



## **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 – Correct]

### 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 – 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 – Correct]

**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: 9 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 role of the Viscount in respect of a *Desastre* is to realise the assets of the debtor for the benefit of the debtor's creditors. The Viscount's powers include the power to bring, institute or defend action in respect of property; to compromise debts, claims and liabilities; to make compromise or other arrangements with creditors; to dispose of property; to carry on the business of the debtor as far as is necessary for the beneficial winding-up of the debtor; to borrow money; the power to pay creditors; power to disclaim onerous property and contract leases; and powers to pursue recovery in respect of antecedent transactions. Such transactions include those at an undervalue, preferences, wrongful trading, fraudulent trading extortionate credit transactions and excessive pension contributions.

The role of the liquidator in respect of a Winding Up is (like the Viscount's role in a *Desastre*), is to realise the assets to enable a *pari passu* distribution amongst creditors according to their status, with any surplus (after payment of creditors in full with interest) to be distributed to shareholders. Pursuant to Article 149 of the Companies Law, directors' powers (as provided for in the company's governing documents) cease upon appointment of a liquidator in a summary winding-up and a liquidator may instead exercise those powers. In a creditors winding-up, a liquidator's powers are more wide-ranging and include payment of creditors under Article 170, disclaiming of onerous property under Article 171, and the pursuit of antecedent transactions under Articles 176 to 179. By comparison, in a just and equitable winding up, the liquidator's powers will be determined by the court order and are likely to be similar to either a summary winding up or a creditors' winding up, depending on whether the company is solvent or insolvent. However, a number of general duties are set out in the Companies Law, which include an obligation to report criminal offenses relating to the company and, in a creditors' winding up, to investigate the assets of the company.

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.

As an offshore jurisdiction and international finance center, Jersey has a different business landscape than onshore jurisdictions such as England or the US. The large number of corporate entities domiciled in Jersey are predominantly used for financial structuring and other finance-related purposes and are therefore special purpose vehicles, holding companies or other group companies, as opposed to traditional trading business found onshore. The lack of traditional operating businesses in Jersey means that there is not the demand or need for statutory or customary corporate rescue and turnaround procedures. However, the Jersey Court has shown a willingness to be creative and flexible where necessary, and by example, the just and equitable winding-up process has been used to effect a *quasi*-pre-packaged sale of assets, which is typical of an administrative process.

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 varieties of mortgage (or hypothec) available in respect of immovable property are:

(i) A judicial hypothec, which occurs by judgment of the Jersey Court (by consent or otherwise) acknowledging a debt of a defined sum, which is registered in the Jersey Public Registry (for example, where a creditor asks the Jersey Court to register a judgment for a debt obtained against a debtor, which effectively becomes a mortgage over immovable property owned by the debtor – this has the effect of converting an unsecured debt to a secured debt).

(ii) A conventional hypothec, which is created by agreement between two or more parties as to the granting and taking of security expressed in the form of a contract passed before the Jersey Court.

(iii) A legal hypothec, which is relatively rare and arises by operation of law in certain special 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.

The Debt Remission Order (DRO) is a local small debt proceeding, similar to the English DRO, administered by the Citizens Advice Bureau and run by the Viscount. The restricted circumstances in which a DRO is available include where the applicant has (i) assets worth less than JEP 5,000; (ii) less than JEP 100 of disposable income on a monthly basis; (iii) debts of less than JEP 20,000; and (iv) acted in good faith whilst incurring debt.

**ANSWER: Good (2 marks)**

**Question 2: 10 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*

*Desastre* is a procedure for the winding up of the affairs of a company<sup>1</sup> or an individual. It is the most common way that a creditor (secured and unsecured) can seek to enforce rights in respect of outstanding debt against a debtor. However, in addition to creditors, an application for *Desastre* can also be made by the debtor, or by the Jersey Financial Services Commission in respect of regulated business activities.

For a creditor's application, the creditor must have a valid claim of at least JEP 3,000 to be able to apply for the debtor's *Desastre*. Other requirements for *Desastre* include that the debtor must be insolvent but also have realisable assets and an applicant creditor must confirm in its application that they believe this to be the case. Another qualifying requirement is that the debtor must have been ordinarily resident in Jersey at any time within the period of 12 months immediately preceding the date of the application for *Desastre*; or have carried on business in Jersey at any time within the period of three years preceding the date of the application; or have immovable property in Jersey at the time of the application.

The making of a *Desastre* order is discretionary and the Jersey Court will consider each application carefully and determine whether such a declaration should be made. It is usual for a personal *Desastre* to take 4 years, but this may be shortened or lengthened as necessary. The debtor is made subject to a moratorium during the process. A debtor will cease to be liable for their debts provable in a *Desastre* once an order is made for their discharge under Article 41 of the Bankruptcy (*Désastre*) (Jersey) Law 1990 (**Bankruptcy Law**). However, the debtor will still remain liable for debts incurred by them during the *Desastre*.

The effect of an order for *Desastre* on the debtor is that its worldwide assets are automatically declared *en Desastre*, which means that they vest in the Viscount. The Viscount is the Chief Executive Officer of the Jersey Courts and States of Jersey. The Viscount will realise the assets of the debtor for the benefits of its creditors and will conduct investigations to identify how and why the debtor came to be insolvent, and whether any offences were committed. The

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<sup>1</sup> This can be a company registered in Jersey under the Companies Law or a company that has been dissolved pursuant to the Companies Law, and also includes an incorporated Limited Partnership or Limited Liability Partnership.

Viscount has wide ranging powers, including the power to bring, institute or defend action in respect of in respect of property; to compromise debts, claims and liabilities; to make compromise or other arrangements with creditors; to dispose of property; to carry on the business of the debtor as far as is necessary for the beneficial winding-up of the debtor; to borrow money; the power to pay creditors; power to disclaim onerous property and contract leases; and powers to pursue recovery in respect of antecedent transactions. Such transactions include those at an undervalue, preferences, wrongful trading, fraudulent trading extortionate credit transactions and excessive pension contributions

The process for proving claims is set out in Part 7 of the Bankruptcy Law. All debts and liabilities, present, future or contingent are provable in the *Desastre*. Interest is provable to the date of the *Desastre* if the debt bears interest, or to the date of payment if it is a secured debt. A creditor must prove their debt at the time and in the manner prescribed by the Court and must also bear the cost of proving their debt. Creditors are entitled to examine other creditors' proofs at a time fixed by the Viscount. The Viscount will adjudicate claims and request further information if and when required. Creditors' claims will be admitted or rejected (in whole or in part) by the Viscount. If rejected, a notice of rejection must be served on the creditor and if the creditor is dissatisfied, the creditor has the opportunity to require the Viscount to apply to the Court for a review of the decision. Pursuant to Article 31 of the Bankruptcy Law, priority is conferred on certain classes of creditors, the first class being depositors where the debtor is a bank. The second class of priority creditors include employees in respect of remuneration and other employment benefits, sums payable to the Health Insurance Fund to the Social Security Fund, certain amounts due under the Income Tax (Jersey) Law 1961 and due under the Goods and Services Tax (Jersey) Law 2007, sums due to a landlord for payment of rent to the extent it qualifies for preference under customary law and parochial rates due to any parish in Jersey for a period not exceeding two years.

Jersey is often considered to be a debtor-friendly jurisdiction. This is reflected by not only *Desastre* proceedings being the only insolvency option available for a creditor to pursue, but also in the context of costs, as the applicant creditor is usually required to indemnify the Viscount for costs and liabilities incurred during the *Desastre* process<sup>2</sup>. The Viscount may levy fees as they arise or take amounts equivalent to 12.5% of the amounts realized and distributed. The Viscount's costs are paid in priority to other creditors from amounts liquidation with the exception that the rights of secured creditors are undisturbed.

If the debtor is a company, once the *Desastre* process has been completed, the Viscount will file the necessary forms with the Registrar of Companies to dissolve the company. The company will then be struck off the register.

**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
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- 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

Part 21, Chapter 4, Articles 156 to 186, of the Companies Law (**Law**) applies to Creditors' Winding Up. However, the Bankruptcy Law also applies as regards creditor claims and order of priority.

Although this process is designed to enable creditors to share in the proceeds of realisation of a company's assets, a creditor cannot commence this procedure. Instead it must be commenced by shareholders passing a special resolution (two thirds majority) which must be filed with the Registrar of Companies within 14 days. The shareholders will appoint a liquidator. Creditors will then meet (on 14 days' notice, plus Gazette advert) to either confirm the liquidators appointment or nominate their own liquidator. Creditors can also appoint a liquidation committee of creditors to supervise or assist the liquidator.

The general role of the liquidator is to realise assets to enable a *pari passu* distribution amongst creditors according to their status, with any surplus (after payment of creditors in full with interest) to be distributed to shareholders. The realisation process is facilitated by the moratorium provided by Article 159 of the Law which prevents any action being taken or proceeded against the company without leave of the Court. Article 170 of the Law provides the power to the liquidator to make payments to creditors. Article 171 provides the liquidator with the power to disclaim onerous property. Articles 176 to 179 equip the liquidator with powers to pursue antecedent transactions, which include transactions at an undervalue (Article 176), preferences (Article 176A), wrongful trading (Article 177), fraudulent trading (Article 178) and extortionate credit transactions (Article 179). The liquidator can therefore make payment to creditors not only from assets realised in the ordinary sense, but also from the proceeds of the aforementioned recovery actions.

As noted above, the Bankruptcy Law also applies to Creditors' Winding Up in certain respects. Article 166 of the Law, states that the same rules prevail with regard to the respective rights of secured and unsecured creditors, to debts provable, to the time and manner of proving debts, to the admission and rejection of proofs of debt and to the order of payment of debts, as are in force in the Bankruptcy Law.

In relation to timing and notice for the purpose of lodging a proof of debt, there is no statutory time period for notices to be published for potential claims in a winding up. However, it is generally agreed that a period of 60 days' notice is adequate for a creditors' winding up and no statutory provision for publishing a notice for potential claims outside of Jersey.

The process for proving claims is set out in Part 7 of the Bankruptcy Law. All debts and liabilities, present, future or contingent are provable. Interest is provable to the date of the winding up order if the debt bears interest, or to the date of payment if it is a secured debt. A creditor must prove their debt at the time and in the manner prescribed by the Court and must also bear the cost of proving their debt. Creditors are entitled to examine other creditors' proofs of debt.

Pursuant to Article 31 of the Bankruptcy Law, priority is conferred on certain classes of creditors, the first class being depositors where the debtor is a bank. The second class of

priority creditors include employees in respect of remuneration and other employment benefits, sums payable to the Health Insurance Fund to the Social Security Fund, certain amounts due under the Income Tax (Jersey) Law 1961 and due under the Goods and Services Tax (Jersey) Law 2007, sums due to a landlord for payment of rent to the extent it qualifies for preference under customary law and parochial rates due to any parish in Jersey for a period not exceeding two years.

The liquidator will adjudicate claims and request further information if and when required. Creditors' claims will be admitted or rejected (in whole or in part). If rejected, a notice of rejection must be served on the creditor and if the creditor is dissatisfied, the creditor has the opportunity to require the liquidator to apply to the Court for a review of the decision.

**ANSWER: Very good (8 marks)**

**Question 3: 14 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.**

It is noted Big Bank has security by way of fixed and floating charges over XYZ's assets. If the Jersey Store has been put up as collateral which, as immovable property, under Jersey law the security would amount to a "conventional hypothec". Big Bank may take steps to enforce this security once an event of default occurs (i.e., if rental payments were not paid on 25 December 2018). Big Bank can search the public register of security interests online to confirm the status of its interest. In order to appropriate or sell the property subject to hypothec, Big Bank must give ZYX 14 days written notice. Big Bank may then apply to the Jersey Court for a *Desastre* or a *Degravement* for the purposes of enforcement. To the extent that the security relates to any moveable property in Jersey, such as a pledge, which is capable of being enforced against, Big Bank may apply to the Jersey Court to enforce its contractual rights afforded by the security instrument.

**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"))?

Assuming the administration in England was taking place prior to Brexit, then these laws would apply to England. However, as Jersey is not and never was part of the EU, Regulation EU and the Recast EIR are not applicable and the Jersey Court is therefore not bound by these laws.

That said, the Recast EIR can influence decisions and may be persuasive when considering an application for recognition or assistance.

The Jersey Court historically has provided assistance to overseas officeholders, in this case an Administrator appointed in relation to the Administration of XYZ, in England. Assistance may be provided pursuant to Article 49 if it applies and if not, pursuant to common law principles and on the grounds of comity<sup>3</sup>. The Jersey Court will typically co-operate in foreign proceedings where there is a sufficient connection between the debtor and the law under which the foreign representative is appointed. As ABC Limited is a Jersey Company, but on these facts, its COMI is considered to be England and XYZ is registered in England (it is assumed the two companies are connected / in the same corporate structure), there may be a sufficient connection in order for the Jersey Court to provide assistance to the Administrator. Although there is no equivalent administrative process in Jersey, the Jersey Court has exercised its inherent jurisdiction regarding a Letter of Request to give effect to an application by a company that had applied for English administration pursuant to section 426 of the UK Insolvency Act<sup>4</sup>. The basis for recognition in Jersey may also be under Article 49 of the Bankruptcy Law as England is a "relevant" jurisdiction.

**ANSWER: Very good (3 marks)**

#### **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?

Although, as mentioned, there are no modern rehabilitation procedures equivalent to England's administration process in Jersey, the Jersey Court has also shown willingness to be creative and flexible where necessary by giving effect to a quasi-pre-packaged sale of assets under the just and equitable winding up process. This may enable a pre-packaged sale of ABC's Jersey store. However, potential problems of achieving a sale as a going concern include that the administrator appointed would, in addition to an order for recognition, would also need to apply for appropriate relief in order to give effect to the pre-packaged sale intended within the English Administration. This is due to the fact that the powers available to an officeholder under the just and equitable winding up procedure would ordinarily be restricted to winding up the ABC's affairs. Therefore, an order specifically permitting the sale of ABC's store whilst still trading would need to be obtained from the Jersey Court.

**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 of XYZ as opposed to a separate Jersey Company, Article 49 of the Bankruptcy Law may be used by the Administrator appointed in England to apply for recognition / assistance, as the UK is a "relevant country". Article 49 provides for cooperation in cross-border insolvency cases and sets out the requirements for the Jersey Court to provide assistance to foreign courts. The English Administrator may be able to gain recognition via Article 49 in order to exercise a power of sale of the Jersey Store. The Administrator will need to apply, by way of a Letter of Request to the Jersey Court from the

<sup>3</sup> *Re Royco Investment Company Limited* [1994 JLR 236]

<sup>4</sup> *Re OT Computers Limited* (2002) JU 29, 2002 JLR N10

English Court. It will be necessary to engage with the Viscount regarding the proposed strategy in relation to the drawing up of the Letter of Request. This is required by Practice Direction RC05/17

However, the extent of assistance offered is discretionary as is what law will apply. The Jersey Court has recognised the office of an administrator, even though Jersey does not have an equivalent process. It must be noted though that the Jersey Court is likely to consider whether the principles of equality of treatment of creditors as per the Bankruptcy law will be upheld, such as the interests of Big Ban. However, it is understood that Big Bank consents to the UK administration and therefore (in addition to the interests of other creditors in Jersey) this is likely to be factor in favour of the Jersey Court recognising the Administrator and providing relief to give effect to any proposed sale of the Jersey store.

**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?

Although Poland is part of the EU, Jersey is not and has never been part of the EU. Therefore, the Recast EIR will apply to Poland, it will not apply in Jersey. However, it can influence decisions in Jersey so as to harmonise approach<sup>5</sup>. Any administrator appointed in an Administration in Poland will still need to apply for recognition in Jersey as recognition will not be automatic. An application will need to be made by Letter of Request, which will need to be presented by Jersey counsel. It will be necessary to engage with the Viscount regarding the proposed strategy in relation to the drawing up of the Letter of Request, as is required by Practice Direction RC05/17

Jersey has not adopted the Model Law, and therefore, is similarly not bound by it. However, the Jersey Court typically will provide assistance to overseas office holders, including Administrators, under both Article 49 of the Bankruptcy Law and on the basis of common law principles and on the grounds of comity. As Poland is not a "relevant" jurisdiction for the purpose of Article 49, the Court may provide assistance under pre-existing customary law and the Jersey Court's inherent jurisdiction to extend assistance under principles of comity<sup>6</sup>. As XYZ in Poland, has a store in Jersey, if the Court considers this to establish a sufficient connection, it will typically grant the relief sought, including for a transfer of assets, as long as the interests of Jersey creditors are protected by an undertaking or court order. The Court will, in exercising its discretion, also wish to ensure that any request from a foreign court or administrator is not inconsistent with Jersey law and public policy.

**ANSWER: Good (3 marks)**

**Question 4: 15 out of 15**

**TOTAL: 48 out of 50**

**\* End of Assessment \***

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<sup>5</sup> *Idem*

<sup>6</sup> *Re Royco Investment Company Limited* [1994 JLR 236]