



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.

As long as the asset one is registering a security over is real estate, ships, aircraft, motor vehicles and intellectual property, it is possible to register a mortgage or charge since the Cayman Islands maintain their ownership registers. Moreover, Section 54 of the Companies Law requires such security interests be registered in the respective register of the debtor company. Registration despite it not conferring priority of charges, confers notice on third parties who also have the discretion to inspect the registers before purchase and where one purchases the interest, they acquire it subject to the secured creditor's interest. After granting of the loan, it is prudent for the creditor to update their details and ensure sufficient control over the security.

Commented [BT12]: And what is the effect of registering? Notice? Priority? 2 marks awarded.

It is worth noting that there is no public register for the other assets not mentioned above in Cayman Islands.

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.

Commented [BT13]: 2 marks. Specific reference should have been made to the relevant sections of the Companies Act, particularly section 242.

The legal basis for the Grand Court's power to assist in foreign proceedings is derived from Part XVII of the Companies Law which provides for international co-operation and coordination in cross-border insolvency proceedings. These powers are discretionary and are geared towards rehabilitating and restructuring the insolvent debtor. From the above concept, the Grand Court must ensure that it is best guided by matters which ensure the efficient administration of the estate.

These powers may be exercised to recognise the foreign representative's right to act on behalf of the debtor and even allowing them to participate in the legal proceedings against a debtor or even require an officer submit to examination, produce documents and hand over the company's property. All this is done in order to ensure that there is fair treatment of all creditors more so, in line with the principles of natural justice, despite them being local or foreign creditors. To prevent fraudulent or preferential dispositions over property of the debtor all while guaranteeing protection of creditors in the Cayman Islands from being prejudiced and inconvenienced during the processing of claims in foreign bankruptcy proceedings. The Grand Court may also assist in foreign proceedings to ensure processing & distribution of the estate is according to the statutory order of priority and to promote rules of comity as well as the recognition and enforcement of security interests created by the debtor.

Question 2.3 [maximum 3 marks]

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

- i. Treaties & Convention – the New York Convention on the Recognition & Enforcement of Foreign Arbitral Awards.
- ii. Statutes – the Foreign Judgments Reciprocal Enforcement Law (1996 Revision) & the Order 71 of the Grand Court Rules.
- iii. Principles of Common Law.
- iv. Limitation of actions 6 years from the date of judgment.

Commented [BT14]: 1.5 marks. More detail required for more 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.

This statement is not true as the Cayman Islands insolvency regime has provisions that hold the directors personally liable for wilfully disregarding the interests of creditors. The regime has provisions on Fraudulent trading which is prohibited under section 147 of the Companies Law where directors can be held liable if they carried on business with the intention of defrauding its creditors or for any other fraudulent purpose during the winding-up of a company. In such a case, the liquidator may apply to court for orders seeking to have the directors personally contribute to the company's assets, with leave from court, compel/summon director to submit to examination. This is more of a criminal liability due to the element of fraud and so long as one can prove the intent to defraud. Penalties for such directors or officers convicted of any of the above offences range from monetary fines to imprisonment (for periods ranging from 12 months to five years).

Cayman Islands also has the Fraudulent Disposition Law (1996 Revision) which allows creditors to challenge transactions by the company so long as they can prove there was intent to defraud creditors or other stakeholders and further, that they were prejudicial to the creditors. However, these transactions can only be set aside as personal liability by directors rarely arises.

In addition to the statutory provisions above, the Cayman Islands insolvency regime also relies on principles of Common Law or equity to hold directors accountable for insolvent trading. This is respectively with regards to the fiduciary duty that arises as a result of the relationship between the company and the directors. This duty requires them to act in the best interests of the company at all times (which means avoiding wrongful & fraudulent trading) and where there is breach they are liable to the company for damages. These actions may be pursued by the liquidator against directors.

Directors can also be held liable in damages to the company for negligence if they breach their common law duties of skill and care owed to the company.

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

Question 3.2 [maximum 6 marks]

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

Secured lenders have a variety of restructuring & enforcement options available to pursue outstanding monies owing from corporate entities; appointment of receivers is one such mode in the Cayman Islands and their appointment by the secured creditors need not involve the court. The powers of a receiver to deal with the secured property may only be exercised for the purpose to which they were granted and they must therefore only deal with the secured property as expressly provided for in the underlying security instrument. Such powers include to take possession of, sell and/or manage the secured property, to exercise any voting rights concerning the secured property, and the power to receive and retain all payments, dividends or interests relating to the secured property.

The Grand Court has the discretion to appoint a receiver to preserve assets of a debtor company pending trial (whether local or foreign). This relief is available even if a freezing injunction is in place, so long as the risk of squander/misuse of assets is sufficiently high. They are also appointed for the purposes of collecting money, rents, to execute contracts, documents of title and enforce security rights and/or court orders. The Grand Court Rules provides for their appointment & duties under pursuant to Order 30, 45 & 51.

With regards to statutory provisions, Receivers are specifically appointed in Segregated Portfolio Companies for the purpose of realizing and distributing its assets to the entitled creditors and closing down its business in an orderly manner. Their appointment is limiting as they cannot be appointed under other corporate insolvency rescue assignments.

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

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

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

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

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

Black Pearl has already failed to pay various service providers for several months (tender vessels, food and beverage suppliers, utilities, engineers and mechanics). The payment of utilities is particularly important to the ongoing repair and maintenance of the fleet of vessels at Black Pearl's dry dock facility in Little Cayman.

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

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

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

(a) Monster Mortgage being a secured creditor for USD 40 Million over 4 of Black Pearl's cruise ships and following the default on its loan can protect itself by:

- i. Appointing a receiver pursuant to the security instrument to enforce the security and recover their monies.
- ii. Taking possession of the security and exercising its statutory powers of sale.
- iii. If it was an equitable mortgage and the agreement had a power of attorney, Monster may opt to execute a transfer of the 4 ships to its name and possibly consider continued operations or a sale of the same; or apply for specific performance where there is no power of attorney.

However, it is worth noting that should Black Pearl go into liquidation, Monster will have to prove for the balance of USD 60M as an unsecured creditor.

(b) Jolly Roger Inc. being a judgement creditor for USD 50 Million may consider either:

- i. Filing a winding up petition and commence proceedings to wind -up Black Pearl Ltd. and subsequently, claim as a creditor.
- ii. Appointing a Receiver pursuant to Order 45 and/or Order 51 of the Grand Court Rules, by making a court application as a judgment creditor to enforce payment of the arbitral award or for the appointing of a receiver by way of "equitable execution".

(c) The unsecured creditors may take action against Black Pearl by filing a winding up petition to have the company placed under official liquidation and further, citing one at least one act of bankruptcy and the company's inability to pay debts as per section 73 of the Companies Law.

(d) Cayman Islands and more specifically the Grand Court has jurisdiction over Black Pearl Ltd by virtue of the company being incorporated and/or registered in the Cayman Islands. Additionally, by virtue of the of the company carrying on business in the Cayman Islands.

(e) Black Pearl Ltd can protect itself legally by either:

- i. Applying to the Grand Court to have the company put under provisional liquidation. Under this alternative, Black Pearl may invoke provisions of section 104(3) of the Companies Law. This action will in effect activate a moratorium to stay/stop all proceedings against it and thereby giving the company some breathing space to allow it restructure or get into an arrangement/compromise.

Commented [BT17]: 2 marks

Commented [BT18]: 1 mark. Before this, JR need to apply for recognition – New York Convention and Arbitration Law.

Commented [BT19]: 1.5 marks (section 93)

Commented [BT20]: 1 mark

ii. Entering into a scheme of arrangement between itself and its creditors in general or any of its classes where it can only restructure its liabilities, debt for equity swaps, reorganise its liabilities, alter its shareholders & creditors distribution rights and even consider pre-packs. This is pursuant to section 86 of the Companies Law.

Commented [BT21]: 2 marks

iii. Creating/establishing Black Pearl as a Segregated Portfolio Company (SPC) which will allow it to remain a single legal entity with internal segregated portfolios such that the assets and liabilities of each Portfolio are legally separate from the assets and liabilities of any other Portfolio and more so, from the SPC's general assets and liabilities. Therefore, the appointment of a receiver to a portfolio of a SPC by the Grand Court affords an automatic stay on proceedings so the SPC consequently enjoys protection and relief against enforcement or any other action being taken against it for the duration of the receivership. Additionally, the appointment may allow for an investigation into the conduct of the SPC's segregated portfolio assets, and potentially the general assets, as applicable, without the need for appointment of a liquidator over the SPC as a whole.

Commented [BT22]: Too late for this.

(f) Sparrow family can only continue to run Black Pearl so long as the company avoids liquidation in totality except if it goes the provisional liquidation route. However, this is discretionary depending on the circumstances of the case and further, will be done under the supervision by the provisional liquidator and the Grand Court.

Commented [BT23]: 1 mark

(g) Factors to be considered before approving a restructure:

- i. That there are positive & consensual deliberations/negotiations which have been taking place prior to the restructure application being made.
- ii. Whether there is a provisional liquidation that has been commenced, (say to enable a scheme of arrangement or to preserve assets) and its purpose.
- iii. Whether there is any rescue financing
- iv. The primary assessment and the viability of the proposed restructure

Commented [BT24]: 1 mark. This question is calling for a summary of the voting and sanction elements of the scheme of arrangement process.

Commented [BT25]: 9.5 for question 4.

* End of Assessment *

Commented [BT26]: Total marks for this candidate = 35