



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]: 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.

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.

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

Question 1.10

Select the **incorrect statement**.

A company may be wound up by the Grand Court if the:

(a) company passes a special resolution requiring it to be wound up.

(b) company does not commence business within a year of incorporation.

(c) company is unable to pay its debts.

(d) board of directors decides it is "just and equitable" for the company to be wound up,

Commented [BT10]: Correct. 1 mark

(e) company is carrying on regulated business in the Cayman Islands without a license.

Commented [BT11]: 10/10 for question 1.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

Explain the extent to which it is possible to register security over an asset in the Cayman Islands.

Under s. 54 of the Companies Act security interests granted over company assets must be registered in the register of mortgages and charges of the debtor company. Thus the registration of security granted over company assets is not only possible, but obligatory.

Commented [BT12]: 1.5 marks. More detail required (see Guidance Text) to demonstrate understanding and earn full marks.

With regard to assets generally (whether held by an individual or a company) there is no general public security registration regime. However, security over particular classes of assets may be entered in the ownership registers for real estate, ships, aircraft, motor vehicles and intellectual property.

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.

Under section 241 of the Companies Act (2021 Revision) (the "Act") the Grand Court may make orders ancillary to a foreign bankruptcy proceeding for the purposes of:

1. recognising the right of a foreign representative to act in the Islands on behalf of or in the name of a debtor;
2. enjoining the commencement or staying the continuation of legal proceedings against a debtor;
3. staying the enforcement of any judgment against a debtor;
4. 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
5. ordering the turnover to a foreign representative of any property belonging to a debtor

The criteria upon which the Court's discretion shall be exercised is set out at section 242 of the Act, which provides as follows:

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:

1. the just treatment of all holders of claims against or interests in a debtor's estate wherever they may be domiciled;
2. the protection of claim holders in the Islands against prejudice and inconvenience in the processing of claims in the foreign bankruptcy proceeding;
3. the prevention of preferential or fraudulent dispositions of property comprised in the debtor's estate;
4. the distribution of the debtor's estate amongst creditors substantially in accordance with the order prescribed by Part V [of the Act];
5. the recognition and enforcement of security interests created by the debtor;

6. the non-enforcement of foreign taxes, fines and penalties; and
7. comity

In addition to such statutory provisions, the Grand Court may recognise foreign judgements made in bankruptcy proceedings, as considered in answer to the next question.

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 Foreign Judgements Reciprocal Enforcement Act (1996 Revision) provides a statutory scheme for recognition and enforcement of foreign judgments. However this is of limited use in practice because the provisions of the Act have only been extended to judgments from the Superior Courts of Australia, to date.

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

In practice, therefore, foreign judgments are enforced as a matter of common law under which there are a number of well-settled mandatory criteria to be met for the successful recognition of Money and non-money judgements.

Commented [BT14]: 2 marks. More detail required for 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.

The first point to note is that the statement refers only to the wilful disregard by directors of the interests of creditors in general (as opposed to at a time when the company is insolvent). As such, the introduction of a statutory prohibition on wrongful trading could not be a complete answer to the wilful disregard by directors of the interests of creditors in general, because such prohibition would only 'bite' if the company was insolvent. Where a company is solvent, the directors are obliged to consider the interests of creditors in accordance with any agreement between the company and its creditors. In these cases, the sophisticated legal system of the Cayman Islands (with ultimate recourse to the Privy Council) is well placed to enable creditors to enforce their legal rights.

Turning to consider the position where a company is insolvent, the introduction of statutory wrongful trading provisions would better equip the jurisdiction to deal with directors who wilfully disregard the interests of creditors by causing the company to continue trading when insolvent. Such a law would necessarily mean that directors would need to exercise greater caution to act in the interests of creditors in circumstances where a company is insolvent.

That said, there are tools available in the Cayman Islands to address the wilful disregard by directors of creditors' interest in certain circumstances. Most notably, directors can be made 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. Furthermore, case law has established that when a company is insolvent, directors must act in the best interests

of the creditors. Should a company subsequently be wound up, the Official Liquidators may be able to pursue claims against the directors personally for breach of fiduciary duty. This presents one avenue to seeking redress on behalf of the creditors because where a director has wilfully disregarded the interests of creditors (at a time when the company was insolvent) and has acted in breach of his fiduciary duties in doing so, it may be possible to recover monies to the estate for the benefit of creditors, from the director personally.

However, it is worth noting that it would be usual for a Cayman Islands' company's M&A to include protections for the company's officers in the form of indemnities and/or exculpation provisions. However, these would not provide a defence to the irreducible core obligations of the directors, whose liability remains for breach of fiduciary duty, fraud or wilful default. The relevance of this is that, where a director has wilfully disregarded the interests of a company's creditors but has not for example acted fraudulently, he may still avoid personal liability.

In summary, the introduction of wrongful trading provisions would undoubtedly provide a useful tool to address the wilful disregard of creditors' interests by directors of an insolvent company. However, that is not to say that creditors are presently without effective forms of redress. Firstly creditors may enforce their legal rights in accordance with any agreement in place with the company. Secondly, where a company is insolvent case law has established that director must act in the interests of creditors. Where they do not do so and are in breach of their fiduciary duties, a liquidator may seek to make recoveries for the benefit of creditors by claiming against the directors personally (although note this will not be effective if the director is able to benefit from an indemnity from the company).

Question 3.2 [maximum 6 marks]

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

Unlike many other jurisdictions, there are no statutory provisions in the Cayman Islands to govern the appointment of receivers (other than in respect of segregated portfolio companies).

That said, receiverships may play an important role in providing an alternative to formal methods of court supervised recovery for creditors. In particular, receivers may be appointed without Court involvement pursuant to the terms of a security instrument. In circumstances where a secured creditor has such a right, a receiver may be appointed over a company's charged assets if the debtor has defaulted and the agreed conditions are met. The receiver will then act under the powers provided for in the charge document. Whilst these may vary, the general purpose of a receiver is usually to realise the value of the charged assets and repay the creditor to amount due. In so doing the receiver will usually owe its duties to the creditor in question rather than the company.

In addition, the Grand Court rules provide for receivers to be appointed in certain circumstances. Under GCR O. 45 the Court may appoint a receiver to enforce court orders. Furthermore, GCR 51 in conjunction with s 11(1) of the Grand Court Law, empowers the Grand Court to appoint a receiver where it is just and convenient to do so. Such receivers may be empowered to identify, investigate and recover certain property over which the applicant has a beneficial interest.

Therefore in summary, it is true to say that receivers play a less central role in the Cayman Islands insolvency regime than in some other jurisdictions. However, there is still scope for their use by the Court and under its supervision, as well as informally by agreement between a debtor and creditor in respect of a secured debt.

Commented [BT15]: 6 marks. Candidate demonstrates a good grasp of the principles but could have made specific reference to case law and sections of the Companies Act (sections 99, 135, 145, 146, 147 Companies Act) for additional credit.

Commented [BT16]: Short but accurate. 4 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?

Advice on each of the issues in question is set out in turn below:

- (a) What action can Monster take to protect itself?

Monster should first consider whether any further agreements can be reached with Black Pearl in order to secure the unsecured portion of the loan (USD 60 million). If Black Pearl has assets of a value in excess of those which are already secured under the USD 40 million mortgage, Monster should explore whether the debt can be informally restructured, perhaps to allow Black Pearl to recover from the effects of Covid on its market by allowing more time for repayment, in return for additional security being granted. If that were possible, Monster could

Commented [BT17]: Sound answer overall. 13 marks.

at least take comfort that were Black Pearl to ultimately fail and be wound up, it could enforce its security in order to recover the debt (regardless of any moratorium).

In any event at present, USD 40 million of the debt is secured. Once the debt becomes due, Monster can consider enforcing its security against the vessels. If it is the case that the vessels are deteriorating due to lack of funds on the part of Black Pearl, Monster would be well advised to enforce their security by taking possession of the vessels and selling them as soon as possible.

If Monster takes the view that Black Pearl cannot recover, the best thing may be to enforce its security in respect of the USD 40 million, and at the same time present a petition to wind-up Black Pearl. Monster will then submit a proof of debt in the liquidation and rank as an ordinary unsecured creditor in respect of USD 60 million of the debt.

An alternative option would be for Monster to seek Black Pearl's agreement to enter into provisional liquidation and for a scheme of arrangement to be agreed between Black Pearl and its creditors including Monster.

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

Jolly Roger should appoint Cayman Islands attorneys to seek to enforce its judgment debt from the English arbitration proceedings in the Cayman Islands. We require more information on the exact nature of the arbitration proceedings and final decision. However, on these facts there is nothing to suggest that the arbitration decision would not be enforceable in the Cayman Islands. The benefits of enforcing the arbitration decision in Cayman is to open up the full range of domestic enforcement options. If Black Pearl enters into Official or Provisional Liquidation before Jolly Roger has sought to enforce its judgment in the Cayman Islands, Jolly Roger would need leave of the Court to commence proceedings against Black Pearl in the Cayman Islands.

If Black Pearl does not meet the judgment debt, Jolly Roger may consider presenting a winding-up petition against Black Pearl in the Cayman Islands. Unless Black Pearl has admitted its insolvency in open correspondence, Jolly Roger would be well advised to serve a statutory demand for the unpaid debt on Black Pearl, and if this remains unpaid the Court will then deem Black Pearl insolvent for the purpose of the winding-up petition.

Upon a winding-up of Black Pearl, Jolly Roger would submit a proof of debt in the liquidation and rank as an ordinary unsecured creditor, whose debt would be paid *pari passu*. We require more information as to the assets of Black Pearl to know whether once Monster has enforced its security against the USD 40 million debt, there will remain assets for Jolly Roger and other unsecured creditors to make recoveries.

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

The unsecured creditors can serve statutory demands on Black Pearl, seeking payment of the debts. If such a statutory demand is unpaid (and is in excess of KYD 100), the Court would then deem Black Pearl insolvent for the purpose of any winding up petition. This may give the unsecured creditors some leverage in seeking repayment of their debts because they can threaten to wind-up Black Pearl. If the debts are for small sums and Black Pearl wishes to not be wound up, Black Pearl may find a way to pay the debts. If Black Pearl is wound up, then the unsecured creditors will submit proofs of debts and have their debts paid *pari passu*.

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

The Grand Court of the Cayman Islands has jurisdiction over Black Pearl because Black Pearl is a Cayman Islands incorporated company.

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

Black Pearl could seek to protect itself and seek to restructure by applying under section 104(3) of the Companies Act to be placed into provisional liquidation. In order to do so Black Pearl would need to present a petition to wind itself up, and at the same time file a summons seeking the appointment of provisional liquidators (and adjournment of the petition).

The key benefit of doing so would be for Black Pearl to benefit from the moratorium under section 97 of the Companies Act to prevent any action or proceedings being commenced against it without the leave of the Grand Court. Black Pearl would need to meet the conditions of 104(3) of the Companies Act; namely that it was unable or was likely to become unable to pay its debts and that it intended to present a compromise or arrangement to its creditors. As part of the latter condition, Black Pearl would be seeking to restructure its debts, for example by offering an equity for debt swap, in order to give itself the best possible chance of recovering, in the interests of its creditors.

(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?

The current directors of Black Pearl may be allowed to continue in control of the company, working alongside the joint provisional liquidators in order to effect the restructuring, in the event that the Grand Court grants a 'light-touch' provisional liquidation order. If so, the directors would be subject to the supervision of the provisional liquidators and the Grand Court, in accordance with the Order. Whether this is possible will depend on the facts of the case, including whether the Sparrow family directors have mismanaged the company (making a light touch provisional liquidation order less likely).

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

Once in provisional liquidation Black Pearl, would have gained some breathing space within which to propose a restructuring its creditors.

Black Pearl may seek to propose a scheme or arrangement to its creditors or any class thereof. The procedure for approval of a scheme or arrangement is governed by O.102, r. 20 of the GCR and Practice Direction 2/2010. The company must comply with the procedure set out therein.

In order for a proposed scheme to be approved, over 50% of creditors representing over 75% in value present and voting at the convened meeting must agree to the scheme. If the necessary majorities are obtained the scheme can proceed to a sanction hearing in the Grand Court. The Court will hear from any dissentient creditors who wish to appear.

Ultimately the Court will need to be satisfied that the procedure laid out by the rule has been followed, and that the required votes have been obtained. The Court will consider whether the scheme is such that an intelligent, honest member of the class of creditors convened, acting in his own interests, might reasonably approve the scheme.

* End of Assessment *

Commented [BT18]: Total marks for this candidate = 40.5