



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

### **THE BAHAMAS**

This is the **summative (formal) assessment** for **Module 5G** of this course and is compulsory for 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 5G.** 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.assessment5G]**. An example would be something along the following lines: 202122-336.assessment5G. **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 **7 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**

Select the **correct answer**:

What are the modes of winding-up for a Bahamian company?

- (a) Compulsory winding-up.
- (b) Voluntary winding-up.
- (c) Winding-up under supervision of the Court.

**(d) All of the above.**

1 mark

#### **Question 1.2**

Select the **correct answer**:

When is a Bahamian company deemed to be unable to pay its debts under section 188 of the Companies Act, Ch 308?

- (a) Only when it is balance sheet insolvent.
- (b) Only when it is cash flow insolvent.
- (c) When it is balance sheet insolvent and cash flow insolvent.

**(d) When it is either balance sheet insolvent or cash flow insolvent, or a valid statutory demand has not been satisfied within a period of three weeks after service on the company's registered office, or if a judgment in favour of a creditor remains unsatisfied.**

1 mark

#### **Question 1.3**

Select the **correct answer**:

In what order are the following paid in a compulsory liquidation under Bahamian law?

- (i) Employees' salaries, wages and gratuities;
- (ii) all taxes, assessments or impositions imposed or made under any Bahamian Act;
- (iii) sums due for employees medical insurance;
- (iv) wages for any workman or labourer regarding services rendered to the company two months before the commencement of the company's liquidation.

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

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

(c) (iii), (i), (iv), (ii).

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

1 mark

#### Question 1.4

Select the **correct answer**:

What is the minimum percentage of the members required to resolve for a Company's voluntary winding up?

(a) 45%.

(b) 50%.

(c) 75%.

(d) 95%.

1 mark

#### Question 1.5

Select the **correct answer**:

What is the clawback period for voidable preferences under section 241 of the Companies Act, Ch 308?

(a) One (1) month.

(b) Six (6) months.

(c) Twelve (12) months.

(d) Two (2) years.

1 mark

#### Question 1.6

Select the **correct answer**:

What types of preferential transactions are voidable in an insolvent liquidation?

a) Every fraudulent conveyance or transfer of property.

b) Every charge made three years before the commencement of the liquidation.

(c) Every payment made after the commencement of the liquidation.

d) None of the above.

0 mark

### Question 1.7

Select the **correct answer**:

Who may apply for the winding-up of a Bahamian company?

- (a) The company itself.
- (b) The company's receiver.
- (c) Any officer of the company.
- (d) The Supreme Court of The Bahamas.

1 mark

### Question 1.8

Select the **correct answer**:

Where do secured creditors rank in a liquidation?

- (a) Behind the costs and expenses of liquidation.
- (b) Behind preferential creditors.
- (c) Behind unsecured creditors.
- (d) In priority to all other creditors, since they can enforce their security outside of the liquidation.

1 mark

### Question 1.9

Select the **correct answer**:

Under which circumstance may a company be wound up by the Court?

- (a) The Court is of the opinion that it is just and equitable that the company should be wound up.
- (b) The company is insolvent.
- (c) The company did not commence its business within a year from its incorporation, or suspends its business for a whole year.
- (d) All of the above.

1 mark

### Question 1.10

Select the **correct answer**:

What is the effect of a winding-up?

- (a) The liquidator acquires custody and control of the company's assets.
- (b) Unless the court orders, no share in the company may be transferred.

- (c) Both a and b.
- (d) Neither a nor b.

0 marks

8 marks out of 10.  
Good job.

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

### Question 2.1 [maximum 4 marks]

In what circumstances may a provisional liquidator be appointed in a winding-up?

The court may appoint a liquidator provisionally under section 199 of the Companies (Winding up Amendment) Act 2011, at any time after the presentation of a winding-up petition but before the making of a winding-up order if there is a prima facie case for making a winding-up order and the appointment of a provisional liquidator is in the public interest or necessary to prevent (i) the dissipation or misuse of the company's assets; (ii) the oppression of minority shareholders; or (iii) mismanagement or misconduct on the part of the company's directors. If a company is or is likely to become unable to pay its debts; and intends to present a compromise or arrangement to its creditors then the company may make an application for the appointment of a provisional liquidator.

2 marks out of 4

### Question 2.2 [maximum 2 marks]

In what circumstances may a contributory present a winding-up petition for the winding-up of a company?

Under section 189 of the Companies Act 1992, any application to the Supreme Court for the winding up of a company may be presented by a contributor of the company by petition. However, for the contributory to make the application to wind up the company, one of the circumstances under section 187 of the Companies Act 1992 must apply.

These circumstances are (a) when the company has passed a resolution requiring the company to be wound up by the court; (b) when the company does not commence its business within a year from its incorporation, or suspends its business for a period of one year; (c) when the members are reduced in number to less than two; (d) when the company is unable to pay its debts; (e) if the court is of the opinion that it is just and equitable that the company should be wound up; (f) if the Central Bank petitions for the winding up of a bank whose license has been suspended; or (g) if the Commission or Statutory Administrator, under the Insurance Act or the External Insurance Act, petitions for the winding up of an insurance company.

1 mark out of 2

The circumstances in which a contributory may present a winding up petition for the winding up a company are stated in section 190(3) of the *Companies Act*.

A contributory may petition for the winding up of a company only if:

1. The shares in respect of which he is a contributory, or some of them, are partly paid; or
2. The shares in respect of which he is a contributory, or some of them, either were-

- (a) originally allotted to him/her, or have been held by him/her and registered in his/her name for at least six months immediately preceding the presentation of the winding up petition, or
- (b) have devolved on him/her through the death of a former holder.

**Question 2.3 [maximum 4 marks]**

Describe what the primary forms of security over moveable and immoveable property are.

The primary forms of security over moveable and immoveable property in The Bahamas are mortgages, debentures, pledges, charges, liens and promissory notes. As security interests registered take first priority over later-registered security interests, failure to register could result in a loss of the security interest. Interest should be registered in the Registry of Records which is accessible at the Registrar General's Department or online.

1 mark out of 4.

While you listed the primary forms of security in The Bahamas. You did not describe them.

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

**Question 3.1 [maximum 8 marks]**

Write a brief essay on the duties, functions and powers of official liquidators.

When appointed, an official liquidator takes over management of the company's business and assists the court by conducting the liquidation. There are two main duties and functions of an official liquidator. The first is collecting, realizing and distributing the assets of the company to its creditors, and in the situation of surplus, to persons entitled by the statute. The second is investigating and reporting on the affairs of the company and how it has been liquidated to the company's creditors and contributories.

The Fourth Schedule to the Companies Act 1992 outlines a list of specific powers exercisable with and without the sanction of the court. Pursuant to section 202 of the Companies Act 1992, the powers exercisable with the approval of the court include (a) bringing or defending any action or other legal proceeding in the name and on behalf of the company; (b) carrying on the business of the company so far as may be necessary for its beneficial winding up; (c) disposing of any property of the company by public auction or private contract; and (d) paying any class of creditors in full. The official liquidator may appoint counsel and attorney to assist in the performance of duties with the approval of the court under section 205 of the Companies Act 1992.

The powers exercisable without the sanction of the court include (a) taking possession of the property of the company; (b) executing deeds, receipts and other documents in the name of and on behalf of the company; (c) prove, rank, claim and draw a dividend; and (d) convening meetings of creditors and contributories; and engaging staff, counsel, attorneys and other professionally qualified persons to assist in the performance of functions.

8 marks out of 8.  
Very good job.

**Question 3.2 [maximum 7 marks]**

Write a brief essay on the recognition of foreign judgments in The Bahamas.

Judgments obtained from a superior court outside of The Bahamas have no direct operation and cannot be immediately enforced by execution within The Bahamas. The judgment must be registered or given recognition by the Bahamian Supreme Court under either statutory or common law requirements to have direct operation.

The jurisdiction where the judgment was obtained will generally determine whether statutory or common law requirements govern the registration or recognition proceedings. Judgments obtained in the United Kingdom and certain Commonwealth countries including Barbados, Bermuda, Jamaica, Leeward Islands (Antigua & Barbuda, Montserrat, St Kitts & Nevis, Anguilla and the British Virgin Islands), St Lucia, Trinidad & Tobago, Guyana, Belize and Australia can apply to have judgments registered under the Reciprocal Enforcement of Judgments Act 1924 (REJA).

Pursuant to section 3(1) of the REJA, the Supreme Court has jurisdiction and discretion to register a foreign judgment. The foreign judgment must satisfy the definition of “judgment” under section 2 of the REJA to invoke the court’s jurisdiction for statutory recognition. Section 3(2) of the REJA outlines the circumstances where the court will refuse to register a judgment or where the judgment debtor may challenge. On the grant of the order registering the foreign judgment, it becomes recognised in The Bahamas.

Jurisdictions unable to register under REJA will have standard law requirements regulating the proceedings to regulate judgments. The judgment creditor may commence an action in the Supreme Court relying on the judgment debt as the cause of action. If the judgment debtor does not reside or carry on business in The Bahamas but has assets in The Bahamas then the judgment creditor may encounter difficulties commencing proceedings as the Supreme Court may not have jurisdiction over the judgment debtor. The standard law requirements for a proceeding are that (a) the foreign court must be a competent jurisdiction; (b) the rules of natural justice have been compiled in the foreign proceedings; (c) the foreign judgment is final and conclusive; (d) the judgment debt is definite or ascertainable; (e) the foreign judgment must not be obtained by fraud; and (f) enforcement of the foreign judgment is not contrary to public policy in The Bahamas.

Whether a foreign judgment is recognized under statutory requirements or as the debt of a Bahamian judgment, it becomes enforceable by the same means available.

6.5 marks out of 7

One point was deducted as there is no mention of the circumstances the Court would recognise/register a foreign judgment under the common law.

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

Multi-national Company Limited (the Company) was incorporated in 2011 in Panama as a private company limited by shares. It held offices in Nassau, The Bahamas and carried on business in The Bahamas, the United States, Canada, England, Singapore, Italy, Switzerland, France, Australia and New Zealand. Since its incorporation, the Company conducted business as an investment firm in American and European markets. The Securities Commission of The Bahamas regulated the Company.

From 2011 to 2017, the Company had over 10,000 wealthy clients in multiple countries and had raised over BSD550 million from its investors. Its investment manager was Nicholas Jameson (Mr Jameson). It was discovered in late 2017 that Mr Jameson had defrauded the Company’s investors by falsely claiming that he had successfully achieved exceptional returns when, in fact, he was concealing huge losses by his mismanagement of the assets and misappropriation of investor funds to support his lavish lifestyle. The losses were never



disclosed to the Company's investors and Mr Jameson grossly misstated the Company's value in order to continue to attract new investors.

In 2018, it was discovered that the Company was insolvent. The Company's directors were aware of Mr Jameson's actions but took no action to report such behaviour to the relevant authorities and did not resign from the Company's Board.

**Using the facts above, answer the questions that follow.**

**Question 4.1 [maximum 7 marks]**

Can a winding-up petition be filed in The Bahamas for the Company's winding up? Explain your answer by discussing the Bahamian Supreme Court's jurisdiction to make winding-up orders and state on which ground any winding-up petition could be filed and by whom.

The Supreme Court of the Bahamas (Supreme Court) has jurisdiction to make a winding-up order in respect of a foreign company that has property located within The Bahamas or is carrying on business in The Bahamas. Therefore, as Multi-national Company Limited (the Company) has offices in and carries out business in The Bahamas, the Supreme Court does have jurisdiction to make a winding-up order.

The Company may be wound up if by the Supreme Court under section 187 of the Companies Act 1992 (Companies Act) (a) when the company has passed a resolution requiring the company to be wound up by the court; (b) when the company does not commence its business within a year from its incorporation, or suspends its business for a period of one year; (c) when the members are reduced in number to less than two; (d) when the company is unable to pay its debts (insolvency); (e) if the court is of the opinion that it is just and equitable that the company should be wound up; or (f) if the Central Bank petitions for the winding up of a bank whose license has been suspended; or (g) if the Commission or Statutory Administrator, under the Insurance Act or the External Insurance Act, petitions for the winding up of an insurance company.

Under section 190 of the Companies Act, the Company, any creditor, any contributory, or a regulator may make an application to the court for the winding-up of the Company.

As stated in the facts, in 2018 it was discovered the Company was insolvent. A creditor can petition to the Supreme Court for the Company's winding-up on the ground that it is insolvent. This can be done whether a statutory demand has been first served to the Company or not. Therefore, based on the facts Supreme Court is able to wind-up the Company under section 187 of the Companies Act.

6.5 marks out of 7.

Your answer was very good, but all of the grounds under section 187 of the *Companies Act* do not apply to the facts – only (d) and (e) apply.

**Question 4.2 [maximum 8 marks]**

To what extent could the Company's Board be liable for the Company's insolvency and failure to act, given their knowledge of Mr Jameson defrauding the Company's investors and misappropriation of investor funds?

Pursuant to section 79 of the Companies Act 1992 (Companies Act), the board of directors of the Company had a general duty to direct the management of the business and act honestly and in good faith with a view to the best interests of the company and exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable

circumstances. Based on the facts, they failed to act honestly and in good faith by allowing Mr Jameson's actions to occur and continue.

As the company is distressed, if a court is satisfied that before the commencement of the liquidation, any of the board of directors knew or ought to have concluded there was no reasonable prospect that the company would avoid being wound-up due to insolvency then the court may order the director to make such contribution to the company's assets as the court considers proper (s244 of the Companies Act).

Additionally, under section 263 of the Companies Act if the board of directors are found guilty of any misfeasance or breach of trust in relation to the company then the court may examine the conduct and may compel them to repay any monies for which the court deems just.

7 marks out of 8.

Note that section 263 of the Companies Act was repealed in 2011.

Total marks awarded: 40 out of 50

**\* End of Assessment \***