



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 8F

NEW ZEALAND

This is the **summative (formal) assessment** for **Module 8F** 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 8F. 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.assessment8F]**. An example would be something along the following lines: 202122-336.assessment8F. **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 “studentnumber” 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

35.5/50

QUESTION 1 (multiple-choice questions) [10 marks in total] **6/10**

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:

If a creditor is dissatisfied with the Official Assignee or Liquidator's decision in respect of its proof of debt, the creditor may:

- (a) challenge the decision through an application to the ITS or MBIE.
- (b) apply to the Official Assignee or Liquidator for the decision to be reversed or modified.
- (c) bring court proceedings for a money judgment in respect of the debt.
- (d) apply to the court for the decision to be reversed or varied. 1**

Question 1.2

Which of the following **is not** a collective insolvency process:

- (a) Receivership. 1**
- (b) Liquidation.
- (c) Voluntary bankruptcy.
- (d) Voluntary administration.

Question 1.3

Select the correct answer:

Which one of the following **does not** justify the use of voluntary administration:

- (a) Maximisation of the company's prospects of trading through and/or continuing in existence.
- (b) To enable a Deed of Company Arrangement to be entered into for the benefit of creditors.
- (c) To minimise tax liability by giving the Inland Revenue Department preferential status. 1**

(d) Enable the company to be administered in such a way to provide a better return to creditors than they would otherwise receive by way of an immediate liquidation.

Question 1.4

Select the correct answer:

A receiver:

(a) is an agent of the secured creditor that appointed the receiver. 0

(b) owes a duty of care to unsecured creditors.

(c) is an agent of the company and not of the secured creditor that appointed the receiver.

(d) is an agent of the company until the appointment of a liquidator to the company.

Question 1.5

Select the correct answer:

Company A goes into liquidation. It has a secured creditor who has security over all present and after-acquired property, including accounts receivables and inventory. There are insufficient amounts to meet all creditor claims. Which of these claims would be last in priority?

(a) PAYE owed to the Inland Revenue. 0

(b) Employee claims.

(c) The Liquidator's costs and expenses.

(d) Costs of the creditor who applied to put the company into liquidation.

(e) The secured creditor. 1

Question 1.6

Select the correct answer:

Assuming attachment has occurred, timing of registration of a financing statement:

(a) creates a security interest which gives a creditor priority over other creditors.

(b) perfects a security interest.

(c) is the only way perfection of a security interest can effected.

(d) determines the order of priority between competing security interests. 1

Question 1.7

Select the correct answer:

Liquidators in New Zealand:

(a) can only be appointed by the Court as they are officers of the Court.

(b) act in the interests of unsecured creditors.

(c) act as agents for the appointing creditor.

(d) protect the interests of all creditors of the company.0

Question 1.8

Select the correct answer:

A voluntary administrator must convene and hold a watershed meeting within how many business days of his appointment?

(a) 3 business days.

(b) 8 business days.

(c) 12 business days.

(d) 24 business days.1

(e) 45 business days.

Question 1.9

Select the correct answer:

Secured creditors in New Zealand:

(a) have absolute rights ahead of other unsecured creditors.

(b) stand outside the liquidation or administration of a company.

(c) have exclusive rights to appoint a receiver.

(d) have 10 working days within which they must elect to enforce their rights under the voluntary administration regime.1

Question 1.10

Select the correct answer:

A monetary debt judgment obtained from an Australia High Court may be enforced in New Zealand under the:

(a) Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.

(b) Reciprocal Enforcement of Judgments Act 1934.0

(c) Trans-Tasman Proceedings Act 2010.

(d) common law.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 5 marks] 4.5/5

Name three types of transactions that can be avoided by a liquidator and indicate whether the company needs to have been insolvent at the time of the transaction, or become insolvent upon entering into the transaction.

- (a) A liquidator could apply to set aside insolvent charges granted 6 months (“restricted period”) immediately preceding the liquidation if, following the granting of the charge, the company was unable to pay its due debts. Such a restricted period is 2 years if the charge was granted to a related party. The current restricted period of 6 months is an amendment implemented by the COVID-19 Act, where prior to such amendment, the restricted period was 2 years for all scenarios. **1.5 – Court may also set aside securities and charges granted to certain related parties without proof of insolvency where it is just and equitable to do so**
- (b) A liquidator may also seek to avoid undervalue transactions in the specific period prior to liquidation (such period is generally 2 years before liquidation pursuant to section 297(3) of the Companies Act). The liquidator may recover the difference in value, per the statutory formula under section 297(1) of the Companies Act, if the company entered into the transaction within the specified period and either (i) the company was unable to pay its due debts when it entered into the transaction or (ii) the company became unable to pay its debt as a result of entering into the transaction. **1.5**
- (c) A liquidator may also avoid transactions entered into with related persons – being director, relatives of a related company, for inadequate or excessive consideration under section 298 of the Companies Act. The liquidator does not need to show that the company was insolvent at the time of the transaction. The relevant specified period is generally 3 years before the liquidation pursuant to section 298(4) of the Companies Act. Such period covers the period of time during which the Court is considering the liquidation application. One may defend a claim under section 298 of the Companies Act by arguing that the consideration was adequate or not excessive. **1.5**

Question 2.2 [maximum 3 marks] 1/3

In what way can receivership come about in New Zealand? In whose interests does the receiver act? What is the name of the Act that governs receiverships in New Zealand?

Receivership usually occur in circumstances concerning secured property and in rare circumstances, receivership could be over a person.

A receiver acts in the best interest of the person in whose interest he has been appointed. The receiver has to act in good faith, for propose purpose and in a manner that he believes on reasonable grounds to be in the best interest of the said person.

The Receiverships Act governs receivership in New Zealand.

Receiver appointments can occur by way of contractual agreement (for example there is a contractual right to appoint under a security agreement in specified circumstances (e.g. default). This is the most common way an appointment occurs. In this circumstance, the receiver is an agent of the grantor company but acts primarily in the interests of

the secured creditor. A receiver may also occur by way of Court order. This is relatively rare. In this circumstance, the receiver acts as the independent and in accordance with the Court order. He or she is not required to act in the interests of any specific party, unless the Court order requires otherwise.

Question 2.3 [maximum 2 marks] 2/2

What options are available to a creditor who wishes to enforce a judgment obtained outside of New Zealand? What role does the New Zealand court play in this process, if any?

Depending on the forum in which the judgment was obtained, a creditor who wishes to enforce a foreign judgment in New Zealand are able to do so via the following 4 methods. The role of the New Zealand court, if any, is also set out below.

- (a) **Enforcement under the Reciprocal Enforcement of Judgments Act 1934** – The registration application is a summary process in the New Zealand Court. Once a registration order is issued by the Court, it must be served on the judgment debtor who can content the registration before the Court.
- (b) **Enforcement under the Enforcement of Commonwealth Judgments under Senior Courts Act 2016 (SCA)** – SCA being a self-contained regimen, excludes the operation of the Court’s inherent jurisdiction. If a judgment is enforced under the SCA, the Court will not re-examine the merits of the foreign judgment.
- (c) **Enforcement under the Trans-Tasman Proceedings Act 2010 (TTPA)** – Under the TTPA, the application must be made to the Court, and is subject to challenge.
- (d) **Enforcement under common law** – Under common law, the application must be made to the Court, and is subject to challenge. As a general principle, New Zealand Courts will not re-visit the merits of a final judgment on errors of fact or law. An objecting party also cannot argue that the relevant foreign court was not competent to grant the order under the law of the foreign jurisdiction.

QUESTION 3 (essay-type questions) [15 marks in total] 11/15

Voluntary administrations have not received significant traction in New Zealand. Discuss the potential reasons for this, having regard to the process and New Zealand's commercial context. In what circumstances would you advise a company to consider voluntary administration? Name 2 considerations that would influence this advice and explain why.

Voluntary administration was introduced in New Zealand in 2007 is largely modelled after the Australian’s voluntary administration. The primary objective of voluntary administration in New Zealand is the maximisation of the insolvent company’s prospect, or as much as possible of its business, continuing in existence under the terms of a deed of company arrangement. If that is not possible, then the aim would be to administer the business of the insolvent company in a way that creditors would be in a better position as compared to if the company enters immediate liquidation. However, voluntary administrations have not received significant traction in New Zealand.

One of the reasons for its lack of popularity may be contributed by the fact that there is a larger number of small and medium enterprises (SMEs) in New Zealand. While voluntary administration is available to any companies that wish to initiate it, including SMEs, the cost of initiating voluntary administration may be a cause of concern for SMEs, who are most likely already in financial distress, or potentially financially distressed. As compared to voluntary

administrations, small businesses may view liquidation as a more cost and time effective option.

Besides that, under the New Zealand voluntary administration, there is a lack of preferential status for the Inland Revenue Department therefore, IRD may not be willing support company's entering into voluntary administration. In a liquidation scenario, IRD retains its status as a preferential creditor. **Yes**

Relatively unused compared to receivership and/or liquidations. Unfamiliarity with process. Lack of understanding – all factors also.

When should a company consider voluntary administration

A company should consider voluntary administration when the company is confident that its major secured creditor would definitely support the voluntary administration. Upon commencement of voluntary administration and appointment of a voluntary administrator, moratorium kicks in whereby the company is protected from any creditor's action while the administrator comes up with a plan to rescue the financially distressed company. There is a suspension (subject to certain limitations) against enforcement actions against the company or its property unless the administrator consents to such action, or there is Court's permission to proceed. Moratorium protects the company against enforcement actions, recovery of any leased properties, any other proceedings against the company or assets utilised by the company in its trade of business.

Note however, such moratorium does not apply to secured creditors of the company who has security over the whole, or substantially the whole of the company's assets, for a period of 10 working days known as "decision period". The said "decision period" could also be extended through a written consent procedure. In other words, such secured creditors retain its rights to seek enforcement actions against the company. Therefore, in reality, if a major secured creditor is not supportive of a company commencing voluntary administration, it is unlikely that an administrator would be appointed, rendering the voluntary administration unsuccessful and ineffective. **Yes. The position of other secured creditors also important, particularly if they have commenced enforcement action. Worth asking the question before advising VA is suitable**

It is also advisable for a company to consider voluntary administration if it is the aim of the company to continue trading/ remain in business and would like to go through the deed of company arrangement (DOCA) option. A DOCA allows the company to set out terms in which the company will operate and how creditors' rights will be compromised and/or managed while the company continues its trade. DOCA is bound by statutory procedures and creditors are able to vote on the proposed terms. Under DOCA, creditors are also empowered to vary the terms by passing a resolution or obtaining an order of the Court. Accordingly, this may impart confidence in creditors as there is perhaps a lower probability of the company not adhering to the terms of the DOCA.

Also consider other practical issues such as nature of the business, are there known interested parties who might acquire the business through a VA process (or can part of the business be 'hived' off. What about other creditors? Lessors? IRD? What proportion of the debt does the IRD have? How do the major creditors make up the voting numbers (by number and value of debt)? Affects prospects of DOCA being voted on, so should consider general level of support for DOCA, prior to appointment.

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

Mr Strong was born in New Zealand but has travelled between the United Kingdom and New Zealand for most of his adult life as he has family and business interests there. He rented while he lived in the United Kingdom. He has bank accounts in both the United Kingdom and New Zealand.

He worked in the United Kingdom for a number of years, but decided he wanted to return to New Zealand. He sold some of his business interests in the United Kingdom and moved back to New Zealand. About two years later, proceedings were issued in the United Kingdom pursuant to a guarantee against Mr Strong. The creditor obtained judgment for GBP 500,000 and subsequently petitioned for Mr Strong's bankruptcy in the United Kingdom. Ms Finder was appointed trustee of the bankrupt estate.

Mr Strong had GBP 5,000 in his bank account in the United Kingdom. Other than that, Ms Finder was unable to uncover any other assets in the United Kingdom that could be realised for the benefit of creditors. She did discover, however, that Mr Strong owned some property in New Zealand.

Mr Strong:

- has three adult children, two of whom are located in New Zealand and one in the UK;
- continues to receive income from his business interests in the United Kingdom, but does not work in New Zealand. He has no active role in the business in the United Kingdom;
- has retired. Outside of the income he receives from the remaining business interests in the United Kingdom, he remains dependent on his wife's income for day to day living.

Question 4.1 [maximum 8 marks] 8/8

What options are available to Ms Finder to recover property belonging to Mr Strong located in New Zealand?

What factors point towards the bankruptcy being foreign main proceeding, compared to a foreign non-main proceeding?

Ms Finder would have the following options which may enable her to recover and realise Mr Strong's the assets in New Zealand:

- (a) Apply to the New Zealand to be recognised as a foreign main proceeding or foreign non-main proceeding (further discussed below).
- (b) Alternatively, apply for an order of assistance from the New Zealand Court pursuant to Section 8 of the Insolvency (Cross Border) Act 2006 (Cross Border Act).
- (c) Aside from the Cross Border Act, to rely on common law or statutory assistance under section 135 of the Insolvency Act 1967 (predecessor to Insolvency Act 2006).

Under the Insolvency Act 1967, the New Zealand High Court had an obligation to assist a foreign commonwealth court in bankruptcy upon request. Such request from a foreign court will enable the New Zealand Court to exercise any discretion or powers within its jurisdiction. However, with the adoption of the UNCITRAL Model Law, Ms Finder can now rely on the Cross Border Act.

Foreign main/non-main proceeding

Article 2 of Schedule 1 of the Cross Border Act defines foreign main proceeding as “a foreign proceeding taking place in the State where the debtor has the centre of its main interests”. As a starting point, New Zealand courts will refer to Article 16 of Schedule 1 where there is a starting assumption that the presumption of centre of main interest (COMI) was the person’s place of habitual residence. On the facts, since Mr Strong had been residing in New Zealand after moving out of the UK, it is likely that the Court will find that Mr Strong’s COMI is New Zealand.

Article 2 of Schedule 1 defines foreign non-main proceeding as “a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment...”. Establishment is defined as “any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services”. It is indicated by the said definition that past-business activities in a particular state would not suffice to fall within the ambit of “establishment” for the purposes of being a foreign non-main proceeding. **Having said that, he is receiving income from his interests in the UK, though he is not actively working there. We also know he is not working in New Zealand. Does this affect your assessment?**

Therefore, on the facts of the matter, by merely having business interests in the UK without currently carrying out non-transitory economic activity in the UK, suggest that Mr Strong’s does not have any establishment in the UK. Accordingly, the UK bankruptcy proceeding would not be regarded as a foreign non-main proceeding by the New Zealand court.

Having said that, the New Zealand courts have always been receptive in providing recognition and assistance to foreign insolvency representatives, as seen in *Williams v Simpson* [2011] 3 NZLR 380. It can be observed that one of the policy in New Zealand is to ensure streamlined and efficient process with key strategic countries where New Zealand has trade relationships with. This is achieved by ensuring mutual co-operations with certain foreign courts, including that of the UK (subject of course to New Zealand’s public policy).

Thus, the Court is likely to find that it has jurisdiction to order relief sought by Mr Finder to provide assistance to the UK Court by enabling Mr Finder to realise Mr Strong’s assets in New Zealand, by relying on Article 8 of Schedule 1. On the facts, it does not appear that granting assistance to Ms Finder would be manifestly contrary to any public policy in New Zealand. As such, it further persuades the New Zealand court to grant assistance to Ms Finder.

Question 4.2 [maximum 7 marks]

Question 4.2.1 [maximum 4 marks] 3/4

What options are available to Ms Finder to:

- (a) find out further information about Mr Strong's affairs in New Zealand, if she believes she has insufficient information; and
- (b) assuming she has reliable information about concealed assets in New Zealand, what steps could she take to protect those assets?

Ms Finder could rely on Article 25 of Schedule 1 of the Cross Border Act to apply for co-operation from the New Zealand High Court in the effort of obtaining further information regarding Mr Strong. Article 25 provides that the High Court shall co-operate to the maximum

extent possible with foreign representatives (such as Ms Finder), either directly or through an insolvency administrator.

By relying on Article 27, the New Zealand High Court could communicate information by a means considered appropriate by the Court or co-ordinate the administration and supervision of Mr Strong's assets and affairs.

Ms Finder could seek the following orders from the New Zealand High Court who could then rely on section 8 of the Cross Border Act to make such necessary orders, with the objective of providing assistance to the foreign representatives:

- (a) Ms Finder is to be entrusted with the administration or realisation of all Mr Strong's assets that are located in New Zealand.
- (b) In order to facilitate (a) above, Ms Finder is allowed to carry out investigations into the possessions of Mr Strong such as computer data and computers to further secure information on assets belonging to Mr Strong in New Zealand.

Might also be able to obtain orders under Article 23, but would first need to be able to secure orders that the proceeding was a foreign main/non main proceeding.

Question 4.2.2 [maximum 3 marks] 2/3

If Ms Finder sought to have her appointment recognised under the Insolvency (Cross-border) Act 2006 in New Zealand, do you think she would be successful? Provide reasons for your answer.

[Type your answer here]

Yes, it is likely that Ms Finder will be successful in her recognition application. It is to be noted that this recognition of appointment is a different issue from an application for recognition of main or non-main proceeding (as per Question 4.1 above).

In order to answer whether Ms Finder is a foreign representative, the first question the Court must consider is whether the UK bankruptcy proceeding is a "foreign proceeding" within the definition of Article 2 of Schedule 1.

The inter-related definitions of "Foreign proceeding" and "foreign representative" are:

- (a) Foreign proceeding is "a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation";
- (b) Foreign representative "means a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding".

Applying the elements of the definition, it is observed that:

- (a) UK bankruptcy proceeding is a judicial proceedings in which Mr Strong's assets and affairs are subject to the control and supervision of the UK Court for the purposes of liquidation.

- (b) The bankruptcy proceeding is collective in nature, being for the benefit of all of the debtor's creditors entitled to prove their debt in the bankruptcy and to receive a dividend on a pro rata basis, subject to statutory priorities.

Based on the above, it is argued that UK bankruptcy proceeding falls within the ambit of "foreign proceeding". Therefore Ms Finder, being trustee of Mr Strong's estate in the UK, who is authorised under the English law to administer Mr Strong's bankruptcy, would be recognised as a foreign representative in the New Zealand Court. In other words, Ms Finder's appointment application will be granted.

Once a recognition order is granted by the Court, Ms Finder must give notice to Mr Strong of the same.

Whether the proceeding qualifies as foreign main proceeding or foreign non-main proceeding is relevant to what Ms Finder can then do as a foreign representative.

*** End of Assessment ***