



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]: Incorrect. Answer was (d)

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?**

*In the Cayman Islands, there is no public registration of security and therefore the creditor must take adequate steps to investigate where there is any security held over an asset and also, should a creditor have any security they must also do the appropriate due diligence in order to ensure that no third party can purchase the security which means they must have sufficient control over this asset.*

*Registering security under section 54 of the Companies act requires that security be registered in the register of mortgages and charges of the debtor company, which must be maintained by the Debtors Company. Whilst the register must be maintained by the Debtor Company, companies do not always comply. Registering security, I the company's registry also does not imply priority. The register is open for inspection by any member of the company or creditor and therefore registration does put third parties on notice of the existence of security recorded within the register.*

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?**

*Given the jurisdiction, and that the Cayman islands has become a leading financial centre many of the liquidations involve cross border insolvency.*

*In the Cayman Islands there is no threshold test for the grant of assistance nor thr automatic rights based on the centre of main interest and therefore the foreign debtor must satisfy the Cayman court that it is appropriate for the court to exercise its discretion by granting relief sought in the foreign representative's application. The Grand Cayman Court can provide the following forms of ancillary relief*

- 1) Recognising the right of the foreign representative to act in the islands on behalf of, or in the name of the debtors;*
- 2) Enjoining the commencement or staying the continuation of lehal proceedings against the debtor*
- 3) Staying the enforcement of any judgement of the debtor*
- 4) Requiring a person in possession of information relating to the business of affairs of a debtor to be examined by and to produce documents its foreign representatives; and*
- 5) Order the handover to a foreign representative of any property belonging to the debtor*

*The Grand court is guided by matters which will best assure an economic and expeditious administration of the debtors estate consistent with*

**Commented [BT3]:** Candidate has not appreciated that there are central registers. Suggest re-reading 5.3 guidance text. 1.5 marks.



- a) *The just treatment of all holders of claims, wherever they are domiciled*
- b) *The protection of claims holders in the Cayman Islands against prejudice and inconvenience*
- c) *The prevention of preferential or fraudulent dispositions*
- d) *The distribution of the estate among creditors substantially in accordance with order of priority*
- e) *The recognition and enforcement of security interest*
- f) *The non enforcement of foreign taxes, fines and penalties*
- g) *Comity*

Commented [BT4]: Yes, section 242 Companies Act. 3 marks.

Question 2.3 [maximum 3 marks]

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

*Cayman Islands operates a co-operative approach with respect to the recognition of foreign judgements however the Foreign Judgement Reciprocal Enforcement Act (1996 Revision) does provide a statutory scheme for recognition and enforcement of foreign Judgements however there needs to be substantial reciprocity of treatment regarding the enforcement of Cayman Island Judgements*

*With respect to the legal framework, and given there is limited application for the Foreign Judgements Reciprocal Enforcement Act, enforcement is generally achieved through commencing a new action in the Cayman Islands. The reason why is because the provisions in the enforcement act have only extended to judgements from the Courts of Australis. This is governed by Order 71 of the Grand Court Rules.*

*It is important to mention that money and non-money judgements are enforceable at common law.*

Commented [BT5]: 2.5 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.***

*As outlined, there is no statutory provision to file for insolvency and the Companies Act does not contain any prohibition on wrongful trading, where the directors continue to trade whilst the Company is insolvent but directors can be held liable to the*

*Company for any losses which the company suffers as a result of the directors acting in breach of their fiduciary duties to act in the best interest of the Company.*

*It is in the interest also, for creditors to be paid and it is in the interest of the company to be safeguarding assets or other duties against positions where the Company is unable to pay. As a result it is possible for liquidators to pursue claims against the directors on behalf of the Company for any losses caused as a result of their fiduciary duties.*

*Once example where assets might not be safeguarded would be the idea of preference, that being where the interest of one creditor ahead of a position it otherwise would have been. Any payment or disposal to a creditor would be voidable as per s145 of the Companies Act if it occurs in six months before the deemed commencement of the company's liquidation and at a time when it is unable to pay its debts, and it was the dominant intention of the directors to give a creditor preference over other creditors. This would not be, for example, the payment of an essential supply which will be needed to continue the business trading. Where a transaction is deemed to be a preference, then it would need to be inferred by the Court by the way of evidence, and a liquidator may request that the Court produce an order for the creditor to return the asset and instead prove in the liquidation the amount of its claim.*

*Additionally, s146 of the Company's act provides that a transaction in which property is disposed of at an undervalue so that it defeats an obligation which owed to a creditor then this can be voidable on application of the liquidator and the liquidator must bring this this application within six years of the disposal.*

*A liquidator could also consider s.147 where they feel that the directors have traded intentionally to defraud interested parties, and a liquidator would also have to bring an application to order such parties to make contributions to the Company's assets as the court sees fit.*

*As Outlined there ways which the liquidator can apply to court to seek various clawbacks mechanisms where a director has breached their fiduciary duties.*

**Commented [BT6]:** Good. A little more detail (e.g. case law) would have secured full marks. 7.

**Question 3.2 [maximum 6 marks]**

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

*Receivers can be appointed however are not explicitly mentioned in their statutory provisions dealing specifically with insolvency. The Gran Court Rules suggest that receivers can appointed for the purpose collecting monies ie rent, or to carry out some other act, say execution of a document.*

*Where receivers are appointed, and the orders are provided for by statue would be the appointment of segregated portfolio companies whereby separate portfolios are*

*generated under the umbrella of a single entity and the assets and liabilities of each portfolio are ringfenced to that designated portfolio*

*Where the assets are unable to discharge the liabilities for that specific SPC, then the grand court might deem it applicable to make a receivership order with respect to only that portfolio. In the case *JP SPC 1 v JP SPC 4* the role of the receiver was almost comparable to that of a liquidator.*

*Additionally, receivership might offer an alternative course of action for certain creditors especially through rights in a security instrument. If the charging document provides specifically for the appointment of a receiver, then a creditor can appoint if the debtor has defaulted on its obligations. The receiver is no support by the court and must only abide by the powers set out in the charge document which generally would be the right off sale of the asset so that it can repay the creditor the amount of its unpaid debt.*

**Commented [BT7]:** Good and nice use of case law. Specific reference to sections of statute and GCR required for 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?**
- (b) What action can JoBo take to protect its interests?**
- (c) What action can the unpaid employees take against VP?**
- (d) Does the Cayman Islands Court have jurisdiction over VP?**
- (e) Is there a legal route via which VP can protect itself and seek to restructure?**
- (f) Following on from (e) above, can the Rackham family continue play a part in running VP during any restructuring process?**
- (g) What factors will the Cayman Islands court take into consideration before approving any proposed restructuring?**

**a) BTIB**

*BTIB, given that the loan is secured by a mortgage of four of VPs party boats could look at appointing a receiver so that the receiver can look to realise the assets by right of sale so that it can recover the unpaid debt due to BTIB. The receiver will not be a court appointment and will only be able to act under the powers of the charge document, if that charge document has the right to appoint receivers in the event of Default*

Commented [BT8]: 1.5

**b) Jobo**

*Given that a judgement has been made in ICC then Jobo would need to look at enforcing that judgement in the Cayman Court. To enforce a judgement in the Cayman islands the judgement has to be final; the foreign court had jurisdiction over the debtor; the foreign judgement was not obtained by fraud; the foreign judgement is not contrary to public policy of the Cayman islands; and the foreign judgement was not obtained contrary to the rules of natural justice. Therefore, Jobo would need to seek whether the Cayman Islands has jurisdiction over VP*

Commented [BT9]: 1.5

**c) Employees**

*There is no action which the employees can take.*

Commented [BT10]: 0. They are preferential creditors with power to wind up.

**d) Does Cayman Island Court have jurisdiction over VP?**

The Cayman Island court has jurisdiction to make order in respect of companies which are either

- 1) Incorporated in the Cayman Islands
- 2) Incorporated elsewhere but subsequently registered in the Cayman Islands or
- 3) In respect of a foreign company - has property in the Cayman Islands, carrying business in the Cayman Islands, is the general partner of a limited partnership or is registered under Part IX

On the basis that VP is registered in the Cayman Islands, then the Cayman Island Court does have jurisdiction over VP

Commented [BT11]: 1

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

Whilst there is not a statutory regime with respecting to a restructure the Cayman Islands has managed to develop a reputation as a leading restructuring jurisdiction, such as using a provisional liquidation which provides some breathing space for the debtor. Whilst this wont be used going forward the Cayman Islands has introduced new legislation to create the concept of a restructuring office which is similar to the US Ch11 or English Administration

Commented [BT12]: 2

VP could present a petition to the Grand Court as it is unable to pay its debts however wants to compromise with its creditors and can be presented by the directors without a resolution from the Company. Upon filing the petition a moratorium, us automatically triggered and s extraterritorial effect. However, BTIB will be able to enforce their security without leave from the Court.

Also, the Company could seek a scheme of arrangement as a way to make a deal with its creditors, however a resolution will need to be consented by the Company.

- f) Can the Rackham Family continue play a part in the running VP during any restructuring process?

If an RO has been appointed, it is the determination of the Grand Court whether any powers remain left with the directors and the powers vest with the RO - similar to when a PL was appointed

Commented [BT13]: 1

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

The Court would need to understand whether there is a prospect of restructuring or whether the Company is past its trading life and it will be just and equitable for the Court to appoint liquidators to manage the affairs of the Company and look for an orderly wind down

Commented [BT14]: 1/2. Revisit applicable tests in study guide - honest member, majorities etc.

Commented [BT15]: 7.5

\* End of Assessment \*

Commented [BT16]: TOTAL MARKS 34.5 OUT OF 50