



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]

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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.

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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.

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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.

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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

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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.

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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.

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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.

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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.

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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.

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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.

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QUESTION 2 (direct questions) [10 marks]

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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.

Under Guernsey law, the main forms of security granted over intangible movable assets are:
(1) a security interest in terms of the Security Interests (Guernsey) Law, 1993 (the "**Security Interests Law**") which is created by way of an agreement over a particular intangible moveable property. This agreement is a **security interest agreement ("SIA")** and can be used to create a security interest over any intangible moveable property other than a lease. The security interest created has a possessory nature to it and the secured party will need to take possession of the interest. For example, if the security interest was created over shares in a Company, the secured party under the terms of the security interest agreement will want to take possession of the share transfer form in relation to those shares as well as the existing share certificate in respect of those shares. Another example would be to take possession of the policy documents to which the security relates (for example a life insurance policy). A security interest pursuant to a Guernsey law SIA, may be assigned to a third party, but express written notice of such an assignment will be required by the assignees thereto.

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The requirements for a valid SIA under Guernsey law are that:

- (a) it must be in writing;
- (b) be dated;
- (c) identify and be signed by the debtor;
- (d) identify the secured party;
- (e) contain provisions regarding the collateral sufficient to enable its precise identification at any time;
- (f) specify the events which are to constitute events of default, and
- (g) contain provisions regarding the obligation payment or performance of which is to be secured, sufficient to enable it to be identified.

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A security interest may be created before or after the obligation, whose payment or performance is to be secured by it comes into existence, provided that the abovementioned requirement at (g) can be and is complied with. Failure to comply with the abovementioned requirements does not necessarily render the

security agreement void, but it may be said that the security does not fall within the scope of the Security Interests Law which may affect how the security can be enforced should it get to that point. The matter may need to be referred to the Court for a resolution should this be disputed.

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(2) security under the Law of Property (Miscellaneous Provisions) (Guernsey) Law, 1979 (the "**Property Law**") which is created by way of a **set-off agreement**. The Property Law provides that "debt" includes all debts and liabilities, present or future, certain or contingent, but does not include demands in the nature of unliquidated damages arising otherwise than by reason of contract or breach of trust.¹ In essence, this will be an agreement between two parties whereby, in respect of mutual dealings between them, the debt owing by one party to the other, is set off against another debt owing between the parties. The Property Law provides that the effect of such an agreement is, unless the parties have expressly or by implication agreed to a different effect, that the only action which may be taken at any time in relation to what would otherwise be those mutual debts is in respect of the balance (if any) then due after that set-off. This provision is subject to:

- in a case where the affairs of one party have been declared to be in a state of "désastre" at a meeting of his arresting creditors held before a Jurat as Commissioner of the Royal Court, then where the Jurat presiding at such a meeting has reasonable cause to believe that any such agreement was entered into by the party whose affairs have been declared to be in a state of "désastre" (the "**Debtor**") less than six months before the date of the meeting, the matter of the agreement shall be referred to the Royal Court and where the Royal Court is satisfied that the agreement was entered into with a view of giving to the other party a preference over the other creditors of the debtor, the Royal Court may make an order directing that the agreement shall be treated as being fraudulent and void as against the other creditors of the debtor;² and
- in ascertaining the balance due as described above, if a contingent liability is to be taken into account the contingency is to be treated as having occurred, and if a future liability is to be taken into account it is to be treated as if presently payable.³

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The right to a debt under the set-off agreement may be assigned to a third party so long as the assignor executes such an assignment in writing and an express notice in writing of such an assignment is served on the debtor (or other person from whom the assignor would be able to claim from). A draft of such notice is usually included in the set-off agreement as a schedule for future use if required. Failure to comply with the abovementioned requirements for the assignment does not necessarily render such an assignment void.

The following must be satisfied before a set-off agreement can be effective and be enforced: (a) it must be executed by the assignor in writing; and (b) express notice in writing of the assignment must be served on the debtor, trustee or other person from whom the assignor would have been able to claim the debt or chose in action.

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¹ The Law of Property (Miscellaneous Provisions) (Guernsey) Law, 1979 (the "**Property Law**") at section 1(5).

² The Property Law at sections 1(1)(a) and 1(2).

³ The Property Law at section 1(1)(b).

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.

Guernsey's insolvency regime is described as being "creditor friendly" for the following reasons:

- (1) There is no moratorium in either a compulsory or voluntary liquidation.
- (2) In Administration proceedings, an indirect moratorium operates in that once an administration order is made as no resolution may be passed or order made for the winding up of the company, and no proceedings can be commenced or continued against the company except with the consent of the administrator or the leave of the Royal Court. This is essentially a creditor friendly moratorium, in that creditors with security and creditors with set-off may enforce their rights regardless of the moratorium.
- (3) Any creditor, including contingent and prospective creditors can make an application for an administration order.
- (4) A creditor can apply to the Royal Court for an order regulating the future conduct of the administration of the company by the Administrator.
- (5) A company which is being or which is to be voluntarily wound up may, by special resolution, delegate to its creditors the power to, inter alia, appoint a liquidator or fill a vacancy and enter into arrangements effecting the exercise of the liquidators powers.
- (6) An order placing a company into liquidation applies to all the company's creditors, notwithstanding the fact that they did not present the application.
- (7) In compulsory liquidation, there is no specific time period and the Royal Court does not tend to impose time limits giving the creditors flexibility and enough time to bring claims.
- (8) Creditors are able to protect/preserve their interests in a company (and seek to recover their debts) quickly in that applications to place a company in liquidation are typically filed on a Thursday and heard the following Tuesday (so a company can be placed into liquidation within a few days). The Royal Court is also able to sit on an urgent basis if required.
- (9) The pari passu principle is applicable to Guernsey company insolvency whereby subject to any preferential payments, all creditors participate in the common pool of assets in proportion to the size of their admitted claims.
- (10) A company may be forcibly wound up in many other instances for the benefit of its creditors and not only when it is insolvent, for example when the company has failed to comply with a direction of the Registrar of Companies to change its name or to hold a general meeting of members.

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

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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?

In Guernsey, the Judgments (Reciprocal Enforcement)(Guernsey) Law, 1957 (the "Enforcement Law") allows certain foreign judgment to be enforced in Guernsey, provided

they are first registered by the Royal Court of Guernsey (the "**Royal Court**"). Once registered, the judgment will have the same effect (from date of registration) as if the Royal Court granted it. The Enforcement Law has its limitations in that only judgment from reciprocal jurisdictions can be registered following the Judgments (Reciprocal Enforcement)(Guernsey) Rules, 1972 (the "**Enforcement Rules**"). The current reciprocal jurisdictions include England & Wales. As such, the creditor would be able to register (and then enforce) its English judgment in Guernsey, subject to the correct registration procedure being followed.

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In order to have a judgment registered and enforced in Guernsey the creditor would need to apply to the Royal Court and show that the judgment, inter alia:

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- a) was obtained from a court in a reciprocal country (of which England is one);
- b) was obtained from a superior court with jurisdiction (except a judgment handed down on appeal from a court which is not a superior court);
- c) is final and conclusive between the parties;
- d) be for a sum of money payable;
- e) is unsatisfied but capable of execution on the country of the original court;
- f) is not more than 6 years old.

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The application by the creditor can be ex parte and will need to be supported by affidavit (explaining that, inter alia, the creditor is eligible to enforce it, it is unsatisfied, it can be executed in the original country and setting out the sum claimed). The Affidavit will also need to exhibit a certified and sealed copy of the judgment.

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Where the judgment is not from a reciprocating country (like the USA) the officeholder will need to follow the common law subject to certain conditions (such as (i) the foreign court must be of competent jurisdiction and (ii) the conflict of laws rules will apply). The Royal Court in *Emanuel v Symon* 1908 1 kb 302 has previously held that the Royal Court will only enforcement a judgment from a non-reciprocating country in the following circumstances:

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- a) The defendant is resident in the foreign jurisdiction;
- b) The foreign jurisdiction was selected as the forum for the dispute by the defendant; and
- c) The defendant contract to submit to judgment jurisdiction.

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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?

Under Guernsey law, in accordance with sections 105 to 112 of the Companies (Guernsey) Law 2008 (the "**Companies Law**"), a Scheme of Arrangement (a "**Scheme**") is compromise or arrangement between a company and its creditors or members which is sanctioned by the Royal Court. One of the main advantages of Schemes in Guernsey is that the provisions regulating Schemes are quite wide. If we take a Scheme between a company and its members in the context of a takeover bid one of the main advantages of using a Scheme as opposed to other forms of takeovers or merger alternatives, is that once a Scheme is sanctioned by the Royal Court, it becomes binding on the members of the company are bound by that decision despite perhaps having voted against a Scheme in the first instance. Although a Scheme requires consent of the majority of the members of the company (ie 75% or more), this creates a level of certainty for the bidder, that 100% of the company will be acquired. At first, it appears more cumbersome than merely securing control of the company by way of a traditional takeover by means of approval of the bid by 50% of the voting rights in the company, but this control does not provide the same level of certain as with the 100%

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acquisition of the company you would get from a Scheme. In a traditional takeover bid, in order to acquire 100 per cent of the company, the acceptance of not less than 90% of the members entitled to vote will need to approve the bid, before the remaining non-assenting members can be dragged along.

Commented [DJ27]: This is a very good observation although not strictly relevant to the question – 1 mark

In the context of a Scheme where the stakeholders are creditors (instead of members per the above example), the advantage of binding all stakeholders to the decision of 75% remains. If after having gained the relevant approvals of the relevant stakeholders involved in the company, once the Royal Court sanctions the Scheme, all of the creditors whether secured, preferential or not, are bound by the Scheme. Another main advantage of a Scheme is that there is no automatic stay on proceedings. This means that whilst a Scheme is in place, the company is still able to continue trading and doing business in order to assist with the securing financial stability, put colloquially "to turn things around". This is in contrast to insolvency or winding up proceedings where the aim is not to save the business but rather to distribute the assets of the company appropriately amongst the company's creditors. The company's ability to continue to function with the object to secure financial stability with a Scheme in place, generally also allows the members to receive better return on their investment and for creditors to receive more in repayment of the debt owed to them, than would otherwise be the case with other insolvency measures. A Scheme is also less expensive than entering into formal insolvency proceedings (including both administration and liquidation) and does not require the same level of investigation into the company's business affairs, which are cumbersome, time consuming and increase costs.

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In relation to the directors of the company, a Scheme provides certain advantages to them too. If a Scheme is agreed, the directors of the company will be considered to have taken the sensible steps to avoid insolvency in the eyes of the law and accordingly will not be exposed to personal liability for wrongful or fraudulent trading. Further, during the lifespan of a Scheme the directors of the company are afforded more time to re-organise and restructure the company as appropriate to mitigate any further losses and to increase profitability for the company's members, without the threat of creditor action.

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

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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.

Answers:

(a) Having considered the above, and noting that we do not know what M&D's memorandum and articles of incorporation say about placing the company in voluntary liquidation (in particular whether (i) the company's started duration has expired; and (ii) an event has occurred which allows for the company to be placed in liquidation), M&D currently have the following two insolvency procedures available to **them**:

1. Compulsory Liquidation (because M&D can be compulsory wound up if the Company has by special resolution resolved that the company be wound up by the Court or if it is just and equitable to do so); and
2. Administration (because M&D will soon fail to satisfy the solvency test OR M&D could be saved).

Since Dwight has absconded to his farm in Scotland, and assuming Dwight (as director and shareholder of the Company) has to approve the special resolution placing the company into liquidation, it may be difficult for the Company to pass a special resolution resolving that the company be placed in liquidation. M&D could however, acting through Michael, apply to the Royal Court to have M&D placed into liquidation on the grounds that it would be just and equitable to do **so**.

However, given that M&D could easily return to profitability (subject to small tweaks to the sales platform), Pam and Jim should apply to the Royal Court for an administration order, especially given the administration order (and administration process) has the potential to result in the survival of the **company**. A further advantage to following the administration route is that during the period between the presentation of an application for an administration order and the making of such an order, or the dismissal of the application (and during the period for which an administration order is in force):

No resolution can be passed or order made for the company's winding-up (protecting M&D against any compulsory winding up proceedings being brought by M&D major supplier who is owed £500,000 or the bank from which the loan to pay Scranton was obtained);

Commented [DJ35]: Please note that voluntary liquidation is always an option where the members pass a special resolution authoring its commencement.

Commented [DJ36]: This is a good observation but Michael could still circulate the resolution to members as the remaining director. Michael could, of course, also apply for a compulsory liquidation on the grounds the company is insolvent.

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No proceedings (by either the bank or the major supplier) can be commenced or continued against M&D except with the administrator's leave.

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The administration order will also allow M&D (or the Administrator) to seek to recover the assets appropriated by Dwight and/or prevent Dwight from selling and/or using the valuable information of M&D.

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(b) Preference – In respect of the contract that M&D entered into with Scranton, Pam and Jim as liquidators of M&D may apply to the Royal Court for an order to set aside the contract on the basis that M&D became insolvent as a result of the transaction. It is clear from the facts that since entering into the Scranton contract, M&D began struggling financially directly due to the failure of the platform's launch and costs. M&D then having decided to pay off debt (Scranton contract) with further debt (loan from Toby) became the nail in the proverbial coffin of the company making it insolvent. The sales platform was expensive, did not produce the results as promised, and shortly after making payment under the contract, M&D became unable to pay its debts as they became due. Generally, any payment made within 6 months immediately preceding the application for a compulsory winding up is vulnerable to be set aside by the Royal Court, however this period is extended to 2 years where the payment was made under a transaction with a connected party to whom preference was given.

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A company is deemed to have given a preference to a person where: (a) that person is one of the company's creditors (or surety or guarantee for the company's debts or other liabilities); and (b) the company does anything or permits anything to be done which improves that person's position in the company's liquidation. M&D can be said to have given a preference to Scranton as it was a creditor under the contract for the provision of the sales platform, and M&D despite being in financial distress proceeded to take out a loan with Toby to discharge the debt owing to Scranton above all other creditors of M&D. This action clearly indicates a "desire" to prefer one creditor above the general body of creditors. As Scranton is wholly-owned by Michael's son Ryan, this may be classified a connected party transaction and accordingly Pam and Jim if successful in proving that a preference has been given to Scranton, they may apply that the Royal Court set aside such payment under the contract as the 2 years period mentioned above will apply.

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Remedy against delinquent officers - In respect of the appropriation of M&D's property and information by Dwight upon absconding from his role of director of M&D, Dwight's actions may be seen as misfeasance or a breach of his fiduciary duties as a director of M&D. As a director of M&D, Dwight owed fiduciary duties to act in the best interest of the company and to act for proper purposes. Pam and Jim may look to section 422 of the Companies Law to apply to Royal Court for an order against Dwight in his personal capacity to recover the loss. Section 422 of the Companies Law provides that where in the course of the winding up of a company it appears that any past or present officer of the company, (in this case Dwight in his capacity as director of M&D) – (a) has appropriated or otherwise misapplied any of the company's assets, (b) has become personally liable for any of the company's debts or liabilities, or (c) has otherwise been guilty of any misfeasance or breach of fiduciary duty in relation to the company, the liquidator or any creditor or member of the company may apply to the Royal Court for an order. Pam and Jim in bringing their application under section 422, will need to prove that Dwight committed the actions in contravention of his fiduciary duties as director using a subjective test, being one where the Royal Court will look at Dwight's state of mind at the time of the breach, and whether in the circumstances it appeared to him that he may have been acting in the best interest of the M&D and for proper purposes. If Pam and Jim are successful if proving the misfeasance or breach of fiduciary duty, the Royal Court may order that Dwight return or account for the property taken or contribute certain sums towards M&D's assets as the Royal Court thinks fit.

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Michael may also find himself liable for a breach of fiduciary duties, making him liable in his personal capacity to M&D, in that he did not attempt to avoid a conflict of interest in exercising his duties. The reason being that Michael, despite knowing that Scranton was owned by his son Ryan, continued to enter into the contract with Scranton (which may not have been in the best interests of M&D) and furthermore, made every effort to pay Scranton under the terms of the contract for the sales platform even when the platform had failed to deliver. It may also be argued that in taking out a loan with Toby in order to pay Scranton's contract was not acting in the best interests of M&D, and Pam and Jim would be entitled to proceed with an action under section 422 of the Companies Law against Michael for breach of his fiduciary duties as a director making him personally liable to M&D for its loss as a result of such breach.

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(c) By way of the Insolvency Act 1986 (Guernsey) Order, 1989 (the "Insolvency Order"), the Royal Court is now able to provide judicial assistance to the Courts of, inter alia, Scotland. The Insolvency Order also allows insolvency practitioners appointed in Guernsey to seek assistance in, inter alia, Scotland. Such assistance will be subject to the officeholder following procedures under section 426 of the UK Insolvency Act, 1986 (the "1986 Insolvency Act").

Commented [DJ48]: 1 mark

In order to make use of the above, Pam and Jim would need to make an application to the Royal Court (under its inherent jurisdiction). The Royal Court, if satisfied, would then issue a letter of request (the "Request") seeking assistance from the Scottish Court under section 426. The Request would be issued by order of the foreign court. The Request would need to be made to the competent court in Scotland who has the appropriate jurisdiction and who is capable of disposing of insolvency matters. Subject to the Courts jurisdiction, the Request would act as authority for the Scottish Court to apply either its own insolvency law or Guernsey insolvency Law. Section 426(5) of the 1986 Insolvency Act provides that the request is "authority for the court to which the request is made to apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction". In exercising its discretion under this subsection, a court shall have regard in particular to the rules of private international law.

Commented [DJ49]: Not quite – the application would actually be made under section 426 as extended to Guernsey.

Commented [DJ50]: 1 mark

Commented [DJ51]: 1 mark. This was generally a very good answer with excellent application of the facts to the relevant law. This was reflective of the overall quality of the paper.

* End of Assessment *

Commented [DJ52]: Total mark awarded 47/50