



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 5D

GUERNSEY

This is the **summative (formal) assessment** for **Module 5D** 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 5D. 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: **[studentID.assessment5D]**. An example would be something along the following lines: 202122-336.assessment5D. **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 “studentID” 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 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. 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 **8 pages**.

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total]

Commented [DJ1]: 10/10

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

Which one of the following statements **correctly describes** the Guernsey legal system?

- (a) Guernsey is bound by decisions of the English Court of Appeal.
- (b) UK legislation is directly applicable in Guernsey.
- (c) Guernsey law is often influenced by the common law of other Commonwealth jurisdictions.
- (d) Customary law in Guernsey cannot be altered by legislation.

Commented [DJ2]: Correct

Question 1.2

Which one of the following **is not** a fiduciary duty of a director?

- (a) Exercise independent judgment.
- (b) Avoid conflicts of interest.
- (c) Act *bona fide* in the best interests of the company.
- (d) Act with skill and care.
- (e) Act for proper purposes.

Commented [DJ3]: Correct

Question 1.3

Which one of the following statements **is correct** in respect of the order of priorities in a liquidation in Guernsey?

- (a) The *pari passu* principle affects the rights of secured creditors.
- (b) Preferential debts come first in the order of priority.
- (c) There is no preferential treatment given to employees.
- (d) Debts in a certain class are given priority in relation to the time of their creation.
- (e) Rent due to a landlord has priority among preferential debts.

Commented [DJ4]: Correct

Question 1.4

Which one of the following **is not** a standalone ground for the making of a compulsory winding up order as set out in the Companies Law?

- (a) The company has is unable to pay a dividend to members.
- (b) The company has failed to send its members a copy of its accounts or reports under specified provisions of the Companies Law.
- (c) The company has, by special resolution, resolved to be wound up.
- (d) The company suspends business for a year.
- (e) The company is unable to pay its debts as they fall due

Commented [DJ5]: Correct

Question 1.5

Which one of the following statements about Schemes of Arrangement is **incorrect**?

- (a) The process is broadly the same as that in the UK.
- (b) At the Court-convened meeting of creditors / members, a majority in number representing not less than 50 per cent in value of the members present and voting must approve the scheme before it is sanctioned by the court.
- (c) Notice of the meeting of the members of the company must be sent to each creditor or member.
- (d) A scheme may be used in conjunction with an administration.
- (e) A scheme could be used for restructuring.

Commented [DJ6]: Correct

Question 1.6

Which of the following types of security can be effectively taken over Guernsey **immovable property**?

- (a) A fixed charge / mortgage.
- (b) A lien.
- (c) A *hypothèque* by way of bond.
- (d) A security interest agreement.
- (e) A floating charge.

Commented [DJ7]: Correct

Question 1.7

Which of the following **two statements are correct** in respect of compulsory liquidations?

- (a) There is no statutory moratorium on creditors' claims.
- (b) Once the winding-up procedure has commenced, any transfer of shares is valid for a period of 30 days without the need to seek approval from the liquidator.
- (c) The company must not carry on any business upon the making of a compulsory winding-up order.
- (d) The courts usually impose time frames for the length of liquidation.
- (e) A company is dissolved at the start of the liquidation.

Commented [DJ8]: Correct

Question 1.8

Which one of the following parties **does not** have automatic statutory standing to make an application for an administration order in respect of a Guernsey company?

- (a) A member.
- (b) An incorporated cell company.
- (c) A prospective creditor.
- (d) A director.
- (e) The Guernsey Registry.

Commented [DJ9]: Correct

Question 1.9

Which one of the following **is not** a ground for setting aside a judgment registered under the Reciprocal Enforcement Law?

- (a) The enforcement of the judgment would be contrary to public policy in the home jurisdiction.
- (b) The courts of the originating country did not have jurisdiction.
- (c) The judgment debtor did not receive notice of the proceedings in sufficient time to enable him / her to defend the proceedings and he / she did not appear.
- (d) The judgment was obtained by fraud.
- (e) The enforcement of the judgment would be contrary to public policy in Guernsey.

Commented [DJ10]: Correct

Question 1.10

Which of the following statements is **incorrect** in respect of misfeasance / breach of fiduciary duty?

- (a) The test for a breach of fiduciary duty is a subjective one.
- (b) Any claim must be brought within three (3) years from the date of breach.
- (c) The court may order the director to contribute towards the company's assets.
- (d) It may arise where a director has breached their fiduciary duty towards the company.
- (e) Any creditor of the company may apply to the court for an order against the director.

Commented [DJ11]: Correct

QUESTION 2 (direct questions) [10 marks]

Commented [DJ12]: 7/10

Question 2.1 [maximum 5 marks]

What are the most common forms of security granted over intangible movable assets in Guernsey? Explain what is required to ensure the security documents are valid and the consequences of failure to comply with any formalities.

There are two common forms of security over intangible movable property which include a security interest under the Security Interests (Guernsey) Law, 1993 (Security Interests Law) and a security under the Law of Property (Miscellaneous Provision) (Guernsey) Law, 1979.

Commented [DJ13]: 1 mark

Security Interests under the (Guernsey) Law, 1993 (Security Interests Law):

- Can be created by a security agreement over any intangible movable property other than a lease;
- Can be created by the secured party in possession of certificates of title or policy documents (under a security agreement); and
- If title to collateral is assigned, express notice in writing of the assignment must be given to the assignee.

Commented [DJ14]: 1 mark

For the security interest to be valid, the security agreement must:

- Be in writing;
- Be dated;
- Identify and be signed by the debtor;
- Identify the secured party;
- Contain provisions regarding the collateral sufficient to enable its precise identification at all times;
- Specify the events which constitute default; and
- Contain provisions regarding the obligation, performance or payment to be secured, sufficient to enable it to be identified.

Failure to comply with any of the above requirements takes the security interest outside of the scope of the Security Interests Law, although not rendering the security agreement void.

Commented [DJ15]: 1 mark

Security Interests under the Law of Property (Miscellaneous Provision) (Guernsey) Law, 1979:

- Considered to be a set-off agreement and an assignment with a condition for reassignment; and

- Relates to agreements where any debt from one party is to be set off against any debt from the other party.

For an assignment to be effective, the following must occur:

- The assignor must execute it in writing; and
- Express notice in writing of the assignment must be served on the debtor, trustee or person from whom the assignor could claim the debt.

Failure to comply with any of the above requirements does not render the assignment as void.

Commented [DJ16]: 2 marks

Question 2.2 [maximum 5 marks]

Guernsey's insolvency regime is often described as being "creditor-friendly". Identify key features of the various insolvency procedures available to companies that support this description.

Key features of the insolvency system that support this claim below:

- No moratorium against the claims of secured creditors afforded by the administration regime in Guernsey;
- The *Saisie* procedure allows for the distribution of the real estate of an insolvent person to two or more creditors;
- Preliminary Vesting Orders are judgments which could be granted in favour of creditors in *Saisie* procedures whereby leave is automatically granted to execute against the debtor's realty (as in the creditor acquires the right to use, let, possess, and receive payment of rent from the realty);
- The *Arret Execution* judgment can be awarded to the creditor which grants the creditor the authority to proceed against the personalty of a debtor (after this judgment is delivered to the HM Sheriff, he will arrest goods from the debtor to the value awarded in the judgment); and
- Licitation is a method used by creditors to enforce a judgment in personal or consumer bankruptcies against jointly owned real estate in *saisie* proceedings;

Commented [DJ17]: 1 mark

Commented [DJ18]: As below, *Saisie* is more of an enforcement method than a pure insolvency regime. However, the points made are creditor friendly. 1 mark

Commented [DJ19]:

Commented [DJ20]: Whilst this is a creditor friendly enforcement mechanism, an *arret* is not really an insolvency procedure.

Commented [DJ21]: The answer could have examined more closely the administration/liquidation regimes and the availability of schemes.

Commented [DJ22]: 11/15

QUESTION 3 (essay-type questions) [15 marks in total]

Question 3.1 [maximum 7 marks]

A creditor wishes to register or enforce an English judgment in Guernsey. Explain whether this is possible and what the creditor would need to do. How would your answer differ if the officeholder sought to register or enforce a judgment from the USA?

England is considered to be a reciprocating jurisdiction under the Judgments (Reciprocal Enforcement) (Guernsey) Law 1957 (the "**Reciprocal Enforcement Law**") which created a right for foreign judgments to be registered in the Royal Court in Guernsey. The creditor would be able to register his judgment under the Reciprocal Enforcement Law because it is an English judgment; however, the judgment must also meet the following criteria:

- It must be a judgment of a superior court having jurisdiction (not an appellate court);
- It must be final and conclusive (as to the parties);
- It must be for a sum of money payable and it must not relate to taxes, fines, penalties, etc.;
- It must be unsatisfied but capable of execution in England (originating country);
- It must not be in respect of a matrimony, administration of an estate of a deceased, insolvency, winding up procedures, guardianship of infants; and

Commented [DJ23]: 1 mark

- It must not be more than six years **old**.

Commented [DJ24]: 1 mark

The English creditor could apply to the Court to register his judgment *ex parte* (meaning that the other side is not present for this specific proceeding). If so, the English creditor must make the application with a certified and sealed copy of the judgment, accompanied by an affidavit which deposes the following:

- The judgment creditor is entitled to enforce the judgment;
- The judgment has not been satisfied (or has parts outstanding which shall be summarised);
- The judgment can be enforced by execution in England;
- The judgment would not be set aside under the reciprocal Enforcement Law if it were registered; and
- The amount of interest due up until the registration will be **specified**.

Commented [DJ25]: 1 mark

The Reciprocal Enforcement Law does not apply to judgments originating from the USA. The registered judgment will be set aside if the Court is satisfied that:

- It is not a judgment to which the Reciprocal Enforcement Law applies (such as the USA);
- The USA court did not have jurisdiction;
- The judgment debtor did not receive notice of the proceedings in sufficient time to bring a defence and he did not appear at the proceedings;
- The judgment was fraudulent;
- The enforcement of the judgment would be contrary to Guernsey public policy; or
- If the applicant did not have rights that vested under the judgment.

However, with regards to a judgment originating from the USA, common law will apply which will require the creditor to sue the debtor for summary judgment. The Guernsey Royal Court will enforce upon a judgment if the following circumstances apply:

- The defendant is a USA resident;
- The defendant selected the USA as the forum for dispute with the plaintiff;
- The defendant voluntarily appeared in a USA court relating to this judgment; or
- The defendant contracted to submit to judgment jurisdiction.

If the defendant submitted to the jurisdiction of the USA and the judgment cannot be impeached, the claim will most likely proceed to summary judgment as the defendant most likely has no **defence**.

Commented [DJ26]: 2 marks. A good attempt but please bear in mind that enforcement under the common law essentially constitutes the commencement of new proceedings and an award of a new judgment which can then be enforced in the same way as any other Guernsey judgment.

Question 3.2 [maximum 8 marks]

Write a short essay on the benefits of using Schemes of Arrangement over other forms of corporate rescue or winding up procedures?

For context, a scheme of arrangement (a "Scheme") is an agreement between a company and its creditors (or members) sanctioned by the court, pursuant to sections 105 to 112 of the Companies Law. A Scheme may provide a benefit when used in conjunction with other processes (such as administration) as a Scheme allows for a moratorium (or an automatic stay) on proceedings against the **company**. A Scheme allows for the company to negotiate a compromise with its creditors and members (or each class thereof) which can be sanctioned by the Court thereby making the arrangement binding on all creditors (secured and preferential) and **members**. A Court will consider the following characteristics when discerning whether to sanction a Scheme, such as whether:

Commented [DJ27]: 1 mark

- The company's creditors or members should actually belong to a different class, based on their interests;

Commented [DJ28]: 1 mark

- Each creditor/member was properly represented by those in attendance at the a meeting convened by the Court which requires a majority in number representing 75% or more in value of the members present and voting to approve the Scheme in order to receive sanction from the Court; and
- The Scheme has been crafted such that an “intelligent and honest man might approve.”

The Scheme has several advantages in that can be cost-effective and help a company avoid insolvency proceedings. It also allows the company to continue trading and its directors the time necessary to re-organise the company without threat of creditor action (with reference to the moratorium as noted above). The Scheme does not require a thorough investigation of the company’s affairs (in contrast to an administration or a liquidation) and provides more of a chance for the company’s members to receive an increased return on their investment and its creditors to receive a higher payout on their debt. Lastly, the Scheme also provides benefits to the company’s directors as they will not be vulnerable to personal liability if the Scheme is agreed as they undertook measures to keep the company out of insolvency.

Commented [DJ29]: 1 mark

Commented [DJ30]: 1 mark

A Compulsory Liquidation, in contrast to the Scheme, puts the company under supervision by a liquidator and the Court, usually extends the timeline of the proceeding, forces the company to cease carrying on business in normal course, is much costlier than a Scheme, provides no protection to directors (regarding their personal liability for wrongful/fraudulent trading) and results in the dissolution of the company at the end of the liquidation. Much like a Compulsory Liquidation, a Voluntary Liquidation results in the dissolution of a company at its end.

As the objectives of Compulsory and Voluntary Liquidations are to permanently end the company, rather than rescue a struggling business, they should not be considered a corporate rescue procedure. As an added note, these liquidation processes also do not provide a company with an automatic moratorium, as a Scheme would do.

Commented [DJ31]: 1 mark

Another form of corporate rescue is the Administration, which is the most utilized process in Guernsey as it relates saving a struggling company as a going concern. An Administration application must statutorily be served on more parties than that of a Scheme (including the GFSC and the Registrar of Companies). A successful order for Administration also seizes control of a company’s assets and affairs from its directors and provides them to an Administrator under supervision by the Court. An Administrator does not need to take input from the company’s creditors or members into his processes whilst a Scheme incorporates a compromise between a company and its creditors/members. Also, importantly, is an application for Administration is discharged, the company is placed into liquidation which is not the case for a Scheme.

Commented [DJ32]: 1 mark

Commented [DJ33]: This is not always the case as the company can survive an administration and be handed back to its management albeit this is rare. Generally this was a good and well thought out answer.

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

Commented [DJ34]: 5/15

Pam and Jim have been asked to consider taking an appointment as insolvency officeholders over Munder & Diffilin Limited (M & D), a Guernsey incorporated company specialising in selling office supplies. Michael and Dwight were the company’s only members and directors.

For the last 18 months, the company has been experiencing financial difficulties as a result of the implementation of an expensive online sales platform which failed to deliver the promised increase in sales and profitability.

The platform was designed and built by Scranton Software Limited (Scranton), a company registered in England. Scranton invoiced M & D in the sum of £250,000 three (3) months ago. Scranton is owned by Ryan (Michael's son).

Following the failed launch of the website, it was obvious that M & D had cash flow issues in that it could not meet its day to day liabilities and that insolvency was inevitable. Michael and Dwight thought it would be a good idea to get cash quickly injected back into the company and took out a short term loan from a friend, Toby. The loan was primarily used to discharge the debt to Scranton.

The company now has no cash or liquid assets and cannot pay its major supplier that is owed £500,000. It also cannot meet this month's salaries, rent and other trade debts.

It is, however, understood that a small tweak to the sales platform could very easily return D & M to profitability if it can be protected from action by its creditors.

Jim and Pam have been approached by Michael to help navigate the crisis. Dwight has absconded to his farm in Scotland, taking with him various items of company property and valuable information.

Help Jim and Pam to advise on the following issues:

- (a) The formal insolvency proceedings available to M & D under Guernsey law and the most appropriate course to follow in the circumstances. Your answer should draw support for your conclusion from the facts set out above.
- (b) What, if any, potential claims the insolvency officeholders may wish to investigate following their appointment. For these purposes, you may assume that M & D will ultimately be placed into compulsory liquidation.
- (c) How Jim and Pam could seek assistance overseas in dealing with Dwight.

a) The formal insolvency proceedings available to M&D are a Compulsory Liquidation and a Voluntary Liquidation. The most appropriate course to follow would be to have the company placed into a Compulsory Liquidation. The main necessity for M&D is to get an automatic moratorium which is not offered by either a Compulsory or a Voluntary Liquidation; however, in the case of a Compulsory Liquidation, a creditor can apply to the Court before the winding-up order is finalised for an order restraining any pending actions or proceedings against the company. Also, given that the Company's director Dwight has retreated back to his farm with company property, creditors of the company would feel safer knowing that a court-appointed liquidator has taken control of the company from its former directors, and a liquidator could go after Dwight for the stolen company property and potentially any transactions made briefly before the liquidation commenced (such as the loan received from Toby or the Scranton loan) if authorised by the Court to do so. In addition, there is no requirement for independence as it relates to Voluntary Liquidations and a creditor (such as Toby) could apply to appoint Dwight as the voluntary liquidator. For these reasons, Michael should request that the company is placed into Compulsory Liquidation rather than Voluntary Liquidation

An Administration would most likely not be applicable in this situation given that M&D would not pass the solvency test as it is not able to pay its debts as they become due and it has no liquid assets and over \$500,000 in liabilities. Even though a "small tweak" to the sales platform could theoretically provide value to the company, it is not a sure fix to the company's solvency problems and would not hold up with the Court.

Commented [DJ35]: There are several issues with this answer. Whilst it is certainly correct that compulsory liquidation looks favorable to a voluntary liquidation (not least because of the mismanagement issues), administration seems the better choice. The fact that the company is insolvent does not preclude an administration order from being made and if, in fact a prerequisite for it. It does appear that at least on of the statutory purposes may be achieved. Please also note that it is the debtor that needs to apply for a stay of proceedings in a compulsory winding up. Members choose the liquidator in a voluntary winding up.

b) As noted above, the liquidators may wish to investigate a claim against Dwight for stealing the company property he brought with him to the farm. This claim against Dwight could be for misfeasance or a breach of fiduciary duty as a former director of the company, pursuant to section 422 of the Companies Law as he has appropriated the company's assets and there is no reason to see that Dwight made the decision to steal the assets in the best interests of the company. If the claim is successful, the Court may order Dwight to return the property or contribute sums towards the company's assets, among other **acts**.

Commented [DJ36]: 1 mark

The liquidator could also apply to the Court for an order to set aside a transaction that appears to be have made in preference, such as the loan provided by Scranton, which is owned by the son of Michael, the company's former director. This relationship could deem Ryan, Michael's son, as a "connected party". An order from the Court could make Michael personally liable for this loan or restore the company to its financial position before the **preference**.

Commented [DJ37]: You are right o have identified a preference issue here but it is the repayment of the loan rather than its granting which is the major issue from that perspective. There may, of course, also be an issue for the directors in having taken on new debt when insolvency seemed inevitable. 1 mark

c) In order to deal with Dwight, who is in Scotland, the liquidators could seek to obtain a judgment in Guernsey in relation to the misappropriation of assts by Dwight and to restore an equivalent monetary sum to the value of the stolen property to the company. The liquidators could utilise the Reciprocal Enforcement Law (discussed earlier in this assessment) given that both Guernsey and Scotland are reciprocating jurisdictions. The leave of the Court will not be required given that the judgment debtor is out of the Guernsey jurisdiction. If the judgment meets the various criteria as set out earlier in this assessment, then the Scottish Courts should provide assistance on the enforcement of this **judgment**.

Commented [DJ38]: 1 mark

Section 426 of the UK Insolvency Act provides for the courts in reciprocating jurisdictions to provide assistance to one another in insolvency matters. In order to seek recognition of the Guernsey judgment, the officeholder could apply to the Guernsey Royal Court, which (if accepted) would issue a letter High Court of Scotland seeking assistance under section 426 of the UK Insolvency Act 1986. The request will be issued by the order of the Scottish Court, which would have jurisdiction to levy a judgment on Dwight as he has absconded to Scotland, and then an application is made seeking assistance of the Scottish Court "for the order as sought in the request (application)". Given the Guernsey officeholder's powers to investigate are somewhat limited, the ability to apply certain provisions of a foreign (Scottish) insolvency law will be an advantage to the **officeholder**.

Commented [DJ39]: 2 marks

It is noted that the common law approach would only provide limited powers to an officeholder which are the powers available to them under Guernsey's domestic insolvency law, therefore, Jim and Pam should seek to utilise section 426 of the UK Insolvency Act which will provide more flexibility with regards to their **powers**.

Commented [DJ40]: 1 mark

*** End of Assessment ***

Commented [DJ41]: Total mark awarded 33/50