



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 5C

CAYMAN ISLANDS

This is the **summative (formal) assessment** for **Module 5C** 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 5C. 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).
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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 **8 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

Select the **correct answer**.

Once a provisional liquidator is appointed:

- (a) **No action may be commenced against the company without leave of the court.**
- (b) No existing action may be continued against the company without permission of the provisional liquidator.
- (c) Legal proceedings may be commenced or continued against the company without leave of the court.
- (d) No action may be commenced against the company.

Commented [BT1]: Correct. 1 mark.

Question 1.2

Which of the following is **not** available in the Cayman Islands?

- (a) **Appointment of a receiver.**
- (b) Court-supervised liquidation.
- (c) Official liquidation.
- (d) Deed of Company Arrangement.

Commented [BT2]: Incorrect (answer was D)

Question 1.3

Select the **correct answer**.

In a voluntary liquidation:

- (a) The company may cease trading where it is necessary and beneficial to the liquidation.
- (b) **The company must cease trading except where it is necessary and beneficial to the liquidation.**
- (c) The company must cease trading if it is necessary and beneficial to the liquidation.
- (d) The company may cease trading unless it is necessary and beneficial to the liquidation.

Commented [BT3]: Correct. 1 mark.

Question 1.4

Select the **correct answer**.

The Grand Court of the Cayman Islands has jurisdiction to make winding up orders in respect of:

- (a) A company incorporated in the Cayman Islands.
- (b) A company with property located in the Cayman Islands.
- (c) A company carrying on business in the Cayman Islands.

(d) Any of the above.

Commented [BT4]: Correct. 1 mark.

Question 1.5

Select the **correct answer**.

In a provisional liquidation, the existing management:

- (a) Continues to be in control of the company.
- (b) Continues to be in control of the company subject to supervision by the court and the provisional liquidator.

(c) May continue to be in control of the company subject to supervision by the provisional liquidator and the court.

(d) Is not permitted to remain in control of the company.

Commented [BT5]: Correct. 1 mark.

Question 1.6

Select the **correct answer**.

When a winding up order has been made, a secured creditor:

- (a) May enforce their security with leave of the court.
- (b) May enforce their security with leave of the court provided the liquidator is on notice of the application.

(c) May enforce their security without leave of the court.

(d) May not enforce their security until the liquidator has adjudicated on the proofs of debt.

Commented [BT6]: Correct. 1 mark.

Question 1.7

Select the **correct answer**.

Any payment or disposal of property to a creditor constitutes a voidable preference if:

- (a) It occurs in the six months before the deemed commencement of the company's liquidation, or at a time when it is unable to pay its debts and the dominant intention of the company's directors was to give the applicable creditor a preference over other creditors.
- (b) It occurs in the six months before the deemed commencement of the company's liquidation and at a time when it is unable to pay its debts and the dominant intention of the company's directors was to give the applicable creditor a preference over other creditors.
- (c) It occurs in the six months before the deemed commencement of the company's liquidation and at a time when it is unable to pay its debts, or the dominant intention of the company's directors was to give the applicable creditor a preference over other creditors.
- (d) It occurs in the six months before the deemed commencement of the company's liquidation, or at a time when it is unable to pay its debts, or the dominant intention of the company's directors was to give the applicable creditor a preference over other creditors.

Commented [BT7]: Correct. 1 mark.

Question 1.8

Which of the following **is not** a preferential debt ranking equally with the other four?

- (a) Sums due to company employees.
- (b) Taxes due to the Cayman Islands government.
- (c) Amounts due to preferred shareholders.
- (d) Sums due to depositors (if the company is a bank).
- (e) Unsecured debts which are not subject to subordination agreements.

Commented [BT8]: Correct. 1 mark.

Question 1.9

Select the **incorrect statement**.

A company may be wound up by the Grand Court if:

- (a) The company passes a special resolution requiring it to be wound up.
- (b) The company does not commence business within a year of incorporation.
- (c) The company is unable to pay its debts.
- (d) The board of directors decides it is "just and equitable" for the company to be wound up.
- (e) The company is carrying on regulated business in the Cayman Islands without a license.

Commented [BT9]: Incorrect. Correct answer is 'D'

Question 1.10

Select the **correct answer**.

In order for a proposed scheme of arrangement to be approved:

- (a) 50% or more representing 75% or more in value of the creditors must agree.
- (b) 50% or more representing more than 75% of the creditors must agree.
- (c) More than 50% representing more than 75% of the creditors must agree.

(d) More than 50% representing 75% or more in value of the creditors must agree.

Commented [BT10]: Correct. 1 mark.

Commented [BT11]: 8/10 for this section

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 3 marks]

Is it possible for a creditor to register its security over an asset in the Cayman Islands? If so, how, and what is the effect of it doing so, if any?

[While Cayman Islands system provides for various types of security over tangible and non-tangible assets, but there is no centralised system or public registry for registration of security /charge. The system does provide for registration of ownership of assets, such as the Registered Land Law provides for registration of ownership of real estate, Maritime Authority Law for ships, Civil Aviation Authority Law and Mortgaging of Aircraft Regulations for aircrafts and so on. Thus, charges will have to be registered with the relevant authority But, there is no public security registration regime in Cayman Islands. As per section 54 of the Companies Act, security interests are required to be entered in the Register of Mortgages and Charges of the relevant company creating the charge or security on its assets. This register is required to be maintained at the registered office of the Company. This register is open for inspection by members of the Company or creditors, thus serves as notice to third party about the charge created by the Company over its assets.]

Commented [BT12]: 2 1/2. Nearly full marks but the candidate doesn't demonstrate full mastery of the law. There are central registers, but only in respect of certain types of property. Where central registers exist, any security that is registered gives the creditor priority.

The Company and its director also has duties to ensure that entries in the register are updated and if any property of the company is mortgaged or charged without such entry being made in the register, every director, manager or other officer of the company who knowingly and wilfully authorises or permits the omission of such entry, shall incur a penalty of one hundred dollars.]

Question 2.2 [maximum 4 marks]

Does the Cayman Islands Grand Court have the power to assist foreign bankruptcy proceedings? If so, what is the source of that power and in what circumstances may it exercise it?

[Cayman Islands has not implemented the UNCITRAL Model Law on Cross-Border Insolvency but most of the system and procedures related there with are followed by the Courts. Part XVII of the Companies Act deals with the powers of the Grand Court to make orders in respect of foreign insolvency proceedings. Section 241 provides for various types of orders that may be

made by the Grand Court on an application of a foreign representatives. This includes order recognising right of a foreign representative, staying continuation of legal proceedings, enforcement of judgement against the debtor, furnishing of information etc.

As per section 242 of the Companies Act, in determining whether to make an ancillary order under section 241, the Grand Court is to be guided by matters which will best assure an economic and expeditious administration of the debtor's estate, consistent with the just treatment of all holders of claims, protection of claim holders in the Islands against prejudice and inconvenience in the processing of claims in the foreign bankruptcy proceeding, to prevent preferential or fraudulent dispositions of property and to ensure distribution of the debtor's estate amongst creditors substantially in accordance with the order prescribed by Part V. The Court will also take into consideration the issue of enforcement of security interest created by the debtor, and that allowance of application in respect of foreign proceedings does not result in enforcement of foreign taxes, fine and penalties in Cayman Islands. The Grand Court will also take into account the Comity and reciprocity.]

Commented [BT13]: 4 marks

Question 2.3 [maximum 3 marks]

Outline the legal framework for the recognition of foreign judgements in the Cayman Islands.

[Another unique feature of Cayman Islands law governing cross border insolvency is that Cayman Islands has not adopted UNCITRAL Model Law on Cross Border Insolvency nor has the Islands entered into any international treaties for reciprocal recognition and enforcement of foreign judgements. Cayman Islands is also not a signatory to the Hague Convention on Recognition and Enforcement of Foreign Judgements. Even UK has not extended its ratification of such treaties to the Cayman Island. However, still, without adoption of such law/treaties, Cayman Islands does extend co-operation to ensure an effective winding up and protection of interest of creditors. However, Cayman Islands do have a Foreign Judgements Reciprocal Enforcement Act but is based upon the principle of reciprocity and it has only been extended to the judgements from Superior Courts of Australia.

Commented [BT14]: 3 marks

Thus, in the absence of any specific legislation or Treaty concerning enforcement of foreign judgements, enforcement of a foreign judgement is done by way of commencing a new action in the Cayman Island based upon the foreign judgement as per the procedure for litigation in the Islands or under the reciprocity arrangements.

Therefore, if a foreign judgement is sought to be enforced in Cayman Islands (outside reciprocity), a new case is to be filed as per the procedure of the Grand Court. Such action is to be commenced within a period of six years from the date of foreign judgement or when it attained the finality, in case of appeal.

An application for the recognition and enforcement of foreign judgments is to be filed before the Financial Services Division of the Grand Court which follows common law principles on the issue. Under the Common Law money judgments may be enforced if it satisfies the following conditions:

- ◇ The judgment is in persona rather than in rem;
- ◇ The foreign court had jurisdiction over the debtor;
- ◇ The judgment was not obtained by fraud;
- ◇ The judgment is final and conclusive,
- ◇ The judgement is not contrary to public policy of the Cayman Islands and
- ◇ The judgement was not obtained or passed contrary to the rules of natural justice.

Judgments ordering or prohibiting doing of acts is not enforceable in the Cayman Island. Based on the judgement in the case of **Bandone v Sol Properties** (2008 CILR 301), foreign judgments concerning non-money issue can be recognised and enforced by way of equitable remedies under principle of comity.

A Foreign judgment which falls within the ambit of the Reciprocal Enforcement Law, the judgment holder needs to apply for registration of the foreign judgment in accordance with Order 71 of the Grand Court Rules.

However, following types of judgements cannot be enforced in the Cayman Islands:

- ⇒ Foreign judgements in rem deciding on the issue of title over the immovable properties located in the Cayman Island, foreign tax judgements, a judgement declaring trust or disposition in respect of a trust, foreign judgments which are repugnant to public policy; and the foreign judgments which relate to the penal laws of another country or that impose punitive damages.]

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

Question 3.1 [maximum 9 marks]

In the absence of a statutory prohibition on insolvent trading, is it possible for court appointed liquidators of an insolvent company, or creditors of such a company, to hold its former directors accountable by either seeking financial damages against those directors and / or by seeking to "claw back" any payments that those directors should not have made? If so, please explain the possible options.

[As per section 118 of the Companies Act, in case of a voluntary winding up, the company shall from the commencement of its winding up cease to carry on its business except so far as it may be beneficial for its winding up. Thus, there is no explicit prohibition on carrying of business or trading by the Company if it is for the beneficial conclusion of winding up process.

So far as liabilities of directors is concerned, normally they are not personally liable for the debts, obligations or liabilities of a company except for those which arise out of negligence, fraud or breach of fiduciary duty by an individual director, or due to an action not within his authority and not ratified by the company.

There is statutory liability provided under section 147 of the Companies Act. Section 147 of the Companies Act provides that the liquidator may apply to the Court to determine liability of any person, if in the course of winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors or any other person or for any fraudulent purpose and the Court may pass order directing the director, who was knowingly party to the carrying on of the business in the manner mentioned the section, to make contributions to the company's assets as the Court thinks proper.

Section 134 of the Companies Act, on the other hand, provides for criminal liability of a person (is liable on conviction to a fine and to imprisonment for five years), who is or was an officer, professional service provider, voluntary liquidator or controller of the company and who, within the twelve months immediately preceding the commencement of the winding up, has concealed, removed any part of the company's above certain value, or has concealed, destroyed, mutilated or falsified any documents, pawned, pledged or disposed of any property of the company which has been obtained on credit and has not been paid for (unless the pawning, pledging or disposal was in the ordinary way of the company's business), with intent to defraud the company's creditors or contributors.

Similar way, section 135 of the Companies Act, provides for liability of any officer or professional service provider, who has made or caused to be made any gift or transfer of, or charge on, or has caused or connived at the levying of any execution against, the company's property or has concealed or removed any part of the company's property, with intent to defraud the company's creditors or contributors.

Thus, while section 134 and 135 focus on criminal liability of persons liable, section 147 specifically provides not only for the liability of director but also contains provision for recovery. **Section 147 creates a compensatory remedy when any part of a company's business has been carried on with intent to defraud creditors. Section 146 creates a restitutionary remedy when any of a company's property has been disposed of at an undervalue with intent to defraud its creditors. These sections create statutory remedies aimed at different aspects of the same kind of mischief.** (2014 (2) CILR 4 Statutory Interpretation, 5th ed., ss. 285 and 315, at 864–869 and 986–999 (2008)).

For financial liability of director, it needs to be proved that the business of the company has been carried on by the director(s) with intent to defraud creditors of the company or creditors or any other person or for any fraudulent purpose. The critical aspect to establish fraudulent trading based on "blind-eye" knowledge. The purport of this was described in the speech of Lord Scott of Foscote, in *Manifest Shipping Company Limited v. UniPolaris Company Limited*. **"Blind-eye knowledge requires, in my opinion, a suspicion that the relevant facts do exist and a deliberate decision to avoid confirming that they exist. But a warning should be sounded. Suspicion is a word that can be used to describe a state-of-mind that may, at one extreme, be no more than a vague feeling of unease and, at the other extreme, reflect a firm belief in the existence of the relevant facts. In my opinion, in order for there to be blind-eye knowledge, the suspicion must be firmly grounded and targeted on specific facts. The deliberate decision must be a decision to avoid obtaining confirmation of facts in whose existence the individual has good reason to believe."**

The purpose of Section 147 is to enable the liquidator to recover compensation from those who have knowingly assisted the fraudulent conduct of a company's business. In UK, in the case of **Re Patrick and Lyon Maughan**, it was clarified that the jurisdiction of the court was confined in civil cases to declaring that past or present directors, including shadow directors of the company, who had carried on its business with intent to defraud creditors, should be personally responsible for all or any of the debt or other liabilities of the Company as the Court may direct.

Section 147 of the Companies Act, thus provide for unlimited liability on a director of an insolvent company who is found to have indulged continuation of trade during times when he knew or ought to have known that there was no prospect for the company to avoid the liquidation process. The rule is aimed at protection of interest of creditors and the Company. The conduct of directors is tested on the basis of test of skill and experience that may be reasonably expected out of a 'reasonably diligent person' acting in the capacity of a director.]

Commented [BT15]: 4.5 marks. Answer would have been improved by referring to sections 145, 146, 99

Question 3.2 [maximum 6 marks]

Receivers have no role to play in a Cayman Islands insolvency scenario. Discuss.

[It is true that Receivers have no direct role to play in Cayman Islands insolvency regime as there is no statutory provisions prescribing any specific role to Receiver under the relevant legal provision of the Companies Act. Role of a receiver is limited in cases where enforcement of security is to be done as per the terms of the agreement or execution of a judgement. Order 30 of Grand Court Rules provide for powers of the Court to appoint Receivers as an interim measure for protection and preservation of property for which a receiver is sought to be appointed.

Similar way, Order 45 of Grand Court Rules provides that subject to the provisions of the Rules, a judgment or order for the payment of money into Court may be enforced by one or more of the following means, that is to say -

1. (a) the appointment of a receiver;
2. (b) an order of committal;
3. (c) writ of sequestration

There are provisions in GCR dealing with appoint of Receiver on equitable basis at the stage of execution of judgement. It provides that "*where an application is made for the appointment of a receiver by way of equitable execution, the Court in determining whether it is just or convenient that the appointment should be made shall have regard to the amount claimed by the judgment creditor, to the amount likely to be obtained by the receiver and to the probable costs of his appointment and may direct an inquiry on any of these matters or any other matter before making the appointment*".

Thus, Receiver has no direct role in insolvency related proceedings but plays an important part as an interim measure for protection of right of claimant over the property before and during determination of right of parties by the Court and thereafter for realisation of securities and assets at the execution stage.

Another type of role for receiver arises based on contractual structure. This position is created by agreement for the purpose of enforcement of security interest by creditors and without intervention of Court. The power of receiver in such cases, is derived through the agreement between the parties and can only be exercised for the purpose laid down under the agreement. Normally, receiver is conferred with powers to take possession, sell and or manage the security. The term and remuneration etc of receiver is governed by instrument of appointment. Remuneration is usually paid from the realisation of secured assets.]

Commented [BT16]: 4 marks. What about SPCs?

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

Skull & Crossbones Inc (S & C) is a company registered in the Cayman Islands. It operates a fleet of pirate-themed party ships across central America and the Caribbean. It was founded by the wealthy Rackham family over 50 years ago. The family continues to own and manage the business.

Between 2015 and 2019, S & C had been rapidly expanding its operations. However, the unexpected slump in worldwide tourism at the start of 2020 due to COVID-19 adversely affected S & C's revenues.

S & C has only managed to stay afloat for the past 2 years with the assistance of a very large loan from Sparrow's Treasure Bank (Sparrow). Sparrow has lent S & C USD 200 million (USD 80 million of which is secured by a mortgage over four of S & C's largest party boats). The loan facility has now been exhausted. S & C has also fallen behind on the monthly repayments to Sparrow.

There are early signs that the tourism market is starting to pick up again; however, S & C cannot afford to pay the ongoing costs associated with maintaining its fleet of ships (which include electricity and water costs for its huge dry dock facility, ongoing engineering and mechanical costs and also wages, pension and health insurance for its reduced team of employees) let alone find enough money to buy the vast quantities of top-shelf rum it will need for its forthcoming booze cruises.

To make matters worse, S & C commissioned Roger Jolly to build 10 more oversized party boats only a few months before the pandemic struck. S & C attempted to wriggle out of the contract but, by virtue of an arbitration clause, the dispute was referred to the ICC sitting in London. Earlier this month, the ICC ruled that S & C must pay damages of USD 50 million to Roger Jolly by mid-February 2022. S & C has no prospect of being able to satisfy that award.

You are a Cayman Islands-based insolvency professional and have been approached to provide advice on the following:

- (a) What action can Sparrow take to protect its interests?
 - (b) What action can Roger Jolly take to protect its interests?
 - (c) What action can the unpaid employees take against S & C?
 - (d) Does the Cayman Islands Court have jurisdiction over S & C?
 - (e) Is there a legal route via which S & C can protect itself and seek to restructure?
 - (f) Following on from (e) above, can the Rackham family continue play a part in running S & C during any restructuring process?
 - (g) What factors will the Cayman Islands court take into consideration before approving any proposed restructuring?
- [(a) What action can Sparrow take to protect its interests?

One of the important features of Cayman Island law governing restructuring and insolvency is that the secured creditor retain option to remain outside such process and enforce its securities. Section 142(1) of the Companies Law, provides: "*Notwithstanding that a winding up order has been made, a creditor who has security over the whole or part of the assets of a company is entitled to enforce his security without the leave of the Court and without reference to the liquidator.*"

Commented [BT17]: 1 mark

Now, in this case, Sparrow has lent S & C USD 200 million out of which only USD 80 million is secured but remaining USD 120 million is unsecured portion. It is also reported that S & C has also fallen behind on the monthly repayments to Sparrow. This clubbed with other financial obligations which S & C is unable to meet on account of ongoing financial crunch, it is most likely that S & C would default in repayment of dues of Sparrow too. In this likely scenario, Sparrow needs to ensure that its security over the fleet of ships mortgaged to it, is entered in the register of mortgages and charges of S & C as per the requirement of section 54 of the Companies Act.

Commented [BT18]: These are vessels therefore there is a central registry and priority

As regards other measures that Sparrow may take, is to check with S & C what plan it has to tide over the financial difficulties it is facing and do its assessment about whether such plan or proposal of S & C will be able to garner the requisite support from creditor and convince the court to order on compromise and arrangements. And based on such assessment, it may either support the proposal of S & C or enforce its securities.

Since Sparrow is a partially secured creditor to the extent of USD 80 million only and larger portion of dues is unsecured, it is advisable to Sparrow to work out a practical restricting.

Commented [BT19]: Yes, 1/2 a mark. The point is that Sparrow has standing as an unsecured creditor to petition to wind up S&C however it may chose to help S&C restructure via a work out or as part of a court supervised process depending on its view of the likely recovery in each scenario.

(b) What action can Roger Jolly take to protect its interests?

S & C has suffered an award of damages of USD 50 million to be paid to Roger Jolly by mid-February 2022 and given the current financial difficulties which it is facing, S & C has no prospect of being able to satisfy that award.

As far as enforcement of foreign arbitration award is concerned, provisions of Arbitration act, 2012 have been suitably amended to provide for recognition and enforcement of foreign awards in Cayman Islands and now any foreign award can be enforced in accordance with the provisions of the Foreign Arbitral Awards Enforcement Act.

Therefore, it is advisable to Roger Jolly to move an application in Cayman Island seeking leave to enforce the award. Such application needs to be supported by originals or certified copy of the arbitration agreement and award together with the English translation. On grant of such leave Roger Jolly shall have to serve the order on S & C. S & C will have 14 days to apply to the Court to set aside the order. Once an award has been recognised by the Grand Court, it can be enforced in the same manner as a judgment or order of the Court.

The other alternative available to Roger Jolly is to file application for winding up of S & C based on the unpaid foreign judgment debt, if S & C fail to honour the award within the time specified. However, in this scenario, Roger Jolly will get paid only after payment to secured creditor (where they have not opted for enforcement of their securities outside the mechanism) along with other creditors and that too after expenses of winding-up, and preferential debts are paid off. Therefore, Roger Jolly is advised to go with the first mentioned option.

Commented [BT20]: 2 marks

(c) What action can the unpaid employees take against S & C?

As per the facts mentioned, S & C has so far not defaulted in meeting its obligations though it is facing very tough challenges on financial front. While it is so, there are very limited options

Commented [BT21]: 1.5 marks. The unpaid employees can sue S&C for the unpaid debts (provided a winding up petition has not yet been filed). Alternatively, they can apply to wind up under section 92 - 94 Companies Act or apply to apply to appoint provisional liquidators under 104 (if they are concerned about mismanagement or wish to support a court-supervised restructuring). If an order is made that S&C be liquidated, the sums due to the employees rank as preferential debts (section 141) ahead of certain other creditors.

available to the employees of S & C as the Company is still a going concern and if it succeed in getting restructuring its debt, it may able to tide over the present phase which may in turn enable it to clear the dues of its employees.

Thus, for the present employee may have to wait for what action S & P is proposing to overcome the present financial crunch. Though section 141 of the Companies Act, do provide for priority of dues of employees but this stage is available when the company has entered winding up process. Since, in the present scenario, S & P has so far not entered that stage, there is no relevance of priority at this stage of things. The other option that is available to employees is to take normal civil route to press for their claim in the court. But that does not seem to be advisable in this case.

(d) Does the Cayman Islands Court have jurisdiction over S & C?

Under the Companies Act, the Grand Court of Cayman Islands has jurisdiction over corporate to deal with liquidation or restructuring where the debtor company is either incorporated in the Cayman Islands or registered in the Cayman Islands. Since, S & C is registered in Cayman Islands, Court in Cayman Island have jurisdiction over S & C.

Commented [BT22]: 1 mark.

(e) Is there a legal route via which S & C can protect itself and seek to restructure?

Given the financial difficulties that S & C is facing and staring at the imminent possible of legal action by various claimants including its creditors, the best possible avenue that S & C could avail of is 'Scheme of compromise and arrangements' under section 86 of the Companies Act. Under this provision, the Company can move an application before the Grand Court of Cayman Islands, to restructure its liabilities and to avoid liquidation.

Commented [BT23]: 3.5 marks

However, this option on its own, does not afford any protection to the company against legal action by its creditors and other claimants. Therefore, the better option that could be availed by the S & P is to conjoint the Scheme with liquidation application which will enable the company to the benefit of moratorium against legal actions by third parties. Section 104 of the Companies Act provides that where an application is filed by a company for winding up, the Court may, at any time after the presentation of a winding up petition but before the making of a winding up order, appoint a liquidator provisionally. Given the financial position and defaults and award it has suffered, S & P is in a strong position to press admission of the application on the basis of 'a prima facie case' as per sub-section (1) of Section 104 of the Companies Act.

Along with the winding up petition, S & P should also move application for ex-parte appointment of a provisional liquidator on the ground that Company is unable to pay its debts and that the Company intends to present a compromise and arrangements to its creditors.

This option will also provide breathing time to the Company to work out its proposal and put a moratorium on legal action and threat from its creditors and claimants.

(f) Following on from (e) above, can the Rackham family continue play a part in running S & C during any restructuring process?

As per provisions of section 104(1)(4) of the Companies Act, once appointed by the court a provisional liquidator will carry out only such functions as the Court may confer on him/her and will exercise such powers as may be conferred by the order of appointment. Thus, provisional liquidator may or may not replace the existing management and if the provisional liquidator is given only the limited to supervise the directors' proposal and implementation of the Scheme and in such situation the Rackham family may continue to play a part in running of the Company under supervision of the provisional liquidator under "Light Touch" regime.

Commented [BT24]: 1 mark

(g) What factors will the Cayman Islands court take into consideration before approving any proposed restructuring?

Commented [BT25]: 3 marks

For a Scheme for restructuring of debt to be placed before the Court for sanction, it will have to be approved by a majority in number (over 50%) representing at least 75% in value of the Creditors (or class of creditors, or member of class of members, as the case may be), present and voting either in person or by proxy at the meeting.

Once the Scheme is approved by the requisite vote by the relevant parties, it need to be sanctioned by the Court and registered with the Registrar of Companies, so as to be binding on all the parties. The process is governed by Order 102 rule 20 of the Grand Court Rules and Practice Direction 2/2010.

Since it is a scheme that is primarily finalised by the relevant parties, role of Court is limited and the court will not go into the commercial aspect of the Scheme. The Court will, thus, ensure that the requisite process for calling up and conducting meeting of the relevant parties was followed in accordance with the Law and the Court's order,

The Court will also look into the fact:

- a) whether the majority of Stakeholders voting acted in good faith, were a fair representation of the relevant Class, and
- b) that the Scheme is better than the result would be if the company were wound up, and
- c) that an intelligent and honest member of the Class would agree that the Scheme should be approved.

After the order is passed, sanctioning order is to be registered with the Cayman Registrar of Companies once so registered it becomes binding on the company, liquidator/ contributories of the company, and all the Class of creditors, including those who did not vote for the Scheme.

Commented [BT26]: 13.5 out of 15

*** End of Assessment ***

Commented [BT27]: Total score 39.5/50