



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: 202223-336.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.**
- 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. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

Select the correct answer.

Once an application for a restructuring officer is filed:

- (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

Question 1.2

Which of the following is not available to a debtor company in the Cayman Islands?

- (a) Appointment of a receiver.**
- (b) Court-supervised liquidation.**
- (c) Official liquidation.**
- (d) Deed of Company Arrangement.**

Commented [BT2]: Correct

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.*

Commented [BT3]: Correct

(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.*

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

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.*

Commented [BT5]: Correct

(d) *Is not permitted to remain in control of the company.*

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

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

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.

Commented [BT8]: Correct

(d) Sums due to depositors (if the company is a bank).

(e) Unsecured debts which are not subject to subordination agreements.

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.

Commented [BT9]: Correct

(e) The company is carrying on regulated business in the Cayman Islands without a license.

Question 1.10

Select the correct answer.

In order for a proposed creditor 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

Commented [BT11]: 10/10

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?

The Cayman Islands has ownership registers such as the Registered Land Law, Maritime Authority Law, Civil Aviation Authority Law and Mortgaging of Aircraft Regulations. Each of the registers grant a debtor the right to title in the relevant asset, subject to the security granted to the registrant creditor. This registration grants the secured creditor priority over other unsecured creditors.

Where the security interest relates to mortgages and charges in relation to a debtor company, section 54 of the Companies Act requires that the mortgage/charge be entered onto a register maintained by the debtor company. A failure to do so, does not invalidate the security.

However, there is no publicly available security register for other types of assets (unlike the Australian Personal Property Securities Register).

Commented [BT12]: Also has the effect of putting third party purchasers on notice

Commented [BT13]: Decent answer but lacking detail required for full marks. See 5.3 Guidance Text.

Commented [BT14]: 2 marks

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?

According to section 240 of the Companies Act, a foreign bankruptcy proceeding includes one for the purpose of reorganising or rehabilitating an insolvent debtor.

Recognition of foreign bankruptcy proceedings is governed by the Foreign Bankruptcy Proceedings (International Cooperation) Rules 2018.

Section 241 of the Companies Act requires:

- *An application by a foreign representative to the court;¹*
- *To make an ancillary order, for one of the specified purposes; and*
- *In relation to a foreign bankruptcy proceeding.*

The specified purposes for ancillary orders includes: recognising the right for the foreign representative to act in the Cayman Islands, staying or continuing legal proceedings, collecting assets or securing books and records from the debtor or a person prescribed by s103(1) of the Companies Act.

¹ A foreign representative is defined by section 240 of the Companies Act as "a trustee, liquidator or other official appointed in respect of a debtor for the purposes of a foreign bankruptcy proceedings."

Section 242(1) of the Companies Act then prescribes the criteria upon which the Court's discretion to grant recognition. Some of the relevant criteria includes: comity; just treatment of creditors (whether domestic or international); enforcement of security interests; etc.

Commented [BT15]: This is what the question was about. More detail needed for full marks. 3/4.

Section 243 of the Companies Act requires that a successful recognition application be gazetted with the specified Registrar.

Question 2.3 [maximum 3 marks]

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

Caymans Islands is not a signatory to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters.²

The Foreign Judgments Reciprocal Enforcement Act (1996 Revision) provides recognition in the following limited circumstances, the foreign judgment must be: final; monetary; and made after the 1996 Revision. Order 71 of the Grand Court Rules applies the procedural steps to apply for said recognition.

At common law, recognition is usually achieved by commencing a new action in the Cayman Islands based on the foreign judgment. To meet the requirements, the monetary or non-monetary foreign judgment, must:

- *Be final, without being obtained by fraud;*
- *Have been ordered within the preceding 6 years;³*
- *Involve the foreign court having jurisdiction over the debtor; and*
- *Not be contrary to Cayman Islands public policy or the rules of natural justice.*

The new action can then open up the successful applicant to the full range of domestic remedies.

Commented [BT16]: 3 marks

² Guidance Text, page 53.

³ *Limitation Act (1996 Revision).*

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.

The Companies Act (2023 Revision) does not contain a specific statutory prohibition against insolvent (or wrongful) trading. Rather, the source of power to hold directors personally liable for insolvent trading is the common law fiduciary duty to act in the best interest of creditors.⁴

The Grand Court of the Cayman Islands has identified two broad categories of fiduciary duties held by directors (excluding those found in the articles of association); these are:⁵

- 1) Duty to act honestly and in good faith in the exercise of the directors’ vested powers in the best interest of the company.⁶ This duty extends to not acting for a collateral purpose,⁷ or in conflict with their personal interest;⁸ and*
- 2) Duty to act with due care and skill that a reasonably diligent person could be expected, having regard to the knowledge, skill and experience of the director and a reasonable person.⁹*

According to the Prospect Properties v McNeill case,¹⁰ these duties owed to the company/shareholders are altered when the company is insolvent (or is likely to become insolvent) to a paramount duty to its creditors. This ‘creditor duty’ is also supported by the decisions of (at least) AHAB v SAAD Investments Company Limited (2021, unreported, CICA 15 of 2018), West Mercia Safetywear Ltd (in Liq) v Dodd [1988] BCLC 250 and BTI 2014 LLC v Sequana SA & Ors [2022] UKSC 25.

In order for the ‘creditor duty’ to be enlivened, the court will consider whether the company can pay its liabilities as and when they fall due (ie a cash flow test),¹¹

⁴ Prospect Properties v McNeill [1990-91 CILR 171].

⁵ Ibid, 199.

⁶ Argentine Holdings (Cayman) Limited v Buenos Aires Hotel Corporation S.A. [1997 CILR 90].

⁷ Prospect Properties v McNeill [1990-91 CILR 171].

⁸ Phyllison Ltd v GH Ltd [1992-93 CILR 160].

⁹ Norman v Theodore Goddard [1991 BCLC 1027].

¹⁰ Prospect Properties v McNeill [1990-91 CILR 171].

¹¹ Companies Act, s 93(c); Grand Court Rules 2021, Rules 92 and 93; and Re Oryx Natural Resources [2007 CILR N 6].

including a consideration of due and payable debts in the reasonably foreseeable future.¹²

Accordingly, where the official liquidator reasonable suspects that a director(s) has breached a creditor duty, then the official liquidator may apply¹³ to court under common law for (*inter alia*):

- declarations that the director has breach the relevant duty;
- declarations that a particular transaction/payment is void or invalid; and/or
- damages (payable personally by the director) in the amount of the loss suffered by creditor debts incurred following the relevant date of insolvency.

I note that there is no statutory limitation for the official liquidator to bring such a claim (see the Limitation Act (1996 Revision)), however the liquidator needs to consider (if considering bringing proceedings after considerable time delay) whether the defence of laches or acquiescence in the law of equity applies (see *Prospect Properties v McNeill* [1990-91 CILR 171, 207-211]).

Question 3.2 [maximum 6 marks]

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

Although receiverships are not governed by the Companies Act or Companies Winding Up Rules,¹⁴ they do play a role in the Cayman Island insolvency framework.

Receivers can be:

- a) appointed by the court, for example, to collect money or carry out some other act (like where it is just and equitable);

Court appointments as receiver are governed by Order 30 of the Grand Court Rules and the associated powers are governed by Order 45 of the Grand Court Rules. The appointment does not require the company to be insolvent (or likely to become insolvent).

- b) appointed by instrument, for example where a company defaults on a loan to a secured creditor;¹⁵ or

- c) appointed by statutory instrument, in respect of Segregated Portfolio Companies.¹⁶

¹² *Re Cheyne Finance Plc* [2008 BCC 182] and *Re Weaving Macro Fixed Income Fund Ltd (in Liquidation)* [2016 (2) CILR 514].

¹³ This power to apply to court is conferred by Part 1 of Schedule 3 of the Companies Act.

¹⁴ Guidance Text, Page 41.

¹⁵ *Scotiabank (Cayman Islands) Limited v Treasure Island Resort (Cayman) Limited* [2004-05 CILR 423].

¹⁶ Companies Act, s216.

Commented [BT17]: Great answer on fiduciary duties but regrettably it fails to demonstrate candidates knowledge of the statutory provisions, particularly sections 145-147. 5/9

[Empty response area]

Commented [BT18]: Good but too short to get full marks 4/6

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

Vegan Patty Inc (VP) is a company registered in the Cayman Islands. It operates a fleet of party boats cross central America and the Caribbean. It was founded by the wealthy Rackham family over 40 years ago. The family continues to own and manage the business.

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

VP has only managed to stay afloat for the past three years with the assistance of a very large loan from Blue Iguana Treasure Bank (BITB). BITB has lent VP USD 300 million (USD 180 million of which is secured by a mortgage over four of VP's largest party boats). The loan facility has now been exhausted. VP has also fallen behind on the monthly repayments to BITB.

This year, the tourism market picked up again; however, VP 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 rum it needs to keep the tourist customers suitably refreshed.

To make matters worse, VP commissioned Johnson & Boris Ltd (JoBo) to build seven more oversized party boats only a few months before the pandemic struck. VP 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 VP must pay damages of USD 50 million to JoBo within 45 days. VP 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 BITB take to protect its interests?

I assume that BITB has validly registered its mortgage on the Maritime Authority Law register, as the ships are presumably moveable property.

BITB may apply to court for orders appointing receivers under Order 30 of the Grand Court Rules. The Court can provide such orders as it deems fit, including providing security and all necessary powers to the receiver to secure the relevant moveable property. It may also approve the remuneration of the receiver.

Also, BITB may have rights under maritime law to arrest/seize the boats, however, this is outside the scope of this course.

Commented [BT19]: Good but what about the unsecured portion? 2/3

(b) What action can JoBo take to protect its interests?

It is not clear on the facts where JoBo is located. I have assumed that JoBo is a Cayman Islands registered company.

Section 94 of the Companies Act provides standing to creditors (ie JoBo) to apply to the Grand Court to wind-up VP. Section 92 of the Companies Act relevantly provides the following grounds upon which the Court may order the winding-up of VP:

- *VP is unable to pay its debts; and*

Section 93 of the Companies Act defines an inability to pay debts as either, where:

- *A written demand for payment of a sum greater than KYD 100 remains unpaid after the expiry of 21 days from service on the company;*
- *The execution of a judgment, decree or order remains unsatisfied; or*
- *On a cash-flow test basis, the company cannot be its due debts.*¹⁷

JoBo could issue a written demand (in accordance with the above requirements), but it is also arguable that a decision of the ICC falls under the second limb of an unsatisfied execution of a judgment, decree or order. I would seek instructions to test the veracity of falling under this second limb. Alternatively, JoBo could attempt to prove (as the burden rests with it) that VP is insolvent, but in my experience that type of test can be expensive. Particularly, as JoBo will have limited access to VP's records.

- *The Grand Court decides that it is just and equitable to wind-up VP.*

Common just and equitable grounds include: loss of substratum, deadlock, mismanagement or exclusion from management. In the matter of China CVS (Cayman Islands) Holding Corporation (CVS case),¹⁸ the court had to deal with an application by a creditor (but who was also a minority shareholder) to wind-up a debtor on just and equitable grounds, where the source of the creditor's debt was an arbitration. However, in that case, the court was dealing with dispute amongst shareholders which, under the shareholders agreement, required the dispute to be dealt with through arbitration. Although the court declared that the application for just and equitable winding-up was not an abuse of process, it ordered a stay.

The CVS case is not analogous to the circumstances facing JoBo. JoBo, does not appear to be a shareholder of VP and does not appear to fit in any of the recognised just and equitable grounds (as per the above). I therefore, do not believe that JoBo could rely upon the just and equitable limb to wind-up VP.

¹⁷ Section 93(2) of the Companies Act and *Re Weaving Macro Fixed Income Fund Ltd (in Liquidation)* [2016 (2) CILR 514].

¹⁸ [2019 (1) CILR 266].

Commented [BT20]: NY convention, Foreign Arbitral Awards Enforcement Act, recognition and enforcement (potentially via winding up petition). Candidate has jumped to the petition, but still gets 1/2 marks - 1.5

(c) What action can the unpaid employees take against VP?

Section 94 of the Companies Act provides standing to creditors (ie employees) to apply to the Grand Court to wind-up VP.

Section 92 of the Companies Act relevantly provides the following ground upon which the Court may order the winding-up of VP:

- *VP is unable to pay its debts; and*
Section 93 of the Companies Act defines an inability to pay debts as either, where:
 - *A written demand for payment of a sum greater than KYD 100 remains unpaid after the expiry of 21 days from service on the company;*
 - *The execution of a judgment, decree or order remains unsatisfied; or*
 - *On a cash-flow test basis, the company cannot be its due debts.¹⁹*

The employees could issue a written demand (in accordance with the above requirements) or seek first apply to court for judgment. It is unlikely commercial for employees to rely on the cash flow test limb. Pursuant to s141 of the Companies Act, employee debts are treated as preferential debts, and are paid in priority to all other debts.

Commented [BT21]: Good. 1.5

(d) Does the Cayman Islands Court have jurisdiction over VP?

The Grand Court relevantly has jurisdiction in respect of companies incorporated in the Cayman Islands.²⁰ The facts state that VP is registered in the Cayman Islands and therefore the Grand Court has jurisdiction.

Commented [BT22]: Correct. 1.5

(e) Is there a legal route via which VP can protect itself and seek to restructure?

Pursuant to section 91A-J of the Companies Act, VP may present a petition to the Grand Court to appoint a Restructuring Officer (RO). The filing for the petition of an RO grants a moratorium on all (including extraterritorially) actions/suits.²¹ The petition requires that VP be unable to pay its debts (or likely to be unable) and that it intends to present an arrangement to its creditors.

Commented [BT23]: Yes. Candidate might also have explicitly mentioned scheme of arrangement and demonstrated knowledge of PL for full marks. 2/3

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

There is nothing specifically in the Companies Act that prohibits the Rackham family "continuing to play a part" in the restructuring. However, the Grand Court will appoint an RO, which must be a qualified insolvency practitioner. The

¹⁹ Section 93(2) of the Companies Act and *Re Weaving Macro Fixed Income Fund Ltd (in Liquidation)* [2016 (2) CILR 514].

²⁰ Section 91 of the Companies Act.

²¹ Section 91G of the Companies Act.

RO's powers and functions are recorded in the order provided by the Grand Court.

Commented [BT24]: Yes, and the functions that remain with the existing directors. 1

Practically, the RO may want the assistance of the Rackham family, given the familiarity with the running of the business and their potential relationships with key stakeholders. This depends, however, on the discretion of the RO.

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

The Grand Court requires that VP be unable to pay its debts (or likely to be unable) and that it intends to present an arrangement to its creditors.²²

Commented [BT25]: 1 mark. Examiner is looking for reference to complains with convening orders, majority fairly representing class, intelligent member test etc 1 mark

Commented [BT26]: 10.5 for question 4

* End of Assessment *

Commented [BT27]: TOTAL MARKS 37.5 OF 50

²² Section 91B(1) of the Companies Act.