



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]: 9/10

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.

In Guernsey there are two common forms of security available in respect of intangible movable assets deriving from the following:

1. Security Interest (Guernsey) Law, 1993
2. Law of Property (Miscellaneous Provisions) (Guernsey) Law, 1979

Commented [DJ13]: 1 mark

Taking each of these in turn, a security interest under the Security Interest (Guernsey) Law is by way of a security agreement over any intangible movable asset, with the exception of leases.

The security agreement must contain certain clauses/information to ensure validity:

- Dated
- Signed by both parties
- Physical written agreement
- Event of default provisions
- Identifies the obligation to the secured party
- Identifies the secured asset

Commented [DJ14]: 1 mark

If the security agreement fails to comply with the above – it does not automatically become void; however, it does fall outside of the Security Interest (Guernsey) Law.

Commented [DJ15]: 1 mark

The second form under the Law of Property Law is effectively a set-off and assignment of mutual debts agreement. The two parties set of their mutual debts and the balance post set-off can then be assigned to a third party.

For the assignment to be valid the assignment must be in writing and notice of the assignment must be given to the debtor.

Commented [DJ16]: 1 mark

Failure to comply with these requirements does not in itself make the assignment void.

Commented [DJ17]: 1 mark

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.

Unlike in a UK liquidation, both compulsory and voluntary, there is no automatic moratorium in Guernsey on appointment of a liquidator and therefore creditors are still able to bring actions against a company and its **property**.

Commented [DJ18]: 1 mark

An automatic moratorium does come into effect in a Guernsey administration but does not apply to a secured **creditor**.

Commented [DJ19]: 1 mark

A creditor has the right to make an application to have a company wound up by the Court.

A creditor, including prospective and contingent creditors, has the right to make an application to appoint an administrator.

Commented [DJ20]: 1 mark

In Guernsey there appears to be more focus on the returns to creditors rather than the rescue of the company and they do not have procedures equivalent to a company voluntary arrangement or a restructuring plan, both of which are generally viewed as debtor friendly **procedures**.

Commented [DJ21]: 1 mark

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

Commented [DJ22]: 13/15

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?

An English judgment can be enforced in Guernsey; under the Judgements (Reciprocal Enforcement) (Guernsey) Law 1957, the judgment can be **registered**.

Commented [DJ23]: 1 mark

England is a reciprocating **jurisdiction**.

Commented [DJ24]: 1 mark

For an English judgment to be eligible for registration it must;

- Be final and conclusive
- Be capable of enforcement in England
- Be for a sum of monies, but not to include debts to the Crown
- Be brought within 6 years of being handed down
- Not be in relation to; matrimonial disputes, the estate of a deceased, winding up of a company
- Have been handed down by a superior court in **England**.

Commented [DJ25]: 1 mark

The judgment creditor can make an ex parte application for the registration of the judgment. The application must be accompanied by an affidavit that confirms the following:

- The creditor is entitled to enforce the judgment
- The judgement is capable of being enforced in England

- That all or some of the judgment debt remain outstanding
- The sums owed plus interest
- That the registration is not liable to be set aside under the applicable law.

Commented [DJ26]: 1 mark

If the judgment creditor wanted to enforce a US judgment, it would not be able to rely on The Judgement (Reciprocal Enforcement)(Guernsey) Law 1957 as the US is not a reciprocating jurisdiction.

Commented [DJ27]: 1 mark

However, it is possible to enforce a US judgment in Guernsey under common law.

The US judgment is viewed as a debt and the creditor can sue for non-payment of that debt and obtain summary judgment in Guernsey which can subsequently be enforced.

Commented [DJ28]: 1 mark

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?

A Scheme of Arrangement ('Scheme') is not regarded as an insolvency process and therefore reputationally contains less stigma for the company than using an administration as a means of rescue.

Commented [DJ29]: 1 mark

Given that it is not viewed an insolvency process the ability to have a Scheme recognised in other jurisdictions is generally more certain of success.

Commented [DJ30]: I would have been interested to see this statement expanded albeit doing so may be beyond the scope of the syllabus.

A Scheme is a rescue tool which allows the directors of the business to retain control whilst the restructuring is implemented. In a liquidation or administration, the directors' powers cease on the appointment of an officeholder.

Commented [DJ31]: 1 mark

Given the lack of prolonged involvement of an officeholder or advisers, the costs associated with a Scheme tend to be lower than those of a liquidation or administration.

Commented [DJ32]: 1 mark

If sanctioned by the court, the Scheme is binding on all members and creditors, including preferential and secured creditors, which allows the directors breathing space to turn the business around without risk of enforcement action. Whilst an administration can be used as a rescue procedure it does not provide for a moratorium against the secured creditor(s).

Commented [DJ33]: 1 mark

A Scheme can be flexible in its design and therefore can be tailored to sui the needs of the company.

Commented [DJ34]: 1 mark

A Scheme will generally provide for a better outcome for all members and creditors than the alternative insolvency proceeding.

Commented [DJ35]: 1 mark

From a directors point of view, in addition to the above a Scheme could be viewed as more attractive as there are no officeholder investigations.

Commented [DJ36]: 1 mark

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

Commented [DJ37]: 11/15

Pam and Jim have been asked to consider taking an appointment as insolvency officeholders over Munder & Diffin 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) There are three insolvency proceedings available to M&D under Guernsey Law, which are:
 - Compulsory liquidation
 - Voluntary liquidation
 - Administration

Taking each in turn, Michael can apply to Court as a director or member of M&D and must provide an affidavit to support the application which outlines why the company should be placed into **compulsory liquidation**. The basis on which Michael can make this application is that M&D is unable to pay its debts as and when they fall due given the outstanding amount of £500,000 due to its main supplier and its inability to meet this month's wages, rent and trade payments.

A **voluntary liquidation** may be possible if an event has occurred which under either M&D's memorandum or articles provides that the company can be dissolved. That event may be that the company is unable to pay its debts as and when they fall due. A review of the memorandum and articles would be necessary to determine this.

Commented [DJ38]: 1 mark

If such an event had occurred, the company, M&D, can pass an ordinary or special resolution that the company be voluntarily wound up. Given that Dwight has absconded we would need to ensure that Michael had the requisite voting rights to pass such a **resolution**.

Commented [DJ39]: This is not quite right. The members can always pass a special resolution to wind up without any independent reason being necessary. Of course, in his situation the insolvency would be a justification.

As a director or member, Michael can make an application to court to place the company into **administration**. The application would need to be supported by an affidavit stating why administration is the most appropriate procedure for the company.

The affidavit must also state what the purpose of the administration would be, including evidence to support the purpose:

- The survival of the company and the whole or part of its business' or
- Better realisations than would be achievable in a **liquidation**.

Commented [DJ40]: 1 mark

Michael would also need to evidence that M&D is unable to pay its debts as and when they fall due.

In this scenario, the most appropriate course of action would be for Michael to make an application to place the company into administration. Given that there appears to be a relatively simple fix to the online platform issue which would in turn return the company to profitability, it would appear that the survival of the company is a realistic **objective**.

Commented [DJ41]: 1 mark

The administration itself would provide the company with protection from the company creditors (there does not appear to be a secured creditor) whilst the officeholder is able to return the company to **solvency**.

Commented [DJ42]: 1 mark

- b) **Wrongful Trading** – the company has been experiencing financial difficulties for 18 months. The officeholders may want to attempt to establish the time at which the directors knew, or ought to have known, that the company was or could not avoid becoming **insolvent**.

Commented [DJ43]: 1 mark

From that point, the officeholders could investigate the actions and decisions made by Michael and Dwight and whether appropriate steps were taken to minimise the loss to **creditors**.

Commented [DJ44]: 1 mark

If a successful claim was brought Michael and Dwight may be liable to contribute to the company's assets.

Preference – The outstanding invoice due to Scranton of £250,000 was discharged by taking on further indebtedness. The invoice was issued 3 months ago when the company was experiencing financial difficulties. The payment to Scranton improved its position as a creditor relative to the other creditors of M&D at a time when the directors knew that the company could likely not avoid **insolvency**.

Commented [DJ45]: 1 mark

Given that Scranton is owned by Michael's son it is a connected party and the desire to prefer is **assumed**.

Commented [DJ46]: 1 mark

If a successful preference claim is made the court can make any order it sees fit to restore the company to the position prior to the preference having been made and the director can be personally **liable**.

Commented [DJ47]: 1 mark

Misfeasance – this should be investigated against Dwight who has absconded to Scotland with company assets and valuable information. If it becomes apparent that

Dwight is not willing to return the assets and provide the information to the officeholders they may have a claim against him for misfeasance.

If successful the court may order Dwight to; repay, restore or account for the property, make a contribution to the company assets and calculate any interest incurred.

- c) Jim and Pam could take action against Dwight in Guernsey for misfeasance obtaining Guernsey judgment and seek to enforce that judgment in Scotland as a reciprocating jurisdiction.

Jim and Pam could apply to the Guernsey Court for a letter of request to the Scottish Court to allow them to enforce their powers in Scotland. The request to enforce their powers in Scotland should be limited to the powers they have under Guernsey Law and not look to obtain additional powers that may be available under Scottish insolvency law.

*** End of Assessment ***

Commented [DJ48]: 1 mark – I wonder if Michael and Dwight might both have been subject to scrutiny for general breach of duty claims for negligence.

Commented [DJ49]: 1 mark

Commented [DJ50]: The answer does not consider recognition under the S. 426 route which might allow the use of wither/or powers. I would have liked to see a little more detail here.

Commented [DJ51]: Total mark awarded 43/50