



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.**
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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?

While Cayman Islands does have ownership registers for ships, aircrafts, real estate, intellectual property, motor vehicles, and mortgages/ charges can be registered in these centrally maintained registers, there is no public security regime for other assets. The effect of registering such interest is that a third-party purchaser (in relation to the above mentioned assets) will be deemed to have notice of such interest and will acquire such asset subject to the secured creditor's interest.

Commented [BT12]: 3 marks

For other assets, while there is no centrally maintained register, Section 54 of the Cayman Islands Companies Act (2022 Revision) (*CICA*), requires the security interests be entered in the register of mortgages and charges of the debtor company. The register must be maintained by the company at its registered office in the Cayman Islands. It must be noted that failure of a company to update the register of mortgages and charges does, in itself invalidate the security interests and registering the security interest in the register maintained by the company also does not create priority. In any event, a creditor must ensure that it takes adequate steps to obtain sufficient control over an asset to prevent a third party from purchasing it and should also review the register of charges and mortgages maintained by the company prior to making a loan. The register is open for inspection by any member of the company or creditor and therefore registration foes put third parties on notice of the existence of a 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?

Yes, the Cayman Islands Grand Court (Court/court) does have power to assist foreign insolvency/ bankruptcy proceedings.

While the Cayman Islands has not implemented the UNCITRAL Model Law on Cross-border insolvency, most of the principles are followed in the interest of comity. In terms if statutory powers, the Court's derives powers to make orders in support of foreign insolvency proceedings under Part XVII of the CICA. There are no threshold tests as such for granting

assistance, and it is the discretion of the court to assist the foreign insolvency office holder/ proceedings. So, a foreign representative/ office holder must satisfy the court that it is appropriate for the court to grant the relief/ assistance sought by them.

Section 241 of the CICA allows the Court to grant ancillary relief in the form of recognising the right of a foreign officer to act on behalf of the debtor in Cayman Islands, stay of legal proceedings against the debtor, ordering the hand over of any property belonging to the debtor to a foreign representative etc. In order to ascertain whether such reliefs should be granted and such power exercised, Section 2 the Court shall be guided by matters *'which will best assure an economic and expeditious administration of the debtor's estate, consistent with-*

- (a) the just treatment of all holders of claims against or interests in a debtor's estate wherever they may be domiciled;*
- (b) the protection of claim holders in the Islands against prejudice and inconvenience in the processing of claims in the foreign bankruptcy proceeding;*
- (c) the prevention of preferential or fraudulent dispositions of property comprised in the debtor's estate;*
- (d) the distribution of the debtor's estate amongst creditors substantially in accordance with the order prescribed by Part V (i.e. Winding-up order);*
- (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.'*

Commented [BT13]: 4 marks

The Cayman Islands is a creditor friendly jurisdiction and it takes a universalist approach to cross-border issues which would be in best interest of the creditors and the company consequently.

Question 2.3 [maximum 3 marks]

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

While Cayman Islands has not entered into any international treaties for reciprocal arrangement of foreign judgements, it does have a statutory regime under the Foreign Judgements Reciprocal Enforcement Act (1996 Revision) for the recognition and enforcement of Cayman Islands Judgements. However, this regime extends only to countries which assure substantial reciprocity of treatment regarding the enforcement of Cayman Islands judgements. Practically, these provisions have been exercised only to judgements from Superior courts of Australia. In order to be enforceable, the foreign judgement must be:

- (a) final,
- (b) a money judgement, and
- (c) made after the 1996 Act was extended to the relevant foreign country.

In any event, this statutory regime does not hold practical value when it comes to other jurisdictions and enforcement is usually achieved by commencing a new action in the Cayman Islands based on the foreign judgement as an 'unsatisfied debt' or other obligation. The procedure for such actions is governed by the Cayman Islands Grand Court Rules (which is the same set of rules governing litigation).

As decided in the Cayman Grand Court judgement of *Bandone v Sol Properties*¹, the ability to enforce foreign judgments and orders made in personam is no longer confined to judgments for a debt or a definite sum of money. Therefore, money and non-money judgements are enforceable at common law. Of course, enforcement of a foreign in personam non-money judgment requires that the judgment be final and conclusive and of such a nature that the principles of comity require this court to enforce it.

¹ 2008 CILR 301

Following are the mandatory requirements for enforcement of a foreign Judgement at common law:

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

Upon the local judgement being obtained, the domestic enforcement remedies will be available to the foreign representative.

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.

Once appointed, the official liquidators displace the company's directors and control the company's affairs subject of the supervision of Grand Court. The directors are usually still required to assist the liquidators and can be ordered to provide information and deliver assets or records.

(1) Investigations and oral examinations:

Liquidators have very wide powers including the power of investigation and as a part of their duty to realise and distribute the assets of the company to unsecured creditors, they can require directors, professional services providers or employees to provide statement of the company's affairs supported by affidavit (Section 101, CICA and *Saad Investments Company Limited and ors.*²). The liquidators may also with the leave of the court compel certain persons such as former directors to submit of oral examinations.

Further, Section 137 authorises a liquidator to require directors, officers, professional service advisors and employees of the company to submit a statement of affairs to the liquidator setting out their knowledge of the assets and liabilities of the company. The ability of the liquidator to require these parties to submit a statement of affairs is enhanced by a corresponding provision which criminalizes and makes punishable by a fine or imprisonment for five years, any material omission by any 'former' or present director, officer (including shadow director), manager or professional service advisor, in any such statement of affairs, made with intent to defraud the company's creditors or contributories.

(2) Voidable transactions:

Section 145 of CICA provides that any payment or disposal of property to a creditor constitutes a voidable preference if (1) it occurs 6 months prior to the commencement of the company's liquidation at the time when it was unable to pay its debts; (2) dominant intention of the company's directors was to give the applicable creditor a preference over the other creditors.

A dominant intention is inferred and decided by the court based on the evidence available before it. Further, an intention need not be proved if the transaction is made to a 'related party'

² 2010 (2) CILR 422

of the company as it is deemed to be a preference. A related party would be a person who can exercise sufficient control or significant influence over the company. This may mean to include the directors of a company.

If such disposition or payment is considered to be a preference by the Court, the transaction will be void and the liquidator may apply to the Grand Court to order the creditor to return the specific asset and prove in liquidation the amount of the claim.

(3) Fraud committed by directors/ former directors:

Section 147 of the CICA provides that if a director/ officer was knowingly a part to the carrying of business of the company with the intent to defraud the creditors or for any fraudulent purpose, a liquidator may apply for an order for any person(s)/ officers/directors who were knowing parties to such conduct to make such contributions to the company's assets as the court thinks proper.

Section 134 of CICA makes a criminal offence punishable by a fine or conviction for five years, if fraud in anticipation of a winding up by a director, officer, professional service advisor or voluntary liquidator, who within 12 months preceding the commencement of the winding up has, with intent to defraud the company's creditors or contributories:

- (a) concealed US\$12,250 or more of the company's property or debt;
- (b) removed US\$12,250 or more of the company's property;
- (c) concealed, destroyed or falsified any documents relating to the company's property;
- (d) made a false entry, parted with, altered or made an omission in any documents relating to the company's property or affairs; and
- (e) pawned, pledged or disposed of property obtained on credit and not paid for.

Section 135 also provides a similarly punishable criminal offence by a fine or conviction for five years, transactions by directors (including former directors) in fraud of creditors - where in the case of any company advised to be wound up by the court or voluntarily any officer of the company (including a director) or professional service advisor to a company (a) is found to have made a gift of, or has charged the company's property, (b) connived in levying execution against it or (c) concealed or removed the company's property, in each case with intent to defraud the company's creditors or contributories.

(4) Fiduciary duties and personal liability:

Under common law, a director owes fiduciary duties to the company which include the duty to act in good faith and for proper purpose. Typically, directors obligations are owed to the company to which such director is appointed. It is therefore the company that would bring a claim against the director for breach of duties. However, a creditor may also be able to bring a director claim against the Director for any loss that that creditor has suffered that can be attributed to the breach of directors' duties. This principle was laid down by the English Supreme Court in *Sevilleja v Marex Financial Ltd*³ which would be persuasive in the Cayman Islands.

When a company is in official liquidation, the official liquidator can pursue claims against the directors on behalf of the company for breach of their fiduciary duty.

Directors can be made personally liable to the company if they act in breach of their fiduciary duties to act in best interest of the company.

In *Prospect Properties v McNeill*⁴, the Grand Court held that where a company is insolvent, the director's duty to act in the best interest of the company require them to have regard to the interest of the creditors.

³ [2020] UKSC 31

⁴ 1990-91 CILR 177

Question 3.2 [maximum 6 marks]

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

Receivers maybe appointed over the assets of the company, (1) by the Grand Court; or (2) Out of court (which is usually through powers conferred upon a creditor under a security document).

(1) Appointment by Court:

There are no express statutory provisions for appointment, powers and duties of receiver strictly from a Cayman insolvency context, however, the Cayman Grand Court rules (**GCR**) provide that Receivers may be appointed by the court for the purposes of collecting money such as rent, realisation of assets, or to carry out some act such as execution of a contract, a document of title or sale of property etc.

Order 30 of the GCR governs the appointment of receivers generally. A judgment or order directing the appointment of a receiver may include such directions as the Court thinks fit for the giving of security by the person appointed. Unless the Court otherwise directs, the security shall be by guarantee and shall be submitted for approval by the Clerk of the Court prior to filing.

Section 45 of the GCR deals with the enforcement of judgements and orders generally and provides for the appointment of receivers to provide such court orders for the payment of money. Order 51 of the GCR also provides for the appointment of receivers by the way of equitable execution.

(2) Appointment 'out of court':

A receiver is not subject to the same supervision of the Cayman courts (as an official liquidator or provisional liquidator). This is because, as mentioned above, lack of a statutory framework governing the appointment of 'out of court' receivers under Cayman law.

The powers and duties of the receivers are derived from the terms of the security documents i.e. mortgages/ share charge and these could also be governed under a foreign law (such as English law).

In any event, all powers/ duties of the receiver will of course remain subject to the common law duties to act in good faith and for proper purpose. This means that a sale of the secured shares by the secured party (or the receiver) under an express power of sale granted under the security agreement is subject to the secured party acting in good faith, to sell the shares for the best price reasonably obtainable, and for proper purpose in accordance with the terms of the security document.

Where the security document is governed by foreign law, the remedies available to the mortgagee/ receiver are governed by that foreign law and the terms of the security document. However, Cayman Courts have analysed the requisite considerations and ruled upon the exercise of such powers by the Receiver. In the Cayman Court of Appeal decision of *Paradise Manor Ltd v Bank of Nova Scotia*⁵, assessment of whether the sale was

⁵ 1984-85 CILR 437

properly conducted by the receiver was discussed, re-iterating the above principles confirming that the Court will assess the steps taken by a receiver while effecting a sale and if it was for proper purpose and all reasonable steps were taken to ensure the best possible price being obtained for the particular asset.

From the above, it can be understood that while the court powers and statutory provisions are not as robust for receiverships in Cayman Islands (as compared to liquidations), it is still a significant method for realizing assets of the company, especially in the context of enforcement of a security document by secured creditors of the company.

Commented [BT16]: 4.5 marks. Don't forget SPCs.

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

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

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

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

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

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

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

- (a) What action can Sparrow take to protect its interests?
- (b) What action can Roger Jolly take to protect its interests?
- (c) What action can the unpaid employees take against S & C?
- (d) Does the Cayman Islands Court have jurisdiction over S & C?
- (e) Is there a legal route via which S & C can protect itself and seek to restructure?

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

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

a. What action can Sparrow take to protect its interests?

Sparrow has provided a \$200 million loan to S&C (\$80 million is secured by way of a mortgage, and the rest appears to be an unsecured loan).

Commented [BT17]: 2.5 marks

i. Mortgage - \$80 million over the 4 party boats: As the loan facility is exhausted and S&C has defaulted on its monthly repayments, there is a valid outstanding debt, which (as per the facts), is unlikely to be disputed by S&C. From a Cayman perspective, Sparrow can exercise its rights as a mortgagee, which will usually include in the mortgage agreement (and also under common law) (1) the power of sale of the mortgaged property (in this case the 4 party boats). It is not necessary to obtain a court order if the power is clearly set out in the mortgage agreement but it is always advisable to do so to avoid any action from S&C alleging that the Sparrow as a mortgagee did not act in good faith by not obtaining a reasonable price for the boats; (2) power to appoint receiver over the mortgage property to realise the assets and facilitate repayment of debt (3) an application to court for an order authorising Sparrow (or the receiver) to sell the shares where the mortgage agreement either contains no express power of sale or if such provision is otherwise uncertain; (4) take possession of the mortgaged boats and become the registered owner of the same; and (5) If Sparrow acquires legal title to the boats mortgaged, it will also have a right of foreclosure, however, it maybe a long and expensive court process.

ii. Unsecured debt: For the rest of the debt amount, the following enforcement actions can be taken by Sparrow:

(1)Petition to wind up S&C

A company may be wound up if it is unable to pay its debts (Section 92(d) of CICA). Sparrow as a creditor, is entitled to petition to wind up a company on the basis where it can prove that it is owed the sum of money and it has not been paid, even if a valid statutory demand has not been issued (*Oryx Natural Resources*).⁶ Considering the financial position of S&C and the fact that it has clearly defaulted don its payment, it is unlikely that the

(2)Application to appoint joint provisional liquidators

The Court may, at any time after the presentation of a winding up petition but before making a winding up order, appoint provisional liquidators (section 104(1) of CICA). An application may be made by Sparrow, as a creditor on the grounds that there is a *prima facie* case for making a winding up order and the appointment is necessary to, among other things, prevent dissipation or misuse of the company's assets. However, the failure to meet payments under the loan agreement by itself maybe unlikely to be sufficient to justify the appointment of provisional liquidators without additional circumstances.

(3)Statutory demand

⁶ [2007 CILR Note 6]).

A company is deemed unable to pay its debts if a creditor has served on the company's registered office a demand exceeding Cayman Islands \$100 requiring the company to pay the sum due and the company fails to pay or secure compound for the amount due to the satisfaction of the creditor (section 93(a) of the CICA). Accordingly, Sparrow may, prior to issuing a winding up petition, issue a statutory demand in relation to the amount due from S&C. This is not a pre-requisite to the presentation of a winding up petition. However, if a statutory demand is served and remains unpaid for 21 days, it has the effect of deeming a company unable to pay its debts for the purposes of section 92(d) of CICA.

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

The first step for Roger Jelly is to ensure that the foreign arbitration award is recognised and thereafter enforced under Cayman Islands law by the Cayman courts. The relevant procedures and considerations are provided in the Foreign Arbitral Awards Enforcement Act (1997 Revision)

Once the Court recognises the award, it can be enforced in the same manner as a judgment or order of the Court.

This makes Roger Jelly a judgement creditor and it will have the same rights of winding-up of a company (and issuing a statutory demand) as Sparrow (mentioned and explained above).

There are other methods of enforcement as well such as⁷:

- Charging order: an order in respect of certain types of property belonging to the judgment debtor, including interests held beneficially in land or other securities. The charging order effectively makes the judgment creditor a secured creditor so he can enforce the judgment by obtaining an order for sale of the charged property. The debt can then be satisfied out of the sale proceeds
- Seizing the property of the judgment debtor which may be done by a court bailiff pursuant to a writ of execution
- Examination of judgment debtor can be examined on oath regarding his property or other means of satisfying the judgment before the Court
- Attachment of earnings – the judgment debtor's wages or other income can be attached
- Garnishee proceedings – if the judgment debtor is owed money by a third party, that money can be obtained to satisfy the judgment

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

Section 141 of the CICA provides that the sums due to the employees will a preferential debt and will be paid in priority should the company S&C be wound up.

However, if the company is not wound up, the employees as creditors of the company, can also file a petition to wind up the company in court.

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

Section 91 of the CICA provides that the Cayman Grand Court has jurisdiction to make winding-up order against companies, which are, among other things, incorporated in

Commented [BT18]: 2 marks

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.

⁷ See <https://www.judicial.ky/general-public/satisfying-a-judgment-debt>

Cayman Islands, which S&C is. This indicates that the Grand Court would have jurisdiction over S&C.

Commented [BT20]: 1 mark.

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

As noted above, the Court may, at any time after the presentation of a winding up petition but before making a winding up order, appoint provisional liquidators (PL/s).

Commented [BT21]: 3 marks

An application may be made *ex parte* by the company 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.

As such, in the event that a winding up petition is presented on the grounds that S&C is unable to pay its debts, S&C could respond by seeking to appoint provisional liquidators. This would however involve S&C accepting that it is currently or is likely to become unable to pay its debts.

The appointment of PLs would ensure that no action or proceedings may be commenced or continued against the company without the leave of the Court as per Section 97 of the CICA (i.e. Statutory Moratorium kicks in).

Alternatively, in circumstances where the creditor has filed a winding up petition along with an application to appoint provisional liquidators, S&C may challenge the application on its merits or request the Court appoint PLs preferred/nominated by S&C. This is just to protect its interests and work together with the provisional liquidator to restructure the debts of the company.

It must always be noted that the provisional liquidators are appointed by the court and powers and duties will be determined by the court order.

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

If S&C is not in provisional liquidation and a restructuring agreement is reached with its creditors/ members or relevant classes, then the existing management i.e. Rakham family will continue to manage the company.

However, as mentioned above, upon the appointment of PLs, the court will determine the powers that remain with the directors and the PLs, level of control and supervision.

However, if the Rakham family gathers the requisite support from its creditors/ stakeholders and demonstrates to the court that it will be beneficial for them to stay in control of the day to day activities in order to perform a holistic restructuring of S&C, the Court may allow them to stay in control and continue to perform their duties in the restructuring of the company, subject to of course the supervision of the PLs.

This method of appointing PLs for restructuring purposes with the management remaining in control is often referred to as 'Light Touch' PL appointment.

Commented [BT22]: 1 mark

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

Commented [BT23]: 3 marks

Section 86 of CICA enables rights and obligations of the company and its creditors and members to be altered with the sanction of the court by means of a compromise or

arrangement. For a scheme of arrangement to become binding under this provision, there must be:

(a) a compromise or arrangement between the company and its members or creditors or a class of its members or creditors;

(b) an application to the court for an order that a meeting or meetings be convened (convening hearing);

(c) a meeting be held in accordance with the court order with the creditors/ members or relevant class (scheme meeting) and approval of the compromise or arrangement by a majority in number and 75% majority in value of the creditors/ members or requisite class as the case maybe, present and voting, at the scheme meeting (as required by section 86(2) of the CICA);

(d) the sanction of the court must be obtained. The court would require the applicant to satisfy it that:

i. all the procedures have been completed as per the convening order, scheme meeting held and approval of the requisite majority has been granted (including the proper composition of classes if any and such majority representing the relevant classes) (i.e. (a) to (c) above); and

ii. the arrangement/ restructuring/ scheme is such that an intelligent honest member of the class convened, acting in his own interest, might reasonable approve.

(e) the order of the court must be delivered for registration in accordance with section 86(3) of CICA.⁸

*** End of Assessment ***

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⁸ *Re British Aviation Insurance Co Ltd* [2005] EWHC 1621 (Ch) at para 54; *Re UDL Holdings Ltd* [2002] 1 HKC at para 172, 184