



**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.

There is no public security registration system in the Cayman Islands, and the only assets that do have ownership registers (maintained by the Government) are in respect to real estate, ships, aircraft, vehicles, and intellectual property. Accordingly, mortgages and charges can be registered over these assets and the registers of those assets are searchable.

Commented [BT12]: 2.5 marks. Further detail on the effect of notice and priority would have resulted in full marks.

As there is no centralised registration system for other assets, a creditor must take steps to ensure that it has sufficient control over an asset to prevent a third party from purchasing it. To this end, section 54 of the Companies Law requires that security interests must be entered in the 'register of mortgages and charges' of the debtor company. This register must then be maintained at the company's registered office in the Cayman Islands. Where the company fails to update this register the mortgage or security is not necessarily invalidated, however, it does mean that other parties are not placed on notice of that interest. Further, registering a security in this way does not create priority over other creditors.

The benefit of the register, (particularly if it is kept up to date) is that it does put third parties on notice of the existence of the security, as the register is able to be inspected by any member or creditor of the company. Further, any creditor should review the company's register of mortgages and charges before making a loan in addition to running a search for the Company's name in the other, centrally managed registers cited above.

Accordingly, it is possible to register security over an asset in the Cayman Islands, however, depending on the type of asset concerned, the registration process and considerations will vary.

### Question 2.2 [maximum 4 marks]

Explain the legal basis for the Cayman Islands Grand Court's power to assist foreign bankruptcy proceedings and the circumstances in which such powers may be exercised.

The legal basis for the Grand Court's power to make orders in support of foreign bankruptcy (or insolvency) proceeding, arises under Part XVII of the Companies Law. Further, and although the Cayman Islands have not adopted the UNCITRAL Model Law on Cross Border Insolvency (the Model Law) into domestic legislation, most of the principles are followed in the interests of comity. A foreign bankruptcy proceeding also includes proceedings for the purpose of reorganisation or rehabilitating a foreign debtor.

As to the circumstances within which such powers may be exercised, under Cayman law, there are no threshold tests to grant assistance, nor are there automatic rights based on the debtor's centre of main interest (COMI) (as with the Model Law). Instead, it remains at the Grand Court's discretion as to whether assistance will be provided. To this end, the foreign representative must make an application, and satisfy the Cayman Court that it is appropriate in the circumstances for the court to exercise its discretion by granting the relief requested.

Pursuant to section 240 of the Companies Act, the Grand Court has the discretionary power to grant the following forms of ancillary relief:

Commented [BT13]: s.241

- 1) recognition of the foreign representative to act in the jurisdiction on behalf of or in the name of the 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 business or affairs of the debtor to be examined by the foreign representative, and to produce documents;
- 5) ordering the handover (to the foreign representative) of any property belonging to the debtor.

In considering whether to make an order, the Court is then guided by matters which will best assure an economic and expeditious administration of the debtor's estate, consistent with:

Commented [BT14]: s.242

- The just treatment of all holders of claims, wherever they are domiciled, in accordance with established principles of natural justice.
- The protection of claim holders in the Cayman Islands against prejudice and inconvenience in the processing of claims in foreign proceedings.
- The prevention of preferential or fraudulent dispositions of property in the debtor's estate.
- The distribution of the estate among creditors substantially in accordance with the statutory order of priority.
- The recognition and enforcement of security interest created by the debtor.
- The non-enforcement of foreign taxes, fines, and penalties.
- Comity, being mutual recognition and co-operation concerning legal decisions.

Commented [BT15]: 3 marks

### Question 2.3 [maximum 3 marks]

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

Recognition of a foreign judgement in the Cayman Islands is normally achieved by way of common law principles and application, rather than relying on the statutory scheme, which, as discussed below, is of limited application.

Commented [BT16]: 2 marks. More detail required for full marks.

An action is conducted by way of the regular procedural regime for litigation in the Cayman Islands, being the Grand Court Rules.

A foreign judgement is normally enforced by way of a new action being commenced in the Cayman Court, based upon the foreign judgement as an unsatisfied debt or other obligation.

The Foreign Judgements Reciprocal Enforcement Law (1996 Revision) provides a legislative mechanism for recognition and enforcement of foreign judgements. This statute, however, is only operative in circumstances where the country from which the judgement originates assures substantial reciprocity of treatment regarding the enforcement of Cayman Islands judgements, so can be of limited application in some circumstances.

## 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 [BT17]: Good. 8/9 marks.

Whilst there is no statutory prohibition on insolvent trading under the Companies Law, that does not prevent directors of a company from being held personally liable for allowing the company to continue trading whilst insolvent. Indeed, Directors can still 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. Accordingly, it is through the directors' fiduciary duties, recognised and enforced by the Cayman Courts, that directors can be held accountable for insolvent trading causing loss to the company and to its creditors.

In the case of *Prospect Properties v McNeil*<sup>1</sup>, 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 its creditors. Because it is in the interests of the creditors to be paid and it is in the interest of the company not to be put in a position where it is unable to meet its debts, then "acting in the best interest of the company" includes not allowing the company to continue trading whilst it is insolvent and to do so, has been recognised as a breach of the directors' fiduciary duties for which they can be found personally liable.

Accordingly, whilst Cayman law (through common law) does provide a mechanism by which directors can be held personally liable if they allow the company to trade whilst insolvent, Cayman law also has a number of provisions which are targeted at protecting the interests of creditors and allow a liquidator to claw back assets in circumstances where the company directors may have made decisions which were either not in the interests of the creditors or where certain decisions unfairly favour some creditors over others.

A further example of such a provision is section 99 of the Companies Law which states that any dispositions of a company's property made after the winding up petition has been filed, will be void in the event that the winding up order is subsequently made (unless validated by the Grand Court). Accordingly, in the event that the directors cause the company to dispose of any property once the winding up order has been applied for (which ought to have been reserved to repay creditors claims), then the liquidator is entitled to apply for appropriate relief to require the repayment of the funds or the return of the asset.

In circumstances where the transaction occurred (after the winding up application has been made) but the company was clearly solvent and the court is satisfied that an 'intelligent and honest' director acting reasonably would have come to that decision, then the court has the power to also validate the transaction. Where the company is clearly insolvent, however, then this is unlikely to occur, unless it can be shown that the grant of security or the particular transaction benefits the company and enhances the value for the creditors as a whole.

Accordingly, section 99 does offer some protection for creditors in relation to unfavourable transactions which the directors may cause the company to enter into within the period where the winding up application is pending.

A further statutory mechanism to assist creditors in circumstances where the directors may have caused the company to enter into unfavourable or unfair arrangements in the lead up to the winding up application, is by way of section 145 of the Companies Law. Pursuant to this

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<sup>1</sup> 1990-91 CILR 171



section, any payment or disposal of property to a creditor constitutes a voidable preference if the transaction occurs **i)** in the six months prior to the deemed commencement of the company's liquidation and at a time when the company was unable to pay its debts and **ii)** the dominant intention of the company's directors was to give the applicable creditor a preference over that of the other creditors. A disposition that is successfully set aside as a preference is void and the liquidator may apply to the Grand Court to order that the creditor who has benefitted, return the asset and submit a proof of debt in the liquidation, to have its claim considered alongside all of the other creditors.

The Cayman Islands Court of Appeal has critically considered each stage of this two-part test, in the case of *re Weaving Marco Fixed Income Fund Ltd (in Liquidation)*<sup>2</sup>. Firstly, the Court found that "giving preference over other creditors" means putting one creditor into a better position than it otherwise would have been. As to 'a dominant intention' this may be inferred by the court from the available evidence. If the company's dominant intention in paying the payment or granting the security was to achieve a different purpose (e.g. acting in good faith to pay a service provider which is essential to the business) it may not be classed as a voidable transaction, even if the collateral effect is to prefer the creditor in question.

Section 145 (2) and (3) will also have operation where a disposition is made to a 'related party' of the company, such as a person who has the ability to control the company or who has the ability to exercise significant influence. Where a transaction occurs in this circumstance, it will be deemed to have been made with a view to giving a preference.

As well as a transaction being voidable due to it being made within the six months prior to liquidation and with the intention of benefitting one creditor over others, section 146 of the Companies Law provides a mechanism by which a liquidator can apply to the court to avoid or claw back a disposition made at an undervalue. This can occur when the relevant asset or property is **i)** disposed of at an undervalue, **and ii)** with the intention of wilfully defeating an obligation owed to a creditor (that is, an intent to defraud).

The term 'undervalue' has been defined to mean where no consideration has been given for the company property by the recipient of that property, or a consideration which in money or money's worth is significantly less than the value of the property. In this circumstance, the burden of proof is on the party (creditor or liquidator) who is seeking to have the disposition set aside, to establish an intent to defraud.

A final statutory provision which is of great assistance in the protection of creditors' interests in circumstances where the directors of the company have wilfully conducted the business of the company in a manner which disregards those interests, is by way of section 147 of the Companies Law which deals with fraudulent trading. In circumstances where the business of the company was carried out by the directors with an intent to defraud the creditors, or for any other fraudulent purpose, a liquidator can apply for an order requiring any persons who were knowingly parties to such conduct to make such contributions to the company's assets as the Court thinks proper. Accordingly, if the directors are found to have acted fraudulently, they can be personally liable to repay monies or return any assets to the company, for the benefit of the creditors.

Accordingly, whilst the Cayman Islands may not have a specific statutory prohibition on insolvent trading, there exists at both common law, and through application of the various

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<sup>2</sup> [2016 (2) CLR 514]

other statutory sections of the Companies Law cited above, provisions which allow creditors and/or the liquidator to claw back company assets which have been transferred or dissipated at a time when the company was effectively insolvent (and by virtue of that insolvency). These other mechanisms, in turn have the same effect as a statutory prohibition on insolvent trading, which exists in other jurisdictions. Accordingly, directors who manage a company in a manner which wilfully disregards the interest of the creditors, can find themselves personally liable for their actions by way of a number of different mechanisms under Cayman Law, which is well equipped to deal with such circumstances and protect the interests of creditors.

### Question 3.2 [maximum 6 marks]

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

Commented [BT18]: 5.5 marks.

Whilst receivers may have a limited role to play in a Cayman Islands insolvency, receivers still fulfill an important role, as a receivership may offer an alternative and more targeted course of action for secured creditors which can be pursued more cost effectively than a petition to wind up the company.

There are two routes by which a receiver can be appointed in Cayman:

1. Firstly, the Grand Court Rules (by way of Order 30) provides authority for a receiver to be appointed by the Court. Order 45 of the GCR then states that receivers may be appointed to enforce court orders for the payment of money and Order 51 provides for the appointment of receivers by way of equitable execution. This power further arises from section 11(1) of the Grand Court Law, (which states that the Grand Court shall possess like jurisdiction within the Cayman Islands, which is vested in the High Court of England) applied in conjunction with section 37(1) of the Senior Courts Act 1981 (England) which is authority for the High Court appointing a receiver in all cases where it appears just and convenient to do so.
2. Secondly, in some circumstances, a receiver's authority of appointment arises from the rights of a creditor pursuant to the terms of the security instrument, which then avoids the need for the Court's involvement. One such example is the holder of a fixed or floating charge can (if the charging document specifically provides for it) appoint a receiver over the company's charged assets if a debtor defaults on payment. Further, often the mortgage documents also permit for a receiver to be appointed.

Once appointed, either by way of a court order, or the security document, the powers of a receiver are limited to those set out in the charge document or the order which will typically include a right of sale to recover the creditor's interest. The receiver will generally realise the value of the charged asset and repay the creditor the amount of its unpaid debt. In this circumstance, the receiver generally owes its duties to the creditor rather than the debtor company.

In addition to recovering the interest of a secured creditor, receivers and receiverships also have an important role to play in respect to a segregated portfolio company (SPC). If the Grand Court is satisfied that the segregated portfolio's assets attributable to a particular portfolio of the company are unlikely to be sufficient to discharge the claims of creditors in respect to that portfolio, it may make a receivership order in respect of that portfolio only (rather than needing to wind up the entire segregated portfolio company). Accordingly, a receivership has an important role to play in this context because it allows for the preservation of solvent portfolios, whilst still dealing with the insolvency of one.

In respect of a receivership order being made by the Grand Court in the context of an SPC, the order must direct that the business and segregated portfolio assets of or attributable to a segregated portfolio must be managed by a receiver specified in the order, for the purposes of:

- The orderly closing down of the business, of or attributable to, the segregated portfolio, and
- The distribution of the segregated portfolio's assets attributable to the portfolio, to those entitled to have recourse to those assets.

A receivership order:

- May not be made if the SPC is in the process of being wound-up (i.e. is already in a liquidation process), and
- shall cease to have effect upon commencement of the winding up of the SPC, but without prejudice to the prior acts of the receiver or his agents.

When an application has been made for a receivership order and whilst the appointed receiver is carrying out the terms of the order, there is a stay on proceedings against the SPC in relation to that particular portfolio, except by leave of the court. Finally, during the receivership order, the receiver relieves the directors of their functions and powers in respect of the business of that particular segregated portfolio (similar to that which occurs in a liquidation) so that it is able to implement the receivership order.

Accordingly, whilst a receiver may have a more limited role to play within the Cayman Islands insolvency regime, by comparison to a liquidation or a scheme of arrangement, it is still an effective mechanism for secured creditors and segregated portfolio funds that is available in certain circumstances. In those certain circumstances outlined above, appointing a receiver can provide a more direct and cost-effective means of recovering a secured creditor's interest from a company without the need to resort to a liquidation or scheme of arrangement which can both be more costly, time consuming and affects the whole company, rather than just a targeted part of it.

**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) Part of the debt owed by Black Pearl ("BP") to Monster Mortgage ("MM") is by way of a secured interest, as we are told that 40m of the 100m loan is secured over four of the cruise ships. Pursuant to section 142 of the Companies Law, a creditor with a security interest over an asset of the company is entitled to enforce its security even after the company is placed in official liquidation or provisional liquidation. Furthermore, MM as a secured creditor (in respect to part of the debt) is able to enforce the \$40m security without leave of the Court and with any reference to a liquidator (if there is one so appointed).

In order to recover the unsecured part of the debt, MM will either need to apply to the Cayman Islands Grand Court to have BP wound up (if this has not occurred already), and then once a liquidator is appointed and the winding up petition approved by the Court, MM submits a proof of debt for the unsecured part of the loan (USD \$60m). The proof of debt must state the particulars of the security and the value that MM places on that security. In order for MM to successfully petition the Court for a winding up order of BP, it must be able to provide evidence that the BP is insolvent and is unable to pay its debts. Accordingly, a failure by BP to pay several service providers as payments have fallen due will provide evidence of this, as will the fact that BP will be unable to satisfy the arbitral award made against it by the English Court.

(b) In respect to Jolly Roger Inc ("JR") and enforcement of its arbitral award against BP, because this award was made in the English Court, JR will need to apply to the Cayman Court for recognition of its award in Cayman. Further, and as BP is unlikely to be able to pay that award, JR will need to seek recovery of that award against BP's assets, most of which appear to be in Cayman, although some are throughout the Caribbean. Accordingly, and if a winding up petition hasn't already been filed in the Cayman Court by another creditor (i.e. MM above) then JR could also apply to have the company liquidated in order to then prove its debt in the liquidation. Because JR's claim is an arbitral award, it will be treated as an unsecured creditor in a liquidation, with secured creditors claims being preferred ahead.

(c) Firstly, in order to recover the debts owed to them, the unsecured trade creditors have the right to file a winding up petition in respect of BP on the basis that it has been unable to pay its debts as they have fallen due, which is evidence that the business is insolvent.

**Commented [BT19]:** Solid answers overall. 13.5 marks for question 4.

Unfortunately, for the unsecured trade creditors, their claims against BP will rank below any secured creditors claims (which can be dealt with outside of the winding up) and also, below any funds owed regarding the liquidation expenses and then preferential debts, which include debts owed to employees and taxes due to the Cayman Islands Government. If BP instead enters into provisional liquidation and seeks to restructure, as set out below at (e), then it may be that some of the trade creditors may be better off (some, but not all). For example, the utilities, engineers and mechanics are essential to maintaining the ships and therefore, preserving value in the assets. If the BP is to be restructured and the company is to continue on, it will be necessary of these trader creditors to be paid and for them to continue maintaining the assets. Accordingly, for some of the unsecured trade creditors, a scheme may be a more beneficial route whereby they may be able to recover more or protect their position.

(d) As a starting point, the Grand Court of the Cayman Islands has jurisdiction over corporate liquidations and restructurings. Whilst we know that BP operates throughout the Caribbean and has creditors located in at least the UK, and likely other jurisdictions (other than Cayman), BP is registered in the Cayman Islands and we are told that some of its assets are in dry dock in Little Cayman, accordingly it has some assets within the Cayman jurisdiction. On the basis of these facts, the Cayman Grand Court would have jurisdiction to make winding up orders in respect to BP (of the nature discussed above at (a) – (c) or below at (e).

(e) There is a legal route by which BP can seek to protect itself and seek to restructure. Section 86 of the Companies Act permits a company to propose a scheme of arrangement which can be agreed between the BP and its creditors, MM, JR and the Trade Creditors. Under the Companies Law, a scheme can allow for the restructuring of liabilities, reorganisation of share capital and / or can alter shareholders and creditors distribution rights. BP is able to commence the scheme itself, however, given that JR has obtained judgement in the UK against BP, it would also be worthwhile for BP to appoint provisional liquidators so that it can get the benefit of a court ordered stay of proceedings in order to gain some breathing space from both MM and JR whilst it prepares and negotiates the scheme. A court ordered stay is only possible in Cayman when a company is in liquidation, accordingly, the BP will need to present a winding up petition to the court and apply to appoint provisional liquidators before progressing the scheme.

Pursuant to section 104 (3) the application of BP can be made on an *ex parte* basis on the grounds that the company is or is likely to become unable to pay its debts as they fall due and the company intends to present a compromise arrangement. BP should be aware that although the court may grant the application *ex parte*, it will normally require an *inter partes* hearing shortly thereafter to provide the creditors with an opportunity to be heard.

Given the apparently difficult financial circumstances that BP is in, and the likelihood that there will not be sufficient funds to repay all of the creditors, it may be to the creditors benefit to agree a scheme of arrangement as in the long run, they may in fact have a greater chance of recovering more of their debt than by way of winding up the company.

The procedure for obtaining approval for a scheme is set out under Order 102, rule 20 if the GCR and practice direction 2/2010. After the filing of a scheme petition, there is a three-stage process for schemes.

1. Firstly, an application must be made to the Grand Court for an order that meetings of creditors and members be convened for the purpose of approving the scheme.
2. The scheme proposals are then discussed at meetings held in accordance with the Court's order obtained at point 1, and are either approved or rejected.

3. If approved at the meetings regarding the scheme, then an application is made to the Court to obtain approval / sanction of the scheme.

The scheme documentation is then distributed to the scheme participants and advertised depending on the circumstances.

(f) As to the Sparrow family continuing to run BP during the restructuring process, this can only occur if the company doesn't enter into provisional liquidation. As noted above however, in order to get the benefit of the court ordered stay, which BP will need in order keep the enforcement and filing of its creditors' claims at bay, it will need to enter into provisional liquidation.

When provisional liquidators are appointed, the court will determine (as part of that application and subsequent order) which powers (if any) will remain with the existing directors of the Sparrow family, and which will be vested in the provisional liquidators. Depending on the past conduct of the Sparrow family directors, and whether or not their actions have contributed to the losses that the company has incurred, in some circumstances the Court will decide to relieve the directors of control entirely. Given that the rapid downturn in business was as a result of the collapse of tourism due to COVID, which is largely out of the control of the Sparrow family directors, and evidently, up until the time of COVID the business was successfully managed and expanding, the Sparrow Family directors may have some grounds upon which they can demonstrate to the Court that they remain capable of working in the best interests of the company and its creditors, and that they should be permitted to remain in management, even to a limited extent and working with the provisional liquidators.

(g) On the assumption that the Cayman Islands Court has jurisdiction, the court will consider the following factors before approving the proposed restructuring:

1. Firstly, at the convening hearing when then the Court first considers the application for convening meetings to agree the scheme, it will give close consideration to issues of creditor class composition, any jurisdictional issues, the adequacy of the scheme documentation and notice. At this stage, the Court must be satisfied that the scheme document and supporting explanatory statement contain all the reasonably necessary information to enable the scheme creditors to make an informed decision about BP's restructuring proposals.

2. If the scheme gains the necessary creditor support through the scheme meetings, then it will come back before the court for sanction. This step must occur in order for the scheme to become binding (section 86 (2) of the Companies Law). Before the court sanctions the scheme, it will closely consider the compliance of the convening orders, whether the majority fairly represent the class, whether the arrangement (having regard to the alternatives) is such that an intelligent, honest member of the class convened, acting in his own interest, might reasonably approve it.

Finally, the Court will consider whether the terms of the scheme are fair and if it is satisfied of that, along with the matters discussed above, then the Court will normally proceed to approve the terms of the scheme.

**\* End of Assessment \***

Commented [BT20]: Total marks for this candidate = 44.5