



## **SUMMATIVE (FORMAL) ASSESSMENT: MODULE 5E**

### **JERSEY**

This is the **summative (formal) assessment** for **Module 5E** on 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 5E.** 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.assessment5E]**. An example would be something along the following lines: 202122-336.assessment5E. **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]**

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 court** would be most appropriate in pursuing enforcement for a claim of JEP 5,000 in Jersey?

- (a) Royal Court.
- (b) Court of Appeal and Privy Council.
- (c) Petty Debts Court.**
- (d) None of the above.

[ANSWER C – Correct]

#### **Question 1.2**

Debtors that can become subject to *Désastre* in Jersey under the Bankruptcy (*Désastre*) (Jersey) Law 1990, include the following:

- (i) A dissolved company that was registered in Jersey under the Companies (Jersey) Law 1991.
- (ii) An individual who was ordinarily resident in Jersey until 18 months before, but has had no connection to Jersey since that time.
- (iii) An incorporated Limited Partnership.
- (iv) An individual who has never been ordinarily resident in Jersey or carried on business in Jersey, but owns movable property in Jersey.

**The answer is:**

- (a) (i), (ii), (iii) and (iv).
- (b) (i), (iii) and (iv).
- (c) (ii) and (iv).**
- (d) (i) and (iii).

[ANSWER D – Incorrect]

### Question 1.3

Which party **cannot** make an application for *Désastre* under the Bankruptcy (*Désastre*) (Jersey) Law 1990?

(a) The Viscount.

(b) The Jersey Financial Services Commission.

(c) A creditor with a claim of at least £3,000.

(d) The Debtor.

[ANSWER A – Correct]

### Question 1.4

Which statutory processes provide a moratorium against action being brought by non-secured creditors?

(i) Summary Winding Up.

(ii) Creditors' Winding Up.

(iii) Just and Equitable Winding Up.

(iv) *Désastre*.

(v) *Dégrévement* or Realisation.

(vi) Debt Remission Order.

(vii) *Remise de Biens*.

(viii) Compromises or Arrangements.

**The answer is:**

(a) (i), (ii), (iii), (iv), (vi), (vii) and (viii).

(b) (i), (ii), (iii) and (iv).

(c) (i), (ii), (iii), (vii) and (viii).

(d) All of the above.

[ANSWER A – Incorrect]

### Question 1.5

Which liquidation processes under Part 21 of the Companies (Jersey) Law 1991, as amended, are available in respect of solvent companies?

- (i) Summary Winding Up.
- (ii) Creditors' Winding Up.
- (iii) Just and Equitable Winding Up.

**The answer is:**

- (a) (i) only.
- (b) (i) and (ii).
- (c) (i) and (iii).**
- (d) All of the above.

[ANSWER D – Incorrect]

#### **Question 1.6**

Which one of the following statements **is correct**?

- (a) Jersey is part of Britain, the UK and the EU.
- (b) Jersey is part of Britain and the EU but not the UK.
- (c) Jersey is part of Britain but not the UK and not the EU.**
- (d) Jersey is not part of Britain, or the UK or the EU.

[ANSWER C – Correct]

#### **Question 1.7**

Which of the following statements **are correct**?

Jersey is an attractive destination for international finance, due in part to its:

- (i) Low tax regime.
- (ii) Political independence.
- (iii) Rapidly expanding economy.
- (iv) Legal and regulatory infrastructure.

**The answer is:**

- (a) (i), (ii), (iii) and (iv).
- (b) (i), (iii) and (iv).
- (c) (i), (ii) and (iii).

(d) (i), (ii) and (iv).

[ANSWER D – Correct]

**Question 1.8**

What type of mortgage can be granted in Jersey, following judgment of the Jersey Court, to allow an unsecured creditor to obtain security over immovable property owned by a debtor?

(a) A conventional hypothec.

(b) A judicial hypothec.

(c) A pledge.

(d) A legal hypothec.

[ANSWER B – Correct]

**Question 1.9**

In which statutory processes is it typical for an independent professional Insolvency Practitioner to be appointed?

(i) Summary Winding Up.

(ii) Creditors' Winding Up.

(iii) Just and Equitable Winding Up.

(iv) *Désastre*.

(v) *Dégrévement* or Realisation.

(vi) Debt Remission Order.

(vii) *Remise de Biens*.

(viii) Compromises or Arrangements.

**The answer is:**

(a) (i), (ii) and (iii).

(b) (ii) and (iii).

(c) (i), (ii), (iii), and (viii).

(d) All of the above.

[ANSWER B – Incorrect]

### Question 1.10

What other responsibilities are overseen by the office of the Viscount, besides insolvency functions?

(a) Coroner.

(b) Data Protection.

(c) Farming and fishing.

(d) Prison services.

[ANSWER A – Correct]

**Question 1: 6 out of 10**

## QUESTION 2 (direct questions) [10 marks]

### Question 2.1 [maximum 3 marks]

**Describe** the powers that are available to a Viscount in respect of a *Désastre* and a Liquidator in respect of a Winding Up.

The powers available to a Viscount's in respect of a *Désastre* includes bringing or defending proceedings in relation to the property of the debtor, compromising debts and claims, voting any shares owned by the debtor, and carrying on the business of the debtor.

The Viscount also has powers to summon any person in, or suspected to be in, possession of information relating to the debtor's activities and to require production of documents.

A liquidator may exercise all the powers as above except for the compromise of any claim by or against the company, or the payment of any class of creditors in full which requires court sanction, or sanction by the liquidation committee or by a meeting of creditors.

**ANSWER:** Viscount also has the power to make compromise or other arrangements with creditors; dispose of property; borrow money; pay creditors; and disclaim onerous property. Liquidator in a summary winding up will have powers only to realise assets, discharge liabilities and distribute assets. Liquidator in a creditors' winding up will have wide ranging powers including all powers of the company required for its beneficial winding up; power to pay creditors; power to disclaim onerous property and power to pursue recovery in respect of antecedent transactions. Liquidators in a just and equitable winding up will have specific powers granted by the Jersey Court (1 mark)

### Question 2.2 [maximum 2 marks]

**Briefly describe** the practical reasons why Jersey may not have a statutory or customary corporate rescue and turnaround procedure equivalent to an English administration or US Chapter 11.

There is an argument that Jersey does not have a statutory or customary corporate rescue/turnaround procedure akin to an administration or US Chapter 11 process, because Jersey is an offshore financial centre whose many companies that are incorporated there, use the jurisdiction for financial structuring or other financial related purposes, for example SPV's, wealth funds, etc which do not have extensive operating needs such as trading companies that can be found onshore. Thus whilst solvent liquidations are high, corporate rescue requirements are much lower.

**ANSWER:** Very good (2 marks)

### Question 2.3 [maximum 3 marks]

Describe the three varieties of mortgage available in Jersey in respect of **immovable property**.

The three types of mortgage available for immovable property are:

1. A judicial hypothec - created by the registration of an acknowledgment document (billet) in the Jersey Public Registry. The instrument of debt or obligation (for example, a bond, promissory note or guarantee) is not itself registered, rather the billet simply acknowledges the source of the indebtedness;



2. A conventional hypothec - created by the passing of a contract before the Royal Court, which contract sets out the terms of the borrowing and includes an express acceptance of the hypothec from the borrower. Once passed before Court, the contract is registered in the Jersey Public Registry, and is available for public inspection; and
3. A legal hypothec – a rare mortgage which arises by operation of law in certain cases.

ANSWER: Very good (3 marks)

**Question 2.4 [maximum 2 marks]**

**Describe** the restricted circumstances in which a Debt Remission Order is available for a Jersey resident under the Debtor Remission (Individuals) (Jersey) Law 2016.

For a Debt Remission Order (DRO) to be available to a Jersey resident, the following restricted circumstances need to be present:

- The debt is less than JEP 20,000;
- S/he has less than JEP 100 in disposable income monthly
- s/he has less than JEP 5,000 in assets; and
- s/he acted in good faith whilst incurring those debts.

ANSWER: Good (2 marks)

**Question 2: 8 out of 10**

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

#### **Question 3.1 [maximum 7 marks]**

Write a short essay on the *Désastre* process under the Bankruptcy (*Désastre*) (Jersey) Law 1990. In your essay, you should refer to at least the following:

- The parties who can be subject to *Désastre*
- The parties who can apply for *Désastre*
- Requirements for an application for *Désastre*
- The effect of *Désastre* upon the debtor
- The role of the Viscount
- The Viscount's costs
- Conclusion of the *Désastre*

A *Désastre* is a procedure for winding-up the affairs of companies and individuals unable to pay their debts as they fall due and which may be initiated either by a creditor owed in excess of £3000, the company itself or the Jersey Financial Services Commission or by the debtor.

In general, applications are made on an ex-parte basis. The applicant is required to file a petition enclosing a statement and affidavit (excepting the JFSC who does not need to enclose an affidavit) setting out the information required for the Court to make its decision. However it should be noted that even if the company meets all of the criteria for a *Désastre*, the Court's decision to order a *Désastre*, is in fact discretionary.

Where the applicant is the debtor, the statement must set out the estimated value of the company's assets and liabilities. The affidavit must verify the contents of the statement and state that the company is insolvent but has realisable assets.

Where the applicant is a creditor, the statement must provide details of the debt owed to the creditor and the affidavit must verify the contents of the statement, state that to the best of the creditor's knowledge and belief the company is insolvent but has realisable assets and specify the grounds on which the creditor believes the company is insolvent.

Once a *Désastre* is declared the following takes place:

- all property vests in Viscount (whether located in Jersey or elsewhere) and all powers of the company vest in the Viscount.
- there is a general moratorium on any creditor commencing or continuing any action or legal proceedings against the company or its property to recover the creditor's debt without the consent of the Viscount. (although a secured creditor can still take any action to enforce its security that does not involve

commencing legal proceedings, except under the Security Interests (Jersey) Law 2012 (the 2012 Security Law)).

- Any transfer of shares in the company cannot be made without the consent of the Viscount, and any alteration in the status of the members of the company, made after the declaration is void. However, a transfer of shares made by a secured creditor pursuant to the 2012 Security Law is not avoided.

- Termination of creditors' winding up: if a creditors' winding up had commenced prior to the declaration being made, the creditors' winding up is automatically terminated.

The Viscount is the executive officer of the court, and unlike a liquidator, is not an agent of the company. The Viscount's principal duty is to gather in, preserve and realise the company's assets for the benefit of, and to distribute the proceeds of realisation among, its creditors.

The Viscount has broad powers to deal with the company's assets, including to institute or defend any legal proceedings relating to the company's assets, compromise debts and other claims, to carry on the company's business and generally to exercise any powers relating to the company's assets that the company could have exercised.

The Viscount will also provide creditors with a report of the accounts and pay a final distribution upon realization of all the company's assets. The Viscount will levy fees as they arise or take 12.5% of assets realized and distributed. The Viscount's fees are in priority to all other costs of the liquidation.

To conclude the *Désastre*, the Viscount will give the registrar of companies a notice stating that the final distribution has been paid. The company will be dissolved once the notice has been registered by the registrar.

**ANSWER: A personal Desastre will last four years. (6 marks)**

### **Question 3.2 [maximum 8 marks]**

Write a **short essay** describing in detail the creditor claims process in respect of a Creditors' Winding Up. In your essay, you should refer to at least the following:

- The relevant Jersey law that applies
- Which areas are covered under the relevant Jersey law
- Advertising for claims and notice periods
- Which debts are provable
- Interest on debts
- Proof of debts and the cost of proving
- Examination of proofs of debts
- Adjudication and the process of admitting or rejecting claims

Despite its name, a creditors' winding up must be commenced by the members of the company. It cannot be commenced by the company's creditors. Under the Companies Law, the company must hold a meeting of members whereby a special resolution is passed to wind up the company by way of a creditors' winding up. They will also nominate a liquidator.

The creditors' winding up commences at the time the special resolution is passed. Within 14 days of the special resolution being passed, the company must publish a notice in the Jersey Gazette advising that the special resolution has been passed.

A creditors' winding up may also result from the conversion of a summary (or solvent) winding up if, during the course of the summary winding up, it becomes apparent that the company cannot pay its debts within six months of the commencement of the summary winding up, or if they fall due after that date, as they fall due.

A meeting of creditors must be convened, to take place in Jersey on the same day as, and immediately after, the meeting of members. The company must notify its creditors of the meeting by giving them at least 14 days' notice by post and publishing an advertisement in the Jersey Gazette at least 10 days prior to the meeting.

All present, future or contingent debts and liabilities to which the company is subject at the time of the creditors' winding up of the company or any obligation incurred before the commencement of the creditors' winding up, are provable. Where a debt accrues interest, interest to the commencement of the creditors' winding up is also provable as part of the debt, except in the case of a debt secured by a hypothec, security interest or pledge, where interest payable out of the proceeds of sale of the secured property to the extent that it is secured and can be satisfied from the proceeds of sale.

Many of the procedural rules applying to a *Désastre*, including proving and adjudicating on debts, and the priority of payments to creditors, also apply to winding up, and so the liquidator will adjudicate the provable debts, albeit certain actions such as paying creditors in full, or compromising claims by or against the company, still require sanction of the Royal Court or the creditors' committee.

**ANSWER:** Article 166 of the Companies Law explains that the same rules as apply to *Desastre* under the Bankruptcy Law apply to creditors' winding up. The law covers the rights of secured and unsecured creditors, debts provable, the time and manner of proving, the admission and rejection of proof of debts and the order of payments. There is no statutory time period for notices to be published but it is generally agreed that a period of 60 days' notice is adequate. A creditor shall bear the cost of proving. Creditors are also entitled to examine other creditors' proofs. The liquidator is to adjudicate claims and request further information as required, and will admit or reject claims. If dissatisfied, the creditor has the opportunity to request that the liquidator applies to the Jersey Court to review the decision. (3 marks)

**Question 3: 9 out of 15**

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

XYZ Limited is a major high-street retailer registered in England with stores throughout England and a store in Jersey. Like many retailers, XYZ has struggled in recent times due to the change in shopping habits of the British public. Sales have fallen as customers increasingly look for cheaper alternatives online and XYZ is struggling to meet its ongoing rent commitments at its many stores. The majority of XYZ's stores have been loss making for some time, including its store in Jersey. XYZ's secured lender, Big Bank PLC, has become increasingly concerned at the situation. Big Bank has the benefit of fixed and floating charges over XYZ's assets.

In December 2018, Big Bank confirmed that it would no longer continue to provide financial support and would not allow a further extension of facilities in order to meet the rental payments which were due on 25 December.

**Using the facts above and the additional facts below, answer the questions that follow.**

##### **Question 4.1 [maximum 3 marks]**

Big Bank has obtained legal advice in England in relation to its rights as secured creditor. You have been approached in Jersey to comment on Big Bank's rights. **Please draft a note in which you set out your comments.**

[  
Dear Big Bank:

RE: Creditor Rights as Secured Creditor over XYZ Ltd.

I write to advise on your rights as secured lender over XYZ Ltd' assets as both fixed and floating

The legislation which covers security over tangible and intangible moveable property in Jersey is the Security Interests (Jersey) Law 2012 (the Security Law). You have stated that you are a secured lender by way of fixed and floating charges over XYZ Ltd's assets. The assets are not specified. As such, I can broadly advise that under the Security Law a secured party can take control:

- of a registered security, by being registered as the holder of it or taking possession of the certificate of title to it;
- of a deposit account, by
  - (a) the account being transferred into the name of the secured party,
  - (b) the account bank agreeing in writing to act on the secured party's instructions,
  - (c) the account being assigned to the secured party or
  - (d) the secured party being the account bank; and
- of a securities account, by the same methods as a secured party can take control of a deposit account.

If the assets are situated outside of Jersey, security granted under the law where the property is situated will generally be recognised, in this scenario, the UK.

In summary, as a secured creditor you have specific rights afforded to you to protect your security, such that they can still be disposed of/recovered by you, despite any potential insolvency process.

**ANSWER:** In Jersey, the power of enforcement is exercisable once an event of default has occurred and written notice of this fact has been served on the grantor. The options available for Big Bank depend upon what security it has (and it is noted that there is no equivalent to a floating charge in Jersey). If Big Bank has security over Jersey immovable property (e.g. a mortgage over the building) then they can apply to Court in Jersey for a Désastre or Dégrèvement. If they have security over movable property then they may apply to Court in Jersey to enforce their contractual rights. (1 mark)

**Additional facts:**

The directors of XYZ identify a party who is interested in acquiring the business of XYZ. Following a brief period of negotiation conducted with the oversight of a proposed Administrator (and with the approval of Big Bank), the directors of XYZ begin the process of placing XYZ into Administration in England, in order to allow a “pre-packaged” sale of the business to occur.

**Question 4.2 [maximum 3 marks]**

The Jersey store is owned by a separate Jersey company, ABC Limited, but ABC’s centre of main interest (COMI) is considered to be in England. Will it be possible to place ABC under English Administration (following the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast) (“the Recast EIR”))?

Neither England or Jersey are part of the EU, and so the Recast EIR is irrelevant. However it is possible to place ABC Ltd under English administration if its COMI is indeed considered to be in England. Under the UK Insolvency Act, the UK Court has the power to place an insolvent company incorporated outside the UK into administration if its COMI is in the UK, a feature common in many jurisdictions.

ABC Ltd could seek to be placed into administration by applying to the English High Court for an order placing the company into administration (as it has its COMI in the UK), or, it could ask the Jersey Court for a letter of request which requests the English Court to make an order placing the company into administration.

**ANSWER:** It would be necessary to demonstrate that an English Administration would achieve a better outcome for the debtor and creditors than a local process, with emphasis on the proposed pre-packaged sale (2 mark)

**Question 4.3 [maximum 3 marks]**

If it is not possible to place ABC under English Administration, are there alternative Jersey insolvency processes that will allow a pre-packaged sale to occur? Are there any potential problems in achieving a sale as a going concern?

A pre-packaged sale could be achieved via the winding up of ABC under a just and equitable provision, In Re Collections Group, the Royal Court was clear that, in giving the liquidator (being appointed on just and equitable grounds) power to enter into a pre-pack arrangement, it was for the liquidator to exercise his judgment as to whether “the terms of the agreement are in the interest of creditors or not”. Thus it would not be certain that the sale of the assets out of the liquidation would be made, who would it provides an avenue in which a successful sale as a going concern could be made.

**ANSWER:** Good (3 marks)

**Question 4.4 [maximum 3 marks]**

Would the approach be different if the Jersey store was a branch of XYZ as opposed to a separate Jersey company? How might Article 49 of the Bankruptcy Law be used?

If the Jersey store was a branch, rather than a separate legal entity it may be possible for the English Administrator to seek assistance pursuant to Article 49 of the Bankruptcy (*Désastre*) Law (and Article 6 of the Bankruptcy (*Désastre*) (Jersey) Order 2006 (the Order)).

The Royal Court may, to the extent it thinks fit, assist the courts of a “relevant country” in all matters relating to the insolvency of a person, and that a request from the court of a relevant country would be regarded as sufficient authority for the Royal Court to exercise its jurisdiction. A list of the relevant countries prescribed to date are found in Article 6 of the Order, which includes the United Kingdom, Australia, Republic of Ireland, Finland, Guernsey and the Isle of Man, and so the Order would apply here.

Although discretionary the Jersey Court could apply either Jersey law or foreign law in a way that would assist the administrator, as long as Jersey creditors are protected and that the assistance is consistent with public policy/interest.

**ANSWER: Good (3 marks)**

**Question 4.5 [maximum 3 marks]**

What if XYZ Limited was a Polish company with Polish stores and a store in Jersey, but all other details remain the same (and assume that Poland has an Administration process the same as in England)? Would the UNCITRAL Model Law on Cross-Border Insolvency or the Recast EIR assist with recognition in Jersey?

There would be no difference in seeking recognition in Jersey because Jersey is not a signatory to the Model Law, nor is it within the EU. If XYZ Ltd was a Polish company it would still be required to undertake the process as described above for the English company.

**ANSWER: If the Jersey Court receives a request from a non-relevant country then it is likely that the Jersey court will provide assistance based upon common law principles of private international law and/or comity and cooperation (2 marks)**

**Question 4: 11 out of 15**

**TOTAL: 34 out of 50**

**\* End of Assessment \***