



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.
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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?

Whether a creditor can centrally register a security over an asset depends on the nature of the asset. The Cayman Islands has centralised ownership registers for land, ships, aircraft, motor vehicles and intellectual property. The advantage of centrally registering a security over one of these assets is that any subsequent third party purchaser of the secured asset will be deemed to have notice of the lender's security interest. That may, in turn, make it easier to trace the asset in which the lender wishes to realise his or her security interest into the hands of third parties, who might otherwise be protected by equity as a *bona fide* purchaser for value without notice. In order to register a security interest on a central register, the lender would need to file a notice with the relevant authority (the Cayman Islands Land Registry, the Cayman Islands Shipping Registry, the Civil Aviation Authority of the Cayman Islands, the Department of Vehicles & Drivers' Licensing, and the Cayman Islands Intellectual Property Office).

Commented [BT12]: 2 1/2 marks. Don't forget that the central registers (unlike the RM&C) don't just give notice - they also give priority status.

For all other types of property, a lender should ensure that the borrower company's register of mortgages is clear prior to making the secured loan, and then update the register with details of the charge after the granting of the loan. Section 54 of the Companies Act requires that security interests be entered in a debtor company's register in this way, although a failure to comply does not of itself invalidate the security. As with the centralised registers, entering a security interest on the debtor company's register of mortgages (which must be maintained at the company's registered office in the Cayman Islands) serves to put third parties on notice of the existence of the security.

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?

The powers of the Cayman Islands Grand Court to assist foreign bankruptcy proceedings are set out in Part XVII of the Companies Act (International Co-operation). The definition of foreign bankruptcy proceedings in section 240 includes proceedings for the purpose of reorganising or rehabilitating an insolvent debtor.

Section 241 lists the orders which the Grand Court may make in support of foreign bankruptcy proceedings. These include staying proceedings or enforcement of a judgment against the debtor to protect assets in the insolvency, and ordering the turnover of assets belonging to the debtor to the foreign representative.

The court has an apparently wide discretion to determine an application under section 242, being guided by "matters which will best ensure an economic and expeditious administration of the debtor's estate", but that discretion must be exercised consistently with the seven factors listed in section 242(1). When making any order under section 242, the court must also consider whether to wind up the debtor's local branch.

Commented [BT13]: 4 marks

Question 2.3 [maximum 3 marks]

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

There being no international treaties binding the Cayman Islands in respect of the reciprocal recognition of foreign judgments, there are two relevant sources of law: statute and case law.

The relevant statute is the Foreign Judgments Reciprocal Enforcement Act (1996 Revision) (the "Reciprocal Enforcement Act"). Currently, only judgments from the Supreme Courts of certain Australian states and territories and from the Australian Federal and High Courts are registrable under the Reciprocal Enforcement Act. The statute is therefore very limited in scope. To be registered under the Reciprocal Enforcement Act, a qualifying foreign judgment must satisfy all of the following requirements (section 3(2)):

1. The foreign judgment is final and conclusive (section 3(2)(a), see also section 3(3)).
2. The foreign judgment is for payment of a sum of money, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty (section 3(2)(b)).
3. The judgment was given after the Act came into force (section 3(2)(c)).
4. At the date of the application for enforcement, the judgment has not already been wholly satisfied and is still capable of enforcement in the country of the foreign judgment (section 4(1), see also section 4(4)).
5. The judgment is from one of the jurisdictions to which the Reciprocal Enforcement Act applies (section 6(1)(a)(i)).
6. The judgment debtor was duly served in accordance with the law of the foreign country and had notice of the proceedings in sufficient time to enable him or her to defend the proceedings, even if he or she did not appear in the proceedings (section 6(1)(a)(iii)).

There are certain, limited grounds on which a judgment debtor might challenge registration (e.g. the original judgment was obtained by fraud, or enforcement would be contrary to Cayman Islands public policy, see section 6(1)).

Due to the limited application of the Reciprocal Enforcement Act, most foreign judgments recognised in the Cayman Islands are recognised at common law. The common law route is not limited to money judgments. Injunctive and declaratory relief can also be recognised, as can judgments made *ex parte* and foreign enforcement orders and pre-judgment attachment orders. The requirements for recognition of a foreign judgment at common law are:

1. The judgment is final.
2. The foreign court had jurisdiction over the debtor in respect of the debtor.

Again, there are three grounds on which a judgment debtor might challenge recognition: the judgment was obtained (1) by fraud or (2) contrary to the rules of natural justice, or (3) enforcement would be contrary to the public policy of the Cayman Islands.

Commented [BT14]: 3 marks

Proceedings for the recognition and enforcement of foreign judgments (whether at common law or under statute) are heard by the Financial Services Division of the Grand Court (order 72 of the Cayman Islands Grand Court Rules 1995, as amended). The FSD has similar powers to the High Court of England & Wales. Proceedings for recognition, whether under statute or at common law, must be brought within 6 years of the date of the original judgment (section 4(1) of the Reciprocal Enforcement Act / limitation period for bringing an action on an unsatisfied debt).

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.

I will deal first with recovering payments which should not have been made, and thereafter with the personal liability of directors and former directors.

The most powerful “claw back” provision in my view is section 99 of the Companies Act, which provides that “any disposition of the company’s property ... made after the commencement of the winding up is, unless the Court orders otherwise, void.” The reference to the court ordering otherwise, is a reference to a validation order, but where one is considering a payment which should not have been made in an insolvency context, a validation order would be very unlikely to be made. That is because clear solvency is a threshold requirement, and the court must also be satisfied that an “intelligent and honest” director acting reasonably would have believed that the disposition was necessary or expedient in the interests of the company (*In the matter of Fortuna Development Corp* [2004-05 CILR 533]). In most insolvent trading cases, therefore, despite an express statutory prohibition, any disposition of company property will be void. A liquidator may apply for restoration of a void payment or asset transfer to the estate.

Secondly, a liquidator can ask the court to declare void any payment, disposal of property or grant of a charge which is a preference under section 145(1) of the Companies Act, if it occurs at a time when the company is insolvent and within 6 months preceding the commencement of liquidation. A voidable preference is a transaction made with the dominant intention of putting the benefitting creditor in better position in the insolvency than he or she would otherwise have been (*In re Weaving Macro Fixed Income Fund Ltd (In Liquidation)* [2016 (2) CILR 514] at paragraph 42, applying *In re DD Growth Premium 2X Fund* [2015 (2) CILR 278 at paragraph 174). It is not necessary to demonstrate fraud or dishonesty on the part of the company. As the Cayman Islands Court of Appeal explained in *In re Weaving Macro Fixed Income Fund Ltd (In Liquidation)* [2016 (2) CILR 514] at paragraph 52:

“The idea underpinning insolvency legislation is that limited assets should be shared *pari passu* among the creditors, so that each bears a share of the loss that corresponds to the proportion that his debt bears to the total indebtedness. Preferring one creditor over the others means on the face of it that the preferred creditor suffers no loss, and the other creditors suffer more than their proportionate share. That subverts the principle of *pari passu* distribution, and intentionally giving an advantage to one creditor is something that is to be frowned on.”

Again, if a transaction is declared void under section 145(1), the liquidator may seek to have the transferred money or property restored to the estate.

Thirdly, a liquidator can ask the court to declare void any disposition of property made at an undervalue under section 146(2) of the Companies Act. The liquidator must show that both that the transaction was at an undervalue (as defined in section 1456(1)(e) – no consideration or significantly less than the value of the transferred property) and also that the disposition was made with the intent to defraud creditors (section 146(2)). Again, if the disposition is held to be void, the liquidator may seek restoration of the transferred property to the estate.

Fourthly, there may be a company law remedy available to the liquidator. If a transfer has been made *ultra vires* the company's Articles of Association, the liquidator could apply to the court for a declaration that such transfers are of no legal effect and seek restoration of the transferred property to the estate, see e.g. *Prospect Properties Ltd (In Liquidation) v. McNeill and J.M. Bodden II* [1990–91 CILR 171], pages 190, 192, 193.

Turning to remedies against directors personally, section 147(1) of the Companies Act deals with fraudulent trading and provides that, if “any business of the company has been carried on with the intent to defraud creditors of the company or creditors of any other person or for any other fraudulent purpose” then the liquidator may apply to court for a declaration under section 147(1). The court may, under section 147(2), require anyone who was a knowing party to the fraud to contribute to the estate as the court thinks proper, hence liability is not restricted to restoration of any value paid away from the estate, but could include compensation to the estate for any losses resulting from fraudulent trading.

Finally, directors of a company are subject to fiduciary duties (essentially, duties of loyalty to the company). There are many different aspects to fiduciary duties (e.g. the duty not to make a secret profit, the duty not to have a conflict of interest) but the essence of fiduciary obligations is the obligation to act in the best interests of the company without regard to one's own interests or any other person. In insolvency, it is a “vital part” of the fiduciary duties of directors to consider the interests of creditors. It was in the interests of the creditors to be paid and correspondingly in the interests of the company to be safeguarded against being put in a position in which it was unable to pay its debts (*Prospect Properties*, above, pages 199 and 202 to 203). If a director breaches his or her fiduciary duties to the company, he or she may be held liable in equity to make good the losses suffered by the company (the “Belmont principle”, see *Prospect Properties* at page 202 line 5 to page 202 line 6).

Commented [BT15]: 9 marks

Question 3.2 [maximum 6 marks]

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

The role of receiver does not feature in statute or the CWR, but is foreseen in the Grand Court Rules (GCR) (see orders 30, 45 and 51 GCR).

Receivers may be appointed without leave of the court by a secured creditor pursuant to a security instrument. However, the realisation of securities pursuant to contract is, strictly speaking, a matter outside the scope of insolvency and for that reason I will not discuss this further.

The main role which receivers play in insolvency in the Cayman Islands is in relation to Segregated Portfolio Companies (SPC). SPCs are dealt with in Part XIV of the Companies Act. An SPC is a type of Cayman Islands company, under which arrangement the company, which is a single legal entity, may hold assets and liabilities in one or more distinct portfolios (sections 216(1) and 219(1) of the Companies Act). The assets within a given portfolio are

ringfenced under sections 220 and 221, so that they can only be applied to liabilities attributable to that segregated portfolio.

A receivership order may be made in respect of an SPC under section 224(1), as long as the court is satisfied that a segregated portfolio (a) is or likely to become balance sheet insolvent when account is taken of the company's general assets, and (b) that a receivership order would achieve the two purposes in section 224(3), i.e. the orderly closing down of the segregated portfolio's business and the distribution of its assets. The receiver has the wide-ranging powers at sections 226(1) and 226(6)(b) (see also 226(6)(a)). The role of receiver over a portfolio is therefore analogous to that of a liquidator, but a receivership order over one or more segregated portfolios is an alternative to and cannot co-exist with winding up the SPC as a whole (section 224(4)). Receivership may help to postpone winding up and facilitate restructuring, since no suit, action or other proceedings may be commenced against the SPC except by leave of the court in relation to the segregated portfolio(s) in receivership once a receivership application has been made and during the duration of the receivership (section 226(5)).

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

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

A: Sparrow's position

USD 80 million of Sparrow's loan to S&C is secured against four of S&C's largest party boats. Given S&C's failure to repay monthly instalments under the loan agreement, Sparrow may be entitled to realise that security in accordance with the terms of the loan agreement. This could be done even after a winding up order has been made (section 142(1) of the Companies Act).

The balance of USD 120 million together with contractual interest, is an unsecured loan. Sparrow could commence insolvency proceedings, or explore restructuring options with S&C, in an attempt to recover the unsecured amount.

If Sparrow wishes to commence insolvency proceedings, it could apply to the court under section 94(1)(b) for S&C to be wound up. Sparrow would need to prove that one of the circumstances in section 92 applies. Since S&C has failed to repay the loan to Sparrow, the obvious ground for the winding up petition would be section 92(d), inability to pay debts. That is defined at section 93. Although it seems likely on the facts that the court would be satisfied that S&C is unable to pay its debts under section 93(c), it may assist with proof of S&C's inability to pay if Sparrow serves a statutory demand for payment on S&C in accordance with section 93(a).

Once an official liquidator has been appointed under section 105(1), Sparrow will need to submit its claim in writing to the liquidator. This is referred to as a proof of debt (see further, section 139 and order 16, r. 2(3) CWR).

If Sparrow would prefer to let S&C try to trade out of its present difficulties, which might be an attractive option in view of the early signs of an improving tourism market, Sparrow has the option under section 104(2) of applying for the appointment of a provisional liquidator over S&C. Sparrow would need to show that the grounds in section 104(2)(a) and (b) are satisfied. Provisional liquidation would give rise to an automatic stay of proceedings and enforcement against S&C while restructuring options are explored (section 97(1)), but this would not prevent Sparrow from realising its security. I discuss provisional liquidation in more detail below so I will not duplicate that answer here.

B: Mr Jolly's position

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards applies in the Cayman Islands and is given effect domestically by the Foreign Arbitral Awards Enforcement Act (1997 Revision).

Pursuant to section 5 of the Foreign Arbitral Awards Enforcement Act, a Convention award (i.e. an award made in pursuance of an arbitration agreement in the territory of a State, other than the Islands, which is a party to the New York Convention) is enforceable in the same

Commented [BT17]: 2.5 marks

manner as an award under section 22 of the Arbitration Law and shall be treated as binding for all purposes on the persons between whom it was made.

Applying that to the facts of this case, the award in Mr Jolly's favour appears to have been made in England and Wales (the question refers to the ICC tribunal sitting in London, which I understand to be a reference to the arbitration being seated in England and Wales). If that is the case, the award was made in a Convention state (the UK) and is a Convention award within the meaning of section 2 of the Foreign Arbitral Awards Enforcement Act. Consequently, Mr Jolly can apply to enforce the arbitral award. He may make the application by *ex parte* originating summons in the FSD in accordance with section 6 of the Foreign Arbitral Awards Enforcement Act and the applicable CGR rules.

It is possible that S&C might have grounds to oppose enforcement under section 7 of the Foreign Arbitral Awards Enforcement Act, but none are apparent on the face of the question. Absent any such grounds, the court is obliged to enforce the award by reason of the mandatory language in section 72(5) of the Arbitration Law.

Commented [BT18]: 2 marks

C: Unpaid employees

Sums due to employees are preferential debts pursuant to section 141 and Schedule 2 of the Companies Act. This does not mean that they will necessarily be paid if the debtor company has insufficient funds, but they will be paid *pari passu* with other preferential debts in priority over all other debts, once the costs and expenses of the liquidation have been defrayed (section 141(2)).

Commented [BT19]: 2 marks

Category 1 of Schedule 2, paragraph 1 clarifies that sums due to employees which constitute preferential debts are not limited to employees in the Cayman Islands, but also elsewhere, and includes sums in respect of salaries, wages and gratuities accrued during the four months immediately preceding the commencement of liquidation.

In addition, the following sums are preferential debts under Category 1 of Schedule 2, and they do not appear to be subject to the four-month guillotine:

1. any sums due on behalf of an employee in respect of medical health insurance premiums or pension contributions (paragraph 2);
2. where an employment contract has been terminated as a consequence of the company going into liquidation, severance pay and accrued holiday pay (paragraph 3); and
3. certain statutory compensation claims (paragraph 4).

Applying those provisions to the facts of the case, it appears likely that at least some of S&C's employees may be based outside the Cayman Islands. This is because the question states that the company's fleet of ships operates across central America and the Caribbean. That should not pose a problem, as any employee of the insolvent company is entitled to claim in the insolvency.

The question states that the sums due are wages, pension contributions and health insurance premiums. Subject to the four-month guillotine for wages, those all fall within category 1 and are preferential debts in any insolvency.

In the premises, it appears likely that the unpaid employees are entitled to claim at least some of the outstanding sums as preferential debts in a liquidation.

D: Jurisdiction over the insolvent company

The question states that S&C is registered in the Cayman Islands. This could mean that S&C is a Cayman Islands incorporated company registered in the Cayman Islands, or it could be a

foreign company registered under Part IX of the Companies Act. In either case, the Grand Court would have jurisdiction over insolvency proceedings in respect of S&C under section 91(b) or 91(d)(iv) of the Act, read in conjunction with the definition of “company” in section 2 of the Act: “except where the context excludes exempted companies, means a company formed and registered under this Act or an existing company”.

Commented [BT20]: 1 mark.

The question states that S&C was founded over 50 years ago, which would be prior to 1972, so it is also possible that the company could be an “existing company” within section 91(a) and section 2, but further instructions would be required as to whether it was incorporated prior to 1 December 1961.

E: Protection during restructuring

Provisional liquidation appears appropriate to provide S&C with breathing space while it explores restructuring options. (It is only possible to obtain a moratorium on claims or enforcement against the debtor company if it is in liquidation.)

Commented [BT21]: 3.5 marks

Section 104(3) gives a company standing to apply for the appointment of a provisional liquidator where the company is or is likely to become cash flow insolvent and it intends to present a compromise or arrangement to its creditors.

Section 97(1) provides an automatic moratorium on proceedings against S&C and enforcement of judgments etc. against S&C upon the appointment of the provisional liquidator. It is this moratorium which could give S&C the protection it needs while it seeks to restructure.

S&C could seek to restructure under a scheme of arrangement, which is a court-approved process which permits the rights of creditors or members to be varied, by forcing the relevant non-consenting creditors and/or members into the compromise or arrangement (also known as “cramming down” the dissenting creditors) (section 86(2)).

F: The Rackham family’s management during restructuring

Yes, “soft touch” provisional liquidation can leave the existing management in place subject to supervision by the court and provisional liquidator. The terms of the order appointing the provisional liquidator will dictate the scope of his or her powers (section 104(4)).

Commented [BT22]: 1 mark

G: Factors in court approval of a proposed restructure

Court approval is necessary for a restructuring scheme, even if the creditors support the proposal (section 86(2)).

The statute does not specify a test which the court must apply when considering whether a proposed scheme will be sanctioned, however a recent decision of the Grand Court provides guidance on the principles to be applied (*Re Freeman FinTech Corporation Limited*). Segal J reviewed the authorities and concluded that the court must be satisfied that:

1. the statutory requirements were complied with;
2. the class of creditors the subject of the court meeting were fairly represented and that the statutory majority had acted bona fide and did not coerce the minority;
3. an intelligent and honest person, a member of the class concerned and acting in respect of his own interests, might reasonably approve the scheme;
4. there was no “blot” on (i.e. defect in) the scheme; and
5. there was no other reason which would preclude the court from sanctioning the scheme such as the scheme not achieving substantial effect if it was sanctioned (the court will not act in vain).

The first four points are cited in Buckley on the Companies Act and in *In re TDG plc* [2009] 1 BCLC 445. Segal J added the fifth factor on the basis that one matter frequently referred to in the authorities (and which arose for consideration in this case) is that the court must be satisfied that the scheme will achieve a substantial effect and that the court is not acting in vain. |

The *Freeman* decision concerned a debt governed by Macau law, but the principles are applicable to the court's sanction of schemes of arrangement under Cayman Islands law generally.

Commented [BT23]: 3 marks

*** End of Assessment ***

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