



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).**
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- 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.**

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.**

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.***

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.***

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.***

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.*

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.*

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.

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 [BT1]: Incorrect. Answer was (d)

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 [BT2]: 9/10

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?

Yes; if the security is over real estate, ships, aircrafts, motor vehicles or intellectual property; the Cayman Islands have centrally maintained registers for ownership of real estate, ships, aircraft, intellectual property, and motor vehicles. Mortgages and charges can be registered therein. There is however, no other public security registration for other types of assets in Cayman, which means a creditor must take steps (in advance of providing credit) to discover whether the relevant asset is encumbered.

Section 54 of the Companies Act requires that a company record security interests on its register of mortgages and charges.

The register of mortgages and charges should include:

- i. a short description of the property mortgaged or charged;*
- ii. the amount of charge created; and*
- iii. the names of the mortgagees or persons entitled to such charge.*

In practice however, this statutory requirement is often not complied with and failure to record a security does not in itself render the security invalid.

The effect of registration is:

- secured creditors are given priority over non-registered creditors;*
- third party will be deemed to have notice of any interest of the charged asset and will have acquired the asset subject to such secured creditor's interests.*

Commented [BT3]: 3 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?

The Cayman Islands has not implemented the UNCITRAL Model Law on Cross-Border Insolvency (the "Model Law"). However, the Cayman Islands Grand Court (the "Grand Court") has a discretionary power under section 241 of the Companies Act 2023 Revision to grant certain relief to a foreign representative of a foreign bankruptcy proceeding.

Section 241 provides that

1) Upon the application of a foreign representative the Court may make orders ancillary to a foreign bankruptcy proceeding for the purposes of:

- a. recognising the right of a foreign representative to act in the Islands on behalf of or in the name of a debtor;**
- b. enjoining the commencement or staying the continuation of legal proceedings against a debtor;**
- c. staying the enforcement of any judgment against a debtor;**
- d. requiring a person in possession of information relating to the business or affairs of a debtor to be examined by and produce documents to its foreign representative; and**
- e. ordering the turnover to a foreign representative of any property belonging to a debtor.**

Section 242 Companies Act 2023 Revision requires the Grand Court to take the following into account when exercising its discretion:

- 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 [of the Companies Act 2023];**
- 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**

The Grand Court would also follow common law principles expounded in *Singularis Holdings Ltd v PricewaterhouseCoopers*¹ being modified universalism and assistance

¹ [2014] UKPC 36

in cross-border insolvency. Modified universalism is premised on universalism (i.e. that assets should be collected and distributed on a global basis) however, modified universalism allows each jurisdiction to determine how it will protect its local creditors' interests.

In summary, the Grand Court will assist in circumstances where it is satisfied that there is a sufficient Cayman Islands connection, where the assistance sought by the foreign representative is available to them under both the foreign jurisdiction and Cayman Islands law; and where the assistance is not contrary to Cayman Islands public

Commented [BT4]: 4 marks

Question 2.3 [maximum 3 marks]

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

Foreign judgements have no direct legal effect in the Cayman Islands. Furthermore, the Cayman Islands is not a signatory of any international treaty for the reciprocal recognition or enforcement of foreign judgment. Moreover, although the UK has power to extend treaties (by Order in Council) to the Cayman Island by reason of the fact that Cayman is a British Overseas Territory, it has not done so.

The Foreign Judgment Reciprocal Enforcement Act (1996 Revision) (the "1996 Act") provides that foreign judgements from specified foreign courts may be registered in the Cayman Islands and enforced in the Cayman Islands in the same manner as a Cayman Islands domestic judgment. However, the 1996 Act only applies to certain Australian courts and external territories which are set out in the Foreign Judgements Reciprocal Enforcement (Australia and its External Territories Order) 1993.

Where the 1996 Act applies, Order 71 of the Grand Court Rules prescribes the procedural rules to follow.

In order to be enforceable in the Cayman Islands, the foreign judgement must be a final money judgement made after the 1996 Act was extended to the relevant foreign country.

Where the 1996 Act does not apply then common law principles will apply for the enforcement of foreign judgments in the Cayman Islands. The enforcement of a foreign judgement under common law usually requires commencement of a new Cayman Islands action using the foreign judgement as a cause of action (i.e. as an unsatisfied debt or other obligation).

The action must follow the procedural protocol for litigation under the Grand Court Rules. The requirements are:

- that the judgement is final*
- the foreign court had jurisdiction of the judgement debtor*

- *the foreign judgement was not obtained fraudulently;*
- *the foreign judgement is not contrary to Cayman Islands public policy; and*
- *the foreign judgment was obtained contrary the rules of natural justice.*

A successful suit will result in a summary judgement which will avail the full range of domestic enforcement remedies available in the Cayman Islands.

Commented [BT5]: 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.

While there is no statutory prohibition on insolvent trading in the Cayman Islands there are transaction avoidance provisions in the law which are designed to preserve, as far as possible, the available assets of an insolvent debtor’s in for there to be a fair distribution amongst the debtor’s creditors.

The relevant provisions are found in the Companies Act 2023 (the “CA 2023”); section 145 (voidable preferences), section 146 (dispositions at an undervalue) and section 147 (fraudulent trading).

Voidable preferences - Section 145 CA 2023 provides that:

- 1. every conveyance or transfer of property, or charge thereon, and every payment obligation and judicial proceeding, made, incurred, taken or suffered by any company in favour of any creditor at a time when the company is unable to pay its debts within the meaning of section 93 [CA 2023] with a view to giving such creditor a preference over the other creditors shall be invalid if made, incurred, taken or suffered within six months immediately preceding the commencement of a liquidation;*
- 2. any payment made as aforesaid to a “related party” of the company shall be deemed to have been made with a view to giving such creditor a preference; and*
- 3. a creditor shall be treated as a “related party” if it has the ability to control the company or exercise significant influence over the company in making financial and operating decisions.*

A transaction entered within the six months period prior to the commencement of the liquidation, while the debtor was unable to pay its debts, would be open to challenge

by the liquidator under this section. A key part of the test is to find that there was a dominant or principal intention to prefer the particular creditor. In other words, an intention to put that creditor in a better position than they would have otherwise been in a liquidation. The court would be obliged to discern the intention behind the payment in the sense that there was a deliberate intention to pay the creditor out of turn while being cognisant of the consequence for other unpaid creditors. If the dominant purpose however, was to for a different purpose such as paying an essential service provider, then the transaction may not be classed as a voidable preference. Note that if the preferred party is a "related party" there is a presumption that there was an intention to prefer.

Disposition at an undervalue or fraudulent dispositions

Section 146 CA 2023 provides that every disposition of property made at an undervalue by or on behalf of the company with the intention to defraud its creditors shall be voidable at the instance of the official liquidator.

Undervalue is defined as no consideration for the disposition; or a consideration for the disposition the value of which in money or monies worth is significantly less than the value of the property which is the subject of the disposition.

The liquidator must establish an intention to defraud, which is defined as an intention to wilfully defeat an obligation owed to a creditor. The intention to defraud needs only to be 'a' purpose and not necessarily the sole or dominant purpose. This may be very difficult for the liquidator to prove and dependent on the available evidence. The vulnerability period in the case of dispositions at an undervalue is six years.

A creditor who was prejudiced by the disposition may seek a court order to void the disposition. The creditor will also need to establish intention to defraud which is even more difficult without powers like a liquidator to investigate the books and records of the company.

If successful the disposition will be set aside and the liquidator may seek that the creditor return the asset and prove their debt in the liquidation for the amount claimed.

Fraudulent trading - ***section 147 CA 2023 state that***

If during the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose the liquidator may apply to the Court for a declaration under the section.

The Court may declare that any persons who were knowingly parties to the carrying on of the business in the manner aforementioned are liable to make such contributions, if any, to the company's assets as the Court thinks proper.

Thus, a liquidator can pursue former directors and officers of the company for misfeasance or fraudulent trading. If it appears that the directors and officers were carrying on the business for the purpose of defrauding creditors or for any fraudulent purposes the liquidator is empowered to seek court order for a declaration under the section that such person make a contribution to the assets of the company.

Commented [BT6]: Good. Case law would have secured the final mark. 8/9

Question 3.2 [maximum 6 marks]

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

The statement is false. Although appointment of receivers is not explicitly mentioned in the Cayman Islands' statutory provisions which specifically deal with insolvency, a receivership can be part of an insolvency scenario in the Cayman Islands.

Firstly, a receiver may be appointed over charged assets in a security document by a secured creditors for the purpose of enforcing the security rights under the security document. The power of the receiver would be those set out in the security documents and would typically include a right to realise and sell the charged asset and to repay the secured creditor. This is useful in an insolvency scenario where the secured creditor will have priority over unsecured creditors in respect of the proceeds from the sale of the asset. The receiver will not be under the supervision of the court and their primary duty will be owed to the secured creditor as opposed to the general body of creditors. Accordingly, the role of a receiver in an insolvency scenario is to provide an alternative course of action for certain creditors.

Secondly, the Grand Court Rules ("GCR") contemplates the appointment of receivers in a variety of scenarios including insolvency. For example, Order 30 GCR provides for the appointment and role of receivers generally.

Thirdly, the Senior Courts Act 1981, section 37(1) as applied by the Grand Court Act 2015R section 11(1) gives the Grand Court general powers to appoint a receiver in all cases when it appears to be just and convenient to do so. This power is often used in support of freezing injunctions where there is a risk of dissipation of the debtors' assets while waiting for the outcome of proceedings.

Receivers appointed by the Court derive their powers from the Court order appointing them or from the applicable statutory regime. Receivers act on behalf of all the creditors. The Court order may be drafted narrowly or widely depending on what the Court determines to be proportionate in the circumstances. Accordingly, in an insolvency scenario the role of the receiver may only be to take possession and control of the asset or to deal with the asset in a particular way. A Court may also appoint a receiver in aid of the enforcement of a money judgement.

*Fourthly, the Companies Act 2023 (the "CA") contains bespoke statutory receivership provisions for segregated portfolio ("SP") of a segregated portfolio company ("SPC") found at sections 224 to 228. These provisions allow for the liquidation of an SP. This SP receivership regime is in many ways similar to the winding-up procedures for companies. The Grand Court stated in *JP SPC*² that the purpose of an appointment of a receiver of an SP is the same as the purpose of the appointment of a liquidator in a company; the difference is the confinement to shareholders or creditors of the particular SP.*

Any shareholder or director of the SPC, or any shareholder or creditor of an SP can make the application where the assets are insufficient (based on an insolvency cash flow test) to satisfy claims of creditors in respect of the portfolio. The powers of the receiver will be derived from the Court order which appointed them and also from the CA. Section 226 CA provides that the receiver may do all things as may be necessary for the purposes set out in section 224(3) CA. The receiver will also have powers and functions of the directors in respect of the assets and business of the SP. Note that the director's powers cease in regards to the business and assets of the SP, section 226 (6)(a) CA. The receiver is entitled to be present at all of the SPC's meetings and entitled to vote as a director of the SPC in respect of the SPC's general assets. Notwithstanding, the receiver is permitted to apply to the Grand Court at any time for directions as to the extent and/or exercise of any of its powers, section 226(2)(a) CA.

The court may discharge the receivership when the purpose for which the receivership was ordered has been achieved (or substantially achieved) or when such purpose becomes incapable of being achieved. Finally, the receivership order will cease to have effect should a winding-up order be made in regards to the SPC, section 224(4)(b).

A receiver's role therefore, is to manage the orderly winding-up of the SP and to distribute its assets to those entitled to them.

Commented [BT7]: 6/6

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.

² 2013 (1) CILR 330 at para 9.

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?

In respect of the secured mortgage over the four boats BITB can enforce their security in accordance with the terms outlined in the security agreement. Generally, these would provide that if the debtor default on the payment the creditor would be permitted to:

- *Take possession and sell the property; or*
- *Appoint a receiver to take possession and realise the property.*

BITB can enforce its security without leave of the court and without reference to any of VP's restructuring officer or liquidator, section 142 Companies Act 2023.

In respect of its unsecured loan BITB can issue a statutory demand in respect of the debt. If VP does not dispute the debt and fails to satisfy the statutory demand within 21 days of service then it will be open to BITB to file winding-up petition under section 94 of the Companies Act on the grounds that VP is unable to pay its debts per section 93.

*The unsecured debt will be ranked *pari passu* with other unsecured creditors and paid after preferential and secured creditors.*

Commented [BT8]: 3

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

JoBo may be able to enforce the foreign judgement under common law principles if:

- *the judgement is final;*
- *the foreign court had jurisdiction over VP;*
- *the foreign judgement was not obtained by fraud;*
- *the foreign judgement is not contrary to Cayman Islands public policy; and*
- *the foreign judgement was not obtained contrary to the rules of natural justice.*

JoBo would need to commence a new action in the Cayman courts based on the foreign judgement from ICC London as an unsatisfied debt. JoBo would have 6 years in which to commence the proceedings and the date would run from the date of the judgement.

A successful suit will result in a summary judgement which will avail the full range of domestic enforcement remedies available in the Cayman Islands.

Commented [BT9]: 2. Reference the law is missing.

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

The amounts due to the VP employees fall in a very limited class of preferential unsecured creditors under Cayman Islands law. As such in an insolvency where there are insufficient assets to pay all preferential debts, the VP employees will rank ahead of unsecured creditors and ahead of secured creditors with a floating charge. Per section 141 of the Companies Act 2023 the preferential debts rank equally. The categories of preferential debts are set out in Schedule 2 of the Companies Act and are as follows:

Commented [BT10]: Yes. 1.5

- *Debts due to employees;*
- *Debts due to bank depositors; and*
- *Taxes due to the Cayman Islands Government.*

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

Yes, VP is a company registered in Cayman and therefore the Cayman Court has jurisdiction over VP.

Section 91 of the Companies Act (2023 Revision) gives the Grand Court jurisdiction to make winding-up orders in respect of the following types of companies:

Commented [BT11]: 1.5

(a) an existing company;

- (b) a company incorporated and registered under this Act;*
(c) a body incorporated under any other law; and
(d) a foreign company which:-
- I. has property located in the Islands;*
 - II. is carrying on business in the Islands;*
 - III. is the general partner of a limited partnership; or (iv) is registered under Part IX.*

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

VP may consider an informal (out of court) creditor workout which can be beneficial in that it is more private (avoiding publicity) and more cost-efficient than other alternatives. Other benefits are that the value of VP can be preserved and liquidation of a viable company can be avoided. VP will still be at risk of unsecured creditor claims which would frustrate restructuring efforts.

VP can consider a section 86 scheme of arrangement in order to restructure its debt. A scheme of arrangement is a court approved compromise entered between the company and its creditors or members or classes thereof. The scheme can be used to:

- Restructure company liabilities;*
- Reorganise the share capital of the company; or*
- Alter the shareholder and/or the creditor distribution rights*

VP can also consider a debt-to-equity swap or a prepackaged sale of VP.

The scheme will need the consent or approval of the majority in number representing 75% in value of creditors or members present in person or by proxy and entitled to vote at the meeting agreeing the terms of the scheme.

The section 86 does not provide a stay during the negotiation or implementation of the scheme so VP will still be exposed to unsecured creditor action which may frustrate the restructuring efforts. An appointment of a provisional liquidator under section 104(3) can afford a stay but this approach has been replaced with the more modern option of appointing a restructuring officer (discussed below). Secured creditor's rights to enforce their security will not be affected in any event.

The scheme will be binding on all creditors, members and the company itself once approved by the Court. The scheme will need to be filed with the Registrar of Companies in the Cayman Islands in order to be effective.

VP can also make a section 91G application for the appointment of a restructuring officer ("RO"). The filing of a petition for a restructuring officer will trigger an automatic stay on creditor proceedings allowing VP breathing

room to restructure its business. This stay will have extraterritorial effect. VP can apply on the grounds that:

- it is likely to be unable to pay its debts; and
- it intends to present to its creditors (or classes thereof) a compromise or arrangement

The petition can be presented by a director of VP without a shareholder resolution and without express power to in the articles to present the petition.

The RO's powers and function will be as set out in the Court order which appoints them. The RO will have power to carry out the restructuring in a number of ways; either employing consensual deal or informal work out with creditors. It is also open to the RO to use a scheme of arrangement or support other foreign restructuring of VP.

Commented [BT12]: 3

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

While the scheme is being implemented the Rackam's family can continue to play a part in the running of VP. However, in the context of a RO it is expected that the Court will determine which and to what extent management power can be retained by the Rackam's family and which powers will be vested in a RO.

Commented [BT13]: 1

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

Before approving any proposed restructuring the court must apply the substantive test set out in the Companies Act which requires the court to be satisfied that the interests of all relevant parties, (creditors and shareholders) have been considered and are not prejudiced.

The court will ensure:

- Compliance with the convening orders;
- The majority is fairly representing in the class; and
- Having regard to alternatives, the arrangement is such that an honest, intelligent member of the class, acting in their own interest would approve it.

Commented [BT14]: Yes. Don't forget to cite the law. 2 marks.

Commented [BT15]: 14

Commented [BT16R15]: 47 OUT OF 50

* End of Assessment *