



**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).
4. You must save this document using the following format: **[studentID.assessment5C]**. An example would be something along the following lines: 202122-336.assessment5C. **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 **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]: Correct. 1 mark.

#### **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]:** 10/10 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?

Yes. You could file notice of such security with the centrally maintained registers for real estate, ships, aircrafts, motor vehicles or intellectual property. For all other property, e.g. shares, you should run checks of the Register of Mortgages to ensure it is clear and you can then update such with details of the charge.

The effect of such registration is that any third party looking to purchase the secured asset will be deemed to have been given notice of your interest and, therefore, any purchase of the asset will continue to be subject to your security interest.

**Commented [BT12]:** Decent answer but the distinction between the effect of registering centrally (priority) versus registering on the ROM&C (notice only) is not demonstrated. 2 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?

Yes. The Foreign Bankruptcy Proceedings (International Cooperation) Rules 2018 assists where there are foreign proceedings on foot for the purpose of reorganising and/or rehabilitating an insolvent debtor, and where the foreign representative needs Cayman Islands Grand Court recognition and assistance, e.g. an order to stay legal proceedings.

**Commented [BT13]:** 2 marks. Incomplete answer. In what circumstances may the power be exercised? See statutory criteria under section 242.

#### Question 2.3 [maximum 3 marks]

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

The Foreign Judgment Reciprocal Enforcement Act (1996 Revision) provides a statutory scheme for recognition and enforcement of foreign judgements, only if the originating country provides reciprocity.

Order 71 of the Grand Court Rules further sets out the procedures.

The judgment must be: (1) final, (2) a monetary judgment, and (3) made after the above-mentioned 1996 Act was extended to the relevant foreign country.

**Commented [BT14]:** What about non-Australian enforcement? Common law? 1 mark.

### 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.

#### Holding directors accountable

- Directors can be personally liable for any losses they cause to the company by acting in breach of their fiduciary duty to act in the company’s best interests.
- An official liquidator may pursue such claims against the director in the name of the company.
- In *Prospect Properties v McNeil*<sup>1</sup> the Grand Court held that, where a company is insolvent, this fiduciary duty to a company extends to the interests of the creditors as well.
- In relation to fraudulent trading, per Section 147 of the Companies Act, if the company intended to defraud creditors, the liquidator may apply for an order requiring the director or any other persons (if they were knowing parties), to repay the company for its losses, or order otherwise as the Grand Court thinks fit.

#### Claw back from creditors

- If the company is placed into official liquidation, and there was a disposition of the company’s property after the ‘deemed’ commencement of the winding-up (e.g. date of filing of the petition), this transaction will be void and the liquidator is entitled to apply for relief to require the repayment of funds or the return of the asset.
- Further, if the disposition of property occurs in the six months before the deemed commencement date, the transaction may be a voidable preference only if<sup>2</sup>:
  1. The transaction also occurred at a time when the company was unable to pay its debts; and
  2. The director’s dominant intention was to give the creditor a preference by making the payment. E.g. can not simply be a payment to an essential service provider.
- Further, if this preference was made to a related party, this is automatically deemed to have satisfied the ‘giving the creditor a preference’ intention.
- The liquidator would need to apply to the Grand Court to order the return of the funds from the creditor, who may then submit a proof of debt.
- In addition, if the disposition of property was at an undervalue, it may be voidable on applicable to the Grand Court by a liquidator per section 146 of the Companies Act.

As general note to the above, Section 146 and 147 of the Companies Act, are liquidator’s actions only and are not powers which are available to the company’s creditors or shareholders to pursue.

**Commented [BT15]:** Good. 7 1/2 marks.. Candidate might also have mentioned s.99 and s.135

<sup>1</sup> [1990-91 CLR 171]

<sup>2</sup> As was applied in *re Weaving Macro Fixed Income Fund Ltd (in Liquidation)*

### Question 3.2 [maximum 6 marks]

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

This is incorrect. Whilst Receivers are not mentioned in the Cayman Islands statutory provisions dealing with insolvency, being the Companies Act and the Cayman Winding Up Rules, Receivers may be appointed by the Grand Court as indicated in the Grand Court Rules (“GCR”):

- Order 30 GCR – appointment and duties of receivers generally.
- Order 45 GCR – appointment of receivers to enforce court orders for payment of money.
- Order 51 GCR – appointment of receivers by way of equitable execution.

#### SPC

If a segregated portfolio company (“SPC”) has an insolvent segregated portfolio (“SP”), a receiver must be appointed by the Cayman court to close down the business of the SP and distribute the SPs assets – i.e. winddown the SP in a similar manner to an official liquidator. Also in a similar manner, the SPC director will have no powers in relation to the specific SP once a receiver is appointed.

#### Security Instrument

A receivership appointment may also be used by secured lenders when a debtor has defaulted. Under the term of the loan/security documents, a lender can often appoint an insolvency practitioner to act as a receiver of a specific asset (or a whole entity) for the purposes of repaying the secured debt via the realisation of such asset. The Receivers powers are more specifically set out in the mortgage document and will typically include a right of sale. The appointed receiver is an agent of the creditor/lender and owes its duties to them, rather than the court or the debtor.

Commented [BT16]: 6 marks

### 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?

- Register its security interest as Sparrow lent S&C USD 200 million and of this, USD 80 million, is secured by a mortgage over four of S&C's largest party boats.
- There is a specific Cayman Islands vessel register to register mortgages so that if the boats are sold, the purchaser is deemed to have been aware of the mortgage and will inherit the obligation to repay the USD 80M.
- As S&C has defaulted on the terms of the loan (by falling behind on monthly repayments), depending on the loan documents, S&C can likely appoint a Receiver to realise and sell the four boats.
- A Receiver is not impacted by any stay of proceedings, should a winding up application be filed by a third party creditor.

**Commented [BT17]:** 1.5 marks. Examiner was looking for candidate to reference ability of secured creditor to enforce its security (which should be centrally registered given it concerns vessels) outside of liquidation proceedings and without leave of the court (s.142). Also, that S&C cannot pay its debts (s.92 and 93) such that Sparrow has standing as an unsecured creditor to petition to wind up S&C. Sparrow may therefore choose to help S&C restructure via a work out or alternatively as part of a court supervised process depending on its view of the likely recovery in each scenario.

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

- RJ obtained an arbitration order that S&C must pay damages of USD 50M by mid Feb 2022. RJ should look to have the foreign order recognised by the Grand Court under the Foreign Judgement Reciprocal Enforcement Act (1996 Revision).
- However, given the provisions of the Act have only been extended to judgments in Australia to date, RJ could look to commence an action in the Grand Court of the Cayman Islands based on the outstanding foreign judgment being an unpaid debt/obligation. This is on the assumption that the judgment is final, the foreign court had jurisdiction over S&C, it was not obtained by fraud, it is not contrary to Cayman Islands public policy or to the rules of natural justice.
- Once granted, RJ could look to appoint a Receiver to recover the debt (along with the full range of other insolvency remedies).

**Commented [BT18]:** 1.5 marks. 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) What action can the unpaid employees take against S & C?

- The employees could look to wind-up S&C, as a preferential creditor, on the basis of insolvency, if their wages are unpaid. Should there any funds available for distribution, employees are paid in priority to ordinary creditors.

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

- Yes, as S&C is registered in the Cayman Islands.

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

- Yes, the company can apply for itself to be placed into provisional liquidation. By doing so it will obtain automatic breathing space against any proceedings continuing or being commenced.
- S&C could use the PL to propose a scheme of arrangement to its creditors.

**Commented [BT19]:** 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.

**Commented [BT20]:** 1 mark.

- However, this will not prevent a secured creditor enforcing, e.g. Sparrow seizing the four largest boats, which would be big issue for the company wanted to propose a scheme. They would need to separately try to negotiate with Sparrow to prevent any enforcement which may compromise the restructuring.

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

- The court order will govern the director's continued role in S&C. Sometimes the court will order a light touch provisional liquidation, in which it is a more oversight role and existing management stay in control of the company.

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

- Initially for the provisional liquidation appointment, the court will need to ensure:
  - There is a prima facie case for making the winding up order; and
  - The appointment of a provisional liquidator is necessary to: preserve and protect the company's assets; prevent the oppression of minority shareholders; or prevent mismanagement.
- The court will need to be satisfied that the company is, or is likely to become, unable to pay its debts per section 93 of the Companies Act and per the cash flow test.
- The court will need to be satisfied that the company intends to propose to its creditors with a compromise or scheme.
- In relation to any proposed scheme of arrangement, this will need to be approved by the Grand Court per Order 102, rule 20 of the Grand Court Rules and Practice Direction 2/2010.
  - An application needs to be made for an order that meetings of creditors/members be convened for the purposes of approving the scheme.
    - At this hearing the court will consider any class composition issues or if there are jurisdictional issues.
    - The court will further consider the scheme documents, notices, and explanatory statement to ensure it contains all information reasonably necessary for the creditors/members to make an informed decision.
  - If the scheme proposal is approved, i.e. by over 50% representing at least 75% in value of the creditors/members at the scheme meeting, a further application needs to be made for sanction of the scheme. This will then make the scheme binding on all creditors, the company and its shareholders.
    - The court would consider any input from a dissenting creditor/member.
    - The court would also want to ensure the convening order was complied with, if the 50% majority was a fair representation, and that the scheme is one that someone should reasonably approve.

**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

**Commented [BT23]:** 2 marks. Factors include:

1. The meeting was properly convened (in accordance with the court's initial order)
2. Proposal approved by over 50% in number representing 75% or more in value of the creditors (or class of creditors) present and voting
3. whether the majority of Stakeholders voting acted in good faith, were a fair representation of the relevant Class
4. that the Scheme is better than the result would be if the company were wound up, and
5. that an intelligent and honest member of the Class would agree that the Scheme should be approved.

**\* End of Assessment \***

**39.5 / 50**