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

39.5/50

QUESTION 1 (multiple-choice questions) [10 marks in total] 7/10

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.

(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. 0 Secured creditors stand inside the VA regime unless they elect to enforce their security within 10 working day window

(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.

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.

(c) Trans-Tasman Proceedings Act 2010. 1

(d) common law.

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 5 marks] 4/5

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.

In accordance with section 292 of the Companies Act a liquidator may pursue insolvent or voidable transactions entered into by the company in the period immediately preceding the liquidation (6 months in the case of transactions with third parties and two years in the case of transactions with related parties. Insolvent transactions are transactions entered into at a time when the company is unable to pay its debts (i.e. insolvent at the time of the transaction) and result in a creditor receiving more than its entitlement in the liquidation. 1

In accordance with section 293 of the Companies Act a liquidator can apply to set aside insolvent charges granted within 6 months prior to liquidation (previously 2 years before the COVID-19 Act, unless to a related party in which case the 2 year period remains), an insolvent charge being a charge which following the granting of which meant the company was unable to pay its due debts (i.e. the company became insolvent after entering into the transaction). (1 – note also the Court has the ability to set aside securities and charges granted to named classes of related parties where it is just and equitable to do so – insolvency will likely be a factor, but Court can take into account wider set of circumstances)

In accordance with section 297 of the Companies Act a liquidator may pursue transactions entered into by the company at undervalue in the period prior to liquidation (generally two years prior to the liquidation). This enables the piquidator to recover the true value of a transaction for the benefit of creditors as the transaction at undervalue in effect reduced the pool of available assets available to the creditors. The company does not need to have been insolvent at the time or become insolvent upon entering a undervalue transaction for it to be recovered. 1 [Must be able to establish that company was unable to pay due debts at time of transaction or became unable to pay due debts as a result of entering into transaction]

Question 2.2 [maximum 3 marks] 3/3

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?

A receivership commonly occurs in the event where a creditor has security over a company's asset or group of assets and the terms of the agreement between the creditor and company enable the creditor to appoint a receiver to enforce their contractual rights.

The appointment of a receiver vests control of the asset from management/grantor and puts it in the control of the receiver. The receiver's principal role is to bring about repayment of the debt secured by the security agreement. Thus, the receiver is required to act in the best interests of the person/creditor who appointed them

.

The Act that governs receiverships in New Zealand is the Receiverships Act 1993.

Another mechanism by which a receiver can be appointed is by the High Court (although this is far less common then being appointed by a creditor as discussed above). A receiver can

be appointed by the High Court either pursuant to a specific power conferred by statute or in the exercise of its inherent jurisdiction. A court appointed receiver will usually have a specific purpose and be granted specific powers as needed to meet the purpose. Unlike when appointed by a creditor a receiver appointed by the court is independent of all parties and is not answerable to the debtor party or creditors.

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?

A creditor who obtains a judgement outside of New Zealand which it wishes to enforce in New Zealand has four methods, being:

- Enforcement under the Reciprocal Enforcement of Judgements Act 1934 (requires reciprocity in other jurisdiction);
- Enforcement under the Enforcement of Commonwealth Judgements Under Senior Courts Act 2016 (available if other commonwealth jurisdiction is not covered under Reciprocal Enforcement of Judgements Act);
- Enforcement under the Trans-Tasman Proceedings Act 2010 (Australia only); and
- Enforcement under common law.

The method appropriate is dependant on the forum in which the foreign judgement was obtained. The New Zealand is involved in these processes to different degrees. For example, if seeking recognition of a foreign judgement under common law the applicant would issue summary proceedings in New Zealand to obtain judgement in New Zealand which would enable the judgement to be enforced. In this scenario the New Zealand court will not typically re-visit the merits of a final judgement on errors of fact or law, nor can a complaint be raised that the 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.

The primary purpose of voluntary administrations ("**VA's**") is to allow a company the opportunity to restructure its debts, from this position, the company will hopefully be able to trade out of its financial difficulties. The main benefit to the company is that there is a moratorium on enforcement action by most creditors, this gives the company some breathing space to assess the best way forward with the assistance of an independent administrator.

Benefits of a VA include that creditors get greater transparency about the financial state of the company and are presented with alternatives to liquidation. Additionally, it may allow for the profitable portions of a company to continue, while the dead weight/underperforming business units can be cut loose. This could be of particular use to a construction company for example if projects are nearing completion. In addition, from a director's perspective, they may be protected from future personal liability – including for reckless trading claims by commencing a VA.

Part of the reason as to VA's not receiving significant action can be attributed to the historical tendency in New Zealand for secured creditors to appoint receivers, or for unsecured creditors to apply to the court for a liquidator to be appointed to a debtor company. In respect of a secured creditor VA may present an unnecessary risk, as appointing a receiver ensures a quicker return to that creditor of as much as possible of their debt. Such creditors may be unwilling to forgo their rights by entering into a DOCA with other creditors, unless they are confident they will get a better return in doing so. Entering VA may, in fact, diminish the pool of assets available to satisfy the debt, resulting in a lower return than what would have been possible through appointing a receiver.

Additional factors as to the slow adoption of VA's include the cost of appointing an administrator may be considered as high due to the personal liability administrators incur in undertaking administration. In addition, setting up and running the two required creditors' meetings can also be costly. Directors of a company may also be of the view that when you're trying to pay creditors, it's easy to view money spent on legal advice or an insolvency practitioner as a lower priority.

Position of IRD in NZ – absence of preferential position means there is no incentive for the IRD to vote in favour of a DOCA as opposed to a liquidation where its position is prioritised.

Further, areas of the VA legislation themselves may hinder its use. For example, the lack of a moratorium against ipso facto clauses, an ipso facto clause being a contractual provision allowing one party to terminate or modify the operation of the contract (or providing for this to occur automatically) upon the occurrence of a specified insolvency-related event. These clauses may allow important supply contracts to be terminated upon the appointment of an administrator. The termination of key supply contracts makes it difficult for a company in VA to trade out of insolvency. *Yes. What about exemptions to moratorium to enforcement because enforcement steps already commenced? Important factor to consider (depending on circumstances) in assessing whether VA might be a viable option!*

One circumstance in which a company may consider a VA is where an adjudication award has been made against them and management are unsure about the company's ability to pay the award by its due date and even if the award can be met whether the knock on implications mean that the company may be unable to more generally meet its debts as they fall due. From a directors perspective a VA may be applicable to ensure that no insolvent trading takes place (thereby protecting them) and it may also be that the award is a one off event without which the company may be able to continue. If it were the case that if the company were able to negotiate an extension on its other liabilities, for example bank loans then the company may be able to continue as a viable business resulting in full repayment to all creditors (albeit likely over a longer time period) rather then the company entering liquidation, its assets being sold at likely discounted values (fire sale) and creditors receiving a smaller recovery (not to mention employees retaining jobs etc).

Two considerations that would influence the advice above for the company to enter VA include whether the company is viable in its current form, i.e. if the company has been loss making or breakeven for a number of years and is on the decline (sales dropping etc, lack of investment). If a company is already terminally insolvent before an administrator is appointed, the outcome of VA will almost always be liquidation. In this sense, timing is crucial. Companies should enter VA when there is still a core, sustainable business for the administrator to work with. Yes, timing and financial health of company is important.

Or, if the company has being trading on an insolvent basis prior to the judgement award, then a VA may not be appropriate and a liquidation may be more suitable such that a liquidator can pursue voidable transactions etc to increase the pool of assets available to pay creditors.

Other critical factors:
Is there a secured lender with a GSA? Will they likely support?
Who are the other secured creditors? Are they likely to be supportive?
Does the director know what attitude the secured creditors might have?
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. What enforcement steps have been taken 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] **6.5/8**

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 could seek recognition under section 135 of the Insolvency Act 1967 in respect of bankrupt individuals. Under the Insolvency Act of 1967 the High Court of New Zealand is obligated to assist a foreign court of any Commonwealth country having jurisdiction in

bankruptcy on request. The request for assistance would allow the Court in New Zealand to exercise any discretion or power it had in relation to the specified order that it could exercise if the matter had arisen in New Zealand. Now replaced with Insolvency (Cross-border) Act 2006 provisions.

In addition, Ms Finder could seek recognition in accordance with the Insolvency (Cross-border) Act 2006. In accordance with Article 15 of the 2006 Act Ms Finder could apply to the New Zealand high court, including a certified copy of the decision from the UK court commencing the foreign proceeding and appointing Ms Finder as the foreign representative. In addition, Ms Finder would need to provide in her application a certificate from the UK court affirming the existence of the foreign proceeding and her appointment.

In respect of the factors that would contribute to whether the bankruptcy was considered as the foreign main or foreign non main proceeding, relevant case law includes Williams v Simpson. Williams v Simpson is the prominent case in New Zealand on the assessment of COMI under the cross border regime, in the case the court noted that the assessment was fact specific but with specific reference to Article 16 of Schedule 1 which had a starting assumption that the presumption of COMI was the person's place of habitual residence.

In respect of whether the scenario in question would be a foreign main or foreign non-main proceeding Mr. Strong's habitual residence would be a key factor as referenced in Williams v Simpson. In Mr. Strong's case given he has been living in New Zealand for approximately two years the initial presumption would be of COMI would be New Zealand. Whilst Mr. Strong still receives income from his business interests in the UK given that Ms Finder could only identify £5,000 worth of assets in the UK one could assume that Mr. Strong therefore transfers the income he receives in the UK back to New Zealand to pay his day to day living expenses. Although given Mr. Strong appears to earn annual income in the UK an argument could be made that Mr. Strong had an establishment in the UK, as at the date of Ms Finder's application (assuming Mr. Strong still earned the income in the UK) it could be argued that said income qualified as Mr. Strong carrying out non-transitory economic activity in the UK.

Question 4.2 [maximum 7 marks]

Question 4.2.1 [maximum 4 marks] 4/4

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?

If Ms Finder wanted to find out further information about Mr. Strong's affairs assuming she had recognition of the proceedings in New Zealand, the court could grant relief (in accordance with article 21 of the Insolvency (Cross-border) Act 2006 including providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtors assets. Such relief could assist Ms Finder in her investigations.

If Ms Finder has reliable information about concealed assets in New Zealand she could apply for an order of assistance under section 8 of the Cross-border Act. Through this she may be able to obtain search and seizure order made by the court which could enable her to seize the assets she had identified.

In addition, in accordance with Article 21 of the Insolvency (Cross-border) Act 2006 assuming Ms Finder was successful in obtaining recognition in New Zealand (whether main or non main) where necessary to protect the interests of the creditors the New Zealand court may at the request of the foreign representative (Ms Finder) grant appropriate relief including:

- suspending the right to transfer, encumber, or otherwise dispose of any assets of the debtor (Mr. Strong);
- entrust the administration or realisation of all or part of the debtor's assets located in New Zealand to Ms Finder.

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.

If Ms Finder sought to have her appointment recognised under the 2006 Act she would likely be successful in obtaining recognition as the purpose of the act is to implement the model law on cross border insolvency, which the UK has also adopted. The purpose of the 2006 Act is also to provide a framework for facilitating insolvency proceedings when a person is subject to insolvency administration in one country but has assets or debts in another country. This is applicable to this scenario as Mr. Strong is subject to insolvency proceedings in the UK but is understood to have assets in New Zealand.

She is also likely to be successful as it is likely Mr. Strong's COMI would be determined as New Zealand, primarily given his habitual residence. [Yes, but there are factors which point against this also such as economic interests in the UK!]

*** End of Assessment ***