



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]: 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]: Incorrect. The correct answer was 'a'.

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. The correct answer was 'c'.

Question 1.8

Select the **correct answer**.

Any payment or disposal of property to a creditor constitutes a voidable preference if it:

- (a) occurs in the six months before the deemed commencement of the company's liquidation, or at a time when it is unable to pay its debts and the dominant intention of the company's directors was to give the applicable creditor a preference over other creditors.
- (b) occurs in the six months before the deemed commencement of the company's liquidation and at a time when it is unable to pay its debts and the dominant intention of the company's directors was to give the applicable creditor a preference over other creditors.
- (c) occurs in the six months before the deemed commencement of the company's liquidation and at a time when it is unable to pay its debts, or the dominant intention of the company's directors was to give the applicable creditor a preference over other creditors.
- (d) occurs in the six months before the deemed commencement of the company's liquidation, or at a time when it is unable to pay its debts, or the dominant intention of the company's directors was to give the applicable creditor a preference over other creditors.

Commented [BT8]: Correct. 1 mark

Question 1.9

Select the **correct answer**.

In order for a proposed scheme of arrangement to be approved:

- (a) 50% or more representing 75% or more in value of the creditors must agree.
- (b) 50% or more representing more than 75% of the creditors must agree.
- (c) more than 50% representing more than 75% of the creditors must agree.
- (d) more than 50% representing 75% or more in value of the creditors must agree.

Commented [BT9]: Incorrect. Answer was 'd'. However this candidate's mistake is attributable to an error in the wording of para 6.5.2.7 of the Guidance Text. 1 mark is therefore awarded.

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 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.

In the Cayman Islands there are ownership registers for real estate, ships, aircrafts, motor vehicles and intellectual property. These registers are centrally maintained. There is no public security registration regime for other assets. It is advised that a creditor must take adequate steps to ensure that it has sufficient control over an asset to prevent a third party from purchasing. According to section 54 of the Companies Law, it requires that security interest be entered in the register of mortgages and charges of the debtor company and the register must be maintained by the company at its registered office in the Cayman Islands. Registering a security interest in the company's register of mortgages and charges does not create priority however, the register is open for inspection by any member of the company or creditor and therefore registration does put third parties on notice of the existence of a security.

Commented [BT12]: 2.5 marks. The candidate should also have mentioned that the central registers give the registered person priority.

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, although most of the principles are followed. Despite being a British Overseas Territory it is not a member of the EU and therefore the EU legislation does not apply. In Cayman Islands, there is no threshold tests for the grant of assistance nor are there automatic rights on the basis of centres of main interests of the debtor. Instead, the foreign representatives must satisfy the court that it is appropriate for the court to exercise its discretion by granting the relief in foreign representative application. The circumstances in which the powers of the Grand Court maybe exercise when:

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

Commented [BT13]: 2.5 marks. Reference should have been made to section 242 of the Companies Act at 7.7 of the Guidance text.

Question 2.3 [maximum 3 marks]

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

The legal framework for recognition of foreign judgements in the Cayman Islands are as follows:

Commented [BT14]: 3 marks

The Cayman Islands has not entered into any international treaties for the reciprocal recognition or enforcement of foreign judgements neither has the UK extended its ratification of any such treaties to the Cayman Islands by Order in Council. Also the Cayman Islands is not a signatory to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. However, The foreign Judgements Reciprocal Enforcement Law (1996 Revision) provides statutory scheme for recognition and enforcement of foreign judgements in circumstances where the country from which the judgement originates assures substantial reciprocity of treatment regarding the enforcement of Cayman Islands judgements. This provision of the law is only extended to judgement from the Superior Courts of Australia.

Given the limited application of the foreign judgements reciprocal Enforcement Law (1996 Revision), the enforcement of foreign judgements is usually achieved by commencing a new action in the Cayman Islands based upon the foreign judgement as an unsatisfied debt or other obligation which is conducted under the regular procedural regime for litigation. Money and non-money judgements (including declaratory judgements) are enforceable at common law. The mandatory requirements for enforcement at common law are:

- The judgement is final;
- The foreign court had jurisdiction over the debtor;
- The foreign judgement was not obtained by fraud;
- The foreign judgement is not contrary to public policy of the Cayman Islands; and
- The foreign judgement was not obtained contrary to the rules of natural justice.

There is a six year limitation period which applies to both the common law enforcement and under the 1996 Law. This period runs from the date of the judgement or when there have been appeals, the date of the last judgement

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 do not agree with this statement. Even though there is no statutory obligation to file for insolvency and the Companies Law does not contain a prohibition on wrongful trading.

Directors can be held personally liable to the company for any losses which they cause to the company if they act in breach of their fiduciary duty to act in the best interests of the company.

In *Prospect Properties v McNeil* the Grand Court held that where a company is insolvent, the directors duty to act in the best interests of the company requires them to have regard to the interests of the creditors. It is in the interest of the creditors to be paid and it is in the interest of the company to be safeguarded against being put in a position where it is unable to pay.

When a company is in official liquidation, the official liquidator can pursue claims against the directors on behalf of the company for breach of their fiduciary duty and by wilfully disregarding the creditors interest they are failing to perform their fiduciary duty.

Commented [BT15]: 6 marks. 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.

Receivers are not explicitly mentioned in the statutory provisions dealing specifically with insolvency however the Grand Court Rules (GCR) do contemplate that receivers may be appointed by the court for the purposes of collecting money or to carry out some other act (for example, the execution of a contract or a document of title.

Commented [BT16]: Short but accurate. 4 marks.

Order 30 GCR governs the appointment and duties of receiver generally. Order 45 GCR (which deals with enforcement of judgements and orders generally) states that receivers may be appointed to enforce court orders for the payment of money. Order 51 GCR also provides for the appointment of receivers by way of equitable execution. Receivers and receivership orders are specifically provided for by statute in respect of the particular type of Cayman Islands legal entity, namely the Segregated Portfolio Company (SPC). If the Grand Court is satisfied that the SPC's assets attributable to a particular portfolio of the company are likely to be insufficient to discharge the claims of creditors in respect of that portfolio, it may make a receivership order in respect of that portfolio. During the period of appointment the receivers, they relieves the directors of their functions and powers in respect of the business of the segregated portfolio

The main relevance of the receiver in an insolvency context is that receiverships may offer an alternative course of action of certain creditors. Receivers can be appointed without the court involvement pursuant to the rights in a security instrument and Receivers owe their duties to the creditor rather than the debtor company.

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? When the Company defaults on the loan payments Monster can apply to have the company placed into official liquidation. The is 40 million of the loan is secured by a mortgage over four of Black Pearl's cruise ships. Monster can seek to enforce their security for the ships as the automatic stay which is enforced by the filing of the liquidation does prevent secured creditors from enforcing their security.
- (b) What action can Jolly Roger Inc take against Black Pearl? Jolly Roger Inc can apply to the Grand Court of the Cayman Islands to provide the ancillary relief to stay the enforcement of their judgement against Black Pearl and to commence a new action in the Cayman Islands based upon the foreign judgement as an unsatisfied debt.
- (c) What action can the unsecured trade creditors take against Black Pearl? The unsecured trade creditors can file a winding-up petition in respect to Black Pearl.
- (d) Does the Cayman Islands Court have jurisdiction over Black Pearl? Yes! The Cayman Islands Court has jurisdiction over Black Pearl Ltd because it is a company which was registered in the Cayman Islands.
- (e) Is there a legal route via which Black Pearl can protect itself and seek to restructure? Although the Cayman Islands legislative framework does not contain a regime equivalent to the US Chapter 11 or the UK'S administration procedures, the Cayman Islands has managed to earn a reputation as a leading restructuring jurisdiction. The practitioners would obtain a moratorium against any proceedings continuing or being commenced against a company by putting the debtors into provisional liquidation pursuant to section 104(3) of the Companies Law. At the time of making the application, the applicant will explain to the court the purpose of the application which will be the appointment of JPLs in order to allow for the negotiation and promotion of a compromise or arrangement with its creditors or members.
- (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? Upon the appointment of provisional liquidators, the Grand Court will determine which powers will remain with the directors and which will be vested in the provisional liquidators. Sometimes directors will be relieved of control entirely.
- (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 (GCR) and Practice Direction 2/2010 governs the procedures for obtaining approval for a scheme of arrangement. There are three stages to this process:

- 1 An application must be made to the Grand Court for an order that meetings of creditors or members be convened for the purpose of approving the scheme (the "convening hearing")
- 2 The scheme proposals are discussed at the meeting held in accordance with the convening hearing order and are either approved or rejected (the "scheme meetings");
- 3 If approved at the scheme meetings, an application is then made to the Grand Court to obtain approval / sanction of the scheme (the "sanction hearing")

Commented [BT17]: 2 marks. And it can prove for the unsecured balance in the liquidation.

Commented [BT18]: Sort of. 1 mark. Reference should be made to the New York Convention and Arbitration Law.

Commented [BT19]: 1 mark. Since Pearl is unable to pay their debts as they fall due. Or apply for PL.

Commented [BT20]: 1 mark

Commented [BT21]: 1.5 marks. It is an application for a scheme under section 86 coupled with PL under 104(3) which triggers the moratorium under section 97.

Commented [BT22]: 1 mark.

The court will be concerned with issues of class composition, any jurisdictional issues, the adequacy of the scheme documentation and notice. The Grand Court must also be satisfied that the scheme document and supporting explanatory statement contain all the information reasonable necessary to enable the scheme creditors (and /or shareholders as applicable) to make an informed decision about the proposed scheme.

In order for a proposed scheme to be approved, a majority in number (that is, over 50%) representing over 75% in value of the creditors (or class of creditors or members or class of members as the case may be), present and voting either in person or by proxy at the meeting, must agree to the compromise or arrangement. If the proposed scheme has the necessary creditor support, then it will be sanctioned by the court.

Commented [BT23]: 3 marks.

Commented [BT24]: 10.5 marks for question 4.

*** End of Assessment ***

Commented [BT25]: Total marks for this candidate = 36.5