



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]: 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?

It is possible for a creditor to register its security over an asset in the Cayman Islands. How this is done depends on the asset over which security is granted.

Ownership registers which are centrally maintained and in which mortgages and charges can be registered exist for real estate¹, ships², aircraft³, motor vehicles and intellectual property⁴. The effect of registering the security is that a third-party purchaser of the assets will be deemed to have notice of the interest and will acquire subject to that interest.

For other assets (not named above), public security registration regimes do not exist in the Cayman. For mortgages and charges over a company's shares, a creditor should check the company's register of mortgages and charges⁵ prior to making a loan to ensure it has sufficient control over an asset to prevent a third party from purchasing it. In terms of effect of registration of a mortgage or charge, this does not create a priority. However, the register is open to inspection by any members of the company or creditor and therefore registration does put third parties on notice of the existence of the security.

It must also be noted that a failure of a company to update the register does not, in and of itself, invalidate any security interests. Under Cayman Islands conflict of law rules, the relevant law governing the priority and perfection of security interests will be determined by the location of the asset over which security is given.

Commented [BT12]: 3 marks

Question 2.2 [maximum 4 marks]

¹ Registered Land Law (now "Act", and this change is applied from herein and below).

² Maritime Authority Act.

³ Civil Aviation Authority Act and Mortgaging of Aircraft Regulations.

⁴ <https://www.ciipo.ky/laws/>.

⁵ Section 54 of the Companies Act requires security interests to be entered in the register of mortgages and charges which is required to be maintained by the company at its registered office.

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?

The Grand Court has the power to assist foreign bankruptcy proceedings pursuant to Part XXII of the Companies Act. A foreign bankruptcy proceeding includes proceedings for the purpose of reorganising or rehabilitating an insolvent debtor⁶.

There are no threshold tests for the grant of assistance, nor are there any automatic rights based on the centre of main interests of the debtor. Rather, a foreign representative must satisfy the court that it is appropriate for the court to exercise its discretionary power to grant the relief sought. Such relief (as provided for under section 241 of the Act) includes recognising the right of a foreign representative to act in the Islands on behalf of, or in the name of the debtor; enjoining the commencement or staying the continuation of legal proceedings against a debtor; staying the enforcement of any judgment; requiring a person in possession of information relating to the business or affairs of a debtor to be examined by and to produce documents to the foreign representative; and ordering any property to be handed over to the foreign representative.

In determining whether to exercise its discretion to provide assistance, the Grand Court is guided by matters which will best assure an economic and expeditious administration of the debtor's estate⁷ consistent with:

- (a) the just treatment of all holders of claims, where they are domiciled, in accordance with established principles of natural justice;
- (b) the protection of claim holders in the Cayman Islands against prejudice and inconvenience in the processing of claims in foreign proceedings;
- (c) the prevention of preferential or fraudulent dispositions of property in the debtor's estate;
- (d) the distribution of the estate among creditors substantially in accordance with the statutory order of priority;
- (e) the recognition and enforcement of security interests created by the debtor;
- (f) the non-enforcement of foreign taxes, fines and penalties; and
- (g) comity (mutual recognition and cooperation concerning legal decisions).

Question 2.3 [maximum 3 marks]

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

The Cayman Islands has not entered into any international treaties for the reciprocal recognition or enforcement of foreign judgments. It is not a signatory to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. With the exception of New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the UK has not extended by ratification of any such treaties, to the Cayman Islands, by Order in Council.

Therefore, the route to recognition may be statutory pursuant to the Foreign Judgments Reciprocal Enforcement Act (1996 Revision) if the judgment is from the Superior Courts of Australia⁸. However, most judgments will need to be enforced under the common law by

⁶ Section 240 of the Companies Act

⁷ *Idem*, Section 241

⁸ Procedure is governed by Order 71 of the Grand Court Rules.

issuing⁹ new enforcement proceedings in the Cayman court for recovery of the judgment amount as an unsatisfied debt or other unsatisfied obligation¹⁰.

In order to obtain an enforcement order, the following must be satisfied:

- (i) the judgment is final;
- (ii) the foreign court had jurisdiction over the debtor;
- (iii) the foreign judgment was not obtained by fraud;
- (iv) the foreign judgment is not contrary to public policy of the Cayman Islands; and
- (v) the foreign judgment was not obtained contrary to the rules of natural justice.

Once an order from the Cayman court is made, the full range of domestic enforcement remedies are available¹¹.

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.

There is no obligation under the Companies Act on directors to file for insolvency. There is also no prohibition on continuing to trade whilst insolvent.

However, directors can be held personally liable to the company for losses arising from the directors' breach of fiduciary duty. Directors are under a duty to act in the best interests of the company which requires them to have regard to the interests of creditors¹². This basis for this principle (as held in *Prospect*) is because it is in the interests of creditors to be paid and it is in the interests of the company to be safeguarded against being put in a position where it is unable to pay. Accordingly, liquidators, acting on behalf of and in the name of an insolvent company can seek damages from directors for breach of fiduciary duty, for the benefit of the estate's stakeholders.

There are also a number of statutory remedies that liquidators can pursue to "claw back" payments that former directors should not have made, for the benefit of an insolvent company's stakeholders.

Firstly, section 145 of the Act deals with voidable preferences. Any disposition which constitutes a preference within the meaning of this section will be void and the liquidator may apply to the Grand Court to order the creditor to return the asset and provide in the liquidation for the amount of its claim. A disposition (payment or disposal of property) constitutes a voidable preference if: (i) it occurs within the 6 months before the deemed commencement of the company's liquidation¹³ and at a time when it is unable to pay its debts; and (ii) the

⁹ The relevant limitation period is 6 years from the date of the judgment, or where appeals, the date of the last judgment.

¹⁰ Money and non-money judgments are enforceable at common law, as are *in personam* judgments, as was confirmed in the case of *Bandone v Sol Properties* 2008 CILR 301.

¹¹ Including the appointment of receivers over assets under O.45 of the GCR.

¹² *Prospect Properties v McNeill* [1990-91 CILR 171]

¹³ Section

dominant intention of the company's directors was to give the applicable creditor a preference over the other creditors.

The Judicial Committee of the Privy Council in *Weaving*¹⁴ confirmed that giving a preference over other creditors means putting that creditor in a better position than it otherwise would have been¹⁵. In relation to the second stage of the test, if the company's dominant intention in making the payment or granting the security was to achieve a different purpose (for example, in good faith to pay an essential service provider) it might not be classed as a voidable preference even if the collateral effect is to prefer the creditor in question. However, a dominant intention may be inferred by the court from the available evidence. It is also important to note that a disposition made to a "related party" such as a someone with the ability to control the company will be deemed to have been made with a view to giving a preference¹⁶.

Secondly, section 146 of the Act provides for the avoidance of dispositions at an undervalue. Such a transaction will be voidable on an application by a liquidator if it can be established that the property is disposed of at an undervalue and with the intention of wilfully defeating an obligation owed to a creditor (i.e. an intent to defraud). Undervalue for the purposes of this section means the provision of no consideration or a consideration which in money or money's worth is significantly less than the value of the property. An action under this section must be brought within six years of the disposal and the burden of proof is on the creditor or liquidator (seeking to have the disposition set aside) to establish an intent to defraud.

Thirdly, section 147 of the Act deals with fraudulent trading and can be invoked if a business of a company was carried on with intent to defraud creditors, or for any fraudulent purpose, a liquidator may apply for an order requiring any persons who were knowingly parties to such conduct to make such contributions to the company's assets as the Court thinks proper. There are no Cayman Islands authorities which interpret this provision the Act nor does it appear that an application under this section has been the subject of judicial determination. However, this section applies to any persons who were knowingly party to fraudulent conduct, such as a controlling beneficial owner, and is therefore broader in scope and captures conduct of any person (not just a former director).

Finally, section 99 of the Act provides for avoidance of any property dispositions made after the deemed commencement of the winding up void in the event that a winding up order is subsequently made (unless validated by the court). In this scenario the liquidator may apply for an order for the repayment of funds or return of an asset.

Commented [BT15]: 9 marks

Question 3.2 [maximum 6 marks]

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

Although not specifically mentioned in the Companies Act provisions dealing with insolvency (with the exception of the provisions relating to Segregated Portfolio Companies (SPCs)), or the Companies Winding-up Rules, the Grand Court Rules¹⁷ do contemplate that receivers may be appointed for the purposes of collecting money, or to carry out some other act such as the execution of a contrary.

Thus, whilst there is no specific statutory receivership process available to insolvent companies (with the exception of SPCs as addressed below) as a means to realise assets, a

¹⁴ [2019 (2) CILR 235]

¹⁵ *Weaving* [2019] UKPC 36

¹⁶ Companies Act s 145(2) and (3)

¹⁷ Orders 30, 45 and 51.

receiver does have a role to play in an insolvent company context if a secured creditor wishes to enforce its security interest. Appointment of a receiver can occur without court involvement but pursuant to rights in a security instrument, such as a charging document over a fixed or floating charge that provides for the appointment following an event of default¹⁸. Under the terms of the charging document the receiver can exercise the powers expressed which typically include exercising a right of sale. This enables the receiver to sell the charged asset and repay the secured creditor the amount of the unpaid debt. The receiver owes its duties to the creditor rather than the debtor company as it has not been appointed and / or supervised by the court.

In addition (as alluded to above), receivers have a prominent role to play in relation to insolvency proceedings concerning SPCs. An SPC is a regular company which remains a single entity but which is permitted to create separate portfolios (called a "segregated portfolio" (SP) for different assets and liabilities. Under section 216 of the Act, each portfolio is ring-fenced from the assets and liabilities contained in other portfolios. An SPC or SP is identified by the acronym "SPC" or "SP" after its name. If it appears to the Court that an SPC is insolvent (its assets are likely to be insufficient to discharge the claims of creditors in respect of that SP) then it may make a receivership order in respect of that portfolio¹⁹. The receiver's role is analogous to that of a liquidator²⁰.

Commented [BT16]: Good. 5 marks.

A receivership order may not be made if the SPC is in the process of being wound up and shall cease to be of effect upon commencement of the winding up of the SPC, but without prejudice to prior acts of the receiver or his agents²¹. A receivership order must state that the business and SP's assets of, or attributable to, a SP must be managed by a receiver specified in the order for the purposes of the orderly closing down of the business of, or attributable to, the SP and the distribution of the SP assets attributable to the SP to those entitled to have recourse thereto²².

As with a stay on claims against a company in a liquidation, when an application has been made for and during the period of operation of a receivership order, no suit, action or other proceeding may be instituted against the SPC in relation to the SP in respect of which the receivership order was made, except with leave of the Court (which may be conditional or unconditional)²³. During the period of the receivership order, the receiver relieves the directors of their functions and powers in respect of the business of the SP²⁴.

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.

¹⁸ See, eg, *Scotiabank (Cayman Islands) Limited v Treasure Island Resort (Cayman) Limited* [2004-2005 CILR 423].

¹⁹ Section 224(1) of the Act

²⁰ See *In the Matter of JP SPC 1 and JP SPC 4* [2013 (1) CILR 330]

²¹ Section 224(4) of the Act

²² *Idem* at s 224(3)

²³ *Idem* at s 226(5)

²⁴ *Idem* at s 226(6)

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? wind up, pref creditors.
- (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?

Dealing first with the question of jurisdiction at (d) above, even if incorporated in another jurisdiction, as a company registered in the Cayman Islands, the court has jurisdiction over it, and to make winding up orders²⁵.

In relation to question (a), namely what action Sparrow can take to protect its interests: it is noted that 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). It is also noted that S&C are now in default of its loan obligations, having fallen behind on its monthly repayments. In relation to the debt which is secured, Sparrow can take steps to enforce its security (mortgages). If the security instrument provides for the appointment of receiver and grants powers of sale to the receiver, Sparrow can appoint a receiver to exercise the power of sale in relation to the four large party boats. The receiver can then pay the proceeds of the sale of those assets to S & C. However, because there is also debt which is unsecured (USD 120 million) which, in the absence of a

²⁵ Section 91 of the Act.

scheme of arrangement or compromise, is likely only to be recovered by proving in a liquidation for the amount of the unsecured debt, Sparrow may also consider issuing a winding up petition. This would not interfere with Sparrow enforcing its security either by way of a receiver or during the official liquidation procedure²⁶.

In relation to question (b) Roger Jolly can take steps to have the arbitral award recognised so that it has the benefit of a Cayman judgment which Roger Jolly can then enforce. In this context Roger Jolly will be able to issue a winding-up petition on the ground that pursuant to section 92(e) of the Act, S & C is unable to pay its debts. Assuming the arbitral award is recognised, the judgment amount will then constitute a debt owed to Roger Jolly which if unsatisfied in whole or in part, will satisfy the threshold test in section 93(b) of the Act. Because the because award is a foreign arbitral award, from the ICC in London and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards was extended to the Cayman Islands by Order in Council, Roger Jolly's award will be enforceable in the Cayman Islands pursuant to section 5 of the Foreign Arbitral Awards Enforcement Act (1997 Revision). In order to enforce the award, Roger Jolly will need to comply with the requirements of section 6 of that statute and produce the original or certified copies of the award, arbitration agreement (and if either is in a foreign language, a translation of it certified by an official or sworn translator or by a diplomatic or consular agent).

In relation to question (c) regarding unpaid employees, they are also deemed creditors of the company and may prove in a liquidation for the unpaid remuneration. Subject to the relevant debt being more than KYD 100, the employee(s) can serve a statutory demand on the company requiring the payment of sums due and after a period of 21 days if the amount due remains outstanding, the employees can petition the court to wind up S & C under section 92(e) and 93(a). As sums owed to employees are preferential debts²⁷, they take priority over all other claims save for the rights of secured creditors which are superior to the rights of all other parties, and liquidation expenses.

It is worth mentioning that for any of the winding up scenarios in questions (a) to (c), the creditors could also rely on section 93(c) to establish that the company is unable to pay its debts. In this event, the court applies a cash-flow test. In recent times authorities have suggested that future cash flow may be considered²⁸.

In relation to question (e) if a winding up petition has not been presented by a creditor already, S&C could apply for provisional liquidation if it has a compromise or arrangement it wishes to present to its creditors²⁹. This would provide S & C with the protection of an automatic stay whilst such a compromise or arrangement is being worked out³⁰ however, it must be understood that the stay will not operate to prevent . S & C will need to satisfy the grounds under section 104(3) on an application (which may be made ex parte) for an order placing the company in provisional liquidation. The relevant grounds are that (a) the company is, or is likely to become, unable to pay its debts within the meaning of section 93 (applying the cash flow test); and (b) the company intends to present a compromise or arrangement to its creditors (that is, a scheme of arrangement under section 86 of the Act – addressed below). S & C will be able to nominate the joint provisional liquidators (**JPLs**) since the application is made ex parte, but the Court will appoint them and their powers and duties will be provided for in the appointment order. As the extent of the powers will depend on the reason for their appointment, S & C should prepare to justify the reason for each and every power sought in the draft order submitted.

²⁶ CWR, O.17

²⁷ Section 141 of the Act

²⁸ *Re Weaving Macro Fixed Income Fun Ltd (in Liquidation)* [2016 (2) CILR 514].

²⁹ Section 104(3)

³⁰ *Idem*, section 97

Commented [BT18]: 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. It 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.

Commented [BT19]: 2 marks

Commented [BT20]: 2 marks

Commented [BT21]: 3 marks

Following on from (e) above and in answer to question (f), the Rackhams family may be able to continue to play a part in running S & C during any restructuring process if it is proposed that the provisional liquidation be "light touch". This will usually enable existing management to continue in control of the company subject to the supervision of the JPLs and the Court. However, if the situation of S & C is not suitable for a "light touch" provisional liquidation (which is very much fact dependant and is likely to depend on the viability of the restructuring proposal being put forward), the JPLs powers replace those of management / directors.

In relation to question (g), before the Court considers sanctioning the scheme, it needs to have been approved at creditors meetings and the scheme approved by a majority in number (over 50%) representing at least 75% in value of the creditors (or class of creditors, as the case may be), present and voting either in person or by proxy at the meeting. If the necessary majorities are achieved, the scheme then needs Court sanction before it is binding on all the creditors³¹. The Court will be concerned with the compliance with the convening orders, whether the majority fairly represents the class, whether the arrangement (having regard to the alternatives such as a liquidation of assets) is such that an intelligent, honest member of the class convened, acting in his own interest, might reasonable approve it. Ultimately, the Court will be concerned with ensuring the scheme is fair.

Commented [BT22]: 1 mark. It depends on the terms of the PL order. 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.

Commented [BT23]: 3 marks

*** End of Assessment ***

47.5 / 50

³¹ Section 86(2) of the Act