



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 5D

GUERNSEY

This is the summative (formal) assessment ***for*** Module 5D ***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 5D. ***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.assessment5D]. An example would be something along the following lines: 202122-336.assessment5D. Please also include the filename as a footer to each page of the assessment (this has been pre-populated for you, merely replace the words "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. Assessments that do not comply with this instruction will be returned to candidates unmarked.**
- 5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6. The final submission date for this assessment is 31 July 2023. The assessment submission portal will close at 23:00 (11 pm) BST (GMT +1) on 31 July 2023. 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 9 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 (unless requested to select more). Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

Which one of the following statements correctly describes the sources of Guernsey law?

- (a) **Guernsey's laws mirror that of England and Wales.**
- (b) **Guernsey's law is all set out in statute adopted from England.**
- (c) **Guernsey's law is based on Norman customary law.**
- (d) **Guernsey substantive law is set out in statutes and the historic customary law and complimented by case law from persuasive jurisdictions.**

Commented [DJ1]: Correct

Question 1.2

Which one of the following is not a fiduciary duty of a director?

- (a) **Exercise independent judgment.**
- (b) **Avoid conflicts of interest.**
- (c) **Act *bona fide* in the best interests of the company.**
- (d) **Act with skill and care.**
- (e) **Act for proper purposes.**

Commented [DJ2]: Correct

Question 1.3

Which of the following parties rank first in priority in a Guernsey compulsory winding up:

- (a) **Trade creditors.**

Commented [DJ3]: Incorrect - fees and expenses are paid in priority to all other claims.

(b) Local tax creditors.

(c) Money lent by a sole trader to the company.

(d) Fees and expenses of the liquidator.

(e) Fully paid up shareholders.

Question 1.4

It is advisable for a creditor to take which one of the following steps before commencing a *saisie* action?

(a) Obtain a prohibitory injunction to prevent the debtor from disposing of the realty.

(b) Register an interest in the realty at the *Greffé*.

(c) Advertise in the local Gazette an intention to commence *saisie* proceedings against the debtor.

(d) Exhaust the debtor's personalty (personal property) and register a claim in *Livre des Hypotheques* in the interim.

Commented [DJ4]: Correct

(e) Enter into a security interest agreement with the debtor to ensure that the creditor's interest in the realty is protected.

Question 1.5

Which one of the following statements about Schemes of Arrangement is incorrect?

(a) The process is broadly the same as that in the UK.

(b) At the Court-convened meeting of creditors / members, a majority in number representing not less than 50 per cent in value of the members present and voting must approve the scheme before it is sanctioned by the court.

Commented [DJ5]: Correct

(c) Notice of the meeting of the members of the company must be sent to each creditor or member.

(d) A scheme may be used in conjunction with an administration.

(e) A scheme could be used for restructuring.

Question 1.6

Which of the following types of security can be effectively taken over Guernsey immovable property?

- (a) A fixed charge / mortgage.
- (b) A lien.
- (c) A hypothèque by way of bond.
- (d) A security interest agreement.
- (e) A floating charge

Commented [DJ6]: Correct

Question 1.7

Which of the following two statements are correct in respect of compulsory liquidations?

- (a) There is no statutory moratorium on creditors' claims.
- (b) Once the winding-up procedure has commenced, any transfer of shares is valid for a period of 30 days without the need to seek approval from the liquidator.
- (c) The company must not carry on any business upon the making of a compulsory winding-up order.
- (d) The courts usually impose time frames for the length of liquidation.
- (e) A company is dissolved at the start of the liquidation.

Commented [DJ7]: Correct

Question 1.8

Which two of the following are essential requirements for a valid security agreement pursuant to the Security Interests Law?

- (a) Registration with the Guernsey registry.
- (b) Executed as a deed.
- (c) Identify the secured party.
- (d) Executed before the Court.
- (e) Be in writing.

Commented [DJ8]: Correct

Question 1.9

Which one of the following is not a ground for setting aside a judgment registered under the Reciprocal Enforcement Law?

- (a) The courts of the originating country did not have jurisdiction.
- (b) The enforcement of the Judgment would be contrary to public policy in Guernsey.
- (c) **The enforcement of the Judgment would be contrary to public policy in the home jurisdiction.**
- (d) The Judgment was obtained by fraud.
- (e) The rights under the Judgment are not vested in the person by whom the application for registration was made.

Commented [DJ9]: Correct

Question 1.10

Which of the following statements is incorrect in respect of misfeasance / breach of fiduciary duty?

- (f) The test for a breach of fiduciary duty is a subjective one.
- (g) **Any claim must be brought within three (3) years from the date of breach.**
- (h) The court may order the director to contribute towards the company's assets.
- (i) It may arise where a director has breached their fiduciary duty towards the company.
- (j) Any creditor of the company may apply to the court for an order against the director.

Commented [DJ10]: Correct

Commented [DJ11]: Total 9/10

QUESTION 2 (direct questions) [10 marks]

Question 2.1 [maximum 4 marks]

What are the most common forms of security granted over intangible movable assets in Guernsey? Explain what is required to ensure the security documents are valid and the consequences of failure to comply with any formalities.

The two most common forms of security granted over intangible movable assets in Guernsey are:

1. a security interest which is created by a security agreement. This arrangement is governed by the Security Interests (Guernsey) Law 1993 (Security Interests Law) (the "SI Law"). The security is created by the secured party taking possession, under the security agreement, the relevant policy documents, or certificates of title.

Commented [DJ12]: 1 mark

Under s.2 SI Law the validity of the security agreement requires it to:

- be dated and in writing;
- identify the secured party;
- identify and be executed by the debtor;
- contain provisions for the precise identification of the collateral at any time;
- specify the default event; and
- contain provisions in respect of the secured obligations including payment, performance or obligation to be secured.

If the above requirements are not satisfied, it does not necessarily void the security agreement. However, it does take the arrangement outside of the scope of the SI Law.

Commented [DJ13]: 1 mark

2. taking security pursuant to the Law of Property (Miscellaneous Provisions) (Guernsey) Law 1979. This is a provision relating to agreements where the parties have mutual dealings between them and debts from one party is set-off against debts from the other party. Accordingly, the only action which can be taken is in respect of the balance due following the set-off. Legal rights to a debt or choses in action are assignable to third parties. Such assignments are effective if:

Commented [DJ14]: 1 mark

- they are in writing; and
- express notice is given in writing and is served on the debtor, trustee or other person from whom the assignor would have been able to claim from.

If the above requirements are not satisfied, it does not necessarily render the assignment void.

Commented [DJ15]: 1 mark

Question 2.2 [maximum 4 marks]

Outline the test for a company being unable to pay its debts. What considerations will a court take into account when assessing the solvency of a company?

The test of solvency for a Guernsey company is found in s.527(1) of the Companies (Guernsey) Law 2008; and essentially provides that:

1. a company must demonstrate that it is able to pay its debts as they become due (the cash-flow test); and
2. the value of the company's assets is greater than the value of its liabilities (the balance sheet test)

Commented [DJ16]: 1 mark

This test of solvency is cumulative requiring the company to be both cash-flow solvent and balance sheet solvent. From the balance sheet perspective, the court would consider the company's contingent and prospective liabilities and if it cannot reasonably be said that the company is able to meet these liabilities then the company will be deemed insolvent, even if the company is able to pay its debts as they fall due.

Commented [DJ17]: 1 mark

Accordingly, when making decisions, the directors must have regard to the most recent accounts of the company and the circumstances which could affect the value of the assets and liabilities of the company.

Commented [DJ18]: 1 mark. The answer could also have mentioned the deemed inability to pay debts post service of a statutory demand.

Question 2.3 [maximum 2 marks]

The following two statements relate to specific aspects of insolvency proceedings in Guernsey. Identify the concept described in each statement:

1. "The mechanism used by creditors to enforce a judgment against immoveable property owned in common".

Licitation is a customary law enforcement method used by creditors to enforce a judgement against jointly owned property in saisie proceedings.

Commented [DJ19]: 1 mark

2. "The court process used to unwind or set aside a transaction the purpose of which is to commit a fraud on the creditors during a time in which the company is insolvent."

A Pauline action is a court process used to unwind or set aside a transaction, the purpose of which is to commit a fraud on the creditors during a time when the company is insolvent. The transaction can be set aside if either the third-party recipient was a party to the fraud or acquired the property for no value.

Commented [DJ20]: 1 mark

Total 9/10

QUESTION 3 (essay-type questions) [15 marks in total]

Question 3.1 [maximum 5 marks]

A creditor wishes to register or enforce an English judgment in Guernsey. Explain whether this is possible and what the creditor would need to do. How would your answer differ if the officeholder sought to register or enforce a judgment from the USA?

A foreign judgement can be enforced in Guernsey by one of two ways; either pursuant to the Judgements (Reciprocal Enforcement) (Guernsey) Law, 1957 (the "1957 Law") or under common law.

Under the 1957 Law

Foreign Judgements from the courts of reciprocating countries like England can be enforced under the 1957 Law by way of registration pursuant to s.4(1) 1957 Law if the following criteria are met:

- **the judgment is from a superior court of a reciprocating country;**
- **the judgment is final and conclusive, whether or not an appeal is possible or pending;**
- **the sum of money payable under the judgement is not for taxes, fines or other penalties;**
- **the court of the reciprocating country had jurisdiction to make the judgement; and**
- **less than six years have elapsed since the date of the judgment or the date of the last judgement in any appeal proceedings.**

Commented [DJ21]: 1 mark

The judgement will not be registrable under the 1957 Law if:

- **at the date of the application, the judgement was wholly satisfied;**
- **the judgement could not be enforced by execution in the court of the reciprocating country;**
- **the judgement is an *in personam* judgement dealing with matrimonial matters, administration of a deceased's estate insolvency, lunacy or guardianship of infants or the winding-up of companies.**

Commented [DJ22]: 1 mark

Following registration, the foreign judgement will have the same force and effect as a judgement of the Royal Court and judgement interest can accrue from the date of registration.

A judgement debtor may set aside a registration of a foreign judgement by making an application to the Royal Court to set aside the registration within 14 days from the date of service of the registration. Setting aside the registration may be done on the following grounds:

- **the court of the reciprocating country does not have the jurisdiction to order the judgement against the debtor;**
- **the judgement is in contravention or does not come within the scope of the 1957 Law;**
- **the judgement was obtained by fraud;**
- **notice of the registration was not properly served on the debtor;**
- **enforcement of the judgement would be contrary to Guernsey public policy; or**
- **the applicant for the registration was not the foreign judgement creditor.**

Commented [DJ23]: 1 mark

Under Common Law

Where the criteria for registration of the foreign judgement under the 1957 Law have not been met, the judgement creditor can seek to enforce the foreign judgement under common law principles.

This will require the judgement creditor sue the judgement debtor using the foreign judgment as proof of debt. A successful suit in this regard will result in a summary judgement which can be enforced as usual.

The foreign judgement may be challenged if:

- *the foreign court did not have jurisdiction to make the judgment;*
- *the foreign judgement involved fraud by the judgement creditor;*
- *the proceedings in the foreign court were contrary to principles of natural justice;*
- *the foreign judgement involved fraud by the foreign court; and*
- *enforcement would be contrary to Guernsey public policy.*

Commented [DJ24]: 1 mark

*Successful registration under the 1957 Law or successful suit for the debt under common law can be enforced by Her majesty's Sheriff. The judgement creditor could still proceed, where necessary, against the judgement debtor's realty using the Guernsey procedure called *saisie* or against the judgment debtor's peronalty using the Guernsey procedure called *desastre*.*

In conclusion, the creditor can register the English under the 1957 Law. However, if it was a US judgement the creditor will need to sue for the debt under common law using the USA judgement as proof of debt.

Commented [DJ25]: 1 mark - an excellent thorough answer.

Question 3.2 [maximum 6 marks]

Describe the process for enforcing creditor's rights against real property in Guernsey.

*The process for enforcing creditor's rights against real property in Guernsey is the *saisie*, a court-driven, customary law procedure. The process is governed by Saisie Procedure (Simplification) (Bailiwick) Order, 1952 and is a three-stage, post judgement process which allows a creditor to vest all the debtor's Guernsey realty in the creditor.*

*Because the *saisie* can only be used to recover debts by enforcement exclusively against the debtor's Guernsey realty the following preliminary considerations should be taken:*

- *Whether the value in the realty is sufficient to satisfy the debt, including interests and costs; if not;*

- **Whether it is best to first proceed against the debtor's personalty by way of a *desastre* proceeding; noting that the creditor will not be able to seek payment for any shortfall unless there is some contractual provision to the contrary;**
- **The terms of the security documents, facility letters and judgement debts etc.;**
- **Current ownership of the property, i.e. whether the property is owned outright, owned jointly or if there are any guarantors; and**
- **Date of the registration of the bond and thus the position with regards to priority in relation to the various creditors.**

The following is the three-stage *saisie* process which can take 6 to 12 months to conclude:

Stage 1 - Preliminary Vesting Order (PVO)

Creditor obtains a PVO, which is a court order to enforce judgement against the debtor's real property. Creditor becomes the '*saisi mobilier*'. The debtor still retains title but loses the right to use the property. The *saisi mobilier* has authority to use the property including letting it and receiving rent and receiving any revenue to satisfy or reduce the debt. The debtor still has opportunity to repay the debt or sell the property and use the proceeds to repay the debt.

The debtor is summonsed to a hearing before a Jurat of the Royal Court where the accounts is laid out by the creditor and formalities are recorded. If there is any dispute over the accounts the Court will determine the amounts.

Stage 2 - Interim Vesting Order (IVO)

The *saisi mobilier* is entitled to issue a summons to the debtor, giving 3 clear business days' notice. Therein the *saisi mobilier* seeks payment of the certified amount as set out in the Commissioner's report. The summons states that if the debtor fails to pay the sum due that the *saisi mobilier* will make application for an IVO. The IVO will effectively vest the whole of the debtor's realty in Guernsey to the *saisi mobilier*, extinguishing any right in or title to the realty the debtor had. At this stage the *saisi mobilier* is transformed into the "*saisi héréditaire*" as trustee for the claimants who must act in the general interest of all creditors. Accordingly, the *saisi héréditaire* has duties to maintain the value of the property. They must also make any necessary repairs and insure the property.

The *saisi héréditaire* must ascertain the existence and identity of the debtor's creditors who wish to enforce their own debt against the debtor's property. Accordingly, the *saisi héréditaire* must publish notice in La Gazette Officielle for 2 successive weeks and must also open a register for 28 days at the Greffe (courthouse), allowing creditors to register their claims on the register. The register closes after the 28 days and the *saisi héréditaire* then issues a summons to all the registered creditors, to a meeting before

the Commissioner for the claims to be assessed. The Commissioner assesses the claims, then puts them in order of priority and then formalised in a further report.

Stage 3 - Final Vesting Order (FVO)

*At this stage each of the registered creditors are summons to a further hearing by the *saisi héréditaire*.*

Each registered creditor is called in reversed order of priority and asked if they wish to elect to have the realty vested in themselves or to renounce their claim. If they elect to have the property vested in their name, the condition is that they pay in full the claims of all the higher priority creditors within 15 days. If they renounce their claim, they will have irrevocably renounced their claim against the creditor.

*The creditor who elects to take the property is granted the FVO and becomes the *saisi propriétaire*. This vests absolute title in the *saisi propriétaire* and the FVO is treated as a conveyance of the property to the *saisi propriétaire*. Where the property was owned jointly, the FVO only transfers the debtor's share in the property to the *saisi propriétaire*.*

Question 3.3 [maximum 4 marks]

Discuss the relationship between Guernsey law and the Insolvency Act 1986. When is this used and to what extent does it apply?

Guernsey's legal system is separate from that of England and Wales. As such, English statute such as the Insolvency Act 1986 ("UK IA") has no direct operation in Guernsey and is not, as of right, enforceable in Guernsey.

Nevertheless, s.426 UK IA has been extended to Guernsey by way of the Insolvency Act 1986 (Guernsey) Order, 1989. Accordingly, in insolvency matters, the Guernsey Royal Court can provide judicial assistance to courts of England and Wales, Scotland, Northern Ireland and the Isle of Man or Jersey. Additionally, Guernsey officeholders can seek judicial assistance from these countries i.e. s.426(5) UK IA provides the courts with the means to apply either Guernsey insolvency law or the laws of the foreign jurisdiction in relation to similar matters which fall within their jurisdiction.

The s.426 UK IA procedures require the officeholder to apply to the court in their home country for an order that the home court sends a letter of request to the Guernsey court for assistance. The Guernsey court must comply with the request unless it is contrary to public policy or if the outcome is oppressive.

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

Commented [DJ26]: This is a very thorough and accurate answer but it goes beyond the material set out in the guidance text. No source material is quoted and so mar has been reduced. 2/6

Commented [DJ27]: 1 mark

Commented [DJ28]: 1 mark

Commented [DJ29R28]: More detail could have been given as to the circumstances where the section may be used.

Commented [DJ30R28]: Total 9/15

Dawn and Tim have been asked to consider taking an appointment as insolvency officeholders over W Hogg Limited (WH Limited), a Guernsey incorporated company specialising in paintings and art. David and Gareth were the company's only members and directors.

For the last 18 months, the company has been experiencing financial difficulties as a result of an attempted expansion which saw a further store being opened in Guernsey and which failed to deliver the promised increase in sales and profitability.

The retail store premises is owned by Slough Trading Estate Limited (Slough) a company registered in England. Slough is owed rent payments in the sum of £60,000 covering the last six months and is owned by Chris (David's brother).

Following the failed launch of the new store, David and Gareth were informed by the company's auditor that insolvency was inevitable, although David and Gareth were adamant that they could solve the company's financial issues themselves. They thought it would be a good idea to get cash quickly injected back into the company and sold a number of expensive paintings for significantly less than their worth. This money was used to pay their outstanding rent payments to Slough.

The company now has no cash or liquid assets and cannot pay its major artist that is owed £100,000. It also cannot meet this month's salaries, rent for its other store and other trade debts. There is also £15,000 owed to the Guernsey Revenue Service for unpaid tax. David asked Gareth to arrange payment of the outstanding tax several months ago, but he forgot.

Dawn and Tim have been approached by David to help navigate the crisis. Gareth has fled to Florida, leaving the company in an even more perilous position having taken with him valuable paintings owned by the company and confidential supplier details.

Help Dawn and Tim to advise on the following issues:

- (a) The formal insolvency proceedings available to WH Limited under Guernsey law and the most appropriate course to follow in the circumstances. Your answer should draw support for your conclusion from the facts set out above.**

The formal insolvency proceedings which would ordinarily be available to WH Limited under Guernsey law are voluntary insolvency liquidation and compulsory liquidation.

Voluntary Insolvency Liquidation ("VIL")

A VIL is an out-of-court liquidation process which can be initiated by members of the company who would, by ordinary or special resolution s.391(1)(b) Companies (Guernsey) Law 2008, appoint an independent liquidator. The liquidator would be expected to collect in and realise the company's assets and to distribute dividends in accordance with the statutory order of priority.

The passing of the resolution commences the VIL and will also approve the liquidator's remuneration. Per 391(2) Companies (Guernsey) Law 2008 a copy of the resolution must be delivered to the Registrar of Companies within 30 days of the resolution who will then give notice that the company is in voluntary liquidation.

As the company is insolvent The Companies (Guernsey) Law, 2008 (Insolvency) (Amendment) Ordinance, 2020 requires that the liquidator be independent.

Commented [DJ31]: 1 mark

Once the liquidation commences the company must cease to carry on business unless it is for the benefit of the winding up. The corporate status and powers of the company continue until the company is dissolved. Additionally, once the liquidators are appointed the powers of the directors cease, unless the liquidator or by ordinary resolution, their powers are allowed to continue.

The voluntary liquidator would not be under the control of the court. However, members of the company could apply to the court for directions in relation to any aspect of the liquidation. Furthermore, a creditor of the company could apply to the court to have the liquidation supervised by the court.

There is no statutory moratorium to prevent individual creditor claims during the voluntary liquidation and secured creditors are still entitled to enforce their security.

There is no statutory provision regarding the length of the proceeding however the liquidator must summons a general meeting annually to set out accounts of their acts and the conduct of the proceeding during the preceding year.

In this case it is unlikely that any formal resolution will be achieved (special 75% of voting members or ordinary 50% voting members) in order to put the WH Limited into VIL because only one, out of the two shareholders, is available. It is therefore more appropriate to pursue a compulsory liquidation in the alternative.

Commented [DJ32]: 1 mark

Compulsory Liquidation

An application can be made under s.408(1) the Companies (Guernsey) Law 2008 to have the WH Limited compulsorily wound up by the court. An application can be made by the company, any member, director, creditor, or any other interested party. The court would appoint an independent liquidator whose role would be to do all acts relating to the winding up of the company including collecting and realizing the assets of the company and making distribution of dividends in accordance with the statutory order of priority.

Commented [DJ33]: 1 mark

The application must be supported by an affidavit and should seek an order that the company be compulsorily wound up.

Although there is no obligation to initiate the proceeding, because the company has no prospect of avoiding an insolvent liquidation, the directors would be under a fiduciary duty requiring them to consider putting the company into liquidation. Accordingly, David being the only available director would be best advised to initiate the proceedings since he is aware of the company's insolvent state.

Commented [DJ34]: This is not quite right. The insolvency does not create a fiduciary duty to consider commencing an insolvency but the threat of personal liability will likely trigger consideration. 1 mark

The court can wind up a company if it is unable to pay its debts s.407. A company is deemed insolvent if it fails to satisfy the statutory solvency test set out in s.527(1) of the Companies (Guernsey) Law 2008 i.e. if it is unable to pay its debts as they become due and its liabilities are greater than its assets. Furthermore, the court can wind up a company if it is of the opinion that it is just and equitable to do so s.406(i).

WH Limited can be compulsorily wound up because it is insolvent, unable to pay its debts. It can also be wound up on just and equitable grounds because the directorship is delinquent.

Within 7 days of the wind-up order the liquidator must send a copy of the order to the Registrar of Companies who will publicize the winding up of the company.

The company will be dissolved at the end of the liquidation and within 15 days from the date of the final distribution, the liquidator must apply for a court order declaring that the company is dissolved.

Commented [DJ35]: You could have mentioned the administration procedure here and considered whether it was an option for this company.

(b) What, if any, potential claims the insolvency officeholders may wish to investigate following their appointment. For these purposes, you may assume that WH Limited will ultimately be placed into compulsory liquidation.

Under s.421E(1) Companies (Guernsey) Law 2008 liquidators have an obligation to report to the Guernsey Registry any 'delinquent' officers of the company. This includes past or present officers against whom the court can make a disqualification order under the provisions of the Companies (Guernsey) Law 2008 ("Company Law").

Commented [DJ36]: 1 mark

In this case, following appointment, the liquidator can bring the following claims against the directors of WH Limited for the following:

1. Misfeasance or breach of fiduciary duty under s.422 Companies Law

Gareth is liable for a claim of misfeasance because he has misapplied and/or appropriated company assets when he took the painting. He also breached his duty of care by not paying the taxes owed by the company. He is also liable for breach of fiduciary duty because he absconded. He is therefore to

be held personally liable for the company's debts and liabilities in relation to the breaches.

Commented [DJ37]: 1 mark

The liquidator should apply to the court under s.422 Companies Law for an order upon which the court would order restoration (if possible) of the painting, payment of or contribution to the company's liabilities and debts together with payment of any applicable interests upon such amounts. The claims for misfeasance and breach of duty will need to be brought within six years from the date of the breach.

The court will assess the fiduciary breach predominantly by reference to the Gareth and David's state of mind to conclude whether they:

- Acted bona fide in the best interest of the company
- Acted for proper purpose or not;
- Exercised independent judgment; and
- Avoided conflicts of interests.

In assessing breached of duty of care the court will measure objectively and subjectively the scope of:

- the directors' actual skills, knowledge and experience; and
- the skills, knowledge and experience that may be expected of someone fulfilling that director's role.

Commented [DJ38]: 1 mark

2. Wrongful trading

The liquidators can bring a claim under s.421E(1) against Gareth and David for wrongful trading because they sold paintings for significantly less than their worth. A director can be made liable for wrongful trading if he traded when he knew or ought to have concluded that there was no reasonable prospect of the company avoiding an insolvency, unless it is proven that the director took steps with a view to minimizing loss to the company's creditors. Note that under the new s.426(D)(7) Company Law the director can be exonerated if he can satisfy the court that the transaction was entered into in good faith and for the purpose of carrying on the company's business; and that at the time of transaction there was reasonable ground for believing that the transaction would benefit the company.

In this case, David and Gareth were informed by the company's auditor that insolvency was inevitable. Unless David and Gareth can be exonerated under s.426(D)(7) Company Law they will incur personal liability.

A disqualification order can be made against the David and Gareth pursuant to s.422 Company Law.

Commented [DJ39]: 1 mark - you are right to consider wrongful trading here in the circumstances There is some confusion in your answer between wrongful trading and transaction at an undervalue.

(c) How Dawn and Tim could seek assistance overseas in dealing with Gareth.

Dawn and Tim could seek assistance in the US to deal with Gareth and the US court could assist, in light of the concept of universalism in insolvency. Chapter 15 of the US Bankruptcy Code ("Chapter 15") implemented the UNCITRAL Model Law on cross-border insolvency. Chapter 15 allows foreign representatives access to the US courts and the ability to seek recognition as either foreign main or foreign non-main proceeding. Following recognition, the foreign representative may seek additional relief from the bankruptcy court or other federal courts and can also bring a full bankruptcy case including asset tracing.

Any discretionary relief sought must be appropriate under United States law for the assets in question. Furthermore, the court may impose conditions on the relief granted and may discontinue discretionary relief upon application by a party in interest.

*** End of Assessment ***

Commented [DJ40]: 1 mark

Commented [DJ41R40]: Your answer could also have considered the extent to which the Royal Court can/will provide office holders with assistance pursuant to common law.

1 mark

Commented [DJ42R40]: Total 9/15

Commented [DJ43]: Total Mark Awarded 36/50