



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

41/50

QUESTION 1 (multiple-choice questions) [10 marks in total] 8/10

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.
- (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. 1
- (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 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.0

(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.

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] 3/5

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 liquidator has powers to void certain transactions under the Companies Act.

A liquidator can void a transfer for undervalue that occurred within 2 years of the liquidation when the company was insolvent or if the transaction rendered the company insolvent. (Legislation concerned with liquidity i.e. ability to pay due debts as opposed to balance sheet solvency)

A liquidator can void a transaction to a related party that occurred within 3 years of liquidation. The transaction must have been for either excessive or inadequate value. The transaction did not have to occur at a time when the company was insolvent.

A liquidator can void insolvent transactions which occurred at a time when the company was insolvent and caused the recipient of the transaction to obtain a benefit beyond what they would have received in a liquidation. Following the Covid 19 Act, the review period for such transactions is within 6 months of liquidation, unless the transaction was to a related party, in which case the review period is within 2 years of liquidation. (Legislation concerned with liquidity i.e. ability to pay due debts as opposed to balance sheet solvency)

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 receiver can be privately appointed by a secured creditor subject to the security agreement in place. That is, the security agreement must allow the secured creditor to appoint a receiver in the present circumstances of the company for a private appointment to occur. In this case, the receiver acts on the interests of the secured creditor, but must also be aware of the interests of other parties.

A court-appointed receiver is supervised by the court and must follow its directions. The receiver acts in the general interest of all stakeholders and is not beholden to the company or any creditor in particular.

Receiverships are governed by the Receiverships Act.

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?

Judgements obtained outside of New Zealand can be enforced in New Zealand under the Reciprocal Enforcement Judgements Act 1934, the Enforcement of Commonwealth Judgements Under Senior Courts Act 2016, the Trans-Tasman Proceedings Act 2010, or common law, depending on the jurisdiction of the foreign judgement and the circumstances surrounding the judgement.

The New Zealand Court has the ability to recognize the judgement if it meets the necessary criteria. The Court does not re-litigate the judgment, but rather accepts the decision of the foreign court.

QUESTION 3 (essay-type questions) [15 marks in total] 14/15

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 can involve significant costs. Hence, it is normally utilized by larger companies. New Zealand's business landscape does not include numerous large corporations and as such, there are less companies that can afford to enter a voluntary administration.

Directors lose control of the business by entering a voluntary administration. They remain in office, but have limited powers and need to receive permission from the administrator to take actions. Having an administrator take over with the power to manage the business and sell property of the business may be untenable for some who like to be in control. By choosing a voluntary administration, directors may end up in a liquidation situation at the end anyways. A voluntary administration requires creditors to decide if a company can enter a deed of company arrangement, to end the administration, or to put the company into liquidation. The deed of company arrangement is not binding on all creditors, such as secured creditors who did not vote in favour of it at the watershed meeting. However, the deed of company arrangement is binding on the company, including its directors and shareholders.

Under voluntary administration, the Inland Revenue Department is not a preferred creditor. Given that tax debt is often significant for some of these corporations, they require the IRD to be onside and vote in favour of the deed of company arrangement. However, given that the IRD is not a preferred creditor in a voluntary arrangement but is a preferred creditor in a liquidation, it is beneficial for the IRD if companies enter liquidation rather than a voluntary arrangement so that they obtain preferred status.

Voluntary administrations should be considered by companies who need help, but want to continue operations and to attempt to maintain the company going forward (rather than winding up the business). Voluntary administration should be considered by companies who require a stay, a temporary reprieve to get their company back on track, and/or assistance and oversight with managing operations. An administrator can also examine the company's affairs to gather a true picture of the status and viability of the company. Sometimes, directors need an outside perspective to assist them in objectively analyzing a company's prospects. The stay of proceedings can assist the company by giving it some breathing room to recover from financial distress.

In addition, directors benefit greatly from the stay because the stay also applies to guarantees given by directors for corporate debts. Hence, if directors have a guarantee, a voluntary administration should be considered to assist them in not only the challenges of the company, but to prevent a creditor from enforcing their guarantee against the director without leave of the court.

If a company has significant tax debt, a voluntary administration may not be the best choice because the IRD is unlikely to support of deed of company arrangement over a liquidation. This is because, as stated above, the IRD is a preferred creditor in liquidations, but not in voluntary administrations.

Practical issues to consider:

- Secured creditor – Is there a GSA holder? Is it supportive (or likely to be supportive). If not supportive, VA unlikely to be successful
- Other secured creditors – have any taken enforcement steps (and therefore outside the VA moratorium) – if so, could cause problems
- IRD – what is the level of debt compared to other creditors? Will it likely affect the vote by way of value
- Nature of business and financial health – is liquidation inevitable?

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] 6/8

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?

It is unlikely that Ms. Finder would be successful in attempting to recognize her appointment under common law, because Mr. Strong's residence is New Zealand, not the UK. If she was able to have the proceedings recognized under common law, she would be able to obtain assistance in realizing on Mr. Strong's assets.

Ms. Finder can request under the Insolvency Act 1967 that the UK Court be assisted so that orders from the UK Court can be recognized and acted upon in New Zealand. The UK is a

part of the Commonwealth. Hence, she would be able to recover assets in New Zealand as ordered in the UK. – **Now Insolvency (Cross-border) Act.**

Ms. Finder can apply to the court of New Zealand under Article 8, Schedule 1 of the Insolvency (cross-border) Act 2006 for assistance in recovering assets of Mr. Strong in New Zealand.

The determination of a foreign main proceeding vs. a foreign non-main proceeding is based on COMI (centre of main interests). COMI can be determined by the location of a business' main office, the location of the majority of operations, the location of directors, etc.

Under Article 16, Schedule 1, COMI is assumed to be in the locale of the debtor's residence. Given that Mr. Strong moved back to New Zealand two years ago, his residence would be New Zealand and hence his COMI would be New Zealand. However, unlike in *Williams v Simpson*, Mr. Strong, while retired and having no active role in the UK, still receives income from his business interests in the UK. Therefore, Ms. Finder can argue that the debtor does have establishment in the UK so that the UK proceedings can be recognized as a foreign non-main proceeding.

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?

a) Ms. Finder can attempt to obtain an order in the UK to examine the debtor to obtain more information. Then, she can request that the UK order be recognized in New Zealand under the Insolvency Act 1967 as an order issued by a Commonwealth court. **Yes, but under Cross Border Act**

In addition, Ms. Finder could attempt to have her proceedings recognized as foreign proceedings so that she would have powers to act in New Zealand and potentially obtain further information about Mr. Strong's affairs.

b) Ms. Finder can apply to the court of New Zealand under Article 8, Schedule 1 for assistance in recovering assets of Mr. Strong in New Zealand.

Alternatively, Ms. Finder can attempt to obtain an order in the UK to recover the assets. Then, she can request that the UK order be recognized in New Zealand under the Insolvency Act 1967 as an order issued by a Commonwealth court.

In addition, Ms. Finder could attempt to have her proceedings recognized as foreign proceedings so that she would have powers to act in New Zealand and potentially reveal and recover those concealed assets.

- **Search and seizure orders**
- **Foreign representative an option?**

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.

The Insolvency (Cross-border) Act 2006 has had limited use since its inception.

Under *Williams v Simpson*, COMI is presumed to be the debtor's place of residence. In that case, foreign non-main proceedings were not opened because an establishment of the debtor in England was not shown. However, the trustee was allowed to realize on assets in New Zealand under article 8 of schedule 1.

Under Article 16, Schedule 1, COMI is assumed to be in the locale of the debtor's residence. Given that Mr. Strong moved back to New Zealand two years ago, his residence would be New Zealand and hence his COMI would be New Zealand. However, unlike in *Williams v Simpson*, Mr. Strong, while retired and having no active role in the UK, still receives income from his business interests in the UK. Therefore, Ms. Finder can argue that the debtor does have establishment in the UK so that the UK proceedings can be recognized as a foreign non-main proceeding.

*** End of Assessment ***