



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 5E

JERSEY

1 = 8/10
2 = 7.5/10
3 = 7/15
4 = 9/15
31.5/50

This is the summative (formal) assessment for Module 5E ***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 5E. ***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.assessment5E]. An example would be something along the following lines: 202223-336.assessment5E. 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 10 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

Which court can hear an appeal in respect of a Jersey legal matter?

- (i) Royal Court.**
- (ii) Court of Appeal.**
- (iii) Petty Debts Court.**
- (iv) Privy Council.**

Choose the correct answer:

- (a) Option (ii).**
- (b) **Options (ii) and (iv).** - CORRECT (B)**
- (c) Option (i).**
- (d) All of the above are correct.**

Question 1.2

Debtors that can become subject to Désastre in Jersey under the Bankruptcy (*Désastre*) (Jersey) Law 1990, include the following:

- (a) A dissolved company that was registered in Jersey under the Companies (Jersey) Law 1991.**
- (b) An individual who was ordinarily resident in Jersey until 18 months ago, but has had no connection to Jersey since that time.**

(c) An incorporated Limited Partnership.

(d) An individual who has never been ordinarily resident in Jersey or carried on business in Jersey, but owns movable property in Jersey.

Choose the correct answer:

(a) All of the above.

(b) Options (i), (iii) and (iv).

(c) Option (ii) and (iv).

(d) Options (i) and (iii). - CORRECT (D)

Question 1.3

Which parties can make an application for Désastre under the Bankruptcy (Désastre) (Jersey) Law 1990?

(i) The Viscount.

(ii) The Jersey Financial Services Commission.

(iii) A creditor with a claim of GBP 2,000.

(iv) The debtor.

Choose the correct answer:

(a) Options (ii), (iii) and (iv).

(b) All of the above.

(c) Options (ii) and (iv). - CORRECT (C)

(d) Option (i).

Question 1.4

Which statutory processes provide a moratorium against action being brought by non-secured creditors?

(i) Summary winding-up.

- (ii) Creditors' winding-up.**
- (iii) Just and equitable winding-up.**

- (iv) Désastre.**

- (v) Dégrèvement or Realisation.**

- (vi) Debt Remission Order.**

- (vii) Remise de Biens.**

- (viii) Compromises or arrangements.**

Choose the correct answer:

- (a) Options (i), (ii), (iii), (iv), (vi), (vii) and (viii). - CORRECT (A)**

- (b) Options (i), (ii), (iii) and (iv).**

- (c) Options (i), (ii), (iii), (vii) and (viii).**

- (d) All of the above.**

Question 1.5

Which liquidation processes under Part 21 of the Companies (Jersey) Law 1991, as amended, are available in respect of solvent companies?

- (i) Summary winding-up.**

- (ii) Creditors' winding-up through court.**

- (iii) Creditors' winding-up not through court.**

- (iv) Just and equitable winding-up.**

Choose the correct answer:

- (a) Option (i).**

- (b) Options (i) and (ii).**

- (c) Options (i), (iii) and (iv). - CORRECT (C)**

- (d) All of the above.**

Question 1.6

Which one of the following statements is correct?

- (a) Jersey is part of Britain, the UK and the EU.**
- (b) Jersey is part of Britain and the EU but not the UK.**
- (c) Jersey is part of Britain but not the UK and not the EU.**
- (d) Jersey is not part of Britain, or the UK or the EU. - INCORRECT (C)**

Question 1.7

Jersey is an attractive destination for international finance, due in part to its:

- (i) Tax neutrality.**
- (ii) Political independence.**
- (iii) Economic stability.**
- (iv) Legal and regulatory infrastructure.**

Choose the correct answer:

- (a) All of the above. - CORRECT (A)**
- (b) Options (i), (iii) and (iv).**
- (c) Options (i), (ii) and (iii).**
- (d) Options (i), (ii) and (iii).**

Question 1.8

Which type of mortgage can be created by agreement between two or more parties as to the granting and taking of security expressed in the form of a contract passed before the Jersey court?

- (a) A conventional hypothec. - INCORRECT (A)**
- (b) A judicial hypothec.**

(c) A pledge.

(d) A legal hypothec.

Question 1.9

Which statutory processes require a liquidator to be on the approved register of liquidators?

(i) Summary winding-up.

(ii) Creditors' winding-up through court.

(iii) Just and equitable winding-up.

(iv) Creditors' winding-up not through court.

Choose the correct answer:

(a) Options (i), (ii) and (iii).

(b) Options (ii) and (iii). - CORRECT (B)

(c) Options (ii) and (iv).

(d) All of the above.

Question 1.10

Which other responsibilities are overseen by the office of the Viscount, besides insolvency functions?

(a) Coroner. - CORRECT (A)

(b) Data Protection.

(c) Farming and fishing.

(d) Prison services.

8/10

QUESTION 2 (direct questions) [10 marks in total]

Question 2.1 [maximum 3 marks]

Describe the powers that are available to a Viscount in respect of a *Désastre* and to a liquidator in respect of a winding-up.

In relation to Desastre¹, the Viscount has the powers which are far reaching. They are able to bring and defend claims where property has been vested in the Viscount, they can settle debts and claims as well as liabilities with various creditors, they can sell property and run the business if that is what may be the most beneficial way to run the widening up proceedings. They can also look into any antecedent transactions.

Power to compromise or make arrangements with creditors; power to borrow money; pursue recovery in respect of antecedent transactions

Regarding the powers a liquidator has in respect of a winding up under the Companies Law² they are very similar to that of the Viscount in that most of the above are available to a liquidator too. However, depending upon whether a liquidation emanates from a creditor or for example in a just and equitable winding up the scope of powers may be impacted, as in the latter case the powers of the liquidator can be whatever the court determines is appropriate. Further, there may also be limited scope of powers of a liquidator in a provisional liquidation, as the court deems fit.

Greater distinction required between SWU, CWU and J&E

1.5/3

Question 2.2 [maximum 2 marks]

Describe briefly the practical reasons why Jersey may not have a statutory or customary corporate rescue and turnaround procedure equivalent to an English administration or US Chapter 11:

The offshore nature of the jurisdiction as well as the number of registered companies (being high in proportion to the number of people) and as the high number of companies are generally used as part of a wider structure and are often spas or holding companies etc... there is not the high demand for restructuring as you may find in jurisdictions such as the UK or the USA. However, despite the ostensible lack of statutory or customary corporate rescue, the Jersey courts are more than capable of exercising some flexibility when the need arises, for example, the just and equitable process has been used to obtain the same/similar results.

2/2

Question 2.3 [maximum 2 marks]

¹ Bankruptcy (Desastre)(Jersey) Law 1990

² Companies (Jersey) Law 1991

Describe the ways in which a creditor might take enforcement action in Jersey.

Enforcement can take the form of Desastre or by way of a creditors' winding up. In the case of a secured creditor, they may seek to enforce outside of the insolvency process. They may for example seek to enforce against immovable property - the best options for this would be to enforce by way of Desastre or Degrevement. For movable property they could make a claim in the local courts e.g, for breach of some contractual obligation.

Brief description of processes required

1/2

Question 2.4 [maximum 3 marks]

What claims potentially rank as priority claims in a *Désastre*?

Secured creditors take priority in the sense that they continue to have preserved right. The Viscount's costs rank in priority in this process. Pursuant to Article 32 of the Desastre Law priority creditors are paid in a specific order. Firstly, if the debtor is a bank then any depositors are a priority. Secondly, employees' salary, health insurance³, social security⁴, income tax⁵, debts to landlords, parish rates which may be owed.

3/3

7.5/10

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

Question 3.1 [maximum 7 marks]

Write a short essay to describe the personal insolvency options available in Jersey, being *Désastre*, *Degrevement* and *Realisation*, *Debt Remission Order* and *Remise de Biens*.

There are a number of personal insolvency options that are available in Jersey. Firstly, Desastre which is outlined in the Bankruptcy (Desastre)(Jersey) Law 1990 is applicable to personal bankruptcy as well as company insolvencies. If a person has been resident for 12 months prior to the bankruptcy application, carried out business in Jersey 3 years prior to the application or own immovable property in Jersey upon application then that individual is capable of falling within the remit of personal insolvency law in Jersey. A debtor's creditor may commence the process or, as with English bankruptcy

³ Health Insurance (Jersey) Law 1967

⁴ Social Security Fund pursuant to the Social Security (Jersey) Law 1974

⁵ Income Tax (Jersey) Law 1961

proceedings, an individual can apply themselves for it. The court has a discretion about whether to make an order or not. Once made all property vests in the Viscount who then has the wide-ranging ability to realise whatever assets the debtor has, in whatever is deemed the most appropriate way to repay creditors.

Creditor must be owed at least £3,000

Secondly, regarding Degrevement and Realisation which have old foundations⁶. Essentially, Degrevement can be utilised in order to enforce against immovable property. Attorneys hold a hearing and the lowest ranking creditors are offered the property (so long as they repay all chargees etc...) and this opportunity, if not taken up, moves up the chain of priority until someone accepts. Once accepted they will own the property with no encumbrances. No excess is paid to the debtor if there is any. Thirdly, Realisation applies to all movable assets and can result in an auction in order to realise the assets.

Fourthly, a Debt Remission Order⁷, which is very similar to the UK debt relief order, falls under the remit of the Viscount and is designed to deal with small claims under JEP 20,000. Once a 12 month period, post order, the debtor's debts are written off.

Must have assets of less than £5,000 and less than £100 disposable income per month

Fifthly, Remise de Biens⁸ as a form of court process⁹ which would be appropriate if a debtor owned immovable property, is not necessarily insolvency but cannot pay his debts as he should. Any remaining amounts are repaid to the debtor.

Some of the above are fairly harsh processes for a debtor in distress but with the introduction of the Debt Relief Order it is hoped that this process would be utilised more.

DRO is only available to limited debtors

5/7

Question 3.2 [maximum 8 marks]

Write a short essay describing in detail the creditor claims process in respect of a creditors' winding-up. In your essay, you should refer to at least the following:

- (i) The relevant Jersey law that applies.***

- (ii) Which areas are covered under the relevant Jersey law.***

⁶ Lori (1904) (Amendment No 2) sur la Propriete Fonciere

⁷ Pursuant to Debt Remission (Individuals)(Jersey) Law 2016

⁸ Lori (1839) sur les Remises de Biens

⁹ PD RC17/12 application details

(iii) Advertising for claims and notice periods.

(iv) Which debts are provable.

(v) Interest on debts.

(vi) Proving of debts and the cost of proving.

(vii) Examination of proofs of debts.

(viii) Adjudication and the process of admitting or rejecting claims.

Fairly recently, Jersey amended the Companies Law¹⁰ under the Companies (Amendment No. 8) (Jersey) Regulations 2022¹¹ (Regulations) and created a creditor's winding up¹² process which was more creditor focused. Prior to these amendments there was little in the way of Jersey law which allowed creditors to drive the process. Although there was a process which appeared to be creditor led it was in fact only shareholders of companies that could initiate this process. Only Desastre was available to creditors prior to these amendments. The changes now mean that a creditor can instigate proceedings and ensure that a liquidator is appointed.

The process involves the creditor having a claim against the debtor for JEP 3,000 or more¹³ and the company should be in a position where it is unable to repay its debts or there is some other evidence that the company was insolvent or the creditor obtain the company's consent¹⁴. The creditor could need to send a statutory demand to the company which, if unpaid within 21 days¹⁵, would be sufficient evidence of an inability to repay the debt owed. There are specific restrictions on not bringing an application (where the creditor has confirmed they would not bring the application and where the claim relates to a claim for goods¹⁶) and the creditor must provided 48 hours notice¹⁷ of the application to wind up. If there is an undisputed application and all else is in order then an order may be made by the court and a liquidator could be appointed. However, if disputed and the company can show that they are not insolvent and/or have an ability to repay their debts then the application will likely either be

¹⁰ March 2022

¹¹ <https://www.jerseylaw.je/laws/enacted/Pages/RO-013-2022.aspx>

¹² Companies (Amendment No. 8) (Jersey) Regulations 2022, inserting s.157A into the Companies Law

¹³ Ibid, s.157A(2)(a)

¹⁴ Ibid, s.157A(1)(a-c)

¹⁵ Ibid, s.157A(2)(b)

¹⁶ Ibid, s.157A(4)

¹⁷ Ibid, s.157A(3)

adjourned¹⁸ or fail. Any time after an order is made the creditor can seek the appointment of a provisional liquidators where appropriate¹⁹.

Certain notifications must be given to the Registrar, Viscount and other directors and creditors of the debtor company. The liquidator must ensure that their appointment is advertised in the Jersey Gazette²⁰.

The same rights are in place regardless of whether a creditor is unsecured or not in terms of proving their debt, how and when they must prove them²¹. The debts and interest are provable and must be proved in accordance in the way the court determines at the costs of the creditor seeking to demonstrate the proof and creditors can examine other creditors' proof of debts. The liquidators then approve or reject the debt.

The question has not been fully addressed:

- i) Article 166 of the Companies (Jersey) Law 1991 covers the respective rights of secured and unsecured creditors; debts provable; the time and manner of proving debts; the admission and rejection of proofs of debts; and, the order of payment of debts**
- iii) There is no statutory time period for notices to be published for potential claims in a winding up. It is generally agreed that a period of 60 days' notice is adequate for a CWU. There is no statutory provision for publishing a notice for potential claims outside of Jersey. However, a liquidator should consider the circumstances of the liquidation in determining whether this would be prudent in order to avoid challenge from a claimant subsequently coming forward.**
- iv) All debts and liabilities, present, future, or contingent are provable in the CWU.**
- v) Interest is provable to the date of CWU, if the debt bears interest, or to the date of payment if it is a secured debt.**
- vi) A creditor shall prove their debt at the time and in the manner prescribed by the Jersey Court, and shall bear the cost of proving their debt.**
- vii) Creditors are also entitled to examine other creditors' proofs at a time fixed by the liquidator.**
- viii) The liquidator is to adjudicate claims and request further information as required. The liquidator is then to admit or reject (in whole or in part) creditor claims. If a claim is to be rejected (in whole or in part) then the Liquidator must serve notice of rejection on the creditor. If dissatisfied, the creditor has the opportunity to request that the Liquidator applies to the Jersey Court to review the decision.**

2/8

7/15

¹⁸ Ibid, s.157C

¹⁹ Ibid, s.157B

²⁰ Ibid, s.158(3)

²¹ Companies law, s.166

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

XYZ Limited, is a major high-street retailer registered in England with stores throughout England as well as a store in Jersey. Like many retailers, XYZ has struggled in recent times due to the change in shopping habits of the British public. Sales have fallen, as customers increasingly look for cheaper alternatives online, and XYZ is struggling to meet its ongoing rent commitments at its many stores. The majority of XYZ's stores have been loss-making for some time, including its store in Jersey. XYZ's secured lender, Big Bank PLC, has become increasingly concerned at the situation. Big Bank has the benefit of fixed and floating charges over XYZ's assets.

In December 2018, Big Bank confirmed that it would no longer continue to provide financial support and would not allow a further extension of facilities in order to meet the rental payments which were due on 25 December.

- (a) Big Bank has obtained legal advice in England in relation to its rights as secured creditor. You have been approached in Jersey to comment on Big Bank's rights. Please draft a note in this regard. (3 marks)**

As a secured creditor Big Bank would fall outside of any insolvency proceedings, if any were commenced. Once a default has occurred then Big Bank upon written notice being given to XYZ about the same and an application could be made to court for Désastre or Dégrèvement in relation to immovable property and to court seeking to enforce a contractual right where there are movable assets. A letter of request may be made to the Jersey court for assistance in this matter²².

There is no equivalent to a floating charge in Jersey. If Big Bank has security over Jersey immovable property (for example a mortgage over the building) then they can apply to court in Jersey for a Désastre or Dégrèvement. If they have security over movable property then they may apply to court in Jersey to enforce their contractual rights.

2/3

The directors of XYZ identify a party that is interested in acquiring the business of XYZ. Following a brief period of negotiation conducted with the oversight of a proposed administrator, and with approval of Big Bank, the directors of XYZ began the process to place XYZ into administration in England, in order to allow a "pre-packaged" sale of the business to occur.

- (b) The Jersey store is owned by a separate Jersey company, ABC Limited, but ABC's centre of main interest is considered to be in England. Is it possible to place ABC into English administration (following the Regulation (EU) 2015/848 of the**

²² Re OT Computers Limited(2002) JU 29, JLR N10

European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast) (the Recast EIR)? (3 marks)

The Regulation and the Recast EIR do not apply to Jersey who is not a member of the EU. They are also not a signatory of the UNCITRAL model law²³. The court may however still provide some assistance to any UK insolvency practitioners under common doctrine of comity and article 49 of the Bankruptcy Law, which is discretionary. Under the former the court can exercise its discretion, however, there will likely be difficulties with the separate Jersey entity.

Would need to demonstrate that English administration would achieve the best possible outcome for the debtor and creditors than local processes.

2/3

- (c) If it is not possible to place ABC into English administration, then are there alternative Jersey insolvency processes that will allow a pre-packaged sale to occur? Are there any potential problems with achieving a sale as a going concern? (3 marks)**

A just and equitable winding up petition may ultimately result in the equivalent of a pre-packaged sale or potentially perhaps a scheme of arrangement as an alternative to liquidation.

The Liquidators ability to continue to trade the company is restricted to winding up its affairs, which may limit the ability to sell as a going concern. However the power can be specifically granted by the court.

2/3

- (d) Would the approach be different if the Jersey store was a branch of XYZ as opposed to a separate Jersey company? How might article 49 of the Bankruptcy Law be used? (3 marks)**

Yes. The process in article 49 would likely be a more realistic prospect whereby the court would be likely to cooperate and recognise the English officeholders, examine witnesses and potentially freeze assets where appropriate after receiving a letter of request from the UK court, given that there is a reciprocal agreement between the UK and Jersey.

The English administration should impact the worldwide assets including those located in the Jersey store - recognition in Jersey under A49 may be required.

2/3

²³ UNCITRAL Model Law on Cross-border Insolvency

(e) What if XYZ Limited was a Polish company with Polish stores and a store in Jersey, but all other details remain the same (and assume that Poland has an administration process that is the same as that in England)? Would the UNCITRAL Model Law on Cross-Border Insolvency 1997 (the Model Law) or the Recast EIR assist with recognition in Jersey? (3 marks)

Under the common law private international law principles and UNCITRAL model law²⁴, even though Poland is not a 'relevant' country in relation to reciprocity, it is highly likely that if any request was received from the Polish court it would likely be provided with assistance.

A49 application; Jersey likely to assist based upon common law principles of private international law and/or comity and cooperation

1/3

9/15

*** End of Assessment ***

²⁴ Which article 49 suggests the Jersey court should look to.