



## **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.

1 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  
9 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?

A provisional liquidator may be appointed in the following circumstances:

1. Where a winding up petition has been issued but prior to the hearing of the winding up order;
2. That there is a risk of company assets being dissipated or misused;
3. That a minority shareholder could be oppressed;
4. In the prevention of the incorrect or poor management by the directors; and
5. If its in the public interest.

The appointment of provisional liquidators can be sought by creditors, members or relevant regulators.

4 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?

A company may be petitioned by its contributories for a winding up petition if the company is insolvent or they have passed a resolution requiring the company to be wound up by the court. If the number of members has fallen to less than two, the court will also consider the winding up of the company.

0 marks.  
Your answer is completely incorrect.

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 immovable property are:

1. Mortgages. A legal mortgage over land involves the party taking out the mortgage to transfer their rights of that property to the party who is providing the mortgage. This does involve some conditions such as the right to equity of redemption for the party providing the mortgage. The mortgagor can also be granted an equitable mortgage which is similar to a legal mortgage, but title does not transfer to the mortgagor and is governed by an agreement with different rights.
2. Charges. A charge is created by an agreement between two parties that gives the chargee a right to take control of the asset and apply the proceeds of that realised asset to discharge the agreement.
3. Debenture. Is a form of security against an asset that is issued by the company and is a long term security used over assets that may change like furniture, raw materials to specific assets.
4. Liens. This form of security is for when services have been carried out and the creditor is legally entitled through holding of legal title to the possession of the assets.
5. Other forms of security include pledges and promissory notes.

3.5 out of 4.

Very good job. You didn't mention assignment and bond as primary forms of security.

### 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.

Official liquidators are agents of the court to conduct the winding up of a company and assist the court with the winding up process. As set out in the Companies Act, official liquidators have duties, functions and powers in order to fulfil their role.

Duties of the official liquidator are to deal collectively with the assets and creditors of the company. The official liquidator is in charge of the assets of the company and their collection, realisation and distribution. The assets proceeds will be distributed to its creditors in the priority regime order until all funds have been paid out. The official liquidator's duties are also to investigate what happened to the company and the reason for liquidation, then reporting back to its creditors on the same.

The official liquidator has two different sets of powers, those that can be exercised with court sanction and those without. Once the official liquidator is in control of the company, they are able to take control of the company's property in order to collect the proceeds of that property, act on behalf in its capacity to execute documents, deeds and receipts, organise and settle the priority of creditors in the estate, promote a scheme of arrangement under section 158 of the Companies Act, hold meetings of members and creditors, engage staff and legal counsel to assist with the wind down.

With the courts sanction the official liquidators duties extend to being able to disclaim onerous property, sell company assets through different strategies, bring or defend legal actions for the company, run the underlying business of the company, pay different classes of creditors or make an arrangement with creditors who themselves have a claim against the company and compromise claims against the company. The above is not an exhaustive list of powers of the official liquidator.

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.

A foreign judgement is not immediately enforceable in the Bahamas. In order for recognition by the Bahamian Supreme Court, certain common or statutory law requirements need to be met. The originating jurisdiction of the judgement to be recognised determines whether it is statutory or common law recognised. Under the Reciprocal Enforcement of Judgements Act 1924 (REJA), the UK, Australia and specified Commonwealth Caribbean countries will be recognised by the statutory requirements. The countries not specified above will be recognised under the common law requirements.

#### **Statutory recognition**

Statutory recognition has to be met several criteria to be recognised by the Bahamian Supreme Court including that it meets the definition of judgement under the REJA, it has the right to be challenged by the debtor and is usually granted on an ex parte basis then requiring notification of the debtor.

When the Supreme Court considers the judgement, it has to be from a superior court outside of the Bahamas and to meet the definition of judgement has to be any judgement, order or award on the basis of law and enforceable as it were in the jurisdiction the order originates from. The Supreme Court will consider and may be challenged by the judgement debtor if the original court acted without jurisdiction, the judgement debtor was not a resident or doing business in that originating jurisdiction and did not agree to the jurisdiction of that court, the debtor was correctly served or appeared before the originating court that he was a resident or carried on a business in, the judgement was granted based on fraudulent grounds, that an appeal against the judgement is ongoing or the judgement was not granted with public interest in mind.

Once granted recognition by the Bahamian Supreme Court, the judgement is recognised in the Bahamas.

#### **Common Law**

If not eligible under statutory law, the judgment creditor may start an action in the Bahamian Supreme Court on the basis that the judgment debt is a cause of action.

Depending on where the debtor resides or carries on a business is an important factor that is considered in recognition cases for service on the debtor. If there are only assets in the Bahamas and the other criteria are not met, the Supreme Court may struggle to find jurisdiction over the judgement debtor which in turn prevents the creditor from being able to enforce its judgement.

In the case where service is not required or the Supreme Court agrees to serve outside the jurisdiction, recognition may be granted. To achieve recognition under common law, it must be determined that the foreign court is competent to make the judgement, natural justice has been complied with, the foreign judgement is must not be able to be appealed, the judgement debt amount must be able to be determined, no fraud involved in the judgement being obtained and it's the judgement would be in the public's interest in the Bahamas if enforced.

Once the judgement is recognised by the Supreme Court in the Bahamas it is enforceable by the same means regardless of being recognised under common law or statutory requirements.



7 marks out of 7  
Very good job.

**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.

In determining whether a winding up petition can be filed in the Bahamas, the Bahamian's jurisdiction, the ground of winding up and the party to file the petition must be considered.

From the facts of the case, Multi-national Company Limited (the Company) held offices in the Bahamas, carried business on in the Bahamas and was regulated by the Bahamian regulator. The Bahamian Supreme Court can have jurisdiction to wind up the Company where it is a foreign company, has property in the Bahamas and is carrying on a business in the Bahamas. Therefore the Bahamian Supreme court would have jurisdiction to make winding up order over the Company.

While it appears on the facts of the case that Mr Jameson has defrauded investors, the authorities have not been notified which would have likely resulted in its license or registration with the Securities Commission of the Bahamas being revoked. On this basis or until the Company's registration is suspended, the regulatory authority will not be able to petition in this case for the Company's winding up. Potential successful grounds to wind up the Company are because the Company is insolvent due to Mr Jameson's actions. As the Company's directors were aware of Mr Jameson's actions it unlikely the directors will pass a resolution that it be wound up by the court. The court may also find that the Company should be wound up on just and equitable grounds which may apply in this case if the fraud is confirmed within the Company, due to the value of investments being high at BSD 550,000,000 and impacts multiple countries including the Bahamas.

The interested parties that could wind up the Company based on the above ground is then limited to a creditor which in this case may be an investor that has lost money, the Company could petition its own winding up because it is insolvent although would seem unlikely if they were aware of the fraud occurring, a member of the Company or a regulator such as the Securities Commission of the Bahamas once they are informed of the acts of Mr Jameson.

Based on the above, there are grounds for multiple interested parties to file a winding up petition for the Company in the Bahamas.

5 marks out of 7.

You lost two marks for not specifying that the company, contributory or the company may petition for its winding up on the grounds of insolvency and/or because it is just and equitable to do so.

#### 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?

It would be a requirement for the liquidator to investigate the reasons for the liquidation and affairs of the Company. The Company's board could then be liable for two events that is a breach of their director duties and the misappropriation of Company funds. If a company is found to have become insolvent without malice or trading while insolvent there is usually no reason to pursue the board. In this case where the Company's board did not act upon the information available to them of defrauding investor they were not acting within their duties of the Companies Act under section 81 to "*act in good honesty and in good with a view to the best interest of the company*".<sup>1</sup> The directors and officers of the Company can be disqualified upon application of the Registrar that they are banned from being a director of a public company up to five years.<sup>2</sup> The Company's Board in an insolvency scenario can be found personally liable if they knew of fraud and allowed it to continue.

The second liability that the Company's board may face is under section 263 of the Companies Act if the liquidator finds that directors or officers of the Company are "*guilty of an misfeasance or breach of trust in relation to the company*".<sup>3</sup> The penalty associated with this misfeasance may compel "*him to repay any monies so misapplied or retained, or for which he has become liable or accountable... or to contribute such sums of money to the assets of the company by way of compensation in respect of such misapplication, retainer, misfeasance or breach of trust as the court thinks just*".<sup>4</sup> From the facts of the case, as Mr Jameson was funding his lavish lifestyle through fraudulent acts and the board was aware the board and Mr Jameson may be liable for the funds taken and not returned to investors plus court calculated interest. The liability for falsifying documents also carries a prison term of up to two years. For the Company's board, if they were found to have been guilty within the twelve months preceding winding up could be charged with a fifty thousand fine and or two years imprisonment.<sup>5</sup>

The courts and liquidators will have the ability to pursue the Company's board for compensation, interest on funds and even may face prison time as a result of their actions and lack of inaction.

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<sup>1</sup> Companies Act, s 81(1)

<sup>2</sup> Companies Act, s 83

<sup>3</sup> Companies Act, s 263

<sup>4</sup> Companies Act, s 263

<sup>5</sup> Companies Act, s 296

5 marks out of 8

You could have mentioned that notwithstanding that the Directors were aware of Mr Jameson's negligence, mismanagement and outright wrongful behaviour. They failed to terminate Mr Jameson, report his behaviour to its regulator, and continued to operate an insolvent company. Moreover, section 263 of the *Companies Act* was repealed in 2011.

Total marks awarded 41.5 out of 50 marks.  
Very good job overall.

**\* End of Assessment \***