- (a) Firstly, the judgment must be final and conclusive. In *Peterdy v Dennis* [1998] CILR Note 9, the Court held that a judgment entered in default of appearance by a defendant may be final and conclusive notwithstanding that the court has power to set aside its own judgment (*Boyle v. Victoria Yukon Trading Co.* (1902), 9 B.C.R. 213 followed) and despite the fact that it may be subject to an appeal the time-limit for which has not yet expired (*Colt. Indus. Inc. v. Sarlie (No. 2)*, [1966] 1 W.L.R. 1287 applied).
- (b) Secondly, the foreign judgment by a foreign country must not be impeachable due to: (i) lack of jurisdiction of the foreign court over the debtor; (ii) contravention of public policy in the Cayman Islands; (iii) opposition to natural justice; or (iv) the foreign judgment having been obtained by fraud (for example, see *Bandone v Sol Properties* [2008] CILR 301 at [18] citing *Dacey, Morris & Collins, Conflict of Laws*, now Rules 49 to 54 of the 15th ed.).

There are, however, certain exceptions to the enforcement of foreign judgments. In particular, the Cayman Islands has "firewall" provisions in Sections 91-93 of the Trusts Act (2020 Revision) which aims to protect Cayman Islands trusts from being attacked by foreign courts on the basis of, *inter alia*, the foreign law does not recognise the trust concept or due to forced heirship claims.

Finally, there is a limitation period of 6 years in respect of the enforcement of judgments pursuant to Section 30 of the Limitation Act (1996 Revision).

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 [BT16]: 9 marks

For the reasons explained below, I disagree with the statement that the Cayman Islands is "ill-equipped to deal with directors who wilfully disregard the interests of creditors". Whilst there is no statutory prohibition on wrongful trading in the Cayman Islands, liquidators in the Cayman Islands continue to have a host of other statutory provisions at their disposal, together with potential actions under common law, to pursue directors who have acted to the detriment of creditors.

Common law

At common law, directors can be held personally liable in the Cayman Islands for losses that they cause to the company in breach of their fiduciary duty pursuant to the common law. If a director has acted in breach of such a duty, the official liquidator can pursue a claim for breach of duty on behalf of the company against that director (see Section 110 of the Companies Act and Part 1, Schedule 3). Whilst directors owe a fiduciary duty to act in the best interests of the company whilst the company is solvent, the Grand Court has also recognised that such a duty extends to having regard to the interests of creditors during the company's insolvency.

In *Prospect Properties Limited (in liquidation)* [1990-91 CILR 171], a liquidator of the company brought an action to recover funds from the directors of the company in relation to, *inter alia*, their alleged breaches of fiduciary duty. During the course of finding that the directors were in breach of their fiduciary duty to the company, the Grand Court held that such fiduciary duty extended to considering the interests creditors where the company was insolvent. At page 203, Harre J stated:

"The nature of the company's business, its financial position and above all the obvious effect of the resolutions and the McNeill agreement on the company's future liquidity and ability to dispose of its land made it an imperative part of the directors' duty to the company itself to consider the interests of the creditors. The interests of the company and the creditors were almost indistinguishable at that time. It was in the interest of the creditors to be paid and in the interest of the company to be safeguarded against being put in a position where it was unable to pay. The directors failed in their fiduciary duty to the company in failing to act in that interest. The transaction was not reasonably incidental to the carrying on of the company's business, was not bona fide and was not done for the benefit, or to promote the prosperity, of the company...."

In *Sequana SA v BAT Industries Plc* [2019] EWCA Civ 112, the English Court of Appeal recently considered the circumstances in which directors owe a duty to act in the interests of the company's creditors. In that case, the Court of Appeal held that the duty to have regard to creditors' interests "*may be triggered when a when a company's circumstances fall short of actual, established insolvency*" (at [216]). Furthermore, the authorities established that the "*duty arises when the directors know or should know that the company is or is likely to become insolvent...In this context, "likely" means probable.*" (at [220]). Whilst the judgment in *Sequana* is not automatically binding in the Cayman Islands, such authority may be persuasive in the Cayman Islands.

Provisions of the Companies Act

Furthermore, Cayman Islands liquidators are equipped with a wide range of statutory provisions to pursue directors who wilfully disregard the interests of creditors. Such actions may be initiated in the Financial Services Division of the Grand Court, which comprises of specialist commercial judges who are well-equipped to resolve international disputes and commercial litigation.

Section 147: Fraudulent Trading

Firstly, the Caymans Islands (as with many other jurisdictions) makes specific statutory provision for fraudulent trading to address circumstances in which directors commit a fraud on creditors by intentionally incurring debts on behalf of an insolvent company. Pursuant to Section 147 of the Companies Act, a liquidator may make an application to the Grand Court where it "*appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose*". In those circumstances, the Court may declare that any persons who were knowingly parties to the carrying on of the business in such manner are liable to make contributions to the company's assets as the Court thinks proper.

Section 99: Avoidance of property dispositions

Secondly, Section 99 of the Companies Act provides for the avoidance of dispositions property made after a winding up petition. In the event that a winding up petition is made, "*any disposition of the company's property and any transfer of shares or alteration in the status of the company's members made after the commencement of the winding up is, unless the Court*

otherwise orders, void". The winding up of a company is deemed to commence at the time of presentation of a winding up petition (Section 100(2)). Accordingly, the liquidator may seek the return of any such property disposed of by the directors of the company after this time for the benefit of the company's creditors.

The Grand Court provided guidance in *In the Matter of Fortuna Development Corporation* [2004-05 CILR 533] in relation to any application for validation of such dispositions. In that case, Henderson J stated in relation to solvent companies at [5]:

"... *First, the proposed disposition must appear to be within the powers of the directors. ...Secondly, the evidence must show that the directors believe the disposition is necessary or expedient in the interests of the company...Thirdly, it must appear that in reaching the decision the directors have acted in good faith. The burden of establishing bad faith is on the party opposing the application. Fourthly, the reasons for the disposition must be shown to be ones which an intelligent and honest director could reasonably hold.*" (Also see *In the Matter of Torchlight Fund LP* [2018] (1) CILR 290 at [76]-[77])

In *In the Matter of Freerider Limited* [2010 (2) CILR 154], the Grand Court stated at [55] that the above factors are only guidelines and every case turns on its own circumstances. Furthermore, different considerations may apply depending on whether the company concerned is solvent or insolvent. The usual assumption in a case where the company is solvent is that the particular disposition would not be prejudicial to the creditors as it should not affect their debts being repaid. However, if it cannot be established that the company concerned is solvent, then the principal concern of the court in considering an application for a validation order will be to seek to avoid prejudice to the interests of unsecured creditors of the company (see *Freerider* at [56]-[57]).

Section 145: Voidable preferences

Thirdly, liquidators may apply to the Grand Court to set aside any transfers of property or payments to creditors which amount to voidable preferences pursuant to Section 145 of the Companies Act. Such transfers of property or payments may be set aside if they are made:

- (a) within 6 months immediately preceding the commencement of a liquidation;
- (b) at a time when the company is unable to pay its debts within the meaning of Section 93 of the Companies Act (cash flow insolvency); and
- (c) with a view to giving such creditor a preference over other creditors.

Whilst the relevant transfers or payments need to be made with the principal intention of preferring one the relevant creditor to the company's other creditors, it is not necessary to demonstrate fraud or dishonesty on the part of the company (see *In Re Weaving Macro Fixed Income Fund Limited (in liquidation)* [2016 (2) CILR 514] at [52]-[56]). However, payments made to a "related party" of the company (namely, a person who has the ability to control the company or exercise significant influence over the company in making financial and operating decisions) shall be deemed to have been made with a view to giving such creditor a preference (Section 145(2)-(3) of the Companies Act).

Section 146: Avoidance of dispositions at an undervalue

Section 146 of the Companies Act provides for the avoidance of dispositions made at an undervalue by or on behalf of a company with intent to defraud its creditors. Liquidators must bring such actions within 6 years of the date of the relevant disposition (Section 146(4) of the

Companies Act). An "intent to defraud" means "an intention to wilfully defeat an obligation owed to a creditor" and the liquidator has the burden of establishing such an intent (Section 146(1)(b) and (3) of the Companies Act). An "undervalue" in relation to a disposition of a company's property means: "(i) the provision of no consideration for the disposition; or (ii) a consideration for the disposition the value of which in money or monies worth is significantly less than the value of the property which is the subject of the disposition" (Section 146(1)(e) of the Companies Act).

Other jurisdictions

Finally, whilst other jurisdictions have enacted statutory provisions expressly prohibiting insolvent trading, such claims do not necessarily provide liquidators with a straightforward route in which they can hold directors accountable. Taking the United Kingdom ("UK") as an example, liquidators are able to bring an action of wrongful trading against directors in the UK pursuant to Section 214(1) of the Insolvency Act 1986 ("IA 1986"). However, in order to succeed, the liquidator is required to overcome a number of difficult hurdles. In addition to a number of hurdles. In addition demonstrating that the person was a director of a company placed in insolvent liquidation (Section 214(2)(a) and (c) of the IA 1986), the liquidator must also demonstrate that:

"at some time before the commencement of the winding up of the company, that person knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation" (see Section 214(2)(b) of the IA 1986).

In addition, a director is afforded a defence if he can show that once he knew or ought to have known of the matters specified in Section 214(2)(b) above, he took every step with a view to minimising the potential loss to the company's creditors as he ought to have taken (Section 214(3) of the IA 1986). An action which is dependent upon establishing objective and subjective elements of a director's knowledge (see Section 214(4) of the IA 1986) may give rise to a number of evidential difficulties for a liquidator.

Conclusion

In conclusion, despite the absence of a statutory claim for wrongful or insolvent trading, Cayman Islands liquidators remain sufficiently equipped to take action by other means against directors who wilfully disregard the interests of creditors when the company is insolvent.

Question 3.2 [maximum 6 marks]

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

Commented [BT17]: 6 marks.

The insolvency provisions of the Companies Act and the Companies Winding Up Rules, 2018 do not expressly address the appointment of receivers generally. Notwithstanding this, receivership orders are specifically addressed in Part XIV of the Companies Act relating to Segregated Portfolio Companies ("SPCs") and the appointment of receivers remains an important alternative means for certain creditors to recover their debts.

SPCs

Firstly, there are specific statutory provisions in respect of receivers in relation to SPCs, namely an exempted company registered as an SPC under Section 213(1) of the Companies Act (see Section 212 of the Companies Act). Pursuant to Section 216(2) of the Companies

Act, an SPC is a single legal entity. However, the SPC may create one or more segregated portfolios in order to segregate the assets and liabilities of one segregated portfolio from the assets and liabilities of another segregated portfolio within the SPC or the assets and liabilities of the SPC (which are not otherwise held within a segregated portfolio) (see Section 216(1) of the Companies Act).

An application to Court for a receivership order may be made in respect of a segregated portfolio in accordance with Section 225 of the Companies Act. The Court has the power to make a receivership order in respect of a segregated portfolio pursuant to Section 224(1) of the Companies Act if the Court is satisfied that:

- (a) the segregated portfolio assets attributable to a particular segregated portfolio of the company (when account is taken of the company's general assets, unless there are no creditors in respect of that segregated portfolio entitled to have recourse to the company's general assets) are or are likely to be insufficient to discharge the claims of creditors in respect of that segregated portfolio; and
- (a) the making of an order would achieve the purposes set out in Section 224(3) of the Companies Act, including the orderly closing down of the business of or attributable to the segregated portfolio and the distribution of the segregated portfolio assets attributable to the segregated portfolio to those entitled to have recourse thereto

There are some limitations, however, of the role of receivership orders. In particular, any receivership order shall cease to be of effect upon commencement of the winding up of the segregated portfolio company, but without prejudice to prior acts of the receiver or that person's agents (Section 224(4)(b) of the Companies Act). In addition, a receivership order may not be made if the segregated portfolio company is already being wound up (Section 224(4)(a) of the Companies Act).

However, a receivership order may continue to be a valuable tool in an insolvency scenario given that the functions and powers of the directors will cease in respect of the business of the segregated portfolio in respect of which the order was made (Section 226(6)(a) of the Companies Act). Instead, the receiver of a segregated portfolio has all the functions and powers of the directors in respect of the business and segregated portfolio assets of or attributable to the segregated portfolio (Section 226(1)(b) of the Companies Act). In addition, the receiver may apply to Court for directions as to the extent or exercise of any function or power (Section 226(2)(a) of the Companies Act).

Furthermore, when an application has been made for, and during the period of operation of, a receivership order, no suit, action or other proceedings shall be instituted against the segregated portfolio company in relation to the segregated portfolio in respect of which the receivership order was made except by leave of the Court, which may be conditional or unconditional (Section 226(5) of the Companies Act).

Alternative means for creditors

Secondly, the ability to appoint a receiver outside of Court proceedings remains a valuable tool for certain creditors (such as holders of fixed or floating charges) if they have such rights in a security instrument. In those circumstances, the receiver would not be under the supervision of the Court, but would ordinarily owe duties to the creditor. Subject to the powers set out in the security instrument, the receiver may have the power to exercise a right of sale to realise the value of the charged assets for the benefit of the creditor.

Moreover, Order 30 of the Grand Court Rules ("**GCR**") contains provisions in relation to the appointment of receivers by the Court and the duties of receivers (including submitting

accounts and giving security). Order 51 of the GCR sets out provisions in relation to the appointment of a receiver by the Court by way of equitable execution. In determining whether it is "*just and convenient*" to make such an appointment, the Court will have regard to "*the amount claimed by the judgment creditor, to the amount likely to be obtained by the receiver and to the probable costs of his appointment*" (see Order 51, rule 1 of the GCR; also see the general provisions in respect of applications for the appointment of receivers in Order 30 of the GCR). In addition, Order 45, rule 1(2)(a) of the GCR provides that a judgment or order for the payment of money into Court may be enforced by the appointment of a receiver.

Accordingly, for the reasons outlined above, in my view, receivers continue to have an important role in relation to SPCs and as one of the alternative means for certain creditors to recover their debts.

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 [BT18]: Comprehensive answer. 14 marks.

What action can Monster take to protect itself?

It is understood that US\$40 million of Monster's outstanding debt is secured by way of a mortgage over moveable property, namely four of Black Pearl's cruise ships. Monster ought to confirm that it has the benefit of a legal mortgage same and provide its advisors with a copy of the loan and security documentation. A legal mortgage grants the mortgagee legal title to the property as security until the secured debt has been discharged. If Black Pearl defaults on a legal mortgage, Monster (as mortgagee) would be entitled to take possession of the secured property and to exercise its power to sell that property to recover the secured debt. Alternatively, in the event of default, Monster (as mortgagee) may be able to appoint a receiver out of court to realise the secured property pursuant to its rights in the security documentation (and such documentation ought to be checked in this respect). In the event that a receiver is appointed, the receiver would ordinarily owe its duties to Monster (rather than Black Pearl).

If (contrary to the above), Monster only has the benefit of an equitable mortgage, then it would not be afforded the right to take possession of the property on default (given that the mortgagee only retains the *beneficial* title to the property until the secured obligation has been discharged). In those circumstances, Monster will need to check the security documentation to see whether it has been granted a power of attorney expressly permitting Monster to transfer the secured property into its name upon default. Unless such a power has been granted, Monster would need to apply to Court for specific performance seeking an order the Court convert the equitable mortgage into a legal mortgage.

Monster is also advised to confirm that such security has been registered as a mortgage over Black Pearl's cruise ships in the Shipping Registry (see Section 79 of Merchant Shipping Act (2021 Revision) ("**MSA 2021**"); also see the Maritime Authority Act (2013 Revision)). Registration of Monster's security will provide it with protection against third party purchasers (who will acquire the ships subject to Monster's secured interest).

It should also be noted that there are a number of specific statutory provisions in respect of mortgages over ships, which would need to be checked. For example, the instrument creating any such security must be in the prescribed form (Section 79(2) of the MSA 2021) and the priority of multiple mortgages is determined by the order in which they are registered (Section 80(1) of the MSA 2021). Pursuant to Section 83(2) of the MSA 2021, Monster will have the power as a registered mortgagee to sell the ship if any money is due to it. However, if there are multiple mortgagees registered in respect of the same ships, a subsequent mortgagee will not, except under an order of the court, be able to sell those ships without the concurrence of every prior mortgagee (see Section 83(3) of the MSA 2021).

In addition, if Black Pearl defaults, then it may petition as a creditor to wind up Black Pearl in respect of its unsecured debt of US\$60 million on the basis that Black Pearl is unable to pay its debts (Section 92 of the Companies Act). Monster may prove in any liquidation for the unsecured balance (i.e. US\$ 60 million) (see Order 17, rule 1(2) of the Companies Winding Up Rules, 2018 ("**CWR**")).

In the event that Black Pearl is placed into official liquidation, this will not affect Monster's ability to enforce its security. Section 140(2) of the Companies Act provides that the collection in and application of property of the company by a liquidator is without prejudice to and after taking into account and giving effect to the rights of secured creditors. Furthermore, Section 142(1) of the Companies Act provides that a secured creditor is entitled to enforce his security without the leave of the Court and without reference to the liquidator (also see Order 17, rule 1(1) of the CWR, which also states that a "*creditor who has security over the whole or part of*

the assets of a company is entitled to enforce his security without the leave of the Court and without reference to its liquidator").

What action can Jolly Roger Inc take against Black Pearl?

Jolly Roger Inc ("**Jolly Roger**") could seek to enforce the arbitral award pursuant to Section 5 of the Foreign Arbitral Awards Enforcement Act (1997 Revision) and Section 22 of the Arbitration Act (2001 Revision). Given that Jolly Roger's arbitration took place in London, it appears that the arbitral award was made pursuant to an arbitration agreement in the UK. Assuming that to be the case, the UK is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (see <https://www.newyorkconvention.org/countries>). As such, the arbitral award could also be enforced pursuant to Section 5 of the Foreign Arbitral Awards Enforcement Act (1997 Revision), which provides:

"A Convention award shall, subject to this Act, be enforceable in the Grand Court in the same manner as an award under section 22 of the Arbitration Act (1996 Revision) and shall be treated as binding for all purposes on the persons between whom it was made and may accordingly be relied upon by any of those persons by way of defence, set off or otherwise in any legal proceedings in the Islands and any reference in this Act to enforcing a Convention award shall be construed as including references to relying upon such award."

In the case of **Walker International Holdings Ltd v Oleasrius Limited and others** [2003 CILR 457], Smellie CJ applied the above provisions and held at [22] that it was clear that the Grand Court has jurisdiction to enforce a French arbitral award (in circumstances where France was also a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards).

Section 72(1) of the Arbitration Act (2001 Revision) provides that: *"An award made by the arbitral tribunal pursuant to an arbitration agreement may, with leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect."* Accordingly, in Jolly Roger's case, the UK arbitral award could be enforced in the Cayman Islands pursuant to these statutory provisions.

Alternatively, it is noted that Jolly Rogers could seek relevant advice in the UK as to whether a judgment could be obtained from the UK Courts for the enforcement of the arbitral award. In those circumstances, Jolly Rogers could seek to enforce that UK judgment at common law in the Cayman Islands. Such a foreign judgment would need to be final and granted by a foreign court having jurisdiction over the debtor. In addition, the foreign judgment must not be obtained by fraud or contrary to the rules of natural justice or the public policy of the Cayman Islands (see **Bandone v Sol Properties** [2008 CILR 301] in which Henderson J stated at [18] the general rule concerning recognition and enforcement of an *in personam judgment* relying on *Dacey, Morris & Collins*). These common law rules were applied by Smellie CJ at [17] in **Walker International Holdings Ltd v Oleasrius Limited and others** [2003 CILR 457] in relation to the recognition and enforcement of a French arbitral award, which had also become subject to a judgment enforcing it in the English High Court (see [10]).

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

The unsecured trade creditors may present a petition in the Grand Court pursuant to Section 92(d) of the Companies Act for the winding up of Black Pearl on the grounds that the company is unable to pay its debts. Pursuant to Section 93 of the Companies Act, a company shall be deemed to be unable to pay its debts if:

- (a) "a creditor by assignment or otherwise to whom the company is indebted at law or in equity in a sum exceeding one hundred dollars then due, has served on the company by leaving at its registered office a demand under that person's hand requiring the company to pay the sum so due, and the company has for the space of three weeks succeeding the service of such demand, neglected to pay such sum, or to secure or compound for the same to the satisfaction of the creditor;
- (b) execution of other process issued on a judgment, decree or order obtained in the Court in favour of any creditor at law or in equity in any proceedings instituted by such creditor against the company, is returned unsatisfied in whole or in part; or
- (c) it is proved to the satisfaction of the Court that the company is unable to pay its debts."

The test of inability to pay debts under Section 93(c) is a cash flow test. In considering whether the cash flow test is satisfied, the Court is not confined to considering those debts which are immediately due and payable, but may also consider those debts that will become due in the reasonably near future. In *In the Matter of Weaving Macro Fixed Income Fund Limited (in liquidation)* [2016(2) CILR 514], Martin JA explained at [40]:

"In my view, the cash flow test in the Cayman Islands is not confined to consideration of debts that are immediately due and payable. It permits consideration also of debts that will become due in the reasonably near future... I do not regard the words "as they fall due" as adding anything of substance. In Eurosail, Lord Walker, after noting that the words "as they fall due" were introduced for the first time in the Insolvency Act 1985, said (again at [37]) that despite the difference in form they made little significant change in the law and served to underline that the cash flow test was concerned both with presently-due debts falling due in the reasonably near future. Any other conclusion leads to artificiality: if a company is able to pay a small debt due on a particular day, but will inevitably be unable to pay a much larger debt due on the following day, it is artificial to say that on the first day it is not unable to pay its debts..." (emphasis added).

In the event that Black Pearl is placed into official liquidation, an automatic stay prohibits the commencement or continuation of proceedings against the company (Section 97(1) of the Companies Act). It is the function of the official liquidator pursuant to Section 110(1) of the Companies Act to:

- (a) collect, realise and distribute the assets of the company to its creditors and, if there is a surplus, to the persons entitled to it; and
- (b) report to the company's creditors and contributories upon the affairs of the company and the manner in which it has been wound up.

The official liquidator may: (a) with the sanction of the Court, exercise any of the powers specified in Part I of Schedule 3 of the Companies Act; and (b) with or without that sanction, exercise any of the general powers specified in Part II of Schedule 3 thereto (Section 110(2) of the Companies Act).

Given that the payment of utilities is particularly important to the ongoing repair and maintenance of Black Pearl's fleet of vessels, the liquidator (or provisional liquidator) may wish to seek the continuance of such supplies. There are specific provisions in the Companies Act in relation to the continued supply of utilities after the appointment of the provisional liquidator or a winding up order having been made. If a liquidator (or a provisional liquidator) makes a request for the continued supply of electricity, water or telecommunications services, such supplier is permitted to "make it a condition of the giving of the supply that the liquidator personally guarantees the payment of any charges in respect of the supply" (see Section 148

of the Companies Act). However, the utility supplier is not permitted to make it a condition of the supply that any outstanding charges pre-dating the provisional liquidator's appointment or the winding up order are paid (see Section 148(1)(b) of the Companies Act).

Does the Cayman Islands Court have jurisdiction over Black Pearl?

Pursuant to Section 91 of the Companies Act, the Grand Court has jurisdiction to make winding up orders over: (i) existing Cayman Islands companies (as defined in Section 2(1) of the Companies Act); (ii) a company incorporated and registered under the Companies Act; (iii) a body incorporated under any other law; and (iv) a foreign company (as defined in Section 89 of the Companies Act) which either has property located in the Islands, is carrying on business in the Islands, is the general partner of a limited partnership or is registered under Part IX (which relates to "overseas companies").

We know that Black Pearl is registered in the Cayman Islands. It is not known whether Black Pearl was incorporated in the Cayman Islands and registered under the Companies Act or a foreign company registered in the Cayman Islands under Part IX of the Companies Act. However, in either case, the Grand Court would have jurisdiction to wind up Black Pearl. In addition, the Grand Court would also have jurisdiction to wind up Black Pearl if Black Pearl carried on business in the Islands or had property in the Islands (which may be the case on the limited facts known).

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

In the event that Black Pearl intends to seek a restructuring, it may facilitate such an arrangement by seeking the appointment of provisional liquidators pursuant to Section 104(3) of the Companies Act. As explained below, the appointment of provisional liquidators gives rise to an automatic moratorium preventing any proceedings from being commenced or continued against Black Pearl. This ought to afford Black Pearl a breathing space in which to consider proposals and to negotiate any arrangements with its creditors.

Such an application can only be commenced after the presentation of a winding up petition and before the making of a winding up order (Section 104(1) of the Companies Act). The directors of Black Pearl will need to obtain a shareholder resolution authorising the presentation of a winding up petition (unless they possess the requisite authority under the articles of association) (see *Re Emmadart Ltd* [1979] 2 WLR 868). In this case, the Sparrow Family own and manage Black Pearl and, therefore, this seems unlikely to be problematic.

Section 104(3) of the Companies Act provides that the company may make *an ex parte* application for the appointment of a provisional liquidator if the following grounds are satisfied:

- (a) the company is or is likely to become unable to pay its debts within the meaning of Section 93 of the Companies Act (namely, the cash-flow insolvency test); and
- (b) the company intends to present a compromise or arrangement to its creditors.

As to (a) above, it appears likely that Black Pearl will be able to demonstrate cash flow insolvency on the limited facts provided in this case. As to (b) above, the Companies Act only requires that the company "*intends*" to present a compromise or arrangement to its creditors (rather than having done so prior to seeking the appointment of provisional liquidators). Furthermore, Section 104(3)(b) does not require a company to have formulated a precise plan at the stage that the company applies for the appointment of provisional liquidators (see *In the Matter of CW Group Holdings Limited* (unreported, 3 August 2018), per Parker J at [70]).

As outlined above, upon the appointment of a provisional liquidator, Black Pearl will benefit from an automatic moratorium pursuant to Section 97(1) of the Companies Act. Section 97(1) provides that when a provisional liquidator is appointed "*no suit, action or other proceedings, including criminal proceedings, shall be proceeded with or commenced against the company except with the leave of the Court and subject to such terms as the Court may impose*". Once this moratorium is in place, the provisional liquidators will be afforded the opportunity to assess the viability of the proposed restructuring.

In advance of or in conjunction with an application to appoint provisional liquidators, an application may also be made to the Grand Court pursuant to Section 86 of the Companies Act to sanction any scheme of arrangement or compromise (a "**scheme**") proposed between a company and its creditors or any class of them, or between the company and its members or any class of them. Such an application may be made by the company (or where a company is being wound up, its liquidator) or any creditor or member of the company (see Section 86(1) of the Companies Act). In circumstances where the scheme appears to be viable, the winding up petition is adjourned so as to allow time for the scheme to be implemented.

If a majority in number representing seventy-five per cent in value of the creditors or class of creditors or members or class of members (as the case may be) agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors, or on the members or class of members (as the case may be) and on the company (Section 86(2) of the Companies Act).

An application for a scheme is made by petition (see Order 102, rule 4(c) and rule 20(1) of the Grand Court Rules). The procedure for seeking approval of a scheme and the relevant documentation required in support of such an application is set out in Order 102, rule 20 of the Grand Court Rules and Practice Direction 2/2010. In summary, an application for sanction of a scheme consists of the following three stage process.

- (a) Firstly, an application is made for a "convening hearing" in which Grand Court orders that meetings of creditors or members be convened for approval of the scheme. At this stage, the Court will be primarily concerned with whether the scheme documentation and the explanatory statement contain sufficient information to enable creditors to vote in respect of the proposed scheme.
- (b) Secondly, the proposed scheme is approved or rejected at the scheme meeting. Unlike many other jurisdictions, it is important to note that there is no "cramdown" of the scheme on a dissenting class. Accordingly, all classes must accept the proposed scheme (see Section 86(2) referred to above).
- (c) Finally, if the proposed scheme is approved at the scheme meeting, an application is made for a "sanction hearing" in which the Grand Court will determine whether to approve the scheme. At this stage, the Court will consider a number of matters, such as compliance with the convening order and whether the majority fairly represent the class.

Assuming there is a legal route via which Black Pearl can protect itself and seek to restructure, can the Sparrow family continue to run Black Pearl during this process?

If Black Pearl makes an application to appoint provisional liquidators pursuant to Section 104(3) of the Companies Act (whether independently or in conjunction with an application to sanction a scheme), the Grand Court will determine which powers will be vested in the provisional liquidators and the directors of the company (see Section 104(4) of the Companies Act). It is also possible for Black Pearl to adopt a form of "soft touch" provisional liquidation whereby the Sparrow Family continue to control Black Pearl, but under the overall supervision

of the provisional liquidators and the Grand Court. On the other hand, it is also possible that the powers of the directors of Black Pearl will be suspended in their entirety with the provisional liquidators' powers replacing those of its directors. The extent to which management will be permitted to continue to exercise powers will depend on the facts. By way of example, in cases concerning allegations of misconduct of management, it is far less likely that they will be permitted to continue to exercise management functions.

Furthermore, if Black Pearl pursues a scheme and is not placed in provisional liquidation, the existing directors will continue to manage the company.

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

The Grand Court will take into account a variety of factors depending on the stage of the restructuring process.

Convening Hearing

At the first convening hearing on the interlocutory summons for an order to convene the Grand Court meeting (see above), paragraph 3.2 of Practice Direction 2/2010 provides that in every case the Grand Court will consider class composition:

"In every case the Court will consider whether it is appropriate to convene class meetings and, if so, the composition of the classes so as to ensure that each meeting consists of shareholders or creditors whose rights against the company which are to be released or varied under the scheme, or the new rights which the scheme gives in their place, are not so dissimilar as to make it impossible for them to consult together with a view to their common interest."

Paragraph 3.3 of Practice Direction 2/2010 further provides that the Grand Court will consider: "...any other issue which is relevant to the jurisdiction of the Court to sanction the scheme, and any other issue which, although not strictly going to jurisdiction, is such that it would unquestionably lead the Court to refuse to sanction the scheme." In relation to this matter, the applicant has a responsibility to draw any such issues to the attention of the Grand Court (see paragraph 3.4 of Practice Direction 2/2010).

In considering whether the proposed time and place of the Grand Court meeting and the method of giving notice is appropriate, the Grand Court will consider "*whether the parties having the economic interest, which is typically not the registered holder of the shares or debt instruments, will have sufficient time in which to consider the scheme documentation and make an informed decision*" (see paragraph 3.6 of Practice Direction 2/2010). The Grand Court will need to be satisfied that the scheme documentation provides the shareholder/creditor with all the information reasonably necessary to enable them to make an informed decision about the merits of the proposed scheme (see paragraph 3.7 of Practice Direction 2/2010).

Sanction Hearing

As outlined above, if the proposed scheme is approved, the Grand Court will determine whether to approve the scheme at a sanction hearing (see Section 86(2) of the Companies Act). At this hearing, the Grand Court will be consider issues relating to compliance, fairness and voting. In the case of *In the Matter of Sphinx Group of Companies* [2014(2) CILR 152], Smellie CJ stated at [4] that in order to sanction a scheme which has been approved by the requisite majority of creditors at the court-directed meetings, the Court must be satisfied that:

*"(a) the meetings of the scheme claimants were summoned and held in accordance with the court's order ("the compliance issue");
(b) the scheme was approved by the requisite majority of those who voted at the meetings in person or by proxy ("the voting issue"); and
(c) the scheme is such as an intelligent, honest man acting in respect of his interest might reasonably approve ("the fairness issue")."*

In the case of *In the Matter of China Agrotech Holdings Limited (in liquidation)* [2019(2) CILR 356], Segal J referred to the above summary in *Spinx* and added at [22] that there was also a helpful summary of the position under English law set out in Mr. Justice Snowden's judgment in *Re Man Group plc* ([2019] EWHC 1392 (Ch), at para. 10):

"10. The function of the Court at a sanction hearing for a scheme is summarised in the following extract from Buckley on the Companies Acts on section 899 of the Act which has frequently been cited with approval and applied by this Court:

'Sanction of the court

Once the meetings have approved the scheme, the sanction of the court must be sought. The sanction of the court is not a mere formality. Although the court has an unfettered discretion as to whether or not to sanction the scheme, it is likely to do so, as long as: (1) the provisions of the statute have been complied with; (2) the class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent; and (3) the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest might reasonably approve..."

Commented [BT19]: Total marks for this candidate = 49

*** End of Assessment ***