



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. Correct answer is 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]: Correct. 1 mark.

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]: 9/10 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?

Yes, it is possible for a creditor to register its security over an asset in the Cayman Islands. To register the security depends on the type of security.

If the property is real estate, a ship, aircraft, motor vehicle, or intellectual property, there is a centrally maintained register and mortgages and charges can be registered.

By registering the security, a third-party purchaser of the assets will be deemed to have been given notice of the security and will acquire the asset subject to the interest of the secured creditor.

For other types of property, a creditor will need to ensure that the Register of Mortgages for the debtor is clear before making the loan and updating it with details of the charge after the granting of the loan. Per Section 54 of the Companies Act, the register of mortgages and charges must be maintained by the Company's registered office. While registering the security interest in the Company's register of mortgages and charges does not create a priority, the register is open for inspection and therefore puts third parties on notice of the security's existence.

Failure to register the security does not invalidate the security interest.

Commented [BT12]: Correct. 3 marks.

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?

While the Cayman Islands legislation does not have protocols between the Grand Court and Foreign courts, nor have the Cayman Islands implemented the UNCITRAL Model Law on Cross Border Insolvency, the laws do make provisions for Official Liquidators in the Cayman Islands to enter into international protocols with foreign officeholders.

Procedures can be found under Foreign Bankruptcy Proceedings (International Cooperation) Rules 2018

This is geared towards promoting orderly administration of an estate of a company in official liquidation, avoid duplication of work, and avoid conflicts between the official liquidator and foreign officeholders.

The protocols may allocate responsibilities between the foreign officeholder and the Cayman Islands Liquidator to preserve and realize the asset, pursue action, exchange information, adjudicate claims, distribute assets and provide procedures for administration of the estate and reporting.

These international protocols must be approved by the Grant Court and the appropriate foreign court or authority.

Under Section 241 and 242 of the Companies Act, the Court may make ancillary orders upon the application of a foreign representative to a foreign bankruptcy proceeding for the purpose of:

- 1) Recognizing the foreign representative's right to act in the Cayman Islands on behalf of or in the name of the debtor;
- 2) Enjoy the commencement or staying the continuation of legal proceedings against the debtor;
- 3) Staying the enforcement of a judgement against the debtor;
- 4) Require a person in possession of information in relation to the affairs of a debtor to be examined and produce records for the benefit of the foreign representative;
- 5) Order the turnover to a foreign representative of property of a debtor.

This ancillary order can be made where the Court is guided that the matter will best assure an economic and expeditious administration of the debtor's estate.

The decision will be made if it is consistent with the fact that:

- 1) The just treatment of all claimants against the debtor's estate, wherever they may be domiciled;
- 2) Protection of claimants in the Cayman Islands against prejudice and inconvenience in processing claims in foreign bankruptcy proceedings;
- 3) Prevention of preferential or fraudulent disposition of property in the debtor's estate;
- 4) Distribution of the debtor's estate amongst creditors substantially in accordance with provisions under Part V;
- 5) Recognition and enforcement of security interests created by the debtor;
- 6) Non-enforcement of foreign taxes, fines, and penalties; and
- 7) Comity.

Question 2.3 [maximum 3 marks]

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

The legal framework for recognition of foreign judgements in the Cayman Islands is captured under Common Law with the absence of treaties entered into by the Cayman Islands for the reciprocal recognition or enforcement of foreign judgements.

It should however be noted that the Foreign Judgement Reciprocal Enforcement Act (1996 Revision) ("1996 Act") provides a statutory scheme for recognition and enforcement of foreign judgements where the country where the judgement originates assures substantial reciprocity

Commented [BT13]: 4 marks

of treatment regarding the enforcement of Cayman Islands Judgement. These provisions have only been extended to judgements from the Superior Courts of Australia.

To be enforceable under the 1996 Act, the judgement must be final, it must be a money judgement and must be made after the 1996 Act was extended to the relevant foreign country.

Under Common Law, the enforcement of foreign judgements in the Cayman Islands is based upon the foreign judgement being an unsatisfied debt or other obligation and are conducted under the regular procedural regime for litigation in the Cayman Islands.

The requirements for enforcement of a foreign judgement at common law are:

- 1) The judgement is final;
- 2) The foreign court had jurisdiction over the debtor;
- 3) The foreign judgement was not obtained by fraud;
- 4) The foreign judgement is not contrary to public policy of the Cayman Islands; and
- 5) The foreign judgement was not obtained contrary to the rules of natural justice.

There is however a six-year limitation period for enforcement, running from the date of the judgement, or where there have been appeals, to the date of the last judgement. |

Commented [BT14]: 3 marks

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.

Under Section 99 of the Company's Act, disposition of a company's property that are made after the deemed commencement of a winding-up will be void. Commencement in this case refers to the date the petition was filed rather than date the order was made.

The issue occurs however, where transactions occur when the Company is insolvent, but a petition is not yet filed. Additionally, there is no statutory obligation to file for insolvency and the Companies Act does not contain prohibitions on wrongful trading, or trading while the Company is insolvent.

There are several mechanisms where insolvent trading occurs prior to the filing of a petition for winding-up.

Offences can be captured under Sections 134 through 137 of the Act.

Under Section 134 of the Act, where a Company is ordered wound up, any person who was an officer, professional service provider, voluntary liquidator or controller, within twelve months immediately preceding the commencement of a winding up violates any of the actions under this section with the intent to defraud the Company's creditors or contributories is liable to a fine and imprisonment for five years.

These actions include but are not limited to concealing any part of the Company's property to the value of \$10,000 or more, remove part of the property to the value of \$10,000 or more or conceal, destroy, mutilate or falsify documents affecting the Company's property or affairs.

Section 135 extends further to Section 134 to include instances where a transfer of gift, charge on or levying an execution of the Company's property, or concealed or removed part of the property with the intent to defraud the Company's creditors.

While the Company is being wound-up, Section 136 provides that a person who is or was a director, officer or professional service provider of the Company and who:

- a) Does not discover to the liquidator:
 - a. All the Company's property;
 - b. The date and manner in which the Company's property was disposed, if disposed;
 - c. The person to whom it was transferred; or
 - d. The consideration paid
- b) Does not deliver up property in their custody or control that they are required to deliver up;
- c) Deliver documents belonging to the company that they are required to deliver up;
- d) Knows or believes that a false debt has been proved any does not inform the liquidator as soon as practicable;
- e) Prevent the production of documents affecting the company's affairs;
- f) Destroys, mutilates, alters books of accounts or documents belonging to the Company;

With the intent to defraud the Company, is liable to a fine or to imprisonment for a term of five years or both.

Section 137 relates to instances where material omissions are made.

There are actions that that liquidators and creditors can take in relation to actions made by former directors as outlined below:

Firstly, there are provisions under Section 145 of the Companies Act where payment or disposal of property can be considered a voidable preference. This occurs where the transaction takes place six months prior to the deemed commencement of the company's liquidation and at a point where it is unable to pay its debts; and where the dominant intention of the directors was to give the applicable creditor a preference over other creditors.

The onus is to prove that the intention was to put a creditor in a better position over others, and not for a reason that is in good faith or for essential service providers. A preference is deemed to have occurred in situation where the transaction was made to a related party such as a party in control or with significant influence.

An application can be made to the Grand Court to order the creditor to return the assets.

Secondly, under Section 146 of the Companies Act, provisions are made for dispositions made at an undervalue. This occurs where property is disposed at an undervalue; and with the intention of wilfully defeating an obligation owed to a creditor. A liquidator may apply for the transaction to be considered voidable.

In this instance, undervalue relates to situations where the consideration is significantly less than the value of the assets or for no consideration at all.

The creditor or liquidator making the application must prove that there was intent to defraud, and the application must be brought within six years of the disposal.

Finally, under Section 147 of the Companies Act, provisions are made for fraudulent trading. Where the company's business was carried on with the intent to defraud creditors, a liquidator

may apply for an order requiring any parties known of the fraudulent conduct to make contributions to the company's assets that the Court thinks proper.

Although there are no prohibitions to insolvent trading, where there is a breach of fiduciary duty, such as with above, the directors can be held personally liable to the company for losses which they have caused the Company through the breach.

The Grand Court held in *Prospect Properties v McNeil* that a director has a duty to act in the best interest of the company and having regard to the interest of its creditors where a company is insolvent.

The official liquidator can pursue claims on behalf of the directors for breach of their fiduciary duty. |

Commented [BT15]: 9 marks

Question 3.2 [maximum 6 marks]

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

A statement can be made that Receivers have no role to play in the Cayman Islands in an insolvency situation.

This statement can be made on the basis that receivers are not explicitly mentioned in statutory provisions dealing with insolvency in the Companies Act and the Companies Winding Up Rules.

Furthermore, Receivers and receivership orders are specifically provided for by statute over certain types of Cayman Island legal entities, namely, Segregated Portfolio Companies. These companies remain a single entity but is permitted to create separate portfolios for different assets and liabilities. Each portfolio will be ring-fenced from the assets and liabilities contained in other portfolios.

Nonetheless, there is some merit to a Receiver being appointed – that is, for collecting moneys and or carrying out acts of the company such as execution of contracts. The appointment of receivers are governed under the Grand Court Rules (“GCR”).

Where the Grant Court appoints a receiver over a portfolio, the roles of the receiver is very similar to that of a liquidator.

Under the order, the receiver may be appointed for the purpose of:

- 1) Closing the business of, or attributable to the segregated portfolio in an orderly manner; and
- 2) Distributing the assets of the segregated portfolio to those entitled to have recourse thereto.

That being said, a receivership order may not be made where the segregated portfolio company is in the process of being wound-up, and shall cease to be of effect upon the commencement of the winding up.

Like with a liquidation, where a receivership order is issued, the receiver relieves the directors of their functions and powers.

The main benefit of a receiver is that they may be appointed without court involvement and in relation to the security rights under an instrument such as by the holder of a fixed or floating charge. This may be a cost effective option.

Where a receiver is appointed under an instrument, the receiver's powers are contained within the instrument.

On the basis outlined above, while the benefits of a Receiver are limited in insolvent situations, there are some merits to it in the Cayman Islands.

Commented [BT16]: 4.5 marks. Most of the key points are covered but this candidate doesn't quite manage to differentiate clearly between the various scenarios in which a receiver may be relevant or particularize how they might come to be appointed (e.g. GCRs).

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? (The bank, secured creditor)
- (b) What action can Roger Jolly take to protect its interests? (Unsecured creditor)
- (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)

Sparrow, a lender, provided S&C with a loan of USD\$200m, USD\$80m of which is secured by a mortgage over four of S&C's largest party boat.

As the asset referenced is a moveable property, secured by a mortgage, it is assumed that the mortgage is registered on the respective ships. That is, notice of security is filed with the centrally maintained register and also in the Company's register of mortgages and charges held with its registered office. This will put other creditors on notice that there is a secured interest in the assets, giving Sparrow a right to those assets.

Once it is clear that S&C is unable to repay its debt, by way of its default on the loan repayment, Sparrow can protect its interest by enforcing its security. By definition, S&C is insolvent as it is unable to pay its debts as they fall due. As such, it is possible that S&C may be placed into liquidation, however, irrespective of S&C being placed into Liquidation, Sparrow is still entitled to enforce its security. Sparrow can also enforce its security without the leave of the Court and without reference to the liquidator. This is captured under Section 142(1) of the Companies Act.

Sparrow can then serve on S&C a demand, requiring the Company to repay its debts. It is unlikely that S&C will be able to comply with the Statutory Demand, following which, Sparrow can enforce its security.

Under Section 94 of the Act, a petition may be presented by any creditor. As such Sparrow can be petitioning creditor. Furthermore, as S&C is registered in the Cayman Islands, it can also be liquidated in the Cayman Islands.

Commented [BT17]: Good. 2 marks.

(b)

There are two unsecured creditors in the case above:

- 1) Jolly Roger ("JR") who was commissioned to build 10 more oversized party boats, where an award was granted by the ICC in favour of JR for \$50m; and
- 2) Sparrow, for the excess of the outstanding debt over its secured amount

Jolly Roger, as an unsecured creditor, has the right to file a winding-up petition in respect of S&C to protect its interest. However, it should be noted that all unsecured creditors in an insolvency proceeding is treated *pari passu* – that is, they are treated equally in a distribution of the assets of a Company in a liquidation, in proportion to its debts. In this case, the debt will be via the award in the amount of US\$50m.

To commence the winding-up proceedings, JR may file a petition with the Grand Court to show that an application is necessary to preserve and protect the assets of the Company and that the Company is unable to pay its debts as they fall due. In light of the Arbitration Award, JR can use the mandated payment of mid-February 2022, or failure to pay thereon as evidence of S&C's insolvent state. JR will also need to serve a demand on S&C requesting settlement within 21 days.

While a winding-up petition is awaiting hearing by the Court, JR can apply for a provisional liquidator to preserve the Company's assets.

Commented [BT18]: 1 mark. RJ can apply for recognition and enforcement of the arbitral award since the New York Convention has been extended to the Cayman Islands. The key point is that RJ has to apply to have the judgment recognised in the Cayman Islands. Once it does so, a range of enforcement remedies become available to it, including a charging order, writ of execution, examination of judgment debtor, attachment of earnings, garnishee proceedings and the ability to petition to wind up S&C (since RJ will be an unsecured creditor). If winding up petition has already been filed, there may be a moratorium preventing JR from taking any of the enforcement actions mentioned above in which case it will be left to file a proof of debt for its US\$50m as part of the official liquidation.

(c)

Under Section 141 (1) of the Companies Act, some debts are classified as preferential debts. This includes amounts due to employees.

It is noted from the case that S&C is unable to pay its ongoing costs, including electricity and water for its dry dock facility; engineering and mechanic costs; wages, pension and health insurance for its employees.

Amounts due to employees rank in the highest priority and an employee can claim for unpaid wages, including in respect of medical health insurance premiums and severance.

The employee, as a creditor, can take the steps of an unsecured creditor as outlined above.

(d)

The Cayman Islands Court can determine whether it has jurisdiction over S&C pursuant to Section 91 of the Companies Act. Under this section, the Courts can make winding up orders in respect of:

- 1) An existing company;
- 2) That is incorporated and registered under the Companies Act;
- 3) Is a body incorporated under any other law; and
- 4) Is a foreign company which
 - a. Has property in the Cayman Islands;
 - b. Is carrying on business in the Cayman Islands;
 - c. Is the General Partner of a Limited Partnership; or
 - d. Is registered under Part IX.

From the case, S&C is a company registered in the Cayman Islands, and as such the Court does have jurisdiction. Sparrow can show that they are unable to repay loan, in combination with unpaid wages will indicate that the Company is insolvent

(e)

S&C, as a debtor can itself, apply for a provisional liquidation order to present a compromise with its creditors. Under Section 104(3) of the Companies Act, the Company may make an application on the grounds that it is, or is likely to become unable to pay its debts, and that it intends to present a compromise with its creditors by way of a scheme of arrangement.

Under a scheme of arrangement, and pursuant to Section 86 of the Companies Act, the Court may approve this compromise between the Company and its creditors or members.

For this to be valid, a majority in number representing 75% in value of the creditors or class of creditors, present and voting either in person or by proxy, may agree to any compromise or arrangement, and if sanctioned by the Court, this becomes binding on all creditors or class of creditors.

It should however be noted that there is no legislative framework for corporate rescue, however methods as outlined above are available – provisional liquidation followed by a scheme.

(f)

The Rackham family can continue to play a part in running S&C during a light touch provisional liquidation, where the existing management is allowed to continue control, but with the supervision of the provisional liquidator and the Grand Court. In all other circumstances, the directors' powers are replaced by the provisional liquidator.

Commented [BT19]: 2 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.

Commented [BT20]: 1 mark.

Commented [BT21]: 2.5 marks. The Court may, at any time after the presentation of a winding up petition but before making a winding up order, appoint provisional liquidators (PLs). An application may be made *ex parte* by the company (S&C) on the grounds that it is, or is likely to become, unable to pay its debts and intends to present a compromise or arrangement to its creditors in accordance with section 104(3) of the CICA. In the event that a winding up petition is presented by a creditor, S&C could respond by seeking to appoint provisional liquidators. The appointment of PLs would ensure that no action or proceedings may be commenced or continued against the S&C without the leave of the Court as per Section 97 of the CICA (statutory moratorium). Under the supervision of the Court and the JPLs, S&C could then explore a restructuring.

Commented [BT22]: 1 mark

(g)

Before approving any proposed restructuring, there is a three-stage process as governed by Order 102, Rule 20 of the Grand Court Rules ("GCR") and Practice Direction 2/2010. The process is that after filing a petition for a scheme of arrangement:

Commented [BT23]: 3 marks.

- 1) An application must be made to the Grand Court for an order that the meetings of creditors or members be convened for the purpose of approving the scheme;
- 2) The scheme proposal are discussed at the meeting held in accordance with the convening hearing order and are either approved or rejected; and
- 3) If approved at the scheme meetings, an application is then made to the Grand Court to obtain approval / sanction the scheme.

The scheme documentation is to be distributed to all scheme participants and may also be advertised. The document will contain the mechanism for determining claims, post-sanction of the scheme for distribution purposes.

The Court will want to consider for the purpose of the meeting, the composition of the creditor class, any jurisdictional issues, and the adequacy of the scheme documentation and notice. The information within the scheme documentation will need to satisfy the Court that it will allow the creditor to make an informed decision about the proposed scheme.

As noted above, the scheme must be approved by majority in number (over 50%) and representing atleast 75% in value of the creditors, voting either in person or proxy at the meeting.

If approval is passed, creditors who did not vote, or voted against the scheme (that is, the minority of creditors) will be crammed-down to adopt the scheme.

However, if there are multiple classes, which there is likely to be as there are preferential claims, then all classes must vote to accept the scheme and the requirement for approval must be passed at each class level. That is, every class requires more than 50% and representing more than 75% in value of the class.

Before sanction is given, the Court will be concerned with compliance with the convening orders, whether the majority represents fairly, the class, and whether the arrangement is such that an intelligent, honest member of the class, acting in his own interest, might reasonably approve it.

*** End of Assessment ***

45/90