



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 4D

JAMAICA

This is the **summative (formal) assessment** for **Module 4D** of this course and must be submitted by 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 4D. 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.assessment4D]**. An example would be something along the following lines: 202122-336.assessment4D. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
6. The final submission date for this assessment is **31 July 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
7. Prior to being populated with your answers, this assessment consists of **7 pages**.

ANSWER ALL THE QUESTIONS

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

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

The holder of which office is empowered to designate Judges to constitute the Insolvency Division?

- (a) The Governor General of Jamaica.
- (b) The Prime Minister of Jamaica.
- (c) The Minister of Justice.

(d) The Chief Justice of the Supreme Court.

Question 1.2

The Jamaican Insolvency Act is modelled on the insolvency laws of which jurisdiction, and what law in that jurisdiction?

- (a) The United States of America and the Bankruptcy Code.
- (b) Canada and the Companies' Creditors Arrangement Act.
- (c) England and Wales and the Insolvency Act.

(d) Canada and the Bankruptcy and Insolvency Act.

Question 1.3

Which of the following **best describes** the rights granted by a debtor company in favour of a creditor when the debtor company grants the creditor a debenture?

- (a) The debtor company has given the creditor a security interest over specific assets.
- (b) The debtor company has given the creditor a security interest over all its assets (tangible and intangible) and undertakings.
- (c) The debtor company has given the creditor a security interest over all its fixed assets only.

(d) All of the above are correct.

Commented [dp1]: This is incorrect. The best description of a debenture is (b)

Question 1.4

Which of the following persons **may not** make a proposal on behalf of an insolvent person that has entered the JIA's rescue modality?

(a) A creditor of the insolvent person.

(b) The insolvent person.

(c) The trustee.

(d) A receiver.

Question 1.5

A first time individual bankrupt whose discharge is not challenged will receive an automatic discharge from bankruptcy after how many months?

(a) 3 months.

(b) 6 months.

(c) 12 months.

(d) 24 months.

Question 1.6

Which of the following **is not** one of the duties of a trustee appointed pursuant to a Notice of Intention to File a Proposal or a Proposal:

(a) To take possession of all property, books and records.

(b) Giving notice to all creditors within five (5) days of their appointment.

(c) Providing an opinion whether the cash flow statement is reasonable.

(d) All of the above.

Question 1.7

Indicate whether the statement below is **True or False**:

A debtor facing financial difficulties must access either the Proposal Provisions or the Bankruptcy Process under the JIA.

(a) True

(b) False

Question 1.8

Indicate whether the statement below is **True or False**:

A Proposal may provide for the payment of equity claims, but only if other claims are first paid in full.

(a) True

(b) False

Question 1.9

Indicate whether the statement below is **True or False**?

In relation to Eligible Financial Contracts, the rights of the counter-party are not subject to a stay based on either triggering the Proposal Provisions or the Bankruptcy Process.

(a) True

(b) False

Question 1.10

Indicate whether the statement below is **True or False**:

A trustee of a bankrupt may assign a real property lease even if the lease was non-assignable.

(a) True

(b) False

QUESTION 2 (direct questions) [10 marks]**Question 2.1 [maximum 3 marks]**

What are the policy objectives of the Jamaica Insolvency Act?

As expressed in the Jamaica Insolvency Act, they are as follows:

1. The rehabilitation of debtors and the preservation of viable companies, having due regards to the protection of the rights of creditors and other stakeholders; and
2. The fair allocation of the costs of insolvencies with the overriding interest of strengthening and protecting Jamaica's economic and financial system and the availability and flow of credit within the economy.

Question 2.2 [maximum 3 marks]

Briefly describe the two methods a debtor may use to access the Proposal Provisions of the Jamaica Insolvency Act?

A debtor may access the Proposal Provisions by filing a Notice of Intention to File a Proposal; or by filing an actual Proposal. The Jamaica Insolvency Act prescribes that a debtor may file

a proposal to commence insolvency proceedings. The minimum requirements for a proposal are: (1) The proposal must not provide for the payment of equity claims unless all other claims are first paid in full; (2) where the debtor is an employer, the proposal must provide for the priority of payment of certain employee claims; and where the proposal is made conditional on creditors making a contribution to the debtor, creditors must have option to not participate and those that elect not to participate must be given the option to receive a cash payment.

As it relates to the filing of a Notice of Intention to File a Proposal by an insolvent person, within 14 days of filing a Notice of Intention, an insolvent person must file a cash flow statement in the prescribed form with the Supervisor.

A Notice of Intention to File a Proposal or a proposal brings into effect a stay of proceedings on all creditors named in the proposal.

Commented [dp2]: 2 marks. No mention of who can file an actual Proposal in contrast to the Notice of Intention to File a Proposal.

Question 2.3 [maximum 4 marks]

Describe the process by which a Judge in the Insolvency Division will determine whether to give recognition to foreign insolvency proceedings in Jamaica.

When the Jamaican Court is faced with the question of determining whether to give recognition to foreign insolvency proceedings, the Judge will first determine whether the judgment can be recognised in Jamaica on the basis that it is subject to the Reciprocal Enforcement Provisions. If not, the Judge will determine whether the following common law principles have been met:

1. The judgment was given by a court of competent jurisdiction;
2. The judgment is final and conclusive;
3. The judgment can be enforced under Jamaican law;
4. The judgment relates to a money debt and not immovable property; and
5. The judgment is for a definite sum of money and should not contain a penalty.

Where the above conditions have been met, the Judge will grant an order for recognition unless a person seeking to prevent enforcement of the judgment can prove the following:

1. The judgment was obtained by fraud;
2. The recognition or enforcement of the foreign judgment would be contrary to public policy
3. The judgment was obtained in a manner that contravenes the principles of natural justice.

Commented [dp3]: 0 marks. Question asks about insolvency proceedings rather than insolvency judgment. Candidate was expected to discuss Insolvency Regulations that implemented the UNICTRAL Model Law.

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

Question 3.1 [maximum 7 marks]

Set out the process by which a Proposal that has received the requisite creditor approval will be deemed to be accepted and the considerations a Judge will consider in determining whether to approve that Proposal?

Set out the process by which a Proposal that has received the requisite creditor approval will be deemed to be accepted and the considerations a Judge will consider in determining whether to approve that Proposal?

The Jamaican Insolvency Act provides the process by which a proposal may be deemed accepted. It provides that within 21 days of the filing of the proposal, the trustee in bankruptcy will be required to call a meeting of the creditors to consider and vote on the proposal.

All other matters except for the proposal must be passed by an ordinary resolution and if the majority in number of the unsecured creditors in each class holding no less than two-thirds in value of the total debt vote represented by that class, vote in favour of the proposal, the proposal is deemed accepted.

Secured creditors do not determine acceptance of the proposal. However, when they have voted against the proposal, they are no longer bound by the moratorium and can execute their collateral. Once the required majority of unsecured creditor accepts the proposal, court's approval of the proposal must be obtained before its implementation. The Act provides that a proposal is deemed approved by the Court if within 15 days of its acceptance by the required majority of unsecured creditors, **neither a debtor** notice requiring the debtor to apply to the Court to have the proposal approved. In determining whether to approve a proposal the Court will consider the following:

1. Whether the proposal contravenes any of the provisions of the Act;
2. Whether the proposal is calculated to benefit the general body of creditors; and
3. Whether the proposal terms are fair and reasonable to all creditors and not oppressive.

Question 3.2 [maximum 8 marks]

Briefly set out the duties of a receiver as required by the Jamaican Insolvency Act.

Section 74 of the Jamaican Insolvency Act sets out the duties of a receiver and provides that a receiver shall-

- (a) not later than fourteen days after being appointed receiver, publish a notice of his appointment in the form prescribed in one issue of a local daily newspaper in circulation throughout Jamaica;
- (b) take into his custody or control the collateral in accordance with the security agreement or order providing for his appointment;
- (c) deal with any property of the debtor in his possession or control in a commercially reasonable manner;
- (d) open and maintain a bank account in his name as receiver for the deposit of all monies coming under his control as receiver;
- (e) keep records, in accordance with accepted accounting practices, of all receipts, expenditures and transactions involving collateral or other property of the debtor;
- (f) prepare monthly summaries of accounts of his administration of the collateral and other property of the debtor;
- (g) indicate on every business letter, invoice, contract, or similar document used or executed in connection with the receivership, that he is acting as a receiver; and
- (h) act honestly and in good faith.

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

Question 4.1 [maximum 15 marks]

Commented [dp4]: 6 marks. Neither a debtor nor the Supervisor files the notice.

Big Lots Limited (Big Lots) is a commercial landlord. Among their tenants is Bright Stitch Limited (Bright Stitch). Bright Stitch is a clothing retailer resident and operating in Jamaica. Due to supply-chain issues which caused significant delays in receiving goods from its overseas suppliers and the effects of COVID-19 restrictions, Bright Stitch has seen a substantial shortfall in meeting its monthly expenses. Big Lots is owed over JMD 600,000 in rental arrears by Bright Stitch and Big Lots is concerned that Bright Stitch will be unable to make up its rental arrears and meet its continued obligations under its lease, which still has three years remaining. Before Big Lots could take any action to recover possession of its property, it was served with a Notice of Intention to File a Proposal from Bright Stitch.

Using the facts above, answer the questions that follow.

Question 4.1 [maximum 5 marks]

What is the effect of the Notice of Intention to File a Proposal on the rights of Big Lots under the lease?

The filing of the Notice of Intention to File a Proposal by Bright Stitch effects a stay on all creditors which effectively prevents such creditors from commencing or continuing enforcement action to recover debts from the debtor. Therefore, Big Lots as a creditor cannot commence any action to recover the rental arrears owed by Bright Stitch and / or the possession of its premises or under the lease without the stay first being lifted.

Commented [dp5]: 3 marks. Big Lots can continue to accrue/demand rent for Bright Stitch's continued occupation of its premises.

Question 4.2 [maximum 5 marks]

Assuming that a stay on enforcement actions came into effect once the above notice had been served, Big Lots now wishes to have the stay of enforcement lifted. What is the purpose of the stay and what is required for Big Lots to have the stay lifted?

The purpose of a stay is to shield a debtor from the reach and contact of individual creditors while the debtor attempts to reorganize its debts and financial affairs. The court has described it as preventing a selfish march on the debtor by an individual creditor. To have the stay lifted, Big Lots would need to comply with Section 7 of the Insolvency Act which provides that Big Lots will be required to provide the Court with evidence that proves that it is likely to be materially prejudiced by the continued operation of the stay; or that it is equitable on other grounds to make such a declaration.

Commented [dp6]: 4 marks. The proposal provisions are intended to give Bright Stitch the time to put together proposal to be considered by its creditors.

Question 4.3 [maximum 2 marks]

Big Lots wishes to understand the creditor voting requirements for Bright Stitch to successfully pass a proposal. Explain to Big Lots what the requirements are.

The creditors voting requirements to pass a proposal are as follows:

(i) If the majority in number of the unsecured creditors in each class holding no less than two-thirds in value of the total debt vote represented by that class, vote in favour of the proposal, the proposal is deemed accepted. Secured creditors do not determine acceptance of the proposal. In this sense, individual groups of creditors hold no veto power over the passing of the proposal.

Question 4.4 [maximum 3 marks]

If the Bright Stitch proposal fails and Bright Stitch enters the bankruptcy process, what right(s) does a trustee in bankruptcy have in relation to the lease?

The Jamaica Insolvency Act provides that rights of trustees in relation to premises leased by the bankrupt, which are as follows:

- (a) Hold the lease on the same terms and conditions as the bankrupt;
- (b) Disclaim or assign the lease in the same manner as the bankrupt may under the lease agreement;
- (c) Assign the lease pursuant to a Court order even if the lease was non-assignable.

*** End of Assessment ***

Commented [dp7]: 40/50. Overall candidate grasps the concepts. Question 2.3 was misunderstood.