



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).
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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 – Correct]

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 – Correct]

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: 8 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.

Upon the making of a declaration, the Bankruptcy (*Désastre*) (Jersey) Law 1990 (**BL 1990**) confers statutory powers on the Viscount for the administration of the debtor's estate. These powers include:

- Administrative powers pursuant to Article 26 of the BL 1990 including, but are not limited to: (i) bring or defend an action against the debtor relating to his/her property¹; (ii) compromise any debt or claim secured on the property of the debtor²; (iii) carry on the business of the debtor if necessary for the disposal of the same³; (iv) exercise any voting rights on shares owned by the debtor⁴; and (v) exercise any authority or power or the power to do any act concerning the debtor's property⁵;
- The power to sell all or part of the debtor's property⁶;
- The power to prove the debts of the creditors⁷;
- The power to compel the attendance of any party known or suspected to be in possession of the debtor's property or capable of giving information concerning the debtor's property, dealings or affairs, etc.⁸; and/or
- The power to investigate the debtor's affairs and take action to recover such property pursuant to Articles 16, 17, and 17A.

In summary, the powers conferred on the Viscount are to maximize the realization of the debtor's assets to facilitate a *pari passu* distribution of assets for the benefit of a debtor's creditors.

Similar to a Viscount, the Companies (Jersey) Law 1991 (**CL 1991**) also confers wide-ranging powers on a liquidator in a creditor's winding up to effect an orderly distribution of a debtor's assets for the benefit of its general body of creditors. Specifically, the general powers of a liquidator are set out in Articles 170 – 172 of the CL 1991, which include:

- The power to compromise any claim by or against the company⁹;
- The power to exercise all of the powers of the company for a beneficial winding up of the company¹⁰;

¹ Article 26(b) BL 1990

² Article 26(d) BL 1990

³ Article 26(h) BL 1990

⁴ Article 26(o) BL 1990

⁵ Article 26(p) BL 1990

⁶ Article 27(1) BL 1990

⁷ Article 31(1) BL 1990

⁸ Article 20(1)(c) BL 1990

⁹ Article 170(1)(b) CL 1991

¹⁰ Article 170(2) CL 1991

- The power to pay the company's debts and adjust the rights of contributories¹¹; and
- The power to disclaim onerous property¹².

In addition to these powers, a liquidator also has the power to:

- Investigate the affairs of a company to claw back property belonging to the company: see Article 176A preference; Article 176 undervalue transaction; Article 177 wrongful trading; and Article 178 fraudulent trading; and
- The power to distribute the assets of the company (Article 186).

Again, these powers aim to maximize the potential return for the company's creditors and facilitate the orderly distribution of the debtor's assets.

Notwithstanding the extensive powers of a liquidator in a company's winding up, the powers of a liquidator in a summary winding up or just and equitable winding up are more limited. As regards the former, a liquidator, upon appointment, his/her powers are limited to the powers exercised by the directors prior to the commencement of a summary winding up. As regards just and equitable winding up, the Court determines the scope of the liquidator's powers¹³.

ANSWER: Very good (3 marks)

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.

Under Jersey law, there is no equivalent procedure to the UK Administration or US Chapter 11 corporate rescue procedures. This is because of (1) Jersey's position as an international financial center and (2) the use of Jersey registered companies for finance or specific financial-related purposes rather than traditional trading companies. The primary purpose of the corporate rescue procedures is to provide a financially distressed company (generally, a trading company) breathing space with the view toward restructuring its debt to allow the company to continue as a going concern. Given the use of Jersey registered companies for finance or finance-related purposes, there is not as great of a need for a corporate rescue regime. This is demonstrated by the fact that the number of solvent-managed liquidations is high in Jersey¹⁴.

Notwithstanding Jersey's lack of a statutory rescue procedure, the Jersey Court has adopted a pragmatic approach to dealing with domestic and cross-border insolvencies¹⁵. In that regard, the Jersey Court has been willing to exercise its broad discretion under its just and equitable jurisdiction¹⁶. The Jersey Court has used this ground to facilitate a 'pre packaged'

¹¹ Article 170(4) CL 1991

¹² Article 171 CL 1991

¹³ Module at [6.3.6].

¹⁴ Module at [6.51]

¹⁵ Module at [6.51]

¹⁶ Article 155 CL 1991

“(1) A company, not being a company in respect of which a declaration has been made (and not re-called) under the Désastre Law, may be wound up by the court if the court is of the opinion that –

(a) It is just and equitable to do so; or
(b) It is expedient to do so.

sale of a Jersey company in the case of *Re Collections Group* [2013] JRC 096. In the exercise of the Jersey Court's discretion, the critical factor will be whether the winding up order will be in the best interests of the creditors.

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**.

In Jersey, security may be taken over immovable property by hypothèque. In that regard, there are three types of hypothèque:

- The first type is a judicial hypothec (hypothèque judiciaire), created upon an acknowledgment of a debt or judgment of the court registered in the Public Jersey Registry. Lenders commonly use this form of hypothèque in providing a mortgage over immovable property (i.e., domestic property)¹⁷;
- The second type is a conventional hypothec (hypothèque conventionnelle simple) created by parties agreeing to take and grant security over property. The contract which memorializes the parties' agreement is then presented to the court¹⁸; and
- Finally, the third type is a legal hypothec (hypothèque légale) created by an operation of law by the particular circumstances proscribed by Jersey law¹⁹.

Where there are more than one hypothecs registered over the property, priority is given to the hypothec registered first in time²⁰.

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.

The Debtor Remission (Individuals) (Jersey) Law 2016 (**DR 2016**) provides for a statutory out-of-court procedure for individuals who are unable to pay their debts. Under Article 4(1) of the DR 2016, such summary procedure is only available to individuals who meet the following requirements:

- The debtor is at least 18 years of age at the date of the application²¹;

[...]

(4) If the court orders a company to be wound up under this Article it may –

- (a) Appoint a liquidator;
- (b) Direct the manner in which the winding-up is to be conducted; and
- (c) Make such orders as it sees fit to ensure the winding up is conducted in an orderly manner.

¹⁷ Module at [5.1.1]

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Article 4(1)(a) DR 2016

- The debtor has been ordinarily resident in Jersey in the 5 years preceding the date the application is made²²;
- The debtor has not been subject to a debt remission order (**DRO**) within the 5 years preceding the date the application is made;
- The value of the debtor's assets does not exceed GBP 5,000²³ ;
- The amount the debtor owes is less than GBP 20,000²⁴.

In addition to the above requirements, the DR 2016 mandates that a DRO is only available to debtors who have acted in good faith²⁵. The DR 2016 then goes on to set out a non-exhaustive list of conduct that is not considered to be in "good faith":

- Failing to keep or produce records relating to the loss of property or business by a debtor²⁶ or carrying out an undervalue transaction²⁷ within two years of the date of the application;
- Giving a preference within one year of the date preceding the date of the application²⁸;
- Incurring a debt that the debtor knows or recklessly incurs that the debtor knows he/she would be unable to pay²⁹;
- Fraud or fraudulent breach of trust³⁰;
- Failing to cooperate with the Viscount³¹;
- Carrying on gambling which may materially contribute or increase the debtor's ability to pay its debt³²; or
- Failing to account satisfactorily for loss of property or insufficient property to meet the debtor's debts³³.

ANSWER: Very good (2 marks)

Question 2: 10 out of 10

²² Article 4(1)(b) DR 2016

²³ Article 4(1)(f) DR 2016

²⁴ Article 4(1)(e) DR 2016

²⁵ Article 4(2) DR 2016

²⁶ Article 4(3)(a)(i) DR 2016

²⁷ Article 4(3)(a)(ii) DR 2016

²⁸ Article 4(3)(b) DR 2016

²⁹ Article 4(3)(c) DR 2016

³⁰ Article 4(3)(g) DR 2016

³¹ Article 4(3)(h) DR 2016

³² Article 4(3)(e) DR 2016

³³ Article 4(3)(d) DR 2016

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*

In Jersey, the most common method for a creditor to enforce its rights against a debt is by the *Désastre* process under the BL 1990³⁴.

Article 3(1) of the BL 1990 confers standing on certain person(s) to bring an application for *Désastre*. Specifically, an application may be made by:

- A creditor of the debtor with a claim against the debtor not less than such liquidated sum³⁵ (being JEP\$ 3,000³⁶);
- The debtor³⁷; or
- The Jersey Financial Services Commission in respect of regulated business activities³⁸.

Article 4 of the BL 1990 then goes on to state the person(s) who may be subject to an application for *Désastre*. The *Désastre* procedure applies to individuals and corporate entities, provided that the statutory requirements are satisfied. As regards individuals, said individual must be resident³⁹ or was resident in Jersey in 12 months ending with the date of the application⁴⁰; or carries on⁴¹ or has carried on business in Jersey in 3 years ending with the date of the application⁴². In addition to the above, an application may be made against (1) an individual who has moveable property in Jersey capable of realization at the time of the

³⁴ Module at [4.2.3].

³⁵ Article 3(1)(a) BL 1990

³⁶ Module at [4.2.3]

³⁷ Article 3(1)(b) BL 1990

³⁸ Article 3(1)(c); see also Module FN.6

³⁹ Article 4(1)(a)(i) BL 1990

⁴⁰ Article 4(1)(a)(ii) BL 1990

⁴¹ Article 4(1)(b)(i) BL 1990

⁴² Article 4(1)(b)(ii) BL 1990

application⁴³; (2) a company registered under the laws of Jersey or has been dissolved under the CL 1991 or⁴⁴; an incorporated limited partnership⁴⁵ or limited liability partnership⁴⁶.

The application is made by a creditor (as set out in Article 3(1)) by filing a demande. The demande must be supported by an affidavit that sets out (1) the details of the debtor's belief that the debtor is insolvent (on a cash flow basis); (2) the debtor has realizable assets; (3) that the requisite notice (i.e., 48 hours) of the intent to bring the application; and (4) where the applicant is a creditor, the full details of the debt which forms the subject matter of the application⁴⁷. This application may be made *ex parte*; however, consideration must be given to whether to proceed on an *ex parte* basis, as the applicant is under a duty of full and frank disclosure. Moreover, the court may adjourn an *ex parte* application to a later date to allow for an *inter partes* hearing. Upon the court granting the applicant's application, the debtor's worldwide property (save for property held by an individual or company as trustee⁴⁸) vests in the Viscount⁴⁹. In the case of a debtor's immovable property, such property shall vest in the Viscount subject to all hypotheses⁵⁰. The purpose of this is to allow for the orderly administration of the debtor's estate to ensure, subject to any secured interests, that the assets of a debtor are distributed on a *pari passu* basis.

In addition to securing a debtor's assets, the BL 1990 confers certain further statutory powers to the Viscount. These powers include, by way of example, the power to investigate the affairs of a debtor to seek the recovery of any property belonging to the debtor⁵¹; the power to summons persons in possession of the property of the debtor (which includes records and accounts) or has or is suspected of having information concerning the debtor's property or affairs⁵²; power to bring or defend claims⁵³; and the power to adjudicate creditors' proofs of debt⁵⁴.

As regards a Viscount's fees, Article 32(1)(a) provides that the reasonable costs and expenses properly incurred by the Viscount shall rank as a first charge. Such fees shall be paid in priority of all debts out of the debtor's assets.

Once a Viscount has realized all of the debtor's property or as much of that can be realized⁵⁵, he/she must provide a final report⁵⁶ and pay the final dividend to the creditors⁵⁷. Where a debtor is not an individual, notice in writing must be given to the Registrar confirming the date of payment of the final dividend⁵⁸. The Viscount must also prepare a final account to be provided to both the creditors and the court. Upon payment of a final dividend, if the debtor's debts have been fully satisfied, the surplus (if any) will be paid to the debtor, or if the debtor is a company to its contributories.

⁴³ Article 4(1)(c) BL 1990

⁴⁴ Article 4(1)(d) BL 1990

⁴⁵ Article 4(1)(da) BL 1990

⁴⁶ Article 4(1)(e) BL 1990

⁴⁷ See Mourant.com/file-library/media—2017/2017-guidelines/obtaining-a-declaration-en-desastre.pdf

⁴⁸ Article 8(3) BL 1990

⁴⁹ Article 8(1) BL 1990

⁵⁰ Article 11(1) BL 1990

⁵¹ See Article 17 Undervalue Transactions; and Article 17A preferences

⁵² Article 20 BL 1990

⁵³ Article 26(d) BL 1990

⁵⁴ Article 31 BL 1990

⁵⁵ Article 36(1) BL 1990

⁵⁶ Article 36(1)(a) BL 1990

⁵⁷ Article 36(1)(b) BL 1990

⁵⁸ Article 36(2), (2A) and (3) BL 1990

Following the distribution of the debtor's assets, the debtor shall cease to be liable for any debts provable in the *Désastre* still owing and/or for the recovery of any debts incurred during the *Désastre*⁵⁹.

Where a debtor is an individual, at the expiration of 4 years since the onset of the application, the Viscount shall apply to the court for a discharge order⁶⁰. It must be borne in mind that such period may be reduced or extended by the court upon the application of a creditor, debtor, or Viscount⁶¹.

ANSWER: Excellent (7 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

Until recent changes to the CL 1991, the procedure under Part 4, Chapter 21 of the CL 1991, creditors winding up proceedings were commenced when a company resolved to commence winding up by way of special resolution⁶².

Following the changes to the CL 1991, it is now possible for a creditor to bring an application to commence a creditor winding up provided that:

- The creditor has a debt not less than JEP 3,000⁶³;
- The company is unable to pay its debts⁶⁴; or
- The creditor has evidence of the company's insolvency⁶⁵; or
- The creditor has the consent of the company⁶⁶.

⁵⁹ Article 38(1)(a)-(b) BL 1990

⁶⁰ Article 40(1) BL 1990

⁶¹ Article 40(2) BL 1990

⁶² Article 157(a) CL 1991

⁶³ Article 157A(1) CL 1991

⁶⁴ Article 157A(1)(a) CL 1991

⁶⁵ Article 157A(1)(b) CL 1991

⁶⁶ Article 157A(1)(c) CL 1991

For the purposes of this Article, a company shall be “deemed” unable to pay its debts when a debtor fails to satisfy the payment of a debt within 21 days after the service of a statutory demand⁶⁷

This insolvency procedure should be familiar to both onshore and offshore practitioners (e.g., Onshore England & Wales; Offshore Cayman Islands or Bermuda).

Under the CL 1991, a creditor must give the company 48 hours' notice of its intention to make the application⁶⁸. This notice requirement is, however, qualified by an exceptional circumstances exemption⁶⁹. Notice of a creditors' application to wind up a company must be gazetted, in the Jersey Gazette, not less than 24 hours before such application is due to be heard by the Jersey Court.

If the Court is satisfied that the requirements of Article 157A(1)(a)-(c) are met, the Jersey Court will make an order to wind up the company. At this time, the court will also appoint a liquidator. Further to Article 158(3), the liquidator is under a statutory duty to gazette notice of his/her appointment within 14 days of such order. Moreover, within 7 days of the liquidator's appointment, notice must be given to all known creditors of the company of the creditors meeting on a day following 21 days after the making of such order⁷⁰. Finally, not less than 10 days before the creditors' meeting, notice of such meeting must be gazetted in the Jersey Gazette⁷¹.

In addition to a company's notice requirements, Article 160A(2) provides that a director or directors of the company are under a statutory obligation to provide a statement of the company's affairs to be produced to the creditors at the first meeting.

As regards a creditors' winding up commenced by special resolution, the CL 1991 mandates that the company, within 14 days of such resolution, must give notice of the same in the Jersey Gazette⁷². The company also has a statutory duty to provide not less than 14 days' notice of the day the company intends to convene the first meeting of creditors⁷³. The company must also lodge a copy of the special resolution passed by the company within 14 days to the Registrar of Companies⁷⁴.

In addition to the company's notice requirements, a director or directors of the company must prepare a statement of affairs verified by affidavit to be laid before the creditors at the first meeting⁷⁵.

As regards the debts provable in a creditors' winding up, Article 166 of the CL 1991 expressly provides that the rules under the BL 1990 concerning “*debts provable, the time and manner of proving debts, admission and rejection of proofs of debts, and the order of priority*” shall apply to a winding up under the CL 1991.

Further to Article 29 of the BL 1990, all debts of a debtor, whether present or future, or contingent, which the debtor is subject to at the date of the winding up or the debtor becomes

⁶⁷ Article 157A(2)(a)-(b) CL 1991

⁶⁸ Article 157A(3) CL 1991

⁶⁹ Ibid.

⁷⁰ Article 160A(1)(a) CL 1991

⁷¹ Article 160A(1)(b) CL 1991

⁷² Article 158(1) CL 1991

⁷³ Article 160(1) CL 1991

⁷⁴ See Module at p. 15

⁷⁵ Article 160(2) CL 1991

subject to prior to the final distribution of the estate are provable⁷⁶. The priority of such debts is governed by Article 32 of the BL 1990 as follows:

- Payment of a liquidator's reasonable fees and costs properly incurred in the liquidation⁷⁷;
- Payments owing to employees at the date of the winding up relating to wages or salary for services rendered during the six months preceding the winding up⁷⁸ and any outstanding holiday pay or bonuses⁷⁹;
- Payments of sums owing to the Health Insurance Fund pursuant to Health Insurance (Jersey) Law 1967⁸⁰ and Social Security Fund further to the Social Security (Jersey) Law 2007⁸¹; all amounts due under the Income Tax (Jersey) Law 1961⁸², as well as amounts due and owing under the Goods and Services Tax (Jersey) 2007⁸³; an amount due to a debtor's landlord provided that it qualifies as a preference under customary law⁸⁴ and parochial rates due not exceeding 2 years from the date of the liquidation⁸⁵; and
- All other debts of the unsecured creditors provable in liquidation⁸⁶.

As regards interest, any interest payable on the winding up is provable as a debt in the liquidation⁸⁷. This is subject to the proviso that any interest payable on a debt secured by a hypothec or security interest may be payable out of the proceeds of sale of the secured asset⁸⁸.

The Jersey Court shall prescribe the procedure for a creditor to prove their debt in the liquidation⁸⁹. The BL 1990 expressly provides that the costs incidental to and occasioned by the creditor in proving its debts are payable by the creditor, not out of the assets of the insolvency estate⁹⁰. Furthermore, the BL 1990 confers the power on each creditor of the company to inspect and examine the proofs of debt submitted by the company's other creditors at a time to be fixed by the liquidator⁹¹.

Article 31 of the BL 1990 then goes on to provide the process by which a debt is to be admitted or rejected by a liquidator. As a preliminary point, Article 31(1) expressly permits a liquidator to admit or reject a proof in whole or part. This this procedure it may be summarized as follows:

- First, the liquidator must examine each proof and have regard to any statement filed in opposition to the admission of such debt: *see Article 31(2) BL 1990*;
- Before admitting or rejecting a debt, if necessary, a liquidator may require further information in support of admission of such debt: *see Article 31(3) BL 1990*;

⁷⁶ Article 29(1) BL 1990.

⁷⁷ Article 31(1)(a) BL 1990.

⁷⁸ Article 32(1)(b)(i) BL 1990

⁷⁹ Article 32(1)(b)(ii) BL 1990

⁸⁰ Article 32(1)(c)(i) BL 1990

⁸¹ Ibid

⁸² Article 32(1)(c)(ia) BL 1990

⁸³ Ibid

⁸⁴ Article 32(1)(c)(ii) BL 1990

⁸⁵ Article 32(1)(c)(iii) BL 1990

⁸⁶ Article 32(1)(d) BL 1990.

⁸⁷ Article 29(2) BL 1990.

⁸⁸ Ibid.

⁸⁹ Article 30(1) BL 1990.

⁹⁰ Article 30(2) BL 1990.

⁹¹ Article 30(3) BL 1990.

- Where a liquidator rejects a proof of debt in whole or in part, the liquidator must give notice of such rejection in the manner prescribed by the Court: *see Article 31(5) BL 1990*;
- Similarly, where a liquidator rejects a statement filed in opposition to the admission of a debt, the liquidator must give notice to the said person in the manner prescribed by the court: *see Article 31(6) BL 1990*.

The aggrieved party (i.e., a party whose debt or statement in opposition has been rejected) may apply for court review of the liquidator's decision within the time period prescribed by the court: *See Article 31(7) BL 1990*.

In addition to the admission or rejection of a debt, a liquidator has the statutory power to reject in whole or in part any interest on such debt if the liquidator believes such interest is extortionate⁹².

ANSWER: Excellent. (8 marks)

Question 3: 15 out of 15

⁹² Article 31(4) BL 1990.

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.**

In Jersey, Big Bank Plc (**Big Bank**), as a secured creditor of XYZ Limited (**XYZ**), will rank ahead of all other creditors. This, of course, is subject to the caveat that such interest would be subordinate to any prior ranking interest over the asset⁹³. As the holder of a secured interest, Big Bank may enforce its rights in accordance with the terms of the security instrument. Generally speaking, a secured creditor's right to enforcement will be triggered by the occurrence of an event of default, which is expressly provided for in the instrument itself⁹⁴.

If the security is held over foreign property of XYZ, such security may be capable of enforcement in Jersey in accordance with the foreign law⁹⁵. Where the security interest is governed by Jersey law, Article 43 of the SI 2012 provides that the power of enforcement shall arise when (1) an event of default has occurred⁹⁶; and (2) Big Bank has given written notice of the event of default⁹⁷.

Under the SI 2012, any of the following methods of enforcement would be open to Big Bank:

- Appropriate the collateral or proceeds of the collateral: *Article 43(2)(a) SI 2012*;
- Sell the collateral or proceeds: *Article 43(2)(b) SI 2012*;
- Take control or possession of the collateral: *Article 43(2)(c)(i) SI 2012*;
- Exercise any rights of the grantor in relation to the collateral: *Article 43(c)(ii) SI 2012*;
- Instruct any person who has an obligation to carry out such obligation for the benefit of the secured creditor: *see Article 43(2)(c)(iii) SI 2012*; or

⁹³ This does not appear to be the case on the available facts.

⁹⁴ Article 43 of the Security Interests (Jersey) Law 2012 (**SI 2012**)

⁹⁵ Module at [5.1.2]; and Article 13 SI 2012

⁹⁶ Article 43(1)(a) SI 2012

⁹⁷ Article 43(1)(b) SI 2012

- Any remedy of enforcement provided by the express terms of the security instrument provided that such method does not conflict with the SI 2012: *Article 43(2)(d) SI 2012*.

In the case of an appropriation or sale of the collateral, the SI 2012 provides certain further requirements on a secured creditor. As regards appropriation, the secured party must give not less than 14 days' notice before the creditor appropriates the collateral to (1) the grantor; (2) any party who has registered a security interest in the same 21 days before the appropriation; or (3) any other person who has an interest in the collateral⁹⁸. Similar notice requirements apply to a secured creditor who intends to enforce its security by power of sale⁹⁹.

A secured creditor must also be mindful of its statutory duty to obtain fair market value for the collateral¹⁰⁰. In addition to the above, if the collateral is sold or appropriated, a secured creditor has a duty to provide a statement of account in respect of (1) the gross proceeds of sale; (2) the amount of reasonable costs incurred; (3) amount of reasonable costs of enforcing the security; (4) net value of any collateral; and any surplus: *see Article 48 SI 2012*. In the event of such surplus, this may be paid to the Jersey Court: *see Article 50 SI 2012*.

ANSWER: Very good (3 marks)

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”))?

On the basis of the above facts, the date upon which the directors are seeking their advice is not entirely clear. If the facts which give rise to this fact pattern occurred before 31 December 2020, the Regulation (EU) 2015/848 (**EIR Recast**) applied to the United Kingdom. Following 31 December 2020, the EIR Recast no longer applied to the UK as it left the European Union. Thus, if the facts occurred post exit date, it would be impossible to engage the EIR Recast in the UK.

On the basis that the advice was sought before 31 December 2020, it will be necessary to consider whether the English court would have jurisdiction over ABC Limited (**ABC**), whose COMI is in England. Article 3 of the EIR Recast provides that “*the courts of a member state within the territory of which the centre of main interest shall have jurisdiction to open insolvency proceedings (main insolvency proceedings)*”¹⁰¹. While it appears that it may be possible to engage the English court's jurisdiction, it must be borne in mind that Jersey is not a member of the EU. The effect of this is two-fold. First, the benefits of recognition and relief available under the EIR Recast would not be automatically recognized in Jersey, as it is not a member

⁹⁸ Article 44(1)(a)-(c) SI 2012

⁹⁹ Article 44(2)(a)-(c) SI 2012

¹⁰⁰ Article 46 SI 2012.

¹⁰¹ Article 3(1) of the EIR Recast

of the EU. Second, to the extent that ABC's assets are located outside of the UK, recognition would need to be obtained in Jersey for the UK office holder to deal with the assets of ABC.

If the directors wish to engage the English Court's jurisdiction for Administration, since ABC's COMI is located in England, it still may be possible to place ABC into UK Administration pursuant to the Insolvency Act 1986, provided that the requirements under the Insolvency Act 1986 are met.

ANSWER: It would also 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?

While there is no statutory equivalent in Jersey to the UK Administration or US Chapter 11 procedure, due to Jersey being an international financial centre, the Jersey Courts have applied their broad discretion under Article 155 of the CL 1991. Under this jurisdiction, the court must be satisfied that it is "just and equitable" and "expedient" to wind up the company.

Indeed, an example of the Jersey Court facilitating a pre-package sale under its "just and equitable jurisdiction" is the case of *Re Collections Group [2013] JRC 096*. In this case, the court first ordered that the company be wound up under Article 155 of the CL 1991, then went on to authorize the company's liquidators to enter into an agreement of sale of the company¹⁰².

In considering whether it was 'just and equitable to wind up the company, the court was satisfied that it was in the best interests of the company's general body of creditors on the grounds that:

- The company was hopelessly insolvent;
- Failing the court's approval of the pre-pack sale, there would have been a loss of 40 jobs and no realistic possibility of the creditors receiving a distribution in a liquidation scenario; and
- The procedures available under *Désastre* or creditor's winding up would not achieve the sale due to the fact that the company would cease trading before such a sale would occur¹⁰³.

If the facts underlying this case are similar to those in *Re Collections Group*, the directors have reasonable prospects of achieving the pre-packaged sale under the Jersey insolvency process. However, if the Court is unwilling to engage this jurisdiction, the only procedures available to ABC in Jersey would be under *Désastre* or creditor's winding up. In both cases, the problem highlighted in *Re Collections Group* would be present (i.e., the company would cease trading; thus, the likelihood of a sale as a going concern will be significantly impacted, if not impossible.

ANSWER: Good (3 marks)

Question 4.4 [maximum 3 marks]

¹⁰² See *Re Collections Group* at [1].

¹⁰³ See *Re Collections Group* at [22]-[23]

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?

Article 49 of the BL 1990 confers a discretionary jurisdiction to the courts of Jersey to assist foreign courts in cross-border insolvency proceedings. Specifically, Article 49 provides that:

"(1) The Court may, to the extent that it thinks fit, assist the courts of a relevant country or territory in all matters relating to insolvency... and when doing so may have regard to the extent it considers appropriate to the provisions of any model law on cross border insolvency."

Therefore, to engage Article 49 of the BL 1990, foreign insolvency proceedings must be commenced in a 'relevant country' courts. Suppose the answer to that question is yes. In that case, the Jersey Courts, in the exercise of its discretion, may have regard to the Model law principle of 'universalism,' which promotes cooperation between foreign courts in insolvency matters for the efficient administration of cross-border insolvencies.

In this case, the Jersey Court will have the discretion under Article 49, as insolvency proceedings are afoot in the United Kingdom, the English courts are considered a 'relevant country' for the purposes of the BL 1990. To engage this jurisdiction, the foreign office holders will be required to make an application to the Jersey Court for recognition under Article 49. This is done by the requesting court (i.e., the foreign court where the foreign insolvency office holder was appointed) issuing a letter to the Jersey Court seeking assistance. Such application may not be presented to the Court unless the Applicant has consulted with the Viscount to ensure that the proposed order's terms comply with Jersey Law and public policy¹⁰⁴. Upon the application, if the Court is satisfied that recognition and assistance is appropriate, the Jersey Court will exercise its discretion and grant the order in the terms set out in the letter of request.

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?

In short, no. Jersey presently is not a signatory to the UNICTRAL Model Law on Cross-Border Insolvency (**Model Law**) or a member of the European Union¹⁰⁵. Consequently, neither the Model Law nor the EIR Recast would be available to XYZ in respect of recognition of foreign insolvency proceedings in Jersey. However, a foreign insolvency office holder may still be in a position to receive the assistance of the Jersey Court either under Article 49 of the BL 1990 or under common law principles of comity.

Based on the fact that XYZ Limited is a Polish registered company, Article 49 is not applicable. This is because, under Article 49 of the BL 1990, assistance to foreign courts is limited to "relevant countries and territories" and at the present time only extends to Australia, Isle of Man, Finland, Gibraltar, Guernsey, and the UK¹⁰⁶. As such, assistance would only be available to XYZ Limited under common law principles of comity.

ANSWER: Good (3 marks)

¹⁰⁴ RC 05/17 – Practice Direction – Applications for Aid in Bankruptcy and Insolvency Matters

¹⁰⁵ See Module at [7.2.1]

¹⁰⁶ See FN 36 of the Module.

Question 4: 14 out of 15

TOTAL: 47 out of 50

*** End of Assessment ***