



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

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.
See page 56 of text

(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. 0

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

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

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.

(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.

The first type of recovery a liquidator can use is a voidable transactions which is a preferential payment to a creditor in the lead up to the liquidation where the company was insolvent at the time of the transaction. **The transaction is entered into at a time when the company is unable to pay its due debts I.e. focus is on liquidity as opposed to balance sheet (though both are relevant). (1)**

The second type of transaction that can be avoided by a liquidator is transactions with related persons at inadequate or excessive consideration. These type of transactions do not require the proof of insolvency or for the company to have been insolvent. **(1.5)**

The third type of transaction that can be avoided by a liquidation is a charge granted to related parties. There is no requirement for the liquidator to prove that the company was insolvent at the type of the granting of the charge. **(1.5)**

Question 2.2 [maximum 3 marks] 2.5/3

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?

Receivers can be appointed either over a person or in respect of property that is secured by the charge holder. The first way a receiver can be appointed is through the High Court by the powers in statute or exercising their jurisdiction. The second type of appointment is through private arrangements where the secured creditor appoints a receiver after exercising its rights under a security agreement. **1**

The receiver is acting in the best interest of the party that appoints them. This is in order to discharge a debt owed to the secured party in which the receiver acts in the best interest to seek repayment of that debt. **0.5**

The act that governs receiverships in New Zealand is the Receiverships Act 1993. **1**

Note: In the case of Court appointments, the person acts in accordance with the Court order and is generally required to act independently.

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?

Creditors wishing to enforce a judgement obtained outside of New Zealand can use five different options which include enforcement under the following method:

1. the Reciprocal Enforcement of Judgements Act 1934. The New Zealand Court will grant the order for recognition under this act;
2. Enforcement of Commonwealth Judgements Under Senior Courts Act 2016. The New Zealand court does not need to play a role under this process;
3. The Trans-Tasman Proceedings Act 2010. The New Zealand court does not need to play a role under this process;
4. Common law. Summary judgement is required by the New Zealand court under common law enforcement; and
5. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The New Zealand court does not need to play a role under this process

QUESTION 3 (essay-type questions) [15 marks in total] 13/15

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 administrations have not received significant traction in New Zealand due to the lack of priority that the New Zealand tax authority, the Inland Revenue Department (IRD), receives compared to a liquidation and the costs of the voluntary administration process on the company. **Yes!**

New Zealand is identified to have an extremely large number of small and medium enterprises. In 2019, businesses that employed 99 people or less and/or with revenue up to \$30m were 99% of business in New Zealand. 97% of all business employed 20 people or less. From the date of appointment of voluntary administrators, directors can no longer exercise their powers or authority without written consent. In their place, administrators take control of the company while managing its affairs in the best interest to maximise return to creditors or result in a better outcome than liquidation. These administrators are usually highly qualified, professionals that charge professional rates to conduct their work. If 97% of enterprises are small business that are struggling financially or require the assistance of a restructuring professional, they will likely be unable to be generating sufficient funds to afford the required help. As a result of the New Zealand economy being highly concentrated in small to medium enterprises when assistance is required, they will likely not use voluntary administration where the cost is higher than a liquidation scenario. **Yes -costs are a major factor in whether VA is likely to be used in NZ. It is often prohibitively expensive.**

The second reason for lack of traction has to do with the priority regime that the IRD receives in liquidation versus voluntary administration. The IRD is a consistent party across every type of enterprise because of its role in collecting tax and will likely be owed money. If amounts are not paid to the IRD, they will be a creditor that can exercise their vote in a corporate rescue procedure. In the Companies Act which guides the liquidation process, the IRD has preferential status. In a voluntary administration where a Deed of Company Arrangement (DOCA) is put forward, the IRD does not automatically receive preferential status. The voluntary administration process is to return a better outcome for creditors than otherwise possible under a liquidation scenario. **If the IRD does not receive a better outcome they have an interest to vote against voluntary administration. Good!**

The purpose of the voluntary administration process is to try and allow the business to continue in existence or provide a better return for creditors than under liquidation. Companies should consider entering voluntary administration when they require a moratorium on debts that would give the company time to work through a particular event or period of distress. The moratorium in most cases suspends the ability to enforce or bring proceedings against the

company. This could be useful if the business needs to be sold or the company may be insolvent.

Two considerations when advising if a company should enter voluntary administration are:

1. If there is a secured creditor that has a charge over all or majority of the company's assets, the board of the company should consult with the secured creditor and ensure they are supportive of the arrangement. If the secured creditor is not consulted they are the exception to the moratorium which means if they do not agree they could enforce over and realise the company's assets which would be essential in the DOCA.
2. The type of business that the company runs. This is important for the situation where the company has perishable goods and that are charged to a secured creditor. A secured creditor is exempt from enforcing on perishable goods under the moratorium.

Good answer.

Think also about what other major creditors there are, what enforcement steps have already been taken and whether creditors will generally be supportive (e.g. IRD – what is the level of debt? What about other secured creditors? Have they taken steps which might mean they are exempt from the VA moratorium? What prospects are there of a DOCA being approved, remembering the voting requirements for a DOCA?

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?

When considering what options are available to Ms Finder it is assumed from the facts that the situation is set after the introduction of the Insolvency (Cross-border) Act 2006. Ms Finder will have the ability to either apply to the New Zealand court that the United Kingdom proceedings will be foreign main proceedings under the Cross-border Act or ask for assistance under the Cross-border Act which can be in multiple forms. It will need to be proven that Mr Strong's centre of main interests are in the United Kingdom to have the UK bankruptcy recognised as foreign main proceedings. In providing assistance under the Cross-border Act the New Zealand Court may be able to:

- have relief provided in New Zealand which can include staying execution of Mr Strong's assets;
- allowing Ms Finder to realise Mr Strong's assets in New Zealand or another person to preserve the assets;
- Suspend the ability of Mr Strong's to transfer assets;
- Examine and gather evidence of Mr Strong regarding his assets, affairs and liabilities.

The starting point for recognition of foreign proceedings is determining Mr Strong's centre of main interest. In Article 16 of Schedule 1 of the Cross-border Act it states that unless proof to the contrary is provided, Mr Strong's residence will be considered his centre of main interest, which in this case is New Zealand.

The factors that point towards the UK bankruptcy being foreign main proceedings includes:

- Mr Strong still receives income from the UK business activities and does not work in New Zealand;
- Mr Strong has some family in the UK with one child that lives there;
- He has a bank account and conducted business activities in the UK over a number of years;

Factors that point towards the UK bankruptcy being a foreign non-main proceeding include:

- Mr Strong has continued to return back to New Zealand over the years and now has lived in New Zealand for the last two years;
- From the facts, Mr Strong only rented in the UK whereas he owned property in New Zealand;
- Mr Strong has family in New Zealand with two of three children that live in New Zealand and assuming his wife too, who's income he relies on;
- The income he receives from the business is not due to an active role in the UK.

Accordingly, as appears Mr Strong has his centre of main interest in New Zealand and would weigh in the favour of the UK proceedings being a foreign non-main proceeding for Ms Finder.

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?
- a) Under Article 21 of Schedule 1 of the Cross-border Act, regardless of whether the foreign proceedings are determined to be main or non-main proceedings, Ms Finder after recognition from the New Zealand High Court, will be able to request the Court's assistance for the power for "*the examination of witnesses, the taking of evidence, or the delivery of information concerning the debtor's assets, affairs, rights, obligations, or liabilities*"¹. This will enable Ms Finder to find out further information if she does not consider she has enough.
- b) For Ms Finder to protect the assets that she has information about, the ability to protect those assets and the extent of powers/relief include:
- Relief on recognition of the foreign proceedings which can include staying of execution against Mr Strong's assets;
 - Allowing Ms Finder or another appointed representative to look after or realise Mr Strong's assets;
 - Stop the ability of Mr Strong to transfer, charge or dispose of assets.
- All of these powers will need to be granted by the New Zealand High Court to Ms Finder or over Mr Strong's assets.

Question 4.2.2 [maximum 3 marks] 2.5/3

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.

From the facts of the case and the provisions of the Cross-border Act, I think that Ms Finder will be successful in having her appointment recognised, it will more be whether the proceedings are found to be foreign main or non-main proceedings.

I think that the appointment will be recognised as the criteria for recognition is all met as:

- The UK appointment is considered a foreign proceeding;
- Ms Finder is considered a foreign representative in her role in the proceedings in the UK;
- A recognition application by Ms Finder will be able to be completed with copies of appointment documents, a certificate from the UK court can be requested for the existence of the UK proceedings and any other evidence required to verify Ms Finder's appointment; and
- Ms Finder will be required to submit the application to the New Zealand High Court.

*** End of Assessment ***

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¹ Insolvency (Cross-border) Act 2006, Schedule 1, Article 21.
<https://www.legislation.govt.nz/act/public/2006/0057/latest/DLM389648.html>