



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.**

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.**

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 [BT1]: 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?

Creditors can register security over assets in the Cayman Islands. The Cayman Islands have ownership registers for aircraft, ships, motor vehicles, real estate and intellectual property which are centrally maintained and in which mortgages and charges can be registered therein. However, there is no public security registration regime for other types of assets in Cayman. If a creditor wants to ensure it has sufficient control over an asset that does not have a registration regime in order to prevent a third party from purchasing it, they should take steps to investigate whether the asset is already encumbered.

The effect of registering security over an asset is that a third-party purchaser of the charged asset will be deemed to have notice of any interest and will therefore acquire the asset subject to the secured creditor's interest. Registering the security results in the secured creditor being granted priority over other non-registered creditors.

Commented [BT2]: 2 marks. Re-read 5.3 guidance text to solidify understanding.

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 Grand Court has the power to assist foreign bankruptcy proceedings under Part XVII of the Companies Act (2023 Revision). Upon the application of a foreign liquidator, the Grand Court may make orders ancillary to a foreign bankruptcy proceeding for the purposes of: (i) recognising the right of a foreign representative to act in the Cayman Islands on behalf of or in the name of a debtor; (ii) enjoining the commencement or staying the continuation of legal proceedings against a debtor; (iii) staying the enforcement of any judgment against a debtor; (iv) requiring a person in possession of information relating to the business affairs of a debtor to be examined by and produce documents to its foreign representative; and (v) ordering the turnover to a foreign representative of any property belonging to a debtor.

Commented [BT3]: Question asks for information about section 242 not 241 - 1 mark for being in the right area.

Question 2.3 [maximum 3 marks]

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

The Grand Court of the Cayman Islands adopts a co-operative approach to recognising foreign judgements to ensure an effective winding-up and the protection of the interest of creditors. The Foreign Judgments Reciprocal Enforcement Act (1996 Revision) provides a statutory scheme for recognition and enforcement of foreign

judgements but only where the country from which the judgement is originating assures substantial reciprocity of treatment regarding the enforcement of Cayman Islands Judgements. In practice, the provisions of the Act have only been extended to judgements from the Superior Courts of Australia. In order to be enforceable, the foreign judgment must be: (i) final; (ii) a money judgment; and (iii) made after the 1996 Act was extended to the relevant foreign country.

Due to the limited application of the Foreign Judgements Reciprocal Enforcement Act (1996 Revision), foreign judgements are generally enforced by way of commencing a new action in the Cayman Islands based upon the foreign judgement as an unsatisfied debt or other obligation. These actions are conducted under The Grand Court Rules.

There are five requirements to enforce a foreign judgment in the Cayman Islands under common law, as such:

- (i) The judgement is final;*
- (ii) The foreign court had jurisdiction over the debtor;*
- (iii) The foreign judgment was not obtained by fraud;*
- (iv) The foreign judgement is not contrary to public policy of the Cayman Islands; and*
- (v) The foreign judgement was not obtained contrary to the rules of natural justice.*

Commented [BT4]: 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.

*Despite there being no statutory prohibition on insolvent trading, directors can be made personally liable to the company for any losses they have caused to the company for acting in breach of their fiduciary duty to act in the company's best interest. The Grand Court ruled in *Prospect Properties vs McNeill* that where a company is insolvent, the directors' duty to act in the company's best interest results in them needing to have regard to the interest of its creditors. It is in the creditors' interest to be paid and it is in the company's interest to be safeguarded against being put in a position where it is unable to pay. If a company is in official liquidation, the official liquidator can pursue claims against the directors on behalf of the company (in the company's name) for breach of their fiduciary duty.*

If the insolvent trading was fraudulent, under section 147 of the Companies Act (2023 Revision), the liquidator may apply for an order requiring any persons who were knowingly parties to the fraudulent trading make such contributions to the company's assets as the Court deems proper.

Under section 99 of the Companies Act (2023 Revision), any dispositions of a company's property made after the deemed commencement of the winding-up will be void if a winding-up order is subsequently made, unless validated by the Grand Court. The commencement date of the winding-up will be deemed to be the date the winding-up petition was filed rather than the date on which the winding-up order was made. Therefore, if the company's directors were trading whilst the company was insolvent after the deemed commencement of the winding-up, the liquidator would be entitled to apply for appropriate relief for the funds to be repaid or the assets returned. The Cayman Court has the power to validate post-petition grants of security, either retrospectively or prospectively. However, the court is unlikely to do so if the company is insolvent, unless it can be shown that the grant of security has a corresponding benefit to the company and increases the value for its creditors as a whole.

Section 145 of the Companies Act (2023 Revision) provides that any payment or disposal of a property to a creditor constitute a voidable preference if: (i) it takes place in the six months before the deemed commencement of the liquidation of the company and at a time when the company is insolvent; and (ii) the primary intention of the directors of the company was to give the relevant creditor preference over other creditors. The Cayman Islands Court of Appeal considered in detail each of the tests to be applied to identify voidable preferences under section 145(1) in re Weaving Macro Fixed Income Fund Ltd (in Liquidation). If the primary intention of the company in making the payment or granting the security was for a different purpose than giving preference to the creditor over other creditors, e.g. in good faith to pay an essential service provider, the transaction may not be classed as a voidable transaction even if the overall effect of the transaction is to prefer that creditor. Any disposition made to a related party of the company is deemed to have been made with a view to giving a preference.

Any transactions in which property are: (i) disposed of at an undervalue; and (ii) with the intention of defrauding a creditor are voidable on application of the liquidator, under section 146 of the Companies Act (2023 Revision). Here, the burden of proof is on the liquidator or creditor to establish the intent to defraud and the application must be brought within six years of the disposal.

Commented [BT5]: 9/9

Question 3.2 [maximum 6 marks]

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

It is incorrect to state that receivers have no role to play in a Cayman Islands insolvency scenario. Under the Grand Court Rules, receivers may be appointed, albeit they are not explicitly mentioned in the statutory provisions dealing specifically with insolvency,

i.e. the Companies Act and Companies Winding Up Rules. Under the Grand Court Rules, receivers may be appointed by the Court for the purposes of collecting money or to carry out some other act, such as the execution of a contract or a document of title. Order 30 of the Grand Court Rules governs the appointment and duties of receivers. Order 45 of the Grand Court Rules states that receivers may be appointed to enforce court orders for the payment of money. Finally, Order 51 of the Grand Court Rules provides for the appointment of receivers by way of an equitable execution.

Receivers and receivership orders can also play a role with respect to Segregated Portfolio Companies ("SPC") in the Cayman Islands. The Grand Court can make a receivership order in respect of a portfolio of a SPC if the Grand Court is satisfied that the SPC's assets attributable to that portfolio are likely to be insufficient to discharge the claims of creditors with respect to the portfolio. The receivership order directs that the business and assets of, or attributable to, a segregated portfolio must be managed by a receiver to: (i) close down the business of, or attributable to, the segregated portfolio; and (ii) distribute the assets attributable to the SPC to those entitled to them. Receivership orders may not be made if the SPC is in the process of being wound-up and shall cease to be effective upon commencement of the winding-up of the segregated portfolio company, but without prejudice to prior acts of the receiver. When an application is made (and during the period of operation of) a receivership order, no proceedings may be instituted against the SPC related to the segregated portfolio for which the receivership order was made, except by leave of the Court. The receiver relieves the directors of their functions and powers with respect to the business of the segregated portfolio throughout the period of the receivership order.

The primary relevance of receivers in the Cayman Islands in an insolvency scenario is that they offer an alternative course of action for certain creditors. Receivers can be appointed pursuant to rights in a security instrument, e.g. a fixed or floating charge, without any court involvement. For example, if the charging documents provides for it, a fixed or floating charge holder can appoint a receiver over the company's charged assets if the debtor defaults. The receivers powers will be set out in the charge documents which typically include a right of sale. Generally, the receiver will realise the value of the charged asset and from these proceeds repay the creditor the amount of its unpaid debt. The receiver is not supervised by the court in this scenario and ordinarily owes its duties to the creditor rather than the debtor company.

Commented [BT6]: Good. Reference to statutory sections and case law could have earned full marks. 5/6

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?

BITB has secured \$180 million of the loan to VP by a mortgage over four of VP's largest boats and is therefore a secured creditor. As VP has fallen behind on the monthly repayments to BITB, an event of default has occurred and BITB can enforce its security. A secured creditor is entitled to enforce its security over an asset, in this case the four boats, notwithstanding whether a restructuring officer or liquidator has been appointed. BITB can enforce the security over the assets without the leave of the Grand Court and without any reference to a restructuring officer or liquidator of VP, should they be appointed. If the current market value of VP's four largest boats is lower than the \$180 million in secured debt, BITB may prove for the unsecured balance should VP go into liquidation. To do so, BITB would have to submit a proof of debt stating the particulars of the security and the value which they place on it. Should VP go into liquidation, a secured creditor's rights are superior to the rights of all other parties. BITB will be an unsecured creditor for the remaining \$120 million of the loan.

Commented [BT7]: 3

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

JoBo is an unsecured creditor however they have the right to file a winding-up petition in respect of VP if they prove unable to pay the damages of \$50 million as awarded by the ICC.

Commented [BT8]: Good but more on recognition and enforcement needed. 1

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

If VP goes into liquidation, the amounts due to its employees will be treated as a preferential debt and will be third in the order of priority to be paid in an official liquidation (after secured creditors and liquidation expenses).

Commented [BT9]: 1

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

Yes, the Cayman Islands Court has jurisdiction over VP as the company is registered in the Cayman Islands.

Commented [BT10]: 1

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

VP can protect itself and seek to restructure by making use of the new restructuring officer scheme in the Cayman Islands. To do so, they must present a petition to the Grand Court for the appointment of a restructuring officer ("RO") on the basis that: (i) it is or is likely to become unable to pay its debts; and (ii) it intends to present an arrangement or compromise to its creditors. VP is unable to pay its debts in the above scenario. The petition can be presented to the Court by the company's directors without a resolution of the shareholders and without any express power to present a petition in the articles of association of the company. A moratorium is triggered automatically upon the filing of the petition and this moratorium has extraterritorial effect. However, secured creditors of VP, such as BITB, will continue to be entitled to enforce their security without leave of the court or any reference to the RO.

Commented [BT11]: 2

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

As the restructuring officer regime in the Cayman Islands remains novel, it remains to be seen whether, and if so to what extent, existing company management will continue to have a role in managing the company following the appointment of the RO. The Grand Court will determine which powers will remain with the company directors, if any, and which will be vested in the ROs similar to how they made judgements when appointing provisional liquidators.

Commented [BT12]: 1

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

The Cayman Islands is a creditor-friendly jurisdiction and so will the courts will take into consideration whether the proposed restructuring will benefit the creditors of VP prior to approving such.

Commented [BT13]: Examiner was looking for the tests - properly convened, majorities, honest and intelligent member etc .5

Commented [BT14]: 9.5/15

* End of Assessment *

Commented [BT15]: TOTAL MARKS 39.5